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1 (Thereupon, the following was heard in open
2 court at 12:32 p.m.)

3 THE CLERK: 1:08 civil 827, Suhail Nagim
4 Abdullah Al Shimari, et al versus CACI International
5 Incorporated, et al.

6 MS. GALLAGHER: Katherine Gallagher for the
7 Center for Constitutional Rights for the plaintiffs.

8 THE COURT: Good morning, Ms. Gallagher.

9 MS. BURKE: Good morning, Your Honor. Susan
10 Burke for the plaintiffs.

11 THE COURT: Good morning, Ms. Burke.

12 MR. KOEGEL: Good morning, Your Honor. Bill
13 Koegel and John O'Connor for the defendants.

14 THE COURT: Good morning, Mr. Koegel,
15 Mr. O'Connor.

16 MR. O'CONNOR: Good morning, Your Honor.

17 THE COURT: As I've said at the outset of
18 the hearing in other cases, these are legal questions and
19 many of them have been briefed. I do not intend to have
20 oral argument on every single issue that you all have
21 briefed.

22 I'd appreciate very much if each of you give
23 me argument on the issue of the -- whether or not the
24 political question doctrine applies as it relates to this
25 case and also the issue of absolute immunity and please

1 apply some Fourth Circuit case law, if you would.

2 MR. KOEGEL: Thank you, Your Honor. I'll
3 address the political question doctrine at the outset
4 because that does go to the Court's subject matter
5 jurisdiction and therefore appropriate for consideration
6 as a threshold matter.

7 The plaintiffs in this action were all
8 detained by the United States military as hostile forces
9 on the battlefield in Iraq. And through this suit, they
10 challenged battlefield policies and detention practices
11 with respect to the interrogation or the treatment of
12 wartime detainees.

13 The complaint alleges official complicity by
14 members of the military and executive branch officials.
15 We believe that these allegations implicate numerous
16 factors in the Supreme Court's *Baker versus Carr* test.

17 The nonjusticiability of the claims here is
18 particularly evident when read in the context of the
19 Fourth Circuit's *Tiffany* decision. In that case, the
20 Fourth Circuit held unequivocally that strategy and
21 tactics employed on the battlefield are not subject to
22 judicial review.

23 THE COURT: Say that case again.

24 MR. KOEGEL: The *Tiffany* decision.

25 THE COURT: *Tiffany*, all right.

1 MR. KOEGEL: Fourth Circuit's decision in
2 *Tiffany* held unequivocally that strategy and tactics
3 employed on the battlefield in the context of wartime are
4 simply not susceptible to judicial review.

5 THE COURT: Well, does it matter that the
6 detainees were detained as prisoners of war in a military
7 prison? It seems to me that would be the battlefield, but
8 there may be arguments that it's not. What is your view
9 of it?

10 MR. KOEGEL: Your Honor, that was very much
11 the battlefield fact as the Supreme Court has indicated
12 that in the interrogation of prisoners of war detainees is
13 an integral incident of wartime.

14 THE COURT: And the purposes of the
15 interrogation would be to gather military intelligence
16 information about troop movements and where people were
17 located, things likes that; is that right?

18 MR. KOEGEL: That's correct, Your Honor, to
19 gather whatever intelligence can be used in the
20 prosecution of the war in Iraq.

21 THE COURT: So then that if Marine or Army
22 soldiers were carrying out the interrogation, would the
23 detainee who was injured as a result of torture be able to
24 bring a lawsuit in federal court to recover money damages?

25 MR. KOEGEL: Against the United States, Your

1 Honor?

2 THE COURT: Yes.

3 MR. KOEGEL: No, sir.

4 THE COURT: Why not?

5 MR. KOEGEL: The combatant activities
6 exception to the Federal Tort Claims Act provides absolute
7 immunity to military personnel. So any tort claim against
8 the United States or military personnel would be barred by
9 the combatant activity's exception to the Federal Tort
10 Claims Act.

11 THE COURT: I didn't mean to jump ahead
12 there. I want to go back to *Baker*. Part of your argument
13 is that this is battlefield wartime activity that is
14 committed to the executive. And that's in the text of the
15 Constitution; isn't it?

16 MR. KOEGEL: That's correct, Your Honor.

17 THE COURT: Well, am I required --

18 MR. KOEGEL: Committed to the political
19 branches.

20 THE COURT: Am I required under *Baker versus*
21 *Carr* to go through all six or could I stop there?

22 MR. KOEGEL: No, Your Honor, you can stop
23 right there. The case law is clear that if any one of the
24 *Baker* factors is implicated in a significant way, that and
25 that alone is sufficient to trigger the application of the

1 political doctrine question.

