United States Court of Appeals

for the

District of Columbia Circuit

No. 08-7001
Consolidated with 08-7030, 08-7044 and 08-7045

HAIDAR MUHSIN SALEH, *et al.,*
Plaintiffs-Appellees,

v.

CACI INTERNATIONAL INC., *et al.,*
Defendants-Appellants,

ILHAM NASSIR IBRAHIM, *et al.,*
Plaintiffs-Appellees,

v.

CACI PREMIER TECHNOLOGY, INC., *et al.,*
Defendants-Appellants.

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

JOINT BRIEF FOR APPELLEES

SUSAN L. BURKE (D.C. Bar No. 414939)
WILLIAM T. O'NEIL (D.C. Bar No. 426107)
KATHERINE R. HAWKINS
BURKE O'NEIL LLC
4112 Station Street,
Philadelphia, PA 19127
(215) 487-6590

KATHERINE GALLAGHER
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

SHEREEF HADI AKEEL
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, Michigan 48084-4736

Attorneys for Saleh Plaintiffs-Appellees

L. PALMER FORET (D.C. Bar No. 260356)
THE LAW FIRM OF
L. PALMER FORET, P.C.
1735 20th Street, N.W.
Washington, D.C 20009
(202) 332-2404

CRAIG T. JONES
RODERICK E. EDMOND
EDMOND & JONES, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, GA 30303
(404) 525-1080

Attorneys for Ibrahim Plaintiffs-Appellees

August 27, 2008

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellees Saleh et. al and Ibrahim et. al certify that except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants CACI International, Inc. and CACI Premier Technology, Inc.:

1. **Parties**

L-3 Services Inc., formerly known as Titan Corporation and as L-3 Communications Titan Corporation, has also appeared as a Defendant in this action.

2. **Amici**

There were no amici before the District Court. Appellees are aware that certain Amici intend to file briefs in support of Appellees' position in this Court, but are not aware of the precise signatories.

3. Rulings and Related cases

Appellees agree with the statement of the Appellants.

Susan L. Burke

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Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes, Rules and Regulations

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GLOSSARY OF ABBREVIATIONS

AR	U.S. Army Regulation
CACI	Collectively, CACI International, Inc. and CACI Premier Technology, Inc.
COR	Contracting Officer's Representative
Fay Report	AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, Major General George Fay, Investigating Officer (2004)
FM	U.S. Army Field Manual
FTCA	Federal Tort Claims Act
ICE	Interrogation Control Element
MG	Major General
MI	Military Intelligence
MP	Military Police
OIC	Officer in Charge
POC	Point of Contact
RI.__	The District Court record in *Ibrahim*, et. al., v. *CACI Premier Technology*, et. al, No. 1:04-cv-1248 (D.D.C.) (Robertson, J.)
RS.__	The District Court record in *Saleh*, et. al., v. *CACI International Inc.*, et. al, No. 1:05-cv-1165 (D.D.C.) (Robertson, J.)
SOF	Statement of Facts
Taguba Report	AR 15-6 Investigation of the 800th Military Police Brigade, Major General Antonio Taguba, Investigating Officer (2004)

Titan	Collectively, Titan Corporation, L-3 Communications Titan Corporation, and L-3 Services, Inc.
UCMJ	Uniform Code of Military Justice

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over 08-7044 and 08-7045 pursuant to its March order granting CACI's petition to appeal the District Court's summary judgment order under 28 U.S.C. §1292(b). Plaintiffs believe that the Court improvidently granted interlocutory appeal and lacks jurisdiction over CACI's direct appeals, 08-7001 and 08-7030, for the reasons set forth in Section I.

STATUTES, REGULATIONS, AND GUIDELINES

The applicable statutes and regulations, except for those included in Appellant CACI's brief, are reproduced in the addendum hereto.

STATEMENT OF THE CASE

Plaintiffs in this action are Iraqis who were mistakenly detained in prisons operated by the United States military during 2003 and 2004. According to military reports, up to 90 percent of the persons imprisoned in Iraq were innocents arrested by mistake.[1] All of the Plaintiffs fall into this category of persons, as none was ever charged by either military or civilian authorities. During their tenures in prison, Plaintiffs were victims of serious abuse.

[1] *See* RS.111, Appendix C-7 at 37 (military report estimates that 85% - 90% of the detainees were of no intelligence value); *see also* Report of the International Committee of the Red Cross (ICRC) On the Treatment By Coalition Forces of Prisoners of War and Other Protected Persons By the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation (Feb. 2004).

The *Saleh* Plaintiffs learned from the military's own reports and investigations that there were two corporate actors complicit in this abuse, CACI (CACI International Inc. and its subsidiary CACI Premier Technology) and Titan Corporation. CACI employees served as interrogators at the Abu Ghraib prison; Titan employees served as translators. After learning of the corporate complicity in the abuse, the *Saleh* Plaintiffs brought suit in June 2004, alleging that groups of persons (including both military soldiers and corporate employees) conspired together to abuse them. Approximately one month after the *Saleh* Plaintiffs filed suit, the *Ibrahim* Plaintiffs filed suit in the District Court for the District of Columbia, alleging similar conduct by the corporate actors. The *Ibrahim* Plaintiffs do not allege any military personnel were involved in harming them.

Although the *Saleh* Plaintiffs filed suit in the home jurisdiction of Titan Corporation, Defendants sought to transfer the lawsuit, and the *Saleh* lawsuit was eventually consolidated with the *Ibrahim* lawsuit before Judge Robertson in the District Court for the District of Columbia. There, the District Court dismissed all claims other than common law torts claims. The District Court, over Plaintiffs' objections, ruled that Defendants were potentially entitled to invoke an extension of the judicially-created defense established by the Supreme Court in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988) (hereinafter referred to as the "*Boyle* defense" or "*Boyle* doctrine"). The *Boyle* defense insulates the United

States contractors from liability to the extent necessary to ensure the United States itself is not indirectly exposed to liability beyond the waivers of sovereignty set forth in the Federal Tort Claims Act. *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005) ("*Ibrahim I*"); *Saleh v. Titan Corp.*, 436 F.Supp.2d 55 (D.D.C. 2006).

The District Court permitted a limited amount of discovery directed at contractual responsibilities, reporting structures, supervisory structures, and structures of command and control. *Ibrahim I*, 391 F.Supp.2d at 19; *Saleh*, 436 F.Supp.2d at 59-60. The District Court cautioned Defendants that they were only entitled to the affirmative defense if they were able to definitively establish, in a motion for summary judgment, that they were "essentially soldiers in all but name." *Ibrahim I*, 391 F.Supp.2d at 18.

The defendants filed motions for summary judgment on the affirmative defense. The District Court heard oral argument, during which counsel for CACI urged the District Court to implement the "soldiers in all but name" standard by analyzing whether the military exercised exclusive operational control. October 3, 2007 Oral Argument Tr., 6, 7, 9, 13, 16, 57, 63. The District Court subsequently adopted CACI's proposed test. The District Court considered whether Defendants proved with undisputed facts that the military exercised exclusive operational control over CACI and Titan employees in Iraq. *Ibrahim v. Titan Corp.*, 556 F.

Supp. 2d 1, 4 (D.D.C. 2007) ("*Ibrahim II*"). The District Court held the military had exercised such exclusive operational control over Titan employees, but had not over CACI employees. *Id.* at 10-11. The District Court found that there were facts upon which a jury might rule that CACI had also controlled its employees in Iraq. As a result, the District Court denied CACI's motion for summary judgment, but noted that CACI was free to raise the affirmative defense at trial.

CACI successfully sought interlocutory appeal under 28 U.S.C. § 1292(b). This Court granted CACI's petitions for permission to appeal on March 17, 2008, and docketed the appeals as 08-7044 and 08-7045. CACI also filed direct appeals of the summary judgment order, docketed as 08-7001 and 08-7008. Plaintiffs moved to strike the direct appeal. Thereafter, this Court granted CACI's petition for interlocutory appeal and directed the parties to brief the direct appeal issue.

STATEMENT OF FACTS

CACI is a publicly-traded corporation paid to provide interrogation services to the military. CACI used irregular methods to obtain the contract to provide interrogation services. CACI executive Charles Mudd traveled to Iraq to drum up business from the United States military. Mudd Dep. 19-33. A CACI executive drafted the initial Statement of Work for CACI's contract, in violation of federal procurement regulations. Brady Dep. 141-142; RS.111, Appendix C-7, at 49;

RS.111, Appendix C-3, at 14 (Government Accounting Office finds that CACI's role in drafting the Statement of Work "creates a conflict of interest and undermines the integrity of the competitive contracting process").

CACI violated further procurement regulations by entering into the contract with the Department of the Interior via "Delivery Orders" for an existing schedule that was supposed to be used for off-the-shelf contracting for "information technology services." RS.111, Appendix C-3, at 2, 10; RS.111, Appendix C-4, at 1-2. The Delivery Orders used service codes for "information technology services" that failed to reveal that the services being provided were interrogation services. RS.111, Appendix C-4, at 1-5; RS.111, Appendix C-3, at 1-3, 7-8.

The contract between the United States and CACI requires that CACI (not the military) ensure that its employees remain non-combatants: "Contractors are considered non-combatants and are not authorized to be armed." RS.111, Appendix C-1, ¶20.j; RS.111, Appendix C-2, ¶17.i. *See also* RS.111, Appendix C-2, ¶3 ("Under no circumstances will [CACI employees] be armed" or "employed in direct support of combat operations.").

The contract requires that CACI comply with the Geneva Conventions, U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1 1977) ("AR 190-8"), and U.S. Army Field Manual 34-52 ("FM 34-52"), all of which prohibit the abuse of

prisoners. [2] *See* RS.111, Appendix C-8 at Bates p. CACI-248 (military legal department authorized contract contingent on CACI's agreement that its employees adhere to the standards and policies set forth in FM 34-52). *See also* RS.111, Appendix C-7 at 12-13 (contractors accompanying the force are bound by Geneva Conventions); *id*. at 69 (civilians have duty to report abuse and a duty to protect prisoners).

