

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

SUHAIL NAJIM ABDULLAH	.	Civil Action No. 1:08cv827
AL SHIMARI, et al.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	September 10, 2021
CACI PREMIER TECHNOLOGY, INC.,	.	10:10 a.m.
	.	
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 MOTION HEARING  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	PETER A. NELSON, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10036-6710 and BAHER AZMY, ESQ. Center for Constitutional Rights 666 Broadway, 7th Floor New York, NY 10012
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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 33)  
COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 FOR CACI PREMIER  
3 TECHNOLOGY, INC.:

JOHN F. O'CONNOR, ESQ.  
Step toe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036

4

and

5

WILLIAM D. DOLAN, III, ESQ.  
William D. Dolan, III, P.C.  
8270 Greensboro Drive, Suite 700  
Tysons Corner, VA 22102

6

7

OFFICIAL COURT REPORTER:

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ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Third Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

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P R O C E E D I N G S

THE CLERK: Civil Action 8-827, Suhail Najim Abdullah Al Shimari, et al., versus CACI Premier Technology, Inc. Would counsel please note their appearances for the record.

THE COURT: Plaintiffs' counsel over by the jury box, remember.

MR. AZMY: Good morning, Your Honor. Baher Azmy, A-z-m-y, and Pete Nelson for the plaintiffs -- Peter Nelson.

THE COURT: Good morning.

MR. NELSON: Good morning.

THE COURT: Mr. O'Connor?

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

THE COURT: It's been a couple of years since I've seen you-all. It's nice to see you again.

MR. O'CONNOR: It's good to see you, Your Honor.

THE COURT: All right. In the great interim that has occurred in this case, because I think it might have set a record, the amount of time it sat at the Supreme Court on a cert petition, have there been any informal discussions between you-all about this case and about any possibility of resolving the issues? Mr. O'Connor?

MR. O'CONNOR: No, Your Honor. None.

THE COURT: All right. Let me ask plaintiffs' counsel, who's going to be the main spokesperson?

1 MR. AZMY: Your Honor, I'll be addressing the  
2 defendant's motion, and if Your Honor has questions about  
3 other -- the status reports, my colleague will address them.

4 THE COURT: All right. And, counsel, I'm assuming  
5 you're all vaccinated.

6 MR. AZMY: I am.

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

8 THE COURT: All right. So when you're at the  
9 lectern, if you're comfortable, you're welcome to take off your  
10 masks so we can hear you clearly. I'd like to hear from the  
11 plaintiffs' standpoint, this is just a question about  
12 settlement potential. Who wants to address that?

13 MR. AZMY: Your Honor, I can address it. We have  
14 always been open and interested in resolving this case, if it  
15 could be resolved for a reasonable settlement, and -- but the  
16 defendants are not interested, it appears.

17 THE COURT: Well, again, I never let any serious  
18 civil case go without always reminding counsel that settlement  
19 is an option no matter what the issues are in a case, and from  
20 the plaintiffs' standpoint, you know, you-all represent human  
21 beings. I mean, I know that there are some significant  
22 principles involved in this litigation, but ultimately as  
23 counsel, your loyalty is foremost to human beings, and you're  
24 down to just three plaintiffs in this case, and therefore, you  
25 know, were there to be any kind of an offer from the defense,

1 you would be obligated to take that back to your client.

2 MR. AZMY: We fully understand, Your Honor.

3 THE COURT: All right.

4 MR. AZMY: And our understanding is -- well, there  
5 has been no offer --

6 THE COURT: All right.

7 MR. AZMY: -- but we, of course, would consider  
8 anything seriously.

9 THE COURT: All right. Mr. O'Connor, I'm going to  
10 put you back on the hot seat, if you don't mind standing up  
11 there. I mean, I'm not going to make anybody, you know,  
12 negotiate in open court, but, you know, I really, really want  
13 to strongly recommend and suggest that you give some thought.

14 Your client -- I know your client is a large  
15 corporation and has significant resources, so it may not be of  
16 concern to your client that it's continuing to pay attorneys'  
17 fees, you know, for litigation that most likely is going to go  
18 on for a couple of years no matter what happens. I mean, were  
19 I to grant your motion to dismiss, we know the plaintiffs will  
20 take an appeal. I would be shocked if they didn't.

21 The Fourth Circuit would look at it. It could  
22 possibly go back up to the Supreme Court. That's another year  
23 or two, a lot more litigation that goes on.

24 Were I to not grant your motion to dismiss and if  
25 this case proceeds, then the meter will run even more

1 significantly, and so at some point, you know, it makes good  
2 sense for counsel to sit down and think about whether there is  
3 a way of resolving things, and as you know with settlements,  
4 there's no admission of anything. That's usually how  
5 settlements work.

6 Is there actually absolutely no interest at all in  
7 trying to, you know, resolve this case?

8 MR. O'CONNOR: Your Honor, we did receive a demand at  
9 one point that we thought wasn't serious given where we think  
10 we are on the law and the facts.

