

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 SOUTHERN DIVISION

4 WISSAM ABDULLATEFF : Civil Action No.
5 SA'EED AL-QURAISHI, :
6 et al., : PJM 08-1696
7 Plaintiff, :
8 v. :
9 ADEL NAKHLA, : Greenbelt, Maryland
10 L-3 SERVICES, INCORPORATED, :
11 Defendant. : Monday, March 9, 2009
12 _____/ 12:15 A.M.

12 TRANSCRIPT OF MOTION PROCEEDINGS
13 BEFORE THE HONORABLE PETER J. MESSITTE
14 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

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COMPUTER-AIDED TRANSCRIPTION OF STENOGRAPHY NOTES

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APPEARANCES CONTINUED:

FOR THE DEFENDANT
L-3 SERVICES, INC.:

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P-R-O-C-E-E-D-I-N-G-S

1
2 THE DEPUTY CLERK: Civil Action Number PJM 2008-1696,
3 *Wissam Abdullateff Sa'eed Al-Quraish versus Adel Nakhla and L-3*
4 *Services, Inc.* The matter is before the Court for motions
5 hearing.

6 THE COURT: All right. Counsel, for plaintiff,
7 identify yourselves please.

8 MS. BURKE: Susan Burke from the law firm of Burke,
9 O'Neil. I'm here with my partner, William O'Neil and with
10 Katherine Gallagher from the Center for Constitutional Rights.

11 THE COURT: And for the Defendant L-3.

12 MR. ZYMELMAN: Your Honor, Ari Zymelman from Williams
13 & Connolly. With me is my partner, Greg Bowman for L-3
14 Services, Inc.

15 MR. DELINSKY: And, Your Honor, Eric Delinsky on
16 behalf of Adel Nakhla.

17 THE COURT: I'd like to, unless you have something
18 preliminary, start with the Motion to Transfer, which obviously
19 is logically the one to talk about before we talk about a Motion
20 to Dismiss. I'll hear from L-3 on that.

21 MR. BOWMAN: Good morning, Your Honor. Greg Bowman,
22 Williams & Connolly, LLC on behalf of Defendant L-3 Services,
23 Inc. Your Honor, we've prepared binders with key cases.

24 THE COURT: All right. Hand those up, sure.

25 All right.

1 MR. BOWMAN: Your Honor, I'd like to reserve ten
2 minutes of my time to respond to counsel's argument. L-3's
3 Motion to Transfer is straightforward. It is clear that this
4 case should be transferred to the Eastern District of Virginia.

5 THE COURT: Let me just ask, Nakhla is joining this
6 motion or do you have a separate argument to make for Nakhla on
7 the Motion to Transfer?

8 MR. DELINSKY: No separate argument, Your Honor.

9 THE COURT: All right, very good.

10 MR. BOWMAN: There's two independent reasons, Your
11 Honor, that justify transferring this case to the Eastern
12 District. First is a related case pending in that jurisdiction
13 in the same procedural posture as this case, or at least after
14 today. Motions to Dismiss in the Eastern District case have
15 been argued, briefed and argued and pending decision.

16 THE COURT: Sorry, Summary Judgment Motions.

17 MR. BOWMAN: Motion to Dismiss.

18 THE COURT: Motion to Dismiss.

19 MR. BOWMAN: Yes, Your Honor.

20 THE COURT: All right.

21 MR. BOWMAN: There was also a Motion for Partial
22 Summary Judgment on Statute of Limitations that was denied.

23 THE COURT: Now, tell me how many plaintiffs and name
24 your plaintiffs and defendants in your Virginia litigation.

25 MR. BOWMAN: Your Honor, There are four plaintiffs in

1 the Virginia litigation.

2 THE COURT: All right.

3 MR. BOWMAN: There are -- there's a corporate, a set
4 of corporate defendants, CACI. There are no individual
5 defendants, natural persons in that case.

6 THE COURT: Okay.

7 MR. BOWMAN: In this case there are 72 plaintiffs and
8 one corporate defendant, L-3 Services, Inc., one individual
9 defendant, Adel Nakhla.

10 THE COURT: All right. And no question that Nakhla
11 resides in Maryland?

12 MR. BOWMAN: That's correct, Your Honor.

13 So again, two independent reasons. One is to transfer
14 for consolidation in coordination with the related case in the
15 Eastern District. That case is Al-Shimari, S-H-I-M-A-R-I.

16 The second reason is that the center of gravity of
17 this case is in fact in the Eastern District of Virginia, and
18 that is an independent basis for transferring this case there.
19 It's also notable that there are no factors weighing against
20 transfer. In this particular case, the plaintiff's choice of
21 venue is entitled to little or no weight for three reasons.

22 First, because the plaintiffs have not filed in any of
23 their home jurisdictions. Secondly, there's no connection --

24 THE COURT: What are their home jurisdictions?
25 They're aliens, aren't they?

1 MR. BOWMAN: They're all Iraqi citizens, Your Honor.

2 THE COURT: They're what?

3 MR. BOWMAN: Iraqi citizens.

4 THE COURT: What's their home jurisdiction for federal
5 jurisdiction purposes?

6 MR. BOWMAN: They have none within the United States,
7 Your Honor.

8 THE COURT: They can file anywhere, can't they?

9 MR. BOWMAN: They can.

10 THE COURT: Okay. So why are you saying it's entitled
11 to no weight? I'm not sure I follow that argument.

12 MR. BOWMAN: The basis for giving a plaintiff
13 deference when he files in his home jurisdiction is there's a
14 presumption that that's the most convenient jurisdiction for
15 that party to litigate, because that party is located there.
16 That is not the case here.

17 THE COURT: Do you have a case that stands for that
18 proposition that you're not to give any weight to the selection
19 of a forum by an alien?

20 MR. BOWMAN: Yes, Your Honor.

21 THE COURT: What's that case?

22 MR. BOWMAN: In fact we have a number of authorities.
23 In this Court's decision in *Dicken* which is in fact in the
24 binder that I provided. That case in fact involved a plaintiff
25 filing in its home jurisdiction, but with the -- with this

1 jurisdiction and that case had little connection to the events
2 at issue, and this Court held plaintiff's forum was entitled to
3 little weight.

4 In the *Lycos, L-Y-C-O-S*, matter which is also in the
5 binder, the plaintiff filed in the jurisdiction that was not its
6 home forum and the Court held slight weight --

7 THE COURT: I think I asked a slightly different
8 question. Do you have a case that says that choice by a
9 foreign, by an alien is not given particular weight because he
10 or she has no nexus with any particular jurisdiction? I
11 understand that there are cases where weight is not given to a
12 plaintiff's choice, but I was asking a more specific question.

13 MR. BOWMAN: The third case I was getting to, Your
14 Honor, *Mamani*, which is also in the binder. It's also a
15 decision of this Court, involved alien plaintiffs. And the
16 Court held that the deference was significantly lessened where
17 such alien plaintiffs filed in a foreign jurisdiction.

18 And again, I -- in using the terms alien and foreign
19 in this context, it's not that the plaintiffs come from outside
20 this country. It's that the same would apply to a plaintiff
21 with a home jurisdiction within the United States, but not
22 within Maryland.

23 The fourth case I point Your Honor to is the *Polaroid*
24 case. And there the Court said that plaintiff's choice of venue
25 was entitled to no weight due to an inference that forum

1 shopping had occurred.

2 THE COURT: Well, seems to me there's been a lot of
3 forum shopping on both sides of this case. Defendants have done
4 a lot of moving of these cases around the country if I'm not
5 mistaken.

6 MR. BOWMAN: Your Honor, There have been four cases
7 all transferred to the Eastern District of Virginia by
8 defendants. The Eastern District of Virginia is the only
9 jurisdiction in this country that all these cases can be heard
10 regardless of the composition of the defendants; i.e., the mix
11 of individual and corporate defendants.

12 THE COURT: Well, but there's been some re-alignment
13 of parties. Haven't certain parties been dropped? I mean, CACI
14 is not in the case anymore.

15 MR. BOWMAN: The plaintiffs have re-aligned the cases
16 and dismissed some cases or defendant's in order to try to
17 re-align the cases such that two are proceeding at the same time
18 in two different jurisdictions, which is one of the main
19 inefficiencies that Section 1404(a) is designed to prevent. And
20 this forms the basis, one of the basis of our motions.

21 As I said, there are two independent bases. One being
22 the related case, but the second being that the center of
23 gravity of these cases is in fact in the Eastern District of
24 Virginia. Now, L-3 as the movant has the burden of establishing
25 two elements. First, that the case might have been brought in

1 the Eastern District. And second, that the transfer is for the
2 convenience of parties and witnesses in the interest of justice.

3 L-3 submits that both, both of these requirements are
4 easily satisfied here. First, the case having brought in
5 Eastern District of Virginia. There are two defendants here.
6 L-3 Services, Inc. and Adel Nakhla. As to L-3 Services, I don't
7 believe there's any dispute that there's personal jurisdiction
8 in the Eastern District of Virginia. That's L-3's headquarters.
9 Headquarters is located in Alexandria within that jurisdiction.

10 As for Adel Nakhla, L-3 submitted a declaration in
11 support of its motion establishing the facts necessary to show
12 personal jurisdiction within the Eastern District.

13 In short, Mr. Nakhla undertook purposeful contacts
14 with that jurisdiction in the course of obtaining employment
15 with L-3, which of course is the only reason that he was in Iraq
16 and implicated in the instant action.

17 In response, plaintiffs argue that L-3 failed to meet
18 its burden of showing personal jurisdiction over Adel Nakhla
19 because Mr. Nakhla obtained dismissal in the action, in a
20 different action pending in the District of Columbia on personal
21 jurisdiction grounds. L-3 submits that, first of all, that the
22 question of personal jurisdiction over Mr. Nakhla in the
23 District of Columbia is irrelevant to the question of personal
24 jurisdiction over him in the Eastern District. Mr. Nakhla's
25 contacts were with the Eastern District, not the District of

1 Columbia.

2 Secondly, the plaintiffs in that case as noted in the
3 District Court's decision didn't even seek to invoke the
4 District of Columbia Long Arm Statute. In fact, relied on
5 nationwide service of process available under RICO. And so when
6 the RICO claims fail, there was no jurisdiction over Mr. Nakhla.
7 That has no effect on this Court's determination of personal
8 jurisdiction over Mr. Nakhla in the Eastern District.

9 Your Honor, I'd like to take you -- you've asked me a
10 few questions already about one of the other cases pending that
11 arises out of the same facts. I'd like to take a few moments,
12 particularly since this is the first time we've appeared before
13 this Court, to walk through the background of the litigation
14 which --

15 THE COURT: That will be helpful.

16 MR. BOWMAN: It actually starts, this litigation began
17 back in June of 2004. The first case to be filed out of the
18 allegations arising at Abu Ghraib and other prisons in Iraq was
19 a case that was initially captioned *Alrawi*, A-L-R-A-W-I. It's
20 filed in June, 2004 in the Central District of California. It
21 happened to be the same legal team in that case as in this case
22 before this Court.

23 THE COURT: Same legal team for plaintiff?

24 MR. BOWMAN: For the plaintiff, yes, Your Honor.

25 The defendant -- that case was filed as a class

1 action, so it purported to include all prisoners at the U.S.
2 Military that may have been abused in Iraq, anywhere in Iraq at
3 any of the U.S. controlled prisons. So, in fact, that action,
4 the putative class in that case would encompass the plaintiffs
5 in this case.

6 The plaintiffs counsel there was --

7 THE COURT: Were any of the plaintiffs in this case,
8 though, nominal plaintiffs in the California action?

9 MR. BOWMAN: None of the plaintiffs named in this case
10 were named in the California action. Plaintiffs' counsels, as
11 I've said, there and here are the same.

12 The defendants in that case included the Titan
13 Corporation, which is the predecessor to L-3 Services, Inc.
14 Williams & Connolly also defended the Titan Corporation in that
15 action, and now defends L-3 Services here.

16 The other set of corporate defendants in that case was
17 CACI, which was defended by Steptoe & Johnson, the same legal
18 team that's defending CACI in the Eastern District case. So
19 that was the first lawsuit that was filed. About a month later
20 or within a month, a second lawsuit was filed in the District of
21 Columbia. That case --

22 THE COURT: Same plaintiffs' counsel.

23 MR. BOWMAN: Different plaintiffs' counsel, same
24 defense counsel to shorthand it. That case, as I said, was
25 filed in the District of Columbia.

1 THE COURT: What was the title of that case, who was
2 plaintiff?

3 MR. BOWMAN: That case was *Ibrahim*, I-B-R-A-H-I-M.

4 THE COURT: All right.

5 MR. BOWMAN: The two cases -- the California case, as
6 I said, was filed earlier, but ultimately there was a Motion to
7 Transfer.

8 THE COURT: I'm not sure. Tell me who was suing whom
9 in the District of Columbia.

10 MR. BOWMAN: Okay. In the District of Columbia there
11 were, and forgive me if I -- there's been many amendments to all
12 these cases, but there were a handful of cases initially in that
13 case.

14 THE COURT: Are any plaintiffs from this case there?

15 MR. BOWMAN: No, Your Honor, there are no common named
16 plaintiffs.

17 THE COURT: All right. And who were they suing?

18 MR. BOWMAN: They were suing, again, the same
19 corporate defendants, L-3's predecessor at the time, Titan and
20 the CACI.

21 THE COURT: No individual defendants?

22 MR. BOWMAN: In the *Ibrahim* case, there were no
23 individual defendants.

24 THE COURT: All right. And what judge had that case?
25 Was that Judge --

1 MR. BOWMAN: That's Judge Robertson. It was initially
2 assigned to Judge Robertson.

3 THE COURT: Okay.

4 MR. BOWMAN: Backing up to the California case, the
5 *Saleh* case, there were individual defendants in that case. Adel
6 Nakhla was one the individual defendants, and there were also
7 individual defendants who were employees or former employees of
8 CACI. So that the California case was clearly the broadest on
9 both because it was a class action, and because it included
10 corporate and individual defendants.

11 The CACI defendants filed a Motion to Transfer the
12 *Alrawi* case, which was later captioned *Saleh, S-A-L-E-H*, to the
13 Eastern District of Virginia.

14 THE COURT: Is this while the case was pending in D.C.
15 as well?

16 MR. BOWMAN: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. BOWMAN: Yes. And in fact, counsel for the Titan
19 Corporation in its papers suggested that the District of
20 Columbia might be a better forum for that very reason, because
21 there was a related case pending in the District of Columbia.

22 THE COURT: Even though the locus of activity was in
23 Virginia, according to your present argument?

24 MR. BOWMAN: That's correct.

25 The Titan Corporation joined the motion and did not

1 object to transfer to Eastern District of Virginia, the locus,
2 but also suggested that the District of Columbia might be
3 appropriate.

4 THE COURT: Interesting. That's an interesting point.
5 You argue somehow Maryland is not appropriate, not much farther
6 than Virginia, but sobeit. We'll come back to that.

7 MR. BOWMAN: If they were related cases pending here,
8 that might be different. But the point that we were making at
9 the time was given the related case, given the related case in
10 the District of Columbia, the efficiencies of consolidation
11 might make that --

12 THE COURT: Who asked for it to be transferred to
13 Virginia?

14 MR. BOWMAN: The CACI defendants did.

15 THE COURT: And what, plaintiffs consented?

16 MR. BOWMAN: Plaintiffs opposed.

17 THE COURT: Plaintiffs opposed, okay.

18 MR. BOWMAN: As Ms. Burke has indicated. Plaintiff's
19 vigorously opposed that transfer.

20 THE COURT: And which judge had the case is
21 California?

22 MS. BURKE: Rhoades.

23 MR. BOWMAN: Judge Rhoades, thank you.

24 Judge Rhoades, and his opinion is in fact appended as
25 an exhibit to L-3's Motion to Transfer, so you have that before

1 you.

2 THE COURT: Just to follow you for a moment, L-3 was
3 in that case as well is what you said.

4 MR. BOWMAN: L-3's predecessor, the Titan Corporation.

5 THE COURT: All right.

6 MR. BOWMAN: So the case was -- in Judge Rhodes'
7 opinion, Judge Rhoades wrote an exhaustive opinion, which has
8 been, sense been cited many, many times in the Ninth Circuit.
9 Did an exhaustive analysis and transferred the case to the
10 Eastern District of Virginia.

11 Upon arrival in the Eastern District, the plaintiffs
12 in that case moved to re-transfer the case to the District of
13 Columbia. That motion was opposed by the defendants, but
14 ultimately was granted and the case was then transferred to the
15 District of Columbia and consolidated for discovery purposes
16 with the *Ibrahim* case. And ultimately, Judge Robertson in the
17 District of Columbia presided over both of those cases.

18 Now, as the cases proceeded along, Judge Robertson
19 granted the Defendant's Motion to Dismiss all the federal claims
20 in both cases. There were -- those claims included Alien Tort
21 Statute claims identical to the ones in this case, and they also
22 included a number of other federal causes of action that are not
23 alleged here.

24 All those federal claims were dismissed. Some of the
25 state law claims were dismissed on Motions to Dismiss and, but

1 not all of them were. As to the surviving state law claims,
2 Judge Robertson ordered limited discovery based upon the
3 strength of the defendant's preemption defenses. So Judge
4 Robertson ordered discovery into direction and control of the
5 defendant's employees at the military facilities in Iraq to
6 determine whether state law was in fact preempted as to those
7 defendants.

8 After taking approximately 20 depositions on a
9 consolidated basis between the two cases, Judge Robertson
10 ultimately issued a judgment for the Titan Corporation, which is
11 L-3 Services' predecessor, but denied the CACI Defendant's
12 Motion for Summary Judgment, finding that there was a genuine
13 issue of material fact in dispute.

14 Those cases, Judge Robertson's rulings were all
15 appealed in various appeals, six appeals in all, to the D.C.
16 Circuit and those cases have been fully briefed and they were
17 argued last month. So we're waiting decision from the D.C.
18 Circuit on those cases. That's what we refer to in our briefs
19 as the first round of litigation.

20 The second round of litigation of which this case is a
21 part was initiated in May of 2008 with the case filed in the
22 Central District of California captured *Al-Janabi*, J-A-N-A-B-I.
23 Mr. Al-Janabi sued the same two sets of corporate defendants,
24 L-3 Services, Inc. and CACI, along with one of the CACI's
25 employees as an individual defendant.

1 Subsequently, four additional lawsuits were filed in
2 the second round of cases in four distinct venues around the
3 country, including the Western District of Washington, Southern
4 District of Ohio, Eastern District of Michigan and the District
5 of Maryland.

6 THE COURT: And these were all where individual
7 defendants resided, I guess?

8 MR. BOWMAN: That's correct, Your Honor. Each of the
9 five cases in the so-called second round involved one plaintiff
10 and with one exception, the two corporate defendants, plus one
11 individual defendant who is an employee of one of the two
12 corporations. The exception was the case filed in the Eastern
13 District of Michigan, *Al-Tae*, which was filed solely against
14 L-3 Services.

15 What occurred next is that the CACI defendants filed a
16 number of Motions to Transfer, which L-3 Services joined
17 starting with --

18 THE COURT: Let me stop you though for a minute. At
19 that point, was -- L-3 was or Titan was a defendant in D.C. when
20 all these Motions to Transfer were pending? Is L-3 a defendant
21 anywhere at that point?

22 MR. BOWMAN: Let's see. The judgment issued to L-3 in
23 D.C. was December of 2007. Notice of Appeal was filed within 30
24 days thereafter so that L-3's case was on appeal in the D.C.
25 Circuit when this second round of cases was filed.

