

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, Et al.,	)	
	)	
Plaintiffs,	)	Civil No. 08-cv-827
	)	
VS.	)	May 10, 2013
	)	
CACI INTERNATIONAL, INC., et al.,	)	
	)	
Defendants.	)	

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MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: CENTER FOR CONSTITUTIONAL RIGHTS  
 BY: BAHER AZMY, ESQ.  
 KATHERINE GALLAGHER, ESQ.  
 GINA SHAW, ESQ.  
 KELLER & HECKMAN LLP  
 BY: GEORGE BRENT MICKUM, IV, ESQ.  
 AKEEL & VALENTINE, PLC  
 BY: SHAREEF HADI AKEEL, ESQ.  
 PATTERSON BELKNAP WEBB & TYLER, LLP  
 BY: ROBERT PAUL LOBUE, ESQ.

FOR THE DEFENDANT: STEPTOE & JOHNSON  
 BY: JOSEPH W. KOEGEL, JR., ESQ.  
 JOHN O'CONNOR, ESQ.

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 OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR  
 U.S. District Court  
 401 Courthouse Square, 5th Floor  
 Alexandria, VA 22314  
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2 (Thereupon, the following was heard in open  
court at 11:08 a.m.)

3 THE CLERK: 08 civil 827, Al Shimari versus  
4 CACI Premiere Technology, Incorporated.

5 MR. AZMY: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. AZMY: Baher Azmy, A-Z-M-Y for the  
8 plaintiffs. I'm joined by Bob LoBue, L-O capital B-U-E,  
9 Shareef Akeel, Brent Mickum, and colleagues, Katherine  
10 Gallagher and Gina Shaw for the plaintiffs.

11 And just so you know, Your Honor, I'll be  
12 arguing motions one and three, the ATS and sanctions, and  
13 Mr. LoBue will be arguing the motion to dismiss the  
14 common law claims.

15 THE COURT: All right. Thank you.

16 MR. KOEGEL: Good morning, Your Honor, Bill  
17 Koegel and John O'Connor for defendant, CACI PT.

18 I will be arguing the ATS and sanctions  
19 motions. Mr. O'Connor will argue the second motion, the  
20 choice of law motion.

21 THE COURT: Thank you very much.

22 Good morning.

23 All right, counsel, I'm ready. I think we  
24 should probably start with the ATS motion if that's  
25 acceptable to you all.

1 MR. KOEGEL: We agree, Your Honor, because  
2 that presents an issue of subject matter jurisdiction.

3 THE COURT: Well, did the Supreme Court  
4 dramatically alter the landscape of this case as it  
5 relates to Alien Tort Statute claims and have they in  
6 effect said that it has no extra-territorial application?

7 MR. KOEGEL: They've said that in clear,  
8 unequivocal terms, Your Honor, that conduct occurring  
9 outside the United States does not provide the Court with  
10 jurisdiction for alleged violations of international law.  
11 It's very straightforward, and we think its application  
12 of this case readily leads to dismissal of all nine ATS  
13 counts in this case.

14 THE COURT: The Alien Tort Statute is a  
15 jurisdictional statute; is that right?

16 MR. KOEGEL: Purely jurisdictional according  
17 to the United States Supreme Court's decision in *Sosa*  
18 just a few years ago, no dispute, that it's purely  
19 jurisdiction.

20 THE COURT: The power of the Court to act.

21 MR. KOEGEL: Pardon me, Your Honor.

22 THE COURT: The power of the Court to act.

23 MR. KOEGEL: That's correct, it gives the  
24 Court subject matter jurisdiction as reflected in the  
25 fact that the Court's decision on April 17th in *Kiobel*,

1 affirmed the decision of the Second Circuit which had  
2 dismissed the complaint in that action for lack of  
3 subject matter jurisdiction.

4 So we think that the ATS claims at this point  
5 are without subject matter jurisdiction. In fact, that's  
6 the threshold issue that the parties disagree on.

7 The plaintiffs believe it's appropriately  
8 presented under Rule 12(b)(6), not as a 12(b)(1) subject  
9 matter jurisdiction argument. We think that's clearly  
10 wrong. It's clearly wrong because ATS is indisputably  
11 purely a jurisdictional statute. It provides no cause of  
12 action in and of itself. Rather it's a jurisdictional  
13 vehicle for aliens to assert certain claims arising under  
14 international law for which there's a universal  
15 consensus.

16 THE COURT: Well, the *Kiobel* case was before  
17 the Court on an issue involving subject matter  
18 jurisdiction; is that right?

19 MR. KOEGEL: That is correct, Your Honor.

20 THE COURT: It was not 12(b)(6).

21 MR. KOEGEL: That is correct. It was  
22 12(b)(1), subject matter jurisdiction. That was the  
23 basis for the Second Circuit's decision in *Kiobel*, which  
24 the Supreme Court affirmed.

25 So we think it's very clear that the ATS

1 claims in this motion require the Court to determine  
2 whether it has subject matter jurisdiction. And, we  
3 think it's clearly lacking given the effect of the *Kiobel*  
4 decision.

5 THE COURT: Does *Kiobel* create a safe haven  
6 for those who commit atrocities around the world and keep  
7 them safe from coming to federal court in the United  
8 States?

9 MR. KOEGEL: I wouldn't think it -- I  
10 wouldn't characterize as it a safe haven, Your Honor.  
11 That's not the way the Court approached it in *Kiobel*,  
12 keeping in mind that all nine justices concurred in the  
13 result in *Kiobel*.

14 THE COURT: I think one of plaintiff's  
15 arguments is if I read *Kiobel* the way you want me to read  
16 it then the law no longer has any effect to reach acts of  
17 atrocities that occur in other countries where the  
18 defendant might be here.

19 MR. KOEGEL: That's indisputably correct,  
20 Your Honor, that under the Supreme Court's decision in  
21 *Kiobel* if the conduct occurs outside the United States,  
22 there's no jurisdiction in a federal court in this  
23 country under ATS.

24 That's the holding in *Kiobel*.

25 THE COURT: There's discussion in *Kiobel* as

1 well that the United States courts could not host  
2 lawsuits from various matters that occur around the  
3 world; is that right?

4 MR. KOEGEL: That is correct, Your Honor.  
5 The Court effectively said federal courts in this country  
6 are not -- not an international tribunal to serve as the  
7 world's policeman.

8 The Court was crystal clear in saying there's  
9 no jurisdiction for violations of international law that  
10 occur outside the United States. It's equally clear that  
11 all the violations alleged in this action with respect to  
12 the ATS claims occurred in Iraq. That's all that's  
13 really necessary to settle this matter.

14 The plaintiffs have three arguments that they  
15 ask the Court to adopt, to avoid what we believe is a  
16 direct and straightforward application of *Kiobel*.

17 First, they claim that well, Iraq is really  
18 part of the United States.

19 THE COURT: Well, I -- I understand. I'm  
20 going to give them a chance to make that argument --  
21 that I should determine that the prison at Abu Ghraib was  
22 somehow part of the sovereign of the United States where  
23 a war is being conducted and wartime activities were  
24 being carried out there in terms of detention of  
25 detainees in a war, and that somehow the United States

1 had planted a flag in Abu Ghraib and that had become a  
2 part of the United States.

3 I'll give them a chance to make that  
4 argument. You don't have to make the argument for them.

5 MR. KOEGEL: Thank you, Your Honor. We  
6 believe we've adequately addressed that in our brief as  
7 to why that argument holds no water whatsoever.

