

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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5 SALEH, AN INDIVIDUAL, ET AL.,

6 Appellees,

7 v.

Nos. 08-7001, 08-7030,
08-7044, 08-7045

8 CACI INTERNATIONAL INC., A
9 DELAWARE CORPORATION, ET AL.,

10 Appellants.
11

Tuesday, February 10, 2009

12 Washington, D.C.

13
14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGES GARLAND AND KAVANAUGH AND SENIOR
18 CIRCUIT JUDGE SILBERMAN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 J. WILLIAM KOEGEL, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 SUSAN L. BURKE, ESQ.
24
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

J. William Koegel, Esq.
On Behalf of the Appellants

3; 34

Susan L. Burke, Esq.
On Behalf of the Appellees

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P R O C E E D I N G S

THE CLERK: Case number 08-7001, et al., Saleh, An Individual, et al., v. CACI International Inc., a Delaware Corporation, et al., Appellants. Mr. Koegel for the Appellants, Ms. Burke for the Appellees.

ORAL ARGUMENT OF J. WILLIAM KOEGEL, JR., ESQ.

ON BEHALF OF THE APPELLANTS

MR. KOEGEL: Shall I proceed, Judge Garland?

JUDGE GARLAND: Please.

MR. KOEGEL: May it please the Court.

JUDGE GARLAND: We already know you.

MR. KOEGEL: The issue in this appeal was whether state tort law should apply to the combatant activities of the military when performed by a civilian contractor. We submit that whether the Court chooses to engage in the analysis of field preemption, or the conflict preemption analysis, the result is the same, the state law claims are preempted.

In these cases the Plaintiffs seek to inject themselves, the federal courts, and the substantive tort law of some unspecified jurisdiction into the process of second-guessing interrogation policies and practices in Iraq. That exercise necessarily conflicts with the inherently and unique federal interests in waging war, and the federal interest recognized in *Boyle* in the regulation of government contractors.

JUDGE GARLAND: Does it matter at all that the

1 government has, to the extent it can, disowned these
2 interrogation policies, that no one in the government is
3 defending it, that the President at the time and the President
4 elect, or the President now who is now the President but as a
5 candidate both disowned these, that Secretary Rumsfeld
6 disowned them. Not to the question of whether there was
7 supervision, but the question of whether these, this kind of
8 behavior was beyond the pail.

9 JUDGE SILBERMAN: Judge Garland, what record
10 references are you making?

11 JUDGE GARLAND: Right, I'm only talking about the
12 public record of the President's statements during --

13 MR. KOEGEL: I believe --

14 JUDGE GARLAND: -- his press conferences --

15 MR. KOEGEL: -- Judge Garland is referring to
16 Executive Order I believe it's 39421 issued by President Obama
17 on January --

18 JUDGE GARLAND: Right.

19 MR. KOEGEL: -- 22nd in which he --

20 JUDGE GARLAND: Right. That's true with respect to
21 him, and then with respect to President Bush there was a press
22 conference in which he said this, and Rumsfeld at the hearing
23 said this. Unless you -- I mean, you're free to --

24 MR. KOEGEL: That overstates I believe the content
25 of that press conference.

1 JUDGE GARLAND: Yes. Okay.

2 MR. KOEGEL: I do not believe the President, or the
3 Secretary of Defense, or any other individual in a position of
4 responsibility repudiated or otherwise rescinded the
5 interrogation rules of engagement --

6 JUDGE GARLAND: No, no. I'm not --

7 MR. KOEGEL: -- that were in force and effect.

8 JUDGE GARLAND: That's why I'm trying to be careful
9 about this. So, we use the hypothetical provided by the
10 opposing side that no one in a position of authority in the
11 United States government has ever said that piling people up
12 in a naked pyramid is lawful, appropriate, or any other way
13 aimed at yielding information in interrogations, I'm not wrong
14 about that, am I?

15 MR. KOEGEL: You're correct.

16 JUDGE GARLAND: All right. So, imagine there were
17 that circumstance where there is no, there's just no argument
18 from any government official, or even from the people who did
19 it that they were doing this for the purpose of getting
20 information. Under those circumstances I'm going to ask you
21 the same question I asked you before, which is a political
22 question, but we're not talking about political question now,
23 is your position still that it would -- that that would be
24 preempted, and that it would be bad for the courts to look
25 into that question even with the Executive's blessing?

1 MR. KOEGEL: If the claims arise out of the
2 combatant activities of the military that's correct --

3 JUDGE GARLAND: Okay.

4 MR. KOEGEL: -- Judge Garland. That exception to
5 the FTCA, however, is not the only basis for the court --

6 JUDGE SILBERMAN: The last words that Judge Garland
7 asked was with the Executive's blessing. We do not have an
8 Executive position in this case, do we?

9 MR. KOEGEL: We do not have a statement of interest
10 from the United States, Judge --

11 JUDGE SILBERMAN: Yes.

12 MR. KOEGEL: -- Silberman.

13 JUDGE SILBERMAN: Yes.

14 MR. KOEGEL: You're correct.

15 JUDGE GARLAND: But that's what I was asking you. I
16 understand that point, and I was just asking is the
17 implication of where we're going here that if the Executive
18 came in and said, say we get past this case and it goes to the
19 Supreme Court, and an amicus the solicitor general says this
20 is beyond the pail, government completely and totally disowns
21 this, that wouldn't make any difference with your analysis?

