

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

- - -
SULEIMAN ABDULLAH :
SALIM, MOHOMED AHMED : DOCKET NO.
BEN SOUD, OBAID ULLAH :
(as personal : 2:15-CV-286-JLQ
representative of GUL :
RAHMAN), :

Plaintiffs, :

v. :

JAMES ELMER MITCHELL :
and JOHN "BRUCE" :
JESSEN, :

Defendants. :

- - -
Monday, January 16, 2017
- - -

Videotaped deposition of JAMES E. MITCHELL taken pursuant to notice, was held at the law offices of Blank Rome, 130 N. 18th Street, Philadelphia, Pennsylvania 19103, beginning at 10:13 AM, on the above date, before Constance S. Kent, a Registered Professional Reporter and Notary Public in and for the Commonwealth of Pennsylvania.

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1 THE VIDEOGRAPHER: We are
2 now on the record.

3 This begins DVD No. 1 in the
4 deposition of James Elmer Mitchell
5 in the matter of Salim versus
6 James Elmer Mitchell and Bruce --
7 John Bruce Jessen in the United
8 States District Court for the
9 Eastern District of Washington.

10 Today is January 16th, 2017,
11 and the time is 10:19 AM.

12 This deposition is being
13 taken at 130 North 18th Street,
14 Philadelphia, Pennsylvania, at the
15 request of Gibbons, PC.

16 The videographer is Benjamin
17 Neate of Magna Legal Services and
18 the court reporter is Connie Kent
19 of Magna Legal Services.

20 All counsel and parties
21 present will be noted on the
22 stenographic record.

23 Will the court reporter
24 please swear in the witness.

1 JAMES E. MITCHELL, having
2 been first duly sworn, was
3 examined and testified as follows:

4 MR. WARDEN: Thank you. At
5 the outset I'd like to say that
6 I'm Andrew Warden from the United
7 States Department of Justice and I
8 represent the United States
9 government in this case.

10 On behalf of the United
11 States Government, I have here
12 with me today Joseph Sweeney,
13 attorney for CIA Office of General
14 Counsel, Cody Smith, an attorney
15 for the CIA Office of General
16 Counsel, Heather Walcott, an
17 attorney for the CIA Office of
18 General Counsel, Megan Beckman,
19 paralegal with the CIA Office of
20 General Counsel, Antoinette
21 Shiner, Information Review Officer
22 from the CIA.

23 On behalf of the Department
24 of Defense, have Richard Hatch, an

1 attorney with the Office of
2 General Counsel, and Thomas Ellis,
3 a senior program analyst with the
4 Joint Personnel Recovery Agency.

5 The Government is not a
6 party to this case, but we are
7 here today to represent the
8 interests of the United States.
9 We understand that the questions
10 in this deposition will cover
11 topics related to Dr. Mitchell's
12 career with the Department of
13 Defense and later as a contractor
14 with the CIA.

15 Given the sensitive nature
16 of the positions Dr. Mitchell held
17 with those agencies and the
18 information he acquired while in
19 those positions, we are here today
20 to protect against unauthorized
21 disclosure of classified,
22 protected or privileged government
23 information.

24 At the outset, I'd like to

1 mark as Exhibit 1 and 2 for the
2 record, and have them produced to
3 the parties, the classification
4 guidance we have given from the
5 CIA and the DOD.

6 (Exhibit No. 1, CIA
7 Classification Guidance, Bates USA
8 22 through 24, and No. 2,
9 Department of Defense
10 Classification Guidance, Bates USA
11 2169 through 2170, were marked for
12 identification.)

13 MR. WARDEN: I've marked as
14 Exhibit 1 and produced to the
15 parties the CIA guidance. It's
16 stamped as US Bates No. 22 to 24.
17 The production date of May 20,
18 2016. It provides a list of
19 categories of information about
20 the CIA's former detention and
21 interrogation program that remains
22 classified, and a list of
23 categories of information that is
24 now unclassified.

1 Exhibit 2 is the Department
2 of Defense Classification
3 Guidance. It's marked as Bates
4 2169 through 2170, production date
5 January 14, 2017. It provides a
6 list of categories of information
7 about DOD's survival, evasion,
8 resistance and escape training
9 program that remains classified
10 and categories of information
11 about that program that are now
12 unclassified.

13 The government issued --
14 would like to issue an instruction
15 to the witness continuing
16 throughout this deposition that in
17 response to any question, the
18 government instructs the witness
19 not to answer with any of the
20 information identified as
21 classified in our classification
22 guidance as Exhibit 1 and 2.

