NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 08-7008, 08-7009

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCT 17 2008
RECEIVED

HAIDAR MUHSIN SALEH, *et al.*,
Plaintiffs-Appellants,
v.
TITAN CORPORATION,
Defendant-Appellee.

ILHAM NASSIR IBRAHIM, *et al.*,
Plaintiffs-Appellants,
v.
TITAN CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia in Case Nos. 04-cv-1248 and 05-cv-1165 (Honorable James Robertson)

(NON-FINAL) BRIEF OF DEFENDANT-APPELLEE TITAN CORPORATION

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October 17, 2008

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for defendant-appellee Titan Corporation makes the following certification:

(A) Parties, Intervenors, and Amici. These appeals arise from two related cases that were brought by different groups of plaintiffs against overlapping defendants: *Saleh v. Titan Corp.*, No. 05-1165 (D.D.C.), and *Ibrahim v. Titan Corp.*, No. 04-1248 (D.D.C.). Appellants were plaintiffs below; these appeals concern one of the defendants below, Titan Corporation. During the course of the litigation, defendant-appellee was acquired and has since been renamed L-3 Services, Inc. (To avoid confusion, this brief will use the term "Titan" to refer to defendant-appellee.) All of the other parties are correctly listed in appellants' brief.

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 traded company has a 10% or larger ownership interest in L-3 Communications Holdings, Inc. As is relevant to this litigation, the general purpose of L-3 Services, Inc., is to provide translation and other services to the United States Government and, in particular, the United States Department of Defense.

In addition to these appeals, the other corporate defendants (collectively "CACI") have taken their own appeals, which have been docketed as Nos. 08-

7001, 08-7030, 08-7044, and 08-7045; CACI was also granted permission to intervene in these appeals.

We are aware that Professional Services Counsel may seek leave to file an amicus brief in support of Titan.

(B) Rulings Under Review. The district court granted Titan's motions to dismiss plaintiffs' claims under the Alien Tort Statute on August 12, 2005, and June 29, 2006; its opinions are reported at 391 F. Supp. 2d 10 and 436 F. Supp. 2d 55. The district court granted summary judgment to Titan on plaintiffs' common-law tort claims on November 6, 2007; its opinion is reported at 556 F. Supp. 2d 1. The district court denied the *Ibrahim* plaintiffs' motion for reconsideration on November 26, 2007; its order is unreported. The district court entered final judgment in favor of Titan on December 21, 2007; its order is unreported.

(C) Related Cases. These cases have not previously been before this Court or any other court for appellate review. In addition to the related appeals listed above, there are two related cases that were filed in other district courts after the docketing of those appeals. Those cases are *Al Shimari v. CACI International, Inc.*, No. 08-cv-0827 GBL-JFA (E.D. Va.), and *Al-Quraishi v. Nakhla*, No. 08-cv-1696 PJM (D. Md.). The plaintiffs in the *Al Shimari* case are Suhail Najim Abdullah Al Shimari, Taha Yaseen Arraq Rashid, Sa'ad Hamza Hantoosh Al-Zuba'e, and Salah Hasan Nusaif Jasim Al-Ejaili; the defendants are CACI

International, Inc., and CACI Premier Technology, Inc. The plaintiffs in the *Al-Quraishi* case are Wissam Abdullateff Sa'eed Al-Quraishi, Waleed Ubaid Dawood Salman, Uday Fadhil Shiweji Mutlaq Al Mamori, Adnan Fadhil Muhee Al-Niamey, Ahmed Fakhri Za'all Kareem, Sarhan Abdulah Za'all Kareem, Ghazwan Jasim Mohammed Al Ghreri, Sudad Ali Hameed Al Ogaidi, Ali Abdullah Suaihil Salman Al Janabi, Amir Mohammed Ibraheem Al Ogaidi, Ahmed Salman Abdulhameed Al Alosi, Mohammed Taha Himoud Al Majma'ae, Mohammed Salih Ibraheem Dhahir, Hadi Ahmed Slebi Al-Hamadani, Ismail Turkey Moutar Dirweesh, Yasseen Abid Mahmoud Al Mashhadani, Ahmed Dhia Abdulah Ali Al Mahdawi, Mohammed Rekan Aggab Al-Fahdawi, Shihab Ahmed Daffar Al-Saidi, Sadiq Sattori Khaza'al, Rafe'a Abbas Ali Mutar Al-Obaidi, Emad Khudhayir Shahuth Al-Janabi, Sa'adoon Ali Hameed Al-Ogaidi, Mohammed Abdwihed Towfek Al-Taee, Emad Ubaid Hamad Al-Badrani, Husham Haloob Mutar Al-Alwani, Emad Qasim Mohammed Al-Halbosi, Munsi Talal Sameer Al-Fahdawi, Qasim Mohammed Abdullah, Majid Jassim Humadi, Nazar Taha Kahtan, Mohammed Qasim Mohamad, Abdulqadir Muthana Abdulwahab, Abdulah Jawad Kadhum Al-Muhamadi, Mousa Abdulwahid, Ahmed Mahdi Salih, Ibraheem Jawad Al-Muhamadi, Ibraheem Tawfeeq Shafi Hussein, Safialdeen Ahmed Farhan Al Jumaili, Dhiaaldeen Ahmed Farhan, Tawfeeq Shaqi Hussein Al-Hashimi, Bahaaldeen Ahmed Farhan, Qais Kamel Humadi Salih, Murtadha Mohammed

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F. Greg Bowman

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* Authorities upon which we chiefly rely are marked with an asterisk.

FEDERAL STATUTES AND REGULATIONS

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GLOSSARY OF ABBREVIATIONS

ATS	Alien Tort Statute
CACI	Collectively, defendants CACI International Inc., CACI Incorporated – Federal, and CACI Premier Technology, Inc.
DoD	Department of Defense
DFARS	Defense Federal Acquisition Regulation Supplement
FCA	Foreign Claims Act
FTCA	Federal Tort Claims Act
IROE	Interrogation Rules of Engagement
MCA	Military Claims Act
MEJA	Military Extraterritorial Jurisdiction Act
MOU	Memorandum of Understanding
NCIOC	Non-Commissioned Officer in Charge
NCO	Non-Commissioned Officer
RCS	*Saleh* Plaintiffs' RICO Case Statement
SOW	Statement of Work
TVPA	Torture Victim Protection Act
UCMJ	Uniform Code of Military Justice

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(NON-FINAL) BRIEF OF DEFENDANT-APPELLEE TITAN CORPORATION

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1332, 1350, 1367, and 18 U.S.C. § 1964. The district court entered final judgment in favor of defendant Titan Corporation on December 21, 2007. Plaintiffs filed notices of appeal on January 17 and January 18, 2008, in the *Saleh* and *Ibrahim* cases, respectively. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment to Titan on plaintiffs' common-law tort claims, on the ground that those claims implicate the federal interests embodied by the combatant-activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j), and are therefore preempted under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

2. Whether the district court correctly dismissed plaintiffs' claims under the Alien Tort Statute, 28 U.S.C. § 1350.

PERTINENT STATUTORY PROVISIONS

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and relevant provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, are set forth in a statutory addendum to this brief.

STATEMENT OF THE CASE

Plaintiffs in these cases are Iraqi nationals detained by the United States military during wartime operations in Iraq in the second half of 2003 and the first half of 2004. Defendant Titan Corporation provided linguists to the United States military in Iraq. Plaintiffs filed two actions against Titan (and other defendants) in federal court, claiming, *inter alia*, that Titan's linguists participated in a conspiracy with the United States military to torture plaintiffs (or their relatives) at the Abu Ghraib prison and that Titan is liable for acts of its employees, and as a co-conspirator for the acts of military personnel and the employees of co-defendant

CACI. As is relevant here, plaintiffs brought claims against Titan under the ATS and for various common-law torts. The district court granted Titan's motions to dismiss the claims under the ATS, *see Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006), and subsequently granted Titan's motion for summary judgment on the surviving common-law tort claims on the ground that they were preempted by the government contractor defense, *see Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007). These consolidated appeals followed.

STATEMENT OF THE FACTS

1. a. On October 16, 2002, Congress enacted the Authorization for Use of Military Force Against Iraq. *See* Pub. L. No. 107-243, 116 Stat. 1498, 1500-01 (2002). On March 19, 2003, 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). Military operations in Iraq are, of course, still ongoing.

b. The United States military has used civilian contractors to a greater extent and differently in Iraq than in any previous conflict, including having contractor employees fill jobs previously held solely by military personnel. *See* Congressional Budget Office, Contractors' Support of U.S. Operations in Iraq 12

(August 2008).[1] Because of a critical shortage of Arabic speakers in the military, one of the most important functions performed by contractors in Iraq was to serve as linguists assigned to military units. *See* Hopkins Decl. ¶ 11; Rumminger Decl. Ex. A ¶ 1 ("This mission cannot be accomplished without linguistic support").

c. In 1999, the Army entered into a contract with Titan's predecessor for linguist services. The Army turned to Titan in 2003 to provide linguists to perform translation in exactly the same fashion as military linguists, whose positions they were filling due to the critical shortage. *See* Hopkins Decl. ¶¶ 10-11; Rumminger Decl. ¶ 42. The contract was a cost-plus-fixed-fee contract, with Titan personnel provided as required under delivery orders. *See* Peltier Tr. 44-47. Under the operative terms of the contract, set forth in the Statement of Work ("SOW"), the Army specified qualifications for Titan's linguists and retained the authority to veto hiring decisions, *see* SOW § C-1.4.1.2; to disapprove particular linguists based on security and force-protection screening, *see* SOW §§ C-1.6.1.1, C-1.6.1.2, C-1.6.1; and to remove particular linguists from the contract, *see* SOW § C-1.5. The Army also retained complete control over the linguists' work assignments and deployments. *See* SOW §§ C-1.8.4, C-1.3.1. Linguists were directly attached to units deployed to Iraq and required to live and travel with the units to which they

[1] Available at: *www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf* (last visited October 15, 2008).

were assigned. *See* SOW §§ C-1.2, C-3.3. Titan, in turn, was required to provide "all personnel, equipment, tools, material, supervision, and other items and services ... necessary to provide foreign language interpretation and translation services in support of" military operations in the Persian Gulf region. SOW § C-1.1. Titan's primary obligation under the contract was to recruit sufficient numbers of proficient, medically-qualified linguists to meet the Army's needs. *See* SOW §§ C-1.4.1.2, C-1.7.1, C-1.7.2, C-4.2.

d. Before the linguists deployed to Iraq, Titan provided a brief orientation, instructing them that, upon assignment to a military unit, they would "fall within th[e] chain of command." *See* Hopkins Decl., Ex. B, at 3. Titan further told the linguists that they should raise any problems first with military supervisors and then "work your way up the chain of command." *See ibid.* Titan sent its linguists to Fort Benning, Georgia, for a week of military pre-deployment training, which served many of the same purposes as military basic training (or "boot camp"). *See* Winkler Decl. ¶¶ 12-14, 17. While at Fort Benning, the linguists were issued standard military camouflage uniforms and government identification cards listing an equivalent military rank. *See id.* ¶ 21. Linguists typically departed for Iraq directly from Fort Benning, *see id.* ¶ 23, and were required to pass back through Fort Benning before they were free to return home, *see id.* ¶ 24.

