Nos. 10-1891 & 10-1921

In the United States Court of Appeals for the Fourth Circuit

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, ET AL.,
APPELLEES,

v.

L-3 SERVICES, INC. & ADEL NAKHLA,
APPELLANTS.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NO. 08-1696)
(THE HONORABLE PETER J. MESSITTE, J.)

BRIEF FOR APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS

L-3 Services, Inc. is wholly owned by L-3 Communications Corporation, which in turn is wholly owned by L-3 Communications Holdings, Inc. No publicly held company owns 10% or more of L-3 Communications Holdings stock.

The following insurance companies have a potential obligation to indemnify appellant L-3 Services, Inc.: American International Group, Inc.; National Union Fire Insurance Co. (AIG); Lexington Insurance Co. (AIG); The Insurance Company of the State of Pennsylvania (AIG); Zurich Financial Services; Western Risk Insurance; Travelers Company Inc.; Westchester Fire Insurance; Steadfast Insurance Co.; AXIS Insurance Co. (Axis Capital Holdings Ltd.); Endurance Specialty Holdings Ltd.; Starr Excess International Liability Insurance Co. Ltd.; Arch Insurance Group; Great American Insurance Group; Allied World Assurance Co. Holdings Ltd.; General Indemnity Insurance Co. (Gen Re); XL Capital Ltd.; and Illinois Union Insurance Co.

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STATEMENT OF JURISDICTION

The district court order denying defendants' motions to dismiss was entered on July 29, 2010. (JA 923.) Defendant-Appellant L-3 Services, Inc., filed a timely notice of appeal of this decision on August 4, 2010. (JA 929.) Defendant-Appellant Adel Nakhla filed a timely notice of appeal on August 6, 2010. (JA 932.)

This Court has jurisdiction to review the district court's denial of defendants' assertions of immunity under the collateral order doctrine. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996).

The Court has jurisdiction to review the district court's determination that the political question doctrine does not bar plaintiffs' suit because this issue implicates the court's subject-matter jurisdiction, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), and is inextricably intertwined with the immunity analysis, *Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006).

The Court has jurisdiction to review the district court's determination that plaintiffs' claims are not preempted because the bases for the preemption and bar of plaintiffs' claims are inextricably intertwined with and necessary to ensure meaningful review of the immunity and political question issues. *See, e.g.*, *Rux*, 461 F.3d at 475; *see also Swint v. Chambers County Com'n*, 514 U.S. 35, 50-51 (1995). The three issues in this appeal (immunity, preemption, political question doctrine) all center on the viability of suits by

enemy aliens against government contractors who performed an essential governmental function over which the United States military retained command authority during the Iraq War.

The district court had diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs are citizens of Iraq; Mr. Nakhla is a citizen of Maryland; and L-3 is incorporated under the law of Delaware and headquartered in Virginia. (JA 22.) Plaintiffs also claimed jurisdiction under 28 U.S.C. § 1331 (federal question); § 1350 (Alien Tort Statute); and § 1367 (supplemental jurisdiction). *Id.*

STATEMENT OF THE ISSUES

Where enemy aliens file suit against government contractors who supplied linguists and interrogators who were integrated into U.S. military detention and interrogation functions based on injuries allegedly incurred during their wartime detention and interrogation on a foreign battlefield:

1. Are the government contractors and the supplied personnel immune from such suits?
2. Are such suits preempted and barred by federal law?
3. Are such suits nonjusticiable under the political question doctrine?

STATEMENT OF THE CASE

Plaintiffs are seventy-two Iraqis detained by the U.S. military in detention facilities in Iraq, including at Abu Ghraib. (JA 14-85, 831.) They filed this tort suit seeking money damages from L-3, a company that contracted with the government to supply linguists and interrogators to be used by military units in Iraq, and Adel Nakhla, a linguist supplied by L-3 to the military. (JA 14-85, 831-832.) Plaintiffs allege defendants are liable because some of these loaned employees, while assigned to military units that controlled detention facilities in Iraq and conducted interrogations of detainees, allegedly mistreated plaintiffs or joined a country-wide conspiracy to do so. (JA 14-85.) Plaintiffs seek money damages from defendants under the Alien Tort

Statute, 28 U.S.C. § 1350, and applicable state common law (which the district court found to be that of Iraq, JA 909-912).

Defendants moved to dismiss all claims. After full briefing and oral argument, the district court denied the motion to dismiss as to all claims. (JA 831-922.)

The district court concluded that the plaintiffs were "enemy aliens" (JA 840 n.3), but refused to apply well settled law-of-war immunity because plaintiffs alleged illegal conduct inconsistent with the laws of war and because defendants were not soldiers. (JA 836-851.) Narrowly reading this Court's derivative immunity precedents, the district court explained that it was not inclined to dismiss the claims based upon derivative immunity because the complaint does not allege that all actions by defendants were within the scope of their contract with the government, and the court doubted they could be, or if they were, that immunity would attach. (JA 833, 864-869.)

The district court squarely rejected immunity under, and preemption by, the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j) (2006), because, in its view, preemption is never appropriate based on the combatant activities doctrine. (JA 870-877.) The district court declined to follow the D.C. Circuit in a case involving the same defendants, the same plaintiffs' attorneys, and a would-be class that included the plaintiffs in this case. *See Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009) (petition for cert. pending, No. 09-1313 (Apr. 26, 2010)). The district court not only rejected the majority position that these claims are

preempted, but went even further than the *Saleh* dissent in finding preemption never appropriate for this type of wartime claim, even where contractor employees are integrated into the military command structure. (JA 874-877.)

Finally, the district court concluded that suits against private actors do not implicate separation of powers concerns even when the private actors are supplying personnel to be integrated into military units. (JA 851-864.) Rejecting the application of this Court's precedent finding a political question in a suit involving military activities, *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), the court held the case is justiciable (JA 861, 864).

These timely appeals followed (JA 929, 932-933), and this Court on its own motion consolidated the appeals of defendants L-3 and Mr. Nakhla. (Case No. 10-1891, Dkt. 3, Aug. 12, 2010.) The Court granted the parties' motion to expedite the case and to have it argued seriatim with the appeals in *Al-Shimari v. CACI Int'l, Inc.*, No. 09-1335, and No. 10-1543, *Taylor v. Kellogg, Brown & Root.* (Case No. 10-1891, Dkt. 9, Aug. 17, 2010.)

STATEMENT OF THE FACTS

A. The War in Iraq

After Congress enacted the Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1500-01 (2002), the President announced the commencement of military operations "to disarm Iraq, to free its people and to defend the world from grave danger." Presidential Address to the Nation (Mar. 19, 2003). United States military forces, in con-

junction with other members of the Multi-National Force in Iraq remained actively engaged in combating hostile forces in Iraq during the period relevant to this case. *See* JA 173.