The contract expressly requires CACI to supervise its own employees. Delivery Order 35 stated that "[t]he Contractor is responsible for providing supervision for all contractor personnel." RS.111, Appendix C-1, ¶5. Delivery

[2] Specifically, U.S. Army Field Manual 34-52, the military's interrogation manual in effect in Iraq in 2003-2004, states that the Geneva Conventions, the Uniform Code of Military Justice and U.S. policy forbid all "acts of violence or intimidation" against prisoners. RS.111, Appendix C-13 at p. 1-8. The Field Manual lists the following techniques as prohibited by the Geneva Conventions: electric shock; infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape); forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; food deprivation; any form of beating; mock executions; abnormal sleep deprivation; threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty; and intentionally denying medical assistance or care in return for information sought or other cooperation. *Id.* See AR 190-8 § 1-5 (a)-(c) (prohibiting torture, cruel treatment, and degrading treatment of prisoners); RS.111, Appendix C-7 at 12 (Detainees at Abu Ghraib were entitled to the legal protections of the Fourth Geneva Convention, as implemented by Army Regulations and Field Manuals); Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949 ("Fourth Geneva Convention"), 6 U.S.T. 3516, 75 U.N.T.S. 287, art. Art. 3, 27, 31, 32, 37, 100, 147; 10 U.S.C. §§881, 892, 893, 928 (2008)(UCMJ punitive articles defining the offenses of conspiracy, cruelty and maltreatment, dereliction of duty, and assault).

Order 71 stated that "all actions [of CACI interrogators and screeners] will be managed by" another, more senior, CACI employee. RS.111, Appendix C-2, ¶¶4.c, 4.d.

The contract also incorporates by reference the military regulations and field manuals that require defense contractors to supervise their own employees. The regulations and field manuals are explicit that contractors cannot shift the burden of controlling their employees to the military. U.S. Army Regulation 715-9 states that military contractors must "perform the necessary supervisory and management functions of their employees," because "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command." U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) ("AR 715-9"), §3-2(f). To like effect, federal procurement regulations require that defense contractors provide for a "written code of business ethics and conduct and an ethics training program for all employees"; a means by which "employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports"; "[d]isciplinary action for improper conduct"; "[t]imely reporting to appropriate Government officials of any suspected or possible violations of law in connection with Government contracts"; and "[f]ull cooperation" with government investigations of improper behavior. 48 C.F.R. §§203.7000-203.7001 (2008).

The relevant military Field Manual also makes clear that the corporate contractors, not the military chain of command, are exclusively responsible for maintaining discipline among their employees. The Field Manual recognizes that "the contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take ***direct responsibility and action*** for his employee's conduct." U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003) ("FM 3-100.21") §4-45 (emphasis added). *See also* Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations (April 6, 2000) V-7, V-8, available at http://www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf. The relevant military witness testified that he adhered to Army regulations and military field manuals in implementing the CACI contract. Daniels Supplemental Decl. ¶¶3-4.

CACI supervised and controlled its employees in Iraq. CACI management had the same rights vis-à-vis its employees in Iraq as in any other location. Porvaznik Dep. 192-193. These managerial rights included the right "to be the sole judge of the consistency and performance of employees, to determine the means and name in which the business is to be conducted, including assignment of employees, locations of facilities," and "to direct, supervise, control, and when it deems appropriate, discipline the work forces." RS.111, Appendix C-17 at 7-8.

CACI employees in Iraq were not required either by law or contract to obey military orders. *See* Mudd Dep. 90; Northrop Dep. 99; Nelson Decl. ¶¶5, 7, 8. CACI employees could not be court martialed under the Uniform Code of Military Justice (UCMJ). *See* Nelson Decl. ¶¶5, 8; Brady Dep. 17.

CACI employees were at-will employees, who were free to quit their jobs at any time without notice to the military. Nelson Decl., Exhibit A, at 55-62. CACI also could fire its employees at will. Monahan Dep. 133. CACI transferred and promoted its employees without the approval of the military. Brady Dep. 25, 38, 110, 126. CACI hired personnel without the military reviewing or approving the resumes. Brady Dep. 25, 38, 110, 126.

CACI physically placed a CACI Site Lead or manager to supervise CACI employees at every location in Iraq. Mudd Dep. 178; Porvaznik Dep. 234-35; Monahan Dep. 117. CACI selected a Site Lead for Abu Ghraib with intelligence qualifications. Porvaznik Decl. ¶2; Porvaznik Dep. 99-103; Mudd Dep. 147-48. The Abu Ghraib Site Lead (Daniel Porvaznik) reported to CACI management both in Iraq and in the United States. Monahan Dep. 117-18.

CACI executive Charles Mudd, who reported directly to CACI International Inc.'s Chief Executive Officer, repeatedly visited Iraq to ensure CACI employees in Iraq were performing adequately and being adequately supervised. Mudd Dep. 67, 78-79, 96, 188; Porvaznik Dep. 217-18.

CACI managers had the ability to monitor their employees' conduct towards prisoners, including their conduct during interrogations. Mudd Dep. 106-07, 181, 83; Porvaznik Dep. 142-44. The CACI Site Lead, Daniel Porvaznik, had access to the same information regarding CACI interrogators as Captain Carolyn Wood, the military Officer In Charge (OIC) of the Interrogation and Control Element of the Abu Ghraib facility. Porvaznik Dep. 140-41, 157-58. The CACI Site Lead reviewed CACI interrogators' interrogation plans because CACI wanted to make sure that its employees were performing their jobs properly.[3] *Id.* at 164-66. CACI Site Lead had the power to overrule and object to a CACI interrogator's written interrogation plans if he believed the plan crossed the line into illegal and wrongful prisoner treatment, such as using dogs or threatening family members. *Id.* at 164-68. He had the power to stop any physical abuse of prisoners by CACI personnel, including physical abuse during interrogations. *Id.* at 143-44.

The CACI Site Lead was responsible for stopping abuse as part of providing "quality control." Porvaznik Dep. 143-44. The CACI Site Lead had the authority to stop CACI employees from torturing and abusing prisoners even if a military person had ordered such torture and abuse. Porvaznik Dep. 299-300, 306-08;

[3] Although CACI and military interrogators were required to submit written interrogation plans for approval by military intelligence before each interrogation, in practice soldiers and civilians often did not follow this procedure. According to one Sergeant, "[i]t was kind of hit and miss on interrogation plans. To say that every time an interrogator went to interrogate a plan would be written down would be false." RS.111, Appendix C-28 at 2.

Mudd Dep. 149-50, 212-13. CACI employees who ignored the CACI Site Lead's order would be terminated. *Id.* at 182-85; RS.111, Appendix C-16.

The CACI Site Lead (and other CACI management) had the unfettered authority to terminate and discipline CACI employees without seeking military approval. Mudd Dep. 172-74, 185, 223-24; Billings Dep. 50, 88; Northrop Dep. 182.

CACI had the unfettered authority to investigate wrongdoing by their employees, and to measure such misconduct against CACI's own Code of Conduct, wholly independent from any military assessment. Mudd Dep. 211-212; Porvaznik Dep. 189; Northrop Dep. 131-32.

CACI directed its employees in Iraq to report all issues and problems they confronted to CACI management rather than to the United States military. Mudd Dep. 200-04. CACI viewed a clash between a CACI employee and a military person as a "CACI problem" that needed to be brought to CACI management, not to the military. *Id.* at 202-04.[4] If a CACI employee raised an issues directly with the military, CACI reprimanded and counseled him or her against doing do so in the future. *Id.* at 203-04.

[4] All forms of corporate communication (hotlines, email, etc.) were made available to CACI employees in Iraq. Monahan Dep. 67-68; Billings Dep. 122-23; Porvaznik Dep. 193.

CACI admitted in depositions that it was supposed to report all abuse engaged in or observed by its employees to the military. Monahan Dep. 66; Porvaznik Dep. 145-46. In fact, CACI failed to report the abuse of prisoners to the military. *See* RS.111, Appendix C-53; Monahan Dep. 144-85. CACI employee Torin Nelson faced threats and retaliation because he informed the military that CACI interrogators Daniel Johnson and Timothy Dugan abused prisoners. Nelson Decl., Exhibit A, at 55-60; RS.111, Appendix C-54; RS.111, Appendix C-55; RS.111, Appendix C-56; Northrop Dep. 185-89.[5]

CACI wholly disregarded the military's recommendation to terminate CACI employee Steven Stefanowicz for abusing prisoners in Iraq. RS.111, Appendix C-44 at 48 (Major General Antonio Taguba recommends Stefanowicz's termination for abusing prisoners at Abu Ghraib); RS.111, Appendix C-52. In a recently-published book, CACI's CEO asserts that CACI was "not convinced" by the findings of Major General Antonio Taguba's and Major General George Fay's investigations about Stefanowicz's misconduct, and decided that Stefanowicz' mistreatment of prisoners were only "minor abuses." J. Phillip London, *Our Good Name: A Company's Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib*, 188, 421 (Regnery Publishing 2008) (2008). CACI also resisted for some

[5] CACI learned of Mr. Nelson's disclosure through a Criminal Investigative Division agent. Nelson Decl., Exhibit A, at 57-58; RS.111, Appendix C-55.

time the military's recommendations to fire another employee implicated in abuse. *See* RS.111, Appendix C-48; RS.111, Appendix C-49; RS.111, Appendix C-51.

The military has not filed a statement of interest or submitted a declaration on CACI's behalf in this litigation. *See* RS.111, Appendix C-18. No member of the military has expressed an opinion on whether CACI employees functioned identically to soldiers, or on whether CACI is eligible for the government contractor defense. Daniels Supplemental Decl. ¶2 (declaration that military witness previously provided at CACI's request was not "intended to convey any opinion regarding the validity of any legal defense CACI may be advancing"); Brady Dep. 19-20 (military witness has "no personal views on the issue" of whether CACI employees were "essentially soldiers").

No member of the military based at Abu Ghraib has submitted a declaration stating that he or she supervised or in any way controlled CACI employees. *See* Daniels Supp. Decl. ¶¶5-6; Brady Dep. 62-63, 68-71, 103-104; *see also* RS.111, Appendix C-7 at 50, 52 (discussing lack of supervision).

