

EXHIBIT 75

09-01-11.txt

PAGES 1 - 23

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

VIETNAM VETERANS OF AMERICA,)	
ET AL.,)	
)	
PLAINTIFFS,)	NO. C-09-0037 CW
)	
VS.)	THURSDAY, SEPTEMBER 1, 2011
)	
CENTRAL INTELLIGENCE)	OAKLAND, CALIFORNIA
AGENCY, ET AL.,)	
)	
DEFENDANTS.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: MORRISON & FOERSTER
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105
BY: TIMOTHY W. BLAKELY, ESQUIRE
STACEY M. SPRENKEL, ESQUIRE
BEN PATTERSON, ESQUIRE

FOR DEFENDANTS: U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
20 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, DC 20530
BY: KIMBERLY L. HERB, TRIAL ATTORNEY
LILY S. FAREL, TRIAL ATTORNEY

REPORTED BY: DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

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09-01-11.txt

2 P R O C E E D I N G S

3 THE CLERK: CALLING C-09-00037 VIETNAM VETERANS OF
4 AMERICA, ET AL. VERSUS CENTRAL INTELLIGENCE AGENCY, ET AL.

5 PLEASE STEP FORWARD AND STATE YOUR APPEARANCES FOR
6 THE RECORD, PLEASE.

7 MS. HERB: KIMBERLY HERB, DEPARTMENT OF JUSTICE, ON
8 BEHALF OF DEFENDANTS.

9 MS. FAREL: GOOD AFTERNOON, LILY FAREL, DEPARTMENT
10 OF JUSTICE, ON BEHALF OF THE DEFENDANTS.

11 MR. BLAKELY: GOOD AFTERNOON, YOUR HONOR. TIMOTHY
12 BLAKELY OF MORRISON & FOERSTER ON BEHALF OF PLAINTIFFS.

13 MR. PATTERSON: BEN PATTERSON, MORRISON & FOERSTER,
14 ON BEHALF OF PLAINTIFFS.

15 MS. SPRENKEL: STACEY SPRENKEL FROM MORRISON &
16 FOERSTER ON BEHALF OF PLAINTIFFS.

17 THE COURT: GOOD AFTERNOON.

18 THIS ALSO ON FOR CIA'S MOTION FOR JUDGMENT ON THE
19 PLEADINGS AND THEN THERE'S VARIOUS OTHER DISPUTES THAT YOU
20 HAVE.

21 I'M INCLINED TO DENY THE MOTION FOR JUDGMENT ON THE
22 PLEADINGS, HOWEVER I DO TEND TO THINK THAT THE CONSTITUTIONAL
23 CLAIMS AGAINST THE CIA WERE NOT DEFENDED. MAYBE EVERYONE MADE
24 A MISTAKE, BUT IT SEEMS TO ME THAT THE DEFENDANTS DID MAKE A
25 MOTION TO DISMISS THOSE CLAIMS AND MAYBE PLAINTIFFS DIDN'T

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3

1 UNDERSTAND IT, THEY MEANT ON ALL GROUNDS, BUT THE PLAINTIFFS
2 DIDN'T DEFEND THEM, IT SEEMS TO ME, ON THE CONSTITUTIONAL
3 GROUNDS, WHICH LED THE COURT TO BELIEVE THAT THEY WEREN'T BEING
4 DEFENDED ON THE CONSTITUTIONAL GROUNDS AND TO BELIEVE THAT

09-01-11.txt

5 THOSE CLAIMS WERE OUT OF THE CASE, WHICH I THINK THEY NOW ARE.

6 SO THAT DOESN'T REALLY MATTER FOR THE JUDGMENT ON
7 THE PLEADINGS, BUT IT MATTERS FOR SOME OF THE OTHER POINTS.

8 THE ARGUMENT THAT THE DEFENDANT OR THAT THE CIA IS
9 RELYING ON HAVING TO DO WITH ITS STATEMENT THAT IT WILL NO
10 LONGER HOLD THE INDIVIDUAL PLAINTIFFS TO THE SECRECY OATHS IS
11 NOT OF INTEREST TO ME UNLESS THEY WISH TO MAKE IT TO THE ENTIRE
12 CLASS, IN WHICH CASE IT MIGHT WELL MOOT THE CLAIMS AGAINST THE
13 CIA, BUT YOU CLEARLY AREN'T DOING THAT. YOU ARE MAKING THEM
14 ONLY TO THE INDIVIDUAL PLAINTIFFS. IF YOU WANTED TO MAKE THEM
15 TO THE WHOLE CLASS, THAT MIGHT CHANGE THINGS.

16 MS. HERB: BUT CERTAINLY, YOUR HONOR, AND THAT'S
17 SOMETHING I WOULD BE HAPPY TO TALK WITH THE CIA ABOUT. I THINK
18 PART OF THE PROBLEM HERE IS THE CIA DOESN'T KNOW WHO EXACTLY IS
19 IN THE PUTATIVE CLASS, SO --

20 THE COURT: IF THEY DON'T WANT TO HOLD ANYBODY TO
21 SECRECY OATHS, THEY COULD JUST SAY SO, REGARDLESS OF WHO THEY
22 MIGHT OR MIGHT NOT BE.

23 MS. HERB: AND I THINK THAT THAT'S SOMETHING THEY
24 WOULD CONSIDER. SO IF I AM UNDERSTANDING YOU CORRECTLY THEN,
25 ARE YOU SAYING THAT IF CIA WAS WILLING TO OFFER THAT -- THAT

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4

1 WITH REGARD TO -- AND THAT ESSENTIALLY WENT TO THE MOOTNESS
2 ARGUMENT THAT WAS PART OF THE MOTION FOR SUMMARY JUDGMENT, THEN
3 YOU WOULD CONSIDER A MOTION FOR SUMMARY JUDGMENT AT THAT TIME?

4 THE COURT: WELL, NO. I WILL TELL YOU LIKE I TOLD
5 THE OTHER PEOPLE, I LIKE TO DO THE MOTIONS ALL AT ONCE. I WAS
6 GETTING THE FEELING THAT THE DEFENDANTS HAD IN MIND A BATTLE OF
7 ATTRITION ON SUMMARY JUDGMENT AND THEN I WAS GOING TO SEE A

09-01-11.txt

8 MOTION FROM ONE OR THE OTHER OF YOUR CLIENTS EVERY FEW WEEKS
9 BEFORE NOW AND NEXT APRIL, AND I DIDN'T WANT TO DO THAT AND I
10 STILL DON'T.

