ORAL ARGUMENT HELD FEBRUARY 10, 2009

No. 08-7008

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Consolidated with 08-7009

On Appeal from the United States District Court for the District of Columbia
in Case No. 05-cv-1165 (Honorable James Robertson)

APPELLEE TITAN CORPORATION'S RESPONSE TO PETITION FOR REHEARING *EN BANC*

Plaintiffs' petition for rehearing *en banc* falls short of identifying any authority in conflict with the panel's decision—not decisions of the Supreme Court, nor this circuit, nor other circuits. In the absence of an intra- or inter-circuit split of authority, the dispute between the majority and dissent at most is a disagreement over whether to follow other circuits in extending well-established rationales to a unique factual circumstance. *En banc* rehearing is not a tool for changing disputed outcomes of individual cases unless the case is one of exceptional importance with respect to questions that are likely to recur in the future. This is not such a case. It is rooted in the particular circumstances of how Titan's linguists were used directly by the military on the battlefield during a time of war. In the six years since the events at issue have transpired, the only suits that

have been brought based on embedded contractor employees have been brought by appellants' counsel against the defendants in these cases.

That the Supreme Court has not directly addressed this unique factual setting—battlefield tort claims by Iraqis based on the alleged misconduct of contractor employees embedded in military units engaged in combatant activities—does not create a conflict and does not warrant *en banc* rehearing. Although such claims would, for the first time, allow individual states to have a say in war making, an area reserved for the federal political branches. It would fly in the face of the rationale underlying the Court's field preemption decisions in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), and *Zschernig v. Miller*, 389 U.S. 429 (1968), among others; would constitute a rejection of the Supreme Court's framework for implied preemption in *Boyle v. United Technologies*, 487 U.S. 500 (1992); and would create a civil cause of action in an area in which Congress has repeatedly legislated to create administrative and criminal remedial schemes, while explicitly not creating private rights of action.

While the panel's decision is in harmony with existing precedent, the path urged by appellants conflicts with *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (Scalia, J.), this circuit's precedent on the Alien Tort Statute (ATS)

involving United States military operations, the Ninth Circuit's decision in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), and the Supreme Court's admonition in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) to exercise judicial restraint in recognizing ATS causes of action. Indeed, appellants propose that this Court be the first to allow ATS claims to proceed based on United States military operations.

Rehearing *en banc* is not warranted.

STATEMENT

1. These actions arise from the wartime detention and interrogation operations of the United States military in Iraq. Because of critical shortages within the military of trained Arabic speakers before and during the invasion and occupation of Iraq, the United States Army turned to Titan to provide Arabic and other linguists to its combat units. (Op. at 3.)

Titan linguists were assigned to military units in support of battlefield operations, including detention and interrogation operations at Abu Ghraib and other United States military prisons in Iraq. Titan linguists were "integrated and performing a common mission with the military under ultimate military command…subject to military direction, even if not subject to normal military discipline." (Op. at 11.) Titan linguists performed in the same manner as military linguists whose positions they filled, serving alongside soldiers in the ground invasion in March 2003 and throughout the country post-invasion.

Appellants 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. Appellants brought actions against Titan and CACI (and in one case, individuals who were dismissed for lack of personal jurisdiction) asserting claims under the common law and the Alien Tort Statute, 28 U.S.C. § 1350. Appellants allege that while detained by the United States military they were mistreated by soldiers, Titan linguists, and CACI interrogators and that Titan and CACI are liable to them for torts by any of the unidentified perpetrators.

2. The district court granted defendants' motions to dismiss the ATS claims because such claims—predicated on conduct in the course of United States military action—necessarily trenched upon the sovereign immunity of the United States under *Sanchez-Espinoza* and would run afoul of *Sosa*'s caution against imputing new causes of action under the ATS. With regard to the state law claims, the district court ordered limited discovery into the control of defendants' employees to determine whether the military's control of the contract employees meant that the claims would be preempted under the reasoning of *Boyle*. (Op. at 5-6.)