Due to a shortage of qualified Arabic speakers and interrogators in the ranks, the military was required to use contractor employees to serve as linguists and interrogators assigned to military units engaged in combatant and occupation activities in Iraq. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5-6 (D.D.C. 2007), *aff'd in part*, *Saleh*, 580 F.3d at 2; JA 193. To fill this critical role, the government contracted with L-3's predecessor The Titan Corporation[1] and CACI to supply linguists and interrogators to military units in Iraq. *See* 580 F.3d at 2. L-3's linguists were integrated into and supervised by the military chain of command. *Id.* at 6-7 (L-3 linguists "were in fact integrated and performing a common mission with the military under ultimate military command").

In 2004, the news media broadcast pictures depicting apparent abuse of prisoners. Shortly thereafter, the media reported details leaked from a classified investigation by Major General Antonio Taguba, which concluded that Iraqis detained by the United States military had been mistreated by members of the military police and intelligence units at Abu Ghraib. The government conducted extensive investigations into these allegations of abuse, resulting in the court-martial of eleven soldiers. *See Ibrahim v. Titan*

[1] L-3 subsequently acquired The Titan Corporation; we use "L-3" throughout to refer to L-3 Services, Inc. as well as The Titan Corporation.

Corp., 391 F. Supp. 2d 10, 16 (D.D.C. 2005). No L-3 employees were criminally charged, and though some were investigated, the government likewise did not pursue any contractual remedies against L-3. *See Saleh*, 580 F.3d at 2.

In the wake of the Abu Ghraib scandal, senior military officials were called to testify before Congress about the alleged abuses and the military chain of command responsible for detention facilities and interrogation centers in Iraq. These officials explained that detention and interrogation operations are inherently governmental functions such that contract linguists and interrogators worked under the direct supervision of the military chain of command in Iraq. *See* JA 193, 199-200.

Secretary of Defense Donald Rumsfeld testified that civilian linguists and interrogators at Abu Ghraib are "responsible to [military intelligence] personnel who hire them and have the responsibility for supervising them." (JA 193.) Acting Secretary of the Army Les Brownlee confirmed that civilian linguists and interrogators "work under the supervision of officers or non-commissioned officers (NCOs) in charge of whatever team or unit they are on." *Id.* He added that, "any contract employee like that . . . is supposed to work under the direct supervision of an officer or non-commissioned officer who would be the supervisor of that person." (JA 200.) Finally, Army Inspector General Paul Mikolashek testified, with regard to civilian linguists and interrogators, that "their overs[eer] on a day-to-day basis was that mili-

tary supervisor, that [military intelligence] person in that organization to whom they reported." (JA 199.)

B. The *Saleh* and *Ibrahim* Cases

On June 9, 2004, plaintiffs' counsel here filed the *Saleh* action against L-3, CACI, and several employees of each company (including Mr. Nakhla) in the Southern District of California on behalf of a class including all detainees at U.S. military prisons throughout Iraq. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56-57 & n.1 (D.D.C. 2006). On July 27, 2004, other Iraqi nationals filed the *Ibrahim* action against L-3 and CACI in the district court for the District of Columbia. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005). These actions alleged that L-3 linguists participated in a conspiracy to torture them (or their relatives) at Abu Ghraib and other prisons in Iraq; the *Saleh* plaintiffs also contended that United States senior military officials were members of the conspiracy and set the policies under which they were mistreated at Abu Ghraib and other military prisons in Iraq. The *Saleh* action was transferred to the District of Columbia, where the two cases were consolidated for purposes of discovery. *See Saleh*, 436 F. Supp. 2d 55, 57 n.1, 60. Plaintiffs in both cases brought tort claims under the Alien Tort Statute and the common law. The district court dismissed the ATS claims against all defendants and granted summary judgment to L-3, finding it undisputed that L-3's linguists were under the exclusive direction and control of the military chain of command performing as soldiers in all but name. *Saleh*, 580 F.3d at 2. The claims against the individuals were dismissed for lack of per-

sonal jurisdiction. The district court denied summary judgment to CACI, finding that it was disputed whether its employees were exclusively supervised by the military chain of command. *Id.* at 4.

On appeal, the D.C. Circuit rejected tort law as an appropriate means of regulating conduct within United States military detention facilities on the battlefield. *Saleh*, 580 F.3d at 2-17. The court of appeals broadened the rationale of the district court, holding that even if exclusive control by the military was disputed, it did not change the outcome. "[W]here a private service contractor is integrated into combatant activities over which the military retains command authority," *id.* at 9, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place," *id.* at 7. This barred all common law tort claims. The court of appeals had "little difficulty" in concluding that plaintiffs' attempt to claim that international law prohibited the conduct at issue on appeal was "stunningly broad" and based on "an untenable, even absurd, articulation of a supposed consensus of international law." *Id.* at 15. The court of appeals also noted that there were numerous other potential bases for upholding the dismissal of plaintiffs' claims, including that the contractors may be entitled to immunity, *id.* at 5; that Congress had legislated in the area without creating an available cause of action, *id.* at 16;

and that recognizing a cause of action here "would impinge on the foreign policy prerogatives of our legislative and executive branches," *id.*[2]

C. This Case

In May and June of 2008, *Saleh* plaintiffs' counsel filed a second wave of five actions on behalf of five plaintiffs in five different venues against L-3, CACI, three individual CACI interrogators, and Adel Nakhla, a former L-3 linguist. After a series of transfers, voluntary dismissals, and amendments, this second wave comprises this case against L-3 and Mr. Nakhla and one case against CACI that is on appeal to this Court from the Eastern District of Virginia. *See Al-Shimari v. CACI Int'l, Inc.*, No. 09-1335.[3]

Plaintiffs in this case allege mistreatment during their capture and detention by the U.S. military in Iraq for periods ranging from six days to almost five years during the period July 2003 until May 2008. Plaintiffs allege a wide range of tortious conduct against primarily unnamed "co-conspirators," from allegations of shocking abuse to simple assault. Sixty-eight of the seventy-two plaintiffs do not allege any abuse by an L-3 em-

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[2] Judge Garland dissented with regard to the state common-law tort claims only. *Saleh*, 580 F.3d at 17-36. Although he agreed with the majority that *Boyle* supplied the correct analytical framework for the preemption analysis; that the area implicated uniquely federal interests; and that, at least in theory, it might be proper to find preemption under *Boyle* for some combatant activities, he argued for a narrower test for preemption. *Id.*

[3] Plaintiffs' counsel has stated that she represents an additional 100 Iraqis who are willing to see which venue will be hospitable to their claims. (JA 931.)

ployee; rather, they seek to hold defendants vicariously liable for alleged abuse by soldiers or others with whom they came in contact in U.S. military detention facilities. As to Mr. Nakhla, the Second Amended Complaint alleges only that he had contact with one of seventy-two plaintiffs. (JA 101-04.) It does not allege that he had any contact with—much less abused—the other seventy-one plaintiffs. In fact, fifty-two plaintiffs allege that they were detained and abused only *after* Mr. Nakhla's employment in Iraq allegedly ceased. (JA 106-08.)

