

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

-----x
SUHAIL NAJIM ABDULLAH AL : Civil Action No.:
SHIMARI, et al., : 1:08-cv-827
Plaintiffs, :
versus : Friday, November 8, 2024
: Alexandria, Virginia
CACI PREMIER TECHNOLOGY, : Day 7
INC., : Pages 1-26
Defendant. :
-----x

The above-entitled jury trial was heard before the
Honorable Leonie M. Brinkema, United States District Judge.
This proceeding commenced at 2:05 p.m.

A P P E A R A N C E S:

FOR THE PLAINTIFFS: CHARLES MOLSTER, ESQUIRE
THE LAW OFFICES OF CHARLES B. MOLSTER,
III, PLLC
2141 Wisconsin Avenue, NW
Suite M
Washington, D.C. 20007
(703) 346-1505

BAHER AZMY, ESQUIRE
THE CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
7th Floor
New York, New York 10012
(212) 614-6464

MUHAMMAD FARIDI, ESQUIRE
MICHAEL BUCHANAN, ESQUIRE
BONITA ROBINSON, ESQUIRE
ANDREW HADDAD, ESQUIRE
SCOTT KIM, ESQUIRE
ALEXANDRA MAHLER-HAUG, ESQUIRE
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S:

FOR THE DEFENDANT: JOHN O'CONNOR, JR., ESQUIRE
 LINDA BAILEY, ESQUIRE
 JOSEPH MCCLURE, ESQUIRE
 STEPTOE LLP
 1330 Connecticut Avenue, NW
 7th Floor
 Washington, D.C. 20036
 (202) 429-3000

 NINA GINSBERG, ESQUIRE
 DIMUROGINSBERG PC
 1101 King Street
 Suite 610
 Alexandria, Virginia 22314
 (703) 684-4333

FOR THE UNITED STATES: STEPHEN ELLIOTT, ESQUIRE
 UNITED STATES DEPARTMENT OF JUSTICE
 CIVIL DIVISION FEDERAL PROGRAMS BRANCH
 1100 L Street, NW
 Washington, D.C. 20044
 (202) 598-0905

COURT REPORTER: STEPHANIE M. AUSTIN, RPR, CRR
 Official Court Reporter
 United States District Court
 401 Courthouse Square
 Alexandria, Virginia 22314
 (571) 298-1649
 S.AustinReporting@gmail.com

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

(This transcript does not include under seal portion.)

THE DEPUTY CLERK: Civil Action Number
1:08-cv-827, Al Shimari et al. versus CACI Premier
Technology, Inc.

Will counsel please note their appearance for the
record, first for the plaintiffs.

MR. FARIDI: Good afternoon, Your Honor.
Muhammad Faridi from Patterson Belknap on behalf of
plaintiffs, joined by my colleagues Alex Mahler-Haug,
Baher Azmy from The Center for Constitutional Rights, and
Charles Molster.

THE COURT: Good morning.

MR. O'CONNOR: Good afternoon, Your Honor.

THE COURT: Yes.

MR. O'CONNOR: John O'Connor for CACI joined by
co-counsel Linda Bailey, Nina Ginsberg and Joseph McClure.

THE COURT: All right. So, as you know, we've
gotten two questions from the jury. Question Number 1:
What is the definition of operational control? And
Number 2: Does control mean full control or some control?
All right.

MR. AZMY: We want to address the second question
first, as you know, this is a point we keep coming back to.

Our reading of case law in this circuit is clear

1 that it requires a relinquishment of complete control. If I
2 could read to your *Methanol v. CDI Corp.* It's a Fourth
3 Circuit 2022 case. Under the borrowed servant doctrine, a
4 general employer remains liable for the negligent conduct of
5 its employee unless he has "completely relinquished control
6 of the employee's conduct to a third party."

7 *Allegheny Energy*, that's Western Virginia. Under
8 the borrowed servant rule, a general employer remains liable
9 for the negligent act of a servant unless it affirmatively
10 appears he has completely relinquished control.

