RECORD NUMBER: 10-1891 (L)

United States Court of Appeals

for the

Fourth Circuit

L-3 SERVICES, INC., et al.,

Appellants,

– v. –

WISSAM ABDULLATEFF SA' AL-QURAISHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1891 Caption: Wissam Al-Quraishi, et al. v. L-3 Services, Inc., et al

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Wissam Al-Quraishi (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

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   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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CERTIFICATE OF SERVICE

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I certify that on August 17, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Susan L. Burke (signature) August 17, 2010 (date)

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction over this premature appeal. L-3 has failed to satisfy the stringent requirements needed to qualify for collateral order review. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 604-05 (2009); and *Will v. Hallock*, 546 U.S. 345, 349-50 (2006). First, the District Court did not conclusively determine that that L-3 was ineligible for derivative sovereign immunity. Instead, the District Court held L-3 may seek such immunity after discovery concludes, which means there has not been a conclusive determination of the question being appealed. Second, the District Court found that L-3's immunity claims relies on facts not in the record that are inextricably intertwined with the merits. Third, L-3's immunity claims lacks any support from Supreme Court and Fourth Circuit precedents, which prevents the claim from rising to the level of a "substantial" immunity claim eligible for collateral order doctrine.

L-3 cannot challenge the District Court's derivative sovereign immunity ruling under the collateral order doctrine. As a result, this Court should not exercise pendent appellate jurisdiction over L-3's remaining claims invoking the political question doctrine and the affirmative government contractor defense. *See, e.g., Harris v. Kellogg Brown & Root Services, Inc.*, 2010 U.S.App. LEXIS 17140 (3d Cir. Aug. 17, 2010) (holding defense contractor cannot appeal denial of motion

to dismiss invoking the political question doctrine and the government contractor defense); *Martin v. Halliburton*, 601 F.3d 381, 391 (5th Cir. Mar. 23, 2010) (holding that defense contractor cannot appeal denial of a claim that state law is preempted by federal law); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007); *Doe v. Exxon*, 473 F.3d 345, 353 (D.C. Cir. 2007) (holding that denial of motion to dismiss on political question grounds cannot be appealed as a collateral order).

The District Court had jurisdiction under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity); 28 U.S.C. § 1350 (Alien Tort Statute), and 28 U.S.C. § 1367 (supplemental jurisdiction).

STATEMENT OF THE ISSUES

1. May this Court expand the Supreme Court's collateral order doctrine to include review of a District Court tentative order finding that a defense contractor had failed to establish predicate facts necessary to invoke derivative sovereign immunity, absolute immunity, or the political question doctrine?

2. May this Court create a novel immunity doctrine that bestows more immunity on corporate defense contractors and their employees than is enjoyed by military personnel, by protecting such corporate parties from civil liability arising out of war crimes?

3. May this Court expand the Supreme Court's "government contractor defense" by unmooring it from the reasoning set forth in *Boyle v. United Technologies*?

STATEMENT OF THE CASE

On August 4, 2010 and August 6, 2010, L-3 and Nakhla, respectively, filed notices of appeal (J.A. 929, 931) from the opinion of the Honorable Judge Peter Messitte of the U.S. District Court for the District of Maryland on July 29, 2010.[1] *Al-Quraishi, et al., v. Nakhla, et al*, No. 08-1696 (J.A. 831-941). L-3and Nakhla (hereinafter collectively referred to as "L-3" unless specifically noted) seek to overturn the District Court's denial of its motion to dismiss. L-3 sought dismissal on several grounds: derivative sovereign immunity, preemption and political question.

The District Court reasoned that L-3's claim of entitlement to derivative immunity turned on questions including whether L-3 acted within the scope of their employment or contract, whether they acted strictly in line with orders of the United States, and what level of control the government retained over L-3. J.A. 864-869. The Court found based on the allegations in the Detainee Victims' complaint that L-3 acted outside the scope of its contract, contrary to orders of the United States, and that the government did not direct L-3's acts of war crimes, torture and other wrongdoing at issue here,[2] that it was "too early" to dismiss the claims. J.A. 867-869. The District Court left open the possibility that discovery

[1] Detainees and L-3 agreed to an expedited briefing schedule in this appeal in order for this case to be heard *in seriatim* with *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335. J.A. 938-940.

[2] *See* J.A. 62-71.

could reveal evidence to disprove the allegations in the complaint and support L-3's claims of derivative immunity. *Id.*

The District Court preliminarily ruled against L-3's preemption argument, finding that the Supreme Court intended government discretion to serve as the limiting principle in the preemption analysis. J.A. 870-877. The District Court left open the possibility that L-3 would be able to establish preemption in accord with the Supreme Court's decision in *Boyle v. United Technologies*, 487 U.S. 500 (1988). J.A. 877.

The District Court, after analyzing the six *Baker v.Carr*, 369 U.S. 186 (1962), factors, ruled that based on the complaints' allegations the Detainee Victims' lawsuit did not raise a political question. J.A. 858-864.

STATEMENT OF THE FACTS

Plaintiffs are 72 Iraqi civilians who were mistakenly detained by coalition forces at Abu Ghraib and other prisons in Iraq, and later released without charge. As detailed in the Second Amended Complaint, Plaintiffs were tortured during their detention by L-3 translators, including but not limited to Defendant Adel Nakhla, and by U.S. soldiers and contract interrogators acting in conspiracy with L-3. J.A. 23-48.

L-3 received millions of dollars from the United States to provide the Army with translation services. J.A. 22, ¶ 8. It employed all the civilian translators used

by the military in Iraq. J.A. 22, ¶ 7. As of December 2003, L-3 had deployed managers at 28 sites in Iraq, and had deployed 3052 employees throughout the country. J.A. 65, ¶¶ 437-438. L-3 had both the contractual duty, and the actual authority, to supervise its employees and prevent them from committing war crimes. J.A. 65-66, ¶¶ 439-443. It knew that controlling law forbade soldiers and contractors from torturing or otherwise abusing torturing and abusing prisoners. J.A. 67-69, ¶¶ 450-456.

Defendant L-3 knowingly, willfully, and negligently permitted scores of its employees to participate in torturing Plaintiffs and other detainees in Iraq, over an extended period. J.A. 63-65, SAC ¶¶ 425, 428-431, 435-436. L-3 allowed its employees to translate threats of death and rape, and to brag about conduct that violated the Geneva conventions. J.A. 64, ¶¶ 428-430. L-3 translators have admitted to participating in interrogations where detainees were beaten, choked, deprived of sleep, kept in stress positions until they collapsed, and exposed to extreme temperatures. J.A. 64, ¶ 427. These occurred at prisons in Abu Ghraib, Camp Bucca, Baghdad International Airport, Mosul, Camp Ashraf, and many other detention facilities on Forward Operating Bases. J.A. 65, ¶436.

During the night shift at Abu Ghraib, Defendant Adel Nakhla and his co-conspirators sexually assaulted and humiliated prisoners; stripped them naked; exposed them to extreme heat and cold; threatened them with dogs; forced them

into painful stress positions; physically assaulted them; and made unlawful threats of violence to them. J.A. 62, ¶419. Nakhla's criminal actions have been established by photographs, sworn testimony from his co-conspirators and former detainees, and Nakhla's own partial confession to military investigators. J.A. 62, ¶¶415 -417.

L-3 agent John Israel participated in the torture of prisoners at Abu Ghraib. J.A. 63, ¶426.

L-3 employee Etaf Mheisen conspired with CACI interrogator Daniel Johnson to torture prisoners. J.A. 63, ¶426.

L-3 employee "Iraqi Mike" assaulted a defenseless prisoner. J.A. 63, ¶426.

An L-3 translator attempted to pry out detainees' teeth with pliers. J.A. 64, ¶ 426.

An L-3 translator had to be prevented from beating a detainee in the head, potentially fatally, by a Special Forces soldier. J.A. 64, ¶ 426.

Many other incidents of torture remain unreported as a result of L-3's concealment of its employees' misconduct and its policy of discouraging reports of prisoner abuse, J.A. 64-66, ¶¶ 432-434, 445.

SUMMARY OF ARGUMENT

1. As set forth in the Statement of Jurisdiction and elaborated below, this Court lacks jurisdiction over L-3's appeal, and should allow discovery to

proceed and the District Court to exercise its role as fact-finder to evaluate L-3's arguments for dismissal.