1 THE COURT: Okay. And even so, there was a Motion to
2 Transfer to D.C., is that correct?

3 MR. BOWMAN: No, Your Honor. The Motions to Transfer
4 were to the Eastern District of Virginia.

5 THE COURT: Oh, Virginia, okay. And why was that as
6 opposed to D.C., just because it was farther along?

7 MR. BOWMAN: No, sir, because the cases with
8 individual defendants could not be transferred to D.C. for lack
9 of personal jurisdiction of the individuals, which goes to the
10 point I made earlier. Eastern District is the only jurisdiction
11 in the country which happens to be proper for any of these
12 cases, because of the different residences of the individual
13 defendants that have been involved.

14 So again, the first, the first Motion to Transfer I
15 believe was filed in the first filed case, which was the Central
16 District of California case, *Al-Janabi*. That case was -- the
17 Motion to Transfer that was opposed by the plaintiff, the
18 plaintiff in that case, but the Court did in fact rule in favor
19 of the defendants and transferred that case to the Eastern
20 District of Virginia. That opinion is also included in our
21 papers as an exhibit to our papers. Do you have that before
22 you?

23 In the meantime and I think actually before that
24 decision issued, two of the other five plaintiffs in this first
25 round of cases consented or did not oppose transfer of their

1 cases into the Eastern District. Those were *Al-Ogaidi*,
2 O-G-A-I-D-I, in the Western District of Washington, and
3 *Al-Shimari*, S-H-I-M-A-R-I, in the Southern District of Ohio.

4 So, ultimately, those three cases were transferred by
5 the courts to the Eastern District and all were present there
6 for a short period of time. At that point, the plaintiff, the
7 *Al-Ogaidi* plaintiff, Mr. Al-Ogaidi and Mr. Al-Janabi filed Rule
8 41 dismissals and then joined in this case through the mechanism
9 of the First Amended Complaint, which was filed September 5th of
10 2008.

11 That left only one case, *Al-Shimari* in the Eastern
12 District. In that case, Mr. Al-Shimari dismissed L-3 Services,
13 Inc. and the only individual defendant, leaving CACI, the CACI
14 corporate defendants as the sole defendant in the Eastern
15 District. Mr. Al-Janabi, Mr. Al-Ogaidi and ultimately Mr.
16 Al-Tae then joined this case on September 5th, 2008.

17 That brings us, I think, up to date on the second --

18 THE COURT: So there's only two jurisdictions involved
19 now, Eastern District and this, is that correct?

20 MR. BOWMAN: Well, now we come to the third round of
21 cases.

22 THE COURT: You have cases on appeal.

23 MR. BOWMAN: We have cases on appeal and we have what
24 I'll call the third round of cases, the first of which was
25 recently filed in the District of Columbia. So we now have a

1 new case.

2 THE COURT: Who is that? Who is suing who there?

3 MR. BOWMAN: The caption is *Abbass*, A-B-B-A-S-S. There
4 are numerous defendants and I'm sorry I don't have the count off
5 the top of my head, but more than 50 I believe.

6 THE COURT: One plaintiff and --

7 MR. BOWMAN: I'm sorry, plaintiffs, numerous
8 plaintiffs. The plaintiffs' counsel in that case is the same
9 legal team in the *Ibrahim* case in the District of Columbia, the
10 companion case.

11 THE COURT: But not these counsel here.

12 MR. BOWMAN: Not these counsel here.

13 In that case, the parties have agreed to stay that
14 case pending the outcome of the appeals in the D.C. Circuit.

15 THE COURT: Because one will fall if the appeal is
16 sustained?

17 MR. BOWMAN: Well, that's our, that's our argument.

18 THE COURT: Okay.

19 MR. BOWMAN: We've been told by plaintiff's counsel
20 here that there may be additional plaintiffs and cases, but we
21 have not seen any further filings in the so-called third round
22 of cases.

23 THE COURT: Okay.

24 MR. BOWMAN: So coming back to this case -- so I guess
25 to sum up, we have one case pending in the Eastern District of

1 Virginia. That's *Al-Shimari* involving now four plaintiffs.
2 Three additional plaintiffs were added to that case
3 subsequently. Now it's four plaintiffs, one set of corporate
4 defendants, the CACI defendants. It's in the same procedural
5 posture that this case will be in after today's hearing.

6 THE COURT: Well, now, enlighten me again. In D.C.,
7 is L-3 a defendant there or not?

8 MR. BOWMAN: In D.C., L-3 is a defendant in the *Abbass*
9 case. L-3, L-3 has been given judgment in the other two cases,
10 *Ibrahim* and *Saleh*, and that judgment is on appeal in the D.C.
11 Circuit.

12 THE COURT: Well, is it going to be your argument
13 there's a res judicata issue here if the D.C. Circuit decides
14 favorably to you?

15 MR. BOWMAN: We have not made that argument, Your
16 Honor. We think that, we think the D.C. Circuit's opinion would
17 certainly be persuasive, but we have not argued that res
18 judicata would apply.

19 THE COURT: Okay, all right.

20 MR. BOWMAN: In this case, as I said, there was a
21 First Amended Complaint filed on September 5th and then L-3
22 Services filed the instant motion. It's the Motion to Transfer
23 to Eastern District on September 8th, 2008. Our motion to --
24 L-3's Motions to Dismiss were filed later, November 28.

25 THE COURT: Just to sort of stay with your case,

1 you've got four plaintiffs and one corporate defendant there,
2 and you've got summary judgment motions -- I'm talking about
3 Eastern District now. Summary judgment motions have been
4 briefed and argued.

5 MR. BOWMAN: Again, it's the Motion to Dismiss.

6 THE COURT: I'm sorry, Motions to Dismiss have been
7 briefed and argued.

8 MR. BOWMAN: Yes, Your Honor.

9 THE COURT: And you're waiting for an opinion. And
10 who's got that? Is that Judge Lee's case?

11 MR. BOWMAN: That is Judge Lee's case, yes, Your
12 Honor.

13 THE COURT: When was that argued?

14 MR. BOWMAN: It was argued in, I believe October. I
15 can get the exact date for you, but I believe it was October.

16 THE COURT: Any indication of when he's going to issue
17 an opinion? Never ask a federal judge that, right?

18 MR. BOWMAN: He hasn't told me, Your Honor.

19 THE COURT: Okay.

20 MR. BOWMAN: So coming back and I'm sorry for the
21 fairly lengthy diversion. It's a complicated procedural
22 history. Coming back to the point I was making before we
23 started talking about the procedure. We think for three
24 reasons, plaintiff's choice of venue here is entitled to, at
25 best, little weight. At best for them, little weight, but more

1 likely no weight at all, for three reasons. One, they have not
2 --

3 THE COURT: Just on one other fact. Defendant Nakhla
4 is not a defendant anywhere else at this point, is that correct?

5 MR. BOWMAN: That's correct.

6 THE COURT: Okay.

7 MR. BOWMAN: Again, three reasons why plaintiffs'
8 choice of venue is entitled to little or no weight. They have
9 not filed in their home venue; this venue has no connection to
10 the complaint of conduct. And third, plaintiffs admit in their,
11 in their papers to a collective plan to have two cases going at
12 the same time, to related cases going at the same time and that
13 is an inefficiency that 1404(a) is designed to prevent.

14 And I said, they admit to a -- they use the words
15 "collective plan". They do contest that the cases are, in fact,
16 related in a way that we believe they are. So I'd like to walk
17 the Court through the reasons we believe the cases are
18 sufficiently --

19 THE COURT: All right, but let's wind up because I
20 want to hear from the other side, and you want to also rebut,
21 so.

22 MR. BOWMAN: Sure. So very briefly plaintiffs have
23 attempted to paint the Virginia action as focusing exclusively
24 on CACI's acts in the hard site of the Abu Ghraib prison.
25 First, I'd like to point out that the Virginia case is actually

1 broader than that. The lead plaintiff, Al-Shimari, alleges in
2 the complaint that he was detained for nearly five years, the
3 same years that are at issue in this complaint. So, Shimari was
4 detained from 2003 to 2008 by the allegations in the complaint.
5 That is in fact the same period that's at issue here.

6 In addition, Mr. Shimari, the lead plaintiff in the
7 Virginia case, spent only two months of his time at the Abu
8 Ghraib hard site. The balance of that five years was spent at
9 other locations, including Camp Bucca where 14 of the plaintiffs
10 in this case were held. So at any rate, plaintiffs cannot deny
11 that third, important third-party witnesses, the military
12 officials who were present at the Abu Ghraib hard cite at least
13 during that 2003 or 2004 time period are going to be witnesses
14 in the *Shimari* case, and those same people, those same military
15 officials will be witnesses here. That's undeniable.

16 There are 52 plaintiffs in this case that were held at
17 Abu Ghraib. Now, there may be 21 other prisons at issue in this
18 case, but 52 of the 72 plaintiffs in this case were held at Abu
19 Ghraib. Thirty-two of them were held during that same time
20 period, 2003 through 2004 at Abu Ghraib. It's just undeniable
21 that these third-party witnesses --

22 THE COURT: How many plaintiffs in Eastern District
23 were held at Abu Ghraib.

24 MR. BOWMAN: All four of them.

25 THE COURT: All four?

1 MR. BOWMAN: Right. And perhaps more importantly --

2 THE COURT: Is there a claim limited to the Abu Ghraib
3 alleged mistreatment or --

4 MR. BOWMAN: Not by my reading of the complaint, Your
5 Honor. Shimari specifically alleges that he was held at Camp
6 Bucca.

7 THE COURT: Okay.

8 MR. BOWMAN: Perhaps more importantly, plaintiff in
9 both cases, Eastern District and in this case, rely on
10 allegations of a vast conspiracy among, amongst L-3 and it's
11 employees, CACI and it's employees and certain military
12 officials. And they rely on that conspiracy to impute liability
13 to taking this case to L-3 for the actions of, the alleged
14 actions of CACI interrogators. That makes the CACI
15 interrogators witnesses in this case and third party witnesses,
16 which are the most important to consider for the balance of
17 conveniences.

18 And it also makes L-3's witness, L-3's employees
19 witnesses in the Eastern District case. No question about that.
20 And L-3's witnesses are, in fact, third parties in the Eastern
21 District case and that's weighs heavily in favor of
22 consolidation.

23 In fact, the plaintiff's counsel in this case has
24 already notified L-3's counsel that it wishes to take
25 third-party discovery from L-3 for the purpose of the Eastern

1 District case. Now, that didn't happen because discovery in the
2 Eastern District was stayed pending the resolution of the
3 Motions to Dismiss. But before that stay was entered,
4 plaintiff's counsel here notified L-3 that it wished to take
5 third-party discovery from L-3.

6 The parties in the Eastern District case agreed to 20
7 non-party depositions. So the scope of that third-party
8 discovery is going to be extensive in the Eastern Virginia action,
9 Eastern District action.

10 THE COURT: I need for you to wind up. I want to hear
11 from plaintiff's counsel.

12 MR. BOWMAN: I'll wind up here, Your Honor.

13 THE COURT: All right, Ms. Burke.

14 MS. BURKE: May it please the Court. My name is Susan
15 Burke representing the plaintiffs. Our initial concern with the
16 Motion to Transfer is whether L-3 has carried its burden of
17 proving that the action could have been brought in the Eastern
18 District of Virginia. And this is specifically as to the
19 individual defendant.

20 We have actually gone through, as you heard from
21 counsel, we've gone through this before where a case has been
22 transferred over our objections and then we lost jurisdiction
23 over the individual, the individual torturer.

24 Here, the Virginia Long Arm Statute does permit
25 exercise of jurisdiction for anyone transacting any business in

1 the Commonwealth, and L-3 has put in an affidavit that
2 delineates very narrow contacts where Mr. Nakhla went to
3 Virginia to apply for his job.

4 THE COURT: Well, what if he stipulates that he will
5 submit jurisdiction?

6 MS. BURKE: It's actually -- you cannot solve that
7 issue by stipulation. There's case law that says that, you
8 know, the defendants can't simply concede to cure that problem.
9 So what we're worried about is Sub-section C of the Virginia
10 Long Arm Statute that says, when jurisdiction over a person is
11 based solely upon this section, only a cause of action arising
12 from acts enumerated in this section may be asserted against
13 him.

14 So what we're worried about is that they could, in
15 fact, if it were to be moved to Virginia, that he could
16 successfully assert that our claims against him for rape, for
17 the torture, that those don't arise from his submission of an
18 employment application. So we could end up in a posture where
19 we do not have jurisdiction over Mr. Nakhla.

20 So for that reason, the burden is on L-3 and we don't
21 think they can meet that burden. But even assuming for the sake
22 of argument that they could, which we don't think they can,
23 they're simply wrong that our choice of forum is entitled to no
24 deference. Even the cases they cite themselves, for example,
25 the *Polaroid* case, what it says is, a plaintiff is not entitled

1 to deference if the forum has little or no connection with the
2 parties of the subject matter.

3 Here, we have a very distinct and clear connection to
4 Maryland. This is where one of the torturers resides. It's his
5 community. This is where he lives. That is, that is a strong
6 reason. We didn't just file this, you know, in the middle of
7 nowhere. We filed it where Nakhla was located. We want to
8 bring these cases, we want to bring cases on the torture in the
9 jurisdictions where the torturers reside. So, the notion that
10 our choice of forum is not entitled to difference is an
11 over-statement and is not supported by the case law that they
12 cite.

13 The other reasons why you would possibly transfer have
14 to do with convenience to the witnesses. Given the proximity
15 between Virginia and Maryland, that simply is not a strong
16 argument. We certainly confronted and lost on that very issue
17 when we tried to maintain these actions on the West Coast. But
18 here, there is not the same inconvenience. You know, Greenbelt
19 is not that far from Alexandria. So none of those weigh in
20 favor of moving it to Virginia.

21 Now, although --

22 THE COURT: What about the duplication of effort; same
23 parties, same issue?

24 MS. BURKE: Well, Your Honor, originally, we filed
25 back as a class action for just that reason, that there seemed

1 to be some economies of scale, some efficiencies into treating
2 this all as a class action where you would have common rulings
3 on certain legal issues. The defendants opposed that and they
4 prevailed, so this is not a class action.

5 So what happened instead in D.C. actually illuminates
6 why there's not going to be the benefit of consolidation. There
7 Robertson had before him both the defendants and he went off in
8 different directions for the two of them. The conduct of L-3
9 and of Titan is a different genre of conduct from CACI. The
10 other point that they're making about, well, the fact that we
11 have overlapping periods of detention, you know, in the Virginia
12 case and in this case. That misses the point. This is not a
13 case about detention.

14 So, yes, you know, some of the, some of the Eastern
15 District of Virginia defendants -- plaintiffs, excuse me, were
16 in fact detained, other than at Abu hard site. But the reason
17 that that is a Abu Ghraib hard site case is because that's where
18 they were tortured. So although we pled how long they were kept
19 in detention, that's neither here nor there for the purposes of
20 the trial.

21 So here what we're looking at is a very narrow Eastern
22 District of Virginia case that is in fact limited to the Abu
23 Ghraib hard site torture. There are certain witnesses that are
24 going to be testifying about that and there's a certain body of
25 evidence that will go in to prove that.

1 This case is different. We're going to be proving
2 torture at Camp Cropper. We're going to be proving torture at a
3 mobile facility called the Disco. So there is not, there is
4 not, there is not the overlap that --

5 THE COURT: And also Abu Ghraib though.

6 MS. BURKE: Well, as a practical matter, we believe
7 that if the Eastern District of Virginia, that that adjudication
8 will likely precede this Court's adjudication because of the
9 pace of that case. And so our expectancy would be that when we
10 are able to get a jury verdict establishing that torture, that
11 we may be able to resolve that by settlement with the
12 defendants, the particular plaintiffs here that are limited to
13 hard site.

14 But our plaintiffs here are not hard site victims.
15 People were held at Abu and not tortured at Abu. So the fact
16 that we have a plaintiff that was held at Abu Ghraib, he could
17 have been held in the tent camps and the torture did not go on
18 there. So, he could be picked up, put in the tent camps at Abu
19 Ghraib and then transferred to Cropper, and he's tortured at
20 Cropper.

21 So, it's a location -- it's not the question of where
22 they were detained. The question is where they were tortured.
23 And so that's why in this case we really have -- you know, we
24 have really tried to parse through and we've put the Abu Ghraib
25 hard site torture in Virginia. This case is much broader and

1 it's going to be about torture at other locations as well.

2 So we don't think that the -- we do not think that
3 there is a need to move the entire thing to Virginia. And as a
4 practical matter, the argument that there's a nexus with
5 Virginia that doesn't exist here is simply wrong. These actions
6 took place in Iraq. So there's not, there's not some Virginia
7 connection to everything that's going to end up being important
8 to the resolution.

9 So we would ask that this Court keep this case, that
10 permit us to ensure that we have jurisdiction over the
11 individual torturer and permit the case to proceed to trial
12 here. Any inefficiencies are able to be handled by -- we do
13 have counsel we've worked with for many years now and certainly
14 in terms of discovery and the like, any of those types of things
15 can be handled with a case management and status conference type
16 orders.

17 THE COURT: I guess I want to explore with both
18 counsel the issue of how this would fold into the Virginia case
19 anyway, which has already been argued and briefed. What's the
20 idea, that Motions to Dismiss would simply be transported there
21 and Judge Lee would then consider them in conjunction with the
22 other Motions to Dismiss?

23 Is that what you have in mind, Mr. Bowman?

24 MR. BOWMAN: Yes, Your Honor.

25 MS. BURKE: And, Your Honor, Judge Lee has already

1 considered and had argument on the issues before him. And as I
2 said, they are different issues. Robertson came out different
3 ways based on the different company. So if this were to be
4 transferred, it would have to be re-briefed.

5 THE COURT: L-3 or Titan was in the D.C. litigation,
6 was it not? Did I misunderstand?

7 MS. BURKE: No, they were in D.C., but what I'm saying
8 is Judge Lee has before him only CACI. And the -- and as you
9 can tell from the Robertson order, they have a different role.
10 The interrogation raises different issues than the translation.
11 So Judge Lee, we would have to re-argue, re-brief, and go before
12 Judge Lee in order for there to be a ruling on L-3.

13 The arguments that went back and forth on CACI simply
14 wouldn't extend to or cover the role played by the L-3
15 translators. So there would be an inefficiency at the very
16 outset by transferring it to Lee.

17 THE COURT: All right.

18 MS. BURKE: Thank you, Your Honor.

19 THE COURT: Mr. Delinsky, you want to say something?

20 MR. DELINSKY: Your Honor, if I can make three brief
21 points.

22 THE COURT: All right, go ahead.

23 MR. DELINSKY: Three issues have come up, Your Honor,
24 which I'd just like to take you through very quickly. Number
25 one, on behalf of Mr. Nakhla we have put in a joinder paper to

1 this Court in which we state explicitly that Mr. Nakhla is
2 joining in the transfer motion. And we further go on to state
3 that Mr. Nakhla does not and will not contest personal
4 jurisdiction in the Eastern District of Virginia for this case.

5 I don't believe that we, we'd be legally or ethically
6 able to contest jurisdiction in Virginia, or to file the motion
7 that Ms. Burke is fearful of in the Eastern District of Virginia
8 having put this position in writing to the Court and having
9 re-asserted it here today. We will not contest jurisdiction in
10 the Eastern District and I don't believe that that fear is
11 well-placed.

12 Secondly, Your Honor, as to the convenience point.
13 Mr. Nakhla is just an individual. He has never been in the
14 military. He has always been a civilian contractor, and at that
15 only for a period of eleven months. Mr. Nakhla has a job, and
16 for him to be deposed twice and to take days off from work not
17 only in this case, but also in the Virginia case, for that
18 reason alone, being a third party to the Virginia case and
19 having to go through that deposition twice, would pose a
20 significant inconvenience.

21 And that, of course, says nothing about the third
22 parties, particularly the military officials who would have to
23 undergo two separate depositions.