11 And as we've argued to you before, the facts in
12 the *Estate of Alvarez* reflect a complete relinquishment of
13 control. There was no presence of Rockefeller in Guatemala.
14 The people in Guatemala didn't even recognize this person as
15 an employee of the Rockefeller Center, which sort of
16 underscores the idea that there was complete relinquishment.
17 And even then the Court went to a factual analysis of
18 whether, despite the complete relinquishment, there could
19 any circumstance that would render him a dual servant, and
20 then found even under those facts, there could not be shared
21 control. So we believe the law is clear on that point.

22 With respect to operational control, I think our
23 intuition is we don't think we should opine on that one way
24 or the other.

25 THE COURT: I clearly recall the testimony, they

1 asked I believe it was Pappas and several others, what do
2 you mean -- they had trouble themselves --

3 MR. AZMY: Yes, that's right.

4 THE COURT: -- defining what is operational
5 control.

6 MR. AZMY: That's right.

7 THE COURT: We may be getting another question, so
8 let's just wait.

9 MR. AZMY: I understand.

10 THE COURT SECURITY OFFICER: They're all back from
11 lunch now, Judge.

12 THE COURT: That's all.

13 MR. AZMY: Just one final point, Your Honor, while
14 we're on the subject.

15 I think this could be cured and aligned with the
16 notion of the two masters dual servant conception that Your
17 Honor is thinking about by adding a line at the end of the
18 first paragraph of Instruction Number 20 to say something
19 like "or whether the control was shared between the two
20 companies." So we think those two elements are critical to
21 the borrowed servant analysis under Fourth Circuit law.

22 THE COURT: All right. I'll hear from --

23 MR. O'CONNOR: Your Honor, I think I'll start with
24 where we agree, and that is that we don't think that
25 defining operational control is appropriate or wise. I

1 mean, the test doesn't use the phrase "operational control";
2 it uses different words. And if anything is to be said,
3 it's I think to reiterate what the actual instruction is and
4 what the buzz words are in the actual instruction.

5 We disagree with Mr. Azmy's notion that a
6 fact-finder could just say, well, I think they both have
7 respondeat superior liability. If you look at the
8 statement, it says that as between -- I mean, as Your Honor
9 said when we were talking about instructions before the jury
10 began deliberating, the lending employer always has some
11 degree of control because they're paying the loan employees
12 and the like. And if you look at -- the restatement talks
13 about that the liability should go to the entity that is
14 better situated to control the conduct that resulted in
15 injury.

16 Here -- and I turn to the Fourth Circuit's
17 discussion in *Huff* where -- it was a loan of lawyers [sic]
18 -- *Huff* is at 631 F.2d 1140. The loaning -- it was a
19 welding company that loaned some welders to another company
20 when they had a shortfall, and the loaning company actually
21 had a supervisor on site. And the Court said that was
22 not -- the loaning employee was not the employer for
23 purposes of borrowed servant because what was important is
24 that it was the -- who was concerned with the details of the
25 work, that's pulled straight out of *Huff* at 1143.

1 Also, the *McLamb* case, which we've cited to the
2 Court in our briefing on borrowed servant, there, the --
3 Du Pont actually had some experts that were loaned to the
4 Army. And the argument there was, well, they're directing
5 the Army Corps of Engineers personnel in what they're doing,
6 so Du Pont should be viewed as the employer of the
7 underlings who actually caused an explosion through the way
8 they did the work.

9 And what the Fourth Circuit said was, not only is
10 that wrong, the Army Corps of Engineers is the employer of
11 the Du Pont experts, because they were overall in charge of
12 directing and controlling how the activities went, and they
13 could have, you know, accepted or rejected the advice of the
14 Du Pont engineers.

15 So we think that the answer for does control mean
16 full control or some control is right out of *Huff*. And it's
17 which employer was the one that had concern with the details
18 of the work being done, which here would be, you know,
19 interrogation, interaction with detainees.

20 THE COURT: All right. So you're recommending
21 that we tell the jury that we're unable to give them a
22 definition of operational control because that's a
23 factual -- that's not a technical legal term; that's a term
24 in this case about which the lawyers have -- the witnesses
25 have testified, and they have to make that factual

1 determination for themselves.

2 MR. O'CONNOR: Well, or that operational control
3 is not part of -- that's not one of the -- one of the
4 phrases that is the -- that controls the borrowed servant
5 instruction.