11 IF THERE WERE SOME LEGITIMATE CASE MANAGEMENT REASON
12 FOR HAVING STAGED MOTIONS AND HAVING ONE SET AT SOME POINT AND
13 ANOTHER SET AT A DIFFERENT POINT FOR GOOD CAUSE, I MIGHT
14 CONSIDER THAT. BUT FAILING THAT, WHAT I HAD AND HAVE IN MIND
15 IS THAT ALL SUMMARY JUDGMENT MOTIONS WOULD BE MADE AT ONCE IN
16 ONE SET OF BRIEFINGS.

17 I SEE THIS AS THE UNITED STATES, NOT AS A BUNCH OF
18 UNRELATED THIRD PARTIES. THIS IS ALL ONE LAWYER AND ONE ENTITY
19 IN SOME WAYS.

20 MS. HERB: CERTAINLY. WE UNDERSTAND THAT, YOUR
21 HONOR.

22 I THINK THE CIA'S POSITION IS THAT ESSENTIALLY THEY
23 ARE BEING HELD HOSTAGE ON A SINGLE CLAIM THAT EVEN PLAINTIFFS
24 ACKNOWLEDGE HAS NO VIABLE BASIS.

25 THE COURT: I DON'T THINK THEY WOULD ACKNOWLEDGE
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5

1 THAT AT ALL, BUT YOU CAN ARGUE IT IF YOU LIKE.

2 MS. HERB: WELL, I THINK, YOU KNOW, AS WE SAID IN
3 OUR MOTION, THEY HAVE INDICATED THAT THERE'S -- THEY DIDN'T
4 HAVE ANY FACTS FOR THE CLAIM AT THE OUTSET OF THE LITIGATION.

5 WE HAVE DONE DEPOSITIONS OF EACH ONE OF THE
6 INDIVIDUAL PLAINTIFFS. ALL OF THE INDIVIDUAL PLAINTIFFS HAVE
7 SAID THEY HAVE NO INFORMATION EITHER ABOUT THE CIA'S ROLE IN
8 THE TEST PROGRAMS OR SPECIFICALLY ABOUT THE ADMINISTRATION OF
9 SECRECY OATHS. THE ORGANIZATIONAL PLAINTIFFS HAVE ALSO
10 TESTIFIED TO THE FACT THAT THEY HAVE NO KNOWLEDGE OF THE CIA'S

09-01-11.txt

11 ROLE IN THE ADMINISTRATION OF SECRECY OATHS.

12 IN ADDITION SWORDS OF PLOWSHARES HAS TESTIFIED --

13 THE COURT: RIGHT. BUT THEY -- WE'RE NOT REALLY --

14 YOU'RE ARGUING YOUR SUMMARY JUDGMENT MOTION NOW AND WE ARE NOT

15 GOING TO DO THAT, BUT ESSENTIALLY WHAT THEY ARE SAYING, AS I

16 UNDERSTAND IT, IS THEY DON'T KNOW WHO DID IT AND THEY ARE IN

17 THE MIDST OF DISCOVERY TRYING TO FIND OUT. AND YOU ARE NOT

18 WISHING TO RESPOND TO THAT DISCOVERY.

19 BUT I AM GOING TO LEAVE THAT TO THE MAGISTRATE

20 JUDGE, AND I AM NOT GOING TO RULE ON THE SUMMARY JUDGMENT

21 MOTION AT THIS POINT.

22 MS. HERB: I AM SORRY, YOUR HONOR. I WAS TRYING TO

23 ESTABLISH WHY I THINK THERE IS GOOD CAUSE BECAUSE WE THINK --

24 THE COURT: FOR WHAT?

25 MS. HERB: FOR CONSIDERING THE SUMMARY JUDGMENT

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6

1 MOTION AT THIS TIME.

2 THE COURT: WELL, IT'S NOT BRIEFED AT THIS POINT.

3 I SAID THAT I WOULDN'T HEAR IT, AND AS A RESULT

4 PLAINTIFFS DIDN'T BRIEF IT.

5 MS. HERB: NO, CORRECT. I THOUGHT WE WERE ARGUING

6 WHETHER THERE'S GOOD CASE TO PROCEED WITH BRIEFING. I THINK WE

7 ARE SAYING THAT BECAUSE THERE IS NO FACTUAL BASIS AND

8 PLAINTIFFS ARE USING IT AS SORT OF A HOOK TO GET EXTENSIVE

9 DISCOVERY AGAINST THE CIA --

10 THE COURT: CAN YOU REPRESENT THAT THIS WOULD BE THE

11 ONLY SUMMARY JUDGMENT MOTION THAT THE GOVERNMENT WOULD MAKE?

12 MS. HERB: YES.

13 THE COURT: EXCEPT FOR ONE THAT THEY WOULD MAKE IN

09-01-11.txt

14 APRIL?

15 MS. HERB: THIS WOULD BE THE ONLY SUMMARY JUDGMENT
16 MOTION WITH RESPECT TO THE CIA.

17 THE COURT: WELL, THAT'S NOT MY QUESTION.

18 MS. HERB: OKAY.

19 THE COURT: YOU'VE GOT A NUMBER OF DEFENDANTS AND I
20 WANT THEM ALL AT ONCE OR AT MOST TWICE.

21 SO IF YOU WANT TO TELL ME THAT YOU NEED TWO SEPARATE
22 STAGINGS OF SUMMARY JUDGMENT MOTIONS FOR A GOOD AND VALID
23 REASON, I WILL CONSIDER IT.

24 MS. HERB: AND I THINK THAT'S WHAT WE ARE SAYING TO
25 YOU --

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7

1 THE COURT: YOU ARE TELLING ME THAT YOU WANT TO MAKE
2 THE CIA'S MOTION ALONE FIRST AND YOU ARE NOT PROMISING ME THAT
3 I WON'T SEE ANY MOTIONS FROM ANY OTHER DEFENDANT EVER UNTIL
4 NEXT APRIL.

