Nos. 10-1891 & 10-1921

In the United States Court of Appeals for the Fourth Circuit

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, ET AL.,
APPELLEES,

v.

L-3 SERVICES, INC. & ADEL NAKHLA,
APPELLANTS.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NO. 08-1696)
(THE HONORABLE PETER J. MESSITTE, J.)

REPLY BRIEF FOR APPELLANTS

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Plaintiffs march through the three factors of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), taking generic quotes from cases far afield from this one to emphasize how few issues qualify as immediately appealable. (Opp.11-15.) What they neglect to address is the Supreme Court's categorical determination that appeals of orders denying immunity as a matter of law satisfy the three *Cohen* factors. *E.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Eckert Int'l, Inc. v. Fiji*, 32 F.3d 77 (4th Cir. 1994). The district court's denial of defendants' claims of law of war and derivative immunity meet all aspects of the *Cohen* test for the same reasons, and the other issues in this appeal are inextricably intertwined with these two issues. Thus, this Court has jurisdiction over defendants' appeal.

Plaintiffs' principal argument is that because the district court "left open the possibility of revising its decision in the future" this appeal is premature. (Opp.13.) But that is not what the district court did in ruling on law of war immunity. It unequivocally held that law of war immunity (i) does not apply to government contractors (JA.848-51), (ii) does not apply to suits brought in U.S. courts (JA.838-41), and (iii) does not extend to violations of the law of war (JA.842-47). Interlocutory review is thus appropriate. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009) (immediate review is appropriate for denial of qualified immunity).

Nor does the district court's order for discovery and review of the relevant contracts make the appeal of its ruling on derivative immunity premature. The law of this circuit is clear that a party asserting an immunity defense has a right, under the collateral order doctrine, to appellate review of the district court's legal ruling denying immunity, even when the district court concluded that discovery is necessary to resolve the immunity defense. *See McVey v. Stacy*, 157 F.3d 271, 275-76 (4th Cir. 1998); *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997). This is because the purpose of this form of immunity is not only to insulate the party from liability, but also to shield the party (and the government) from being exposed to discovery and/or trial. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 (11th Cir. 2007); *Jenkins*, 119 F.3d at 1159. As set forth below, the district court unequivocally rejected the form of derivative immunity claimed by defendants; the content of the government contracts is irrelevant. *See* Section I.B, *infra*. The decision in *Harris v. Kellogg Brown & Root Servs.*, No. 09-2325, 2010 WL 3222089 (3d Cir. Aug. 17, 2010), is not to the contrary, as it did not involve an appeal of immunity at all.

Plaintiffs can draw no support from *Martin v. Halliburton*, 601 F.3d 381 (5th Cir. 2010), *amended and superseded*, No. 09-20441, 2010 WL 3467086 (5th Cir. Sept. 7, 2010). *Martin* did not involve appeal of a legal ruling regarding law of war immunity, which entails the right not to stand trial. *See Dow v. Johnson*, 100 U.S. 158, 158-60 (1880) (law of war immunity is not a mere defense but rather immunity from suit). And neither *Harris* nor *Mar-*

tin involved interrogation and detention functions, which the district court acknowledged to be "one of the most basic governmental functions, and one for which there is no privatized equivalent." (JA.891.) Here, as required by *Will v. Hallock*, 546 U.S. 345 (2006), the immunities claimed involve substantial public interests: protecting the war-making power and the federal government's immunity for torts arising out of its combatant activities. *Martin*'s rejection of an appeal of derivative immunity was also based on the Fifth Circuit's view of derivative immunity, which is narrower than that recognized in this and other circuits. *Compare Martin*, 2010 WL 3467086, at *7, *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996), *and Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000); *see also Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); Br.26-36. Indeed, this Court has previously allowed a contractor to take an immediate appeal of the denial of derivative immunity. *Mangold*, 77 F.3d at 1453.

The other *Cohen* factors raise little issue; as noted above, immunity claims meet this test as a categorical matter. A defendant's entitlement to immunity is recognized as an issue separate and apart from the merits of plaintiffs' tort claims, and thus the denial of immunity satisfies the second factor set out in *Cohen*. *See Smith v. McDonald*, 737 F.2d 427, 428 (4th Cir. 1984), *aff'd*, 472 U.S. 479 (1985). Finally, immunity claims implicate interests that justify immediate appeal under *Cohen*, such as "the need to avoid judicial interference with military discipline and sensitive military judgments." *McMahon*, 502 F.3d at 1339, 1340 n.7; *see also Mangold*, 77 F.3d at 1453. As

explained in defendants' opening brief and *infra*, defendants' immunity claims implicate separation of powers concerns. *See Sanchez-Espinoza*, 770 F.2d at 207 n.4; *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992).