Upon arriving in Iraq, Titan linguists were assigned to military units by Major John Scott Harris, an Army officer who served as linguist manager for the Coalition Joint Task Force, overseeing the assignment of both military and Titan linguists. *See id.* ¶ 51. The linguists were fully integrated in their units and were required to accompany their units on their missions, including combat missions. *See* Hopkins Decl. ¶¶ 17-18.

Starting in 2003, Titan linguists were assigned to the Abu Ghraib prison. Abu Ghraib was in the middle of a combat zone and was under frequent mortar attack. *See* Karpinski Tr. 107-08; Fay Report, C-9, at 37. The linguists were transported to Abu Ghraib by David Winkler, a Titan site manager; there, they were turned over to Chief Warrant Officer Douglas Rumminger, an Army officer who oversaw the Titan and military linguists at Abu Ghraib (and who served as the Army's principal point of contact with Titan there). *See* Winkler Decl. ¶¶ 1, 31-32; Rumminger Decl. ¶¶ 2, 38-40, Ex. A. Upon arrival, the military assumed exclusive control over the Titan linguists. *See* Winkler Decl. ¶¶ 28, 32, 33, 37, 40, 41, 43, 53; Hopkins Decl. ¶¶ 15-19, 22; Hopkins Decl. Ex. B at 3; Rumminger Decl. ¶¶ 21, 31, 32, 35, 38-40, 43, 52.

As each linguist arrived, Chief Warrant Officer Rumminger conducted interrogation indoctrination training, in which he provided instruction as to what was authorized by the Interrogation Rules of Engagement ("IROE") and what was

prohibited. *See* Winkler Decl. ¶¶ 31-32; Rumminger Decl. ¶¶ 2, 38-40, Ex. A; Rumminger Tr. 62-63, 109, 204-05. At the end of training, each linguist was required to sign two documents: a memorandum of understanding with the unit, and the IROE. *See* Rumminger Decl. ¶ 39. In the memorandum of understanding, the linguist agreed to follow military rules and directives while attached to the unit and not to discuss the unit's mission with others; the memorandum of understanding specifically provided that, in the event of a disagreement between the linguist and an interrogator, the interrogation should stop, and the two parties should report immediately to the officer in charge. *See* Rumminger Decl. Ex. A, at ¶ 6. The purpose of the memorandum of understanding was "[t]o be sure that [the linguists] had been briefed on what was going to be expected of them at Abu Ghraib." (Rumminger Tr. 72.) Titan managers played no part in the training, *see* Rumminger Decl. ¶¶ 38-40; Winkler Decl. ¶ 32, and had no input into the memorandum of understanding, which was drafted by the military, *see* Rumminger Decl. ¶ 40.

e. After completing training, the Titan linguists were given work assignments by Chief Warrant Officer Rumminger (or by non-commissioned officers ("NCOs") with responsibility for particular interrogation teams). *See* Rumminger Decl. ¶¶ 31-35; Rumminger Tr. 65, 67, 91-102. Once a linguist was assigned to a particular team, the NCO in charge of the team assumed

responsibility for directing, controlling, and supervising the linguist. *See* Rumminger Decl. ¶¶ 32, 35. Each NCO was free to assign the linguist as he saw fit. When a particular team needed a linguist, it would simply negotiate with another team to borrow the linguist assigned to that team. *See* Rumminger Decl. ¶¶ 21, 37. Titan management had no role in the day-to-day supervision, direction, or control of its linguists. *See* Hopkins Decl. ¶ 22; Winkler Decl. ¶¶ 33, 40, 44, 53; Rumminger Decl. ¶¶ 21, 43, 52; Bolton Tr. 358; Keune Tr. 184; Winkler Tr. 59-62.

Titan linguists, like military linguists, were required to reflect, as precisely as possible, the words and manner of the interrogator. *See* Rumminger Decl. ¶¶ 41-42. There was no difference in how Titan and military linguists were used. *See* Peltier Tr. 181.

Titan linguists, like military personnel, were required to abide by restrictions imposed by unit commanders. *See* Hopkins Decl. ¶¶ 22c, 22d, 22f; Winkler Decl. ¶¶ 37, 43; Rumminger Decl. ¶ 52; Rumminger Tr. 128-29; Peltier Tr. 179-80; Inghram Tr. 194-95. Noncompliance with military orders was likely to result in removal from the unit or from the contract. *See* Hopkins Decl. ¶ 22c-d. Unit commanders retained the authority to remove Titan linguists from their units. *See* Hopkins Decl. ¶ 22c; Winkler Decl. ¶¶ 37, 43; Rumminger Decl. ¶ 52; Rumminger Tr. 128-29; Peltier Tr. 179-80; Inghram Tr. 194-95. Linguists were even required to obtain permission before traveling beyond the confines of the military facility

where their assigned unit was located. *See* Winkler Decl. ¶¶ 40-42; Hopkins Decl. ¶ 22f; Rumminger Decl. ¶¶ 51-54. One linguist was summarily removed by his unit commander for being absent without leave from the Abu Ghraib compound. *See* Rumminger Decl. ¶ 52; Rumminger Tr. 128-29.

Titan linguists were also required to report any violation of the law of war to the military "in the first instance" because it was an "operational issue"; in the event that they encountered difficulties, they could turn to their site managers, who would help them to take the issue up the military chain of command. *See* Hopkins Tr. 141-43; 196-200; 232-33; Rumminger Tr. 179; Peltier Tr. 124-25, 146-47, 172; Clemens Tr. 113-14.

In contrast to military commanders, Titan's site managers played only an administrative role once the linguists were assigned to particular units. As David Winkler, the Titan site manager at Abu Ghraib, put it: "The military supervised linguists. Their daily duties were supervised by military personnel. My duties were administrative in nature." (Winkler Tr. 56-57, 62, 123-25; *see also* Hopkins Decl. ¶¶ 24-25; Winkler Decl. ¶¶ 33, 34, 36, 54; Inghram Tr. 142-44; Bolton Tr. 60-61; Peltier Tr. 120-21; Keune Tr. 74, 82-83.) The site managers ensured that the linguists were paid and dealt with administrative issues, such as employment benefits, vacation days, and insurance. *See* Winkler Decl. ¶¶ 33-34; Peltier Tr. 133-34. The site managers played no role in supervising the linguists' job

performance. *See* Hopkins Decl. ¶ 22b; Rumminger ¶¶ 21, 31-37; Winkler ¶¶ 40-45. The military directed Titan's linguists not to discuss operational details with their site managers, and prohibited the site managers from observing linguists performing their duties. *See* Hopkins Decl. ¶ 22b; Winkler Decl. ¶¶ 28, 29, 36; Winkler Tr. 95-97, 99; Inghram Tr. 148-49. Instead, the military told linguists to raise any operational issues through the military chain of command. *See* Peltier Tr. 133-35; Bolton Tr. 378-80; Winkler Tr. 94-99; Hopkins Tr. 121-22.

In December 2003, the military funded only 28 site managers to provide administrative oversight to 3,052 linguists in Iraq; as a result, site managers often found it difficult to see their linguists more than once a week, if that. *See* Hopkins Decl. ¶ 14. Winkler, the site manager at Abu Ghraib, visited the prison approximately two or three times each week, when it was safe to do so. Winkler attempted to see each linguist at least once a week so that he could deliver the mail, get them to sign their timecards, and check on their well-being, but the linguists' military duties sometimes made it impossible. *See* Winkler Decl. ¶¶ 27, 33-34, 46, 54.

f. In testimony at a congressional hearing concerning command and control at Abu Ghraib, top military officials confirmed that the Army retained operational control over Titan's linguists. Secretary of Defense Donald Rumsfeld testified that civilian linguists and interrogators at Abu Ghraib were "responsible to

[military intelligence] personnel who hire them and have the responsibility for supervising them." (R.I. 55-8, 44.) Acting Secretary of the Army Les Brownlee confirmed that civilian linguists and interrogators "work under the supervision of officers or noncommissioned officers (NCOs) in charge of whatever team or unit they are on." *Ibid.* 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." (R.I. 55-9, 1023) 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 military supervisor, that [military intelligence] person in that organization to whom they reported." (R.I. 55-9, 1022.)

2. In 2004, the news media broadcast pictures of military personnel abusing Iraqi prisoners at Abu Ghraib. Shortly thereafter, the media reported details leaked from a classified investigation by Major General Antonio Taguba, which concluded that prisoners had been mistreated by soldiers, in some instances, with the participation of contract linguists and interrogators. Eleven soldiers have been convicted of various charges relating to the abuse. *See* C-54.