22 MR. KOEGEL: I don't believe that it would, Judge
23 Garland, because the Constitution commits the war fighting
24 prerogative to the Executive, and to Congress to the federal
25 government exclusively, it affirmatively prohibits the states

1 from regulating foreign affairs, including waging war. You
2 take those constitutional provisions combined with the
3 congressional determination reflected in the combatant
4 activities exception to the FTCA, that a clear congressional
5 determination that there should be no claims arising out of
6 the combatant activities during time of war.

7 JUDGE GARLAND: But it doesn't --

8 JUDGE SILBERMAN: One could easily imagine the
9 government taking the position that the activities alleged
10 here should be criminally prosecuted, but there should be no
11 civil liability under the Federal Tort Claims Act.

12 MR. KOEGEL: That's correct, Judge Silberman. And
13 that, of course, reflects the Executive prerogative to conduct
14 precisely such an investigation and prosecution.

15 JUDGE GARLAND: I understand that. And I'm sorry to
16 push this hypothetical. I know I'm pushing you in an
17 uncomfortable area, but I do want to know. Imagine Congress
18 passed a statute that said contractors are civilly liable
19 under state law, and imagine the President said contractors
20 are civilly liable under state law, and both of them said this
21 would not interfere with the Executive's work, either with
22 congressional war power, or with the Executive's power to wage
23 war. Your position is the court should still say that it
24 would?

25 MR. KOEGEL: Would in your hypothetical, Judge

1 Garland --

2 JUDGE GARLAND: Yes, in mine.

3 MR. KOEGEL: -- Congress be amending the combatant
4 activities exception --

5 JUDGE SILBERMAN: They just amend --

6 MR. KOEGEL: -- to the FTCA?

7 JUDGE SILBERMAN: -- the FTCA to say we want to be
8 clear that the *Boyle* analysis does not apply to the combatant
9 exception, and that there are no circumstances under which a
10 contract is immune.

11 MR. KOEGEL: Congress could not consistent with the
12 Constitution delegate responsibility to the states for --

13 JUDGE KAVANAUGH: Well, sure it could --

14 MR. KOEGEL: -- regulating --

15 JUDGE KAVANAUGH: -- borrow a state, it can create a
16 cause of action borrowing state law, or it can enact a statute
17 indicating that state law is not preemptive in the area. It
18 could do that.

19 MR. KOEGEL: I don't believe that Congress --

20 JUDGE KAVANAUGH: I mean, your political question --

21 MR. KOEGEL: -- could --

22 JUDGE KAVANAUGH: -- theory would throw that out,
23 but your preemption theory would allow that kind of suit to go
24 forward, as I understand your two theories.

25 MR. KOEGEL: Perhaps, Judge Kavanaugh, although

1 Congress --

2 JUDGE GARLAND: Though in this case you'll take
3 Judge Kavanaugh's answer.

4 MR. KOEGEL: Congress could not assign to the states
5 a role in regulating waging war. The Constitution --

6 JUDGE KAVANAUGH: I'm not sure about that. But
7 anyway, it's kind of --

8 MR. KOEGEL: The Constitution reserves --

9 JUDGE KAVANAUGH: -- pretty hypothetical.

10 MR. KOEGEL: -- that exclusively to the federal
11 government.

12 JUDGE GARLAND: But can't the Executive --

13 JUDGE KAVANAUGH: They can --

14 JUDGE GARLAND: -- say this --

15 JUDGE KAVANAUGH: What about the National Guard?

16 MR. KOEGEL: That's correct, Judge Kavanaugh, but
17 that would not necessarily fall within conducting foreign
18 relations in the United States. In fact --

19 JUDGE KAVANAUGH: Well, it's war.

20 MR. KOEGEL: *Scheuer v. Rhodes* is a good example of
21 that where the federal government in a non-wartime context had
22 not asserted the political question doctrine. It was a
23 domestic security matter involving the National Guard. The
24 political question doctrine was neither raised nor viewed as
25 precluding the causes of action there.

1 JUDGE SILBERMAN: We're getting pretty far afield.

2 JUDGE KAVANAUGH: Yes.

3 JUDGE GARLAND: Yes. Go ahead. I'm sorry. This is
4 the problem of having a professor on my left here, am I right?

5 MR. KOEGEL: The District Court here fashioned a new
6 test for combatant activities preemption, and we submit that
7 that test is fundamentally flawed, requiring --

8 JUDGE GARLAND: I take it that any test would be
9 new, right? Because we don't have a --

10 MR. KOEGEL: In this circuit that's correct, Judge
11 Garland.

12 JUDGE GARLAND: We don't have anyone in which
13 contractors acting in this way, that is not as providing a
14 product, but as actually acting as if they were combatants
15 under your view. There's no case on that, is there?

16 MR. KOEGEL: In this circuit that's correct.

17 JUDGE GARLAND: In any circuit, is there one in any
18 circuit? The California, the Ninth Circuit cases they
19 produced a product which American soldiers or --

20 MR. KOEGEL: There are lower --

21 JUDGE GARLAND: -- sailors actually used.

22 MR. KOEGEL: -- court decisions, but not at the
23 appellate level there are some decisions in which services --

24 JUDGE SILBERMAN: *Koohi* and *Johnson*, but they're not
25 really directly on the question of how do you define combat

1 activities.

