NOT YET SCHEDULED FOR ORAL ARGUMENT

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

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

HAIDAR MUHSIN SALEH, et al.,
Plaintiffs-Appellees,
v.
CACI INTERNATIONAL INC, et al.,
Defendants-Appellants.

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

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

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

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellants CACI International Inc and CACI Premier Technology, Inc., make the following certification:

(A) **Parties and Amici.** The following persons have appeared as Plaintiffs in *Saleh et al., v. CACI International Inc et al.*, No. 1:05-cv-1165 (D.D.C.) ("*Saleh*"):[1] Haidar Muhsin Saleh, Haj Ali Shallal Abbas Al-Uweissi, Jalel Mahdy Hadood, Umer Abdul Mutalib Abdul Latif, Ahmed Shehab Ahmed, Ahmed Ibrahim Neseif Jassem, Ismael Neisef Jassem Al-Nidawi, Kinan Ismael Neisef Al-Nidawi, Estate of Ibraheim Neisef Jassem, Mustafa, Natheer, Othman, Hassan, Abbas Hassan Mohammed Farhan, Hassan Mohammed Al Azzawi, Burhan Ismail Neisef, Haibat Fakhri Abbas, Hamid Ahmed Khalaf Haref Al-Zeidi, Ahmed Derweesh, Emad Ahmed Abdel Aziz, Mahmoud Shaker Hindy, Jabar Abdul Al-Azawi, Firas Raad Moarath, Abd al Wahab Youss, Hadi Abbass Mohamed, Estate of Jasim Khadar Abbas, Yousef Saldi Mohamed, Khadayer Abbass Mohamed, Ahmed Ubaid Dawood, Ali Jassim Mijbil, Waleed Juma Ali, Abdul Majeed S. Al-Jennabi, Mufeed Al-Anni, Bassam Akram Marougi, Sinaa Abbas Farhad, Ali Al-Jubori, Meheisin Khihdeir, Abdul Mutalib Al-Rawi, Summeiya Khalid Mohammed Sa'eed, Ali A. Hussein, Sebah N. Juma'a, Kamel

[1] Many of these Plaintiffs were added through the Plaintiffs' Fourth Amended Complaint filed after the district court issued the November 6, 2007 Memorandum Order.

Abood Khalaf Al Samaraii, Hatem Shanoon Awda Hussein Al Shammeri, Mukhlas Ibrahim Ali Al-Aalusi, Khalil Ibrahim Hassan Hamad, Estate of Ahmed Abdullah Hassan Mohammed, Omar Jassam Ibrahim Khalaf Matrood, Jassam Ibrahim Khalaf Matrood, Wissam Kudhayar Nouh, Tawfeeq Al-Jubori, Bilal A. Mijbil, Ahmed Salih Nouh, Raa'd A. Al-Jubori, Abdul Rezzaq Abdul Rahman, Abdul Hafeeth Sha'lan Hussein, Hamad Oda Mohammed Ahmed, Ibraheem J. Mustafa, Ali S. Nouh, Abdul Jabbar Abdel Hassan Dagher Al-Humaydi, Abdul Kareem H. Ma'roof, Esam Majid Hassam Al-Samarai, Saad A. Hussein, Setaar J. Jezaa, Mohammed H. Jassim, Abid H. Jassim, Umar Abdulkareem Hussein, Hassan A. Ubeid, Ziyad A. Al-Jennabi, Abdul Qaddir S. Ubeid, Haidar Abdel Rahman Abdel Razzaq, Faisal Abdulla Abdullatif, Estate of Buthaina Khalid Mohammed Sa'eed, Mohammed Mahal Hammadi Al Hassani, Zedan Shenno Habib Mehdi, Ayad Mughaffar Younis, Me'ath Mohammed Aluo, Estate of Mithal Kadhum Al Hassani, Ala'a Juma'a Aid, Akeel Hany Abdulameer, Raheem Abbosi Raheem, Saed Mohammed Najim, Ghani Talib Fadhil, Ali Haraj Ali, Tawfeeq Haraj Ali, Thamer Ahmed Ali, Ahmed Ali Salih, Nahiz Dalaf Ali, Ali Nife Mohammed, Hasson Ali Chidam Abdualah, Nazhan Abdualah Mohamed, Ahmed Abdualah Mohamed Abid Al-Badrani, Nahidh Zedan Hassan, Faisal Hassan Ajjaj, Abduallah Mansour Khammes, Mahmoud Yusif Khalaf, Khalid Hammad Dahham, Shakir Mahmoud Yousif, Rasmi Ali Hameed, Hatam Ali Hameed, Mohammed Ayed

Hameed, Abduallah Saba'a Khamas, Salih Mahmoud Wadi, Malik Ali Mahmoud, Ubaid Mahmoud Abduallah, Murshid Mohammed Hassan, Esam Mohammed Hassan, Mohammed Hassan Ali Al-Azawi, Talib Abbass Anfous Al-Falahi, Abbas Mohammed Jasim Al-Janabi, Suja'a Abdual Razaq Jibara'a, Ma'ath Abdualrazaq Al-Mousawi, Estate of Ali Tah'a Ubaid, Hussam Dhahir Sultan, Hamid Ahmed Hussani, Shallal Chead Mohammed, Mohammed Ahmed Mansour Hussain, Tahha Abid Hussain Al-Zubaee, Mohamed Shihab Hassan, Estate of Hussain Ali Abid Salim, Taha Mahmoud Taha Majeed, Saleem Faiadh Khalaf Hammeed, Ahmed Abbas Kadhim, Ali Faidh Khalaf, Amir Mohammed Abduallah, Maulood Adna'an, Sulajman Merias Ghoteth, Nermeen Abbas Salih, Hazim Anwar Al Nassiry, Abdel Latif, Fahd Hassan Chiyah, Mohammed Alao Mahdi, Ahmed Abid Rahma Ali, Abduallah Jamal Shakir Al-Jubory, Estate of Ahmed Satar Khamass, Hussain Abdualah Huraish Al-Mashdani, Abdul Aziz M. Abid Al-Juboori, Raeed Ubae Shilal, Thair Obaid Shilal, Juma Ayad Awad, Estate of Mohamed Kamel Yahya, Najeeb Abbas Aamad Al-Shami, Hatef Abdal Rahman Aghwan, Adel Shawkat Sabri Al-Obaidy, Khudayr Abbas Hassan Al-Tamimi, Adeba Jasim Al Jubori, Ali Hussain Ahmed Al Ta'ey, Ibraheem Hammad Abid Atwan, Jasim Faadhil Hamad, Ahmed Abbass Jawad, Mohammed Badulla Najim, Moafaq Sami Abbas Al-Rawi, Sami Abbas Al-Rawi, Abdullah Hassan Mohammed Mustafa, Hassan Mustafa Jassim Saloom Al-Faraji, Mohammed Hassan Alwan Mohammed,

Senad Reja Abdul-Wahib Ayyoub, Natheer Nazir Mohammed Abdullah, Mohammed Tomahed Ali Hussain Hussein Farhan Al Obaidi, Jalal Abid Ahmed Nasir, Adil Nema Uda Shukir, Ibraheem Abid Ahmed Nasir, Jamal Abid Ahmed Nasir, Estate of Nema Uda Shukir Mahmood, Abid Ahmed Nasir Mufdhi, Naf'a Ahmed Faidh Thamer, Abdel Karim Abdul Razzak Abdel Qadir Al-Alainezy, Sheikh Barakat, Basim Khalil Ibrahim Mustaff Al Azawi, Mejbil Ahmed Abid, Husam Mejbil Ahmed, Omar Talab Dira, Nawfal Salim Hummadi, Abdualqadir Salim Hummadi, Shakir Muteab Raddam Hael, Laith Sabah Hummadi, Qasim Abbass Fayadh, Osama Sabbah Hummadi, Ra'ad Hatim Hassan, Abdul Hafiz, Abdul Satar Yasin Hamadi, Akeel Salim Humadi, Younis Mahdi Ali Al-Ogaidi, Khalid Hussain Mohammed, Majid Hussain Mohammed, Estate of Abdualqadir Ali Adi, Haidar Naji Ibraheem Al-Ubaidi, Hussain Jiwad Kadhim Al-Janabi, Omer Sa'ad Khalaf, Mohammed Hikmat Abdualhameed, Sa'ad Abbass Jasim, Ziad Ra'ad Ma'aradh, Saif Abid Ibraheem Al-Shujari, Usama Hikmat Abdul Hameed, Khalel Ibraheem Ismael, Sa'ad Ahmed Nawaf Al-Dulaimi, Salah Mohamed Alwan, Abdul Rahman Abdul Jalel Al-Marsumi, Mohamed Ibraheem Dahboosh, Dhea'a Sabri Salman, Mohamed Saed Hamad Mutar, Ala'a Abid Al-Qadir Salman Hassan, Saed Hameed Dhahir Hamad Al-Ethawi, Thaer Mohammed Salman Khadhim, Amer Abbass Mohammed, Ahmed Ali Adi Khalaf, Ibrahim Ali Hassoon Al-Faraji, Ahmed Abduljabar Abass, Khalid Abass Karhmash, Hardan Hashim

Jasim, Khalid Ahmed Ta'an, Amir Hardan Hashim, Ibraheem Mohammed Ghafri, Najim Abid Hassan Ali, Talib Abid Khalaf, Abbas Abdel Ameer Ubeid, Amer Abdulwahid Muhaysin, Muayed Jassim Mohammed, Sadia Ibrahim Zoman, Firas Majid Hamid, Ahmed Abdullah Rasheed Al Qaisi, Mohammed Hamed Sirhan Basheer Al-Mihimdi, Haitham Saeed Al-Mallah, Mahdi Menzil Fares Sharqy Al-Assafi, Merwan Mohammed Abdullah, Ibrahim Mustafa Jassim Saloom Al-Faraji, Mohammed Mustafa Jassim Saloom Al-Faraji, Nadia Saleh Kurdi, Ismail Ibrahem Rijab, Sufian Ismail Ibraheem, Mohammed Fulaih Hassan, Ilyass Jasim Mohammed Kathim, Emad Sabah Muslih, Muslih Mashkor Mahmood, Mohammed Ali Hussain, Ali Ubeid Kheasara, Tawfiq Ubeid Kheasara, Ahmad Hassan Mhous, Khalid Khaleel Ibrahim, Abdualsalam Jasim Mithgal, Bara'a Mohamed Abdualah, Ma'ath Emad Suhail, Sa'ad Ali Jabir, Mahmoud Shihab Hassan, Ahmed Salim Shallal, Ali Salim Shallal, Ammar Naji Ali Faidh Al-Zubaeya, Khayr Ibraheem Mohammed, Ammar Juma'a Abid, Malik Hassan Mukhlif Abid, Fadel Abid Juda Al-Obaidi, Akeel Mohammed Farhan, Nori Saleem Faza'a, Mohammed Mohsen Jebur Ali, Talib Nusir Murhij, Basheer Abbass Kadhum, and Mustafa Ismail Aggar.