Without distinction as to the identity of the alleged offender or the severity of the alleged conduct, plaintiffs seek money damages from the defendants under federal common law through the Alien Tort Statute, 28 U.S.C. § 1350, and the common law.

The district court denied L-3's and Mr. Nakhla's motions to dismiss. The court held that law-of-war immunity is limited to immunity of soldiers from suit in the courts of the occupied nation. Narrowly construing this Court's derivative immunity jurisprudence, the district court distinguished this case and further held that derivative immunity is unavailable for alleged conduct that is illegal and not specifically ordered by the government. The district court also rejected wholesale the D.C. Circuit's analysis and disposition of the same allegations in *Saleh*. Finally, the court rejected application

of the political question doctrine based in part on the private status of the defendants.[4]

SUMMARY OF ARGUMENT

1. Defendants are immune from these claims brought by enemy aliens based upon injuries during their wartime capture, detention, and interrogation by the United States military.

a. Occupying forces are immune from suits brought by residents in the occupied land. *See Coleman v. Tennessee*, 97 U.S. 509, 517 (1879); *Dow v. Johnson*, 100 U.S. 158, 170 (1880). This rule remains vital today. *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981). The public interests undergirding law-of-war immunity from enemy suits are so compelling that they preclude even Constitutionally-protected civil remedies such as habeas corpus and takings claims. The common law tort claims at issue in this case (which do not enjoy special Constitutional status) are clearly barred. Comprehensive disciplinary, criminal, and compensatory regimes establish that it is the role of the United States to discipline and punish violations, and ex-

[4] In addition, the district court denied Mr. Nakhla's motion to dismiss the claims of the seventy-one plaintiffs who did not allege contact with him. The district court denied this motion based upon plaintiffs' conclusory allegations of conspiracy, even in the absence of any alleged personal involvement of Mr. Nakhla. *See* JA 920 n.27. This was error because the complaint fails to allege a plausible factual basis to suggest that Mr. Nakhla entered a conspiracy spanning 26 facilities, 25 of which he is not alleged to have visited, and 5 years, more than 4 of which were after he was alleged to have departed Iraq.

pressly provide that military personnel *and* contractors such as defendants are immune from suit for such matters. Tort law would be an inappropriate addition to regulate conduct in military prisons in occupied lands.

b. Defendants are entitled to derivative immunity because they are performing essential governmental functions for the United States (whose immunity is rooted in separation of powers) and because they served alongside and under the supervision of soldiers (who have law-of-war immunity). Extending immunity to defendants is necessary to protect the immunity of the United States and the interests giving rise to the law-of-war immunity. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000).

2. This Court should follow the decision of the D.C. Circuit in *Saleh* and hold that plaintiffs' claims are also preempted and barred by federal law based upon the same policies and concerns that undergird law-of-war and derivative immunity. The combatant activities exception to the FTCA, 28 U.S.C. § 2680(j), indicates Congressional intent to cast an immunity net over any claim that arises out of combatant activities where tort law would conflict. Moreover, the exclusive allocation of the war power in the political branches of the federal government preempts the field with respect to regulation of combatant activities. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

3. Finally, plaintiffs' claims for injuries incident to their detention by the U.S. military present non-justiciable political questions under *Baker v. Carr*, 369 U.S. 186, 217 (1962).

STANDARD OF REVIEW

This Court reviews de novo the district court's legal conclusions in denying defendants' motions to dismiss. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 229 (2009); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997).

The issues in this appeal implicate the district court's subject matter jurisdiction, and thus are evaluated under Federal Rule of Civil Procedure 12(b)(1). *See Smith v. Reagan*, 844 F.2d 195, 196 (4th Cir. 1988); *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995). Evidence outside the pleadings can be properly considered under Rule 12(b)(1), and this Court reviews the district court's factual findings for abuse of discretion. *Jadhav*, 555 F.3d at 347; *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Plaintiffs bear the burden of persuasion when a motion to dismiss challenges the court's subject-matter jurisdiction. *Piney Run Pres. Ass'n v. County Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

ARGUMENT

Plaintiffs' fundamental premise, accepted by the district court, is that civil litigation against contractors can be used to regulate the conduct of wartime United States military operations upon a foreign battlefield. That premise is wrong. There is no support for it in the law developed over centuries of United States military conflict; on the contrary, the precedent uniformly supports that the forces of the United States (including contractors integrated into those forces) are not subject to civil tort suits by enemy aliens for injuries arising from the conduct of wartime operations such as military detention and interrogation.

While the factual setting of this case—alleged mistreatment within United States military battlefield detention facilities—has not been passed upon by the Supreme Court, the Court has decided that in the context of U.S. wartime military operations and occupation, no suits by the enemy will lie. The courts of appeals have uniformly rejected the premise that enemies can file civil suits to regulate U.S. battlefield operations or to seek compensation, whether from the government, officials, or government contractors. Until the district court decisions here and in *Al-Shimari*, no federal court had held differently. And for good reason. Tort law conflicts with the Constitutional allocation of war power to the political branches of the federal government and would provide competing supervision of war-making that would hinder the military's conduct of war. The detention facilities at issue here lie at the very core of military war-making and its regulatory scheme. No aspect of

military operation is more closely regulated and controlled by the military than battlefield detention and interrogation. And like all combatant activities, interrogation and detention pose competing interests of international obligations, military objectives, manpower allocation, and security concerns—all in real time and often under fire—that are committed to the military to balance. Detainees cannot use the courts to require a different balance or seek compensation by suing contractors whose personnel were integrated into those operations.

Some of the allegations in the complaint, presumed true at this stage, recount reprehensible conduct (principally by unidentified "co-conspirators") that indicates a breakdown of military discipline and control. These were revealed to the world in shocking photographs of abuse at Abu Ghraib in the early days of the Iraq conflict. But the question presented by this case is not whether such conduct is lawful or justifiable, or whether victims of abuse should be compensated and the perpetrators held to account. The question is what system regulates battlefield military prisons: civil tort suits instituted by those detained, or a combination of civilian criminal law, military justice, and administrative compensation, all of which are controlled by the Executive to which war-making is entrusted. Common law tort is the only one of these systems within the exclusive province of plaintiffs and the judiciary and is furthest removed from the political branches. Plaintiffs here seek to engraft this system—for the first time—to administration of United States military detention facilities on a foreign battlefield during wartime.

