

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

SUHAIL NAJIM ABDULLAH . Civil Action No. 1:08cv827
AL SHIMARI, TAHA YASEEN ARRAQ .
RASHID, SA'AD HAMZA HANTOOSH .
AL-ZUBA'E, AND SALAH HASAN .
NUSAIIF JASIM AL-EJAILI, .

Plaintiffs, .

vs. .

Alexandria, Virginia
February 27, 2019
9:59 a.m.

CACI PREMIER TECHNOLOGY, INC., .

Defendant. .

-----X

CACI PREMIER TECHNOLOGY, INC., .

Third-Party Plaintiff, .

vs. .

UNITED STATES OF AMERICA, and .
JOHN DOES 1-60, .

Third-Party Defendants. .

. X

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

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

6 MR. O'CONNOR: Good morning, Your Honor. John
7 O'Connor and Bill Dolan for CACI PT.

8 THE COURT: Good morning.

9 MR. LoBUE: Good morning, Your Honor. Robert LoBue
10 for the plaintiffs, together with my cocounsel, Baher Azmy to
11 my right and John Zwerling, and if the Court would indulge me,
12 I'd like to introduce some of my colleagues who have worked
13 long and hard on this case: Matthew Funk, Jared Buszin from my
14 law firm, and Katherine Gallagher from the Center for
15 Constitutional Rights. Thank you.

16 THE COURT: Good morning.

17 Ms. Wetzler?

18 MS. WETZLER: Good morning, Your Honor. Lauren
19 Wetzler from the United States Attorney's Office. With me are
20 Eric Soskin and Elliott Davis from the Department of Justice.

21 With the Court's permission, Mr. Soskin is prepared
22 and would like to address if the Court has any questions from
23 the United States on the motion to dismiss based on the state
24 secrets privilege or the motion in limine regarding the
25 reports. Mr. Davis would like to address the Court, if he may,

1 if the Court has questions regarding the other two motions for
2 the government. Thank you.

3 THE COURT: All right. Well, the government has no
4 motions pending today. You've got a summary judgment motion
5 down the road.

6 MS. WETZLER: That's correct, Your Honor. We do not,
7 and it's only if Your Honor has questions regarding the pending
8 motions.

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

10 Well, I recognize that you-all sent me a letter a
11 couple of days ago asking if I could let you know if there were
12 particular issues I was concerned about. In part, I didn't
13 totally want to tip my hand. In other parts, I was too busy
14 going through the records.

15 There are a lot of issues that I don't feel I need
16 any oral argument about at all. I'm going to just tell you
17 what I'm going to do, but there are then definitely some issues
18 I want to discuss with you, all right?

19 So we have first of all, I want to address the two
20 motions to dismiss. The defendant has filed a motion to
21 dismiss for lack of subject matter jurisdiction, once again
22 raising issues that I feel I've already addressed. You're now
23 talking about the *Nabisco* case, which, of course, is a case
24 that was issued by the Supreme Court in 2016, which was before
25 *Jesner*.

1 This is the first that you've raised the *Nabisco*
2 argument. It is an interesting one; however, I'm satisfied,
3 number one, that the law of this case is the law established by
4 the Fourth Circuit, and I'm not reversing the Fourth Circuit in
5 this case. They may want to reverse themselves. I mean, down
6 the road, that's something that may happen because of some of
7 the things that have happened since they issued the remand, but
8 there's no question that *Kiobel* is still good law.

9 *Jesner*, which again is the most recent of these
10 cases, did not overrule *Kiobel*, and the Fourth Circuit's
11 opinion was based primarily on the *Kiobel* analysis.

12 Even under the relatively possibly new standard that
13 *Nabisco* has applied, where the Court has to look at two
14 factors, whether the statute gives a clear affirmative
15 indication that it applies extraterritorially and what the law
16 would be for this case if the ATS does not, and then if not,
17 then we have to look at whether the case, and that is the
18 specific case, involves domestic application of the statute,
19 and you look at the statute's focus.

20 Now, in this case, you know, the conduct here, while
21 some of the conduct occurred at Abu Ghraib, there's clearly
22 significant conduct that occurs in the United States. The
23 contract, for example, that gets CACI involved in this in the
24 first place was issued in the United States. We have a United
25 States corporation. We have United States staff over there at

1 Abu Ghraib. We have people from CACI traveling from the United
2 States to Abu Ghraib. You've got Northrop doing that, you have
3 others, and I think there's enough connection.

4 In any case, you know, the Supreme Court -- I'm
5 sorry, the Fourth Circuit has sent this case back to us on
6 the -- their conclusion that there was enough conduct alleged
7 in this case that touched and concerned United States territory
8 with sufficient force, *Kiobel* is still good law, and I'm not
9 reversing the Fourth Circuit. So I'm going to deny the motion
10 to dismiss that's been argued -- or written -- sorry, filed by
11 CACI, and I don't need to hear any argument on that.

12 The other motion is the motion to dismiss based on
13 state secrets, and there the defendant is arguing that the
14 United States' invocation of the state secrets to prevent a
15 full questioning of multiple witnesses in this case has created
16 a problem for CACI because, for example, they'll be unable to
17 raise issues about credibility or the lack of credibility of
18 various witnesses.

19 There may be issues about whether the witnesses will
20 be physically present in the courtroom or will have some sorts
21 of disguises, and those types of problems -- and I recognize
22 the frustration; it was frustrating to me, too, as I read
23 through those depositions -- to some degree affect both sides.

24 Moreover, I'm satisfied that I can give curative
25 instructions to the jury, but besides which -- and I think it

1 is interesting the plaintiffs point out there's sort of an
2 irony here because on the one hand, CACI is arguing we couldn't
3 get enough information to defend ourselves, and yet they're
4 moving for summary judgment on an argument that we have enough
5 evidence in this record that judgment should be granted to us
6 as a matter of law.

7 So I don't feel that CACI has been unfairly
8 prejudiced to such an extent that it can't be worked out with
9 the proper instructions given to the jury, and so I'm going to
10 deny that motion as well.

11 Now, the really interesting motion is the motion for
12 summary judgment, and here I want to hear, Mr. LoBue, from you.
13 I have a real concern that most of Mr. Rashid's allegations
14 cannot go forward in this case, because as I understand, the
15 uncontested facts were that CACI did not -- no CACI personnel
16 arrived at Abu Ghraib before September 28 of 2003. I think
17 that's actually a stipulation.

18 And the Interrogation No. 1, which is the one that
19 I've seen the deposition, that's the one where all of these --
20 incredibly troubling conduct occurred: the shooting of
21 Mr. Rashid in the leg, being hung from a ceiling fan to be
22 interrogated. All of that occurs in Interrogation No. 1, which
23 occurs according to the interrogation report which is in this
24 record on September 28.

25 That's before CACI's people are on site, and the

1 interrogators involved in that interrogation were military
2 people. That's also uncontested, I think, in this record.
3 Moreover, some of the allegations that Rashid said about the
4 sexual misconduct and a particular female who was tormenting
5 him he describes as occurring before the first interrogation,
6 which again is before CACI is on the scene.

7 So I don't know how any of those allegations from
8 Mr. Rashid can stay in this case. I think there it would be
9 poisonous and unfairly prejudicial to CACI to have any
10 reference be made to gunshots or being hung from a
11 chandelier -- or a ceiling fan.

12 The only things that -- the only allegations, I
13 believe, that are still in this case that would have occurred
14 after the first interrogation and after CACI is now on board
15 would be Rashid's claim that he was part of a naked pyramid,
16 that he was hidden from a human rights delegation visit, and
17 that there may have been some continuing tormenting by this
18 female soldier about putting plastic ties over parts of his
19 body, etc.

