NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 08-7001, 08-7030, 08-7044, 08-7045

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAIDAR MUHSIN SALEH, et al.,
Plaintiffs-Respondents,
v.
CACI INTERNATIONAL INC, et al.,
Defendants-Petitioners.

ILHAM NASSIR IBRAHIM, et al.,
Plaintiffs-Appellees,
v.
CACI PREMIER TECHNOLOGY, INC., et al.,
Defendants-Appellants.

On Appeal From The United States District Court
For the District of Columbia
Case Nos. 1:04-cv-1248, 1:05-cv-1165
The Honorable James Robertson, United States District Judge

REPLY BRIEF OF APPELLANTS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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GLOSSARY OF ABBREVIATIONS

CACI	Collectively CACI International Inc and CACI Premier Technology, Inc.
CACI PT	CACI Premier Technology, Inc.
COR	Contracting Officer's Representative
DE	Docket entry
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
FTCA	Federal Tort Claims Act
ICE	Interrogation Control Element
IROE	Interrogation Rules of Engagement
JIDC	Joint Interrogation and Debriefing Center
MUFDY	Military Slang for Non-military, Civilian Attire
NCO	Noncommissioned Officer
OIC	Officer in Charge
PBSC	Performance-based Service Contracting
RI.__	The district court record in *Ibrahim et al., v. CACI Premier Technology, Inc., et al.*, No. 1:04-cv-1248 (D.D.C.)
RS.__	The district court record in *Haidar Muhsin Saleh et al., v. CACI International Inc et al.*, No. 1:05-cv-1165 (D.D.C.)

I. STATUTES REGULATIONS AND GUIDELINES

The pertinent statutes and regulations are reproduced in the addendum hereto.

II. SUMMARY OF THE ARGUMENT

While the CACI Defendants' preemption defense is grounded in the federal interests underlying the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), Plaintiffs avoid addressing these federal interests by attempting to recast the CACI Defendants' defense as one based on the discretionary function exception. The federal interests embodied in the combatant activities exception – eliminating tort duties on the battlefield, preventing state or foreign tort regulation of the federal government's conduct of war, freeing military commanders from the specter of tort regulation and litigation, and ensuring equal treatment of those injured in war – are incompatible with Plaintiffs' claims, and Plaintiffs' brief mounts no credible argument to the contrary.

Combatant activities preemption is not precluded when the claimant asserts the contractor caused his or her injuries, nor does it require a showing that the military specifically directed the commission of a tort, or that the application of tort law conflicts with contractual obligations. Rather, the only showing required is that application of tort law would conflict with the federal interests embodied in the combatant activities exception, which is evident here.

To the extent that operational control is relevant to combatant activities preemption, none of the facts on which the district court relied constitutes an exercise of operational control by the CACI Defendants under any doctrinally-sound conception of the term. Plaintiffs' misleading factual recitation notwithstanding, the record demonstrates that the Army, and not the CACI Defendants, exercised operational control of CACI PT employees in Iraq.

III. ARGUMENT

A. Plaintiffs Never Address Whether Their Tort Claims Conflict With The Federal Interest Embodied In The Combatant Activities Exception

The issue the district court had to decide on summary judgment was whether permitting Plaintiffs' tort claims would conflict with the federal interests embodied in the combatant activities exception. Toward that end, the district court fashioned a test – one of first impression – that it used to decide this issue. Plaintiffs' brief assiduously avoids addressing the federal interests implicated by the combatant activities exception or whether their tort claims conflict with those interests. Indeed, Plaintiffs offer no defense of the preemption test adopted and applied by the district court. Instead, Plaintiffs' brief is devoted to addressing the discretionary function exception to the FTCA, an exception not at issue in the district court's decision.

Consistent with this approach, Plaintiffs seek to characterize this appeal as involving a rote application of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). While *Boyle* provides the general framework for evaluating preemption defenses based on FTCA exceptions, the specific preemption test applied in *Boyle* applies only where preemption is based on the discretionary function exception. In conflating the discretionary function exception at issue in *Boyle* with the combatant activities exception at issue here, Plaintiffs have misstated the law and avoided addressing the central issue in this appeal – whether Plaintiffs' tort claims conflict with the federal interests served by the *combatant activities exception*.

Plaintiffs' strategy is clear from their opening argument, in which they argue that "where the state common law duty is not contrary to any obligation assumed in the contract, *Boyle* has no application." Pl. Br. at 28. In *Boyle*, however, the Court found that the discretionary function exception required preemption of state products liability law when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512. There is no added condition that a tort duty must conflict with the supplier's *contractual obligation*.