The following entities have appeared as Defendants in the *Saleh* action: CACI International Inc, CACI Premier Technology, Inc., CACI, Inc. – Federal, CACI, N.V., Titan Corporation, L-3 Communications Titan Corporation, Adel

Nakhla, Steven Stefanowicz, John Israel, Timothy Dugan, and Daniel Johnson. There have been no amici curiae appearing in the *Saleh* action.

The following persons have appeared as Plaintiffs in *Ibrahim et al., v. CACI Premier Technology, Inc., et al.*, No. 1:04-cv-1248 (D.D.C.) ("*Ibrahim*"): Ilham Nassir Ibrahim, Saddam Saleh Aboud, Nasir Khalaf Abbas, Ilham Mohammed Hamza Al Jumali, Hamid Ahmed Khalaf, Al Aid Mhmod Hussein Abo Al Rhman, Ahmad Khalil Ibrahim Samir Al Ani, Israa Talb Hassan Al-Nuamei, Huda Hafid Ahmad Al-Azawi, Ayad Hafid Ahmad Al-Azawi, Ali Hafid Ahmad Al-Azawi, Mu 'Taz Hafid Ahmad Al-Azawi, and Hafid Ahmad Al-Azawi.

The following entities have appeared as Defendants in the *Ibrahim* action: CACI International Inc, CACI Premier Technology, Inc., CACI, Inc. – Federal, CACI, N.V., Titan Corporation, and L-3 Communications Titan Corporation. There have been no amici curiae appearing in the *Ibrahim* action.

(B) **Rulings Under Review.** Appellants CACI International Inc and CACI Premier Technology, Inc. have appealed the November 6, 2007 Memorandum Order issued by Judge James Robertson of the United States District Court for the District of Columbia denying Appellants' motion for summary judgment on the issue of combatant activities preemption. RI.102; RS.137. Judge Robertson's Memorandum Order was issued in *Haidar Muhsin Saleh et al., v. CACI International Inc et al.*, No. 1:05-cv-1165 (D.D.C.) and *Ibrahim et al., v.*

CACI Premier Technology, Inc., et al., No. 1:04-cv-1248 (D.D.C.). The official reporter cite for the Memorandum Order is not yet available, though the decision may be retrieved from Westlaw. *See Ibrahim v. Titan Corp.*, __ F.Supp.2d __, No. 1:04-cv-1248, 2007 WL 3274784 (D.D.C. Nov. 6, 2007).

(C) **Related Cases.** The following cases also involve the November 6, 2007 Memorandum Order:[2]

Ibrahim, et al., v. Titan Corporation, et al., No. 08-7009 (D.C. Cir.). The *Ibrahim* Plaintiffs filed a direct appeal from the November 6, 2007 Memorandum Order dismissing defendant Titan Corporation. The *Ibrahim* Plaintiffs have also appealed from the district court's order denying Plaintiffs' Motion for Reconsideration of the November 6, 2007 Memorandum Order, and from the district court's order directing the clerk to enter final judgment dismissing Titan Corporation pursuant to Fed. R. Civ. P. 54(b).

Saleh, et al., v. Titan Corporation, et al., No. 08-7008 (D.C. Cir.). The *Saleh* Plaintiffs have filed a direct appeal from the final judgment entered by the district court dismissing Titan Corporation pursuant to Fed. R. Civ. P. 54(b).

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[2] The Court has consolidated Plaintiffs' direct appeals in the *Ibrahim* and *Saleh* actions.

CORPORATE DISCLOSURE STATEMENT

Appellant CACI Premier Technology, Inc. is a privately-held company. Appellant CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. No publicly-traded company has a 10% or greater ownership interest in CACI International Inc.

William Koegel, Jr.

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GLOSSARY OF ABBREVIATIONS

AOR	Area of Responsibility
CACI	Collectively CACI International Inc and CACI Premier Technology, Inc.
CACI PT	CACI Premier Technology, Inc.
CDR	Commander
CI	Counter-Intelligence
CIV	Civilian
CJTF-7	Coalition Joint Task Force-7
COR	Contracting Officer's Representative
DE	Docket entry
DO	Delivery Order
EPWs	Enemy Prisoners of War
FTCA	Federal Tort Claims Act
HSTs	HUMINT Support Teams
HUMINT	Human Intelligence
IAW	In Accordance With
ICE	Interrogation Control Element
IIR	Intelligence Information Report
INS	Interrogation Notes

IROEs	Interrogation Rules of Engagement
IRT	Individual Readiness Training
LOA	Letter of Authorization
MI	Military Intelligence
MIL	Military
NCOIC	Noncommissioned Officer in Charge
OIC	Officer in Charge
RI.__	The district court record in *Ibrahim et al., v. CACI Premier Technology, Inc., et al.*, No. 1:04-cv-1248 (D.D.C.)
RS.__	The district court record in *Haidar Muhsin Saleh et al., v. CACI International Inc et al.*, No. 1:05-cv-1165 (D.D.C.)
SOP	Standard Operating Procedure

I. STATEMENT OF JURISDICTION

The district court had jurisdiction, initially, over Plaintiffs' claims in *Ibrahim v. CACI Premier Technology, Inc.*, No. 1:04-cv-1248 (D.D.C.) ("*Ibrahim*") and *Saleh v. CACI International Inc*, No. 1:05-cv-1165 (D.D.C.) ("*Saleh*") pursuant to 28 U.S.C. §1331 (federal question) and, subsequently, under § 1332 (diversity).

This Court has jurisdiction over the CACI Defendants'[3] appeals in 08-7044 and 08-7045 pursuant to this Court's March 17, 2008 orders granting the CACI Defendants' petitions under 28 U.S.C. § 1292(b) for permission to appeal the district court's November 6, 2007 Memorandum Order, *Ibrahim v. Titan Corp.*, 2007 WL 3274784 (D.D.C. Nov. 6, 2007) (the "district court's decision"), in the *Ibrahim* and *Saleh* actions.

This Court has jurisdiction over the CACI Defendants' appeals in 08-7001 and 08-7030, which seek appellate review of the same district court order as 08-7044 and 08-7045, pursuant to the collateral order doctrine.[4]

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[3] The term "CACI Defendants" refers, collectively, to Appellants CACI International Inc and CACI Premier Technology, Inc.

[4] The *Saleh* Plaintiffs moved to dismiss the CACI Defendants' appeal in 08-7001. A motions panel directed the parties to address the issue in their merits briefs. To the extent the *Saleh* Plaintiffs' motion to dismiss has not been mooted by this Court's subsequent orders granting the CACI Defendants permission to appeal the same district court decision under 28 U.S.C. § 1292(b), the CACI Defendants have briefed this issue in Section VIII.F, *infra*.

II. ISSUES PRESENTED

A. Whether federal law, embodied in the Constitution and the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j), preempts tort claims against a government contractor for combatant activities the contractor performed in a war zone?

B. Whether the district court erred in holding that, to prevail on a combatant activities preemption defense, a government contractor must show its employees were acting under the "exclusive operational control" of the military chain of command?

C. If combatant activities preemption requires a showing that the military exercised "exclusive operational control" over the contractor's employees, whether the district erred in holding that a contractor's retention of some degree of administrative supervision over its employees precludes summary judgment?

III. STATUTES, REGULATIONS AND GUIDELINES

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

IV. STATEMENT OF THE CASE

In June 2003 the number of Iraqis detained by Coalition forces fighting the Iraq war began to increase dramatically. Thousands of detained Iraqis had to be screened by qualified personnel and, if determined to have valuable intelligence, questioned by trained interrogators. The U.S. Army, however, lacked enough trained interrogators, a shortfall that required augmentation in the form of civilian

contractor interrogators.[5] The Army turned to CACI Premier Technology, Inc. ("CACI PT") to provide intelligence support services, including interrogators.

In April 2004, the details of a classified Army report authored by Major General Antonio M. Taguba were leaked to the media.[6] The Taguba Report implicated not only the military units tasked with running Abu Ghraib prison in detainee abuse, but also a CACI PT interrogator and a Titan Corporation translator. This litigation followed.

The *Ibrahim* and *Saleh* actions were brought by Iraqis detained as enemies by U.S. military forces in Iraq. Plaintiffs allege that, during their detention, they were abused by military personnel and civilian contractors. RI.112 at 17-47; RS.151 at 18-25. The *Saleh* Plaintiffs alleged a broad conspiracy between high-ranking government officials, including the Secretary of Defense and two Undersecretaries of Defense, dozens of military personnel of all grades, and the CACI and Titan Defendants, to abuse detainees and to increase the demand for

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[5] Donald Wright & Timothy Reese, *On Point II – The United States Army in OPERATION IRAQI FREEDOM May 2003–January 2005*, 205-209 (Combat Studies Institute Press 2008).

[6] Article 15-6 Investigation of the 800th Military Police Brigade, March 2004, available at http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html.

interrogation services through the abuse of detainees. RICO Case Statement at 13.[7] Plaintiffs assert that the CACI Defendants, one of which provided civilian interrogators to the U.S. military in Iraq, and The Titan Corporation ("Titan"), which provided civilian translators to the U.S. military in Iraq, are liable for the injuries they suffered while in U.S. custody. RI.112 at 17-47; RS.151 at 18-25. Plaintiffs' claims were brought, *inter alia*, under the Alien Tort Statute, RICO, and as a series of common-law torts. *Id.*

The *Saleh* Plaintiffs filed their Complaint in June 2004 in the U.S. District Court for the Southern District of California, though the case ultimately was transferred to the District of Columbia in 2005. The *Ibrahim* Plaintiffs filed their Complaint in July 2004 in the U.S. District Court for the District of Columbia. RI.1.

The district court (Robertson, J.) granted Defendants' motions to dismiss most of the *Ibrahim* Plaintiffs' claims, including their RICO and Alien Tort Statute claims. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 19 (D.D.C. 2005). The district court declined to dismiss some of the *Ibrahim* Plaintiffs' tort claims on the grounds that the motion to dismiss record was insufficient to determine whether those claims were preempted by federal law. *Id.* Nevertheless, the district court ruled

[7] The *Ibrahim* Plaintiffs alleged a conspiracy between the CACI Defendants and Titan, but did not allege that government officials or military personnel were part of the alleged conspiracy. RI.1.

that "[f]ull discovery [was] not appropriate at this stage," and held that the next step would be for Defendants to file summary judgment motions on the preemption issue, with the *Ibrahim* plaintiffs taking discovery in order to respond to such motions. *Id.*

The district court's motion to dismiss ruling did, however, announce the court's view as to the relevant questions for determining whether the statutory retention of sovereign immunity for combatant activities, codified in an exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), would preempt Plaintiffs' tort claims:

> What were [the contractors'] contractual responsibilities? To whom did they report? How were they supervised? What were the structures of command and control? If they were indeed soldiers in all but name, the government contractor defense will succeed, but the burden is on defendants to show that they are entitled to preemption.