20 But the plaintiff needs to address that because I
21 think the Rashid case is extremely weak and possibly shouldn't
22 be in this case at all, all right?

23 MR. LOBUE: Yes, Your Honor. I'm happy to address
24 that, of course. I readily concede that any acts of abuse that
25 occurred before the demonstrable date that CACI personnel were

1 present should not be part of the case; however, I think there
2 are substantial allegations and testimony concerning both abuse
3 and connection between Mr. Rashid and CACI that transpired
4 thereafter.

5 And I, I would begin by pointing out that the
6 testimony is that a CACI employee was the head of the
7 two-person interrogation team that was responsible for the
8 interrogation of Mr. Rashid at precisely the time he was
9 interrogated, and if you'll bear with me for one moment, the --
10 that's the testimony of Army Interrogator H, which is Exhibit
11 26, at pages 121 through 122. So that's one point.

12 And in addition, there are -- I agree with the Court
13 that the naked pyramid is an allegation that was later in time.
14 There were also -- there was also testimony from Mr. Rashid
15 that he was burned with cigarettes during his interrogation,
16 suffered electric shocks, that he was dragged naked on the
17 floor from the interrogation --

18 THE COURT: But wasn't that all Interrogation 1?

19 MR. LoBUE: Your Honor, I'm not sure I can respond to
20 that.

21 THE COURT: I'm --

22 MR. LoBUE: If it's Interrogation No. 1 and if it's
23 before the date that CACI was there, I agree it should not be
24 in the case, but, you know, being hidden from the International
25 Red Cross, that was later. Sleep deprivation, that almost by

1 definition was over a period of time.

2 And -- so I think there are certainly, there are
3 certainly allegations that postdate that, that first
4 interrogation.

5 THE COURT: All right. I'll let -- Mr. O'Connor, do
6 you want to respond?

7 MR. O'CONNOR: I do, Your Honor. And thank you for
8 the Court's guidance this morning. Your Honor mentioned an
9 irony that we're seeking summary judgment while saying we can't
10 defend. The lion's share of our summary judgment isn't -- we
11 developed facts. The lion's share of our judgment is they
12 don't have any facts and so that there's no inconsistency at
13 all between state secrets and this.

14 But turning to Rashid, Your Honor asked is this
15 Rashid Interrogation No. 1? There is only one. That's it.
16 That is the United States' interrogatory response. There's no
17 evidence to the contrary of that, that he was interrogated
18 once, just once.

19 THE COURT: But -- we'll have to look at that. I'm
20 going to probably take the Rashid evidence back and look at it
21 one more time, but I am concerned about the -- the plaintiffs'
22 theory of this case, again, because there is no evidence of any
23 of the interrogators who interrogated the four named
24 plaintiffs -- there's no evidence and that plaintiffs have
25 taken a step back from a claim that there was direct conduct by

1 any CACI people as to them.

2 The problem -- the case is a case based on
3 conspiracy, a theory of conspiracy and aiding and abetting, and
4 the motivation for that conduct was to soften up the detainees
5 for interrogation purposes.

6 So there's an interesting question. If there's no
7 further interrogation going on, what would be -- what's the
8 motivation or purpose to continue that kind of conduct?

9 MR. O'CONNOR: And where's the evidence connecting
10 any of that to CACI with respect to Rashid? With Rashid, Your
11 Honor mentioned some things that occurred after CACI people had
12 reached Abu Ghraib Prison or reached Iraq.

13 Your Honor mentioned a naked pyramid. The record
14 evidence of that is that that was just MPs, and what happened
15 is, according to the record, and there's no evidence to the
16 contrary, is some rioters were brought from a tent camp that
17 weren't intelligence -- they weren't people who were being
18 interrogated for intelligence value. They were there because
19 they were criminals or otherwise they were at a tent camp.

20 They rioted. They got brought to the Hard Site
21 because they wanted to get the rioters away from the hundreds
22 of detainees held in these open air tent camps, and the MPs
23 were completely sadistic that night and did all sorts of
24 horrible things to them. And Private Frederick, who, who was
25 court-martialed for that conduct, testified that that was MPs,

1 that there was no military -- there was no interrogator
2 involvement whatsoever in the treatment of the detainees that
3 night, and that's the naked pyramid.

4 The -- you know, this Rashid interrogation, you know,
5 plaintiffs' counsel says that, well, CACI had the head of the
6 two-person Tiger Team. That's not exactly what the record says
7 in our view.

8 What the record says is that a CACI -- when CACI
9 personnel first reached Abu Ghraib Prison, the Army said, oh,
10 great, we have more interrogators, and because there was one
11 team, one fight, they integrated them, and they said, oh, you
12 know, we're going to have this person -- who I don't even know
13 who it is, because I can't know, I'm not allowed to know --
14 we're going to have this CACI employee be a section leader,
15 which is not someone who's out conducting these interrogations.
16 He's got five sets of interrogators underneath him, and
17 according to Interrogator H, the role of the section leader was
18 take a look at the interrogation plan and then send it to the
19 Army to approve it or disapprove it.

20 And the evidence undisputed is that this section
21 leader from CACI, who didn't participate in any interrogations
22 but was reviewing plans and sending them to Capt. Wood, the
23 undisputed evidence is that that section leader, who was only
24 in the role for about two weeks until they realized shouldn't
25 be really doing this, did not suggest any mistreatment of any

1 detainee, did not encourage the interrogators to mistreat any
2 detainee.

3 That's the only evidence about this section leader,
4 whose name, identity, and everything else is unknown to me
5 because I'm not allowed to know.

6 So if, if plaintiffs' sole thread that they're
7 hanging onto is a CACI person for two weeks was a section
8 leader, which apparently was after the one Rashid interrogation
9 that occurred, you have to take that evidence as it sits, and
10 that evidence is he was there, did never encourage, suggest, or
11 do anything to want to abuse anyone, and left it at that and
12 two weeks later was out of the job.

13 And there's also zero evidence in the record, zero,
14 of CACI involvement in any way in hiding anyone from the Red
15 Cross or any other human rights agency, zero. I mean, we've
16 got, we've got a foot of paper that's double-sided --

17 THE COURT: I know.

18 MR. O'CONNOR: -- and there's zero evidence of CACI
19 personnel having any role in that.

20 If plaintiffs have something that suggests that, it
21 was incumbent on them to present that on summary judgment.
22 They don't because it doesn't exist.

23 THE COURT: All right.

24 MR. LoBUE: May I briefly respond, Your Honor?

25 THE COURT: Go ahead.

1 MR. LOBUE: The point I was, I was trying to convey
2 regarding the Tiger Team leader, who is concededly a CACI
3 employee, is that the testimony of Interrogator H is that that
4 CACI employee was installed in that position at the time that
5 Mr. Rashid was being interrogated, so it cannot be the case
6 that the only interrogation of Mr. Rashid was before CACI
7 arrived. It's simply not possible.

8 THE COURT: Well, I'm, I'm not comfortable -- that's
9 in my view not sufficient evidence to let this go forward. The
10 Rashid allegations are very, very strong, very vivid, very
11 troubling. I accept them as accurate at this point, but the
12 problem is there's a stipulation in this case that the CACI
13 people did not arrive on scene until the 28th of September, and
14 I cannot believe that they would have been doing interrogations
15 the first day they get there or doing anything, and there's no
16 question that the people who did the actual interrogation, who
17 were on the scene with Mr. Rashid, were both military people.
18 There's no evidence that there was a third person in the room
19 involved in that.