5 MS. HERB: I THINK WE CAN REPRESENT TO YOU THAT
6 THERE WILL BE NO OTHER SUMMARY JUDGMENT MOTIONS UNTIL -- BOTH
7 DEPARTMENT OF VETERANS AFFAIRS AND THE DEPARTMENT OF DEFENSE
8 WOULD MOVE AT A SINGLE TIME AT THE CURRENTLY SCHEDULED TIME,
9 WHICH, I BELIEVE, IS APRIL -- I AM SORRY, IT'S SOMETIME IN
10 2012. I CAN'T REMEMBER THE EXACT DATE.

11 YES, THE OTHER DEFENDANTS WOULD MOVE AT THAT TIME.

12 THE COURT: YOU REPRESENT ALL OF THEM?

13 MS. HERB: YES.

14 THE COURT: AND THE CIA WOULDN'T MAKE ANY MORE
15 MOTIONS EITHER IF THIS ONE WAS RULED ON?

16 MS. HERB: CORRECT, YOUR HONOR.

09-01-11.txt

17 THE COURT: ALL RIGHT. I WILL THINK ABOUT THAT.
18 BUT IF PART OF YOUR MOTION HAD TO DO WITH YOUR OFFER
19 TO RELEASE THE NAMED PLAINTIFFS FROM THEIR SECRECY OATHS, THAT
20 WOULD NOT BE PERSUASIVE. SO THERE WOULDN'T BE MUCH POINT IN
21 BRINGING THE MOTION BASED ON THAT GROUND.
22 THERE MIGHT BE MORE POINT IN IT IF YOU WERE TO MAKE
23 A BROADER MOTION.
24 MS. HERB: OKAY --
25 THE COURT: BROADER RELEASE.

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8

1 MS. HERB: I THINK, WITH ALL HONESTY, YOUR HONOR,
2 THAT WAS SOMETHING WE WERE CONTEMPLATING DOING ON THE REPLY, SO
3 I WOULD OBVIOUSLY NEED TO CHECK WITH THE CIA TO CONFIRM THAT,
4 BUT, YOU KNOW, I THINK THAT THAT IS SOMETHING I COULD EASILY
5 HAVE HAPPEN.
6 THE COURT: AND THEN YOU HAVE THESE DISCOVERY ISSUES
7 WHICH --
8 MR. BLAKELY: YOUR HONOR, MAY I RESPOND TO THAT
9 POINT OR --
10 THE COURT: LET ME FINISH AND SEE IF I HAVE ANYTHING
11 ELSE I WANTED TO SAY.
12 (PAUSE IN THE PROCEEDINGS.)
13 THE DISCOVERY ISSUES ARE LARGELY WHETHER THERE ARE
14 ANY REMAINING CLAIMS AGAINST THE CIA ON CONSTITUTIONAL GROUNDS,
15 WHICH -- OR ANY OTHER GROUNDS, ANY HEALTH CLAIMS, OR WHAT IS
16 THE OTHER ONE, CONSENT OR NOTICE CLAIMS.
17 MS. HERB: NOTICE, YOUR HONOR.
18 THE COURT: AND THEN I GUESS THE OTHER QUESTION IS
19 WHETHER IF THERE AREN'T, WHETHER THE APA WOULD PRECLUDE ANY

09-01-11.txt

20 DISCOVERY EVEN AGAINST THE DOD, OR AGAINST THE CIA WITH RESPECT
21 TO CLAIMS AGAINST THE DOD OR OTHER DEFENDANTS, ALTHOUGH THAT
22 PART OF IT, I GUESS, IS BEFORE JUDGE CORELY.

23 SO YOU MAY ADDRESS WHATEVER YOU WOULD LIKE THEN.

24 MR. BLAKELY: YOUR HONOR, I AM GOING TO START WITH
25 THAT POINT. AND I THINK THAT THESE ISSUES ABOUT DISCOVERY AND
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9

1 WHAT CLAIMS ARE STILL IN THE CASE ARE ALL TEED UP AS PART OF
2 DEFENDANTS' MOTION FOR A PROTECTIVE ORDER THAT IS SET FOR
3 HEARING ON SEPTEMBER --

4 THE COURT: RIGHT, BUT I AM CONSIDERING RULING ON IT
5 RIGHT NOW.

6 I'VE READ THEIR BRIEF, I HAVE READ YOUR OPPOSITION,
7 THEY CAN HAVE A REPLY, BUT MY THINKING IS THAT, AS I'VE SAID AT
8 THE OUTSET, WHETHER IT WAS BY MISTAKE OR MISUNDERSTANDING OR
9 INADVERTENCE OR WHATEVER ELSE, THE DEFENDANTS AND I WERE UNDER
10 THE IMPRESSION THAT THERE WAS NO CONSTITUTIONAL CLAIM AGAINST
11 THE CIA FOR HEALTH CARE OR FOR NOTICE. I KEEP WANTING TO CALL
12 IT CONSENT, BUT I GUESS NO ONE WOULD CONSENT. BUT NOTICE.

13 MR. BLAKELY: YOUR HONOR, LET ME RESPOND TO THAT
14 POINT THEN.

15 THE COURT: OKAY.

16 MR. BLAKELY: I WOULD LIKE TO BEGIN BY SAYING THAT
17 THE CLAIM, THE CONSTITUTIONAL DUE PROCESS BASIS FOR SEEKING
18 HEALTH CARE AND NOTICE FROM THE CIA AND ALL DEFENDANTS IS
19 CLEARLY IN THE COMPLAINT.

20 THE COURT: I KNOW IT IS, BUT WE HAD SEVERAL ROUNDS
21 OF MOTIONS.

22 MR. BLAKELY: AND NONE OF THOSE --
Page 8

09-01-11.txt

23 THE COURT: WE ARE NOT TALKING ABOUT THE OTHER
24 DEFENDANTS, WE'RE ONLY TALKING ABOUT THE CIA.

25 MR. BLAKELY: UNDERSTOOD, YOUR HONOR.

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10

1 EVEN THE CIA'S SECOND MOTION TO DISMISS, WHICH
2 DIFFERENTIATES IT FROM THE OTHER DEFENDANTS, YOUR HONOR, NEVER
3 ONCE ADDRESSED THE SUBSTANCE OF THOSE DUE PROCESS CLAIMS.

