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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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SUHAIL NAJIM ABDULLAH AL      :   Civil Action No.:
SHIMARI, et al.              :   1:08-cv-827
      Plaintiffs,            :
versus                        :   Friday, March 1, 2024
                              :   Alexandria, Virginia
CACI PREMIER TECHNOLOGY,     :
INC., et al.,                :   Pages 1-36
      Defendants.          :
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The above-entitled motions hearing was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:29 a.m.

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: The Court calls civil case
3 Suhail Najim Abdullah Al Shimari, et al. versus CACI Premier
4 Technology, Inc., et al., Case Number 2008-cv-827.

5 May I have appearances, please, first for the
6 plaintiff.

7 MR. AZMY: Good morning, Your Honor. Baher Azmy
8 for the plaintiffs. We have a couple of more new members.
9 And then I have a special introduction after we all make our
10 legal appearances.

11 THE COURT: All right.

12 MR. KICAK: Good morning, Your Honor, Thomas Kicak
13 of Patterson Belknap for the plaintiffs. I'll be addressing
14 the motion in limine regarding deposition designations.

15 THE COURT: All right. Good morning.

16 MS. MAHLER-HAUG: Good morning, Your Honor. Alex
17 Mahler-Haug for plaintiffs, also of Patterson Belknap. I'll
18 be addressing CACI's motion to exclude Dr. Modvig's revised
19 report.

20 THE COURT: Thank you.

21 MR. KIM: Good morning, Your Honor. Scott Kim,
22 also from Patterson Belknap, pro bono counsel for
23 plaintiffs, and I will be addressing defendants' motion to
24 exclude 139 of plaintiffs' 163 exhibits.

25 THE COURT: Good morning.

1 MR. AZMY: And briefly, Your Honor, I'd like to
2 introduce Mr. Salah Al-Ejaili, one of our plaintiffs, who's
3 visiting the United States from Sweden to meet the legal
4 team and to prepare and wanted to see the courtroom and be
5 present.

6 THE COURT: Well, this will not be the courtroom.
7 We'll be on 700, but they're doing renovations there.

8 MR. AZMY: Oh, understood. We were wondering
9 about that. Thank you, Your Honor.

10 THE COURT: Very good. While you're there,
11 counsel -- let me get first, I'm sorry, the introductions
12 from defense team, and then I want you back there at the
13 lectern.

14 MR. AZMY: Yes.

15 MR. O'CONNOR: Good morning, Your Honor. John
16 O'Connor, Linda Bailey and Nina Ginsberg for CACI.

17 THE COURT: All right. Good morning. All right.
18 What's the status of the other two plaintiffs in terms of
19 their ability to be at the trial in person?

20 MR. AZMY: Thank you, Your Honor.

21 So we've applied for visas, we've written the
22 relevant federal agencies requesting expedition and have not
23 heard anything. But there is a matter we think we should
24 share with the Court, which is on his return from Malaysia
25 to Baghdad, Mr. Al Shimari was detained over several days,

1 nearly two weeks. He's only recently released for reasons
2 we do not understand and have no particular information
3 about.

4 I think as of now, he's, you know, recovering from
5 the fear and trauma of that experience with his family, but
6 I think that also -- that might put into some risk --
7 additional risk the possibility that he be able to travel.

8 At the same time, we're making serious
9 arrangements for the possibility of remote testimony,
10 including securing a vendor who would be ready to send over
11 sophisticated monitors, video camera, et cetera to maximize
12 the security and stability of a video feed into the
13 courtroom.

14 And then perhaps later -- I know our team is
15 interested in getting connected with the Court's IT folks at
16 some point.

17 THE COURT: Yeah. You'll need to speak with
18 Mr. Bachman, who is the IT and audiovisual person. And
19 don't leave that for the last minute.

20 You need to understand that, you know, we're
21 taking jurors' time to be committed to the trial, and if
22 there are logistical problems that make that communication
23 not work well, that's going to -- we're not going to delay
24 the trial, and we're not going to change the trial date. So
25 it's going forward on April 15th.

1 MR. AZMY: Understood, Your Honor. I think our
2 Teams person is very eager to get started as well for all
3 the reasons you mentioned so there are no hiccups.

4 THE COURT: And you'll need to make sure you have
5 the appropriate translation and interpretation services
6 available.

7 MR. AZMY: Yes, Your Honor. We've identified
8 three potential interpreters and have run their resumes by
9 CACI, and I think we have agreement that they be acceptable.
10 I think we would plan on just retaining two to alternate
11 and -- but we have availability and -- of Iraqi expert
12 interpreters.

13 THE COURT: And the only other thing is, were any
14 of the depositions in this case taken in Iraq?

15 MR. AZMY: Yes. Two of the Iraqi-based
16 plaintiffs.

17 THE COURT: Is there any issue with --

18 MR. AZMY: Oh, I'm sorry. They were taken in
19 Beirut. I apologize, Your Honor.

20 THE COURT: Is there any issue with Iraqi law in
21 terms of conducting a deposition remotely? There are some
22 countries where I understand that can be a problem, so you
23 need to make sure that whatever you're doing in that respect
24 is not a problem with the local legal system.