On June 9, 2004, various Iraqi nationals filed the *Saleh* action against Titan (and others) in the Southern District of California; on July 27, 2004, other Iraqi nationals filed the *Ibrahim* action against Titan (and others) in the district court for

the District of Columbia. Both actions allege that Titan linguists participated in a conspiracy to torture them (or their relatives) at Abu Ghraib.[2] 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 at 57 n.1, 60. As is relevant here, plaintiffs brought claims against Titan under the ATS and for various common-law torts.

a. Titan moved to dismiss the ATS claims in both cases on various grounds. The district court after rejecting the argument that these claims presented political questions, dismissed the ATS claims in *Ibrahim*. 391 F. Supp. 2d at 13-16. The court reasoned that, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court had made clear, first, that the ATS did not create a cause of action, and, second, that an alien could look to the "law of nations" for a federal common law cause of action only in "limited circumstances." *Id.* at 13. While recognizing that "numerous treaties and other sources of international law ... condemn torture," the district court noted that "these plaintiffs disavow any assertion that the defendants were state actors" and explained that "the question is whether the law of nations applies to *private actors* like the defendants in the present case." *Id.* at 14. The district court reasoned that, while the Supreme Court had not answered

[2] The *Saleh* plaintiffs contended that United States senior military officials set policies under which they were mistreated at Abu Ghraib. *See* RCS 4, 10-12.

that question in *Sosa*, "in the D.C. Circuit the answer is no," citing this Court's decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), and Judge Edwards' concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *Ibrahim*, 391 F. Supp. 2d at 14.

The district court subsequently dismissed the ATS claims in *Saleh*, rejecting plaintiffs' assertion that *Sosa* approved the view that "torture by private parties would be actionable under the ATS if the private parties were acting under color of law." 436 F. Supp. 2d at 57. The court reiterated that *Sanchez-Espinoza* was controlling circuit precedent; that *Sosa* did not overrule *Sanchez-Espinoza*; and that *Sanchez-Espinoza* "makes it clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute." *Id.* at 58.

b. Titan also moved to dismiss plaintiffs' common-law tort claims on the ground, *inter alia*, that they were foreclosed by the government contractor defense of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The district court denied the motions. *Ibrahim*, 391 F. Supp. 2d at 16-19; *Saleh*, 436 F. Supp. 2d at 59-60. The court reasoned that *Boyle* mandated a two-step inquiry in determining whether tort claims were preempted: first, whether the imposition of liability would implicate "uniquely federal interests," and, second, whether liability would produce a "significant conflict" with those federal interests. *See Ibrahim*, 391 F.

Supp. 2d at 17. The court concluded that "the treatment of prisoners during wartime implicates 'uniquely federal interests.'" *Id.* at 18 (quoting *Boyle*, 487 U.S. at 504). Looking by analogy to the combatant-activities exception of the FTCA, 28 U.S.C. § 2680(j) (2000), the court reasoned that "[t]he exception seems to represent Congressional acknowledgment that war is an inherently ugly business for which tort claims are simply inappropriate." *Id.* at 18. At the second step of the analysis, the court concluded that "[s]tate law regulation of combat activity would present a 'significant conflict' with th[e] federal interest in unfettered military action." *Id.* at 18-19. The court reasoned, however, that the critical question, for purposes of the second step, was "whether [Titan's] employees were essentially acting as soldiers." *Id.* at 19. The court denied the motion to dismiss on the ground that "[m]ore information is needed on what exactly [Titan's] employees were doing in Iraq." *Ibid.* The court added that, "[i]f they were indeed soldiers in all but name, the government contractor defense will succeed." *Ibid.*

Titan then moved for summary judgment on the surviving common-law tort claims in each case, again asserting preemption. Titan attached declarations from the three people most knowledgeable about Abu Ghraib:[3] Chief Warrant Officer Rumminger; David Winkler; and Kevin Hopkins, a Titan employee who had

[3] While some of the *Saleh* plaintiffs made allegations about locations other than Abu Ghraib, none argued that this was significant for preemption purposes. *Ibrahim*, 556 F. Supp. 2d at 4 n.4

variously served as a linguist, site manager, and director of Titan's linguist operations. The district court permitted limited discovery on the extent to which the military supervised the operations of Titan's linguists (and consolidated the two cases for purposes of discovery). *Id.* at 19; *Saleh*, 436 F. Supp. 2d at 60. Plaintiffs were permitted 24 depositions and took 19; Titan took two additional depositions of its own.

The district court granted Titan's motion and entered judgment for Titan on the remaining tort claims. *Ibrahim*, 556 F. Supp. 2d at 2-7, 9-10. In so doing, the court provided a "sharper definition of the showing necessary for preemption" by analogy to the FTCA's combatant-activities exception. *Id.* at 4. The court concluded that a contractor must show, first, that it was engaged in combatant activities, and, second, that "[its] employees were acting under the direct command and exclusive operational control" of the military. *Ibid.* The court reasoned that such a test properly served the "policy underlying the FTCA's combatant-activities exception": namely, that "the military ought be free from the hindrance of a possible damage suit based on its conduct of battlefield activities." *Ibid.* (internal quotation marks and citation omitted). The court explained that, "[w]here contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military

orders against the possibility of exposure to state law liability." *Ibid.* By contrast, the court reasoned that, "[w]hen the military allows private contractors to retain authority to oversee and manage their employees' job performance on the battlefield, no federal interest supports relieving those contractors of their state law obligations to select, train, and supervise their employees properly." *Ibid.*

Applying its "operational control" standard, the district court determined that "Titan has shown that its linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel." *Id.* at 10. The court reasoned that "the proper focus is on the structures of supervision that the military actually adopted on the ground," *id.* at 9, and that here "the military, and not Titan, gave all the orders that determined how linguists performed their duties," *id.* at 10.

c. The district court subsequently entered final judgment in favor of Titan on all of plaintiffs' claims under Federal Rule of Civil Procedure 54(b).

SUMMARY OF THE ARGUMENT

Plaintiffs—Iraqis detained as enemies by the United States military in Iraq during an eight-month period of the war and their estates—would have this court hold, for the first time, that alien enemies may bring tort claims for their treatment in battlefield detention and interrogation centers. Notwithstanding that Titan's linguists were working under the military's exclusive operational control, plaintiffs assert that their claims of abuse are actionable against Titan under the common law and the Alien Tort Statute because they allege egregious conduct and because Titan's linguists were not soldiers. But plaintiffs' claims are preempted because they significantly conflict with the federal interest expressed by the combatant activities exception and they are not actionable under the ATS because the required state actor is the United States.

1. With regard to the common law claims, the district court carefully applied the two-step implied preemption analysis adopted by *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), to these circumstances in a narrow and tailored fashion.

a. Correctly identifying that the claims implicate uniquely federal interests, the district court followed *Boyle* in looking to the FTCA exceptions for a significant conflict between those interests and tort liability. Based on the purpose of the combatant-activities exception—to shield military decision-making on the

battlefield from the specter of tort liability—it found such a conflict. The district court correctly identified that if the military had exclusive operational control over the linguists, then the claims in effect challenge the military's combatant activities and are preempted.

b. Plaintiffs' arguments against preemption are unavailing because at their base, plaintiffs assume there can never be preemption based on the combatant activities exception, notwithstanding their embrace of *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). A narrow reading of *Boyle* as limited to procurement contracts and the discretionary function exception is inconsistent with its rationale, and its basis in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), concerning a services contract. None of the authority on which plaintiffs rely to attack the district court's careful analysis holds to the contrary. And the non-precedential remarks by the Department of Defense in the Federal Register relating to service contracts are consistent with, not contrary to, the holding of the district court.

c. Preemption means that conflict with federal interests precludes otherwise meritorious claims. In the context of combatant activities, preemption of tort liability leaves contractor accountability and compensation where it belongs, in the hands of the sovereign. The United States can criminally prosecute its contractors, and compensate alien enemies using the Foreign Claims Act, under

which plaintiff Saleh was awarded damages for wrongful detention even after his claim for torture was denied as unsupported.

d. The district court correctly found that there was no disputed *material* fact, namely that the military had complete control over how the linguists did their jobs when they were attached to military units, and that Titan's only role was to provide administrative support such as payroll. Plaintiffs' abstract assertions about supervision, attacks on the witnesses, and contentions that what happened was contrary to the contract and military doctrine are not relevant and do not create a genuine dispute of material fact.

2. The district court correctly dismissed plaintiffs' ATS claims under this Court's decision in *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) and Judge Edwards's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), on the ground that those claims alleged only private, non-state actions (or actions taken on behalf of the United States).

a. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Kadic* v. *Karadzic*, 70 F.3d 232 (1995), and the international law authorities on which plaintiffs rely do not warrant overruling circuit precedent. This authority is with circuit precedent, or deal with the inapplicable issue of liability in the context of quasi-state belligerents. Here, there is no question that the United States was the relevant belligerent.

b. There is also no basis in federal common law or international law to imply a cause of action under the ATS against corporate entities, as opposed to natural persons.

STANDARD OF REVIEW

This Court's "standard of review under Federal Rules 12(b)(6) and 56 is the same: *de novo*." *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007) (internal quotation marks omitted). Summary judgment may be granted if "'there is no genuine issue as to any material fact [and] the moving party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). "In order to withstand a summary judgment motion once the moving party has made a prima facie showing to support its claims, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1563 (D.C. Cir. 1990) (citing Fed. R. Civ. P. 56(e)); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO TITAN ON PLAINTIFFS' COMMON-LAW TORT CLAIMS BECAUSE THEY ARE PREEMPTED.

The district court correctly held that to obtain preclusion of common-law claims under *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), where a government contractor engages in combatant activities, the contractor

must show that its employees were acting under the exclusive "operational control" of the military. The district court also correctly determined that there was no genuine issue of material fact concerning whether Titan's linguists were acting under the military's exclusive operational control at Abu Ghraib. Accordingly, the district court correctly entered summary judgment for Titan, and its judgment should be affirmed.

A. The District Court Applied the Correct Legal Standard for Preemption in the Context of Combatant Activities.

Plaintiffs contend (Br. 40-57), albeit as a fallback, that the district court applied a "flawed" test by focusing on the existence of "operational control" in determining whether Titan was entitled to invoke the government contractor defense for the conduct of its linguists in combatant activities at Abu Ghraib.[4] Far from "extending" the Supreme Court's decision in *Boyle*, however, the district court's decision constitutes a straight-forward application of *Boyle*'s government contractor defense in the context of combatant activities. Plaintiffs' various arguments about the scope of the government contractor defense lack merit.