4 THE COURT: PERHAPS NOT, BUT THEY MADE CLEAR, I
5 THINK, THAT THEY WERE MOVING TO DISMISS THEM PERIOD ON WHATEVER
6 GROUNDS YOU MIGHT HAVE HAD TO BRING THEM. AND I THINK IT WAS
7 INCUMBENT UPON THE PLAINTIFFS -- I AM NOT BLAMING YOU, I AM
8 JUST SAYING THAT THAT'S HOW THIS HAPPENED -- TO DEFEND THEM ON
9 ALL POSSIBLE GROUNDS. AND THE FACT THAT YOU DIDN'T LED THE
10 DEFENDANTS AND THE COURT TO BELIEVE THAT YOU WEREN'T TRYING TO
11 DEFEND THEM ON ANY OF THOSE OTHER GROUNDS.

12 MR. BLAKELY: YOUR HONOR, LET ME SAY FIRST THAT ANY
13 FAILURE TO DEFEND WAS INADVERTENT. AT NO POINT IN TIME WAS IT
14 PLAINTIFFS' INTENT TO WAIVE OR NOT PURSUE ANY CONSTITUTIONAL
15 CLAIMS FOR NOTICE OR HEALTH CARE AGAINST THE CIA.

16 THE COURT: WELL, YOU DID SAY YOU WEREN'T LOOKING TO
17 THE CIA FOR HEALTH CARE. THAT WAS A PRETTY UNEQUIVOCAL
18 SENTENCE.

19 MR. BLAKELY: YOUR HONOR, WE SAID THAT IN A CONTEXT
20 OF A MOTION THAT WE, I THINK, FAIRLY UNDERSTOOD TO BE A MOTION
21 ADDRESSED TO THE APA BASIS FOR PLAINTIFFS' CLAIMS FOR NOTICE
22 AND HEALTH CARE AGAINST THE CIA.

23 AND I THINK THAT THE EASIEST WAY TO UNDERSTAND HOW
24 WE PERCEIVE THAT MOTION, YOUR HONOR, CAN BE SEEN EVEN FROM THE
25 TABLE OF CONTENTS OF THE PLAINTIFFS -- OF DEFENDANT'S CIA'S

09-01-11.txt

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11

1 MOTION. EVERY ITEM IN THE TABLE OF CONTENTS IS ADDRESSED TO
2 RELIEF UNDER THE APA.

3 WHEN PLAINTIFFS READ THAT BRIEF, WE UNDERSTOOD THAT
4 THEY WERE MOVING TO SAY THERE'S NO DISCRETE DUTY ENFORCEABLE
5 AGAINST THE CIA. THERE IS NO CLEARLY ENFORCEABLE REGULATION
6 THAT CAN BE ENFORCED UNDER THE APA AGAINST THE CIA.

7 WE UNDERSTOOD THAT THAT WAS THE BASIS OF THEIR
8 MOTION. THEY SAID THAT THE DOJ OPINION LETTER, WHICH WAS
9 ATTACHED TO THE COMPLAINT, WAS BASED ON STATE TORT LAW AND THAT
10 WASN'T ENFORCEABLE UNDER THE APA BECAUSE STATE TORT LAW WASN'T
11 CERTAIN ENOUGH TO BE ENFORCEABLE UNDER THE APA.

12 YOUR HONOR, WE RESPONDED ON THOSE GROUNDS. WE
13 DEFENDED THOSE APA CLAIMS AGAINST THE CIA. WE DID NOTE IN A
14 FOOTNOTE THAT REGARDLESS OF THE COURT'S RESOLUTION OF THE APA
15 CLAIMS AGAINST THE CIA, THE CIA WOULD REMAIN A DEFENDANT IN THE
16 CASE, AT LEAST WITH RESPECT TO THE SECRECY OATH CLAIM. WE DID
17 NOT INTEND IN THAT FOOTNOTE TO SAY THAT WAS THE ONLY REMAINING
18 CLAIM AGAINST THE CIA, WE WERE JUST POINTING OUT THAT THE CIA
19 WOULD REMAIN A DEFENDANT, THE CASE WOULD GO FORWARD, DISCOVERY
20 WOULD STILL PROCEED WITH THE CIA, REGARDLESS OF HOW THE COURT
21 RESOLVED THAT MOTION.

22 THE COURT: OKAY. DID YOU HAVE ANYTHING YOU WANTED
23 TO SAY ABOUT ANY OTHER POINTS THAT ARE PENDING BEFORE ME?

24 MR. BLAKELY: YOUR HONOR, WITH RESPECT TO THE --
25 WHETHER THEY HAVE SHOWN GOOD CASE TO MOVE THE SUMMARY JUDGMENT

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12

09-01-11.txt

1 SCHEDULE TO FILE THE SUMMARY JUDGMENT MOTION THAT THEY ALREADY
2 FILED ONCE, YOUR HONOR, I WOULD LIKE TO SAY THAT THE
3 JUSTIFICATION THAT THEY GIVE FOR FILING IT NOW --

4 THE COURT: I DON'T WANT TO LOOK BACK. THE QUESTION
5 IS, DO YOU WANT TO OPPOSE IT NOW OR SHOULD WE WAIT AND OPPOSE
6 IT NEXT APRIL?

7 MR. BLAKELY: YOUR HONOR, WE DON'T THINK THAT WE CAN
8 OPPOSE IT NOW GIVEN THE OUTSTANDING DISCOVERY AT ISSUE WITH
9 RESPECT TO THE CIA.

10 THE COURT: OKAY. WELL SOON THEN.

11 MR. BLAKELY: MAGISTRATE --

12 THE COURT: BEFORE APRIL.

13 MR. BLAKELY: IN APRIL, I THINK, WOULD BE MORE
14 APPROPRIATE. I DON'T THINK THAT THERE'S A REASON TO HAVE A
15 SERIAL SUMMARY JUDGMENT BRIEFING IN THIS CASE.

16 THE COURT: WHAT IF THEY WAIVE THE SECRECY OATH FOR
17 EVERYONE IN THE CLASS?

18 MR. BLAKELY: I THINK WE WOULD BE IN A DIFFERENT
19 POSITION AT THAT POINT, YOUR HONOR. WE WOULD LIKE TO LOOK AT
20 THOSE PAPERS OR TO DISCUSS THAT WITH DEFENDANTS, IF THEY WANT.
21 THAT OBVIOUSLY IS THE RELIEF THAT WE ARE SEEKING AGAINST THE
22 CIA WITH RESPECT TO THAT CLAIM.