25 MR. AZMY: Understood, Your Honor. Thank you.

1 We'll give that consideration.

2 THE COURT: All right. And what about the third
3 plaintiff?

4 MR. AZMY: That's Mr. Al-Ejaili.

5 THE COURT: No. No. Mr. Al Shimari you said --

6 MR. AZMY: Oh, okay. Mr. Asa'ad. He passed
7 through customs and immigration with no problem. But, you
8 know, he also has an outstanding visa request, like Mr. Al
9 Shimari, but we're planning, you know, particularly as we
10 get closer to trial, for the contingency of remote
11 testimony.

12 THE COURT: All right. That's fine.

13 All right. Well, we have basically three motions
14 before the Court. I'm not going to need argument on some of
15 them, and others I might take some.

16 The motion to strike Dr. Modvig's expert report
17 I'm going to deny, Mr. O'Connor. I recognize that -- I've
18 read the two reports, the reports from the doctor who's no
19 longer available, and I still find he would not be
20 available, and then I've compared it with the substitute
21 report.

22 While there are differences, the core reason for
23 both of those expert reports was to help the jury understand
24 what constitutes torture and what constitutes cruel, inhuman
25 and degrading behavior.

1 I frankly don't understand why there's no
2 stipulation as to what type of conduct qualifies for those
3 particular labels since that, to me, is not the core issue
4 in this case. And I think that frankly CACI runs a risk if
5 it tries to argue to the jury that putting somebody in a
6 stressed position and threatening them with growling dogs
7 would not be considered, at the very least, cruel, inhuman
8 and degrading, if not torture.

9 That's not the core issue in this case, in my
10 view. But, again, you have to decide how you want to try a
11 case. And I'm not going to overly restrict that as long as
12 it's not creating unnecessary length of time.

13 I will allow CACI, if you truly want to fight this
14 issue as to what qualifies as torture or cruel, inhuman and
15 degrading conduct, to designate your own expert. All right.
16 But I can't honestly see why this is really an issue that
17 needs to be disputed.

18 So I'm going to, again, deny the motion. The
19 expert will testify. I'm not letting just the report come
20 in; he'll have to be here to be cross-examined. But if that
21 is going to remain an issue in the case, that's how we're
22 going to take care of it. And if you're going to have an
23 expert designated, you need to get that report to the
24 plaintiffs no later than one week before the start of trial
25 so they have a chance to evaluate it if they need to rebut

1 it; all right?

2 MR. O'CONNOR: Understood, Your Honor.

3 THE COURT: All right. The next two motions,
4 again, I really don't think I need to hear a whole lot of
5 argument, because, quite frankly, I'm somewhat alarmed by
6 the positions of both sides.

7 I've never had a case where, pretrial, every
8 single potential exhibit has been objected to with an
9 actually sort of a meaty argument. I am not going to sit in
10 a -- in the in limine context and basically try this case in
11 sort of the abstract.

12 So I'm not going to be ruling specifically on one
13 exhibit versus another at this point. I, however, find that
14 certain of the broad concerns that the plaintiff has do need
15 to be addressed somewhat globally.

16 We're not going to permit hearsay evidence in this
17 case. The rules of evidence apply. If a statement is being
18 offered and the declarant is not available for
19 cross-examination, that statement comes in only to explain
20 what others might have done, but it can't come in for the
21 truth of its contents. All right.

22 So a lot of the statements that are at issue in
23 this case were relied upon by Taguba or Fay in their
24 reports. The proper way of doing this is first to
25 introduce -- and I haven't given you yet, you'll get it in a

1 few days -- the portions of the reports that are going to
2 come in. If, after those portions come in, the defendant is
3 really attacking the foundation of those reports, that may
4 open the door then to the source of the information coming
5 in. But it will come in to explain why the report says what
6 it says.

7 It's the same way when a police officer gets a 911
8 call and somebody reports that John Smith just shot John
9 Brown. All right. That can't come in for the truth of its
10 contents, but it comes in to explain why the police officer
11 then goes to the scene to address the situation. That's
12 basic hearsay types of evidence.

13 So the plaintiff needs to understand that all
14 those exhibits that -- or many of the exhibits about which
15 the defense is complaining, the argument that they're
16 hearsay is appropriate. All right. They don't come in for
17 the truth of the content. They may come in to explain why
18 the reports that result from those statements are -- say
19 what they say.

20 There's a lot of argument about various
21 photographs. I am going to permit a certain amount of
22 evidence of the general conduct that was going on in Abu
23 Ghraib as long as it's connected to the time period when
24 these plaintiffs were there. That's the relevant time
25 period. So it will be important for the plaintiff to make

1 sure that the proper foundation exists. If it's not there,
2 then the exhibit can't come in.

