

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SUHAIL NAJIM ABDULLAH	.	Civil Action No. 1:08cv827
AL SHIMARI, TAHA YASEEN ARRAQ	.	
RASHID, SA'AD HAMZA HANTOOSH	.	
AL-ZUBA'E, AND SALAH HASAN	.	
NUSAIF JASIM AL-EJAILI,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	December 16, 2016
CACI PREMIER TECHNOLOGY, INC.,	.	10:11 a.m.
	.	
Defendant.	.	
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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	JOHN K. ZWERLING, ESQ. The Law Offices of John Kenneth Zwerling, P.C. 114 North Alfred Street Alexandria, VA 22314 and BAHER AZMY, ESQ. KATHERINE GALLAGHER, ESQ. Center for Constitutional Rights 666 Broadway, 7th Floor New York, NY 10012 and ROBERT P. LOBUE, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10046
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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 31)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES: (Cont'd.)

FOR THE DEFENDANT:

JOHN F. O'CONNOR, ESQ.
CONOR P. BRADY, ESQ.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

ALSO PRESENT:

J. WILLIAM KOEGEL, JR., ESQ.

OFFICIAL COURT REPORTER:

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P R O C E E D I N G S

1
2 THE CLERK: Civil Action 08-827, Suhail Najim
3 Abdullah Al Shimari, et al. v. CACI Premier Technology, Inc.
4 Would counsel please note their appearances for the record.

5 MR. O'CONNOR: Good morning, Your Honor. John
6 O'Connor and Conor Brady for defendant, CACI Premier
7 Technology, Inc., and we're joined by Bill Koegel from CACI.

8 THE COURT: Good morning.

9 MR. ZWERLING: Good morning, Your Honor. Your Honor,
10 John Zwerling for the plaintiff, Al Shimari, et al, and I'd
11 like to introduce to the Court three attorneys who are
12 pro hac vice'd into this case but I don't believe the Court has
13 met yet: Baher Azmy and Katherine Gallagher from the Center
14 for Constitutional Rights up in New York, and Robert LoBue from
15 Patterson Belknap Webb & Tyler.

16 THE COURT: Good morning, counsel. All right. Well,
17 as you know, I have inherited this case from Judge Lee, and so
18 I am still relatively new to it, although I have a companion
19 case, the Steptoe folks know about that one, *Abbass v. CACI*,
20 and so -- but again, that case was stayed, because there's such
21 an overlap of issues, to see what happened with the Al Shimari
22 case, which is now before us.

23 I had requested that both sides submit status
24 reports, with suggestions as to how to proceed after the Fourth
25 Circuit issued its remand, and I've looked at both sets of

1 papers; and actually, I'm not going to accept either of your
2 plans because as I look at the issues -- and, you know, a
3 court's first obligation is always to determine whether it has
4 jurisdiction; and the issue, it seems to the Court, that must
5 first be fully resolved, and that's certainly what the Fourth
6 Circuit instructed, is the issue as to whether or not the
7 conduct that's been alleged by the plaintiffs in the third
8 amended complaint, which is the only complaint that's actually
9 before us, was unlawful when committed, and if not, did that
10 conduct occur under the actual control of the military or
11 involve sensitive military judgment.

12 That's the key issue. I've got to decide that. If I
13 find, for example, that the conduct was lawful or was not
14 unlawful, that puts us in one direction. If we find that the
15 conduct was unlawful, then it's irrelevant in terms of the
16 issue of control. Courts clearly have said that. It will
17 definitely change how we go about the discovery.

18 I think that was essentially the fourth point on
19 CACI's list in terms of the push-down order, but in my view,
20 that's the issue that has to get resolved first, and so I've
21 decided that.

22 Now, the only thing I want to sort of talk to you
23 about a little bit is how we go about addressing that
24 particular issue, so we're going to talk a little bit about how
25 we're thinking about the case. And again, I'm still new to it.

1 I have a couple of just sort of procedural questions. Was
2 there actual discovery engaged in during the previous
3 iterations of this case? In other words, have you had some
4 discovery in the case?

5 MR. O'CONNOR: Your Honor, John O'Connor.

6 THE COURT: Yes.

7 MR. O'CONNOR: There was full discovery. We had a
8 full discovery period, and that period closed in 2013.

9 THE COURT: All right. Now, during that, during that
10 period then, were the plaintiffs deposed?

11 MR. O'CONNOR: Only Al-Ejaili, Your Honor. The other
12 three, Judge Lee had ordered them to appear in this district.
13 They were not permitted by the United States to come into this
14 district.