2 JUDGE GARLAND: I guess what I'm saying is you can't
3 blame the District Court for designing a new test when
4 there was --

5 JUDGE SILBERMAN: Yes. No, you had to.

6 JUDGE GARLAND: -- no test to begin with.

7 MR. KOEGEL: We believe that the *Koohi* decision
8 supplies the correct test. The court need only look at
9 whether the complaint of activities constituted combatant
10 activities of the military during time of war. That should be
11 dispositive as to whether preemption applies by --

12 JUDGE GARLAND: The gun in that case was fired by a
13 member of the United States military. It wasn't fired by an
14 independent contractor. The actual physical activity was done
15 by --

16 MR. KOEGEL: That's correct. That's correct.

17 JUDGE GARLAND: The question was a product --

18 MR. KOEGEL: The -- missile defense system --

19 JUDGE GARLAND: -- sort of a product liability issue
20 about the --, but it wasn't a question of the actual direct
21 application.

22 MR. KOEGEL: But the same federal interests that
23 support preemption with respect to a product liability case
24 support preemption where there are services involved, the
25 federal interest is the same.

1 JUDGE GARLAND: No, I understand that. I just
2 wondered whether the test has to be the same, that's all.

3 MR. KOEGEL: Well, for combatant activities, which
4 admittedly is a broader exception to the FTCA, then the
5 discretionary function exception requiring exclusive
6 operational control conflicts with the very nature of the
7 combatant activities exception. It imposes a duty of care on
8 the battlefield. It subjects military commanders --

9 JUDGE SILBERMAN: Suppose a government contractor
10 working for Iraq, not for the United States government, had
11 been in Baghdad when a fire fight developed, and the
12 government contractor perhaps, wasn't there one once hired by
13 Perot, as I recall, for an independent action, I don't know
14 whether it was in Iraq, but suppose the --

15 JUDGE GARLAND: Iran.

16 JUDGE SILBERMAN: I'm talking about a corporation,
17 not necessarily a government contractor, but even a government
18 contractor who was not dealing with the military in any way
19 was drawn into a conflict, and used force, would that
20 individual, that contractor be entitled to an exemption under
21 the FTCA?

22 MR. KOEGEL: As I understand your hypothetical
23 perhaps not, Judge Silberman, because those activities
24 wouldn't be combatant activities of the military, which is one
25 of the tests inherent in the combatant activities exception.

1 It's not all combatant activities --

2 JUDGE SILBERMAN: Well, it would arise out of
3 combatant activities of the military, but it would involve
4 someone who did not have any privity with the military.

5 MR. KOEGEL: It's difficult to imagine a scenario
6 where there's a lack of privity with the United States --

7 JUDGE SILBERMAN: You think the privity is
8 essential?

9 MR. KOEGEL: I think privity would be in certainly
10 most instances as least indispensable to constituting
11 combatant activities of the military. That reflects the
12 government's interest in the control of how war is waged. And
13 absent that privity it's difficult to reconcile the federal
14 interest in waging war --

15 JUDGE SILBERMAN: Judge Garland earlier on said
16 after all, the statute exempts government contractors.

17 MR. KOEGEL: The statute provides immunity -- or I'm
18 sorry, it preempts claims against government contractors, it
19 immunizes --

20 JUDGE GARLAND: No.

21 JUDGE SILBERMAN: No.

22 MR. KOEGEL: -- claims against --

23 JUDGE GARLAND: He means -- Judge Silberman --

24 JUDGE SILBERMAN: Yes.

25 JUDGE GARLAND: -- was asking about the express

1 language, not implied. There's an independent contractor,
2 there's a contractor exclusion, right, with respect to the
3 government's ability to get --

4 MR. KOEGEL: For the discretionary --

5 JUDGE GARLAND: -- sovereign immunity.

6 MR. KOEGEL: -- function exception, that's correct,
7 Judge Garland. But on that --

8 JUDGE SILBERMAN: You see, I thought Judge
9 Garland --

10 JUDGE GARLAND: No.

11 JUDGE SILBERMAN: -- was reading --

12 MR. KOEGEL: -- on that point --

13 JUDGE SILBERMAN: -- the statute to say there was a
14 general exception for government contractors. Do you have the
15 statute in front of you --

16 JUDGE GARLAND: Yes. There's two, and I didn't
17 actually mean to define exactly how they applied. So, there's
18 two, one it says the term federal agency does not include any
19 contractor with the United States; and the second, employee of
20 the government --

21 JUDGE SILBERMAN: Is that, that's 13 --

22 JUDGE GARLAND: -- that's --.

23 JUDGE SILBERMAN: Does that apply to the combat
24 activities exception? Do you have the statute in front of
25 you?

1 MR. KOEGEL: I do not, Judge Silberman. I
2 believe --

3 JUDGE SILBERMAN: Does your --

4 MR. KOEGEL: -- it applies to the discretionary
5 function exception. I'm not at all certain it applies to the
6 combatant activities exception. But it's important to note
7 that --

8 JUDGE SILBERMAN: Well, let's see if we nail that
9 down.

10 MR. KOEGEL: -- that *Westfall* --

11 JUDGE SILBERMAN: Why don't we just see if we can
12 nail it down now. Does it, or doesn't? I know that, I know
13 you can argue that *Boyle* has made this extension, but I wonder
14 what the literal language of the statute says.

15 JUDGE GARLAND: It could be, because that one
16 uses --

17 MR. KOEGEL: Assuming that that caveat applies to
18 contractors, I think --

19 JUDGE SILBERMAN: Well, does it? I mean, this is
20 sort of an -- I grant you we can go to *Boyle*, but I'm trying
21 to get the sense of what the exact language of the statute
22 means, and I was a little surprised at what Judge Garland said
23 earlier, and I thought you would certainly be familiar with
24 the exact language.

