

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT  
3

4 -----  
5 SALEH, AN INDIVIDUAL, ET AL.,

6 Appellants,

7 v.

Nos. 08-7008 & 08-7009

8 TITAN CORPORATION,

9 Appellee.  
10 -----

11 Tuesday, February 10, 2009  
12 Washington, D.C.

13 The above-entitled matter came on for oral  
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES GARLAND AND KAVANAUGH AND SENIOR  
17 CIRCUIT JUDGE SILBERMAN

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANTS:

20 SUSAN L. BURKE, ESQ.

21 ON BEHALF OF THE APPELLEE:

22 ARI S. ZYMELMAN, ESQ.

23 ON BEHALF OF THE INTERVENORS:

24 J. WILLIAM KOEGEL, JR.  
25

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MS. BURKE: Yes. I understand. The District Court in ruling on the arguments made by Titan was confronting a very difficult task, no statutory law, no direction from Congress. Instead, he was in that realm of federal common

1 law, a difficult thing for any judge, and he made an  
2 understandable mistake. Confronted with the voluminous record  
3 he failed to keep circling back to the underlying reason that  
4 the Supreme Court issued its decision in *Boyle*, and that  
5 reason is to ensure that the United States, not any private  
6 litigant, but the United States, benefits from the court's  
7 application of federal common law.

8 The District Court in ruling on circumstances that could  
9 never have been anticipated by the Supreme Court --

10 JUDGE KAVANAUGH: You're talking about state law  
11 here, aren't you?

12 MS. BURKE: What we are talking about is permitting  
13 claims made under state law to go forward.

14 JUDGE KAVANAUGH: Right. And the constitutional  
15 text, structure, history, Article One Section 10 which  
16 prohibits the states from regulating war, combined with two  
17 different lines of preemption cases, *Boyle* and *Garamendi*, all  
18 suggest that the states do not have a role in the  
19 constitutional structure in regulating the United States war  
20 efforts, at least absent congressional direction to that  
21 effect. Wouldn't this upset that entire history and  
22 structure?

23 MS. BURKE: No, Your Honor, it would not, and for  
24 the following reason, the war making power of the Executive is  
25 to decide when and how to make war. So, we look in this case

1 to what the Executive has decided. The Executive has spoken  
2 very clearly that in the war in Iraq the Geneva Conventions  
3 are to apply. So, the Executive has triggered the application  
4 of the Federal Common Law of War to the --

5 JUDGE KAVANAUGH: Again, we're talking about state  
6 law in this first claim, correct?

7 MS. BURKE: What we are talking about is whether or  
8 not to permit claims to go forward where the state law is  
9 looked to as the rule of decision. There's really two paths  
10 that claims could go forward either under federal common law,  
11 or under state law.

12 JUDGE KAVANAUGH: Right.

13 MS. BURKE: And the reason that the District Court  
14 erred is that when you're trying to decide whether or not it  
15 makes sense to let the claims go forward under state law you  
16 need to look at whether or not the state law is going to  
17 create a conflict with the federal interest. So, when you  
18 look at the Supreme Court in decision in *Boyle*, the Supreme  
19 Court laid out three different types of situations.

20 JUDGE SILBERMAN: But wasn't the Supreme Court  
21 interpreting a statute?

22 MS. BURKE: No, Your Honor. What the Supreme Court  
23 was doing was trying to decide whether it would benefit the  
24 United States to stop litigation against a private litigant.  
25 Obviously, the United States itself can invoke immunities; the

1 United States' measure of the waiver of its own sovereign  
2 immunity is set forth in a statute. But the statute does not  
3 simply directly apply to a private litigant, rather the court  
4 has to step back and say okay, as a matter of federal common  
5 law should I bestow this private party who is otherwise  
6 subject to both state and federal common law, should I bestow  
7 about this private litigant a privilege that's reserved for  
8 the sovereign? And to decide whether or not a private  
9 litigant essentially stands in the shoes of the sovereign the  
10 Supreme Court looked at what it is the sovereign wanted, and  
11 what the sovereign wanted is set forth in the immunities, in  
12 the Federal Tort Claims Act.

13 And so, the Supreme Court undertook an analysis and said  
14 okay, there's three different ways this can play out. First,  
15 there can be a state law, the application of state law that  
16 would clearly conflict with the federal interests, and in  
17 those cases we are going to hold that a private litigant  
18 cannot go forward. The second cases are on the other side of  
19 the spectrum, and that was in the *Maray* (phonetic sp.) case.  
20 There the state common law, letting the state common law go  
21 forward actually furthered rather than harmed the federal  
22 interests in aviation safety. That case turned on the fact  
23 that there was a dump that was -- there was land that was  
24 under contract right near an airport. The people operating  
25 the dump said well, we have a federal contract with the FAA,

1 you cannot possibly bring us forward under state law, and the  
2 court looked at that and said well, you know, let's look at  
3 this as a practical matter. If we permit the state law claims  
4 to go forward what happens? It actually furthers the goal of  
5 public safety that is enshrined in the contract.

6 *Maray* is the situation we have here because the goal of  
7 the United States enshrined in both the contract and in the  
8 Executive's statements is that the conduct of a war by  
9 Americans is conducted in a lawful manner. And so, the  
10 Executive has --

11 JUDGE KAVANAUGH: But Congress has had many  
12 opportunities to legislate in this field, but it has in fact  
13 legislated in the 90s the Torture Victim Protection Act, the  
14 War Crimes Criminal Statute, the Torture of Criminal Statute,  
15 since 2004 and extending the UCMJ, but it has never, never  
16 created a private civil cause of action of the kind you're  
17 specifying here.

18 MS. BURKE: It's actually the opposite, sir. To  
19 shut down what would be the ordinary course of tort litigation  
20 they would have to legislate against it.

21 JUDGE KAVANAUGH: Well, that's --

22 MS. BURKE: They would --

23 JUDGE KAVANAUGH: -- the question, right?

24 MS. BURKE: Yes.

25 JUDGE KAVANAUGH: How do we interpret

1 congressional -- what's the default rule --

2 MS. BURKE: Right.

3 JUDGE KAVANAUGH: -- right? Without a specific  
4 statement of congressional preemption. And if you look at  
5 *Boyle* footnote four, for example, which talks about certain  
6 areas of uniquely federal interests, and then you look at  
7 *Garamendi* and *Journig* (phonetic sp.) and that whole line of  
8 cases which are really intertwined with *Boyle*, then you find  
9 that implied preemption in this area, in the war powers area  
10 of all is going to suggest that there's preemption unless  
11 Congress affirmatively wants state law to apply, isn't that  
12 right?

13 MS. BURKE: No, Your --

14 JUDGE KAVANAUGH: When you areas like immigration,  
15 war reparations, the dispute in *Journig* all found preemption  
16 based on field preemption, not simply conflict.

17 MS. BURKE: Well, the reality is that you can never  
18 assume preemption for a private corporation for a private  
19 party, you have to always go back to what is benefitting the  
20 United States interests, not the interests articulated by a  
21 private for-profit corporation. So, one --

22 JUDGE KAVANAUGH: Well, that's just an implied  
23 domestic preemption that's not true.

24 JUDGE GARLAND: But is Judge Kavanaugh correct, I  
25 read *Garamendi* as saying that there was a direct conflict in

1 not using the field preemption, that's pretty express about  
2 that. That was in the *Journig* case. Of course, if you look  
3 at *Medeen* (phonetic sp.) it goes exactly the opposite way,  
4 that is no preemption at all, notwithstanding express  
5 statements by the Executive. What do you make of this  
6 *Garamendi* line of cases? Does it really stand for a  
7 proposition about field preemption?

8 MS. BURKE: I think that the situation that we have  
9 here you do not have, as Judge Kavanaugh said, you do not have  
10 *Garamendi* extending that far. I think what we have here in  
11 this type of preemption is a very narrow type of preemption  
12 that is governed by *Boyle*, and since it is judge-made law we  
13 have to read it narrowly. And so the question that really  
14 Judge Kavanaugh is going to is more how broadly should we be  
15 reading the Foreign Tort Claims Act, the exceptions that are  
16 put out there, how --

17 JUDGE GARLAND: You could ask the question that  
18 Judge Kavanaugh asked in exactly the opposite way, which is  
19 Congress has had many opportunities to give independent  
20 contractors immunity and has never done it. And in fact, the  
21 FTCA specifically exempts contractors even from, actions by  
22 the contractor even with respect to government immunity. But  
23 there's no statute that provides immunity here, is there?

24 MS. BURKE: No. And in addition to the fact that  
25 there's no statute, no discussion from Congress, no statement

1 from the Executive, it's important that the United States has  
2 not intervened to --

3 JUDGE KAVANAUGH: Well, there is a doctrine of  
4 implied preemption, correct?

5 MS. BURKE: Yes, Your Honor.

6 JUDGE KAVANAUGH: And that's well rooted in American  
7 law, correct?

8 MS. BURKE: Well, the actual parameters of it --

9 JUDGE KAVANAUGH: Correct, are debatable. I  
10 understand.

11 MS. BURKE: -- are debatable. So --

12 JUDGE KAVANAUGH: Yes.

13 MS. BURKE: -- of course the doctrine itself is  
14 there, and it is --

15 JUDGE KAVANAUGH: Right. And as a matter of first  
16 principles maybe implied preemption as an entire doctrine is a  
17 little intention with the usual judicial role. But the  
18 doctrine is well rooted, correct?

19 MS. BURKE: Implied preemption has been around for  
20 many, many years, and certainly judges, the federal judiciary  
21 is well equipped to decide the scope of it. And that's what  
22 this litigation presents to Your Honors.

23 JUDGE GARLAND: Is the federal judiciary well  
24 equipped to decide whether the foreign policy interests of the  
25 United States are in favor or against civil liability in a

1 situation like this?

2 MS. BURKE: No, Your Honor. On this, that's why you  
3 would look to the United States itself to speak. And here, of  
4 course, the United States has not intervened, has not spoken.

5 JUDGE GARLAND: And in *Garamendi* the United States  
6 had repeatedly spoken, both in terms of Executive settlement  
7 agreements, and in terms of Deputy Secretary Eizenstat's  
8 letters.

9 MS. BURKE: Yes, Your Honor. And when you look  
10 through the cases in which the *Boyle* doctrine has been  
11 applied, if you keep going back to its purpose, which is to  
12 benefit the United States, the courts have repeatedly held  
13 that the best way to determine what benefits the United States  
14 is to listen to the United States.

15 JUDGE KAVANAUGH: Well, why didn't the court --

16 JUDGE SILBERMAN: And *Boyle* --

17 JUDGE KAVANAUGH: -- do that in *Journig* where the  
18 United States submitted a statement of interest saying that  
19 the Oregon statute would not interfere with foreign policy,  
20 and the court said well, we conclude despite that that the  
21 Oregon law is preempted as a matter of foreign affairs  
22 preemption?

23 MS. BURKE: Your Honor, in this particular case  
24 there's absolutely no reason for this court to go and do  
25 something that's contrary to what the Executive itself has

1 decided to do.

2 JUDGE SILBERMAN: The Executive has --

3 MS. BURKE: So, unlike that case --

4 JUDGE SILBERMAN: The Executive hasn't said anything  
5 either way.

6 MS. BURKE: That's not actually accurate. The  
7 Executive has made a series of proclamations that bear  
8 directly on the facts here. They have said that the abuse at  
9 Abu Ghraib was not authorized, was not something that was at  
10 the behest of the United States. They have said that the war  
11 in Iraq should be governed by the Geneva Conventions and by  
12 the Law of War. And in addition, they have spoken -- in *Rasul*  
13 *v. Myers* they did not invoke the political question doctrine.  
14 So, we have a series of different actions and silences --

15 JUDGE KAVANAUGH: Well, didn't the Congress in the  
16 wake of *Sosa* and Abu Ghraib and the Military Commissions Act  
17 specifically say in section five that no claim shall be  
18 brought based on the Geneva Conventions in any court?

19 MS. BURKE: Your Honor, the passage of the Military  
20 Commissions Act is after the events at issue here.

21 JUDGE KAVANAUGH: Right. And I'm saying, we're  
22 talking about the national government speaking to the issue  
23 here, and you just said the Executive has spoken about the  
24 Geneva Conventions. Well, there's a valid statute that was  
25 passed by Congress in the wake of all this, specifically

1 saying that no person shall be able to bring a claim based on  
2 the Geneva Conventions.

3 MS. BURKE: And that's, Your Honor, why we are not  
4 pressing a direct federal claim based on the Geneva  
5 Conventions being self-executing. Rather, what we are saying  
6 is you need to permit the state tort law to go forward because  
7 it does not conflict with the federal rules that govern here.  
8 So, it's a difference --

9 JUDGE SILBERMAN: Why don't we have a statute here  
10 that is more specific than that which was in *Boyle*?

11 MS. BURKE: I'm sorry, Your Honor, I'm not  
12 understanding your question.

13 JUDGE SILBERMAN: Why is it we do not have a  
14 statutory exemption here that is even more specific than what  
15 was true in *Boyle*?

16 MS. BURKE: Well, the statutory exemption that  
17 you're looking at here, combatant activities exemption is as  
18 broad as the discretionary, and so it's really for the court  
19 to give the substance to that --

20 JUDGE SILBERMAN: My sense is it's broader in a way,  
21 in this respect. It precludes claims that arise out of the  
22 combat activities of the Army, Navy, or Coast Guard. It  
23 doesn't say claims against the Army, Navy, or Coast Guard, it  
24 says those that arise out of, right?

25 MS. BURKE: And, Your Honor, if you think about the

1 interests that that serves --

2 JUDGE SILBERMAN: No, I'm just looking at, you know,  
3 I'm just a country lawyer --

4 MS. BURKE: Right. The language.

5 JUDGE SILBERMAN: -- I'm a country judge --

6 MS. BURKE: Right.

7 JUDGE SILBERMAN: -- I just look at the language  
8 first.

9 MS. BURKE: I think the language is wrong.

10 JUDGE SILBERMAN: And that language arising out of  
11 is used in various other statutes, like for instance workman's  
12 compensation statutes --

13 MS. BURKE: Right.

14 JUDGE SILBERMAN: -- the Longshore and Harbors Works  
15 Act. And it has been interpreted by the Court to mean only a  
16 connection to.

17 MS. BURKE: Right.

18 JUDGE SILBERMAN: So, why in this case isn't there a  
19 clear connection between the actions of the defendant and the  
20 combat activities of the Army?

21 MS. BURKE: There is, Your Honor. It's not that the  
22 connection is not there. The real question is not the breadth  
23 of the combatant activities exception, which is broad, and is  
24 designed to protect the sovereign. The real linkage that's  
25 missing here is why it is that holding a private party liable

1 would contradict that sovereign interest.

2 JUDGE SILBERMAN: The statute says, doesn't limit  
3 itself to actions against the Army, Navy, or Coast Guard. It  
4 precludes claims that arise out of combat activities of the  
5 Army, Navy, or Coast Guard.

6 MS. BURKE: But it's a preservation of the sovereign  
7 immunity, so it's carving out for the --

8 JUDGE SILBERMAN: Well, of course.

9 MS. BURKE: Right.

10 JUDGE SILBERMAN: Of course. But --

11 MS. BURKE: Right.

12 JUDGE SILBERMAN: -- it's designed to preserve  
13 sovereign immunity, but it is broader, what you see is broader  
14 than the discretionary function exemption, which really does  
15 relate directly to the government, and required the court to  
16 do some sort of creative thinking to get to the private  
17 contractor. But here the exact language of the exemption  
18 applies to the private contractor because this is a claim that  
19 arises out of the combat activities.