2 No court has held that all of the *Baker*
3 factors must be implicated in order for the political
4 question doctrine to bar an action.

5 There's --

6 THE COURT: Well -- I'm sorry. I was going
7 to ask another question. The second stand has to do with
8 a lack of judicially discoverable manual standards for
9 resolving it.

10 Now, I'm not sure what that means except it
11 could mean judicially discoverable and manual standards
12 could be the duty of care or it could be how would the
13 court resolve it.

14 It seems to me if there is a cause of action
15 for victims of torture in a war zone that if I were to try
16 such a case I'd have to be able to articulate to a jury
17 what the duty was.

18 What would the duty be to a prison of war?

19 MR. KOEGEL: Well, Your Honor, as we've
20 argued under the combatant activities exception in our
21 preemption argument, the whole purpose of that exception
22 is to remove the duty of care from the battlefield.

23 It's our position that there is no tort duty
24 of care on the battlefield. Congress saw fit to take that
25 off the table.

1 It's reflected in the combatant activities
2 exception which provides that no tort claim can run
3 against the United States for combatant activities of the
4 military.

5 THE COURT: All right. Well, I have Judge
6 Robertson's decision from the D.C. District Court on this
7 political doctrine question, and I've tried to read it
8 carefully and I'm trying to --

9 MR. KOEGEL: They're actually several
10 decisions, Your Honor.

11 THE COURT: Well, the one I'm referring to
12 is dated August 12, 2005, and it appears to address the
13 issue of the political question and applies *Baker versus*
14 *Carr*. And on the Westlaw copy I have, after going through
15 a fairly extensive discussion of the law, the denounce is
16 only one sentence.

17 It says "Here plaintiff sued private parties
18 for actions of a type that both violate clear United
19 States policy and have led to recent high profile court
20 marshal proceedings against United States soldiers".

21 I'm not -- he doesn't tell me why *Baker*
22 *versus Carr* does not apply.

23 MR. KOEGEL: That's correct, Your Honor.

24 THE COURT: And I'm trying to figure out
25 why. And then he acknowledges what I think obviously

1 will -- may or may not come up and that is that
2 manageability problems especially if discovery collides
3 with government claims of state secrecy.

4 I don't even get to discovery without
5 figuring out does *Baker versus Carr* preclude the claim or
6 not. And I'm trying to understand what his basis was. Do
7 you know what it was?

8 MR. KOEGEL: No, Your Honor. We have no
9 information beyond the issue -- decision issued by the
10 District Court.

11 THE COURT: Okay. I know I interrupted you
12 multiple times, but it wasn't an interruption. It was
13 really my question. So, is there something else you
14 haven't said in your brief about political question that
15 you want to say?

16 MR. KOEGEL: If fact, Your Honor, I believe
17 there's something you should be aware of with respect to
18 Judge Robertson's decision from August of 2005. That was
19 issued in the -- excuse me, in Ibrahim action where there
20 is no claim of conspiracy. There are no allegations of
21 official complicity. And I think as a result, the Court,
22 and this is my inference, found that it was for whatever
23 reasons the political question doctrine would not bar that
24 action.

25 In a subsequent decision, in the related

1 Saleh action also pending in front of Judge Robertson, he
2 also denied the political question doctrine argument but
3 warned that the more the plaintiffs alleged official
4 complicity, the greater they sail to the jurisdictional
5 limitation of the political question doctrine, and we
6 think in this action they sailed right into. They are
7 direct unequivocal allegations of official complicity and
8 perhaps the most prominent of which are the allegations
9 that CACI personnel conspired to treat certain detainees
10 as ghost detainees so as to conceal their identity and
11 status at detainee at Abu Ghraib.

12 THE COURT: The ghost prisoner -- the ghost
13 detainee argument, I think, and correct me because I don't
14 know the facts as well as you all do -- has to do with the
15 idea that there were certain prisoners who were kept
16 secret who didn't appear on the detainee rolls that may
17 have been detained by some government intelligence agency;
18 is that right?