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[4] Plaintiffs halfheartedly suggest (Br. 55 n.12) that Titan's linguists were not engaged in combatant activities. The military detention of prisoners during wartime, however, is an "important incident[] of war." *Hamdi v. Rumsfeld*, 524 U.S. 507, 518 (2004). Abu Ghraib, moreover, was in close proximity to the battlefield, under constant attack. *Cf. Boumediene v. Bush*, 128 S. Ct. 2229, 2257 (2008) (distinguishing prison in occupied Germany from Guantanamo Bay, which the Court found to be historically under *de facto* U.S. sovereignty).

1. The Supreme Court in *Boyle* Adopted a Framework for Determining the Scope of the Government Contractor Defense.

In *Boyle*, the Supreme Court considered whether a common-law tort claim against a contractor was preempted (and thereby foreclosed) where the claim at issue arose from a government contract. In the underlying lawsuit, the estate of a military pilot who had been killed in a helicopter crash sued the helicopter's manufacturer, claiming, *inter alia*, that the manufacturer had defectively designed the helicopter's escape hatch causing the pilot's death. *See Boyle*, 487 U.S. at 502-03.

In determining that the claim at issue was preempted, the Court engaged in a two-step inquiry. First, the Court evaluated whether the claim at issue implicated "an area of uniquely federal interest." *Boyle*, 487 U.S. at 507. The Court reasoned that the claim "border[ed] on two areas that we have found to involve … uniquely federal interests": the scope of the government's contractual obligations and the civil liability of federal officials for actions taken in the course of their duties. *Id.* at 504-05. The Court concluded that, "[w]hile the present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, there is obviously implicated the same interest in getting the Government's work done." *Id.* at 505.

The Court then turned to the second step. The Court explained that "displacement will occur only where … a significant conflict exists between an identified federal policy or interest and the [operation] of state law." *Ibid.* (internal quotation marks and citation omitted). Recognizing that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption," *id.* at 507, the Court looked to the FTCA, which waives the government's immunity from tort claims (but contains exceptions for certain types of claims). Specifically, the Court considered the discretionary-function exception, which preserves the government's immunity against claims concerning "the exercise or performance [of] a discretionary function or duty." 28 U.S.C. § 2680(a) (2000). The Court explained that the policy interest underlying this exception was implicated by the claim at issue, because "permitting 'second-guessing' of … judgments [concerning the design of military equipment] through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption." *Boyle*, 487 U.S. at 511.

Having concluded that the availability of a state-law claim could give rise to a "significant conflict" with that policy interest, the Court articulated a three-part test for applying the government-contractor defense in the specific context of a discretionary function. *Id.* at 512. Under that test, the defense is available where "(1) the United States approved reasonably precise specifications; (2) the

equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Ibid.* The Court reasoned that such a test served to "assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id.* at 513.

2. The District Court Properly Applied the *Boyle* Framework to the Combatant-Activities Exception.

The district court faithfully applied the *Boyle* framework to the unique factual circumstances presented by this case: namely, tort claims by alien enemies[5] for mistreatment while confined by the U.S. military on a battlefield. First, the district court determined that "the treatment of prisoners during wartime undoubtedly implicates uniquely federal interests." *Ibrahim*, 556 F. Supp. 2d at 3. As in *Boyle*, the district court looked to the FTCA's exceptions in determining the existence and scope of the federal interest. Rather than discretionary-function, however, the district court looked to the combatant-activities exception, which broadly bars suit against the federal government for "[a]ny claim arising out of the

[5] "[A]n alien enemy is the subject of a foreign state at war with the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2 (1950).

combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j).

The district court correctly concluded that "the purpose of that exception is 'to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.'" *Ibrahim*, 556 F. Supp. 2d at 3 (quoting *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992)). While the legislative history of the combatant-activities exception (like that of most of the FTCA's exceptions) is sparse, the underlying policy behind that exception is obvious: namely, that the military ought to be "free from the hindrance of a possible damage suit" based on its conduct of battlefield activities. *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948). As the Supreme Court has explained (and the district court noted), "[i]t would be difficult to devise a 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." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). As in *Boyle*, while "the present case involves an independent contractor … rather than an official performing his duty as a federal employee," "there is obviously implicated the same interest" in not interfering with the conduct of battlefield activities

through concerns about tort litigation arising from that conduct. *Boyle*, 487 U.S. at 505.

Second, the district court determined that the availability of a state-law claim could give rise to a "significant conflict" with the policy interest underlying the combatant-activities exception. *Ibrahim*, 556 F. Supp. 2d at 3. To "ensure that any displacement of state law will also be commensurate with the scope of the federal interest at issue," the court held that, to avail itself of the government contractor defense in the context of combatant activities, a contractor must show that its employees were acting under the "exclusive operational control" of the military.[6] *Id.* at 4.

The district court's "operational control" test serves the same purpose for combatant activities as *Boyle's* three-part test serves for discretionary function, namely, to "assure that the suit is within the area where the [federal policy] would be frustrated." 487 U.S. at 513. Specifically, as the district court explained, where a contractor is under the "operational control" of the military, application of the government-contractor defense "ensures that [the contractor's employees] need not weigh the consequences of obeying military orders against the possibility of

[6] It could be argued that the district court's preemption test in this context was narrower than that afforded by *Boyle*, because *Boyle* did not require the contractor to show that the government *exclusively* developed the defective design. *See Boyle*, 487 U.S. at 513.

exposure to state law liability." *Ibrahim*, 556 F. Supp. 2d at 5. To put it another way, where contractor employees are placed under the military's operational control on the battlefield, the employees' actions in a meaningful sense constitute the actions of *the military*. *Cf. United States v. Orleans*, 425 U.S. 807, 814 (1976); *Logue v. United States*, 412 U.S. 521, 528 (1973). This is so even when the personnel involved are not soldiers because the availability of tort claims against the contractor would of necessity require adjudication of the military's actions taken on the battlefield. Accordingly, the district court correctly focused on "operational control" as the appropriate test for limiting the potential breadth of the government-contractor defense to instances where the employees' operations were controlled solely by the military. This addresses plaintiffs' attempt to distinguish *Koohi* on the basis that the application of force there was by the military alone. (Br. 41-42, 55.) Under the district court's test, there is preemption where contractor employees engaged in combatant activities are, like the sailors in *Koohi*, acting "under the direct command and exclusive operational control of the military chain of command." *Ibrahim*, 556 F. Supp. 2d at 4.

Plaintiffs cite (Br. 52-54) a variety of lower-court cases for the generic proposition that "the combatant-activities exception cannot be extended so far as to encompass" the conduct at issue in this case. The cases plaintiffs cite, however, involve "the duty of care owed by a private corporation to United States citizens,"

as opposed to the alien enemies, which distinguishes them from *Koohi*, *Lessin v. Kellogg Brown & Root*, No. 05-01853, 2006 WL 3940556, at *4 (S.D. Tex. June 12, 2006), and this case. Nor in any of the cases was the record made that the contractor employees were integrated into military units that controlled their operations in the fashion of Titan's linguists.

Plaintiffs also suggest that this is different than *Koohi* because they allege that Titan linguists on occasion translated for contract interrogators or acted on their own. (Br. 22-26.) But this misapprehends the "operational control" test and the interests it seeks to protect. It is not, as plaintiffs would have it, a case-by-case inquiry into each alleged act of abuse to determine whether the contract employee was specifically directed to engage in the conduct at issue. For claims that are not preempted, that would be a very important inquiry, but such inquiries would largely defeat the purpose of the combatant-activities exception, which is to free the military and contractors under its control from after-the-fact damages claims questioning decisions made in combat. Instead, it preempts claims broadly based on a rigorous inquiry into the military's control over the contract employees' day-to-day duties. Where the military is exercising exclusive operational control, the actions are clearly those of the military, and the test avoids intrusion into battlefield decision-making. For the reasons discussed below, *see* Part I.B, *infra*, it is undisputed that the military in fact exercised such control over Titan's linguists.

3. The District Court's Test Is Not Rooted in the Assumption That Titan's Employees Were Soldiers or Soldier Equivalents.

1. Plaintiffs contend (Br. 44-45, 55) that the district court rooted its decision in the assumption that Titan's employees were subject to military discipline, and then argue that because the Titan linguists are not soldiers who can be "legally bound" by military orders enforceable through the military justice system, there can never be the degree of control required for preemption. This is not what the district court held,[7] and the argument flies in the face of *Boyle*'s extension of preemption to contractors. The district court properly recognized that control sufficient to make the combatant activities at issue those of the military need not be by way of legally binding orders. That was made clear when it sharpened the shorthand "soldiers in all but name," to focus on operational control rather than indicia of soldierhood. *Ibrahim*, 556 F. Supp. 2d at 3. Plaintiffs' authorities hold only that military discipline is not applicable to civilians (Br. 44-45), and deal mostly with the inapplicable *Feres* doctrine which *Boyle* rejected as setting the scope of preemption. *Boyle*, 487 U.S. at 510-11.[8]

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[7] Plaintiffs' argument is based on language lifted from the district court's discussion of the first *Boyle* step (*Ibrahim*, 556 F. Supp. 2d at 5), critically omitting the Court's phrase "[a]s applied to the military."