2. As discussed in Section II, the District Court correctly held that L-3 cannot claim immunity under the laws of war.

    a. First, L-3 was not authorized to act as an occupying power when it tortured the Plaintiffs (hereinafter referred to as "Detainee Victims").

    b. Second, the Detainee Victims are not enemy aliens, as a matter of fact or a matter of law. They are innocent civilians who were released from detention without being charged with any crime, J.A. 834, and they are citizens of a "military ally" of the United States. *Munaf v. Geren*, 128 S.Ct 2207, 2223 (2008). This Court cannot disregard the Supreme Court's holding in *Rasul v. Bush*, 542 U.S. 466, (2004) as it is urged to do by L-3. The *Rasul* Court held that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U. S. courts." *Id.* at 483.

    c. Third, the District Court correctly held that L-3 is not entitled to a greater level of immunity than that enjoyed by our military personnel. The laws of war simply do not immunize soldiers,

much less private contractors, from civil lawsuits brought in United States courts seeking redress for war crimes. As the Supreme Court held in *Freeland v. Williams*, 131 U.S. 405, 416 (1889), the law of war can only immunize acts "done in accordance with the usages of civilized warfare under and by military authority." L-3's torture of Detainee Victims was not authorized by the military, and violated one of the most basic laws of civilized warfare.

3. As discussed in Section III, the District Court properly analyzed and applied *Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), *Mangold v. Analytic Services*, Inc., 77 F.3d 1442 (4th Cir. 1996), *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), and related cases, all of which support the Detainee Victims' argument that L-3 cannot enjoy immunity for engaging in conduct prohibited by federal law and the terms of L-3's contract with the military.

4. As discussed in Section IV, the District Court correctly found that the preemption doctrine developed by the Supreme Court in 487 U.S. 500 (1988) rested on the existence of government discretion. After reviewing with care the D.C. Circuit Court's holding in *Saleh v. Titan Corporation*, 580 F.3d 1 (D.C. Cir. 2009), the District Court agreed with the *Saleh*

dissent that the majority's opinion failed to adhere to controlling Supreme Court preemption precedents. The District Court wisely refrained from adopting the D.C. Circuit's novel and legally suspect "combatant activities" field preemption theory. As the District Court stated, "there was and is no need to craft a new rule that immunizes a contractor's rogue operations." J.A. 874.

5. As discussed in Section V, the District Court correctly declined to dismiss a private lawsuit against an American corporation on political question grounds before the start of discovery. Based on the Complaint's allegations, this suit simply does not raise any separation of powers issues, which are necessary for the invocation of the political question grounds

ARGUMENT

As explained above in the Statement of Jurisdiction and more fully below in Section I, this Court should not hear L-3's appeal because doing so would impermissibly expand the collateral order doctrine. Were this Court to hear L-3's appeal, the Court should uphold the District Court's well-reasoned ruling. The District Court properly, albeit tentatively, rejected L-3's novel immunity arguments premised on the law of war (Section II) and absolute immunity (Section III). The law of war permits damage suits to proceed against military personnel for

misconduct during war. Clearly, L-3, a for-profit corporation, does not enjoy more immunity than military personnel. The District Court also adhered to the controlling precedents in ruling that L-3 could not invoke without discovery any protections potentially afforded by the "government contractor defense" (Section IV). Finally, the District Court correctly ruled that this tort lawsuit against a for-profit corporation does not raise separation of powers issues governed by the political question doctrine (Section V).

I. THIS COURT LACKS JURISDICTION OVER L-3'S PREMATURE APPEAL.

L-3's appeal of the District Court's order denying their motions to dismiss, including their claims of derivative immunity, fails to meet all three requirements for collateral order review: the order 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.' " *Will v. Hallock*, 546 U.S. 345, 349 (2006); *see also In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 258 (4th Cir. 2002). If the decision fails to meet any one of these conditions, interlocutory appeal is inappropriate. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978). "The conditions are 'stringent,'" and "unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 345-46 (citations omitted). The Court should dismiss L-3's premature appeal.

A. The Supreme Court Has Narrowly and Carefully Defined the Type of Collateral Orders That May Be Considered "Final" Under Section 1291.

Congress has expressly limited jurisdiction of the courts of appeals to reviewing "final decisions of the district courts," 28 U.S.C. § 1291, in order to achieve "judicial efficiency and . . . limit litigation costs" by avoiding "piecemeal" appeals. *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 294-95 (4th Cir. 2008); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The Supreme Court has interpreted jurisdiction under § 1291 to encompass judgments that terminate an action, and a "small class" of collateral rulings. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Mohawk Indus., Inc. v. Carpenter*, 130 S.Ct. 599, 604-05 (2009). The collateral order doctrine is of "modest scope," and although the Supreme Court "has been asked many times to expand the 'small class' of collaterally appealable orders, [it] has kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *Mohawk Indus.*, 130 S. Ct. at 609.

The District Court's order denying Defendants' motions to dismiss including claims of derivative immunity fails to meet any of the requirements for collateral order review. *See Martin v. Halliburton*, ---F.3d----, 2010 WL 3467086, at *6-7 (5th Cir. Sept. 7, 2010) (denying collateral order review to a district court's denial

of government contractor's claim for official immunity, derivative sovereign immunity and immunity under the Defense Production Act).

B. The District Court Did Not Conclusively Determine Whether L-3 May Enjoy Derivative Sovereign Immunity.

The collateral order doctrine "disallow[s] appeal from any decision which is tentative, informal or incomplete." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal." *Cohen*, 337 U.S. at 546; *see also Coopers & Lybrand*, 437 U.S. at 469 (collateral review not appropriate where district court decision is "subject to revision"); *Abney v. United States*, 431 U.S. 651, 659 (1977) (collateral order review requires a "fully consummated decision" that marks a "complete, formal and final" resolution of issue); *Jamison v. Wiley*, 14 F.3d 222, 230 (4th Cir. 1994) (district court decision not sufficiently final under collateral order doctrine where prospect of reconsideration and alteration is held open by the district court itself); *Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper of the U.S. Senate*, 471 F.3d 1341, 1344 (D.C. Cir. 2006) (holding "[t]he final judgment rule . . . relieves appellate courts from the immediate consideration of questions that might later be rendered moot").

In denying L-3's motion to dismiss, the District Court repeatedly emphasized the impossibility of deciding Defendants' claims of immunity at this

stage and expressly left open the possibility of revising its decision in the future. J.A. 867-869. The District Court stated that "[s]ince the contract between L-3 and the military is not before the Court at this time, determining both the scope of the contract and whether that scope was exceeded is not possible," and that the issue of "whether deviations from the contract occurred and, if so, whether they were tolerated or ratified . . . must await further discovery before the Court is in a position to judge." J.A. 867-868. The District Court held that "it is clearly too early to dismiss Defendants on the basis of derivative sovereign immunity," J.A. 867, concluding "[w]ithout more information as to Defendants' contract and their duties vis-à-vis the Government -- information which discovery should reveal -- it would be premature to dismiss based on that ground," J.A. 869. Therefore, "accepting [L-3's] appeal now would not be 'review'; it would be improper 'intervention,' if not outright 'intrusion.'" *See Harris v. Kellogg Brown & Root Servs., Inc.*, -- F.3d --, 2010 WL 3222089, at *4 (3d Cir. Aug. 17, 2010) (quoting *Cohen*, 337 U.S. at 546).

C. The District Court's Order Involves "Considerations Enmeshed in the Merits."

To satisfy the second condition for collateral order review, the order being appealed must not "involve[ ] considerations that are 'enmeshed in the factual and legal issues [comprising] the plaintiff's cause of action." *S.C. State Bd. of Dentistry v. Fed. Trade Comm'n*, 455 F.3d 436, 441 (4th Cir. 2006) (quoting

Coopers & Lybrand, 437 U.S. at 469 (citation omitted); *see also Cunningham v. Hamilton County*, 527 U.S. 198, 206 (1999) (collateral review not appropriate where "an inquiry would differ only marginally from an inquiry into the merits"). "Allowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527-28 (1988). An issue ripe for collateral order appeal must be "a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 n.10 (1985)). Here, no such abstract legal issue exists.

Instead, in order to decide the question of whether L-3 is entitled to either derivative sovereign immunity or immunity based on "military occupation," this Court would have to make legal and factual findings on a number of issues that are "not separable from the merits of the underlying action," including issues such as whether the military exerted operational control over L-3 (*see, e.g.*, L-3 Br. 15), whether L-3 complied with the terms of CPA Order No. 17, and whether the acts alleged were "performed by them pursuant to the terms and conditions of a Contract." Because the immunity issues here do not present "neat abstract issues of law," and would require the Court to "consider the correctness of the plaintiff's

version of the facts," the denial of immunity at this stage is not a collateral order subject to interlocutory review. *See Johnson*, 515 U.S. at 313.