The military official in charge of intelligence gathering at Abu Ghraib, Captain Carolyn Wood, testified to military investigators that she did not control or supervise CACI employees. RS.111, Appendix C-26;[6] *see also* RS.111, Appendix C-7 at 50, 52. Captain Wood described CACI's Site Lead Daniel Porvaznik as her

[6] *See* RS.111, Appendix C-26; RS.111, Appendix C-7 at 44-56, 50, 52.

"POC [point of contact] for CACI issues and personnel," and "relied heavily" on him to manage CACI employees. RS.111, Appendix C-26 at 4; *see also* RS.111, Appendix C-7 at 50.

Captain Wood relied on CACI Site Lead Porvaznik to interview CACI employees about their backgrounds when they arrived at Abu Ghraib, and to assign them (with her approval) to the various intelligence teams. RS.111, Appendix C-26, at 4; *see also* RS.111, Appendix C-7 at 50. Captain Wood met daily with the CACI Site Lead to discuss CACI employee performance. Porvaznik Dep. 138.

Captain Wood admitted under oath that CACI employees ended up supervising military soldiers. RS.111, Appendix C-7 at 52 (describing Captain Wood's testimony that CACI personnel "supervised" members of the military). Other soldiers verified this testimony. *Id.* at 51-52; *see also* RS.111, Appendix C-8 at Bates pp. CACI-249, CACI-250.

Colonel Thomas Pappas, the commander of the 205th Military Intelligence Brigade and Abu Ghraib, testified during court martial proceedings that CACI employees were not under his chain of command. Asked what CACI employee Stefanowicz' chain of command was in a statement to a court martial proceeding, Colonel Pappas replied that "his actual chain of command, he was a contractor, and that went back through the contractor lead, who was on site, back to the contracting officer's representative." RS.111, Appendix C-24 at 50-51. Colonel

Pappas testified that military intelligence could not discipline CACI employee Stefanowicz and others assigned to assist them. *Id.* at 51. He gave as an example Stefanowicz "overstep[ing] his bounds" by addressing Colonel Pappas by his first name. Colonel Pappas was unable to discipline Stefanowicz, but instead reported his insubordination to the military's contracting office. *Id.* at 40, 56.

Sergeant Adams, a military intelligence section leader at Abu Ghraib, admitted under oath that she had difficulty managing a CACI interrogator who "had a problem with authority. [He] had been an analyst in the Navy but he did not have any interrogation experience before Abu Ghraib. He had a problem with the military. He did not like the way the military chain of command functioned. And he didn't view the chain of command as something he needed to follow." RS.111, Appendix C-27.[7]

Staff Sergeant Neal described his attempt to counsel CACI employee Timothy Dugan as follows to military investigators:

> it was a CACI guy named [redacted] (an older guy). He was on my team. I took FM 34-52 and sat him down with [redacted] and gave him a verbal counseling on his job performance and to have him read the FM 34-52 approaches, and follow it. [Redacted] did not like me telling him how to do his job. He told me, "I have been doing this for 20 years and I do not need a 20 year old telling me how to do my job. I told him not to do things of that nature. He came out of an interrogation bragging that he made a detainee throw up…I spoke with his

[7] *See* RS.111, Appendix C-7 at 47, 51, 52, 74, 81, 91.

> analyst [redacted] and asked him what had happened and he said that [redacted] an thrown a chair and caused fear in the detainee to the point that he threw up. In joking he said [redacted] is going to try to make the detainee piss himself next time….I told [redacted] and he said, "What do you want me to do about it?" I basically had a shoulder turned on me.

RS.111, Appendix C-28 at 2-3;[8] *see also* RS.111, Appendix C-7 at 50, 131.

Several other military intelligence soldiers who served at Abu Ghraib testified to like effect. *See* RS.111, Appendix C-29 (military intelligence sergeant states that it was difficult to discipline CACI interrogators because "the CACI supervisor on the ground at Abu Ghraib" [Porvaznik] was "very leery about doing anything to his guys;" and "Some of the civilians thought that they were exempted from the rules of conduct which governed the soldiers and some of the interrogators seemed to feel the same"); RS.111, Appendix C-30 (soldier's sworn statement to military investigators that "the addition of civilian interrogators and linguists" at Abu Ghraib was "a direct contributor to the lack of discipline at the facility"); RS.111, Appendix C-32 (public statement of former military intelligence sergeant at Abu Ghraib that "civilian contractors involved in interrogation frequently behaved as if they were the superiors of the uniformed military interrogators…Their presence and activities clearly seemed to undermine or confuse the chain of command at Abu Ghraib").

[8] *See* RS.111, Appendix C-7 at 131 RS.111, Appendix C-7 at 131; Nelson Decl., Exhibit A at 33-43*;* RS.111, Appendix C-54.

CACI employees did not wear military uniforms, and generally identified themselves only by their first name or by a pseudonym. RS.111, Appendix C-34 at 34-36; Nelson Decl., Exhibit A at 36-37; Karpinski Decl. ¶13. As a result, military police soldiers (MPs) did not know CACI employees were legally forbidden from giving orders to military personnel. MPs have testified that they believed that CACI interrogators were civilian employees of "Other Government Agencies" (e.g., the Central Intelligence Agency) or simply followed CACI interrogators' orders without knowing who they were. *See* RS.111, Appendix C-34 at 36; Karpinski Decl. ¶¶ 13-15*;* RS.111, Appendix C-35 at 3 (MP later convicted for abusing prisoners at Abu Ghraib testifies that a person named "Steve" is involved in abuse, but "I don't know who he works for, I just know that he is an investigator/interrogator."); RS.111, Appendix C-36 at 22; Graner Interview at 247 (because Stefanowicz wore civilian clothes, Private Charles Graner stated that he initially "just assumed, you know, Big Steve at first was OGA…you know, another government agency. I didn't know who CACCI [sic] was.").

Several of the court-martialed soldiers admitted that CACI employees directed the abuse of prisoners. Private Graner, currently serving a ten-year sentence in Fort Leavenworth, told military investigators -- after he was already convicted -- that two CACI employees ("Big Steve" Stefanowicz and Daniel "DJ" Johnson) ordered him to abuse the prisoners. Graner Interview, 69-72, 115, 207-

210, 231-239, 244-248, 261-265, 284-287, 290-292, 297-298. Graner characterized CACI employee Stefanowicz as "in charge" and as directing the young military intelligence officials. *Id.* at 235. According to Graner, Stefanowicz repeatedly engaged in misconduct by, among other things, directing Graner and other military police to abuse and mistreat prisoners. *Id.* at 72, 232-233, 244, 263-264, 284, 290-292, 297-298. Graner also told military investigators that he witnessed CACI employee Daniel Johnson instructing others to torture a prisoner by "smacking [the prisoner] on the bottom of his feet and then forcing him to walk." *Id.* at 239. *See also* Frederick Interview at 56 (describing same incident).

Private Ivan Frederick, sentenced to eight years confinement for his participation in torture at Abu Ghraib, testified under oath that that he tortured and abused prisoners as a result of instructions given to him by CACI employees Stefanowicz and Johnson. Frederick Interview at 45, 49-51, 54-56, 84-90, 109-110; RS.111, Appendix C-39 at 40-41; 44- 47, 75-6, 77-78, 83, 87. Frederick testified that he deliberately inflicted pain on a prisoner, and restricted his breathing because he was directed to do so by CACI employee Johnson. Frederick Interview at 54-56. Frederick also testified that CACI employee Stefanowicz "told me personally to treat certain detainees like shit, use the dogs on certain detainees and he would sometimes be there directing as we carried it out."

Id. at 84. According to Frederick, "STEVE really liked using the dogs. STEVE called it the 'doggie dance.'" *Id.* at 109.

Javal Davis, another soldier court martialed for his participation in the abuse, and Captain Donald Reese, who commanded the unit, also testified to Stefanowicz's role in abusing and ordering the abuse of prisoners. RS.111, Appendix C-35 at 3; RS.111, Appendix C-59 at 45-47.

The statements of the military soldiers complicit in the prisoner abuse do not stand alone. The military officers charged with investigating prison abuse at Abu Ghraib found that CACI employees abused prisoners.

Major General Antonio Taguba expressly found that CACI employee Stefanowicz directed military police to engage in physical abuse of prisoners. RS.111, Appendix C-44 at 48. General Taguba found that Stefanowicz' instructions were not authorized by the military and were not in accord with the military regulations and interrogation policy. *Id*. General Taguba further found that, when questioned, Stefanowicz made false statements to investigators, and tried to cover up his activities. *Id.* General Taguba recommended that Stefanowicz be reprimanded, fired, and have his security clearance revoked. *Id.*

Major General George Fay found after further investigation that Stefanowicz (referred to as "CIVILIAN 21") abused prisoners and lied to government investigators. RS.111, Appendix C-7 at 134. General Fay also found that CACI

employees Dugan ("CIVILIAN-05") and Johnson ("CIVILIAN-11") violated military law, policy and standing orders by mistreating prisoners. General Fay found that Dugan refused to follow express military orders to refrain from mistreating prisoners. RS.111, Appendix C-7 at 79, 130-31. General Fay found that Johnson placed a prisoner in an "unauthorized" stress position, and used military dogs against prisoners in a manner that was "clearly abusive and unauthorized." General Fay corroborated the testimony of convicted soldier Frederick, finding that Johnson had directed and encouraged him to abuse prisoners. RS.111, Appendix C-7 at 82, 84, 132.

SUMMARY OF ARGUMENT

CACI employees abused the Abu Ghraib detainees. Such conduct subjects CACI to being tried under common law, unless a trial would intrude on the United States' sovereign immunities, the scope of which is set forth in the Federal Tort Claims Act. *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988) (defense invoked to protect FTCA discretionary function exception); *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) (defense invoked to protect FTCA combatant activities exception, 28 U.S.C. §2680(j)). CACI claims that subjecting it to a trial would harm the United States' military chain of command. The District Court found to the contrary, holding that CACI had not established on summary judgment that the military exercised exclusive operational control over CACI

employees. Rather, the evidence revealed that CACI exercised some amount of operational control over its employees in Iraq, and thus could have stopped the prisoner abuse.[9] Although CACI claims reversal is needed to protect the United States' military, the Department of Defense, in regulations adopted ***after*** the District Court held that CACI must stand trial, voiced unequivocal support for the current state of the law and for "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008). The Department of Defense expressly cautioned against judicially shifting the risks away from corporate wrongdoers to innocent third parties. In short, CACI has no factual or legal basis to claim that the District Court's holding impermissibly infringed on the United States military's command and control structures. This Court should affirm the District Court denial of summary judgment, and permit the action to proceed to trial.