3 The -- some of the evidence about what was going
4 on at the time the plaintiffs were there is clearly relevant
5 because the type of charge -- the claims in this case are
6 conspiracy and aiding and abetting. And I've already ruled
7 in some of my written opinions that to the extent that CACI
8 employees were either aware of and/or participating in this
9 kind of conduct, whether it was at -- addressed to the
10 specific plaintiffs or others during the time period while
11 the plaintiffs were there, can be relevant to the issue
12 about whether they actually conspired or aided and abetted
13 and the harm that actually occurred to the three plaintiffs
14 involved in this case.

15 So, again, I'm not going to rule right now on
16 exhibit by exhibit; I'm just giving you a general feel about
17 what the proper parameters of evidence will be.

18 In terms of the concern that CACI has about, you
19 know, its employees, to the extent that any of the
20 employees' names are clearly in the public record in some
21 other respect, I'm not going to bar their names appearing.
22 But if there's other information about an employee that has
23 not been in the public record, then it's not appropriate for
24 that aspect of their personnel files to be bandied about in
25 public, and so I will definitely -- if that evidence is

1 being introduced, will definitely strike it. So, again,
2 plaintiff needs to be wise about appropriate redactions.

3 Any exhibit that is not clear on its face, either
4 because there's so many redactions that it makes no sense or
5 it is just so vague or so badly mangled with hole punches or
6 whatever, is not coming in. I'm not going to have a jury
7 trying to struggle to understand something. It's -- the
8 evidence has to be adequately clear. So I think the
9 plaintiff, again, is on adequate alert that the -- that the
10 issue has been raised.

11 Now, my understanding from your experience is that
12 some of these problems can be corrected with a different
13 version of the exhibit or a more complete version of the
14 exhibit, so I don't understand why that cannot be worked
15 out. But we're just not going to -- we're not going to take
16 the time during the trial to be worried about that. If it's
17 not properly prepared, it won't come in.

18 In terms of the depositions, I found very
19 interesting the way in which the depositions were conducted,
20 and I'm looking in particular at the Frederickson
21 deposition.

22 Now, Mr. O'Connor, come up to the lectern. I want
23 to talk to you about that.

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

25 THE COURT: All right. Exhibit 4, which is the

1 Frederickson deposition, is your exhibit; is that correct?

2 I believe it's --

3 MR. O'CONNOR: Trial Exhibit 4, Your Honor, or
4 motion Exhibit 4?

5 THE COURT: Motion Exhibit 4. I believe it was
6 attached to your -- the reason --

7 MR. O'CONNOR: Yes. We attached it to our motion
8 so the Court could see --

9 THE COURT: Well, here's my problem. You
10 mentioned in your motion that you didn't get a fair
11 opportunity to cross-examine the witness, and then you cited
12 in your brief to several pages, 82 through 83, 95 through
13 96, 186 to 187. Those pages are not in your exhibit, so I
14 was not able to even tell how you were restricted in your
15 ability to cross-examine Frederickson.

16 MR. O'CONNOR: That's an error on our part, Your
17 Honor. I can explain the situation with the Frederick
18 deposition.

19 THE COURT: Okay.

20 MR. O'CONNOR: The Frederick deposition is
21 different from a lot of the depositions in this case because
22 it occurred in 2013 when the case was -- well, it was five
23 years old, but it was still in its infancy.

24 At the time, the United States's view of state
25 secrets -- which there had never been a court ruling on

1 state secrets at this point. The Court -- or the United
2 States's view was as it related to Abu Ghraib, the only
3 thing the witnesses were allowed to do was to affirm things
4 that they had already said. Because the United States's
5 view at that time was there were things said, for instance,
6 in a court-martial or in a sworn statement that the United
7 States later determined were a state secret.

8 Fast-forward. That's 2013. So when I was
9 allowed -- so they asked questions, let me read 50 pages
10 from your prior testimony, did you say that. When I tried
11 to cross, generally speaking, they would say he can't
12 testify to anything new. I got a few things that I was able
13 to ask, but, for the most part, you know, I was not allowed
14 to elicit anything different or in addition to what the
15 witness had said in a prior statement.

16 Fast-forward five years to 2018, 2019, by then,
17 the United States's view of state secrets I would say had
18 evolved, and they were really only asserting state secrets
19 for evidence that would match an interrogator to a detainee,
20 interrogation techniques that were approved with respect to
21 a particular interrogation. And that's about what the
22 United States has asserted state secrets on and for evidence
23 that matters to this case.

24 So the Frederick deposition, if it had occurred in
25 2018 or 2019, would have gone much differently because, at

1 that point, this Court had only allowed state secrets for a
2 couple of categories of information. So the Frederick
3 deposition -- I mean, it's -- it's, like, literally I'm
4 going to read you 50 pages, do you adopt that? And we
5 couldn't really cross on it because we couldn't get anything
6 in addition.