6 THE COURT: Well, we don't know, though,
7 necessarily that's where this is coming from.

8 MR. O'CONNOR: I suppose that's true, although I
9 think we could infer it probably.

10 THE COURT: Probably.

11 And then the second one, you're recommending the
12 Court for the does control mean full control or some
13 control. We basically say, you know, I'm not answering that
14 question directly, but what I am telling you is that the law
15 requires that you look at who was concerned with the details
16 of the work being done or when the tort occurred.

17 MR. O'CONNOR: Exactly. That's right.

18 THE COURT: All right.

19 MR. AZMY: Your Honor, does that reflect the
20 question around control? Because if the question is about
21 control and not just concern, we think the case law and
22 the --

23 THE COURT: Well, I'll look at the language in 631
24 to see if it uses the word concerned or controlled. But
25 I'll also look at the *Methane* case that you got. And,

1 again, I'll go back to look at *Alvarez* which is the most
2 recent statement on the borrowed servant doctrine out of the
3 Fourth Circuit.

4 MR. AZMY: Right.

5 THE COURT: Just as a matter of curiosity, to your
6 knowledge, is there any other case pending before the Fourth
7 Circuit right now that addresses the borrowed servant issue?
8 Has anyone looked to see?

9 MR. AZMY: No. We agree as between *Methanol* and
10 *Alvarez*, those are the two most recent pronouncements.

11 And, again, Your Honor, we would encourage you
12 towards the end to look at the Court's treatment of the dual
13 servant question. Because after they agreed that there was
14 full relinquishment on the fact, there were zero connections
15 between the two entities. In fact, Rockefeller paid for a
16 while just because the other entity couldn't pay and then
17 stopped. There was no recognition that the doctor was in
18 any way affiliated. There were no communications back and
19 forth between the two entities. There was a complete
20 severance. And here, of course, *Porvaznik*, which is very
21 different than *Huff*, was on the ground. And you know the
22 testimony as well as we do about his level of control.
23 Everyone recognized that these were civilians and were
24 separate from their own entity. They were, you know, with
25 CACI. And so the *Alvarez* really does set the bar -- the

1 factual analysis as the complete relinquishment, and this is
2 very different.

3 THE COURT: Well, again, you know, the problem
4 with this case, and I've said it so many times, it's a very
5 difficult case for this jury. And, I don't mind sharing it,
6 it's always been a difficult case in chambers. We don't
7 agree.

8 All right. And the problem here is, you do have,
9 I think, pretty much uncontestable evidence that the
10 military set the ground rules for how interrogations were
11 supposed to be conducted. They put the Tiger Teams and
12 these teams together. There was a military chain of
13 command. And the work that was being done was interrogation
14 work. And all of that falls under the military's end of
15 things. And what CACI was doing was doing classic
16 government contracting, that is they were providing the
17 government with people to perform a function which the
18 government wanted help with.

19 MR. AZMY: Well, in that sense, this is sort of
20 like government contracting. And, you know, I think this
21 rule would arguably be too expansive and make every
22 government contractor a borrowed servant, which, you know, I
23 don't think as a policy or a legal matter is correct.

24 And then of course, Your Honor, there's plenty of
25 evidence, including the Fay evidence we introduced and

1 the -- from Taguba that there was, in fact, command vacuum
2 on the night shift, and CACI employees were in control.

3 And then ultimately I think the best way to deal
4 with this, if you don't want to -- is to recognize that
5 there can be shared control, and the facts certainly support
6 that in addition to the idea that, as a matter of law, the
7 relinquishment has to be complete per *Methanol*, *Allegheny*
8 and the *Estate of Alvarez*.

9 THE COURT: I think to say that complete
10 abandonment of all control absolutely cannot be an accurate
11 statement. That basically means then that CACI has to fire
12 these people. They no longer work for CACI.

13 CACI's got control over them. If they want to
14 take R&R leave, they arrange that with CACI; they don't
15 arrange that with the military. If they're unhappy because
16 they don't have adequate -- as I understand it, they needed
17 toilets rather than Porta Johns, they're going to CACI for
18 that; they're not going to the military for that.