Finally, as plaintiffs do not dispute, the other two issues in this appeal are inextricably intertwined with the immunity claims, which gives the Court pendent jurisdiction over them. *See Jenkins*, 119 F.3d at 1159 & n.2. This Court should address defendants' claims of combatant activities preemption and non-justiciability if it rejects the immunity claims. *See McMahon*, 502 F.3d at 1339 n.6; *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008); *Akers v. Caperton*, 998 F.2d 220, 223-24 (4th Cir. 1993).

ARGUMENT

Plaintiffs do not contest that they seek to regulate the conduct of wartime United States military operations on a foreign battlefield through private tort suits. Nor do they contest that the detention facilities at issue here lie at the very core of military war-making or that the torts they sue upon were committed during the course of their detention and interrogation—combatant activities for which L-3 provided its linguists and interrogators to the military. In fact, plaintiffs boldly assert as their primary argument against defendants' immunity that "the laws of war permit civil lawsuits in the United States against occupying power personnel [including American soldiers] who engage in torture." (Opp.16.)

Put differently, plaintiffs justify their attempt to use courts to require L-3 to insert its supervisors into military prison operations by arguing that nothing would prevent them from directly injecting tort law into military operations through suits against soldiers. But rather than support their cause, this merely casts in sharp relief the true dispute dividing the parties in this case (and dividing the D.C. Circuit from the district court below): whether tort law is a proper means of regulating battlefield military conduct.

Plaintiffs' fundamental premise—that soldiers are amenable to tort suits like this one—is belied by their own actions as well as the telling lack of authority supporting it. In more than six years of litigation in six different lawsuits filed by the same counsel on behalf of these and would-be fellow class members, never once have plaintiffs sought to sue the American soldiers they allege participated in these torts, let alone the command structure that they have alleged affirmatively encouraged or negligently allowed the conduct. Whatever drove their litigation choices, it strains credulity for them to argue there is a right for the occupied to sue occupying personnel when not a single case has allowed such a claim in the 130 years since *Dow*—a period that included the Spanish-American War, two World Wars, the Korean War, the Vietnam War, and two Gulf Wars, among other conflicts.

Having no precedent, plaintiffs stitch together language from opinions that *reaffirm* law of war immunity to argue the opposite—that there is no immunity here because plaintiffs alleged illegal conduct in a suit brought in a United States court to vindicate their rights under Iraq law. Plaintiffs pluck

such selective quotation even from decisions in which the arguments they make here were rejected by the majority and adopted by the dissent. And because no case has issued a judgment supporting their position, they are left to rely on such unmoored language rather than holdings. This lack of authority defines a truly unfounded claim.

Plaintiffs also have little to say about the cases that support defendants, choosing largely not to respond to defendants' arguments. In particular, plaintiffs do not contest (beyond characterizing it as "slightly dated") that *Sanchez-Espinoza*, 770 F.2d 202, was correct to grant immunity to the contractors accused of engaging in rape, torture, and other war crimes in the course of the Contra Wars in Nicaragua. And importantly, plaintiffs concede that defendants would be immune in Iraq from these very claims under Coalition Provisional Authority Order 17 ("CPA 17") (JA.211 § 4; JA.203 §§ 3, 4), which was promulgated "under the laws and usages of war." Plaintiffs' inability to distinguish *Sanchez-Espinoza* and concession that CPA 17 applies support defendants.

While plaintiffs' arguments against immunity are insubstantial, this Court has a potentially easier way to resolve this litigation: it can adopt the position of the D.C. Circuit as expressed in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *petition for cert. filed*, No. 09-1313 (Apr. 26, 2010). Plaintiffs do not dispute that adoption of *Saleh* by this Court would require dismissal of their complaint. Plaintiffs' sole argument is that *Saleh* was wrongly decided.

Over and over again, plaintiffs confuse the availability of criminal prosecution by the Executive (in federal courts or courts-martial) with the right to bring private tort claims through civil litigation. The availability of criminal prosecution, subject to the Executive's prosecutorial discretion, considered alongside repeated Congressional legislation touching on this area without creating a private right of action applicable here, undercuts rather than supports plaintiffs' claimed right to enforce tort standards against the occupying force. As *Dow* recognized, to require occupying forces to respond to suits by the occupied would destroy military efficiency, 100 U.S. at 165, a position echoed in *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950), more than sixty years later and recently reaffirmed with regard to military detention in Afghanistan, *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010). Thus, as *Dow* held, occupying forces are not governed by the civil law, but instead are only answerable to their government for violations of the law of war. *Dow*, 100 U.S. at 167.