15 THE COURT: All right. But you have fully deposed
16 one plaintiff?

17 MR. O'CONNOR: That's true, Your Honor.

18 THE COURT: And this plaintiff is which of the four?
19 I'm sorry, I know one was an Al Jazeera reporter and one --

20 MR. O'CONNOR: That's the one.

21 THE COURT: So I would -- did he speak English?

22 MR. O'CONNOR: No, Your Honor. We used a translator
23 here and there. It appeared that he could understand, you
24 know, words, but he was deposed through a translator.

25 THE COURT: All right. Do we have a transcript of

1 that deposition in the record someplace?

2 MR. O'CONNOR: Not -- certainly not a complete one,
3 Your Honor.

4 THE COURT: All right. How long was that transcript?
5 How long did that deposition take?

6 MR. O'CONNOR: It took a full day, but keep in mind,
7 Your Honor, that with the translation, probably half as many
8 pages as a normal full-day deposition.

9 THE COURT: All right. I definitely would like to
10 see a copy of that. So was it ever filed with the Court during
11 any motions practice or whatever?

12 MR. O'CONNOR: It's possible there are excerpts but
13 certainly not a complete copy, Your Honor.

14 THE COURT: All right, I would like someone to upload
15 a copy if it's not been scanned in electronically, or give us a
16 hard copy, whatever. Actually, it would probably be valuable
17 if it were electronic because then we can pull from it what we
18 need, all right?

19 MR. O'CONNOR: Your Honor, can I ask one question of
20 plaintiffs' counsel?

21 THE COURT: Yeah.

22 (Discussion among counsel off the record.)

23 MR. O'CONNOR: Your Honor, it's been three years.
24 What I wanted to confer with the plaintiffs --

25 THE COURT: Sure.

1 MR. O'CONNOR: -- I don't think any part of that is
2 designated "Confidential" or anything that requires sealing, so
3 I didn't want to promise that I can upload it before I made
4 sure that it's not confidential. We don't believe there's any
5 issue there.

6 THE COURT: All right. Well, anyway, that's
7 something I want to get so we can start getting a better
8 firsthand feel for the case.

9 All right. So it's CACI's position, as I understand
10 it, you feel that discovery closed?

11 MR. O'CONNOR: Well, Your Honor, the initial period
12 of discovery did close. There were a number of discovery
13 motions that had been pending and --

14 THE COURT: But I think for my purposes and for the
15 initial jurisdictional purpose, the only discovery we really
16 need is clear information as to the specific conduct the
17 plaintiffs are alleging was the unlawful conduct. That's where
18 this case starts. I mean, I've read the complaint, so I know
19 the types of different conduct that's been alleged, but I think
20 in order to be able to fully evaluate the legality or the
21 illegality of the conduct, it has to be very specific.

22 I'm assuming in the one deposition that you've got,
23 that's been spelled out in great detail.

24 MR. O'CONNOR: Yes, Your Honor, though the Fourth
25 Circuit's decision talked about that the district court has to

1 examine evidence regarding the specific conduct to which the
2 plaintiffs were subjected --

3 THE COURT: Correct.

4 MR. O'CONNOR: -- which Your Honor just talked about,
5 and the source of any direction under which the acts took
6 place.

7 So we do think that getting back to the discovery, we
8 do believe that discovery would be required as to --

9 THE COURT: No, because the first point is if the
10 Court finds the conduct was unlawful, it doesn't make any
11 difference in terms of the jurisdictional issue. It doesn't
12 make any difference as to whether you were directed to do it or
13 not. The Fourth Circuit's clear about that.

14 MR. O'CONNOR: But it --

15 THE COURT: If it's unlawful, it makes no difference
16 at whose direction, if any, it was done. It was done. Then
17 the question is some of the more interesting issues about
18 whether conspiracy or aiding and abetting theories are, you
19 know, are established.

20 So I think the key issue, the first issue that we
21 have to decide is whether or not the specific conduct that's
22 been alleged is unlawful, and one of the issues and, I think,
23 the very interesting legal issue here is unlawful by what
24 standard? Are we looking at the law of Iraq? Are we looking
25 at the law of Virginia? Are we looking at the Law of Nations?

1 I don't think that's clear in this record, and certainly I want
2 to hear your positions as to what law the Court must use in
3 determining whether conduct was unlawful, all right?