[8] Plaintiffs citation to *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), *see* Br. at 44 & 55 n.11, is particularly misleading. In *McMahon*, the Court of Appeals rejected a defense not at issue here (*Feres*) and declined to reach the one that is (preemption). 502 F.3d at 1366; *see also id.* at 1351 ("private

The district court found as a matter of uncontested fact that Titan's linguists were as much under control by the military as it is possible to have non-soldiers under control. Military personnel told Titan's linguists what to do, how to do it, and when to do it, 24 hours a day, seven days a week. The linguists were completely dependent on the military for lodging, food, transport, and protection. They were not free to travel or leave their bases without the military's authorization. Military personnel provided the information for their evaluations and had complete control over their assignments within the unit. While a particular unit could not immediately fire employees, they could expel them from the unit, and the military command to which they reported had absolute control over whether a linguist would remain on the contract in Iraq, removal from which would mean dismissal. This distinction is important because it is the ability to remove from the contract, not the ability to hire and fire, that ultimately matters. *Cf. Singh v. S. Asian Soc'y of the George Wash. Univ.*, No. 07-56326, 2008 U.S. Dist. LEXIS 43760, at *23 (D.D.C. June 5, 2008) (ability to hire or fire contractors is irrelevant to existence of day-to-day control).

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contractor agents may be entitled to some form of immunity that protects their making or executing sensitive military judgments … ."). Plaintiffs instead rely (Br. 53-54) on the district court's rejection of a preemption defense, without mentioning the 11th Circuit's reservation on the issue or its observation that the district court overlooked binding Circuit precedent. *See McMahon*, 502 F.3d at 1338 n.5.

2. In a similar vein, plaintiffs also argue (Br. 55) that the FTCA's combatant-activities exception applies only to claims arising out of actions by military personnel. However, that is not what the words say. The language of the FTCA is "combatant activities of the military or naval *forces*, or the Coast Guard." 28 U.S.C. § 2680(j) (emphasis added). To argue, as plaintiffs do, that this language is limited to military or naval *personnel* is to add words to the exception that simply are not there. Plaintiffs' argument proves too much, since the discretionary function exception speaks only to actions of "a federal agency or an employee of the Government," 28 U.S.C. § 2680(a), and if limited to actions taken by agency *personnel* would overturn *Boyle*. The whole point of the government contractor defense is to recognize that the government operates through both its own personnel and through contractors and therefore preemption must apply to both to avoid frustrating the policy interests embodied in the FTCA's exceptions. Put another way, the Titan linguists need no more be soldiers for the combatant-activities exception to preempt claims against Titan than the hatch designers in *Boyle* needed to be government officials for the discretionary function exception to preempt claims against United Technologies.

4. The Authorities Upon Which Plaintiffs Rely Are Inapposite.

Plaintiffs offer a variety of reasons why the government-contractor defense should be given a narrower scope. None of those reasons is availing.

Most ambitiously, plaintiffs appear to contend that the government-contractor defense should *never* be available in the context of combatant activities. The most obvious answer to that contention, however, is that nothing in *Boyle* limits the government-contractor defense to the context of discretionary functions. The two-step preemption inquiry that the Court announced in *Boyle* is, by its terms, applicable whenever the conduct at issue trenches upon federal interests protected by an FTCA exception. *See* 487 U.S. at 511-512. While the three-part test that the Court applied in *Boyle* is relevant only in the context of discretionary functions, it does not follow that the government contractor defense is unavailable in other contexts in which "the suit is within the area where the policy of [an FTCA exception] would be frustrated." *Ibid.* For that reason, plaintiffs' reliance (Br. 49-51) on several cases that apply *Boyle*'s three-part test is misplaced—the district court was not required to "identify any discretionary decisions, directions, acts or policies … that caused the injuries suffered by [p]laintiffs." (Br. 54.)

a. The Government Contractor Defense Is Not Limited to Procurement Contracts.

Although plaintiffs' primary position appears to be that the government-contractor defense should *never* be available in the context of combatant activities, plaintiffs at times seemingly recognize that the government-contractor defense should be available for combatant activities in at least some circumstances. Most notably, plaintiffs acknowledge (and do not quarrel with) the Ninth Circuit's

decision in *Koohi v. United States*, 976 F.2d 1328 (1992), which held that claims against a contractor that supplied a weapon system used to shoot down a civilian aircraft were preempted by analogy to the FTCA's combatant-activities exception. *See* Br. 41-42.

Plaintiffs attempt to distinguish *Koohi* because it involved the performance of a procurement contract rather than a service contract. (Br. 42.) In *Boyle*, however, the Supreme Court refused to draw precisely such a distinction, relying on the holding of *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), which had rejected liability for a *service* contractor working for the Army Corps of Engineers. Indeed, the Court in *Boyle extended* the government-contract defense from *service* contracts to *procurement* contracts. *See* 487 U.S. at 506 (noting that "the federal interest justifying th[e] holding [of *Yearsley*] surely exists as much in procurement contracts as in performance contracts"). Further, it would be wholly arbitrary to draw such a distinction because there is no reason to believe, and plaintiffs offer none, that service contracts implicate federal interests embodied in the combatant-activities exception to a lesser extent than procurement contracts.

b. DoD's Recent Federal Register Remarks Are Fully Consistent with the District Court's Test.

Plaintiffs argue that Federal Register remarks made in 2008 in response to public comments on an amendment to the Defense Federal Acquisition Regulation Supplement ("DFARS") support their argument that the *Boyle* doctrine "should not

be extended to encompass contractors who provide services to the military (as distinct from commodities such as weapons)." *See* Br. 42-43 (citing 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008)). The remarks upon which plaintiffs rely respond to a suggestion that a proposed change to the DFARS might be misinterpreted to create liability for contractors where none existed before. Of course, such remarks refer to a recently promulgated provision that is not contained in Titan's contract. In any case, the remarks state that the proposed rule "retains the current rule of law" and is consistent with court decisions finding state law preempted or non-justiciable questions raised, including *Koohi*. If anything, the remarks merely state the corollary to the district court's test.

The remarks state that the "public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees." (Br. 43.) A performance-based statement of work "describes the required results in clear, specific, and objective terms with measurable outcomes." 48 C.F.R. § 2.101; *see also id.* § 37.602(b)(1). As the administrative remarks make clear, a performance-based statement of work involves the government surrendering control over "the actions and decisions of the contractor"—the opposite of what the evidence establishes and the district court found with respect to Titan's linguists.

5. The Alleged Conduct Does Not Justify Ignoring the Federal Interest Protected by the Combatant-Activities Exception.

Plaintiffs contend (Br. 56-57) that, because the alleged underlying conduct in these cases was particularly egregious, application of the government contractor defense here would not "further[] the United States' interests." They also imply (Br. 6-9) that preemption would eliminate accountability and any possibility of compensation. None of these contentions is correct.

1. Plaintiffs' resort to their factual allegations fundamentally misapprehends the role of the government contractor defense. That defense has no purpose except to insulate a contractor from liability even for concededly tortious conduct, where the underlying *function* the contractor was performing implicates a uniquely federal interest. After all, a preemption defense, by its very nature, precludes damages claims—even potentially meritorious ones—on the ground that there are important and uniquely federal interests that justify precluding such claims. *Boyle* itself makes clear that the proper focus of the inquiry under the government contractor defense is on the function that the contractor was performing, not on the tortious conduct at issue (or the degree of injury alleged). *See, e.g.*, 487 U.S. at 504 (noting that claims against contractors are preempted if "there is obviously implicated the same interest in getting the Government's work done"); *cf. Rasul v. Myers,* 512 F.3d 644, 660 (D.C. Cir. 2008) ("[T]he allegations of serious criminality do not alter our conclusion that the defendants' conduct was

incidental to authorized conduct."); *In re Iraq & Afghanistan Plaintiffs Litig.*, 479 F. Supp. 2d 85, 104 n.21 (D.D.C. 2007) (noting that, "[e]ven if ... the defendants violated treaties or military law, it does not automatically follow that the plaintiffs are entitled to a private cause of action for damages to remedy those illegalities under *Bivens*").

2. While the posture of this case was such that plaintiffs' substantive allegations were never litigated, the evidence in the record suggests things are not as plaintiffs claim (Br. 24-25). Since the government issued its initial Taguba Report, it has become clear that there is little or no evidence that two of the linguists cited by plaintiffs, John Israel and Adel Nakhla, engaged in abuse at Abu Ghraib. Israel, who plaintiffs argue was implicated by the Taguba Report, was in fact cleared by a subsequent government investigation. *See* C-9, 131 ("After a thorough investigation, we found no direct involvement in detainee abuse by [Titan translator Israel]").[9] Press reports suggest that the same is true with regard to Nakhla. *See* R.S. 56-2. And the other linguists cited by plaintiffs—"Iraqi Mike," Etaf Mheisen, and Hamza Elsherbiny—are not alleged to have engaged in any abuse involving the plaintiffs in these cases.

[9] The *Saleh* plaintiffs who named Israel in their early complaints, in fact dropped him after this report, notwithstanding their assertions about him on Appeal.

Even the allegations of one of the lead plaintiffs have proven highly suspect. Plaintiff Saleh filed an administrative claim with the Army under the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734 (2008), seeking more than $3.5 million for the same allegations he levied against Titan in the *Saleh* case. After a thorough investigation, the Army found "absolutely no evidence to support [Saleh's] assertion of abuse by US forces and finds the claimant completely lacking credibility ...." (R.S. [117-04], Griffin Decl. Ex. 5, at 8.) Mr. Saleh was never interrogated, never abused while in U.S. custody, and was never even located in the parts of Abu Ghraib where the alleged abuse occurred. *Id.* at 7-11.

3. Plaintiffs' assertion of the lack of criminal jurisdiction over contractors is also incorrect. There are overlapping bases for criminal prosecution of contractors for criminal conduct at Abu Ghraib. *See* 18 U.S.C. §§ 2340A (2008), 2441 (2000 & Supp. V 2005)), 3261 (2000).[10] Moreover, Congress recently amended the Uniform Code of Military Justice such that Titan linguists would today be subject to military prosecution. 10 U.S.C. § 802(a)(10) (2008). Thus, the conviction of soldiers, but not Titan linguists for abusing prisoners at Abu Ghraib, notwithstanding criminal investigations of contractors at Abu Ghraib, *see* R.S. 56-2, suggests not a lack of jurisdiction, but rather a lack of evidence.

[10] Iraqi linguists are subject to prosecution in Iraqi courts. *See* R.S. 79 Ex. 2 (CPA 17 § 1).