Id. The district court subsequently adopted its rulings in *Ibrahim* with respect to the motions to dismiss filed in *Saleh*, and consolidated the cases for summary judgment discovery. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 60 (D.D.C. 2006).

After the parties completed the limited discovery directed by the district court, filed summary judgment briefs and presented oral argument, the district court issued a summary judgment decision that abandoned the "soldiers in all but name" approach in favor of a new test. Under the district court's new test, a

defendant seeking preemption first had to establish that its employees were engaged in a "combatant activity," which required a showing that the defendant was "engaged in 'activities both necessary to and in direct connection with actual hostilities.'" *Ibrahim*, 2007 WL 3274784, at *2 (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)). In addition, the district court added a second requirement – that combatant activities preemption would apply only where "defendants' employees were acting under the direct command and *exclusive* operational control of the military chain of command." *Id.* at *2 (emphasis added).

Applying this new, first-impression test, the district court denied summary judgment to the CACI Defendants. The district court first determined that CACI PT's interrogators clearly were engaged in combatant activities, as "[t]here can be no question that the nature and circumstances of the activities that CACI employees were engaged in – interrogation of detainees in a war zone – meet the threshold requirement for preemption pursuant to the combatant activities exception." *Id.* at *8. Although the district court acknowledged that the military indisputably exercised operational control over CACI PT's interrogators, the district court next determined that "a reasonable jury could conclude that [CACI PT employee Daniel Porvaznik] effectively co-managed contract interrogators, giving them advice and feedback on the performance of their duties." *Id.* Based on the newly-created requirement that a contractor seeking combatant activities

preemption show that the military exercised "exclusive" operational control, the district court determined that the possibility of some level of co-management of CACI PT interrogators by the military chain of command and CACI PT was sufficient to preclude summary judgment. *Id.* at *8-9.

The district court also based its denial of summary judgment on CACI PT's promulgation of a code of ethics that required its interrogators to report observed misconduct not only to the military but also to CACI PT, and Mr. Porvaznik's testimony that he believed he had the authority to direct a CACI PT interrogator not to carry out an interrogation plan "that was inconsistent with company policy." *Id.* at *8. The district court did determine that Titan satisfied this new preemption test, and entered summary judgment in Titan's favor. *Id.* at *9.

The district court certified its summary judgment order for interlocutory appeal under 28 U.S.C. § 1292(b), RI.110; RS.149, and this Court granted the CACI Defendants' petitions for permission to appeal on March 17, 2008, RI.125; RS.163. These appeals are docketed as 08-7044 and 08-7045. Believing that the district court's order also constitutes an immediately appealable collateral order, CACI also filed direct appeals, which are docketed as 08-7001 and 08-7030. RI.117; RS.156.

V. STATEMENT OF FACTS

A. Introduction

The undisputed evidence demonstrates that at all times CACI PT's interrogators were subject to the supervision, direction and control of the military in performing their interrogation duties. Civilian and military interrogators answered to the same military chain of command, were subject to the same rules for interrogations, and had the same interrogation reporting obligations. While CACI PT provided administrative supervision and support to its employees, as any responsible contractor would, the day-to-day performance and operations of CACI PT interrogators were under the supervision, direction and control of the U.S. Army and ***only*** the U.S. Army.

B. The Statements Of Work Under Which CACI PT Provided Interrogators In Iraq Clearly Provide For Total Military Supervision And Control Over The Conduct Of Interrogations By CACI PT Interrogators

CACI PT provided civilian interrogators in support of the United States' mission in Iraq under two delivery orders, Delivery Order 35 ("DO 35") and Delivery Order 71 ("DO 71"). Billings Decl., ¶ 13. The Statement of Work for DO 35 provided that CACI PT would "provide Interrogation Support Cells, *as directed by military authority*, throughout the CJTF-7 AOR to assist, supervise, coordinate, and monitor all aspects of interrogation activities, in order to provide

timely and actionable intelligence to the commander." *Id.*, Ex. A at ¶ 3 (emphasis added).

The Statement of Work for DO 35 made clear that CACI PT personnel would be fully integrated with military personnel in performing intelligence analysis, screening and interrogation tasks, that priorities and tasks would be established by the Coalition Joint Task Force-7 ("CJTF-7"), and that those tasks were required to be performed in accordance with Government regulations:

> Identified personnel supporting this effort will be integrated into MIL/CIV analyst, screening, and interrogation teams (both static/permanent facilities and mobile locations), in order to accomplish CDR CJTF-7 priorities and tasking IAW Department of Defense, U.S. Civil Code and International Regulations.

Id., Ex. A at ¶ 4 (emphasis added). The Statement of Work for DO 35 contains several other entries making clear that CACI PT interrogators would perform their duties under the dominion of U.S. military personnel:

- Section 4 of the Statement of Work provides that interrogators would deal only with "detainees, persons of interest, and Enemy Prisoners of War (EPWs) that are in the custody of U.S./Coalition Forces in the CJTF-7 AOR."
- Section 5 provides that CACI PT personnel "will be required to travel (ground/air), as task/directed throughout the CJTF AOR in order to accomplish directed mission."
- Section 6 provides that CACI PT interrogators would conduct interrogations "IAW local SOP and higher

authority regulations," would review data collected and cross-reference intelligence collection priorities and plans "IAW interrogation SOPs and plan," "will conduct other intelligence supporting activities related to interrogation operations "*as directed*," and "will report findings of interrogation IAW with local reference documents, SOPs, and higher authority regulations *as required/directed*." (emphasis added)

- Section 14 specifies the place of performance: "The Government intends the contractor personnel to perform from the offices of the CJTF-7 Iraq and its designated interrogation facilities."

- Section 20 provides that the government would provide CACI PT interrogators with:

  - a Uniform Services Identification Card, a Geneva Conventions Identity Card, and a Letter of Authorization (LOA) that allows Army units to issue necessary equipment, tests, shots, and training to the employee.

  - Appropriate individual readiness training, area orientations and training/ briefings on rules of engagement and general orders applicable to U.S. Armed Forces, DOD civilians, and U.S. contractors as issued by the Theater Commander or his/her representative.

  - Force Protection Measures.

  - On-site transportation as needed to fulfill contract/mission requirements.

  - Work space and facilities as required to fulfill contract/mission requirements.

See generally id., Ex. A.

The Statement of Work for DO 71 contains similar provisions demonstrating that CACI PT interrogators were integrated within the military's interrogation command and under the direct supervision and control of that command:

> As the operational element, HSTs (HUMINT Support Teams) support the overall divisional/separate Brigade HUMINT mission, and *perform under the direction and control of the unit's MI chain of command or Brigade S2, as determined by the supported command.*

Billings Decl., Ex. C at ¶ 3 (emphasis added). Similarly, the Statement of Work provided that for CACI PT interrogators: "All actions [of the interrogators provided under DO 71] will be managed by the Senior [Counter-Intelligence] Agent," a member of the United States military. *Id.*, Ex. C at ¶ 4.d.

The Statements of Work for DO 35 and DO 71 also make clear that CACI PT's supervision would be administrative in nature. While Section 5 of the DO 35 Statement of Work referenced CACI PT's obligation to provide supervision for its employees, this was *administrative* supervision that CACI PT provided by assigning personnel to serve as country manager and site leads. Those CACI PT administrative personnel in Iraq had supervisory responsibility for all CACI PT personnel with respect to personnel, finance, and related matters. Billings Decl. ¶ 19. DO 71 contained provisions substantially similar to the provisions of Section 5 of the Statement of Work DO 35. Thus, by the express terms of the contracts,

CACI PT's interrogators operated under the direction and control of the U.S. military, while receiving administrative support from CACI PT.

C. The CACI PT Interrogators Performed The Same Interrogation Duties And Were Subject To The Same Operational Supervision As Military Interrogators

As required by the applicable Statements of Work, CACI PT interrogators were integrated within the military interrogation units that they were assigned to support. All of the interrogators in the Iraq theater of operations – military and civilian – were treated as part of one team and as having the same interrogation responsibilities, reporting obligations, and mission direction. Porvaznik Decl. ¶ 9; Mudd Decl. ¶ 8; Brady Decl. ¶¶ 2, 3; Daniels Decl. ¶ 2.

CACI PT interrogators were pre-approved by the military for deployment to Iraq. As part of that process, CACI PT interrogators were all required to hold United States government security clearances. Porvaznik Decl. ¶ 11; Northrop Decl. ¶ 7. The U.S. military, through its Contracting Officer's Representative ("COR") similarly determined whether CACI PT should remove an employee from the contract. Porvaznik Decl. ¶ 10; Mudd Decl. ¶ 9; Northrop Decl. ¶ 6.

Once in Iraq, the CACI PT interrogators were integrated in the command chain of the U.S. military. Griffin Decl., Ex. 2. For example, at Abu Ghraib prison, all military and CACI PT interrogators were under the control and supervision of the Officer in Charge ("OIC") of the Interrogation Control Element

("ICE"). During the relevant time frame, the OIC of the ICE was Captain Carolyn Wood, U.S. Army. Military and CACI PT interrogators also reported to the Noncommissioned Officer in Charge ("NCOIC") at the ICE. The NCOIC, also a member of the United States Army, reported directly to the OIC of the ICE. Porvaznik Decl. ¶ 12; Northrop Decl. ¶ 8. Below the ICE OIC and NCOIC in the chain of command were Section Leaders, who were also all members of the United States Army. Griffin Decl., Ex. 2. Each Section Leader supervised and controlled between four and eight interrogation teams, which included the military and CACI PT interrogators. Thus, the CACI PT interrogators were under the direct supervision and control of three layers of United States military personnel at Abu Ghraib prison, the ICE OIC, the ICE NCOIC, and an assigned Section Leader. Porvaznik Decl. ¶ 14.

The U.S. Army leadership formed interrogation teams from among the military and civilian interrogators, analysts, and interpreters. Each interrogation team consisted of an interrogator, an analyst and an interpreter. CACI PT's interrogators performed their mission in the same way as military interrogators. Each interrogator, whether military or civilian, would review detainee packages and develop an interrogation plan. The interrogator would then present the proposed interrogation plan to the military Section Leader, who would review the plan. The interrogation plan subsequently would be presented to the ICE OIC or

the NCOIC, also military personnel, for review and approval. Porvaznik Decl. ¶ 13; Billings Decl. ¶ 21; Northrop Decl. ¶ 9.

In reviewing these interrogation plans, the U.S. military had exclusive responsibility for setting all Interrogation Rules of Engagement ("IROEs"). Only the OIC, the NCOIC, or higher military authority could approve any deviation from the IROEs. As a result, each interrogation plan was authorized at both the Section Leader level and the NCOIC/OIC, or by higher military authority. Porvaznik Decl. ¶ 15; Northrop Decl. ¶ 10.