For the same reasons defendants are immune and plaintiffs' claims are preempted and barred, this suit to regulate the United States' detention and interrogation operations in battlefield prisons poses political questions. It is not possible to adjudicate such claims without subjecting to judicial review the military's choices in supervising its prisons and carrying out the combatant activities of detention and interrogation. Plaintiffs generically argue that not all suits arising in a war zone pose political questions (particularly those against contractors). Even if true, this does not answer the issue here.

Ignoring the underlying separation-of-powers concerns and the unique context of battlefield detention and interrogation operations that distinguish this case, as plaintiffs do, does not render it justiciable. In sum, plaintiffs' claims are barred by law of war and derivative immunity, preemption, and the political question doctrine.

I. DEFENDANTS ARE IMMUNE FROM PLAINTIFFS' CLAIMS

A. The Law of War Bars Claims Arising out of Plaintiffs' Detention by the U.S. Military in Iraq

Despite the law of war cases discussed in defendants' opening brief—cases which remain vital today, *see Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) (citing *Coleman* for proposition that the occupied have no recourse against the occupiers)—plaintiffs contend that there is no law of war immunity from their claims (Opp. 15-26).

1. Law of War Immunizes Claims Against the Occupiers Even When It Is Alleged the Occupiers Violated Law of War and Suit Is Brought Outside Occupied Territory

Plaintiffs do not provide a single citation to support their assertion that illegality and war crimes vitiate immunity under the law of war. As explained in defendants' opening brief and not rebutted by plaintiffs, the contention that immunity would not attach when a plaintiff alleged acts in violation of the law of war was the position of the dissent in *Dow*. *Coleman* likewise held that a soldier who committed murder could not be called to account other than by the federal government, over a dissent that argued the opposite because the act violated the law of war.

Plaintiffs rely on language in *Coleman* and *Dow* stating that soldiers are bound by the law of war and remain responsible to their own government for violations. (Opp.21-23.) This does not mean—and no court held before the decisions on appeal here—that tort suits are available as a means to enforce the law of war, or that the allegation of such violations strip the occupiers of immunity. Plaintiffs have no answer to the contention that policing of the battlefield is committed to the Executive and should not be subject to tort regulation. While there is no dispute that soldiers and contractors on the battlefield are answerable to the United States government, the issue presented here, and answered in the negative by the cases, is whether they are also answerable in tort to the occupied. This is why the cases affirming government criminal prosecutions of soldiers and contractors are irrelevant. *See* Opp.24-26 (citing *Franklin*, *Kennedy*, and *Passaro*). That the government may choose to criminally prosecute in federal court rather than through the military justice system says nothing about the availability of private tort suits. *Franklin* did not take place during a time of war, *Kennedy* concerned car theft in West Virginia in the 1940s that was not even remotely connected to the military or occupying forces, *Kennedy v. Sanford*, 76 F. Supp. 736, 737 (D. Ga. 1947), and *Passaro* explicitly made the point that immunity does not attach if the government is choosing to prosecute, *United States v. Passaro*, 577 F.3d 207, 216 (4th Cir. 2009) ("A court does not intrude on any Executive Branch prerogative by holding that Congress empowered

the Executive to prosecute criminal activity and provided a forum for adjudication of that prosecution."), *cert. denied*, 130 S. Ct. 1551 (2010).

Other cases that plaintiffs cite (Opp.23) either reaffirm that occupiers are not subject to suit by the occupied or do not reach the issue; none permit tort claims to proceed against occupiers. *See Ford v. Surget*, 97 U.S. 594 (1878) (law of war immunized civilian from tort suit); *Freeland v. Williams*, 131 U.S. 405, 416 (1889) (dismissing tort suit under West Virginia statute without reaching law of war issue); *Underhill v. Hernandez*, 168 U.S. 250 (1897) (applying rationale of *Dow* to claims arising from civil war in Venezuela); *City of New Orleans v. Steamship Co.*, 87 U.S. 387, 394 (1874) (contracts entered by military government were enforceable after war ended). Plaintiffs' use of ellipses obscures that *MacLeod v. United States* did not involve tort claims and did not address immunity, but rather concerned the conqueror's power "to regulate trade with the enemy and in its country." 229 U.S. 416, 432 (1913) (suit against United States in Court of Claims for tariffs imposed upon goods imported to ports not under U.S. occupation). *Little v. Barreme*, *The Paquette Habana*, and *Mitchell v. Harmony* (Opp.26) are inapposite for the reasons set out in L-3's opening brief (Br.20), to which plaintiffs fail to respond. In addition, none of the cases discuss the law of war, and the only cases actually involving damage suits, *Little* and *Mitchell*, predate *Dow*. The majority in *Dow* specifically distinguished *Mitchell*, while neither the majority nor the dissent in *Dow* found *Little* applicable. *See California v.*

Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (noting "elimination of the common-law rule" embodied in *Little v. Barreme*).