D. The District Court's Denial of Immunity Is Not "Effectively Unreviewable on Appeal from a Final Judgment."

The District Court's denial of L-3's immunity claims is not a ruling that "would imperil a substantial public interest" or "some particular value of a high order" if L-3 was forced to wait until after final judgment to appeal the denial. *See Will*, 546 U.S. at 352-53; *see also Mohawk Indus.*, 130 S. Ct. at 605. "[M]ere avoidance of a trial" is an insufficient reason to grant review under the collateral order doctrine. *Will*, 546 U.S. at 353. The avoidance of trial must serve "some particular value of a high order," such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, [or] mitigating the government's advantage over the individual." *Id.* None of those values -- or any other "value of a high order" -- compels immediate review of the District Court's denial of immunity.

In sum, for the reasons set forth above, L-3's appeal should be dismissed for lack of jurisdiction.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE LAWS OF WAR DO NOT SHIELD L-3 FROM CIVIL LIABILITY FOR ILLEGALLY TORTURING DETAINEES.

As explained in this Section, the District Court correctly held that "[a] defendant can only claim immunity under the laws of war if its actions comport

with the laws of war." J.A. 832. L-3 argues that the District Court erred by failing to find that laws of war insulated L-3 from liability. L-3's arguments fail. First, L-3 is not acting as an occupying power when it engages in conduct not ordered by the military, and not authorized by the terms of its contract with the military. Second, Detainee Victims do not qualify as "enemy aliens" under the laws of war. They are, as has been admitted by the military, innocents mistakenly rounded up and detained without cause. Third, even if L-3 established the necessary predicates of L-3 as an occupying power and Detainee Victims as "enemy aliens," the laws of war permit civil lawsuits in the United States against occupying power personnel who engage in torture. The laws of war only prohibit such lawsuits from being brought in the occupied country itself, not in the home courts of the occupying power. The law of war permits an American soldier engaged in torturing Iraqis to be sued in United States courts. Clearly, it also permits an American for-profit corporation engaged in that conduct to be sued.

A. L-3 Was Not Acting on Behalf of an "Occupying Power" When It Tortured Detainee Victims.

L-3 argues that it is entitled to assume the "occupying power" mantle of the United States military. Yet Detainee Victims are not suing L-3 for providing the occupying power (the United States military) with the contractually-required translation and interrogation services. Rather, Detainee Victims seek to hold L-3 accountable for actions that fell outside the scope of what it was hired to do and

how it was hired to act, including: mock execution (*see*, J.A. 23, ¶14); stacking naked prisoners (J.A. 24-25, ¶¶19, 31); forced nudity (J.A. 23, ¶18; J.A. 26, ¶42; J.A. 29, ¶72); rape or threats of rape (J.A. 24-25, ¶¶20, 27); forcing detainees into contorted, stress positions and/or detained in confined spaces (J.A. 23-27, ¶¶12, 23, 29-30, 54); beatings and other physical harm (J.A. 23-27, ¶¶13, 25, 43-45, 49-51); and pouring feces on detainees (J.A. 23, ¶16). As the District Court concluded, "[o]n the facts alleged, L-3's actions arguably violated the laws of war such that they are not immune from suit under the laws of war." J.A. 832.

B. The Detainee Victims Are Not "Enemy Aliens," and Are Not Barred from U.S. Courts

L-3, a for-profit corporation that breached its duties to the military, cannot hide behind the law of war. L-3 argues that merely because Detainee Victims are Iraqis, they are automatically "enemy aliens" confronting closed courthouse doors. L-3 Br. 18-26. This is wrong as a matter of law on many levels.

First, L-3 wrongly assumes that enemy aliens cannot bring suit in the United States. The Supreme Court held to the contrary in *Rasul v. Bush*, 542 U.S. 466 (2004), holding that "[n]othing in *Eisentrager* or in any of our other Court's cases categorically excludes aliens detained in military custody outside the United States from that [privilege of litigation]" in United States courts. *Id.* at 483. . The Supreme Court held that "28 U. S. C. §1350 explicitly confers the privilege of suing for an actionable "tort ... committed in violation of the law of nations or a

treaty of the United States" on aliens alone," and stated that "[t]he fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims." *Id.* at 484-485.

The District Court properly applied this controlling Supreme Court precedent, stating "*Rasul* indicates that when aliens detained abroad seek to bring suit in a court of the United States, their access to the courts does not depend on a constitutional nexus, only a statutory right." J.A. 839. L-3 tries to argue the District Court erred by relying on dictum, but "if dictum it was, it was dictum well considered, and it stated the view of five Members" of the Supreme Court. *Boumediene v. Bush*, 553 U.S. 723, 773 (2008) (Souter, J., concurring) (referring to other dicta in *Rasul*). The District Court gave the Supreme Court's *Rasul* decision the weight to which it is entitled. L-3 fails to persuade in arguing that this Court should ignore the *Rasul* decision.

Second, L-3 wrongly assumes (without any record evidence) that the Detainee Victims are enemy aliens. To the extent that the "enemy alien" classification status that once attached purely as a function of citizenship has any meaning after *Rasul*, it applies only in declared wars,[3] and only for the duration of

[3] *See* 50 U.S.C. § 21 (Alien Enemies Act triggered by "*declared* war between the United States and any foreign nation or government," or actual invasion of U.S. territory) (emphasis added); Trading With the Enemy Act, 40 Stat. 411-426 (1917)

the war.[4] The United States never declared war on Iraq. The undeclared war ended on May 1, 2003, when President George W. Bush proclaimed that "Major combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed." *Remarks by the President From the USS Abraham Lincoln*, May 1, 2003. With the overthrow of Saddam Hussein's government, the Detainee Victims ceased to be enemy aliens even in the archaic, formalistic sense that they were "bound by an allegiance which commits" them to hostility against the United States. *Eisentrager*, 339 U.S. at 772. The Detainee Victims were tortured occurred after that proclamation. By the time the Detainee Victims filed this lawsuit, the United States had officially transferred sovereignty to an interim Iraqi government, and the Supreme Court had recognized Iraq as a "military ally" of the United States. *Munaf v. Geren*, 128 S.Ct 2207, 2223 (2008).

(defining "beginning of the war" as "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war."); *Guessefeldt v. McGrath*, 342 U.S. 308, 322 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950).

[4] *See Eisentrager*, 339 U.S. at 772 ("But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage."); *id.* at 776-777 (collecting cases holding that alien enemies cannot maintain an action in U.S. courts "during the period of hostilities"); *Caperton v. Bowyer*, 81 U.S. 216, 236 (1871) (Suspension of enemy's "right to sue and prohibition to exercise it exist during war, by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts."); *Taylor v. Albion Lumber Co.*, 168 P. 348, 353 (Cal. 1917) (alien enemy status of plaintiff "would not warrant a forfeiture of [her] right of action. The rights of a nonresident alien enemy are simply suspended until the cessation of hostilities.").

Unlike the *Eisentrager* petitioners, Detainees are not and never were actual enemies of the United States, and have not been engaged in or convicted of attacks on U.S. forces by any tribunal. Detainees were mistakenly swept up along with thousands of other, and released after the military realized that they were mistakenly detained. None has been charged with anything -- a distinction that the Supreme Court has made clear is crucial. *Rasul*, 542 U.S. at 476; *id.* at 486 (Kennedy, J., concurring in the judgment).

Contrary to L-3's unsupported and self-serving argument, it is contrary to United States' foreign policy interests to designate innocent Iraqi civilians as "enemy aliens," and deny them access to justice anywhere.[5] As the Solicitor General of the United States explained in a recent amicus brief submitted to the Supreme Court, our nation has "significant interests in ensuring that its contractors exercise proper care in minimizing risks to service members and civilians and do not avoid appropriate sanctions for misconduct." J.A. 816. The Solicitor General opined that "[c]ontractor misconduct resulting in harm to local nationals abroad also in some circumstances can have significant negative foreign policy implications for the United States." J.A. 816. L-3's torture of prisoners at Abu Ghraib has already severely harmed the United States' foreign policy interests.

[5] Detainees cannot sue in Iraqi Court because of Coalition Provisional Authority Order 17, which immunizes contractors from "Iraqi legal process." J.A. 202-219.

This Court should not compound that harm by closing the court house doors to the Detainees merely because they are Iraqis.

C. Supreme Court Jurisprudence Allows Civil Lawsuit in U.S. Courts Against Soldiers and Civilians Who Violate the Laws of War.