20 And as I said, Rashid's own testimony -- and I'm
21 going to do you a favor because there's been, as Mr. O'Connor
22 pointed out, well over a foot of, of paper, most of it
23 double-sided, that we've had to go through and a whole bunch of
24 different issues. I will go through the depositions that I
25 have of Rashid one more time to make sure that I didn't -- that

1 I didn't overlook something, but my understanding of his
2 testimony has been that he was being mistreated before the
3 first interrogation and then terribly mistreated during the
4 interrogation, and CACI's not on the scene.

5 So CACI can't be held liable for that, and injecting
6 any of that evidence in the case would, I believe, make it
7 unfairly prejudicial to the defendant. So I'm going to
8 determine whether Mr. Rashid should remain in this case or not.

9 MR. LOBUE: Okay. Thank you.

10 THE COURT: All right? But most likely, I'm probably
11 going to grant summary judgment to the defendant on that -- on
12 his case, all right?

13 MR. LOBUE: Your Honor, would it be helpful for the
14 Court if I submit a brief memorandum specifying what
15 transpired --

16 THE COURT: No. I have enough evidence.

17 MR. LOBUE: Thank you.

18 THE COURT: We'll go through it ourselves, thank you.
19 All right?

20 As for the other three individuals, however, there
21 are in my view -- I'm sorry, the other three plaintiffs,
22 they've made allegations of conduct that does qualify in my
23 view to keep them in this case. We have the testimony of Sgt.
24 Frederick, who clearly talks about CACI employee Stefanowicz.
25 He claims that that employee told him, Frederick, to treat

1 certain detainees, quote, like "S"; that another CACI employee,
2 Johnson, asked him to show where there were pressure points on
3 people and then instructed him to hit a detainee on pressure
4 points if he didn't answer questions.

5 You've also got Cpl. Graner, who testified about Big
6 Steve -- again, that's Stefanowicz -- forcing a detainee to
7 stand on a box, and there's a photo of Johnson with a detainee
8 in one of those problematic positions.

9 You've got the testimony of CACI former employee
10 Nelson, who expressed serious concerns about Dugan and Johnson.
11 You've got evidence in this case that Mr. Porvaznik, who was
12 the person, the CACI lead person on board for several months
13 during this critical time period, not bringing any of these
14 concerns to the attention of anybody at CACI or, or following
15 up on problems with the military.

16 You've got CACI Interrogator A admitting that he had
17 seen naked detainees. It's unclear in my view whether it's two
18 or three, but more than one naked detainee.

19 You've got evidence in the record that CACI promoted
20 Stefanowicz, that they fought the firing of Johnson, that they
21 made no effort to contact Nelson.

22 I mean, there's enough evidence in my view to show --
23 to let this case go forward. In other words, there are
24 material issues of fact that are in dispute, and given the
25 broad concepts of both conspiracy liability and aiding and

1 abetting liability, there's enough to go forward.

2 So on the remaining three plaintiffs, I'm going to
3 let that portion of the case go forward. Most likely, as I
4 said, Rashid will probably be dismissed out of this case.

5 So I really want to spend time with you-all talking
6 about the, how this case is going to get tried. Now, I know
7 that plaintiffs' motion in limine is out there as well, but
8 some of these -- some of how I resolve the motion in limine
9 depends upon how this case is going to be tried.

10 We should know at this point, number one, are the
11 plaintiffs going to be here live? What's the status of that
12 situation?

13 MR. LoBUE: Your Honor, the status is this: We made
14 applications for special parole and/or for visas. Those
15 applications have not been resolved as yet, so we still have
16 some hope they will be permitted to come here for trial.

17 Plan B would be to get them to a location where they
18 can testify by live VideoLink, and we are working -- we are
19 working seriously on, on Plan B.

20 The problem we face is that in their current locale,
21 which is Baghdad for three of them and Sweden for one of them,
22 there is a time difference. There is also a -- we have been
23 told that they will not be permitted to testify from the U.S.
24 Embassy, so we're going to have to arrive at an alternative
25 venue for them to, to be present when their testimony is

1 brought in by video.

2 THE COURT: You're going to need to start working
3 well in advance of the trial date with our court technology
4 people, Lance Bachman, all right? This is one of the
5 courtrooms that's set up for that kind of live video testimony.

6 We actually during the *Moussaoui* case took a
7 deposition from somebody in Jakarta, so I know we can do it.
8 I'm assuming that the transmission lines are better now than
9 they were then, because at that point, we were using
10 satellites, and you had to go off when the satellite got out of
11 sync, you had to stop.

12 I'm not going to waste the jury's time, so the
13 problem is the plaintiffs are -- you're obligated to make sure
14 your evidence is well organized and we're not going to have
15 huge gaps in the evidence, all right? And you need to let us
16 know as soon as you know for certain whether we're talking
17 about, you know, live presentation or by video.

18 Now, the depositions were done by video, is that
19 correct, or were you all in one location?

20 MR. LOBUE: Three of them were done by VideoLink.
21 The one gentleman who came to the U.S., Mr. Al-Ejaili, my
22 recollection was not videotaped. Perhaps the defense recalls.

23 THE COURT: Mr. O'Connor?

24 MR. LOBUE: Was he videotaped?

25 MR. O'CONNOR: My recollection is that we took a

1 videotape deposition --

2 THE COURT: All right.

3 MR. O'CONNOR: -- at my office of Al-Ejaili.

4 THE COURT: All right. The ones that were done by
5 video, how difficult was that in terms of a good, clear signal?

6 MR. O'CONNOR: Very. There were problems with
7 transmission being lost at times. There were -- there was a
8 time lag. It was very difficult to -- Your Honor probably
9 knows this: None of them speak English.

10 THE COURT: I know that.

11 MR. O'CONNOR: So it was a very difficult process of
12 translating questions to then be presented to someone who's on
13 a time delay, having them answer and then having it translated
14 back, so those were also issues, but there were -- it was not a
15 perfect process.

16 THE COURT: And because we won't have simultaneous
17 translation, I'm sure the Arabic or Iraqi languages can't be
18 done that way, how long was that taking? In other words, you'd
19 ask a question in English. It has to be -- and I assume it was
20 not translated simultaneously, or was it?

21 MR. O'CONNOR: I would ask the question --

22 THE COURT: Yeah.

23 MR. O'CONNOR: -- and then the interpreter who was at
24 my office would then translate it.

25 Sometimes there were debates --

1 THE COURT: I saw that in the transcript, yeah.

2 MR. O'CONNOR: -- as to whether the, whether the
3 translator should change his, the way he translated the
4 question or translated the answer, but basically it was
5 seriatim.

6 I asked a question. The translator would translate,
7 which usually took longer than my question, because he might
8 even ask me to clarify what I mean. Then the witness would
9 answer in Arabic, and then the translator would translate it
10 back, which again might involve a debate over exactly what the
11 proper translation of the answer was.

12 So if I asked a relatively short question, I would
13 say it took 30 seconds or 45 seconds to kind of do all four of
14 those.

15 THE COURT: All right. Well, that makes -- that
16 logistically makes things very difficult.

17 The translator you used, was it the same person for
18 everybody?

19 MR. O'CONNOR: Oh, it's funny, Your Honor, for
20 Al-Ejaili, we had a translator who was, did not translate the
21 next round, as I recall it. The next round were Al Shimari,
22 you know, it was five years later, Al Shimari and Al-Zuba'e,
23 and we had someone that -- we took it on ourselves to get a
24 translator, and we had someone that plaintiffs didn't like the
25 person we had, so then we got another person, and that person

1 did those two, and then for Rashid, plaintiffs got the
2 translator, and ironically they got the guy that I had
3 originally had for the prior two that they didn't like.