20 MS. BURKE: Well, no, Your Honor. The language  
21 itself does not apply directly to the contractor. What it  
22 says is that it is a broad exemption, and it would certainly  
23 protect --

24 JUDGE SILBERMAN: It doesn't say, you understand it  
25 doesn't say a claim against the Army, Navy, or Coast Guard

1 that arises out of combat activities, it says any claim that  
2 arises out of combat activities.

3 MS. BURKE: But it is not, that is not so broad that  
4 it immunizes all --

5 JUDGE GARLAND: Isn't what you're groping for here  
6 is that this is an exception to the liability section of the  
7 FTCA, which only applies to actions against the United States,  
8 and which in another section specifically says not  
9 contractors.

10 MS. BURKE: Yes.

11 JUDGE GARLAND: So, it is true, no one in this room  
12 I suspect doubts that this combatant exception is broader than  
13 the discretionary function exception, that is the very reason  
14 the defendants are using it. But the only question is whether  
15 it has to do with liability actions against contractors as  
16 compared to the United States, and the FTCA could not be more  
17 expressed by itself on the question of what it applies to,  
18 isn't that right?

19 MS. BURKE: Yes, Your Honor, and that is the point  
20 where in trying to determine whether the private contractor  
21 should fall within that zone you have to look at whether or  
22 not their actions --

23 JUDGE GARLAND: Judge Silberman is asking a much  
24 narrower question.

25 MS. BURKE: Yes.

1 JUDGE GARLAND: He's asking you a textualist  
2 question, and he's saying that this appears to be broader and  
3 cover not just employees, but broader. And it is true --

4 MS. BURKE: It does not.

5 JUDGE GARLAND: -- that as an exception it could do  
6 that, but there's an exception to what textual, the text of  
7 the statute which specifically applies only to, "claims  
8 against the United States." So, if you were being just a  
9 textualist, you could not rely on this statute, you'd have to  
10 be a non-textualist, you have to be somebody who doesn't just  
11 read the words of the statute in order to get to the position  
12 the defendants want you. Now, that could be based on a  
13 preemption doctrine.

14 MS. BURKE: Yes.

15 JUDGE GARLAND: But you can't do it just on the text  
16 of the statute, is that right?

17 MS. BURKE: That's correct, Your Honor. And so,  
18 what the District Court did is unmoored from the statute try  
19 to put the corporate contractors into the zone where they  
20 should by implied preemption be entitled to that. And our  
21 argument here is that when you look at whether or not they  
22 should be moved into that zone you have to look at the United  
23 States' interests, and the United States' interests are  
24 expressed in the contract with the parties, as well as in all  
25 of the other evidence from the Executive, and there because it

1 was unlawful activity that breached the contract they should  
2 not be entitled to stand in the shoes of the sovereign for the  
3 purposes of the foreign, for the FTCA exemption.

4 JUDGE KAVANAUGH: What we were --

5 JUDGE SILBERMAN: Well, actually, in response to  
6 your dialog with Judge Garland, he makes an excellent point.  
7 Of course, *Boyle* has already established the proposition that  
8 the exemptions in the FTCA can extend to the government  
9 contractor. So, you have in this situation a broader  
10 linguistic basis for describing the context in which the tort  
11 exemption applies, but you still have to consider the *Boyle*  
12 analysis to which it does extend the exemption to the private  
13 contractor if it interferes with the same policy that reserves  
14 the suit against the federal government.

15 MS. BURKE: And the breadth of the exception --

16 JUDGE SILBERMAN: For instance, let me take a  
17 hypothetical. Suppose the Department of Agriculture had  
18 people in Baghdad, and a fire fight developed, and the  
19 Department of Agriculture people happened to have weapons,  
20 they were authorized for one reason or another to have  
21 weapons, they were not involved in the Army in any way, but  
22 because of the fire fight they actually engaged in some fire  
23 fighting themselves, and a lawsuit against them was brought  
24 afterwards. It would be clear, would it not, that arose out  
25 of the combat activities, and it wouldn't matter that it

1 wasn't the Army, Navy, or Air Force?

2 MS. BURKE: Yes, Your Honor. But the breadth of the  
3 language of the exemption doesn't speak to how broadly you  
4 should make federal common law on the implied preemption.  
5 That's a separate task that really is divorced from the  
6 breadth of the exemption in the FTCA itself. So, the one does  
7 not lead you to say well, because that's broader language --

8 JUDGE SILBERMAN: It doesn't lead you -- you've got  
9 a bigger step off with this exemption than you get with a  
10 discretionary function exemption, but you're correct, you  
11 still have to look at the *Boyle* analysis.

12 MS. BURKE: Yes, Your Honor. And that is why you  
13 constantly have to go back to is it really benefitting the  
14 United States. And because of the unlawful nature of the  
15 conduct here that actually disgraced the United States and  
16 brought harm to the United States it's a tough argument to  
17 make that what they were doing benefitted the United States.  
18 I see my --

19 JUDGE KAVANAUGH: On the implied preemption question  
20 we were talking about how to interpret Congressional silence,  
21 and there's a statement in the *Crosby* case which is in this  
22 line that I wanted to read to you and get your reaction, where  
23 the court said a failure to provide for preemption expressly  
24 may reflect nothing more than the settled character of implied  
25 preemption doctrine that courts will dependably apply. And it

1 cited the *Hines* (phonetic sp.) case, which is the original  
2 case in the immigration context in this line. Isn't that  
3 relevant to how we interpret what you talk about, the  
4 Congressional silence here?

5 MS. BURKE: I'm sorry, Your Honor, but this is not a  
6 matter of settled law at all. There is no clear cut line of  
7 cases --

8 JUDGE KAVANAUGH: But there is a settled implied  
9 preemption doctrine that applies to certain areas of federal  
10 interest, correct?

11 MS. BURKE: There is indeed some settled law on  
12 implied preemption. The scope of that does not cover this  
13 particular case.

14 JUDGE KAVANAUGH: Wouldn't wartime activity be at  
15 the height of a situation where we would expect a uniquely  
16 federal interest, even more so than immigration --

17 MS. BURKE: No, it --

18 JUDGE KAVANAUGH: -- reparations?

19 MS. BURKE: -- does not actually change the analysis  
20 because in wartime particularly you want to make sure that you  
21 do not extend the preemption to things that harm the United  
22 States --

23 JUDGE KAVANAUGH: Well, isn't --

24 MS. BURKE: -- war-making.

25 JUDGE KAVANAUGH: You've talked many times about

1     harming the United States, and I would think in the  
2     constitutional system we have that it's up to the Congress and  
3     the Executive to determine what harms the United States in  
4     wartime.

5             MS. BURKE:  What I am saying, Your Honor, is you do  
6     not --

7             JUDGE KAVANAUGH:  It's not up to the states.  
8     California may not prefer the Iraq war and could enact all  
9     sorts of regulations of contractors in Iraq, would those all  
10    be permissible?

11            MS. BURKE:  Your Honor, my point was that as judges  
12    making federal common law you have to continue to be moored to  
13    the underpinning of why you're making the common law.  And the  
14    *Boyle* doctrine of federal common law is a doctrine created by  
15    judges in order to make sure --

16            JUDGE KAVANAUGH:  Yes.

17            MS. BURKE:  -- that we protect the sovereign.  So,  
18    my point is you cannot simply kind of claim a whole category  
19    is so broad, the war making is so broad that any private party  
20    who has some claims against another private party if it's in  
21    the zone of a war touches on a war somehow outside of these  
22    courts.

23            JUDGE KAVANAUGH:  Can I ask one more question, which  
24    is reparations for wartime misdeeds are usually negotiated by  
25    nation states at the end of the hostilities.  The statement

1 refers to that, and history is replete with examples of that.  
2 If states could regulate wartime activities wouldn't that  
3 interfere with the federal, the United States government  
4 ability to negotiate such agreements at the conclusion of  
5 wars?

6 MS. BURKE: Your Honor, that's not what is at issue  
7 here, though. What's at issue here is whether or not  
8 particular individuals who were harmed by private parties can  
9 recover under tort law. The notion of whether or not the  
10 United States may see fit to give some broader group of people  
11 reparations is simply not before the Court. We're dealing  
12 with a small subset of people who had the misfortune to be  
13 abused while they were detained. This is not the entire  
14 population of those who were detained. So, if the United  
15 States going forward wants to make some sort of reparations  
16 for mistaken detention, you know, that's a different issue  
17 that's just not presented here.

18 JUDGE KAVANAUGH: One last thing. On the Executive  
19 interests which you've also talked about, the contractors here  
20 were potentially subject to criminal liability, correct?

21 MS. BURKE: The military, General Taguba's  
22 investigation, referred the matter to the Department of  
23 Justice.

24 JUDGE KAVANAUGH: And the contractors were  
25 potentially subject to criminal liability, correct?

1 MS. BURKE: That's correct.

2 JUDGE KAVANAUGH: Under the War Crimes Act, or the  
3 Torture --

4 MS. BURKE: Yes.

5 JUDGE KAVANAUGH: -- Act? So, the Executive has the  
6 ability to state its interests to investigate this matter, and  
7 to prosecute if it so determines?

8 MS. BURKE: Yes, Your Honor. And in fact, the fact  
9 that they have not intervened despite working with us on the  
10 lawsuit really speaks to their view as to whether or not  
11 permitting the suit to go forward helps or hurts their  
12 interests.

13 JUDGE SILBERMAN: Counsel, I'd like to ask a couple  
14 of questions about the exclusive operational control standard,  
15 which the District judge articulated, but do you wish to hold  
16 that until you come back as on the *CACI* case?

17 MS. BURKE: Whichever you prefer, Your Honor. I'm  
18 happy to address it now.

19 JUDGE SILBERMAN: Well, here's a concern that I  
20 have, the District judge standard that he applied is to  
21 provide a motion for summary judgment based on evidence  
22 establishing that in the *Titan* case there was exclusive  
23 operational control of the contractor by the military.

24 MS. BURKE: Correct.

25 JUDGE SILBERMAN: Whereas in, is it *CACI*?

1 MS. BURKE: Yes.

2 JUDGE SILBERMAN: It was not --

3 MS. BURKE: CACI.

4 JUDGE SILBERMAN: -- exclusive particular because  
5 one individual testified that he could complain to the  
6 contractor about abuses. That was the major issue that Judge  
7 Robertson focused on to suggest the contractor was not under  
8 the exclusive operational control of the military, isn't that  
9 correct?

10 MS. BURKE: It was even a bit more than that, Your  
11 Honor.

12 JUDGE SILBERMAN: Go ahead.

13 MS. BURKE: It was that there was an on-site  
14 supervisor --

15 JUDGE SILBERMAN: Yes.

16 MS. BURKE: -- who testified that he could and would  
17 stop any kind of abuse going on, and if a CACI employee  
18 disobeyed his directions he would fire them.

19 JUDGE SILBERMAN: Okay.

20 MS. BURKE: So, you had dual, you had corporate  
21 control.

22 JUDGE SILBERMAN: Fine. Now, isn't it true that if  
23 an American soldier is directed to engage in abusive tactics  
24 towards a prisoner that's an unlawful order and the American  
25 soldier has a right to, and indeed an obligation to disobey

1 the order?

2 MS. BURKE: That's correct, Your Honor.

3 JUDGE SILBERMAN: So, this is exactly the same  
4 standard that would apply to the government contractor in this  
5 case?

6 MS. BURKE: And the government contractor --

7 JUDGE SILBERMAN: Isn't that correct? It's --

8 MS. BURKE: That's --

9 JUDGE SILBERMAN: -- exactly the same?

10 MS. BURKE: Your Honor --

11 JUDGE SILBERMAN: And would it be perverse, and  
12 inconsistent with *Boyle's* reasoning on economic analysis,  
13 wouldn't it be perverse to come out with a conclusion that if  
14 a government contractor integrated into the mission of the  
15 military to search the authority to complain about abusive  
16 behavior, the same kind of authority that an American soldier  
17 would have, if that authority now imposes liability, so then  
18 that would create an economic incentive in the future for the  
19 government contractor to say I'm not allowed to complain if  
20 there's abuse.

21 MS. BURKE: Well, Your Honor, it's a bit --

22 JUDGE SILBERMAN: That doesn't make any sense, does  
23 it?

24 MS. BURKE: No, it's a bit different than that. It  
25 actually is a tort incentive to make sure that they prevent

1 the abuse. So, when you look at what would best serve --

2 JUDGE SILBERMAN: If they have the authority to  
3 prevent the abuse they are liable?

4 MS. BURKE: Yes, because then --

5 JUDGE SILBERMAN: So, if they assert authority to  
6 prevent the abuse, bango, you're liable.

7 MS. BURKE: And if you think about it --

8 JUDGE SILBERMAN: That doesn't sound like normal  
9 incentives for tort law.

10 MS. BURKE: But it is, because you want both the  
11 military and the corporate contractors to be working towards  
12 the same goal.

13 JUDGE SILBERMAN: But we've just articulated it  
14 doesn't matter what the contract says they're under the same  
15 law anyway because the military would have to object to orders  
16 to engage in torture.

17 MS. BURKE: Yes, but there are several differences  
18 between being a soldier and being a contractor.

19 JUDGE SILBERMAN: Which are?

20 MS. BURKE: Well, a contractor, if they're given an  
21 unlawful order they can just walk away, they can quit. These  
22 are at will employees.

23 JUDGE SILBERMAN: And?

24 MS. BURKE: So, the --

25 JUDGE SILBERMAN: And if a soldier is given an

1 unlawful order what is he supposed to do?

2 MS. BURKE: The soldier has a much more difficult  
3 situation because if they simply leave Iraq they are facing  
4 criminal prosecution. So, the --

5 JUDGE SILBERMAN: They're facing criminal  
6 prosecution if they engage in an unlawful order.

7 MS. BURKE: Yes, Your Honor.

8 JUDGE SILBERMAN: If they refuse and say I will not  
9 carry out that order because it's unlawful they are under our  
10 law sanctioned. They are entitled to take that position.

11 MS. BURKE: And, Your Honor, but for tort liability  
12 the contractor would not be similarly situated to that soldier  
13 who's being sanctioned because the corporation that does not  
14 stop their employees from participating in the views basically  
15 reaps the benefits of the contract, the financial contract,  
16 and yet has not lived up to the duty to stop the abuse that's  
17 contrary to the United States' interests.

18 JUDGE SILBERMAN: But under the District judge's  
19 theory if the contractor does not have authority to object to  
20 the abuse he's not liable. But if he does have authority to  
21 object to the abuse he is liable.

22 MS. BURKE: Well, Your Honor, I do think --

23 JUDGE SILBERMAN: That doesn't make any sense.

24 MS. BURKE: -- I do think the District Court has  
25 created a perverse incentive, and I think the way that it did

1 so was immunizing Titan from liability when its conduct was  
2 contrary to the law and to the contract. So, I would agree  
3 with Your Honor that it is a, the test itself creates a  
4 perverse incentive.

5 JUDGE GARLAND: I was just wondering whether you  
6 weren't short-changing your case when you agreed with Judge  
7 Silberman that the only evidence you had was testimony on the  
8 subject. I thought that the principle evidence that you have  
9 is the Army Field Manual, and the Army Regulations, and in the  
10 Titan case a contract, all of which say that the Army does not  
11 supervise these people, that they are not within the chain of  
12 command, and that it is the contractor's responsibility to do  
13 the supervision, isn't that right?

