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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	
Plaintiffs,	Case No. 1:08-CV-00827-LMB-JFA
v.	
CACI PREMIER TECHNOLOGY, INC,	
Defendant.	

MEMORANDUM OF DEFENDANT CACI PREMIER TECHNOLOGY, INC. IN SUPPORT OF ITS MOTION FOR 28 U.S.C. § 1292(b) CERTIFICATION OF THE COURT'S ORDER OF JULY 31, 2023

I. INTRODUCTION[1]

The Court's Order of July 31, 2023 (Dkt. 1390) (the "Order") denied two motions to dismiss:

- CACI's motion filed on July 23, 2021, arguing that Plaintiffs' claims, all asserted under the Alien Tort Statute ("ATS"), are impermissibly extraterritorial (ECF 1331); and
- CACI's motion filed on July 18, 2022, arguing that the separation-of-powers test required for implied causes of action precludes recognition of Plaintiffs' claims (ECF 1367).

[1] The Court's Memorandum Opinion recites select portions of this case's lengthy procedural history. Mem. Op. at 2-9. With respect to those portions, CACI Premier Technology, Inc. ("CACI") notes that three of the five times the Fourth Circuit has been asked to review this case came at the behest of Plaintiffs, who (1) requested *en banc* review of the first Fourth Circuit panel decision in this case, (2) appealed this Court's dismissal on extraterritoriality grounds, and (3) appealed this Court's dismissal on political question grounds.

The Court's Order recites that CACI's motions are denied for the reasons stated in the accompanying Memorandum Opinion ("Mem. Op.") (Dkt. #1389).

CACI respectfully moves that the Court certify its July 31, 2023 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Without question, the Order involves multiple controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation. With respect to the Court's ruling that Plaintiffs' claims represent a domestic application of ATS, the controlling questions of law as to which there are substantial grounds for difference of opinion include:

- The correctness of this Court's conclusion that the extraterritoriality analysis applied in *Al Shimari v. CACI International Inc*, 758 F.3d 516, 530-31 (4th Cir. 2014) ("*Al Shimari III*"), which considered factors such as citizenship of CACI and its employees, that CACI employees were in Iraq under contracts entered in the United States with the U.S. Government, and that CACI employees had U.S.-issued security clearances, remains viable despite multiple Supreme Court and Fourth Circuit decisions requiring strict application of the "focus" test. Mem. Op. at 15-20.

- The correctness of this Court's legal conclusion that, if the "focus" test is mandatory for assessing extraterritoriality under ATS, the conduct relevant for secondary liability claims is not the primary tortious conduct, which all allegedly occurred in Iraq, but instead includes the following: (1) all of the holistic factors described in *Al Shimari III*; (2) domestic conduct that, even if true, is not actionable under ATS; and (3) conduct occurring in Iraq on the theory that the U.S. military controlled Iraq. Mem. Op. at 21-31.

With respect to the Court's conclusion that separation-of-powers concerns pose no barrier to the Court's creation of implied causes of action under ATS, the controlling questions of law as to which there are substantial grounds for difference of opinion include each of the following:

- Whether the law of the case doctrine shields this Court's prior decisions implying causes of action under ATS in this case from reevaluation in light of substantial developments in Supreme Court and Fourth Circuit law strictly circumscribing a federal court's power to imply, or create, a substantive cause of action to be brought under a jurisdictional statute.

- Whether federal courts have the power to imply, or create, new substantive causes of action to be brought under ATS beyond the three paradigmatic causes of action – offenses against ambassadors, violation of safe conduct, and possibly piracy – contemplated by the First Congress when it enacted ATS.

Appellate resolution of these issues now will materially advance the ultimate termination of this litigation because, if CACI is correct on any of these issues, resolution on appeal will avoid a trial that presents serious logistical difficulties and grave due process concerns. The trial that would occur in this case would involve Plaintiffs who the United States has barred from entering this country. CACI's alleged liability will be based on interactions between its employees and Plaintiffs, but CACI has been denied by the United States' invocation of the state secrets privilege and rulings of this Court from even learning the identity of the CACI employees who interacted with Plaintiffs. Indeed, any testimony from personnel (CACI or military) interacting with Plaintiffs will be presented through pseudonymous testimony, a substantial logistical challenge that deprives CACI of all meaningful ways to cross-examine these witnesses.

Moreover, Plaintiffs seek to prove their case by relying on government reports accusing three CACI employees of misconduct *not tied to these Plaintiffs*, the questionable assumption being that *if* these employees acted inappropriately they *may* have done so in a way that affected these Plaintiffs. But the United States' assertion of the state secrets privilege and rulings of this Court prevent CACI from presenting evidence as to whether the three employees identified in the government reports had *any* interaction with these Plaintiffs. Most of the rest of Plaintiffs' evidence consists of hearsay statements to criminal investigators. Wading through all of the issues that must be resolved to bring this case to and through a trial would be a tremendous drain on judicial resources as well as on the resources of the United States and – to the extent Plaintiffs themselves remain active participants in this litigation – the parties.

For all of these reasons, the Court should certify its Order for interlocutory appeal under 28 U.S.C. § 1292(b) so that the threshold controlling questions of law can be decided once and for all before convening a trial with extraordinary logistical challenges and serious due process concerns.

II. ANALYSIS

District courts have "first line discretion to allow interlocutory appeals." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). The Court may certify an order for interlocutory appeal when it "'involves a controlling question of law as to which there is substantial ground for difference of opinion' and immediate appeal . . . may materially advance the ultimate termination of the litigation.'" *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). Because all three of these requirements are met, the Court should certify the Order for interlocutory appeal.

A. The Order and Accompanying Memorandum Opinion Are Replete With Decisions on Controlling Questions of Law as to Which There Are Substantial Grounds for Difference of Opinion

While § 1292(b) "authorizes certification of *orders* for interlocutory appeal, not certification of *questions*," *Linton v. Shell Oil Co.*, 563 F.3d 556, 557 (5th Cir. 2009) (emphasis added), certification requires identification of controlling questions of law as to which there are substantial grounds for difference of opinion. Such questions are apparent with respect to the Court's rulings on both of the motions to dismiss resolved by the Order.