The Supreme Court has never allowed the objects of United States military force to bring suit for torts committed during the military's wartime operations. Nor has any court of appeals done so; in fact, confronted with the same allegations alleged here, the United States Court of Appeals for the District of Columbia Circuit categorically rejected the very propositions advanced by the same counsel on behalf of a would-be class that included these plaintiffs. *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). This Court should not be the first to do so. In addition to the uniform precedent, Congress has spoken in the FTCA and the myriad of statues governing the conduct of the U.S. wars, which uniformly do not provide for a civil cause of action.

The district court in this case relied upon dicta and incorrect inference to cast aside centuries of settled law and reach a troubling result: that enemy aliens can bring civil litigation against those engaged in combatant activities and demand that the judiciary apply international norms and Iraqi law to regulate core military operations on the battlefield. Criminal law (both civilian and military) and the administrative compensation scheme enacted and administered by the political branches are the appropriate tools for regulating battlefield detention and interrogation, activities at the very core of war-making and exclusively vested in those branches. Subjecting contractors and the military (even just as witnesses) to suit is not. The district court order should be reversed.

I. DEFENDANTS ARE IMMUNE FROM PLAINTIFFS' CLAIMS

L-3 and its employees—who were in Iraq at the behest of the U.S. military to support the military's core detention and interrogation operations—are immune from suit by enemy aliens under well settled principles of the law of war and derivative immunity.

A. Under the Law of War, Plaintiffs Cannot Sue for Claims Arising out of their Detention by the U.S. Military in Iraq

In time of war, no claims can be brought by enemy aliens against occupying forces. *See New Orleans v. Steamship Co.*, 87 U.S. 387, 394 (1874); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1879); *Dow v. Johnson*, 100 U.S. 158, 170 (1880). This rule is essential to the efficient conduct of war by the political branches: the threat of judicial intrusion would chill and hinder combatant activities, and the pendency of a lawsuit hampers efficient military efforts. *Dow*, 100 U.S. at 165-66. Based on these powerful concerns, the Court long ago held that occupying forces are immune from civil suits by the occupied. *Id.*; *Coleman*, 97 U.S. at 515; *see also Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981).

As is the case with other forms of immunity, law-of-war immunity depends upon the function the defendant was performing, not the plaintiffs' characterization of the alleged conduct as heinous or illegal: it does not "make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Dow*, 100 U.S. at 163-66; *see also Coleman*, 97 U.S. at 515-19. Thus, the occupied cannot sue

occupying forces of the United States, even if the actions were not justified by the necessities of war. *Dow*, 100 U.S. at 166. The proper remedy for an aggrieved enemy alien is to report the injuries to the military command, which might provide compensation or punish the offender. *Id.* at 167; JA 176. Even a member of the occupying forces who commits murder (in violation of federal law and the laws of war) is immune, although subject to criminal prosecution by the occupying power. *Coleman*, 97 U.S. at 515-19.

The district court acknowledged that *Dow* "suggests" military actions are "immune from civil liability in domestic courts *even for acts which violate the laws of war*," but contended that *Dow's* holding was later limited to immunity for acts "'done in accordance with the usages of civilized warfare under and by military authority.'" (JA 849 (emphasis added) (quoting *Freeland v. Williams*, 131 U.S. 405, 416 (1889)).) In fact, this was the position of the dissent in *Dow*, not the opinion of the Court. *See* 100 U.S. at 170 (Clifford, J., dissenting). There is no basis to interpret *Freeland*, as the district court does, as substituting the dissent for the majority opinion on this issue, particularly since *Freeland* explicitly stated it was *not* reconsidering the doctrine articulated in *Dow*, and reaffirmed that parties are protected "from civil liability *for any act done in the prosecution of a public war*." *Freeland*, 131 U.S. at 417 (emphasis added).[5] More fundamentally, in addition to the cases

[5] It is not surprising that *Freeland* used this language because the statute under review in the first part of the opinion used the quoted terms. And, because nothing turned on whether the conduct was authorized by the laws of war, the language is in any event dicta. *Freeland*, 131 U.S. at 416-17.

discussed above, the doctrine of immunity from suits by the occupied continues without the limitation asserted by the district court.[6]

The district court also claimed that *Dow* (and presumably *Coleman* and later cases) were "outlier[s]" that were contrary to holdings that allowed suits against the military or denied them on the merits. (JA 849-50.) But the cases relied upon by the district court do not support its rejection of the immunity set forth in the law of war cases. Take *Mitchell v. Harmony*, 54 U.S. 115 (1852), for example. *Mitchell* allowed an action for trespass by a citizen—not an enemy—who was invited to accompany and trade with military forces, and the holding was distinguished by *Dow* based on these key differences. *See Dow*, 100 U.S. at 169. *Little v. Barreme*, 6 U.S. 170 (1804), allowed a claim by a neutral, not an enemy. *The Paquete Habana*, 175 U.S. 677, 680 (1900) was an action "in prize," a specialized type of *in rem* proceeding brought by the military forces themselves, which allowed the ship owner to contest the condemnation. *Lamar v. Browne*, 92 U.S. 187 (1876), erroneously relied upon by the district court, specifically reaffirmed immunity of

[6] *See, e.g., Moyer v. Peabody*, 212 U.S. 78, 85-86 (1909) (applying *Dow* immunity to civil suit against Colorado governor); *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) (law-of-war immunity arising from occupation of West Berlin); *In re Lo Dolce*, 106 F. Supp. 455, 460-61 (W.D.N.Y. 1952) (American soldier operating behind enemy lines in German-occupied Italy not subject to Italian law); *United States v. Best*, 76 F. Supp. 857, 860 (D. Mass. 1948) (applying *Dow* immunity in context of occupied Austria); *Hamilton v. McClaughry*, 136 F. 445, 448-49 (D. Kan. 1905) (soldier participating in operation to quell Boxer rebellion not subject to Chinese law).

the military from tort suits in capture situations, even when Congress created a statutory right in the Court of Claims to seek compensation for such capture. *Id.* at 196-99. *Ford v. Surget*, 97 U.S. 594 (1878), and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), clearly reaffirmed wartime immunity. In *Luther*, the claims (that Rhode Island militia members unlawfully broke into the plaintiff's house in the middle of the night to arrest him) were not actionable because "a state of war" existed that immunized the allegedly unlawful conduct, and as a result the government could not be sued for this allegedly unlawful conduct. 48 U.S. at 45-46. And in *Ford*, the Court went further, holding that a civilian acting on behalf of the Confederate military was similarly immune from suit, not because the acts were lawful, but because they were on behalf of the Confederate Army which was accorded the status of a recognized military for purposes of the laws of war. 97 U.S. at 604-07.