After exhaustive discovery into the nature of the military's control of the detention and interrogation operations and the contractors embedded in the military units, the district court found that it was undisputed that Titan exercised no control over its employees who were "fully integrated into [their] military units, essentially

functioning as soldiers in all but name." (Op. at 6; internal quotation omitted.) The district court also found that there was a dispute about whether the military had exclusive operational control over the CACI interrogators. *Id.* at 6-7. Requiring that the military's control be exclusive, the district court granted summary judgment to Titan and denied it to CACI. *Id.* at 7. Plaintiffs appealed the judgment in favor of Titan, while CACI appealed pursuant to 28 U.S.C. § 1292(b).[1] *Id.*

3. In a divided opinion, the panel affirmed the judgment to Titan and reversed denial of summary judgment to CACI.[2]

a. Applying the reasoning of *Boyle*, the majority (Silberman, J. and Kavanaugh, J.) held that "during wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." (Op. at 16.) The majority found that state tort law claims against contractors who supplied employees to be embedded in military units

[1] Contrary to their assertion, appellants did not cross-appeal in the CACI appeals. *Compare* Pet. at 4 n.2 *with* Op. at 7.

[2] The Titan appeals and the CACI appeals were not consolidated with each other, but were set for argument on the same day, before the same panel. Plaintiffs have not petitioned for *en banc* rehearing in the CACI appeals and the mandate has issued. Thus, only Titan would be affected by *en banc* rehearing, unless the Court grants Plaintiffs' opposed motion to recall the mandate and an as-of-yet unfiled petition for rehearing *en banc* in the CACI appeals.

would conflict with uniquely federal interests in the procurement and management of those employees, and in particular with the policies underlying the combatant activities exception to the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. § 2680(j). (Op. at 10-12.) The Ninth Circuit applied the same analysis in rejecting such claims in the other appellate case to consider whether state law claims arising out of military action could be asserted against the military's contractors by the objects of military action. *See Koohi*, 976 F.2d 1328. To allow regulation by 51 possible jurisdictions (or Iraq, the *lex loci*), would "potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors" given "the numerous criminal and contractual enforcement options available to the government in responding to the alleged contractor misconduct—which options the government evidently has foregone." (Op. at 14, 17.)

The majority also held that even in the absence of *Boyle*, plaintiffs' claims would be preempted because the states constitutionally and traditionally have no involvement in federal wartime policymaking, while their interests in adjudicating torts against Iraqis in Iraq are *de minimis*. (Op. at 20-21; citing U.S. Const. Art I, § 10; *Garamendi*, 539 U.S. 396; *Crosby*, 530 U.S. 363; *Japan Line*, 441 U.S. 434; *Zschernig*, 389 U.S. 429; *Hines v. Davidowitz*, 312 U.S. 52 (1941).)

Finally, the panel affirmed the dismissal of the international law claims under the ATS. (Op. at 27.) The panel held that dismissal of the ATS claims was

consistent with circuit precedent—*Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring) and *Sanchez-Espinoza*, 770 F.2d 202—and the Supreme Court's decision in *Sosa*, 542 U.S. 692. (Op. at 24-28.) Given that Congress has legislated extensively in the area of torture and war crimes but not created a private right of action, it would be particularly appropriate to follow *Sosa*'s direction to exercise judicial restraint against implying an ATS cause of action for the same reasons state law is preempted. (Op. at 29-30.)

b. Judge Garland dissented with respect to preemption of the state law claims but did not address the ATS claims.

With respect to implied preemption, Judge Garland believed that the Court should not apply *Boyle* to these facts, in part because the FTCA excludes independent contractors from its coverage. The dissent noted that the Supreme Court had not extended *Boyle* beyond finding a direct conflict with the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). (Dissent at 15.) The dissent attempted to distinguish *Koohi*, which contrary to the dissent's position, applied *Boyle* to preempt claims against a contractor based on the FTCA combatant activities exception. (Dissent at 16.)