After concluding an interrogation, the interrogator would prepare a draft Intelligence Information Report ("IIR") summarizing the interrogation. The IIR would be entered into the military's computerized database. Porvaznik Decl. ¶ 16. Both military and CACI PT interrogators were responsible for submitting IIRs into the same military database. All databases and computer systems used by CACI PT employees were United States property, and all information entered into these databases by CACI PT employees was United States property. Porvaznik Decl. ¶ 17; Northrop Decl. ¶ 11.

The CACI PT interrogators' performance of interrogation tasks was not only supervised by the military, but CACI PT also reported to the COR, who was responsible for monitoring CACI's compliance with its contract and for contract administration. For example, leave for CACI PT employees had to be approved in

the first instance by the major subordinate command to which they were assigned, and then by the COR. From October 2003 until February 2004, CACI PT reported to Lt. Colonel William H. Brady, U.S. Army, for contract-related matters. In February 2004, Major Eugene Daniels, U.S. Army, assumed the duties of COR for the CACI PT contract. Porvaznik Decl. ¶ 18; Northrop Decl. ¶ 12.

Military and civilian interrogators were entitled to identical legal protection. All CACI PT employees that deployed to Iraq were issued Common Access Cards, Letters of Introduction, Uniform Services Identification Cards, and Geneva Convention Cards by the Army. Billings Decl. ¶ 20. These credentials constituted authorization by the military to accompany the armed forces in the CJTF-7 Theater of Operations. *Id.* As a result, as with surrendering combatants and *hors de combat* (*i.e.*, prisoners of war, wounded and sick, medical personnel, chaplains, and civilians accompanying the armed forces), CACI PT personnel, if captured, were entitled to treatment as a prisoner of war. 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, art. 13, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4.A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing prisoner of war status to "[p]ersons who accompany the armed forces without actually being members thereof, such as . . . supply contractors [and] members of labour units . . provided they have received authorization, from the armed forces

which they accompany, who shall provide them for that purpose with an identity card").

The principal difference between the CACI PT interrogators and military interrogators was that the CACI PT interrogators wore civilian clothes while their military counterparts wore uniforms, and – at least at Abu Ghraib prison – the CACI PT interrogators were billeted in a separate part of the camp. Brady Decl. ¶ 2; Daniels Decl. ¶ 2. The only "supervisory" positions held by CACI PT employees were purely internal CACI PT-related positions, such as country manager and site lead, that existed solely for providing administrative support to CACI personnel and communicating with U.S. Army personnel for contract-related issues. These internal administrative managers did not exercise any operational control over CACI or military interrogators. Porvaznik Decl. ¶ 19; Mudd Decl. ¶ 10; Brady Decl. ¶ 3.

D. The Highest Levels Of The United States Military Hierarchy Testified That The Civilian Interrogators Employed In Iraq Were At All Times Under The Direct Supervision Of The United States Military

As detailed above, both CACI PT personnel and the Army personnel responsible for overseeing the CACI PT contract provided undisputed testimony that operational control over CACI PT interrogators was vested solely in the United States military. The highest officials in the Department of Defense

similarly provided sworn testimony before Congress confirming that the civilian interrogators were at all times supervised by military personnel.

On May 7, 2004, Secretary of Defense Rumsfeld, Secretary of the Army Brownlee, and United States Central Command Deputy Commander Lieutenant General Lance Smith testified before the United States Senate Committee on Armed Forces. In response to questioning by Senator McCain, Lieutenant General Smith testified as follows:

> Q: Now were [the civilian interrogators at Abu Ghraib prison] in charge of the interrogations?
>
> A: Yes, sir. There were 37 interrogators that were –
>
> Q: I'm asking who was in charge of the interrogations.
>
> A: *They were not in charge. They were interrogators.*
>
> Q: My question is, who was in charge of the interrogations?
>
> A: *The brigade commander for the MI [military intelligence] brigade.*

RS.79, O'Connor Decl., Ex. 7 at 22 (emphasis added). In response to questioning by Senator Akaka as to the role of the civilian interrogators and linguists at detention facilities in Iraq and Afghanistan, Secretary Rumsfeld stated:

> The answer is that the civilian contractors, as I indicated, numbered something like 37 in this particular facility [Abu Ghraib prison]. They tend to be interrogators and linguists. *They're responsible to MI personnel who hire them and have the responsibility for supervising them.*

Id. at 44 (emphasis added). Secretary Brownlee immediately amplified on Secretary Rumsfeld's testimony by stating:

> In the theater, we have employed civilian contract interrogators and linguists. CENTCOM has done this. *These people have no supervisory responsibilities at all. They work under the supervision of officers or noncommissioned officers (NCOs) in charge of whatever team or unit they are on. They, most of them, are retired military, and they are usually of the skill that they retired in, and that's what they're employed for. They assist in these processes, but they are not in a supervisory role. In fact, they would be forbidden from doing that, because it would be inherently governmental.*

Id. (emphasis added).

On July 22, 2004, Inspector General of the Army General Paul Mikolashek testified as follows before the Senate Committee on Armed Services in response to questions from Senator Akaka:

> Q: Who did the contractors report to in the military chain of command?
>
> A: *There is a military intelligence supervisor or detachment commander that they reported to for their day-to-day work, as stated in the contract.*
>
> Q: Who in the military was responsible for overseeing or keeping track of the activities of the contractors?
>
> A: *The immediate supervisor is responsible for how they perform their mission, their security, and what they did. Of course there is a contracting officer that then ensures that the contract was being followed. But in terms of what they did and how they performed, their oversight on a day-to-*

> *day basis was that military supervisor, that MI person in that organization to whom they reported.*

Id., Ex. 8 at 1022 (emphasis added). This testimony from the highest levels of the United States military confirms the military's sole exercise of operational control over CACI PT interrogators in Iraq.

VI. SUMMARY OF THE ARGUMENT

The Constitution of the United States vests the power to wage war exclusively in the federal government. In waging war, the United States is protected from lawsuits under the doctrine of sovereign immunity. The combatant activities exception to the Federal Tort Claims Act retains that sovereign immunity for any claim arising out of the combatant activities of the military during time of war. 28 U.S.C. § 2680(j). Arrest, detention and interrogation of enemies during times of war are inherently combatant activities of the military.

Plaintiffs – Iraqis detained as enemies by U.S. forces in Iraq – seek through this litigation to insert themselves, the federal courts, and the substantive tort law of some unspecified state or foreign nation into the process of second-guessing U.S. interrogation policies and practices in Iraq. That exercise, however, invariably conflicts with the uniquely federal interests inherent in the conduct of war. As a result, tort claims that challenge combatant activities of the military are preempted; the federal interest in such activities is unique, exclusive and overriding.

The district court acknowledged the uniquely federal interests in battlefield intelligence efforts in support of combat operations, and further recognized that the nature and circumstances of the activities engaged in by CACI PT employees, *i.e.*, interrogation of detainees, constituted quintessential combatant activities. The district court erred, however, by requiring more than the existence of combatant activities to preempt tort claims against a civilian contractor. Specifically, the court held that a civilian contractor must be subject to "exclusive operational control" of the military for tort claims to be preempted.

The district court's test, one of first impression, contradicts the essential purpose of the federal interest in combatant activities. The combatant activities exception is designed to avoid fettering a commander's flexibility in combat, or forcing him to answer for combat judgments in a civil court. The test also contradicts the congressional judgment, reflected in the combatant activities exception, that no duty of care should exist in combat. Allowing battlefield tort suits against contractors where a contractor exercises *some* degree of supervision over its own employees otherwise under military control frustrates this federal interest by creating tort duties that Congress determined should not exist in the wartime environment. It effectively permits tort regulation of commanders' battlefield decisions by the very enemies he has been called on to suppress. As a

result, the proper test for preemption here is solely whether the contractor was engaged in combatant activities of the military.

Finally, even under the district's court's test, the record establishes beyond cavil that CACI PT interrogators were subject to the military's exclusive operational control, as that term is defined and understood by the military.

VII. STANDARD OF REVIEW

This Court reviews a district court's denial of summary judgment *de novo*. *Flynn v. Dick Corp.,* 481 F.3d 824, 828 (D.C. Cir. 2007). These appeals involve questions of law and the application of law to undisputed facts, which this Court reviews *de novo*. *Munsell v. Department of Agriculture*, 509 F.3d 572, 578 (D.C. Cir. 2007); *United States v. Yunis*, 859 F.2d 953, 958 (D.C. Cir. 1988).

VIII. ARGUMENT

Plaintiffs seek to inject themselves, the district court, and the substantive tort law of some unspecified state or foreign nation into the process of overseeing the manner in which the United States has waged war in Iraq. Plaintiffs have not named the United States or any of its officials as defendants in this case because the United States and its employees are immune from suit. Federal law will not permit Plaintiffs' roundabout attempt to interfere, in the guise of tort regulation, with the federal government's exercise of the war powers constitutionally committed to it.

While the district court correctly held that Plaintiffs' claims implicate uniquely federal interests, and that CACI PT's employees were engaged in "combatant activities of the military," the district court erred by creating an additional prerequisite for combatant activities preemption – that the contractor's employees be under the "exclusive operational control" of the military. *Ibrahim*, 2007 WL 3274784, at *2, 8-9. By imposing a requirement of "exclusive" operational control, the district court's test invites judicial micromanagement through tort law of the military's combat operations involving civilian contractors aiding the wartime mission. Such judicial oversight would frustrate the significant federal interests protected by the combatant activities exception to the FTCA.

Moreover, even if the district court's first-impression test were correct, the district court erred in applying that test to the undisputed facts, as those facts demonstrate that "operational control" of CACI PT's interrogators was exclusively vested at all times in the military.[8]

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[8] While not necessary to a finding of preemption, a decision preempting Plaintiffs' claims would not leave Plaintiffs without a remedy. In response to an administrative claim filed by Plaintiff Saleh, the U.S. Army Claims Service confirmed that the Army *will* compensate Iraqis submitting legitimate claims of abuse while detained by the United States. Griffin Decl., Ex. 8. In Plaintiff Saleh's case, the facts alleged in his administrative claim were not borne out by the evidence uncovered during the Army's claim investigation. Notably, the Army's records confirmed that Plaintiff Saleh *was not even interrogated* while detained. *Id.*, Ex. 5.

A. Applicable Legal Framework

1. Sovereign Immunity and the FTCA

Sovereign immunity bars suits against the United States absent an explicit and unequivocal waiver. *Dep't. of Army v. Blue Fox,* 525 U.S. 255, 261 (1999). The scope of any sovereign immunity waiver is strictly construed in favor of the sovereign. *Id.* (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). The FTCA waives the government's sovereign immunity for suits against the United States

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

The FTCA also contains a number of explicit exceptions to this waiver of sovereign immunity, including the combatant activities exception and the discretionary function exception. The combatant activities exception retains sovereign immunity for any claim arising out of the combatant activities of the military during time of war. 28 U.S.C. § 2680(j). The discretionary function exception retains sovereign immunity for claims based on the performance of a discretionary function or duty on the part of a federal agency or a government

employee. 28 U.S.C. § 2680(a). To the extent that an exception applies, it preempts common law tort claims.