7 So, in our view -- and just to advise the Court,
8 last night, the United States responded to plaintiffs' *Touhy*
9 request for Mr. Frederick's presence at trial, and the
10 United States advised that he is outside the subpoena power,
11 which he was just barely outside the subpoena power when he
12 was deposed 11 years ago.

13 In our view, there's a lot of circumstances here.
14 If they want to use Frederick, it should not be through
15 leading, hearsay, you know, reading into the record things
16 that don't meet the recorded recollection. They should take
17 a *de bene esse*, and we would certainly consent to that. And
18 let's do it the right way that comports with the rules of
19 evidence.

20 If the Court has no further questions on that,
21 that's all I have to say.

22 THE COURT: And I should correct the record. It's
23 Frederick, not Frederickson. I was misrepresenting his
24 name.

25 All right. Let me hear from the plaintiff.

1 MR. KICAK: Of course, Your Honor.

2 First, to start, I think that argument
3 misrepresents the entire concept of adopted statements.

4 THE COURT: Well, wait a minute. I don't want to
5 hear about that.

6 Have you made contact with Frederick, and is he
7 going to be willing to come to court and testify?

8 MR. KICAK: We just got a response to our *Touhy*
9 request last night saying that he was outside of the
10 subpoena power of the court, so we have not made that
11 attempt yet.

12 THE COURT: All right. The best evidence is
13 always to have witnesses live in the courtroom. I'm not
14 fond of deposition testimony. We've heard that before.

15 If he is not able to be -- if he's not willing to
16 appear and you're not able to actually subpoena him, then a
17 new deposition of him, a *de bene esse* deposition is the
18 right way to go so that this testimony can be properly
19 developed. All right. So I want you to immediately try to
20 see what's going on with him and get it scheduled for a --
21 another deposition if -- because one of the problems you
22 have here is there is a legitimate argument about leading
23 that gives me some concern.

24 At the same time, I recognize this is a very
25 significant witness, frankly for both sides, and so it would

1 definitely be a better trial if he is available to testify.
2 If he is not available to testify, then a new deposition
3 where it can be handled in a much more appropriate fashion
4 makes far more sense. So I'm, at this point, going to hold
5 in abeyance my decision about what we do with this
6 deposition and the other ones where this practice was used.

7 In terms of just looking at this, we kicked around
8 in chambers -- this is not just an 801 issue; I think 804
9 and 807 frankly could apply here. There would be, to some
10 degree, enough indications of reliability since this
11 statement -- Frederick's testimony was made, as I understand
12 it, during a court-martial. He was under oath. He would
13 have been subject to cross-examination in the court-martial,
14 and Mr. O'Connor, you were at least present and able to ask
15 him a few questions. I understand you were limited, and I
16 understand the unfairness of that.

17 Nevertheless, you know, if a witness is under oath
18 and says yes that is exactly what I said in that context and
19 I am saying it is true, I'm saying that now, there are
20 indicia of reliability in that respect. Nevertheless, he
21 should still be available for cross-examination, which he
22 truly was not.

23 And so I'm going to leave this as an open question
24 as to whether or not if it's impossible to get a new
25 deposition of him or impossible to get him here to testify

1 live, or, again, to testify remotely. I mean, he may not
2 want to come into Virginia, but if he's willing to be
3 available at the trial to actually be examined just the way
4 some of the plaintiffs may have to be, that's certainly
5 preferable to going with the transcript; all right?

6 MR. KICAK: Understood.

7 THE COURT: All right. So that's how I'm going to
8 rule on that one.

9 Basically I'm going to not grant or deny any of
10 the other two motions, other than to warn the plaintiff that
11 I think you proceed at your own risk if you're trying to
12 move into evidence the exhibits that have a genuine problem.
13 Cumulative evidence is not acceptable. Evidence that is
14 highly inflammatory is not acceptable. But I have already
15 ruled in previous rulings that a certain amount of the full
16 context of what was going on in Abu Ghraib is appropriate
17 because of the nature of the two charges that are here, that
18 is conspiracy and aiding and abetting.

19 I do think that it's going to be very helpful to
20 both the Court and to you all as you work on this case to be
21 thinking now about jury instructions. Because it's my
22 understanding that the conspiracy and aiding and abetting
23 theories of liability in a civil case are slightly different
24 from what you would have in a criminal case. For example,
25 *Pinkerton* liability is not the appropriate standard.

1 My understanding is that there has to be enough
2 evidence for the plaintiff to prevail by a preponderance of
3 the evidence that a defendant did more than just be merely
4 present. Even in the criminal context, mere presence at the
5 scene of the crime does not make one a conspirator or an
6 aider or abettor. Even knowing that a crime is going on
7 does not make one an aider or abettor. There has to be some
8 affirmative act that shows that the party intended for the
9 injury to occur and did something to enable it to occur.