14 MS. BURKE: That's right, Your Honor, and I --

15 JUDGE GARLAND: So, it's not just a small --

16 MS. BURKE: Right.

17 JUDGE GARLAND: -- dispute about two different  
18 pieces of testimony about how much there is, the Army has a  
19 position on this, the Army's position is it is the obligation  
20 of the contractor and not the Army to supervise these people,  
21 isn't that right?

22 MS. BURKE: Right, Your Honor, and I was responding  
23 to his characterization of what the District Court relied  
24 on --

25 JUDGE GARLAND: Right.

1 MS. BURKE: -- and even that was broader than Your  
2 Honor's recitation of it. But yes, in addition to what the  
3 District Court relied on there's ample other evidence in the  
4 record that supports the proposition that the contractors are  
5 obliged to do the supervision.

6 JUDGE KAVANAUGH: Can I ask you a couple of  
7 questions because --

8 MS. BURKE: Sure.

9 JUDGE KAVANAUGH: -- you have an ATS claim, as well,  
10 right? In an area that may be even more difficult to figure  
11 out than implied preemption. But on reading *Sosa*, it seems to  
12 me there are lots of statements in *Sosa* about judicial  
13 restraint, judicial caution, whether Congress has acted in the  
14 field. The court says that Congress may shut the door  
15 explicitly or implicitly by treaties or statutes that occupy  
16 the field. A similar question that I had on the implied  
17 preemption, with Congress having acted so much in the last 20  
18 years in this area with the TVPA, the War Crimes Act, the  
19 Torture Criminal Statute, extending the UCMJ, why would a  
20 court in the face of all that congressional action create an  
21 international law-based cause of action to supplement that,  
22 given *Sosa*'s direction to judicial restraint?

23 MS. BURKE: Well, and I think the answer to that  
24 really is you have to look at this particular case. I think  
25 that Congress did not legislate against American involvement

1 in torture likely because it did not anticipate that. But  
2 when you look at the status of international law, and you're  
3 looking for what is --

4 JUDGE KAVANAUGH: You don't think Congress  
5 anticipated that foreign prisoners could sue American  
6 officials in tort?

7 MS. BURKE: I do not think that Congress anticipated  
8 the events of Abu Ghraib. No, I do not.

9 JUDGE KAVANAUGH: No, I didn't ask that.

10 MS. BURKE: And that, you know, that's the --

11 JUDGE KAVANAUGH: I would have --

12 MS. BURKE: -- question really being presented here.  
13 So, when we look at whether or not to imply a federal common  
14 law under ATS, if in fact a District Court's ruling that Titan  
15 was so under the exclusive command and control of the military  
16 that it was in a sense acting as the military, then I think  
17 you do have, you have brought yourself within the zone of ATS  
18 because you have that color of authority. If that is  
19 overruled, as we hope, then I think the only remaining ATS  
20 claim that has that level of concreteness that *Sosa* requires  
21 is the war crimes claim.

22 JUDGE GARLAND: And what about private actors acting  
23 under color of state law?

24 MS. BURKE: On the private actors acting under  
25 color --

1 JUDGE GARLAND: Isn't that something, I mean, our  
2 own case law on this preserves Judge Edwards' position in *Tel-*  
3 *Oren*, which was it left two possibilities, which the District  
4 Court recognized. One was private actor committing a war  
5 crime; and the second is a private actor acting under color of  
6 state law, isn't that right?

7 MS. BURKE: Yes, Your Honor.

8 JUDGE GARLAND: And in *Sosa* the Supreme Court  
9 expressly also said that there is room for federal common law  
10 here, we could not cut it off, and it again expressly cited  
11 Judge Edwards' opinion in *Tel-Oren*. So, this is a hard area,  
12 but this is an area that -- the District Court only said one  
13 thing which was that our case law has precluded this. And I  
14 take it your position is one thing, that our case law does not  
15 preclude this, and it's up to the District Court to develop  
16 this question and find out maybe it will solve the problem and  
17 we won't have to face this because maybe there was no war  
18 crime here, maybe the facts are not the facts that you raised,  
19 maybe these people were not involved, maybe it was somebody  
20 else who was involved. But subject to that I'm not seeing how  
21 our own precedent or *Tel-Oren* cuts this off. Am I wrong about  
22 that?

23 MS. BURKE: No, you're correct, Your Honor. And the  
24 analysis of the color of authority is one that I do think is  
25 intermeshed with the analysis that the court undertook, and so

1 in essence going the path of federal common law under ATS  
2 would certainly forward all of the interests that Judge  
3 Kavanaugh had raised previously. So, I believe that either  
4 under federal common law, or under state tort law you reach  
5 the same result, which is that these are actionable claims.

6 JUDGE SILBERMAN: Aren't your positions  
7 inconsistent? On the one hand you're arguing that the  
8 contractors are independent of the military for purposes of  
9 the Federal Tort Claims Act, and for purposes of ATS you're  
10 arguing they're acting under color of law.

11 MS. BURKE: Your Honor, that really speaks to the  
12 question of the color of law, it's like a cloak that's put  
13 over them. When they are with the military working with some,  
14 like for example, Charles Graner who is now serving time in  
15 Leavenworth, when they're together with Charles Graner beating  
16 somebody up they are being cloaked with the color of the law  
17 even though in fact it is unlawful. So, it is --

18 JUDGE GARLAND: Even if they are not subject to  
19 supervision, even if they're not in the chain of command --

20 MS. BURKE: Yes.

21 JUDGE GARLAND: -- they can still be under color of  
22 law, just like for the purposes of the Fourteenth Amendment,  
23 private actors can be that, even though they are not subject  
24 to that level of supervision.

25 MS. BURKE: Yes, Your Honor.

1 JUDGE SILBERMAN: Do you like Judge Garland's  
2 answer?

3 MS. BURKE: Yes, I do, Your Honor.

4 JUDGE GARLAND: But I got another answer for you.

5 JUDGE SILBERMAN: All right. Before he gives  
6 another answer I have another question for you. You may,  
7 perhaps you could answer first before Judge Garland helps. If  
8 the exemption to the Federal Tort Claims Act is properly read  
9 as number one, the exemption with respect to combat activities  
10 is even broader than the discretionary -- for this case is  
11 broader than the discretionary decision exemption, but it's  
12 added to with the *Boyle* factor that extends it to the  
13 contractor, doesn't that analysis preclude the ATS liability?

14 MS. BURKE: If the federal --

15 JUDGE SILBERMAN: In other words, if --

16 MS. BURKE: -- common law is held implyly (phonetic  
17 sp.) to preempt.

18 JUDGE SILBERMAN: Yes.

19 MS. BURKE: Well, you know, Your Honor, the implied  
20 preemption speaks to whether or not you're intruding on the  
21 sovereign right by letting state tort law go forward, so to  
22 let federal common law go forward under the ATS would not  
23 raise the same issues at all, you do not need to preempt the  
24 federal common law applying to the sovereign.

25 JUDGE SILBERMAN: That's a very interesting point,

1 but actually there's another document in the labor field where  
2 preemption has been interpreted to apply not just to state law  
3 but also to federal law under the National Labor Relations  
4 Act. This Court once wrote an opinion holding an Executive  
5 order of President Clinton's unconstitutional on the grounds  
6 that it was preempted by federal common law. Federal  
7 statutory law.

8 MS. BURKE: Well, but --

9 JUDGE SILBERMAN: So --

10 MS. BURKE: Right.

11 JUDGE SILBERMAN: -- the point is so preemption can  
12 apply to both state and federal under certain circumstances.  
13 All my point being is that this common law notion which is  
14 drawn from the writings of law professors, not the most  
15 reliable way to base your law, but in any event that's sort of  
16 drawn from that --

17 MS. BURKE: Right.

18 JUDGE SILBERMAN: -- runs counter to --

19 JUDGE GARLAND: He's speaking as a law professor, by  
20 the way.

21 JUDGE SILBERMAN: Yes, I am. Runs counter to a  
22 statutory interpretation of, arising out of combat activities  
23 which adds a *Boyle* factor to get to the contractor who is  
24 integrated in the mission. If that statutory interpretation  
25 plus the common law is correct how the devil can ATS stand

1     against it?

2                 MS. BURKE:   Because the statutory interpretation is  
3     on its own, then you have the federal common law that's  
4     implying the preemption.   But if under ATS the international  
5     standards become the federal common law under *Charming Betsy*,  
6     you couldn't interpret that preemption in a way that conflicts  
7     with the international law that's now federal common law via  
8     the ATS.

9                 JUDGE SILBERMAN:   I understand your argument, but it  
10    seems to me it runs more against congressional intent than  
11    would otherwise be so.

12                MS. BURKE:   And the congressional intent, though,  
13    has spoken to the sovereign, not to the private parties.

14                JUDGE SILBERMAN:   But the sovereign's interests are  
15    the same here as it was in *Boyle*.   In fact, it's even  
16    stronger.

17                MS. BURKE:   But the real --

18                JUDGE SILBERMAN:   Here we've got people that were  
19    integrated into the military mission, so they're even more,  
20    the sovereign's interest is even greater than would be true  
21    with a Sikorsky aircraft, or a helicopter manufacturer.

22                MS. BURKE:   But the sovereign's interest vis-a-vis  
23    the contractors is for the contractors to live up to the  
24    sovereign's expectations.   And so, the sovereign's interest  
25    are furthered by holding the contractors to the contract, not

1 to letting them act in an extra-contractual --

2 JUDGE SILBERMAN: But as you point out the sovereign  
3 hasn't sought to do so, as far as we can tell.

4 MS. BURKE: Well, in fact Titan gave money back for  
5 the conduct, and that's in the record.

6 JUDGE SILBERMAN: Anyway, the point is that we don't  
7 have any litigation before us in which the sovereign is  
8 seeking to proceed against the contractors or the individual  
9 employees, either civil or criminal.

10 MS. BURKE: Nor has the sovereign spoken in this  
11 case. The sovereign --

12 JUDGE SILBERMAN: Yes, the sovereign is silent.

13 MS. BURKE: The sovereign has been silent, Your  
14 Honor.

15 JUDGE KAVANAUGH: Can I ask you a question about  
16 your statement that the political branches couldn't have  
17 anticipated tort suits of this kind against the government or  
18 government contractors, and that the *Sosa* brief in the Ninth  
19 Circuit which was two administrations ago, so this is March of  
20 2000 the Justice Department Clinton Administration said in  
21 pursuit of its legitimate foreign policy objectives the United  
22 States occasionally may take actions that some would say  
23 violate its international obligations. In Plaintiff's view  
24 any aliens entitled to complain of such conduct in federal  
25 court under Section 1350, such a rule might render actual

1 efforts by the United States and those acting on its behalf to  
2 pursue its legitimate foreign policy aim, such as U.S. attacks  
3 on Osama Bin Laden's facilities in response to the African  
4 Embassy bombings, etcetera. The alien -- and this is the  
5 key -- the alien tort statute is not intended as a vehicle for  
6 U.S. courts to judge the lawfulness of U.S. government actions  
7 abroad in defense of national security, and any remedies for  
8 such actions are appropriately matters for resolution by the  
9 political branches, not the courts. So, it seems that it was  
10 quite well anticipated that there would be ATS claims against  
11 the U.S., or those acting on behalf of the U.S. government.

12 MS. BURKE: But, Your Honor, the situation here is  
13 not that. I mean, we are not confronting a case in which the  
14 contractors engaged in the conduct at Abu Ghraib for the  
15 benefit of the United States. So, we're not looking at the  
16 United States' conduct --

17 JUDGE KAVANAUGH: But they --

18 MS. BURKE: -- or its agent's conduct.

19 JUDGE KAVANAUGH: Obviously, when you define it that  
20 narrowly, but in terms of the interrogation and translation  
21 services that are being provided, those are on behalf of the  
22 U.S. military, correct?

23 MS. BURKE: But those services are not at issue  
24 here. This is not a case about the way in which interrogation  
25 occurred, this is a case about, you know, stacking people up

1 in pyramids naked.

2 JUDGE KAVANAUGH: Right. And --

3 MS. BURKE: So --

4 JUDGE KAVANAUGH: -- so assume, obviously, war  
5 crimes, but there's a war crimes criminal statute. The  
6 question is whether there's also an implied cause of action  
7 under the ATS against U.S. officials acting on U.S. behalf in  
8 wartime.

9 MS. BURKE: But it's not against U.S. officials  
10 acting on the United States' behalf. So, if you look at it in  
11 the context of a soldier that co-conspired, say Charles Graner  
12 that co-conspired, what would happen if you sued him in his  
13 individual capacity? It would not automatically be deemed a  
14 suit against the United States, there would have to be the  
15 *Westfall* analysis, and the sovereign would have to speak. So,  
16 what they are actually asking for is to be elevated to a  
17 position above that of their co-conspiring military people.  
18 And when you think about the military's anticipation of how  
19 these cases should be handled --

20 JUDGE KAVANAUGH: Can you repeat that above that,  
21 because I thought the military officials would have sovereign  
22 immunity.

23 MS. BURKE: The military officials would have  
24 sovereign immunity if the sovereign spoke and said they  
25 should. The sovereign has not spoken and said these people --

1 JUDGE KAVANAUGH: Or even if a court independently  
2 determines that it was within the scope of employment.

3 MS. BURKE: And, you know, that analysis as to --  
4 that analysis turns again on does the conduct benefit the  
5 United States. And if you look at the military's own  
6 structure under the Foreign Claims Act they clearly expect  
7 that claimants who have a claim that's primarily the  
8 responsibility of the contractor to go after the contractor,  
9 and that's in the Army Regulation 2720. So, I think what you  
10 want to refrain from doing is upsetting the apple cart that is  
11 cabined by the Army regulations and the law, and that is what  
12 the military expected when they brought people like this into  
13 the mix. Thank you, Your Honors.

14 JUDGE GARLAND: Thank you very much. We'll hear  
15 from Mr. Zymelman? Zymelman, sorry. I should ask for  
16 pronunciations beforehand.

17 ORAL ARGUMENT OF ARI S. ZYMELMAN, ESQ.

18 ON BEHALF OF THE APPELLEE

19 MR. ZYMELMAN: May it please the Court, my name is  
20 Ari Zymelman of Williams and Connolly on behalf of the Titan  
21 Corporation, now known as L-3 Services, Inc.

22 Judge Robertson applied the *Boyle* analysis to find that  
23 tort regulation of Titan's supervision of its linguists would  
24 conflict with uniquely federal interests and is preempted.  
25 The linguists provided by Titan to be embedded in units

1 engaged in combatant activities filled a critical gap, a  
2 crucial gap in the fighting force that was essential to the  
3 military's ability to conduct wartime operations in Iraq.

4 JUDGE GARLAND: Can I ask you, when you started out  
5 with *Boyle*, so *Boyle* is not a clearest explanation of how it  
6 got to the result. But it seems to me the one way to read  
7 *Boyle* is that there is an entire section that comes before the  
8 FTCA analysis, and in that section the court asks whether  
9 there's a significant conflict between state law and a federal  
10 policy, and then gives a specific example where there would be  
11 and where there wouldn't be, which is the helicopter  
12 hypothetical, which is not completely hypothetical. And it  
13 says if, for example, a federal procurement officer orders by  
14 model number a quantity of stock helicopters that happen to be  
15 equipped with escape hatches opening outward, the problem that  
16 being a problem, it is impossible to say the government has  
17 significant interests in that particular feature.