The Fourth Circuit has observed that an order involves a "controlling question of law" if the order contains a question of law and the court of appeals' "resolution of it could 'terminate[] the case.'" *Kennedy*, 657 F.3d at 195; *see also Fannin v. CSX Transp., Inc.*, No. 88-8120, 1989 WL 42583, at *5 (4th Cir. 1989) (interlocutory appeal appropriate for questions of law "whose

resolution will be completely dispositive of the litigation"). "[I]t is clear that a question of law is controlling if reversal of the district court's order would terminate the action." *See Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990).

"An issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling question of law." *Cooke-Bates v. Bayer Corp.*, No. 3:10-CV-261, 2010 WL 4789838, at *2 (E.D. Va. Nov. 16, 2010); *see also McDaniel v. Mehfoud*, 708 F. Supp. 754, 756 (E.D. Va. 1989). In addition, a substantial ground for difference of opinion exists where "the dispute raises a novel and difficult issue of first impression." *Cooke-Bates*, 2010 WL 4789838, at *2.

The time it took the Court to resolve CACI's motions is perhaps the most obvious data point regarding whether the Order resolves controlling questions of law as to which there are substantial grounds for difference of opinion. The Court took twenty-three months from the time CACI's extraterritoriality motion was fully briefed to issue a decision on the motion. Mem. Op. at 11-32. With respect to implied causes of action, the Court's Order issued eleven months after completion of briefing on that motion. Mem. Op. at 32-41. The passage of time alone suggests that these issues were not simple for the Court to decide.

But the Court need not rely merely on the passage of time from briefing to decision to conclude that the Order decides controlling questions of law on which reasonable minds can disagree. There are at least *four* such decisions of law within the Court's supporting Memorandum Opinion, two regarding extraterritoriality and two regarding implied causes of action, each of which is sufficient to justify interlocutory appeal.

1. Extraterritoriality

At its broadest level of generality, the Memorandum Opinion's conclusion that this case presents a permissible domestic application of ATS is a controlling question of law, as a

determination on appeal that the Court erred would require dismissal of this action. Embodied within this determination, however, are at least two conclusions of law on which the Court's ultimate holding relies: (1) the Court's continued view that *Al Shimari III* is an appropriate test for extraterritoriality; and (2) the Court's conclusion that the holistic factors applied in *Al Shimari III* (general corporate activity in the United States and conduct occurring *in Iraq*) makes this case a domestic application of ATS even though the primary torts in violation of the law of nations all allegedly occurred in Iraq.

a. Whether the Extraterritoriality Analysis in *Al Shimari III* Remains Viable in Light of Subsequent Supreme Court and Fourth Circuit Decisions

This Court's Memorandum Opinion emphatically concludes that the Fourth Circuit's decision in *Al Shimari III* remains the correct approach for determining whether a claim under ATS represents a permissible domestic application of the statute. As the Court explained:

> In sum, even after *Nestlé*, "CACI's status as a United States corporation," the "United States citizenship of CACI's employees," "facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States" by the United States government, *Al Shimari III*, 758 F.3d at 530-31, as well as Iraq's status as territory under United States control, all show that plaintiffs' claims involve a domestic application of the ATS.

Mem. Op. at 20.

The Court's legal determination of what facts matter in determining extraterritoriality is clearly a controlling question of law. It is the Court's conclusion that *Al Shimari III* remains viable and permits a flexible, multi-factor assessment of facts and interests to decide extraterritoriality that permitted this Court to deny CACI's motion to dismiss. If CACI is correct that the *only* conduct that matters is the primary tort allegedly committed in violation of the law of nations, dismissal would be required because the primary torts of which Plaintiffs complain all

allegedly occurred at Abu Ghraib prison in Iraq.[2] When a ruling on a question of law that is contrary to the district court's ruling would require termination of the proceeding, the question of law is a controlling one. *Kennedy*, 657 F.3d at 195.

Further, there are substantial grounds for a difference of opinion as to whether *Al Shimari III* remains good law with respect to extraterritoriality.[3] In *Al Shimari III*, the Fourth Circuit concluded that the "touch and concern" language used by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), required an ATS-specific extraterritoriality test rather than the "focus" test applied by the Supreme Court in case such as *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 255 (2010). In particular, the *Al Shimari III* panel read *Kiobel* as providing that "'claims,' rather than the allegedly tortious conduct, must touch and concern United States territory with sufficient force, *suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action.*" *Al Shimari III*, 758 F.3d at 527 (emphasis added). Based on this reading of *Kiobel*, the Fourth Circuit panel in *Al Shimari III* concluded that factors such as CACI's citizenship, the citizenship of CACI's employees, the connection between CACI's work and a government contract executed in the United States, the requirement for U.S. security clearances, and Congress's intent, somehow expressed through the TVPA and Anti-Torture Statute (which,

[2] Moreover, to the extent the Court views Abu Ghraib prison as domestic territory for purposes of an extraterritoriality inquiry, that, too, is a controlling question of law as to which there are grounds for a difference of opinion. *See Adhikari v. Kellog Brown & Root, Inc.*, 845 F.3d 184, 196-97 (5th Cir. 2017) (rejecting argument that because the United States controlled Al Asad air base in Iraq, conduct on the base was "domestic" for purposes of an extraterritoriality analysis).

[3] To be sure, and with all due respect to the Court, CACI views the Court's continued reliance on *Al Shimari III* as a correct statement of the law on extraterritoriality as plainly erroneous. But that is not the hurdle for certification under § 1292(b). At a bare minimum, there are substantial grounds for a difference of opinion as to whether the Court's continued reliance in the *Al Shimari III* test is sound jurisprudentially, which is all that is required for certification.

in point of fact, provide no private right of action for Plaintiffs' claims), should be considered as part of a holistic assessment of whether Plaintiffs' claims were sufficiently domestic. *Id.* at 530-31.