19 MR. KOEGEL: That's correct, Your Honor. In
20 fact both -- there are two official Army investigations
21 and reports, 15-6 investigations conducted by General
22 Taguba and then by General Fay, both of which concluded
23 that the ghost detainee operations were conducted
24 exclusively by the Central Intelligence Agency and that
25 the Army had acquiesced in the CIA's use of Abu Ghraib, a

1 DOD-controlled detention facility.

2 Both Army reports were highly critical of
3 the practice and of the Army's acquiescence.

4 Clearly, to be able to -- this type of
5 allegation implicates official complicity of the greatest
6 magnitude. It is possible to litigate the issue without a
7 penetrating examination of ghost detainee practices.

8 That information is held by one agency as
9 far as we know and that is the CIA which has a monopoly on
10 that information.

11 And I believe that when Judge Robertson was
12 talking about discovery problems he was talking about the
13 *Baker versus Carr* factor dealing with manageability and
14 how that could potentially implicate the doctrine down the
15 road. Because in this instance, we have military
16 interrogation records which are classified.

17 The recent DOD directive confirms that as
18 official DOD policy, although our information has always
19 indicated that detention in interrogation records from
20 2003 forward were, in fact, classified. In fact that has
21 been testified under oath of CACI personnel.

22 The CIA's ghost detainee documents are also
23 classified. We've cited to the decision in which that
24 agency has represented to the court in the Southern
25 District of New York that all documentation relating to

1 that is classified at a top secret level and is maintained
2 in a secured compartmentalized information facility.

3 So, we believe that the manageability
4 standards here are essentially insurmountable. And we
5 believe that the suit essentially seeks recovery for
6 wartime reparations. And every court to construe the
7 issue has concluded that wartime reparations is a matter
8 committed to the absolute discretion of the political
9 branches and is not subject to judicial review.

10 If the executive or legislative branch
11 determines to establish a procedure for the award of
12 wartime reparations, that's immunized from judicial
13 review. If they conclude not to establish such a
14 mechanism, that action, too, is immunized from judicial
15 review.

16 THE COURT: If I could ask you now to turn
17 to the issue of immunity, and I'm not sure what the case
18 law is in the District of Columbia concerning immunity.
19 But I do have in the Fourth Circuit the *Mangold* case.

20 What would the public benefit to granting
21 immunity here to the defendant if the plaintiffs could
22 prove that the defendant engaged in intentional acts of
23 torture which we have no question violates the Geneva
24 Convention and many other longstanding policies --
25 military policies as well as United States law? What

1 would the defendant say to that?

2 MR. KOEGEL: Your Honor, that's not the
3 question the Fourth Circuit's *Mangold* decision presents to
4 the Court.

5 The Fourth Circuit in *Mangold* said that the
6 focus is on the function that has been delegated not
7 whether that function was performed well or performed
8 poorly, performed negligently, performed intentionally,
9 tortiously.

10 It's a question of the function. And as the
11 Fourth Circuit recognized, the government in order to
12 perform efficiently, must of necessity contract out
13 certain functions and that *Mangold* is based upon the
14 notion that it is important to protect the government's
15 ability to do precisely that.

16 THE COURT: So the function of *Mangold* was
17 to conduct the investigation and to -- in *Mangold* it was
18 answering questions of an investigator. But the Court
19 said that certainly the function of investigating is a
20 government function. Is that right?

21 MR. KOEGEL: That's correct, Your Honor.

22 THE COURT: So do we have here a
23 circumstance where you have soldiers questioning detainees
24 who I guess I can infer were caught on the battlefield
25 doing something that had the United States military take

1 them into custody, deriving military intelligence.

2 We know that the Marine was asking the
3 question which would be covered by immunity. What makes
4 the private government contractor --

5 MR. KOEGEL: Why is it appropriate to extend
6 that immunity to private contractors?

7 THE COURT: Well, let's focus first on the
8 function. You're saying the function is a government
9 function. The question of prisoners of war is a
10 government function?

11 MR. KOEGEL: Indisputably.

12 THE COURT: All right. Then the second part
13 is what?

14 MR. KOEGEL: The second part, Your Honor, is
15 it is appropriate to extend the immunity enjoyed by
16 military interrogators to civilian interrogators because
17 to do the contrary would deprive the government of the
18 ability to delegate functions when it determines it's
19 appropriate to do so.

20 As the Fourth Circuit noted in *Mangold*, if
21 the government is unable to do that, that is, if
22 contractors are exposed to tort suits, they will be either
23 unwilling to perform those functions and that of course
24 impairs the ability of the government to delegate
25 functions or will perform them only under conditions that

1 may not be in the government's long-term interest.