Even if Plaintiffs' formulation of the test for discretionary function preemption were correct, that test is premised on the discretionary function exception's purpose in protecting the policymaking independence of the executive and legislative branches. *See United States v. Varig Airlines,* 467 U.S. 797, 814 (1984). While those concerns exist here, the federal interests in eliminating tort duties from the battlefield are broader than those supporting the discretionary function exception. The combatant activities exception ensures that states cannot impair the federal government's warfighting prerogatives by imposing their own statutory or tort norms on the prosecution of war. *Koohi v. United States,* 976 F.2d 1328, 1337 (9th Cir. 1992). It ensures that military leaders will not have to be concerned with answering for battlefield judgments in a civil court or distracted by a civil action brought by those against whom military force has been directed. *Id.* It ensures equal treatment of persons injured through military conflict. *Id.* at 1334-35. And it represents an acknowledgement that tort law is incompatible with combatant activities, as "war is an inherently ugly business" that necessarily involves the projection of force, including lethal force, on others. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005).

Thus, the combatant activities exception requires preemption when there is a significant conflict between a tort duty *and the federal interests served by the combatant activities exception*. *Boyle*, 487 U.S. at 507; *Koohi*, 976 F.2d at 1337.

By focusing on the discretionary function exception, Plaintiffs never address this jugular issue.

B. Combatant Activities Preemption Applies To Claims Based On The Combatant Activities Of Contractors

A contractor seeking preemption under the discretionary function exception, at least as it relates to products liability suits, must show that the federal government approved reasonably precise specifications for the product in question. *Boyle*, 487 U.S. at 512. Plaintiffs seek to export this requirement to the completely separate analysis of combatant activities preemption, arguing that preemption is unavailable because the CACI Defendants have not "claimed that the military ordered [CACI employees] to abuse prisoners." Pl. Br. at 30.

Plaintiffs' argument, however, focuses on the federal interests underlying the discretionary function exception, with no consideration of the federal interests embodied in the combatant activities exception. *See id.* (citing *In Re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005), for the holding that corporations cannot invoke *the government contractor defense* for suits based on violations for the laws of war). But the CACI Defendants' contention is that the federal interests underlying the combatant activities exception, not the discretionary function exception, conflict with Plaintiffs' tort claims, a contention Plaintiffs sidestep rather than address.

Plaintiffs cannot distinguish *Koohi* and *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), as involving only "direct action by the United States military that led to injuries to third parties," *see* Pl. Br. at 31, because both *Koohi* and *Bentzlin* involved allegations that the government contractors themselves caused the harm suffered by the plaintiffs. In *Koohi*, the plaintiffs "essentially . . . contend[ed] that the [United States and the weapons manufacturer] were, for differing reasons and to differing degrees, *each responsible for the misidentification of the civilian Airbus as an F-14 and the consequent decision to shoot it down.*" 976 F.2d at 1330-31 (emphasis added). Nevertheless, the Ninth Circuit held the claims preempted, without any analysis of contract specifications or the allocation of decision-making authority between the United States and the government contractor. *Id.* at 1336-37. The existence of combatant activities, by itself, was sufficient to require preemption.

Similarly, in *Bentzlin*, the court rejected "friendly fire" claims asserted by servicemembers' survivors alleging that "a manufacturing defect caused the missile to deviate from its intended target and strike the Marines." 833 F. Supp. at 1487. These claims were preempted under the combatant activities exception even though the plaintiffs alleged that the defendant contractor, and not the United States, caused the injury. *Id.* at 1493-95.

There is good reason why the *Koohi* and *Bentzlin* courts did not restrict combatant activities preemption to instances where the military explicitly orders or directly causes the alleged harm. One of the paramount federal interests embodied in the combatant activities exception – that military leaders will not have to be concerned with answering for battlefield judgments in a civil court or distracted by civil actions filed by the persons against whom military force has been directed – is in conflict with Plaintiffs' proposed requirement. *See Bentzlin*, 833 F. Supp. at 1495 (holding that "federal interests would be frustrated if discovery was required to determine whether a malfunction was *caused* by the United States' wartime policy or a manufacturer's shoddy workmanship" (emphasis added)).

Under Plaintiffs' formulation, government contractors could prevail only by hauling battlefield commanders into court to testify as to whether they ordered an alleged injury. Moreover, the very first fact Plaintiffs submit to the Court – though not in evidentiary form – is that these Plaintiffs allege to be "Iraqis who were mistakenly detained in prisons operated by the United States military during 2003 and 2004." Pl. Br. at 1. This allegation would require the parties to drag battlefield commanders into court to testify as to the reasons the *United States Army* detained these Plaintiffs. These are precisely the intrusions that the combatant activities exception seeks to avoid.

Finally, Plaintiffs cite three recent cases for the proposition that "other federal courts also have rejected consistent corporate attempts to use *Koohi* to extend the *Boyle* doctrine so as to encompass any and all claims asserted against service contractors in combat zones." Pl. Br. at 52. Plaintiffs use these cases to argue that preemption should be limited to procurement contracts, with no preemption available for "service contracts." *Id.*[1] Plaintiffs' treatment of these cases is highly flawed.