23 THE COURT: OBVIOUSLY IS THE RELIEF.

24 MR. BLAKELY: YES.

25 THE COURT: ANYTHING ELSE?

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13

1 MR. BLAKELY: YOUR HONOR, THE ONLY OTHER THING I
2 WOULD SAY WITH RESPECT TO THE CONSTITUTIONAL CLAIMS IS THAT, IS

09-01-11.txt

3 THAT THERE ARE VERY FUNDAMENTAL DUE PROCESS RIGHTS AT ISSUE.
4 THERE ARE DUE PROCESS RIGHTS THAT WE ARTICULATED IN THE
5 COMPLAINT, THAT WE'VE DISCUSSED WITH DEFENDANTS DURING THE
6 COURSE OF DISCOVERY; AT NO POINT DID WE INTEND TO WAIVE THOSE
7 RIGHTS OR NOT DEFEND THOSE CLAIMS, YOUR HONOR.

8 THE COURT: AGAINST THE CIA.

9 MR. BLAKELY: AGAINST THE CIA.

10 THE COURT: OKAY.

11 MS. HERB: YOUR HONOR, I THINK THAT I AM A LITTLE --
12 I HAVE A HARD TIME SORT OF BUYING INTO THAT FOR REASONS,
13 INCLUDING THE FACT THAT PLAINTIFFS HAVE NEVER IDENTIFIED THE
14 CONSTITUTION AS A BASIS FOR THEIR NOTICE IN THE HEALTH CARE
15 CLAIMS IN THEIR INTERROGATORIES UNTIL SIX DAYS AFTER THE CIA
16 FILED THE PRESENT MOTION THAT'S BEFORE YOU. AND THEN SIX DAYS
17 AFTER WE FILED THAT MOTION, THEY THEN ADDED THE CONSTITUTION AS
18 A BASIS FOR THEIR NOTICE CLAIM AGAINST THE CIA. THEY STILL
19 HAVEN'T IDENTIFIED THE CONSTITUTION AS A BASIS FOR THEIR HEALTH
20 CARE CLAIM AGAINST THE CIA.

21 SO WHEN YOU COMBINE THAT WITH THE FACT THAT IN
22 ADDITION THEY DID DISAVOW. THEY DIDN'T SAY -- I MEAN, THEIR
23 STATEMENT ON THE MOTION TO DISMISS WAS, IN FACT, THE COURT NEED
24 NOT GRANT HEALTH CARE FROM THE CIA -- I HAVE A HARD TIME
25 UNDERSTANDING HOW THAT CAN BE LIMITED TO THE APA.

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14

1 IF THEY HAVE NO ENTITLEMENT TO RELIEF UNDER HEALTH
2 CARE, HOW COULD IT BE LIMITED TO SORT OF ONE LEGAL BASIS VERSUS
3 ANOTHER. THEY WERE TALKING ABOUT THE RELIEF, NOT THE LEGAL
4 BASIS.

5 AND THAT COMBINED WITH, AS YOU MENTIONED EARLIER,

09-01-11.txt

6 THE EARLIER BRIEFING. IN DOCKET 43, THEY EXPRESSLY DISAVOW
7 HAVING A CONSTITUTIONAL CLAIM FOR NOTICE. EVEN IN THE ORIGINAL
8 ROUNDS OF BRIEFING, WHEN THEY TALK ABOUT -- YOU KNOW, ONE OF
9 OUR ORIGINAL CHALLENGES WAS ON DECLARATORY RELIEF AND THAT THEY
10 LACKED STANDING TO ASSERT CLAIMS BECAUSE THERE WAS NO ONGOING
11 OR FUTURE INJURY, AND THEIR RESPONSE IN THAT, AGAIN AT DOCKET
12 43, IS WE HAVE ONGOING HARM FROM THE SECRECY OATHS. BEYOND
13 THAT THE CLAIMED RELIEF WAS VINDICATION OF THE RIGHTS AND
14 EDUCATING THE PUBLIC. THEY NEVER IDENTIFIED AN ONGOING HARM
15 DUE TO NOTICE OR HEALTH CARE.

16 SO I THINK, YOU KNOW, WE ARE HARD PRESSED TO BELIEVE
17 THAT THEY CONTINUE TO HAVE CONSTITUTIONAL CLAIMS. WHEN YOU
18 LOOK AT WHERE THE CONSTITUTIONAL CLAIM IS, THE PARAGRAPH THEY
19 CITE TO, IT'S UNDER THE DECLARATORY RELIEF SECTION. THAT WAS
20 ADDRESSED IN THE VERY FIRST ROUND OF BRIEFING, AS I SAID, IN
21 DOCKET 43.

22 THE COURT: DID YOU HAVE ANYTHING ELSE ON ANY OTHER
23 CASE MANAGEMENT POINTS OR DISCOVERY POINTS, OR ANYTHING ELSE?

24 MS. HERB: I DON'T KNOW IF YOU WANT TO GET INTO THE
25 MOTION FOR THE JUDGMENT ON THE PLEADING. IT SEEMED LIKE YOU

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15

1 WERE INCLINED --

2 THE COURT: I AM INCLINED TO DENY IT, BUT YOU CAN
3 ADDRESS IT BRIEFLY IF YOU LIKE.

4 MS. HERB: I DID. I JUST THINK, YOU KNOW, IN GOING
5 BACK AND LOOKING AT THE COMPLAINT, I THINK AS WE SAID IN OUR
6 REPLY, I THINK WHAT TROUBLES ME ABOUT THEIR RESPONSE IS, AGAIN,
7 THIS IDEA THAT CONCERTED ACTION OR CONSPIRACY COULD BE
8 SUFFICIENT TO ALLEGE STANDING. BUT WHEN YOU LOOK AT ALL THE

09-01-11.txt

9 CASES THAT TALK ABOUT CONSPIRACY, AND PARTICULARLY IN LIGHT OF
10 IQBAL AND TWOMBLY, THERE HAS TO BE SOME DEGREE OF
11 PARTICULARIZATION WITH REGARD TO THAT CONCERTED ACTION.