The district court also sought to distinguish *Dow* and later cases by asserting that law-of-war immunity does not apply to non-military personnel because civilians were not answerable to military tribunals until 2006, and because immunity from suit in occupied courts did not mean immunity from civil suit in domestic courts. (JA 850-51.) The district court erred by misapprehending the historical context of *Dow* and the other cases it sought to limit. When those cases were decided, civilians *were* amenable to trial by military tribunals. *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341, 349 & n.15 (1952).[7]

[7] It was not until 1957 that the Court limited the trial by military tribunal of civilians abroad. *See Reid v. Covert*, 354 U.S. 1 (1957). At any rate, the ex-

Nor do the holdings of *Dow* and later cases immunizing soldiers from civil suits turn on the venue (local courts of the occupied country versus home courts of the occupying force), as the district court erroneously held based on another misapprehension of historical context. Under uniformly applicable choice of law principles in force when those cases were decided, "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will also be barred in the domestic courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) (internal quotations omitted); Restatement (First) of Conflict of Laws §§ 377-390, 412-424.

The D.C. Circuit in the modern era confirmed that law-of-war immunity applies to suits in domestic courts, holding that immunity arising from occupation of West Berlin by the United States applies to bar suits brought in federal court in the District of Columbia three decades after the end of the World War II. *Dostal*, 652 F.2d at 176 (citing *Coleman*, 97 U.S. 509). Thus, the correct focus is not on venue, but on whether the conduct of combatant activities is to be regulated by the tort system invoked by those against

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istence of federal criminal jurisdiction to try such contractors exposes the fallacy of the district court's suggestion that immunity from tort suit would create a "lawless loophole" (JA 851). *See, e.g.*, 18 U.S.C. § 7; *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1551 (2010). As the Solicitor General recently explained in opposing Supreme Court review of a case involving a tort claim arising out of the Iraq War, "[i]rrespective of the availability of private tort remedies, contractors remain subject to applicable federal criminal law and contractual remedies, the enforcement of which is under the purview of the United States Government." (JA 821 n.7.)

whom the U.S. military directed its operations or, alternatively, by the Executive. *Saleh*, 580 F.3d at 6-9; *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992).

Even where the Constitution directs that there should be supervision of government action through civil remedy—*e.g.*, review of detention through habeas corpus or damage actions for government takings—there is still immunity in the context of military operations abroad. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court concluded that even the Constitutionally-enshrined writ of habeas corpus is unavailable to enemy aliens detained on foreign battlefields, explaining that judicial intervention in this area would create "a conflict between judicial and military opinion highly comforting to enemies of the United States." *Eisentrager*, 339 U.S. at 779. Absent a Congressionally-created cause of action, civil claims are inappropriate, for "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779. The Court made clear that this rule concerned the proper authority for enforcement of laws of war: "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. The foreign wartime context that precludes civil remedies even where directed by the Constitution even more clearly bars tort claims that do not

enjoy the special Constitutional status of habeas corpus. *See* U.S. Const. art. I, § 9, cl. 2.[8]

In a similar vein, the enemy property cases—involving claims brought under the Takings Clause, which provides a waiver of sovereign immunity for these claims, *see* U.S. Const. amend. V—further reinforce that claims arising out of wartime combatant activities are barred. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355-56 (Fed. Cir. 2004) (allegedly wrongful destruction of factory not compensable); *Perrin v. United States*, 4 Ct. Cl. 543, 547-43 (1868), *aff'd*, 79 U.S. 315, 316 (1871) (same); *United States v. Caltex (Phil.), Inc.*, 344 U.S. 149, 155-56 (1952) (same) ("[I]n wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.").

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[8] The district court erred in concluding that *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008), "significantly narrowed *Eisentrager*'s scope, making it . . . inapplicable to the present case." (JA 838.) *Rasul* simply affirmed that Congress is empowered to create a cause of action that might override law-of-war immunity. In response to *Rasul*, Congress sought to eliminate federal jurisdiction over petitions filed by Guantanamo detainees. *Boumediene* found that this violated the Suspension Clause. 128 S. Ct. at 2262. In doing so, the Court reaffirmed the vitality of *Eisentrager* with regard to battlefield military prisons such as those at issue here but found Guantanamo to be different. *Boumediene*, 128 S. Ct. 2257, 2259-62. The D.C. Circuit, in finding that habeas was barred at Bagram Air Force Base in Afghanistan, found controlling "the rationale of *Eisentrager*, which was not only not overruled, but reinforced by . . . *Boumediene*." *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (2010); *see also* JA 808-829. And while the *Rasul* majority discussed alien enemies' rights to engage in non-habeas litigation (JA 838), that discussion was dicta because the claims had been abandoned. *Rasul*, 542 U.S. at 505 n.6 (Scalia, J. dissenting).

The rule drawn from the law of war cases has been given concrete application to the war in Iraq. Indeed, the legal framework governing conduct of soldiers and contractors in Iraq illustrates the comprehensive enforcement, disciplinary, criminal, and compensatory regime in place for acts occurring during wartime—and how civil tort suits would be an inappropriate addition. Under the regulations of the Coalition Provisional Authority, military personnel and contractors, such as L-3, are immune from suit for matters relating to their contracts. (JA 211 § 4 (CPA 17 June 27, 2004); JA 203 § 3 (CPA 17 June 27, 2003); *see* JA 021 (alleging that the claims in this suit arise from L-3 "selling the services of Mr. Nakhla and other employees to the United States military").) Disciplinary and criminal regulation is reserved to the criminal law of the Sending State. *See* JA 210 § 2(4); JA 203 § 2(4). The United States has vigorously enforced these rules to punish and court-martial those found to have engaged in abuses at Abu Ghraib. *See Ibrahim*, 391 F. Supp. 2d at 16. Civilian contractors can likewise be prosecuted within the United States for criminal conduct at military detention facilities in Iraq, *see* 18 U.S.C. §§ 2340A, 2441, 3261. Contractual remedies can also be sought against contractors who exceed the scope of their contract or fail to comply with its terms. *Saleh*, 580 F.3d at 2. In addition, the United States has established administrative remedies to compensate for mistreatment in U.S. military detention facilities in Iraq to the extent such claims are substantiated. *Id.*; JA 176.

In sum, to allow plaintiffs to proceed here would be contrary to values expressed by the cases barring suits by the occupied against the occupiers over the last two centuries, and would subject the conduct of war and occupation abroad by the U.S. military to the debilitating effects of having to defend at home against the legal attacks of the military's detainees.

B. Defendants Are Immune from Plaintiffs' Claims

Over twenty-five years before *Saleh* addressed these very claims and held them barred by preemption, and intimated they would be barred by immunity as well, *see* Part II, *infra*, the D.C. Circuit confronted claims under the ATS and state common law against government officials and military contractors arising out of United States military action overseas (the Contra Wars). *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (Scalia, J.). The *Sanchez-Espinoza* plaintiffs alleged that the defendants had engaged in outrageous (and clearly illegal) conduct that violated the common law and law of nations, including "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." *Sanchez-Espinoza*, 770 F.2d at 205. As here, plaintiffs alleged that government contractors acted "in concert and conspiracy" with other defendants, including U.S. government officials, to mistreat or aid in the mistreatment of the civilian population of a foreign nation in the midst of foreign hostilities. *Id.* at 205. The court, in a unanimous opinion authored by then-Judge Scalia and joined by then-Judge Ginsburg, held that "[i]t would make a mockery of the doctrine of sovereign immunity" to permit such

claims to proceed. *Id.* at 207. The same analysis applied to the claims brought against the contractor defendants, *id.* at 207 n.4, in part because the immunity that extended to the contractors and government officials was based upon separation of powers. *Id.* at 207 n.5.