23 We reserve our right to
24 object any specific questions

1 posed to Dr. Mitchell consistent
2 with his nondisclosure agreements
3 with the Government and instruct
4 him not to answer more specific
5 questions that would tend to call
6 for disclosure of classified,
7 protected or privileged government
8 information.

9 MR. LUSTBERG: Thank you.

10 MR. SMITH: Before we --
11 just in furtherance of the
12 housekeeping, my name is Jim Smith
13 and I represent Dr. Mitchell at
14 this deposition today.

15 Mr. Warden, I want to make
16 sure that the record is plain
17 here, and in keeping with my prior
18 discussions with you, we intend to
19 do everything we -- in our
20 powers -- our client to protect
21 classified information, but I want
22 to make sure that you understand
23 that we -- we believe the onus is
24 on the government to advise the

1 I just don't recall that being an issue.

2 Q. Just -- my colleagues
3 remained me, just so that the record is
4 clear, JPRA stands for what?

5 A. Joint Personnel Recovery
6 Agency.

7 Q. And what is that?

8 A. That's the executive agent
9 that is tasked with making sure that the
10 various SERE schools and the various
11 other forms of advanced SERE training are
12 uniform and follow the policy guidance
13 established by the executive agency.

14 Q. Okay. With regard to -- so
15 you were at the SERE school then for how
16 long did you do that?

17 A. '89 to sometime in '96.

18 Q. Okay. And after that?

19 A. I went to a counterterrorist
20 unit.

21 Q. And what was that? Explain
22 what that position was, just what your
23 job was there?

24 MR. WARDEN: From the

1 Government's perspective, I would
2 instruct the witness not to
3 answer.

4 You can provide a
5 description of the
6 counterterrorist unit.

7 MR. LUSTBERG: Okay.

8 MR. WARDEN: Anything beyond
9 the job functionality is
10 classified.

11 MR. LUSTBERG: Okay. Fair
12 enough. Got it.

13 BY MR. LUSTBERG:

14 Q. So I guess you can provide a
15 brief discussion of what it was.

16 A. I did a variety of tasks for
17 them. The primary focus really was on
18 things like war criminals and terrorists.
19 I don't know how much more I can say than
20 that. I really don't.

21 MR. SMITH: Let me -- let me
22 pipe in here, Dr. Mitchell. I
23 don't want to do trial-and-error
24 here. If -- I don't know what

1 your answer is, but if you need to
2 confer with the Government to find
3 out what you're permitted to say,
4 I think that would probably be the
5 better way to handle a situation
6 like this.

7 MR. LUSTBERG: I have no
8 objection to that.

9 MR. SMITH: Okay. So why
10 don't we go off the record. We'll
11 give you the opportunity to confer
12 with the appropriate
13 governmental -- government
14 official over there and then we'll
15 go back on the record and you can
16 continue with answer. All right?

17 THE WITNESS: Okay.

18 MR. LUSTBERG: Thank you.

19 THE VIDEOGRAPHER: The time
20 is 11:10 PM. We are now off the
21 video record.

22 (Recess.)

23 THE VIDEOGRAPHER: The time
24 is 11:20 AM. We are now back on

1 the video record.

2 MR. LUSTBERG: How do you
3 want to handle that, Jim?

4 MR. SMITH: Well, we are in
5 the process of getting a resume
6 copied and if you have it --

7 MR. LUSTBERG: Yeah.

8 MR. SMITH: The Government
9 has allowed the witness to amplify
10 a little bit more in response to
11 the question. So let's mark it
12 and --

13 MR. LUSTBERG: Okay. So
14 let's mark this, as how about
15 JEM-1?

16 MR. SMITH: 3.

17 MR. LUSTBERG: We're up to
18 3.

19 MR. SMITH: Well, we already
20 marked 1 and 2.

21 MR. LUSTBERG: Okay. 3.
22 Fine.

23 THE WITNESS: Thank you,
24 sir.

1 "Recognizing and Developing Counter-
2 measures to Al-Qaeda Resistance to
3 Interrogation Techniques, a Resistance
4 Training Perspective," right?

5 A. Sure.

6 Q. Do you remember that?

7 A. Yes, sir.

8 Q. And actually --

9 A. We have the document.

10 Q. I'm about to show it to you.

11 So if you could get that.

12 MR. LUSTBERG: So this is
13 Exhibit 9.

14 (Exhibit No. 9, Article
15 entitled Recognizing and
16 Developing Countermeasures to
17 Al-Qaeda Resistance to
18 Interrogation Techniques: A
19 Resistance Training Perspective,
20 was marked for identification.)