19 MR. AZMY: But they also have the shared interest
20 in the work of collection interrogation. I think there's
21 evidence in the record from Porvaznik and others that they
22 shared, even at the formal level, an interest in
23 interrogation, which is why they were paid to provide
24 resident experts for interrogation. And then of course at
25 some point there was misconduct, and, at that point, the

1 Army was not in control. If anything, the evidence shows
2 where there was misconduct. It was MIs, including CACI,
3 ordering the MPs. That's all over the record.

4 So I think to leave this question open for the
5 jury and not acknowledge all of the facts to show that CACI
6 actually had some control over, not only their own employees
7 but the MPs during the point of misconduct. Which is the
8 entire theory of the case. This is how this scandal was,
9 you know, revealed through the military general reports.

10 THE COURT: Okay. Well, we're going to take a
11 look at it. I'm not going to send anything in to the jury
12 until I come back and run it by you all, and then probably
13 I'll have the jury come in and give it to them verbally with
14 a written supplemental instruction the way we did last time.
15 All right.

16 MR. AZMY: Thank you, Your Honor.

17 MR. O'CONNOR: Understood, Your Honor. Thank you.

18 (A brief recess was taken.)

19 THE COURT: All right. So we've put together what
20 would be Supplemental Instruction Number 1, and it reads:
21 It is a question of fact that the jury must decide whether
22 CACI had the ability to control the interrogation work being
23 performed by CACI employees at Abu Ghraib when the torture
24 or cruel, inhuman or degrading treatment occurred. Whether
25 the Army alone or both the Army and CACI had this ability is

1 a factual question that you must decide.

2 I want your feedback on that.

3 MR. O'CONNOR: Your Honor, we think this
4 instruction has -- is not consistent in several ways with
5 Fourth Circuit law, and there's also some wordsmithing
6 issues as well.

7 Alvarez talks about -- it's who has the power to
8 control and direct the servants and the performance of --

9 THE COURT: I can put power rather than ability if
10 that's the case.

11 MR. O'CONNOR: We certainly want that in all the
12 places where the word "ability" appears.

13 But then it also goes on to say: The important
14 question is not whether the agent remains the servant of the
15 general employer as to matters generally, but whether or
16 not, as to the act in question, he is acting in the business
17 of and under the direction of one or the other.

18 And the restatement talks about the employer being
19 the one in the better position to control, not -- the final
20 sentence we think is clearly contrary to the restatement, I
21 think it's contrary to Rockefeller or to the *Estate of*
22 *Alvarez*. Certainly *McLamb* where there is no question that
23 the Du Pont experts had the power to exercise some control
24 over the Army Corps of Engineers people underneath them,
25 because they were directing them exactly what to do, and the

1 Court said no, the Army was ultimately in charge, so the
2 Army is ultimately in charge.

3 The -- also the -- I think the word allege
4 probably should come before the word torture or cruel. I
5 think we're assuming facts --

6 THE COURT: Well, remember, they don't get -- the
7 jury does not get to the affirmative defense unless they
8 have already found that there was the torture.

9 MR. O'CONNOR: But I don't think they're required
10 to do these in any order, so I do think it assumes a fact
11 that's not there.

12 THE COURT: All right. So reading your objection,
13 you would change it to read: It is a question of fact that
14 the jury must decide whether CACI had the power to control
15 the interrogation work being performed by CACI employees at
16 Abu Ghraib when the alleged torture or cruel, inhuman or
17 degrading treatment occurred. Whether the Army alone, or
18 both the Army and CACI, had this power to control is a
19 factual question that you must decide.

20 MR. O'CONNOR: No, Your Honor. We certainly
21 object to the final question, because that suggests that the
22 jury can decide, well, CACI had some ability or power here,
23 and so therefore we're going to find that both the Army and
24 CACI are subject to respondeat superior.

25 I think the question is which of the -- taking it

1 right out of the *Estate of Alvarez*, the important question
2 is not whether general servant, et cetera, but whether or
3 not, as to the act in question, he is acting in the business
4 of and under the direction of one or the other. Which,
5 again, restatement frames it in terms of who had the better
6 ability or power to control the conduct in question.

7 THE COURT: But, you know, your problem for you is
8 they're in the business of serving CACI's contract. So, I
9 mean, I think we looked last time or I thought last time
10 about in the business of, and that's confusing to the jury,
11 I think.