24 Third and final, Your Honor, Ms. Burke indicated that
25 the Virginia case focuses on the abuse at the Abu Ghraib hard

1 site whereas this case focuses on abuse at a broader array of
2 sites. Mr. Nakhla was only at Abu Ghraib. The complaint only
3 alleges in paragraph six that he was at Abu Ghraib. So there is
4 a direct overlap between any conduct in which he was allegedly
5 involved then Virginia case.

6 Those are my only points, Your Honor. Thank you.

7 THE COURT: Mr. Bowman.

8 MR. BOWMAN: Your Honor, I would submit that the main
9 point here is that there, there is going to be duplication of
10 effort. And I don't -- I didn't hear Mrs. Burke, Ms. Burke to
11 say that, that that wouldn't be the case.

12 First, she did not, she did not say that the
13 plaintiffs here or in *Al-Shimari* were backing away from their
14 conspiracy allegations, which is an attempt to hold again this
15 corporate defendant and this individual defendant responsible
16 for the actions of third parties, including the CACI defendants
17 who are in the Eastern District right now, as well as the
18 military officials. Those, those are complimentary conspiracy
19 allegations in this case and in *Al-Shimari*, and it combines the
20 two cases together inextricably.

21 I also take issue with the notion that, that this --
22 that this case, this Maryland case does not involve the Abu
23 Ghraib hard site. I'd like to read one of the allegations made
24 by one the plaintiffs in this case, Mr. Al-Janabi. And what I'm
25 reading from is his original complaint at Paragraph 40. That

1 complaint is Exhibit B to our Motion to Transfer.

2 Mr. Al-Janabi alleges the facts known to date show
3 that Big Steve -- Big Steve is the terminology that Al-Janabi
4 uses to denote one of the CACI employees -- that Big Steve,
5 other CACI employees, example D.J. Johnson and Tim Dugan, and
6 L-3 employees, example Adel Nakhla, conspired with military
7 personnel to torture prisoners kept other the Abu Ghraib hard
8 site. That's an allegation by one of the plaintiffs in this
9 case that pertains to the Abu Ghraib hard site and ties together
10 the defendants in the Eastern District with the defendants in
11 this case with a common set of third-party military officials.
12 And these cases are really inseparable for that reason as well.

13 I'd like to also point out that Judge Robertson's
14 ruling on Motions to Dismiss, which are -- which is what is
15 pending in this Court as well as in Eastern District, was
16 identical as between the two corporate defendants. It was at
17 the next stage, Motion for Summary Judgment where the treatment
18 diverged.

19 So, following up with that point, there is no need to
20 re-brief Motions to Dismiss at this stage, mainly because as the
21 Court knows, Maryland and the Eastern District are both within
22 the Fourth Circuit. There's no change of law based upon a
23 transfer to the Eastern District.

24 That was not the case when, when the prior, when the
25 *Saleh* case was transferred from the Eastern District to D.C.

1 Circuit. There was a change of circuit precedent that was
2 controlling and did result in re-briefing. That's not the case
3 here. These motions could be shipped over to Eastern District
4 and decided by Judge Lee on these papers.

5 THE COURT: Let me ask you, both counsel this issue.
6 What would prevent the Court from keeping the case now, deciding
7 the Motion to Dismiss and then consolidating, transferring
8 later?

9 MS. BURKE: Your Honor, that would certainly be
10 possible.

11 THE COURT: I mean, you've got the case briefed now.
12 I'm not making any commitment, but suppose I could write my
13 opinion faster than Judge Lee, then what?

14 MS. BURKE: Yes, Your Honor. Then your opinion would
15 be the law of the case.

16 THE COURT: Well, may or may not, but in any event, I
17 mean, in some ways what you're doing is saddling Judge Lee with
18 at least another round of reading your briefs and trying to
19 decide them. I may be able to go forward and decide this with
20 some dispatch. So what's lost with the Court going through the
21 Motions to Dismiss and then looking at it again and seeing what
22 needs to be done?

23 MS. BURKE: Well, we think, Your Honor, that that
24 would -- in terms of judicial efficiency, which is the
25 cornerstone of their argument, that that would certainly save

1 resources.

2 THE COURT: In candor, I'm a little bit hesitant to
3 just sort of dump this case with 71 or two plaintiffs and a
4 different defendant on Judge Lee now, whose got a fairly, seems
5 like a somewhat more discreet issue, even though there's some
6 relationship. It might be better sorted out. I mean, this case
7 may not survive a Motion to Dismiss here.

8 MR. BOWMAN: Your Honor, my partner would like to --

9 THE COURT: Are you arguing the Motion to Dismiss?

10 MR. ZYMELMAN: I am, Your Honor.

11 THE COURT: Okay, go ahead.

12 MR. ZYMELMAN: And obviously, Your Honor, the decision
13 as to whether to retain this and decide the Motion to Dismiss
14 and then transfer is obviously within your discretion.

15 In terms of efficiency, however, if the cases are to
16 be transferred, which we, as Mr. Bowman argued we believe is
17 essential if the cases are to go forward, to have the Motions to
18 Dismiss decided in two separate places, given especially that
19 the posture of where Judge Lee's case is, which is he hasn't
20 issued his ruling yet. And so -- and the arguments in our
21 Motions to Dismiss overlap to a large degree, not entirely, but
22 to a large degree with the arguments that are in front of Judge
23 Lee. And to simply add these motions to his consideration of
24 these issues we think would be a matter of efficiency for these
25 cases to basically proceed directly.

1 For example, you may deny the Motion to Dismiss and
2 Judge Lee might grant the motion, or -- excuse me -- and may
3 grant the motion or vice versa. And there's no reason why these
4 cases should be proceeding in two different courts given the
5 overlap of both legal and the factual considerations that
6 militate in favor of --

7 THE COURT: Yeah, but the issues you're raising now,
8 the issues of convenience of parties and witnesses, that's not
9 really a factor right now. I mean, it's a legal issue right
10 now. Nobody has to travel anywhere. I mean, that's really not
11 there. And choice of forum issue, I mean, you're here, you've
12 got some plausible presence here. So those arguments are either
13 abstract or they may eventuate down the road, but --

14 MR. ZYMELMAN: There's no question, Your Honor, that
15 the considerations in terms of the witnesses don't apply at the
16 Motion to Dismiss stage. However, I believe the efficiencies
17 that are set forth -- we filed a Motion to Transfer, obviously,
18 well before we filed the Motion to Dismiss. Our view was that
19 the Motion to Transfer should be decided first, put the cases on
20 the same track. And for all we know, and again, Judge Lee
21 doesn't keep me informed. He may be waiting to see if this case
22 is coming over there if he's aware --

23 THE COURT: Has anybody talked to him? Does he even
24 know that this is going on?

25 MR. ZYMELMAN: We don't know, Your Honor.

1 THE COURT: Does he know this case is pending?

2 MS. BURKE: No, Your Honor, and we have not alerted
3 him to that.

4 MR. ZYMELMAN: I am -- we have no indication one way
5 or the other, Your Honor, but we do think that there is -- to
6 have the case -- again, we're perfectly -- you know, we filed
7 our Motions to Transfer long before, as I said, before the
8 argument to --

9 THE COURT: Well, but now you are where you are, so.

10 MR. ZYMELMAN: We are where we are, Your Honor, and
11 that decision obviously is your decision on what constitutes
12 greater efficiencies.

13 THE COURT: Well, I mean, in some ways, as I say,
14 greater efficiencies probably favor in my keeping the case now,
15 because I'm ready to decide it, not this minute, but in the same
16 way Judge Lee is not. He's going to have to go back and do some
17 back-tracking to fold this case into the case he's got. There's
18 no question about it. And in some ways, we're ahead of him on
19 that.

20 Now, I understand that you're concerned that you may
21 get split results here; that one may decide one way and one may
22 decide the other and, you know, that's still --

23 MR. ZYMELMAN: Obviously, Your Honor, if you're going
24 to grant the Motions to Dismiss, that would --

25 THE COURT: You'd be delighted.

1 MR. ZYMELMAN: We'd be delighted. However, we are
2 making our argument without making a presumption one way or the
3 other --

4 THE COURT: Yeah.

5 MR. ZYMELMAN: -- which way you're going to --

6 THE COURT: No, I'm not prepared to tell you one way
7 or another on that. I mean, I've obviously, faced some of these
8 arguments. I think you got my *Lazarbe* spin this weekend and
9 some of these issues have come up before obviously.

10 MS. BURKE: Your Honor, I'd just add a further note on
11 the efficiency. We have already had a conference about the
12 scope of discovery with a decision by the magistrate on what
13 discovery would look like --

14 THE COURT: What are you talking about? Where?

15 MS. BURKE: In the Eastern District of Virginia. So
16 you know, and clearly the scope of discovery contemplated for a
17 four person case in one location is dramatically different than
18 what will be needed for a multi-location. So again, you know,
19 just further the efficiency of your keeping the case.

20 THE COURT: All right, Mr. Bowman.

21 MR. BOWMAN: Your Honor, I would like to add that one
22 of the factors in the cases we've submitted that deal with
23 transfer for consolidation is to avoid the risk of inconsistent
24 judgments.

25 THE COURT: I understand. That's certainly the case.

1 MR. BOWMAN: Very briefly, I see my time is just about
2 up. I would like to address one other point made by Ms. Burke.

3 THE COURT: Go ahead.

4 MR. BOWMAN: She said that in the past there was a
5 case transferred and then the plaintiff lost jurisdiction over
6 an individual. I believe that the instance that she was
7 referring to was the transfer on plaintiff's motion, not
8 defendant's motion, but plaintiff's motion of the *Saleh* from the
9 Eastern District to the District of Columbia.

10 The personal jurisdiction over Nakhla, again, being
11 asserted by the plaintiffs was based upon RICO. The defendants
12 actually opposed that transfer because -- on the basis that the
13 RICO claims were invalid and therefore, there was no personal
14 jurisdiction. You know, in other words, that the case couldn't
15 have been brought there.

16 The judge, Judge Hilton disagreed and transferred it,
17 but Judge Robertson agreed and dismissed the RICO claim to the
18 individual defendants along with it. So I don't think the facts
19 support the assertion made there.

20 THE COURT: All right. Final word, Ms. Burke.

21 I'm sorry, Mr. Bowman, are you done?

22 MR. BOWMAN: Yes, Your Honor. For the reasons stated
23 in our papers and here at argument, we ask the Court to transfer
24 this case to Eastern District of Virginia.

25 THE COURT: All right, Ms. Burke.

1 MS. BURKE: Yes. Just in response to -- just a quick
2 response to his last point, Your Honor. That is what is the
3 cause of our concern here with 1404. In the transfer from
4 Virginia to D.C., Judge Hilton found that the 1404 had been met
5 and there was -- it could have been brought in D.C. And yet as
6 a practical matter, then the receiving Court is not bound by
7 that and they are able to exercise their own judgment as to
8 whether or not there is jurisdiction.

9 So it simply reinforces the point we made earlier,
10 which is that it's this Court that has to undertake an analysis
11 under 1404 as to whether Sub-section C of the Virginia Long Arm
12 Statute means that jurisdiction is questionable. And if
13 jurisdiction over Nakhla is questionable in Virginia, which we
14 believe it is, then they have not met their burden of
15 establishing --

16 THE COURT: I understand, but to sort of close that
17 out, you say that you can't cure it by stipulating. But unless
18 a party raises a jurisdictional objection, the jurisdiction is
19 waived, isn't it?

20 MS. BURKE: It actually, it's -- there's case law that
21 says they can't waive it in order to accomplish a transfer that
22 they want to transfer. So that, basically, your analysis has to
23 set aside the fact that they've waived it.

24 THE COURT: All right. Mr. Bowman.

25 MR. BOWMAN: Just very briefly, two quick points in

1 response. The first being that, again, that was plaintiffs'
2 Motion to Transfer to the District of Columbia that caused the
3 loss of jurisdiction. The defendants all opposed the transfer
4 on that very basis, so it's completely distinguishable where
5 here you have the individual defendant joining the motion and
6 submitting an affidavit establishing the facts necessary.

7 THE COURT: Very well. We'll break until two o'clock
8 and pick up then.

9 I may be prepared to address the Motion to Transfer
10 issue when we come back at 2:00 o'clock, and then we'll hear you
11 on the Motions to Dismiss. Frankly, I'm inclined to tell you
12 right now that I will probably hold it and look at it for later
13 review, since I think the case is pretty ripe for a review at
14 this point and see what we do, but I'll have more to say when we
15 come back.

16 (Recess taken at 1:03 p.m., and resuming at 2:05 p.m.)

17 THE COURT: Anything anybody want to say on the Motion
18 to Transfer?

19 MR. ZYMELMAN: Your Honor, Ari Zymelman for --

20 THE COURT: I can hear you.

21 MR. ZYMELMAN: Ari Zymelman for L-3 Services. At the
22 lunch break, at the lunch break, we checked with counsel for
23 CACI who told us that Ms. Burke was mistaken. Judge Lee has
24 been told about this case. Both in the Motion for Partial
25 Summary Judgment and for the Motion to Stay Discovery was told

1 about the pendency of this case.

2 MS. BURKE: Your Honor, just on that, the question I
3 believe was whether he'd been told about the date of this oral
4 argument, and to the best of my knowledge, what I said before is
5 the case, I don't think he's aware we're arguing today.

6 THE COURT: All right. In this case Wissam
7 Abdullateff Sa'eed Al-Quraishi and others have sued Adel Nakhla
8 and L-3 Services, Incorporated. The Second Amended Complaint
9 proceeds in 20 counts, but essentially they are counts of,
10 substantive counts, conspiracy counts, aiding and abetting,
11 counts of torture, cruel inhuman or degrading treatment, war
12 crimes, assault and battery, sexual assault and battery,
13 intentional infliction of emotional distress and negligent
14 hiring and supervision against the corporate defendant,
15 negligent infliction of emotional distress against the corporate
16 defendant.

17 The matter is before the Court on the corporation, on
18 L-3 Services' Motion to Transfer which is joined by Defendant
19 Nakhla. The essential background facts are that 72 Iraqi
20 nationals as plaintiffs claim mistreatment during their capture
21 and detention by the U.S. military, various U.S. military
22 facilities in Iraq during the period July, 2003 until May, 2008.

23 They allege that while they were innocent of
24 wrongdoing and wrongfully captured, they were tortured while
25 detained by the military during the Iraq hostilities. They seek

1 damages for this torture, alleged torture from L-3 Services and
2 Mr. Nakhla, one of the former employees of L-3. Plaintiffs
3 reside in Baghdad, Iraq with the exception of Mr. Al-Quraishi
4 who is a resident of Jordan. Majority of the plaintiffs claim
5 to have been detained at Abu Ghraib Prison at some point.

6 Defendant L-3 sold services of Nakhla and other
7 employees to the United States military. Plaintiffs claim that
8 the Defendant L-3 is liable because of the actions of these lone
9 employees, who while assigned to military units that controlled
10 detention facilities in Iraq tortured the plaintiff and aided
11 others in doing so, and/or joined the conspiracy to do so.
12 Without getting into specifics, that's the essential allegation
13 of the, allegation of the case.

14 There are a number of suits that have preceded this
15 suit that have taken place in the Central District of
16 California, the District of Columbia with varying results.
17 These parties have, the present suit have been parties to one or
18 more other suits. There is presently pending in the Eastern
19 District of Virginia one case that remains in which an alleged
20 corporate co-conspirator, CACI, has been sued along with -- is
21 it one other, did you say, defendant? No other defendant, just
22 the corporation.

23 MS. BURKE: No individual defendants, Your Honor.

24 THE COURT: There are four plaintiffs in that case as
25 opposed to the 71 here, and that matter has been briefed on

1 Motions to Dismiss by the defendants and, by the defendant and
2 is awaiting decision by Judge Lee.

3 This case comes to this Court. It was filed in June
4 of 2008. The Amended Complaint was filed in November. The
5 Motion to Transfer was filed in September, I guess, of 2008 and
6 then the Motion to Dismiss came in late, November.

7 The central argument that is made with regard to the
8 Motion to Transfer under 28 U.S.C. Section 1404(a), this is a
9 convenience transfer, because clearly there is jurisdiction in
10 this Court given the residence of Defendant Nakhla here and the
11 fact that the plaintiffs are aliens, non-resident aliens.

12 The defendants have put forth arguments under 1404(a)
13 and point to the Court the various factors to be considered in
14 the 1404(a), convenience transfer. The weight to be accorded
15 the plaintiff's choice of forum, the witness convenience and
16 access, convenience of the parties and interest of justice. And
17 transfer has to be a Court in which the action could have been
18 brought initially.

19 The first suggestion by the defendants is that Nakhla
20 who is not a resident of Virginia would be subject to
21 jurisdiction there, because if he was an employee and signed his
22 contract to work for L-3 or its predecessor there in Virginia,
23 plaintiffs contest that it's clear that the jurisdiction could
24 have been obtained in Virginia over Nakhla.

25 In any event, the further argument is made that

1 although courts ordinarily do accord some weight to the choice
2 of forum by the plaintiffs where the plaintiff is not a resident
3 of the forum state, that is the factor that's given less weight.
4 They further argue that witness convenience and access is
5 important because if the case in Virginia goes forward,
6 witnesses would have to in effect be trying similar issues in
7 two jurisdictions, albeit jurisdictions close to one another.
8 Particularly insofar as the alleged conspiracy between the two
9 corporate entities is involved.

10 The further argument is that the -- there are
11 arguments that are not made in oral argument today, but the
12 suggestion is that the Eastern District of Virginia is less
13 congested and routinely deals with cases of this type, and
14 highly classified information of the sort that would be involved
15 here.

16 The plaintiff's argument, of course, is that the
17 burden of proving that there was a clear reason to transfer lies
18 with the plaintiff and -- the defendant, excuse me, and there is
19 no question that there's jurisdiction over Defendant Nakhla
20 here. And they argue that Nakhla, in fact, defeated
21 jurisdiction in the District of Columbia, personal jurisdiction
22 with a similar long arm statute presumably saying he wasn't
23 present there.

24 The plaintiff also argues that no witness would be
25 particularly inconvenienced because the courts are close

1 together and that there isn't that much similarity in the issue,
2 via two corporate defendants, albeit allegedly in league in
3 their conspiracy. There are other sites where the alleged
4 torture occurred, not just in Abu Ghraib, which is
5 characteristic exclusively of the sites where the alleged
6 torture occurred in the Virginia case. And that the justice,
7 interests of justice do not require transfer there.

8 As I say, it's sufficient differences according to
9 plaintiffs in their case and the case in Virginia, which is
10 exclusively Abu Ghraib, located alleged torture before.
11 Plaintiffs here, far greater number of victims would be alleged
12 to have been affected over a five-year period in other sites.

13 The Court takes note of the fact that this case is in
14 a posture for decision on Motion to Dismiss or Motions to
15 Dismiss, because Nakhla joins. And although the Motion to
16 Transfer was made early on, some of ordinary considerations that
17 one would take into account such as the witness convenience
18 really don't apply at this stage, because the issues before the
19 Court are strictly legal issues. So that factor really seems to
20 drop out of the case, although it's one that defendants set some
21 store by.

22 The other issue, it's true that to some extent when a
23 plaintiff is not, or plaintiffs are not residents of a forum,
24 the weight according to the plaintiff's choice of forum is less
25 substantial. It doesn't mean it's non-existent, however, and we

1 have aliens here who, non-resident aliens who are entitled to
2 sue in any jurisdiction in this country. So at least there is
3 the slight tilt in the plaintiff's favor in being here for now.

4 The only issue really that the Court sees that's
5 potentially problematic would be inconsistent verdicts; that is,
6 on similar issues. Whether it's arguing the applicability of
7 the Political Doctrine or some other aspect of the defense.