12 AND IN PREPARING FOR THIS HEARING, I WENT BACK AND
13 LOOKED AT THE ALLEGATIONS, INCLUDING THE ONES CITED BY
14 PLAINTIFFS, SORT OF THE MOST PROBABLY HELPFUL FOR THEM IS
15 PARAGRAPH 2 WHERE THEY SAY THE CIA AND ARMY PLANNED, ORGANIZED,
16 AND EXECUTED AN EXTENSIVE SERIES OF EXPERIMENTS INVOLVING
17 POTENTIAL CHEMICAL AND BIOLOGICAL WEAPONS.

18 BUT ALL THE CASE LAW CLEARLY SAYS, JUST SORT OF
19 CONCLUSORY ALLEGATIONS OF CONSPIRACY ARE INSUFFICIENT. THERE'S
20 ACTUALLY ALLEGATIONS IN THE COMPLAINT THAT SAY THE CONTRARY.
21 PARAGRAPH 108; THEY REPRESENT WHAT THE TEST PROGRAMS WERE.
22 THEY SAY IT WAS ACTUALLY A JOINT EFFORT BETWEEN DIFFERENT
23 COMPONENTS WITH THE ARMY, BUT THEY NEVER IDENTIFY THE CIA.

24 SO, I THINK WHEN YOU LOOK AT WHAT THE STANDARD IS
25 FOR ALLEGING CONSPIRACY, IT REALLY IS A HIGHER STANDARD. AND

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16

1 IT'S PARTICULARLY TRUE IN THE WAKE OF IQBAL AND TWOMBLY. THERE
2 HAS TO BE -- THE ARAR CASE WE CITED IN OUR REPLY BRIEF, THERE
3 HAS TO BE SOME DEGREE OF PARTICULARITY, OR AT LEAST SOME
4 SYMMETRY BETWEEN THE ALLEGED HARM -- OR THE UNLAWFUL ACTION,
5 PARDON ME, AND THE CONSPIRACY.

6 SO, IN THIS CASE, THE UNLAWFUL ACTION WOULD BE THE
7 SUPPRESSION OF THE TEST SUBJECTS' FIRST AMENDMENT RIGHTS.
8 THERE HAS TO BE SOME TAILORING BETWEEN THAT ALLEGED HARM AND
9 THE CONSPIRACY.

10 HERE WE HAVE NOTHING THAT REALLY GOES TO THE IDEA
11 THAT THE CIA, EVEN IF YOU ASSUME AS A MATTER OF FACT THAT THEY

09-01-11.txt

12 WERE INVOLVED IN THE TEST PROGRAMS AT LARGE, THAT THAT
13 CONSPIRACY THEN EXTENDED TO THE ADMINISTRATION OF SECRECY
14 OATHS. AND I THINK THAT WAS SORT OF ONE OF TWO POINTS WE MADE
15 IN OUR REPLY BRIEF.

16 THE OTHER IS I THINK THERE'S SOMETHING UNIQUE ABOUT
17 A SECRECY OATH. IT'S AN AGREEMENT, IT'S ESSENTIALLY A CONTRACT
18 THAT INDIVIDUALS WON'T DISCLOSE STUFF.

19 AND THE WAY IT SORT OF READS IS THAT PLAINTIFFS ARE
20 SAYING, YOU KNOW, IF MR. BLAKELY AND I ENTERED INTO A CONTRACT
21 TODAY IN THIS COURTROOM, AND YOU WITNESS IT, HE CAN SEEK RELIEF
22 FROM YOU BECAUSE YOU KNEW OF IT. THAT'S CLEARLY NOT THE WAY IT
23 WORKS. THE ONLY RELIEF THAT YOU WOULD BE ENTITLED TO WOULD BE
24 RELIEF FROM THE PARTY WHO WAS A PARTY TO THE AGREEMENT.

25 AND THIS CASE, UNLESS THERE'S SOME ALLEGATION THAT
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17

1 THE CIA WAS INVOLVED IN THE ACTUAL AGREEMENT, IT HAS NO ABILITY
2 OR OPPORTUNITY TO PROVIDE RELIEF TO DEFENDANTS. SO, THAT'S WHY
3 WE THINK THE PLEADINGS ARE INSUFFICIENT IN THIS CASE.

4 THE COURT: WELL, I THINK WHAT I WOULD LIKE FOR YOU
5 TO DO IS, FIRST OF ALL, WHY DON'T YOU FIND OUT WHETHER THE CIA
6 IS WILLING TO RELEASE ANYBODY WITHIN A CERTAIN TIME FRAME OR
7 HOWEVER IT COULD BE DEFINED --

8 MS. HERB: I COULD GET YOU A RESPONSE ON THAT WITHIN
9 A WEEK, YOUR HONOR.

10 THE COURT: MORE IMPORTANTLY GET IT TO THE
11 PLAINTIFFS. THEN YOU NEED TO TAKE A LOOK AT THAT AND SEE
12 WHETHER YOU WANT TO PURSUE YOUR CLAIMS AGAINST THE CIA FOR THE
13 SECRECY OATH. IF YOU DON'T, THEN THAT TAKES CARE OF THAT.

14 IF YOU DO, OR IF YOU WANT TO PURSUE YOUR

09-01-11.txt

15 CONSTITUTIONAL CLAIMS FOR MEDICAL CARE OR NOTICE AGAINST THE
16 CIA, THEN I AM GOING TO HAVE TO TELL YOU TO FILE A MOTION TO
17 RECONSIDER THE MOTION TO DISMISS AND EXPLAIN TO ME -- BECAUSE I
18 JUST CAN'T GO BACK TO THAT BRIEFING AND UNDERSTAND WHETHER
19 THOSE CLAIMS SHOULD BE DISMISSED OR NOT BECAUSE IT JUST WASN'T
20 BRIEFED ADEQUATELY OR AT ALL DUE TO WHATEVER MISUNDERSTANDING
21 ON WHOSE PART IT WAS.