[9] Note, the District Court simultaneously granted summary judgment to the defense contractor Titan, reasoning that such judgment was necessary because Titan employees (translators) were under the exclusive operational control of the military, outside Titan's ability to control and supervise.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS APPEAL ON THE GROUNDS THAT THE APPEAL WAS IMPROVIDENTLY GRANTED.

The District Court's decision below denied CACI's motion seeking summary judgment on an affirmative defense under *Boyle* and its progeny. The District Court's denial of CACI's motion for summary judgment simply does not merit an interlocutory or direct appeal. To be reviewed on this basis, a District Court decision must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; *and* (3) be effectively unreviewable on appeal from a final judgment. *Doe v. Exxon Mobil*, 473 F. 3d 345, 349 (D.C. Cir. 2007).

The District Court decision fails on all three counts. First, the District Court did not conclusively decide whether CACI could invoke the affirmative defense. Instead, the District Court merely held that a jury should decide, as there are disputed facts material to the invocation of the defense. *Ibrahim II*, 556 F.Supp.2d at 5 (citing *Boyle*, 487 U.S. 500, 514 (1988). Second, and to like effect, the District Court did not resolve any issue separate from the merits; it merely deferred resolution to a jury. Third, the District Court decision is not "effectively unreviewable on appeal from a final judgment" because the jury's determination of

the factual question -- and whether it is supported by the record of evidence introduced at trial -- can be reviewed after entry of a final judgment.

CACI's reliance upon immunity decisions such as *Mitchell v. Forsyth*, 472 U.S. 511 (1985) is misplaced because, in the words of the District Court, "immunity involves not an affirmative defense that may ultimately be put to the jury, but a decision by the court at an early stage that the defendant is entitled to freedom from suit in the first place." *Ibrahim I*, 391 F.Supp.2d at 18, n. 5 (citing *Mitchell*, 472 U.S. at 523-27, and noting that defense was one of preemption, not immunity). Under *Mitchell*, *supra* and its progeny,

> The order in question resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial. We hold that the defendants cannot immediately appeal this kind of fact-related district court determination.

Johnson v. Jones, 515 U.S. 304, 307 (1995). The Supreme Court affirmed this principle in *Crawford El v. Britton*, 523 U.S. 574, 595 (1998) (rejecting the "argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency."). While both immunity and preemption ultimately have the effect of discharging a defendant from liability, the procedural differences between the two doctrines (i.e., the fact that the defendant has the burden of proving the affirmative defense of preemption while the plaintiff

has the burden of proving the absence of immunity) compelled the District Court to hold that CACI's claim of preemption be decided by a jury, meaning that the decision below neither "conclusively determine[s] the disputed question" nor "resolves an important issue completely separate from the merits of the action." *Exxon Mobil*, 473 F. 3d at 349.

Plaintiffs' motion to dismiss the direct appeal was mooted by this Court's grant of interlocutory appellate jurisdiction under 28 U.S.C. §1292(b). If this Court decides (as it should) to revisit the §1292 ruling and withdraw the interlocutory review as improvidently granted, Plaintiffs respectfully submit that the direct appeal should also be dismissed for all the reasons set forth in their motion to dismiss.

II. CACI IS NOT ENTITLED TO INVOKE THE *BOYLE* DOCTRINE TO PROTECT AGAINST LIABILITY FOR ITS OWN EGREGIOUS MISCONDUCT.

The *Boyle* doctrine should not apply to this action. *Boyle* and its progeny, including *Koohi*, 976 F.2d 1328 (9th Cir. 1992), and *Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp 1486 (C.D. Cal. 1993), are designed to protect the United States' decisions, not to protect private contractors for their own action. The illegal and extra-contractual actions by CACI employees should, as a matter of law, place this action outside the scope of the *Boyle* doctrine. There is no evidence that the military supports CACI's efforts to protect itself against liability for the egregious

prisoner abuse. The military has court-martialed soldiers who conspired with CACI to abuse prisoners. The Department of Defense also recently voiced the view that the *Boyle* doctrine should not be applied to insulate service contractors from liability for their own "negligent or willful actions," as distinct from actions mandated by the government. Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008).

A. The *Boyle* Doctrine May Be Invoked Only To Protect the United States' Interests, Not Government Contractors'.

The affirmative defense sought by CACI is not intended to insulate government contractors from accountability for their ***own*** misconduct. *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 139 (2d Cir. 2008). As explained by the Supreme Court in the seminal case creating the affirmative defense, *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988), the purpose is to protect the United States. The defense ensures that federal contractors, acting in accord with the terms of their contracts with the federal government, are not held liable for their contractually-mandated conduct.

The Supreme Court created the defense to protect the United States' interests from infringement by state tort laws and state judicial systems. The Court reasoned that subjecting contractors to state tort liability for decisions actually

made by the federal government, not the contractors, would implicate "uniquely federal interests" and create a "significant conflict" with federal policies. *Boyle*, 487 U.S. at 504-513.

In *Boyle* itself, the Supreme Court barred the application of state strict products liability laws against the manufacturer of a helicopter designed according to military specifications. The Court reasoned that permitting liability "would produce the same effect sought to be avoided" by the FTCA's discretionary function exemption, 28 U.S.C. §2680(a). *Boyle*, 487 U.S. at 511. The Court held that the discretionary function exemption preempted suits against manufacturers who provided equipment to the U.S. government for design defects "when (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." *Boyle,* 487 U.S. at 512.

Boyle has not been applied to protect a contractor from liability resulting from its *violation* of federal laws and federal policies. For example, in *Jama v. INS*, 334 F. Supp. 2d 662 (D.N.J. 2004), the District Court held *Boyle* inapplicable to a contractor who ran a detention facility for asylum applicants because the alleged tortious conduct violated certain contract terms. The court found, "In hiring, training, and supervising its employees, [contractor] Esmor was required

not only to abide by the detailed terms of the Contract, but also to fulfill its more general obligation of running the facility safely. It would defy logic to suggest that the INS could have 'approved' practices that breached this larger duty." *Id*. at 689. *See also Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 927 (E.D. Wis. 1999) (*Boyle* doctrine is "intended to protect contractors from 'civil liabilities arising out of the performance of federal procurement contracts,' and not from liabilities arising out of the breach of such contracts.") (internal citations omitted).

The Supreme Court held in *Boyle* that the affirmative defense does not apply when the state law duty imposed is consistent with the contract, but would apply when that state law duty contradicts the contract. The Court went on to state that "it is easy to conceive of an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." *Boyle*, 487 U.S. at 509. In that situation, as long as "[t]he contractor could comply with both its contractual obligations and the state prescribed duty of care," state law will not generally be pre-empted. *Id.* Courts applying *Boyle* have followed this guidance. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001) ("Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense."); *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)

("Stripped to its essentials, the military contractor's defense under *Boyle* is to claim, 'The Government made me do it.'"). *See also Neilson v. George Diamond Vogel Paint Co.*, 892 F. 2d 1450, 1454-55 (9th Cir. 1990); *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 86 (2d Cir. 1993); *Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203, 1207 (N.D. Cal. 1994) (holding that the "requisite conflict exists only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract."). In the present case, where the state common law duty is not contrary to any obligation assumed in the contract, *Boyle* has no application.

B. The Department of Defense Agrees that Government Contractors Providing Services to the United States Should Not Be Permitted To Invoke the *Boyle* Doctrine To Fend Off Liability for Their Own Actions.

The Department of Defense ("DoD"), in a regulation and accompanying comments published in the Federal Register months ***after*** the District Court issued its November 6, 2007 Order, voiced unequivocal support for "***the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors.***" Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008) (emphasis added).

The DoD opposed extending the *Boyle* doctrine to service contractors who were trying to evade liability for their own actions, as opposed to actions done at the direction of the military.

The DoD noted the revised regulations "cover[ed] service contracts, not manufacturing," and stated,

> ***The public policy rationale behind Boyle does not apply when a performance-based statement of work is used in a service contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors***….Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. ***However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties.***

Id.[10]

The Court should reject CACI's invitation to shift responsibility for CACI's misconduct to innocent third parties such as plaintiffs. Such a result is opposed by

[10] Given how much CACI harmed the United States and its reputation around the world, the United States Congress is seriously considering a complete *ban* on using corporate employees for interrogation. The U.S. House of Representatives' 2009 Defense Authorization Bill includes an amendment banning the use of contractors in interrogation, which passed by a 240-168 margin. 154 Congressional Rec. H4794-96, H4810 (daily ed. May 22, 2008). The legislation is still pending before the Senate.

the military, the very sovereign entity CACI purports to be protecting from judicial intrusion. This Court should rule that CACI is not permitted to invoke the *Boyle* defense, which protects the sovereign, not a corporate entity who abused prisoners and then tried to hide the misconduct and wrongdoing from the military.

C. The *Boyle* Affirmative Defense Cannot Be Invoked To Defend Against Claims Premised on CACI's Self-Initiated Conduct at Abu Ghraib Prison.

The conduct at issue here (torturing and abusing prisoners of war) was illegal and extra-contractual. CACI has not claimed that the military ordered Messrs. Stefanowicz, Dugan and Johnson to abuse prisoners. CACI should be barred as a matter of law from invoking the judicially-created *Boyle* affirmative defense. *See In Re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005) (stating that corporations cannot invoke the government contractor defense for suits based on their violations of the laws of war, because conduct that "is illegal under international law…cannot be an appropriate public duty.").