8 THE COURT: Well, there is a question that I  
9 think, the plaintiff raise and that is that at the end of  
10 the opinion, there's a reference about whether to  
11 displace the presumption against extra-territorial  
12 application, and it uses the words "and even where the  
13 claims touching concerning the territory of the United  
14 States".

15 And, the argument that is being made is that  
16 because the defendant corporation is based here and was  
17 working with the government, with the military in this  
18 war activity in Iraq, that this should -- somehow falls  
19 within that and that's an exception.

20 Do you read that line as an exception that  
21 would give the Court extra-territorial jurisdiction in  
22 those circumstances?

23 MR. KOEGEL: Certainly not in this action,  
24 Your Honor. The Court was equally clear that "mere  
25 presence in the United States is insufficient to



1 establish subject matter jurisdiction".

2 Second, it's conceded that all the tortious  
3 conduct alleged here occurred in Iraq. None of the  
4 conduct alleged as actionable under the ATS claims  
5 occurred in the United States.

6 Rather, they say, well, this was a United  
7 States corporation. That's true. That the United States  
8 hired employees in -- pardon me, the defendant hired  
9 employees in the United States. That's equally true.  
10 None of that is actionable conduct under ATS, and the  
11 touching concern language doesn't come remotely -- you  
12 know, can't be stretched nearly as far as plaintiffs  
13 would attempt to do.

14 THE COURT: I was trying to figure out from a  
15 judicial standpoint what was -- how would you interpret  
16 touching concerning the territory of the United States  
17 without their being some definition to it.

18 And I note that the Court in that cited the  
19 *Morrison* case. And *Morrison* was a securities case, and I  
20 think that the way *Morrison* is read, the Court was  
21 suggesting that there was no extra-territorial  
22 application securities laws outside the United States.  
23 And if Congress wants to change it, then it's up to  
24 Congress to change it.

25 MR. KOEGEL: That's exactly correct, Your

1 Honor. And that point you just made supports our  
2 approach to this issue, because when Chief Judge Roberts  
3 in the *Kiobel* opinion was using the touching concern  
4 language, he cited *Morrison*.

5 And in *Morrison*, the Court held that the  
6 federal securities laws do not have extra-territorial  
7 application, even though there was evidence in that  
8 record that some conduct had occurred in Florida.

9 But the Court found it was -- that the  
10 conduct was outside the United States for purposes of its  
11 decision on extra-territoriality.

12 That is precisely analogous to the situation  
13 presented here. But, here we've got some additional  
14 assistance, and that assistance comes from the Fourth  
15 Circuit.

16 In the *French* decision, the Fourth Circuit  
17 had to determine whether the conduct alleged was  
18 territorial or extra-territorial.

19 And, it developed a standard. It developed a  
20 test to make that determination. And it looked toward  
21 the acts, the targets and the effects of the conduct  
22 alleged to violate the offense -- to constitute the  
23 offense in that action.

24 We explained how applying that standard to  
25 these facts leads inevitably to the conclusion that this

1 is extra-territorial conduct.

2 And I think that the silence in plaintiff's  
3 brief speaks volumes on that. I think it's a fair  
4 statement, Your Honor, to say that in this action, over  
5 the five years it's been on file, it's been vigorously  
6 litigated, that point rarely go uncontested.

7 We had explained how the Court -- how the  
8 application of the *French* decision would lead easily to  
9 the conclusion that this conduct is extra-territorial.  
10 They neither cite nor address it in their opposition.

11 So, we think that in this circuit at least,  
12 the *French* decision provides an additional reason for  
13 concluding that the activity on which the Court must  
14 focus is purely exclusively 100 percent,  
15 extra-territorial. And the fact that there is a  
16 defendant that is incorporated in the United States that  
17 hired employees in the United States is not remotely  
18 sufficiently under *Kiobel* and under the *Morrison* decision  
19 to establish subject matter jurisdiction here.

20 THE COURT: All right.

21 MR. KOEGEL: Keeping in mind that it is the  
22 plaintiff's burden, it's not a jump all on subject matter  
23 jurisdiction. They bear that burden. And faced with  
24 *Kiobel* and *Morrison*, we don't think they come remotely  
25 close.

1 THE COURT: All right. I've asked you the  
2 questions I have. Let me hear from plaintiff's counsel,  
3 Mr. Azmy.

4 MR. AZMY: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. AZMY: So, defendants have an  
7 implausibly, I think, simplistic reading of a Supreme  
8 Court decision.

9 The Court used the term "presumption". They  
10 did not say that the ATS would not apply abroad. They  
11 used the term "presumption".

12 And in part four of the opinion which is the  
13 application of the opinion, they said the presumption  
14 could be displaced in certain circumstances.

15 So, I imagine, Your Honor, we have  
16 presumptions all over the law, for example, a presumption  
17 of innocence. I imagine, Your Honor would be surprised  
18 to hear a defense lawyer say that the prosecutor cannot  
19 submit evidence that would rebut the presumption of  
20 innocence. And the Supreme Court suggested a way to  
21 overcome that presumption in part four of the opinion.

22 THE COURT: Well, before you go there, let's  
23 focus here for a second. Do you agree that the text of  
24 the ATS does not in its text set forth any indication of  
25 extra-territorial reach?

1 MR. AZMY: No, but I think the Supreme Court  
2 said -- interpreted those arguments. The plaintiff's in  
3 *Kiobel* said, well of course, the ATS embodies  
4 extra-territorial principles and the defendants said no,  
5 it didn't. The Court came in somewhere on the middle to  
6 say there is a presumption against its application in  
7 part because you don't want to interfere with sovereign  
8 foreign relations in holding foreign corporations or  
9 foreign governments responsible for violations in the  
10 U.S. courts, factors that are not present here.

11 THE COURT: I thought that they started out  
12 first with just reading the terms of the statute as and  
13 that's what you're supposed to do with the mechanics of  
14 construction, is that right, to read the statute itself?

15 MR. AZMY: That's right. They read the terms  
16 of the statute and rejected plaintiff's argument that it  
17 would always have extra-territorial effect and instead  
18 said there would be a presumption against  
19 extra-territorial application which would become  
20 displaced as in part four of the opinion.

21 And I would stress --

22 THE COURT: Well, I want to focus if you  
23 would, before you go to part four just on what the Court  
24 actually held.

25 MR. AZMY: Uh-huh.

1 THE COURT: It appears to me that the  
2 question presented, at least as set forth in the opinion,  
3 and the question presented is "whether and under what  
4 circumstances courts may recognize a cause of action  
5 under Alien Tort Statute for violations of law of nations  
6 occurring within the territory of a sovereign other than  
7 the United States".

8 Did I read that correctly?

9 MR. AZMY: Yes.

10 THE COURT: Does that suggest to you that the  
11 focus was on whether or not the statute had  
12 extra-territorial application to events that occurred in  
13 a foreign land?

14 MR. AZMY: Yes, and under what circumstances  
15 is where part four comes in. So, there's a presumption  
16 that it won't apply, but that presumption can be overcome  
17 where the -- the torts touch and concern the United  
18 States with sufficient force to overcome it.

19 THE COURT: Well, I'm going to get there.  
20 Now, also, there's no question here but everything  
21 occurred in Abu Ghraib in Iraq; is that right?

22 MR. AZMY: We disagree, Your Honor. For  
23 purposes of the extra-territorial analysis, we disagree  
24 in several ways.