4 MR. O'CONNOR: Yes, Your Honor.

5 THE COURT: And I don't believe that's been resolved
6 in this case.

7 MR. O'CONNOR: Well, yes and no, I think. We did
8 file a motion on the common law counts, basically saying that
9 common law counts were not permitted based on Coalition
10 Provision Authority Order 17, and Judge Lee agreed with that.
11 As the case went up --

12 THE COURT: The Fourth Circuit has not addressed that
13 issue.

14 MR. O'CONNOR: Well, they did not. They ended up
15 vacating Judge Lee's decision without -- you know, they said it
16 was thorough but said we're not offering an opinion on it,
17 because they on *Kiobel* had said the ATS counts -- *Kiobel* did
18 not bar the ATS counts, and they wanted to make sure that if
19 political question resolved the case, that the Court didn't
20 enter judgment on a 12(b)(6) basis when a 12(b)(1) basis would
21 have been more proper.

22 THE COURT: Right, right.

23 MR. O'CONNOR: Your Honor, as to the question of the
24 legality of the specific conduct, we do think it's important
25 that this not proceed on mere allegations. We have

1 complaint -- we have a complaint, but we do think that the
2 Fourth Circuit's remand instructions require more than that,
3 and so for Al-Ejaili, for instance, he actually had to testify
4 about what -- you know, and was subject to cross-examination
5 about what actually happened to him.

6 And in all these cases, we spend a lot of time at the
7 allegation stage, and I think the Fourth Circuit's instructions
8 are that that's not sufficient anymore. We're now at the point
9 where -- the evidence stage, because they use "evidence." They
10 don't say "allegation."

11 THE COURT: I understand that. Well, there are
12 different ways of getting evidence. One would be sworn
13 affidavits. One would be answers to interrogatories or
14 depositions.

15 MR. O'CONNOR: Yes, Your Honor.

16 THE COURT: And I'm not -- I have -- I do not agree
17 with how Judge Lee approached the issue about the depositions
18 of the, of the plaintiffs. I in my experience have had
19 witnesses who couldn't get into the United States and we -- and
20 have had parties who couldn't get into the United States, and
21 we've done it by video. There's no reason that can't be done,
22 and I think that was offered at one point.

23 We could also have you-all go over to Istanbul or
24 Amman, Jordan, or someplace which is relatively safe to take
25 the depositions. I think the least expensive way of doing it

1 would be by video.

2 But there's no reason in my view why the testimony of
3 these plaintiffs cannot be obtained, and it would make the
4 record complete, and my reading of the Fourth Circuit is that
5 my job in this case is to develop the full facts -- I agree
6 with you, we have to develop the full factual record. The
7 issues in this case are very important, and both sides plus,
8 frankly, you know, the American people and the people of Iraq
9 have a right to get the full record developed here, and so I
10 feel that we are going to need to get the testimony of the
11 three remaining plaintiffs.

12 The fourth one, you've already got his testimony, and
13 I would assume whatever description he has provided of the
14 conduct is what it is.

15 However, so that we don't waste time, some of the
16 allegations to some degree overlap. I mean, the use of the
17 dogs, for example, to scare people. So there's no reason why
18 even while we're getting a complete record as to the other
19 three plaintiffs, the lawyers can't start looking at the legal
20 question, I mean, because you have some genuine specific detail
21 already as to the type of conduct that's at issue in the
22 plaintiffs' case.

23 MR. O'CONNOR: Your Honor, we agree that the Fourth
24 Circuit's instructions here are to develop the full record.
25 What we -- one concern we have is that a deposition of a

1 plaintiff is not the full record because the United States
2 certainly has records and information about the treatment of
3 everybody who was detained in Abu Ghraib prison. Those were
4 discovery motions that had been brought, had not been ruled on
5 because Judge Lee entered judgment.

6 So unless --

7 THE COURT: But why would that be relevant to this
8 case? We have four individual plaintiffs who have said certain
9 things happened to us at Abu Ghraib, right? That's it.

10 MR. O'CONNOR: Yes, Your Honor.

11 THE COURT: All right. Their description of what
12 happened forms the parameters of the legal analysis as to
13 whether that conduct was unlawful under the law, whatever law
14 it is, that existed at that time. That's the issue for the
15 jurisdictional -- to get it over this jurisdictional problem.

16 MR. O'CONNOR: But, Your Honor, on a 12(b)(1) motion,
17 we think that the Court resolves conflicts in the evidence, and
18 I don't think --

19 THE COURT: But what other -- your only evidence
20 would be it didn't happen to them?

21 MR. O'CONNOR: Didn't happen to them, that's right,
22 the surrounding circumstances. Also, legality will be greatly
23 informed by what was authorized by the United States at the
24 time that these alleged events occurred.