Sanchez-Espinoza's holding—that the military's contractors are immune from tort claims arising out of their participation in United States military operations overseas because subjecting them to suit would trench on the immunity of the United States—fits squarely within the framework set out by this Court for determining whether non-governmental actors are derivatively immune. Because it is beyond dispute that the claims in this case arise out of L-3's provision of linguists and interrogators for detention and interrogation operations during the Iraq War, and that detention and interrogation are core public functions in the wartime operations of the U.S. military, defendants are derivatively immune from the tort claims asserted here.

This Court has clearly held that government contractors and their personnel enjoy derivative immunity under appropriate circumstances, setting out in two cases a framework that explains the result in *Sanchez-Espinoza* and dictates the result here. In *Mangold v. Analytic Services., Inc.,* 77 F.3d 1442, 1447-48 (4th Cir. 1996), plaintiffs sued a government contractor for defaming them to government investigators. On interlocutory appeal under the collateral order doctrine of the district court's order denying immunity to the contractor, this Court held that the government contractor was immune notwithstanding its private status, because "the public benefits obtained by

granting immunity outweigh its costs." *Id.* at 1446-47. It is not the governmental status of the defendant, nor the legality of the alleged conduct, but rather the nature of the function being performed by the defendant that determines whether immunity attaches. *Id.* at 1447-48.

Four years later, *Butters v. Vance International, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), held that a private security contractor enjoyed immunity from claims of unlawful gender discrimination deriving from a foreign sovereign. While *Mangold* derived the contractor's immunity from the doctrines of official immunity and testimonial immunity, *Butters* characterized the principles of derivation of immunity set out in *Mangold* as broadly applicable and applied the same function-driven framework to foreign sovereign immunity. *Id.* at 466. This Court explained that because the "public interest remains intact when the government delegates that function down the chain of command," private contractors are covered as well as government personnel. *Id.* "Imposing liability on private agents of the [foreign] government would directly impede the significant governmental interest in the completion of its work." *Id.* The private entity was thus immune when providing employees to perform a governmental function—in that case, protective security for Saudi Arabia. *Id.*

The district court's cramped reading of *Mangold* as allowing derivative immunity for only the specific underlying immunities at issue there, *see, e.g.*, JA 869 ("there is no contention by either party that Defendants' liability arises out of their testifying or cooperating with investigators"), is flatly in-

consistent with this Court's broad application of *Mangold* to the different immunity in *Butters*, as well as the understanding of the doctrine manifested by other courts of appeals. *See, e.g.*, *Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (citing *Mangold*, 77 F.3d at 1447); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998); *Midland Psychiatric Assocs. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998); *Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997).

Defendants are derivatively immune because they were performing uniquely governmental functions for which the government enjoys sovereign immunity, *see Saleh*, 580 F.3d at 13 (direct challenges to U.S. military action are precluded by sovereign immunity); *Sanchez-Espinoza*, 770 F.2d at 207; FTCA, 28 U.S.C. § 2680(j), and soldiers enjoy law-of-war immunity because of their function, *see supra* Part I.A. Because it is in the public interest to protect battlefield operations from interference by enemy aliens, and for the military to have the freedom to use contractors to fill shortages in military ranks without fear that their use will be subject to review in civil suits, derivative immunity is appropriate here.

First, there can be no dispute that defendants were involved in carrying out a "governmental function." *Murray*, 444 F.3d at 174. Injuries arising during capture, detention, and interrogation by military forces clearly implicate core governmental functions: such activities "by 'universal agreement and practice,' are 'important incident[s] of war,'" *Hamdi v. Rumsfeld*,

542 U.S. 507, 518 (2004) (alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)), and were an "essential tool" in combating hostile forces in Iraq (JA 173). The military used contract interrogators and translators in these operations due to shortages of qualified personnel in the military ranks. (JA 193 (Testimony of Deputy Commander of U.S. Central Command, Lieutenant General Lance L. Smith).) The detention and interrogation functions supported by civilian contract linguists and interrogators in Iraq are "inherently government" functions calling for "exercise of sovereign government authority" or "significantly affect[ing] the life, liberty, or property of private persons." (JA 199 (Testimony of Acting Secretary of the Army Les Brownlee).) Because contractors were used to make up shortfalls in military ranks in the contest of detention and interrogation operations, *id.*, such contractor employees were required to be integrated into the military chain of command and directly supervised by military personnel. *See* JA 193; *Saleh*, 580 F.3d at 6-7.

Indeed, while the district court rejected defendants' claims of immunity and preemption because of the nature of the alleged conduct, it relied upon the sovereign nature of their work to assert, incorrectly, liability under the ATS: "Defendants' work operating alongside the military as interpreters for non-English speaking captives is fairly classifiable as a public function. Operation of a military force is one of the most basic governmental functions, and one for which there is no privatized equivalent." (JA 891; *see also* JA 893

("[A]ctually working alongside the military to carry out military duties approaches the Government's core power to operate a military.").)

As *Saleh* and *Sanchez-Espinoza*, observed, the United States is clearly immune from suits arising from such functions; indeed, Congress expressly reserved sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j); *see also Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 967-68 (4th Cir. 1992) (ATS claims arising out of U.S. occupation of Panama barred by sovereign immunity). The combatant activities provision "casts an immunity net over any claim that *arises* out of combat activities." *Saleh*, 580 F.3d at 6; *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1489-90 (C.D. Cal. 1993). Likewise, members of the United States military (and under CPA 17, L-3 and its loaned employees) are immune under two centuries of caselaw on the law of war. *See* Part I.A, *supra*.

Second, there is an overriding public interest in permitting military commanders to act "'free from the hindrance of a possible damage suit' based on its conduct of battlefield activities." *Ibrahim*, 556 F. Supp. 2d at 4 (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). The district court's ruling—applying civil tort regulation to the conduct and supervision of L-3's loaned employees engaged in detention and interrogation operations—would bar military commanders from using contractors in such core functions or subject the battlefield to tort regulation. In the context of Iraq,

this was a false choice, insofar as the military could not have conducted the necessary wartime interrogation and detention functions without L-3's loaned employees.