L-3 tries to support it novel immunity claim argument with extensive citation to Supreme Court jurisprudence. Yet even a cursory reading of the precedents cited reveals the meritless nature of L-3's claim. The Supreme Court jurisprudence actually *affirms* that soldiers are subject to the laws of war, and may be sued in United States courts if they violate those laws. The precedents hold only that soldiers cannot be tried in an occupied country's courts, or (in some cases) under the occupied country's domestic laws.[6]

In *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878), the Supreme Court overturned a Union soldier's criminal conviction for murder by a Tennessee court. The Court reasoned that "[o]fficers and soldiers of the armies of the Union were not subject during the war to the *laws* of the enemy, or amenable to his *tribunals* for offences committed by them." The Court continued, however, with a finding

[6] Here, Coalition Provisional Order 17 states that it is "without prejudice to the exercise of jurisdiction by the Sending State and the State of nationality of a Contractor in accordance with applicable laws." J.A. 211. The prior version of the Order similarly stated that claims against for damage are to "be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State." J.A. 204.

that contradicts L-3's argument: "They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished."

In *Dow v. Johnson*, 100 U.S. 158, 165 (1879), the Court applied the same reasoning to Confederate soldiers fighting in our civil war, finding that they could not be tried in the tribunals of the opposing party. The Court held, "[i]n both instances, from the very nature of war, the *tribunals* of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army…." The Court reasoned that the law of war applied with equal force to "members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States." (emphasis added).[7]

As with *Coleman*, the controlling holding in *Dow* supports Detainees, not L-3. The Court held in *Dow* that "the military should always be kept in subjection to the laws of the country to which it belong…[H]e is no friend to the Republic who advocates to the contrary." *Id.* at 169. The Court affirmed that soldiers in the occupying army "[r]emain subject to the laws of war, and are responsible for their

[7] *In Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981), the Court of Appeals did not hold that occupation forces were immune from suits in U.S. courts or that German nationals lacked standing to bring suit in U.S. courts; rather, it reached the merits, and held that "assuming the Bill of Rights is fully applicable in Berlin, neither the due process clause of the fifth amendment, nor any other portion of the Bill of Rights prohibits the conduct complained in this case." *Id.*

conduct only to their own government, and the tribunals by which those laws are administered." *Id.* at 165.

Before and after *Dow*, the Supreme Court repeatedly held that soldiers enjoy immunity only to extent they acted in compliance with the laws of war. *See City of New Orleans v. Steamship Co.*, 87 U.S. 387, 394 ("There is no limit to the powers that may be exerted" in cases of military occupation "save those which are found in the laws and usages of war."); *Ford v. Surget*, 97 U.S. 594, 605-606 (1878) (Confederate army, and those acting on military orders, were exempt "from liability for acts of legitimate warfare" that were consistent "with the laws and usages of war."); *Freedland v. Williams*, 131 U.S. 405, 416 (1889) (describing *Dow*'s holding that "for an act done in accordance with the usages of civilized warfare under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."); *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897) ("if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability."); *MacLeod v. United States*, 229 U.S. 416, 432 (1913)("the authority of a conquering power . . . is, however, not without limitation, and . . . is subject to the laws and usages of war, and, we may add, to such rules as are sanctioned by established principles of international law.")

The District Court properly held that "[a] defendant can only claim immunity under the laws of war if its actions comport with the laws of war." J.A. 846. It is beyond dispute that Detainees are seeking to hold the L-3 responsible for their violations of the law of war, in a court that clearly has the authority to administer those laws.

L-3's argument to the contrary rests exclusively on the Court's dictum in *Dow* that if soldiers are "guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal…" *Id.* L-3 claims that this language demonstrates that soldiers are not amenable to *any* suit in civilian court, even for violations of United States law and the laws of war. But there are numerous precedents holding to the contrary, in both criminal and civil cases.

For example, in *Coleman*, the Supreme Court held that the Congressional act which grants military tribunals the authority to punish soldiers for crimes committed during the war "does not declare that soldiers committing the offences named shall not be amenable to punishment by the State courts" in states that remained loyal to the United States, where the civilian courts remained open. 97 U.S. at 514. In *Franklin v. United States*, the Court affirmed that the Articles of War do "not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and

that civil courts have concurrent jurisdiction over all offenses committed by a military officer." 216 U.S. 559, 567 (1910); *see also Kennedy v. Sanford*, 166 F.2d 568, 569 (5th Cir. 1948) ("That a soldier in time of war is under military law and answerable to a court martial does not absolve him from prosecution for crimes against federal or State laws committed where such laws are of force.")

Further, as Colonel William Winthrop states in his authoritative treatise,[8]

> It is a general principle that the Government is not legally liable for unauthorized wrongs or injurious acts done by its officers (or soldiers) to or against civilians, though occurring while engaged in the discharge of their official duties. It is the officer (or soldier) therefore who is personally amenable where he exceeds or abuses his authority, and thus commits a wrongful act to the injury of a civilian.

W. Winthrop, Military Law and Precedents 885 (rev.2d ed.1920) (hereinafter Winthrop). In a time of war,

> For an act done *jure belli*, or for the exercise of a belligerent right, an officer or soldier cannot be called to account in a civil proceeding….The existence, however, of war will not….justify wanton trespasses upon the persons or property of civilians, or other injuries not sanctioned by the laws or usages of war, nor will it justify wrongs done by irresponsible unauthorized parties. *For such acts the offending officer or soldier may be made liable in damages.*

Id. at 889 (emphasis added).

L-3 seeks an immunity not extended to our military officers and soldiers. Throughout our history, military personnel have been sued for damages based on

[8] The Supreme Court has labeled Winthrop "the Blackstone of military law." *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006).

misconduct arising out of war. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), a unanimous Supreme Court held that a Captain in the U.S. Navy was liable for illegally seizing a ship during wartime, although the Captain had acted on orders from the President. The Court held that the President's orders authorizing seizure of the ship went beyond his statutory authority, and therefore did not immunize the captain from a lawsuit for civil damages. *Id.* at 179. The Court rejected the argument that the owner's claim should be resolved by "negotiation" with the government rather than a damages action. *Id.* In *Mitchell v. Harmony*, 54 U.S. (12 How.) 115 (1851), the Court permitted a soldier to be sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War. In *The Paquete Habana*, 175 U.S. 677, 708 (1900), the Court awarded damages for the seizure of enemy nationals' fishing boats, because it found that "an established rule of international law" exempted unarmed, civilian fishing vessels from capture as prizes of war.

L-3 concedes, as it must, that the District Courts in the Fourth Circuit had the authority to convict civilian contract interrogator David Passaro for his torture of an Afghan civilian. *L-3 Br.* 22 (citing *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009)). There is no precedent that bars the same tribunals from holding contractors civilly liable for torturing civilians.

III. THE DISTRICT COURT PROPERLY REJECTED L-3's NOVEL ABSOLUTE IMMUNITY CLAIM.

L-3 asserts that it was engaged in a "governmental function" and therefore enjoys the same immunity enjoyed by the sovereign United States. L-3 Br. 29. This is absurd. Not even military officials enjoy that level of immunity. The Supreme Court set forth the parameters for recognizing derivative immunity for contractors in *Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940), which includes the requirement that contractors were acting pursuant to authority that was "validly conferred." *Id.* at 21.

A. The District Court Properly Applied Controlling Supreme Court Jurisprudence.

The District Court properly applied the Supreme Court's ruling in *Yearsley*, and held that the United States lacks the power to delegate illegality to a corporate contractor. The District Court found that "[d]erivative sovereign immunity does not mean that any action taken by a contractor working for the Government is automatically immunized. This doctrine recognizes that there are many things the Government can lawfully do which a private party normally cannot…." J.A. 868. The District Court considered the acts alleged, however, and held that they may violate the Anti-Torture Statute (18 U.S.C. § 2340A) and the War Crimes Statute (18 U.S.C. § 2441). J.A. 868.

The District Court reasoned, therefore, that the United States lacked the power to direct L-3 to torture Detainees: "If the Government would have been lawfully allowed to carry out the actions alleged in this case, then it could delegate that power to L-3. But if, by its own laws, the sovereign could not lawfully take these actions on its own, it could not delegate the task to a private contractor." J.A. 868-869.

The District Court's holding is well-reasoned and in accord with Fourth Circuit precedent. Indeed, this Court has already considered and rejected the very same argument being made by L-3 here when considering the true conduct of the contractor-defendant: the torturing of detainees entitled to the protections of the Geneva Conventions. In *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), this Court ruled that torture cannot be considered as conduct falling within the detention and interrogation function. There, a civilian contractor was being prosecuted for brutally beating and kicking a detainee during an interrogation at a U.S. Army outpost in Afghanistan. The civilian contractor claimed, as L-3 and Nakhla do here, that he was protected by the political question doctrine because he was interrogating a detainee on behalf of the military.