22 I WOULD LIKE TO JUST GO BACK AND DECIDE IT NOW
23 UNDERSTANDING THAT YOU DID WANT TO DEFEND IT ON THOSE GROUNDS,
24 BUT THERE IS NOTHING THERE FOR ME TO DECIDE, SO I WOULD NEED TO
25 HAVE IT DONE OVER AGAIN. AND THE ONLY WAY I CAN THINK OF TO DO
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18

1 THAT WOULD BE YOU WOULD HAVE TO FILE A MOTION FOR
2 RECONSIDERATION.

3 NOW, BEFORE DOING THAT, YOU MIGHT DISCUSS IT WITH
4 THE DEFENDANTS AND SEE IF SOME AGREEMENT CAN BE REACHED,
5 CONSIDER IT YOURSELF, WHETHER YOU REALLY WANT TO DO THAT GIVEN
6 YOUR PRIOR STATEMENTS THAT YOU AREN'T REALLY LOOKING TO THE CIA
7 FOR MEDICAL CARE, MAYBE YOU DON'T WANT TO DO THAT.

8 BUT IF YOU DO, YOU'RE GOING TO NEED TO FILE A MOTION
9 TO DO THAT.

10 I HATE TO GO BACK AND FORTH BETWEEN MYSELF AND JUDGE
11 CORELY, BUT I REALLY WANT JUDGE CORELY TO DO THE DISCOVERY.
12 AND I DID MAKE IT CLEAR TO HER THAT SHE CAN MAKE WHATEVER
13 DECISIONS SHE WANTS TO. IF SHE WANTS TO READ MY ORDERS AND
14 INTERPRET THEM, SHE CAN DO THAT. I CAN ALWAYS CORRECT HER IF I
15 FEEL THE NEED TO, BUT I'VE TOLD HER TO GO AHEAD AND ERR ON THE
16 SIDE OF RULING ON THINGS RATHER THAN NOT.

17 SO I KNOW YOU ARE SEEING HER ON SEPTEMBER 22ND.

09-01-11.txt

18 I'LL TRY TO HAVE THE JUDGMENT ON THE PLEADINGS ORDER OUT BY
19 THEN, BUT I WOULD LIKE YOU ALSO TO HAVE RESOLVED AMONGST
20 YOURSELVES WHETHER YOU ARE GOING TO RELEASE THE SECRECY OATH,
21 WHETHER YOU ARE REALLY GOING TO TRY TO BRING THOSE OTHER CLAIMS
22 BACK IN, ET CETERA, SO THAT WE AT LEAST HAVE SOME CLARITY ON
23 THAT BEFORE THE 22ND.

24 MR. BLAKELY: I THINK I UNDERSTAND, YOUR HONOR. I
25 THINK THAT THAT'S FAIR TO -- I MEAN, ONE THING WE DON'T WANT

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19

1 THE COURT TO BE DEPRIVED OF IS BRIEFING ON THE SUBSTANCE OF
2 THOSE CLAIMS BEFORE PASSING ON THEM.

3 THE COURT: OH. WELL, OKAY.

4 I REALLY THINK YOU OUGHT TO THINK ABOUT WHETHER YOU
5 WANT TO BRING THEM, THOUGH, AGAINST THE CIA. I UNDERSTAND YOU
6 HAVE CLAIMS AGAINST OTHERS, BUT I AM NOT SURE THAT YOU
7 REALLY -- I AM NOT SURE IT REALLY WAS INADVERTENT THAT YOU
8 DIDN'T DEFEND THEM AGAINST THE CIA. I THINK YOU OUGHT TO GO
9 BACK AND GIVE THAT ANOTHER LOOK.

10 WHAT ARE WE DOING ON SETTLEMENT OF THIS CASE? I
11 COULDN'T REMEMBER.

12 MS. HERB: WE HAVE CONCLUDED SETTLEMENT TALKS. I
13 THINK THAT IT WAS PRETTY CLEAR THE PARTIES WERE FAIRLY FAR
14 APART AND IT WAS NOT LIKELY SETTLEMENT WOULD BE REACHED.

15 THE COURT: WHO DID YOU HAVE SETTLEMENT TALKS WITH
16 AND WHEN?

17 MS. HERB: JUDGE LAPORTE. I BELIEVE OUR LAST ONE
18 WAS IN OCTOBER OF 2010. DOES THAT SOUND RIGHT?

19 MR. BLAKELY: LAST FALL.

20 THE COURT: OKAY. WELL, I WILL BE HAVING YOU GO

09-01-11.txt

21 BACK TO HER AT SOME POINT, BUT MAYBE NOW ISN'T THE TIME. BUT
22 ONCE WE HAVE RESOLVED WHAT IS STILL IN THE CASE, I WILL WANT
23 YOU TO GO BACK THERE.

24 MS. HERB: YOUR HONOR, ONE QUESTION AND MAYBE THIS
25 WILL BE RESOLVED IN YOUR ORDER ON THIS, IS THE BASIS THAT, AT
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20

1 LEAST THAT IS BEING OFFERED FOR SOME OF THE DISCOVERY IS THE
2 FACT THAT PLAINTIFFS CONTEND THEY HAVE CONSTITUTIONAL CLAIMS.
3 SO IS THAT AN ISSUE THAT WE SHOULD ADDRESS TO --

4 THE COURT: I AM GOING TO TELL YOU WHETHER THEY HAVE
5 CONSTITUTIONAL CLAIMS AGAINST THE CIA, AND I DON'T THINK THEY
6 DO, BUT THEY DO HAVE CONSTITUTIONAL CLAIMS AGAINST OTHER
7 DEFENDANTS, I BELIEVE.