Plaintiffs' reliance on the Winthrop treatise (Opp.25), is similarly misplaced. The major assertion—that soldiers (in contradistinction from the sovereign) may be held responsible for law of war violations—does not address the issue of whether a civil action (as opposed to criminal prosecution) is available. The single emphasized sentence on a following page that asserts that soldiers "may be made liable in damages" (Opp.25), is unsupported by citation,[1] contrary to precedent, and, unsurprisingly, has not been cited or relied upon by any case.

Even if plaintiffs were correct that allegations of war crimes vitiate immunity, it would not erase L-3's immunity here. Plaintiffs allege no facts suggesting that L-3's conduct directly violated the law of war, only that L-3 is responsible for alleged law of war violations of its employees and alleged co-conspirators. As recently made clear, international law (which includes the law of war) precludes stitching together theories of vicarious liability to reach defendants who do not personally engage in such conduct. *See Doe v. Nestle*, No. 05-5133, 2010 U.S. Dist. LEXIS 98991, at *80-97 (C.D. Cal. Sept. 8, 2010); *see also Kiobel v. Royal Dutch Petrol. Co.*, Nos. 06-4800, 06-4876, 2010 U.S. App. LEXIS 19382 (2d Cir. Sept. 17, 2010) (holding there is no cor-

[1] The sentence preceding the assertion is supported exclusively by state court decisions pre-dating and trumped by *Dow*.

porate liability under international law or the ATS). The same reasoning would bar the claims of 71 of 72 plaintiffs against Mr. Nakhla. (Br.12 n.4.)

Plaintiffs assert that law of war immunity applies only to claims brought before tribunals in occupied territory, not to claims brought outside of the occupied land. (Opp.21.) Not so. *Ford* held—over an opinion asserting that because the suit was brought after the occupation in a domestic court law of war immunity was inapplicable, 97 U.S. at 608 (Clifford, J., concurring)—that a suit for a civilian's tort during the war was barred by law of war immunity, *id.* at 607-08. Once again, *Dow* clearly refutes the position plaintiffs assert through incomplete quotation of that opinion (Opp.22):

> The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; *it is not the civil law of the conquering country*: it is military law,—the law of war, —and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is . . . essential to the efficiency of the army . . . .

Dow, 100 U.S. at 170 (emphasis added). Plaintiffs also do not dispute that at the time *Dow* was decided, barring suits in the foreign jurisdiction where they arose meant they could not be brought at all. (Br.22.) Thus the distinction between the courts of the occupied territory and domestic courts is one that made no sense at the time of *Dow* and is refuted by the holding in *Ford*.

2. Plaintiffs Concede that CPA 17 Bars Their Claims in Iraq

Plaintiffs concede that CPA 17 would immunize defendants if this suit were brought in Iraq and argue this means they must have recourse to the

courts here. (Opp.20 & n.5.) But the plaintiffs who were denied remedies in *Dow, Ford,* and *Freeland* had no other legal recourse against the alleged tortfeasors. Plaintiffs cannot explain why they should fare better than those plaintiffs. *Cf. Wilson v. Libby*, 535 F.3d 697, 703, 710 (D.C. Cir. 2008) (holding omission of remedy does not require access to judicial forum particularly where claims "inevitably require judicial intrusion into matters of national security and sensitive intelligence information"), *cert. denied* 129 S. Ct. 2825 (2009). As *Dow* made clear, recourse for damages is to the occupying force, not to civil tort law. *Dow*, 100 U.S. at 167; JA.176; *cf. Eisentrager*, 339 U.S. at 789 n.14 (The proper authority for enforcement of law of war "is upon political and military authorities"). And plaintiffs have a remedy here (JA.176); that they deem the remedy inadequate does not entitle them to an additional one.

More fundamentally, plaintiffs do not dispute that CPA 17 implements the aspects of law of war immunity set forth in *Dow* and *Coleman* over which the Coalition Provisional Authority had cognizance (Br.25; JA.202 (CPA 17, June 27, 2003 (promulgating order "under the laws and usages of war")). Plaintiffs' important concession that CPA 17 bars their claims in Iraq (Opp.20 n.5) also concedes that, even under their view, the predicates to defendants' immunity claims are present here as well. *See* JA.203 (immunizing coalition contractors in matters relating to "terms and conditions" of their contracts); JA.211 (same). And *Dow* is clear that the occupiers are not subject to the civil law of Iraq *or* the United States without regard to "what de-

nunciatory epithets the complaining party may characterize [defendants'] conduct." *Dow*, 100 U.S. at 165.[2] At any rate, plaintiffs cannot circumvent the important interests undergirding CPA 17 and law of war immunity that bar their suits by coming to Maryland and asserting claims under Iraq law (which is the law the district court correctly found to apply, *see* JA.914).