In *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), the court affirmed on interlocutory appeal the district court's denial of the contractor defendants' motion to dismiss on *Feres* immunity and political question grounds. In so holding, the court "acknowledge[d] that private contractor agents may be entitled to some form of immunity that protects their making or executing sensitive military judgments, and that overlaps and possibly extends beyond the protection provided by the political question doctrine." *Id.* at 1351. However, the court declined to consider the precise scope of such an immunity, because the contractor had presented no theory of immunity other than the derivative *Feres* immunity claim that the court rejected. *Id.* at 1355-56.

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[1] The CACI Defendants note that their contract required them to provide certain equipment in addition to intelligence personnel who would answer to the Army chain of command. *See* Billings Decl., Ex. A at ¶¶ 8, 10; Ex. B at ¶¶ 8, 10.

The *McMahon* court did not address the district court's preemption ruling, but did expressly note that the district court's conclusion that combatant activities preemption was unavailable for injuries arising out of service contracts was contrary to binding circuit precedent. *Id.* at 1338 & n.5 (citing *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003)). Thus, *McMahon* does not address preemption other than to specifically reject the proposition for which Plaintiffs cite it – that preemption should be unavailable where the contractor provides services to the government.

In *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 450 F. Supp. 2d 1373, 1377 (N.D. Ga. 2006), also relied on by Plaintiffs, the court denied a motion to dismiss on preemption grounds a claim made by an American soldier and his family for injuries incurred when a convoy vehicle operated by the defendant's employee crashed in Iraq. The court essentially acknowledged that the rule announced by the Ninth Circuit in *Koohi* would require preemption of the plaintiffs' claims, but declined to follow *Koohi* because, among other reasons, "the [*Koohi*] court focused on the fact that no duty of care is owed to those against whom military force is directed, which is understandable because the force at issue in that case was directed by the Government against a perceived enemy." *Id.* at 1379. Here, like *Koohi*, and unlike *Carmichael*, Plaintiffs' claims are asserted by

those against whom the U.S. military directed military force and control, and not personnel associated with the American military's war effort.

While relying on *Carmichael*, Plaintiffs do not acknowledge that the district court in *Carmichael* recently *granted* the contractor's renewed motion to dismiss on political question grounds once discovery established that the U.S. military established the rules for the convoy operation, such as appropriate speed and route. *Carmichael v. Kellogg, Brown & Root Svcs., Inc.*, ___ F. Supp. 2d ___, 2008 WL 2676088, at *4-6 (N.D. Ga. July 9, 2008).[2] The military's role in *Carmichael*, in setting the ground rules for convoy operations, is analogous to the military's unquestioned role in establishing the interrogation rules of engagement, and *Carmichael* thus stands for the proposition that no tort claims should be permitted in such circumstances.

Finally, Judge Robertson correctly rejected the court's decision in *Fisher v. Halliburton*, 390 F. Supp. 610, 615-16 (S.D. Tex. 2005), limiting combatant activities preemption to procurement contracts, as there is nothing in the general

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[2] The contractor's renewed motion to dismiss did not seek dismissal on the basis of preemption, so the court did not address whether the facts adduced in discovery would require dismissal based on preemption in addition to the political question doctrine. *Carmichael*, 2008 WL 2676099, at *1 n.1. In the present appeals, the district court authorized the defendants to file summary judgment motions solely on the issue of preemption. Consequently, because the summary judgment order appealed from was limited to the issue of preemption, the CACI Defendants have not argued political question here.

framework set forth in *Boyle*, or the application of that framework to combatant activities by the Ninth Circuit in *Koohi*, that would limit preemption to product liability claims. *See Ibrahim*, 556 F. Supp. 2d at 4 n.3.[3]

C. Plaintiffs Cannot Avoid A Conflict Between The Federal Government's Warfighting Prerogatives And Their Tort Claims

Plaintiffs' brief avoids addressing what they believe should be the appropriate test for assessing a combatant activities preemption defense. Instead, Plaintiffs incorrectly claim that the CACI Defendants have sought "absolute immunity" by advocating a preemption test that requires preemption when a contractor's employees are engaged in combatant activities. *See* Pl. Br. at 50.

But this appeal concerns *preemption* and not immunity.[4] That Plaintiffs have brought a lawsuit that directly conflicts with the federal interests served by the combatant activities exception does not require that the Court address the

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[3] Stating it was unaware of any cases applying FTCA preemption to the provision of services, the court in *Fisher* apparently was unaware of the Eleventh Circuit's decision in *Hudgens*, 328 F.3d at 1345, where, as Judge Robertson correctly noted, the court applied the government contractor defense to claims based on the contractor's allegedly negligent performance of maintenance services. *See Ibrahim v. Titan Corp.*, 556 F. Supp. 2d at 4 & n.3.