8 MS. HERB: OKAY.

9 THE COURT: DON'T THEY?

10 MS. HERB: I THINK IT REALLY WOULD DEPEND ON WHICH
11 ORDER YOU ARE REFERRING TO. IF YOU FOUND THAT THEY HAD SORT OF
12 DISCLAIMED HAVING A CONSTITUTIONAL CLAIM IN YOUR JANUARY -- IN
13 THE BRIEFING THAT WAS LEADING UP TO YOUR JANUARY 2010 ORDER,
14 THEN THAT WOULD ENCOMPASS DOD. IF IT'S REALLY WHAT YOU ARE
15 RELYING ON IS THIS LAST ROUND OF MOTIONS THAT RELIED -- THAT
16 SPOKE TO THE CIA MORE SPECIFICALLY, THEN I THINK THAT WOULD
17 JUST BE TO THE CIA. IF IT'S SORT OF THE A COMBINATION --

18 THE COURT: I FRANKLY DON'T REMEMBER.

19 MS. HERB: OKAY.

20 THE COURT: BUT IF YOU ALL CAN'T AGREE ON WHAT I
21 RULED ON, THEN JUDGE CORELY CAN READ WHAT I SAID AND SHE CAN
22 INTERPRET IT AS BEST SHE CAN. IF I SOMEHOW THINK IT IS WRONG,
23 THEN IT WILL COME BACK. BUT MY IMPRESSION WAS THAT THEY DID

09-01-11.txt

24 HAVE CONSTITUTIONAL CLAIMS AGAINST OTHER DEFENDANTS. I COULD
25 BE WRONG ABOUT THAT.

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21

1 MR. BLAKELY: AND OBVIOUSLY OUR POSITION IS THAT WE
2 DO.

3 THE COURT: YEAH. AND EVEN IF THERE ARE ONLY APA
4 CLAIMS, IT'S NOT ENTIRELY CLEAR THAT THERE WOULDN'T BE
5 ALLOWABLE DISCOVERY ON THE APA CLAIMS; NOR IS IT ENTIRELY CLEAR
6 THERE WOULDN'T BE ALLOWABLE DISCOVERY AGAINST THE CIA EVEN IF
7 THE CIA WAS NO LONGER A DEFENDANT.

8 MS. HERB: CERTAINLY. I MEAN WE CERTAINLY
9 UNDERSTAND THAT THE CIA WOULD THEN BE A THIRD PARTY, AND THIRD
10 PARTIES ALWAYS HAVE --

11 THE COURT: THEY ARE NOT EXACTLY A THIRD PARTY
12 BECAUSE WE ARE TALKING ABOUT THE U.S. GOVERNMENT HERE, AND THEY
13 ARE ALL PART OF THAT. I DON'T SEE THEM AS QUITE THAT SEPARATE.
14 BUT CERTAINLY YOU'RE RIGHT THAT THEY COULD STILL BE SUBJECT TO
15 SOME DISCOVERY EVEN IF THERE WERE NO LONGER ANY CLAIMS DIRECTLY
16 AGAINST THE CIA.

17 MS. HERB: CERTAINLY WE RECOGNIZE THAT.

18 THE COURT: IS THERE ANYTHING ELSE THAT I NEED TO
19 DECIDE THAT YOU'LL NEED TO KNOW WHEN YOU GO BEFORE JUDGE
20 CORELY? I JUST DON'T WANT TO HAVE THINGS FALL IN THE CRACKS
21 AND HAVE HER --

22 MS. HERB: I THINK THAT'S IT.

23 THE COURT: -- HAVE THINGS THAT SHE THINKS I SHOULD
24 HAVE DECIDED THAT SHE CAN'T DECIDE.

25 MR. BLAKELY: I THINK, YOUR HONOR, THAT IF SHE IS

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09-01-11.txt

22

1 THE PROPER PERSON TO DETERMINE WHETHER OR NOT THERE ARE
2 CONSTITUTIONAL CLAIMS AGAINST THE OTHER DEFENDANTS, THEN WE CAN
3 DEAL WITH THAT ISSUE WITH HER.

4 THE COURT: OKAY.

5 MS. HERB: I THINK THAT'S FINE.

6 THE COURT: ALL RIGHT.

7 MS. HERB: OKAY. THANK YOU, YOUR HONOR.

8 THE COURT: YOUR NEXT DATE BEFORE ME IS WHAT?

9 MS. HERB: I THINK IT IS PROBABLY NOT UNTIL WE
10 HAVE --

11 THE COURT: THOSE APRIL --

12 MS. HERB: ON THE SUMMARY JUDGMENT.

13 MR. BLAKELY: NEXT YEAR.

14 THE COURT: APRIL SUMMARY JUDGMENT MOTIONS?

15 MR. BLAKELY: THAT'S RIGHT.

16 THE CLERK: APRIL 15TH.

17 THE COURT: OKAY. AS LONG AS WE ARE HERE, FOR
18 THOSE, WHAT I WOULD LIKE TO SEE WOULD BE ONE SUMMARY JUDGMENT
19 MOTION.

20 MS. HERB: OKAY.

21 THE COURT: FROM ALL DEFENDANTS, PRESUMPTIVELY 25
22 PAGES. IF YOU NEED MORE THAN THAT, YOU CAN MAKE A MOTION FOR
23 MORE BEFORE YOU FILE THE BRIEF. DON'T FILE IT, HUNDRED PAGE
24 BRIEF AND THEN ASK FOR PERMISSION.

25 MS. HERB: OF COURSE.

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23

1 THE COURT: FIGURE OUT HOW MANY PAGES YOU ARE GOING
Page 20

09-01-11.txt

2 TO NEED AND THEN ASK FOR PERMISSION IN ADVANCE.

3 ONE MOTION EVEN IF IT HAS HAVE SUBSECTIONS FOR
4 DIFFERENT PEOPLE, THAT'S OKAY. ONE MOTION, ONE RESPONSE, ONE
5 REPLY.

6 MS. HERB: THAT'S CERTAINLY FINE. AGAIN, YOU WOULD
7 CONSIDER IF THE CIA WERE WILLING TO EXPAND ITS SORT OF WAIVER
8 OF THE SECRECY OATH TO THE BROADER CLASS, YOU WOULD BE WILLING
9 TO CONSIDER A SUMMARY JUDGMENT MOTION PRIOR TO APRIL?

10 THE COURT: I WILL CONSIDER THAT, ALTHOUGH I AM
11 GETTING THE FEELING THAT IF YOU WOULD SAY SO, YOU MIGHT BE ABLE
12 TO REACH AGREEMENT ON THAT WITHOUT HAVING TO.

13 MS. HERB: WE WILL CERTAINLY DISCUSS IT WITH THE
14 PLAINTIFFS.

15 MR. BLAKELY: WE WILL DISCUSS THAT WITH THE CIA.

16 THE COURT: ALL RIGHT.

17 MS. HERB: THANK YOU, YOUR HONOR.

18 MR. BLAKELY: THANK YOU, YOUR HONOR.

19 (PROCEEDINGS ADJOURNED AT 3:45 P.M.)

20

21

22

23

24

25

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CERTIFICATE OF REPORTER

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