Nor will the preclusion of their civil damages claims necessitated by the federal interest in protecting combatant activities from civil litigation mean that victims of substantiated abuse will go uncompensated. The Army has confirmed that "criminal acts of torture and abuse by U.S. personnel would be cognizable under the FCA if the allegations are substantiated." (R.S. [117-04], Griffin Decl. Ex.8.) Indeed, as discussed above, named plaintiff Saleh submitted a request for compensation under that authority for torture. Notwithstanding that there was "absolutely no evidence" to support his allegations of abuse, the military offered Saleh $5,000 for his negligent detention at Abu Ghraib. (R.S. [117-04], Griffin Decl. Ex. 5)

B. The District Court Correctly Determined That There Was No Genuine Issue of Material Fact Concerning the Military's Control of Titan's Translators.

In their primary argument before this Court, plaintiffs incorrectly contend (Br. 22-40) that the district court relied on disputed evidence, and overlooked other evidence, in determining that the military exercised "exclusive operational control" over Titan's translators. The district court carefully considered the evidence in granting Titan's motion for summary judgment (and denying plaintiffs' motions for reconsideration), and correctly identified the *material* undisputed facts that were confirmed even by plaintiffs' witnesses. Much of the evidence on which plaintiffs rely pertains not to the military's operational control, but instead to whether Titan

"supervised" the translators in some abstract (and unspecified) manner. Because the district court correctly determined that there was no genuine issue of material fact under the correct legal standard, its judgment in Titan's favor should be affirmed.

As explained in greater detail in the statement of facts, uncontroverted evidence before the district court demonstrated that military supervisors told Titan's translators precisely *what* to do on a day-to-day basis;[11] told them precisely *how* to do it;[12] reported problems with translators up the military chain of command;[13] and counseled translators when their performance was deficient.[14] By contrast, Titan was responsible for administrative issues like pay, and Titan managers did not oversee the translators' operations.[15] That uncontroverted evidence alone establishes the military's "exclusive operational control" over

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[11] *See* Lagouranis Tr. 27-28, 38-39; Karpinski Tr. 162, 202-203; Mawiri Decl. ¶ 9; Rumminger Decl. ¶¶ 12, 31-32, 35; Hopkins Decl. ¶ 22(a)-(b); Winkler Decl. ¶ 40; Rumminger Tr. 62-67, 91-97, 204-210; Peltier Tr. 143-147, 180-181; Bolton Tr. 184-185, 238-241, 358-359; Keune Tr. 184-189; Winkler Tr. 59-62, 94-99, 106-113, 116-125.

[12] *See* Lagouranis Tr. 44-45; Karpinski Tr. 202-203; Karpinski Decl. ¶ 14; Rumminger Decl. ¶¶ 12, 38-39, 42; Rumminger Tr. 204-210, 215-217; Hopkins Tr. 121-122; Clemens Tr. 114; Keune Tr. 184-189; Winkler Tr. 112-113.

[13] *See* Lagouranis Tr. 44-46; Lagouranis Decl. ¶ 14; Karpinski Decl. ¶¶ 16-17; Rumminger Tr. 126-131; Peltier Tr. 61-65.

[14] *See* Lagouranis Tr. 45; Winkler Decl. ¶ 37; Rumminger Tr. 95.

[15] *See* Lagouranis Tr. 49; Hopkins Decl. ¶ 24; Winkler Decl. ¶ 33-34; Rumminger Tr. 103-104; Peltier Tr. 120-121, 133-135; Bolton Tr. 56-59, 280-281; Inghram Tr. 37-38, 142-144; Keune Tr. 82-84, 184-189; Winkler Tr. 44, 56-57.

Titan's translators. *See Ibrahim*, 556 F. Supp. 2d at 10 (concluding "that [Titan's] linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel").

The plaintiffs do not directly challenge any of these facts. Instead they try to chip around them by misrepresenting the record to attack the credibility of witnesses without pointing to evidence contrary to their testimonies and trying to substitute plaintiffs' assertion of what *should* have happened for what the district court found indisputably *did* happen.

1. Plaintiffs' Mischaracterization of the Record Does Not Create a Factual Dispute.

1. Hoping to distract from the devastating and uncontradicted testimony and documentary evidence provided by Chief Warrant Officer Rumminger—who oversaw the linguist program at Abu Ghraib and served as the Army's principal military intelligence "point of contact" with Titan—plaintiffs imply (Br. 16.) Rumminger lacked a foundation for his testimony and declaration. But during plaintiffs' cross-examination, Chief Warrant Officer Rumminger vigorously affirmed his personal knowledge and the details of the military's supervision set forth in his declaration (Rumminger Tr. 75-82; *see* Rumminger Decl. ¶¶ 32, 35), and expanded upon the supervision of linguists by the military teams to which they were assigned. (Rumminger Tr. 207-08.)

Incorrectly describing the preemption test as requiring the elimination of all "autonomy" by the linguists, plaintiffs argue that Rumminger contradicted the memorandum of understanding he adapted for use at Abu Ghraib to confirm with the linguists that they were bound to follow precisely the directions of military interrogators. (Br. 30-31.) Consistent with the terms of the memorandum, Rumminger testified that Titan's translators could raise concerns with their military supervisors during the performance of their duties—a fact that further confirms that the military, and not Titan, exercised day-to-day operational control over the translators. The supposed evidence of contradiction is utterly trivial: one Titan linguist was permitted not to translate swear words to accommodate his religious objections. *Ibid.* Far from showing a departure from the memorandum, this story proves its importance: the linguist approached Rumminger, not Titan, and Rumminger spoke about the solution with the commander in charge of interrogations, not Titan. Nor was a civilian treated differently in this regard, for Rumminger had similarly objected and been relieved from having to translate swear words. (Rumminger Tr. 160.)

2. With regard to Winkler, plaintiffs first contend (Br. 27-30) that the district court should have discounted his testimony on the ground that Winkler was a Titan "executive" (and therefore an interested party). That contention patently lacks merit. Winkler was never a Titan "executive"; he was a site manager—the

lowest level of Titan management in Iraq—before eventually being promoted to the next level in Iraq. (Winkler Decl. ¶¶ 1-2.) Indeed, at the time of his deposition, Winkler was a true third party: He had not been employed at Titan for some time, and his only financial interest was in receiving the standard compensation for travel expenses related to the deposition. *See* Winkler Tr. 104, 197.

Even if Winkler were an "interested party," the legal premise of plaintiffs' argument is incorrect. Testimony of "interested" witnesses is not automatically discounted in resolving motions for summary judgment. Courts have rejected the broad interpretation of *dicta* from *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 150-53 (2000), upon which plaintiffs rely. *See, e.g., Luh v. J. M. Huber Corp.*, 211 Fed. App'x 143, 146 (4th Cir. 2006); *Smith v. Honda*, 101 Fed. App'x 20, 24-25 (6th Cir. 2004).

Plaintiffs also contend (Br. 28-30) that other witnesses and documents contradicted some of Winkler's testimony: specifically, his testimony that he was not permitted by the military to observe translators performing their duties or discuss their duties because he did not have a need to know. None of the testimony or documents cited by plaintiffs contradicts Winkler's testimony. Insofar as other testimony indicated that translators could enlist the help of a site manager such as Winkler to report illegal conduct up the military chain of command, *see, e.g.*, Hopkins Tr. 141-42, such testimony merely confirms that the military was in

operational control—and that, in the absence of illegal conduct, strict need-to-know rules governed. *Cf. Ibrahim*, 556 F. Supp. 2d at 7 (noting that Winkler sometimes served as an intermediary to resolve "personality conflicts" between translators and military personnel, and citing Winkler's testimony that, in doing so, he would "remind [the translators] that they work for the military").

3. Plaintiffs mischaracterize the record in other respects, though even as mischaracterized, the citations cannot contradict the evidence of what actually happened in Iraq. Here is a sampling.

a. Plaintiffs point to Titan documents that they claim contradict the evidence on which the district court relied in determining that Titan did not exercise operational control. *See* Br. 9-13, 28-29, 37-38. The documents they cite, however, are *drafts*,[16] which were never implemented because they were known by Titan to be inaccurate in the very respects for which they are cited by plaintiffs. *See* Hopkins Tr. 69-70, 261-262; Hoylman Tr. 148-151. While plaintiffs baldly assert that Titan employee Stephen Bolton "testified that the draft accurately reflected managements' [*sic*] understanding" of Titan's operational control (Br. 11 n.3), Bolton's actual testimony clarifies that the passage cited by plaintiffs refers

[16] *See, e.g., Lloyd v. Prof'l Realty Servs., Inc.*, 734 F.2d 1428 (11th Cir. 1984) (per curiam) (draft minutes are not business records or admissions of party opponent).

only to "administrative support" (Bolton Tr. 379-380), and otherwise makes clear that the military provided operational supervision for the translators, *see id.* at 314.

b. Plaintiffs suggest (Br. 9-10, 37-38) that certain "contemporaneously-generated" Iraq job-placement advertisements contradict the district court's findings. Both advertisements were issued in 2007—*three years* after the events in suit. *See* C-28. And the second of those advertisements concerned *Afghanistan*, not Iraq—where Titan conducted its operations differently. *See* C-29; Peltier Tr. 151.

c. Plaintiffs assert (Br. 13) that several witnesses testified that Titan did not adequately supervise the translators, implying that Titan acknowledged that it had an obligation to do so. To the contrary, the witnesses in question testified that *the military* was responsible for supervising the translators (or that the military in fact did so). *See* Inghram Tr. 51-52; Bolton Tr. 358-359; Mawiri Decl. ¶ 9. Plaintiffs' suggestion (Br. 36) that Titan failed to provide sufficient numbers of supervisors to "increase corporate profits" is frivolous. It would have been in Titan's financial interest to have more, not fewer, supervisors. *See* Peltier Tr. 44-47. The military, however, provided sufficient funding for only one site manager per approximately 100 translators—a fact that itself constitutes compelling evidence that the site managers provided only administrative support, rather than day-to-day supervision.

2. It Is Not Relevant That the Military Required Linguists To Work with Others or Did Not Prevent Them from Acting on Their Own.