18 And then it goes on, and so it says so first we find --  
19 that's not this case, they say in this case there was a  
20 conflict, and then they go on to look for what they call a  
21 limiting principle, and they look to the FTCA. But it seems  
22 like the first question that has to be asked even independent  
23 of the FTCA is whether there's a conflict here, and since the  
24 government didn't order the interrogators to do these things,  
25 or at least no one in the government has claimed that the

1 government did this, and the Plaintiffs claim that this is --  
2 I understand there's a dispute in the *CACI* case -- in the  
3 *Saleh* case, I guess, with a RICO claim, but at least with  
4 respect to the *Ibrahim* plaintiffs they claim that this is a  
5 conspiracy, a private conspiracy between the interrogators,  
6 the linguists, and rogue soldiers. Under those circumstances  
7 why do we even get to the FTCA claim?

8 MR. ZYMELMAN: I think, Your Honor, that the *Boyle*  
9 analysis actually proceeded a little bit differently than you  
10 articulated.

11 JUDGE GARLAND: Not temporally in terms of the  
12 opinion, right?

13 MR. ZYMELMAN: Not -- but --

14 JUDGE GARLAND: Because the opinion clearly doesn't  
15 get to the FTCA until the first (indiscernible).

16 MR. ZYMELMAN: Well, Your Honor, it certainly first  
17 finds that there's a uniquely federal interest in the  
18 liability of independent contractors performing the  
19 government's work. And it found that interest in the context  
20 of military procurement contract for military equipment during  
21 peacetime.

22 JUDGE GARLAND: But it says the present case is the  
23 opposite, here the state imposed duty of care, the asserted  
24 basis of the contracts is liability is precisely contrary to  
25 the duty imposed by the government contract, which is to equip

1 it with a specific kind of escape hatch.

2 MR. ZYMELMAN: But I think at that point, Your  
3 Honor, they moved from the analysis to the analysis to the  
4 specific case that was in front of them and applying that  
5 analysis to those facts. The analysis, I would submit, Your  
6 Honor, in *Boyle*, was they established that it was a uniquely  
7 federal interest in terms of the liability of independent  
8 contractors supplying the military in that case with  
9 equipment, I would submit that that uniquely federal interest  
10 is certainly present here where --

11 JUDGE GARLAND: They found a specific conflict  
12 between the contract at issue in that case and tort law. That  
13 is because the contract asked for a specific kind of escape  
14 hatch, and this contract doesn't ask for torture or anything  
15 else.

16 MR. ZYMELMAN: I would submit, Your Honor, that the  
17 conflict they found in *Boyle* was between state tort regulation  
18 of the contractor and the government's interest in getting the  
19 government's work done, and that the facts of those cases  
20 focused on the design, as because it was a design defect case,  
21 focused on the design and the source of the design. The  
22 analysis, I would submit, that they looked to the exemptions  
23 in the FTCA to find the outlines of the conflict.

24 JUDGE GARLAND: I understand. So, your view then is  
25 that the exemptions are what provide the outline of the

1 conflict, right?

2 MR. ZYMELMAN: It certainly, in that case and in  
3 this one, Your Honor.

4 JUDGE GARLAND: All right. So, why are we even  
5 messing with the combat exemption, why don't you jump directly  
6 to the foreign country exemption and just say whenever  
7 contractors act in foreign countries they are immune in every  
8 case, whether they're in chain of command or not, whenever  
9 they're hired by the government and they act in a foreign  
10 country they're immune?

11 MR. ZYMELMAN: It would certainly in this case  
12 dispose of these claims to do so. I would submit, Your Honor,  
13 that the policy, that the issue as discussed in *Sosa*, the  
14 policy behind the foreign country exception in terms of  
15 subjecting the United States to foreign law regulation is  
16 different than the policy as identified by Judge Silberman in  
17 terms of preempting and excluding all claims arising out of  
18 the combatant activities of the military.

19 JUDGE GARLAND: All right. So, let me pause over  
20 that. Just so I understand your position is not that every  
21 exception of the FTCA is a source of conflict, and you would  
22 not say that the foreign country exception is a source of  
23 conflict because the policies are different there, is that  
24 right?

25 MR. ZYMELMAN: I would submit, Your Honor, that that

1 issue hasn't been developed in this case.

2 JUDGE GARLAND: Right. But I need to know because  
3 what we decide today about one, depending on how it's worded  
4 could obviously affect the other. So, just for the general  
5 principle, is the general principle that the exceptions to the  
6 FTCA that define the outline of the conflict, or that we have  
7 to also look at how important those principles are?

8 MR. ZYMELMAN: I would submit, Your Honor, that it's  
9 not about how important the principles are, I would submit  
10 that the analysis set forth in *Boyle* is to look at the policy  
11 underlying the exception in order to determine the outlines of  
12 the conflict between --

13 JUDGE KAVANAUGH: But looking at the policy  
14 underlying that is not what courts usually do in statutory  
15 interpretation, why shouldn't we take *Boyle* as a given for the  
16 discretionary function exemption and beyond that follow the  
17 text of the statute and let Congress provide exemptions for  
18 contractors that it sees fit?

19 MR. ZYMELMAN: Because --

20 JUDGE KAVANAUGH: I mean, that's the textualist  
21 approach, isn't it?

22 MR. ZYMELMAN: Your Honor, I submit that this is not  
23 exactly an exercise in statutory construction. We are not  
24 arguing --

25 JUDGE KAVANAUGH: Well, why not? There's a statute

1 that provides exemptions for certain activities of the  
2 government, and it doesn't provide exemptions for contractors.  
3 Congress could easily do so.

4 MR. ZYMELMAN: But that was precisely the issue  
5 considered in deciding in *Boyle*, Judge Kavanaugh, that looked  
6 to whether state tort regulation of the contractor of Titan  
7 would conflict with the federal interests in getting the  
8 government's work done.

9 JUDGE KAVANAUGH: And do you think *Boyle* then set  
10 the federal courts on a mission to do this kind of policy  
11 balancing, which is very difficult, and we're not well  
12 equipped to do, and all sorts of areas related to other  
13 exemptions in the FTCA?

14 MR. ZYMELMAN: I don't know about which, you know,  
15 depending on the circumstances of the case it is certainly the  
16 case here where you have a procurement of personnel to be  
17 embedded in military units engaged in combatant activities  
18 that tort regulation of the contractor would, and basically  
19 through tort regulation regulating how Titan supervises its  
20 employees, requiring Titan to embed supervisors in the  
21 military units.

22 JUDGE KAVANAUGH: Great policy arguments that  
23 Congress could address, right?

24 MR. ZYMELMAN: As has been pointed out, Judge  
25 Kavanaugh, the issue is how to interpret congressional silence

1 I would submit against the backdrop of *Boyle*, and that it has  
2 never been held that state law should be allowed to regulate  
3 claims arising out of combatant activities --

4 JUDGE GARLAND: If I could just reword Judge --

5 MR. ZYMELMAN: -- for the military.

6 JUDGE GARLAND: -- Kavanaugh's question, great  
7 policy that the Executive could address, and in *Boyle* the  
8 Executive did. In *Boyle* the Executive filed an amicus saying  
9 that this would conflict. No one has done that in this case.  
10 So, you're asking us to assume, because we're judges we're  
11 apparently capable of doing that, what the policy interests of  
12 the United States area?

13 MR. ZYMELMAN: Your Honor, I'm not asking you to  
14 assume that. In *Boyle* as far as we can determine the United  
15 States only appeared when the issue reached the Supreme Court,  
16 they did not appear in the Fourth Circuit.

17 JUDGE GARLAND: Well, you could have asked them to  
18 appear here. Did you ask them?

19 MR. ZYMELMAN: We did not, Your Honor.

20 JUDGE GARLAND: You didn't ask the Army? No one  
21 asked the Army, or the Justice Department to consider  
22 appearing?

23 MR. ZYMELMAN: No, Your Honor, we did not make a  
24 request for them to appear --

25 JUDGE GARLAND: But they were well --

1 MR. ZYMELMAN: -- just as they have --

2 JUDGE GARLAND: -- aware of this case, weren't they?

3 MR. ZYMELMAN: Certainly the Army litigation section  
4 was well aware of this case.

5 JUDGE GARLAND: And they didn't file anything?

6 MR. ZYMELMAN: That would not have been up to the  
7 Army litigation --

8 JUDGE GARLAND: Well, they could have asked --

9 MR. ZYMELMAN: -- section, Your Honor.

10 JUDGE GARLAND: -- the Justice Department.

11 MR. ZYMELMAN: They would have had to go to the  
12 Justice Department and require them to make an appearance.

13 JUDGE GARLAND: So, how do we decide which is in the  
14 interests of the United States? So, imagine you are Secretary  
15 of State and you're afraid that people around the world will  
16 stop cooperating with us if we don't provide liability for  
17 people who do this kind of behavior, we don't provide civil  
18 liability. On the other hand, the Secretary of State might  
19 have the opposite view, that is -- or that maybe the Defense  
20 Department might have the opposite view that it's very  
21 necessary to prevent just the kind of things you're talking  
22 about. How do we make that balance?

23 MR. ZYMELMAN: Your Honor, I don't think that is the  
24 proper balance that's being struck here. The balance in the  
25 case of the common law claims is whether you're going to

1 subject Titan to state, or Iraqi law regulation in terms of  
2 how it supervised the linguists --

3 JUDGE GARLAND: But the state civil liability. What  
4 I'm asking is you think it's unimaginable that the United  
5 States might think it would be helpful to its foreign policy  
6 to have these contractors subject to state civil liability?  
7 Do you think that's just unimaginable?

8 MR. ZYMELMAN: Your Honor, I think it is certainly  
9 not the express policy of the United States, and it's  
10 certainly contrary to the structure of committing the conduct  
11 of war, and of not allowing state law regulation, it is state  
12 law regulations through the tort system.

13 JUDGE GARLAND: But the regulation itself says that  
14 contractors can be subject to civil liability.

15 MR. ZYMELMAN: Which regulation, Your Honor?

16 JUDGE GARLAND: The regulation that has been cited  
17 in both, that your opposing counsel expressly cited just a few  
18 minutes ago. I'll cite it for you if you want, but I'm  
19 sure --

20 JUDGE SILBERMAN: Are you talking about the  
21 regulation or the statute?

22 JUDGE GARLAND: No, I'm talking about the Army  
23 regulation that was --

24 JUDGE SILBERMAN: I thought you were earlier talking  
25 about the statute.

1 JUDGE GARLAND: No, I'm talking about the  
2 regulation.

3 JUDGE SILBERMAN: But you weren't --

4 JUDGE GARLAND: You know which regulation I'm  
5 talking about, don't you?

6 MR. ZYMELMAN: I'm not sure if you're talking about  
7 the comment in response --

8 JUDGE GARLAND: No, I'm not talking about the  
9 comment.

10 MR. ZYMELMAN: -- to the question. Okay.

11 JUDGE GARLAND: I'm talking about the final rule  
12 itself, which the comment relates to, and that says  
13 inappropriate use of force by contractor personnel authorized  
14 the company, the U.S. Army forces can subject such persons to  
15 United States or host nation prosecution and civil liability.

16 MR. ZYMELMAN: Well, it's certainly in terms of  
17 civil -- in terms of criminal prosecution, Your Honor --

18 JUDGE GARLAND: Civil liability. I got the criminal  
19 part.

20 MR. ZYMELMAN: -- in terms of it's civil liability,  
21 Your Honor.

22 JUDGE GARLAND: Yes.

23 MR. ZYMELMAN: I think that if adopting the approach  
24 of the District Court raises open the question depending on  
25 the nature of the relationship between the contractor

1 personnel and the military and combatant activities, it does  
2 not say --

3 JUDGE GARLAND: So, you're not going for the  
4 *Garamendi* preemption here, you're going -- that is for field  
5 preemption, you're talking only about *Boyle* preemption, is  
6 that right?

7 MR. ZYMELMAN: We are talking about *Boyle*  
8 preemption, Your Honor.

9 JUDGE GARLAND: And what if the United States filed  
10 a letter saying what I just said? What if the United States  
11 were to file a letter saying this would actually hurt our  
12 foreign policy, we don't want this exception? Your position  
13 is it would make no difference, right?

14 MR. ZYMELMAN: Until there's been an act -- until  
15 Congress has spoken, or until there's been some formal -- if  
16 they had filed such a letter, and I would in fact find it  
17 surprising for them to file such a letter.

18 JUDGE GARLAND: But if they did would you --

19 JUDGE SILBERMAN: Well, you could always refer to  
20 the doctrine *If My Aunt Had Wheels She'd Be A Trolley Car*.

21 JUDGE GARLAND: Yes, but I guess my question, which  
22 has little to do with trolley cars exactly, but does have to  
23 do with the question of who makes the policy here. If the  
24 Congress remains silent, and if the President or the Attorney  
25 General filed a letter saying, you know, really we think that

1 the Plaintiffs are right here with respect to the scope of  
2 this contractor exception.

3 JUDGE SILBERMAN: Isn't your argument that Congress  
4 hasn't remained silent, as your interpretation of the Federal  
5 Tort Claims Act as interpreted by the Supreme Court in  
6 *Boyle* --

7 MR. ZYMELMAN: That is --

8 JUDGE SILBERMAN: -- does mean that Congress has not  
9 been silent?

10 MR. ZYMELMAN: That is correct, Your Honor. That  
11 they certainly have not been silent in terms of the --

12 JUDGE SILBERMAN: And incidentally, in that respect  
13 how do you treat the exemption which we have here as compared  
14 to the exemption in *Boyle*?

15 MR. ZYMELMAN: I believe within the subject matter  
16 of the combatant activities of the military it is, as you  
17 pointed out, Judge Silberman, a much more sweeping and  
18 absolute prohibition against all claims arising out of,  
19 whereas the discretionary function exemption obviously has  
20 many limitations in the law, and is narrowed, more narrow. It  
21 is clear to us, Your Honor, and I think to Judge Robertson,  
22 that the congressional intent here was to not allow claims of  
23 against contractors, to allow a state or foreign law to  
24 require contractors to exercise a certain level of  
25 supervision, embed supervisors in military units, that that

1 would in fact conflict with the general proposition that the  
2 military's, claims arising out of the military's combatant  
3 activities should not proceed.

4 JUDGE GARLAND: So, in light of that -- just so I'm  
5 clear, in light of that it wouldn't matter what the Executive  
6 Branch said, is that right?

7 MR. ZYMELMAN: Your Honor, again, if there was a  
8 clear statement by the Executive Branch in terms of civil  
9 liability for contractors I would submit, Your Honor, that in  
10 determining federal common law preemption of state law claims  
11 that should not determine the issue.

12 JUDGE GARLAND: So, it would not matter what the  
13 Executive said, that that's the bottom line, right?

14 MR. ZYMELMAN: I hesitate --

15 JUDGE GARLAND: Because you put it in the best  
16 possible way, you said if there was a clear expression on  
17 exactly this point it still shouldn't matter.

18 MR. ZYMELMAN: I guess I hesitate on the whether it  
19 should not matter at all, or whether it should determine the  
20 issue.