25 THE COURT: Well, tell me how.

1 MR. AZMY: Okay. Well, first, there's the --  
2 the notion that Abu Ghraib was under the -- the plenary  
3 authority of the United States. And I know you want to  
4 talk about this separately, and we can. And so that  
5 therefore, it wouldn't interfere with any foreign  
6 sovereign interests to apply U.S. law to this U.S.  
7 corporation.

8 THE COURT: Well, let's focus for a second.  
9 The events occurred in Iraq; is that right?

10 MR. AZMY: It occurred in Iraq, yes.

11 THE COURT: The United States never took over  
12 Iraq, did they?

13 MR. AZMY: As a legal matter, yes, they did,  
14 Your Honor. The Coalition Provisional Authority appointed  
15 a U.S. ambassador subject to the United States, the  
16 President of the United States, and authorized that  
17 entity to run the government of Iraq. And it had legal  
18 and political authority there which in the *Rasul* case  
19 suggests that that affects whether or not territory is  
20 U.S. territory in the extra-territoriality analysis. And  
21 it also --

22 THE COURT: Go ahead.

23 MR. AZMY: It also -- so, it suggests that  
24 the territories function as the United States territory  
25 under *Rasul* and the *Vermilya-Brown* case from 1948 for

1 purposes of analyzing whether or not a statute should  
2 apply extra-territorially.

3 It also suggests for the touch and concern  
4 analysis that there is no interference with any foreign  
5 sovereign interests here. We're --

6 THE COURT: I don't think I have to reach all  
7 that touch and concern --

8 MR. AZMY: Okay.

9 THE COURT: -- if I'm just focused on what the  
10 Court actually held --

11 MR. AZMY: Uh-huh.

12 THE COURT: -- where all the facts occurred in  
13 a foreign country.

14 Now, I understand your argument. Your  
15 argument is that where the government has control of the  
16 body, like at Guantanamo Bay, that there can be habeas  
17 corpus jurisdiction. I think *Rasul* --

18 MR. AZMY: And ATS jurisdiction, Your Honor.

19 THE COURT: And ATS jurisdiction. But, that  
20 was before *Kiobel*. That was before *Kiobel*.

21 Do you think that *Kiobel* suggests that there  
22 remains a claim that can be brought where everything  
23 occurred in Iraq? That's the ultimate question. Can you  
24 answer that?

25 MR. AZMY: We don't concede that everything



1 occurred in Iraq, but we think *Kiobel* --

2 THE COURT: That's what you pled, haven't  
3 you? You haven't pled any facts that occurred in the  
4 United States. You pled that everything occurred in  
5 Iraq. What you pled about what occurred here was the  
6 cover up, right?

7 MR. AZMY: The cover up, the hiring, and that  
8 the contract was executed here, and also that the  
9 corporation was here which is relevant to the *Kiobel*  
10 analysis as well because the foreign corporation at issue  
11 in *Kiobel*, they had mere presence, and that mere presence  
12 was a foreign -- an investor relations office on Park  
13 Avenue. That was it.

14 And all of those sort of foreign cubed facts  
15 are very much unlike the facts here. And the touchstone  
16 of the presumption against extra-territoriality is the  
17 concern about comity and interference with foreign  
18 relations.

19 And also in *Kiobel*, the claim was that there  
20 was aiding and abetting the foreign government of Nigeria  
21 to commit torts, and the Court was very wary about that  
22 where you have a U.S. defendant acting in an area in a  
23 space subject to plenary U.S. authority, with U.S.  
24 servicemen pursuant to a U.S. contract.

25 THE COURT: But you're not suing the United

1 States government, are you?

2 MR. AZMY: No, but it --

3 THE COURT: You're not, because there would  
4 be immunity.

5 Well, let's focus for a second. I want to go  
6 to part four of the opinion.

7 MR. AZMY: Uh-huh.

8 THE COURT: And I've read this sentence to  
9 Mr. Koegel, so I want to read it to you.

10 What is the test that I'm to apply under the  
11 so-called -- where the claims touch and concern the  
12 territory of the United States that they must do so with  
13 sufficient force to displace presumption?

14 What am I to discern from that in a citation  
15 to *Morrison*?

16 MR. AZMY: We suggest three things, Your  
17 Honor.

18 THE COURT: I'm listening. What's number  
19 one?

20 MR. AZMY: Number one is the policy -- the  
21 policy principles underlying the presumption which is  
22 interference with international comity and foreign  
23 governments interests which we say is not implicated  
24 here, both because the -- the conduct occurred in a place  
25 where the U.S. Government had control and also because

1 there's a U.S. defendant. We're not holding a foreign  
2 corporation responsible for our loss.

3 That's number one.

4 Number two, we would suggest that the Court  
5 look to the kinds of factors the courts have look to in  
6 applying *Morrison*, including Your Honor's decision in  
7 *Schreiber* which was a Lanham Act case.

8 And that looked a lot like the kind of  
9 factors that Justice Breyer used in its concurrence which  
10 were not rejected by the majority and which was not  
11 uncommon. He suggested these are some -- these are some  
12 guidepost. Among those guidepost is whether or not a  
13 defendant is a U.S. entity, a U.S. citizen and whether or  
14 not it would have interfered with foreign relations.

15 THE COURT: Are you referring to -- what  
16 you're referring to, Breyer?

17 MR. AZMY: Breyer, yes.

18 THE COURT: Was there holding in the case?

19 MR. AZMY: It's not the holding of the case.  
20 The holding of the case is touch and concern. But to  
21 identify what touch and concern means, I think you can  
22 look to traditional foreign relations principles that  
23 Your Honor used in the *Schreiber* case which happens to  
24 map very much to what Justice Breyer did in his  
25 concurrence.

1           And where there's a U.S. defendant, no  
2 interference with foreign -- foreign relations. Why  
3 would the Iraq government, unlike the Nigerian government  
4 or the Dutch government where the corporation was from,  
5 why would the Iraq government be upset if the United  
6 States were holding a U.S. corporation accountable for  
7 alleged crimes under international law?

8           THE COURT: Well, doesn't *Morrison* say that  
9 the Court is not going to apply the securities law  
10 extra-territorially and if Congress want to do so, they  
11 can amend the statute?

12           MR. AZMY: It does, but --

13           THE COURT: That's what's cited here as it  
14 relates to touch and concern, the displace, is that  
15 right?

16           MR. AZMY: *Morrison* says there will be a  
17 presumption and the presumption can be overcome. And on  
18 page 20 of our brief, Your Honor, we have cite, I think  
19 very relevant post-*Morrison* RICO cases which involve  
20 conspiracy. And those cases say, you need to have more  
21 than an incidental relationship to the United States.  
22 There has to be something -- something more.

23           And, we think -- frankly, Your Honor, I -- I  
24 can't see a constellation of facts post-*Kiobel* stronger  
25 than those presented here.

1           The facts are so strong that -- the U.S.  
2 interests here are so strong that the U.S. Government saw  
3 fit to court marshal a number of the co-conspirators in  
4 this case for the very conduct at issue in this case and  
5 put them in U.S. prisons.

6           This is not a foreign --

7           THE COURT: What does that have to do with  
8 civil liability of this corporation?

9           MR. AZMY: It has to do with touching and  
10 concerning the interest of the United States. This is  
11 not an exotic action in Nigeria involving the Nigerian  
12 government and a Dutch organization. This is so  
13 intimately intertwined with U.S. conduct and U.S.  
14 interests that it would overcome the presumption.

15           And respectfully, I think if any case does,  
16 this case would.

17           THE COURT: All right. Well, as I read the  
18 opinion, the sentence that follows the issue of whether  
19 or not corporation's mere presence would be sufficient  
20 talks about "if Congress were to determine otherwise, a  
21 statute more specific that the ATS would be required".