4 THE COURT: Because I notice the translators were
5 fairly interactive with you-all. I mean, their names appear in
6 the transcripts.

7 MR. O'CONNOR: They had a lot of questions.

8 THE COURT: But they've obviously heard these
9 people's voices. Are you going to use the same ones? That's
10 what I guess I'm asking. Is the plan to have the people who've
11 had some involvement already in the case be the ones who are
12 going to work during the trial?

13 MR. LOBUE: Your Honor, I -- my recollection is not
14 quite the same as Mr. O'Connor's. There was an interpreter
15 retained by defendants who was not conversant in the Iraqi
16 idiom or dialect of Arabic, and that presented some problems.

17 The, the translator that we obtained for the last
18 deposition was an Iraqi-American and far more fluent, and that
19 went a lot more smoothly. We are making inquiries to see if he
20 is available or another certified translator who has the proper
21 idiom, and our proposal would be to have that translator here.

22 So the witnesses will be sworn from this courtroom,
23 the translator will be here in proximity to the court reporter,
24 and I, I don't suggest this won't be a challenge, but I think
25 we can do it.

1 THE COURT: All right. Okay. That's fine.

2 MR. O'CONNOR: And, Your Honor --

3 THE COURT: Yeah.

4 MR. O'CONNOR: -- just -- Your Honor asked about the
5 status of the plaintiffs, and my latest knowledge is that
6 Al-Ejaili was denied a visa to come here in January.

7 Maybe that's changed, but if he's not getting in the
8 country, none of them are getting in the country.

9 THE COURT: Yeah.

10 MR. O'CONNOR: So we probably ought to be looking
11 hard at --

12 THE COURT: I would just given the nature of the
13 political world these days, I would be really surprised if any
14 of these three men are able to come here, but I think you've
15 got to start making the logistical plans now. You've got to
16 talk with Mr. Bachman, and I want to make sure that there's
17 been a test run a couple of days before trial, because what I
18 don't -- what's not going to happen is I'm not going to have,
19 you know, eight or ten civilians sitting in the jury box just,
20 you know, twiddling their thumbs while we're trying to hook up
21 the signals and that sort of thing, so it's got to be worked
22 out ahead of time, all right?

23 Now, the next witness I'm concerned about is is
24 Gen. Taguba going to be testifying?

25 MR. LoBUE: Your Honor, it's our intention to serve a

1 trial subpoena on him.

2 THE COURT: All right. And he's within 100 miles of
3 the court, as I understand it.

4 MR. LOBUE: I believe he is. I don't know if there's
5 going to be an objection to that from the government, but if
6 there is, we'll, we'll have to deal with it.

7 THE COURT: All right, you-all have a seat.

8 Let me hear from the government. Ms. Wetzler, is
9 there going to be any objection to the general testifying live?

10 MR. SOSKIN: Your Honor, plaintiffs' counsel had
11 inquired as to whether we would accept a trial subpoena for
12 Gen. Taguba. I had asked our clients at the Army to reach out
13 to him regarding his testimony, but it is our intention to
14 accept the subpoena on his behalf.

15 I don't think there will be any problem securing his
16 appearance as long as he remains here, which he -- within this
17 jurisdiction, which he was the last time we were in touch with
18 him.

19 THE COURT: All right. Well, while you're here, do I
20 understand that the -- one of the reasons for invoking the
21 state secret privilege during many of these depositions was to
22 protect the identity of the interrogator?

23 MR. SOSKIN: Yes, Your Honor. The predominant reason
24 was that.

25 THE COURT: What if an interrogator doesn't care

1 about his or her identity being revealed?

2 MR. SOSKIN: Well, Your Honor, as we set forth in our
3 briefing at the time of the state secrets privilege assertions
4 and as I think came up in some of our discussions, there are
5 two separate interests.

6 There is the interrogators' own interest and those
7 four folks who were unrepresented during the motions practice,
8 and we set that forth, as well as the United States' interest,
9 national security interest in the potential harms that could
10 come about if interrogator identities were disclosed, and those
11 harms exist whether or not an interrogator is willing to
12 voluntarily disclose his or her identity.

13 We do not authorize them to discuss classified
14 information such as their identities in connection with a
15 specific interrogation with the public, whether or not they
16 wish to do so.

17 THE COURT: And do you have case law that supports
18 that concept that that by itself can be enough to justify a
19 state secret invocation?

20 MR. SOSKIN: That classified information --

21 THE COURT: No. No, no.

22 MR. SOSKIN: -- is the government's information and
23 not --

24 THE COURT: No, I don't think --

25 MR. SOSKIN: -- individuals'?

1 THE COURT: No. That if an individual, private
2 citizen, not a member of the military, who happened to at one
3 point be a government contractor working on -- at a military
4 base on a project, the project itself is no longer classified,
5 I mean, there's been plenty of public exposure about what
6 happened at Abu Ghraib, and there's a lot of information just
7 in this case alone that's public, if -- and I'm not saying any
8 of these interrogators would necessarily be concerned, well,
9 for example, Nelson, I mean, his name is out there,
10 Stefanowicz, a whole bunch of these interrogators' names are
11 out there, so the name of a particular interrogator, I don't
12 see how that remains a state secret.

13 Why is one interrogator's name a state secret and the
14 other's is not?

15 MR. SOSKIN: So two points, Your Honor. First, what
16 is classified and what the Court has previously affirmed as a
17 state secret here is the name of an interrogator in connection
18 with the identity of a specific individual who that person
19 interrogated.

20 So the names of the interrogators and the fact that
21 they may have been, for example, named in the Taguba report is
22 not a classified fact, and it is not something over which we
23 asserted the state secrets privilege or over which the Court
24 affirmed the state secrets privilege.

25 Second --

1 THE COURT: Then why, why was there an objection
2 during one of these depositions when the question was asked of
3 the witness: Did you give a statement, I guess it was either
4 to CID or Taguba, and the witness said he gave a statement, and
5 then I think the question was was it oral or was it written,
6 and you invoked the state secret as to those two questions?
7 What difference does it make if he's already admitted that he's
8 made a statement, whether it was written or oral?

9 MR. SOSKIN: So, Your Honor, there is a universe of
10 information that has been made public about the interrogators,
11 including, as you know, some information about the names of
12 some of these individuals in some portions of the Taguba and
13 Jones/Fay and other reports, and as part of our state secrets
14 assertion, what we have permitted is for an individual to be
15 identified by pseudonym in connection with the interrogation of
16 a specific plaintiff.

17 So many of the questions to which we instructed
18 witnesses not to answer in the depositions were questions for
19 which the answer would have narrowed the pool of potential
20 individuals who, say, Interrogator B was, and by narrowing that
21 pool could have been easily pieced together with other facts
22 such that it would become apparent who Interrogator B was and,
23 thus, would allow the combination of that name with the name of
24 the person who he interrogated, thus revealing the information
25 over which the United States asserted and this Court affirmed

1 the state secrets privilege.

2 THE COURT: What about the background and training
3 for these people? Certainly whether or not a CACI interrogator
4 was properly trained in the, in the principles of the Geneva
5 Convention and in proper interrogation techniques is a very
6 relevant issue and can't possibly reveal the identity of a
7 person.

8 MR. SOSKIN: Your Honor, many of the questions that
9 relate to the training that individuals, that individuals had
10 were raised in the course of depositions in connection with who
11 their previous employers were and over what time, and again,
12 revealing whether someone was in the Army or in the Navy or in
13 the Air Force previously would permit a significant
14 narrowing -- or whether they are currently in the Armed
15 Services would permit a significant narrowing of the pool for
16 whom an individual could be, and that is, you know, that is
17 what is relevant here.