2 *Mangold* essentially dictates that the same
3 immunity from tort suits afforded government officials
4 should be afforded to contractors who perform those
5 delegated functions in the government's stead. And the
6 focus is on the function not on whether the function was
7 performed appropriately, because in any instance in which
8 a challenge is brought to a civilian contractor, there
9 will be an allegation that the contractor acted
10 intentionally wrong or negligently wrong.

11 If that allegation alone were sufficient to
12 defeat immunity, then it would never be available.

13 THE COURT: All right.

14 MR. KOEGEL: In fact, in *Mangold*, the Court
15 extended immunity really beyond the discretionary function
16 that was at issue there because the Court found no public
17 interest in providing false or misleading testimony to
18 government investigators. And that's not a discretionary
19 function, but nevertheless the Court extended immunity to
20 that very conduct.

21 THE COURT: All right, Mr. Koegel, you all
22 have briefed the matter. I'm going to hear from the other
23 side and I'll give you all a chance to respond.

24 MR. KOEGEL: Thank you, Your Honor.

25 MS. BURKE: Your Honor, a few points on the

1 political question.

2 THE COURT: Ms. Burke.

3 MS. BURKE: Hello.

4 THE COURT: Yes.

5 MS. BURKE: This case doesn't raise a
6 political question any more than CACI's case against Randy
7 Rhodes raised a political.

8 There CACI came into court and said that
9 they were going to prove that the statements that had --
10 they had tortured people in prison were demonstrably
11 false.

12 This case is simply the flip side of that.
13 We're coming into court -- the victims are coming into
14 court and saying we're going to prove that the information
15 contained in the military reports that the CACI employees
16 tortured the victims are demonstrably true. It's a
17 straightforward tort suit.

18 The reason --

19 THE COURT: Let's focus on that now. You're
20 saying that a person who is detained on the battlefield in
21 a military prison, held in military custody can bring a
22 tort suit into federal court here in America.

23 Now the first question is what is the duty?

24 MS. BURKE: Your Honor, the duty is the duty
25 of the United States law. And the United States law has

1 said both by statutory criminal law as well as the Geneva
2 Convention that you have a duty to not torture prisoners.

3 THE COURT: All right. And does that give
4 rise to civil liability?

5 MS. BURKE: Yes, it does, Your Honor. Yes,
6 it does. It gives rise to civil liability, the
7 jurisdiction is through the alien tort statute as well as
8 just straightforward tort law, common law tort law against
9 these American corporate actors.

10 I would also point out that the statement
11 that you could not bring a military official in a same
12 fashion is simply not true.

13 For example, Charles Graner is serving time
14 in Leavenworth for these actions. He was a
15 co-conspirator, and he's serving time in Leavenworth for
16 having tortured people.

17 We could sue Charles Graner. It is not
18 clear without that suit going forward as to whether he
19 would be given immunity because the government may not
20 step in and try to substitute itself. So you may, in
21 fact, sue the official, those who are military officials
22 but are complicit in torture and that's because the duty
23 to not torture is clear.

24 THE COURT: So then this soldier,
25 Mr. Graner, could be hauled into court and sued for his

1 acts carried out in uniform on the battlefield and be held
2 liability to the so-called enemy?

3 MS. BURKE: He violated the law of war. And
4 first before I get to that --

5 THE COURT: My question is very precise.
6 You're saying to me that a person who is in the Army or
7 Marine Corpse who is on the battlefield in Iraq in a
8 military prison with detainees -- whether they should be
9 there or not is not up to me. They were there --

10 MS. BURKE: Right.

11 THE COURT: -- could be sued in federal
12 court for breaching his duty by torturing someone? Now,
13 he's already been prosecuted by the military criminal
14 court, right?

15 MS. BURKE: Right.

16 THE COURT: And you're saying he has to be
17 liable for money damages to these individuals?

18 MS. BURKE: Well, what I'm saying, Your
19 Honor, is the suit could be brought --

20 THE COURT: I'm asking you a specific
21 question, Ms. Burke. Can you answer my question?

22 MS. BURKE: Yes, a suit could be brought and
23 he would be liable for money damages unless the United
24 States exercised its discretion and stepped in and
25 substituted themselves.

1 THE COURT: Tell me how the instruction to
2 the jury would go.

3 Ladies and gentlemen, the duty of a soldier
4 on the battlefield who has a prisoner of war in custody is
5 not to torture that person. You're not to abuse them and
6 if you do, then this soldier who is over there acting
7 pursuant to orders from his superior is civilly liable and
8 you, the taxpayers are to order this soldier to pay money
9 to this person who is on the other side trying to kill
10 them.