25 THE COURT: Well, but that goes -- that's a question

1 of law. That goes to what are we looking at in terms of what
2 makes something unlawful.

3 In other words, if, if -- anyway, I'm not going to
4 start giving you a view of how I think the case will ultimately
5 wind up because I don't know how it's going to wind up. I
6 haven't seen your briefs.

7 But we're not going to delay this case ad infinitum.
8 This case needs to get -- these issues need to get resolved,
9 and I think the most efficient and clearest way is to go right
10 to the essence of the case, and the essence of the case, as I
11 said before, is the specific allegations of the four plaintiffs
12 as to the conduct that they, they allege they experienced, and
13 then to look at what sources of law which were in effect in
14 that 2003-2004 time period, what was clearly established law.

15 Remember, the Fourth Circuit also talked about the
16 gray zone. Again, if certain conduct is not clearly against
17 whatever legal standard I find is the proper legal standard,
18 then you do have to look at whether there was direct direction
19 from the military or sensitive military judgment involved.
20 That analysis comes in in the gray zone or in the zone where
21 the conduct is not unlawful.

22 But the first and key question is whether the conduct
23 was unlawful, and that's -- I think there are only two things
24 you need to do for that. One is what is the conduct and what
25 is the law that you're -- that it's going to be weighed

1 against, and that's how I want these first round of motions to
2 proceed.

3 I'm going to do the following: I'm going to give
4 you-all some time limits in which I want to have certain things
5 done. Do the plaintiffs' counsel feel there's going to be any
6 problem in organizing the depositions of the three remaining
7 plaintiffs? I assume you've been in touch with them since the
8 decision of the Fourth Circuit?

9 And who's the spokesperson on this issue? Your name
10 again, please?

11 MR. AZMY: Baher Azmy.

12 THE COURT: Yes, sir.

13 MR. AZMY: Your Honor, yes, we have been in touch
14 with them, and we have been in the process of preparing for the
15 possibility of entry into the United States, which requires for
16 two of the three plaintiffs renewing their passports and then a
17 visa process, but as we urged in the earlier proceedings, we
18 can also make them available for video depositions or for in
19 person depositions in a neutral city like Istanbul.

20 So we would propose to meet and confer with the
21 defendants to identify a timetable by which we could complete
22 the video depositions, but we also agree with Your Honor that
23 for purposes of political question, the Court can decide on the
24 evidence. We don't think it necessarily has to be evidence
25 that is subject to cross-examination in a, in a deposition. We

1 have evidence in the record, not only the allegations in the
2 complaint, we do have detailed interrogatories and a medical
3 examination from our expert.

4 THE COURT: All right. Now, see, that helps me
5 somewhat. So there have been detailed interrogatories that
6 have been answered by these plaintiffs that go into more
7 specifics than what's in the complaint?

8 MR. AZMY: Yes. They, they verify what's in the
9 complaint. The third amended complaint was, I think if I'm
10 recalling correctly, filed after we completed the
11 interrogatories. So the complaint in many respects mirrors the
12 interrogatories, but they are, of course, signed by the
13 plaintiffs.

14 THE COURT: Well, for example, I mean, just -- the
15 complaint just alleges things like, you know, restrictions on
16 food. I mean, I don't know what that means, all right? Does
17 that mean, for example, that somebody who's following a halal
18 diet was not given halal-compliant food? Does it mean that
19 people were given, you know, bread and water for days?

20 I don't know what that means, and I think I have to
21 know more specifically what that means in order to be able to
22 tell whether that would be in violation of some international
23 norm of lawful or unlawful behavior.

24 So that's why I didn't think that the generic
25 descriptions -- in some cases, the generic description may be

1 enough, but in other cases, I'm not sure that it's enough,
2 because again, as to each plaintiff, it's not all the same
3 conduct that you've alleged as to each plaintiff.

4 MR. AZMY: That's right, Your Honor, and I think --

5 THE COURT: Yeah.

6 MR. AZMY: I think the interrogatories, if I recall,
7 do not -- would say that deprivation of food, for example, was
8 deprivation of food for days, but it would not specify a
9 particular sort of dates or, you know, very concrete duration.

10 But, you know, sort of going to how the Fourth
11 Circuit analyzed the case, there would be some conduct that
12 would be clearly unlawful that the Court could evaluate based
13 on the evidence presently in the record and that could not be
14 lawfully authorized.