Other federal circuits expressed differences of opinion with *Al Shimari III* right out of the gate. The same year the Fourth Circuit decided *Al Shimari III*, the Second Circuit disagreed with *Al Shimari III* and held not only that *Morrison*'s "focus" test controlled extraterritoriality analyses for ATS claims, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014), but also squarely rejected *Al Shimari III*'s view that the defendants' citizenship could ever be relevant to the required focus test. *Id.* at 188 ("Furthermore, in identifying the conduct which must form the basis of the violation *and* the jurisdictional analysis under the ATS, precedents make clear that neither the U.S. citizenship of the defendants, nor their presence in the United States, is of relevance for jurisdictional purposes."). In so holding, the Second Circuit noted *Al Shimari III*'s reliance on citizenship as a relevant consideration and concluded that the Fourth Circuit was simply wrong. *Id.* at 188-89 ("We disagree with the contention that a defendant's U.S. citizenship has any relevance to the jurisdictional inquiry.").

Three years later, the Fifth Circuit was no more charitable toward *Al Shimari III*. In *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), the court affirmed dismissal of ATS claims based on KBR's alleged involvement in forced labor and human trafficking at military bases in U.S.-occupied Iraq while performing services under U.S. government contracts. *Id.* at 198. In so holding, the court applied the "focus" test mandated by *Morrison* and *RJR Nabisco v. European Community*, 579 F.3d 325 (2016), rejecting *Al Shimari III*'s conclusion that all facts relevant to ATS claims, rather than just the conduct relevant to ATS's focus, controlled the extraterritoriality inquiry. *Adhikari*, 845 F.3d at 193-94. To

punctuate its disagreement with the Fourth Circuit's approach in *Al Shimari III*, the Fifth Circuit noted that the plaintiffs sought leave to amend their complaint to assert facts relating to aiding and abetting claims on the grounds that they could allege the same facts the Fourth Circuit found sufficient in *Al Shimari III*. The Fifth Circuit affirmed the district court's denial of leave to amend to conform the allegations to *Al Shimari III* because *Al Shimari III* was an incorrect statement of law:

> Plaintiffs argue they would be able to allege facts that satisfy *Al Shimari*, **but *Al Shimari* is not the test**. As we have discussed, our approach requires analysis of the conduct relevant to the statute's "focus."

Adhikari, 845 F.3d at 199 (emphasis added). Indeed, there is no surer sign that the Court's ruling is a matter on which there are grounds for a difference of opinion than this Court's citation three separate times to the *dissenting opinion* in *Adhikari* to support the Court's holistic, multi-factor assessment of extraterritoriality. Mem. Op. at 16, 17, 20 (relying on *Adhikari*, 845 F.3d at 209-11 (Graves, J., dissenting as to ATS ruling)). By definition, the view of a dissenting judge is one with which a majority of the panel had a difference of opinion.

By 2017, the Fifth Circuit's rebuke of *Al Shimari III* was not a bold step, but merely acknowledged the development of Supreme Court case law on extraterritoriality. One year earlier, the Supreme Court decided *RJR Nabisco* and held that the "focus" test was the mandatory test for extraterritoriality. The panel in *Al Shimari III* had noted the *Kiobel* had novel "touch and concern" language and did not apply *Morrison*'s "focus" test, concluding from these data points that a more holistic test applied to ATS. *Al Shimari III*, 758 F.3d at 527. But the Supreme Court explained in *RJR Nabisco* that there was a very simple reason why it did not explicitly apply the "focus" test in *Kiobel* – all conduct even theoretically relevant to ATS's focus had occurred outside of the United States, so the Court "did not need to determine, as [it]

did in *Morrison*, the statute's 'focus.'" *RJR Nabisco*, 579 U.S. at 337. And the Court left no doubt that the "focus" test is mandatory for ATS claims:

> *Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application *regardless of any other conduct that occurred in U.S. territory.*

Id.

After the Supreme Court decided *RJR Nabisco*, the Fourth Circuit acknowledged that the "focus" test, and not the unstructured, multi-factor test applied in *Al Shimari III*, was the mandatory test for extraterritoriality. In a notable understatement, the Fourth Circuit observed in *Roe v. Howard*, 917 F.3d 229 (4th Cir. 2019), that *RJR Nabisco* "appears to privilege consideration of a statute's 'focus' – the approach set out in *Morrison* – over the inquiry articulated in *Kiobel*, which asked whether the claims at issue 'touch and concern the territory of the United States.'" *Roe*, 917 F.3d at 240. Indeed, during this case's last trip to the Fourth Circuit, the panel became aware of this Court's statement that CACI's invocation of *RJR Nabisco* was "interesting," but that "the law of the case is the law established by the Fourth Circuit, and I'm not reversing the Fourth Circuit." Tr. of 2/27/19 at 4-6. Judge Floyd's reaction suggested incredulity:

> Somewhere in the record, Judge Brinkema said that it's – used the phrase "law of the case." Does – does she understand that *RJR Nabisco* controls?"

Ex. 1 at 12:12-15 (Floyd, J.).

The Fourth Circuit's and Supreme Court's full-on embrace of the "focus" test as the mandatory test for extraterritoriality has continued apace. In *United States v. Ojedokun*, 16 F.4th 1091 (4th Cir. 2021), the Fourth Circuit explained that the "focus" test applies to statutes, such as ATS, that do not have extraterritorial effect. *Id.* at 1102 (quoting *RJR Nabisco*, 579 U.S. at 337). If there were any doubt after *RJR Nabisco*, the Supreme Court once again made clear in *Nestlé* that the "focus" test that applies to every other statute applies with the same force to ATS. *Nestlé*, 141 S. Ct. at 1936.

In the last year, the Fourth Circuit once again acknowledged that *RJR Nabisco*, and not *Kiobel*, establishes the mandatory test for extraterritoriality, expressly rejecting the notion (adopted in *Al Shimari III*) that the "touch and concern" language in *Kiobel* allowed deviation from the "focus" test:

> At step two, if the statute does not apply extraterritorially, we then ask whether the case before us "involves a domestic application of the statute." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016). And to identify a permissible domestic application, we must determine the statute's "focus" and whether the conduct relevant to the statute's focus occurred inside the United States. *Id.* It is not enough for conduct to merely "touch and concern the territory of the United States," *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013); the conduct must be domestic.