18 I believe there may be record facts also about
19 whether CACI provided training to particular individuals, and
20 that may have been involved in the, you know, particular
21 instructions not to answer.

22 Now, one, you know, one sort -- one big picture issue
23 that's important to keep in mind is that many -- all of these
24 interrogation personnel who were deposed by pseudonym are, are
25 persons who we assured we would protect the identity of in

1 connection with the state secrets privilege assertion, and to a
2 person, for all of the depositions I was involved in -- and
3 Mr. Davis, I think, can speak to the others -- those are
4 individuals who informed us that they were gravely concerned
5 about the possibility their identities would be exposed, and
6 their willingness to give fulsome answers in the course of
7 these depositions was based on their understanding that we
8 would protect those identities.

9 THE COURT: All right. Which of the, what I'll call
10 the named or identified CACI people, that is, Dugan, Johnson,
11 Stefanowicz, those three in particular, which was the
12 22-year-old?

13 MR. O'CONNOR: Johnson. Johnson, Your Honor.

14 THE COURT: He's the young one?

15 MR. O'CONNOR: Yes.

16 THE COURT: I thought Johnson was the gray-haired
17 one.

18 MR. O'CONNOR: No, Johnson --

19 THE COURT: That's Dugan?

20 MR. O'CONNOR: I'm not sure if he was exactly 22, but
21 he was, he was in his early to mid-early twenties.

22 THE COURT: Okay. All right. At trial, CACI needs
23 to be able, it seems to me, to at least get out what training
24 in terms of what, what CACI provided in terms of training to
25 its people. You don't have an objection to that.

1 In particular, what, what training, if any, they got
2 in the proper ways to interrogate someone, the Geneva
3 Convention, that sort of thing. It's directly relevant to this
4 case, and I would think that that can't possibly be a state
5 secret. We're not talking about specific techniques for
6 interrogation but just the general rules of what you should not
7 be doing, let's say.

8 MR. SOSKIN: Your Honor, your instinct is an instinct
9 or an intuition that I share. I think we would want, of
10 course, to look closely at what information, you know, needed
11 to be brought out to share that in connection with specific
12 individuals.

13 It's unclear to me which specific individuals, you
14 know, standing here we would be talking about or why we would
15 have an objection, but we can certainly work with them to
16 figure out whether and how that information will be made
17 available.

18 THE COURT: All right. Because -- okay. That's
19 fine.

20 I think you can go back now. Thank you.

21 Mr. O'Connor?

22 MR. O'CONNOR: Your Honor, on the question of
23 training --

24 THE COURT: Yeah.

25 MR. O'CONNOR: -- I want to put down a marker that

1 what training CACI provided isn't the right question because
2 what, what the right question is, what training and experience
3 did they have, because that is what's important.

4 If we have -- if we hire someone who is a trained
5 Army interrogator, nobody could say that we need to train them
6 to be an interrogator. Send them over and the Army is in
7 charge of making sure they're doing what they're supposed to be
8 doing over there.

9 And we provided our supplement of the Interrogator G
10 deposition, which took place after briefing, and we asked:
11 What training did you have prior to going to Abu Ghraib from
12 any source, and what experience did you have? And he wasn't
13 allowed to answer that.

14 So the, the question isn't what training did CACI
15 generally provide, because the question is did the people who
16 interacted with plaintiffs, were they adequately trained and
17 did they have adequate experience, and that we are not by any
18 stretch allowed to have.

19 Also, on -- Your Honor asked about, well, what if an
20 interrogator agrees to be unmasked, and Mr. Soskin said that
21 everyone they've talked with was very concerned about having
22 their identity revealed. I can tell Your Honor that there is
23 zero chance that CACI Interrogator A would agree to have his
24 identity revealed. I don't have direct, person-to-person
25 knowledge, but I have been told that the same is true of CACI

1 Interrogator G, but I think -- I just want to make sure the
2 Court understands that what the -- what Mr. Soskin said about
3 all the pseudonymous interrogators certainly applies to the two
4 CACI pseudonymous interrogators to the best of my knowledge and
5 understanding.

6 THE COURT: All right.

7 MR. O'CONNOR: Also, Your Honor, in terms of trial
8 planning and preparation, I think we're in a bit of a -- we
9 have a bit of a problem right now because, you know, the United
10 States has a motion to dismiss that's been pending for a year,
11 and we don't know are they going to be in the case at trial,
12 which of the allegations in the third amended complaint do they
13 admit --

14 THE COURT: Well, I don't -- okay.

15 MR. O'CONNOR: -- which ones do they deny.

16 THE COURT: I've, I've looked at the motion for
17 summary judgment. You've not responded to it yet.

18 MR. O'CONNOR: We haven't.

19 THE COURT: Yeah. Quite frankly, I don't mind
20 sharing this with you, the reason I -- I haven't just been
21 sitting on it. I've been agonizing over the motion to dismiss
22 because as you know, the government is arguing sovereign
23 immunity, and I'm, I'm struggling with the concept that
24 sovereign immunity should protect any government from suit for
25 jus cogens violations.

1 There's not much case law out there. There's a bit,
2 and I've looked at it, and I still haven't decided how I want
3 to resolve it, but, but I did look at the motion for summary
4 judgment, and that looks very powerful. If, in fact, you-all
5 entered into a settlement agreement where you basically said no
6 more liability for anything connected to these work orders, I'm
7 not so sure you're going to survive with your case.

8 So I'm waiting to see your response on that, and that
9 may avoid having to address the motion to dismiss entirely.

10 MR. O'CONNOR: And at this point, Your Honor has only
11 heard one-half of the argument.

12 THE COURT: That's what I'm saying. So I haven't
13 ruled on that yet, yeah. Okay? But when is your -- when is
14 your response coming in on that?

15 MR. O'CONNOR: It's due on Friday.

16 THE COURT: All right. Well, we'll know pretty soon.
17 So you'll get an answer pretty soon on that then probably.

18 MR. LoBUE: Your Honor, may I have just a brief
19 comment on, on some of the trial processes?

20 THE COURT: Yeah.

21 MR. LoBUE: There's nothing that stops CACI from
22 calling Steve or DJ or Tim Dugan to the stand and asking about
23 their training, and if they do, I mean, they're listed as trial
24 witnesses. If they do, we're the ones who are going to be
25 prejudiced because we weren't allowed to hear the answers to

1 those questions, either.

2 So, so CACI can still do that. They can also call
3 pseudonymous interrogators, as many as they like, who
4 presumably could testify behind a screen or, or with a suitable
5 disguise and recite all the testimony -- all the other
6 testimony that, that was elicited.

7 So I think the prejudice falls on us. We're the ones
8 who, who, in fact, asked many of those questions but were
9 blocked.

10 THE COURT: Well, both sides have problems. That's
11 why, as I said, I think that's why we did not dismiss the case
12 on the state secrets issue. I mean, it's frustrating, but
13 that's how it goes.

14 And I still strongly recommend that some of those
15 issues be reconsidered. There may be ways of fashioning
16 questions that can still get at some of this information
17 without such that they would lead to identification of the
18 individuals.

19 I mean, rather than asking have you served in the
20 Army or the Air Force, just have you ever been in the military?
21 I mean, there have been hundreds of thousands of people in the
22 military. The ability to single out somebody based on that
23 broad a question it seems to me would be practically
24 impossible.

25 But anyway, on the motion in limine, which is the

1 only motion that's remaining on the docket, most of what are in
2 those reports, and I've read them both over again, involve
3 issues that I'm not at all sure are really being contested. I
4 mean, the plaintiff wants those reports to come in to establish
5 four things, and the first is to establish the abuse of
6 detainees by Military Police and others similar to what the
7 plaintiffs have described.