11 THE COURT: All right.

12 MR. O'CONNOR: We will always consider any settlement  
13 overture that we receive. I will say that as Your Honor said,  
14 that there may be principles involved for plaintiffs, there are  
15 principles involved --

16 THE COURT: I recognize that.

17 MR. O'CONNOR: -- when you accuse the CEO and the  
18 board of a corporation of condoning torture, it becomes  
19 difficult to say we're going to write those people a check,  
20 and -- but, you know, I hear exactly what Your Honor is saying,  
21 and I will relay Your Honor's comments to my client, but, you  
22 know, we're always open, but I'm not sure that, that --

23 THE COURT: Well, maybe I can help you in that, all  
24 right? I'm very pleased to hear what you've just said, at  
25 least that you're open, all right? And frankly, I have always

1 thought the counsel in this case have been superb. Reading the  
2 briefs was absolutely fascinating.

3           It is really a pleasure as a judge to get really  
4 well-reasoned -- I might not agree with all the arguments, but,  
5 I mean, well-argued, well-reasoned, articulate arguments, and  
6 there are obviously some really significant issues that both  
7 sides are raising in this litigation, but I'm a bit of a  
8 pragmatist, and I come down to the reality of I'm looking at a  
9 case that was first filed in 2008, and as you know, I was  
10 only -- I've only been on this case a few years. Many of the  
11 earlier decisions were out of my control, and the case might  
12 have been in a different posture if I had it from 2008, but  
13 it's been up and down at the Fourth Circuit multiple times,  
14 it's been to the Supreme Court, and it's still very amorphous.  
15 There are still from the status reports that you've filed all  
16 kinds of issues that are not yet resolved.

17           One thing that may help in terms of significantly  
18 getting a settlement potential moving is in the status  
19 report -- and the plaintiffs did not respond to this, which  
20 concerned me somewhat -- the defendants point out that the  
21 requests through the discovery process were made for a clear  
22 statement of what the damages are that the plaintiffs -- for  
23 which the plaintiffs are suing, and according to my  
24 understanding of the status report, the plaintiffs have never  
25 responded to that.

1           You know, in an ordinary civil case, if a party in a  
2 case which is calling for damages, if the defendant in such a  
3 case files a discovery request to the plaintiffs, you know,  
4 list your damages and give us, you know, what you are seeking  
5 in this case, and that's not responded to, that can result in  
6 Rule 37 sanctions.

7           So I want the plaintiff to respond to that aspect of  
8 the status report. Where are you with that? Because my  
9 understanding was you represented that in the expert reports --

10           MR. O'CONNOR: In response to initial disclosure  
11 requirements and our interrogatories, the plaintiffs said that  
12 they would detail their damages in their expert reports, which  
13 the expert reports did not put a dollar figure or a method of  
14 calculation for any damages. So we're -- if we went to trial,  
15 I'd hear it in closing argument, you know, what plaintiffs  
16 believe they've been injured.

17           THE COURT: All right. But the other thing is you've  
18 requested the opportunity to have your own medical experts  
19 examine the plaintiffs.

20           MR. O'CONNOR: For two of the three. One, one we  
21 were able to do --

22           THE COURT: Right.

23           MR. O'CONNOR: -- because she was able to come to  
24 this country; that's right, Your Honor.

25           THE COURT: But the other two have not been examined.



1 MR. O'CONNOR: They've not, and the options appear to  
2 be Iraq -- at least a few years ago, the options were Iraq,  
3 Iran --

4 THE COURT: Beirut, I thought, was one.

5 MR. O'CONNOR: That might have been. It certainly  
6 was a place where they might be able to testify, but they were  
7 places that, you know, are probably not the most hospitable for  
8 a government contractor.

9 THE COURT: All right. So again, I mean, these are  
10 realities of this case. Again, this is putting aside for a  
11 moment the pending motion to dismiss, but in terms of, you  
12 know, a settlement evaluation, this is something the plaintiffs  
13 have to look at very, very carefully.

14 So let me hear -- let me have you switch positions  
15 for a second.

16 MR. O'CONNOR: Can I say one more thing --

17 THE COURT: Yes, sir.

18 MR. O'CONNOR: -- that bears on our manner of  
19 thinking?

20 Your Honor has mentioned this before. We do have  
21 another case that's been stayed for about ten years assigned to  
22 Your Honor that has about 60-ish plaintiffs.

23 THE COURT: I keep forgetting that.

24 MR. O'CONNOR: That, that always -- I mean, that is  
25 something that always weighs on our mind too because it's not

1 where in a different posture, it might be that you settle these  
2 three cases and you're done. That's not the case here. I  
3 mean, I don't have any idea whether the plaintiffs' counsel  
4 there are even in touch with those plaintiffs, but we have  
5 another case pending before Your Honor with about 60  
6 plaintiffs.

7 THE COURT: Were there to be a genuine settlement  
8 effort, you'd want a global settlement.

9 MR. O'CONNOR: I, I don't know that that's true, Your  
10 Honor. What I would say is that this is not a case where my  
11 client could reach a settlement with three people and be done.  
12 We'd either have to litigate with the others or try to reach a  
13 settlement with the others, but, you know, our view has been  
14 that, you know, there's a lot of principles involved here.