21 BY MR. LUSTBERG:

22 Q. Let me know when you're
23 ready. It's quite heavily redacted.

24 A. Yes.

1 Q. Are you ready?

2 A. Yes, sir.

3 Q. Thank you. So was this the
4 document that you produced after having
5 re- -- after having reviewed the
6 Manchester manual?

7 A. It wasn't just the
8 Manchester manual I reviewed, but yes.

9 Q. Okay. What else did you
10 review?

11 MR. WARDEN: Objection.
12 It's described in there, other
13 Al-Qaeda training --

14 MR. SMITH: Mr. Warden,
15 we're having trouble hearing you
16 down here.

17 MR. WARDEN: Objection. We
18 would instruct the witness not to
19 answer beyond what's in the scope
20 of the document, which I believe
21 describes it as the other Al-Qaeda
22 training.

23 MR. SMITH: Where is it
24 you're looking?

1 MR. LUSTBERG: Page 1.

2 MR. SMITH: Maybe I can help
3 out here. Do you mean where it
4 says:

5 "This paper discusses the
6 techniques and strategies for
7 resisting interrogation described
8 in captured Al-Qaeda training
9 manuals and other documents"?

10 MR. WARDEN: In fact, the
11 Manchester manual is one of those
12 documents. It's publicly
13 acknowledged unclassified fact.
14 Any further discussion of other
15 documents that form a part of
16 this, I instruct the witness not
17 to answer.

18 MR. LUSTBERG: No problem.

19 MR. SMITH: So the record is
20 clear: You have information, but
21 you're protecting the Government's
22 classified information, right?

23 THE WITNESS: Yes, sir.

24 MR. SMITH: Okay.

1 happened was he began to provide bits and
2 pieces of information, and as he did, we
3 dialed that stuff back.

4 Q. Uh-huh. Okay. This
5 phase -- by the way, let's talk about the
6 phases of -- I'm sorry.

7 There was -- with Abu
8 Zubaydah, at the beginning there's these
9 different phases that he goes through,
10 and this is the final phase, right, where
11 he's -- where he's -- where you're
12 applying these techniques. Before that
13 there was the isolation phase, before
14 that there was the phase where he was
15 being questioned with lesser techniques
16 as you described them, or lesser adverse
17 conditions, right?

18 A. You know, this whole concept
19 of phase, I've never seen that in the
20 cable traffic, but I don't remember at
21 that particular point calling them phases
22 like that. I mean, it wasn't -- that
23 wasn't something that -- I mean, I know
24 they called it the aggressive phase,

1 right?

2 Q. Right.

3 A. But I don't remember it
4 become orchestrated in the way that you
5 seem to be implying that it was.

6 Q. I'm -- I'm just asking. I'm
7 not implying anything, just take the
8 words as -- so there's this aggressive --
9 so would you agree with me that there's
10 this new aggressive phase when you go
11 back and apply these enhanced
12 interrogation techniques to Abu Zubaydah?

13 A. Yes, it's more aggressive.

14 Q. And does he -- does he
15 immediately respond and provide
16 information?

17 A. No.

18 Q. Does he -- does he respond
19 in -- within 72 hours and provide
20 information?

21 A. I think he started providing
22 information within 72 hours.

23 Q. And in what regard did you
24 then dial it back? Because I'm reading

1 these cables and it looks like for
2 17 days, he's being waterboarded and put
3 in confined -- in a confinement box and
4 put in stress positions and walled. Am I
5 wrong about that?

6 MR. SMITH: Objection.

7 THE WITNESS: You're wrong
8 in the sense that we don't have
9 all of the cable traffic around
10 that time because there came a
11 point when Dr. Jessen and I said,
12 We're not going to continue doing
13 this. We don't think it's
14 necessary to continue to
15 waterboard Abu Zubaydah. And the
16 CIA COB initially said, No, no,
17 no, we're going to do this for
18 30 days. And then in conjunction
19 with headquarters, they continued
20 to order those sessions done in
21 30 days so -- for 30 days.

22 And at some point, we
23 brought the COS, who is the chief
24 of station for the country, the

1 most senior CIA person in that
2 country, we asked him to visit the
3 site, showed him the process and
4 asked him if he could intercede
5 with headquarters to get them to
6 discontinue the use of --
7 particularly of waterboarding, but
8 of enhanced interrogations.

9 And eventually we ended up
10 in a video conference with Jose
11 Rodriguez and a bunch of folks,
12 and prior to that, Bruce and I had
13 said, We're not going to continue
14 doing this, and what they said
15 was, Well, you guys have lost your
16 spine. I think the word that was
17 actually used is that, You guys
18 are pussies, there was going to be
19 another attack in America and the
20 blood of dead civilians are going
21 to be on your hands. If you won't
22 follow through with this, then
23 we're going to send somebody out
24 there who will.