8 Now, I don't think CACI is going to be making any
9 argument that the type of abuse discussed by these plaintiffs
10 did not occur at Abu Ghraib. Are you arguing that that did not
11 occur?

12 In other words, the fact that detainees were
13 kept naked -- some of them were kept naked, that there were
14 stress positions used, sleep deprivation, dogs, isolation,
15 those types of things, is there really a factual dispute about
16 that?

17 MR. DOLAN: Well, Your Honor, please, if I could --

18 THE COURT: And, Mr. Dolan, you've been in this court
19 long enough to know that with motions in limine, many times the
20 answer is if you open the door, then the other side can walk
21 right in. But, I mean, it seems to me that most of the things
22 that are discussed in those reports are really not subject to
23 honest contest.

24 MR. DOLAN: Okay. The issue, it seems to me, Your
25 Honor, is in balancing whether or not they are relevant to the

1 claims of these plaintiffs against the prejudice that
2 necessarily flows from some of the allegations, when you have
3 repeated instances where it's described in the report of other
4 detainees, military personnel, no CIA -- no CACI involvement,
5 it becomes what is the relevance to the individual claim.

6 When we are denied -- and I take exception to the
7 Court's description of the state secrets impact on our
8 discovery. We're denied access to eyewitnesses in case -- in a
9 case that turns on eyewitnesses.

10 It seems to me that when you have, for instance,
11 several of these descriptions, just not to belabor the point,
12 but just to make sure that you see the point that we're
13 trying -- that I'm trying to make, when you see a paragraph in
14 the Fay report that goes into great detail about head blows
15 rendering detainees unconscious, sexual posing and forced
16 participation in group masturbation, extremes where the death
17 of a detainee in CIA custody, an alleged rape committed by a
18 U.S. translator and observed by a female soldier, and the
19 alleged sexual assault of a female detainee, that -- and then
20 including, same paragraph, to go on to simply say at the end:
21 What started as nakedness and humiliations, stress and physical
22 training, exercise, carried over into sexual and physical
23 assaults by a small group of morally corrupt and unsupervised
24 soldiers and civilians.

25 So therefore, CACI is within the ambit of, of that

1 list of horrors by being named as a civilian, when we know
2 that the only civilian activity in that paragraph was the rape
3 by a translator -- alleged rape by a translator, and the
4 paragraph does not relate factually to anything that CACI
5 people have done.

6 The difficulty with putting that all in by way of
7 background and then always using the umbrella of conspiracy in
8 order to get anything in, there has to be some link between
9 those horrors and our, our employees, and that's why just
10 simply saying that these things happened as a matter of fact
11 makes the report admissible throughout this entire -- both
12 reports, Fay particularly, there are countless examples of that
13 kind of inference, and when you then say it's Abu Ghraib and
14 there's a contract and they're going to profit, the jury is
15 then subjected to data unrelated to CACI, and the only reason
16 they're in for conspiracy and aiding and abetting is because of
17 the conspiracy umbrella, it becomes impossible for us to
18 answer, for instance, that paragraph when it didn't have
19 anything to do with our people.

20 So we simply cannot say to you, Judge, that's an
21 illustration of uncontested facts; why would you object to it?
22 Because it did happen. It did happen. Many things happened at
23 Abu Ghraib.

24 And I think it's -- for the fact finder, it's
25 critically important to distinguish between those events that

1 occurred and those events that are fairly linked as a theory
2 under conspiracy or aiding and abetting to CACI.

3 THE COURT: All right. Mr. LoBue?

4 MR. LOBUE: Your Honor, briefly, the defendant clings
5 to the theory that unless we can place a CACI employee at the
6 precise physical site where an abuse occurred, we have no case.
7 We've been through this before. We've been through this on the
8 motion to dismiss of the third amended complaint, which was
9 filed after our discovery was substantially taken and pleaded
10 robustly the facts on which we rely, and the Court in denying
11 in relevant part the motion to dismiss said: Given the
12 confined and relatively small nature of the Hard Site and the
13 commonalities among the different detainees' description of the
14 abuse they suffered and the concerted efforts to conceal the
15 mistreatment, the allegations in this paragraph support an
16 inference not merely of individual conspiracies between
17 specific interrogators and specific MPs, but instead a
18 broad-ranging conspiracy involving a number of interrogators
19 and military personnel to torture detainees.

20 So I am not going to be able to place the CACI
21 employees in physical proximity to every one of these acts that
22 we're complaining about, but we do know from the depositions
23 taken most recently, for example, CACI Interrogator A was in
24 the Hard Site every day. We do know that when Gen. Taguba was
25 investigating, he saw CACI interrogators walking freely around

1 the Hard Site. We have testimony from others that entry to the
2 Hard Site was, was open to the interrogators, that they could
3 see into all the cells.

4 So, so there is -- there is perhaps circumstantial
5 but there is relevance to the atmosphere of humiliation and
6 mistreatment and fear that was prevalent at the site, which
7 according to the general's reports was largely provoked by the
8 actions of the interrogators, including specifically and by
9 name three of their employees.

10 So I do think we will be offering and I hope the
11 Court will admit at least some of the evidence of the general
12 conditions and the abuses visited upon other detainees at the
13 relevant time period in this confined locale.

14 THE COURT: Well, I think, again, because of the
15 strange way in which this case is postured, that is, based on
16 the conspiracy and aiding and abetting theories, there is a
17 kind of broad approach that is not inappropriate. I think
18 probably a significant part of this case is going to involve
19 some very careful cautionary instructions to the jury, and
20 you're both -- both sides are fortunate, we have very
21 intelligent juries in this district. I am constantly amazed at
22 the questions that they ask, and I am satisfied that with
23 proper instructions, the jury can sort through this.

24 I am still much more in favor of live testimony, and
25 if General Taguba, for example, is called as a witness, that

1 avoids much of the problems that might otherwise occur when
2 just entering the report itself. As I said earlier, the whole
3 report is not going in. Specific -- the specific sections
4 which the plaintiff has indicated, there are still way too many
5 of them, and many of them may not be necessary if, for example,
6 he's here to testify live.

7 So on the motion in limine, I'm not going to resolve
8 it today other than to suggest that both sides see if you can
9 work it out. Again, to the extent that there are statements in
10 there that are hypotheses or not really sufficiently reliable,
11 they're not going to come in, all right?

12 And I think some of the extreme issues, I mean, for
13 example, the -- the detainee who was brought in by an OGA and
14 died and then was packed up in ice, that shouldn't come into
15 this case. There's absolutely no indication that any of the
16 CACI people or the interrogators would have been involved with
17 that. That to me is too incendiary.

18 So I would expect both sides to think wisely about
19 some of these what I'll call really extreme incidents that
20 ought not to be in the case at all. And the same way, that's
21 why the Rashid things are not going to be in the case, and as I
22 said, probably he won't be at all.

23 But that's what I think both sides should be trying
24 to, to think about in terms of getting this case, you know, in
25 a better situation.

1 Now, the other thing I want to warn both sides about
2 is probably three-quarters of the materials I reviewed for
3 these motions are under seal. There are no national security
4 reasons why they're under seal, we haven't had CIPA hearings on
5 any of this, and I'm not worrying about what's under seal or
6 not under seal in any opinions that I write, and when the case
7 goes to trial, whatever evidence comes in is publicly
8 available, and I think we have to at this point as we're
9 getting close to trial start looking at whether there is any
10 really proper reason for any of this material staying under
11 seal.