15 THE COURT: I understand that, all right. All right.  
16 What -- yeah, come up to the lectern, please. And  
17 your name again, please?

18 MR. NELSON: Peter Nelson, Your Honor.

19 THE COURT: Yes, Mr. Nelson. What is the status of  
20 the -- one plaintiff, as I understand it, is in Sweden.

21 MR. NELSON: That's correct.

22 THE COURT: What is the actual status of your other  
23 two plaintiffs? Have you been able to contact them?

24 MR. NELSON: Yes. Actually a member of our team was  
25 in touch with them today. They, they both are in Iraq.

1 THE COURT: All right. Are they able to travel  
2 outside of Iraq?

3 MR. NELSON: I, I don't know the answer to that. We,  
4 we certainly would undertake efforts to do that. I think the  
5 COVID pandemic makes travel particularly difficult, and the  
6 circumstances in Iraq are somewhat unstable, but they are  
7 willing to make the effort and certainly would make themselves  
8 available within Iraq to -- for, for a video examination or  
9 testimony.

10 THE COURT: All right. Okay.

11 MR. NELSON: And, and just to respond on the damages  
12 issue, all three of our plaintiffs were deposed and described  
13 their injuries. We also submitted an expert report from a  
14 doctor that described the injuries. We haven't quantified, we  
15 haven't offered a number.

16 If that's something the Court believes that we should  
17 do or are obligated to do before trial, we could take that  
18 under advisement.

19 THE COURT: Well, it certainly helps a defendant in  
20 evaluating the strengths and weaknesses not -- of the case but  
21 also of, you know, whether or not settlement efforts make any  
22 sense, but I just want -- you know, I spoke briefly with Judge  
23 Anderson. He is certainly open and willing to work with you if  
24 there's a serious interest in settling.

25 Mr. O'Connor, when I said "global," it's been my

1 experience when I have a party who is facing two -- multiple  
2 pieces of litigation, that many times the settlements that work  
3 the best would be global; that is, you bring the other, other  
4 case in as well. We could talk about that down the road if, in  
5 fact, you know, there is any genuine interest in trying to  
6 settle.

7 But I'm glad you reminded me, I've totally forgotten  
8 about the other case because this one has always been the lead  
9 case, but we'll need to take a look at that, and just I'll give  
10 you an alert that most likely I'm going to issue a status  
11 report on that one, try to get that -- see where they are on  
12 that one, because I'm assuming many of the same legal arguments  
13 that are before the Court now apply to that case as well.

14 It's all at Abu Ghraib; is that correct?

15 MR. O'CONNOR: The other case, I believe -- we  
16 haven't had any discovery in that case, but I believe it is not  
17 strictly limited to Abu Ghraib, but I -- but it's limited to  
18 persons who were detained by the U.S. military in Iraq.

19 THE COURT: Is it ATS only?

20 MR. O'CONNOR: That one is ATS only from the start.  
21 Clear statute of limitations issues with common law, so they  
22 only brought ATS.

23 THE COURT: All right, all right. We'll take a look  
24 at that when we go back to chambers, all right?

25 All right, so the -- and there was one other thing I

1 want to just clear up. You know, anytime a motion is filed,  
2 the Clerk's Office puts a gavel on it until it is resolved, and  
3 this case has gavels -- you-all don't see them, but we do, it's  
4 a way of keeping track of what's going on -- there are just  
5 gavels all over the place.

6 So when I looked at the status report particularly,  
7 because the defendants went through a whole bunch of issues  
8 that still need to be resolved, and the plaintiffs really  
9 didn't respond to that, but I notice that one of the motions  
10 that's out there, one of the issues that's out there, so I  
11 thought I could get rid of a couple of gavels at least, is I'm  
12 not issuing a juror questionnaire in this case if we get to  
13 that point.

14 Juror questionnaires are expensive. They're  
15 time-consuming. I, I only give them in capital or national  
16 security cases. That's not what this is, and I'm satisfied  
17 that the standard way we do voir dire will be more than  
18 sufficient. So I'm going to deny that motion. That's one  
19 gavel I can get rid of.

20 All right. In terms of the motion to dismiss, I'm  
21 not going to rule on it today, which doesn't help you a whole  
22 lot. I have looked at the arguments. I'll give you,  
23 Mr. O'Connor, an opportunity to focus the argument, but I gotta  
24 tell you that I think you overread Nestlé, all right? And  
25 that's the only basis really for your argument.

1 I mean, we've resolved the motions to dismiss in the  
2 past. You know, we have found that *Kiobel* and *Jesner*, none of  
3 those cases truncate this case.

4 And I don't see *Nestlé* having changed the law  
5 significantly. In fact, *Nestlé* explicitly says at the  
6 beginning it's clarifying *Kiobel*. It does not overrule *Kiobel*.  
7 So why don't you try to convince me that I misunderstand that  
8 situation.