25 MR. KOEGEL: Well --

1 JUDGE SILBERMAN: Is there a provision in the
2 statute which limits the exemption for activities to -- limits
3 the exemption for government contractors?

4 MR. KOEGEL: For the discretionary function, yes.

5 JUDGE SILBERMAN: But not -- there's not a provision
6 for the combat activities?

7 MR. KOEGEL: I need to check into that. I don't
8 believe that it --

9 JUDGE SILBERMAN: I don't understand why --

10 MR. KOEGEL: -- that that caveat applies --

11 JUDGE SILBERMAN: -- in this case --

12 MR. KOEGEL: -- to government contractors.

13 JUDGE SILBERMAN: -- in this case of -- importance
14 why nobody would have that right at their fingertips. Does
15 anybody have it?

16 JUDGE GARLAND: Okay. We'll worry about that --

17 JUDGE SILBERMAN: You cause so much trouble.

18 JUDGE GARLAND: I'm sorry.

19 MR. KOEGEL: Judge Silberman, the statute by
20 definition applies to government employees, and it also
21 defines employees, and it has also been held to apply to
22 agents of the government. So, even if the exclusion
23 applies --

24 JUDGE SILBERMAN: Defines or has been held?

25 MR. KOEGEL: It has been, that has been held.

1 JUDGE GARLAND: Right. So, there are a series of
2 cases about contractors, and it depends on right, physical
3 control over the contractors.

4 MR. KOEGEL: Agency --

5 JUDGE GARLAND: Right.

6 MR. KOEGEL: -- is determined based upon the day to
7 day control --

8 JUDGE GARLAND: Right.

9 MR. KOEGEL: -- of the duties --

10 JUDGE GARLAND: Right.

11 MR. KOEGEL: -- of the contractor under --

12 JUDGE GARLAND: But that's not your position here?
13 You don't think there has to be any day to day control, right?

14 MR. KOEGEL: Not for preemption under the combatant
15 activities exception. Given the unique federal interest in
16 conducting war.

17 JUDGE SILBERMAN: Explain why you think that is a
18 broader term than the discretionary function exemption.

19 MR. KOEGEL: Discretionary function protects the
20 policy making prerogatives of the United States. And in *Boyle*
21 the Supreme Court determined that it was necessary to fashion
22 a two-part test.

23 JUDGE SILBERMAN: Although the language specifies
24 the discretionary activities of the government, right. And
25 *Boyle* had to take an extension, a considerable extension under

1 the preemption theory in order to reach the --

2 MR. KOEGEL: That's right.

3 JUDGE SILBERMAN: -- contractor. But the direct
4 language of the combat activities language, the direct
5 language of that section easily applies to government
6 contractors on its face.

7 MR. KOEGEL: That's our position, Judge Silberman.
8 That a --

9 JUDGE SILBERMAN: Now you add *Boyle* to it, but you
10 don't really need it.

11 MR. KOEGEL: And you add the constitutional
12 provisions that prohibit the states from regulating foreign
13 affairs including the conduct of war. Taken alone or taken
14 together they lead to preemption. In this case the District
15 Court found that the exclusive operational control test was
16 not satisfied, and we submit that there were two fundamental
17 flaws in that, the District Court failed to define what it
18 meant by operational control, and in the process completely
19 ignored the military's definition of operational control, and
20 under that definition --

21 JUDGE SILBERMAN: Isn't your theory that operational
22 control is a misnomer anyway? You're asking whether the
23 contractors' activities are integrated in with the military
24 and under the ultimate control of the military, isn't that
25 your basic point?

1 MR. KOEGEL: If the activities constitute combatant
2 activities of the military that's sufficient for preemption.
3 The court might inquire into the degree of control for
4 purposes of assessing whether the activities are of the
5 military.

6 JUDGE GARLAND: Your position is a little broader
7 then because of the way the case turned out than counsel in
8 the previous case, right?

9 MR. KOEGEL: That's correct.

10 JUDGE GARLAND: Right. That's right. He was
11 willing to accept the Court's definition with respect to the
12 kind of supervision that was provided, and you're taking a --
13 you want to take both positions, you want to say even taking
14 the Court's position you're right, but otherwise there should
15 just be broad field prevention and such.

16 JUDGE SILBERMAN: No, no, no. Wait a minute. I
17 don't think you're saying field preemption -- or excuse me.
18 You're saying the exemption for combat activities would cover
19 a contractor --

20 JUDGE GARLAND: Regardless.

21 JUDGE SILBERMAN: -- who is integrated in with the
22 military --

23 MR. KOEGEL: Yes.

24 JUDGE SILBERMAN: -- and under the mission control
25 of the military, and --

1 MR. KOEGEL: Precisely.

2 JUDGE SILBERMAN: -- you wouldn't look at exclusive
3 operation control, you'd ask the basic functional questions.

4 MR. KOEGEL: That's correct.

5 JUDGE SILBERMAN: Yes.

6 MR. KOEGEL: Looking at exclusive --

7 JUDGE KAVANAUGH: You said that plus field
8 preemption just now, didn't you? Because you said taking the
9 constitutional structure, and you said taking them separately
10 or together --