11 MS. BURKE: Well, they're not -- couple
12 points in response, Your Honor.

13 THE COURT: No, I'm asking about instructing
14 the jury. I'm thinking way down the road. You want me to
15 go --

16 MS. BURKE: What I --

17 THE COURT: Let me finish. Let me finish.
18 You don't know what I'm going to say. You want me to go
19 way down the road on this, and I'm trying to understand
20 how do I instruct the jury on such a thing.

21 MS. BURKE: And what I'm saying, Your Honor,
22 if you get to a jury on that question, if you have the
23 uniform soldier such as Charles Graner go forward so that
24 it reached the jury, you would have had the United States
25 making a discretionary decision not to step in and

1 substitute itself. So --

2 THE COURT: So, you agree that the soldier
3 would be absolutely immune if the government came forward
4 and asserted immunity.

5 MS. BURKE: That's correct, Your Honor. And
6 in the same way, what they're asking for here basically is
7 to put themselves in the shoes of the soldiers. And
8 they're not allowed to be in the shoes of the soldiers for
9 a couple reasons. They're corporate employees who had a
10 contractual duty to obey the law. And the United States,
11 the military, has not intervened.

12 We actually have a declaration prepared as a
13 result of CACI's claim in its papers about the
14 classification and the manageability on this case.

15 I talked to the military lawyer yesterday,
16 and one of the things that he said is that, you know, the
17 military knows how to intervene to protect its interest
18 and it has not done so here.

19 The military has also represented that it
20 does not intend to invoke the state secrets. So what
21 you're really dealing with here is you're dealing with a
22 group of people, some of whom are military and some of
23 whom are corporate employees, all of whom are bad actors
24 in the sense that they conspired to torture.

25 Now, they have different -- they have

1 different levels of immunity. So it's the same way for
2 example if someone conspires with a diplomat or someone
3 conspires with a judge. Not all conspirators are treated
4 equally on the immunity issue. But the duty, the duty is
5 the same. They all have the same duty not to torture.

6 THE COURT: Well, I don't think that anyone
7 disputes nor I don't think that CACI is saying it has any
8 right to torture. No one has a right to torture. The
9 Geneva Convention says that. Established laws say that.
10 It's been said many times that torture is not allowed on
11 the battlefield or otherwise. That certainly is not
12 permissible.

13 The more precise legal question I have today
14 is whether the victim of torture in a battlefield
15 circumstances who has been detained in the military prison
16 can come into federal court and assert some type of tort
17 claim against the soldiers or the private -- more
18 precisely the private contractor who carried out the
19 interrogation and allegedly carried out the torture. That
20 is the legal question.

21 Help me with the political question
22 doctrine. Obviously you don't disagree that the right to
23 conduct a war and the elements of war are committed to the
24 executive in a text of the Constitution. You don't
25 disagree with that, do you?

1 MS. BURKE: No, I don't disagree with that
2 at all, Your Honor. And what you have here is you do not
3 have an unanswered political question. What you have is
4 the executive branch and the congressional branch speaking
5 with one voice saying that there shall be a duty not to
6 torture those who are detained in prison.

7 THE COURT: All right. Now, let's go to
8 step two was a lack of judicially discoverable and
9 manageable standards for resolving it. Now to me that
10 means more than discovery. It means standards for
11 resolving the claim.

12 So the claim here is one of some type of
13 negligence of some sort, and I don't know what that is. I
14 mean, I know that it violates Geneva Convention and the
15 law. You shouldn't torture people. But what is the duty
16 here?

17 MS. BURKE: The duty here when you look at
18 the Geneva Convention and you look at the United States,
19 the war crimes law, the torture laws on the book, it is a
20 straightforward duty to not use excessive physical
21 coercive force of the type that we have alleged in the
22 complaint.

23 So, for example, subjecting someone to
24 electric shocks, hanging them for hours from bars. Those
25 are -- those rise to the level of torture.

1 THE COURT: And they are subject to
2 prosecution in a military tribunal for the soldiers and
3 maybe subject to prosecution against the individuals and
4 accorded him the right of national criminal court at the
5 Hague; is that right?

6 MS. BURKE: Yes, Your Honor.

7 THE COURT: But, what you're doing is maybe
8 not unprecedented, but I'm trying to -- maybe there's a
9 case where you take one of these to a jury. Is there such
10 a case?