21 JUDGE GARLAND: I'm sorry. But it shouldn't  
22 determine preemption?

23 MR. ZYMELMAN: It should not determine --

24 JUDGE GARLAND: Okay.

25 MR. ZYMELMAN: -- the preemption, Your Honor.

1 JUDGE KAVANAUGH: The court ignored the Justice  
2 Department's statement in *Journig*, of course.

3 MR. ZYMELMAN: That's correct, Your Honor. And  
4 again --

5 JUDGE KAVANAUGH: What do we make of the fact that  
6 Congress since 2001, since September 11th, has enacted  
7 statutes that have express government contractor defenses, for  
8 example in the Safety Act, which was enacted in 2002, doesn't  
9 that suggest Congress again aware of contractors, and then you  
10 put the DTA, the MCA, the extension of the UCMJ, Congress has  
11 been very active in this area, yet no action like the Safety  
12 Act to exempt contractors from liability.

13 MR. ZYMELMAN: Your Honor, again, when you're  
14 enacting a particular piece of legislation that you might want  
15 to, as Congress did, exempt contractors under a new piece of  
16 legislation, but this is not a new situation under *Boyle*.  
17 Under *Boyle* it says that federal procurement contracts have a  
18 uniquely federal interest, and that you look to the FTCA  
19 exemptions in order to determine the scope of state law  
20 conflict regulation, I would submit that you don't need any  
21 more of an express statement by Congress on this issue than  
22 what exists already. And again, as you pointed out, there is  
23 in fact criminal, there has been criminal legislation with  
24 regard to war crimes and foreign torture victim protections  
25 act, none of which would create liability, civil liability in

1 this situation.

2 JUDGE GARLAND: Do you think, by the way, that your  
3 employees could be criminally prosecuted for what they did  
4 then, not now, then? Are you in a position to concede that  
5 they are subject to criminal prosecution?

6 MR. ZYMELMAN: They certainly have been subject in  
7 this record, Your Honor, there have been a grand jury  
8 investigation as late as December of 2007. There have been  
9 grand jury, an ongoing grand jury investigation --

10 JUDGE GARLAND: Would you take the position --

11 MR. ZYMELMAN: -- of our employees.

12 JUDGE GARLAND: -- that they could be prosecuted  
13 under this?

14 MR. ZYMELMAN: Without knowing what the facts of the  
15 particular case are, and what statute --

16 JUDGE GARLAND: What about your company itself for  
17 the charges raised in the complaint, are you subject to  
18 criminal prosecution?

19 MR. ZYMELMAN: Your Honor, I'd have to understand on  
20 what, you know, for failure to supervise, Your Honor? If  
21 that's the case --

22 JUDGE GARLAND: Well, it's sort of like the --

23 JUDGE SILBERMAN: You might want to take the  
24 fifth --

25 JUDGE GARLAND: -- Coopers -- yes.

1 JUDGE SILBERMAN: -- you'll want to take the Fifth  
2 Amendment.

3 JUDGE GARLAND: That's what I thought, I though you  
4 might want to do that. Let me ask you, I would like to ask  
5 the question that opposing counsel ended with, which has to do  
6 with the Westfall Act, it's a question that has been troubling  
7 me, as well. So, if your client here were a soldier or an FBI  
8 agent, not a contractor, what would happen?

9 MR. ZYMELMAN: Under that --

10 JUDGE GARLAND: Exact same claims, but soldiers or  
11 agents, FBI agents.

12 MR. ZYMELMAN: As opposed -- although I submit, Your  
13 Honor, it's not directly analogous because the analogous  
14 question is what would happen if they sued the linguists, as  
15 opposed to the corporation who provided the linguists.

16 JUDGE GARLAND: Oh, all right. Let me start --

17 MR. ZYMELMAN: But in that --

18 JUDGE GARLAND: -- with that. I think that's a good  
19 point. That was my last question, but I'll use it first.  
20 That's a good point. So, what about that? Do the linguists  
21 get the same protection here that you do?

22 MR. ZYMELMAN: It's a different --

23 JUDGE GARLAND: Your employees?

24 MR. ZYMELMAN: -- issue, Your Honor, I would submit.

25 JUDGE GARLAND: I know. If --

1 MR. ZYMELMAN: I think if --

2 JUDGE GARLAND: -- it were the same issue I would  
3 know what your answer was.

4 MR. ZYMELMAN: I understand. If in the case, if  
5 they were not able to avail themselves of preemption, if as a  
6 matter of law if this court held that the interest in  
7 regulating the individuals through tort law regulation was  
8 different than the corporation, and I don't think it is, but  
9 if you held that preemption was available to the corporation  
10 but not to the individuals, then the individuals, I would  
11 submit, could in fact seek protection under the Westfall Act,  
12 because based on the record established below they were acting  
13 as agents of the government, and they would be able to argue  
14 that they were --

15 JUDGE GARLAND: Even though they're not government  
16 employees?

17 MR. ZYMELMAN: That is correct, because the Westfall  
18 Act applies not just to employees, but to governmental agents,  
19 and agency, the rules of law of agency governs that  
20 determination, which comes back to what Judge Robertson did  
21 here, which is --

22 JUDGE GARLAND: Can I --

23 MR. ZYMELMAN: -- evaluating their day to, who was  
24 in control of their day to day performance.

25 JUDGE GARLAND: All right. So, is your -- but your

1 underlying position is that they should get the same  
2 protection as the corporation, otherwise they might not like,  
3 they might not want to work for you, in which case that would  
4 raise your prices in order to track people, and that would  
5 then raise prices for the government, and that would also  
6 interfere with the war effort, is that your position?

7 MR. ZYMELMAN: I think those are some of the  
8 reasons. I think there are other reasons as articulated by  
9 Judge Robertson, as well, as to why you would not want --

10 JUDGE GARLAND: All right. So, in all --

11 MR. ZYMELMAN: -- to subject them --

12 JUDGE GARLAND: Right. So --

13 MR. ZYMELMAN: -- to state tort law regulation.

14 JUDGE GARLAND: All right. So, in all those cases,  
15 though, if they were actually FBI agents or soldiers there  
16 would have to be a *Westfall* filing by the government, or there  
17 would have to be a de novo decision by the court, right?

18 MR. ZYMELMAN: That they were acting within the  
19 scope of their authority, yes.

20 JUDGE GARLAND: Right. Right.

21 MR. ZYMELMAN: Yes, Your Honor.

22 JUDGE GARLAND: So, the soldiers, you are asking for  
23 something more than the soldiers would get. They would first  
24 have to get this *Westfall* certificate, and which we would view  
25 deferentially. If they have to go without a *Westfall*

1 certificate we'd have to view this less deferentially. But  
2 you're asking to be able to go forward without even asking the  
3 government. In other words, this would force the government  
4 to address the question which they have not addressed today,  
5 whether you're within the scope?

6 MR. ZYMELMAN: In the question of whether they would  
7 be substituted as a party in the litigation the Westfall Act  
8 does require them to speak as to whether these employees were  
9 acting within the scope --

10 JUDGE GARLAND: The scope.

11 MR. ZYMELMAN: -- of their duties. I don't believe  
12 that we are --

13 JUDGE KAVANAUGH: The court can independently do  
14 that, as well.

15 MR. ZYMELMAN: And the court would then have an  
16 independent determination, whatever the answer the government  
17 said about whether they were in fact acting within the scope  
18 of their duties. There's every --

19 JUDGE GARLAND: But there aren't many cases I assume  
20 where the government has said you're not acting within the  
21 scope, and the court has said you are? Am I wrong about that?

22 MR. ZYMELMAN: I believe that that's correct. I  
23 have not done a count, Your Honor. I can't answer that. But  
24 it is certainly the case, Your Honor, that on these types of  
25 facts here, which is allegations of abuse in the context of

1 detention and interrogation decisions, this court has held  
2 that that was within the scope of authority of the employees  
3 at that point. So, it is someone --

4 JUDGE GARLAND: Well, let me ask you about one of  
5 those cases. So, in the *Rasul* case we said the plaintiffs  
6 concede that the torture, threats, physical and psychological  
7 abuse inflicted on them, which were allegedly approved,  
8 implemented, supervised, and condoned by the defendants were  
9 intended as interrogation techniques. And then goes on to say  
10 while the plaintiffs challenged the methods that the  
11 defendants used to perform their duties, the plaintiffs do not  
12 allege that the defendants acted as rogue officials or  
13 employees who implemented the policy of torture for reasons  
14 unrelated to the gathering of intelligence.

15 At least with respect to the *Ibrahim* claims here their  
16 claim is exactly that, that these are war criminals, that they  
17 are acting, that they acted not for information collection,  
18 but to harass and punish. That sounds like in *Rasul* we're  
19 leaving open the possibility that scope of employment might  
20 not include every kind of torture committed by a contractor,  
21 or even the government, is that wrong?

22 MR. ZYMELMAN: I think it is. I think *Rasul* might  
23 have left open that question. Obviously, that question wasn't  
24 before the *Rasul* board, and so I don't know that that --

25 JUDGE KAVANAUGH: And in other cases interpreting

1 D.C. law, because of course --

2 MR. ZYMELMAN: Yes.

3 JUDGE KAVANAUGH: -- we have to interpret a state's  
4 scope of employment law, which varies from state to state, but  
5 in interpreting D.C. law we summarized the law I think in  
6 *Harbury* after *Rasul*, and it had -- we summarized our law which  
7 has said that sexual harassment, shooting a customer, rape,  
8 all fell within the scope of employment, and we dropped a  
9 footnote to explain the oddity of that law, and the oddity of  
10 the law was based you want a D.C. law's designed so that you  
11 can recover from the deep pocket employer rather than from the  
12 usually judgment proof person who actually committed the  
13 offense. The scope of employment law is defined under D.C.  
14 law in a way that doesn't really fit with the terms of the  
15 words and what you usually think about a scope of employment.

16 JUDGE GARLAND: So, that's right. My only question  
17 about that is whether this is one step further, that is  
18 this -- I appreciate you don't agree on the facts, but  
19 unfortunately for purposes of this argument we're assuming  
20 that real war crimes were committed here. Now, what if the  
21 government were to say yes, there are a lot of bad things that  
22 our employees can do that we're going to say are within the  
23 scope of employment, but this is just over the edge. That is,  
24 this is a direct violation of both our own law. and these are  
25 war crimes to torture people for -- not to get information,

1 not in pursuit of any lawful objective. President Bush in his  
2 press conference on Abu Ghraib could not have been clearer in  
3 saying this hurts the United States, this is against our  
4 policy, this is against the interests of the United States.  
5 So, why would it be -- leave aside what the government might  
6 take as a position in general about a contractor liability,  
7 you think it's unimaginable that the government could take a  
8 position that this kind of behavior is outside the scope of  
9 employment of our contractors?

10 MR. ZYMELMAN: Your Honor, I think that question  
11 doesn't hit on the issue in terms of Titan's liability.  
12 Obviously, if it's of the -- if the linguists were acting  
13 outside the scope of their employment Titan would have no  
14 liability at that point. So, under your hypothetical Titan  
15 wouldn't have any liability either.

16 JUDGE GARLAND: I see.

17 MR. ZYMELMAN: And so --

18 JUDGE GARLAND: I see. Yes.

19 MR. ZYMELMAN: -- the question here is assuming  
20 they're acting within the scope of employment are you going to  
21 subject Titan to state tort law regulation for the alleged  
22 actions of its linguists that are embedded in combat --

23 JUDGE GARLAND: Got it.

24 MR. ZYMELMAN: -- to provide, fill critical military  
25 billets. And I would submit, Your Honor, that *Boyle*, the

1 analysis in *Boyle* makes clear, as well as the constitutional  
2 allocation of responsibilities for the conduct of war, as well  
3 as all the other issues we've discussed makes it clear that --

4 JUDGE GARLAND: So your point really is that --

5 MR. ZYMELMAN: -- Titan should not be submitted --

6 JUDGE GARLAND: -- the plaintiffs don't get  
7 anything --

8 MR. ZYMELMAN: -- to that regulation.

9 JUDGE GARLAND: -- if you're not within the scope of  
10 employment. So --

11 MR. ZYMELMAN: Well, they may get --

12 JUDGE GARLAND: -- right?

13 MR. ZYMELMAN: -- they may have a, they may, I  
14 submit --

15 JUDGE GARLAND: In this case they don't get  
16 anything, so --

17 MR. ZYMELMAN: That's correct, because there are no  
18 employees.

19 JUDGE GARLAND: -- they have to argue that it is,  
20 they have to argue in order to win that it is within the scope  
21 of employment.

22 MR. ZYMELMAN: That is correct, Your Honor.

23 JUDGE GARLAND: So this hypothetical gets them  
24 nowhere.

25 MR. ZYMELMAN: That is correct, Your Honor.

1 JUDGE GARLAND: All right.

2 JUDGE KAVANAUGH: How about can we turn to ATS?

3 JUDGE GARLAND: I have --

4 JUDGE KAVANAUGH: Okay.

5 JUDGE GARLAND: -- one more set of questions about  
6 Boyle. So, what about these Army regulations, contractors  
7 accompanying the force, and the Army manual contractors on the  
8 battle field. It seemed quite express about supervision being  
9 the obligation of the contractor, and about the employees not  
10 being in the chain of command of the Army. What about that?

11 MR. ZYMELMAN: I have two responses to that, Your  
12 Honor. I think in the first answer that what matters for  
13 this, for the analysis of preemption here is what actually  
14 happened.

15 JUDGE GARLAND: Why? That's what I -- I know that  
16 has to be your answer, but I'm just wondering why is it? Why  
17 does it not matter if the Army's carefully considered  
18 regulations say that management of contractor activities is  
19 accomplished to the responsible contracting organization, not  
20 the chain of command, commanders do not have direct control,  
21 only contractors manage, supervise, and give directions to  
22 their employees, which is -- this statement is it must be  
23 clearly understood that contractors do not have direct control  
24 over contractor employees, only contractors manage and  
25 supervise their employees. It's repeated over and over again.

1 Why if this is the considered decision of the Army that's  
2 expressed in two, you know, official documents, why is that  
3 less important, or unimportant as compared to what actually  
4 happened on the ground?

5 MR. ZYMELMAN: Because, Your Honor, the question  
6 again is whether to submit Titan to state tort regulation for  
7 these claims would conflict with the interest expressed in  
8 combatant activities exception. And I submit that in a  
9 situation here where the record shows that the day to day  
10 activities of the linguists who were embedded in these  
11 military units were under the control of the military, and  
12 where the testimony from the highest echelons of the Executive  
13 to Congress was that the military was in fact in control of  
14 the performance of their duties that that is what matters.

15 JUDGE SILBERMAN: How do you explain, which is  
16 implicit in Judge Garland's question, the divergence between  
17 the contract and the practice?

18 MR. ZYMELMAN: Well, Your Honor --

19 JUDGE GARLAND: And not just the contract, but  
20 the -- the contract also, but the --

21 JUDGE SILBERMAN: Yes.

22 JUDGE GARLAND: -- regulations.

23 MR. ZYMELMAN: Well, again, because this is on  
24 summary judgment I think the meaning of the contract certainly  
25 as implemented in Iraq is that the supervision that was

1 provided was administrative supervision.

2 JUDGE SILBERMAN: That's what I thought you would  
3 say.

4 MR. ZYMELMAN: And so, but to the --

5 JUDGE GARLAND: What about the meaning of the  
6 regulations?

7 MR. ZYMELMAN: And the meaning of the --

8 JUDGE GARLAND: We hardly ever look at the way  
9 people actually behave to determine the meaning of a  
10 regulation issued by a government agency.

11 MR. ZYMELMAN: But again, Your Honor, in order to  
12 determine whether these claims should be preempted against  
13 Titan, should be preempted, I would submit that here the  
14 interest, the policy interest requires you to look at what  
15 actually happened on the battlefield.

16 And in terms of my explanation it is obviously to a  
17 certain degree speculation, but war, you know, the history of  
18 this contract certainly, I can't speak to the regulations, the  
19 history of this contract was that it was done well before the  
20 conflict in Iraq. You had a situation where you had an  
21 incredible need, and in essence the operational commanders  
22 decided on how they were going to employ these linguists, and  
23 how they were going to control these linguists. And that was  
24 supported consistently certainly by the Army in terms of the  
25 number of site managers that were approved for this contract.

1 And again, I don't think, you know, the factual record shows  
2 that it was in fact the Army that was giving these people day  
3 to day instructions on how they perform their duty.

4 JUDGE KAVANAUGH: On the ATS claim --

5 MR. ZYMELMAN: Yes.

6 JUDGE KAVANAUGH: -- *Sosa* seems to say that  
7 international law claims that are sufficiently universally  
8 recognized and definite can be recognized by the federal  
9 courts. Why isn't war crimes, which has been recognized,  
10 private commission of war crimes, which has been recognized at  
11 least since *Neurenberg* (phonetic sp.), one of those norms that  
12 should be applied by the federal courts?

13 MR. ZYMELMAN: Your Honor, first of all I think the  
14 outcome here is controlled by *Sanchez-Espinoza*, and would  
15 require -- where war crimes were in fact --

16 JUDGE KAVANAUGH: Assume it's not --

17 MR. ZYMELMAN: -- presented.

18 JUDGE KAVANAUGH: -- just applied --

19 MR. ZYMELMAN: Assuming that it is not, Your Honor,  
20 I disagree with your hypothetical, your question a little bit  
21 in terms of the characterization. War crimes, as we briefed,  
22 may not require state action, and may allow for private  
23 individuals, but it does require the presence of a  
24 belligerent. In order to have a war crime you must have a  
25 belligerent, which in this case is the United States. And I

1 submit that that brings you squarely within the reasoning of  
2 *Sanchez-Espinoza* that to allow those claims to proceed where  
3 implicit in the claim is that you were acting on behalf of a  
4 belligerent, you would trench on the sovereign immunity of the  
5 United States. That is, I submit, the holding of *Sanchez-*  
6 *Espinoza*.

7 I believe that it would in fact control the outcome, and  
8 nothing in *Sosa*, which talked at length about the prudential  
9 requirements to limit the scope --

10 JUDGE KAVANAUGH: Well, can't you read --

11 MR. ZYMELMAN: -- the scope of --

12 JUDGE KAVANAUGH: -- *Sosa* to talk about those  
13 prudential cautionary notes to be the set up to the ultimate  
14 test that *Sosa* sets forth, the ultimate test after going  
15 through those various factors requiring caution is universal  
16 recognition and sufficient definiteness?

17 MR. ZYMELMAN: But it's universal recognition of the  
18 nature of the claim, as well. And I would -- the footnote  
19 20 --

20 JUDGE KAVANAUGH: Right.

21 MR. ZYMELMAN: -- which talks about whether state  
22 action is required, I think it's noteworthy that they talk  
23 about that you need official action for torture, and that the  
24 one claim in *Kadic*, which is genocide, the one claim which is  
25 universally understood not to require a state or a

1 belligerent, that is detached from that is the only thing that  
2 has showed up in that parenthetical.

3 JUDGE KAVANAUGH: Well, war crimes, correct me if  
4 I'm wrong, I thought that had been universally recognized, and  
5 long recognized as being a state actor, or a private actor  
6 could be liable for war crimes.

7 MR. ZYMELMAN: Again, Your Honor, in the *Neurenberg*  
8 case, it goes back to the *Neurenberg* case --

9 JUDGE KAVANAUGH: Yes.

10 MR. ZYMELMAN: -- as you say, there was no question  
11 that the war crimes at issue there were in fact involved Nazi  
12 Germany, which was a state. And therefore the issue for  
13 private liability had to do with whether you were going to  
14 address a foreign, you know, extend the foreign sovereign  
15 immunity, the comedy considerations to the --

16 JUDGE KAVANAUGH: What about war crimes --

17 MR. ZYMELMAN: -- individual actor.

18 JUDGE KAVANAUGH: -- committed by a contractor  
19 acting for the belligerent?

20 MR. ZYMELMAN: I would submit, Your Honor, where  
21 that belligerent is the United States, that runs squarely  
22 within the concerns expressed in *Sanchez-Espinoza* that it  
23 is --

24 JUDGE KAVANAUGH: In *Sosa* carved out in footnote 21,  
25 for example, a couple of exceptions to the rule that they had

1 set forth, but it didn't carve out something that suggested an  
2 exception for U.S. officials in wartime, or U.S. contractors  
3 in wartime. It wouldn't have had to do the former because of  
4 sovereign immunity, but it didn't do the latter either.

5 MR. ZYMELMAN: And that issue, this issue has not  
6 really come up in the cases, Your Honor. This is the first  
7 time I believe where the belligerent is the United States  
8 other than in *Sanchez-Espinoza* where the --

9 JUDGE KAVANAUGH: But certainly it could have been  
10 anticipated as I read earlier from the Ninth Circuit brief in  
11 *Sosa* years before, and that's actually repeated in the  
12 solicitor general's brief at the Supreme Court level the  
13 possibility of extending ATS liability against U.S. officials  
14 was part of the mix.

15 MR. ZYMELMAN: And that issue never, was never  
16 addressed, and never considered, and I would submit doesn't  
17 change the holding of *Sanchez-Espinoza*, or the rationale  
18 behind *Sanchez-Espinoza*, which is one should not imply an  
19 action against contractors where the belligerent -- where it  
20 is in fact the United States as an essential actor in the  
21 underlying claim. We also submit, Your Honor, alternative  
22 grounds which --

23 JUDGE KAVANAUGH: The text of the ATS doesn't  
24 distinguish among the United States as defendants from foreign  
25 defendants, does it?

1 MR. ZYMELMAN: No, it does not, Your Honor. But the  
2 ATS --

3 JUDGE KAVANAUGH: Nor would customary international  
4 law, obviously, distinguish between the home state, the home  
5 country versus foreign countries in terms of whether the norm  
6 is to be recognized in the home country's courts.

7 MR. ZYMELMAN: I'm not sure about that, Your Honor.  
8 I'm --

9 JUDGE KAVANAUGH: Of course, every nation -- not  
10 every, lots of nations have sovereign immunity that may make  
11 it a hollow promise that's customary international law.

12 MR. ZYMELMAN: And as a matter of federal common  
13 law, Your Honor, I do think that considering whether these  
14 acts were conducted, you know, in the context of a prison in a  
15 U.S. war zone controlled by the U.S. military should inform  
16 whether you should imply a cause of action. We also submit,  
17 Your Honor, that corporations are not liable under the ATS for  
18 the reasons we've advanced in our brief, and that if one were  
19 to --

20 JUDGE KAVANAUGH: There's a whole slew of cases out  
21 there. Are they all wrong? Everyone's missing the boat on  
22 that?

23 MR. ZYMELMAN: I would submit, Your Honor, that none  
24 of them have considered the issues of -- have considered the  
25 holding in *Malesko*, and it's relationship after *Sosa* to

1 whether you would imply a federal common law claim against a  
2 corporation. Moreover, Your Honor, I would submit that the  
3 special factors analysis would apply to this claim where the  
4 United States is the belligerent, and is the state actor on  
5 behalf of this conduct that is alleged to have occurred.

6 JUDGE GARLAND: Can I just ask, this is on the  
7 ATS --

8 JUDGE SILBERMAN: Let me just one thing --

9 JUDGE GARLAND: I'm sorry, please, go ahead.

10 JUDGE SILBERMAN: -- you're talking about the  
11 factors in *Sosa*.

12 MR. ZYMELMAN: No, Your Honor. Well, the special  
13 factors analysis --

14 JUDGE GARLAND: Like you're talking about like a  
15 *Bivens* special --

16 MR. ZYMELMAN: I'm sorry?

17 JUDGE GARLAND: -- You're talking about *Bivens*  
18 special factors analysis?

19 MR. ZYMELMAN: The *Bivens* special factors  
20 analysis --

21 JUDGE SILBERMAN: Yes. Okay.

22 MR. ZYMELMAN: -- Your Honor.

23 JUDGE GARLAND: On the point about *Espinoza*, I'm not  
24 really exactly clear about what aspect of that makes you think  
25 that a suit against a private actor can't be brought, even if

1 the United States is the belligerent?

2 MR. ZYMELMAN: Because it would trench on the  
3 sovereign immunities of the United States no differently than  
4 if they were acting -- because the actions of the United  
5 States are essential to the underlying --

6 JUDGE GARLAND: Okay.

7 MR. ZYMELMAN: -- claim.

8 JUDGE GARLAND: But I'm looking for the holding in  
9 *Sanchez-Espinoza* that gets you there. Were there --

10 MR. ZYMELMAN: The holding, Your Honor, is that  
11 there were claims for war crimes and for torture, and what  
12 then Judge Scalia held was that whether these people were  
13 acting as private actors or as state actors those claims  
14 failed. That is the holding of *Sanchez-Espinoza*.

15 JUDGE GARLAND: Well, right. But did it hold with  
16 respect to whether these are war crimes or not, what was  
17 alleged? Was that considered in the case? The allegations in  
18 that case are not the same as the allegations here, right?

19 MR. ZYMELMAN: Well, the factual allegations are of  
20 torture and of rape, and are of assault, and of --

21 JUDGE GARLAND: Right. But they're not --

22 MR. ZYMELMAN: -- extrajudicial killing.

23 JUDGE GARLAND: Yes. But they're not treatment of  
24 prisoners, or are they? They're not the war crime of --

25 MR. ZYMELMAN: I don't believe it's --

1 JUDGE GARLAND: -- torturing prisoners of war?

2 MR. ZYMELMAN: And I would submit, Your Honor, that  
3 I don't see why one would draw a distinction between what kind  
4 of war crime one is alleging, and I don't know that one can  
5 tell based on the *Pellik* (phonetic sp.) decision whether these  
6 torts were committed against prisoners or not.

7 JUDGE GARLAND: Okay. Thank you.

8 MR. ZYMELMAN: For all the reasons -- if there's no  
9 further questions, for all the reasons we've addressed here  
10 and set forth in our brief we request that you affirm the  
11 judgment of the District Court.

12 JUDGE GARLAND: Okay. Thank you. Let's see, Mr. --  
13 I'm not even going to try to pronounce it, so you start.

14 ORAL ARGUMENT OF J. WILLIAM KOEGEL, JR.

15 ON BEHALF OF THE INTERVENORS

16 MR. KOEGEL: May it please the Court, Bill Koegel  
17 for the CACI Intervenor, Your Honor. The political question  
18 doctrine bars both these actions. In both actions here --

19 JUDGE KAVANAUGH: So, if Congress passed a statute  
20 regulating contractors courts couldn't enforce that statute  
21 because of the political question doctrine?

22 MR. KOEGEL: It would be a very fact specific  
23 situation, Judge Kavanaugh.

24 JUDGE KAVANAUGH: Okay. Let me try to make it fact  
25 specific. Congress passes a statute saying that contractors

1 are subject to private civil liability if they engage in  
2 torture, can a court enforce that congressional prohibition?

3 MR. KOEGEL: Only to the extent that it would not  
4 intrude on strategy and tactics on the battlefield made by the  
5 United States. That activity --

6 JUDGE KAVANAUGH: Well, hasn't Congress made a  
7 judgment on that when they enacted the statute?

8 MR. KOEGEL: It would obviously be a closer question  
9 than present here because if the Executive affirmatively seeks  
10 a determination of judicial review, then it's much more  
11 difficult to argue that the political question doctrine bars  
12 that review.

13 But in this instance where the prosecution of war is  
14 committed exclusively to the Executive and the legislative  
15 branches, and not to the judiciary, the strategy and tactics  
16 employed on the battlefield are simply not subject --

17 JUDGE KAVANAUGH: See, that's what I don't get, the  
18 judiciary clearly has a role in regulating, in policing  
19 certain wartime issues. That's from *Youngstown* through  
20 *Boumediene* we've seen that. And the question in those cases  
21 usually is whether the Executive has transgressed the boundary  
22 set by Congress or by the Constitution.

23 MR. KOEGEL: Or by the Constitution.

24 JUDGE KAVANAUGH: And the political question  
25 doctrine would have said courts shouldn't get involved in any

1 of those cases, and rather except for the question of actually  
2 declaring war, which is still the subject of some dispute in  
3 the case law, courts have gotten involved in all sorts of  
4 wartime questions.

5 MR. KOEGEL: Those wartime questions have been  
6 limited to statutory or constitutional rights. For example,  
7 in *Hamdi* or *Boumediene* where there were statutory right to  
8 habeas corpus involved in the one instance, and a  
9 constitutional right to habeas corpus involving an enemy  
10 combatant in the other, the courts clearly have staked out  
11 appropriately the jurisdiction to review and to enforce those  
12 rights, both statutory and constitutional. Neither are  
13 present here. In this instance we're dealing with  
14 plaintiffs --

15 JUDGE KAVANAUGH: I guess you can gerrymander the  
16 political question doctrine that way, but usually the doctrine  
17 would say the whole area is just not for the -- beyond the  
18 competence of the courts.

19 MR. KOEGEL: Certainly with respect to the facts  
20 presented here that's correct. In response to Judge Garland's  
21 question about whether we're talking about field preemption,  
22 or conflict preemption, I think there's a passage in *Garamendi*  
23 that's relatively instructive. If there is an area that is  
24 committed exclusively to the federal government and in which  
25 the states have no role to play, and keeping in mind that the

1 Constitution affirmatively forbids the states from engaging in  
2 the calculus of waging war, in an area where the states have  
3 no traditional competence, where there is no traditional area  
4 of state concern, it might well be appropriate to find field  
5 preemption. On the other hand where there is an area --

6 JUDGE KAVANAUGH: *Garamendi* helps you on preemption,  
7 does it really help you on political question?

8 MR. KOEGEL: I think by analogy it does.

9 JUDGE KAVANAUGH: Okay.

10 JUDGE GARLAND: Is your position that -- I mean, we  
11 said in *Harbury* that it matters much whether the Executive has  
12 filed something. In fact, interpreting of all of our previous  
13 cases, and noted in all of those cases the Executive had said  
14 there was a problem, either a scope of employment problem,  
15 that is it was within, or that it was a political question,  
16 and that we should be careful, maybe a little bit more. The  
17 political question doctrine ordinarily would not apply to a  
18 court case unless the government has affirmatively come in and  
19 said so. This takes us pretty far past our previous cases,  
20 doesn't it?

21 MR. KOEGEL: I have two responses to that, Judge  
22 Garland. First, that action and the other decisions from this  
23 Court, such as *Gonzalez* (phonetic sp.), *Vera* (phonetic sp.),  
24 or *Schneider* (phonetic sp.), or *Bancolt* (phonetic sp.) all  
25 involved claims brought against United States government

1 officials in which the United States was in fact represented.  
2 The United States therefore had to take a position in those  
3 cases with respect to the implications for foreign affairs.  
4 In this action the United States is not a party. The  
5 Plaintiffs have sued neither the United States nor any  
6 government personnel.