10 And so I think that's pretty much the standard
11 that the plaintiff has to meet in this case. And so, down
12 the road, there still has to be enough evidence to show that
13 the CACI people themselves were involved in inflicting
14 misconduct on these plaintiffs for them to prevail.

15 So I do want to make sure that I talk with you now
16 about some of how the trial will be set up. I'm going to
17 sit a jury of eight jurors. The civil rules provide that a
18 civil jury should be between six and 12. I'm going to use
19 eight, there's no alternates, just eight jurors. You each
20 get three strikes -- peremptory strikes.

21 I will want any proposed jury instructions. First
22 of all, to the extent you can agree, I want one set of
23 agreed-upon instructions, and then you can each file your
24 separate instructions about which you don't agree. You will
25 file those in court, but I want Word versions sent directly

1 to chambers as well. I would assume in this case that
2 special verdicts will be wanted. I think they're probably
3 appropriate, and, therefore, again try to work collegially
4 on one set of proposed verdict forms. If you can't agree,
5 then I'll look at your separate ones.

6 The same thing with proposed voir dire. I do all
7 the voir dire questioning. I will certainly look at what
8 you submit. I may or may not give it. Again, I prefer to
9 get one joint set, and then if there are separate questions
10 that either side wants the Court to ask, then those get
11 done. All of that should be filed no later than one week
12 before the start of trial so that I can have a chance to
13 look at it and make sure that we're ready to go.

14 I'm giving each side 20 minutes for your opening
15 statements. Those will be timed. I'm not timing the rest
16 of the case. But I have looked at the evidence that you've
17 got here, I've thought about the case, I will advise the
18 jurors when we pull them together that they should expect
19 the case will not last more than two weeks, and I think it
20 will be less than that. But just out of an abundance of
21 caution -- and I can't recall whether we're going to bump
22 into the -- we may -- does anybody recall, does Passover
23 start during that two-week time period? I know we're sort
24 of in that spring holiday season. Yeah, Passover begins
25 Monday night, the 22nd. So that would be the second week of

1 the trial. So that may or may not result in the need to
2 have a delay. I am not sure how the jury will be made up,
3 and I don't know what counsels' situation on witnesses will
4 be.

5 But, anyway, I'm going to tell the jury two weeks.
6 So if I see that we're getting very far behind, then I may
7 start putting time limits, but right now, I don't intend to
8 do that. And I'll determine how much time I give you for
9 closing argument after I see how the trial has been going.
10 I think that's all of the pretrial stuff that I need to give
11 you.

12 I will be getting back to you, I hope on Monday,
13 the excerpts from the reports that I've had under advisement
14 for some time. And if there are any other matters that we
15 need to address pretrial -- we're going to talk about the de
16 bene esse depositions in a second, but I will not be
17 available until March 18 for anything further.

18 Now, how many depositions did we agree I was going
19 to sit in on? There are two or three; is that correct?

20 MR. O'CONNOR: It's three, Your Honor.

21 THE COURT: All right.

22 MR. O'CONNOR: March 18 at 10 a.m. is Steve
23 Stefanowicz. That will be in Philadelphia. March 19 will
24 be Colonel Pappas, that's at 11 a.m. Eastern Time in Austin,
25 Texas. And then March 20 would be General Fay. That starts

1 at 10 a.m. Eastern Time, and that's going forward in Juno
2 Beach, Florida.

3 THE COURT: All right.

4 MR. O'CONNOR: I have a number of questions about
5 those that we hope for guidance on. I can ask them now or I
6 can --

7 THE COURT: Ask them now.

8 MR. O'CONNOR: Your Honor -- and we appreciate
9 that the Court's going to sit in because I think that's
10 going to make things a lot better for getting ready for
11 trial.

12 Is the Court planning to take the bench or
13 participate from chambers? That just affects things like
14 how we get exhibits in front of Your Honor.

15 THE COURT: No, we're going to be in court. I'm
16 going to assume my courtroom is up and ready to go, so we'll
17 have to make sure -- it might have to be up here, we'll see.
18 I'm not sure which courtroom we'll be in yet. Okay.

19 Give me those times again. Monday March 18 at 10?

20 MR. O'CONNOR: Tuesday, March 19 at 11.

21 THE COURT: Okay.

22 MR. O'CONNOR: And Wednesday, March 20 at 10.
23 They're all 10:00 local time, but one's in Austin.

24 THE COURT: All right.

25 MR. O'CONNOR: Given that Your Honor is going to

1 take the bench, our intention will be to have someone in
2 court here who can hand up -- if I hand an exhibit to the
3 witness, they can hand up the exhibits so Your Honor will
4 have a hard copy to look at.

5 THE COURT: What's your estimate as to the amount
6 of time?

7 MR. O'CONNOR: For Stefanowicz, Your Honor, I
8 believe our direct will be in the range of two to two and a
9 half hours. I obviously have no idea on the plaintiffs'
10 side. I believe that Pappas and Fay, I would be surprised
11 if they last longer than two hours each for my direct.