12 There is legitimate public interest in this case, and
13 I recognize that, you know, a lot of times, up until cases get
14 ready for trial, the lawyers do exchange a lot of things under
15 seal, but it's always been the practice in this court that when
16 we actually get into litigation, that changes, and so I want
17 you to be aware that when I write, you know, any opinions down
18 the road which may now refer to evidence that you submitted
19 under seal, I'm not going to worry about the -- that context,
20 and I think you have to be prepared to have everything unsealed
21 in the very near future, all right?

22 So I think that takes care of what I had on my list.
23 I again would like both sides to really think more carefully
24 now about their witness lists. It will make a big difference,
25 I think, for everybody to know exactly who's going to be here

1 live.

2 To the extent that any of the interrogators -- well,
3 I should ask this of you, Mr. O'Connor: We've talked before
4 about the problem with some of the witnesses not being within
5 the subpoena power of the Court. How many witnesses do you
6 think you're going to have to call by deposition, in other
7 words, having the transcript read into the record?

8 MR. O'CONNOR: Read into the record, Your Honor?

9 THE COURT: Yeah.

10 MR. O'CONNOR: Interrogator A, Interrogator B,
11 Interrogator C. They couldn't find Interrogator D.
12 Interrogator E, Interrogator F, Interrogator G, Interrogator H,
13 Interrogator I. I believe they couldn't find J or maybe he's
14 deceased. Interpreter K, Interpreter L, Interpreter M, and
15 Interpreter N.

16 I believe everyone else that we took a deposition of
17 who's outside the Court's subpoena power was videotaped. I'm
18 not going to swear on that, but it's either -- substantially
19 all the rest of them were videotaped, but there may be one or
20 two others that we have to read.

21 THE COURT: Interrogator A was not videotaped?

22 MR. O'CONNOR: Well, we were prohibited by Your
23 Honor. The pseudonymous depositions were not permitted to be
24 videotaped. We weren't even allowed to retain -- keep a
25 recording.

1 We have no -- we have a written transcript. That's
2 all that we were allowed for all, I think, 11 pseudonymous
3 interrogators. I can't do anything more.

4 We would like to bring them here. We're told now
5 that they're all outside the subpoena power of the Court. We'd
6 like to present a de bene esse where they're videotaped and
7 they could do -- and the jury could actually look at them and
8 view their demeanor and all of that stuff, but we've been
9 barred by the Court from doing that.

10 THE COURT: And that was originally Judge Anderson's
11 rule, and then I affirmed it.

12 MR. O'CONNOR: Yes.

13 THE COURT: I mean, I know I affirmed the use of -- I
14 affirmed doing these under pseudonyms. I did not realize that
15 part of that motion actually involved not being able to video
16 because I --

17 MR. O'CONNOR: If we had been able to videotape them,
18 then their identities would have been known because we'd all
19 look at their faces, but we were not permitted to take
20 videotape of any of the pseudonymous witnesses.

21 THE COURT: Of those -- of those A through N, and
22 some missing, who do you think are the most critical for your
23 case?

24 MR. O'CONNOR: Well, certainly A and G. Those are
25 the CACI employees who did the only two interrogations that we

1 know of these plaintiffs. H, he's the only -- he's the only
2 one who actually remembered the interrogation.

3 Now, if Rashid falls out, then that gets rid of H, I,
4 and possibly one of the interpreters, but B, B is an Army
5 interrogator or analyst who, he's of more importance than the
6 others because he participated in two interrogations, one of
7 Al Shimari and one of Al-Zuba'e.

8 So A, B, and G are the most important, and certainly
9 H if Rashid remains in the case.

10 THE COURT: How long do those depositions take?

11 MR. O'CONNOR: They varied. Typically, my direct
12 would range from three hours to -- probably on average three
13 hours. As we got farther in, they got shorter because once
14 eight people tell me, you know, something, I don't -- that the
15 site got bombed, I don't need to ask the ninth person. So they
16 did get shorter, but I would say on average three hours.

17 Probably the plaintiffs' cross varied. Sometimes
18 that would be, I think, under an hour, but sometimes took three
19 hours or more.

20 THE COURT: You -- both sides now -- you've got the
21 transcripts, and you know the lines of questions which the
22 government -- to which the government is going to object.

23 MR. O'CONNOR: Well, they, I mean, they object to --

24 THE COURT: A portion of those transcripts show the
25 back and forth between you and Mr. Soskin or, you know, the

1 invocation of privilege and a moment to discuss it, and then
2 authorizing a yes-or-no answer, that sort of thing.

3 MR. O'CONNOR: That's true.

4 THE COURT: A lot of that went on.

5 MR. O'CONNOR: That's true.

6 THE COURT: So what I am thinking, because I can tell
7 you that, that trials are -- first of all, they're deadly
8 boring when you have to have a -- although my law clerks are
9 very good at reading these things, but it's deadly boring, and
10 you can -- it goes in in a time concentration that no other
11 type of testimony goes in.

12 What I am thinking is to order that there be
13 re-depositions of those three or four key people, not all of
14 them. It can be done with a screen so that the jury isn't
15 going to see the person but they can at least hear it, it will
16 go in live, and you and Mr. LoBue or whoever is going to do it
17 for the other side can ask questions.

18 You've already got the script. Basically, it would
19 be the questions you've already asked them. Perhaps you can
20 work with the government on getting ahead of time a few more of
21 these background questions of a more general nature, a bit more
22 of that, and then that can be played for the jury rather than
23 having to read those transcripts in.

24 And there's no danger of the person's identity being
25 revealed, especially if the, you know, these are former CACI

1 people. How -- do you think you-all can get that done before
2 the trial?

3 MR. O'CONNOR: Well, we could -- talking about CACI,
4 we could get that done. You know, we don't have much control
5 over the process. We don't have the power to compel any of
6 these people to appear anywhere, and for virtually all of them,
7 we don't know who they are, so it's really a question that the
8 United States would have to have a better sense of than us.

9 I mean, if somebody told me: You're going to take a,
10 what I guess would be mostly a recorded deposition tomorrow of
11 one of them, I'd do it, but I don't -- the logistics are
12 completely out of my control.

13 THE COURT: All right. I assume plaintiffs' counsel
14 can handle that.

15 MR. LoBUE: We can, Your Honor. I, I might inquire
16 through the Court whether any of the parties actually retained
17 an audio recording. We did not, but --

18 MR. O'CONNOR: We were prohibited from having one,
19 so --

20 THE COURT: But does one exist?

21 MR. LoBUE: Maybe the government has one. I don't
22 know.

23 MR. SOSKIN: Your Honor, we did not create recordings
24 of the depositions, of the pseudonymous depositions. I would
25 note that with regard to the appropriate protective measures to

1 protect identities, we believe we would need to look into what
2 those specific measures would be. In addition to the visual
3 depiction that you referenced, we also have concerns that the
4 voices of the individuals you mentioned may --

5 THE COURT: Now, look, I tried a case involving an
6 active CIA agent who testified live in court behind a screen,
7 and the voice was never an issue, and if the CIA isn't worried
8 about their people, this doesn't rise to that level. I would
9 expect that's overreaction.

10 We've got to get this case into a format that is
11 appropriate, and I would not expect the government to have an
12 issue about the voice. Unless there's something so amazingly
13 unique, a stutter or something that would absolutely identify
14 the person, that's just beyond the pale, but I do not want to
15 have to have this case done by deposition if it can reasonably
16 be done -- and I'm shocked, most court reporters keep an audio
17 transcript. That's a standard practice in case there's a
18 problem in getting an accurate transcript.

19 Who was the court reporter on this, a government
20 person or a private party?

21 MR. O'CONNOR: We used Alderson Reporting for every
22 one of them, Your Honor.

23 THE COURT: Were they told not to make a tape
24 recording?

25 MR. O'CONNOR: I don't know what the government told

1 them. I know the order said that we were not to have an audio
2 recording. That's the extent of my knowledge.