8 The cases kind of go both ways on that issue. The
9 Court did a little bit of research on that quickly about
10 inconsistent verdicts being dispositive factor. It's certainly
11 one that one could consider. In *Greater Yellowstone Coalition*
12 *versus Kempthorne*, which appears at 2008 Westlaw, 1862298, a
13 decision authored by Judge Sullivan of the District Court of the
14 District of Columbia. He faces the issue of the risk of
15 inconsistent judgments and found that that involved mere
16 speculation about the likelihood of an adverse ruling in the
17 court to which the case was proposed to transfer. And *Roth*
18 *versus Bank of the Commonwealth*, which is a 1978 Westlaw 1133,
19 Eastern District of Michigan, 1978. There is some discussion
20 about inconsistent verdicts being a matter of concern, although
21 it talks about duplicitous pre-trial and trial proceedings,
22 which again is not really the issue that the Court has here.

23 The only real issue is what happens if this Court
24 decides one way on the Motion to Dismiss and on similar issues
25 Judge Lee decides another way, but seems to me we can cross that

1 bridge when we come to it.

2 The Court is going to deny without prejudice the
3 Motion to Transfer, but revisit the issue when we see how we do
4 here. Should for some reason both cases proceed to trial,
5 there's certainly a way we can accommodate a potential problem.
6 Should it appear that it makes more sense for the cases to be
7 consolidated, at least in some if not all respects, we can also
8 visit that at the time. In sum, the Motion to Transfer is
9 denied without prejudice.

10 Now, let's go right into the Motion to Dismiss, and
11 tell me -- I gather with regard to the Motion to Dismiss, are
12 you dividing up your argument on that motion? How are you going
13 to do that?

14 MR. ZYMELMAN: Yes, Your Honor.

15 THE COURT: How are you going to do that?

16 MR. ZYMELMAN: There are two motions pending. One by
17 L-3 Services, Inc., one by Mr. Nakhla. I'm going to address the
18 issues -- we attempted not to overlap in our briefs and I think
19 the common issue between us in terms of having done some
20 briefing on the issue is the conspiracy, the adequacy of the
21 conspiracy allegation.

22 Mr. Delinsky is going to -- and I'll let Mr. Delinsky
23 on behalf of Mr. Nakhla address that issue for both of us, but I
24 think that with regard to the issues raised in our brief, I was
25 going to address that, those issues and we're going to divide

1 the argument basically along the lines of our brief. Other
2 than, I think, as I said, with regard to conspiracy, I'll defer
3 to Mr. Delinsky.

4 THE COURT: Okay. Let me say, I often find it more
5 helpful from my standpoint in oral argument of a case like this
6 to go issue by issue and hear the response as you make your
7 argument. Now, that may be somewhat problematic with you, but
8 you've got a lot of arguments that you packed in there. And by
9 the time I revisit those arguments, I'm sort of back in the dark
10 again.

11 Do you have any problem with posing some of your basic
12 issues, at least, in cluster so I can get response from the
13 plaintiff as we go?

14 MR. ZYMELMAN: I guess I would like to address sort of
15 the overarching standing, just disability.

16 THE COURT: All right. Why don't you do that first,
17 but then let me hear their response before you get into some of
18 the other defenses that you're raising.

19 MR. ZYMELMAN: Yes, Your Honor.

20 THE COURT: All right.

21 MR. ZYMELMAN: Your Honor, we have prepared per your
22 request notebooks of the cases in advance. I mean, I've tried
23 to select what I think are some of the more important cases.

24 THE COURT: All right.

25 MR. ZYMELMAN: But they are, it is just some of the

1 cases. If I could approach?

2 THE COURT: Okay. All right. Thank you.

3 MR. ZYMELMAN: We've alphabetized the cases, Your
4 Honor. So if that --

5 THE COURT: Very good, okay.

6 MR. ZYMELMAN: -- by first name.

7 Your Honor, this -- as you noted in your bench ruling
8 on the Motion to Transfer, this case involves allegations of the
9 misconduct of L-3 employees who were serving as translators in a
10 military controlled prison in Iraq during the war in Iraq, and
11 its occupation.

12 These claims for these translators were provided to
13 the military under contract to serve in attached military units,
14 to translate and function for these military units, to fulfill
15 billets that would otherwise be fulfilled by military personnel.
16 Because of the great demand, the military could not do so.

17 These linguist, as one might imagine, in an invasion
18 of an Arab-speaking country were essential to the military
19 mission. The first set of issues I'd like to address is whether
20 there lie civil claims at all by the military detainees, the
21 military prisoners in Iraq, Iraqi prisoners in military
22 controlled prisons during a time of war and occupation.

23 I think the case, with exception of the cases brought
24 by the Center for Constitutional Rights, Ms. Burke acting on
25 their behalf, are unique and there are no such cases in the

1 history of the United States which have allowed claims by the
2 occupied persons to be brought against the occupiers.

3 The first -- there are several doctrines that are at
4 play. The first we would submit is one of standing. The Court
5 in *Eisentrager*, in the context of habeas ruled that foreign
6 prisoners during an occupation after war had no access to the
7 civil litigation process in this country. That was in the
8 context of habeas.

9 The recent ruling by the Supreme Court in *Rasul* and
10 then later *Boumediene*; *Rasul* addressing the statutory issue and
11 *Boumediene* addressing whether detainees at Guantanamo resort to
12 civil courts to vindicate constitutional rights there, the right
13 to habeas, do not change the *Eisentrager* holding. And in fact,
14 both *Rasul* and *Boumediene* indicated that they did not intend to
15 disturb the holding in *Eisentrager*.

16 *Boumediene* made a point of distinguishing Guantanamo
17 from Landsberg Prison, which was the site of the claims in
18 *Eisentrager*. The distinctions between Guantanamo, which was
19 held as a factual and functional matter to be within the
20 sovereignty of the United States fully, and if not so more so,
21 applied to the military prisons in the Iraqi war zone. The fact
22 that they were prisons abroad in the war zone or in the zone of
23 occupation would, made all the difference in the *Boumediene*
24 litigation.

25 This is perfectly consistent with a line of cases that

1 plaintiffs have not addressed at all in their opposition to our
2 motion, which are the cases dealing with what is called the law
3 of occupation or the law of war. These are cases primarily, but
4 not exclusively, arising out of the Civil War where the issue
5 was both before and after the Civil War, I would say, where the
6 issue was, could the occupied bring claims, civil claims against
7 the occupiers. And the answer and the assumption was, clearly
8 not.

9 *Dow v. Johnson*, which we've quoted from in block
10 quotes, because it was surprisingly quiescent 150 years ago,
11 stated that there could not be claims either in the courts of
12 the occupied or the occupiers; of the occupied country or the
13 occupying country against the occupiers. That the only resort
14 to -- the only way to administer punishment and compensation was
15 that which the government undertook.

16 That doctrine, although it has had little occasion to
17 be applied, because frankly there are -- have been no such
18 claims brought. Never in the history of the United States, this
19 would be the first time, that military prisoners had been
20 allowed to bring claims based on what happened to them in the
21 course of detention.

22 I would submit that the distinction plaintiffs try to
23 draw that these are claims about torture do not change that
24 analysis. As *Dow* observed, if what was necessary to bring a
25 claim was to change your allegations, then certainly the victim

1 of an occupation or of a war would not hesitate to make such
2 claims in an attempt to litigate their cause.

3 This is also consistent with a line of cases, again as
4 we set forth in our brief, under the Takings Clause. Now,
5 obviously, the holdings in those cases are different. Those
6 were cases that sought compensation for damage to property. But
7 if you look through the cases we've cited and the analysis in
8 those cases, in particular the *El-Shifa* case from Federal
9 Circuit which goes through the history of these claims, it makes
10 clear that even when there has been a waiver of sovereign
11 immunity in the case of the Takings Clause, that the occupied
12 and people who suffer harm or injury, or damage and that --
13 again, these are property cases because they are Takings cases,
14 that people who suffer damage during the course of a war in an
15 occupation, even in the face of a waiver of sovereign immunity,
16 that the back, the back assumption to that is that there will
17 not be claims arising out the military's conduct of war. And
18 that is true whether they are the occupied or the enemy, or
19 evening neutrals caught in the crossfire.

20 THE COURT: Is it just a war where the United States
21 is involved, or is it any war anywhere in the world?

22 MR. ZYMELMAN: Well, the Takings cases are obviously
23 cases where it was the United States. It was the action of the
24 United States. So these precepts are held out as, as
25 international law. The idea that the occupier is not subject to

1 litigation in its courts or the courts of the occupied.

2 THE COURT: Well, aren't there in tort, the claims
3 though that have been brought as a result of war time where
4 people are accused of torture brought against the neutral
5 soldiers?

6 MR. ZYMELMAN: I'm sorry.

7 THE COURT: Aren't there cases that permit plaintiffs
8 to go forward against --

9 MR. ZYMELMAN: Not.

10 THE COURT: -- against soldiers who are operating,
11 quote unquote, in war time?

12 MR. ZYMELMAN: Not where it was the United States,
13 Your Honor.

14 THE COURT: But clearly there are cases where when
15 we're talking about other countries it's been recognized?

16 MR. ZYMELMAN: The claims, Your Honor, have -- are
17 first of all, are of somewhat more recent vintage. And the
18 claims generally have been against not countries, but against --

19 THE COURT: Soldiers.

20 MR. ZYMELMAN: Well, against organized militias, for
21 example, in the *Kadic* case, which was not viewed as a state.
22 I'm not aware of claims that have been brought against soldiers
23 of other countries. I guess --

24 THE COURT: You make a blanket statement that war time
25 somehow is off limits.

1 MR. ZYMELMAN: It is off limits to adjudication in the
2 U.S. courts against the United States.

3 THE COURT: Well, that's the question I asked, whether
4 it's just the United States. So far, that's true, but seems to
5 me there are cases that have held and I did recently myself hold
6 that someone operating in war time could be liable for --

7 MR. ZYMELMAN: That is correct, Your Honor, and that's
8 based on, obviously was based on a, the federal tort claim, the
9 Alien Tort Statute or the Alien Tort Claims Act. But as we
10 discussed in the context of that particular act, consistent with
11 this line of cases which have said that aliens, enemy aliens do
12 not have standing to bring claims in this court consistent with
13 the cases that have specifically held that there cannot be
14 claims against the United States.

15 THE COURT: Well, that's the emendation, if you will,
16 the United States.

17 MR. ZYMELMAN: That is correct.

18 THE COURT: We recognize it in other context.

19 MR. ZYMELMAN: That is correct, Your Honor, that these
20 are claims obviously brought in the United States District Court
21 and the precedent involves whether claims of this sort can be
22 brought where the United States is conducting --

23 THE COURT: What is the distinguishing feature though
24 of the United States versus some other activity of war involving
25 another power? Why should there be a distinction?

1 MR. ZYMELMAN: Well, the distinction, Your Honor, I
2 think, and this actually leads right into the Political Question
3 Doctrine, which is why I thought they'd treat them as together.

4 I believe the distinction, Your Honor, is whether you
5 can have a civil litigation that, in essence, judges acts taken
6 during war time or occupation of the United States. And no one
7 has analyzed the analysis as judge, then Judge Scalia said in
8 the *Sanchez-Espinoza* case, which is in the ATS, is that it's a
9 very different analysis as to whether you're going to allow such
10 claims in the United States courts where it's the act of foreign
11 sovereigns. But where it's the act of the United States, then
12 that means that it is not appropriate for civil claims to lie.

13 THE COURT: Is the Political Doctrine limited to the
14 United States? I thought it was the doctrine that applied
15 across the board.

16 MR. ZYMELMAN: Well, Your Honor, the Political
17 Question Doctrine applies to issues that are committed to the,
18 that are committed to the political branches. And it may be
19 applicable in context involving foreign conduct, but generally,
20 but generally that involves commenting on the United -- it could
21 require commenting on the United States relations with other
22 countries. So it does not apply in the separation of powers
23 concern that underlies the -- whether there's a political
24 question where it's the military activity of the United States
25 is not the same analysis where it's the military activity of a

1 foreign power.

2 That the military activity of a foreign power may, if
3 you're going to bring claim, if you're going to analyze it would
4 require you to judge whether it is a political question as to
5 allow claims to go forward not because the judiciary is
6 trenching on issues, on Executive and the Legislative Branches
7 conduct of war. It would be on the conduct of diplomacy. And
8 so, therefore, it would have to involve a different analysis.

9 And I think in the context of it is something that
10 sharply distinguishes the claims that have been brought under
11 the ATS against foreign, for a conduct of foreign soldiers as
12 opposed to conduct of the United States. And that was certainly
13 what Judge Scalia held in the *Sanchez-Espinoza* case in the
14 context of the ATS.

15 And I think if you look at the Political Question
16 Doctrine cases, there's no question that if it requires a
17 judgment that, that involves analysis of the military's conduct
18 of the war or conduct of how it supervised within its detention
19 facilities in a war zone, that that judgment would trench on the
20 separation of powers that underlies the political question. And
21 I think you can see that in the cases we've cited in our brief.

22 And I direct you in particular, obviously, to the
23 *Tiffany* case, which is the Fourth Circuit case that makes it
24 clear that war time -- how the -- that you cannot allow civil
25 claims to go forward where it would require you to make a

1 judgment about the military's conduct of defense operations.

2 But there, there are other cases, some of which
3 post-date Judge Robertson's decision under the *Ibrahim* case
4 where he rejected application of Political Question Doctrine.
5 There are other cases that have since developed that I think
6 more sharply clarify that it would be a -- it would touch on the
7 Political Question Doctrine to try to allow these claims to go
8 forward given these facts.

9 That you have, basically, allegation concerning the
10 conduct of linguists assigned to military units in a military
11 controlled prison, in the conduct of the detention and
12 interrogation operations in a war zone and in an occupation that
13 to assess the claims that are present here, which is were these
14 people being adequately supervised. Is it required -- would it
15 inherently require a judgment about whether the military
16 properly allowed or didn't allow the extent to which the
17 linguist could be supervised. It requires a judgment about
18 whether these people were properly detained or not detained.

19 These are all questions that are inherent. But the
20 fact that they put it in their complaint that they were innocent
21 and they rely upon that shows that that question of their
22 innocence, whether they were security risk or not properly
23 deemed a security risk, or not properly deemed a security risk
24 is inherent in deciding these issues. And that it is impossible
25 to analyze these claims without trenching on the military's

1 conduct of the war.

2 And as you pointed out in your recent decision
3 yourself that the political question cases that involved
4 military decision-making are different, are different when it
5 applies to the conduct of the U.S. military operations versus
6 foreign operations.

7 I would go back to, however, Your Honor, to the
8 fundamental where I started from and I'll come back to political
9 question in a second, but I would go back to the fundamental
10 premise of whether subjects of occupation or, of U.S. occupation
11 or U.S., or enemy aliens can bring civil litigation claims. And
12 it would open a Pandora's box as this does about whether the
13 military can use contractors in their operations, whether the
14 military can use personnel to fill in military billets or not,
15 how they conduct their operations.

16 The issue that -- one the cases, political question
17 cases that plaintiffs rely upon was the *Lane* case, which is a
18 Fifth Circuit case that reviews one of the convoy cases. I
19 don't know if you're familiar. There's a series of cases
20 involving use of contractors to conduct supply operations in
21 Iraq. And these are cases brought by the contractor employees
22 against their employers.

23 That case was initially dismissed on political
24 question grounds. That it was impossible to judge the claims in
25 that case without touching on a political question. The

1 District Court held that. The Fifth Circuit reversed. However,
2 the analysis in *Lane*, I think, shows why this case requires
3 dismissal for political question at the Motion to Dismiss stage.

4 In the *Lane* case, the claims were fraud. You,
5 employer, lied to me about what things would be like when we got
6 to Iraq. You lied to me about whether we'd be perfectly safe.
7 You lied to me about my conditions of employment. And what the
8 Fifth Circuit said was, you can litigate that case without
9 implicating the military's judgments. You can litigate whether,
10 you can litigate the fraud claim without implicating the
11 military's judgments.

12 There are also other allegations which they said they
13 were going to allow to go forward, but were again involving the
14 contract -- the relationship between a contractor and its
15 employee, and whether the contractor could or should have done
16 things to keep the employees more safe.

17 First, none of that implicates what we think is the
18 initial stumbling block here. The initial stumbling block under
19 *Dow*, under *Eisentrager* is that the genus of claims by occupied
20 persons against the U.S., based on the U.S. conduct of the war
21 or our occupation have never been permitted to go forward other
22 than in the District of Columbia, and where this issue is not
23 presented in all fairness because of the way the case was
24 litigated.

25 This issue of whether these parties have standing

1 under *Eisentrager*, under *Dow* was never presented to Judge
2 Robertson?

3 THE COURT: Why would that be so?

4 MR. ZYMELMAN: Well, Your Honor, the timing -- that
5 case dates back to 2004. *Rasul* had come out and had cast some
6 doubt on the continued vitality of *Eisentrager*. Judge
7 Robertson -- the Motions to Dismiss, as we've heard, the case
8 had kind of moved around from California to Virginia, to D.C.
9 By the time the case was -- the way the Motion to Dismiss was
10 postured, we had succeeded in dismissing all of the federal
11 claims, and all that was left was the state law claims and was
12 limited to a very narrow issue on which we ultimately prevailed.
13 And it wasn't until after, long after this was done that
14 *Boumediene* came out that made it very clear that *Eisentrager*
15 retained its vitality. That *Boumediene* made very clear, if you
16 read it against -- which judge, Justice Stevens from the *Rasul*
17 opinion joined, that *Eisentrager* retains its vitality
18 completely. And so, that's why the issue was never presented.

19 And frankly, it is currently pending, the issue on the
20 law of war and so on, is currently pending in that case on the
21 behalf of CACI. So that issue has not, was not presented and
22 had not been decided. And the reason is, as Your Honor I'm sure
23 knows, cases develop and have a -- on their own. And obviously,
24 if I could go back and have written that, but I got judgment in
25 that case, Your Honor, and so I'm not going to go back and

1 second guess that.

2 THE COURT: I need you to sort of wind up this phase
3 so we go back and forth on this.

4 MR. ZYMELMAN: Sure. Your Honor, so I want to go back
5 to the *Lane* case and the political question cases. And I would
6 focus on the *Lane* case which is, is -- I think articulates very
7 clearly the distinction between this case and the convoy cases.
8 This is a case of aliens and occupied persons trying to bring a
9 claim based on -- that is inextricably linked with the military,
10 how the military ran its detention facilities, how the military
11 conducted interrogation, how the military supervised the
12 soldiers and the contractors that were assigned to the military
13 units. It is impossible to separate out these issues from the
14 claims that are at issue here.

15 I would also specifically mention the *Bancoult* case
16 from the D.C. Circuit which is in your binder, which -- where
17 the claims were that there was a policy decision to take over
18 Diego Garcia. And the complaint, however, was that in doing so,
19 extremely illegal things were done. All sorts of things that on
20 their face were accepted to be tortious and in violation of --
21 and illegal unquestionably. And what the *Bancoult* Court held
22 was that even -- that the method of carrying out foreign policy
23 and security methods is a political question.

24 And that's what we're talking about here. We're
25 talking about complaints based on how the military conducted its

1 detention operations, how the military conducted its
2 interrogation operation. Doesn't mean it's not subject to
3 prosecutorial discretion. Doesn't mean that it's not subject to
4 remediation scheme, which the United States has put in place
5 through the Foreign Claims Act to compensate people.

6 What it says, as the *Dow* case held, was that those
7 decisions to punish, to compensate do not lie in civil claims.
8 They lie in with the sovereign and, therefore, we think that
9 under both the political question and the standing issues,
10 these -- the entire complaint should be dismissed.