United States v. Elbaz, 52 F.4th 593, 602 (4th Cir. 2022).

The Supreme Court recently reinforced the mandatory nature of the "focus" test, holding that for domestic statutes "courts *must* start by identifying the 'focus' of congressional concern underlying the provision at issue," and then must credit only the specific conduct relevant to that focus. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. ___, 2023 WL 4239255 (2023)

(emphasis added). In *Abitron*, a Lanham Act case, the Court rejected the argument that the place of the "risk of confusion" was the relevant touchstone for an extraterritoriality analysis because a "risk of confusion" is not *conduct*. *Id.* at *6. As the Court explained, the fact that matters for extraterritoriality must be *conduct*, which necessarily excludes from consideration virtually all of the status-based facts relied on by the Fourth Circuit in *Al Shimari III*. Indeed, in *Abitron*, the Court held that the relevant conduct was "use in commerce" because that is the conduct on which the statute premised liability. *Id.* ("Because Congress has premised liability on a specific action (a particular sort of use in commerce), that specific action would be the conduct relevant to any focus on offer today.").

At this point, there is not a court in the country other than this Court that treats *Al Shimari III* as viable precedent with respect to extraterritoriality analysis. Not even the Fourth Circuit relies on *Al Shimari III*. And subsequent Supreme Court and Fourth Circuit precedents mandate an extraterritoriality approach that is completely incompatible with *Al Shimari III*. *Al Shimari III* represented an early good-faith, but flawed, effort to give meaning to inscrutable language in *Kiobel* regarding application of the presumption against extraterritoriality. CACI's view is (and was) that *Al Shimari III*'s analysis was incorrect the day the decision was issued. Regardless of one's views on that, there are at the barest minimum substantial grounds for a difference of opinion as to the correctness of this Court's continued invocation of *Al Shimari III* as a credible authority on extraterritoriality law. Certification for interlocutory appeal is thus appropriate.

b. Whether the Court's Memorandum Opinion Errs in its Alternative Application of the "Focus" Test

After its broad endorsement of *Al Shimari III*, the Court's Memorandum Opinion pivots and states that "[t]he record also shows substantial domestic conduct that is relevant to the alleged law of nations violations." Mem. Op. at 20. The conduct on which the Court relies

includes hiring decisions made in the United States; CACI's supposed responsibility for supervising employees in Iraq (which the record actually shows involved administrative matters only, with the U.S. military charged with operational supervision); visits to Iraq by a CACI executive, who actually testified (without refutation) that he checked on employee welfare but had no involvement in operations; regular reports from CACI personnel in Iraq to CACI headquarters in Virginia, which again involved administrative matters and not detainee operations; a statement by a CACI employee who was serving *in Iraq* that he would have stopped detainee abuse if he had seen it; receipt by CACI managers in Virginia of an email in which a former CACI employee stated he witnessed bad conduct *by soldiers*, that was already under Army investigation, and that CACI personnel were not involved; a statement by a CACI interrogator *in Iraq* to Army investigators that he had seen "questionable things" done by a CACI interrogator *in Iraq*, though the same employee testified those "questionable things" were not abuse, and the reaction of CACI personnel *in Iraq* to the interrogator's statement; and interaction by CACI personnel in Virginia with Army personnel investigating abuse at Abu Ghraib prison. Mem. Op. at 25-31.

The Court's recitation of facts mostly accepts at face value Plaintiffs' representations, and many of these stated facts are not fairly supported by the record. While the supportability of the Court's factual findings would be relevant on a direct appeal or with respect to a petition for writ of mandamus, CACI recognizes that a 28 U.S.C. § 1292(b) appeal is limited to orders involving controlling questions of law, and a § 1292(b) interlocutory appeal likely would focus on reviewing this Court's legal conclusions. That said, even accepting the Court's recitation of facts at face value, there are substantial grounds for differences of opinion as to the Court's legal conclusions flowing from the statements treated as facts in the Court's Memorandum Opinion.

The Supreme Court's decision in *Abitron*, 2023 WL 4239255, at *4, holds that the fact on which extraterritoriality turns must constitute *conduct* and stressed the importance of "separating the activity that matters from activity that does not." *Id.* Indeed, the Court further held that the activity that matters is the conduct on which the statute premises liability, which here is a "tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. All of the alleged facts, recited above, on which the Court relies involve conduct in Iraq, or general corporate activity in the United States, such as decisionmaking. It is a straightforward question of law whether the facts identified by the Court, even if they all had record support, involve domestic conduct relevant to ATS's focus. And a decision in CACI's favor on that point would be case-dispositive, making the Court's ruling a controlling question of law.

There are three grounds for a difference of opinion with the Court's legal conclusion. *First*, the Court presumably detailed its view of conduct in Iraq on the theory that supposed U.S. control in Iraq made conduct in Iraq less extraterritorial than if it had occurred in a nation not in the midst of a war and occupation. To the extent this is the Court's view, the Fifth Circuit has squarely expressed a difference of opinion. *Adhikari*, 845 F.3d at 196-97 (rejecting argument that military bases in Iraq were "domestic" for purposes of ATS).

Second, the Court has dismissed Plaintiffs' direct claims as completely unsupported by fact, leaving only claims asserting that CACI has co-conspirator or aiding-and-abetting liability for abuses committed by U.S. soldiers. The Fourth Circuit held in *Elbaz* that, for purposes of extraterritoriality, the conduct relevant to a secondary liability claim (conspiracy in that case) is the primary actionable conduct, *Elbaz*, 52 F.4th at 604, which here would be the torture, war crimes and cruel, inhuman, or degrading treatment allegedly committed by U.S. soldiers in Iraq. The Court's Memorandum Opinion contends in a footnote that *Elbaz* is distinguishable, but the

case is directly on point. Mem. Op. at 23 n.15. It is true, as the Court states in its footnote, that *Elbaz* cited *United States v. Ojedokun*, 16 F.4th 1091 (4th Cir. 2021), for the proposition that "conspiracies operate wherever the agreement was made or wherever any overt act in furtherance of the conspiracy transpires," *Elbaz*, 52 F.4th at 604, but the relevant question is not where a conspiracy occurred, but whether the focus of the conspiracy claim is domestic or extraterritorial. *Elbaz* is clear on that question – the domestic or extraterritorial nature of a conspiracy claim depends on the place where the substantive violation occurred, not where the conspiracy occurred:

> The focus of § 1349 is the "object of the attempt or conspiracy." And that object is the offense that the conspirators conspire to commit. Here, the substantive wire-fraud counts, which were domestic, were the objects of the conspiracy. And Elbaz concedes that the extraterritoriality analysis of her conspiracy conviction mirrors the substantive-wire-fraud counts. *See RJR Nabisco*, 579 U.S. at 341 (assuming that a conspiracy offense's "extraterritoriality tracks that of the provision underlying the alleged conspiracy"); *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) ("If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions."). So the conspiracy conviction was a domestic application of the statute in so far as the object of the conspiracy was domestic wire fraud

Elbaz, 52 F.4th at 604-05 (most internal citations omitted, full citation added for *WesternGeco*). Thus, the Court's analysis distinguishing *Elbaz* assesses the place of the secondary liability conduct when *Elbaz*'s holding is that the relevant conduct for extraterritoriality purposes is the place of the primary actionable conduct.

Third, there are no facts suggesting that any CACI personnel in the United States had any interaction, direct or indirect, with any solider who mistreated these Plaintiffs or any other detainees. The gravamen of Plaintiffs' claims, as the Court correctly observed, is that CACI personnel on the ground in Iraq gave instructions to U.S. soldiers that resulted in the abuse of

Plaintiffs. Mem. Op. at 3. That conduct, if it were established, is plainly extraterritorial. The conduct occurring in the United States, even treating the Court's recitation of those facts as accepted for purposes of § 1292(b) review, is general corporate conduct that cannot convert a claim involving extraterritorial injuries into a domestic application of ATS. *Nestlé*, 141 S. Ct. at 1936. For all of these reasons, there are substantial grounds for a difference of opinion with respect to how the Court applied the "focus" test in this case.

2. Implied Causes of Action

The Court's Memorandum Opinion rejects CACI's challenge to the Court's power to imply causes of action under ATS that encompass Plaintiffs' claims. The Court's Memorandum Opinion states that "CACI has previously raised similar arguments, which have been rejected, and its renewed separation-of-powers arguments provide no basis for this Court to change its earlier rejection of these arguments." Mem. Op. at 32. The Court's invocation of the law of the case doctrine in response to CACI's motion to dismiss is a controlling question of law as to which there are substantial grounds for difference of opinion. The same is true of the Court's abbreviated treatment of CACI's argument on the merits.

a. There Are Substantial Grounds for Concluding that the Law of the Case Doctrine Is Inapplicable

The Court's Memorandum Opinion states that the Court previously had held that "'it is law of the case[] that adjudication of plaintiffs' claims does not impermissibly infringe on the political branches' and that allowing plaintiffs' claims to proceed is consistent with the purpose of the ATS." Mem. Op. at 36. When the Court's observation is unpacked, it becomes clear that the Court's continued reliance on the law of the case doctrine is at a minimum highly debatable.

As the Court correctly observes, the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent

stages in the same case." Mem. Op. at 10 (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009)). But as the Court also noted, "[t]he law of the case [doctrine] 'is not absolute nor inflexible,' and 'a court has the power to revisit prior decisions of its own . . . in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances.'" Mem. Op. at 10. Indeed, when this case was reassigned to its current judge, the Court was open in stating that the parties should not assume that any of the decisions by the previously-assigned judge would be adhered to going forward.[4] The Court provided no reason for this treatment of the previous judge's rulings. Moreover, as this Court acknowledged, reasons why the law of the case doctrine should not be applied in a particular case include the issuance of "controlling authority [that] has since made a contrary decision of law applicable to the issue," and where "the prior decision was clearly erroneous and would work manifest injustice." Mem. Op. at 10. These recognized exceptions are applicable here.

The Court's prior invocation of the law of the case doctrine came in connection with the Court's denial of CACI's motion to dismiss based on *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), in which CACI argued that separation-of-powers concerns prohibited creating a private right of action arising out of the United States' conduct of war. *Al Shimari v. CACI Premier Technology, Inc.*, 320 F. Supp. 3d 781, 786 (E.D. Va. 2018). However, the "law of the case" on which the Court relied consisted of Fourth Circuit decisions on extraterritoriality and the political question doctrine, and the Fourth Circuit merely held that the inquiries associated with *those doctrines* did not preclude Plaintiffs' claims. *Id.* (discussing *Al Shimari v. CACI Premier Tech.,*

[4] 4/28/17 Tr. at 10 ("The other thing I would ask you-all to do, you're with a new judge now, and with all due respect to my colleague, I mean, I'm treating this case pretty much as it's starting with me, all right? I mean, I'm certainly going to follow what the Fourth Circuit has done, but just because certain things were done or not done previously, don't assume that will be the case with me, all right?").

Inc., 758 F.3d 516, 529–30 (4th Cir. 2014), and *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154, 157–58 (4th Cir. 2016)).

Of course, judge-made implied causes of action raise entirely different concerns than extraterritoriality and the political question doctrine. Extraterritoriality does not involve separation-of-powers issues at all. As the Fourth Circuit has held, "[w]hether a federal statute applies to conduct beyond the territorial boundaries of the United States 'is a matter of statutory construction.'" *United States v. Skinner*, 70 F.4th 219, 224 (4th Cir. 2023) (citing *United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012)). The political question inquiry addressed in the Fourth Circuit appeal involved a completely different set of concerns than those involved in deciding when, if ever, it is permissible for federal judges to imply causes of action. Specifically, the political question inquiry directed by the Fourth Circuit in this case concerned a narrow question of fact – whether CACI personnel in Iraq were under the "direct control" of the U.S. military. *Al Shimari III*, 758 F.3d at 535. This has nothing to do with the completely distinct set of separation-of-powers concerns that underlie judicial creation of private rights of action.