The dissent also rejected the panel's alternate preemption rationale. Conceding that generally applicable state laws may conflict with (and therefore be preempted by) such federal interests, the dissent disagreed with the panel's

application of the doctrine here, based on the absence of precedent employing "a foreign policy analysis to preempt generally applicable state laws." *Id.*

ARGUMENT

1. Appellants argue that rehearing *en banc* is warranted because the panel based its reasoning on improper adjudication of facts. (Pet. at 1-5.) This argument is the quintessential case-specific allegation of error and would not be a basis for rehearing *en banc* even if it were true, which it is not. The majority did not make factual findings: "[F]or the purposes of this appeal, we must credit plaintiffs' allegations of detainee abuse." (Op. at 4.) More importantly, the majority's holding on preemption was not based on the nature of the alleged abuse, but on the undisputed facts of the military's control over the contractor employees. *See* Op. at 9-14 (relevant facts are the role of the contractors and the nature of the federal interests); Op. at 13 ("[I]t is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield."). As Judge Garland acknowledged, his dispute with the majority's characterization of the facts was irrelevant; the holding would have applied even if the majority uncritically credited Judge Garland's view of the facts. (Dissent at 7.)

2. The panel held state law preempted under two rationales. Both are straightforward applications of Supreme Court precedent to these unique factual circumstances and do not involve the development of new legal principles. There

is no authority in conflict with the panel's preemption analysis; to the contrary, the analysis is consistent with decisions of the Supreme Court, this circuit, and other circuits. Disagreement over whether to apply settled law in a novel factual context is not a reason for *en banc* rehearing.

a. The majority's conclusion that state tort regulation of contractors who provide personnel to be embedded in military units conflicts with uniquely federal interests is wholly consistent with *Boyle*. *Boyle* did not hold, as appellants contend (Pet. at 9), that state law is preempted only when it would impose a duty opposite of what the military has approved (in the case of *Boyle*, a hatch that opened inwards instead of the government approved design opening outwards). Where the United States approved reasonably precise specifications, "[l]iability for design defects in military equipment cannot be imposed, pursuant to state law." *Boyle*, 487 U.S. at 512. The question is whether tort regulation would conflict with the government interest (there the exercise of federal discretion, here the conduct of combatant activities during wartime), not the content of that regulation.

Similarly, the majority held that state tort law regulation must be preempted where claims arise from the acts of embedded employees' units engaged in wartime combatant activities. As to appellants' assertion that the finding of preemption contradicts the FTCA's exclusion of independent contractors from its scope (Pet. at 8), that position is directly contrary to *Boyle*, which preempted

claims against independent contractors, notwithstanding the FTCA's exclusion. *Boyle*, 487 U.S. at 505. Titan linguists need no more be soldiers to preempt claims against Titan than the hatch designers in *Boyle* needed to be government officials to preempt claims against United Technologies.

b. Appellants assert that tort claims must lie against Titan because the alleged conduct violated federal law, regulations, and policy. (Pet. at 5.) Yet this Court recently held that claims based upon indistinguishable allegations of serious criminality (including torture) did not lie against military officials involved in detention and interrogation operations away from the battlefield. *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).[3] The distinction appellants urge is untenable because, as the majority explained, "the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." (Op. at 13.)

Appellants' assertion that the majority "bestows *more* immunity on corporations than is enjoyed by American Soldiers" (Pet. at 6), is incorrect because it misapprehends the Westfall Act and the basis for Titan's potential liability.[4]

[3] Appellants now assert that the linguists were not engaged in combatant activities (Pet. at 8), but at oral argument they conceded they were. *See* Tr. at 87-88.

[4] The Westfall Act, 28 U.S.C. § 2679, provides that the United States is substituted as a defendant in suits against employees acting within the scope of employment.

While the Attorney General makes the initial determination of whether an employee is acting within the scope of employment, that decision is reviewable in court, and the government is not free to withhold certification for other reasons. *See Harbury v. Hayden*, 522 F.3d 416-17 (D.C. Cir. 2008). Yet Titan is liable for its employees' actions only if they were acting within the scope of employment. Thus, it does not affect the outcome here whether claims are preempted where the employee is acting outside the scope: under that circumstance, Titan would not be liable as a matter of substantive law.[5]

c. The panel majority is consistent with the rulings of other circuits. *Koohi* specifically held that state and ATS tort claims against military contractors are preempted under *Boyle* where they arise out of wartime combatant activities of the United States military. Relying on the political question doctrine, the Eleventh Circuit recently held in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009) that state law claims cannot proceed against a contractor where they arise in the context of military operations and implicate sensitive military judgments. It further found that courts are not equipped to pass