9 MR. O'CONNOR: Yes, Your Honor, thank you. We've  
10 never said, at least I don't think, that *Nestlé* overruled  
11 *Kiobel*. Our point is that some courts, including the Fourth  
12 Circuit, had read the stray language at the end of the *Kiobel*  
13 majority opinion, the touch and concern language, as providing  
14 for you can consider anything at all relating to the claim and  
15 sort of make a holistic assessment on whether, you know, the  
16 claim has enough domestic content to allow the case to proceed  
17 as a domestic application of ATS.

18 We've always thought that was not the correct reading  
19 of *Kiobel*. *Kiobel* is a case that cites to *Morrison*, and the  
20 rule in *Morrison* is the two-step focus test, and as the Supreme  
21 Court pointed out in *Nabisco*, the reason that in *Kiobel* the  
22 Court did not go through and apply Step 1, Step 2 of the, the  
23 focus test was because all of the conduct occurred  
24 extraterritorially, so the Court said we don't, we don't need  
25 to get into it. That's how *Nestlé* cast it.

1           But when we were last before Your Honor, Your Honor's  
2 view was that *Al Shimari III* was law of the case and that the  
3 things like status as a U.S. corporation, entering into U.S.  
4 contracts, hiring U.S. employees, getting U.S. security  
5 clearances, that those were the kinds of things that could  
6 supply the domestic content for an ATS claim.

7           And when we went up to the Fourth Circuit, we've put  
8 in the transcript from the Fourth Circuit argument, and the  
9 panel certainly was of the view that *RJR Nabisco* was the law  
10 here and, and not *Al Shimari III*. That's why the panel was  
11 asking for JA cites of actual conduct in the United States  
12 that's relevant to the claims, to the ATS -- alleged ATS  
13 violations.

14           And Nestlé punctuates that because Nestlé says all of  
15 the things that are alleged in Nestlé, they don't count.  
16 They're not adequate --

17           THE COURT: I think you -- they're characterized as  
18 general corporate activity, right?

19           MR. O'CONNOR: That's, that's right. And, and it's  
20 things like, well, all operational decisions are made in the  
21 United States. Not good enough.

22           The Ninth Circuit held that the defendants have taken  
23 steps to perpetuate a system built on child slavery to depress  
24 labor costs. Not good enough. Even if true, not good enough.  
25 General corporate activity in the United States.

1 THE COURT: All right. Let's say, for example,  
2 however, that a corporation which had its employees functioning  
3 in a foreign country got an e-mail from one of their employees  
4 saying this -- you know, the project is, is violating  
5 international law, there are colleagues who are out there  
6 torturing people. That memo is sent back to headquarters, and  
7 the corporation does nothing to address that.

8 You don't think that is sufficient activity that  
9 would affect -- that would give the jurisdiction under the ATS?

10 MR. O'CONNOR: I don't think it would, Your Honor,  
11 because in *Nestlé*, the allegation that was credited, because  
12 that was a facial challenge, so the allegation that was  
13 credited was that Nestlé and Cargill knew, they knew that the  
14 entities that they were doing business with were using child  
15 slavery and they were paying kickbacks for the purpose of  
16 keeping cocoa prices low, and the Court said that's not enough.

17 Now, I'll also -- I want to add that in -- under  
18 *Aziz*, the Fourth Circuit has held that knowledge is not even  
19 aiding and abetting. So if a corporation had acted with the  
20 purpose and saying we want to do this conduct in this foreign  
21 country because we want to commit -- we want to commit child  
22 slavery, we want to commit torture, we want to commit piracy,  
23 you know, whatever, whatever ATS claim we're talking about  
24 here, then I think that conduct is relevant.

25 The Supreme Court talked about is there enough



1 domestic conduct? So I think there would have to be some  
2 assessment of whether is this enough compared to what's  
3 occurring extraterritorially?

4 THE COURT: But then doesn't that make a motion to  
5 dismiss of the type you've made really a motion for summary  
6 judgment because it is so evidentiary in nature?

7 MR. O'CONNOR: It doesn't, Your Honor, because this  
8 is, this is a jurisdictional motion, and on a fact-based  
9 jurisdictional motion, the Court's obligation is to resolve any  
10 facts, but we've -- there are no real facts in dispute here. I  
11 mean, plaintiffs can say that, but it -- but it's not true.

12 The plaintiffs -- and this is the domestic conduct  
13 that the plaintiffs talked about: incorporated in the U.S.,  
14 contracted in the U.S., hired U.S. citizens with U.S. security  
15 clearances. Under *Nestlé*, plainly general corporate activity.  
16 There's nothing nefarious about any of those things.

17 Then they say that CACI promoted an employee after  
18 learning he was accused of detainee abuse. That is not  
19 supported by the record. They -- what they cite to is the  
20 30(b)(6) of CACI, and what that witness testified to was that  
21 in March, a CACI executive was told that a CACI employee was  
22 under investigation, no name, no under investigation for what.  
23 Just that somebody's being investigated.