As the Supreme Court has relentlessly explained, the separation-of-powers concerns associated with implied causes of action involve the proper allocation of law-making power, and the various government branches' respective competence to perform this quintessentially legislative function. As the Supreme Court explained in *Egbert v. Boule*, 142 S. Ct. 1793 (2022):

> At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a range of policy considerations . . . at least as broad as the range . . . a legislature would consider. . . . Unsurprisingly, Congress is far more competent than the Judiciary to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain.

Id. at 1802-03. Thus, the Court's invocation of the law of the case to reject CACI's motion to dismiss based on *Jesner* was, with respect, incorrect, and continuing that reliance now perpetuates the error.

The Court's Memorandum Opinion noted that "CACI did not appeal" the Court's decision regarding *Jesner*. Mem. Op. at 6. Of course, CACI had no right to appeal that decision, as it was interlocutory and not subject to the collateral order doctrine. However, the Memorandum Opinion also omits that CACI specifically asked the Court to certify its ruling for a § 1292(b) appeal, which the Court rejected with an oral ruling in which the court commented that "I'm going to do everything I can to avoid that further delay of getting this case resolved, but I appreciate it." 6/15/18 Tr. at 15. Thus, to the extent that the Memorandum Opinion's comment on CACI's failure to appeal the *Jesner* ruling is intended to suggest some acceptance of the ruling by CACI, CACI's lack of an appeal was not for lack of trying.

But even if the Court's invocation of the law of the case doctrine in 2018 had been correct, the doctrine cannot reasonably be applied now. Since 2018, there have been *significant* developments in binding precedent that justify a fresh look at the propriety of this Court's foray into lawmaking through implied causes of action under ATS. As CACI detailed in its most recent motion to dismiss, the test for implying a cause of action under ATS has merged with the "special factor" test for *Bivens* actions, such that neither a *Bivens* claim nor an ATS claim may be implied if there is "even a single sound reason to defer to Congress." *Egbert*, 142 S. Ct. at 1803 (*Bivens* case) (quoting *Nestlé*, 141 S. Ct. at 1937 (plurality opinion) (ATS case)). Indeed, Justice Gorsuch's concurrence in *Egbert* suggested that the Court was providing "false hope" to litigants by leaving open the theoretical possibility of implied causes of action going forward,

when the test created by the Court for implying a cause of action is impossible to satisfy. *Egbert*, 142 S. Ct. at 1810 (Gorsuch, J., concurring).

The Fourth Circuit has taken the hint. In *Dyer v. Smith*, 56 F.4th 271 (4th Cir. 2022), the court recognized that the same test applies to *Bivens* and ATS claims when it comes to the propriety of a judge-created cause of action, citing *Nestlé* as suppling the applicable test for the *Bivens* case before it:

> As "even a single sound reason to defer to Congress" will be enough to require the court refrain from creating a Bivens remedy, we decline to extend an implied damages remedy pursuant to Bivens against Appellants based on the existence of an alternative remedial structure and/or the interest of national security. ***Nestlé USA, Inc.*, 141 S. Ct. at 1937**.

Dyer, 56 F.4th at 281 (emphasis added).

In rejecting the implied cause of action proposed in that case, the court held that the impact of allowing photography of TSA searches was sufficiently connected to national security and foreign affairs to preclude a judge-made claim, and that the availability of remedial structures *that did not even apply to the plaintiff* also precluded judicial wading into the waters of lawmaking through implied causes of action. Moreover, the *Dyer* court quoted approvingly to Justice Gorsuch's concurring opinion in *Egbert* in which he observed that the Court's separation-of-powers test "left 'a door ajar and [held] out the possibility that someone someday might walk through it even as it devises a rule that ensures no one . . . ever will." *Dyer*, 56 F.4th at 277 (alterations in original) (quoting *Egbert*, 142 S. Ct. at 1793 (Gorsuch, J., concurring)).

In *Bulger v. Hurwitz*, 62 F.4th 127, 136 (4th Cir. 2023), the court acknowledged that "[t]he Supreme Court has continued to caution lower courts to beware of arrogating legislative power. Because creating a cause of action is a legislative endeavor, the Court warned that the Judiciary's authority to [create causes of action under the Constitution] is, at best, uncertain."

Id. (alteration in original) (internal quotations omitted) (quoting *Egbert*, 142 S. Ct. at 1802-03). Applying that warning, the court rejected a proposed *Bivens* claim based on dangerous prison transfer policies because Congress gave the task of prison transfers to the Bureau of Prisons and a remedial scheme was available to challenge transfers even if the decedent here had no opportunity to use that remedial scheme. *Id.*

All of these developments in the last five years make clear that judicially-implied causes of action are highly disfavored and present grave separation-of-powers issues different from those associated with the narrow political question issue identified and decided by the Fourth Circuit. Given these developments, the law of the case doctrine cannot shield the propriety of judicially-implying causes of action in this case from a fresh review. At a minimum, there are substantial grounds for difference of opinion as to the correctness of an invocation of law of the case here.

b. Whether the Court Has the Power to Imply the Causes of Action Asserted in this Case

With the law of the case doctrine not properly applicable here, there are obvious grounds for a difference of opinion as to whether the Court has the power to imply the causes of action it is allowing Plaintiffs to pursue in this action. In *Nestlé*, three Justices expressed the view that federal courts lack the power to create new claims under ATS beyond the three paradigmatic torts – offenses against ambassadors, violation of safe conduct, and possibly piracy – contemplated by the First Congress when it enacted ATS. *Nestlé*, 141 S. Ct. at 1939 (plurality opinion of Thomas, Gorsuch, and Kavanaugh, JJ.). The Seventh Circuit has agreed, holding that separation-of-powers concerns categorically preclude new judge-made causes of action under ATS. *Kriley v. Nw. Mem. Healthcare*, 2023 WL 371643, at *2 (7th Cir. Jan. 24, 2023) ("[F]ederal courts cannot 'recognize private rights of action for violations of international law

beyond' three historical torts – violation of international safe conduct, infringement of ambassadors' rights, and piracy." (quoting *Nestlé*, 141 S. Ct. at 1939-40 (plurality opinion)). While the *Nestlé* plurality opinion and *Kriley* are not binding on this Court, that is not the test for § 1292(b) certification. The test is whether there are substantial grounds for difference of opinion, *Kennedy*, 657 F.3d at 195, and these decisions express the view that implying new causes of action under ATS is never permissible.