12 MR. O'CONNOR: I'm sorry, Your Honor, I just
13 didn't follow that.

14 THE COURT: Yeah. Is this not working?

15 I'm saying I think when you put phrases in like
16 who's working in the business of, the only business here is
17 CACI. That's the business. I mean, the work or the -- you
18 don't talk about the Army -- well, I guess some people talk
19 about the Army being the business, but you wouldn't normally
20 say the business of interrogation, but you would say the
21 business of fulfilling a contract. So I don't like that
22 particular language for this case.

23 MR. O'CONNOR: Well, I have others.

24 The *Estate of Alvarez* also talks -- it cites
25 *Standard Oil*, a Supreme Court case, and it says that -- the

1 question is: Which employer's work is being done, and which
2 employer exercised the power of control. That's at 694 from
3 *Estate of Alvarez*.

4 I mean, we're giving this instruction -- the last
5 sentence gives the jury the erroneous instruction that if
6 they conclude that it's the Army's work, the Army is in
7 charge of the interrogation mission, but CACI could exercise
8 some influence at the margins, that, oh, we could just find
9 that they're both the respondeat superior entity, and I
10 think that's not consistent with the law. The law is who's
11 in a better position to control the work and control the
12 conduct of the employees.

13 THE COURT: Let me hear from the plaintiff.

14 MR. AZMY: Thank you, Your Honor.

15 In sort of order of importance, we think the last
16 line is critical, as you know, because the law accommodates
17 the possibility, and implicit in the question about power to
18 control is that there may be shared power to control.

19 The facts in this case suggest that strongly via
20 Porvaznik. He had the -- he had the authority to stop
21 interrogations that were improper. People, in fact, went to
22 him when there are improper interrogations. He said he had
23 the obligation to stop interrogations as part of QC. Morse
24 said -- the 30(b)(6) witness -- he was in control. Captain
25 Wood worked with him to assign interrogators. He sat in on

1 interrogations. So there is shared control, which is
2 completely consistent with *Estate of Alvarez*. The notion
3 that you have two masters, including under the restatement
4 and with *Standard Oil* which talks -- the term they use is
5 whether control had been suspended, creating an entirely new
6 relationship.

7 So we think the last sentence is appropriate, as
8 you know. And for the record, Your Honor, we think that we
9 should add what follows from a conclusion that there's
10 shared control, which is that the defense doesn't apply.
11 That's been our consistent position. And then so that's
12 most important I think given the law and the facts and
13 *Estate of Alvarez* and the dual servant instruction.

14 We have no problem with adding alleged torture,
15 cruel, inhuman or degrading treatment. We think the term
16 "power" is a little bit confusing, it's a little bit
17 abstracted. I think we would prefer authority rather than
18 ability.

19 THE COURT: Maybe just change it to who
20 controlled.

21 MR. AZMY: No. I think it's -- I think authority
22 or capacity or ability I think for us more accurately
23 captures the conception in our view, Your Honor.

24 MR. O'CONNOR: And, Your Honor, we continue to
25 believe that the restatement view which formulates the

1 question is who's in the better position to control -- to
2 direct and control the employees in their exercise of the
3 conduct that is alleged to have given rise to liability,
4 that's the right formulation.

5 I think the final sentence is confusing and wrong
6 because it suggests some ability at the margins. *Huff*, the
7 loaning employee -- the loaning employer had a supervisor on
8 site, but the Court said the details -- you know, the
9 loaning employee was not concerned with the details of the
10 work; that was the borrowing employer. And the supervisor
11 wasn't present at the exact time that the injury occurred.
12 But there was no question that they had a supervisor who the
13 Court assumed he supervised.

14 THE COURT: Well, I'll tell you, at some point
15 Courts have to make decisions. I'm making a decision in
16 this case because I think this is actually a statement that
17 adequately addresses their question, and if they have
18 further questions, they can come back and ask. I am going
19 to give the instruction as I've amended it in court.

20 So I'm changing the word "ability" to "power"
21 because I think that is a good, strong, clear word that
22 they're going to understand. And I think that absolutely
23 should solve the problem, if they're an intelligent jury,
24 and I think they are, that power to control would I think
25 automatically mean small instances of some control would not

1 be enough. So I'm going to leave it as is. All right.