Plaintiffs argue that because they had evidence that on particular occasions Titan linguists within the confines of Abu Ghraib acted on their own or under orders from CACI interrogators, this creates a dispute about the military's control over the linguists. (Br. 22-27.) However, the military's ability to require linguists to work with CACI interrogators is only a further indication of the military's control over the linguists. The record is clear that the CACI interrogators were working at the direction of the military. *See, e.g.*, C-36, at 4 (linguist John Israel, who often translated for a CACI interrogator, confirmed "that there's a military commander above the things that [he was] doing"). But whatever the relationship, such assignments within the military detention facility in the course of detainee interrogations implicate combatant-activities exception no less than do identical assignments to military interrogators.

Assertions that linguists acted on their own initiative are really another way of saying that the military chose not to, or failed, to control the linguists in all cases. But the decision on how much control the military did or should have exercised over a military detention and interrogation center in a war zone is precisely the sort of decision insulated by the combatant-activities exception. Moreover, there is no evidence that Titan was in operational control when the

military was not. Once operational control is established, claims about the sufficiency or exercise of that control in the context of combatant activities are preempted.

3. The District Court Properly Relied on Undisputed Facts Rather Than Contract Construction.

Plaintiffs contend (Br. 32-40) that Titan's contract with the Army and applicable military regulations provide that Titan *should* have more closely supervised its translators. The district court correctly focused not on how the terms of the contract should be construed in the abstract, but rather on how the contract was implemented in reality. Specifically, the court distinguished between Titan's administrative supervision of matters such as "delivering linguists to their assigned units and facilitating their payment," on the one hand, and the military's operational control of the translators, on the other. *Ibrahim*, 556 F. Supp. 2d at 6. That arrangement is entirely consistent with the Statement of Work, which specified merely that Titan should provide any necessary "supervision" (without explaining what that "supervision" would entail). *See* SOW § C-1.1. Even assuming that the parties' operating practice had deviated from the terms of the contract, it would not alter the analysis. Titan and the Army had the right to modify the contract between them to fit the circumstances of the war in Iraq. If they had done so, plaintiffs would have no right to complain, because plaintiffs are not third-party beneficiaries and therefore do not have vested rights in the contract.

That Titan was performing as the military expected is evidenced by the fact that even after the disclosures about Abu Ghraib, Titan's contract was repeatedly extended.

Plaintiffs' reliance on various military regulations and manuals (Br. 35 & n.8) fares no better. The congressional testimony of the Secretary of Defense (and other senior military leaders) confirms that the Army intended to exercise operational control over Titan's translators—and thereby belies any claim that the exercise of operational control was inconsistent with any military regulation or policy. Even assuming, *arguendo*, that the military's regulations required Titan to provide a greater degree of supervision than it actually did (and those regulations were nowhere referenced in the Titan contract), the legally relevant inquiry is whether the military *actually* exercised operational control over Titan's contractors. *See Ibrahim*, 556 F. Supp. 2d at 9 (acknowledging that, "as a general matter, Army policy places significant limits on the way that contract personnel are to be used and supervised," but concluding that "the proper focus is on the structures of supervision that the military actually adopted on the ground").

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS UNDER THE ALIEN TORT STATUTE.

The district court correctly held that plaintiffs' ATS claims should be dismissed under this Court's decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), and Judge Edwards' concurring opinion in *Tel-Oren v. Libyan*

Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), on the ground that those claims alleged only private, non-state actions (or actions taken on behalf of the United States). *Ibrahim*, 391 F. Supp. 2d at 13-15; *Saleh*, 436 F. Supp. 2d at 57-58. Its judgment on the ATS claims should also be affirmed.

A. There is No Basis for Overruling *Sanchez-Espinoza* and *Tel-Oren.*

Plaintiffs acknowledge that the district court correctly interpreted and applied *Sanchez-Espinoza* and *Tel-Oren*. They nevertheless contend that this Court should recognize ATS claims alleging torture by private actors on the ground that *Sanchez-Espinoza* and *Tel-Oren* have been superseded by the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and overtaken by recent developments in international law. That is not correct. *Sosa* is consistent with *Sanchez-Espinoza* and *Tel-Oren*, as is the Second Circuit's decision in *Kadic v. Karadzic*, 70 F.3d 232 (1995), on which plaintiffs heavily rely. Plaintiffs confuse claims brought against private parties for actions taken on behalf of states (or quasi-state actors, in the case of war crimes and crimes against humanity), on the one hand, with claims brought against private actors for torture unrelated to state action, on the other—which no court has endorsed. Nor have there been any developments in international law that support recognizing ATS claims alleging torture by private actors; if anything, recent developments in international law are

to the contrary. There is therefore no basis for disturbing the controlling circuit precedent of *Sanchez-Espinoza* and *Tel-Oren*.

1. Plaintiffs first assert (Br. 58) that, by "taking up" an ATS claim against a private party, *Sosa* implicitly recognized that ATS claims may be brought against private parties even in the absence of any state action. That assertion lacks merit. In *Sosa*, the Court held that the ATS is merely a jurisdictional statute, *see* 542 U.S. at 712, and that federal common law would create a cause of action only for violations of a clearly-defined, widely-accepted, norm of international law, *see id.* at 725. The Court proceeded to hold that the conduct at issue in *Sosa*—arbitrary detention—did not violate such a norm. *See id.* at 738. Thus, the district court correctly concluded that *Sosa* did not address the question whether a plaintiff can maintain an ATS claim alleging torture by a private actor; indeed, it correctly read *Sosa*, which expressly cautioned against recognizing causes of action too readily, *see id.* at 725-28, as suggesting that lower courts should be reluctant to recognize such a claim. *See Ibrahim*, 391 F. Supp. 2d at 14; *Saleh*, 436 F. Supp. 2d at 57-58. And given that the ATS is jurisdictional, the implicit ruling that plaintiffs argue for would have no precedential value. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (a *sub silentio* ruling on a question of subject matter jurisdiction is not precedential).

Plaintiffs nevertheless doggedly contend (Br. 58) that the Supreme Court "endors[ed] the view" that torture in the absence of state action violates a clearly defined norm of international law (and therefore gives rise to a cause of action under the ATS). Plaintiffs' selective quotation from *Sosa*, however, does not support that contention. In the quoted language, the Court was in turn quoting from *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), where the Second Circuit held that, for torture to be actionable, it must be torture by a state actor (and not by a private party). *See Sosa*, 542 U.S. at 732 (quoting *Filartiga*, 630 F.2d at 890). In the same sentence that plaintiffs advance as "endorsement" of their view, the Supreme Court cited Judge Edwards's concurrence in *Tel-Oren* for the same proposition. *Id.*; *see also id.* at 732 n.20 (citing *Tel-Oren* as involving an international norm that requires state action).

Sosa's discussion of the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note) (2000), confirms that the Court did not intend to disturb this circuit's preexisting rule that, for torture to be actionable under the ATS, it must be torture by a state actor (and not by a private party). The Court cited the TVPA in cautioning against recognizing causes of action under the ATS too readily, noting that the TVPA constituted a congressional mandate allowing claims limited to a "specific subject matter." *Sosa*, 542 U.S. at 728. The TVPA, in turn, extends to United States citizens the right to bring actions for damages alleging foreign *state*

torture that aliens have under the ATS. *See* 28 U.S.C. § 1350 note § 2(a) (TVPA is limited to conduct "under actual or apparent authority, or color of law, of any foreign nation"). The language of the TVPA was intended to "make[] clear" that "the plaintiff must establish some governmental involvement in the torture or killing to prove a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. The TVPA's limitation of the rights extended to U.S. citizens to sue for torture is compelling evidence of Congress's understanding that torture under the ATS requires state action to be cognizable as a violation of international law. *See Enahoro v. Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005) (stating that the TVPA represents Congress's view of the scope of actions available under the ATS), *cert. denied*, 546 U.S. 1175 (2006).

Plaintiffs ignore the TVPA, but instead rely (Br. 61-62) on the War Crimes Act (18 U.S.C. § 2441) and the Military Commissions Act (10 U.S.C. § 948a *et seq*. (2006)). Those statutes are plainly inapposite because they do not address the issue of implied private causes of action at all. As criminal statutes enforceable by the sovereign, those statutes do not implicate the doctrine of sovereign immunity of the United States that undergirds the holding of *Sanchez-Espinoza,* nor do they alter the evident understanding of Congress, reflected in the TVPA, that claims for torture by private actors are not actionable under the ATS.

2. In support of their argument that this Court should revisit the controlling precedent of *Sanchez-Espinoza* and *Tel-Oren*, plaintiffs also rely on the Second Circuit's decision in *Kadic* and its supposed endorsement by *Sosa*. (Br. 59.) That case, however, does not stand for the proposition that purely private actions can violate international norms relating to torture. The defendant in that case, Radovan Karadzic, was the president of the self-declared Serbian Republic of Bosnia-Herzegovina (also known as the Republic of Srpska). The plaintiffs alleged that Karadzic was acting in an official capacity when he directed military forces in a "genocidal campaign" involving rape, summary execution, murder, and torture. *Kadic*, 70 F.3d at 236-37. The question in *Kadic* was whether Karadzic's forces were proper subjects of international law when the self-declared republic for which they fought had not achieved full statehood.

Historically, international law applied only to conduct during wars between nations, and not to conduct during an internal armed conflict by a belligerent party that had not achieved statehood. *See Prosecutor v. Tadic*, 1995 WL 17205280 (Appeals Chamber, Int'l Criminal Tribunal for Former Yugoslavia, Oct. 2, 1995) ¶ 96. More recently, however, the norms of international law have been extended to internal armed conflicts that had previously been regulated by domestic law. *Id.* ¶ 97. In *Kadic*, the Second Circuit, citing the more recent view, determined that Karadzic's forces were "a party to the conflict" because "the law of war embodied

in common article 3 [of the Geneva Conventions] binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents." *Kadic*, 70 F.3d at 243.