But even if new judicially-implied causes of action are not categorically prohibited, there are substantial grounds for a difference of opinion as to whether the Court properly may imply the causes of action it has allowed in this case. In *Egbert*, the claim involved a border patrol agent roughing up an American smuggling suspect, entirely in the United States, and the Court found enough of a national security context to require courts to refrain from implying a damages remedy. 142 S. Ct. at 1804-05. *Egbert* also held that the existence of alternative remedial structures categorically precludes a judge-implied cause of action. 142 S. Ct. at 1806-07. The foreign affairs and national security nexus is much closer here, where Plaintiffs were captured and detained by the U.S. military and held at a war-zone interrogation facility in Iraq, where CACI personnel acted under the supervision and control of the U.S. Army chain of command. Nowhere in the Memorandum Opinion is there an explanation why the judiciary is better suited than Congress to decide which causes of action to imply in a wartime context. Moreover, the availability of an administrative claim process by those alleging abuse in Iraq, *see Saleh v. Titan*, 580 F.3d 1, 2 (D.C. Cir. 2009), categorically forecloses an implied court remedy.

The Fourth Circuit's decisions in *Dyer* and *Bulger*, addressed in the preceding subsection, only reinforce why reasonable minds could conclude that implying a cause of action in this case is inappropriate. The national security nexus with wartime interrogation operations is much

more pronounced than the decision whether to allow videotaping of TSA pat-downs in a public place. Moreover, in both of those cases, the Fourth Circuit applied the dictate from *Egbert* that the existence of remedial structures bar a judicially-implied cause of action even if the remedial procedures are ineffective or inapplicable to a particular plaintiff. Here, Plaintiffs did not make any effort to submit an administrative claim to the United States. Thus, even if new judicially-implied ATS causes of action are not categorically barred, there are substantial grounds for a difference of opinion with tis Court's conclusion that implying a new cause of action in this case is in line with current precedent.

B. An Immediate Appeal Would Materially Advance the Ultimate Termination of the Litigation

An immediate appeal would involve a handful of pure questions of law involving (1) a determination of the conduct that is relevant to an extraterritoriality analysis for secondary claims brought under the ATS, and (2) the propriety of the judicially-implied causes of action that this Court has created in this case. An immediate appeal may materially advance the ultimate termination of the litigation because these issues are case-dispositive, and resolving them now would avoid a veritable mountain of work the Court, the parties, and the United States would have to complete before a trial, and would make that work unnecessary if CACI is correct on the law.

As the Fourth Circuit held in *Kennedy*, the requirements of § 1292(b) are met when the Fourth Circuit is "faced with a pure question of law and [the court's] resolution of it terminates the case." 657 F.3d at 195. As explained above, a decision in CACI's favor on either issue addressed in the Order would terminate the case. Here, an interlocutory appeal of the Court's Order also would "conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed." *APCC Services, Inc. v.*

AT&T Corp., 297 F. Supp. 2d 101, 104 (D.D.C. 2003) (citing *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 728 (S.D. Tex. 2002)).

This case is unique in a myriad of ways. The Court, the parties, and the United States have a daunting amount of work to do before this case could ever be brought to a trial. Moreover, the actual trial of this action will be a significant logistical challenge, with Plaintiffs' ability to participate uncertain and a cumbersome process for presenting percipient witnesses because of this Court's state secrets rulings. The following is just a sampling of the resource-intensive work that would have to be done to bring this case from its present state through a trial:

- Resolving Plaintiffs' participation at trial. Currently, CACI does not know if counsel of record are in direct contact with their own clients. Plaintiffs previously have been denied entry into the United States for purposes of participating in this action. The last such denial, however, was several years ago. If Plaintiffs intend to provide trial testimony in this case, they will need to take steps (if they have not done so already) to determine if the United States will now allow them to enter the country for trial. CACI objects to the presentation of testimony by Plaintiffs in any form other than live, in-person testimony in front of the jury. Moreover, any consideration of testimony through deposition excerpts or video link should come only if Plaintiffs establish their unavailability because the current Administration will not allow them into the country. When Plaintiffs last reported on these issues, they could not even confirm that two of the three Plaintiffs could appear by video link if that were permitted by the Court.

- Resolving disputes concerning the admissibility of sixty-four excerpts from the Taguba and Fay reports that Plaintiffs seek to admit at trial. The Court has ruled that Plaintiffs were "certainly not going to be permitted to just introduce those entire reports as an exhibit," 12/10/18 Tr. at 3, and will not be permitted to introduce report excerpts as a "history lesson," as Plaintiffs "can just as easily put a live witness on the stand who can talk about what Abu Ghraib was, so I don't think that that's an appropriate use of the report." *Id.* at 4. The Court directed Plaintiffs to prepare a list of the specific report excerpts they desired to admit at a trial of this action. Dkt. #1026. At a February 27, 2019 hearing on report excerpts, the Court reiterated that it was "much more in favor of live testimony," that "the whole report is not going in" and that Plaintiffs identified "way too many" excerpts from the report for admission. 2/27/19 Tr. at 38-39. The Court added that "to the extent that there are statements in there that are hypotheses or not really sufficiently reliable,

they're not going to come in, all right?" *Id.* at 39. The Court will need to make individualized rulings on 64 excerpts Plaintiffs seek to introduce.

- Resolving CACI's motions *in limine* seeking to exclude testimony from three so-called expert witnesses identified by Plaintiffs. CACI has filed motions *in limine* assertion *Daubert* challenges and other challenges to three expert witnesses disclosed by Plaintiffs. This case was stayed before CACI filed its replies in support of these motions. Once replies have been filed, the Court will need to consider and decide these three motions.