2. The Government Contractor Defense

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court extended principles of sovereign immunity beyond the government itself to preempt certain claims against civilian contractors performing governmental functions, thereby recognizing the government contractor defense. This defense is intended to implement and protect the government's interest in policymaking. The discretionary function exception is designed to protect policymaking by the executive and legislative branches of government from judicial "second-guessing." *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984); *see also Boyle*, 487 U.S. at 511; *Shuler v. United States*, __ F.3d __, 2008 WL 2728932, at *2 (D.C. Cir. July 15, 2008). As the Court explained in *Boyle,* "[i]t makes little sense to insulate the Government against financial liability for the judgment that . . . equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512. Thus, the Court concluded that state laws holding government contractors liable for design defects in military equipment, where those defects derived from reasonably precise specifications in government contracts, presented a conflict with federal policy and were preempted.

In *Boyle*, the Court identified two conditions that must be met to justify preemption of state tort law. The first condition is that the dispute involve "'uniquely federal interests' [that] are . . . committed by the Constitution and laws of the United States to federal control." *Id.* at 504 (citations omitted). As the Court explained in *Boyle*, a showing that the dispute involves an area of uniquely federal interest "merely establishes a necessary, not a sufficient, condition for the displacement of state law." *Id.* at 507.

Once a defendant has shown that a dispute involves an area of uniquely federal interests, preemption will apply when "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Id.* (internal citations omitted).

Applying these standards, the Court found that tort claims against a government contractor relating to aircraft design were preempted as a matter of federal common law. Because the selection of a military aircraft design "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness," *id.*, the Court held that discretionary function preemption should apply where the design in question is

at least "considered by a Government officer, and not merely by the contractor itself." *Id.* at 512.

Indeed, the *Boyle* Court specifically rejected as too narrow the Eleventh Circuit's formulation that would have required a showing either that the contractor "did not participate, or participated only minimally, in the design of the defective equipment," or that the contractor identified the design defect to the federal government and was instructed to proceed anyway. *Id.* at 513. The Court rejected this test because the design ultimately selected could reflect significant governmental policy judgments even if the contractor had more than a *de minimis* role in development, and because "it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." *Id.*

Boyle is significant to this litigation because it provides the framework for determining whether tort claims against contractors performing governmental functions are preempted by federal law. The federal law and functions relevant here involve combatant activities of the military, to which we now turn.

3. The Combatant Activities Exception

As with discretionary functions, there is no waiver of sovereign immunity for "[a]ny claim arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. §2680(j). While the legislative history of the exceptions

to the FTCA is "singularly barren of Congressional observation apposite to the specific purpose of each exception,"[9] the statute itself is clear and unequivocal in barring any claim arising from combatant activities of the military in time of war. Courts have consistently recognized that the exception reflects a congressional judgment that, under the unique circumstances of wartime operations, no tort duty should extend to those against whom combatant force is directed. *Koohi*, 976 F.2d at 1337 ("The reason [why claims against the contractor were subject to combatant activities preemption], we believe, is that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim*, 391 F. Supp. 2d at 18 ("The [combatant activities] exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which tort claims are simply inappropriate."); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993) ("The *Koohi* court noted that in enacting the combatant activities exception, Congress recognized that it does not want the military to 'exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.'" (citation omitted)).

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[9] *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992) (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)).

As these courts have noted, eliminating tort duties of care from the battlefield serves several important federal interests. First, is the necessary recognition that "war is an inherently ugly business" that necessarily involves the projection of force, including lethal force, on others. *Ibrahim*, 391 F. Supp. 2d at 18.

Second, eliminating a duty of care from the battlefield spares military leaders from having to be concerned with either answering for battlefield judgments in a civil court or the distraction of a civil action brought by the very persons against whom military force has been directed. *Koohi*, 976 F.2d at 1337. This in turn allows military leaders to conduct the war without having to exercise the "great caution" that might be required if second-guessing by tort regulation applied. *Id.* at 1334-35; *Ibrahim*, 391 F. Supp. 2d at 18 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950))); *Bentzlin*, 833 F. Supp. at 1493.

Finally, eliminating duties of care from the battlefield ensures equal treatment of persons injured through military conflict. As the Ninth Circuit observed: "War produces innumerable innocent victims of harmful conduct-on all

sides. It would make little sense to single out for special compensation a few of these persons . . . on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other." *Koohi*, 976 F.2d at 1334-35; *see also Bentzlin*, 833 F. Supp. at 1494.

In addition to the federal interest in simply eliminating a tort duty of care in the zone of combat, a second important purpose underlying the combatant activities exception is ensuring that the United States' conduct of war is not regulated by any other sovereign – whether a state or a foreign government – in the guise of applying that sovereign's tort law. The Constitution expressly commits this Nation's foreign policy and war powers to the federal government. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. Conversely, it expressly forbids the states from exercising those powers. U.S. Const. art. I, § 10, cls. 1, 3.[10]

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[10] Plaintiffs have not identified the state or foreign nation the law of which they contend would govern their tort claims. Even if Plaintiffs' claims were not preempted, the CACI Defendants assert that it would violate due process to apply the law of any state or the District of Columbia to conduct occurring entirely in Iraq. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 816-17 (1985); *Allstate Ins. v. Hague*, 449 U.S. 302, 308 (1981) (plurality decision). Moreover, the CACI Defendants are immune from Iraq law by virtue of Section 4 of Coalition Provisional Authority Order Number 17, available at www.hq.usace.army.mil/cehr/Deployment/Theater/COALITION_PROVISIONAL.pdf (noting that "under international law occupying powers, including their forces, personnel, property and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory").

Indeed, one of the driving forces that led to enactment of the Constitution was the unworkable experience under the Articles of Confederation whereby the states were able to frustrate and interfere with the federal government's ability to raise armies and provide for the national defense.[11] Consistent with its view that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942), the Supreme Court regularly invalidates state regulations that intrude into the Nation's foreign affairs or otherwise frustrate the federal government's Constitutionally-committed role as the sole voice on war and foreign affairs.[12] The combatant

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[11] *See, e.g.*, The Federalist No. 22 (Hamilton), at 145-46 (Clinton Rossiter ed., 1961) (identifying the national government's inability under the Articles of Confederation to effectively respond to Shays' Rebellion because of the states' counterproductive role in raising an Army under the Articles); The Federalist No. 41 (Madison), at 256 ("Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal government."); The Federalist No. 74 (Hamilton), at 447 ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.").

[12] *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380-81 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 65-68 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government and cannot be subject to any curtailment or interference on the part of the several states."). As noted in *Garamendi*, the Court need not decide whether the preemption of state law is premised on field preemption or conflict preemption where, as here, there is a clear conflict between state law and federal interests. 539 U.S. at 420.

activities exception ensures that states cannot impair the federal government's warfighting prerogatives by imposing their own statutory or tort norms on the prosecution of war. Indeed, providing redress to foreign nationals for injuries allegedly sustained in a foreign country during a war waged by the United States is not a traditional state responsibility.

The federal interest in not having a foreign sovereign's tort law apply to the United States' conduct of war is even more acute. The local law of an occupied territory applies only to the extent permitted by the occupying government, and even then only to relations solely between inhabitants of the occupied country.[13] The combatant activities exception reflects and promotes the clear federal interest in ensuring that the United States' waiver of sovereign immunity would not subject its prosecution of war to the tort regulation of a foreign power.

In *Koohi*, 976 F.2d at 1336-37, the Ninth Circuit held that claims against a defense contractor relating to the U.S. Navy's shooting down of an Iranian commercial aircraft during the Iran-Iraq "tanker war" were preempted by the federal interests embodied in the combatant activities exception. Consistent with

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[13] *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878); *New Orleans v. The Steamship*, 87 U.S. 387, 394 (1874); *see also Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857); 2 William Winthrop, *Military Law and Precedents* 800 (2d rev. ed. 1896). Indeed, in *Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981), this Court reaffirmed the validity of *Coleman*, observing that local courts in occupied Berlin were solely organs of the occupying power with no authority over occupying personnel.

the purposes underlying the combatant activities exception, the Ninth Circuit's analysis began – and essentially ended – by considering whether the injuries arose out of combatant activities. As the Court explained, "the only question that need be answered is whether the challenged action constituted combatant activity during time of war." *Id.* at 1336. Having determined that the injuries occurred in "time of war," the Ninth Circuit affirmed dismissal of the United States on sovereign immunity grounds, finding that the combatant nature of the conduct triggered the combatant activities exception. *Id.* at 1337.

Turning to the claims against the contractor, the *Koohi* court recognized that the *only* relevant consideration, once it determined the conduct took place in "time of war," was whether the contractor's actions in supplying a vessel's weapons constituted a combatant activity. *Id.* at 1336-37. Holding that it did constitute a combatant activity, the court affirmed dismissal of claims against the contractor because allowing such claims to proceed would accomplish exactly that which the statute was intended to preclude – the injection of a tort duty of care onto the battlefield. *Id.* It mattered not to the Ninth Circuit the extent of the contractor's role in designing or manufacturing the weapons system or whether the victims were innocent civilians because, as the court recognized, the purposes of the combatant activities exception are defeated *whenever* a contractor is subject to a tort suit for the combatant activities of its employees in a military operation. Thus,

the *Koohi* court affirmed dismissal of the contractor based on the combatant nature of the conduct, without applying any of the product specification requirements of the government contractor defense.

B. The District Court Correctly Ruled That Plaintiffs' Claims Implicate An Area Of "Uniquely Federal Interest"

The district court's summary judgment decision acknowledged "that the treatment of prisoners during wartime undoubtedly implicates uniquely federal interests," thereby making preemption an available defense to Plaintiffs' claims. *Ibrahim*, 2007 WL 3274784, at *1. This conclusion is compelled by the Supreme Court's analysis in *Boyle*.

In *Boyle*, the Supreme Court held that federal law preempted tort claims asserted against the supplier of a military helicopter that crashed during peacetime off the Virginia coast. 487 U.S. at 502, 512. The Court first determined that "the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest." *Id.* at 505 n.1. This conclusion made preemption an available defense and compelled preemption of state tort law if the application of such law would cause a "significant conflict" with an identifiable federal interest or would "frustrate specific objectives" of federal legislation. *Id.* at 507.

The uniquely federal interest is even more pronounced in the present case than it was in *Boyle*. While *Boyle* involved the peacetime manufacture and repair

of a helicopter that crashed during a training exercise, *id.* at 502, the present action involves a government contractor's provision of interrogators in a war zone in direct support of the United States military's war effort in Iraq. The foreign relations of the United States, including the exercise of the war-making power, is uniquely a federal prerogative over which the states have no permissible role. *Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

The present case involves all of the federal contracting issues found to be a sufficiently unique federal interest in *Boyle*. It also implicates the federal government's Constitutionally committed role in exercising the Nation's war powers. Therefore, preemption is available upon an appropriate showing of conflict between those federal interests and the imposition of state or foreign tort law.