11 We also have a issue of derivative immunity, but I
12 thought we'd take that up separately.

13 THE COURT: Let's hold off on that.

14 Ms. Burke.

15 MS. BURKE: Your Honor, this is a case in which people
16 who were victimized in a prison are suing a corporation, not
17 suing the United States. They have standing clearly. The
18 reason that it was not argued before is because the *Rasul*, the
19 Supreme Court in *Rasul v. Bush* has spoken so clearly on the
20 issue as to whether or not people that are currently being
21 detained have the courts open to them.

22 And there the Supreme Court said that 28 U.S.C. 1350
23 explicitly confers the privilege of suing for an actionable tort
24 committed in violation of the law of nations. The Court goes on
25 to say that the fact that they're being held in custody is

1 immaterial.

2 Here, we're not even in that situation. What we have
3 are people who were mistakenly swept up and held for a period of
4 time. They're not suing because they were mistakenly swept up
5 and held for a period of time. They're suing because while they
6 were held, L-3 employees tortured them and hurt them. And they
7 were then let go.

8 So the military has already exercised military
9 discretion as to whether or not these people constitute any sort
10 of threat to the United States. The military judgment here is
11 not being challenged whatsoever by this case. This case can be
12 ruled on without looking in any way at a military judgment.

13 They tried to, the defendants try to elevate this into
14 something novel and something that necessarily intrudes upon
15 military decision-making. And arguing that the political
16 question compels dismissal here because it's not justiciable.

17 Robertson dismissed that. We are obviously not in
18 D.C. So looking to the Fourth Circuit, is there anything in
19 Fourth Circuit law that would compel a different result? The
20 answer is in the *Tiffany* decision. If you read what *Tiffany*,
21 what the Court of Appeals wrote there, is *Tiffany* was very clear
22 that the case they were ruling on was not one in which there was
23 an allegation that the government violated any federal laws
24 contained in statute or formal published regulations. So you're
25 outside the realm of alleged illegality and you're in the realm

1 of just negligence.

2 *Tiffany* has another important distinction because, of
3 course, that was a suit against the United States. Here, this
4 is a suit against a private corporation. The United States is
5 well aware of these proceedings, has informed -- has informed
6 us, has informed the Court that they have no present intention
7 to intervene. They have not submitted a statement of interest.
8 It does not entrench upon their sovereignty whatsoever to allow
9 the doors of the federal courthouse to remain open to those who
10 were harmed by an American corporation.

11 THE COURT: Should they be brought in as amicus and
12 argue that maybe they do have an interest, and we shouldn't go
13 forward in this case?

14 MS. BURKE: They're certainly free to intervene if
15 they want to, Your Honor. And if you want them to invite them
16 to intervene, that's fine. The truth is that the United
17 States -- every person acting on behalf of the United States has
18 disavowed a United States policy to torture and abuse people.

19 What we're alleging is the rape of a 14 year old.
20 We're alleging people being hung. We're alleging people being
21 stacked up naked in pyramids. This is not a U.S. policy and the
22 United States has not embraced this.

23 THE COURT: What if they are military who have done
24 it?

25 MS. BURKE: The military who have done it have been

1 court marshaled.

2 THE COURT: No, but have they been sued civilly?

3 MS. BURKE: The military co-conspirators, say for
4 example, Charles Graner. Say Charles Graner was sued by one of
5 the victims. That case would then proceed under the *Westfall*
6 *Act*. And the way in which a case against a government employee
7 or government official proceeds is that the United States is
8 forced to step in and either claim those actions or disavow
9 those actions. So a case against Graner would necessarily
10 involve a United States decision on its own sovereign interest.

11 Here, what this private for-profit corporation is
12 asking for is that they not even get a statement of interest
13 from the United States, but instead that we simply assume that
14 they were acting in the United States' interest, but the
15 definition of what was in the United States' interest was in
16 their contract.

17 These people were hired for a reason. They were hired
18 to translate. The contract itself admonished them and
19 contractually bound them to obey the law of war and the United
20 States law. So they were acting outside the scope of their
21 contract with the United States, and they were not in any way
22 benefiting the United States when they raped people, when they
23 abused people, when they tortured people.

24 The effort to resurrect all the law that has actually
25 been overcome by the common law of war is not going to work.

1 The *Eisentrager* case itself doesn't apply. There there had been
2 an actual adjudication that those individuals were enemies of
3 this nation. There's no such adjudication here. In fact, it's
4 the opposite. These people were simply let go. So *Rasul* and
5 *Boumediene* clearly control this issue and clearly keep the
6 courthouse doors open to federal claims for what occurred to
7 these people.

8 THE COURT: Just as a practical matter, why couldn't
9 everybody who is detained in war time come in and claim these
10 international horrible acts and say, well, at least we're
11 entitled to our day in court on this? Wouldn't you just be
12 always involved in hearing cases by aliens, leave aside enemy
13 aliens, just people who are in any way affected by war time?

14 MS. BURKE: Well, the reason -- there are several
15 reasons that you wouldn't. And that is because not all harm
16 done to people had a private actor involved. So say you are an
17 alien and you were hurt by the United States, that is -- that
18 would be a claim against the United States. And there the
19 Federal Tort Claims Act defines the scope of the waiver of
20 sovereign immunity, and expressly carved out from that waiver of
21 sovereign immunity if acts occurring in a foreign country.

22 In addition, there is -- carved out from that are
23 combatant activities. So if everyone who were hurt by the
24 United States abroad tried to get in these courthouse doors,
25 they would be shut because of sovereign immunity.

1 What's different here and what is a natural limitation
2 on a number of these cases is that this is not a case where it
3 was the United States acting. This is a case of for-profit
4 corporate employers, the for-profit corporate employees who did
5 the acting. So it's really much more akin to a straightforward
6 tort suit. It certainly happened abroad and it happened in a
7 prison, but it is a straightforward claim of assault and
8 battery, abuse by corporate employees.

9 So, Your Honor, for that reason we think the Supreme
10 Court decisions clearly, clearly bestow standing on the victims
11 here, and that the Political Question Doctrine, which really
12 speaks to a separation of powers, does not apply here. You will
13 be able to -- there will be able to be a trial in this courtroom
14 that does not question military judgments.

15 THE COURT: You want to respond to that issue, Mr.
16 Zymelman.

17 MR. ZYMELMAN: A couple of, respond to a couple of
18 points. First of all, she, Ms. Burke talks about, well, this is
19 just a suit against L-3 employees. Of course, that is not quite
20 accurate in the sense that she's seeking to hold the corporation
21 liable for the act of the employees. And she's seeking to hold
22 both Mr. Nakhla and L-3 liable not just for the acts of the
23 corporation and the employees, but the acts of the military and
24 the acts of alleged, and CACI who are allegedly in the
25 conspiracy.

1 So this is sort of a camel's nose in the tent that
2 basically would allow claims for all the conduct, not just the
3 conduct of the L-3 and --

4 THE COURT: Well, but suppose you're right about
5 conspiracy, but not on the other counts. Could part of the
6 claim survive?

7 MR. ZYMELMAN: I don't think so, Your Honor, because
8 again, let's take a look at negligent supervision. Let's take a
9 look at the liability issue. How is it possible -- for example,
10 she, plaintiffs repeat again, well, we were released. We were
11 innocent.

12 Well, the issue is that as set forth in the reports
13 and it's very clear, people were not picked up in the middle of
14 a war in an occupation just because, to see whether they are
15 liable for criminal acts. They were picked up as potential
16 security risk. And situations change and time passes, and they
17 are released.

18 The difference between Abu Ghraib and Guantanamo for
19 the purposes of these arguments are, there are multiple
20 differences. In the case of Guantanamo, you didn't have enemy
21 aliens. Enemy aliens is a status. You are, you are an Iraqi
22 with whom we're at war or which is currently under occupation.
23 That makes you an enemy alien.

24 The people held in Guantanamo were, the issue there
25 was are they enemy combatants which would allow you to treat

1 them and detain them differently. There's no question about
2 your ability to detain enemy aliens during a war and an
3 occupation.

4 The people in Guantanamo were detained as Boumediene
5 made clear for long periods of time, indefinite detention, not
6 subject to any review in what was later held to be a functional
7 part of the United States. And that's the key point on which
8 those decisions turn.

9 The issue of how the -- it is -- this is not just a
10 suit based on a prison. This is a military prison during a war
11 and an occupation where the prison is being run by the military
12 and the people who are being picked up are being picked up not
13 just to be incarcerated subject to, for punishment. They're
14 being picked up as security risk. They are being picked up as
15 having intelligence value.

16 I mean, a lot of the people were picked up and later
17 released because they were determined not to have intelligence
18 value. But the fact of how -- what happened to them in those
19 prisons by the military, by L-3 during the war, it is
20 impossible, Your Honor, I would submit to analyze those claims
21 without touching on the military's conduct of the war or the
22 military supervision of the prison.

23 And frankly, plaintiff don't contest any of that.
24 They have not said, oh, yes, you can get into this without how
25 the military supervised the prisons and, you know, what they

1 said was, it happened to them while they were in the prisons.

2 Well, the military is indisputably in control of the
3 prison. How much resources the military devotes -- I mean, if
4 these to -- controlling the prisons and how much staffing and
5 how much protection of the prisoners. I mean, if these people
6 were acting as rogues outside the scope of employment for which
7 they were hired, then there's no liability for the corporation.
8 If they were acting as part of their, within the scope of
9 employment, within the control of the military, then how do you
10 analyze that without touching on a political question.

11 And again, the *Rasul* and the *Boumediene* cases are
12 particular to Guantanamo. Justice Stevens' comment about
13 Section 1350, as we articulated in our reply is inapplicable to
14 this situation.

15 First of all, it was dicta. It's clearly dicta. The
16 ATS claims had been abandoned.

17 THE COURT: That's not all we have to go on, you know,
18 of course.

19 MR. ZYMELMAN: Well, but the problem with relying upon
20 dicta, in a different situation -- again, these are claims by
21 people held in Guantanamo, which is held to be a functional
22 equivalent of the United States. These are claims by -- the
23 issue in the, in that case, in the *Rasul* case was whether they
24 had any access to review of their detention. It was not whether
25 you can bring damage claims.

1 Plaintiffs' counsel referred to *Dow* as old law. Well,
2 that old law has been applied as recently as the 1980's in the
3 D.C. Circuit when there was a case involving the occupation of
4 Germany to say that there is no right to bring claims against
5 the occupiers in either the country that's occupied or in the
6 United States Court.

7 I left me notebook behind --

8 THE COURT: That's all right. I need you to sort of
9 move on anyway. I want to get to some of the these other
10 issues. I just want to hit the high points with you. I've got
11 your briefs.

12 Ms. Burke, you want to say something very briefly in
13 response on this point and then we'll move on to another
14 argument.

15 MS. BURKE: Yes, Your Honor. Really just want to make
16 the distinction. What counsel, when counsel is talking about
17 potential claims against the United States for failure to
18 supervise, that's a different type of claim and that's -- that
19 would be governed by the *Goldstar* case, where essentially, you
20 know, that the occupying power wasn't diligent and didn't
21 protect them. That's not the claim we're making here. We're
22 making the claim for the direct torture that was caused by L-3.

23 THE COURT: All right. Well, I assume I'm going to
24 hear about derivative immunity in a moment, so let's go right
25 into that.

1 Go ahead.

2 MR. ZYMELMAN: Your Honor, as you said, it turns next
3 on the other ground we have, which would be an absolute bar to
4 these claims would be the Doctrine of Derivative Immunity.

5 As plaintiffs' counsel just indicated, there's no
6 question that the United States is immune under 13, under
7 Section 1350. That's the *Goldstar* holding where there were
8 claims brought and the United States was held to be sovereignly
9 immune.

10 The case law in the Fourth Circuit, in the *Butters* and
11 *Mangold* cases is very clear that if there's a function which has
12 been delegated for which the United States is immune, the fact
13 that they've delegated it to private contractors does not, makes
14 those contractors themselves immune.

15 *Butters* is a particularly good example of that. There
16 it wasn't even the United States. The immunity was that of
17 Saudi Arabia where the, the suit was as, of an employee against
18 its employer. Again, on its face, seemingly no involvement in
19 the government's immunity. But because the conduct at issue was
20 taken on behalf of the Saudi Arabia, the employer was held to be
21 immune.

22 *Mangold* is an example of a case of clearly tortious
23 conduct, clearly improper conduct that was held to be immune
24 because the function that had been delegated to the corporation.
25 Here again, it's undisputed. The linguists were loaned, as you

1 described them, loaned to the military to fill military billets.
2 They were performing war-time functions for the government,
3 translating as part of military units.

4 The argument, well, there wasn't a -- you know, they
5 weren't loaned to engage in torture. Well, of course not. And
6 there's no question that plaintiffs cannot sue and are not suing
7 as third-party beneficiaries of L-3's contract with the
8 government.

9 The question here is, was the function being performed
10 by the L-3 employees. The job that they were doing, not the
11 acts they were included -- not the acts that they were accused
12 of. There was no -- there was no delegation to commit slander.
13 There was no delegation to commit defamation in the case of, the
14 *Mangold* case. There was no delegation to commit sex
15 discrimination in the case of the *Butters* case.

16 Here, the delegation, the job, the function as the
17 Fourth Circuit has put it, that was delegated to the L-3
18 employees was to be attached to military units to perform
19 translation in support of detention and interrogation
20 operations, which the Supreme Court has recognized is inherently
21 incident, important incident of the power of war.

22 And for the same reason that this is a political
23 question, that analysis of these claims would trench on a
24 political question on the government's conduct of how it
25 conducted the war, under the Derivative Immunity Doctrine in the

1 Fourth Circuit, under the holding in *Goldstar*, it would be these
2 employees and L-3 is immune for the conduct.

3 And obviously, immunity carries with it, just as
4 closing the courthouse doors to aliens, enemy aliens, or closing
5 the courthouse doors to occupiers carries with it the situation
6 where people, even assuming it's true what they allege, even
7 assuming that this torture took place and the people they
8 accused of engaging in the torture in fact did it, assuming it's
9 true, it keeps out meritorious claims.

10 And the reason is because of the fundamental judgment
11 in the case of Political Question Doctrine. It's the judgment
12 that those issues are committed to, in the case of the conduct
13 of war, to the executive and the Congress in terms of declaring
14 wars.

15 In the case of derivative immunity of this function
16 it, is committed to the United States. The function is, one,
17 how they fight the war, how they conduct interrogation, how they
18 conduct detention operations for which the value of attaching
19 immunity outweighs the harm from not allowing these things to
20 proceed in civil suits.

21 Again, as we pointed out in our brief, every case,
22 every case to have considered allegations of these type of
23 allegations, mostly in Guantanamo, although not exclusively, has
24 held a torture where U.S. employees, U.S. government officials
25 have been accused in torture. Every case to have considered

1 them has dismissed them either under *Westfall*, which is subject
2 to Court review. It's the Court that ultimately decides whether
3 the conduct was within the scope of employment under *Westfall* or
4 under the political question doctrine.

5 You have *Harbury* which is, post-dates Judge
6 Robertson's opinion in the binder that I gave you where they
7 hold on both grounds, both on *Westfall* and on Political Question
8 Doctrine. CIA operatives who engaged in torture abroad, that
9 would be a political question. And so, for the same reason, the
10 function that is given to these -- for the same reason that this
11 conduct is within the scope of employment for *Westfall* purpose,
12 I would submit that there should be derivative immunity based on
13 *Butters*, based on *Mangold*. It's clear that the United States is
14 immune under *Goldstar* and, therefore, the immunity should be
15 derivative to the employees.

16 THE COURT: All right, Ms. Burke.

17 MS. BURKE: Your Honor, there is serious flaws in
18 counsel's argument. First, the Supreme Court teaches that you
19 cannot look to a functional analysis to decide on immunity. You
20 look at the *Richardson* case at Page 408 to 409, the Supreme
21 Court is quite clear that, and I quote, the Court has sometimes
22 applied a functional analysis in immunity cases, but only to
23 decide what type of immunity, absolute or qualified, a public
24 official should receive.

25 It has never held that the mere performance of a

1 governmental function can make the difference between unlimited
2 1983 liability and qualified immunity, especially for a private
3 person who performs a job without government supervision or
4 direction. So cannot just invoke this functional analysis and
5 say, because we were transacting and but for the government
6 contract, a military person would do it, therefore we're immune.
7 Instead you have to look at what the government asked you to do.

8 Counsel said, well, in *Butters v. Vance* there wasn't
9 any delegation to commit sexual discrimination, and yet, you
10 know, they were immune to that. That's not accurate. *Butters*
11 *v. Vance* actually turned on just that point. There was a
12 factual determination. There was discovery and factual analysis
13 as to whether or not the Saudi Arabian government had directed
14 the company to sexually discriminate against a woman.

15 And what the Court found is that the Saudi government
16 for its own reasons and consistent with its own culture directed
17 something that would be illegal and unlawful in our culture and
18 in our society. The Saudi government directed that a woman not
19 be placed in the control room, so they made an express finding
20 that the government had directed that very action.

21 Same analysis in *Mangold*. Again, the Fourth Circuit
22 went into a factual determination as to whether the government
23 contractor claiming the immunity had been told what, had been
24 told by the government. And the scope of the immunity was not
25 broad and overreaching. It was limited to that precise issue.

1 And so they looked at, for example, in that case
2 whether information had simply been given in response to
3 investigator's question or whether it had been volunteered. If
4 it was answering questions, it was covered. If it was
5 volunteered, it wasn't.

6 So all of the immunity cases are very clear that you
7 define any immunity that exist by the scope of what the United
8 States Government directed and said to do. I think a case that
9 is on point, another Supreme Court decision that's very on point
10 when you look at the facts is the *Malesko* case.

11 There there was a prisoner who had a heart problem.
12 The private company had been told, don't make that guy take the
13 steps. Make sure he takes the elevator. One of the guards had
14 him take the steps, and he had a heart attack. In a footnote
15 there, the Court pointed out in footnote six that *Boyle*, the
16 Derivative Sovereign Immunity, the government contractor defense
17 that they're seeking here, that that wouldn't apply because he
18 hasn't been directed on what to do.

19 So I think, Your Honor, what is missing for their
20 invocation of immunity is some evidence that the United States
21 government asked them to do this. Now, certainly there were
22 military officials that co-conspired, but *Richardson* teaches,
23 you're not entitled to stand in the shoes of your
24 co-conspirator.

25 There's no evidence on the record and there will be no

1 evidence on the record that the United States requested them to
2 rape that young boy; that the United States requested that they
3 stack these men up in a pyramid with boxes in between. All of
4 the conduct that happened to our plaintiffs was conduct that was
5 illegal conduct, that was a conspiracy between their employees
6 and certain bad actors in the military, and CACI as well. So
7 there's no government direction here sufficient to confer
8 immunity, Your Honor.

9 THE COURT: Mr. Zymelman.

10 MR. ZYMELMAN: Your Honor, as we talked about in our
11 reply brief, *Richardson v. McKnight*, if anything, points the
12 other way. *Richardson v. McKnight* was a 1983 case. It's a --

13 THE COURT: Could you speak louder please?

14 MR. ZYMELMAN: Sorry. *Richardson v. McKnight*, if
15 anything, points the other way. It was a statutory case under
16 Section 1983. And I think *Malesko*, which I think is directly,
17 you know, is very informative certainly on the issue of whether
18 corporations can be liable under common law for federal common
19 law claims, which is the subject of the ATS we'll get to. But
20 *Malesko* is distinguishable and *Richardson v. McKnight* are
21 different. *Richardson v. McKnight*, one of the things that it
22 turned on was that historically state prisons -- this was a
23 state prison. It wasn't a federal prison. Historically state
24 prisons were not necessarily public undertakings.

25 Historically, the conduct of war and the conduct of

1 soldiers in military prisons during time of war is the essential
2 federal governmental undertaking. And that's a significant
3 fundamental difference between *McKnight* and this case. *McKnight*
4 went through a very careful analysis of the history of state
5 prisons and whether it would be correct to assume that there
6 would be derivative immunity.

7 Here, a novel question, but one which I think is
8 basically inarguable is that the history is that the conduct of
9 military prisons during time of war in a zone of occupation,
10 during a time of occupation is historically a governmental
11 function. And therefore, the delegation of activities within
12 that prison, under control -- and that was another significant
13 issue in *Richardson*. *Richardson* was that the private contractor
14 as in *Malesko* was in charge of the prison.

15 Here it's undisputed that the military was in charge
16 of the prison. And so, therefore, the issue of, the issue of
17 whether it's historically a function for which immunity should
18 attached, it was answered differently in *Richardson* than it
19 should be here.

20 With regard to the issue of direction, the *Mangold*
21 case is not as finely parsed as plaintiff would have you read
22 it. *Mangold* said that the, because the function of reporting to
23 the government was, was -- had been delegated, then the conduct
24 which was admittedly tortious would be subject to immunity.

25 And we submit that the conduct of our employees in the

1 military prison as loaned employees to the military given that
2 they were there for military functions is similarly entitled to
3 immunity.

4 THE COURT: All right. Final word on that, Ms. Burke.
5 Anything further?

6 MS. BURKE: Your Honor, that's simply inaccurate.
7 When you look at the expectations of the United States vis-a-vis
8 the contractors and you look at the common law of war about the
9 contractors, what's clear is that the entire preexisting legal
10 tort regime is expected and anticipated to apply to those
11 contractors.

12 THE COURT: All right. Let's go on to your next
13 point.

14 MR. ZYMELMAN: The next issue, Your Honor, is the
15 Alien Tort Statute. And quite simply, this was an issue that's
16 already been litigated in the *Saleh* case and the *Ibrahim* case.
17 Judge Robertson twice ruled -- oh, I take it back. Once and
18 then again on summary judgment reconfirmed it, that the Alien
19 Tort Statute does not apply to these types of claims.

20 The analysis is based on *Sanchez-Espinoza*, which is
21 the only circuit case to address ATS claims brought against for
22 the, brought against private individuals for conduct on behalf
23 of the United States.

24 The *Sanchez-Espinoza* was a case involving the
25 Iran-Contra. The claims were against both government officials

1 and contractors who supposedly acted in conspiracy and at their
2 direction. And the accusations were very much similar here;
3 rape, torture, extrajudicial killing.

4 Then Judge Scalia analyzed the law under the ATS and
5 found that when the state, that state action for claims of
6 torture and war crimes require that, that -- that claims for
7 torture and war crimes require state action, or in the case we
8 would submit of war crimes, certainly, the action of a
9 belligerent. That the, when that actor, either the state or the
10 belligerent is the United States, to allow claims under the ATS
11 would trench on the sovereign immunity of the United States.

12 That holding, obviously, is the, it's been -- that's
13 the subject of the appeal in the *Saleh* and *Ibrahim* cases, but
14 Judge Robertson clearly analyzed the issue as it was presented
15 here and found that there were no claims. In this case I don't
16 think plaintiffs make any attempt to distinguish this case from
17 the case, from Judge Robertson's decision. They basically say,
18 well, this is a different circuit and you should go in a
19 different direction.

20 First of all, they submit no contrary authority.
21 There is no contrary authority where the United States was the
22 state actor that allowed ATS claims to go forward. And
23 everything in *Sosa* supports that, the analysis in
24 *Sanchez-Espinoza*. Nothing in *Sosa* suggests that where the
25 United States is the state actor for a valid ATS claim.

1 Obviously, *Sosa* held that the claim there was not a
2 valid claim, but there is nothing -- all the implications in
3 favor of a limited judicial remedy of carefully examining not
4 only the claim, but the actors against which the claim is
5 brought to see whether there should be an extension under the
6 federal common law -- in *Sosa* supports the decision in
7 *Sanchez-Espinoza*.

8 As we've briefed extensively that plaintiff's reliance
9 on *Kadic*, which is a Second Circuit case which involved a
10 foreign power, it wasn't even a foreign power. It involved a
11 foreign state-like group to which they had extended the claims
12 that had previously been reserved just for states, that nothing
13 in *Kadic* undercuts the rationale or the holding in
14 *Sanchez-Espinoza*. And there's no reason why this Court should
15 reach a different conclusion than Judge Robertson did in his
16 case on exactly the same claims.

17 I think it is important to note that *Sosa* says that
18 claims under the ATS or federal common law claims, and as such
19 the question is whether you should extend and find a new claim
20 here where the United States is the state actor both for the
21 torture or the, the belligerent in the case of the war crimes
22 case.

23 We also point out in a couple of different, couple of
24 cases that have since analyzed the issue and clearly articulated
25 the Ninth Circuit case of *Abagninin* in terms of crimes against

1 humanity; *Saperstein* from the District Court case in Florida
2 which analyzed war crimes; both of which said that the mere fact
3 that the claims took place during a time of war is not
4 sufficient to state a claim, that you look to who the
5 belligerent was.

6 Here the belligerent was, there's no question that the
7 belligerent was the United States. And to allow claims under
8 the ATS against contractors working in military prisons on
9 behalf of the United States would trench as judge, then Judge
10 Scalia said on the sovereign immunity of the United States. And
11 there are no cases, again, there are no cases that have ever
12 allowed this kind of claim to go forward under the ATS.

13 THE COURT: All right.

14 MR. ZYMELMAN: The *Jama* case to which they point to in
15 the District of New Jersey, this issue was never even raised.
16 It's a case against the conduct against a prison by the INS, and
17 other than that I'm not aware of any cases.

18 THE COURT: All right. Let me hear what Ms. Burke has
19 to say about it.

20 MS. BURKE: Your Honor, on this issue, we think the
21 Supreme Court has spoken. *Sosa* itself, the state actor was the
22 United States. The Supreme Court did not say that as a result,
23 we cannot hear the case at all. So what this really is is an
24 effort to raise the same Political Question Doctrine concerns,
25 the trenching on sovereignty.

1 The mere fact that the state actor is the United
2 States doesn't control. We hold ourselves as the rule of law.
3 We hold ourselves to the same standards that we hold others to.
4 And so when you look at *Kadic* and when you look at *Sosa*, and
5 *Sosa's* approval of *Kadic*, we think that the District Court
6 decision in *Sanchez-Espinoza* was just wrong and has been
7 overruled by *Sosa*.

8 The fact that Robertson was not persuaded by that was
9 unfortunate, but *Sosa* itself said, ATS cannot be stillborn. And
10 that's exactly what the analysis of the defendants lead you to,
11 that it would be an illusory, it would be an illusory cause,
12 because if you have enough state action, then you therefore are
13 out of court.

14 So we don't, we don't think that there's any validity
15 to that argument and that perusing the Supreme Court decision in
16 *Sosa* answers the question.

17 THE COURT: What did Judge Robertson say about this
18 argument?

19 MS. BURKE: What he said was that he was not free to
20 overturn *Sanchez-Espinoza* and that it would have to be left to
21 the District Court, the Court of Appeals to determine whether or
22 not that precedent remained valid in light of *Sosa*.

23 THE COURT: All right.

24 MR. ZYMELMAN: A couple points first, Your Honor.
25 This is part of the problem with the reliance on decisions.

1 Sosa's decision was there was no claim for arbitrary detention.
2 How one goes from that to a decision that if there was a claim
3 for arbitrary detention and the United States was the state
4 actor, you had a claim, this is -- you would have a claim under
5 the ATS is beyond me, Your Honor.

6 There was absolutely no discussion whether if there
7 had been a claim for arbitrary detention under, under
8 international law, whether that claim would apply if the United
9 States was the primary actor, it's not good -- it's not the way
10 we, not the way we look to cases.

11 Judge Robertson fully considered their arguments that
12 Sosa had overruled, had overruled the *Sanchez-Espinoza*. First
13 of all, again, how does the Supreme Court case that doesn't even
14 mention the decision overrule a circuit opinion is beyond me,
15 but he in fact says that Sosa points the other way.

16 I'm looking for the exact quote. Hold on. Sorry,
17 this is the wrong -- this is the 2007 opinion. If you look at
18 --

19 (Pause.)

20 MR. ZYMELMAN: Anyway, Judge Robertson clearly
21 addressed that issue in his opinion and found that Sosa had
22 nothing to say about it, and if anything supported our, the
23 ruling he made.

24 The assertion that ATS would be illusory if the United
25 States, if there's no claim when the United States is the state

1 actor is, of course, completely false. In the decision you just
2 recently made, the issue was if you had a foreign power you did
3 have claims under the ATS. And so all the jurisprudence that
4 has arisen under the ATS, all the claims that have been
5 recognized and allowed to go forward involve a foreign power.

6 And then Judge Scalia in his opinion in
7 *Sanchez-Espinoza* specifically identified that there was a
8 difference, that he knew about -- his opinion happened after
9 *Filartiga*. He specifically said, Nothing I say here disturbs
10 the holding in *Filartiga*, which was the first case to recognize
11 claims for torture going forward.

12 This is not a jurisdictional -- this is not a
13 courthouse barring issue. This is an element of the claim. And
14 what judge, then Judge Scalia found is that to the extent that
15 the United States is the state actor or the belligerent, there
16 is no claim under the ATS. That does not make the statute
17 illusory specifically when he recognized, when he recognized
18 that nothing he did here disturbs the Second Circuit's holding
19 in *Filartiga*, which found liability when it involved the foreign
20 power.

21 His language on that was quite specific about the
22 difference that the nature of sovereign immunity for the United
23 States is very different than that for foreign powers. I'll see
24 if I can find the quote.

25 THE COURT: Well, that's all right. You know, I'll

1 be, I'll be involved in all these cases for --

2 MR. ZYMELMAN: Anyway, Your Honor, if you look at the
3 *Saleh* case at Page 4 of the printout I've given you in your
4 notebook, it says, Arguing that the Supreme Court *Sosa* --
5 plaintiffs argue that the Supreme Court *Sosa* opinion approved
6 Judge Edward's view in --

7 THE COURT: Slow down a little bit if you would.

8 MR. ZYMELMAN: I'm sorry?

9 THE COURT: You need to slow down because the court
10 reporter has to be with you.

11 MR. ZYMELMAN: Oh, I'm sorry, Your Honor.

12 *Sosa* did not overrule that precedent, referring to
13 *Sanchez-Espinoza*. In *Sosa*'s pointed admonition that lower
14 federal courts should be extremely cautious about
15 discovering new offenses among the law of nations certainly
16 cannot be read as an endorsement of Judge Edward's view in
17 *Tel-Oren*. *Sanchez-Espinoza* makes it clear that there is no
18 middle ground between private action and government action at
19 least for purposes of the Alien Tort Statute.

20 So Judge Robertson made very clear, he analyzed these
21 arguments about *Sosa*, found them not well-founded. The
22 suggestion that this makes it illusory is itself not correct,
23 because it doesn't touch any of the cases that have actually
24 gone forward under the ATS involving foreign powers.

25 THE COURT: All right. Final word on this, Ms. Burke,

1 please.

2 MS. BURKE: I'll just make a short point, Your Honor,
3 and that is that the state actor requirement is a jurisdictional
4 on certain of the claims, but not on war crimes. And so Mr.
5 Zymelman has been conflating the state actor, United States as
6 the belligerent and state actor. Even if, which we don't agree
7 with, but even if that argument had any merit, it doesn't touch
8 the war crimes claims.

9 MR. ZYMELMAN: Your Honor, *Sanchez-Espinoza* also
10 involved claims of war crimes. The holding was exactly the
11 same. And as we laid out in our brief and, frankly, within the
12 cases we cited, which are *Saperstein* and *Abagninin* from the
13 Ninth Circuit, it's clear that there is the same -- that
14 belligerent is required. And the analysis in *Sanchez-Espinoza*
15 for why you would not allow claims under Section 1350 to proceed
16 where the United States -- it's the action of the United States.

17 There's no question that the United States -- that
18 this was all conduct during a war of the United States. And to
19 say that you're going to allow claims based on war crimes where
20 it's the United States' war would trench on the United States'
21 sovereign immunity no less than to allow claims for torture.
22 And the analysis, as we said, is, would -- is exactly the same.

23 THE COURT: All right. Let's take about a seven or
24 eight minutes break and then we'll pick up.

25 (Brief recess.)

1 THE COURT: All right. Ready to go?

2 MR. ZYMELMAN: Your Honor, I had two more ATS related
3 issues I wanted to touch on quickly.

4 THE COURT: Go ahead.

5 MR. ZYMELMAN: The first is we had a couple of, we
6 have a particular argument with regard to inhuman and degrading
7 treatment, that that doesn't meet the standard under
8 international law. We cite the *Aldana* case, which I think
9 summarizes that very clearly. And I think the fact that, the
10 authority on which that's -- on which those claims rely has
11 been, was rejected as recently as 2004 by *Sosa* and therefore
12 doesn't state a claim.

13 We have two alternate grounds for why there is no ATS
14 claims against L-3 in particular. The first is that
15 corporations are not liable under the ATS. I believe that's
16 been fully briefed, but let me just touch on it very quickly.
17 As *Sosa* makes clear, claims under the ATS is one of the few
18 little pockets of federal common law that has been approved to
19 go forward. We think the strongest analogy for that area is
20 the, is the case law under *Bivens*. *Malesko* which plaintiff's
21 counsel cited to you makes clear that corporations are not
22 assumed to be liable, unlike in the statutory setting where in
23 the federal common law setting you don't assume that
24 corporations are liable. Under international law, corporations
25 are not liable. And therefore, we would submit, Your Honor,

1 this obviously applies to L-3 Services, Inc. only that
2 corporations are not liable under the ATS.

3 We've gone through the case law. There's case law
4 both before and after *Sosa* that have held corporations to be
5 liable. We don't believe that they've analyzed the issue
6 correctly, and I think we spelled that out in our brief. I'm
7 happy to go into greater detail about that.

8 THE COURT: Don't. We need to cover a lot of ground
9 yet, so.

10 MR. ZYMELMAN: Then the second area also from the
11 *Bivens* analysis, and it really echoes the issues that we
12 addressed earlier with regard to political question, with regard
13 to standing, which is that are there special factors, are there
14 special factors that counsel against the finding of a cause of
15 action. And that would provide an alternative ground for the
16 rationale that Judge, then Judge Scalia articulated in
17 *Sanchez-Espinoza*, that Judge Robertson endorsed in his opinions,
18 which is that when you, when you are involved in cases such as
19 this which do touch on the military, conduct of the military,
20 that that's a special factor that should counsel against the
21 finding of a cause of action. And we submit that's an
22 alternative ground for finding that there are no ATS claims for
23 these claims.

24 At this point, Your Honor, I would turn to the --

25 THE COURT: Perhaps she has a response. You've raised

1 a couple new points here. So let me just hear her quickly on
2 those points.

3 MS. BURKE: Your Honor, just very quickly. First, in
4 terms of the cruel and inhuman degrading treatment, the case law
5 that we've cited in our briefs speaks to the fact that there
6 are -- that term covers a range of conduct. We're really, the
7 conduct that we have alleged is at the core and it is covered by
8 ATS.

9 The second point on the corporations, we think that if
10 you look, for example, at the recently decided *Pfizer* case by
11 the Second Circuit, you've got have *Khulumani*, *Wiwa*, *Bowoto*,
12 *Aldana*. The weight of the jurisprudence in this area is clearly
13 that corporations are covered. And I would just point out even
14 in *Malesko*, the Court there was not looking at the question --
15 the Court there was looking at a different question, which was
16 whether or not to extend *Bivens*. And the Court noted, well, you
17 know, it's interesting that the plaintiff just didn't go with an
18 alternative regular tort liability theory.

19 So, in that case, *Bivens* is not a close fit with ATS
20 and that case really does not counsel against private
21 corporations being held liable.

22 THE COURT: All right. Let's move on to your next
23 point, Mr. Zymelman.

24 MR. ZYMELMAN: Turning to state law claims, Your
25 Honor, counts ten through 20.

1 By the way, just the footnote I was referring to in
2 *Sanchez-Espinoza* is footnote number five where he specifically
3 mentioned that nothing in *Sanchez-Espinoza* disturbs or makes
4 illusory the ATS law with regard to foreign sovereigns.

5 There are ten counts in the complaint we submit, Your
6 Honor, that involve, that are based on diversity jurisdiction
7 that would be based in state law. We submit, Your Honor, that
8 those are, those claims would be governed by Iraqi law if, if
9 they're allowed to proceed.

10 I mean, I will -- let me give advance notice now. As
11 I'm sure you've read in Judge Robertson's opinions, the next
12 stage after the state -- not all the state law claims were
13 dismissed in those cases, was we move for summary judgment based
14 on preemption. We did not make that as a Motion to Dismiss
15 argument in light of Judge Robertson's ruling that it was
16 appropriate for summary judgment. We will, of course, move for
17 that and to, if necessary, address the state law claims that
18 way. However, we don't believe we need to get to that point.

19 Plaintiffs dispute that Iraqi law would apply here.
20 And they make, basically -- you know, and they -- but they do so
21 without really providing much rationale. Maryland is, as you
22 know, a *lex loci* jurisdiction. It's indisputable, although they
23 assert without authority to the contrary that *lex loci* is
24 determined by the place of the injury in tort cases. The
25 injuries here are in Iraq. In fact, plaintiffs' counsel in the

1 context of the Motion to Transfer identify Iraq is the place
2 where all these, where all this litigation is about.

3 And there's no question that the injuries alleged took
4 place in Iraq. Under *lex loci*, that means that Iraqi law would
5 apply. In response, plaintiffs have argued that, that this
6 Court should apply federal common law to these claims without
7 really citing any cases that support that. The two cases they
8 cite involve contract claims.

9 They don't have any contract claims, Your Honor. They
10 cannot sue under our contract. They tried to do so in the
11 previous litigation when the case was still a would-be class
12 action, and the Court held that they had no standing and no
13 claims under the contract.

14 This is a tort claim. There is no basis to apply
15 federal common law to what they say are simple assault and
16 battery charges. So then that, that comes back to the question
17 of *lex loci* points to Iraq. They say it would be against the
18 public policy of Maryland for, to apply Iraqi law because Iraqi
19 law doesn't recognize all of their claims. But that is not the
20 standard for public policy.

21 We've set forth the cases. I think the *Ayres* case,
22 which I have included in my binder, summarizes the Maryland law
23 on this situation. Maryland normally looks to a statute for
24 expression of a public policy. There is no such statute here.
25 There's really no basis to overcome what's termed the heavy

1 burden to say that Maryland should override the law of the
2 jurisdiction where the injury took place.

3 I don't know if you want me to stop on the choice of
4 law issue and go back, or if you want me to go through and talk
5 about what the implications are for that.

6 THE COURT: Well, you have a few more minute on it.
7 Go ahead.

8 MR. ZYMELMAN: Well, Your Honor, since we believe that
9 Iraqi law applies, we submit that under CPA-17, the -- we would
10 be immune from, under Iraqi law. CPA-17 as expressed in the
11 pleadings was an order by the Coalition Provisional Authority,
12 which was later adopted by Iraq when it regained limited
13 sovereignty during, and was applicable during all the time of
14 this complaint.

15 Plaintiffs say it's no longer applicable at present,
16 but that's now and not during the time of the allegations in
17 this complaint, which end as indicated back in May of 2008 when
18 CPA-17 was still applicable.