That the law prohibited abuse of prisoners at Abu Ghraib is beyond dispute. *See CACI Premier Technology, Inc. v. Rhodes*, __ F.Supp.3d ___, No. 06-2140, 2008 WL 2971803, at *1 (4th Cir. Aug. 5, 2008) (describing how "sickening photographic evidence" of abuse at Abu Ghraib "stunned the U.S. military, public officials in general, and the public at large."); *id.* at *2 (quoting Taguba Report's

finding of "sadistic, blatant, and wanton criminal abuses" at Abu Ghraib); *id.* at *4 (quoting Fay Report's description of the abuses at Abu Ghraib as "shameful events," "ranging from inhumane to sadistic," perpetrated by "a small group of morally corrupt soldiers and civilians," that "violated U.S. criminal law" or were "inhumane and coercive without lawful justification."). Had the CACI employees been members of the military, their misconduct at Abu Ghraib would have led them to be court-martialed. The United States military, recognizing the legal duty not to abuse and torture prisoners, court-martialed and convicted soldiers and officers who conspired with CACI employees to mistreat prisoners. *See Ibrahim I*, 391 F.Supp.2d at 16 (recognizing that defendants are being sued "for actions of a type that both violate clear United States policy . . . and have led to recent high profile court martial proceedings against United States soldiers.")

CACI relies primarily on *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) and *Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp. 1486 (C.D. Cal. 1993), two cases in which the *Boyle* affirmative defense was applied to protect the United States combatant activities exception to the FTCA, but neither of these cases are applicable to the claims alleged here. In both *Koohi* and *Bentzlin*, the courts applied the combatant activities exception to the FTCA and preempted product liability claims arising out of direct action by the United States military that led to injuries to third parties. The contractors sued did not perform the injury-causing

event; instead those events occurred during combat at the hands of the United States military. The intervening actions of the U.S. military are a necessary prerequisite for pre-emption under this framework. No court has applied *Koohi* or *Bentzlin* to claims such as those at issue here, where the government contractor directly harmed plaintiffs without having been ordered to do so by the military.[11]

III. THE DISTRICT COURT ADEQUATELY PROTECTED THE UNITED STATES' MILITARY CHAIN OF COMMAND.

CACI argues on appeal that the District Court failed to protect the United States' military chain of command. CACI argues that ***all*** defense contractors providing services in wartime must be insulated from ***any*** judicial scrutiny in order to prevent judicial interference with military decision-making. CACI's self-serving attempt to elevate and equate CACI's corporate financial interests with the military's interests should be rejected by this Court. Neither the Department of State nor the DoD has filed a statement supporting CACI's self-serving corporate efforts to evade the judicial process. Indeed, as noted above, the DoD believes that the *Boyle* doctrine should not be applied when the conduct at issue was not directed or ordered by the United States.

[11] *Koohi* and *Bentzlin* are discussed further in Section III(C)(1) below.

A. The District Court Expanded the Reach of the Judicially Created *Boyle* Defense by Adopting CACI's Proposed "Exclusive Operational Control" Test.

The District Court rejected Plaintiffs' arguments and agreed with CACI that service contractors who acted illegally could nonetheless invoke the *Boyle* doctrine to protect the United States' non-waiver of sovereign immunity as expressed in the combatant activities exception to the FTCA. The District Court cited to *Koohi* and held that the purpose of the combatant activities exception to FTCA is to ensure "that state law will not interfere with an officer's authority, pursuant to the military chain of command, to give legally binding orders to his subordinates….the exception eliminates the possibility that state law liability could cause a soldier to second-guess a direct order." *Ibrahim II*, 556 F.Supp.2d at 5. The District Court ruled that CACI was entitled to summary judgment under Fed.R.Civ.P. 56 if and only if CACI was able to establish that the United States' military exercised "exclusive operational control" over CACI employees at Abu Ghraib. *Id.*

CACI tries to concoct an appellate issue by claiming that the District Court unfairly sandbagged CACI by "abandoning" its earlier phrasing ("soldiers in all but name"), and adopting instead the "exclusive operational control" test. CACI Brief at 5-6. This argument lacks any merit, as it was CACI who repeatedly argued to the District Court that summary judgment should be granted because CACI employees were under the complete operational control of the United States

military. *See, e.g.,* Northrop Decl. ¶5 ("I did not exercise any operational control over CACI or military interrogators…Rather, CACI personnel were at all times under the operational supervision, control, and direction of U.S. military personnel"); RS.118 at 5 ("CACI PT Personnel Were Under the Complete Operational Control of the United States Army."); *id.* at 6 ("witness after witness referenced the total operational control exercised by the military"); *id.* at 11 ("at all times, operational supervision was vested exclusively in the United States Army").

Indeed, at the October 3, 2007, oral argument, CACI counsel ***advocated*** that the District Court abandon the "soldiers in all but name" test as too "fuzzy" and instead adopt CACI's focus on whether the military exercised exclusive, absolute, and total operational control over CACI employees. See Oct. 3 Oral Argument Tr. at 57 (CACI's counsel states that "the rubric of whether the contractors were acting as soldiers in all but name was a little fuzzy," and suggests that the court clarify it by adopting "[t]he operational control test"); *see also id.* at 7 ("the hard facts… reflect absolute operational control by the United States Army over all facets of interrogation activity by CACI interrogators."); *id.* at 6 (CACI was "under the complete and total operational control of the United States Army in performing interrogations…. every step of the way is evidenced by complete operational control"); *id.* at 9 ("there's simply no reasonable dispute over the absolute operational control exercised by the United States Army" over CACI

interrogators); *id.* at 13 ("activities of CACI PT reflect absolute operational control by the military"); *id.* at 16 (referring to "absolute operational control by the United States Army" over CACI interrogators); *id.* at 63 (military had "total operational control" over CACI interrogators). *See also* RS.133 at 4 (arguing that CACI is eligible for summary judgment because "the undisputed facts on the ground demonstrate the Army's total operational control," and all other evidence was immaterial); *id.* at 5 (referring to Army's "absolute operational control" over CACI interrogators).[12]

The Plaintiffs argued that it was impossible for a suit against a civilian defense contractor to threaten military officers' authority to issue legally binding orders to subordinates, because private contractors by definition are not subject to

[12] CACI argues that in order for plaintiffs' tort claims to be preempted under the combatant activities exemption to the FTCA, defendants need only demonstrate a sufficient government interest and that their employees were engaged in activities "necessary to and in direct connection with actual hostilities" in a combat zone. CACI Brief at 34-37. CACI asserts that the district court found that its interrogators at Abu Ghraib "were engaged in combatant activities of the military," and that *Koohi* requires dismissal of the plaintiffs' claims on that basis alone. *Id.* at 34-35. Plaintiffs strongly disagree that the District Court found that CACI employees "were engaged in combatant activities *of the military*." Rather, that was the question the District Court was seeking to answer in determining whether CACI was under the "exclusive operational control" of the military. In any event, CACI's two part test essentially reads out of the *Boyle* test the question of whether in fact the federal government required or even authorized the contractors' behavior. Simply being contractors in a war zone is not enough to invoke *Boyle*. *See Boyle*, 487 U.S. at 510-11 (defining "limiting principle" so as to ensure that the results of allowing preemption of claims against contractors were neither "too narrow" nor "too broad").

the military's system of discipline, command and control. *See e.g., McMahon v. Presidential Airways*, 502 F.3d 1331, 1348 (11th Cir. 2007) (allowing suits against private contractors does not threaten military discipline, because "a private contractor is not in the chain of command"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)(judicial deference to military discipline must be limited to those "lawfully inducted" into the Army); *United States v. Brown*, 348 U.S. 110, 112 (1954) (discussing special relationship between soldier and superiors); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (military is, by necessity, a specialized society separate from civilian society); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (military discipline has no counterpart in civilian life); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (unique military structure based on established relationship between enlisted military personnel and their superior officers). The District Court, however, was persuaded by CACI, and held that the relevant inquiry was the "the degree of operational control exercised by the military over contract employees." *Ibrahim II*, 556 F.Supp.2d at 5.

The District Court reasoned that the United States' interests would be served by permitting government contractors to invoke the affirmative defense only in those instances when they were acting under the sole control of the military. *See In re Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990) ("Stripped to its essentials, the military contractor's defense under *Boyle* is

to claim, 'The Government made me do it.'"). The District Court held 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." *Ibrahim II*, 556 F.Supp.2d at 5. The District Court properly focused on protection of United States' military, not corporate defense contractors, interests: "[i]t is the military chain of command that the FTCA's combatant activities exception serves to safeguard…common law claims against private contractors will be preempted only to the extent necessary to insulate *military* decisions from state law regulation." *Id.* (emphasis in original).

B. The Facts Establish That CACI Exercised As Much or More Operational Control Over CACI Employees at Abu Ghraib Prison Than the Military.

The District Court designed its test for pre-emption in an effort to protect the interests of the United States military, not simply to protect the corporate interests of a defense contractor (CACI) who had actually caused grave harm to the military. After adopting CACI's proposed "exclusive operational control" formulation, the District Court denied summary judgment to CACI, but granted summary judgment to Titan (now known as L-3), finding that the Titan translators were under the exclusive operational control of the military.

The District Court reached these differing results based on the evidence.[13] It concluded that there was sufficient evidence to permit a reasonable jury to find that "CACI interrogators were subject to a dual chain of command, with significant independent authority retained by CACI supervisors," and that "[w]hen the facts are construed in this manner, no federal interest requires that CACI be relieved of state law liability." *Ibrahim II*, 556 F.Supp.2d at 10. Given this evidence, CACI was not entitled to summary judgment on the affirmative defense, on which it bears the burden of both production and persuasion. *See Ibrahim I,* 391 F. Supp. 2d at 17-18 ("[P]reemption under the government contractor defense is an affirmative defense, with the burden of proof on the defendants."); *see also Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

(1) The Soldiers Convicted of Mistreating Prisoners Testified That CACI Employees Directed and Participated in the Abuse of Prisoners at Abu Ghraib.