24 And then ten days later, at the -- either at the  
25 government's request or with the government's approval, CACI

1 filled the, filled the vacancy as site lead at Abu Ghraib  
2 Prison with Steve Stefanowicz, who later when the Taguba report  
3 was leaked, he was -- allegations were made against him in the  
4 Taguba report.

5 But even Mr. Morse's testimony in the 30(b)(6) makes  
6 clear CACI didn't have any reason to believe that  
7 Mr. Stefanowicz was under investigation when he was made the  
8 site lead. So that's not -- there's no record basis for that.

9 THE COURT: But has Rich Arant been deposed in this  
10 case?

11 MR. O'CONNOR: He has not, Your Honor, but --

12 THE COURT: Because that October 14, 2003, e-mail  
13 that he sent to Amy Jensen, in my view, would be a smoking gun  
14 in almost any piece of litigation. He, he resigned after  
15 having been over there for a very short period of time, and he  
16 flagged -- now, it is true he didn't say that CACI had done  
17 anything wrong. I mean, he was very diplomatic, but he did say  
18 he was resigning because of the misconduct that he was seeing  
19 at Abu Ghraib.

20 I'm amazed that nobody at CACI would have wanted to  
21 follow up on that type of a memo. Is there -- discovery is  
22 over. Was there evidence -- did anybody probe the Arant  
23 e-mail? Did anybody speak with him and find out exactly what  
24 it was about Abu Ghraib that was troubling him?

25 MR. O'CONNOR: I believe the answer to that is no,

1 Your Honor.

2 THE COURT: All right.

3 MR. O'CONNOR: And certainly no at the time of the  
4 e-mail. This e-mail was sent to Amy Monahan, who is -- who was  
5 deposed in this case. She viewed the e-mail as talking about  
6 issues that were specific to the Army, and, in fact, that's  
7 what they are.

8 I wouldn't even say that the author of this e-mail is  
9 diplomatic about CACI. I think he's clear that the folks at  
10 CACI hadn't done anything wrong, and the only misconduct he  
11 identifies is male soldiers interrogating a female soldier,  
12 which he also says is being investigated by the Army.

13 So we could sit here today with the benefit of  
14 hindsight and say should Ms. Monahan have gone to the Army and  
15 said, you know, we have somebody who thinks that having junior  
16 soldiers as interrogators is a bad idea and you ought to take a  
17 look at that? We, we could do that with 20-20 hindsight, but  
18 that's not involvement by CACI in torture, in war crimes, or in  
19 cruel, inhumane, or whatever the "D" stands -- degrading  
20 conduct.

21 That is somebody saying, I don't like the way that  
22 soldiers are doing interrogations, but CACI people are clean as  
23 a whistle here.

24 Again, could she/should she have said something to  
25 somebody at the Army? We can debate that, but, but that does

1 not make CACI liable because knowledge, of course, is not good  
2 enough under *Aziz*.

3 THE COURT: All right.

4 MR. O'CONNOR: But, you know, we're not saying that  
5 that was handled perfectly, but I don't think that's what we  
6 need in order to show that this is not a domestic application  
7 of CACI, that one -- and I'm glad Your Honor brought up that  
8 e-mail because as we go through, that's the only thing in  
9 plaintiffs' brief that's not general corporate activity that  
10 has any actual record basis.

11 You know, the other conduct that plaintiffs -- the  
12 other supposed whistleblower event that plaintiffs talk about  
13 occurred entirely in Iraq. That was Torin Nelson speaking to  
14 Scott Northrop, and even Torin Nelson said he didn't, in his  
15 words, have anything damning on the CACI people. He was just  
16 concerned for his personal safety because the prison was being  
17 bombed, and he was concerned that he was, maybe rightly, viewed  
18 dimly by some of his coworkers for comments he made to C.I.D.,  
19 which he admits he had no factual basis for.

20 THE COURT: Well, in your reply brief, the way you  
21 characterize *Nestlé*, you say that *Nestlé* unequivocally holds  
22 that the ATS applies, quote, only when the conduct relevant to  
23 the statute's focus occurred in the U.S.

24 MR. O'CONNOR: Yes, Your Honor. I think, I think  
25 that's exactly what *Nestlé* holds.

1 THE COURT: So do you think that the only way in  
2 which an American corporation can be held liable for torture or  
3 violation of -- other violations of jus cogens overseas occurs  
4 if the conduct itself occurs in the United States? It almost  
5 seems to be, you know, a contradiction.

6 MR. O'CONNOR: Well, Your Honor, I don't -- I think  
7 the answer to your question is no, but I want to define  
8 "conduct." If a corporation conspires from the United States  
9 to commit child slavery, piracy, torture, then I believe that  
10 that -- I think a court would be on reasonably firm ground to  
11 say that there's a domestic application.