15 THE COURT: Well --

16 MR. AZMY: And then there may be some issues that
17 would be in the gray zone, and then because, as we argue -- and
18 there is a full factual record on the question of control --
19 the Court could evaluate whether certain things that are still
20 gray and therefore subject to future deposition testimony --
21 and we're not ruling out the idea of deposition. We very much
22 want our plaintiffs to be able to testify, but just thinking
23 about how the Court could deal, if it wanted to, with put up a
24 question on the present record, where things were unclear, we
25 could conclude it's in the gray zone and then do an analysis on

1 the full factual record of whether or not there was military
2 control over the conduct of CACI in carrying out the gray
3 conduct.

4 THE COURT: Well, you know, the other way of
5 simplifying this case is for the plaintiffs to look at -- I
6 mean, I think for each of these plaintiffs, you've alleged at
7 least eight or nine specific types of mistreatment. If there
8 are one or two that in your view are slam-dunks, you know, you
9 make the case a lot simpler to just go with those two, jettison
10 the other ones and, you know, focus on those.

11 I mean, that's the other thing. I would think at
12 this point, this case has been around for, what, eight years?
13 Both sides need finality one way or the other, and
14 simplification is the way to get to that, so that's another
15 option.

16 And that's in the control of the plaintiffs, frankly,
17 at this point.

18 MR. AZMY: Yes, Your Honor, we would consider that.

19 THE COURT: All right.

20 MR. AZMY: Yes.

21 THE COURT: All right. But you are telling me then
22 within -- again, normally interrogatory answers are not filed
23 with the Court. Have they been filed, though, were they
24 exhibits to some previous motions?

25 MR. AZMY: Portions were exhibits to previous

1 motions, but I don't believe all four were filed in full, and
2 we could certainly do that, Your Honor.

3 THE COURT: All right. Well, I think actually rather
4 than having things piecemeal, other than that one deposition
5 that I would like to read, I think any other types of filings I
6 want in the context of motions with exhibits so it's all --
7 there's context for it.

8 How much time do the plaintiffs think it would --
9 you-all need to arrange with defense counsel setting up the
10 depositions of the remaining three plaintiffs?

11 MR. AZMY: Video depositions, Your Honor?

12 THE COURT: I think video is the way to go in this
13 case, because it's going to take too long to get a visa, I'm
14 sure, and since you said there were problems last time
15 around --

16 MR. AZMY: Yeah. Well, it is still not entirely
17 uncomplicated given the conditions in Iraq, so we'd like some
18 flexibility around the time. We would propose 60 days, Your
19 Honor.

20 THE COURT: You need that much time, huh?

21 MR. AZMY: Well, just to be, just to be safe given
22 complications around communications and travel and the like.

23 THE COURT: I think -- all right, if I -- assuming we
24 give you the 60 days, is there any reason why the position of
25 the parties as to the applicable sources of law can't be

1 briefed before then?

2 MR. AZMY: That could be briefed, Your Honor.

3 THE COURT: Because that's a pure legal argument, and
4 then applying that law to the facts developed enables us to
5 decide how we want to go.

6 MR. AZMY: Yes.

7 THE COURT: All right. How long does the plaintiff
8 think -- I think 30 days for the opening briefs?

9 MR. AZMY: Yes.

10 THE COURT: Is there an agreement among, among you at
11 all as to the source of law, or are you differing on that?

12 MR. AZMY: We -- our position is the sources of law
13 for the ATS claims is the Law of Nations, which includes
14 customary international law, the Geneva Conventions, Convention
15 against Torture, so the full corpus of international law, and
16 for the remaining common law claims, I think there's not
17 agreement. There's a choice of law question there that we
18 would have to brief.

19 THE COURT: All right. What about from the defense
20 standpoint?

21 MR. O'CONNOR: There's certainly no agreement on, I
22 think, any aspect relating to the common law claims.

23 THE COURT: What about for the -- how about for the
24 ATS claims?

25 MR. O'CONNOR: For the ATS claims, Your Honor, I

1 think there is agreement that those are governed by customary
2 international law. I think there is disagreement --

3 THE COURT: As to what is customary international
4 law.

5 MR. O'CONNOR: -- once you get below that level.

6 THE COURT: Yeah.

7 MR. O'CONNOR: Your Honor, may I ask a couple of
8 questions to make sure we understand the path forward here?

9 THE COURT: All right.

10 MR. O'CONNOR: Your Honor has said video depositions
11 is the way to go. Our depositions had been accompanied by a
12 request for medical exams. Am I to assume that those are put
13 off for now? Because they are claiming significant injuries,
14 and Judge Lee had ordered medical exams, and Al-Ejaili, for
15 instance, had a medical exam when he was here for his
16 deposition.