[4] The CACI Defendants have asserted, *inter alia*, that they are absolutely immune from suit in their pending motions to dismiss the *Saleh* Plaintiffs' Fourth Amended Complaint and the *Ibrahim* Plaintiffs' Third Amended Complaint. The district court's resolution of those motions has been stayed, along with the entirety of those cases, pending resolution of the parties' appeals from the district court's summary judgment decision on preemption. As the CACI Defendants' appeals are restricted to the single issue – preemption – addressed in the district court's summary judgment decision, they do not argue an immunity defense here.

separate question of immunity, an issue not before it, but requires preemption of Plaintiffs' claims.

The closest that Plaintiffs get to an analysis of the federal interests embodied in the combatant activities exception is to characterize as "outlandish" any possibility that their lawsuit would result in subjecting battlefield decisions to regulation by a foreign power. Pl. Br. at 55. However, the possibility that the choice of law rules would point to Iraqi law is not only real but likely.

For tort claims, District of Columbia courts consider the interest of the various jurisdictions, paying particular attention to the place of injury, the place of the allegedly tortious conduct, the parties' domiciles, and the place where the relationship is centered. *Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110, 1117 (D.C. 2007); *Wigfall v. Wilpoff & Abramson, LLP*, No. 05-591(JR), 2005 WL 3213955, at *2 (D.D.C. Nov. 1, 2005). The allegedly tortious conduct, if it occurred, took place in Iraq. The Plaintiffs are Iraqi citizens or persons voluntarily present in wartime Iraq at the time of their apprehension by military forces. Any contact between Plaintiffs and CACI PT personnel indisputably occurred in Iraq. The only choice of law factor that does not strongly point toward application of Iraqi law is the domicil of the CACI Defendants, which are incorporated in Delaware with their principal places of business in Virginia. It

thus appears that the applicable choice of law rules would point to application of Iraqi law, which clearly conflicts with federal interests.

Plaintiffs have not identified the law they contend applies to their tort claims. Instead, as the CACI Defendants identified the flaws in applying Iraqi law, Plaintiffs assert merely that Iraqi law would not apply, leaving unanswered the law Plaintiffs contend actually govern their claims. Regardless, it is no answer for Plaintiffs to claim that because they have not sought the application of Iraqi law their claims will not be governed by it. While Plaintiffs may express their views on the appropriate governing law, the choice of law rules do not give weight to a party's preference as to the governing law.

Moreover, there is no basis to Plaintiffs' contention that Judge Robertson's use of the term "state" implicitly rejects application of foreign law. The word "state" as used by a district court refers to the law of some domestic or foreign jurisdiction other than the United States, a convention common in courts' choice of law analyses. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir. 1984) (referring to England and the United States as "two or more states"); *Eli Lilly Do Brasil, Ltda. v. Federal Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007) (referring to the United States and Brazil as "[t]he states which are most likely to be interested [in the lawsuit]") (internal citation omitted).

Even if the law of one of the states of the United States would supply the applicable tort law, a result with serious due process implications,[5] there is a clear conflict between the imposition of state tort regulation and the quintessentially federal prerogative to direct the Nation's war efforts. *See* CACI Def. Br. at 29-31. By recasting the CACI Defendants' argument as one seeking discretionary function preemption, Plaintiffs avoid addressing the issues raised by their attempt to impose state tort regulation on the federal government's conduct of war.

Finally, calling the CACI Defendants alleged actions "egregious," "illegal" or "extra-contractual," *see* Pl. Br. at 24, is not a substitute for legal argument. Plaintiffs cannot duck addressing the legal infirmities in their brief by ramping up their rhetoric against the CACI Defendants.

D. The Department Of Defense Has Not Commented On The Scope Of Combatant Activities Preemption

Plaintiffs rely on non-authoritative Department of Defense ("DoD") staff responses to comments on a proposed Defense Federal Acquisition Regulation Supplement ("DFARS") rule that has no application to this case. *See* Pl. Br. at 28-30. The DoD staff responses clearly state that the proposed contracting and acquisition rule "retains the current rule of law" and "is consistent with existing

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[5] *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985) (due process requires a "significant contact or significant aggregation of contacts" with a state before its law may apply to a plaintiff's claim).

laws and rules." Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008) (codified at 48 C.F.R. 252.225-7040). Indeed, the DoD staff comments on which Plaintiffs so heavily rely concern application of the *government contractor defense*, which is not the preemption defense at issue here, and the comments relate solely to *performance-based statements of work*, which are not the types of statements of work at issue in this case.[6] Indeed, these DoD staff comments were made long after the events that are at issue in this action.