Under the district court's view, L-3 would be precluded from providing employees to the military to be integrated into the military chain of command and supervised by military members. Instead, L-3 would be required to inject supervisors between its linguists and the military units to which they were assigned by the military and to insist that military operations and employee supervision be undertaken in a manner consistent with, in this case, the law of Iraq. This result would, in the language of *Sanchez-Espinoza*, make a mockery of the doctrine of sovereign immunity. Finally, there is a heightened interest in this context in avoiding "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the same where, as here, contract employees are so inextricably embedded in the military structure." *Saleh*, 580 F.3d at 8; *see also Dow*, 100 U.S. at 160, 165.

Balanced against the public benefits of immunity in this context are the costs of such immunity. The primary interests here are not the enemy aliens that bring these suits—as set forth in *Eisentrager,* enemy aliens detained abroad during an occupation are accorded few, if any rights of civil litigation. The primary interests are, as set forth in law-of-war precedent, protection of the Executive's conduct of war and foreign policy interests that are also committed to the Executive. And the Executive possesses—in addition to

military tribunals which used to, and for the last four years have again, had power over contractors accompanying the force—"numerous criminal and contractual enforcement options … in responding to the alleged contractor misconduct…" *Saleh*, 580 F.3d at 8; *see also Sosa*, 542 U.S. at 727. Moreover, as *Dow* suggested, plaintiffs are not left without sources of compensation; the Executive has put in place a comprehensive compensation scheme. *See* 10 U.S.C. § 2734 (Foreign Claims Act); JA 176 (describing administrative compensation system for allegations of abuse and mistreatment); *Saleh*, 580 F.3d at 2-3.

This balance in favor of immunity is not thwarted by plaintiffs' allegations of illegal conduct, or in the language of *Dow*, "denunciatory epithets" characterizing the conduct. *Mangold*, which did not involve the Constitutional war-making and foreign policy interests here, recognized that immunity covers "illegal and even offensive conduct," but accepted that cost to protect the government's ability to delegate essential tasks. 77 F.3d at 1446-47. Indeed, both *Mangold* and *Butters* involved illegal and socially undesirable conduct—false statements to the government and sex discrimination respectively—yet that did not change this Court's unambiguous holdings that contractors performing a public function are immune. Other courts have consistently held that allegations of torture do not vitiate immunities or permit civil litigation over United States operations abroad.[9]

[9] *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.) (dismissing claims alleging torture by military at Guantanamo), *cert. denied*, 130 S. Ct. 1013 (2009); *Har-*

The district court erred by requiring as a condition of derivative immunity that the conduct being challenged be directed by the government (even then, illegal conduct would never be so directed), and confining *Mangold* to its facts, notwithstanding its far broader application by this Court in *Butters* and other courts of appeals. (JA 864-69.) While there are situations where government direction to engage in the conduct can be a defense and may provide immunity to a contractor, as set forth above, derivative immunity is not circumscribed to only those circumstances. As set forth in *Sanchez-Espinoza*, *Mangold*, *Butters*, and *Saleh*, the derivative immunities at issue here—law-of-war immunity from enemy alien suits and derivative sovereign immunity necessary to protect federal war-making—turn on the function being performed by the contractor and whether civil tort regulation of the contractor conflicts with the military's right to prosecute the war free from civil tort regulation. As plaintiffs never cease to repeat, torture, rape, and other heinous conduct are not the policy of the United States, any more than mali-

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bury v. Hayden, 522 F.3d 413 (D.C. Cir.) (alleged CIA torture and execution non-justiciable), *cert denied*, 129 S. Ct. 195 (2008); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (alleged conspiracy with Chilean officials to torture non-justiciable); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (alleged torture and other violations of international law non-justiciable), *cert. denied*, 549 U.S. 1206 (2007); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (alleged torture and killing of a Chilean general non-justiciable), *cert denied*, 547 U.S. 1069 (2006); *see also El-Masri v. United States*, 479 F.3d 296 (4th Cir.) (state secrets dismissal of claims against officials and contractors), *cert. denied*, 552 U.S. 947 (2007); *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (dismissing claims alleging torture by military in Iraq).

ciously destroying property in *Dow* or murder in *Coleman*, or torture, rape, and extra-judicial killing in *Sanchez-Espinoza* or making false statements in *Mangold* were the policies in the times of those cases. Yet immunity attached because the claims arose out of functions that, on balance, needed to be protected from civil suits.

Thus, the district court's supposed reservation of the immunity issue until the contracts are in front of it (JA 867-68) is unnecessary and inappropriate. All that needs to be known about the contracts is known, i.e., as pleaded in the complaint, discussed in *Saleh*, and recognized by the district court, they were contracts to provide employees to the military to participate in wartime interrogation and detention of enemy aliens in the military's Iraq detention facilities. *See* JA 893 ("[A]ctually working alongside the military to carry out military duties approaches the Government's core power to operate a military."). Thus, the claims of how plaintiffs were treated in Abu Ghraib and other military prisons in Iraq arose out of the military's wartime operations and these contracts, even if the particular acts were not directed by the military; allowing the claims to proceed would equally trench on the military's conduct of the war and the government's sovereign immunity, as would allowing claims to proceed in *Dow* or *Coleman* or *Sanchez-Espinoza*. For the same reason that immunity attached in *Mangold* even though it is fair to assume that the false statements in violation of 18 U.S.C. § 1001 were not made at the direction of the government, immunity is appropriate for defen-

dants, and the district court's decision to permit the case to proceed should be reversed.

II. PLAINTIFFS' CLAIMS ARE PREEMPTED

As noted above, the very claims pursued by a would-be class that included these plaintiffs were squarely rejected by the D.C. Circuit. *Saleh*, 580 F.3d at 2. Because of the posture of *Saleh*—plaintiffs appealed the summary judgment awarded to L-3 on preemption grounds and contested dismissal of their ATS claims, and CACI appealed under 28 U.S.C. § 1292(b) the narrow preemption issue—the D.C. Circuit focused on whether the claims were preempted and barred by federal law and whether plaintiffs had stated an ATS claim against L-3. This Court should follow the decision in *Saleh* and find as an alternative ground for reversing the district court that plaintiffs' claims are preempted and barred by federal law.

Saleh's analysis—squarely rejected by the district court (JA 874-77)[10]—is rooted in the same policies and concerns as law of war and derivative immunity issues such that they are completely intertwined. *See Rux v.*

[10] The district court rejected the rationale of the D.C. Circuit (as well as the Ninth Circuit, *see Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992)), in holding that the combatant activities exception to the Federal Tort Claims Act is not a valid basis for preemption. (JA 874-77.) In a brief footnote, the district court also noted that it was "not convinced" the D.C. Circuit's field preemption analysis "comports with established precedent," but in any event would not find preemption where the conduct was contrary to federal policy, apparently believing, as with immunity, that only untrue allegations are preempted. (JA 877 n.11.)