2 If both sides are unhappy, that probably suggests
3 it's a good decision.

4 MR. O'CONNOR: We would also ask the Court add
5 what the Court just said. I understand the Court's ruled,
6 but --

7 THE COURT: I'm going to give just this
8 instruction. So we have to clean it up, and that's what the
9 jury will get. I'm going to bring them in in a minute just
10 to give it to them verbally. Okay.

11 (A brief recess was taken.)

12 THE COURT: All right. So you've got the
13 instruction, and I'm going to bring the jury in now. I'm
14 going to give it to them orally, and we have four copies for
15 them that they can add to their set.

16 THE COURT SECURITY OFFICER: Yes, Judge.

17 Rise for the jury.

18 (Jury present at 2:58 p.m.)

19 THE COURT: Good morning -- or afternoon, ladies
20 and gentlemen. The day is half over.

21 I always am impressed by the questions which
22 juries ask us. It shows again how careful you all are
23 thinking about the case. And so we try as much as we can to
24 answer your questions, but you need to understand there are
25 times when we cannot actually answer the question.

1 So you've given us two questions. The first is
2 what is the definition of operational control. I cannot
3 give you that definition. I mean, that's a factual issue in
4 the case for you to determine. All right. So we can't help
5 you with that.

6 As to the second question, does control mean full
7 control or some control? I'm going to give you a
8 supplemental instruction, which you should consider. And
9 that is: It is a question of fact that the jury must decide
10 whether CACI had the power to control the interrogation work
11 being performed by CACI employees -- I'm sorry, CACI
12 employees at Abu Ghraib when the alleged torture or cruel,
13 inhuman or degrading treatment occurred. Whether the Army
14 alone, or both the Army and CACI had this power to control,
15 is a factual question that you must decide. All right.

16 So you'll have four copies of that instruction and
17 your collective memories and opinions, and we'll let you all
18 continue to deliberate.

19 All right. We'll recess court and await the
20 decision of the jury.

21 (Jury not present at 3:01 p.m.)

22 THE COURT: I tell my law clerks more than once,
23 how this is the greatest job in the world, because there's
24 never a week when there isn't some issue that comes up I've
25 never seen before, and that has happened in this case. So

1 I'm going to try to get this as accurately reported to you
2 as possible.

3 My court security officer heard a knock. I think
4 you all heard the knock. The juror -- was it the
5 foreperson?

6 THE COURT SECURITY OFFICER: It was.

7 THE COURT: -- asks Kim that they want to send a
8 note to me that they do not want me to share with counsel.
9 Yeah, see. I've never had that happen before.

10 I told Kim you go back and tell the jury that they
11 have to communicate in writing, that I will look at a
12 written note, but I can't guarantee them that I'm not going
13 to share it with counsel. He took that message back to
14 them. Again, not in writing, they told him, well, if we
15 send the Judge a note and she decides she's going to share
16 it with counsel, can we withdraw the note?

17 So I'm revealing this to you because I have no
18 idea, nor does Kim, what is bothering them.

19 What I am suggesting we should do to have a
20 complete record, but I want to hear your input on this, is
21 that I bring them in with all of you out of the courtroom,
22 that we get whatever it is that's bothering them on the
23 sealed record. They may not like this because the reality
24 of it is, if I find what they're telling me is something
25 that I have to reveal, I'm going to reveal it to you all.

1 If it's something that I really feel is unnecessary -- I
2 mean it could be that some juror is having some issue that's
3 embarrassing to the juror and it's not going to affect the
4 jury, I have no idea. I've never had this issue come up
5 before.

6 I'm looking for guidance from counsel. And I
7 should also add that we just got a slip of paper, which
8 we'll give copies to you, of their Tuesday schedule, so I
9 don't think we're getting a decision tonight. And we'll
10 give you a copy of this. It's basically the same schedule,
11 9:30 Tuesday, leaving at 6, the same type of break and lunch
12 structure. So we'll give you a copy of that.