12 Now, the defendants in *Nestlé* said the, the primary  
13 conduct has to occur in the United States. We've not argued  
14 that. We've argued that the ATS violation has to occur in the  
15 United States, but there's no evidence of CACI personnel in the  
16 United States agreeing with anyone to mistreat detainees. They  
17 were walled off from that. The Army ran that and --

18 THE COURT: Well, of course, I mean, under  
19 traditional principles of agency, if an employee of a  
20 corporation commits a tort during the course of the employee's  
21 employment, the employer is usually going to be liable for  
22 that.

23 So if you had -- if, if you have CACI employees over  
24 in Abu Ghraib who are committing these violations, why would  
25 that -- and under a theory of aiding and abetting or

1 conspiracy, because that's all we have left in this case, we  
2 have that type of sort of joint liability, if you want to put  
3 it that way, why would that not be enough?

4 MR. O'CONNOR: Because, because the claims are  
5 brought under ATS, and ATS, the Supreme Court has said three  
6 different times, has zero extraterritorial application, meaning  
7 that conduct occurring in Iraq is not actionable under ATS.

8 So the -- if the plaintiffs had sued Bill Jones, you  
9 know, contractor, or Sergeant Jones, military interrogator, and  
10 under ATS, because they had done bad things in Iraq, those  
11 claims would be dismissed under *Nestlé* because it's entirely  
12 extraterritorial, so therefore, their employers would not have  
13 agency or respondeat superior liability because there's no --  
14 the person -- the alleged tortfeasor is, in fact, not a  
15 tortfeasor under the ATS.

16 THE COURT: All right.

17 MR. O'CONNOR: Now, if there had been a common law  
18 claim and that had been -- that had proceeded and -- then we  
19 would have a question about, you know, whether an employer --  
20 whether that conduct is within the scope of employment, that  
21 somebody is out committing torture or slavery.

22 THE COURT: Of course, you know, the first argument  
23 that the plaintiffs are actually making is that this does not  
24 involve an extraterritorial application of the ATS because of  
25 the particular unique nature of the American presence in Iraq

1 at that time and the specific rules that have governed Abu  
2 Ghraib.

3 MR. O'CONNOR: Well, we're aware of that, Your Honor,  
4 and I think we dealt with that, I think, well in our reply.  
5 The Fifth Circuit certainly disagrees with that in *Adhikari*,  
6 where they considered an argument that Al Asad Air Base in Iraq  
7 was functionally United States for purposes of ATS, and the  
8 Court went through and said no, that's not right.

9 And the language in *Kiobel* and *Nestlé* talks about in  
10 the United States. Iraq is not in the United States, and Iraq  
11 was under the control of the CPA, which was a U.N.-authorized  
12 multination peacekeeping effort, but even if all that was not  
13 true and the U.S. had just invaded all by itself and had just  
14 occupied, it's still not in the United States.

15 And the reliance on *Rasul* is wrong because *Rasul*  
16 dealt with how do we construe this statute, and this Court  
17 said, well, we construe this statute as having extraterritorial  
18 application. They can apply to a person who's detained outside  
19 the United States as long as the custodian is subject to  
20 process here.

21 But we -- but we're not in a position of construing  
22 ATS as to whether it can have some extraterritorial  
23 application. The Supreme Court has said three different times  
24 that it doesn't.

25 THE COURT: All right, thank you.

1 Mr. Nelson, or who is going to argue?

2 MR. AZMY: I don't know if there's any particular  
3 order.

4 THE COURT: Why don't you start with the  
5 extraterritorial issue first. That was the first argument you  
6 made and the last one I just heard.

7 MR. AZMY: I think it's logically antecedent to the  
8 *Nestlé* question, and we strongly disagree with the defendant's  
9 characterization of *Rasul* as applying the presumption. *Rasul*  
10 is very clear to say the government argues that this  
11 presumption should apply, but it has no application in a  
12 context where the United States exercises jurisdiction and  
13 control. Therefore, the territory is de facto U.S. territory.

14 The "in" is a construct that the Court says doesn't  
15 turn on sovereignty, turns on de facto control. They cite  
16 *Vermilya* and *Foley Brothers*, which are Fair Labor Standards Act  
17 cases that come to the same conclusion, and I'd really -- I'd  
18 really commend Your Honor to look at Judge Ellis's decision in  
19 *Souryal*, which we cite. He does exactly the process we do  
20 here.

21 The question was whether the FMLA applied to the U.S.  
22 Embassy in Iraq as of 2009, and the first question he says we  
23 have to ask is was this workplace U.S. territory, and he -- to  
24 define "U.S. territory," he says was it under the  
25 jurisdiction -- did the United States have jurisdiction to



1 regulate conduct? He concludes the answer to that is no, it is  
2 not U.S. territory. It is therefore extraterritorial.

3 Then he gets on the staircase of Step 1 and Step 2  
4 and applies the presumption against extraterritoriality. But,  
5 of course, Iraq in 2005 is not Iraq in 2009 that he was  
6 considering, and the CPA was completely controlled by the  
7 United States, answerable to the President in all the ways we  
8 described.