17 We assume that if they're going to stay in Iraq or
18 somewhere like that, one, getting a doctor for us into Iraq for
19 a medical exam is probably not particularly practical, or
20 having an Iraqi publicly represent us is probably not
21 particularly practical.

22 THE COURT: Do some of these plaintiffs allege that
23 they have scars as a result of some of the activities that
24 occurred?

25 MR. O'CONNOR: Well, Your Honor, plaintiff Rashid

1 filed a complaint and interrogatory answers that listed all of
2 his injuries, and then five years later, the third amended
3 complaint said, oh, he was shot, also. So I would assume that
4 there's a bullet wound just as one sort of simple example.

5 THE COURT: Well, I mean, not to get into the details
6 of this, but, I mean, if the first interrogatory doesn't
7 include being shot and one lives in Iraq, I think you can get
8 shot at almost any point.

9 What's going on with Mr. Rashid? Who's talked with
10 him recently? Is he -- I didn't see a shooting. Did I miss
11 that in the third amended complaint?

12 MR. O'CONNOR: It was added for the first time in the
13 third amended complaint, Your Honor.

14 THE COURT: That he was shot?

15 MR. O'CONNOR: He says he was shot. That was not an
16 authorized amendment. Judge Lee had only allowed amendments as
17 to conspiracy allegations, but that was a new one in the third
18 amended complaint.

19 THE COURT: Did you object?

20 MR. O'CONNOR: We filed a motion to strike, which was
21 mooted by Judge Lee's entry of judgment on *Kiobel* and the
22 governing law issues.

23 THE COURT: Well, other than that issue, do some of
24 the other claims -- I want to know what the relevance of the
25 medical examination now, which is more than, more than 13 years

1 after the events, what do you think that would show?

2 MR. O'CONNOR: Well, Your Honor, some of the
3 plaintiffs, for instance, allege long-term psychological
4 damage.

5 THE COURT: All right. So PTSD or something like
6 that.

7 MR. O'CONNOR: We had a psychiatrist who saw the
8 plaintiff -- the one plaintiff who appeared for deposition.

9 THE COURT: All right. What's the plaintiff position
10 on that?

11 MR. AZMY: Your Honor, the medical reports go to
12 damages, and I think we can resolve this question separately
13 and --

14 THE COURT: Well, they to some degree also go to the,
15 to the credibility of claims of certain types of injuries,
16 right? I mean, if I, if I claim that I was burned --

17 MR. AZMY: Right.

18 THE COURT: -- right?

19 MR. AZMY: Right.

20 THE COURT: And the other side maybe is contesting
21 that I was burned, the best evidence of that besides my
22 testimony unless you have witnesses who saw it happen would be
23 I've got burn scars on my arm. Well, that would be pretty
24 strong evidence that I was telling the truth when I said I was
25 burned.

1 MR. AZMY: That's right, Your Honor, certainly. I
2 understood you wanted to -- wanting to resolve the question of
3 whether or not the conduct was unlawful, which could, I think,
4 be resolved on the present evidence, and then much of this --
5 the testimony regarding the severity of the harm would
6 ultimately go to damages or, if medical exams could be
7 completed before summary judgment, perhaps the sufficiency of
8 the evidence.

9 THE COURT: The evidence, yeah. I agree. I don't
10 want to delay this case. So again, I want -- I'm going to give
11 the plaintiffs 60 days to arrange with opposing counsel for the
12 deposition by video unless you get super fast visa. I mean, if
13 they can come here, that's fine, but if they can't, then it
14 will be by video deposition.

15 They don't have to have medical exams at this point.
16 We'll leave that issue to down the road.

17 But there's no reason in my mind -- because again,
18 you've all been working on this case for years; you've got a
19 huge advantage over the Court in this respect -- that we can't
20 have initial briefs from each side, so dueling briefs as to
21 what your position is on the law that is applicable both, you
22 know, the standard of law under the ATS as well as for the
23 common law issues, all right? That gives me a preliminary
24 feeling for where you're coming from, and that will give us a
25 chance to be working on both an evidentiary and a legal front

1 at the same time.