C. The District Court Correctly Found That CACI PT Interrogators Were Engaged in Combatant Activities of the Military

The district court correctly found that "[t]here can be no question that the nature and circumstances of the activities that CACI employees were engaged in – interrogation of detainees in a war zone – meet the threshold requirement for preemption pursuant to the combatant activities exception." *Ibrahim*, 2007 WL 3274784 at *8. This conclusion is unassailable. For purposes of the FTCA, combatant activities "include not only physical violence, but activities both

necessary to and in direct connection with actual hostilities." *Johnson*, 170 F.2d at 770. "Aiding others to swing the sword of battle is certainly a 'combatant activity.'" *Id.*

The CACI PT interrogators were interrogating persons detained by the military in a combat zone detention facility, under regular mortar attack and threat of ground attack. Karpinski Dep. at 112-13, 209-10. Such battlefield intelligence efforts are in direct support of combat operations and constitute "combatant activities." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Ex parte Quirin*, 317 U.S. 1 (1942))).

D. The District Court Erred In Adopting A Test For Combatant Activities Preemption That Required More Than A Showing That Defendants' Employees Were Performing Combatant Activities In A Military Operation

After correctly holding that CACI PT interrogators were engaged in combatant activities, the district court erred in imposing a second requirement for preemption: that a civilian contractor must be under the "*exclusive* operational control of the military chain of command." *Ibrahim*, 2007 WL 3274784, at *2 (emphasis added). The district court reasoned that the combatant activities exception insulates military decisions from state law regulation, and that purpose was served only where a contractor is subject to *exclusive* operational control. However, allowing tort suits to proceed where the military exercises operational

control and the contractor exercises *any* level of concurrent operational control necessarily undermines the very purpose of the combatant activities exception identified by the district court.

As discussed below, the only appropriate requirement for combatant activities preemption is that the contractor's employees were engaged in "combatant activities" as part of a military operation.[14] The district court's unequivocal finding that CACI PT's employees were engaged in combatant activities, standing alone, compels a finding that Plaintiffs' claims were preempted.

1. The District Court's Preemption Test Is Inconsistent With The Combatant Activities Exception

As the Supreme Court explained in *Boyle*, once uniquely federal interests have been identified, preemption is required when those interests would be frustrated by concurrent tort regulation. 487 U.S. at 511. The Court cautioned that the test for preemption should be neither too broad nor too narrow, thus ensuring that the test precludes suits that would frustrate federal interests while allowing suits to go forward that would not. *Id.* at 510.

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[14] In addition to a showing that the contractor's employees were engaged in "combatant activities," combatant activities preemption can lie only "in time of war." *See* 28 U.S.C. § 2680(j). Here, Plaintiffs did not contest that Defendants' employees were performing their interrogation duties during a time of war, nor could they. *See Koohi*, 976 F.2d at 1333-35 (holding that the undeclared "tanker war" between Iran and Iraq constituted a "time of war" for FTCA purposes).

Just as the Supreme Court rejected in *Boyle* the notion that preemption required that the government have exercised exclusive control over the aircraft design, this Court should reject the district court's requirement, for preemption purposes, that the government have exclusive operational control over a contractor engaged in combatant activities.

The United States has an obvious and uniquely federal interest in unfettered control over its intelligence gathering efforts in a war zone, and not having those combatant activities subject to tort regulation by the very individuals against whom they were directed. When the federal interests embodied in the combatant activities exception are taken into account, as required by *Boyle*, it is readily apparent that the sole criterion for preemption, provided that the activities occur in time of war, is that the contractor's employees were engaged in "combatant activities of the military." This is a requirement that the district court has already found satisfied in these cases. *See Ibrahim*, 2007 WL 3274784, at *8. Grafting onto that test an additional requirement that the military exercise *exclusive* operational control over the contractor's activities conflicts with and frustrates the federal interests inherent in the combatant activities exception.

The combatant activities exception reflects congressional judgment that no tort duty of care should exist in combat because war necessarily involves the projection of force on others, resulting in intentional and/or accidental injuries to

the victims of war. *Ibrahim*, 391 F. Supp. 2d at 18. Allowing battlefield tort suits against contractors if a contractor exercises *some* degree of supervision over its own employees otherwise under military control frustrates this federal interest by creating tort duties that Congress determined should not exist in the wartime environment. Every one of the Plaintiffs in these cases alleges that he was apprehended and forcibly detained by ***the United States military***. Thus, every Plaintiff is someone against whom the ***United States*** decided to exercise hostile force. When the United States military decides, in its discretion, to prosecute a war with the assistance of civilian contractors, the rationale for permitting no duty of care applies with just as much force to civilian interrogators as it does to military interrogators.

The combatant activities exception also is designed to avoid fettering a commander's flexibility and freedom to take bold action in response to combat necessities, or forcing him to answer for combat judgments in a civil court. *Koohi*, 976 F.2d at 1334-35; *Ibrahim*, 391 F. Supp. 2d at 18.[15] But allowing suits such as Plaintiffs' to go forward would create the untenable situation where a commander

[15] Allowing tort suits to proceed against contractors based on their employees' combatant activities also creates the risk of reducing military flexibility, as contractors may be reluctant to provide employees in a combat environment if it potentially exposes the contractor to combat-related torts. At a minimum, the federal government's war interests would be disserved as contractors adjusted their contract bids to reflect the specter of tort litigation. *Boyle*, 487 U.S. at 511-12; *Ibrahim*, 391 F. Supp. 2d at 18.

ensures that he operates in a tort-free world only if he refrains entirely from deploying contractors. Otherwise, under the district court's test, the commander exposes the military mission to tort litigation if he exercises his prerogative to respond to combat needs in time of war in a manner later characterized as involving less than 100% operational control over civilian contractors. This dichotomy necessarily imposes an artificial and counterproductive consideration on the commander's decision-making process.

Moreover, allowing suits against contractors based on their employees' combatant activities, where the contractor exercised even a negligible degree of parallel supervision, would require military commanders to answer for their battlefield judgments in civil suits, something the combatant activities exception is designed to prevent. The *Saleh* case is a perfect example. That action challenges United States interrogation policies and practices in Iraq, and alleges a broad conspiracy between Defendants and military and Defense Department personnel. Plaintiffs identified as supposed co-conspirators with Defendants the then-sitting Secretary of Defense, two Undersecretaries of Defense, five general officers,[16] eleven other military officers, and a number of high-ranking enlisted soldiers.

[16] The general officers identified by the *Saleh* Plaintiffs as alleged co-conspirators include Major General Geoffrey Miller, Lieutenant General Ricardo Sanchez, Brigadier General Janis Karpinski, Major General Barbara Fast, and Major General Walter Wojdakowski. RICO Case Statement at 4.

RICO Case Statement at 4-5. Should the *Saleh* action go forward against CACI, these high-ranking Defense Department officials and military personnel would be called upon to answer for their decisions with respect to interrogation policies and practices, to disclaim conspiratorial intent, and to explain the command decisions that led to the plaintiffs' alleged injuries. This is exactly the sort of proceeding the combatant activities exception is designed to prevent.

The district court attempted to distinguish *Koohi* as being concerned with procurement contracts, holding that a different test should be created for service contracts. *Ibrahim*, 2007 WL 3274784, at *2. This, however, is a distinction without a difference. *Boyle* provides the analytical framework, with the sole inquiry being whether allowing tort suits to proceed would conflict with or frustrate the interests embodied in the relevant federal statute. As the *Koohi* court observed, those interests are undermined any time that a contractor, regardless of the type of contract, is subjected to a tort duty of care for combatant activities.

Moreover, the district court's determination that contractor personnel's performance of combatant activities is not enough to trigger preemption also leads to the anomalous result that, in the context of Plaintiffs' claims, a detainee assigned a military interrogator would have no tort rights with respect to the performance of his interrogation while a detainee in the next interrogation booth would have the full panoply of tort remedies available to him if his assigned interrogator were a

civilian contractor. This result makes no sense. It is directly contrary to the federal interest, embodied in the combatant activities exception, that no victims of wartime injuries have greater tort rights than other persons intentionally or accidentally injured by combatant acts. *Koohi*, 976 F.2d at 1334-35; *Bentzlin*, 833 F. Supp. at 1494.

Finally, allowing tort suits to proceed against contractors for the combatant activities of their employees necessarily allows states – or even worse, foreign governments – to regulate the United States' war effort through imposition of their tort jurisprudence on combat activities. This interference is directly contrary to the Constitutional design, which allows states and foreign governments no role in controlling the United States' war efforts. This interference exists regardless of whether the contractor exercises no supervisory control or some amount of supervisory control.

2. The District Court's Preemption Test Conflicts With *Boyle*

The district court's rejection of the preemption test announced in *Koohi*, in favor of a test with a requirement that the military have exercised *exclusive* operational control, is particularly indefensible when juxtaposed against the preemption test adopted in *Boyle*. *Boyle* involved the federal interests embodied by the discretionary function exception, which is entirely about protecting *government choice* from tort litigation. 487 U.S. 511. But even in that context, the

Court rejected the notion that preemption required nonexistent or minimal contractor involvement in product design because (1) it is the exercise of discretionary decisionmaking by the government and not the absence of participation by the contractor that matters, and (2) it would be bad policy to create a rule that penalized and deterred contractor participation in the design process. *Id.* at 513. Instead, the Court crafted a test that would allow preemption where the government had a significant role in selecting the product design *even if* the contractor also had a significant role. *Id.* Thus, even in the context of the discretionary function exception, the proper focus is on the extent of the *government's* involvement and not the extent of the *contractor's* involvement.

The combatant activities exception is more expansive, and certainly less nuanced, than the discretionary function exception. It commands, in clear and unequivocal terms, that no claim may be maintained against the United States arising out of combatant activities of the military in time of war. Under those circumstances, no duty of care exists on the battlefield. Nevertheless, the district court adopted a preemption test more restrictive in terms of contractor participation than even the test the Supreme Court rejected as too strict in *Boyle*. Indeed, as the Court noted in *Boyle*, it is bad policy to fashion a preemption rule that would penalize a contractor for performing responsibly in working with the government to achieve a shared objective. 487 U.S. at 513.

But every act of supposed operational supervision by the CACI Defendants identified by the district court – providing "advice and feedback" to less experienced interrogators, having a code of ethics that required employees to report observed misconduct to both the military and CACI PT, and an employee presuming he would have had the authority to direct an employee not to carry out an interrogation plan involving misconduct[17] – is precisely the type of responsible contractor conduct that should be encouraged and not penalized. *See Boyle*, 487 U.S. at 513. The preemption test created by the district court would have the perverse effect of punishing the contractor that behaves responsibly in providing guidance to its personnel while rewarding the contractor that does not.

For these reasons, the Court should adopt the analysis in *Koohi*, and hold that the proper test for preemption is whether the contractor's employees were engaged in combatant activities. This is a test the district court has already found satisfied by the CACI Defendants.