11 MS. BURKE: Yes, Your Honor. There have
12 been cases of torture that have gone to juries. It is a
13 standard, and you put on the evidence and you demonstrate
14 what has been done and then you ask the jury to find
15 whether or not the defendant's tortured someone.

16 A case down in Georgia went to verdict not
17 that long ago. It didn't involve Americans doing the
18 torturing, but it involved torture.

19 THE COURT: No, well, my question has to do
20 with the government contractors who are interrogators or
21 others who are breaking the law by torturing people in a
22 battle zone in a military prison whether such a case has
23 been brought to trial in federal court.

24 MS. BURKE: Your Honor, just a quick
25 response to that. The battle zone and prison are

1 different by the terms of the fourth Geneva Convention.
2 Prisons where people who are detained have to be outside
3 of the battlefield. So it's not technically in the
4 battlefield.

5 But, in terms of cases going forward on
6 these types of claims not involving the United States but
7 in other contexts, yes, there have been such cases.

8 THE COURT: What case?

9 MS. BURKE: The *Kadic* case went to the jury.
10 It was a Second Circuit case. We have cited that in the
11 briefs.

12 I would just note, Your Honor, that perhaps
13 on your precise question as to whether a government
14 contractor has been brought to a jury, the answer to that
15 I believe is no.

16 THE COURT: So I would be the first district
17 judge in America to allow such a claim to go forward?

18 MS. BURKE: Yes, Your Honor.

19 THE COURT: The first out of 1,236 district
20 judges to let it go forward?

21 MS. BURKE: Your Honor, Judge Robertson in
22 the District of Columbia just a few miles across the river
23 was letting it go forward. It's up on appeal, but he let
24 it go forward.

25 THE COURT: And I'm telling you I looked at

1 his decision. I read it again last night, and I'm looking
2 at page eight of the Westlaw opinion. And what I read to
3 you all was one sentence of analysis on the *Baker versus*
4 *Carr* issue, one sentence.

5 MS. BURKE: But, Your Honor, that's because
6 it's so straightforward. There simply is not -- this
7 action does not challenge any type of decision making by
8 the executive branch. It does not challenge any type of
9 decision making by the military. But --

10 THE COURT: But, come back to my -- my
11 concern -- and I certainly would follow -- and I know
12 Judge Robertson. I would follow his opinion if I thought
13 that it was judicially sound. And it may be in a D.C.
14 Circuit.

15 I'm in the Fourth Circuit and as you know,
16 we've had Hamdi and several other cases involving
17 Moussaoui where this circuit is really conservative and
18 they are, you know, very expansive in their view of what
19 the government can do particularly in a wartime and a
20 battlefield.

21 District judges around here have been beaten
22 down three or four times involving those issues. It's
23 only been the Supreme Court that stood up and said well,
24 wait a minute in Hamdi, the right of habeas corpus does
25 apply on the battlefield to people detained here.

1 So, I'm in a Fourth Circuit circumstance
2 where I've got to be very thoughtful about how I do this.
3 And so, if I'm going to do this, this one sentence from
4 Judge Robertson's opinion is not going to help me.

5 MS. BURKE: No, Your Honor, but what helps
6 you is the Fourth Circuit's decision itself. The issue of
7 whether or not there can be civil liability arising out of
8 their actions out of CACI's corporate actions was brought
9 to this Court and then brought up to the Fourth Circuit by
10 CACI.

11 CACI themselves tried to get money from
12 another party who was saying that they were torturing. In
13 order to do that, in order to litigate that case, CACI had
14 to put at issue and try to prove which they failed, try to
15 prove that those statements were false.

16 The very same actions, the very same actors,
17 the very same conduct that the Fourth Circuit had no
18 problem looking at there is what's at issue here. So the
19 Fourth Circuit's own precedent in that case should give
20 you great comfort that there's no political question.

21 Political question is a prudential doctrine.
22 If they had a problem with looking at what was going on
23 between you know Graner and Big Steve and Daniel Johnson
24 in the context of that defamation case, they could have
25 taken upon themselves and said listen we're not going to

1 rule on this.

2 Instead, they took a look at your
3 well-reasoned decision with all the factual information
4 that you had sited to which is the very same information
5 we will be putting on here and they let that case go
6 forward to a decision.

7 So I don't think that given the fact that
8 we're dealing with a corporate entity, you know, not a
9 governmental entity, that the United States military, the
10 United States executive, the United States Congress
11 everybody agrees there's a duty not to torture. It cannot
12 be breached.