3 THE COURT: Do you know for a fact whether an audio
4 recording was made or not made?

5 MR. O'CONNOR: No.

6 THE COURT: I'm asking the government counsel.

7 MR. SOSKIN: Your Honor, I don't know for these. I
8 was with the witness, which was not at the same location as the
9 court reporter.

10 MR. DAVIS: Your Honor, I have not -- this is Elliott
11 Davis for the government. I have not looked at the protective
12 order that relates to depositions in some time. I seem to
13 recall that the protective order prohibited anyone apart from
14 the government from retaining an audio recording, and the
15 government did not retain an audio recording, but I believe
16 that was part of the protective order that was signed by Judge
17 Anderson.

18 THE COURT: Well, I'm going to amend it then. Let's
19 see what you can do about getting hold of these people. Now, I
20 don't know whether they're in the United States or not. I
21 mean, that possibly complicates things but doesn't make it
22 impossible. Technology would still permit that if we can get
23 the depositions of the plaintiffs from Iraq, we should be able
24 to get these people as well. I expect the government to find
25 where these guys are and see if you can work it out.

1 MR. SOSKIN: And, Your Honor, just so you're aware,
2 two of the individuals who are mentioned do have their own
3 counsel as well, so --

4 THE COURT: You need to check with their counsel.

5 MR. SOSKIN: They will need to be consulted as well.

6 THE COURT: All right, that's fine. All right? See
7 if you can work that out, but I would much prefer that than to
8 have to read the depositions in. And obviously, if ultimately
9 this can't be worked out and we have to work with the
10 depositions, then we need to make sure that those pages are
11 properly, you know, indicated.

12 Also, another problem with Mr. Rashid was the
13 transcript. I don't know what the printing errors were, and I
14 don't know if any of you read the transcript, but it was very
15 hard to read.

16 MR. O'CONNOR: I saw that on the hard copy --

17 THE COURT: Yeah.

18 MR. O'CONNOR: -- as I was preparing for this, Your
19 Honor.

20 THE COURT: Yeah, all right.

21 MR. O'CONNOR: Your Honor, just to fill in a data
22 point that the Court was wondering about, I was, I was present
23 for every one of these pseudonymous depositions, and I would
24 not say that any of the witnesses had, you know, a stutter or
25 a, you know, a very hard accent.

1 Well, the interpreters, they all had accents because
2 most of them were not native English speakers --

3 THE COURT: Yeah.

4 MR. O'CONNOR: -- but the interrogation personnel, I
5 didn't notice anything noteworthy about their voices, for what
6 that's worth.

7 THE COURT: All right, all right. I'm sure we will
8 have a couple more sessions. The motion for summary judgment
9 from the United States I may resolve on the papers. I'm really
10 looking forward to seeing what the defendant's response is on
11 that. Again, I have looked at that already.

12 But I think I've covered everything I had on my list,
13 so what I want to hear from you-all, number one, is as soon as
14 possible, the plaintiffs need to let us know for certain
15 whether the three remaining plaintiffs are going to be here in
16 person or are going to have to testify by video, and if they do
17 have to testify by video, then you've got to start making
18 arrangements in advance.

19 Now, I'm assuming that of the three that are left,
20 one is in Sweden; is that correct?

21 MR. LoBUE: Yes, Your Honor.

22 THE COURT: And the other two are in Baghdad?

23 Well, Sweden shouldn't be as big a problem.

24 MR. LoBUE: The only problems are, number one, the
25 time zone.

1 THE COURT: Well, they're going to -- the witnesses
2 will have to struggle with that.

3 MR. LoBUE: They will --

4 THE COURT: Yeah.

5 MR. LoBUE: They will have to conform to our time.

6 There may be an issue that the government has --
7 diplomatic issue that the government has raised regarding the
8 giving of testimony from Sweden which we'll have to work out
9 with the government.

10 THE COURT: The government of Sweden has problems
11 with that?

12 MR. LoBUE: No, the government of the United States
13 has a, has a potential problem with that. They, they have told
14 us that they need to make a diplomatic overture to the
15 government of Sweden to seek their permission to permit
16 testimony to be beamed to a U.S. court from Sweden.

17 THE COURT: All right, let me hear about that. Such
18 a problem does not exist for Iraq, or is there a problem like
19 that for Iraq as well?

20 MR. LoBUE: It has not been a problem.

21 MR. DAVIS: My understanding is --

22 THE COURT: Yeah.

23 MR. DAVIS: -- that's not an issue for Iraq.

24 Because Sweden is a, a party to conventions on the
25 taking of evidence that we are, the way -- and it doesn't have

1 to do with the fact that the United States is a party to the
2 case, as I understand it from my colleagues in different
3 branches.

4 The issue is that the Court will be hearing
5 testimony -- the Court is a, you know, an entity of the United
6 States -- will be hearing videotape testimony from a non-U.S.
7 citizen in a foreign country that's a party to conventions.

8 So even if we were not in the case, we would -- or
9 plaintiffs would need to request permission from the government
10 of Sweden to do so. The information that we need from
11 plaintiffs is the location from which Mr. Al-Ejaili will be put
12 up so that our colleagues with State Department can send a
13 diplomatic note to our colleagues in the embassy in Sweden --
14 the Swedish Embassy, rather, to permit -- they do not
15 anticipate issues with that. We just need to send a note out.

16 THE COURT: Well, I recommend it be done soon because
17 with letters rogatory and some of those other types of
18 international judicial assistant matters, they could take some
19 time, so this can't wait until two weeks before the trial.

20 MR. DAVIS: Right. And we'll do that as soon as we
21 receive the location from which Mr. Al-Ejaili will be providing
22 videotaped deposition if he's -- video deposition if he's
23 unable to make it into the country.

24 THE COURT: All right. Now, I know in past
25 experience, some of the large hotels, like especially an

1 American hotel like a Hilton or whatever, some of them have,
2 you know, business facilities. I did a conference from Kenya,
3 and we did it from a hotel. That beam worked quite well.

4 But you'd better check with Mr. Bachman right away so
5 he can tell you the types of parameters that are needed to make
6 it a worthwhile video situation, all right?

7 MR. LOBUE: We will do so, Your Honor.

8 THE COURT: All right, very good.

9 All right, any other logistical issues out there?

10 MR. O'CONNOR: One housekeeping that I think I know
11 the answer, Your Honor.

12 THE COURT: Yeah.

13 MR. O'CONNOR: When Your Honor began today, Your
14 Honor listed issues that the Court did not need argument on and
15 then dealt with summary judgment.

16 THE COURT: Yeah.

17 MR. O'CONNOR: Your Honor talked about subject matter
18 jurisdiction but then only dealt with extraterritoriality. I
19 assume from that that the Court does not want argument on
20 political question.

21 THE COURT: No, we've already addressed that. That's
22 the law of the case.

23 I think I told you-all when I first got this case,
24 you know, given its tortured history, I said we're going to
25 have lots of motions practice, but you should expect if you

1 don't settle this case, it's going to go to trial. I mean, and
2 that's what's going to happen. It's going to go to trial
3 unless it settles, all right? And that's always out there as a
4 possibility for both sides to think about. There are lots of
5 logistical issues and hurdles in this case yet to be addressed.

6 All right, is there anything further? If not, we'll
7 recess for the day.

8 MR. LoBUE: Thank you, Your Honor.

9 (Which were all the proceedings
10 had at this time.)

11

12 CERTIFICATE OF THE REPORTER

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

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16

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/s/

Anneliese J. Thomson

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