E. Even If The District Court's "Exclusive Operational Control" Test Were Correct, The Undisputed Facts Still Compel Preemption

The CACI Defendants presented the district court with extensive, undisputed evidence of the United States military's pervasive exercise of operational control over CACI PT's employees. That evidence is sufficient to establish preemption

[17] *Ibrahim*, 2007 WL 3274784, at *8.

even under the test set by the district court. Moreover, none of the supposed indicia of operational control identified by the district court actually qualifies as operational control as that term is properly understood and applied in a military context. Therefore, preemption is appropriate even if the district court's "exclusive operational control" test were the correct standard.

1. CACI Provided Undisputed Evidence That The United States Military Exercised Exclusive Operational Control Over CACI PT Interrogators

The undisputed evidence demonstrates that the military exercised exclusive supervision and control of CACI PT interrogators' performance of their interrogation duties. The military had to approve CACI PT interrogators before they deployed to Iraq. Porvaznik Decl. ¶ 10; Mudd Decl. ¶ 9; Northrop Decl. ¶ 6. Once a CACI PT interrogator deployed to Iraq, he or she was fully integrated into the military chain of command, reporting at all times to multiple levels of military intelligence supervisors. Porvaznik Decl. ¶ 9; Mudd Decl. ¶ 8; Brady Decl. ¶ 2, 3; Daniels Decl. ¶ 2. The military chain of command assigned interrogation tasks to the CACI PT interrogators; established the appropriate rules of engagement for interrogations; decided when exceptions to the IROEs would be permitted; reviewed and approved interrogation plans submitted by all interrogators, military and civilian; dictated interrogation reporting requirements; and established and maintained a classified interrogation database into which reports from all

interrogators – military and civilian – would be archived. Porvaznik Decl. ¶¶ 10-17; Mudd Decl. ¶ 9; Northrop Decl. ¶¶ 8-11; Billings Decl. ¶ 21; Daniels Decl. ¶ 2; Brady Decl. ¶ 2. These circumstances are the epitome of "one team, one fight."

Nevertheless, the district court concluded that CACI had not established beyond cavil the military's exclusive operational control. Significantly, the district court did not find any material facts in dispute. Rather, according to the district court, the following facts, when viewed most favorably to Plaintiffs, might lead a fact-finder to the conclusion that the CACI Defendants exercised some semblance of operational control over the CACI PT interrogators:

- That a reasonable jury could conclude that Mr. Porvaznik "effectively co-managed contract interrogators, giving them advice and feedback on the performance of their duties."
- That a reasonable jury could conclude that "CACI interrogators were supervised by both Mr. Porvaznik and Capt. Wood."
- That CACI PT interrogators "had a requirement to report abuse not only up the military chain of command but also to CACI."
- That Mr. Porvaznik "had the authority to direct CACI interrogators not to carry out an interrogation plan that was inconsistent with company policy."

Ibrahim, 2007 WL 3274784, at *8.

As shown below, none of these findings constitutes an exercise of operational control by the CACI Defendants, and none of them can preclude summary judgment.

2. The District Court Misunderstood And Misapplied The Concept Of Operational Control

The district court's misunderstanding of the concept of "operational control" resulted in its erroneous holding that a fact-finder might conclude that CACI PT and the military had some form of joint operational control over CACI PT's interrogators. *See Ibrahim*, 2007 WL 3274784, at *8. The district court never defined "operational control," thus leaving unclear what it meant by that term. Since preemption here is predicated upon the statute reserving sovereign immunity against claims arising from combatant activities of the military, it is appropriate to look to the military's definition of "operational control." This the district court did not do. That definition makes clear that the activities identified by the district court as precluding summary judgment do not constitute operational control.

The Department of Defense defines "operational control" as follows:

> *Command authority* that may be exercised by commanders at any echelon at or below the level of combatant command. Operational control is inherent in combatant command (command authority) and may be delegated within the command. *Operational control is the authority to perform those functions of command* over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. *Operational control includes authoritative direction over all aspects of military operations* and joint training necessary to accomplish missions assigned to the command. Operational control should be exercised through the commanders of subordinate organizations. Normally this authority is

> exercised through subordinate joint force commanders and Service and/or functional component commanders. *Operational control normally provides full authority* to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions; *it does not, in and of itself, include authoritative direction for logistics or matters of discipline, internal organization, or unit training.*[18]

Thus, there are two elements to operational control, the "operational" aspect and the concept of "control." A matter is not operational in nature unless it relates to the conduct of the military mission itself. Operational matters do not include logistics attendant to the mission, or matters of discipline, organization, or training.

Equally as important, operational *control* extends solely to those with the power to make authoritative command decisions on operational matters. This concept is ubiquitous throughout the Defense Department's definition of operational control, with the doctrine repeatedly described as referring to "command authority," "authority to perform the functions of command," "authoritative direction," and "full authority" over the military mission. The lower court here altogether ignored this element of control. Indeed, the district court's decision equates CACI PT's personnel providing input or feedback as an exercise

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[18] Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, at 397-98, April 12, 2001, available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (emphasis added).

of operational control, when such actions by definition do not reflect "control," and many of them reflected neither "control" nor "operations."

The district court held that a reasonable jury could conclude that Mr. Porvaznik "effectively co-managed contract interrogators, giving them advice and feedback on the performance of their duties." *Ibrahim*, 2007 WL 3274784, at *8. However, as the authoritative definition of operational control makes clear, it is erroneous to equate "advice and feedback" with the exercise of operational control, as operational control requires ***decisionmaking authority***. Mr. Porvaznik specifically testified that, as opposed to purely administrative matters, "in the sense of the interrogation business, [the CACI PT personnel] worked along with, for, and again under the command, control, and direction of the U.S. military." Porvaznik Dep. at 317-18. There is no contrary evidence in the record.

It is undisputed that the military and not CACI PT: (1) established the interrogation rules of engagement (Porvaznik Dep. at 162; Northrop Dep. at 106; Mudd Dep. at 108-09); (2) decided where and how to deploy CACI PT interrogators (Brady Dep. at 51; Porvaznik Dep. at 233-34); (3) required each interrogator to submit interrogation plans and was the approval authority for all such plans (Porvaznik Dep. at 161-62, 325-26); (4) determined who would be interrogated and who would conduct interrogations (Porvaznik Dep. at 132-33; Mudd Dep. at 143; Northrop Dep. at 148; Billings Dep. at 112); (5) required

interrogators to prepare reports of interrogations and enter them into a military-controlled classified database (Mudd Dep. at 75; Porvaznik Dep. at 140-42); and (6) directed the removal of CACI PT interrogators from the contract (Monahan Dep. at 45; Billings Dep. at 88; Mudd Dep. at 72-73, 206, 215; Brady Dep. at 45; Northrop Dep. at 46-47, 147).

In contrast to the Army's undisputed decisionmaking authority, and hence operational control, the district court's description of Mr. Porvaznik's activities reveals a total absence of decisionmaking power. The district court relied on the fact that Mr. Porvaznik interviewed newly-arrived CACI PT interrogators and "'provided [Capt. Wood] with input' about each interrogator's background, input that *she used in deciding* how to deploy these contract employees." *Ibrahim*, 2007 WL 3274784, at *6 (emphasis added). This fact cannot support a finding of operational control for at least two reasons. First, there is no exercise of control. The district court's own characterization of the record allows that Captain Wood, and not Mr. Porvaznik, was the decisionmaking authority on "how to employ these contract employees." *Id.* Second, as the district court observed in reaching its conclusion that the Army had exclusive operational control over Titan linguists, assigning and reassigning personnel does not constitute "operational" control even when the contractor has the full decisionmaking power on this subject:

> That Titan reassigned linguists without coordinating such reassignment with the military does not show that the

> military shared *operational* command and control of the linguists with Titan. Moving linguists from location to location involves administrative oversight; there is nothing in this record to suggest that it has to do with the operational control of linguists' duties.

Id. at *8.[19]

The district court also found potential operational control by Mr. Porvaznik because he sometimes would be shown draft interrogation plans by less experienced CACI PT personnel and believed that he would have told a CACI PT interrogator not to do something that was inappropriate. But Mr. Porvaznik made clear that while a less experienced interrogator might ask him for advice, he was *not* an approval point for interrogation plans – command power (and operational control) rested solely in the hands of the military leadership. Porvaznik Dep. at 161-62, 325-26.

Furthermore, the district court's reliance on Mr. Porvaznik's perceived authority to prevent a CACI PT interrogator from doing something in an interrogation plan that was improper is inconsistent with the court's holding elsewhere in its opinion. In discussing certain contract provisions in the Titan contract, the district court correctly held that those contract provisions did not

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[19] Whether Titan had the unfettered power to assign and reassign its linguists was a matter potentially in dispute. The district court held, however, that such a potential dispute was not material because it would not be a sharing of operational control *even if* Titan had this power because such a power would constitute mere administrative oversight. *Ibrahim*, 2007 WL 3274784, at *8.

matter because "[t]he proper focus is on the structure of supervision that the military actually adopted on the ground." *Id.* at *8. As Mr. Porvaznik testified, the facts "on the ground" were that Mr. Porvaznik *never* saw anything in the interrogation plans he reviewed that he ever instructed a CACI PT employee not to do. Porvaznik Dep. at 182-83. Mr. Porvaznik's after-the-fact statement that, hypothetically speaking, he would have directed a CACI PT interrogator not to do something in an interrogation plan that constituted misconduct, while certainly appropriate, is wholly beside the point. Moreover, depriving a contractor of a preemption defense because it would prevent misconduct of which it was aware is just the sort of bad policy that cannot form part of a preemption analysis. *Boyle*, 487 U.S. at 513.

Beyond these elements of giving "advice," the district court also identified Mr. Porvaznik's provision of "feedback" to CACI PT personnel as indicia of a sharing of operational control. But feedback is not the type of command authority and decisionmaking power that constitutes operational "control." Moreover, as the doctrinal definition of operational control makes clear, administrative matters such as training and internal organization are not operational in nature and therefore are not operational control even for those with decisionmaking authority.

Thus, even if the concept of *exclusive* operational control were an appropriate requirement for a finding of combatant activities preemption, the few

snippets of facts identified by the district court do not constitute an exercise of operational control.

3. Defense Department Regulations Directed CACI To Have A Code Of Ethics And A Mechanism For Reporting Misconduct Observed By CACI PT Employees

In concluding that the CACI Defendants were not entitled to summary judgment, the district court emphasized that CACI PT's site lead at Abu Ghraib prison, Daniel Porvaznik, testified that he "did have the authority to prohibit a contract interrogator from pursuing an interrogation plan that he felt was not consistent with the CACI Code of Ethics." *Ibrahim*, 2007 WL 3274784, at *7. The district court summarized Mr. Porvaznik's testimony as stating that "all CACI employees had a duty to report any abuse they saw both to him as the CACI representative, and to the military; he agreed that CACI interrogators effectively had a 'double duty' to report abuse." *Id.* at *6.