9 THE COURT: Well, Mr. O'Connor has just said, though,  
10 that the United Nations was part of that structure.

11 MR. AZMY: It was. Two responses, Your Honor: The  
12 United States had ultimate control and authority, and if you  
13 look at these orders, they're displacing Iraqi law and  
14 replacing it with United States law in -- almost in totality,  
15 and Bremer is in charge.

16 Too, the same sort of argument was brought up in the  
17 *Munaf v. Geren* case. It's a bit of an obscure case, but the  
18 Court said the fact that there was international participation  
19 in the CPA doesn't change the analysis that the United States  
20 was ultimately in control.

21 And it's, you know, it's a kind of sui generis  
22 situation for *Rasul*, for the air base in Bermuda, for the U.S.  
23 Embassy in Iraq, and here, and that -- you know, in response to  
24 their slippery slope argument, the slope has ended. There's  
25 no -- there are no more cases that could be brought.

1           And, you know, I think it's not just the principle of  
2 fairly elementary justice. If a -- the United States chooses  
3 to invade, occupy, and completely govern and displace Iraqi  
4 law, it seems fair that U.S. actors should be subject to U.S.  
5 law. It doesn't seem that radical, and I think that's the  
6 notion that *Rasul* was getting at as a matter of fundamental  
7 fairness.

8           THE COURT: All right. And obviously, if the Court  
9 were to find that there, in fact, was no extraterritorial issue  
10 here, that really -- does that not pretty much moot the rest of  
11 the issues?

12           MR. AZMY: Yes, right. In the way that -- in the way  
13 that *Rasul* concluded. We don't have to get to the analysis of  
14 Step 1 and Step 2 if it's de facto U.S. territory.

15           THE COURT: All right. But assume I don't find that.

16           MR. AZMY: Yes.

17           THE COURT: Then go on.

18           MR. AZMY: Yeah, I mean, we quite agree that, that  
19 CACI overreads *Nestlé*. They do say that the law changed  
20 dramatically, which is what is required in order to abrogate  
21 *Al Shimari*, but as the Fourth Circuit in *Roe v. Howard* said,  
22 *Nabisco* doesn't overrule *Kiobel* and at Step 2 retains a  
23 similar -- the focus part of Step 2 retains a similar interest  
24 in domestic conduct.

25           Further, as Your Honor pointed out, I think *Kiobel*,

1 Nestlé, and Nabisco are in constant conversation with *Kiobel*  
2 and continue to ratify *Kiobel* in its application, and in a way,  
3 they're really two sides of the same test.

4           *Kiobel* asks is that -- do the activities touch and  
5 concern the United States with sufficient force and displace  
6 the presumption, and, you know, *Nabisco* and *Nestlé* ask --  
7 sorry, *Nestlé* asks is -- do the cause of action -- does the  
8 cause of action, not the claim, the cause of action, similar  
9 term, have a sufficient connection to the United States to --  
10 relevant conduct in the United States? So they're really both  
11 saying if, if there are sufficient connections to the United  
12 States, that's a permissible domestic application of the ATS,  
13 it seems.

14           And I, I want to stress sort of, zoom out a little  
15 bit and talk about just the really bare deficiencies of the  
16 allegations in *Nestlé* as compared to this case. In *Nestlé*,  
17 there was zero corporate presence in Côte d'Ivoire -- if I'm  
18 saying that correctly -- in terms of staff or operations.

19           The very -- one of the very first lines the Supreme  
20 Court says is they do not own or operate farms on the Ivory  
21 Coast. In that sense, it was the most generic corporate  
22 activity, just went there to buy cocoa and to give them  
23 fertilizer, and the only reason they were visiting was to do  
24 this general stream of commerce kind of activity.

25           There were no allegations that they were visiting to

1 supervise employees there. There were no allegations that they  
2 were visiting and were made aware, let alone as we have argued,  
3 ratified the idea that they were hiring child slaves from Mali.

4 THE COURT: The other fact that doesn't exist in any  
5 of those cases, that whole line of cases, is that the presence  
6 of the American corporation CACI in the foreign country is via  
7 a contract with the U.S. government, so, in essence, you have  
8 U.S. interests both domestically and in the foreign space.

9 All these other cases involved basically foreign  
10 corporations other than *Nestlé*, right, foreign corporations  
11 dealing with foreign governments or foreign entities.

12 MR. AZMY: Right.

13 THE COURT: But you didn't have this U.S.-to-U.S.  
14 connection that we have here.

15 MR. AZMY: Right. U.S. to U.S. where the contract  
16 specifically makes CACI responsible for supervising their  
17 employees, and that's not in *Nestlé*, and as we set out in page  
18 25 of our brief in comparison to the *Nestlé* facts, they made  
19 the hiring, promotion, and termination decisions in Virginia  
20 for the very employees that engaged in the misconduct.

21 There's nothing like that in *Nestlé*. So there's a  
22 real connection between the domestic conduct and the  
23 perpetuation of the tort.