19 CPA-17, Your Honor, provides complete immunity from
20 Iraqi process subject to a waiver from the sovereign, from the
21 United States. It also provides immunity based on claims
22 arising out of the terms and conditions of the contract. We
23 would submit, Your Honor, that where you have an immunity,
24 CPA-17 which was really no different than to implement the law
25 of occupation and the law of war that's referenced, that's in

1 Dow, that, that you cannot bring state law claims based on
2 conduct that took place during the occupation.

3 There are -- then the question is, there are
4 particular claims under the complaint, Your Honor, that we
5 believe do not survive under Iraqi law. Plaintiffs are correct
6 that under Iraqi law --

7 THE COURT: Under Iraqi law is what the CPA says it
8 is? Is that what you're saying?

9 MR. ZYMELMAN: I'm sorry? CPA-17 is now, is part of
10 the Iraqi law during the relevant period, Your Honor. CPA-17
11 was the order of the occupying authority which applied to all
12 claims during the occupation that was then adopted by Iraq as
13 part of its law in the context of its limited sovereignty. We
14 don't think it adds much --

15 THE COURT: When was it adopted?

16 MR. ZYMELMAN: It was adopt -- CPA-17 was originally
17 adopted in, I believe, May of or June of -- I believe June of
18 2003. There was a return of limited sovereignty to Iraq in June
19 of 2000 -- June 30, I believe, or July 1st of 2004, but under
20 the UN Resolutions which governed the United States remained an
21 occupying power, and the CPA-17 was continued until at least,
22 the terms of this -- I won't represent what the current status
23 is of CPA-17 under Iraqi law, but it was certainly in force and
24 applicable during the time of these allegations.

25 With regard to the particular claims under the state

1 law, Iraqi law does not recognize some of the theories of
2 liability here. And in particular, they do not recognize aiding
3 and abetting, or civil conspiracy liability under these
4 circumstances. That is set forth in some detail in the
5 declaration of our expert.

6 Plaintiff's have submitted a document unsworn and
7 unverified from their expert, the -- saying that our expert is
8 wrong. However, if you look at the supplemental declaration we
9 have submitted, in fact, he says we're wrong, but his analysis
10 in fact says we're right. And the Court, obviously, under Rule
11 41.1 needs to determine what the content of Iraqi law is.

12 We think the declarations, if you read them in
13 sequence, Your Honor, clearly state what Iraqi law is and we
14 don't think there's a natural dispute. To the extent there is a
15 dispute, we would submit before we can have any further
16 proceedings, we need to know what the law is and this Court
17 should hold a hearing on those matters.

18 But again, we think that the declarations,
19 particularly the supplemental declaration, which goes through
20 what their expert says shows that he does not disagree with our
21 expert. He simply disagrees -- he asserts that she's wrong, but
22 he never affirmatively says there is an action for aiding and
23 abetting, that there is an action for civil conspiracy and he
24 doesn't explain it.

25 THE COURT: But you said, these causes of action would

1 not survive your argument about Political Question Doctrine --

2 MR. ZYMELMAN: None of this would, Your Honor, which
3 is why we started off with those.

4 THE COURT: All right.

5 MR. ZYMELMAN: And then the final point which we've
6 added in, and again as with the aiding abetting, we've also
7 raised the issue of availability of punitive damages under Iraqi
8 law. Obviously, the aiding and abetting, and the civil
9 conspiracy would not get rid of all of the civil counts, but
10 they would narrow the field, Your Honor. And they would narrow
11 the scope of discovery.

12 If you are inclined, and obviously, we do not think it
13 would be appropriate to proceed to discovery in this case. We
14 think this can be resolved in the Motions to Dismiss. It is
15 important to define what are the claims that are actually at
16 issue. What is the scope of discovery that's going to be
17 allowed?

18 It will be a very different case if there is no aiding
19 and abetting, and civil conspiracy because, obviously, that
20 would cut out all of the conduct of the military. It would cut
21 out all of the conduct of CACI. Again, we don't think that
22 would cure the political question issues because, as I
23 articulated before. But if this case is to go forward and
24 again, we believe the next step in this case is to litigate the
25 preemption issue that was resolved in the D.C. litigation, but

1 the parties -- it would benefit the parties and the Court to
2 identify what are the claims, what are the parts of the
3 complaint that actually state a claim?

4 And with regard to punitive damages, the
5 unavailability of punitive damages might of course inform the
6 parties' perceptions of how to proceed in the case.

7 Your Honor, let me -- I think I'll have another chance
8 to get up here and respond to what plaintiffs' counsel has to
9 say, but that is the substance of what I intend to address in my
10 Motion to Dismiss.

11 Mr. Delinsky will address the conspiracy issues and
12 the issues related to Mr. Nakhla.

13 THE COURT: I'll hear the response at this point.

14 MS. BURKE: Your Honor, a few quick points on this.
15 First, we think this issue is actually prematurely raised, that
16 discovery really is needed in order to properly apply choice of
17 law rules, because there may well be conduct in the United
18 States --

19 THE COURT: Well, where do you say the tort occurred
20 or torts?

21 MS. BURKE: The tort of, the tort of the assaultive
22 battery, the tort of torture occurred in Iraq. No doubt about
23 that. The only question would be the tort of negligent
24 supervision, did that perhaps occur here in the United States.

25 What we do -- the second point I would say, though,

1 Your Honor, is that the defendants are misreading the *Bremer*
2 *Order*. The *Bremer Order* is something that protects them from
3 being brought into the courts of Iraq, but it doesn't mean that
4 Iraq law cannot be applied. It doesn't immunize them in a way
5 that they have argued.

6 So I think even if you were to go forward under Iraq
7 law, you could find liability. I mean, the core of this case
8 involves conduct that is universally condemned under the law of
9 every nation. So the disagreement we have with them is that any
10 law of any nation could possibly lead to dismissal here. I just
11 don't think that that's the case. And certainly, the *Bremer*
12 *Order* does not stand for that proposition.

13 When you look to the specifics, I do think you have a
14 dispute before you. I mean, our expert is an actual practicing
15 Iraqi lawyer. The person that they found is someone who
16 observes it from afar. He tells us and has told the Court that
17 these claim are cognizable under Iraq law.

18 So even if the Court were to apply Iraq law as opposed
19 to federal common law, you'd still reach the same result that
20 the claims can go forward.

21 THE COURT: How would you arrive at applying a federal
22 common law as opposed to Iraqi law?

23 MS. BURKE: Well, I think that the reasoning we have
24 here is that the contract itself sets forth their duties. And
25 that is a federal government contract. And so if you look at

1 enforcing the terms of that contract under federal law, you --
2 it basically incorporates and holds them liable under United
3 States law.

4 And so that you could craft federal common law to hold
5 them liable and you would look to, the contract looks
6 specifically to American federal statutory law. So, for
7 example, you know, the prohibition against war crimes and the
8 like. And so, that was our reasoning there.

9 Now, obviously, the ATS claims incorporate --

10 THE COURT: Sounds more like a third-party beneficiary
11 claim.

12 MS. BURKE: Well, Your Honor, you know, that may be a
13 claim that we need to amend to add. I mean, it may be that
14 that's the appropriate way to postulate the, the state law
15 claims is as a third-party beneficiary of the duty that they
16 assume to abide by federal law. So, you know, Your Honor, that
17 may be something we move to amend and add.

18 THE COURT: All right. Mr. Zymelman.

19 MR. ZYMELMAN: Let me just pick up where my colleague
20 ended. As you said, Your Honor, this is -- that is a
21 third-party beneficiary claim. That claim isn't here in this
22 complaint. It was made in prior litigation by this counsel on
23 behalf of the purported class. It did not survive a Motion to
24 Dismiss. It would not survive a Motion to Dismiss here.

25 The idea that this Court should craft new law and new

1 duties and obligations under statutes, under criminal statutes
2 that did not provide for civil causes of action is exactly the
3 sort of federal common law making that just didn't survive the
4 *Erie*, Your Honor, other than in particular areas. And
5 therefore, this is a matter of state law. Should be, should be,
6 you know, should be analyzed under the traditional rules.

7 The Bremer order says what it says. We've briefed
8 this quite clearly, Your Honor. Again, the Bremer order is
9 perfectly consistent with *Dow v. Johnson*, the *Coleman* case, the
10 other cases regarding the law of occupation that says that you
11 cannot bring these kinds of claims. The occupied persons cannot
12 bring these kinds of claims against the occupier. And it would
13 be perfectly consistent to apply the *Bremer Order* as it's
14 written, as we've briefed. And I'm not going to, I don't want
15 to parse the whole language here, Your Honor. It does more than
16 just simply immunize us from state courts.

17 THE COURT: Where are we now? Tell me how much more
18 we have on --

19 MR. ZYMELMAN: At this point, Your Honor, and again,
20 just on the Iraqi law expert, it's not enough that he says that
21 there isn't a case. He has to support his statements with
22 reasoning and we just urge you to read the, read the
23 declarations and decide yourself whether the reasoning is
24 present. And if there's a question, we need to have a hearing.

25 It is not premature, Your Honor, at the beginning of a

1 case to know what law is going to govern. There is no factual
2 discovery that's necessary here. It's not unknown what they're
3 claiming. It's their claims. They have claimed injury in Iraq.
4 Negligent supervision, even if the conduct, even if the
5 supervision was somehow negligent here, the injury that they are
6 claiming is in Iraq. That mean it points to Iraq.

7 THE COURT: All right. Let's stop on this point. I
8 want to go to the last point. I think we're on conspiracy?

9 MR. ZYMELMAN: Yes, Your Honor.

10 THE COURT: All right, Mr. Delinsky.

11 MR. DELINSKY: Your Honor, I have a packet of cases
12 for you. They're all out of the brief, if you'd like. I've
13 tabbed, highlighted and these are the main ones most of which I
14 will not touch on today, but they've all been cited.

15 Thank you, Your Honor. Again, Eric Delinsky on behalf
16 of Adel Nakhla. On Mr. Nakhla's behalf, we have joined fully in
17 L-3's Motion to Dismiss, and in that regard we'll be resting on
18 Mr. Zymelman's argument and I will not repeat them.

19 But we have filed a separate motion to raise two
20 issues that are unique to Mr. Nakhla and that to some degree
21 have application to L-3 Services as well. And both issues are
22 of the same fundamental nature. They are pleading issues. And
23 they go to the fact that in this complaint these plaintiffs for
24 the most part don't allege that Adel Nakhla engaged in the
25 allegedly illegal conduct as to them.

1 And I want to pause here for a moment, Your Honor. In
2 the briefs and a little bit this morning, my client is often
3 referred to as a torturer. We take great umbrage at statements
4 like that. We do not believe they are true and accurate. And
5 if this case proceeds, we will disprove them.

6 But that's not for today, because this is a lawsuit
7 brought by specific plaintiffs against my client, and they need
8 to state a claim. And general statements about what my client
9 may or may not have done to other people cannot save the claims
10 against my client that are brought by these particular
11 plaintiffs.

12 With that said, I'd like to break my argument in two
13 and I'll be very brief. The first part of the argument goes to
14 the plaintiffs' direct claims. I think Your Honor in your bench
15 ruling on the, on the transfer motion refer to them as the
16 substantive counts. My second argument will go to the
17 conspiracy counts, and again, both should be brief.

18 What I call the direct counts, Your Honor, are that
19 torture, intentional infliction of emotional stress, sexual
20 assault and battery, and so on. I also include in the direct
21 counts aiding and abetting, because as Your Honor set forth in
22 *Lazarbe*, I hope I'm pronouncing it correct, aiding and abetting
23 requires specific intent and specific facilitation as to a
24 concrete act. So I lump all of those together as the direct
25 claims.

1 Seventy-two plaintiffs bring direct claims against
2 Mr. Nakhla. Seventy-one of them do not identify a single act
3 that Mr. Nakhla did to any of them. They don't identify any
4 conduct that Mr. Nakhla engaged in as to them. And that's 71 of
5 the 72 plaintiffs.

6 And, Your Honor, just to illustrate, I'd like to hand
7 up an excerpt from plaintiffs' complaint that I just took
8 randomly. This is -- what I've handed up, Your Honor, is Pages
9 20 through, I believe, 25 of the Second Amended Complaint. And
10 this is, this is a representative example of how the complaint
11 is formatted vis-a-vis the specific allegations by each of the
12 72 plaintiffs.

13 And if you take the first one, and I apologize in
14 advance because I'm sure I will butcher the pronunciation, but
15 by Plaintiff Al-Majma'ae. Paragraph 105 says, "The plaintiff
16 was tortured and otherwise mistreated by L-3 and its
17 co-conspirators." Doesn't mention Mr. Nakhla. Paragraph 106,
18 "The plaintiff was detained." Doesn't mention Mr. Nakhla.
19 Paragraph 107, "The plaintiff was beaten." 108, "threatened
20 with unleashed dogs." 109, "Threatened with burning his eyes
21 with lit cigarettes." And I can go on and on, not only for this
22 plaintiff, Your Honor, but for 70 of the other 72 plaintiffs, in
23 none of their allegations mention Adel Nakhla.

24 The most basic function of a pleading is to let the
25 defendant and the Court know what the plaintiffs think the

1 defendant did to them. And for these direct claims, this
2 complaint fails that function.

3 Your Honor, this is such a basic, well-established
4 principle, I don't think cases or authority is necessary to
5 decide this question as to the direct claims for these 71
6 plaintiffs. But I direct Your Honor to Rule 8, which requires a
7 short and plain statement of the nature of the claim and showing
8 entitlement to relief.

9 I direct Your Honor to the *Dixon* case in the Fourth
10 Circuit, which says the plaintiffs have to support facts in
11 support of each element of their claim. And I'd like to direct
12 Your Honor to the *Major* case, which is a relatively recent case
13 decided by Judge Bates on the District Court in the District of
14 Columbia where he makes the self-evident point that in a
15 multi-defendant case, in a multi-plaintiff case, each plaintiff
16 must include allegations of fact as to each defendant. And if
17 they don't, the claims must be dismissed.

18 Now, implicit in what I'm saying, Your Honor, are the
19 allegations of one plaintiff, Mr. Al-Quraishi who is the lead
20 plaintiff. He does include fact allegations to support these
21 substantive counts against Mr. Nakhla. The argument I'm making
22 now does not pertain to those counts. We do not believe the
23 allegations are susceptible to being proven and we believe we
24 will disprove them, but we concede that will be for another day
25 if the case were to proceed. But with regard to 71 other

1 plaintiffs, their direct claims must be dismissed.

2 Turning to my second argument, Your Honor. This
3 relates to the conspiracy claim, and I would just like to take a
4 step back. There are six counts in the complaint for
5 conspiracy. As Your Honor noted, one for, that mirrors each
6 substantive count.

7 Mr. Nakhla as stated in the complaints, by the
8 complaints very allegations was in Iraq for approximately one
9 year from, I believe, May or June of 2003 through May of 2004.
10 He was -- he departed from Iraq by the terms of the complaint by
11 May of 2004. He was at one facility, Abu Ghraib. And again,
12 these are both in paragraph six of the complaint. One facility
13 for approximately eleven months.

14 The conspiracy alleged in this complaint is a
15 conspiracy that, number one, pertains to in excess of 20 other
16 facilities throughout the entire country of Iraq that Mr. Nakhla
17 never by the terms of the complaint, as well as in fact never
18 went to and never worked at.

19 The conspiracy also extends for a period of time
20 beyond when he left Iraq. And it extends for this period of
21 time -- sorry I'm not being incredibly articulate here, but it
22 extends from 2003 to 2008, a five-year period. At most,
23 Mr. Nakhla was in Iraq for eleven of those months.

24 Now, if there's a properly pled conspiracy, that is
25 appropriate. But this conspiracy is massive. Twenty facilities

1 throughout the country of Iraq spanning five years. And my
2 client by the terms of the complaint only was at a small slice
3 of the facilities for a small slice of the time. And the
4 plaintiffs have a pleading burden at the outset before they can
5 proceed on a claim where he can be held vicariously liable for
6 the conduct of others to show that there is some factual basis
7 to believe that my client, Mr. Nakhla, in fact joined the
8 conspiracy as alleged, that vast and wide-ranging conspiracy.

9 THE COURT: Could he have joined a smaller conspiracy,
10 though, at Abu Ghraib for the time he was there. Of course,
11 there's some argument about whether he withdrew timely and so
12 on. But leaving that aside, it's arguable that it could be
13 scaled back to just a conspiracy involving just that particular
14 site, couldn't it?

15 MR. DELINSKY: I think the plaintiffs would continue
16 to have problems, but I think their task would be less momentous
17 in that instance.

18 THE COURT: All right.

19 MR. DELINSKY: Your Honor, the key issue here goes to
20 the key element of conspiracy, which is so well-settled. I
21 won't harp on it, but there needs to be an agreement. That's
22 the crime or that's the civil offense. There needs to be a
23 conspiratorial agreement.

24 And this case is dictated by a Supreme Court decision
25 handed down last year called the *Twombly* case. In *Twombly*, the

1 plaintiffs had asserted an anti-trust conspiracy. Yet, all they
2 did was rather than setting forth facts to suggest the existence
3 of an agreement, they just used the boilerplate terms. They
4 said, the defendant's agreed, the defendants conspired, but
5 there was no factual matter to support those very cursory and
6 boilerplate allegations. And the Supreme Court ruled that that
7 is insufficient as a matter of Rule 8 and as a matter of
8 pleading.

9 The Supreme Court said that a complaint alleging a
10 conspiracy has to have enough factual matter to suggest a
11 conspiracy. That was the first prong in the holding. The
12 second prong of *Twombly* was the Supreme Court said that parallel
13 conduct is not enough. In other words, it's not enough to say
14 that Mr. Zymelman engaged in Conduct A and Ms. Burke also
15 engaged in Conduct A, because that just as well could be a
16 coincidence.

17 THE COURT: It's a good argument for two separate
18 lawsuits, isn't it?

19 MR. DELINSKY: It's a good argument for no conspiracy.

20 THE COURT: Well, I'm going to ask Ms. Burke
21 momentarily though whether the case survives if conspiracy
22 counts go. That's what I want to hear answer to.

23 All right. Let me hear from her and you can rejoin.

24 MR. DELINSKY: Okay. Thank you, Your Honor.

25 THE COURT: And answer that question first, Ms. Burke.

1 What happens if the conspiracy counts go to the suit?

2 MS. BURKE: Your Honor, it would still proceed with
3 the, you know, with the actions of the L-3 employees, the direct
4 actions against the victims.

5 THE COURT: You mean, the ATS actions?

6 MS. BURKE: Yes.

7 THE COURT: All right.

8 MS. BURKE: Yes. And if so, there's still direct
9 liability as well as, you know, as well as vicarious.

10 A couple points first on the direct liability points
11 that counsel made on behalf of his client. Although, I
12 understand his point that he wants more information, we do think
13 that his client has been put on notice. We did for each
14 plaintiff say where they were and whether or not they overlapped
15 in time with him, and those dates were put in to provide him
16 with notice. Certainly, you know, if you think we need more
17 specificity, we can add more.

18 THE COURT: Isn't the short of the matter though that
19 71 plaintiffs really don't know whether Mr. Nakhla was involved
20 at all?

21 MS. BURKE: Well, actually, Mr. Nakhla because of his
22 status, he was the primary translator for Charles Graner and he
23 was in the hard site. So, unlike some the other wrongdoers,
24 he's known by sight. They called him Abu Hamid. And he's known
25 by sight, and they know what he did to them.

1 THE COURT: You mean, he's going to be identified as
2 the perpetrator if this case goes forward.

3 MS. BURKE: He is one of the perpetrators, definitely.
4 Yes, definitely. And so on the direct liability, the notice
5 that we gave, we think he has been put on notice.

6 THE COURT: Does it cure the alleged deficiency in the
7 pleading to say that on information and belief Mr. Nakhla was
8 one of the people who you said beat them, beat plaintiff,
9 threatened them with dogs, threatened burning their eyes.

10 MS. BURKE: Yes. And, Your Honor, we did, we did on
11 the first plaintiff spell out with specificity the acts that
12 were observed by Nakhla. Both things that were done directly to
13 Mr. Al-Quraishi as well as things that were observed.