11 JUDGE SILBERMAN: You would add field --

12 JUDGE KAVANAUGH: -- you would --

13 JUDGE SILBERMAN: -- preemption to it, but you don't
14 need it.

15 MR. KOEGEL: That's correct.

16 JUDGE KAVANAUGH: Yes.

17 JUDGE GARLAND: But you didn't argue for that in
18 your brief, this is --

19 MR. KOEGEL: That's correct.

20 JUDGE GARLAND: -- limitation.

21 JUDGE KAVANAUGH: Yes, you did.

22 MR. KOEGEL: Well, we --

23 JUDGE KAVANAUGH: Page 29 to 31 you did, and it's
24 responded to on 52 to 54 --

25 MR. KOEGEL: We argue --

1 JUDGE KAVANAUGH: -- of the red brief.

2 MR. KOEGEL: -- that in the context of the unique
3 federal interest because we're here on a 1292B appeal --

4 JUDGE SILBERMAN: Yes.

5 MR. KOEGEL: -- where the only issue before the
6 Court is the combatant activities preemption test adopted by
7 the District Court. And we take issue with that test, and in
8 doing so reflect the unique federal interest in waging war as
9 reflected in the constitutional provisions that assign
10 responsibility exclusively to the federal government for that.
11 As a result, that field is occupied --

12 JUDGE KAVANAUGH: Right.

13 MR. KOEGEL: -- by --

14 JUDGE KAVANAUGH: And you had those as two separate
15 arguments in your District Court briefs, and they're melded --

16 MR. KOEGEL: That's correct.

17 JUDGE KAVANAUGH: Yes.

18 MR. KOEGEL: And which is why I began this argument
19 by saying whether the Court goes through field preemption
20 analysis or conflict analysis the result is the same.

21 JUDGE GARLAND: I have a question I meant to Mr.
22 Zymelman, and I apologize for not asking you because you are
23 very good at answering my questions, but you have a stand in
24 here for this one. So, if the -- under the UCMJ if the
25 military supervisor of the contract ordered the contractor to

1 do something, that is the individual employee, and they refuse
2 the order could they be punished under the UCMJ?

3 MR. KOEGEL: The UCMJ is applied to civilian
4 contractors now --

5 JUDGE GARLAND: Going forward. Right.

6 MR. KOEGEL: -- going forward --

7 JUDGE SILBERMAN: And it wasn't applied at that
8 time, right?

9 MR. KOEGEL: It was not in -- the UCMJ was not
10 applicable at the time of the actions complained of here.

11 JUDGE SILBERMAN: With respect to going forward --

12 MR. KOEGEL: On a going forward basis I believe that
13 yes, the contractor could be --

14 JUDGE SILBERMAN: Even refusing to follow an order?
15 I'm not talking about don't do a war crime, I'm talking about
16 any order. Your understanding is that the UCM -- I have no
17 idea --

18 MR. KOEGEL: I don't know.

19 JUDGE SILBERMAN: -- what the answer is.

20 MR. KOEGEL: I can't --

21 JUDGE SILBERMAN: In order to figure out whether
22 these people are like soldiers, I appreciate this may be
23 totally irrelevant to your own analysis, but it's helpful to
24 mine, I guess what I want to know is even if they are in the
25 chain of command are they subject to punishment for other

1 than, you know, you're out of the contract, or we don't pay
2 you, are they subject to military punishment for refusing an
3 order the way a normal soldier would be?

4 MR. KOEGEL: I can't give you an exhaustive answer
5 to that question right now, Judge Garland.

6 JUDGE GARLAND: Can you give me an unexhausted, or
7 can't give me anything?

8 JUDGE SILBERMAN: What is it about the question, you
9 recall a question I asked the other side in this case which is
10 since the District Judge relied importantly, as Judge Garland
11 said not exclusively, but importantly on the proposition that
12 the supervisor there, the civilian supervisor testified that
13 he could have complained about behavior up through the civil
14 ranks, up through the contractors ranks about behavior he
15 thought was abusive. You recall that I asked counsel if that
16 was a factor to be used to apply liability wouldn't that have
17 an absolutely perverse economic incentive creating a situation
18 where government contractors were not supposed to object to
19 war crimes?

20 MR. KOEGEL: Absolutely, Judge Silberman. And it
21 would also be inconsistent with the DFAR's (phonetic sp.)
22 regulation that requires a civilian contractor to have a code
23 of ethics, and that that code of ethics must require the
24 reporting of wrong-doing.

25 JUDGE SILBERMAN: And what is the DFAR's regulation?

1 MR. KOEGEL: The DFAR's regulation, which is set
2 forth in our brief, and I'll give you the page number for
3 that, Judge Silberman, we referenced this because when Judge
4 Robertson concluded that the presence of CACI's code of ethics
5 might be viewed as establishing a dual chain of command, he
6 did so without awareness of DFAR's 48 C.F.R. 203.7000-.7001.
7 It's set forth on page 53 and 54 of our brief. We believe
8 that it's counterintuitive for a contractor to be penalized
9 for having a code of ethics that requires wrong-doing, but
10 worse yet --

11 JUDGE SILBERMAN: Requires reporting of wrong-doing.

12 JUDGE GARLAND: No, it requires reporting of wrong-
13 doing.

14 MR. KOEGEL: Requires -- thank you -- reporting of
15 wrong-doing, but worse yet, when that code of ethics is
16 affirmatively required by federal regulation that's an indicia
17 of more rather than less control of the contractor.

18 JUDGE SILBERMAN: That makes it another *Boyle* point.

19 MR. KOEGEL: That's correct.

20 JUDGE SILBERMAN: So, the government is requiring
21 you to do.

22 MR. KOEGEL: The government required the company to
23 have --

24 JUDGE SILBERMAN: So, you're really being hoisted on
25 your own petard.

1 MR. KOEGEL: We were penalized for compliance with
2 the Defense Department regulation. That's exactly correct.

3 JUDGE GARLAND: Okay. Like every other attorney
4 you're way over your time, but it's because of us and not you.
5 Ms. Burke. We have exhausted ourselves, I think.