3. Plaintiffs' Disagreement with the District Court over Their Status as Enemy Aliens Is Incorrect and Irrelevant

Plaintiffs take umbrage at the district court's finding that they are enemy aliens, a term that applies to every subject of a foreign state at war with the United States, without reference to whether that person is actually hostile. (JA.840 & n.3.) The term reflects the status of the plaintiffs relative to occupying forces based upon their citizenship and the existence of the war and was used in the opening brief as shorthand for various, and sometimes longer, formulations found in the relevant cases, e.g., "those against whom force is directed" (*Koohi*), "enemies" (*Dow*), "enemy aliens" (*Eisentrager*). The key is that all the cases make clear that these plaintiffs, the occupied, cannot bring claims arising out of their wartime detention by the occupiers. The assertion that this immunity is temporary (Opp.19 & n.4), was squarely rejected in *Ford*, which applied law of war immunity to claims based on war-

[2] Plaintiffs rely on the reference to the exercise of jurisdiction by the Sending State (or Parent State) to suggest a civil remedy. (Opp.21 n.6.) But as set forth above and in defendants' opening brief, this is a reference, as in *Dow*, to prosecutions by the government and administrative schemes such as the Foreign Claims Act (JA.176), not civil suits.

time activities, even though the suit was instituted during peacetime. *See* 97 U.S. at 608 (Clifford, J., concurring).[3]

In quarreling with the district court's application of the term to them, plaintiffs miss the relevance of it altogether. While the status of the plaintiffs in *Eisentrager* and the enemy property cases as enemy aliens was necessary to the holdings of those cases, those cases are not cited as controlling here. Rather, they demonstrate that the outbreak of war alters even Constitutionally-enshrined legal relations of greater weight than plaintiffs' common law tort claims against the occupiers.

B. Defendants Are Entitled to Derivative Immunity

Plaintiffs' argument that derivative immunity extends only to delegation of lawful acts falls apart in the face of *Sanchez-Espinoza*. Plaintiffs do not dispute that the D.C. Circuit properly granted immunity to the government contractors in *Sanchez-Espinoza*, but claim that its holding is not applicable here because in that case "the challenged acts were 'official actions of the United States'" authorized by the President. (Opp.37.) But the Complaint in *Sanchez-Espinoza* explicitly alleged that non-combatants had been raped, mutilated, and tortured in the course of the operations in Nicaragua,

[3] Plaintiffs' claim that they are not enemy aliens because the war was not authorized or ended is makeweight. The Civil War, which gave rise to law of war decisions relied upon here, also was not a "declared war." At any rate, the agreement limiting the prerogatives of U.S. troops in Iraq took effect on January 1, 2009, after this suit was filed. *See also Munaf v. Geren*, 553 U.S. 674, 699 (2008) (recounting "on-going hostilities").

e.g., Am. Compl. ¶¶ 84, 93, No. 82-3395 (D.D.C July 20, 1983), conduct which is of course contrary to U.S. law (and which the Complaint alleged was also in violation of the law of nations and the Constitution, *id.* ¶¶ 127, 129, 131, 137). Moreover, several members of Congress joined in the suit arguing that the actions were contrary to express Congressional directives and law, and the U.S. Government filed a brief suggesting that there had been no official involvement in the incidents at issue, *see* Fed. Defs. Mot. to Dismiss, Case No. 82-3395 (D.D.C. Feb. 22, 1983). The D.C. Circuit did not find that the President specifically authorized each alleged act of rape or torture in the course of the military operations in Nicaragua, but that the mission and the contractors' participation in it were authorized, and civil suits against the contractors for torts allegedly committed during that operation—exactly the same torts alleged here during a far more "authorized" war—would trench on the sovereignty of the United States.

In attempting to refute this persuasive analysis, plaintiffs do not dispute that the claims in this case arise out of defendants' performance of core public functions in the wartime detention and interrogation operations of the United States military. Plaintiffs instead focus on the fact that one early case involved conduct that was concededly legal for the government to perform. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22-23 (1940). But *Yearsley* did not purport to limit derivative immunity to this context. It was later applied to support a line of cases that establish a defense when the defendant can show under a contract that the government required them to en-

gage in conduct legal for the government but illegal for private parties (Opp.30-31). Cases from this circuit have also relied on *Yearsley* to support the development of derivative immunity and applied the doctrine to contractors performing core government functions regardless of the term of the contract and even when the alleged conduct is illegal or improper.