13 How do you want me to proceed?

14 MR. O'CONNOR: Your Honor, I guess first I would
15 just ask a question to understand. They would come out and
16 they would talk to the Court on the sealed record. If the
17 Court concludes it's something that we shouldn't see -- or
18 don't need to know because it's not really germane to the
19 deliberations, what happens to the sealed record? Does it
20 just stay sealed and we never see it?

21 THE COURT: It's sealed.

22 MR. O'CONNOR: Or is it disregarded?

23 THE COURT: No. No. No. It's part of the record
24 of this case. I used to be a librarian before I was a
25 lawyer, I keep everything so that down the road the Court of

1 Appeals could get to see it and possibly counsel.

2 MR. O'CONNOR: Understood. Okay.

3 THE COURT: It's hard to know what it is.

4 MR. O'CONNOR: I understand.

5 We're perfectly fine with the Court's proposed
6 approach. I just wanted to understand the mechanics of --

7 THE COURT: And they may not want it. Because I
8 must, in fairness to them, tell them that after they've made
9 whatever disclosure they have made to me, I may be
10 required -- but at least I could explain that to them in
11 person and you have a record of what they say and what I
12 say.

13 MR. O'CONNOR: That's fine with CACI. I just
14 wanted to make sure I understood what would happen with the
15 sealed record if they don't want us to see it and you don't
16 think we need to. So that's fine with us. Thank you.

17 THE COURT: What's the plaintiffs' position?

18 MR. FARIDI: It's fine with us as well.

19 THE COURT: Then I'm going to ask all of you, and
20 you have to be out in the hallway, you can't be in the
21 vestibule.

22 THE COURT SECURITY OFFICER: I'll seal the
23 courtroom, and I'll come back in, Judge.

24 THE COURT: Right.

25 (Sealed proceeding produced under a separate cover.)

1 THE COURT: All right. As I indicated to you, I
2 have had a discussion with the jury on the record that is
3 sealed. The jury has given me the note at issue, so I will
4 have this note made also under seal part of the record.

5 I am not going to reveal the contents of the
6 question at this time; it is not necessary to do so. I have
7 told the jury the answer to their question is no. It's a
8 very simple answer to a question. A very interesting
9 question. And the jury has advised that they are tired and
10 would like to go home. And I've told them that we all
11 appreciate how hard they've been working, they've asked good
12 questions. They're working very diligently. But we're
13 going to let them go home, which means you all can go home
14 as well and start the long weekend. And we'll see you back
15 here at 9:30 tomorrow morning -- Tuesday morning, folks.
16 All right. And I want to thank you for your service.

17 You all may leave at this time. Remember my
18 cautions. You're getting a three-day break. Just, you
19 know, get relaxed. You know, get some fresh air, enjoy the
20 weekend, and come back Tuesday morning. All right.

21 We'll stay in session for just a second.

22 THE COURT SECURITY OFFICER: Rise for the jury.

23 (Jury not present at 4:45 p.m.)

24 THE COURT: And the only thing, just to put you
25 somewhat at ease, is I will be able to show you the

1 question, and you can get the transcript once the trial is
2 over. This is not going to stay in limbo forever. All
3 right. But it's not necessary for you to see it, and that's
4 what's happened.

5 Again, as I said, in this business, there's never
6 a dull moment, and you never know what you're going to have
7 with a jury trial, which is why I always recommend to
8 lawyers to think about settling, because with jury trials,
9 you just never know what is going to happen. All right.

10 So we'll give you a copy of the schedule for
11 Tuesday. It's the same schedule you've been seeing, but I'd
12 like to make sure you get copies of everything. And if
13 there's nothing further -- I do have a criminal docket
14 starting at 9:00 Tuesday morning, so I think you've cleared
15 out most of your stuff at this point anyway. All right.

16 MR. FARIDI: Your Honor.

17 THE COURT: Yes.

18 MR. FARIDI: I expect that the answer is going to
19 be no, but are you at liberty to disclose, at least at a
20 high level, perhaps, the general category of the type of
21 issue this is and whether it's interpersonal among members
22 of the jury, whether it relates to any of the lawyers?

23 THE COURT: I will not say a word other than no.

24 All right. You all have a good weekend. We'll be
25 recessing court.

(Proceedings adjourned at 4:47 p.m.)

I certify that the foregoing is a true and accurate
transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR