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

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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

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

On Appeal from the United States District Court for the District of Columbia in Case Nos. 04-cv-1248 and 05-cv-1165 (Honorable James Robertson)

Appellants CACI International Inc and CACI Premier Technology, Inc.'s Response To Petition For Rehearing *En Banc*
(Oral Argument Held on February 10, 2009)

I. INTRODUCTION

En banc review of this appeal is not warranted. The Majority's opinion, grounded in both the Constitution and the overriding federal interest in the prosecution of war articulated by Congress in the FTCA's combatant activities exception, applies but to a narrow class of claims: state law tort claims against

contractors arising from combatant activities of the military during time of war, and then only if the contractors are integrated into the military force. No compelling circumstances suggest the need for review by the full Court. The Majority's opinion accords with the Constitution and Supreme Court precedent, and creates no intra-circuit conflict for which authoritative guidance is needed.

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

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

Majority reached the correct result on the proper legal bases. Nothing about the decision suggests the need for *en banc* reconsideration.

II. BACKGROUND

In *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), this Court held, in a 2-1 decision, that state tort claims brought against civilian contractors by Iraqis detained as enemies by U.S. military forces in Iraq were preempted by federal law. The Majority based its holding on two independent grounds: (1) the federal interests embodied in the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j); and (2) the wartime policy-making prerogatives entrusted by the Constitution exclusively to the federal government. 580 F.3d at 5-14. The former holding flowed directly from the approach crafted by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1992). The latter holding was based upon the "broader rationale" that the very imposition of any state law would create a conflict with federal foreign policy interests.

The *Saleh* Plaintiffs alleged that, during their detention, they were abused by military personnel and civilian contractors pursuant to a broad conspiracy between high-ranking government officials, dozens of military personnel of all grades, and the CACI and Titan Defendants. *Id.* at 2. The purported objective of the conspiracy was to increase the demand for interrogation services through the abuse

of detainees. *Id.* The *Ibrahim* Plaintiffs made similar claims of abuse but alleged only a conspiracy between CACI and Titan. *Id.*

The district court granted the Defendants' motions to dismiss the Plaintiffs' federal claims, including RICO and ATS claims. With regard to the state law claims, the district court ordered discovery focused on the control of the Defendants' employees by the military to determine whether the claims would be preempted. *Id.* at 3-4.

After extensive discovery regarding the military's supervision, direction and control of detention and interrogation operations, the district court announced a new test for preemption: whether the military exercised "exclusive operational control" over civilian contractors. Applying that test, the lower court found that there was a dispute about whether the military had exclusive operational control over the CACI interrogators and denied summary judgment to CACI. *Id.* at 4. CACI appealed pursuant to 28 U.S.C. § 1292(b). *Id.*[1]

This Court agreed with CACI that the district court's "exclusive operational control" preemption test "did not protect the full measure of the federal interest embodied in the combatant activities exception," and held that "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the

[1] CACI also appealed under 28 U.S.C. § 1291.

contractor's engagement in such activities shall be preempted." *Id*. at 8-9. Characterizing the Majority's decision as "unprincipled," Plaintiffs have petitioned for *en banc* rehearing, arguing that the decision ignores mandates from both Congress and the Supreme Court. Petition at 1. We show below that neither assertion is correct, and that Plaintiffs' petition is no more than a disagreement with the result reached in the decision.

III. ARGUMENT

"*En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960). Fed. R. App. P. 35 provides that rehearing *en banc* "is not favored" and may be ordered only when "(1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."

Plaintiffs make three basic arguments, none of which satisfies Rule 35's exacting standards.[2] First, Plaintiffs argue that the Court improperly adjudicated facts even though the district court did not allow discovery on the merits. That is,

[2] CACI does not address Plaintiffs' arguments concerning the Alien Tort Statute because the district court's decision dismissing those claims was not appealed as to CACI. *Saleh*, 580 F.3d at 13.

however, not what the Court did, nor is it a basis for rehearing *en banc*. Plaintiffs' quarrel on this point relates to this case only and presents no issue of broader import. Second, Plaintiffs argue that the Court expanded *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) beyond what the Supreme Court intended. On the contrary, the majority followed the analytical framework adopted in *Boyle* in concluding that the combatant activities exception embodies a Congressional determination that no duty of care exists on the battlefield. The policies of the combatant activities exception apply with equal force and effect whether the conduct at issue is that of a soldier or of a contractor engaged in combatant activities of the military and subject to military control. Third, Plaintiffs argue that the panel erred in finding tort claims preempted because "battlefield preemption" is available only when narrowly drawn state statutes are at issue. This is simply not the law, as the Court's opinion makes clear. The Supreme Court has often held that generally applicable state laws are preempted when they conflict with competing federal interests.

A. The Court's *Dicta* About The Merits Of Plaintiffs' Claims Did Not Create A Conflict With Applicable Precedent

Plaintiffs first argue for *en banc* rehearing on the grounds that the Majority improperly adjudicated facts in the absence of full-blown discovery. This is reflected, so the theory goes, by the Majority's observation that Plaintiffs did not refer in their briefs to factual allegations of torture or war crimes that appear in

their complaints. Based on that observation, the Plaintiffs claim that the Court disregarded the allegations of the complaint and erroneously determined that the Plaintiffs had not proven, and could not prove, those allegations. Petition at 2. From there, Plaintiffs submit that the Majority's opinion contradicts Supreme Court precedent holding that summary judgment is appropriate only after discovery on the merits. Plaintiffs' claim is both an inaccurate reading of the Majority's opinion and insufficient as a matter of law for *en banc* review.

The Majority's opinion adjudicated no facts, drew no inferences adverse to the Plaintiffs, and adhered to the requirement of accepting the factual allegations in a complaint as true. The plain language of the decision shows as much. What the Majority did do, which rankles the Plaintiffs, is make an editorial comment that Plaintiffs' briefs did not repeat factual allegations of torture or war crimes. 580 F.3d at 3. That observation about the content of Plaintiffs' briefs was entirely accurate, and Plaintiffs do not claim otherwise. The Majority did not, however, use that observation to make any factual findings. Indeed, the Majority noted that for purposes of appeal it had to "credit plaintiffs' allegations of detainee abuse." 580 F.3d at 3. Even Judge Garland, in dissent, acknowledged that the Majority had done that. 580 F.3d at 19.

Equally important, the few sentences in the opinion addressing this issue were *dicta*. The Majority's holding – that Plaintiffs' claims were preempted

because CACI was "integrated into combatant activities over which the military retains command authority" and Plaintiffs' tort claims arose out of CACI's "engagement" in these activities, 550 F.3d at 9 – was not based on the nature of Plaintiffs' claims. Rather, it was based on undisputed facts regarding combatant activities over which the military retained command authority. The Majority simply did not decide whether Plaintiffs could prove their allegations.

Disagreement with *dicta* is not a basis for *en banc* rehearing. Rule 35 authorizes rehearing to "secure or maintain uniformity *of the court's decisions*," and a disagreement over *dicta*, which by definition is not the decision of the Court, cannot justify rehearing *en banc*. *See ACLU of N.J. ex rel. Lander v. Schundler*, 168 F.3d 92, 98 n.6 (3d Cir. 1999) ("Rehearing *en banc* provides the opportunity for the full court to correct a panel decision to which the court is unwilling to be bound. *But the standards for rehearing en banc look to the panel's decision, not to the panel's dicta*." (emphasis added)).

Not only is the Majority's discussion of the content of Plaintiffs' briefs *dicta*, it is relevant to this case only. Plaintiffs have not even attempted to show how the Court's discussion of Plaintiffs' briefs transcends this appeal and presents a "question of exceptional importance." Fed. R. App. P. 35. Clearly, it does not.

B. The Court's Decision Is Limited In Scope And Does Not Create A Conflict With This Court's Precedent

1. Plaintiffs do not address whether this case presents a question of exceptional importance

By its terms, the Majority's decision is limited in scope. It applies only to state law tort claims arising from combatant activities of the military during time of war, and then only when contractor personnel are integrated into the military force. Ignoring this, Plaintiffs argue that the Court impermissibly created a "battlefield preemption" test that protects "any and all corporations or individuals who contracted with the United States from being subject to any civil claims for misconduct, regardless of whether the acts in question violated federal law, regulations, the terms of the contract or federal policy." Petition at 5. Plaintiffs' hyperbole mischaracterizes the Court's decision. The Court's decision does not apply to "any and all corporations who contracted with the United States," but only to contractors who *during wartime* are "*integrated into combatant activities over which the military retains command authority*." *Saleh*, 550 F.3d at 9. Nor does the Court's decision apply to "any civil claims for misconduct, regardless of whether the acts in question violated federal law, regulations, the terms of the contract or federal policy," but only to *tort claims* that arise out of a contractor's engagement in combatant activities. *Id.*

Moreover, as this Court pointed out in its decision, Plaintiffs are not left without remedies for their alleged abuse, nor is the government left without a means of punishing contractors who commit illegal acts. Plaintiffs may pursue administrative relief for their alleged injuries through the Army Claims Service, which has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734. *See Saleh*, 580 F.3d at 2-3. And as the Majority noted, there are "numerous criminal and contractual enforcement options available to the government in responding to the alleged contractor misconduct." 580 F.3d at 8.

Indeed, in enacting the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, Congress created federal criminal jurisdiction for certain crimes committed by contractors overseas. More recently, Congress amended the Uniform Code of Military Justice to provide for court-martial jurisdiction over contractors supporting contingency operations overseas. *See* 10 U.S.C. § 2(a)(10). Tellingly, while authorizing federal criminal jurisdiction in these statutes, Congress did not see fit to relinquish the federal government's control over combatant activities by creating civil causes of action that private plaintiffs could litigate on their own initiative.

2. The Court's decision that Plaintiffs' claims are preempted by the federal interests embodied in the combatant activities exception is not in conflict with applicable precedent

Plaintiffs make a number of arguments that the Court's decision is wrong. *En banc* review is not appropriate just because a litigant disagrees with the result reached by a panel. Instead, the test is whether the Court's decision creates a conflict with applicable precedent.

Plaintiffs argue that the Majority erred in holding that the activities at issue in this case – interrogation of detainees in a war zone – are combatant activities. Petition at 8. This represents a change in Plaintiffs' position that cannot properly be made in seeking *en banc* review. In their brief in these appeals, Plaintiffs did not challenge the district court's finding that CACI PT's interrogators were engaged in combatant activities of the military during time of war. And at oral argument Plaintiffs' counsel conceded the issue. Tr. of 2/10/09 at 87-88. Plaintiffs cannot now change their position and contest the district court's finding for the first time in their petition; the argument is waived. *See Southeast Alabama Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 n.7 (D.C. Cir. 2009); *Albrecht v. Comm. on Employee Benefits*, 357 F.3d 62, 66 (D.C. Cir. 2004).

Plaintiffs next argue that the Court's decision conflicts with the FTCA because "[t]he federal scheme applies only to governmental employees." Petition at 8. This argument misses the point and is contradicted by *Boyle*, which itself

held that tort claims against a government contractor were preempted by federal law based on the discretionary function exception to the FTCA. The question is not whether the immunity retained by the FTCA for combatant activities of the military during time of war applies by the express terms of the statute to civilian contractors. The issue is whether the Congressional determination that tort claims arising on the battlefield may not be brought against the United States evinces a federal interest in not having the same claims pursued against military personnel or civilian contractors integrated into the military's combatant activities. The Majority concluded that it does. 580 F.3d at 7. As the Majority noted:

> The policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges are obviously are precluded by sovereign immunity).

580 F.3d at 7.

Plaintiffs ignore that in *Boyle* the Supreme Court held that allowing state tort claims against contractors could frustrate the federal interests embodied in the United States' retention of sovereign immunity under the FTCA. Moreover, the Court did this to *protect* the government's interests as embodied in the FTCA. Plaintiffs' argument that the purpose of the FTCA is frustrated when claims against contractors are preempted was thus rejected by the Supreme Court in *Boyle*.

Plaintiffs next charge that the Court's decision to preempt Plaintiffs' claims on an "alternative battlefield preemption theory" was error because the Court "ignore[d] the reasoning of the controlling Supreme Court precedents to reach its desired result." Petition at 11. Plaintiffs argue that Supreme Court decisions preempting state laws on field preemption grounds involve only state statutes "drawn so narrowly as to apply only in the realm of foreign relations and commerce as it interests with state affairs." *Id*. at 12. Therefore, according to Plaintiffs, field preemption is not permissible when "the state laws at issue are common law torts, not any legislative initiatives designed to control the executive's conduct." *Id*. Plaintiffs are wrong as a matter of law.

Plaintiffs overlook that *Boyle* involved state tort claims against a government contractor, not "legislative initiatives designed to control the executives conduct." Moreover, as this Court observed, "it is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of the federal schemes just as much as a targeted state law." *Saleh*, 580 F.3d at 13 (collecting cases).

3. *En Banc* consideration is not appropriate for the Constitutional preemption issue

Plaintiffs claim that the appeal should be reheard *en banc* because "the Majority did not – and cannot – identify any . . . Constitutional article that conflicts with permitting [Plaintiffs] to use common law state torts to pursue

redress." Petition at 13. This is simply wrong. The Majority opinion cited and relied upon Article I, Sec. 10 of the Constitution, which expressly forbids the states from exercising war powers or regulating the conduct of war. 580 F.3d at 11. As the Majority explained: "even in the absence of *Boyle*, the plaintiffs' claims would be preempted. The States (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." *Id.* That authority is entrusted *by the Constitution* exclusively to the federal government. U.S. Const. Article I, Sec. 8, Article II, Sec. 2. Allowing state law tort claims here would intrude into a domain of exclusively federal dominion and competence.

Indeed, the Constitution could not be more emphatic with respect to responsibility for waging war and foreign affairs. It affirmatively grants a monopoly to the federal government and it expressly disenfranchises the states from exercising authority in those fields. Not surprisingly, then, the Majority concluded that the scope of displacement under the "ultimate military authority" test is "appropriately broader" than preemption under *Boyle.* 580 F.3d at 12. This preemption arising from the Constitution itself was not addressed in the dissent, is not analyzed in Plaintiffs' petition, and nothing in this appeal suggests that this Constitutional issue would benefit from *en banc* consideration.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' petition for rehearing *en banc*.

Respectfully submitted,

/s/ John F. O'Connor

J. William Koegel, Jr. (Bar No. 323402)
John F. O'Connor (Bar No. 460688)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
wkoegel@steptoe.com
joconnor@steptoe.com

Attorneys for Appellants CACI International Inc and CACI Premier Technology, Inc.

November 30, 2009

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, counsel for Defendants-Appellants CACI Premier Technology, Inc. and CACI International Inc discloses as follows:

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

/s/ John F. O'Connor

John F. O'Connor

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be served this 30th day of November 2009, in the manner indicated below, on the following counsel of record:

Susan Burke (by electronic service)
William O'Neil
Katherine Hawkins
Burke O'Neil LLC
1000 Potomac Street, N.W.
Suite 150
Washington, D.C. 20007

Katherine Gallagher (by first-class mail)
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012

L. Palmer Foret (by electronic service)
5069 Overlook Road, N.W.
Washington, D.C. 20016

Craig Jones (by electronic service)
Page Perry LLC
1040 Crowne Pointe Parkway
Suite 1050
Atlanta, Georgia 30338

Roderick Edmond (by electronic service)
Edmond & Lindsay LLP
127 Peachtree Street, N.E., Suite 410
Atlanta, Georgia 30303

/s/ John F. O'Connor

John F. O'Connor