22           Should I infer from that that there is an  
23 exception that should be created judicially to make the  
24 judgment that there are facts that -- that displace a  
25 presumption?

1           Let me just develop that thought a little bit  
2 more.

3           It occurs to me that if I accept your  
4 argument about the exception, then that means that the  
5 many atrocities that have occurred in Rwanda, that have  
6 occurred in other countries, that involve genocide and  
7 other very horrible human rights violations, that the  
8 United States would become the forum of choice under your  
9 theory for all those kinds of claims.

10           My recollection is that the United States  
11 doesn't even participate in any of the international  
12 tribunals that hear those cases. So why would I do that  
13 in this case?

14           MR. AZMY: Your Honor, that -- that  
15 assumption is wrong. We think -- those kinds of utterly  
16 foreign-cubed cases like the Rwanda atrocities or what  
17 was going on in Nigeria are the kind of cases that the  
18 majority was excluding and inviting Congress to say, "you  
19 know, Congress, if you want to create an international  
20 tribunal in the United States to hear case that are  
21 utterly foreign cubed, you can".

22           But the holding in this case which -- which  
23 got and needed the fifth vote of Justice Kennedy suggests  
24 that it is a presumption. And it may be a high  
25 presumption, but it can be overcome when interests touch

1 the United States. And Justice Kennedy did say, you  
2 know, this will have to be teased out in future cases.

3 THE COURT: But, you're not giving me any  
4 guidance. I'm a trial judge. I'm not the Supreme Court  
5 and maybe the Supreme Court intended to somehow  
6 communicate to trial judges the facts or the legal  
7 principles under which to displace a presumption, and I'm  
8 certainly familiar with how presumptions are just ways to  
9 alleviate a person's burden of proof.

10 But here I'm dealing with matters as it  
11 relates to jurisdiction, which is the power of the Court  
12 to act and also the substance of extension of the law  
13 beyond our borders.

14 There is -- in Justice Breyer's opinion, he  
15 says he "leaves for another day, the determination of  
16 just when the presumption against extra-territoriality  
17 may be overcome". But he doesn't tell me what to do.

18 MR. AZMY: Your Honor, you're in the  
19 regrettable position, as you may have been in the past,  
20 of being on the front lines of interpreting and applying  
21 a Supreme Court decision that doesn't provide you much  
22 guidance. And for better or worse, that seems to be how  
23 the Supreme Court works and how case percolate in the  
24 lower courts, which is why we stress so much how the  
25 constellation of these facts more than frankly any other

1     ATS case that I'm aware of in the country would meet the  
2     touch and concern analysis because of U.S. legislative  
3     control over Iraq at the time, because of the U.S.  
4     corporation and because of continuing corporate practices  
5     in the United States that contributed to the conspiracy.

6             THE COURT: Isn't there something called the  
7     Tortured Victims Protection Act?

8             MR. AZMY: There is, Your Honor, but it  
9     doesn't apply to the facts of this case. And in fact,  
10    when Congress adopted the Tortured Victims Protection  
11    Act, they cited cases, ATS cases that applied  
12    extra-territorially.

13            And one more point about the safe haven, Your  
14    Honor --

15            THE COURT: Yes.

16            MR. AZMY: Breyer is concerned about that as  
17    well. And there is a case -- the *Filártiga* case from  
18    1979 that the --

19            THE COURT: That was not cited in the  
20    majority opinion, right?

21            MR. AZMY: It was cited in *Sosa* and affirmed  
22    in *Sosa* but --

23            THE COURT: But, it wasn't cited in the  
24    majority opinion in this case, was it?

25            MR. AZMY: No, but it was cited in *Sosa*.



1 THE COURT: I know, I read Sosa. I read  
2 that.

3 MR. AZMY: And just that case suggests also  
4 that U.S. entities that commit torture should not have  
5 safe haven in the United States because there's in fact  
6 an -- speaking about comity, there is international  
7 obligation for domestic states to prosecute or provide  
8 remedies for their domestic entities who commit  
9 international crimes which is different than dragging in  
10 a Dutch corporation for crimes committed against Nigerian  
11 plaintiffs alleged to have been aiding and abetting the  
12 Nigerian government and therefore embarrassing the State  
13 Department and all of that. That's a very different  
14 situation than what we have in this case.

15 THE COURT: All right. I've asked you the  
16 questions I have.

17 MR. AZMY: Thank you, Your Honor.

18 MR. KOEGEL: Let me first address the safe  
19 haven point that Your Honor raised.

20 THE COURT: Well, I only raised it because it  
21 appears to be in the briefs and it does appear in one of  
22 the concurrences, the issue of whether this decision will  
23 create a safe harbor.

24 MR. KOEGEL: Your Honor's reference to the  
25 Tortured Victims Protection Act is the segue to our

1 position on this point. That is one of numerous federal  
2 statutes at the disposal of the United States of America  
3 or certain civil contexts.

4 The Anti-torture Statute, the War Crimes Act,  
5 the Military Extra-Territorial Jurisdiction Act, the  
6 Tortured Victims Protection Act. The United States of  
7 America has ample means with which to pursue criminal,  
8 civil or administrative sanctions and penalties against a  
9 United States corporation or even its employees.

10 And, it is undisputed and indisputable that  
11 in this action, the United States has taken no criminal,  
12 civil or administrative action against CACI PT or any of  
13 its employees in connection with the allegations made by  
14 the plaintiffs in this action.

15 So, there's --

16 THE COURT: They were been missing from the  
17 whole case, weren't they? The United States has never  
18 appeared in this case until the Fourth Circuit directed  
19 them to appear; isn't that right?

20 MR. KOEGEL: That's correct, Your Honor. So,  
21 there's absolutely no truth to the notion that dismissing  
22 the ATS claims creates some sort of safe haven in this  
23 country for United States corporations or their  
24 employees.

25 There's a slew of federal laws at the

1 disposal of the government if they determine there are  
2 grounds to use them against a corporation or United  
3 States employees.

4 THE COURT: Well, is there a touch and  
5 concern exception and in this case, plaintiff says that  
6 they have come forward with sufficient facts because this  
7 happened in connection with a U.S. military operation  
8 controlled by the government provisional authority and  
9 that somehow takes it into an exception that rebuts the  
10 presumption against extra-territoriality. What's your  
11 take on that? And I'm not -- there's no case to guide us  
12 on this, I don't think.

13 MR. KOEGEL: With the exception of the *French*  
14 case, for determining --

15 THE COURT: Right.

16 MR. KOEGEL: -- whether conduct is  
17 territorial or extra-territorial, but here, all of the --  
18 if you go to their third amended complaint, every single  
19 act alleged to constitute a violation of the ATS occurred  
20 in Iraq. That's undisputed.

21 The plaintiffs' argument is that the Supreme  
22 Court's decision in *Kiobel* that conduct occurring outside  
23 the United States leaves the Court without jurisdiction  
24 means something other than outside the United States.  
25 And they've come up with this control and authority test.

1           You won't find that in *Kiobel*. You won't  
2 find it in *Rasul* either.

3           The -- the fact of the matter is, it's cut  
4 from a whole cloth. And it would call upon the Court to  
5 determine in the context of a war zone whether the United  
6 States in fact had control and authority.

7           How the Court would go about doing that for  
8 purposes of this analysis is left to the imagination and  
9 we believe that would present a quintessential political  
10 question, whether the Court had to conduct fact finding  
11 as to whether the United States was in sufficient control  
12 in a war zone to provide jurisdiction for aliens to bring  
13 ATS claims.