6 ORAL ARGUMENT OF SUSAN L. BURKE, ESQ.

7 ON BEHALF OF THE APPELLEES

8 MS. BURKE: What CACI is asking you to do is to
9 substitute a corporate view of what's in the military's
10 interest with the military's view of what's in their interest.
11 The military has spoken on the issue as to whether or not it
12 benefits the military to have private --

13 JUDGE KAVANAUGH: Why don't they speak to this Court
14 then?

15 MS. BURKE: Well, Your Honor, I think that if you
16 asked them to they would. Seriously, I mean, we have met with
17 the Department of Justice, I think that, you know, they have
18 not filed a statement of interest. I think that the, you
19 know, the litigation branch of the military has been very
20 actively involved in this, has attended all the depositions,
21 and I think that the military's regulations which set out very
22 straightforwardly their view, and the statutory law that makes
23 it clear that corporations remain subject to civil liability,
24 the military goes in with the expectation that that looming
25 specter of tort law is one of the things that makes your

1 corporations abide by all the laws and continue to perform as
2 the military expects them to do in a lawful manner. The
3 situation that you have when you --

4 JUDGE KAVANAUGH: Just so I'm clear, the military
5 informs contractors, at least back at the time, that they may
6 be subject to state tort laws and to international law based
7 ATS claims?

8 MS. BURKE: The regulations and the military's
9 information provided to the contractors makes it clear that
10 they are subject to all U.S. law. All U.S. law. So, there's
11 no going --

12 JUDGE KAVANAUGH: Do you think D.C. law is U.S. law?

13 MS. BURKE: It's one of the United States laws.

14 JUDGE KAVANAUGH: Okay.

15 MS. BURKE: And I think that, you know, the real
16 question here is when you take away the --

17 JUDGE SILBERMAN: No, wait a minute, Counsel. You
18 don't mean to suggest that the contractor could be liable to
19 tort and contract law of 50 different states?

20 MS. BURKE: What I'm saying --

21 JUDGE SILBERMAN: All of which might be quite
22 different.

23 MS. BURKE: What I'm saying, Your Honor, is that
24 when the military hires a private corporation and tells them
25 to abide by the law, that the military is well aware of the

1 fact that one of the mechanisms in our system of American
2 jurisprudence that keeps corporations abiding by the law is
3 the specter of tort liability, and that the military has
4 looked at this issue --

5 JUDGE KAVANAUGH: Is there any evidence of that?

6 MS. BURKE: Your Honor, if you look at the comments
7 by the military in the regulations they were very clear --

8 JUDGE KAVANAUGH: No, but back at the time?

9 MS. BURKE: If you look at -- well, there's a couple
10 of different things in the record on the -- and I'll need to
11 get you the record cites, but if you look at the contracts
12 themselves, which are at JA 319 to 368 --

13 JUDGE KAVANAUGH: (Indiscernible.)

14 MS. BURKE: -- the contracts themselves talk about
15 that. And then there are manuals, as well, that are in the
16 record that also talk about contractor being subject to the
17 liability.

18 JUDGE KAVANAUGH: To the liability?

19 MS. BURKE: To tort liability, to private liability.

20 JUDGE GARLAND: Was there some kind of status of
21 forces agreement that protected the contractors from host
22 country liability in Iraq?

23 MS. BURKE: Your Honor, there was what was called
24 the Bremmer (phonetic sp.) Order, and the Bremmer Order said
25 that contractors operating in Iraq were not subject to Iraqi

1 jurisdiction, and that the sovereign could waive that.

2 JUDGE GARLAND: Which sovereign are we talking
3 about?

4 MS. BURKE: The United States.

5 JUDGE GARLAND: So, would that --

6 MS. BURKE: It's a United States order.

7 JUDGE GARLAND: -- eliminate the possibility of
8 Iraqi law governing here?

9 MS. BURKE: Your Honor, that, the Bremmer Order
10 referred to Iraqi jurisdiction so that they couldn't be hauled
11 into the courts in Iraq. I think it certainly would be cited
12 as evidence that by the state courts that you would not apply
13 Iraqi law, it would be on indicia that that was not where --

14 JUDGE SILBERMAN: But as you said earlier Iraqi law
15 could apply.

16 MS. BURKE: And --

17 JUDGE SILBERMAN: Is that a conflict of laws theory?

18 MS. BURKE: Well, what I said is that all laws of
19 all civilized nations, including Iraq, prohibit torture so
20 that you don't end up with the conflicts of law analysis
21 because the conduct is so egregious. So, we don't get to the
22 harder question of, you know, any kind of difference between
23 law --

24 JUDGE SILBERMAN: Well, a number of the allegations
25 of abuse that you make are not torture under anybody's theory.

1 MS. BURKE: Well, Your Honor, I think that the --

2 JUDGE SILBERMAN: Isn't that correct? Your

3 allegations are much broader than torture.

4 MS. BURKE: No, Your Honor. If you look at the --

5 JUDGE SILBERMAN: You go to abuse, don't you?

6 MS. BURKE: Well, if you look at the conduct that's
7 alleged for each individual, every individual was subjected to
8 a level of physical force that rose to the level of torture.

