



Federal Court to Decide Whether Former Abu Ghraib Prisoners Can Sue U.S. Contractors for Damages



A prisoner holds on to his prayer beads at Abu Ghraib prison, on the outskirts of Baghdad, Iraq, Aug. 1, 2004.
(Elizabeth Dalziel/AP Photo)

By ARIANE de VOGUE
Feb. 3, 2012

Eight years after the release of shocking photographs depicting detainee abuse in Iraq's famed Abu Ghraib prison, a federal appeals court in Virginia is grappling with whether former Iraqi prisoners can bring a civil suit against U.S.-based contractors.

The case, which hasn't drawn much public attention, is notable for an unexpected position taken by the U.S. government.

Although the government is not a party to the suit, when the court asked for its opinion, it argued the former prisoners' case should be allowed to go forward.

It marks the first time the government has said that former Abu Ghraib prisoners, who allege they were tortured while in U.S. custody, should have the opportunity to make their case and sue contractors for damages.

But the government says that similar claims in the future would be pre-empted by a federal law passed after the Abu Ghraib scandal that provides separate ways of holding contractors accountable.

"The U.S., at least at this juncture, has given a green light to the case proceeding," says Katherine Gallagher, senior staff attorney at the Center for Constitutional Rights, a group representing the Iraqi civilians.

"In so doing, the United States rightfully recognized that there is a federal interest in ensuring military detentions are conducted in a lawful manner, consistent with their international law obligations and ensuring that contractors are held accountable for their egregious conduct."

The government's position appeared to be an attempt to straddle an interest in protecting the federal government from civil law suits second guessing the military, but also addressing concerns that contractors who were implicated in the Abu Ghraib scandal were never charged with any crime.

After the 2003 invasion of Iraq, the United States used the Abu Ghraib prison as a detention facility and hired contractors from U.S.-based CACI International and L-3 Services Inc. to provide interrogation and interpretation services to the U.S. military. In 2004, photos emerged depicting abuse of several detainees.

Amid an international outcry, the military disciplined several service members. But no contractor was ever charged with abuse.

In the pending case, former Iraqi prisoners allege that contractors exposed them to electric shocks, sexual assaults, naked strip searches, sensory deprivation, mock executions as well as "other dehumanizing acts of torture." Lawyers for the Iraqis say that the contractors participated directly and through a "conspiracy in torture."

Lawyers for CACI say the former prisoners are relying on allegations that don't implicate CACI directly and say that their clients were performing military interrogations in a theater of war under contract with the U.S. government.

J. William Koegel Jr., a lawyer for CACI, argues in court papers that his clients should receive absolute immunity for their performance of governmental functions, and that the former prisoners' claims are a product of Iraqi law that applies only to internal relations between its citizens, not to occupying personnel.

While a district Court ruled in 2009 that the case could go forward to discovery, a majority three judge panel of the 4th Circuit Court of Appeals reversed that decision. The full 14-judge panel of the 4th Circuit agreed to take up the case and heard arguments last week.

In court, the government argued that there should be a narrow exception drawn allowing the case against contractors in this case to go forward "to the extent that a contractor has committed torture" as defined by federal criminal law.

The government said that before the scandal broke there were not proper laws and procedures in place to ensure oversight and accountability of contractors, a circumstance that was changed after the scandal broke.

"The government's position is, in effect, that these prisoners should have their day in court," says Stephen I. Vladeck, a professor of law at American University Washington College of Law. "But that it has fixed the gaps in laws such that in the future a scandal like Abu Ghraib will be dealt with by prosecuting the contractors as opposed to paying damages to the victims."

Vladeck, who signed a brief on behalf of the former prisoners, says there's a "liability gap" in the response to the abuse.

"The reality is, that other than the court martial of a few of the soldiers that are involved, the contractors have thus far been let off the hook," he says.

But Koegel dismisses the government's carving out of some kind of "torture exception" in the case. He says that if the government had evidence of torture committed by the contractors it could have pursued a criminal prosecution under federal law. The former prisoners, he argues, could have availed themselves of an administrative claims process instead of bringing a civil action for damages.

Koegel argues the proposed exception is "unworkable" and "mistakenly attempts to vindicate significant federal interests through the surrogate of state law, which is prohibited by the Constitution."

Some judges on the bench on Friday seemed unclear of the government's position, and one Judge, J. Harvie Wilkinson III, expressed extreme frustration.

Judge Diana Gribbon Motz told the government lawyer arguing the case, "This is the most equivocal brief I've ever read," according to an audio release of the hearing.

Judge Wilkinson repeatedly pressed H. Thomas Byron III, the government lawyer, as to why the government would argue that the case against the contractors should go forward as a complicated civil case when the government that presumably had an understanding of the contractor's involvement had failed to go after the contractors itself.

When Byron argued that after the scandal broke Congress and the Executive Branch found there were not the necessary remedies available for criminal prosecution, Wilkinson responded angrily.

"You are telling me that the government could not go after these people? That there were so many loopholes in federal law that you could not possibly under existing law, given all the

different options that federal government has, that you could not possibly hold the contractors to account for torturous acts?"

"I have not said that, " Byron said.

"There are substantial federal interests at stake here, and we believe that pre-emption is the appropriate mechanism to analyze those interests and give them effect with respect to available remedies we think it's relevant in assessing the overall balance of federal interests to recognize that in the wake of Abu Ghraib substantial changes to federal law were made both by Congress, the Defense Department and the Executive Branch," Byron said.

Wilkinson said the government was letting the contractors "hang out to dry" by "watching from the stands" and arguing the case should go forward even though it had chosen not to prosecute contractors for any wrong doing.

"Why wouldn't you be the logical party to hold contractors accountable for tortuous acts of which we would all disapprove?" he asked.

The government's position also highlights potential complications should this case go forward. While the government stressed that discovery should be limited in order to protect federal interests, Koegel indicated he would object to limitations on his clients' ability to prove they were not involved in the alleged torture.

"Would you agree to discovery limitations as to people in the military?" asked Judge Dennis W. Shedd

Koegel responded, "No."

"You would push it as broadly as you possibly could to prove your client did not conspire with anybody?" Shedd pressed.

"Absolutely your honor. The prime evidence of absence of conspiracy is going to be found in the testimony and the documents of the alleged co-conspirators," Koegel said.

Human Rights First was pleased with the government's position.

"The government is basically saying that the contractors should be held accountable for torture. Despite the fact that the contractors were implicated in a Senate Armed Services detainee treatment report, none of those contractors have been held accountable," said Melina Milazzo, a lawyer for the organization.

In 2004, a similar case was brought by former prisoners against CACI and L-3 (formerly Titan Corp.). But a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit dismissed the case, arguing that the suit interfered with the president's ability to control military operations on the battlefield.

The prisoners appealed their case to the Supreme Court, and the court called for the federal government to express its view. At that time, the government argued it was premature for the court to take up the case that involved inordinately complex legal issues such as immunity, federal pre-emption and the role of courts in addressing combatant activities. The government said the issues would benefit from "further percolation" in the lower courts. The Supreme Court, without comment, declined to take up that case.