14           THE COURT: I think that we have exhausted my  
15 questions on this motion. I'd like to hear about the  
16 next motion.

17           MR. KOEGEL: Thank you, Your Honor.

18           MR. O'CONNOR: Your Honor, the legal issue  
19 before the Court today is what law governs plaintiff Al  
20 Shimari's common law tort claims. Both parties agree  
21 that the starting place is Ohio's choice of law rules,  
22 and the reason for that is that plaintiff Al Shimari  
23 originally filed his lawsuit in Ohio.

24           Ohio's choice of law rules are well settled.  
25 According to the *Morgan* case which both sides agree is

1 the case that sets forth the standard, a presumption is  
2 created that the law of the place of injury controls  
3 "unless another jurisdiction has a more significant  
4 relationship to the lawsuit".

5 Now, plaintiffs in their opposition keep  
6 wanting to cross out the word "relationship" and put in  
7 the word "interest". But Ohio is not an interest  
8 analysis state for purposes of choice of law. It's a  
9 Second Restatement most significant relationship state.

10 The --

11 THE COURT: The injury is the key inquiry on  
12 where the law applies, where the injury occurred.

13 MR. O'CONNOR: Generally speaking, that's  
14 right, Your Honor. Now, there are other relationships  
15 that if they all point in other directions could lead to  
16 a different result. And those relationships are the  
17 place of injury which here is Iraq, the place where the  
18 conduct causing the injury occurred, which here is Iraq,  
19 the domicile, residence and nationality of the parties  
20 which for plaintiff, Al Shimari, is Iraq. For CACI PT,  
21 it's Virginia, and I suppose Delaware is the state of  
22 incorporation. The place where the relationship between  
23 the parties, if any, is located, here that would be Iraq.  
24 And then there's any Section 6 factors from the Second  
25 Restatement that the Court might deem relevant.

1           And one of those Section 6 factors is the  
2 interest of the various jurisdictions.

3           But, I would say that in a Second Restatement  
4 jurisdiction such as Ohio where all of these  
5 relationships point toward Iraq law, that maybe in an --  
6 maybe in an interest analysis state you could say, well  
7 I'm just going to disregard all that and going to apply  
8 the loss under the jurisdiction because I don't Iraq is  
9 very interested in this. But that isn't really the  
10 result that's available under the Second Restatement.

11           THE COURT: Well, to apply Iraqi law, does  
12 the provisional authority Section 6 and I think it's 13  
13 apply here?

14           MR. O'CONNOR: Section 3.1, and Section 6  
15 apply, yes, sir.

16           Iraq law is -- and both parties agree to  
17 this -- Iraq law provides a threshold defense to CACI PT  
18 for a common law tort claim. That's under Section 3.1 of  
19 CPA order 17.

20           And both sides agree that what CPA order 17  
21 does in its place is it displaces subcenter of Iraq  
22 toward law and substitutes in Section 6 a claims process  
23 where a party with a claim of personal injury shall  
24 submit a claim to the parent state and that -- that  
25 parent state will decide that claim pursuant to the

1 national laws of the parent state.

2 So, in our view, what -- the way that Iraq  
3 law works here is there is no common law tort claim  
4 available. Instead, as in *Saleh* where the D.C. Circuit  
5 recognized availability of administrative claim, what  
6 Section 6 does is it directs a plaintiff or a claimant to  
7 make a claim to the United States under the Foreign  
8 Claims Act which uses the exact same combat/noncombat  
9 dichotomy that's in Section 6 of CPA order 17 and that  
10 claim is decided by the United States and they allow it  
11 or they don't allow it.

12 And if the United States then feels that  
13 there is a reason to chase somebody else because it  
14 believes an employee, a soldier, or a contractor is  
15 actually responsible, then the United States is  
16 subrogated, and it can go do that.

17 THE COURT: So, Section 3 says "coalition  
18 contractor and its subcontractors, as well as the  
19 employees, shall not be subject to Iraqi laws relating to  
20 the terms and conditions of their contract".

21 And I think the claim here involves  
22 allegations that CACI PT's interrogators exceeded or  
23 breached the contract because they were engaged in acts  
24 that were not authorized by the contract or U.S. law; is  
25 that right?

1 MR. O'CONNOR: That's exactly right, Your  
2 Honor. In fact, in our opening brief we cited seven or  
3 eight places in the third amended complaint where  
4 plaintiffs expressly allege that the injuries that they  
5 allege were caused in some way by CACI PT were done in  
6 violation of CACI PT's contract. So that's right.

7 And relating to -- we cited cases relating  
8 to -- well, we cited cases explaining that relating to  
9 particularly when used it's in the preemption context is  
10 exceedingly broad.

11 THE COURT: That was going to be my next  
12 question about relating to.

13 Now with respect to Section 6 --

14 MR. O'CONNOR: Yes, sir.

15 THE COURT: -- it talks about "that do arise  
16 in connection with military combat operations". So, in  
17 connection with military combat operations shall be  
18 submitted. And that's what you're talking about earlier.  
19 They can submit a claim, right?

20 MR. O'CONNOR: I don't think that's quite  
21 right, Your Honor.

22 THE COURT: Okay.

23 MR. O'CONNOR: If it's in connection with  
24 military combat operations, you're just out of luck.

25 THE COURT: That's excluded under Section 6.



1 MR. O'CONNOR: That's excluded under Section  
2 6. And that would be for instance, the *Al-Shifa* case in  
3 the Federal Circuit States where the United States bombed  
4 a factory in Sudan because they thought it had chemical  
5 weapons. There's just no claim. You don't get a claim.  
6 That's unfortunate. That's life.

7 THE COURT: I don't think there's any  
8 question this arises in connection with military combat  
9 in this case.

10 MR. O'CONNOR: Well, if that's the Court's  
11 view and we don't disagree with that and we said that we  
12 believe that's probably right in our opening brief.

13 THE COURT: Well, we're talking about a war  
14 and people being detained in a military -- in a prison at  
15 Abu Ghraib.

16 MR. O'CONNOR: You won't get --

17 THE COURT: It would be kind of hard for me  
18 to say it wasn't in connection with military operation,  
19 military contact, I think.

20 MR. O'CONNOR: You won't get any pushback  
21 from us on that, Your Honor. And that's our point is  
22 that if it arises out of military combat operations,  
23 there's just no claim available.

24 If it arises out of noncombat operations,  
25 then the Foreign Claims Act is available. A claim can be

1 submitted and it can be evaluated.

2 Now, I will say that, you know, statutory  
3 language, be it what it may be, the United States has  
4 taken the position that it will pay administrative claims  
5 from someone who has a bona fide claim detainee abuse.  
6 And that was referenced by the D.C. Circuit in *Saleh*.

7 Mr. Saleh had submitted a claim and the  
8 United States, they offered him \$5,000, but they found  
9 that the detainee abuse was just made up. So they were  
10 paying him for other things, but they didn't reject the  
11 detainee abuse claim as not covered. They would have  
12 paid him if he had a bona fide claim.

13 THE COURT: All right.

14 MR. O'CONNOR: But the -- while all this  
15 circles back to Ohio's choice of law rule is plaintiff's  
16 view is if there's no tort claim available under Iraq  
17 law, the Court should go look and find another  
18 jurisdiction that has a greater quote, unquote  
19 "interest".

20 We cited to the Court seven different cases  
21 where Ohio courts had done a choice of law analysis,  
22 found the Second Restatement jurisdiction that law should  
23 apply and said, that jurisdiction doesn't allow this  
24 claim, so the plaintiff is out.

25 They -- not one of those cases said that

1 other jurisdiction doesn't allow the claim, so it's not  
2 very interested. Let's go find another jurisdiction.

3 In fact, plaintiffs have cited no cases in  
4 Ohio standing for that proposition of Ohio choice of law  
5 jurisprudence.

6 THE COURT: All right.

7 MR. O'CONNOR: And I would also say with  
8 respect to Virginia law, we just don't see how Virginia  
9 has an interest.

10 THE COURT: I don't think we will have to  
11 have a discussion about Virginia.

12 Thank you.

13 MR. O'CONNOR: Thank you.

14 MR. LOBUE: Good morning, Your Honor. Robert  
15 LoBue for plaintiff, Mr. Al Shimari, who is still  
16 interested in having his day in court.

17 THE COURT: Yes, Mr. LoBue.

18 MR. LOBUE: Your Honor, we don't agree on  
19 many things with the defendants, but we do agree that you  
20 start with Ohio law choice of law principles. And we  
21 agree that under Ohio principles, the first place you  
22 look is Iraq to see what Iraq says about what's the  
23 governing law.

24 And the question is what is the governing  
25 Iraqi provision of law here. There is really only one

1 place you need to look, and that's Coalition Provisional  
2 Authority Order Number 17 which speaks directly to the  
3 issue at hand of claims against contractors.

4 And, so I think we should take a look, if you  
5 would, at that order again. It's -- I know Your Honor  
6 has it.

7 What's paradoxical about the defendant's  
8 reading of that order is they want it to be controlling  
9 when it provides immunities as to domestic Iraqi tort  
10 law. But they don't want it to be controlling when it  
11 says that in a case like this, you go back and resolve it  
12 in the courts of and pursuant to the laws of the sending  
13 state or the parent state.

14 I think that's the plain reading of Section  
15 6. And this order by the coalition and by Ambassador  
16 Brehmer was done not in ignorance of the underlying  
17 international law, but it was declaratory of the  
18 underlying international law. And the very second  
19 recital, it acknowledged that occupying powers and their  
20 military and employees accompanying the military are not  
21 subject to the local domestic law of the occupied  
22 territory.

23 And, this order implements that provision by  
24 saying that the people who are part of this coalition are  
25 not subject to Iraqi domestic law, and that any claims

1 must be prosecuted in the sending state, exactly what --  
2 THE COURT: How am I to read the phrase that  
3 "do not arise in connection with military combat  
4 operations"?

5 MR. LOBUE: Two things, Your Honor, first of  
6 all, I will point out that the plaintiff -- I'm sorry,  
7 the defendants -- the defendant did not argue in its two  
8 briefs that what we have here is a claim arising out of  
9 military combat activities or operations. And they do  
10 argue that today or at least they say they won't disagree  
11 with the Court if the Court wants to go there.

12 I respectfully submit that is not what we  
13 have in this case.

14 The -- first of all, CACI's contract with the  
15 U.S. Government says that its employees will not engage  
16 in combat activities or operations.

17 If everything -- and so if they were engaged  
18 in combat operations, that would be not only a violation  
19 of their contract with the United States but a gross  
20 violation of domestic and international law to have  
21 non-uniformed civilians rather than members of the  
22 military conducting combat operations.

23 And I think that's probably why the defendant  
24 was perhaps a little bit obfuscatory in their brief and  
25 using the word "if".

1 THE COURT: What am I to interpret Abu Ghraib  
2 to be? What is Abu Ghraib? Is it a prison --

3 MR. LOBUE: It was --

4 THE COURT: Let me finish. It was a prison  
5 that was being used by military to detain individuals in  
6 connection with a war operation? Is that what Abu Ghraib  
7 was?

8 MR. LOBUE: That is correct, but, Your Honor,  
9 if every --

10 THE COURT: Just tell me what you think it  
11 is. I've told you mine. What is your definition what  
12 Abu Ghraib was?

13 MR. LOBUE: It was a detention facility under  
14 the control of the coalition.

15 THE COURT: In Iraq.

16 MR. LOBUE: In Iraq.

17 THE COURT: In connection with the war; is  
18 that right?

19 MR. LOBUE: It was in connection with the  
20 war, and just about everything that was happening in Iraq  
21 at that time was in connection with the war. But if  
22 every activity that in some way related to the war  
23 efforts were deemed to be a military combat operation,  
24 then the exception would swallow the rule in Section 6.

25 THE COURT: Well, is it normal to have people

1 who are being -- in an -- occupied by outside military  
2 force bring a lawsuit against the force that invaded them  
3 for violations of their civil law. That's not a normal  
4 operation, is it, that the so-called enemy is able to  
5 bring a lawsuit into the offending -- the invading  
6 state's courts for tortures that occurred in connection  
7 with war. That not a normal occurrence; is it?

8 MR. LOBUE: Your Honor, it's probably not a  
9 frequent occurrence, but it's an occurrence that's  
10 provided for by law.

11 The United States on many occasions has  
12 adhered to international treaties that say that it of  
13 paramount important to provide a remedy for persons who  
14 suffer injuries in violation of international law.

15 And when the Coalition Provisional Authority  
16 in Section 6 says submit your claim in the parent  
17 country, it doesn't say submit it to the parent country  
18 by the way. But it says submit, and these claims will be  
19 submitted and dealt with according to the laws of the  
20 parent country.

21 THE COURT: All right. So, what law am I to  
22 look at? Shall be submitted in Delaware by the parent  
23 state.

24 MR. LOBUE: But the --

25 THE COURT: Let me finish.

1 MR. LOBUE: I'm sorry.

2 THE COURT: Defense counsel said there is a  
3 procedure by which an administrative claim can be filed.  
4 Is that what is -- what is referred to here or am I  
5 required to create a new federal common law tort action  
6 here?

7 MR. LOBUE: Respectfully neither, Your Honor.

8 THE COURT: All right.

9 MR. LOBUE: It's state common law that  
10 applies to these claims, and --

11 THE COURT: Which state?

12 MR. LOBUE: We think Virginia is the -- is  
13 the state that -- well, first of all --

14 THE COURT: Tell me how you get to Virginia,  
15 I'm curious.

16 MR. LOBUE: I've said it's Virginia, but  
17 what's important to recognize here is that with one  
18 possible exception involving the tort of negligent  
19 supervision, the defendant has not suggested that there  
20 is any difference, any conflict between the tort law of  
21 Ohio and the tort law of Virginia.

22 And, ordinarily, if there is no suggestion of  
23 a conflict, one applies the law of the forum. And,  
24 these --

25 THE COURT: Well, you know, I've been around



1 and around this case and plaintiff's counsel, Ms. Burke  
2 knows there. Mr. Azmy knows this. We started out  
3 assuming Virginia law apply. And of course, that would  
4 turn out to be wrong on the putative plaintiffs' claims.  
5 That turned out to be wrong from the Virginia Supreme  
6 Court's decision.

7 And then plaintiff came back and said no, no,  
8 no, Ohio law applies. And so now today you're saying  
9 Virginia law applies.

10 Now, Judge Wilkinson had a whole lot to say  
11 whether Virginia had an interest in that. So I'm very  
12 reluctant to go down that path. I just don't think  
13 that's going to happen here.

14 MR. LOBUE: Your Honor, I think I'm the one  
15 who is responsible for that. I came in last November and  
16 argued that Ohio statute of limitations principles should  
17 apply and --

18 THE COURT: I'm not going there again. I'm  
19 not going back to Virginia law. There is nothing in this  
20 case that relates to Virginia other than the courthouse  
21 is located in Virginia. Not one thing happened here.

22 MR. LOBUE: Your Honor, I'd like to make one  
23 final point --

24 THE COURT: Yes.

25 MR. LOBUE: -- in answer to one of your final

1 questions.

2 The administrative process under the Foreign  
3 Claims Act does not cover claims against contractors for  
4 injuries caused by contractors in a foreign country.

5 Two things, number one, that is the plain  
6 language of the statute, 10 USC Section 2734.

7 I can also tell Your Honor, although this is  
8 not in our brief because it really only came up in reply,  
9 there has been correspondence between counsel -- among  
10 the counsel for plaintiffs and the Department of Defense  
11 which illustrates the position of the Department of the  
12 Defense that the Foreign Claims Act Administrative  
13 Procedure does not cover injuries suffered -- claims  
14 against contractors.

15 There are also decisions made by the  
16 Department of the Army which were made public in a  
17 Freedom of Information Act request a few years ago in  
18 which the Army denied claims when they were made for  
19 injuries caused by contractors.

20 If it's -- if it would be helpful to the  
21 Court, I would respectfully seek leave to submit those  
22 citations which I can do on Monday.

23 But in any event --

24 THE COURT: You can certainly submit them. I  
25 think that I have asked you the questions that I have

1 concerning the choice of law question.

2 MR. LOBUE: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. O'CONNOR: Your Honor, can I make one  
5 brief comment?

6 If there's communication relating to  
7 administrative claim between the plaintiffs and the  
8 United States, that would be news to us, even though we  
9 expressly asked for documents to be produced relating to  
10 administrative claims between plaintiffs and the United  
11 States.

12 Now, they've given us 14 pages of documents.  
13 Maybe I missed in it there. But we have not received  
14 anything. And we were told in an interrogatory response  
15 that they've submitted no claims to the United States.

16 MR. LOBUE: If it please the Court, it's  
17 not --

18 THE COURT: Come back to the podium.

19 MR. LOBUE: I may have -- I may have been  
20 imprecise, not a plaintiff in this case, one of the other  
21 similarly-situated plaintiffs who --

22 THE COURT: Oh, well, I need -- I'm only  
23 concerned about what's going on in this case.

24 Let me hear from the plaintiff only on the  
25 issue of sanctions. I have received the defendant's

1 brief, and the defendant could not be more clear what  
2 they think I should do concerning sanctions. So you tell  
3 me why I shouldn't.

4 This case has gone on for many year and  
5 everybody knew sooner or later the plaintiffs have to  
6 come to federal court in Virginia.

7 MR. AZMY: Your Honor, the -- as Your Honor  
8 observed in your last ruling, based on the very same  
9 evidence in this case, that the Supreme Court and the  
10 Fourth Circuit does not permit dismissal under Rule 37  
11 where, in fact, the *Wilson* case says it is never, quote,  
12 "never appropriate to dismiss where the failure to comply  
13 with the discovery order is due to inability as opposed  
14 to willfulness and bad faith", and they used the term  
15 "flagrant bad faith".

16 And all of the cases that the defendants  
17 recited in support of their motion involve the exact  
18 opposite circumstances that are present in this case.

19 THE COURT: Well, what do I have in the  
20 record here that explains the absence of the plaintiffs?  
21 There has been this suggestion that the individual  
22 plaintiffs were on the so-called No Fly List. But I  
23 don't see a document here called No Fly List that has  
24 their names on it. Do you see -- have such a document?

25 MR. AZMY: We do not have those documents.

1 We have attempted to obtain such documents by subpoenaing  
2 DHS and filing a motion to compel.

3 THE COURT: So there is no record here even  
4 to prove to the Court's satisfaction that there is, one,  
5 a No Fly List, and two, that that list has these  
6 individuals names on it, is there?

7 MR. AZMY: There isn't. And I would submit  
8 that it -- that certainly doesn't suggest that the  
9 plaintiffs' claims should be dismissed. The defendants  
10 have to show bad faith in their efforts to get here  
11 and --

12 THE COURT: I know. But what I understand is  
13 when the -- when the process of the Court is invoked,  
14 there is an obligation for the plaintiff to prosecute  
15 their claims. There may be cases that could be tried in  
16 absentia. And actually as a lawyer, I defended a  
17 corporation once where there was nobody present and did  
18 all right. But I'm not familiar with the civil case  
19 involving allegations like this where the plaintiffs do  
20 not ever have to appear.

21 The Court -- this Court is not going to keep  
22 it on the docket five years more. I promise you that.

23 MR. AZMY: Your Honor, as we -- we've cited I  
24 think it's on the order of 15 cases where video  
25 depositions were -- were taken, and we think that this --

1 that kind of remedy is entirely appropriate under the  
2 authority given to this Court by local Rule 30(a) which  
3 contemplates special circumstances.

4 THE COURT: So, you're saying we should have  
5 a video deposition trial. And so the jury can look at  
6 the video tape deposition of the plaintiffs, submit --  
7 and in effect I would be conducting a trial from Iraq  
8 here; is that right?

9 MR. AZMY: Not necessarily, Your Honor. We  
10 would propose the following. First, video depositions  
11 and then can also be *de bene* in case they're unable to  
12 appear, and that's certainly, I think authorized under  
13 local Rule 30 and frankly compelled by the Supreme Court  
14 in the Fourth Circuit.

15 We will still make efforts to --

16 THE COURT: Are you saying there's a Fourth  
17 Circuit case that says I have to have a trial where the  
18 witnesses -- the complaining witnesses, the plaintiffs do  
19 not have to ever come into this courthouse and I can show  
20 to the jury on TV?

21 MR. AZMY: The Fourth Circuit cases speak to  
22 depositions being compelled as opposed to dismissal.

23 THE COURT: My question was very precise.

24 MR. AZMY: Uh-huh.

25 THE COURT: Are you able to cite a Fourth

1 Circuit case that says I can conduct a trial, a jury  
2 trial, in a tort case by video display to a jury --

3 MR. AZMY: We've cited --

4 THE COURT: -- and the parties never have come  
5 in the courthouse?

6 MR. AZMY: We've cite a number of cases Your  
7 Honor, in which video testimony was taken by -- sorry,  
8 trial testimony was taken by video.

9 And, of course, local -- the federal --

10 THE COURT: Where --

11 MR. AZMY: I'm sorry.

12 THE COURT: You have a plaintiff case there  
13 that you can cite a plaintiff did not appear in court and  
14 the whole trial was done by video deposition?

15 MR. AZMY: Yes, Your Honor, on page 16.

16 THE COURT: All right, okay.

17 MR. AZMY: And, those are -- those are ATS  
18 cases and then on page 10.

19 THE COURT: This is from your brief?

20 MR. AZMY: Yes, of our brief. And then --  
21 page -- page 10.

22 And then -- so sorry. I would say page 10  
23 and pages 15 to 16.

24 THE COURT: All right. Under that procedure  
25 then, was the -- how would the defendant be able to do

1 their physical examinations of the witnesses?

2 MR. AZMY: So, Your Honor, we're talking  
3 about the deposition or the trial?

4 THE COURT: I have been talking entirely  
5 about the trial. And I thought I was very clear. I kept  
6 saying the trial, and you're --

7 MR. AZMY: Sure.

8 THE COURT: I understand and we have had many  
9 cases in civil cases, even in Abu Ali criminal case, we  
10 had video tape depositions. But that was not of the  
11 party bringing the lawsuits seeking damages in front of a  
12 jury to do the whole trial by the video.