The Court ruled that abusing detainees cannot be considered as within the interrogation function. As the Court explained, "[n]o true 'battlefield interrogation' took place here; rather, Passaro administered a beating in a detention cell. . . . . To

accept [Passaro's] argument would equate a violent and unauthorized 'interrogation' of a bound and guarded man with permissible conduct. To do so would ignore the high standards to which this country holds its military personnel." *Id.* at 218. *See also Griggs v. WMATA*, 232 F.3d 917, 921 (D.C. Cir. 2000) (no immunity for conduct that "crossed the line from official duty into illicit brutality").

B. The Fourth Circuit *Butters* and *Mangold* Decisions Do Not Support L-3's Novel Absolute Immunity Claim.

L-3 tries to overcome the compelling logic of the District Court's ruling by arguing that Court should ignore Detainees' allegations of torture, and instead focus exclusively on the "function" being performed by L-3 and Nakhla. L-3 relies on two Fourth Circuit decisions -- *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000) and *Mangold v. Analytic Svcs., Inc.*, 77 F.3d 1442 (4th Cir. 1996) -- to support this argument. Neither decisions supports overruling the District Court's decision.

1. The *Butters* Decision

In *Butters* , the Fourth Circuit was asked to rule on the extent of derivative *foreign* sovereign immunity afforded to private contractors able to demonstrate that their conduct (which was alleged to violate United States laws) was contracted for, and directed by, a foreign sovereign. There, a private contractor was hired to provide security for members of the Saudi Arabian royal family during a visit to

the United States. Rather than promoting a women (Butters) to serve as the head of the security detail, the company (Vance Intl.) assigned a man to that position. As discovery revealed, Saudi Arabia specifically directed that Butters not be placed in the command position. *Butters*, 225 F.3d at 467. Taking into account international comity and the Foreign Sovereign Immunities Act (FSIA),[9] 225 F.3d at 465, the Court extended derivative sovereign immunity under the FSIA to Vance Intl., the American company.

The Court reasoned that such immunity was necessary in order not to discourage American companies "from entering lawful agreements with foreign governments." *Butters*, 225 F.3d at 466. Significantly, and analogous to the "government contractor defense" test set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Court found that if the decision in question had not been directed by Saudi Arabia but instead had been the company's decision, the company would not enjoy derivative sovereign immunity. *Id.* at 466-67.

As the District Court held, *Butters* did not depart from the rule that derivative sovereign immunity "shields federal contractors from liability for actions that are tortious when done by private parties but not wrongful when done

[9] There are no similar concerns of respect for a foreign sovereign at stake in this case to warrant immunity. *See Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 533 (M.D.N.C. 2008) (rejecting the application of the "novel theory of derivative sovereign immunity" recognized in *Butters* to the § 1983 context because, among other reasons, "immunity arose under a unique statute that granted immunity to foreign sovereigns, not the United States").

by the government." *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004). If the government's authority is "limited by statute, [] actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 1949). In those cases, the agent "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Id.* And if "a private contractor acts independently of precise directions and approvals, . . . the defense is unavailable." *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512, 540 (M.D.N.C. 2008). "The level of governmental control required is significant; merely providing general direction while leaving the implementation to others will not suffice." *Id.*

2. The *Mangold* Decision

L-3 also argues that the District Court failed to follow the Fourth Circuit's decision in *Mangold v. Analytic Svcs., Inc.*, 77 F.3d 1442 (4th Cir. 1996). L-3 is wrong. In *Mangold*, a private contractor and its executives were sued by a military officer for tort law violations arising from the contractor's sworn statements made in response to government investigators during the course of an official government investigation into charges of fraud and misconduct by the military officer. After discovery concluded, the contractor moved for absolute immunity from suit, but the District denied the motion.

This Court accepted jurisdiction under the collateral order doctrine, reasoning the denial raised a discrete legal issue not enmeshed in the merit facts. *Id.* at 1446. The *Mangold* Court reversed the District Court's denial of immunity after analyzing whether granting immunity was in the public interest. *Id.* at 1446-49. The Court explained absolute immunity "tends to undermine the basic tenet of our legal system that individuals be held accountable for their wrongful conduct…. For these reasons, the common law immunity recognized in *Barr* [*v. Matteo*, 360 U.S. 564 (1959)] and *Westfall* [*v. Erwin*, 484 U.S. 292 (1988).] is afforded *only* to the extent that the public benefits obtained by granting immunity outweigh its costs." 77 F.3d 1442, 1446-47 (4th Cir. 1996) (emphasis added, internal citations omitted.)

The *Mangold* Court reasoned, that absolute immunity was needed to protect official investigations into suspected fraud, waste and mismanagement of government contracts. *Id.* at 1447. The Court held government investigations into fraud and abuse can only be effective if investigators are able to obtain the cooperation of witnesses, who will often be employees of government contractors. *Id.* The Court reasoned that while the decision to conduct an investigation may be a discretionary act protected by absolute immunity, and may provide a partial foundation for protecting witnesses cooperating in an official investigation, the "full justification for such immunity also draws on principles of that immunity

which protects witnesses in government-sponsored investigations and adjudications." *Id.* at 1448.

The *Mangold* Court explained the unique nature of the case before it, reasoning that that the absolute immunity being extended has:

> two roots, one drawing on the public interest in identifying and addressing fraud, waste, and mismanagement in government, and the other drawing on the common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators. *While this immunity has foundations well established in the common law, we take care to apply it to witnesses in the private sector only to the extent necessary to serve the greater public interest.* Therefore we apply such immunity only insofar as necessary to shield statements and information, whether truthful or not, given by a government contractor and its employees *in response to queries* by government investigators engaged in an official.

Id. at 1449 (emphasis added); (emphasis in original).

The *Mangold* Court's finding of testimonial immunity rests squarely on the absolute immunity afforded to witnesses at common law. *See Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985) ("The [absolute] immunities for judges, prosecutors, and witnesses established by [Supreme Court] cases have firm roots in the common law."). Efforts by L-3 and other contractors to extend *Mangold* beyond its facts have failed. *See Houston Community Hosp. v. Blue Cross & Blue Shield of Texas*, 481 F.3d 265, 275 & n.52 (5th Cir. 2007) (distinguishing *Mangold* on the ground that unlike common law immunity protecting witnesses in government-sponsored investigations, "[t]here is no evidence that insurance companies [which contract with the government] were immune from suit at common law.").

Most recently, in *In Re KBR Inc. Burnpit Litigation*, 2010 WL 3543460 (D.Md. Sept. 8, 2010), the District Court (J. Titus) rejected KBR's attempts to invoke sovereign immunity and absolute immunity based on *Mangold*. The Court ruled that *Mangold* was " a unique case best limited to its facts" because of its heavy reliance on the common law of witness immunity. *Id.*

3. No Public Interest Is Served by Affording L-3 Absolute Immunity

Here, the District Court properly held that no public interest would be served by allowing L-3 and Nakhla to evade tort liability for their role in the abuses at Abu Ghraib, which this Court has described as "sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law." *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280, 285 -286 (4th Cir. 2008). On the contrary, numerous federal interests are served in holding L-3 and Nakhla accountable for their violations of the terms of their contract and for violations of federal and state law. Accountability for such violations serves as a powerful deterrent for future violations by contractors, and sends the clear message that they cannot violate the law with complete impunity. Furthermore, by affording redress to the victims by holding L-3 accountable, the obligations that the United States has made to the international community to prevent and punish the commission of torture, through its ratification of the Convention Against Torture, and to safe-guard detainees held

under it care through ratification of the Geneva Conventions.[10] And by fulfilling our international obligations in this regard, members of the U.S. military and civilians are more likely to benefit from reciprocal protections by other States, a key consideration at a time of war.

In a self-aggrandizing argument, L-3 asserts that permitting civil lawsuits to proceed against defense contractors hinders the performance of military commanders in carrying out "battlefield activities." L-3 Br. 31. This argument fails because the Department of Defense's official rule-making makes clear that holding defense contractors liable for their own negligence helps, not hinders, the military mission. As persuasively explained by the District Court in *In Re KBR Inc. Burnpit Litigation*, 2010 WL 3543460 (D.Md. 2010), great weight must be given to Department of Defense ("DoD") rulemaking. The DoD issued rules requiring defense contractors to warn their employees that they could be subjected "to prosecution or *civil liability* under the laws of the United States and the host nation" for the "inappropriate use of force." *Id.* (emphasis added), citing Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed.Reg. 16,764, 16,767 (Mar. 31, 2008). The District Court extensively quoted the Department of Defense's rationale for this warning:

[10] *See e.g.,* Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949, Arts. 3, 27, 31, 32, 37, 100, 147.