As a preliminary matter, it is counterintuitive for a defendant to be worse off because it established a code of ethics that, *inter alia*, required reporting of misconduct. The result of the district court's decision is to reward contractors who do not enact a responsible code of ethics. *See Boyle*, 487 U.S. at 513. Regardless, the district court's reliance on CACI's code of ethics missed a critical fact: *CACI was required to have a code of ethics by Defense Department regulation*. That is yet another indicia of military control over CACI PT's contract performance.

The relevant Defense Federal Acquisition Regulation Supplement ("DFARS") provides:

> *Government contractors must conduct themselves with the highest degree of integrity and honesty.* Contractors should have standards of conduct and internal control systems that –
>
> . . . .
>
> (3) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and
>
> . . . .
>
> A contractor's system of management controls should provide for –
>
> (1) *A written code of business ethics and conduct* and an ethics training program for all employees;
>
> . . . .
>
> (3) *A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports*;
>
> . . . .
>
> (5) *Disciplinary action for improper conduct*;
>
> (6) *Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts*; and
>
> (7) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

48 C.F.R. 203.7000 to .7001 (emphasis added).[20]

Thus, the Defense Department regulations applicable to CACI PT's delivery orders required CACI to have a code of ethics, to establish mechanisms so that employees can report incidents of misconduct that they observe, to discipline employees who violate the law or the company's code of ethics, and to report misconduct to the government. The district court's failure to understand that these features were required as a matter of Defense Department regulation led it to conclude that CACI PT, and not the United States military, was exercising supervision and control over its employees by doing exactly as directed by the Defense Department. It makes no sense to find that a contractor's compliance with one military directive has the consequence of divesting the military of unfettered control over that contractor. The court committed error in finding CACI's code of ethics as inconsistent with operational control by the military.

F. This Court Has Jurisdiction To Review The District Court's Decision

While subject-matter jurisdiction is a threshold issue, the CACI Defendants address the *Saleh* Plaintiffs' motion to dismiss appeal 08-7001 last because this

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[20] The delivery orders by which CACI PT provided interrogators in Iraq provide that the work effort was to be in accordance with Defense Department, U.S. Civil Code, and international regulations. Billings Decl., Exs. A, B. The DFARS requirement was expanded through a Nov. 23, 2007 amendment to the Federal Acquisition Regulations. *See* 48 C.F.R. 52.203-13(b) (providing a Contractor Code of Business Ethics and Conduct).

Court clearly has subject-matter jurisdiction to review the district court's decision by virtue of the Court's orders granting the CACI Defendants' petitions to appeal that decision in both *Saleh* and *Ibrahim* pursuant to 28 U.S.C. § 1292(b). RI.125; RS.163. Therefore, the question of subject-matter jurisdiction only can become material if the Court were to withdraw the permission to appeal that it has already granted. If that were to occur, the CACI Defendants contend that they are entitled to appeal the district court's summary judgment decision as a matter of right pursuant to the collateral order doctrine.

The collateral order doctrine allows appeals from orders that "do not necessarily conclude the litigation, but do finally determine claims of right separable from, and collateral to, rights asserted in the action." *Doe v. Exxon Mobil*, 473 F.3d 345, 348 (D.C. Cir. 2007); *see also Cohen v. Benef. Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

To qualify for immediate appealability, the collateral order must "(1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment." *Exxon Mobil*, 473 F.3d at 349 (internal quotation marks omitted). The district court's decision satisfies all three of these requirements.

1. The District Court's Decision Conclusively Determines Three Questions Of Law

The district court's decision on combatant activities preemption conclusively determines the following questions of law: (1) whether the combatant activities exception to the FTCA can preempt tort claims against a contractor for combatant activities the contractor performed in a war zone; (2) whether any degree of operational supervision by the contractor defeats a preemption defense; and (3) whether a contractor can prevail on a combatant activities preemption defense when it retains some administrative supervision over its employees, but operational decisionmaking authority remains vested in the military chain of command.

2. The District Court's Decision Resolves An Important Question Separate From The Merits Of The Action

The separability requirement is clearly satisfied in this case. The CACI Defendants are not asking this Court to review or make factual determinations as to the merits of Plaintiffs' claims, but only to decide whether the district court's combatant activities preemption test is correct, and how the correct test applies to the facts identified by the district court. Because this appeal only raises questions of law, the issues involved in the district court's decision satisfy the second prong of *Cohen*. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

3. The District Court's Decision Is Effectively Unreviewable On Appeal From Final Judgment

A lower court's order is effectively unreviewable on appeal from final judgment "if it involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Exxon Mobil*, 473 F.3d 345, 350 (D.C. Cir. 2007) (citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989)). The CACI Defendants have tendered a preemption defense that, if successful, would allow them to completely avoid discovery and trial. Admittedly, without more that is not enough to satisfy the third prong. *Id.* Rather, the right to avoid trial must embody "some particular value of a high order" such as "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual. *Will*, 546 U.S. at 353.

The combatant activities exception is a congressional determination to retain sovereign immunity for actions arising from combatant activities of the military during time of war. An order denying a claim of immunity is immediately appealable. *See Nixon v. Forsyth,* 457 U.S. 731, 742 (1982) (absolute immunity); *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (qualified immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993) (Eleventh Amendment immunity). Orders denying claims of immunity implicate the collateral order doctrine because

> they involve the rejection of a defense that would have allowed the defendant to avoid trial altogether. . . . [D]octrines of qualified immunity and absolute immunity do not just protect covered individuals from judgments; they also provide protection from the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.

Exxon Mobil, 473 F.3d at 350.

Because the CACI Defendants' preemption defense is based on the same federal interests underlying the retention of sovereign immunity for combatant activities, *Boyle*, 487 U.S. at 511-12, the federal interests rendering immunity decisions immediately appealable apply with equal force to the CACI Defendants' preemption defense. Moreover, courts addressing the purpose of the exception recognize that Congress determined that no tort duty of care should be imposed on the battlefield, and that commanders should not be fettered by the prospect of combat-related tort suits or the distraction of ongoing tort litigation. *See, Koohi*, 976 F.2d at 1337; *Johnson*, 170 F.2d at 769; *Ibrahim*, 391 F. Supp. 2d at 18; *Bentzlin*, 833 F. Supp. at 1493.

Plaintiffs' claims necessarily would entail expansive discovery of the United States and military leaders. *See Koohi*, 976 F.2d at 1336-37. It would be necessary to take discovery regarding the *Saleh* Plaintiffs' far-flung conspiracy claims, to assess the purported participation of myriad government officials, soldiers and civilian contractor personnel in the alleged "torture conspiracy." This

entails a detailed examination of interrogation policies and practices in Iraq. It would be necessary to examine why the military detained each plaintiff. Were they interrogated, and if so by whom? What interrogation techniques were authorized and employed? What evidence in the military's classified files supports or refutes plaintiffs' claims?

The district court has on three separate occasions recognized the significant interests in resolving CACI's combatant activities preemption defense prior to allowing merits discovery. The district court created an initial summary judgment process, with discovery limited to preemption issues, "given the potential for time-consuming disputes involving state secrets." *Ibrahim*, 391 F. Supp. 2d at 19. The district court certified its November 6, 2007 decision for interlocutory appeal. Finally, the district court stayed trial court proceedings pending resolution of the parties' appeals. These decisions by an experienced trial judge evince the district court's conclusion that the legal questions embedded within the district court's decision are important enough to outweigh the ordinary operation of final judgment principles.

Neither the Supreme Court's decision in *Will*, 546 U.S. at 353, nor this Court's decision in *Exxon Mobil*, 473 F.3d at 348, preclude application of the collateral order doctrine here. In *Will*, the Court held that the FTCA's judgment bar lacked the public interest required to trigger the collateral order doctrine. 546

U.S. at 353. But *Will* holds that because the *only* interest served by the judgment bar statute is to prevent litigation against the government "for its own sake," there was no public interest in allowing a collateral appeal under the statute. *Id.* at 353-56. By contrast, the combatant activities exception reflects a congressional judgment that combatant activities by their "nature should be free from the hindrance of a possible damage suit." *Ibrahim*, 391 F. Supp. at 18. For this reason, *Will* does not inform this case.

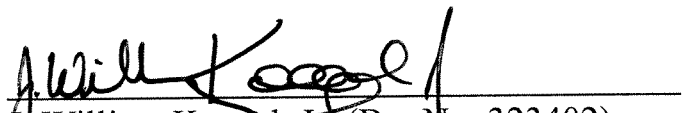
Exxon Mobil also does not control the permissibility of the CACI Defendants' direct appeals. In *Exxon Mobil*, Exxon argued that interlocutory review of its political question defense was necessary to protect the executive branch from "judicial intrusion into sensitive foreign policy matters." 473 F.3d at 351. This Court held that it lacked jurisdiction because Exxon's defense did not derive from any immunity claim. *Id.* at 353. The defense at issue here derives directly from the sovereign immunity of the United States. CACI PT interrogators were interrogating Iraqis detained by the military in a war zone. These interrogation efforts were in direct support of combat operations and were carried out under the orders of battlefield commanders. In these unique circumstances, allowing tort suits involving combatant activities to go forward undermines the very interests Congress sought to protect when it enacted the combatant activities exception.

For these reasons, if the Court were to withdraw its permission to appeal under 28 U.S.C. § 1292(b), the CACI Defendants' still would have an entitlement to appeal the district court's decision pursuant to the collateral order doctrine.

IX. CONCLUSION

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

Respectfully submitted,



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July 28, 2008

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

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

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

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Certificate as to Parties, Table of Contents, Table of Authorities, Glossary, Addendum, and Certificate of Compliance and Service) contains 13,978 words.

J. William Koegel, Jr.

ADDENDUM: STATUTES AND REGULATIONS

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28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(a), (j)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

...

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

28 U.S.C. § 1292(b)

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, art. 13, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

Geneva Convention Relative to the Treatment of Prisoners of War, art. 4.A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

. . .

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war

correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

48 C.F.R. 203.7000

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have standards of conduct and internal control systems that—

(1) Are suitable to the size of the company and the extent of their involvement in Government contracting,

(2) Promote such standards,

(3) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and

(4) Ensure corrective measures are promptly instituted and carried out.

48 C.F.R. 203.7001

A contractor's system of management controls should provide for—

(1) A written code of business ethics and conduct and an ethics training program for all employees;

(2) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting;

(3) A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;

(4) Internal and/or external audits, as appropriate;

(5) Disciplinary action for improper conduct;

(6) Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts; and

(7) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

48 C.F.R. 52.203-13(b) Contractor Code of Business Ethics and Conduct

...

(b) Code of business ethics and conduct. (1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—

(i) Have a written code of business ethics and conduct; and

(ii) Provide a copy of the code to each employee engaged in performance of the contract.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2008, I caused the foregoing Brief of Appellants CACI International Inc and CACI Premier Technology, Inc. to be filed with the Clerk under F.R.A.P. 25(a)(2)(B), and a true copy to be served on the following counsel, by U.S. mail, first-class postage prepaid:

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