13 I've been doing this a long time and maybe  
14 you've done that. Have you done that somewhere in a  
15 federal court?

16 MR. AZMY: We came close in another context,  
17 Your Honor, a hearing to related Guantanamo. But that  
18 was a hearing, not necessarily a full trial before a  
19 jury.

20 THE COURT: Okay, okay.

21 MR. AZMY: But, I would say two things, Your  
22 Honor. First, we have not abandoned attempts to bring  
23 them here. And that's why we're suggesting this two step  
24 process of depositions for now while we continue to try  
25 and bring them here and we'll make every effort to still



1 try and get them here for a trial.

2 THE COURT: How many more years should I do  
3 that?

4 MR. AZMY: Well, I think under the ordinary  
5 course, Your Honor, you know, the defendants have  
6 suggested they're going to file for summary judgment.  
7 That will take more time, and so for all we know, they  
8 could be here this summer or the fall. We just don't  
9 know.

10 So, I wouldn't necessarily give up hope and I  
11 certainly would not suggest that Your Honor should  
12 dismiss now in anticipation that they won't be able to  
13 appear for trial. We could address that question later,  
14 including the mechanics.

15 But I think that would be the -- the  
16 appropriate case given the governing legal framework,  
17 Your Honor.

18 THE COURT: All right, thank you very much.

19 MR. AZMY: Thank you, Your Honor.

20 MR. KOEGEL: Briefly, Your Honor. Discovery  
21 closed two weeks ago.

22 Second, last week you granted our motion to  
23 compel production of the plaintiff's travel documents.  
24 After we learned that the plaintiffs had not informed us  
25 they weren't going to be able to get here for the

1 depositions we scheduled in January. We submitted a  
2 request to them for the documents relating to their  
3 efforts to get into the United States.

4 We were told it's irrelevant. We received no  
5 documents. Eventually, we moved to compel, particularly  
6 because the plaintiffs had dribbled in selective  
7 documents when it was in their interest to do so.

8 We said, that's fundamentally unfair. We  
9 moved to compel and pointed out that they had also waived  
10 the privilege by introducing for the Court's  
11 consideration in October 2012 e-mail to the plaintiffs  
12 directing them at that point in time that from one of  
13 Ms. Burke's associates, they needed to apply for visas by  
14 October 22, 2012.

15 The plaintiffs opposed that motion. Last  
16 Friday, the Court granted it. That same day, we wrote to  
17 Mr. Azmy and said that motion has been granted. We'd  
18 like production of those documents by Monday in view of  
19 the fact we had a reply memorandum due on Wednesday.

20 We received no response to that  
21 communication. We have received no documents in response  
22 to the Court's order.

23 A week's gone by with nothing but silence  
24 from the plaintiff's counsel with respect to the Court's  
25 order granting our motion to compel their documents.

1           They have put into the record when it was in  
2 their interest to do so selective documents relating to  
3 their efforts to get to the United States.

4           And in our opening brief which was filed  
5 before the Court's order of last Friday, we argued that  
6 it would be appropriate to draw an adverse inference from  
7 their failure to produce documents relating to their  
8 efforts to get into this country.

9           It was information within their control, and  
10 their failure to produce it, given its obvious relevance,  
11 they've come into this court on numerous occasions  
12 arguing "we've tried, Your Honor. We've made all  
13 conceivable efforts to be able to appear for depositions  
14 and medical examinations in this district as the Court  
15 ordered".

16           But, at the same time they made that argument  
17 to this Court, they told us the documents relating to  
18 those efforts to get into the United States is  
19 irrelevant.

20           The Court granted the motion, but we don't  
21 have a complete production of the plaintiff's travel  
22 documents.

23           Under Rule 37, the Court has the clear  
24 discretion to sanction their failure to comply with the  
25 Court's order of last Friday by prohibiting them from

1 relying upon the selective documents that are appended to  
2 Mr. Azmy's declaration which was filed in connection with  
3 their opposition. This consists of their opposition,  
4 Mr. Azmy's declaration and the exhibits. Many of those  
5 exhibits are plaintiff's travel documents, some of which  
6 we've seen before.

7 They had produced some travel documents in  
8 connection with their filings to us. But they're not in  
9 compliance with the Court's order of last Friday. They  
10 have not --

11 THE COURT: Sum up.

12 MR. KOEGEL: They've not made a complete  
13 production of documents pursuant to the Court's order.  
14 That disqualifies them from offering selective documents  
15 for the Court's consideration with respect to their  
16 efforts to comply with the Court's order to appear for  
17 depositions and medical examinations in the United  
18 States.

19 Thank you.

20 THE COURT: Thank you.

21 MR. AZMY: If I may briefly address that  
22 issue, Your Honor.

23 Under the -- we are not in violation of this  
24 Court's order. Under the local rules we have 11 days to  
25 comply with an order of production.

1           And, that's number one. So there would be no  
2 authority, I don't believe, for this Court to sanction  
3 us.

4           Number two, the case the defendants rely on  
5 for sanction of an adverse inference is a case which  
6 involved affirmative evidence of destruction of  
7 documents.

8           Number three, there was no selective  
9 production of documents. We've produced hundreds of  
10 pages. There is a trifle more which we will pull  
11 together which looks very much like what we've already  
12 produced.

13           The defendants' suspicion that there's  
14 something we have hiding is -- you know, is -- we know  
15 that the defendants [sic] were granted visas and a  
16 boarding pass. It's -- and, all of the documents we have  
17 after that are attempts to communicate with the  
18 Department of State and the Department of Homeland  
19 Security officials to find out, A, what happened, and B,  
20 can they do something about it.

21           So, there is no absence of compliance with  
22 this Court's order.

23           THE COURT: All right. Counsel, there's  
24 certainly been a great deal of briefs submitted to me.  
25 And I will take the matter under advisement and the

1 matter is submitted. I'll issue a ruling in due course.

2 Thank you.

3 MR. KOEGEL: Your Honor, we have one  
4 housekeeping matter, may we address with the Court.

5 The current scheduling order has a summary  
6 judgment deadline of, I believe, next Friday. We would  
7 request that the Court suspend that pending the issuance  
8 of the ruling and the determination of what date for  
9 filing summary judgment motions might be appropriate.

10 MR. AZMY: We have no objection to that  
11 request, Your Honor.

12 We -- on the discovery -- the pending  
13 discovery order, we believe there's some ambiguity about  
14 the scope of the discovery order with respect to  
15 privileged documents.

16 And so, we would request either a stay of  
17 production of privileged documents which could be massive  
18 going back to 2008 or the opportunity to seek  
19 clarification on the scope of that portion of the  
20 discovery order.

21 We will produce all non-privileged documents  
22 under the Court's -- pursuant to the Court's order from  
23 last Friday.

24 THE COURT: I believe under our rules there  
25 are requirements that you must meet to assert a privilege

1 in connection with discovery and a privilege log with  
2 itemization of the assertion of what the privilege is.

3 I can't give you guidance on what it is, but  
4 I'm sure you'll be able to find it. There's case law of  
5 what you have to do if you are going to assert privilege.  
6 And I need to know which privilege it is and what the  
7 basis of it is for each item.

8 MR. AZMY: All right, Your Honor. Thank you.

9 (Proceeding concluded at 12:11 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 Suhail Al Shimari vs. CACI PT.

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 55, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 24th day of May, 2013.

\_\_\_\_\_  
/s/  
Renecia Wilson, RMR, CRR  
Official Court Reporter