1 And Bruce and I were
2 concerned that they would send
3 somebody out there who would do
4 the sorts of things that we had
5 recommended that they not do in
6 terms of frequency, intensity,
7 that sort of stuff. And so we --
8 we administered the pours for an
9 average of about eight seconds,
10 which resulted in more pours, but
11 more opportunities to breathe,
12 and -- whereas our concern was if
13 they sent somebody out from
14 headquarters, the DOG (sic) -- DOJ
15 guidance said you could do it for
16 20 to 40 seconds, and that would
17 be multiple applications at 20 to
18 40 seconds, and we thought that
19 was not necessary, you know, and
20 could actually interfere with --
21 and we talked it over with the
22 COB, and the COB -- Chief of Base,
23 the person who was actually in
24 charge, and we were working under

1 that person's authority and
2 control, and just told him we
3 weren't going to continue to do
4 this, and -- so eventually we had
5 this videoconference and they
6 said, Send your most skeptical
7 person, who was the person that
8 was sending those cables --
9 actually, I don't think they were
10 cables, I think they were phone
11 calls and emails, and somebody who
12 has enough throw weight at the
13 CIA, somebody who is a high enough
14 SIS guy, that when he said, We
15 don't need to do this anymore, he
16 would be believed back home, and
17 they did.

18 So there was a period of
19 days there where we didn't do any
20 waterboarding, you know.

21 And the way the
22 authorization was written -- this
23 has been a while, but the way the
24 authorization was written, you

1 could have waterboarded several
2 times a day, and I think we had
3 one waterboard session in the
4 afternoon in the normal using I
5 think walling or something, which
6 we actually were able to get away
7 from pretty quickly then.

8 Does that answer your
9 question?

10 BY MR. LUSTBERG:

11 Q. I think so. I have to just
12 unpack it a little bit.

13 First of all, let's talk
14 just a bit about waterboarding.

15 A. Okay.

16 Q. In your book you discuss how
17 you actually forgot about waterboarding
18 and then the night before you made the
19 list, suddenly it came to you.

20 Do you remember that?

21 A. Yeah, it was the night
22 before -- I don't if it was the night
23 before we made the list, but it was the
24 night before one of those meetings that

1 it could be harmful, that it was
2 potentially harmless in the SERE -- in
3 the context of the SERE program might not
4 mean that it would be harmless in the --
5 in the context of somebody like Abu
6 Zubaydah?

7 A. I'm trying to recall and I
8 don't recall that conversation.

9 Q. So you don't recall anybody
10 at any time ever distinguishing between
11 the application of these techniques in
12 the SERE context in contrast to the
13 application of these techniques to
14 somebody who was there involuntarily and
15 did not have a safe word, for example?

16 A. Well, the first time you
17 asked the question, you asked me about
18 this paragraph. This paragraph is
19 written in a way that is -- the
20 connotations of the words he used, you
21 know, makes it seem to me like what he's
22 trying to -- or she I think -- it's a he
23 I think that wrote this.

24 Q. Do you know who wrote this?

1 A. Yes.

2 Q. Okay. I don't know if I can
3 ask who wrote this. Can I ask who wrote
4 this?

5 A. You can ask, but I can't
6 answer.

7 MR. WARDEN: You can ask,
8 but I'll give an instruction.

9 BY MR. LUSTBERG:

10 Q. So I'm asking --

11 MR. WARDEN: You are asking?

12 BY MR. LUSTBERG:

13 Q. Who wrote it? Do you know
14 who wrote it?

15 A. Yes.

16 MR. WARDEN: We instruct the
17 witness not to answer that
18 question on the grounds of
19 classified information and
20 privilege.

21 MR. LUSTBERG: I understand.

22 MR. SMITH: Just as a point
23 of clarification, that was a yes
24 or no question. Right? Do you

1 know who wrote it.

2 MR. WARDEN: I thought he
3 answered yes. I thought that was
4 what the question was.

5 MR. SMITH: Did you answer
6 yes?

7 THE WITNESS: Yes.

8 MR. SMITH: Okay.

9 MR. LUSTBERG: Right. But
10 the next question was who, and
11 that's what Andrew is objecting
12 to.

13 MR. SMITH: Okay. Got it.

14 BY MR. LUSTBERG:

15 Q. Take a look at paragraph 5
16 on page 2 of this document.

17 A. Okay.

18 Q. It says:

19 "Effective use of the
20 waterboard overwhelms the individual's
21 ability to resist."

22 Do you believe that's true?

23 A. It can. I mean, I think
24 prior to KSM, I would have thought with