> [T]he clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and 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 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. The District Court held that "[c]onsistent with the DoD's position, the Court will not, at this early stage, allow contractors "to avoid accountability to third parties for their *own* actions" based on the political question doctrine, or….based on the sovereignty of the United States." *Id.*

C. This Court Should Not Adopt the Reasoning of a 1985 D.C. Circuit Decision That Is Easily Distinguished From the Instant Lawsuit.

L-3 spills much ink setting forth why the Fourth Circuit should adopt the reasoning of a somewhat dated D.C. Circuit decision, *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir 1985). L-3 relies on this decision to argue the Fourth Circuit should wholly ignore the Detainees' allegations of torture, and instead focus on L-3's status as a government contractor. L-3 Br. 26. L-3 elevates the *Sanchez-Espinoza* holding into a doctrine that "the military's contractors are immune from tort claims arising out of their participation in United States military operations overseas because subjecting them to suit would trench on the immunity of the United States." L-3 Br. 27.

In fact, the *Sanchez-Espinoza* decision cannot be applied here because the facts are easily distinguished from the instant lawsuit. There, plaintiffs sued President Reagan, other government officials, and private parties for their actions in Nicaragua. The plaintiffs affirmatively argued that the private parties had acted with *actual* authority and approval from the President as authorized agents of the United States. *Sanchez-Espinoza*, 770 F.2d at 207 n.4.

On that record, the Court of Appeals for the District of Columbia held that the doctrine of sovereign immunity barred the claims against the government officials and their agents because the challenged acts were "official actions of the United States," that the official conduct of the Reagan Administration's foreign policy in Nicaragua was "authorized by the sovereign" and as such not "contrary to statutory or constitutional prescription." *Id.* at 207. The Court expressed concern that holding government officials liable for "action authorized by the sovereign as opposed to private wrongdoing" would "necessarily 'interfere with the public administration'" and "restrain the government from acting, or … compel it to act." *Id.* (citations omitted).[11]

That D.C. Circuit holding does not apply or persuade here. L-3 was not an authorized agent of the President when its employees tortured Detainee Victims.

[11] Even senior government officials are not entitled to absolute immunity for acts outside their official duties. *See, e..g., Nixon v. Fitzgerald*, 457 U.S. 731, 747-49 (1982).

To the contrary, the former President of the United States and Secretary of Defense both roundly condemned the torture at Abu Ghraib, and labeled the conduct as contrary to U.S. law, policy and interests. *See Saleh v. Titan Corp.*, 580 F.3d 1, 17-19 (D.C. Cir. 2009) (Garland, J., dissenting). This set of facts simply cannot be equated with *Sanchez-Espinoza*, where the acts in question were performed under the authority, with the approval, and at the direction, of, the President of the United States. Immunity is intended to protect the United States, not a private party such as L-3 who engaged in misconduct that shamed this nation. The District Court properly rejected L-3's effort to rely on *Sanchez-Espinoza* at this juncture. As the District Court observed: "In light of the many prohibitions against torture, L-3 will have to show (and they would seem to face a challenge to do so) that their actions were nevertheless lawful for the Government, else they would be deemed 'individual and not sovereign actions' and not immunized." J.A. 868-869

The District Court's reasoning finds support in Supreme Court jurisprudence. As the Supreme Court explained in *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689 (1949), when a statute (such as the Anti-Torture Statue) prohibits certain conduct, actions beyond those limitations are considered individual and not sovereign actions [because the actor] is not doing the business which the sovereign has empowered him to do or is doing it in a way that the sovereign has forbidden." *See also Butz v. Economu*, 438 U.S. 478, 489 (1978)

(stating that "a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers.").

In sum, L-3 lacks any legal support for its novel absolute immunity argument. Neither this Circuit nor any other permits a private plaintiff to enjoy absolute immunity merely because the United States retained them to perform a governmental function. Rather, the Supreme Court, *see, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 n.1 (1988), as well as the Congress and the Executive, have repeatedly rejected defense contractors' pleas for such absolute immunity.[12]

IV. THE DISTRICT COURT CORRECTLY FOUND THAT L-3 CANNOT INVOKE THE FTCA "COMBATANT ACTIVITIES" EXCEPTION.

L-3 and other defense contractors have repeatedly sought, and repeatedly failed, to persuade Congress and the Executive to immunize them from lawsuits when they are accompanying the forces to overseas conflicts. Yet L-3, relying heavily on the D.C. Circuit opinion in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (petition for cert. pending, No. 09-1313) (April 26, 2010), argues that this Court should find Congress intended to immunize all corporate contractors assisting the military in war zones. The District Court properly rejected L-3's

[12] As discussed below, Congress expressly excluded government contractors from the scope of sovereign immunities defined by the Federal Tort Claims Act, and from the scope of official immunity defined by the Westfall Act. *See* 28 U.S.C. § 2679 (1988).

argument. As Judge Garland's dissent in *Saleh* explained, the Federal Tort Claims Act "expressly excludes private contractors from the immunity it preserves for the government," and no Executive branch official has asked the courts to extend it to them. 580 F.3d at 17-18 (Garland, J., dissenting). The Department of Defense "has repeatedly stated that employees of private contractors accompanying the Armed Forces in the field are *not* within the military's chain of command, and that such contractors *are* subject to civil liability." *Id.*

A. Congress Has Never Immunized Government Contractors From Liability.

The FTCA expressly and explicitly excludes independent contractors from its scope. In Section 2671, entitled "Definitions," Congress stated the scope "does ***not*** include any contractor with the United States." 28 U.S.C. § 2671 (emphasis added). does not apply to contractors. In fact, the immunity conferred by the FTCA does not even apply to soldiers, but only to the United States government. 580 F.3d at 26. (Garland, J., dissenting). For soldiers and government employees to enjoy such immunity, they must invoke the protection of a separate statute, the Westfall Act. 28 U.S.C. § 2679. Under the Westfall Act, a government employee may invoke the immunity conferred on the United States only if the Attorney General certifies that the employee acted within the scope of his employment. 28 U.S.C. § 2679(d)(1),(4). Like the FTCA, the Westfall Act excludes contractors from its scope. To give private contractors immunity under the FTCA would give

them more protection than government employees who must seek certification under the Westfall Act.

B. *Boyle v. United Technologies* Created a Narrow Preemption Doctrine Protecting the United States' Discretionary Acts From State Lawsuits.

In *Boyle*, the Supreme Court created a narrow preemption doctrine designed to protect weapons manufacturers who were "executing [the] will" of the government from state product liability lawsuits. *Boyle v. United Technoloogies*, 487 U.S. 500, 506 (1985). The *Boyle* Court set forth a two-part test for determining whether a lawsuit asserting state or common law claims should be preempted: the suit must (1) involve a "uniquely federal interest[]" and (2) create a "significant conflict" with an "identifiable federal policy." *Id.* at 505-07.

In *Boyle*, the government gave a weapons manufacturer precise specifications for building a helicopter. *Id.* at 512. After the manufacturer built the helicopter in accord with the specifications, it was sued under state law. The Supreme Court found a significant conflict between the federal interest in "the procurement of equipment by the United states" and the state suit because "the state-imposed duty of care that is the asserted basis of the contractor's liability . . . is precisely contrary to the duty imposed by the Government contract . . . ." *Id.* at 507-09.

In other words, it was impossible for the contractor to both comply with government directives and with state standards of care. *Id.* As the Court noted, on the opposite end of the spectrum was a lawsuit that sought to enforce the same contractual duty imposed by the government contract. The "intermediate" scenario was when a state duty of care was not the same as that prescribed in the government contract, but also not directly contrary to it. *Id.* at 508-09. In neither of these scenarios would a state suit be preempted because there would be no significant conflict. *Id.*

C. The District Court Correctly Analyzed and Applied the *Boyle* Court's Reasoning.

L-3 urges this Court to follow the path broken by the Ninth and D.C. Circuits, and expand the *Boyle* doctrine to preempt lawsuits that arise from combatant activities. *See Saleh*, 580 F.3d at 1; *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). Instead, the District Court reasoned that Boyle doctrine must be limited to lawsuits challenging acts reflecting the exercise of government discretion. *Boyle*, 487 U.S. at 511. The District Court held:

> As for how to define the conflict between the federal and state interests, *Boyle* relied only on the "discretionary function" exception of the FTCA; it did not state that courts should pick and choose whichever FTCA exception they feel is most appropriate to the cases before them or should apply each exception in turn to see if any suggests a conflict.

J.A. 874.