This case plainly does not present the issue addressed in *Kadic*. There is no question about the status of the party which detained the Iraqi nationals at issue and on behalf of which Titan's employees were working: it was the United States. As the district court recognized, if Titan's employees were not acting on behalf of the United States (and therefore immune from suit), they were engaged in private action, not action on behalf of "state-like" organized militias at issue in *Kadic*. Contrary to plaintiffs' contention (Br. 59-61), *Kadic* did not suggest that international law applied more broadly to private actors; if it had, purely private criminal activity would constitute a war crime merely because it occurred during wartime. *See Saperstein v. Palestinian Auth.*, No. 04-20225, 2006 U.S. Dist. LEXIS 92778, at *28-31 (S.D. Fla. Dec. 22, 2006) (noting that no court has held that "murder of an innocent person during an armed conflict" amounts to per se violation of the law of nations); *see generally* David Luban, *A Theory of Crimes Against Humanity,* 29 Yale J. Int'l L. 85, 95-97 (2004) (discussing related development of international law of war crimes and crimes against humanity). *Cf. Abagninin v. Amvac Chem. Corp.*, No. 07-56326, 2008 U.S. App. LEXIS 20226, at *18-22 (9th Cir. Sept. 24, 2008) (extension of liability for crimes against humanity

to non-State entities with "de facto control over a defined territory" in Bosnia and Rwanda "does not justify eliminating the [state action] requirement altogether").[17]

Because *Kadic* merely held that norms of international law extend to "state-like" organized militias, it is of no moment that the Supreme Court cited *Kadic* in *Sosa*. In any event, the Court relied on *Kadic* only for its separate holding on genocide, *see Sosa*, 542 U.S. at 732 n.20; in fact, the Court cited it in the same sentence as *Tel-Oren* (which indisputably held that an ATS claim alleging torture by a private actor is not cognizable). *Id.*

3. Plaintiffs' arguments conflate individual liability with the question of whether actions were taken on behalf of a state. The core of Judge Edwards's opinion in *Tel-Oren* and the opinion in *Sanchez-Espinoza* is the difference between individuals acting privately and persons acting for the state. What matters is on whose behalf the *conduct* was taken, i.e., state or private action. In contrast, the *status* of the defendant (a private party versus a government official or military member) is a separate question that is generally not determinative as to whether the *conduct* is official or private. A party can engage in official action for some purposes and private action for others—regardless of whether that party's *status* is governmental or private. Plaintiffs repeatedly confuse cases that hold that private

[17] Because *Kadic* is inapplicable here, so too are the cases cited by plaintiffs (Br. 60-61) that supposedly "adopted" *Kadic*'s reasoning, none of which actually held that ATS claims for war crimes are cognizable against private actors.

parties can be liable for official action with the question of whether private parties can be liable in the absence of official action. The district court made the correct distinction, holding that the *conduct* here was either official and the claims are barred by United States sovereign immunity or private and not reached by international law.

4. Finally, plaintiffs contend (Br. 62-64) that, in light of recent developments in international law, this Court should overrule *Sanchez-Espinoza* and *Tel-Oren*. Plaintiffs do not dispute (Br. 63 n.15), however, that the most relevant recent international agreement, the Convention Against Torture, is expressly limited to state action—and thus entirely consistent with *Tel-Oren* and *Sanchez-Espinoza*. As a result, plaintiffs certainly cannot establish the existence of a widely-accepted and well-defined international norm prohibiting non-state torture, as *Sosa* requires. *See* 542 U.S. at 732.

Plaintiffs' reliance (Br. 62-64) on the Nuremberg Proceedings, and on the statutes of regional criminal tribunals and the International Criminal Court, is entirely inapposite. Because the Nuremberg tribunals involved actions taken by persons alleged to be agents of the Nazi government, they clearly implicated state action. Perhaps not surprisingly, moreover, the arguments made by plaintiffs were expressly considered (and rejected) by Judge Edwards in his concurring opinion. *See Tel-Oren*, 726 F.2d at 792-93. As for the more recent authorities on which

plaintiffs rely, those authorities (like *Kadic*) at most extend international jurisdiction to organized belligerents even when such belligerents are not acting for recognized states. Those authorities do not suggest that purely private torture violates international law merely because it occurs in the context of a war. *See, e.g.*, *Prosecutor v. Kunarac*, 2002 WL 32750375; Case Nos. IT-96-23 & IT-96-23/1A, Judgment, ¶ 148 (June 12, 2002) (cited at Br. 63 n.15) ("[T]he Appellants in the present case did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture …").

5. Even if this Court were inclined to revisit *Tel-Oren*'s and *Sanchez-Espinoza*'s ATS holdings, which the district court followed in dismissing plaintiffs' ATS claims, they would be barred by "special factors" rooted in practical consequences, including the existence of alternative remedies[18] and national security and foreign policy concerns.[19]

B. There is No Implied Cause of Action Against a Corporation Under the ATS.

In the alternative, the district court's decision to dismiss the ATS claims against Titan can be sustained on the ground that ATS claims are actionable only

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[18] *See Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 n.14 (1983). As explained, *supra*, although the Army found Mr. Saleh's allegations of torture not credible, it made clear that the alleged acts of torture at Abu Ghraib are compensable under 10 U.S.C. § 2734.

[19] *See Sanchez-Espinoza*, 770 F.2d at 208 (dismissing *Bivens* claims under special factors analysis).

against natural persons. Neither federal common law nor international law permits the imposition of liability on a corporation in these circumstances.

1. In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), the Supreme Court held that there is no implied cause of action under *Bivens* against corporations for violations by their employees of individual constitutional rights. In *Sosa*, the Court, citing *Malesko*, cautioned that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727. In addition, in discussing the question of the status of a perpetrator that could be sued, the Court expressly distinguished between private actors that are corporations and those that are individuals. *Id.* at 732 n.20. The Court therefore made clear that it does not automatically follow from the fact that there is a federal common law cause of action against a natural person that there is also a cause of action against a corporation.

The TVPA, moreover, reflects Congress's understanding of the scope of actions under the ATS for torture. The TVPA uses the term "individual" for both the potential claimants and defendants. 28 U.S.C. § 1350 note, § 2(a). Recognizing that the term "individual" usually excludes legal entities such as corporations, and also that it would be impossible for a corporation to be a victim, many courts have concluded that the TVPA does not allow for claims against corporations. *See Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1176

(C.D. Cal. 2005); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161, 168-69 (5th Cir. 1999); *but see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003). If the TVPA does not allow *citizens* to sue corporations, it would be strange indeed if the ATS were read to allow *aliens* to sue corporations—especially in the face of *Sosa*'s cautions about creating new causes of action as a matter of federal common law.[20]

2. International law similarly does not provide a cause of action against corporations for torture claims. International instruments have repeatedly rejected the imposition of corporate liability. *See generally Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 321, 321-26 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (canvassing international instruments from Nuremberg on).

[20] Since *Sosa*, some courts have allowed claims to proceed against corporations, but they have uniformly done so without discussing or analyzing the issue. *See, e.g., Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 321 (2d Cir. 2007), *aff'd without opinion for lack of quorum*, 128 S. Ct. 2424 (2008). Such decisions are unpersuasive, because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Indeed, the Rome Statute,[21] the treaty that created the International Criminal Court (which has jurisdiction over violations of the law of war, including torture), considered, and expressly rejected, the imposition of corporate liability. *See id.* at 322-23. For that reason, plaintiffs cannot meet their burden of demonstrating the existence of a widely-accepted and well-defined international norm. Their recitation of aspirational pronouncements of international bodies (or commentators) is insufficient. "Creating a private cause of action to further that aspiration would go beyond any residual common law discretion" appropriate for the courts to exercise. *Sosa*, 542 U.S. at 738. The absence of corporate liability under the ATS serves as an alternative basis for sustaining the district court's dismissal of plaintiffs' ATS claims.

CONCLUSION

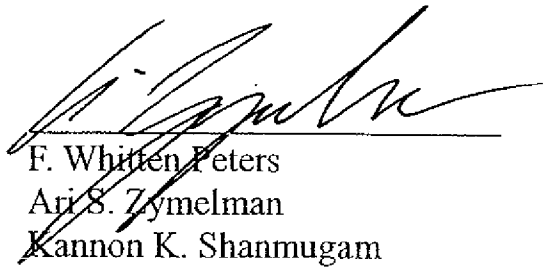
For the reasons stated, the judgment below should be affirmed, including on the alternative grounds with respect to the Alien Tort Statute and on the ground that all claims are precluded by the political question doctrine, for which we adopt the arguments of the CACI intervenors.

[21] 37 I.L.M. 999 (opened for signature July 17, 1998; entered into force July 1, 2002).

Dated: October 17, 2008

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

By: 

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ADDENDUM
STATUTES AND REGULATIONS

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28 U.S.C. § 1350 – Alien's Action for Tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 n. Sec. 2(a) – Torture Victim Protection Act of 1991

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 2680(j) – Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

10 U.S.C. § 2734 – Foreign Claims Act

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $ 100,000, a claim against the United States for—

. . .

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his

department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(b) A claim may be allowed under subsection (a) only if—

(1) it is presented within two years after it accrues;

(2) in the case of a national of a country at war with the United States, or of any ally of that country, the claimant is determined by the commission or by the local military commander to be friendly to the United States; and

(3) it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

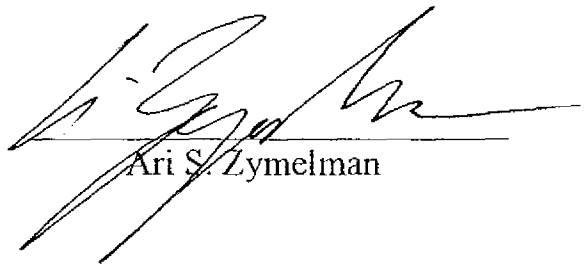
. . .

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that the foregoing Brief for Defendant-Appellee Titan complies with the prescribed type-volume limitation because:

1. It contains 13,871 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type style.



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CERTIFICATE OF SERVICE

I certify that on October 17, 2008, two copies of Defendant-Appellee The Titan Corporation's Brief were mailed by Federal Express to the following:

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