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[6] A performance-based statement of work "describes the required results in clear, specific and objective terms with measurable outcomes," and essentially leaves the federal government completely out of the decision-making process as it relates to the means for performing the work for which it contracts. *See* 48 C.F.R. 2.101 (defining "performance work statements"); 48 C.F.R. § 37.602(b)(1) (explaining that performance-based statements of work "[d]escribe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided"); Office of Mgmt. & Budget, *Guide to Best Practices for Performance-Based Service Contracting*, at 2 (Oct. 1998) ("Performance-based service contracting (PBSC) emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed as opposed to the manner in which the work is to be performed . . . ."), *available at* http://www.whitehouse.gov/omb/procurement/pbsa/guide_pbsc.html. The CACI PT contracts were not performance-based statements of work where the United States simply identifies an end product and leaves it to the contractor to decide when, where, and how to meet the output required by the contract. Rather, the U.S. Army indisputably established the interrogation rules of engagement, decided where the CACI PT interrogators would perform their work, determined who would be interrogated and by whom, and reviewed and approved interrogation plans performed by CACI PT interrogators. The relevant statements of work also explicitly provided that interrogators would take direction from the Army chain of command. *Ibrahim*, 556 F. Supp. 2d at 8; Billings Decl., Ex. A at ¶ 3; Ex. B at ¶ 3. Thus, the DoD staff comments concerned a different defense (the government

Despite DoD's explicit statement that it did not intend to change any existing liability standards, Plaintiffs argue that DoD's comments regarding *the scope of the government contractor defense* indicate that DoD believes that the defense should not apply here. *See* Pl. Br. at 28-29. Whatever force DoD's comments might have in other contexts, they are irrelevant to the resolution of the issue before the Court – whether preemption is required to remedy a conflict between tort law and the federal interest embodied in the combatant activities exception. Plaintiffs' heavy reliance on the DoD comments is yet another strategy to avoid addressing whether their claims conflict with the federal interest in conducting a war free from state or foreign tort regulation.

E. The United States Military, And Not The CACI Defendants, Exercised Operational Control Over CACI PT's Interrogators In Iraq

The federal interests embodied in the combatant activities exception to the FTCA require preemption of tort claims against a government contractor whenever the government contractor is performing combatant activities as part of a military operation. That is a test the district court has already found that the CACI Defendants satisfy. *Ibrahim*, 556 F. Supp. 2d at 10 (finding that "the nature and circumstances of the activities that CACI employees were engaged in –

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contractor defense) and related solely to a particular type of statement of work that was not in use with respect to CACI PT's interrogators.

interrogation of detainees in a war zone – meet the threshold requirement" that the activities in question were combatant activities).

The district court, however, determined that a contractor seeking combatant activities preemption must show more than performance of a combatant activity, and must show that the military exercised *exclusive* operational control over the contractor's employees. *Ibrahim*, 556 F. Supp. 2d at 4. Plaintiffs do not attempt to defend this additional requirement for preemption, or to tie it to the policies underlying the combatant activities exception. Regardless, the record demonstrates the absence of operational control exercised by the CACI Defendants. Plaintiffs seek to avoid this undisputed fact through a flawed conception of "operational control" and by mischaracterizing the record. Even if the district court's first-impression test for combatant activities preemption were correct, or some weighing of operational control exercised by the military and a defendant contractor were required, the CACI Defendants would remain entitled to summary judgment.

1. None Of The Facts Identified By The District Court Constitute An Exercise Of Operational Control By The CACI Defendants

Plaintiffs acknowledge that the district court had the correct doctrinal definition of "operational control" before it. Pl. Br. at 56 n.16. The concept of "operational control" requires an exercise of command authority, which is the "control" aspect of the doctrine, and that the activities in question involve mission

accomplishment, as opposed to "authoritative direction for logistics or matters of discipline, internal organization, or unit training," which is the doctrine's "operational" component. CACI Def. Br. at 47. The facts relied on by the district court in denying summary judgment do not qualify as "operational control" by the CACI Defendants under any sound conception of that term. CACI Br. at 47-51.

The district court identified three facts as its basis for denying summary judgment: (1) a CACI PT employee's occasional provision of "advice and feedback" to CACI PT interrogators when the Army had final decision-making authority; (2) a CACI PT employee's perceived authority to prevent abuse if he had observed it; and (3) the CACI Defendants' promulgation of a code of ethics that required observed misconduct to be reported both to the Army and to CACI management. *Ibrahim*, 556 F. Supp. 2d at 8-9.

Plaintiffs' brief makes no more than a token effort to fit any of the facts identified by the district court within the doctrinal definition of "operational control,"[7] but instead complains that this definition would provide contractors with

[7] Plaintiffs do not argue that the provision of "advice and feedback," when the Army chain of command retains all decision-making authority, or the power to stop observed abuse, fit within the doctrinal definition of "operational control." Plaintiffs do offer the Orwellian argument that the CACI Defendants, and not the Army, are exercising "control" when the CACI Defendants merely comply with a Defense Department directive that the CACI Defendants establish a code of ethics. Pl. Br. at 57-59. Regardless, this code of ethics dealt with matters of discipline, which are clearly not operational under the Defense Department's conception of "operational control." *See* CACI Def. Br. at 46-47.

a "blanket immunity from scrutiny." Pl. Br. at 56. But this is not the CACI Defendants' doctrinal definition of operational control – it is the Department of Defense's. And the "exclusive operational control" test is not the CACI Defendants' – it was created by the district court.[8] In any event, the facts identified by the district court do not qualify as operational control. Thus, if the district court's test were correct, the CACI Defendants would be entitled to summary judgment as a matter of law. Conversely, if the facts identified by the district court were sufficient to preclude summary judgment, then the district court's stated test is incorrect because the contractor's exercise of something other than operational control would have precluded summary judgment.