CACI fails to explain why this Court should simply ignore the evidence that clearly raises a genuine issue of material fact about whether the military exercised exclusive operational control over the CACI employees at Abu Ghraib, including "Big Steve" Stefanowicz, "DJ" Johnson, and Tim Dugan. Instead, perhaps

[13] Plaintiffs believe the District Court overlooked certain critical evidence regarding Titan, and are appealing that portion of the decision.

attempting to create the illusion that the Department of Defense ("DoD") somehow supports CACI's effort to evade accountability (which it does not, see above at Section II-B), CACI cites to high-level DoD officials' testimony before Congress in the immediate aftermath of the Abu Ghraib scandal. This testimony -- to the effect that the military did not officially bestow any authority to supervise and direct soldiers onto CACI employees -- predates the military's own release of an investigative report concluding that CACI interrogators did, in fact, supervise and direct soldiers. *See* RS.111, Appendix C-7 at 51-52. More importantly, the question for this Court on appeal is not whether CACI has some support for its invocation of the defense, but whether the facts are so one-sided and uniform as to merit the Court taking the issue away from the jury and granting CACI summary judgment before merits discovery and before a trial. *See Morgan v. Fed. Home Loan Mortgage Corp.*, 328 F.3d 647, 650 (D.C. Cir. 2003) (citing *Celotex Corp. v Catrett*, 477 U.S 317, 322 (1986)). *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (in adjudicating motion for summary judgment, court should "disregard all evidence favorable to the moving party that the jury is not required to believe," and should only rely on testimony in favor of the moving party that is "uncontradicted, unimpeached," and "comes from disinterested witnesses.").

The record below contains ample testamentary evidence from military soldiers and officers who were actually located at Abu Ghraib that prevented the District Court from holding that CACI employees were under the exclusive operational control of the military.

A few examples of testimony raising material factual disputes suffice: Private Charles Graner, currently serving a ten-year sentence in Fort Leavenworth for abusing prisoners at Abu Ghraib, told military investigators that two CACI employees ("Big Steve" Stefanowicz and "DJ" Johnson) ordered him to abuse the prisoners. SOF at 18. Graner characterized Stefanowicz as "in charge" and as directing the young military intelligence officials. SOF at 18. According to Graner, Stefanowicz repeatedly engaged in misconduct by, among other things, directing Graner and other military police to abuse and mistreat prisoners. SOF at 18. Graner also told military investigators that he witnessed CACI employee Daniel Johnson instructing others to torture a prisoner by "smacking [the prisoner] on the bottom of his feet and then forcing him to walk." SOF at 18.

Private Ivan Frederick, sentenced to eight years confinement for his participation in torture at Abu Ghraib, testified under oath that that he tortured and abused prisoners as a result of instructions given to him by CACI employees Stefanowicz and Johnson. SOF at 18-19. Frederick testified that he deliberately inflicted pain on a prisoner, and restricted his breathing because he was directed to

do so by CACI employee Johnson. SOF at 18-19. Frederick also testified that CACI employee Stefanowicz "told me personally to treat certain detainees like shit, use the dogs on certain detainees and he would sometimes be there directing as we carried it out." According to Frederick, "STEVE really liked using the dogs. STEVE called it the 'doggie dance.'" SOF at 19.

Javal Davis, another soldier court martialed for his participation in the abuse, and Captain Donald Reese, who commanded the unit, also testified to Stefanowicz's role in abusing and ordering the abuse of prisoners. SOF at 19. The record evidence clearly could be found by a jury to reveal that CACI employees abused prisoners, and directed (i.e., conspired with) military police to abuse prisoners.

(2) The Military Generals Tasked with Investigating the Abu Ghraib Prison Scandal All Found That CACI Employees Participated in Wrongdoing.

Further, the military generals who were charged with investigating the prisoner abuse at Abu Ghraib expressly found that CACI employees were ***not*** under the exclusive operational control of the military, but rather acted contrary to military direction, regulation and policy. Indeed, the military reports raise the lack of military control over the civilian contractors as a serious structural problem that was interfering with the military's mission.

General Taguba expressly found that CACI employee Stefanowicz directed military police to engage in physical abuse of prisoners. General Taguba found that CACI employee Stefanowicz' instructions were not authority by the military and were not in accord with the military regulations and interrogation policy. General Taguba further found that, when questioned, CACI employee Stefanowicz made false statements to investigators, and tried to cover up his activities. SOF at 19-20.

To the same effect, General Fay found after further investigation that Stefanowicz (referred to as "CIVILIAN 21") abused prisoners and lied to government investigators. SOF at 20. General Fay also found that CACI employees Dugan ("CIVILIAN-05") and Johnson ("CIVILIAN-11") violated military law, policy and standing orders by mistreating prisoners. General Fay found that CACI employee Dugan refused to follow express military orders to refrain from mistreating prisoners. SOF at 20. General Fay found that CACI employee Johnson placed a prisoner in an "unauthorized" stress position, and used military dogs against prisoners in a manner that was "clearly abusive and unauthorized." General Fay corroborated the testimony of convicted soldier Frederick, finding that CACI employee Johnson had directed and encouraged him to abuse prisoners. SOF at 20.

(3) CACI Management Had the Power and Authority To Ensure that CACI Employees Abided by Military Instruction and Policy.

The District Court found that CACI was not entitled to summary judgment because a reasonable jury could find that "CACI interrogators were subject to a dual chain of command, with significant independent authority retained by CACI supervisors" to prevent CACI employees from torturing prisoners. *Ibrahim II*, 556 F.Supp.2d at 10. The District Court cited testimony from CACI Abu Ghraib Site Lead Daniel Porvaznik that employees were obligated to report prisoner torture to both CACI and the military. *Id.* at 10.

The CACI Site Lead testified under oath that he reviewed CACI interrogators' interrogation plans, and had the power and authority to prohibit a contract interrogator from pursuing an interrogation plan that he felt was not consistent with the CACI Code of Ethics. Porvaznik Dep. at 140-44, 164-66, 299-300, 307-08. He testified that he would have stopped CACI employees implementing an illegal, abusive interrogation plan even if a member of the U.S. military had approved it. *Id.* at 299-300, 307-08. If a CACI employee ignored a direct order from the CACI Site Lead, CACI would terminate him or her.[14] *Id.* at 182-85.

[14] CACI argues that CACI Site Lead Porvaznik's admission that he had the authority to forbid employees from torturing prisoners should be disregarded because he never actually objected to a CACI employees' proposed interrogation

CACI Site Lead Porvaznik's testimony is consistent with deposition testimony from CACI executive Charles Mudd. Mudd testified that he visited Iraq 17 times to ensure that CACI employees in Iraq were performing adequately. Mudd Dep. at 47, 67. During these visits, Mudd asked about how CACI employees were treating prisoners and how they were conducting interrogations, and observed interrogations. *Id.* at 96, 181-83. Mudd testified that CACI expected employees who were asked to illegally abuse prisoners to refuse, and to inform CACI management. *Id*. at 149-50.

Mudd's and Porvaznik's testimony is also consistent with the terms of CACI's contract and Army Field manuals and regulations, all of which place the duty on CACI , not the military, to supervise its employees and prevent them from violating the laws of war. SOF at 6-8. CACI now claims that the company was required to provide only "administrative support," CACI Brief at 12, but the contract required CACI to retain and deploy an experienced person with a security clearance to perform the required supervision. RS.111, Appendix C-1, ¶5.

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plan. But obviously the litigation itself proves that CACI's Site Lead failed to stop CACI employees from abusing prisoners. The District Court correctly found that CACI Site Lead Porvaznik's own admissions that he had the ability and authority to stop the abuse raise genuine issues of material fact.

CACI's claim that the company was only required to provide administrative support is also wholly contradicted by the Army Regulation 715-9 and the Army Field Manual governing the use of contractors. Those authorities make it clear that CACI, not the U.S. military, was responsible for ensuring that corporate employees at Abu Ghraib did not abuse prisoners. *See* AR 715-9 §3-2(c) ("Commercial firm(s) providing battlefield support services will supervise and manage functions of their employees"); *id.* at §3-2(f) ("Contractor employees are not under the direct supervision of military personnel in the chain of command."); *id.* at §3-3(b) ("Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel"). *See also* FM 3-100.21, §1-22 ("Commanders do not have direct control over contractors or their employees"); *id*. at §1-25 ("Only the contractor can directly supervise its employees") *id.* at §4-2 ("As stated earlier, contractor management does not flow through the standard Army chain of command.... It must be clearly understood that commanders do not have direct control over contractor employees"); *Id.* at §4-45 ("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command….It is the contractor who must take direct responsibility and action for his employee's conduct.")

CACI, which has the burden of proof, has introduced no evidence that the military departed from these policies in Iraq. On the contrary, the relevant military witness has submitted a sworn declaration stating that he complied with Army Regulations and Field Manuals in administering CACI's contract. SOF at 8.

(4) CACI Has Failed To Present *Any* Evidence that the Military Ordered CACI Employees To Abuse Prisoners.

CACI continues to insist, without any supporting deposition testimony, that the military "exercised exclusive supervision and control of CACI PT interrogators' performance of their interrogation duties." CACI Brief at 44. The only citation given to support this claim is to the policy that CACI employees were required to submit their "interrogation plans" for review by military personnel; that the U.S. military set the rules of engagement for interrogation at Abu Ghraib; and that interrogators could not lawfully deviate from the rules of engagement without authorization from military officers. *Id.* at 13-14. All of those facts are certainly true.

But the reason for the lawsuit, and the reason why the affirmative defense established by *Boyle* does not compel summary judgment, is the overwhelming body of evidence establishing that CACI employees acted unlawfully and ***without authorization*** from the military. If CACI employees had done as they were told to do by the terms of the contract and the military, and abided by the military

orders not to mistreat prisoners, there would not be a lawsuit pending against them for *illegally* abusing prisoners.

The limited discovery permitted by the District Court to date, combined with the military investigations and testimony regarding Abu Ghraib, strongly suggests that the CACI employees actually were the ringleaders in the illegal abuse. CACI employees Stefanowicz and Johnson mistreated prisoners so badly that both Frederick and Graner -- who were sentenced to a total of eighteen years in prison for their own illegal conduct -- drew the line and refused to participate. Graner Interview at 263-64; Frederick Interview at 56.