7 JUDGE GARLAND: I understand. But you're taking the  
8 position in both in this case and your other case that this is  
9 deadly important to the United States, that it would be a  
10 disaster for the United States war making powers if it  
11 didn't -- if there weren't preemption here. There's no  
12 question that the United States knows what's going on in this  
13 courtroom, this is a publicized case, and there have been  
14 letters back and forth with the Army. So, if it really is as  
15 important as you say, the fact that the government isn't a  
16 party here, hardly prevents it from filing an amicus brief,  
17 which it has done in other cases.

18 MR. KOEGEL: That's correct, Your Honor, it has.  
19 Although generally in claims brought against contractors it  
20 has not been the practice of the United States in cases  
21 brought against contractors arising from the war in Iraq to  
22 file amicus briefs or to intervene.

23 JUDGE GARLAND: Right. I know that. But the  
24 question is what should we take from that?

25 MR. KOEGEL: I don't believe you can draw any

1 significance from that, Judge Garland. In fact, the Supreme  
2 Court has never laid down a requirement for the United States  
3 to file a statement of interest, or otherwise participate in  
4 an action.

5 JUDGE GARLAND: Has there ever been a case where --  
6 I have no idea what the answer to this is, where the court  
7 found a political question where the government didn't argue  
8 that there was a political question?

9 MR. KOEGEL: I believe that occurred last year in  
10 the *Carmichael* decision in the Northern District of Georgia in  
11 which the District Court dismissed the action on the political  
12 question doctrine --

13 JUDGE GARLAND: Okay.

14 MR. KOEGEL: -- after finding that the military's  
15 responsibilities for convoys --

16 JUDGE GARLAND: I guess I meant whether there was a  
17 Court of Appeals or Supreme Court opinion?

18 MR. KOEGEL: I'm not aware of one, Judge.

19 JUDGE GARLAND: Let me ask, just to be sure I  
20 understand your political question point, your point is that  
21 the government hires a contractor and does not supervise.  
22 Let's say the contract expressly says you're on your own,  
23 buddy, that that's a political question?

24 MR. KOEGEL: If the government chooses to exercise  
25 control of the contractor in that manner, that's correct.

1 JUDGE GARLAND: It's still a political question.

2 MR. KOEGEL: It's still a political question.

3 JUDGE GARLAND: So, none of the elements that  
4 counsel here is arguing for with respect to *Garamendi*, or with  
5 respect to *Boyle* would apply. So, if the government hires a  
6 contractor and -- does the government have to say go to Iraq?  
7 I mean, does it at least have to direct that the contractor go  
8 to Iraq?

9 MR. KOEGEL: For purposes of preemption, or purposes  
10 of political question?

11 JUDGE GARLAND: No, for purposes of the political  
12 question.

13 MR. KOEGEL: I would anticipate that for purposes of  
14 the political question doctrine a contractor would need to be  
15 engaged with the United States in a way that would implicate  
16 policies formulated and adopted by the United States, because  
17 that's precisely the problem here. It's impossible to  
18 litigate these cases without --

19 JUDGE GARLAND: I thought that, at least your co-  
20 counsel here is taking the position the way you know that the  
21 policies of the United States are implicated is that the  
22 United States actually supervises. And I take it you're  
23 arguing for something much broader, which is all the  
24 government has to do is hire the contractor without any  
25 constraints of any kind, and at least send them to Iraq, or

1 anywhere in Iraq, even in a non-combat zone, or do we have to  
2 decide whether there's a combat zone?

3 MR. KOEGEL: I'm not certain it goes that far, Your  
4 Honor, but it's certainly not the fact scenario presented --

5 JUDGE GARLAND: I know, but --

6 MR. KOEGEL: -- to this Court.

7 JUDGE GARLAND: -- you know --

8 MR. KOEGEL: And the political --

9 JUDGE GARLAND: -- as I said to the other counsel  
10 here we've got to know, whatever we decide today is going to  
11 bleed over into the next case. So, we have to know where the  
12 line is, and --

13 MR. KOEGEL: Well, this Court --

14 JUDGE GARLAND: -- you've told me one line not to  
15 draw which is supervision. The government does not have to  
16 supervise the contractor in any way for this to be a political  
17 question.

18 MR. KOEGEL: If that is the --

19 JUDGE GARLAND: That's your point, right?

20 MR. KOEGEL: That's correct.

21 JUDGE GARLAND: All right.

22 MR. KOEGEL: If that is the policy adopted by the  
23 United States government in the deployment of a civilian  
24 contractor the political question doctrine nevertheless  
25 applied. Because as this Court's decision has made clear --

1 JUDGE GARLAND: Let me ask one more question. I'm  
2 sorry. I don't mean to cut you off, but I do understand what  
3 you're saying. And do you also take the position that they  
4 take that even if the United States says in its regulations,  
5 the Army says in its regulations that they are subject to  
6 supervision, that they are not subject to supervision or  
7 anything else, and they are subject to civil liability, which  
8 they said in the regulation, still the political question  
9 doctrine applies?

10 MR. KOEGEL: In this situation, that's correct, Your  
11 Honor.

12 JUDGE GARLAND: Even if the United States in its  
13 regulation says they are subject to civil --

14 MR. KOEGEL: If it requires --

15 JUDGE GARLAND: -- liability?

16 MR. KOEGEL: -- an examination of the underlying  
17 government policies, the political question doctrine bars that  
18 action.

19 JUDGE GARLAND: So, notwithstanding the role of the  
20 Executive, we should not intervene here. Notwithstanding the  
21 Executive's view that civil liability is okay we should not  
22 intervene here, civil liability should not be okay, because  
23 that would be a political question.

24 MR. KOEGEL: I don't think the Court can read that  
25 regulation as permitting state regulation of combatant

1 activities.

2 JUDGE GARLAND: Was there any other kind of civil  
3 liability they could get?

4 MR. KOEGEL: Under various scenarios it's  
5 conceivable there could be a federal statutory claim, or  
6 federal common law claim that might be asserted against a  
7 civilian contractor that's not present here.

8 JUDGE GARLAND: Okay. Thank you.

9 MR. KOEGEL: Thank you, Your Honor.

10 JUDGE GARLAND: Ms. Burke. Ms. Burke, could I ask  
11 you to answer if you can what I thought was a very powerful  
12 argument by opposing counsel on the argument you raised at the  
13 end, which is --

14 MS. BURKE: Sure.

15 JUDGE GARLAND: -- the argument about the Westfall  
16 Act, which is you really are between a rock and a hard place,  
17 that is this has to be within the scope of employment,  
18 otherwise you can't collect against the contractor.

19 ORAL ARGUMENT OF SUSAN L. BURKE, ESQ.

20 ON BEHALF OF THE APPELLANTS

21 MS. BURKE: No, that's actually not correct, because  
22 what you're looking at is you're looking at the corporation in  
23 the position of the soldier. And so, with the soldier you're  
24 looking at a scope of employment, but to determine whether or  
25 not the contractor is in that same position you're not looking

1 at employment, it's not an employment relationship, you're  
2 going to look at the contract terms.

3 JUDGE GARLAND: I'm still not following. I mean, if  
4 the soldiers, if the linguists and the interrogators here were  
5 not acting within the scope of their employment --

6 MS. BURKE: With the corporate defendant.

7 JUDGE GARLAND: Yes. Hold on. Hold on. Let me  
8 go --

9 MS. BURKE: Okay.

10 JUDGE GARLAND: -- one step at a time.

11 MS. BURKE: Okay.

12 JUDGE GARLAND: If they are not acting within the  
13 scope of their employment, D.C. law would not allow you to get  
14 recovery from their employer, right?

15 MS. BURKE: Yes, Your Honor. And our position is  
16 that the linguists were within the scope of employment,  
17 because as Judge Kavanaugh explained, this --

18 JUDGE GARLAND: You mean when they did the  
19 torturing?

20 MS. BURKE: Yes. Because the scope of employment,  
21 the way it's defined in D.C. is so broad that it's basically  
22 are you on duty type of analysis.

23 JUDGE GARLAND: All right. So -- okay. So, that  
24 would mean then that they -- if this were a *Westfall* case  
25 they'd get a *Westfall* certificate?

1 MS. BURKE: No, because that's where you are not  
2 looking at them as employees of the government. What the  
3 government analysis would be, the equivalent to the *Westfall*  
4 would not be a scope of employment, it would be whether or not  
5 they abided by the contractual duties, because it's a  
6 contractual relationship between these private parties and the  
7 government, it's not an employment relationship. So, what  
8 we're -- what you would be looking for, the equivalent of a  
9 *Westfall* certification in this context, and what's missing,  
10 you know, what's not here, the equivalent would be a United  
11 States declaration that when they were doing those actions,  
12 when Titan and its employees were doing those actions, they  
13 were performing the contractual duties that the United States  
14 had asked them to do. They were within the scope of the  
15 contract. And so, there, you know, that would be an  
16 independent contractor's *Westfall* equivalent, and there you  
17 can see quite clearly that --

18 JUDGE GARLAND: Well, what about Judge Kavanaugh's  
19 point that normally in these cases we look at D.C. law about  
20 scope of employment, and for the reasons Judge Kavanaugh  
21 explained in his opinion, which, you know, points out how  
22 difficult it is to believe but nonetheless is true, you know,  
23 rapes by delivery men are included.

24 MS. BURKE: But --

25 JUDGE GARLAND: Under D.C. law.

1           MS. BURKE: I understand that, sir, but what that  
2 really goes to is the employment relationship. What you would  
3 be doing in order to determine whether a private corporation  
4 that contracted with the government is in the same status as a  
5 soldier is you would look at that relationship, you'd look at  
6 the relationship between the United States and between Titan  
7 and its employees.

8           And so, when you look at that you don't have to get to  
9 the notion of employment law, you're really in the zone of  
10 contract law. And you would be asking the United States is  
11 what they did within the terms of what you asked them to do?  
12 Because you didn't employ them, you didn't ask them just to go  
13 over and do whatever it is you wanted them to do, you asked  
14 them to go over and do a specific task translation. And the  
15 contract terms which are in the record are very clear, do the  
16 translation, and make sure you do it in accord with the laws  
17 of war. So, that would be the appropriate analysis when you  
18 are looking for the United States to speak in the equivalent  
19 of a *Westfall* situation.

20           JUDGE SILBERMAN: Might I take you into another  
21 question? Is it your position that under the Federal Tort  
22 Claims Act, and the exemption for combat activities a private  
23 contractor for the government could never under any  
24 circumstances be entitled to that exemption?

25           MS. BURKE: The scope --

1 JUDGE SILBERMAN: The exemption would never cover a  
2 lawsuit against a private contractor.

3 MS. BURKE: The scope of that exemption wouldn't  
4 decide that, it would be the scope of the implied preemption.  
5 So, if you had a situation in which the contractor abided by  
6 its contract and complied with all the terms, and that that  
7 contractual compliance served to benefit the United States,  
8 and served to further that combatant interest to get the  
9 government's job done, then you may be in the same situation  
10 as you are in *Boyle* where you had contract compliance that  
11 furthered the government's interest. Now, you could never  
12 have that type of --

13 JUDGE SILBERMAN: So, you're not relying on it,  
14 you're not making any argument to the effect that as a --  
15 there could not be liability to a government contractor under  
16 the combat activities exemption?

17 MS. BURKE: It does not turn, that decision does not  
18 turn on the text of the FTCA, it turns on that scope of the  
19 common law *Boyle* doctrine.

20 JUDGE SILBERMAN: Well, in other words I just want  
21 to make sure --

22 MS. BURKE: Yes.

23 JUDGE SILBERMAN: -- I understand that that  
24 exemption could be there based on the statute plus *Boyle*?

25 MS. BURKE: That's correct, Your Honor, but under

1 that analysis.

2 JUDGE SILBERMAN: And the question for us would be  
3 the proper interpretation of *Boyle* in that context. But isn't  
4 it fair to say that the exemption is broader for combat  
5 activities than it is with respect to the discretionary  
6 action, because the discretionary action focuses on specific  
7 actions of the government, whereas the combat activities is  
8 broader language, it arises out of the combat activities. On  
9 its face it couldn't cover, on that language on its face could  
10 cover other than the government.

11 MS. BURKE: Well, you know, in a sense, and this is  
12 an unsatisfactory answer, but yes and no, because the  
13 combatant activities exception really subsumes within it the  
14 phrase the combatant, and so it has the whole law of war, the  
15 federal common law of war within it. So, there is more  
16 definiteness to that than the words themselves may apply.

17 JUDGE SILBERMAN: You don't have any doubt that in  
18 this case the judge was right in concluding that there was war  
19 and there were combatant activities?

20 MS. BURKE: There was definitely war, and there was  
21 definitely combatant activities. Now, there was not the  
22 activities themselves, the cause of action what arose here did  
23 not actually happen in combat.

24 JUDGE SILBERMAN: It doesn't matter, it's still  
25 combat activity.

1 MS. BURKE: It's still within the combatant  
2 activities.

3 JUDGE SILBERMAN: Okay.

4 MS. BURKE: Because that is a broader term than  
5 combat. But we would say, and this is really what we'll get  
6 to the CACI argument, but the duty of care is different in  
7 combat than it is in that broader zone of combatant  
8 activities.

9 JUDGE KAVANAUGH: A lot of this seems to turn on  
10 conflict preemption versus field preemption, and some of what  
11 we've been talking about, and I want to ask you about  
12 *Garamendi*, which the Intervenor noted, and tried to raise  
13 before. In footnote 11 of *Garamendi* in terms of the real  
14 keys, there are conflict or it's the field preemption --

15 MS. BURKE: Right.

16 JUDGE KAVANAUGH: -- it says if a state were simply  
17 to take a position on a matter of foreign policy with no  
18 serious claim to be addressing a traditional state  
19 responsibility, field preemption might be the appropriate  
20 doctrine whether the national government had acted, and if it  
21 had without reference to the degree of any conflict the  
22 principle having been established that the Constitution  
23 entrusts foreign policy exclusively to the national  
24 government. And then that footnote cites *Hines*, and then it  
25 cites *Boyle*.

1 MS. BURKE: And, Your Honor, what I understand from  
2 that is that what that is saying is that if for example, you  
3 know, the State of Texas passed a law that said, you know, the  
4 war in Iraq is illegal and no Texans can go fight, that that  
5 would be an issue of field preemption. I do not think that  
6 that --

7 JUDGE KAVANAUGH: Well, why not --

8 MS. BURKE: -- has any --

9 JUDGE KAVANAUGH: Why --

10 JUDGE SILBERMAN: Doesn't it ask, doesn't it require  
11 us to ask how much interest does the District of Columbia law  
12 have in the relations that take place in Iraq in these  
13 circumstances, as compared to the federal government?

14 MS. BURKE: No. What it really asks you to do --

15 JUDGE SILBERMAN: Is it fair to say the District of  
16 Columbia has almost no interest in this at all?

17 MS. BURKE: Your Honor, what *Boyle* asks you to do is  
18 ask okay, does the regular course of tort litigation in D.C.,  
19 those regular duties that apply to all corporations, do those  
20 conflict, is there some type of conflict that would intrude on  
21 the sovereign if you let --

22 JUDGE SILBERMAN: I thought that footnote perhaps  
23 asked a broader question.

24 MS. BURKE: I don't understand it to, sir. I do  
25 think that the federal common law that you are looking at here

1 is one of an extension of sovereign immunity. So, you --

2 JUDGE SILBERMAN: So, we switched from federal  
3 common law. But I was talking about D.C. law for a moment.  
4 D.C. law. And it's fair -- if this is any kind of balancing  
5 test D.C.'s law, D.C.'s interests are pretty minimal, isn't  
6 that correct?