9 JUDGE SILBERMAN: I thought your allegations were
10 broader than that, they included abuse.

11 MS. BURKE: Well, I mean, part of it, of course, is
12 the definition of torture, and so when you look at -- when
13 we're looking at it, the Geneva Convention is that you're not
14 to use any physical force, they all involve physical force.

15 JUDGE SILBERMAN: But that doesn't necessarily mean
16 torture.

17 MS. BURKE: You're right, Your Honor. And we are --
18 I mean, this is not the label of --

19 JUDGE SILBERMAN: So, your allegations are broader
20 than torture.

21 MS. BURKE: Yes. Your Honor, the allegations turn
22 on the physical force whether or not those are labeled
23 definitionally as torture or not really doesn't matter because
24 we're talking about assault and batteries. And so, you know,
25 if for example, you know, something like --

1 JUDGE SILBERMAN: So, assault and battery would be
2 covered by the law of nations, as well.

3 MS. BURKE: And one of the ways to look at it --

4 JUDGE SILBERMAN: Is that correct?

5 MS. BURKE: -- is -- yes. Yes. In this context it
6 would be because one of the ways to look at it --

7 JUDGE GARLAND: I'm getting confused. When you say
8 this context are we on the ATS issue now, or are we on just
9 your civil liability claim?

10 MS. BURKE: If you look at --

11 JUDGE GARLAND: Which are you talking about?

12 MS. BURKE: I'm talking about under the federal
13 common law --

14 JUDGE SILBERMAN: That's the ATS.

15 MS. BURKE: -- the ATS --

16 JUDGE GARLAND: Yes.

17 MS. BURKE: -- and you look at the law of war.

18 JUDGE GARLAND: Okay. You're talking about ATS now.

19 MS. BURKE: Yes. Yes. So, if you look at the law
20 of war, the word torture goes to the use in a coercive
21 environment for the purposes of gathering the intelligence.
22 The physical harms, the stacking the people up in the pyramid
23 not necessarily torture, but it is --

24 JUDGE SILBERMAN: It isn't torture at all.

25 MS. BURKE: -- but it's a violation --

1 JUDGE SILBERMAN: Under anybody's theory.

2 MS. BURKE: It's a violation of the duty not to
3 inflict physical harm on the detainees. And this really goes
4 to the point of the duty of care and why the argument made by
5 CACI that the combatant activities exception eliminates any
6 duty of care is not accurate because when we're looking under
7 federal common law, we're just on the federal side here now,
8 and you have the common, the federal common law incorporating
9 the law of war, the law of war does not eliminate a duty of
10 care. The law of war does the opposite, it makes specific
11 when there are duties of care. And one of the places in which
12 there is a duty of care is when people are detained, they're
13 no longer out in the battlefield, they're not --

14 JUDGE SILBERMAN: Do I understand correctly that you
15 must be applying on the Federal Tort Claim Act case either
16 D.C. law or Iraqi law, it has to be one of those two options?

17 MS. BURKE: No, it could be California. We
18 originally sued in California so that we could --

19 JUDGE SILBERMAN: I see. So, it has to be one of
20 those three.

21 MS. BURKE: Yes.

22 JUDGE SILBERMAN: Okay.

23 MS. BURKE: Yes.

24 JUDGE SILBERMAN: All right.

25 JUDGE GARLAND: One of the briefs I thought said you

1 were relying on D.C. law. Your brief in one of these cases I
2 thought responded to the claim that you were applying Iraqi
3 law --

4 JUDGE KAVANAUGH: It hinted.

5 JUDGE GARLAND: Maybe it only hinted.

6 MS. BURKE: Yes. And that's --

7 JUDGE GARLAND: Are you withdrawing your hint now,
8 or --

9 MS. BURKE: The reality is that we have not briefed
10 this, and so we have not taken a position in the litigation.
11 I think that --

12 JUDGE GARLAND: Sometimes preserving every single
13 position you could take might actually make you lose all of
14 your positions.

15 MS. BURKE: Right. And I think that --

16 JUDGE GARLAND: So, you might want to think about
17 that just for a minute.

18 MS. BURKE: Well, then we will take D.C. law.

19 JUDGE KAVANAUGH: Good choice.

20 MS. BURKE: Then we will select D.C. law.

21 JUDGE GARLAND: You take the hints very well.

22 JUDGE KAVANAUGH: Yes.

23 MS. BURKE: And so, going forward, the state law
24 that we will be arguing applies will be the law of D.C. And
25 our point remains that, you know, that does not create any

1 conflicts of law issues. So, if you look at the duty of care
2 that would arise under D.C. assault and battery, and the duty
3 of care under the federal common law of war it's the same
4 duty. So, you do not get into the situation, you are in a
5 *Maray* situation rather than a *Boyle* situation, or the third
6 bucket.

7 JUDGE KAVANAUGH: When Congress extended the UCMJ to
8 contractors after this incident became known why didn't it
9 create a federal civil cause of action? Do you have any
10 information about whether something was proposed along those
11 lines, or what the thinking was?

12 MS. BURKE: Well, I don't know whether the thinking
13 was that under *Sosa* it already would be a federal cause of law
14 of action, or not. I don't have any information on what was
15 considered.

16 JUDGE KAVANAUGH: Senator Feinstein proposed a bill
17 that would have specified the various causes of action to
18 eliminate what we're going through on the ATS issue. But I
19 was thinking a more general federal civil cause of action, but
20 you're not aware of anything targeted to contractors
21 specifically?

22 MS. BURKE: I'm sorry, I'm not familiar enough with
23 all the proposed legislation --

24 JUDGE KAVANAUGH: Right.

25 MS. BURKE: -- to really speak knowledgeably, and

1 there may well have been one and I may not know of it, or have
2 forgotten it.