CACI failed to present ***any*** evidence whatsoever that the CACI employees were directed by the military, received military authorization and approval, to abuse prisoners. CACI instead simply points to the *Saleh* Plaintiffs' RICO statement, no longer an operative document in the litigation given the dismissal of the RICO claims, as evidence that the Plaintiffs alleged former Secretary of Defense Rumsfeld and other high-level military officials were involved as co-conspirators in the abuse. CACI Brief at 3-4, 39-40. But CACI cannot rely on Plaintiffs' allegations about which military members may be co-conspirators to prove that those co-conspirators ordered CACI employees to act as they did. Former Secretary Rumsfeld and the others have all denied that they authorized the Abu Ghraib prison abuse. The military generals and civilian leadership who have

investigated the facts also have concluded that CACI employees acted unlawfully and without military authorization.

(5) CACI Prevented the Military From Learning of CACI's Abuse of Prisoners By Adopting a Corporate Policy of Lying and Covering Up Prison Abuse.

CACI, unable to produce any evidence that any member of the military told CACI employees to abuse prisoners, argues that such orders may be assumed because CACI employees had to submit written interrogation plans to the military. CACI extrapolates this submission of written interrogation plans into exclusive operational control. But CACI's extrapolation misses the mark and fails to entitle CACI to summary judgment: the CACI employees did not include their plans to abuse unlawfully prisoners, and direct military police to abuse prisoners, in their written plans.

CACI has not elicited any testimony or affidavits from Messrs. Stefanowicz, Dugan and Johnson to the effect that they memorialized the abuse and received approval to proceed. Military intelligence testified that, "[t]o say that every time an interrogator went to interrogate a plan would be written down would be false." SOF at 10, n.3. It is even less likely that unlawful abuse would have been included in written plans.

CACI's claim that the military must have known and approved of CACI employees' abuse of prisoners is also undercut by the extensive evidence that CACI actively concealed CACI prisoner abuse from the military. As noted above, both General Taguba and General Fay found that CACI employee Stefanowicz lied under oath to military investigators. SOF at 19-20. CACI employee Stefanowicz' lies to the military do not stand alone. Rather, the record evidence suggests that CACI had a company policy to hide prisoner abuse from the military. SOF at 12. CACI's policy of concealment is reflected also in the fact that CACI amended its corporate code of ethics to eliminate any mandatory reporting of misconduct to the military. *See* RS.34, ¶88.

In sum, although the military set the rules of engagement at Abu Ghraib, CACI has not proved that its employees followed those rules of engagement. The military was not able to exercise exclusive operational control over CACI, who unlawfully abused prisoners, directed soldiers to abuse prisoners, and lied under oath to prevent the military's detection of this misconduct. As admitted by CACI executives, such misconduct violates the terms of its contract with the military, which requires that employees abide by the Geneva Conventions, AR 190-8, and Field Manual 34-52, which specifically prohibit the type of conduct engaged in by CACI employees. SOF at 6, n.2.

C. This Court Should Reject CACI's Effort To Transform the *Boyle* Defense Into Absolute Immunity.

Although the District Court applied CACI's own "exclusive operational control" formulation to the *Boyle* doctrine, it reached a different result than CACI after reviewing the evidence described above. As a result, CACI now tries to back away from its briefing below and persuade this Court to adopt whatever definition works to yield the desired result for CACI: complete immunity from judicial scrutiny of its employees' egregious misconduct at Abu Ghraib.

(1) CACI Seeks the Absolute Immunity for War Zone Contractors That Has Been Repeatedly Rejected by Every Court To Consider the Issue.

CACI argues that in order for plaintiffs' tort claims to be preempted under the combatant activities exemption to the FTCA, Defendants need only demonstrate that their employees were engaged in activities "necessary to and in direct connection with actual hostilities" in a combat zone. CACI Brief at 34-37. CACI reasons that, given the District Court's finding that CACI employees were involved in combat support, this Court should grant CACI summary judgment.

CACI relies heavily on *Koohi*. There, the Court of Appeals for the Ninth Circuit held that a weapons manufacturer could invoke the affirmative defense against survivors of civilians mistakenly killed when the military erroneously fired their weapons against the wrong target. The survivors had sued the weapon

manufacturer, seeking to recover for the military's mistake. The Court held that the manufacturer had to be insulated from liability because the weapon was being used in combat.

Koohi is distinguishable on several grounds. First, *Koohi* was a products liability case implicating defects in manufacturing. The contractors merely supplied the military with a weapons system, in accordance with the terms of their contract; it was the United States Navy who actually used the weapons to shoot down a civilian plane.[15] Here, the lawsuit seeks to recover for intentional torts, not only torts based on negligence. The lawsuit alleges actual and direct wrongdoing by CACI employees, who were undisputedly *not* members of the U.S. Army, Navy, or Coast Guards.

Second, unlike the shooting down of an aircraft in *Koohi*, the defendants' acts occurred in a prison, where the military recognizes and abides by the well-established legal duties owed to prisoners detained *hors de combat*. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006).

The District Court considered and rejected CACI's effort to use this Ninth Circuit decision to bestow absolute immunity on all defense contractors operating

[15] Similarly, the Court in *Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp 1486 (C.D.Cal. 1993), applied the combatant activities exception to the friendly fire killings of U.S. Marines by a missile fired by U.S. Air Force aircraft during the Persian Gulf War.

in Iraq. The District Court noted, "[i]n *Koohi*….the preempted tort claims were for products liability. There was, and is, no controlling authority applying the combatant activities exception to the tortious acts or omissions of civilian contractors in the course of rendering services during 'wartime encounters.'" *Ibrahim II,* 556 F.Supp. at 3. *See also Ibrahim I*, 391 F.Supp.2d at 17 (declining to "expand *Boyle's* preemption analysis beyond *Koohi's* negligence/product liability context to automatically preempt any claims, including these intentional tort claims, against contractors performing work they consider to be combatant activities. This would be the first time that *Boyle* has ever been applied in this manner.")

Several other federal courts also have rejected consistent corporate attempts to use *Koohi* to extend the *Boyle* doctrine so as to encompass any and all claims asserted against service contractors in combat zones. *See McMahon v. Presidential Airways*, 502 F.3d at 1366 (declining to review or reverse District Court's holding (460 F.Supp.2d 1315, 1330 (M.D.Fla. 2006)) that declines to extend *Boyle* "defense for private contractors based solely on the fact that [d]efendants were operating in a combat zone."); *see also Carmichael v. Kellogg, Brown, & Root Servs.*, *Inc.*, 450 F.Supp.2d 1373, 1380-81 (N.D.Ga. 2006) (district court distinguishes *Koohi* and declines to apply combatant activities preemption in part because "instead of manufacturing weapons, which were then procured and

utilized by the military in combat, Defendant itself provided a convoy service" to the U.S. government in Iraq); *Fisher v. Halliburton*, 390 F.Supp.2d 610, 615-16 (S.D.Tex. 2005) (district court declines to apply combatant activities pre-emption to negligence action against service contractor in Iraq because "Plaintiffs' claims in this case do not involve any allegation that Defendants supplied equipment, defective or otherwise, to the United States military"). Indeed, no other court has recognized an affirmative defense for service-providing contractors under the combat activities exception.

(2) Holding CACI Accountable, Not Letting CACI Evade the Law, Furthers the United States' Foreign Policy Interests.

CACI tries to support absolute immunity by citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) and related cases, and suggesting the permitting this case to go to a jury will impermissibly intrude on the United States' conduct of foreign policy. Holding an American corporation liable for its egregious misconduct is not interfering in the United States' conduct of foreign policy. Indeed, here, holding CACI accountable for abusing prisoners will further the United States' interests of preventing and punishing the commission of torture and other serious violations in the same fashion as the courts martial of the military wrongdoers furthered the United States' interests. These type of judicial proceedings establish the United States adheres to the rule of law.

Tellingly, although well aware of the lawsuit through repeated contacts with military counsel, the United States has not filed a statement advocating dismissal of the victims' lawsuit. *Compare Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp 1486, 1491 n.8 (C.D.Cal. 1993) (finding that the government contractor defense bars plaintiffs' claims in part because "the government has intervened and taken the position that a case cannot be brought without undermining federal interests."); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (United States filed an *amicus curiae* brief advocating dismissal); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383-84 (2000) (Executive represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress).

This litigation simply does not involve a state statute infringing on or reaching into sensitive foreign-policy matters. *See Beaty v. Republic of Iraq*, 480 F.Supp.2d 60, 87 (D.D.C. 2007); *Garamendi*, 539 U.S. at 419 n. 11 (where a state has acted within its "traditional competence" with an incidental effect on foreign relations, clear or substantial conflict with federal law or policy may be required for foreign affairs preemption to apply); *Doe v. Exxon Mobil Corp.*, Civ. A. No. 01-1357, 2006 WL 516744, at *3 (D.D.C. Mar. 2, 2006) (*Garamendi* is "simply not applicable" because "no state government has passed any statute in conflict with U.S. foreign policy"), *appeal dismissed*, 473 F.3d 345 (D.C.Cir. 2007).

CACI's outlandish claim that allowing this case to continue would subject the United States' "prosecution of war to the tort regulation of a foreign power," CACI Brief at 31, lacks any merit. The District Court's decision contemplates applying District of Columbia, not Iraqi, common law to the claims brought by individual victims, not a foreign government. *Ibrahim II*, 556 F.Supp.2d at 3-5, 11 (discussing potential for conflict between federal interests and application of *state* tort law to plaintiffs' claims). In any event, even had the victims sought to apply Iraqi law (which they have not), the District of Columbia's choice of law rules require the court to weigh the United States' interests in having domestic rather than foreign law applied. *See In Re Air Crash Disaster Near Saigon, South Vietnam, on April 4, 1975*, 476 F.Supp. 521, 528-29 (D.D.C. 1979) (applying Congressionally enacted District of Columbia statutes to a wrongful death/survival action because other states' interests are "dwarfed by comparison with the interest of the United States that the rule of decision…be the law of the Seat of the Government.").

(3) CACI Advocates a Circular Definition of "Operational Control" That Would Amount to Automatic Immunity for Military Service Contractors.