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[8] Plaintiffs contend that the CACI Defendants advocated the "exclusive operational control" test adopted by the district court, citing a series of statements made by the CACI Defendants to the effect that the United States Army exercised absolute operational control over the CACI Defendants. But Plaintiffs confuse the difference between what the facts were and what is legally required for preemption. While the CACI Defendants did – and do – contend that the Army exercised total operational control over the CACI PT interrogators, they have never advocated that exclusive operational control was a requirement for preemption. *See* RS.133 at 1. Judge Robertson acknowledged this at oral argument, noting that while the CACI Defendants were dealing with the "soldiers in all but name" test previously adopted by the district court, they were of the view that the conduct of combatant activities, without more, required preemption: "You'd go even farther than that, wouldn't you? You'd say, it's the activity that governs." Tr. at 16 (Oct. 3, 2007). Nowhere have the CACI Defendants contended that they must show exclusive operational control for the federal interests embodied in the combatant activities exception to preempt Plaintiffs' claims.

2. Plaintiffs Mischaracterize The Summary Judgment Record As It Relates To Operational Control

Plaintiffs assert that the summary judgment evidence demonstrates that the CACI Defendants exercised some degree of operational control over the CACI PT employees, and perhaps exercised more operational control than the U.S. Army chain of command. The district court, for good reason, declined to credit Plaintiffs' disingenuous characterization of the record. Instead, the district court rested its decision solely on Mr. Porvaznik's occasional provision of "advice and feedback" to CACI PT interrogators, Mr. Porvaznik's belief that he had the authority to stop CACI PT interrogators from engaging in conduct that amounted to abuse, and the CACI Defendants' promulgation of a code of ethics, as required by Defense Department directive. *Ibrahim*, 556 F. Supp. 2d at 10.

Plaintiffs' characterization of the summary judgment testimony bears no resemblance to what the witnesses *actually said*. Rather, through distortion of testimony they do not quote, and selective quotation of the testimony actually included in their brief, Plaintiffs have created an alternative universe where CACI PT personnel exercised operational decision-making powers in Iraq, when every single witness actually testified that this was not the case.

For example, Plaintiffs' brief selectively quotes from Colonel Thomas Pappas's court-martial testimony to suggest that CACI PT interrogators were not

supervised by the military chain of command. But Colonel Pappas's testimony was exactly the opposite:

> Q: [by Judge McConnell]: What was [CACI PT employee Steven Stefanowicz's] leadership chain of command?
>
> A: He worked as an interrogator inside the interrogations thing; his actual chain of command, he was a contractor, and he went back through the contractor lead, who was on site, back to the contracting officer representative."
>
> Q: Let me follow up on that. These contractors, were they performing some of the missions of some of your soldiers – some of the same exact missions, in terms of interrogating?
>
> A: ***Yes, that's correct. In terms of their supervisory, their day-to-day supervisory thing, that would've been just like Sergeant Ashton, [a military interrogator] back through the ICE, to the operations section, and ultimately, to me.***

Pl. Ex. C-24 at 50-51 (emphasis added). Plaintiffs quote from Colonel Pappas's response to the first question above for the proposition that "CACI employees were not under [Colonel Pappas's] chain of command (Pl. Br. at 14), but intentionally omit Colonel Pappas's response *to the very next question*, which makes clear that the CACI PT interrogators *were* within Colonel Pappas's chain of command for operational matters.[9]

[9] Given that the CACI Defendants had raised Plaintiffs' mischaracterization of Colonel Pappas's testimony in the district court proceedings, Plaintiffs' continued mischaracterization of his testimony is particularly indefensible.

Similarly, Plaintiffs suggest that Colonel William Brady, the COR on CACI PT's interrogation contract, testified that the U.S. Army did not supervise CACI PT interrogators. However, when Plaintiffs' counsel asked Colonel Brady whether he conferred with local military commanders on the performance of CACI PT personnel, Colonel Brady responded:

> I can't say that I had set a rhythm or such to do that. I guess what I will express is that I was very confident in the military chain of command. It does real well for the Army. ***The contract employees were embedded with the military chain of command.*** Any problem, regardless of the nature of the problem, the Army's pretty good at reporting the problem.