13 It's -- even though it may be in the context
14 of being over in Iraq, it's a straightforward thing
15 because there's no ambiguity about the standard. It's not
16 a case where, you know, the executive branch is saying, oh
17 we're allowed to torture but Congress is saying they're
18 not. Everyone in the United States government system is
19 speaking with one voice.

20 This branch of the government is -- is
21 needed in order to have -- there be a remedy to have --
22 there be accountability. And there's no reason, none of
23 the *Baker* -- none of the *Baker* factors would lead you to
24 suggest that you shouldn't exercise that role here.

25 And it's pivotally important that you do so

1 because there is no other forum for these victims.

2 THE COURT: All right, if you would turn to
3 the issue of the absolute immunity and *Mangold* is a case
4 that we discussed earlier with Mr. Koegel.

5 Do you agree that I have to decide
6 government function first?

7 MS. BURKE: No, what I think what you have
8 to look at is what is the scope of what it is that the
9 United States government is delegating and wants to
10 delegate. And the United States government delegates down
11 the ability to interrogate. But it's only to conduct
12 lawful interrogation. There is no function that you can
13 delegate that requires unlawful, illegal activity.

14 And so when you -- you cannot define a
15 function so broadly that it encompasses criminality. By
16 their definition, essentially would immunize all
17 government contractors for any actions whatsoever simply
18 because they were in the war zone. That cannot be the
19 standard.

20 So, instead you have to look at, all right,
21 what is -- what is the public benefit. I mean *Mangold* put
22 forward a very straightforward test. What is the public
23 benefit to the United States to permitting corporate -- a
24 corporation to let its employees torture prisoners?

25 Everyone agrees that's not allowed. The

1 military has punished its own folks who did that, and
2 there's no reason why there shouldn't be accountability on
3 the corporate side. In fact, the military --

4 THE COURT: Well, let's focus on that for a
5 second. The -- we agree that if the person conducting the
6 interrogation was a Marine or a member of the Army and
7 certainly under Military Code of Justice and the Geneva
8 Convention they're not permitted to torture a detainee.
9 We all agree with that, right?

10 MS. BURKE: Right.

11 THE COURT: And we know that some soldiers
12 were prosecuted criminally and are in prison now because
13 the government thought they violated the Military Code of
14 Justice. We understand that.

15 MS. BURKE: Yes.

16 THE COURT: But there is no soldier who is
17 in custody now who has been held civilly liable for those
18 acts to the victims of the torture; is that right?

19 MS. BURKE: Your Honor, we represent --
20 along with another firm we represent the victims and we
21 opted not to sue the soldiers.

22 THE COURT: So the answer to my question is
23 there is no soldier in custody who has been held liable
24 civilly for money damages to a victim of torture in Abu
25 Ghraib; is that right?

1 MS. BURKE: That's correct, to the best of
2 my knowledge.

3 THE COURT: To the best of our acknowledge.
4 So then this action that we contemplate here is an action
5 against an interrogator who is a civilian who was
6 contracted for by the government allegedly because they're
7 not enough members of the military who speak Arabic
8 languages and so they need to have not only someone
9 trained in interrogation but also someone who spoke the
10 language, right?

11 MS. BURKE: No, Your Honor. That's actually
12 not right. The interrogators did not speak Arabic. There
13 was a separate company that provided translators because
14 we are woefully short as a nation on Arabic speakers.

15 The interrogation function was simply a
16 shortage of -- of military -- of bodies by the military.
17 So they brought in -- they outsourced the functions that
18 they viewed as noncombat.

19 And in CACI's contract itself it says they
20 cannot play a role in combat. So in order to free up what
21 they call the green suitors, in order to free up these
22 soldiers and the military personnel to go actually fight
23 the war, they fill in behind in the non-battlefield places
24 with corporate employees.

25 THE COURT: Right. And it's not a judge's

1 role to try to figure out whether the military should
2 subcontract or not. That brings me back to *Boyle* and some
3 of these other cases dealing with government contracts.

4 MS. BURKE: Sure.

5 THE COURT: Why shouldn't a government
6 contractor who has been engaged to carry on a government
7 function which is interrogation of detainees in a military
8 detention be held immunized from suit as if they were
9 soldiers? Aren't they soldiers in all but uniform?