2 MR. O'CONNOR: Your Honor, the other question I had
3 was while we're working on this legal and evidentiary phase,
4 which I assume will, in the end, we'll end up with big briefs
5 on political question --

6 THE COURT: Correct.

7 MR. O'CONNOR: -- are we to assume that this process
8 will not involve at all a factual question as to whether CACI
9 personnel were involved in injuring these plaintiffs?

10 THE COURT: At this point, I just want to see if we
11 even have a basis for the Court to exercise jurisdiction, all
12 right?

13 MR. O'CONNOR: Your Honor --

14 THE COURT: We have an allegation right now in the
15 complaint that the only people at that high-level facility were
16 CACI people and military people.

17 MR. O'CONNOR: Well, that's not quite right, Your
18 Honor. There were also other government agencies who were at
19 the facility.

20 THE COURT: Or government --

21 MR. O'CONNOR: Other linguists who -- more linguists
22 than interrogators, and they were not CACI personnel. There
23 were lots of non-military, non-CACI personnel there.

24 My other question, Your Honor, is these depositions
25 and Al-Ejaili's deposition was a merits deposition. If we're

1 going to have the plaintiff sitting there to answer questions,
2 it would seem to me that efficiency would not limit what I can
3 ask that plaintiff, because this is my -- this is my first
4 chance to talk to these plaintiffs.

5 So we would like to be able to conduct our merits
6 deposition. Now, I recognize we don't have all the discovery
7 we would like from the United States but -- and I would like to
8 not have fights with counsel during the deposition: You can't
9 ask that because that doesn't relate to political question. I
10 mean, they're sitting there. We would like to ask them --

11 THE COURT: Well, beyond how these people were
12 treated, what would be other -- what other relevant questions
13 would there be for this case?

14 MR. O'CONNOR: Your Honor, for instance, for
15 Al-Ejaili, we asked him a lot of questions about whether he can
16 identify people with whom he interacted, and the answer was
17 basically no.

18 THE COURT: And did he explain why he could not
19 identify them?

20 MR. O'CONNOR: Sometimes he was hooded. Sometimes he
21 just, you know, he could give the vaguest of physical
22 descriptions but not really much else.

23 THE COURT: And, I mean, there are allegations in the
24 complaint that people's name tags were covered over. Did he,
25 did he say something along those lines as well?

1 MR. O'CONNOR: I don't recall him saying anything
2 about name tags. I'm not even sure he could read a name tag if
3 it was there.

4 THE COURT: All right, sure.

5 MR. O'CONNOR: But if we're going -- unless we're
6 going to do multiple depositions of the plaintiffs --

7 THE COURT: Yeah, I'm not a fan of bifurcation --

8 MR. O'CONNOR: Neither are we.

9 THE COURT: -- and I do think it would probably be in
10 the plaintiffs' best interests, too, to get it all done at one
11 time.

12 MR. AZMY: We don't disagree with that, Your Honor.

13 THE COURT: All right, that's fine.

14 Now, Judge Anderson is the magistrate judge on this
15 case, and I'm going to let him know what we're doing. He's a
16 very, very good manager of discovery. So if there are
17 discovery disputes, I'm going to also -- he and I together will
18 be watching this case.

19 Part of me is tempted to want to invite the
20 depositions to be conducted from the courthouse so that I can
21 actually get a firsthand view of these plaintiffs. We have
22 done that before. It takes some logistics in terms of setting
23 it up.

24 We have a couple of benefits there. Among other
25 things, my court reporter, who's extremely good, can be taking

1 down the testimony. I get a chance to see it. Looking way
2 down the road, were there to be a trial, I can get a feel for
3 potential, you know, objections and start cleaning up the
4 testimony right then and there, because in many cases, these
5 people may not be able to come here. I had a case involving
6 Somali citizens under the ATS, and we took some of the evidence
7 that way, and I've done it before in other cases.

8 But that's an option. That's not a requirement, but
9 I would be open to that as a possibility as well if you-all can
10 work that out, all right?

11 MR. O'CONNOR: Your Honor, taking a deposition here
12 would be fine with us. We do want to put down our marker that
13 we would have very strong views about the idea that these
14 plaintiffs could go to a trial and just put a television show
15 on for the jury, and that's not an issue for today --

16 THE COURT: Sure.

17 MR. O'CONNOR: -- but that is -- we have a very, very
18 strong view about that.

19 THE COURT: Well, and it may be then that jointly
20 everybody goes to the State Department and asks for a
21 short-term parole of these folks into the United States. I
22 mean, again, there could be creative ways of getting them here,
23 but that's way down the road.