Thus, in *Mangold* this Court held a government contractor was entitled to immunity from civil suit for its perjurious response to a governmental request for comments, *Mangold,* 77 F.3d at 1447-48, even though perjury and lying to the government is clearly contrary to law, 18 U.S.C. § 1001; *see also Butters*, 225 F.3d at 466 (contractor entitled to immunity for illegal discrimination and retaliatory firing on the basis of gender). Plaintiffs struggle desperately to limit *Mangold* to its facts, citing a single court of appeals case (Opp.33)[4]—while ignoring multiple cases from the courts of appeals cited in L-3's opening brief that have pointedly extended *Mangold* beyond the testimonial context. *See* Br.29. Indeed, this Court's own decision in *Butters* embraced *Mangold* as a broad precedent applicable to derivative immunity outside the testimonial privilege context. *Butters*, 225 F.3d at 466. Rather than acknowledging this, plaintiffs' brief, as did the district court opinion, reverses the temporal order of the cases in their discussion (Opp.30-34), omitting any

[4] *See* Opp.33-34 (citing *Houston Cmty. Hosp.* (noncombat); *In re KBR, Inc.* (refuse-disposal and water-treatment services). Neither involved governmental functions without "privatized equivalent." (JA.891.)

mention of *Butters*' application of the framework for assessing derivative immunity set out in *Mangold*.

Mangold and *Butters* dispose of plaintiffs' claim that derivative immunity turns on (1) whether the terms of the contract required the defendants to perform the contested action, and (2) whether that action was lawful (Opp.29-36). In *Mangold*, this Court concluded that derivative immunity was appropriate despite a district court finding that there was no evidence of any contractual provision under which the government had required the defendants to perform the disputed action at all, let alone any contract or other requirement that required them to perform it in a false and perjurious manner. *Mangold v. Anser Corp.*, 842 F. Supp. 202, 203 (E.D. Va. 1994). That is, there was no evidence the specific conduct was directed or required by the federal government, but because the defendants were performing key governmental functions they were entitled to derivative immunity even for illegal acts. *Id.* Similarly in *Butters*, the inquiry was not into the nature of the contractual relationship between Vance International and the Saudi government, but the function being performed. This is precisely the situation here; both the district court (JA.867-69) and plaintiffs urge that examination of the underlying contract is necessary to a determination of derivative immunity, but in so doing they confuse the "government made me do it" defense, where the contract may (or may not) be relevant, with the functional derivative immunity that assesses the social benefits of immunity against the costs.

As set out in *Mangold* and *Butters*, derivative immunity is appropriate when a contractor is performing a governmental function, and "the public benefits obtained by granting immunity outweigh its costs." *Mangold*, 77 F.3d at 1446-47. Plaintiffs make no attempt to dispute that interrogation of enemy aliens on the battlefield is a core government function. Plaintiffs acknowledge no public benefits from insulating battlefield interrogation and detention, despite the Supreme Court's repeated admonitions that civil liability is inconsistent with military efficiency, *Dow*, 100 U.S. at 1, hampers battlefield operations, *Eisentrager*, 339 U.S. at 779, interferes with executive authority, *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988), and fetters military discipline and command, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *see also United States v. Stanley*, 483 U.S. 669, 681 (1987).

Instead they focus exclusively on the fact that immunity would preclude some meritorious claims. They rely on statements from a Department of Defense ("DoD") rulemaking that they contend express the government's support for their assertion that immunity should not attach. (Opp.35-36.) This argument is disingenuous at best; plaintiffs neglect to inform this Court that the United States has expressly disavowed plaintiffs' interpretation of the DoD rules, explaining that the DoD did not intend to opine as to whether the law permitted civil suits against government contractors. *See* JA.819 n.4; *see also Saleh*, 580 F.3d at 9-10 (rejecting this argument).

Moreover, plaintiffs' argument is simply wrong; while the ability to impose some sanction on inappropriate acts by contractors is of course in the

public interest, there is no reason that "the obligations the United States has made to the international community to prevent and punish the imposition of torture" (Opp.34-35) need to be enforced through private civil suits, rather than through vigorous enforcement of the criminal laws. "Irrespective of the availability of private tort remedies, contractors remain subject to applicable federal criminal law and contractual remedies, the enforcement of which is under the purview of the United States Government." (JA.821 n.7.)[5] All imposition of civil liability would do that is not already done through the criminal and administrative remedies is ensure that contractors such as L-3 would need to place on-the-ground supervisors within military units to question, evaluate, and potentially countermand every order given by military officials to contract employees—a result that would greatly hinder U.S. military operations.