14 Because of the physical layout of the hard site, Your
15 Honor, the victims not only knew what happened to them, but it
16 was all done in front of them to other people. So we do have
17 eyewitnesses to Abu Hamid, to Adel Nakhla's involvement in the
18 various acts of torture.

19 Now, there are some who he's not, there is not the
20 direct, because he was gone. So it's the subset of the Abu
21 Ghraib victims that we have that information for.

22 THE COURT: What is your theory that he's liable for
23 acts that occurred after his departure?

24 MS. BURKE: Well, that really goes to the conspiracy
25 allegation, is to whether once you have joined, once you have

1 voluntarily joined in a conspiracy to torture detainees, whether
2 you can evade liability for what happens once you physically
3 leave. And that turns on the case law on withdrawal,
4 conspiratorial -- you know, members of conspiracy, whether or
5 not they can withdraw.

6 If Mr. Nakhla had come back to the United States,
7 raised the alarm, went to the authorities, he may have an
8 argument that he shouldn't be held liable for what happened
9 after he left. But that's not what happened. You know, he lied
10 to the authorities. He continues to insist that he didn't
11 participate. He has made no -- he's never stated, okay, I'm
12 withdrawing from the conspiracy.

13 So, we think it's an issue of conspiracy law that he
14 has continued vicarious liability for the acts of the others.
15 And, you know, if you think about the nature of this case, it's
16 not like the case in *Twombly*. You know, there Mr. Delinsky's
17 point that, okay, we don't have enough evidence of agreement.

18 Well, in *Twombly*, the conduct at issue, the parallel
19 conduct at issue was lawful conduct. So it was susceptible to,
20 you know, two different interpretations. Here, you know, the
21 parallel conduct, what we've alleged is that, you know, he held
22 down a boy while another conspirator placed a toothbrush in his
23 anus. The conduct is that he held Mr. Al-Quraishi down while
24 another conspirator poured feces on him.

25 You know, so it's not, the type of conduct we're

1 alleging, his participation in it with others is an allegation
2 of the agreement, because you don't accidentally do that. You
3 have to be -- they joined together to hurt people.

4 So I don't think -- you know, I understand Mr.
5 Delinsky's pleading points, but I don't think they are
6 well-taken when you read *Twombly*. The parallel conduct here is
7 not susceptible to a lawful interpretation.

8 THE COURT: All right. Mr. Delinsky.

9 MR. DELINSKY: Thank you, Your Honor.

10 If other plaintiffs have something to say about my
11 client, Mr. Nakhla, that's fine, but it should be put in a
12 pleading. It is not sufficient for counsel to stand up in open
13 court and simply say so. It should be put in a pleading and we
14 should have the opportunity to, number one, see the allegations;
15 and number two, to test them in any way that's appropriate.

16 As we sit here today, 71 of the plaintiffs don't say
17 nothing about Adel Nakhla. They don't identify any conduct that
18 he perpetrated on to them apart from this vast conspiracy.
19 Those direct claims by those 71 plaintiffs against my client
20 must be dismissed.

21 Now, Your Honor, I'd like to make just one final point
22 about that. In Virginia, in the first round of litigation where
23 we represented Mr. Nakhla and the same counsel in behalf of
24 plaintiffs represented the class, we raised this very same
25 argument. When the case was transferred to D.C., we raised the

1 very same argument. This is not new. This is basic Rule 8.

2 A First Amended Complaint was filed in this case in
3 the fall. Plaintiffs then moved to amend. Part of their reason
4 for amending was they wanted to add more specificity, and we now
5 find ourselves with the Second Amended Complaint that with
6 regard to Mr. Nakhla doesn't haven't specificity.

7 Plaintiffs have been on notice that this was required,
8 and I don't believe they can supplement or amend in a way to add
9 allegations against Mr. Nakhla, but they should not be permitted
10 that opportunity. Enough is enough at this point. These
11 arguments are old. They've been on notice of them for years.

12 THE COURT: Has there been any discovery at any point?

13 MR. DELINSKY: No, Your Honor, because Mr. Nakhla was
14 dismissed so quickly from the other suits.

15 Now, Your Honor, briefly turning to the conspiracy
16 issue. I would simply direct Your Honor to the *Twombly* case.

17 THE COURT: I'm familiar with *Twombly*.

18 MR. DELINSKY: And I would also direct Your Honor to
19 *Ruttenberg* case, which is a case out of the Fourth Circuit
20 included in what I have given you. And the reason I direct you
21 to this case is as follows. That was a case involving civil
22 rights violations. And when it came to the conspiracy under
23 Section 1985 to commit civil rights violations, the Fourth
24 Circuit adopted in full *Twombly*. It did not bind to the
25 distinction made by plaintiff's counsel that *Twombly* in its

1 pleading rules only applied to instances where the conduct is
2 innocent but for the conspiracy, because in that case there were
3 civil rights violations that were violative of statute. Yet,
4 the Court still said, parallel conduct alone is not enough. You
5 need facts to show that there was an agreement.

6 Now, Your Honor, in that regard I'd like to end on the
7 following note and that is Your Honor's opinion in *Lazarbe*.
8 Again, I hope I'm pronouncing it right, because Your Honor did
9 address a joint criminal enterprise claim in that case and did
10 sustain it.

11 Lazarbe, especially when you study the complaint,
12 though, as well as Your Honor's opinion contains the exactly
13 kind of conspiracy, allegations of fact that is needed in order
14 to sustain a claim. In *Lazarbe* there was allegations of a
15 meeting involving Defendant Rondon, as well as his commanders
16 and his co-lieutenants. In *Lazarbe* there were allegations. It
17 was a much more discreet conspiracy. As Your Honor knows, there
18 were allegations that he played a critical role in the totality
19 of the conspiracy by blockading roads.

20 So particularly with regard to the meeting allegation,
21 there was a meet to that conspiracy allegation that is
22 completely lacking in this complaint. This is a vast
23 conspiracy.

24 My client was a civilian translator and he is alleged
25 to have joined a conspiracy spanning 20 facilities he's never

1 seen, and spanning four years beyond the time he left the
2 country. Yet, there's no allegations to support the fact that
3 he ever agreed to that, that he joined it, that there was a
4 meeting, who he met with, what was said, or even what the common
5 object was. The only allegation is that the common object was
6 to engage in a series of illegal acts, and that's just not
7 enough.

8 So, Your Honor, this complaint is just void of the
9 kind of basic allegations of fact that not only *Twombly*
10 requires, but a long line of Fourth Circuit law requires. And I
11 handed them up to you, Your Honor; *Dixon, Bass*, as well as
12 *Ruttenberg*.

13 Thank you, Your Honor.

14 THE COURT: All right. Ms. Burke, final.

15 MS. BURKE: Just very briefly, Your Honor. I want to
16 respond to one point by Mr. Delinsky about there not being any
17 discovery yet. Because of the proceedings in the other cases,
18 we have been given some documents from the, from the government
19 itself. And included in those are statements from the
20 co-conspirators, from Graner and from Frederick. So there's
21 certainly basis for the allegations that we are making about his
22 client.

23 And I think that when you look at this complaint and
24 you look at the allegations we made about his role and his
25 participation, and what he was willing to do and go along with,

1 that we do meet the level set forth to allege the conspiracy.

2 THE COURT: Before you sit down, give me some idea of
3 how you say L-3 conspired. I know you identified Nakhla and
4 you're saying that there are some individuals who did this.
5 What did the corporation do exactly? What's your theory of
6 their liability?

7 MS. BURKE: Well, yes. For example, we have testimony
8 from a middle manager at L-3, and he learned from one L-3
9 translator that another L-3 translator had been abusing a
10 prisoner. He reported it up and the response from management
11 was, well, let's hope the military doesn't report it. Let's
12 hope they're on our team. So we have evidence of L-3's --

13 THE COURT: What sort of torture do you say was
14 reported?

15 MS. BURKE: On that particular one, those I believe
16 were beatings of, those were beatings.

17 THE COURT: All right. What else? Anything else?

18 MS. BURKE: Well, it's a similar, it's similar genre.
19 You know, it's other L-3 employees who had participated with the
20 one, with the -- the torture that's best known, the facts and
21 circumstances that we know the best are the Abu Ghraib hard
22 site, because of the Taguba report and the government
23 investigation. So we have a more fulsome picture of what L-3
24 did there.

25 And L-3's own executives have testified that they took

1 no steps, they took no steps whatsoever. That their view was,
2 you know, we'll just turn our translators over. If they abuse
3 people, they abuse people. We're not going to stop them.

4 THE COURT: So your alternative theory is that they
5 weren't paying attention as opposed to making a concerted
6 decision to torture?

7 MS. BURKE: Yes, Your Honor, although because of the
8 span of time, you know, not paying attention may be how you
9 would describe it in year one. When you get to year four, year
10 five, I think you're getting into an agreement.

11 If they wanted to stop it, they could have. And the
12 length of time that it went on and their continued willing
13 participation, as Judge Weinstein teaches in the Agent Orange
14 case, if a corporate actor is put in a situation of having to do
15 an illegal act or walking away, they're always free to walk away
16 and lose their corporate profits.

17 So here, you know, L-3 has continued participation in
18 this on-going conduct. I think it goes far beyond not doing
19 anything about it. They had to -- they sought out and continued
20 to reap the financial rewards of being willing to send their
21 people over to participate in hurting others.

22 THE COURT: So, your, your theory, at least, is that
23 there's a steady stream of reports of abuse that they are not
24 acting on or they're concealing?

25 MS. BURKE: Well, concealing as well, Your Honor.

1 THE COURT: Is that the way it's alleged in your
2 complaint?

3 MS. BURKE: Yes, Your Honor. I think if you look in
4 the back when we talk about L-3's conduct, we allege that they
5 tried to cover it up. And that they, that they willfully --
6 Paragraph 425, "Knowingly and willfully permitted scores of its
7 employees to participate in the torturing and --

8 THE COURT: Slow down a bit, slow down.

9 MS. BURKE: I'm sorry.

10 "Knowingly and willfully permitted scores of its
11 employees to participate in torturing and abusing prisoners over
12 an extended period of time throughout Iraq."

13 And then we talked about how there's been admissions
14 under oath, and how L-3 continued to permit its translators to
15 participate. That they failed to take any effective action to
16 prevent its employees from making threats, abusing and torturing
17 prisoners.

18 And then Paragraph 432 alleges, L-3 willfully failed
19 to report L-3 employee's repeated assaults and other criminal
20 conduct by its employees to the United States or Iraqi
21 employees.

22 Paragraph 433 alleges, L-3 affirmatively hid the
23 misconduct of its employees from the United States military.

24 Paragraph 434, L-3 discouraged its employees from
25 reporting prisoner abuse to the United States authorities.

1 And then we go on to talk about the fact that L-3
2 participated in the various locations.

3 THE COURT: All right. Final word.

4 MR. ZYMELMAN: Since L-3 has -- the question about
5 specific allegations against L-3, Your Honor, as we set forth in
6 our brief, the allegations are in paragraphs 4 -- principally in
7 Paragraphs 424 and 425. And none of the paragraphs have been
8 read. They're all sort of arguments as to why you might want to
9 hold -- why plaintiffs think that L-3 is liable for the acts of
10 its employees. Obviously, L-3 can't conspire with its own
11 employees. The conspiracy is allegedly between L-3 and the
12 military, and CACI. And there are no allegations about the
13 agreement that, between those three other than they agreed.

14 And all the issues that Mr. Delinsky raised with
15 regard to Mr. Nakhla apply equally with regard to L-3. There
16 are no allegations here of how L-3 conspired and agreed with the
17 military and CACI. The suggestion that one of the managers
18 said, well, we hope they're on our team suggests exactly the
19 opposite. If there were an agreement, there wouldn't need to be
20 any kind of hope.

21 THE COURT: Well, how do account for the individuals
22 like Graner and so on who were supposedly military who committed
23 these acts?

24 MR. ZYMELMAN: And none of them testified that there
25 was a conspiracy. None of them testified that there was a

1 generalized agreement. They testified to what they did and
2 that, who was present and not. And most of the statements
3 relied upon are not sworn statements anyway. And none of that
4 is in the complaint.

5 If there are specific allegations to be found from Mr.
6 Graner's statement or the other military, convicted personnel
7 statements, then to describe the, how this conspiracy arose and
8 what the common purpose was, when there was a meeting with the
9 specificity that was in the *Lazarbe* complaint, that there was a
10 meeting where all this was discussed, it doesn't exist.

11 We are entitled to have those types of allegations
12 subject to Rule 11 put forward. If they are in all these other
13 documents, it shouldn't be that big a deal. This case has been
14 proceeding along for some time. As Mr. Delinsky pointed, this
15 is now, we're now on the Second Amended Complaint.

16 This issue of the adequacy of the conspiracy
17 allegations, the fact that at this point since conspiracy is
18 such an important linchpin of so many of these claims, to say
19 that it comes down to the allegation in Paragraph 424 of L-3
20 also participated in the conspiracy to torture prisoners; L-3
21 verbally expressed its intent to join the conspiracy by making a
22 series of statements to military personnel and others. L-3's
23 actions evidenced an intent to join the conspiracy as the
24 company knowingly and willfully permitted scores of its
25 employees to participate in torturing and abusing prisoners over

1 an extended period of time throughout Iraq. That's not enough,
2 Your Honor, under *Twombly*, under *Ruttenberg*, under all the
3 cases.

4 THE COURT: I don't know, I don't know. I can't say
5 that I've totally digested every specific of the allegation, but
6 certainly there is a suggestion that at the highest levels of
7 the Department of Defense there was indication that certain
8 techniques that could be employed that some people would call
9 torture, and that this was really a play-out of that sort of,
10 that sort of direct, if you will.

11 Now, is that -- I don't know whether that's in the
12 complaint, but assuming that it were, would that be enough to at
13 least get you by the pleading stage.

14 MR. ZYMELMAN: In terms of the conspiracy --

15 THE COURT: Well, I mean, one talks commonly about
16 water boarding, and I don't know whether that's one of the
17 things that's claimed in this case. It may well be.

18 MS. BURKE: Not this particular case.

19 MR. ZYMELMAN: It's not, Your Honor.

20 THE COURT: All right.

21 MR. ZYMELMAN: But, Your Honor, obviously, that kind
22 of allegation, with or without it, we think would obviously walk
23 straight into the Political Question Doctrine and the other
24 jurisprudential issues. However, even on the basis --

25 THE COURT: Well, it might not if it was -- if there's

1 no derivative immunity.

2 MR. ZYMELMAN: No, Your Honor, we believe that what
3 we're talking about is a policy from the highest levels of the
4 executive. Whether it's derivative or not, it would clearly
5 touch on how the military at that point chose to conduct the
6 war.

7 THE COURT: Well, when it comes to conspiracy, you're
8 saying, I think in effect, it's impossible to conspire with the
9 military because every military decision is effectively a
10 political question decision.

11 MR. ZYMELMAN: No, Your Honor, I mean, not every
12 conspiracy with the military is necessarily a political
13 question. I submit, Your Honor, that a conspiracy with the
14 military and how it conducts the war is a political question,
15 Your Honor.

16 THE COURT: Well, when could you have a conspiracy
17 with the military that was not subject to the Political Question
18 Doctrine?

19 MR. ZYMELMAN: The military engages in all sorts of
20 conduct and all sorts of issues. How the military runs a PX,
21 for example, on its bases. The military conducts all sorts of
22 activities that aren't the conduct necessarily of the
23 prosecution of a war. During peace time, how the military puts,
24 you know, gas stations and what prices to charge. I mean, Your
25 Honor, I don't have a specific case in mind, Your Honor. I'm

1 dealing with a sort of unstated hypothetical, but it's not the
2 case that simply because conspiring with the military to conduct
3 military policy during war time would walk you squarely into the
4 Political Question Doctrine doesn't mean you could never have
5 that kind of conspiracy.

6 But again, if you have a specific hypothetical, Your
7 Honor, I'm happy to try to analyze that, but obviously there are
8 many activities the military --

9 THE COURT: Well, torture is a specific example, I
10 guess. I mean, when is it proper to, when it is proper to hold
11 a boy down and rape him? When is that proper?

12 MR. ZYMELMAN: Proper in the sense of is it the proper
13 --

14 THE COURT: Is that blocked by the Political Doctrine?

15 MR. ZYMELMAN: Yes, Your Honor. Under these
16 circumstances where the allegation, if true -- again, we're
17 assuming the truth of these allegations. But if we're assuming
18 the truth of these allegations, then the proper venue for that
19 is through prosecutions, through compensation from the
20 sovereign. But if the allegation is that this was done in the
21 course of detention and interrogation operations in a military
22 prison during a time of war and occupation, then, yes, Your
23 Honor, there is no civil claim for that.

24 THE COURT: All right. Let me hear from you, Ms.
25 Burke, on that.

1 MS. BURKE: Your Honor, in fact that question is
2 exactly the point. You know, this conduct that is alleged is
3 not a U.S. military policy. It's illegal conduct. And even
4 this notion that the defendants have argued, well, if you want
5 any type of civil compensation, you have to go to the United
6 States is belied by the United States own army regulations.

7 Army Regulation 27-20, and I'll bring up a copy to
8 Your Honor, said that if there's a third-party claim involving
9 an independent contractor, the military is not going to handle
10 that. It gets bumped to the independent contractor and their
11 insurance carrier.

12 So, you know, clearly this company conspired with
13 wrongdoing military actors. The fact that they conspired with
14 the military does not turn it into a political question. This
15 is conduct that is illegal under the laws of the United States.
16 It's illegal under international law. It's illegal under Iraq
17 law. So there's no way that they can escape any kind of
18 liability for a voluntary and willing participation in a series
19 of criminal acts in order to make more money.

20 THE COURT: You want to hand that document up?

21 All right. Is there anything else we haven't talked
22 about this afternoon? Pretty much exhausted it?

23 MR. ZYMELMAN: Your Honor, just one clarification. I
24 want to be clear that, obviously, I was addressing the
25 sufficiency of the conspiracy allegation and whether it was as

1 you hypothesized, if there was, this was a direction from the
2 highest levels of the military department to engage in this
3 conduct, that it would walk you squarely into the political
4 question.

5 We believe with or without the conspiracy allegation,
6 for all sorts of other reasons that we've discussed here today
7 and in our papers that you are walking straight into a political
8 question. I just want to be clear that we weren't narrowly
9 defining it as assuming a conspiracy --

10 THE COURT: No, I understand that. The question I
11 asked really of plaintiffs was whether if the conspiracy counts
12 go out, what remains? They said, there's still the direct
13 causes of action.

14 MR. ZYMELMAN: Well, again, assuming we -- on all the
15 other issues, obviously, Your Honor, if there are particular --
16 assuming they survive Political Question, Derivative Immunity,
17 Law of War and whether there are, in fact, ATS claims, under
18 those circumstance, then to extent that there are state law
19 claims that particular plaintiffs against particular
20 individuals, I mean, those would proceed until we get to the
21 next stage would obviously be the preemption argument.

22 THE COURT: Yes, I understand.

23 All right. Anything further?

24 MR. DELINSKY: Your Honor, if I could just make one
25 last point.

1 The entire tenure of the conversation in the last five
2 minutes, I think, underscores from the perspective of an
3 individual the importance of dismissing the direct claims as
4 well as the conspiracy claims of the 71 plaintiffs who say
5 nothing about Mr. Nakhla.

6 These are inflammatory allegations that garner media
7 attention, that have had the effect of impacting my client's
8 reputation. And if a party is to come into a court and assert
9 these claims, they must put my client on the most basic notice
10 of what they're saying he did. And right now, only one the
11 claimants has.

12 THE COURT: I understand.

13 All right. Anything else?

14 Well, I'll take this under advisement and write an
15 opinion. We'll see who wins the race between me and Judge Lee
16 to get something written.

17 Thank you very much.

18 (Recess at 4:40 p.m.)

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CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/

Linda C. Marshall, RPR
Official Court Reporter

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