The District Court cautioned against allowing the contractor preemption doctrine to become unmoored from *Boyle* requirement that there be government discretion, *Boyle*, 487 U.S. at 511-12. J.A. 874-877. The District Court stated, "The combatant activities exception fails to take into account the requirement that the Government must play a role in the alleged tortious conduct, which the Supreme Court found to be the basis for immunizing contractors working for the Government." J.A. 874.

The District Court's reasoning finds support from the *Boyle* decision itself, in the Supreme Court's rejection of the *Feres* doctrine as a basis for preemption "because it does not take into account whether the Government exercised any discretion or played any role in the contractor's alleged tortious acts." J.A. 876-877. (citing *Boyle*, 487 U.S. at 510).

Government discretion is the touchstone for preemption. The *Saleh* court clearly departed from that touchstone, holding that preemption could apply regardless of whether the United States authorized or directed L-3 to engage in the "combatant activity" challenged here. In contrast, the other "combatant activities" preemption case, *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), did focus on whether the United States authorized the conduct in question. The Ninth Circuit essentially injected government discretion into its definition of "combatant activities" by looking at whether "force is directed as a result of *authorized*

military action." *Id.* at 1337 (emphasis added). As in *Boyle*, the contractor in *Koohi* could not comply with both military orders and tort standards of care. In contrast, because L-3 acted contrary to military direction, L-3 cannot show that preemption is needed to protect any discretionary decisions. L-3 cannot identify a "significant conflict" between state tort law and a "uniquely federal interest," *Boyle* 487 U.S. at 507.

D. This Court Should Adhere to the Supreme Court Jurisprudence on Field Preemption, Which Was Ignored by the DC Circuit in *Saleh.*

L-3 fashions a "field preemption" by arguing that the federal power to wage war results in preemption of *any* state tort law. See L-3 Br. 38. Finding little support for such a broad proposition, L-3 relies almost exclusively on the decision by the Court of Appeals for the District of Columbia in *Saleh v. Titan Corporation*, 580 F.3d 1 (D.C. Cir. 2009), in support of its argument. Both the majority opinion in *Saleh* and the position L-3 argues here are contrary to controlling Supreme Court precedent.

The Supreme Court has repeatedly allowed civil actions for damages arising from war to be adjudicated. *See, e.g., Mitchell v. Harmony*, 54 U.S. 115 (1851); *The Paquete Habana*, 175 U.S. 677 (1900). There is no Supreme Court decision that supports L-3's argument that all state tort law has been preempted by the federal war-making power.

L-3 relies on *Saleh* and its erroneous interpretations of various field preemption precedents that arose, not in the war-making context, but in the foreign policy context. In none of the cases cited was tort law preempted; rather, in all of the cases, narrowly-drawn state legislation directly conflicted with a congressional or executive pronouncement involving foreign affairs. *See generally American Insurance Association v. Garamendi*, 539 U.S. 396, 408-09 (2003) (state legislation that forced German insurers to pay individual Holocaust survivors was preempted by an executive agreement with Germany that had created a general fund for the compensation of claimants); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 367 (2000) (state legislation that prohibited buying from Burma was preempted by federal statute that placed different sanctions on Burma); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 454-455 (1979)(state legislation that levied a property tax on Japanese vessels engaged in international trade was preempted because it resulted in the multiple taxation of instrumentalities of foreign commerce); *Zschering v. Miller*, 389 U.S. 429, 440-41 (1968) (Oregon inheritance statute that would dispense property to heirs abroad only if foreign government afforded Americans reciprocal right to inheritance and would not confiscate property was preempted because the statute required a state court to pass judgment on policies of foreign nations); *Hines v. Davidowitz*, 312

U.S. 52 (1941) (state alien registration statute preempted by comprehensive congressional registration statute).

L-3 makes no attempt to explain how holding defense contractors liable for torts committed abroad would intrude on international comity. Because of the breadth of displacement created by field preemption, the Supreme Court has limited preemption even in the context of foreign policy. *See Medellin v. Texas*, 552 U.S. 491, 531-32 (Executive authority to settle international claims not sufficient to preempt "neutrally applicable state laws"); *Garamendi*, 539 U.S. at 425 (contrasting "a generally applicable 'blue sky' law," which would not be preempted, to a law targeted at German insurers of Holocaust survivors). As the dissent in *Saleh* notes, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." 580 F.3d at 22 (Garland, J., dissenting).

The District Court did not err, as L-3 argues, in applying a presumption against preemption in "traditional areas of state power." L-3 Br. 39. L-3's argument that the presumption against preemption is reversed in the area of military and national security affairs is simply wrong. *See Wyeth v. Levine*, 129 S. Ct. 1189, 1194-95("[I]n *all* pre-emption cases . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (emphasis added)). The cases cited by L-3 is inapposite as all of them dealt with

suits that undermined the intricate system of military justice—a system to which L-3 is not subject, *see Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian"). *See generally*, *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (same); *Dep't of Navy v. Egan*, 484 U.S. 518.

E. Congressional Silence Does Not Support a Finding of Field Preemption.

L-3 argues that the *absence* of federal legislation regulating government contractors somehow supports its preemption argument and that the District Court erred when it relied on the fact that contractors were not covered by the FTCA. L-3 Br. 39-40. These arguments lack merit. First, that Congress has failed to create a cause of action for Detainee Victims cannot mean that Congress silently intended state tort law to be preempted; to the contrary, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee*, 464 U.S. 238, 251 (1984); *see also Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) ("[T]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them" (internal quotation marks omitted)).

Second, a statute that by its own terms does not apply to contractors cannot "occupy the field" regarding contractors' liability in wartime such that it evidences a clear intent to preempt all state claims. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (Field preemption occurs only when there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) ("Congress' intent, of course, primarily is discerned from the language of the preemption statute and the statutory framework surrounding it." (internal quotation marks omitted)). Aside from unsupported pronouncements that the purpose of the FTCA was to eliminate tort from the battlefield, there is no evidence that allowing state causes of action to proceed against contractors would undermine Congress's intent in enacting the FTCA.

Third, L-3's half-hearted argument that an administrative compensation system through which claims *may* be paid is evidence of a congressional intent to preempt tort claims is unavailing. 10 U.S.C. § 2734. The purpose of section 2734 is "[t]o promote and to maintain friendly relations through the prompt settlement of meritorious claims . . . [of] foreign inhabitants," and the Supreme Court has long recognized that state tort remedies often serve to further federal interests. *Silkwood*, 464 U.S. at 253 (holding that even though standards of care as to nuclear safety had been preempted by the federal government, state tort remedies were not

foreclosed for those injured in nuclear incidents). Detainee Victims do not argue that state tort standards should usurp federal standards to the extent they conflict. Rather, Detainee Victims seek redress for the injuries inflicted when L-3 acted in ways not authorized by military and contrary to its government contract, federal standards, and U.S. law. Detainee Victims who were tortured by L-3 deserve an opportunity to seek a judicial remedy for their injuries.

Compensating foreign inhabitants for injuries sustained from torture by private contractors promotes federal interests in promoting and maintaining friendly relations abroad, in promoting compliance with federal contracts, and in promoting the United States prohibitions on torture, among other things. It is for that reason the Executive Branch (namely, the Department of Defense), has clearly articulated its view that L-3 and other defense contractors cannot evade liability for their own negligence.

V. THE DISTRICT COURT PROPERLY APPLIED THE *BAKER* FACTORS AND HELD DETAINEES' LAWSUIT DOES NOT RAISE A POLITICAL QUESTION.

The Detainee Victims' lawsuit does not raise a political question. The District Court correctly applied the legal standard set forth by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

A. Damage Claims Are Constitutionally Committed to the Judiciary.

The purpose of the political-question doctrine is to protect "the coordinate branches of the Federal Government" through separation of powers, *Baker*, 369 U.S. at 210, and the most important *Baker* factor is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political branch." *Baker*, 369 U.S. at 217. Appellants are not part of a coordinate branch of the federal government. Therefore, to invoke the first *Baker* factor, L-3 face a "double burden". *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359-60 (11th Cir. 2007) ("*McMahon II*"); *Lane v. Halliburton*, 529 F.3d 548,560 (5th Cir. 2008). "First, [they] must demonstrate that the claims against [them] will require reexamination of a decision *by the military*. Then, [they] must demonstrate that the military decision at issue is, like those in *Tiffany* and *Aktepe*, insulated from judicial review." *McMahon II*, 502 F.3d at 1359-60.