II. PLAINTIFFS' CLAIMS ARE PREEMPTED

Plaintiffs do not dispute the critical point that if this Court adopts the reasoning of the D.C. Circuit in *Saleh*, 580 F.3d 1, it should reverse the dis-

[5] Plaintiffs selectively quote from the Brief of the Solicitor General in *Carmichael v. Kellogg, Brown, & Root Service, Inc.* (No. 09-683) (Opp.20), without acknowledging that the Solicitor General stressed that there were a number of different viable options for this control (JA.821), or that "[t]he United States has significant interests in ensuring that sensitive military judgments are not subject to judicial second-guessing, in protecting soldiers and civilians from wartime injuries, and in making sure contractors are available and willing to provide the military with vital combat-related services." (JA.816.)

trict court's order denying defendants' motions to dismiss on pre-emption grounds. Plaintiffs instead urge this Court to disagree with the D.C. Circuit on the scope of preemption of precisely the same claims. This Court should follow *Saleh* and decline to set itself at odds with the D.C. Circuit.

Saleh did not "immunize all corporate contractors assisting the military in war zones." (Opp.39.) Adhering to the methodology and rationale of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the *Saleh* court carefully tailored the scope of the displacement of the preempted law to coincide with the bounds of the federal interest being protected. *Saleh*, 580 F.3d at 8. The D.C. Circuit took care to explain the limits of the preemption rationale it articulated, which squarely encompassed these claims against the contract linguists and interrogators in military prisons, but would not encompass every service contractor on the battlefield. *Id.* at 9.

Plaintiffs' arguments for rejecting the D.C. Circuit's rationale are primarily arguments that their counsel previously made but were rejected by that court. For example, in rejecting an argument recycled by plaintiffs here (Opp.40-41), *Saleh* explains that *Boyle* held the exclusion of contractors from the FTCA does not preclude looking to FTCA exemptions in outlining the scope of preemption. *See Saleh*, 580 F.3d at 6 (explaining that this issue was briefed and decided by the Supreme Court over dissent) (citing *Boyle*, 487 U.S. at 526-27). In other words, plaintiffs' argument quarrels with *Boyle* itself, not *Saleh*.

The D.C. Circuit also rejected the argument made here (Opp.42-44) that *Boyle* should be limited to the FTCA exemption at issue there and not expanded to encompass the combatant activities exemption, *see Saleh* 580 F.3d at 7-8, which is inconsistent with the only other appellate decision to have addressed the issue, *see Koohi*, 976 F.2d at 1337 (combatant activities exception can serve as a source of preemption of claims against government contractors) (citing *Boyle*).[6]

In urging this Court to reject the D.C. Circuit's alternate field preemption rationale, plaintiffs argue that the reservation of "historic police powers of the States," (Opp.46), creates a presumption against preemption here. But plaintiffs confuse preemption in areas of uniquely federal interests with areas historically regulated by states, a distinction on which the *Boyle* analysis rested.[7] Regulation of the United States military's operations on foreign

[6] In an attempt to distract from the fact that *Koohi* also found preemption arising from the combatant activities exception, plaintiffs argue that the Ninth Circuit "essentially injected government discretion" into its test for combatant activities. (Opp.43.) Not so. If *Koohi* rested upon the exercise of the government's discretion, its discussion of combatant activities would have been unnecessary. At any rate, because L-3 linguists and interrogators were performing, as the district court observed, "one of the most basic governmental functions, and one for which there is no privatized equivalent," JA.891, there can be no question that uniquely federal interests are implicated.

[7] *Compare Boyle*, 487 U.S. 500, 504 (1988) (distinguishing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) *with Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009) (relying on *Rice* as establishing that historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress), *and* Opp.48 (relying on *Rice*).

battlefields has never been the province of the States; it is constitutionally committed to the political branches of the federal government. Unlike drug manufacturer liability, military contractor liability is one of "a few areas, involving uniquely federal interests, [that] are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called federal common law." *Boyle*, 487 U.S. at 504 (citation and internal quotations omitted); *see also id.* at 507 (uniquely federal interests mean the "conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates 'in a field which the States have traditionally occupied'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Nearly one hundred years after *Mitchell v. Harmony*, Congress expressed in the FTCA a policy of eliminating tort from the battlefield, "both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Saleh*, 580 F.3d at 7.[8] Moreover, despite extensively legislating in the areas of torture and war crimes, Congress has never created a private right of action that these plaintiffs might pursue. Congress

[8] *The Paquete Habana*, 175 U.S. 677 (1900), the other case on which plaintiffs rely to assert that there is a right to assert tort claims arising out of war (Opp.44), was not a tort action at all, it was an action in prize.

did, however, authorize an administrative claims process to compensate for the injuries alleged here. (JA.176.) Because this is an area reserved to the federal government, i.e., one of uniquely federal interests, the combined effect of Congressional action and inaction in this area of uniquely federal interests preempts and bars these claims.[9]

And while plaintiffs attempt to distinguish the precedents relied upon by *Saleh* as falling not within the war-making context but the foreign policy context (Opp.45-46), *Saleh* addressed that very point. *See Saleh*, 580 F.3d at 12 n.8 ("Insofar as this lawsuit pursues contractors integrated within military forces on the battlefield, we believe it similarly interferes with the foreign relations of the United States as well as the President's war making authority.").