CACI argues in the alternative that the District Court erred by failing to adopt a specific definition of "operational control" from a military dictionary, which CACI never submitted or brought to the Court's attention during summary

judgment briefing or argument.[16] CACI Brief at 46-47. CACI claims that "operational control" includes, as a necessary element, the authority to "perform…functions of command" and exercise "authoritative direction over all military operations." CACI Brief at 46-47. In short, CACI suggests that unless corporations providing services to the military are able to issue binding military orders or fully control the military mission, they are insulated from any review. This equates to full immunity without any review of the evidence, as clearly no defense contractor will ever be entitled to issue binding orders to military members, or control the military mission. Such blanket immunity from scrutiny finds absolutely no support in the statutory or decisional law.

CACI also argues that operational control should be defined to exclude all "matters of discipline, organization, or training," which CACI characterizes as "administrative" in nature. CACI Brief at 47. Accordingly, CACI asks the Court to find that the District Court erred by considering record evidence that CACI had the authority to direct CACI employees not to abuse prisoners, not to use unlawful interrogation techniques, and terminate or otherwise discipline them for engaging in abuse or otherwise disobeying a direct order from CACI management. *Ibrahim II,* 556 F.Supp.2d at 8-10. But such an approach to "operational control" would

[16] In fact, it was the plaintiffs who submitted the Department of Defense's definition of "operational control" to the District Court. *See* RS.111, Appendix C-20; RS.112, Appendix C-34.

undercut the very purpose of adopting the test. The test is designed to make the affirmative defense available to those service contractors in Iraq and other war zones who are acting, and can only act, solely under the control of the military, but not available to those contractors who are supposed to be supervising and controlling their own employees. The District Court noted 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." *Ibrahim II*, 591 F.Supp.2d at 5. CACI cannot change this reality.

(4) CACI Argues the Military Must Be Viewed as Controlling CACI's Operations Because CACI Adopted the Federally-Required Code of Ethics, Yet This Code of Ethics States that CACI Should Control CACI's Operations.

CACI argues that exclusive military ***operational*** control is established by the fact that the United States requires contractors to adopt codes of ethics. Specifically, DoD regulations require military contractors to supervise their employees in order to prevent any legal and ethical violations. Defense contractors must provide a written code of ethics; a reporting mechanism for "suspected instances of improper conduct, and instructions that encourage employees to make such reports"; "[d]isciplinary action for improper conduct"; "[t]imely reporting to appropriate Government officials of any suspected or possible violations of law in connection with Government contracts"; and "[f]ull cooperation" with government

investigations. 48 C.F.R. §§ 203.7000-203.7001 (2008). CACI claims that because the DoD required it to take steps to ensure that its employees complied with the law, CACI's authority over its employees was another example of the military's "unfettered control." CACI Brief at 54.

First, as noted above, CACI did not even comply with this regulation. CACI modified its code of ethics and watered-down the duty to report abuse to the military. RS.34, ¶ 88. Moreover, CACI, trying to distance itself from the reality testified to by Mr. Porvaznik and others in depositions, submitted various declarations trying to prove that CACI management did nothing other than provide "administrative support" to interrogators. *See, e.g.,* Porvaznik Decl. ¶19; Mudd Decl. ¶11; Northrop Declaration ¶5. The regulation itself, however, requires CACI to handle discipline, which is clearly not merely administrative but rather operational control.

Second, even assuming CACI's Code of Ethics complied with the regulation, the very text of the required code proves that CACI, not the military, had operational control over employees. The fact that a federal regulation required CACI to adopt a Code of Ethics does not somehow transform corporate managers into military officers, or corporate supervision and discipline into military "operational control". Instead, it proves the opposite: DoD took steps to

ensure that CACI, not the military, was responsible for operationally controlling its employees.

The very purpose of the federal requirement of the code is to make sure contractors such as CACI do not try to shift their own obligations to supervise onto the United States government. The DoD regulation imposes a duty to supervise, the very same state law duty that the District Court was considering. There is even *less* potential for conflict between state law and federal interest when the government imposes the same obligations on contractors as state tort law. *See Boyle* 487 U.S. at 508-509 (1988)*; Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 927 (E.D. Wis. 1999); *Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203 (N.D. Cal. 1994).

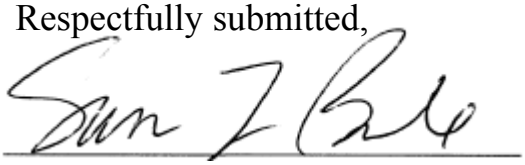
This Court should not countenance CACI's effort to transform the DoD regulation mandating that CACI control the conduct of their employees into exclusive operational control by the military. Such sophistry disserves this Court.

CONCLUSION

Appellees respectfully request that this Court dismiss this appeal on the grounds that the appeal was improvidently granted and no right of direct appeal exists. In the alternative, Appellees request that the Court affirm the District Court's denial of CACI's motion for summary judgment. For all the reasons

explained above, the *Boyle* doctrine cannot be applied here because any liability imposed on CACI would not infringe in any way on the United States' sovereign immunities enshrined in the combatant activities exception to the FTCA. The District Court's adoption of the exclusive operational control test fully protects the military, which has gone on record unequivocally supporting holding service contractors liable for the consequences of their own misconduct. The evidence establishes that CACI employees were not under the exclusive operational control of the military but rather were the ringleaders of the illegal and unauthorized abuse at Abu Ghraib prison.

Respectfully submitted,



Susan L. Burke (D.C. Bar No. 414939
William T. O'Neil (D.C. Bar No. 426107)
Katherine R. Hawkins
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
(215) 487-6596

Katherine Gallagher
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Shereef Hadi Akeel
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, Michigan 48084-4736
Attorneys for Saleh Plaintiffs-Appellees

L. Palmer Foret (D.C. Bar No. 260356)
THE LAW FIRM OF
L. PALMER FORET, P.C.
1735 20th Street, N.W.
Washington, D.C 20009
(202) 232-2404

Craig T. Jones
Roderick E. Edmond
EDMOND & JONES, LLP
127 Peachtree Street, NE, Suite 410
Atlanta, GA 30303
(404) 525-1080
Attorneys for Ibrahim Plaintiffs-Appellees

ADDENDUM

ADDENDUM: STATUTES AND REGULATIONS

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Uniform Code of Military Justice, Punitive Articles

10 U.S.C. § 881. Art. 81. Conspiracy

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

10 U.S.C. § 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

10 U.S.C. § 893. Art. 93. Cruelty and maltreatment

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

10 U.S.C. § 928. Art. 128. Assault

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) Taking of hostages;
(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 27

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Article 31
No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.

Article 32
The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.

Article 37
Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty shall during their confinement be humanely treated. As soon as they are released, they may ask to leave the territory in conformity with the foregoing Articles.

Article 100
The disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization. Identification by tattooing or imprinting signs or markings on the body is prohibited.

In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.

Article 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997), § 1-5(a)-(c)[17]

1-5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

[17] See RS.111, Appendix C-14 for further excerpts from AR 190-8.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence

U.S. Army Regulation 715-9, Contractors Accompanying the Force, §§ 3-2(c), 3-2(f), 3-3(b) (Oct. 29, 1999).[18]

§ 3-2(c)

Commercial firm(s) providing battlefield support services will supervise and manage functions of their employees, as well as maintain on-site liaison with functional U.S. organizations.

§ 3-2(f)

The commercial firm(s) providing the battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees are not under the direct supervision of military personnel in the chain of command. The contracting officer (KO), or their designated liaison (contracting officer's representative (COR), is responsible for monitoring and implementing contractor performance requirements; however, contractor employees will be expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander. In the event instructions or orders of the Theater Commander are violated, the Theater Commander may limit access to facilities and/or revoke any special status a contractor employee has as an individual accompanying the force to include directing the Contracting Officer to demand that the contractor replace the individual.

§ 3-3(b)

Contracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel. Instead, as prescribed by the applicable federal acquisition regulations, or as required by force protection to insure the health and welfare, the Contracting Officer's Representative shall communicate the Army's requirements and prioritize the contractor's activities within the terms and conditions of the contract.

[18] See RS.111, Appendix C-10 for the full text of AR 715-9

U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003)[19]

§ 1-22

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees. Commanders must manage contractors through the contracting officer or ACO. CORs may be appointed by a contracting officer to ensure a contractor performs in accordance with (IAW) the terms and conditions of the contract and the Federal acquisition regulations. The COR serves as a form of liaison between the contractor, the supported unit, and the contracting officer.

§ 1-25

It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.

§ 4-2

As stated earlier, contractor management does not flow through the standard Army chain of command. Management of contractor activities is accomplished through the responsible requiring unit or activity COR through the supporting contracting organization in coordination with selected ARFOR commands and staffs. It must be clearly understood that commanders do not have direct control over contractor employees (**contractor employees are not government employees**); only contractors directly manage and supervise their employees. Commanders manage contractors through the contracting officer and their appointed CORs in accordance with the terms and conditions of the contract.

§ 4-45

Contractor employees are not subject to military law under the UCMJ when accompanying US forces, except during a declared war. Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct.

[19] See RS.111, Appendix C-11 for the full text of Field Manual 3-100.21.

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

I, Susan L. Burke, hereby certify that:

1. I am attorney representing the *Saleh* Plaintiffs.

2. This brief is in Times New Roman 14-point type. Using the word count feature of the software used to prepare this brief, I have determined that the text of the brief (excluding the Certificate as to Parties, Table of Contents, Table of Authorities, Glossary of Abbreviations, Addendum, and Certificates of Compliance and Service) contains 13,843 words.

Susan L. Burke

CERTIFICATE OF SERVICE

S*aleh, et al. v. CACI International Inc., et al.*, No. 08-7001

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by BURKE O'NEIL LLC, Attorneys for Appellees.

On the **27th Day of August 2008**, I served the within (Proof) **JOINT BRIEF FOR APPELEES** upon:

Joseph W. Koegel, Jr.
John F. O'Connor
Steptoe & Johnson, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202-429-3000
Attorneys for CACI International, Inc. and CACI Premier Technology, Inc.

Frank G. Bowman
F. Whitten Peters
Ari S. Zymelman
Williams & Connolly
725 12th Street, NW
Washington, DC 20005
202-434-5000
Attorneys for L-3 Services, Inc

via Federal Express, by causing 2 true copies of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of Federal Express.

Unless otherwise noted, 7 copies have been filed with the Court on the same date and in the same manner as above.

August 27, 2008 _____