10 MS. BURKE: No, Your Honor. The key here is
11 that they are -- they are doing the government's bidding
12 and entitled to that type of extension only when they
13 abide by the terms of their contract.

14 THE COURT: No, no, I understand what you
15 want to do. I'm not sure I'm prepared to go that far
16 because *Mangold* the Court could have made a judgment that
17 the method of the interrogations or the questioning
18 were -- was deficient and violated some standard. But
19 *Mangold* focused on the government function itself, not how
20 it was carried out. You're asking me to focus on it was
21 carried out. I'm not willing to go that far.

22 MS. BURKE: No, Your Honor. What I'm saying
23 is that there's boundaries. If you look at the Department
24 of Defense regulation itself you'll see the military's
25 view on this. And I will submit as well the declaration

1 on the conversation with the military lawyer.

2 The military does not want to have
3 government contractors immunized for conduct that the
4 military has not asked for and is not controlling. You do
5 not want to have a situation in which our normal civil
6 tort law that plays a deterrent effect on corporate
7 employees misbehaving. You don't want to eliminate that
8 deterrent effect for no reason, for no benefit.

9 Now the military has a mechanism to
10 discipline contractors but it's fairly cumbersome. And
11 there is no sentiment by them or anyone else that there
12 should be an -- that we should be eliminating what's an
13 important part of our jurisprudence that keeps
14 corporations in line.

15 So here what we're saying is you simply
16 don't step in and disrupt the natural flow of the law.
17 The law says that you have to abide by the terms of your
18 contract. The law says you cannot torture. There's no --
19 there's no public benefit. There's no benefit to the
20 military. There's no reason to dramatically extend the
21 Supreme Court created doctrine in *Boyle*.

22 Now, what the Supreme Court was worrying
23 about was when a government contractor that manufactured
24 weapons knew a spec was not a good spec but was told by
25 the government manufacture it that way, in that instance

1 they wanted to make sure that the government contractor
2 who is doing the bidding of the government doesn't get
3 hammered around the side by state product liability law.

4 THE COURT: Well, I understand that.

5 MS. BURKE: That's a very different
6 situation than what you have here where you have the state
7 common law as well as the international law that is part
8 of federal common law being consistent and the exact same
9 duties that the government itself imposed on these
10 contractors. So you have different mechanisms to hold
11 CACI responsibility.

12 THE COURT: All right. Well, let me say
13 that I've asked you the questions that I have now about
14 this. I've not asked you to go into all of the other
15 issues that have been briefed, and they have been briefed
16 quite extensively, and I intend to make a judgment about
17 them. But I wanted to ask you all about the two areas
18 that I had questions about. So I've asked you the
19 questions that I have.

20 MS. BURKE: And Your Honor if I may just
21 hand up the declaration on the manageability issue.

22 Thank you, Your Honor.

23 THE COURT: Through the court security
24 officer. Thank you.

25 Mr. Koegel, very briefly.

1 MR. KOEGEL: Your Honor, Ms. Burke first
2 turned to the Rhodes defamation action asserting that
3 somehow that demonstrates that there's no political
4 question here. It's hard to know where to begin with that
5 statement.

6 THE COURT: Well, let me say that we can
7 submit on the record on that.

8 MR. KOEGEL: Very well, Your Honor.
9 Unless -- do you have any further questions?

10 THE COURT: No. All right.

11 Counsel, let me first say that this is a
12 very challenging legal issue you all have presented to me.
13 And it has been briefed quite extensively. And obviously
14 this is unprecedented litigation, and there is no guide to
15 help me make the judgment that I must make about whether
16 to open up the federal court to this claim and whether the
17 legal arguments that have been advanced here to dismiss
18 have any merit at all.

19 I have to give great consideration to all
20 the law you all have briefed. And so I'm not going to
21 make any ruling from the bench, but I do want to thank you
22 for the quality of your preparation and you all have
23 briefed it in a quite helpful way. And so I will get back
24 to you with a ruling as soon as I can, but it's going to
25 take me some time. I'm sure you all spent some time

1 briefing it, so hopefully you will give me some time to
2 write a ruling before you.

3 Thank you. You're excused.

4 MR. KOEGEL: Thank you, Your Honor.

5 MS. BURKE: Thank you, Your Honor.

6 (Proceedings concluded at 1:12 p.m.)

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CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Al Shimari, et al vs. CACI, et al.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said motions, and that the foregoing pages, numbered 1 to 35, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 17th day of November 2008.

Renecia Wilson, RMR, CRR
Official Court Reporter