Brady Dep. at 68 (emphasis added); *see also id.* at 108 ("In my experience, the contractor personnel were embedded into the military operations. The military chain of command on the site – the brigade commander, the chief of operations, the brigade S-3, the joint interrogation detainee center chief – they were all the military points of contact."). When asked to describe the similarities and differences between assigned civilian personnel as compared to soldiers, Colonel Brady testified that "[t]hey are a member of our team." *Id.* at 12. When asked whether there are any differences between soldiers and civilian contractors assigned to support the Army, Colonel Brady testified that "there are some differences, primarily administrative and logistical. But from a missions standpoint, no." *Id.* at 13. Thus, Colonel Brady's actual testimony demonstrates

that the Army, and not CACI PT, exercised operational control over CACI PT interrogators' performance of the interrogation mission.

While assiduously avoiding direct quotations, Plaintiffs characterize Daniel Porvaznik as testifying that CACI PT exercised total control over its employees. Pl. Br. at 8-9. But this is what Mr. Porvaznik actually *said* in his deposition:

> The only real distinction between the military and the CACI-PT interrogators over there is we didn't wear uniforms. It was pretty clear that we were civilians to anybody looking, namely because we – we dressed in [mufdy – a slang for civilian attire]. We – A good amount actually had long hair or facial hair, things that one – a soldier would not be wearing or – or have, and we didn't carry weapons. We're not authorized to carry weapons. Other than that, though, in the sense of the interrogation business, we worked along with, for, and again under command, control, and direction of the U.S. military. We used their computer databases, every – all the report – everything else was pretty much in sync.

Porvaznik Dep. at 317-18. Indeed, Mr. Porvaznik made clear that his designation as CACI PT's site lead at Abu Ghraib prison gave him no operational authority, but merely provided the Army and CACI personnel in the United States with a single point of contact for *administrative* matters:

> There were a lot of administrative issues that had to be handled, quite a few actually. Anything from insurance, pay issues, mail, living quarters – establishing living quarters, that was a – that was a big thing; getting the equipment from – you know, once it arrived in Iraq, getting it out to Abu Ghraib . . . .

Id. at 104. Mr. Porvaznik also testified that the military would decide where to place CACI PT interrogators as they arrived in Iraq. Porvaznik Dep. at 233-34 ("[W]ell, we responded to the client's need. If they wanted people at the division facilities, that's where we would send them. . . . But the military at the end of the day is the ones who really made the decision.").[10]

Plaintiffs' brief cites to the deposition testimony of CACI PT country manager Scott Northrop for the proposition that CACI PT interrogators answered to company personnel only and not to the military. But as Mr. Northrop testified:

> In their operational capacity, whatever their job may be, whether it be a property book officer on the logistic side or an intelligence analyst on the intelligence side, [CACI PT employees] worked for a military person whether it be an NCO or an officer, depending on where they were. And they took their – their operational – for example, you need to write intelligence reports or you need to ensure that all of this equipment is accounted for. Their operational day to day work and support of the military was supervised by [a] military NCO or officer.

Northrop Dep. at 43-44.

Plaintiffs also assert that the CACI Defendants exercised operational control by having CACI executive Charles Mudd visit Iraq "to ensure CACI employees in

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[10] Plaintiffs' brief mischaracterizes Mr. Porvaznik's testimony to suggest that he had access to interrogation reports based on a supervisory role he undertook as CACI PT's site lead. But Mr. Porvaznik had access to the interrogation database not because he was site lead, but because he was an interrogator, and all interrogators had access to this database. *See* Mudd Dep. at 100.

Iraq were performing adequately and being adequately supervised," and that Mr. Mudd observed interrogations in order to provide such supervision. Pl. Br. at 9, 10. But Mr. Mudd, who has no intelligence background (Mudd Dep. at 99, 109-11, 145), testified that he traveled to Iraq to evaluate employee welfare and ensure customer satisfaction, and that he viewed part of a single interrogation solely to obtain a basic understanding of what the CACI PT interrogators were doing. *Id.* at 182 ("I didn't go around watching operations because I wasn't there for operational issues. The government ran that.").

Plaintiffs characterize Captain Carolyn Wood as testifying in a statement to Army investigators[11] that "she did not control or supervise CACI employees." Pl. Br. at 13. This is false. As Captain Wood explained in her statement:

> I never received official guidance or perimeters [sic] from higher as to how to employ [the CACI PT interrogators]. I briefly interviewed each contractor, provided in-brief information, and standards of conduct and interrogation rules of engagement and paired them up with a military interrogator since I knew my soldiers' capabilities but did not know that of the contractors. At this time I created a three to four page initial counseling statement which each contractor signed. ***The statement essentially covered the standards of conduct, performance expectations, informed them of the military chain of command and to whom to report any incidents, operational security awareness***. . . . I presented each CACI contractor with a new arrival briefing and had each sign an initial counseling statement and acknowledge his understanding

[11] Plaintiffs did not take Captain Wood's deposition.

> of the operation and IROE [Interrogation Rules of Engagement].