12 Which I guess brings me to my next point that --
13 we've moved for these, so we assume that these are -- we are
14 the taking -- you know, this is going in in our case where
15 we're going to go first and they're going to cross and we'll
16 do redirect. Obviously if they're going to be going in
17 their case, if we're trying to replicate a trial, it might
18 look a little different.

19 THE COURT: You would be calling them in your
20 case, though, or ...

21 MR. O'CONNOR: That's right. We moved for them
22 because we wanted to call them in our case. So my
23 expectation is that during the trial, they'll put their
24 evidence on, they'll rest, and then we're going to start our
25 case, and somewhere in our case we're going to call

1 Stefanowicz, Pappas and Fay, and we're going to play de bene
2 esse depositions of them, which will have our direct, their
3 cross and then any redirect or recross that the Court
4 permits.

5 THE COURT: All right. Is there any objection to
6 proceeding that way?

7 MR. KIM: Your Honor, just on Major General Fay,
8 it was always our position that we were not intending on
9 calling him, given we thought his report was sufficient.
10 But now that he is being called, we potentially would have
11 want to put him on during our direct during our portion of
12 the case. So I think it is a little bit unclear as to
13 whether we would have been calling him during our case in
14 chief, but now that it's happening on March 20th, somewhat
15 out of order of how we would have typically done it during
16 trial, I suppose it's the only complication we would want to
17 raise with Your Honor about the mechanics of how that should
18 be handled.

19 THE COURT: Well, I think since CACI took the lead
20 on this, I'm going to go as Mr. O'Connor has requested. So
21 they're going to do the direct, and then you can cross, and
22 then redirect and recross if necessary.

23 MR. KIM: Thank you, Your Honor.

24 THE COURT: The main thing is to get the evidence
25 in to the jury.

1 Now, you're going to have a court reporter and a
2 videographer at the location where the witness is?

3 MR. O'CONNOR: That's correct, Your Honor.

4 THE COURT: Okay. I'm not going to bother having
5 my court reporter in the courtroom.

6 MR. O'CONNOR: There's no need. I agree, Your
7 Honor.

8 THE COURT: But I will not -- I will not hesitate
9 to interject if I'm finding that the questioning is
10 unnecessarily long, repetitious, et cetera. So that's the
11 whole reason why I wanted to be in place when you took the
12 depositions.

13 MR. O'CONNOR: Understood, Your Honor. Just like
14 trial. We understand that fully.

15 THE COURT: That's right. That's right. And any
16 objections then -- hopefully it will be a good, clear
17 system. You'll make your objections out there in Texas or
18 Florida or wherever you are, and I will rule on them from
19 the bench; okay?

20 MR. O'CONNOR: That's what we expect, Your Honor.

21 THE COURT: That's right.

22 MR. O'CONNOR: A few more on the logistics.

23 Because of the travel, Philadelphia, Austin, Juno,
24 Florida, it's -- it would be difficult to have one person do
25 them all, so we're going to have Ms. Bailey in Austin.

1 She's been pro hac in this case for more than a decade. Do
2 we --

3 THE COURT: That's fine.

4 MR. O'CONNOR: I just --

5 THE COURT: You don't need local counsel.

6 MR. O'CONNOR: Thank you.

7 And then I think the last thing on the depositions
8 is an issue came up last night with respect to the United
9 States's *Touhy* response that we can deal with it at the
10 deposition, but I should at least -- I think it's -- we
11 should alert the Court now, it seems the United States's
12 position is that it's not only a state secret if a witness
13 testifies that he is one of the pseudonymous interrogators
14 that interacted with these plaintiffs, but also if the
15 witness testifies that he is not.

16 Now, I understand if Steve Stefanowicz were to get
17 on the stand and say -- and would want to say I am CACI
18 Interrogator A, I completely understand why the Court's
19 state secrets ruling would bar that because that's
20 connecting a human being with a detainee.

21 If he gets on the -- if he were to get on the
22 stand and say I am not Interrogator A, we're -- we don't
23 agree that that's a state secret, and, at best, it just
24 narrows the pool of who could be Interrogator A by one.

25 We intend to ask the witness that on March 18, and

1 from the United States's *Touhy* response, it's pretty clear
2 to me that they're going to assert state secrets. So I at
3 least wanted to flag that. We can brief it and deal with it
4 on the 18th, but that's an issue that's going to arise, and
5 that's one of the reasons why we're happy the Court is going
6 to be on so then we don't -- we'll get a ruling.

7 THE COURT: Ms. Wetzler, I see you're here in
8 court. Are you really going to raise that issue?

9 MS. WETZLER: Good morning, Your Honor.
10 Lauren Wetzler. May I introduce Stephen Elliott, who came
11 prepared to speak to this issue?