First, Detainee Victims are asking the Court to review decisions and actions taken by L-3, an American corporation, not the military. Claims against corporations that do not challenge military conduct have repeatedly been found to be justiciable. *See Harris*, 618 F. Supp. 2d at 424; *McMahon II*, 502 F.3d at 1358; *Lane*, 529 F.3d at 560; *Lessin*, 2006 WL 3940556, at *3.

In *In Re Xe Services Alien Tort Litigation*, 665 F.Supp.2d 569 (E.D.Va. 2009), the district court rejected a private security contractor's argument that the political

question barred a tort suit against a private corporation for its wrongful killing of Iraqi civilians. The court held that "[o] n the rare occasion when claims against government contractors have been deemed nonjusticiable, it has been because the claims depended critically on battlefield policies and procedures of the United States government." *Id.* at 601. Since the plaintiffs had alleged, and the government had agreed, that the conduct alleged was extracontractual and illegal, the case did not raise a political question. *Id.* at 601-02. The same is equally true here.

Second, adjudication of damage claims are constitutionally committed to the Judiciary, not the Executive or Congress. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991) (tort issues "constitutionally committed" to the judiciary); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("damage actions are particularly judicially manageable" and "are particularly nonintrusive"); *Lane*, 529 F.3d at 560 ("when faced with an 'ordinary tort suit,' the textual commitment factor actually weighs in favor of resolution by the judiciary.").

Although L-4 claims that the conduct at issue falls squarely within the war-making powers committed to the political branches, "[t]he Constitution's allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to 'combat,' as the Supreme

Court's rejection of the government's separation of powers argument in *Hamdi v. Rumsfeld* makes clear." *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2008) (internal citations omitted).

L-3 argues that because the torture arose in the context of military interrogations, and interrogations require military judgment, this lawsuit raises a political question. The political branches already have made a determination that torture is unlawful, and a determination of whether L-3's conduct constituted torture will not contradict that or any other judgment of the political branches. *See* 10 U.S.C. § 801; 10 U.S.C. § 950v; 18 U.S.C. § 2441; 18 U.S.C. § 2340A; 22 U.S.C. § 2152; 22 U.S.C. § 2656; 28 U.S.C. § 1350; 42 U.S.C. § 2000dd; 32 C.F.R. § 116; 28 C.F.R. § 0.72. This case requires only the application of traditional tort principles and statutory interpretation, both of which are within the province of the judicial branch. *Lane*, 529 F.3d at 561 (stating that tort claims "are uniquely suited for judicial resolution"); *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("[O]ne of the Judiciary's characteristic roles is to interpret statutes….").

In *Tiffany v. United States*, 931 F.2d 271, 280 (4th Cir. 1991) this Court seemed to envision such a case. It held that the judiciary should not intrude on the exercise of professional judgments of the military personnel who were making split-second decisions on whether aircraft invading United States airspace were

hostile, but stated that its political question analysis would be wholly different if the Detainee Victims were arguing—as they are here—that L-3 "violated any *federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations*." *Id.*

B. There Are Judicially Discoverable and Manageable Standards.

As discussed briefly above, Detainee Victims' lawsuit raises traditional tort claims, claims that "are uniquely suited for judicial resolution." *Lane*, 529 F.3d at 561; *see also McMahon II*, 502 F.3d at 1364 ("common law of tort provides clear and well-settled rules on which the District Court can easily rely); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (rejecting political-question challenge to tort suit); *Klinghoffer*, 937 F.2d at 49 ("common law of tort provides clear and well-settled rules on which the District Court can easily rely"). Indeed, "American courts have resolved such matters between private litigants since before the adoption of the Constitution. *See* THE FEDERALIST NO. 80 (Alexander Hamilton)." *Lane*, 529 F.3d at 561. "The flexible standards of negligence law are well-equipped to handle varying fact situations. This case does not involve a *sui generis* situation such as military combat or training, where courts are incapable of developing judicially manageable standards." *McMahon II*, 502 F.3d at 1364.

Here, there are judicially discoverable and manageable standards for Detainee Victims' tort damages claims and Court is "capable of granting relief in a

reasoned fashion." *See Alperin*, 410 F.3d at 553; *Koohi*, 976 F.2d at 1332; *Kadic*, 70 F.3d at 249. L-3 expressly agreed to abide by United States federal laws and regulations governing the military's conduct (as well as federal procurement laws) in return for being paid to provide services. *See* 48 C.F.R. §§ 203.7000-203.7001 (procurement regulations); U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) §3-2(c), §3-2(f) (military contractors must supervise and manage their employees); U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003) §1-25, §4-45 (military contractors are responsible for disciplining their employees and ensuring their compliance with the law). Federal statutory and common law imposes a duty on every American not to torture. *See* 10 U.S.C. § 801 ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); 18 U.S.C. §§ 2441; 22 U.S.C. § 2152; 22 U.S.C. § 2656; 28 U.S.C. § 1350; 42 U.S.C. § 2000dd; 10 U.S.C. § 801; 10 U.S.C. 950v; 32 C.F.R. § 116; 28 C.F.R. § 0.72; 48 C.F.R. § 252.225-7040(e)(2)(ii). "[O]ne of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because [the] decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

C. Detainee Victims' Claims Do Not Require the Court To Make Policy Decisions.

The third *Baker* factor applies if the Court must make an "initial policy determination of a kind clearly for nonjudicial discretion" in order to decide the case. Here, the Court need not make any policy determination because Congress has already made it. *See Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 347 (S.D.N.Y. 2003). The United States prohibits torture. *See* 18 U.S.C. § 2340, 10 U.S.C. § 801; 18 U.S.C. §§ 2441; 22 U.S.C. § 2152; 22 U.S.C. § 2656; 28 U.S.C. § 1350; 42 U.S.C. § 2000dd; 10 U.S.C. § 801; 10 U.S.C. § 950v; 32 C.F.R. § 116; 28 C.F.R. § 0.72; 48 C.F.R. § 252.225-7040(e)(2)(ii).

D. Judicial Resolution of Detainee Victims' Claims Will Not Contradict Any Decision Made by the Executive Branch.

"The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). *Cf. McMahon II*, 502 F.3d 1331, 1365 n.35 ("[W]e have on a previous occasion found it 'useful' to collapse the factors into three . . . We find an abbreviated discussion of the last four factors to be equally appropriate here."). None of these last three *Baker* factors apply here because resolution of the detainees' tort claims does not threaten to contradict any prior policy of the

Executive branch or Congress. Appellants do not identify any policy at risk of being contradicted, and have not even briefed the final four *Baker* factors.

Under the fourth *Baker* factor, a question is non-justiciable if a court cannot undertake "independent resolution without expressing lack of respect due coordinate branches of government." *Baker*, 369 U.S. at 217. The fifth and sixth factors are similar and bar a claim only if a case would undermine an "unusual need for unquestioning adherence to a political decision already made," or would present the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* As discussed above, the resolution of this case does not involve questioning military judgment or any other judgment by the Executive branch or Congress, and would not lead to a conflict with any prior judgment of the Executive branch or Congress. Appellants have identified no political decision challenged by Detainee Victims' claims, and have only invoked the "war-making powers committed to the political branches," and "combatant activities." L-3 Br. 41-42. These are overbroad and the very "semantic cataloguing" the Supreme Court warned against in *Baker*. *Baker*, 369 U.S. at 217.

"[N]ot every matter touching on politics . . . [or] foreign relations lies beyond judicial cognizance." *Japan Whaling*, 478 U.S. 229-230. *See also Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Kadic v. Karadzic*, 70

F.3d 232, 249 (2d Cir. 1995) ("Not every case 'touching foreign relations' is nonjusticiable, and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.") (internal citation omitted). Instead, the case requires only a determination of whether Appellants acted negligently or in violation of U.S. statutes that prohibit torture. *Lane*, 529 F.3d at 567 (holding that negligence and fraud case did not present a non-justiciable political question); *Klinghoffer*, 937 F.2d at 49 ("The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.").

Finally, the United States has not intervened in this case, indicating that the case does not present a political question. *McMahon II*, 502 F.3d at 1365 ("The apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question.").

CONCLUSION

In conclusion, this Court should dismiss L-3's premature appeal. If the Court decides to hear the appeal, it should uphold the District Court's well-reasoned holding. Neither the law of war nor decisional law from this and other Circuits provides any basis to immunize L-3 from civil lawsuits arising from war crimes. L-3 seeks more immunity than is enjoyed by military personnel, yet did not abide by the military's express prohibitions against torturing Detainees. This

Court should not create novel immunities or field preemption doctrines inconsistent with Supreme Court jurisprudence. Instead, this Court should remand this lawsuit back to the District Court for the necessary discovery.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1891 L **Caption:** L-3 Services, et al. v. Al-Quraishi

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