Pl. Ex. C-26 at 3 (emphasis added); *see also* Porvaznik Dep. at 132-33 ("Now [Captain Wood] and other JIDC staff made a determination where people were to be assigned. Yes, that's what – that's part of what she did."); *id.* at 137 (Captain Wood was told of CACI PT personnel's experience, which "enabled her to make a decision as to where she wanted to employ the CACI-PT personnel").

Indeed, Captain Wood assigned interrogation tasks to military and civilian interrogators. Porvaznik Dep. at 132-33 ("Well, I didn't assign the work. That – that would have been done [by] the – the JIDC staff or the Joint Interrogation & Debriefing Center staff, more specifically the OIC."). Consistent with her role in supervising the intelligence-collection effort, Captain Wood held regular shift-change meetings, attended by both military and civilian interrogators, in which *she* would identify the intelligence-gathering priorities for the day. *Id.* at 159-60.

The district court correctly declined to credit Plaintiffs' version of the "facts." Instead, the district court based its ruling solely upon Mr. Porvaznik's occasional provision of "advice and feedback" to less experienced CACI PT interrogators, Mr. Porvaznik's testimony that, hypothetically, he believed he would have directed an interrogator not to perform an interrogation plan that involved abuse, and CACI's promulgation of a code of ethics. As discussed in Section III.E.1, *supra*, these facts would not preclude summary judgment even if

operational control were part of the relevant test for combatant activities preemption.

F. This Court Has, And Should Retain, Jurisdiction Over the CACI Defendants' Appeals

In both *Ibrahim* and *Saleh*, this Court has jurisdiction over the CACI Defendants' appeals from the district court's summary judgment order on two bases: (1) this Court's grant of permission to appeal pursuant to 28 U.S.C. § 1292(b); and (2) the CACI Defendants' appeals as of right pursuant to the collateral order doctrine. Recognizing the CACI Defendants' undeniable basis to appeal under 28 U.S.C. § 1292(b), Plaintiffs devote their jurisdictional argument to a plea that this Court withdraw its permission to appeal under 28 U.S.C. § 1292(b). But Plaintiffs' argument for withdrawing permission to appeal is a condensed repetition of the arguments the Court rejected in granting permission to appeal. *See* Pl. Br. at 22-24. Withdrawing permission to appeal would make no sense in the context of these appeals.

The Court has before it Plaintiffs' appeals of the district court's order as it relates to the entry of summary judgment in favor of L-3 Services, Inc., formerly known as The Titan Corporation. Thus, the Court is already going to have to identify the appropriate test for preemption of tort claims involving combatant activities. Moreover, even if the Court withdrew its permission to appeal, that would not necessarily eliminate interlocutory review of the district court's order as

to the CACI Defendants, as the Court *then* would have to determine whether the CACI Defendants have a right to appeal pursuant to the collateral order doctrine.

The district court proceedings in *Ibrahim* and *Saleh* have been stayed since January 2008 pending resolution of these appeals. It would be tremendously inefficient from a litigation management perspective for this Court to leave the parties without a decision on the appropriate test for preemption when the district court proceedings have been stayed for eight months in order to receive exactly that appellate guidance. Therefore, there is no arguable reason, either legally or prudentially, why this Court should withdraw its permission to appeal.

While the CACI Defendants believe they have a right to appeal under the collateral order doctrine, that question appears moot unless the Court were to withdraw its permission to appeal under 28 U.S.C. § 1292(b). Plaintiffs' brief does not address the collateral order doctrine, instead incorporating by reference the arguments presented in the *Saleh* Plaintiffs' motions to dismiss. Pl. Br. at 24. This is contrary to the Court's directive: "The parties are directed to address in their briefs the issues presented in the motion to dismiss rather than incorporate those arguments by reference." Or. of May 9, 2008, *Saleh v. CACI Int'l Inc*, No. 08-7001 (D.C. Cir.). The CACI Defendants explained at pages 54-61 of their opening merits brief why the collateral order doctrine would permit these appeals even if §

1292(b) permission were withdrawn, and Plaintiffs' brief contains no arguments to be rebutted on reply.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of summary judgment to the CACI Defendants, and remand these cases with instructions to enter summary judgment in the CACI Defendants' favor.

Respectfully submitted,

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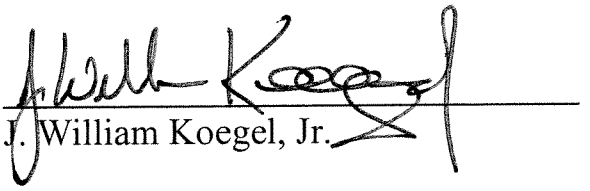
September 10, 2008

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

I, J. William Koegel, Jr., hereby certify that:

1. I am an attorney representing Appellants CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, Glossary, Addenda, and Certificate of Compliance and Service) contains 6,988 words.



J. William Koegel, Jr.