12 THE COURT: Yeah.

13 MS. WETZLER: Thank you.

14 MR. ELLIOTT: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. ELLIOTT: Counsel for CACI is correct with the
17 government's position. The government can neither confirm
18 nor deny whether a specific individual interrogated the
19 plaintiffs or any other detainee. I think we can all agree
20 if, for example, Mr. Stefanowicz said I did hypothetically
21 interrogate one of the plaintiffs, that would fall within
22 the scope of the government's assertion of state secrets.

23 But, likewise, if he hypothetically said I did not
24 and we agreed or confirmed that, another individual could
25 come in and say I was Interrogator A. And if we say we can

1 neither confirm nor deny that, it would tend to reveal that
2 that individual was the interrogator of --

3 THE COURT: I'm not going to ask the government to
4 confirm anything. But I agree with Mr. O'Connor. I can't
5 see how a person -- it's one thing if there were only two
6 interrogators, and Interrogator 1 says it wasn't me. Well,
7 then obviously it was the other one.

8 But, in this case, I have no idea, nor is it going
9 to be in this record, as to how much interrogators there
10 were. And so if one says I wasn't the one, it doesn't say
11 anything about who the other ones were.

12 So I don't see how that's the state secret. I
13 think that's an abuse of the secret in this context. Unless
14 you're telling me there were only two interrogators on the
15 scene or even a half a dozen. I believe there were quite a
16 few more than that.

17 MR. ELLIOTT: Respectfully, Your Honor, we did
18 meet with an original classification expert this week to
19 discuss this question and some other related questions, and
20 they were firm in the government's position in light of how
21 individuals or entities or groups could compile information
22 to ascertain the identities of certain interrogators who
23 participated in the interrogations of the plaintiffs or
24 other detainees.

25 If Your Honor would prefer, we would welcome the

1 opportunity to submit something in writing that could
2 provide a declaration or a more fulsome explanation of the
3 government's position.

4 THE COURT: You're going to have to, because,
5 right now, my inclination is to absolutely permit him to
6 testify. I don't see how, in this day and age, that is a
7 genuine state secret. I think that's probably an abuse of
8 using that doctrine, and you better have some good evidence
9 to support it. I'm not going to permit him to say he was,
10 all right, so we're not going to allow the identity of the
11 interrogators to come out.

12 But if a person says it was not me, he's just
13 talking about himself and not talking about anybody else, I
14 would permit it. So unless you can convince me to the
15 contrary, I will allow that; all right?

16 MR. ELLIOTT: Understood, Your Honor. We will
17 expeditiously submit something to the Court.

18 THE COURT: All right.

19 MR. ELLIOTT: Thank you.

20 MR. O'CONNOR: Just two more logistical things,
21 Your Honor.

22 The Court issued an order a couple weeks ago about
23 the pseudonymous depositions and said to remove pauses,
24 extraneous conversations. We want to make sure that we do
25 it in the way that the Court wanted.

1 Is the Court -- if the -- for instance, if I asked
2 a question of a witness, the United States made a state
3 secrets assertion and told the witness not to answer, is the
4 Court's intention that the question and the objection go
5 out? I mean, in our mind, it makes sense to have the jury
6 hear the things the witness wasn't allowed to say, but it
7 might be the Court's intention to handle that in
8 instructions. I just want to make sure when we have our
9 people cut it, I want to make sure we do it right.

10 THE COURT: In part it depends on how much Swiss
11 cheese we sort of get from it. That's the difficulty in
12 having the jury able to understand what's going on.

13 So can you give me an example of a particular
14 witness where you think this is going to become an issue?

15 MR. O'CONNOR: Sure. Any of the pseudonymous
16 interrogators, for instance, I might have said were you a --
17 did you attend the Army's interrogation school, and the
18 objection went -- would be that's a state secret because it
19 would tend to give clues as to who this person is or is not.
20 And there might be some colloquy, but -- and we understand
21 the colloquy the Court wants us to take out, and of course
22 we wouldn't want to play that. But the --

23 THE COURT: Yeah. I think that the -- I think the
24 interjection that it's a state secret and therefore the
25 witness cannot answer the question would be appropriate to

1 keep that in the transcript, but the colloquy thereafter is
2 not appropriate.

3 MR. O'CONNOR: It's irrelevant. I agree, Your
4 Honor. Thank you.

5 Oh, and last thing. I don't know if the Court has
6 seen the Supreme Court's decision in *Department of*
7 *Agriculture v. Kirtz*. It came out about two weeks ago
8 dealing with sovereign immunity. We're going to file a
9 motion for reconsideration on derivative sovereign immunity.
10 I think we're going to file it today, and I didn't want to
11 walk out of here and have the Court say, geez, I didn't hear
12 about that today, but we are going to file that.

13 THE COURT: You know, we're going to go to trial
14 on April 15th. That's the answer.

15 MR. O'CONNOR: I'm fully intending that we are.
16 Well, I'm fulling expecting that we are, Your Honor.

17 THE COURT: Okay. That's good.

18 Yes, Ms. Wetzler.

19 MS. WETZLER: Your Honor, one logistical question.
20 I heard Your Honor say that Ms. Bailey did not need local
21 counsel with her. May the government also proceed without
22 counsel simply in its role as being present to protect the
23 state secrets privilege, or does Your Honor prefer that I'm
24 either in the courtroom or available by link?