[5] Appellants exaggerate the scope of the panel's decision in other ways. The panel's holding narrowly applies to contractor employees integrated into the military chain of command and engaged in combatant activities, a circumstance that hardly applies to "any and all corporations or individuals who contracted with the United States." (Pet. at 5.)

judgment on the degree of supervision appropriately exercised over personnel charged with performing tasks under the military's ultimate direction. *Id.* at 1295.

d. As the majority noted, Congress has legislated extensively in this area, passing criminal sanctions for war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad, yet it has avoided creating a private right of action for conduct by or on behalf of the United States military. (Op. at 24 n.9.) In response to the Abu Ghraib misconduct, which it decried, Congress subjected contractor personnel to the Uniform Code of Military Justice, making them more like soldiers; it did not create a civil damages action.[6] *Id.*

e. Even in the absence of *Boyle*, plaintiffs' claims would be preempted based on the Supreme Court's field-preemption decisions. (Op. at 20-23.) The majority correctly explained that the Constitution commits the field of foreign relations, particularly in wartime, to the federal power, while states constitutionally and traditionally have no involvement in federal wartime policy-making and little interest in alleged torts committed in Iraq against its citizens. *Id.* at 20-21.

As with the issue of *Boyle* preemption, appellants do not identify any cases with which the majority's alternative ground is in conflict. They simply assert that

[6] Appellants' hypotheticals (Pet. at 8) prove the point. It is clear that if soldiers were the perpetrators, there would be no civil remedy so long as they were acting within the scope of their employment, which is the same limit on Titan's liability. In this uniquely federal area, it is appropriate that federal law alone regulates the battlefield actions of soldiers and contractors alike.

state laws of general applicability cannot be preempted in this way, summarily distinguishing *Garamendi*, *Crosby*, and the other cases cited by the majority as being confined to their facts. (Pet. at 11-13.) In the absence of a conflict of authority, the application of the principles articulated in these cases in this fact-specific context does not warrant *en banc* review.

3. Finally, the panel's disposition of the ATS claims, which the dissent does not address, is consistent with prior circuit precedent that considered and rejected indistinguishable ATS claims in the context of United States military action. *See Sanchez-Espinoza*, 770 F.2d 202 (rejecting ATS claims against U.S. government officials and private contractors working at their direction based on allegations of murder, torture, rape, war crimes and other torts in the Contra Wars in Nicaragua). Although it reached the same conclusion as *Sanchez-Espinoza*, the panel fully analyzed *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and the other authorities cited by the plaintiffs, finding no conflict with *Sanchez-Espinoza* or between it and Second Circuit precedent. To hold otherwise would be contrary to the congressional policy choices and the Constitution's allocation of power that support preemption. *See* Op. at 24-30.[7]

[7] Appellants' assertion that the majority "created a circuit split by holding that the [ATS] does not permits[sic] claims to be asserted against corporations" (Pet. at 1), is unfounded. Whether ATS suits may be brought against corporations was briefed but was not reached by the panel. Contrary to appellants' contention, that issue remains open in the Second Circuit, *see Presbyterian Church of Sudan v. Talisman*

* * *

For the foregoing reasons, the petition for rehearing *en banc* should be denied.

Respectfully submitted,

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Energy, Inc., 2009 WL 3151804, at *15 n.12 (2d Cir. Oct. 2, 2009), and none of the cases appellants cite from other circuits (Pet. at 14) involved United States military action, which is the predicate for the majority's holding—based on congressional intent and federalism concerns as set forth in *Sosa*—that there is no ATS claim.

DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, counsel for defendant-appellee The Titan Corporation discloses as follows:

During the course of the litigation, The Titan Corporation was acquired by L-3 Communications Corporation and has since been renamed L-3 Services, Inc.

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.

/s/ Ari S. Zymelman
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CERTIFICATE OF SERVICE

I certify that I caused a true copy of the foregoing *Appellee The Titan Corporation's Response to Petition for Rehearing En Banc* to be served via the court CM/ECF system and by e-mail this 4th day of November 2009, on the following counsel of record:

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