3 JUDGE KAVANAUGH: And in any event the question
4 still is how to interpret that inaction.

5 MS. BURKE: Yes. Yes. And so certainly for our
6 purposes there was no legislation that we could look to to
7 answer these questions.

8 JUDGE GARLAND: Are you exhausted?

9 MS. BURKE: I am a bit tired, but I'm happy to
10 answer any further questions.

11 JUDGE GARLAND: Hearing none, we'll take the matter
12 under consideration. Oh, no, you've got to reply. You've got
13 to reply, but a little shorter. A little shorter since she
14 didn't take all of her time.

15 MR. KOEGEL: I'll be brief.

16 JUDGE GARLAND: Okay.

17 ORAL ARGUMENT OF J. WILLIAM KOEGEL, JR., ESQ.

18 ON BEHALF OF THE APPELLANTS

19 MR. KOEGEL: In response to your earlier question,
20 Judge Garland, when Congress amended Article 2 of the
21 Uniform --

22 JUDGE GARLAND: Yes.

23 MR. KOEGEL: -- Code of Military Justice to render
24 contractors in the field subject to the law, it did include
25 Article 92, failure to obey an order, and Article 134, conduct

1 contrary to good order and discipline as applicable to
2 civilian contractors. So, yes, they could be charged and
3 disciplined for failure to obey an order.

4 JUDGE GARLAND: And that's going forward from 2007
5 or something like that?

6 MR. KOEGEL: That's correct. Yes. And in response
7 to Judge Kavanaugh's question about the amendment to the UCMJ,
8 Senator Graham's amendment was included without debate or
9 committee consideration, and as a result there is no amplified
10 discussion on the decision that Congress made to extend UCMJ
11 to contractors in the field. It was done very, very quickly,
12 and without any congressional debate or discussion.

13 JUDGE GARLAND: Can I just ask back on the other
14 one. If -- imagine there weren't any contractors at all, but
15 you had the regulations that said that the contractor -- or
16 maybe you had both a contract and you had regulations that
17 said the contractors are not in the chain of command, they are
18 not supervised by the military, imagine it said they are
19 supervised only by their civilian supervisor, would the UCMJ
20 require them to follow an order of -- could they be punished
21 for not following an order which would really be an illegal
22 order under those circumstances?

23 MR. KOEGEL: (No audible response.)

24 JUDGE GARLAND: See, I'm having this difficulty with
25 the regulations, right. I understand all the other arguments,

1 but I'm having difficulty. The regulations say you're not in
2 the chain of command, and you're not subject to command.
3 Whether it actually happens in practice or not I don't
4 understand how there's authority for it to happen in practice,
5 and therefore I don't see how even if the UCMJ covered it
6 somebody could be punished for following an order when the
7 government's regulations and contracts say you don't have to
8 follow orders.

9 MR. KOEGEL: I think there are several questions
10 there, Judge Garland, I'll --

11 JUDGE GARLAND: There are. There are.

12 MR. KOEGEL: -- try to answer them in sequence.
13 First, if there is a federal statute adopted by Congress that
14 imposes affirmative obligations on a contractor, that's going
15 to trump a Defense --

16 JUDGE GARLAND: Yes.

17 MR. KOEGEL: -- Department regulation.

18 JUDGE GARLAND: So, do you think the UCMJ says not
19 only that they can be punished for not following lawful
20 orders, but they can be punished for following orders even if
21 there's no -- the UCMJ by itself is an obligation to follow
22 orders regardless, is that right?

23 MR. KOEGEL: Yes. Yes. And in certain
24 circumstances that's correct. Even in the absence of a
25 contractual obligation.

1 JUDGE GARLAND: And even in the face of regulations
2 that say the opposite?

3 MR. KOEGEL: The regulations don't provide that it
4 is impermissible for a contractor --

5 JUDGE GARLAND: It says they're not subject to the
6 direct command, and it says they're not in the chain of
7 command.

8 MR. KOEGEL: And that's correct, Your Honor,
9 although that is better read as a reference to administrative
10 supervision, and we believe the Secretary of Defense and the
11 Defense Department do have flexibility with respect to the
12 formulation of government contracts because the contract here
13 that CACI had to provide interrogators is replete with
14 references to being required to follow the direction and
15 supervision --

16 JUDGE GARLAND: Right. But better read is not
17 usually the argument that we follow before somebody can be put
18 in the brig, or before somebody can be put in jail. The law
19 is that unclear, in fact the express language seems otherwise.
20 Are you saying that your employees from now on can be put in
21 the brig for failing to follow an order even if the contract
22 and regulations say they don't have to follow orders? I just
23 wonder.

24 MR. KOEGEL: I don't believe that the government by
25 contract can exempt a civilian contractor from federal law.

1 JUDGE GARLAND: Okay.

2 MR. KOEGEL: That a government contracting
3 officer --

4 JUDGE GARLAND: All right. You've satisfied me. Do
5 you have any other questions?

6 MR. KOEGEL: Thank you.

7 JUDGE GARLAND: Anything more? Judge Silberman just
8 nudged me that we're about 50 minutes, maybe an hour over.

9 MR. KOEGEL: Thank you.

10 JUDGE GARLAND: All right. Thank you very much. We
11 appreciate this is a difficult case, and I thought the
12 arguments were very good today. I appreciate it.

13 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

February 16, 2009

DEPOSITION SERVICES, INC.