25 THE COURT: For what, when the depositions are

1 being --

2 MS. WETZLER: When the de bene esse depositions
3 are occurring, the United States intends to be present to
4 enforce the scope of those state secrets privilege
5 assertions, just as it would be at trial as well.

6 THE COURT: I don't mind whoever you want to
7 handle that issue.

8 MS. WETZLER: Thank you, Your Honor.

9 THE COURT: All right. But the person must be
10 available. You're not going to hold it up.

11 MS. WETZLER: Yes, Your Honor. We intend to send
12 people to each of the locations, but I simply needed to make
13 sure that Your Honor didn't also expect that I would be
14 available in addition.

15 THE COURT: No, you don't need to be.

16 MS. WETZLER: Thank you.

17 THE COURT: Anything from the plaintiff? Yes.

18 MR. AZMY: Briefly, Your Honor. Two matters.

19 The -- there have been an in limine motion to
20 exclude the testimony of our medical expert, Dr. Xenakis,
21 which has been withdrawn because the big premise of the
22 motion disappeared.

23 There still was, though, an embedded issue that
24 might come up on cross that would benefit from the
25 Court's -- a ruling now. There was a -- as part of their

1 motion surfacing past evidence of a supposed lack of candor
2 with respect to an extramarital affair that got Mr. Xenakis
3 sanctioned but ultimately expunged, and think that's -- we
4 would argue that that's inappropriate to come in and would
5 just benefit from clarity from the Court on that point, if
6 possible.

7 THE COURT: Who's going to handle that? Are you
8 really going to try to raise that issue?

9 MS. BAILEY: Your Honor, we have no intention of
10 bringing up his extramarital affair. The only extent to
11 which we would intend to bring this up would be the fact
12 that Dr. Xenakis was, in fact, relieved of his position for
13 a lack of -- a stated lack of candor. He got a sanction
14 about that part.

15 Now, he did go to court, and that was undone, but
16 the only reason that it was undone was because a recording
17 involved -- the convening authority had relied on a
18 recording that was unlawfully made. And so it wasn't that
19 he didn't lie to his commanding officer, he did lie to his
20 commanding officer. There was an extensive reprimand that
21 says as much. He was later reinstated because the evidence
22 that the commanding officer relied upon was unlawfully
23 obtained. And so nobody wants to put out, you know, you had
24 an affair with your cancer stricken wife's nurse, that's
25 not -- we don't have any interest in that, the jury doesn't

1 need to know that. But it is fair for them to know that he
2 lost his job because he lied.

3 THE COURT: But then you open the can of worms
4 that allows the defense to come back in and, to some degree,
5 say, well, that finding actually was then overturned. No.
6 I'm going to sustain the objection from the defense. That
7 doesn't come in.

8 MS. BAILEY: All right.

9 THE COURT: All right. I'm sorry. From the --

10 MR. AZMY: Thank you, Your Honor. Just one last
11 housekeeping matter.

12 Do you plan to or could we request at some time a
13 pretrial conference or --

14 THE COURT: Oh, I anticipate the week before trial
15 we would probably get together at least one time.

16 MR. AZMY: Okay. Thank you.

17 THE COURT: All right. Hopefully it will not be
18 too extensive.

19 All right. I really urge both sides to -- because
20 we're getting close to crunch time, to think wisely about,
21 you know, the core issues that really have to be resolved in
22 this case and to try to trim any extraneous information.
23 Because, frankly, if I'm finding that, you know, either side
24 is unduly complicating or elongating the trial, I'll cut it.
25 I'm not shy about jumping into a party's case, so you need

1 to be careful about that.

2 Again, I strongly recommend that both sides think
3 about whether you can come to some stipulations, especially
4 on this issue of definitions of what constitutes torture and
5 CID. All right.

6 All right. If there's nothing further, we'll
7 recess court for the day.

8 I'm sorry. Yes, ma'am.

9 MS. BAILEY: I just want clarification on that
10 point so -- if we are able to even have discussions about
11 it.

12 Is Your Honor suggesting definitions like the
13 definitions that the Court put forward in earlier orders, or
14 is the Court suggesting particular acts? You know, is a
15 stress position torture or CIDT; yes or no? You know, is it
16 a broad definition the Court is asking about, or is it a
17 laundry list of --

18 THE COURT: Well --

19 MS. BAILEY: -- alleged techniques --

20 THE COURT: -- again, it makes this case much --
21 it enables the jury to focus on the core issue, which is
22 whether or not CACI, our defendant in this case, is
23 complicit in the injuries that occurred to the three
24 particular plaintiffs who are in this case. All right.
25 That's the issue.