24 And certainly the idea that the tort has to occur in  
25 the United States is not the law. That's Justice Alito's

1 position in *Kiobel* joined by Justice Thomas at the time, but,  
2 of course, Justice Thomas now abandons that position in writing  
3 for eight justices in *Nestlé* in this fairly generic, I think,  
4 banal application of the ATS, where on the one hand, mere  
5 corporate presence is not enough, on the other hand, mere  
6 generic corporate activity of the kind here that's disconnected  
7 from the underlying tort is not enough.

8 THE COURT: The other thing that is missing, I think,  
9 in this case, again because what we're dealing here is U.S. to  
10 U.S., so to speak, is this concern that runs through all of  
11 these cases, and that is, the concern about interference with  
12 international relations with a sovereign state.

13 Again, because of the unique nature of Iraq at that  
14 time and the, the presence of the U.S. forces, that doesn't  
15 exist.

16 MR. AZMY: I think that's really, that's really  
17 present both in *Rasul*, where, you know, the Court basically  
18 says, well, if there's no U.S. law, there's no law, which is  
19 sort of problematic to the principle of rule of law, and it's  
20 apparent in *Jesner* and the other cases, where they continue to  
21 say we can't drag these foreign cases into the United States  
22 courts. They'll be upset. Go to Holland or sue in Nigeria.

23 Here there's no other place to sue. The CPA told --  
24 tells contractors they're immune from Iraqi law and you're  
25 subject to the law of the parent state.

1           Well, here we are. We're subject to the law of the  
2 parent state, and there is no disjuncture there of the kind  
3 that the Supreme Court was worried about. I quite agree.

4           THE COURT: Well, this is, this is a unique case. I  
5 mean, the facts here, in my view, are quite different from the  
6 facts in that *Kiobel* line of cases.

7           At the same time, in reading those cases carefully,  
8 there certainly is some interest, it seems to me, among some of  
9 the justices to perhaps issue a ruling that basically would cut  
10 off all corporate liability for any conduct overseas, which is  
11 a potentially very troubling possibility.

12           And so I'm obviously going to take my time in looking  
13 at this issue. I'm not going to give you a ruling today. As  
14 I've said, you-all did a phenomenal job of writing very  
15 interesting and compelling briefs, but this is a really serious  
16 issue.

17           You know, in a society that's become so global, where  
18 our corporations are present all over the world, there are  
19 ramifications for cases like this that have to be considered  
20 very, very carefully, and so we're going to take some time on  
21 this, which is why I started the whole program today -- or the  
22 whole session today with talking to you-all about the realities  
23 of litigation.

24           As, as important and fascinating as these issues are,  
25 ultimately we're dealing with three human being plaintiffs and

1 a corporation that's well known in this area, and I would think  
2 that good attorneys for both sides ought to try to see whether  
3 or not there is some way of working this out, and to the extent  
4 that we can assist you in that respect by providing you with  
5 access to one of our very good magistrate judges, we'll  
6 certainly do that. And obviously, there are private mediation  
7 services as well.

8 I am going to look into -- so, Mr. O'Connor, be  
9 prepared for this -- I'm going to look into the other case to  
10 see where that's at because I think that might be helpful,  
11 frankly, since I now that you mentioned it recall that that was  
12 always sort of lingering in the background, and if that is some  
13 sort of an obstacle to a realistic approach.

14 Have you been in contact with counsel for the other  
15 plaintiffs in any respect?

16 MR. AZMY: I think it's been five years, Your Honor.  
17 I too totally forgot about that case.

18 THE COURT: Yeah.

19 MR. AZMY: I think it's very, very embrionic, you  
20 know, and we'd have -- of course, we'd entertain it. We'd have  
21 some concerns about a global settlement concerning how much  
22 farther we've gone in the litigation, but I'm assuming there  
23 are ways to accommodate in a, in a settlement that different  
24 positionality.

25 THE COURT: All right. The other thing is because

1 the political world has changed somewhat here, are the  
2 obstacles to your clients being able to get visas still in  
3 effect, or do you feel that that might have changed?

4 MR. AZMY: We are investigating that given the new  
5 State Department. I think COVID is just really a problem. I  
6 don't think our clients are vaccinated, for example. So we  
7 have a political world, and then we have this epidemiological  
8 world.

9 THE COURT: Well, your client in Sweden most likely  
10 could be vaccinated at this point.

11 MR. AZMY: He could be. I think there are  
12 restrictions -- formal restrictions on his travel because he's  
13 in a refugee process.

14 THE COURT: Okay.

15 MR. AZMY: So he, I think, is not permitted to leave  
16 Sweden.

17 THE COURT: All right, very good.

18 MR. AZMY: Thank you, Your Honor.

19 THE COURT: All right. Well, thank you for the  
20 argument, and we'll be back in touch, I'm not going to give you  
21 a time frame, but as soon as we can.

22 MR. AZMY: Thank you, Your Honor.

23 THE COURT: It won't be as long as the Supreme Court  
24 took, all right?

25 All right, we'll recess court for the day.



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

CERTIFICATE OF THE REPORTER

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

\_\_\_\_\_  
/s/  
Anneliese J. Thomson