24 MR. O'CONNOR: I understand.

25 THE COURT: I've got to get over this political

1 question issue. This is a big hurdle, and this is in my view
2 the biggest hurdle to get this case moving, and so I want to
3 get it moving, all right?

4 So I think -- have I given you enough to get this
5 case started now?

6 MR. AZMY: Yes, Your Honor.

7 MR. O'CONNOR: Yes, Your Honor.

8 THE COURT: All right, anything further at this
9 point?

10 MR. ZWERLING: I have one issue.

11 THE COURT: Can you go to the lectern, Mr. Zwerling?

12 MR. ZWERLING: With whom within the courthouse family
13 would we contact to try to make arrangements with the Court
14 for --

15 THE COURT: The video?

16 MR. ZWERLING: -- this end of the depositions?

17 THE COURT: Lance Bachman.

18 MR. ZWERLING: Lance Hoffman.

19 THE COURT: Lance Bachman.

20 MR. ZWERLING: Bachman.

21 THE COURT: He's the IT person here at the
22 courthouse.

23 MR. ZWERLING: Thank you.

24 THE COURT: We have the screens here. I mean, it
25 takes some logistics, and it can't cost the Court any money. I

1 don't know how this case is being financed, but, I mean, I have
2 to be honest with you-all, you'd have to figure that out.

3 I mean, we have certain cables and conduits, and I
4 think there's a satellite hookup, but -- and again, discovery
5 is normally not open to the public, and it would be a sealed
6 proceeding. I would consider this just like a private
7 deposition between the parties, so we'd have it done in a
8 sealed courtroom.

9 Every now and then, you do get pressure from the
10 press, and, you know, there are First Amendment potential
11 issues out there, so I just warn you about that if you do it
12 here at the courthouse. But anyway, talk with him to get
13 started to see what could be done, all right?

14 MR. ZWERLING: Yes, Your Honor.

15 THE COURT: And again, it may be that it can't be
16 done from Iraq. Your plaintiffs might have to go to Turkey or
17 Jordan or some other place where it's easier to -- and the
18 other thing is make sure that there is no problem with the
19 local country about conducting this kind of a proceeding. Some
20 countries have laws that would not permit that. Because we're
21 not doing this through the Hague Convention or any of the more
22 formal structures, all right?

23 MR. ZWERLING: Okay.

24 THE COURT: All right. In terms of the -- so in 30
25 days, I'm going to get your opening briefs as to your view of

1 the law. Now, if to the extent there's an agreement, you know,
2 Geneva Convention, this particular Geneva Convention, both
3 sides say this is the law but you may argue how it applies
4 differently, that's one thing.

5 And then after I've seen your opening briefs, I'll
6 decide when I want any responses to each other's brief if I
7 even think I need them, all right?

8 All right, anything further on this case at this
9 point?

10 MR. AZMY: No, thank you, Your Honor.

11 THE COURT: No? How about from CACI?

12 MR. O'CONNOR: No, Your Honor.

13 THE COURT: And the only other thing is can you reach
14 out to the counsel in the *Abbass* case?

15 MR. O'CONNOR: I will.

16 THE COURT: Let them know what we're doing because I
17 don't want to have to address the political question twice. At
18 some point, the *Abbass* case also has to be heard or considered.

19 MR. O'CONNOR: Your Honor?

20 THE COURT: Yeah.

21 MR. O'CONNOR: Would the Court like me to discuss a
22 plan to get going on political question with that case?

23 THE COURT: Yes, yes. And I can hear either through
24 a phone conference with counsel for those plaintiffs to see if
25 they want to sort of join in. I mean, the deposition issue is

1 too complicated because there are 40 or something plaintiffs in
2 that case, but the law, the applicability of the law issue
3 would be the same for both cases, it seems to me, right?

4 MR. O'CONNOR: I think that's, that's right, Your
5 Honor.

6 THE COURT: Yeah. And is it the same team -- the
7 same group of lawyers that are going to be on both cases?

8 MR. O'CONNOR: For CACI, that's right, Your Honor.

9 THE COURT: Yeah, okay. All right, great. All
10 right?

11 MR. O'CONNOR: Thank you, Your Honor.

12 MR. AZMY: Thank you, Your Honor.

13 THE COURT: All right, you're all free to go.

14 MR. AZMY: Have a good weekend.

15 (Which were all the proceedings
16 had at this time.)

17

18 CERTIFICATE OF THE REPORTER

19 I certify that the foregoing is a correct transcript of
20 the record of proceedings in the above-entitled matter.

21

22

23

/s/

Anneliese J. Thomson

24

25