- Resolving CACI's motion *in limine* stemming from Plaintiffs' repeated failure to disclose their damages calculations. Plaintiffs' initial disclosures stated that they would disclose their damages calculations with their interrogatory responses. They did not do so. A long line of cases bars a plaintiff from recovering damages not disclosed in their initial disclosures or during discovery. In response to CACI's motion, the Court ordered Plaintiffs to disclose their damages calculations. That, however, occurred well after all discovery concluded, denying CACI the opportunity to take discovery on Plaintiffs' damages calculations. It is CACI's view that the Court's order directing Plaintiffs to make a 2021 disclosure of their damages calculations cannot rescue Plaintiffs' damages case. This is an issue the Court will need to decide.

- Resolving CACI's objections to deposition excerpts from more than twenty witnesses that Plaintiffs seek to read into the record. CACI has objected a Plaintiffs' proposed deposition designations on a number of grounds. These include: (1) three of the witnesses excerpted by Plaintiffs appear to be available to testify at trial, (2) Plaintiffs have designated large passages of hearsay where Plaintiffs' counsel simply read the deponent's prior statements to him or her verbatim and asked if what the witness had said previously was true, (3) Plaintiffs have designated testimony that is either irrelevant, involves impermissible character evidence, or is unfairly prejudicial to CACI, and (4) Plaintiffs have designated testimony that lacks foundation, calls for opinion testimony from a lay witness, or is inadmissible due to the form of the question.

- Resolving CACI's motion *in limine* regarding scores of Plaintiffs' proposed exhibits, many of which (such as witness statements made to military investigators) are plainly hearsay or otherwise inadmissible. Fifty-two (52) of Plaintiffs' proposed exhibits are written statements made by soldiers and civilians to military investigators or others, out-of-court statements offered for their alleged truth that are the poster children for inadmissible hearsay. In an effort to narrow the parties' disputes, CACI provided Plaintiffs with a list of every single exhibit CACI intended to move to exclude, but Plaintiffs declined to eliminate any of their 180 exhibits, many of which are transparently inadmissible. *See* Dkt. #1218. Thus, the Court's intervention is necessary to resolve these issues for there to be any hope of a smooth-running trial.

- Resolving Plaintiffs' motion *in limine* seeking to prevent the jury from being told of Plaintiffs' background or that they lied during interrogations. Plaintiffs have moved to exclude all reference to their conduct that led to their detention at Abu Ghraib prison. Dkt. #1225. As one example, Al Shimari seeks to conceal from the jury that he was taken into custody after the U.S. military found a veritable arsenal of machine guns, ammunition, and explosives in and around his home, that he remained in U.S. military custody for five years, and that military review boards repeatedly reviewed his case and concluded that he could not safely be returned to the civilian populace. Plaintiffs also ask the Court to preclude CACI from showing the jury, through Plaintiffs' detainee files and through cross-examination, that Plaintiffs lied during their interrogations.

- Resolving issues regarding medical examinations for two of the three Plaintiffs, which CACI has sought since 2013. On September 28, 2018, Magistrate Judge Anderson ruled that CACI could conduct medical examinations of these Plaintiffs, but that they would not have to appear in the Washington, D.C. area for such examinations. Plaintiffs took the position that they could insist that any medical examinations take place in Iraq. On October 26, 2018, Magistrate Judge Anderson granted CACI's motion to compel Plaintiffs to identify locations outside of Iraq where they would be able to appear for medical examinations. Dkt. 977. Plaintiffs advised CACI in November 2018 that they could travel to Beirut, Syria, or Iran. At that time, they stated that they may be able to travel to Jordan, Egypt, Turkey, or the UAE, but may not be able to obtain visas from those countries. Plaintiffs have since insisted that CACI must attempt to schedule the medical exams in either Baghdad or Beirut. It is patently unfair to CACI to force it to defend a personal injury case where the witnesses will appear only in Baghdad or Beirut for medical examination, and the Court will need to address this issue before any trial.

- Effectuating the Court's prior statement that key witnesses should be re-deposed behind a screen so the jury may better evaluate their testimony. All of the interrogation personnel who interacted with Plaintiffs have their identities shielded from disclosure by the United States' invocation of the state secrets doctrine and this Court's rulings requiring pseudonymous telephone depositions. The United States also has represented that they all reside outside the subpoena power of this Court. The Court has determined that key interrogators should appear for video depositions to be played at trial:

> THE COURT: So what I am thinking, because I can tell you that, that trials are -- first of all, they're deadly boring when you have to have a -- although my law clerks are very good at reading these things, but it's deadly boring, and you can -- it goes in in a time concentration that no other type of testimony goes in. What I am thinking is to order that there be re-depositions of those three or four key people, not all of them. It can be done with a screen so

> that the jury isn't going to see the person but they can at least hear it, it will go in live, and you and Mr. LoBue or whoever is going to do it for the other side can ask questions. You've already got the script. Basically, it would be the questions you've already asked them. Perhaps you can work with the government on getting ahead of time a few more of these background questions of a more general nature, a bit more of that, and then that can be played for the jury rather than having to read those transcripts in.

2/28/2019 Tr. at 44:6-23. Accomplishing this task requires the government to relocate those interrogators and have them appear for new depositions. Neither party can assist with these logistics because neither party knows the interrogators' identities.

- Conducting *de bene esse* depositions as necessary. Certain government witnesses agreed to submit a declaration for use in pretrial proceedings in lieu of being deposed, along with an agreement that they would appear at trial if the case proceeds to trial. In 2019, when this case was proceeding to trial, counsel for the United States advised that certain of these witnesses were no longer willing to appear as trial witnesses as promised, and CACI's then-understanding is that they were located beyond the subpoena power of this Court. If this remains the case, CACI likely will seek leave to take *de bene esse* depositions of these witnesses. There also may be additional witnesses who reside beyond the subpoena power of this Court who have important testimony that should be presented via *de bene esse* deposition if they are not willing to appear in court voluntarily.

The above partial list of tasks to be accomplished would be a significant drain on the Court's resources, the United States' resources, and the parties' resources. All of that expenditure of time and money would be for naught if, as CACI submits, the Court's Memorandum Opinion is erroneous on the discrete legal issues addressed therein. Certification is thus appropriate.

III. CONCLUSION

For the foregoing reasons, the CACI respectfully requests that the Court certify for interlocutory appeal its July 31, 2023 Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2023, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel:

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