Republic of Sudan, 461 F.3d 461, 475 (4th Cir. 2006). Indeed, the district court viewed *Saleh*'s analysis as a form of immunity derived from the reservation of sovereign immunity in the combatant activities exception to the FTCA (JA 870-71), just as the D.C. Circuit went out of its way to intimate, without deciding, that defendants are also immune from such suits, *see Saleh*, 580 F.3d at 5 ("[T]he contractor should be regarded as an extension of the military for immunity purposes."); *id.* at 6 (The FTCA "casts an immunity net over any claim that *arises* out of combat activities."); *id.* at 7 ("[T]he policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control."). Accordingly, this Court has pendent appellate jurisdiction to decide whether plaintiffs' claims are preempted under *Saleh*'s analysis. *See Rossignol v. Voorhaar*, 316 F.3d 516, 527 n.3 (4th Cir. 2003); *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 615 (4th Cir. 2001).

The D.C. Circuit's rationale in *Saleh* tracks the concerns that undergird law-of-war immunity for soldiers and the prohibition of alien enemies challenging their detention during occupation. During U.S. military operations abroad "all of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place." *Saleh*, 580 F.3d at 7. The court added that the costs of imposing tort liability would be passed through to the government

(and thus to the American taxpayer), *id.* at 8, and that imposing tort liability on contract employees would mean that the military would be "haled into lengthy and distracting court or deposition proceedings," *id.* at 8. Based on those considerations, the court of appeals concluded that, "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Id.* at 9. Such preemption would also prohibit a claim under the ATS, if plaintiffs had stated one. *Id.* at 16.

In addition to finding that there was a conflict with Congressional intent to cast an immunity net over claims arising out of combatant activities, the court of appeals found an independent basis in the commitment of war-making to the federal government, "because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests." *See Saleh*, 580 F.3d at 13. "The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." *Id.* at 11 (citing U.S. Const. Art I, § 10, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)).

In rejecting *Saleh*, the district court erroneously applied a presumption against preemption applicable to "traditional areas of state power." (JA 877.) But no rationale for allowing tort regulation of the battlefield was advanced to offset *Saleh*'s observation that "[u]nlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare." *Saleh*, 580 F.3d at 11. Moreover, as the Supreme Court has made clear, the presumption on which the district court relied to reject *Saleh* is properly reversed in the area of military and national security affairs, which lie outside traditional areas of state power. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (no cause of action in military justice context where judicial intrusion might interfere with military discipline); *United States v. Stanley*, 483 U.S. 669, 681 (1987) (no cause of action where defendants were civilian personnel). That the district court correctly concluded that Iraqi law would govern plaintiffs' non-ATS claims heightens the absurdity of allowing plaintiffs to impose civil tort regulation on defendants' participation in the military's detention and interrogation operations during the Iraq war.

The district court also erred in focusing on Congress's alleged failure to extend FTCA coverage to contractors in these circumstances. (JA 875-

76.) *Saleh* was not focused on whether defendants were covered by the terms of the FTCA (*Boyle* held that there was preemption even when the defendants were explicitly not covered by the FTCA), but on congressional intent expressed in the combatant activities exception and Congress's significant legislation on the issue. *See Saleh*, 580 F.3d at 13 n.9 ("Congress has declined to create a civil tort cause of action that plaintiffs could employ.").[11]

Not only has Congress not created a cause of action that plaintiffs can pursue, its extensive legislation in the areas of torture and war crimes strongly suggests that its failure to do so was purposeful. Congress has created comprehensive criminal statutes to punish torture and war crimes, which the Executive chose not to pursue against L-3's employees. *See* 10 U.S.C. § 948a *et seq.*; 18 U.S.C. §§ 2340-2340A; 18 U.S.C. § 2441. In addition, when Congress created a statutory civil cause of action to remedy torture, it expressly limited the action to torture in connection with *foreign* state action. *See* 28 U.S.C. § 1350 note (Torture Victim Protection Act or TVPA).

As first made clear by *Dow*, compensation is not through the tort system, but through the political branches. And Congress created a comprehensive administrative compensation system that the Army Claims Service

[11] *See also Saleh*, 580 F.3d at 16 n.14 ("'[T]he [ATS] is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security[,] and any remedies for such actions are appropriately matters for resolution by the political branches, not the courts.'") (quoting Brief for the United States as Amicus Curiae, *Alvarez-Machain v. Sosa*, No. 99-56880 (9th Cir. Mar. 20, 2000)); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985).

has properly employed to compensate victims of verifiable abuse in Iraq. *See* 10 U.S.C. § 2734 (Foreign Claims Act); JA 176 (describing administrative compensation system for allegations of abuse and mistreatment); *Saleh*, 580 F.3d at 2-3. Importantly, Congress specifically precluded judicial review of the Executive's resolution of such claims, s*ee* 10 U.S.C. § 2735; judicial creation of a common law tort claim would invite such intrusion into this area that Congress has properly committed to Executive discretion.

Saleh is persuasive authority on these exact claims and this Court should follow it in finding plaintiffs' claims barred.

III. THE CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS

Claims by enemy aliens for injuries during their detention by the U.S. military present non-justiciable political questions under *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The choice of system to regulate battlefield military operations is a political question committed by the text of the Constitution to the political branches. U.S. Const. art. I, § 8; *id.* art. II, § 2, cl. 1; *see supra* Part I. The supervision of military detention and interrogation operations falls within the core of the war-making powers committed to the political branches.

How to imprison enemy aliens and how effectively to supervise soldiers and civilians performing such core military functions are matters of military judgment and discipline that demand deference from the judiciary. *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991) ("The strategy and tactics

employed on the battlefield are clearly not subject to judicial review."); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010). Plaintiffs' characterization of their allegations as involving illegal torture do not make the case justiciable because the task of investigating and punishing unlawful conduct committed in the course of combatant activities military is committed to the executive. *See Tiffany*, 931 F.2d at 279-82; *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). The allegations in the complaint are thus barred by the first test for identifying political questions. *See Baker*, 369 U.S. at 217.

In addition, there are no judicially discoverable and manageable standards for resolving this case. Common law tort principles do not govern wartime military detention and interrogation, and courts lack the standards and expertise to evaluate military decisions on supervision in battlefield detention operations, detainee treatment, and interrogation. *Tiffany*, 931 F.2d at 278-79. In sum, this complaint is barred under both the first and second *Baker* factors, and dismissal is thus required for lack of jurisdiction.

CONCLUSION

The district court's order denying defendants' motions to dismiss should be reversed.

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September 2, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I, Ari S. Zymelman, hereby certify that:

1. I am an attorney representing Appellant L-3 Services, Inc.

2. This brief is in proportionally spaced 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 10,664 words.

/s/ Ari S. Zymelman
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2010, I caused a true copy of the foregoing Brief for Appellants to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused eight copies of the foregoing to be hand delivered to the Clerk of Court, and sent by United Postal Service, postage prepaid, to the same below-listed counsel:

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