III. ADJUDICATION OF THIS CASE IS BARRED BY THE POLITICAL QUESTION DOCTRINE

Ignoring the record and L-3's brief, plaintiffs piece together generic arguments about why the six factors of *Baker v. Carr* are not implicated in suits against government contractors generally (Opp.49-57), although defendants rely only upon the first two *Baker* factors (Br.41-42), which are of

[9] Plaintiffs' citation to *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984) is inapposite. That case was decided as a matter of statutory interpretation of the Atomic Energy Act, an issue of domestic regulation. *Id.* at 256. *Bonito Boats Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989), merely quotes from *Silkwood*, while holding the opposite, i.e., that there is preemption in an issue of intellectual property regulation.

foremost "importance and certainty," *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Even if these claims were not barred for the reasons set forth above, they present political questions.

Regulation of battlefield detention and interrogation is committed by the text of the Constitution to the political branches. (Br.44.) Plaintiffs do not seriously dispute this, but argue (Opp.50-51) there is no bar to suit because L-3 is not part of the Executive. This is true but irrelevant. Plaintiffs' claims broadly implicate the administration of all U.S. military interrogation and detention facilities in Iraq over more than five years. All of the conduct at issue was in the presence of a "co-conspirator," used to denote soldiers and contractors integrated in military units. And the district court permitted plaintiffs to seek to hold L-3 liable for actions of members of the U.S. military who allegedly conspired with L-3, even though in most cases contractor employees were not even present. Thus, it is simply not true that plaintiffs are only asking the court to review "decisions and actions taken by L-3 . . . not the military." (Opp.50.)

The separation of powers and other concerns that preclude alien enemies from bringing civil damages claims against their wartime captors do not vanish simply because the complaint denominates military personnel as "co-conspirators" rather than defendants. The claims cannot be separated from their context as part of battlefield detention and interrogation operations. Resolution of plaintiffs' claims and L-3's defenses will unavoidably require discovery and assessment of U.S. military interrogation policy, *see, e.g.*,

JA.23-24, 26-27, 64, much of which remains classified. *See Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (The political question analysis must consider "how [plaintiffs] might prove [their] claims *and* how [defendants] would defend"); *Carmichael v. KBR Servs., Inc.*, 572 F.3d 1271, 1286 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010).

Plaintiffs' allegations alone touch directly on the U.S. military's detention policies and administration of its detention facilities in the Iraq war zone. *See, e.g.*, JA.25, 26, 61, 66 (treating as "ghost detainee"). And analysis of L-3's defenses would require examination of military decisions concerning interrogation methods and tactics, which are not subject to review by the courts. *Carmichael*, 572 F.3d at 1281-83; *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991); *Haig v. Agee*, 453 U.S. 280, 292 (1981).

Plaintiffs' allegation that they were "innocent" civilians mistakenly detained (Opp.4) emphasizes the non-justiciability of their claims. Whether they were "innocent" or of "no intelligence value" is exactly the kind of determination that is committed solely to the political branch. *See El-Shifa Pharm. Indus. v. United States*, 378 F.3d 1346, 1361-70 (Fed. Cir. 2004).

Plaintiffs fail to respond to the litany of cases demonstrating that allegations of torture do not sweep the claims out of established doctrines that bar claims by the alleged victims for alleged abuse while in the government's hands. *See* Br.at 33 n.9. The federal interests that make such claims nonjusticiable are not abated by moving the government official from the category of "defendant" to "co-conspirator."

McMahon stressed that the case "does not involve a *sui generis* situation such as military combat or training, where courts are incapable of developing judicially manageable standards." (Opp.52 (quoting *McMahon*, 502 F.3d at 1364).) It is hard to imagine a situation where tort principles are more inappropriate than battlefield detention and interrogation. The Eleventh Circuit later confirmed, in a decision ignored by plaintiffs, that the political question doctrine bars suits based on conduct over which the military exercised "plenary" control. *Carmichael*, 572 F.3d at 1276, 1281-83. That is precisely the case here.

CONCLUSION

The district court's order denying defendants' motions to dismiss should be reversed.

Respectfully submitted,

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September 30, 2010

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

I, Ari S. Zymelman, hereby certify that:

1. I am an attorney representing Appellant L-3 Services, Inc.

2. This brief is in proportionally spaced 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 6932 words.

/s/ Ari S. Zymelman
Ari S. Zymelman

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2010, I caused a true copy of the foregoing Reply Brief for Appellants to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused eight copies of the foregoing to be hand delivered to the Clerk of Court, and sent by United Postal Service, postage prepaid, to the same below-listed counsel:

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