7 MS. BURKE: Well, Your Honor, what you --

8 JUDGE SILBERMAN: Isn't it fair to say that? D.C.'s  
9 interest is minimal, almost trivial.

10 MS. BURKE: I don't know, because to me every  
11 American in every state has an interest in ensuring that the  
12 Americans abide by the law of war, and I don't think that the  
13 geographic situation of where you are changes that interest.  
14 So, the question really is does D.C. law -- does the  
15 application of D.C. law further our national interests of  
16 ensuring --

17 JUDGE KAVANAUGH: Well, the states could define that  
18 interest quite differently once they could put heavy punitive  
19 damages on a case like this, another state might not, some  
20 states might give the State Attorney General the ability to  
21 bring suits against military contractors, other states might  
22 not, and some states might define the laws of war which are  
23 not always crystal clear, differently from how other states do  
24 it. There would be a patchwork of state laws regulating U.S.  
25 military contractors in war zones, wouldn't there?

1 MS. BURKE: There would be a patchwork of laws that  
2 apply to U.S. military contractors. There is now, and there  
3 likely always will be. If you were a defense contractor  
4 merely by the fact that you are hired to assist with war  
5 doesn't suddenly insulate you from acting, you know, in accord  
6 with all of the different state regulation. So, there's no  
7 reason to displace the entirety --

8 JUDGE SILBERMAN: What was the -- the contract here  
9 between CACI and the government, did it state what the law  
10 of -- what applied for the interpretation?

11 MS. BURKE: It did not speak to which -- no, it did  
12 not speak to the issue of which law should apply. It did put  
13 an affirmative duty to abide by the federal law.

14 JUDGE SILBERMAN: Well --

15 JUDGE KAVANAUGH: Can I ask you -- sorry.

16 JUDGE SILBERMAN: -- I'm a little curious as to why  
17 is D.C. law involved at all?

18 MS. BURKE: D.C. law is --

19 JUDGE SILBERMAN: Under the contract.

20 MS. BURKE: D.C. law is not being looked to to  
21 provide the rule of decision for the governing of the  
22 contract, rather it is that these claims, the claims being  
23 made, the type of conduct at issue basically violates the  
24 state law, the federal law, the international law.

25 JUDGE SILBERMAN: Put aside, we'll get to the

1 federal and international --

2 MS. BURKE: Okay.

3 JUDGE SILBERMAN: -- separately. I'm curious now  
4 about the more I think about this you could theoretically have  
5 50 different state laws applying to this contract under your  
6 theory.

7 MS. BURKE: No, you couldn't because that's exactly  
8 the point of *Boyle*. You are looking to see whether there's a  
9 conflict, and you are looking to see whether --

10 JUDGE SILBERMAN: Well, no, wait a minute, you said  
11 that D.C. law -- I mean, federal law would have governed the  
12 interpretation of the contract, but D.C. law governs the  
13 implementation of the contract.

14 MS. BURKE: No. This is --

15 JUDGE SILBERMAN: Is that what you're saying?

16 MS. BURKE: No, I'm sorry, Your Honor, it's not,  
17 because we are not suing under contract.

18 JUDGE SILBERMAN: No, but the --

19 MS. BURKE: Right?

20 JUDGE SILBERMAN: But you're suing, alleging the  
21 implementation of the contract was a tort.

22 MS. BURKE: Right. We are suing under basically --

23 JUDGE SILBERMAN: So, why doesn't that necessarily  
24 bring into question the contract? As a matter of fact, Judge  
25 Garland was looking at the contract. But now you're telling

1 me no, no, this has got nothing to do with the contract  
2 because after all D.C. law couldn't interpret the contract.

3 MS. BURKE: What I'm saying is that what we are  
4 looking at is corporate liability for breaching a duty. And  
5 the duty of care is the duty to refrain from physically  
6 harming the people that are in detention.

7 JUDGE SILBERMAN: Duty of care under what law?

8 MS. BURKE: The duty of care under all law. The --

9 JUDGE SILBERMAN: Wait. No, no, no, no, no, no.  
10 That won't work.

11 MS. BURKE: Well, it's --

12 JUDGE SILBERMAN: We have to be a little bit more  
13 specific.

14 MS. BURKE: Well, we have not --

15 JUDGE SILBERMAN: In other words, is there D.C. --

16 MS. BURKE: Right.

17 JUDGE SILBERMAN: -- D.C. law is involved here, is  
18 it correct?

19 MS. BURKE: Well, we have not actually reached that  
20 point in the proceedings where we've briefed which law would  
21 apply. So, it has --

22 JUDGE SILBERMAN: Well, could we ask?

23 JUDGE KAVANAUGH: Could Iraqi law apply?

24 MS. BURKE: Yes --

25 JUDGE SILBERMAN: Sorry?

1           MS. BURKE:  -- Iraqi law, you know, there is a  
2 theoretical train of events you could say okay, Iraqi law  
3 would apply, you could say D.C. law would apply, which is  
4 frankly why the federal common law under the color of  
5 authority in ATS is the --

6           JUDGE KAVANAUGH:  So, in the state --

7           MS. BURKE:  -- cleaner way to go.

8           JUDGE KAVANAUGH:  -- common law claim, the treatment  
9 of prisoners in a war zone by U.S. military contractors could  
10 be governed by the enemy's law?

11          MS. BURKE:  No, it's not that, because you could not  
12 apply enemy law to the claims.

13          JUDGE KAVANAUGH:  No, the enemy country's law.

14          MS. BURKE:  No, but you could not because of the --

15          JUDGE KAVANAUGH:  Iraq was the enemy country,  
16 correct?

17          MS. BURKE:  At the time of this episode no, it had  
18 already --

19          JUDGE KAVANAUGH:  Assume hypothetically this was in  
20 March of '03.

21          MS. BURKE:  Then it would be a different analysis  
22 because then you wouldn't have the statement factors coming in  
23 to say, you know --

24          JUDGE KAVANAUGH:  Okay.

25          MS. BURKE:  -- you have a public interest issue that

1 you would never apply enemy law because you have the public  
2 interest there. And so, when we look at the conflict of law  
3 analysis, which we have not briefed and has not been done in  
4 this proceeding yet --

5 JUDGE GARLAND: So, it's still possible that the  
6 judge would hold that the District of Columbia has no interest  
7 in this, or insufficient interest to assert its authority, and  
8 dismiss this case on the merits.

9 MS. BURKE: He could do that. The other way --

10 JUDGE SILBERMAN: Why isn't that relevant in the  
11 preemption analysis?

12 MS. BURKE: The preemption really looks to ascertain  
13 whether there's a conflict by applying the tort law with the  
14 federal interests.

15 JUDGE SILBERMAN: You're asking, you're saying the  
16 preemption analysis should look only at the federal side of  
17 the balancing test, not at the countervailing side.

18 MS. BURKE: No, we --

19 JUDGE SILBERMAN: But in *Boyle* there was a  
20 consideration of both side, wasn't there?

21 MS. BURKE: Yes. And if you look in the *Maray*  
22 case --

23 JUDGE SILBERMAN: So, why then is, then why isn't it  
24 what law you're relying on relevant to the preemption  
25 analysis?

1 MS. BURKE: And Your Honor, I'm not saying that it's  
2 not relevant. What I'm saying is that although --

3 JUDGE SILBERMAN: It's not relevant, but you don't  
4 want to tell me what it is.

5 MS. BURKE: It's not that, Your Honor. It's that it  
6 may be -- and the reason I speak in kind of generalities about  
7 all law is because it has not yet been ruled on which law.  
8 But assuming that it's D.C. law, assuming that we stated D.C.  
9 law, then you look at it and say all right, the D.C. law on  
10 say assault and battery, would applying the D.C. law on  
11 assault and battery create a conflict with the federal  
12 sovereign interest that's at play here? And when you look at  
13 it that way you say okay, well, what is the federal sovereign  
14 interest? The federal sovereign interest is defined by the  
15 Executive, and by the Executive's proclamations, and by the  
16 Executive determinations that the Iraq war should be, they  
17 should abide by the Geneva Conventions.

18 So, the reason that you do not get a conflict and you're  
19 in a *Maray* situation rather than a *Boyle* situation is because  
20 the application of the state law yields the same result that's  
21 sought by the United States in its contract.

22 JUDGE KAVANAUGH: You've appropriately for your  
23 position used the word conflict repeatedly, and it goes back  
24 really to this question, is this a conflict situation, or is  
25 this a field situation? And that footnote again referred in

1 Boyle has similar analysis to whether something's an area of  
2 traditional state responsibility, is regulating foreign  
3 detainees in a war situation a traditional state  
4 responsibility, I guess is a relevant question.

5 MS. BURKE: And the answer, Your Honor, is no. I  
6 mean, it is not --

7 JUDGE KAVANAUGH: Well, doesn't that then kick it  
8 into a field preemption type of situation?

9 MS. BURKE: No, because you only -- what you are  
10 looking at in *Boyle* and you're looking at in that implied  
11 preemption is protecting the sovereign. How do we protect the  
12 sovereign in the circumstances that are at hand here, and in  
13 the circumstances that may arise in the future by your rule of  
14 law? And so, you have to start the analysis with the federal  
15 interests, and the federal interests, there is a federal  
16 interest in war making. But there is a federal interest in  
17 lawful war making. The federal interest is to make sure that  
18 Americans engage in conduct that's befitting of Americans, and  
19 that it's consistent with the law of war. So --

20 JUDGE SILBERMAN: Let me ask you a question about  
21 that. If the government -- let's assume the government  
22 contractor here was doing precisely what the military wished  
23 him to do in every jot and tittle, you know, complete  
24 exclusive operational control, although I'm not sure that's an  
25 appropriate standard, but let's assume that was true, as a

1 fact or matter, put aside the whatever the contract said,  
2 that's the way it operated. Why is it in your view in the  
3 government's interest for the contractor to be liable to a  
4 private part?

5 MS. BURKE: In that particular situation you would  
6 be saying, and this really gets into the analysis of the  
7 conduct itself, because take the example of, you know, the  
8 putting the men in the naked pyramid, if the government said  
9 to do that, and it was government officials saying to a  
10 private contractor I want you to go and stack those men up,  
11 you know, then you would have that government sovereign  
12 interest in both the discretionary function and the war  
13 making, that okay, it is to be done this way. But you then  
14 clearly would get, you then clearly get off into this separate  
15 issue, which is can the United States qua United States do  
16 that? And it would turn on whether you had a sovereign  
17 statement, whether you had the Department of Justice coming in  
18 and saying yes, this is what the officials did, and that's  
19 what they're allowed to do, and therefore it's in the  
20 sovereign interest that this claim not proceed against the  
21 private party. We don't have that here.

22 JUDGE SILBERMAN: But suppose you did?

23 MS. BURKE: It would be a different case.

24 JUDGE SILBERMAN: Suppose you did, what would be the  
25 answer?

1           MS. BURKE: I think if that were the situation then  
2 the court would end up having to defer to the sovereign's  
3 definition of the war making interests. But that's not what  
4 we're confronting here. What we're confronting is a situation  
5 in which the military, the three military witnesses that  
6 testified, testified uniformly they did not supervise --

7           JUDGE GARLAND: All right. Can I just ask, and  
8 pause for just one second. Your position is that if the  
9 government expressly orders a contractor to commit a war crime  
10 for no reason relating to the collection of information or  
11 anything else other than to torture prisoners being held,  
12 detainees, or prisoners, or whatever you call it, you're  
13 giving up under those circumstances?

14           MS. BURKE: Well, Your Honor, I don't --

15           JUDGE GARLAND: It seems to me you -- I'm not saying  
16 you shouldn't --

17           MS. BURKE: Right.

18           JUDGE GARLAND: -- or you should, I just want to be  
19 clear --

20           MS. BURKE: Well, Your Honor, I think that --

21           JUDGE GARLAND: -- your answer to Judge Silberman  
22 seems to me that you say okay, you lose under those  
23 circumstances, is that right?

24           MS. BURKE: Well, Your Honor, what you're really  
25 getting to there is the power of the United States judiciary

1 then to step in on the war making --

2 JUDGE GARLAND: No, I'm only asking about a  
3 preemption question. And your position, and your view is that  
4 liability is preempted if the United States clearly and  
5 expressly authorizes, orders a contractor to do something that  
6 is clearly against the law of the United States, the law of  
7 war, every other kind of law, and with no instrumental  
8 purpose? Your position -- I just want to know, your position  
9 is that that's civil liability is preempted?

10 MS. BURKE: Well, Your Honor, I guess the answer is  
11 no because it's hard to envision a case when you have the  
12 Department of Justice --

13 JUDGE GARLAND: I'm envisioning it just for the  
14 moment here.

15 MS. BURKE: But if you -- what you are envisioning  
16 is you are envisioning a case, what Judge Silberman laid out  
17 is the hypothetical, you're envisioning the case where the  
18 Department of Justice has opined that something that was  
19 wholly illegal was in fact not wholly illegal. And so, you  
20 know, it really -- and this we're basically getting beyond the  
21 limits of my expertise here, because then you're --

22 JUDGE GARLAND: Well, what if -- I'm not -- let's  
23 leave the Justice Department out of this for the moment.

24 MS. BURKE: Well, I think that was the situation.

25 JUDGE GARLAND: All right. Oh, I see. So, your

1 answer to him was based on there being a legal opinion from  
2 the Justice Department?

3 MS. BURKE: That insulated the contractors --

4 JUDGE GARLAND: I see. I see.

5 MS. BURKE: -- in kind of the --

6 JUDGE GARLAND: I see. I --

7 MS. BURKE: -- government made --

8 JUDGE GARLAND: -- missed that part.

9 MS. BURKE: -- me do it, because their *Boyle* defense  
10 is basically --

11 JUDGE GARLAND: Okay. I missed that part.

12 MS. BURKE: Okay.

13 JUDGE GARLAND: I'm sorry.

14 MS. BURKE: So -- and no broader than that. But  
15 that --

16 JUDGE KAVANAUGH: Right. In that case there would  
17 be the conflict that you're --

18 MS. BURKE: There would be the conflict that we're  
19 talking about that's not this case. And I did not mean to go  
20 beyond that in any way.

21 JUDGE GARLAND: It's my fault.

22 MS. BURKE: Okay.

23 JUDGE GARLAND: I must have lost the train of the  
24 argument. Sorry.

25 JUDGE SILBERMAN: No, you didn't.

1 MS. BURKE: Thank you.

2 JUDGE GARLAND: I guess we're going to call the next

3 case.

4 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, reading "Paula Underwood". The signature is written in a cursive style with a large initial 'P' and 'U'.

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Paula Underwood

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February 15, 2009

DEPOSITION SERVICES, INC.

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT  
3

4 -----  
5 SALEH, AN INDIVIDUAL, ET AL.,

6 Appellees,

7 v.

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

8 CACI INTERNATIONAL INC., A  
9 DELAWARE CORPORATION, ET AL.,

10 Appellants.  
11 -----

12 Tuesday, February 10, 2009

13 Washington, D.C.

14 The above-entitled matter came on for oral  
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGES GARLAND AND KAVANAUGH AND SENIOR  
18 CIRCUIT JUDGE SILBERMAN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 J. WILLIAM KOEGEL, ESQ.

22 ON BEHALF OF THE APPELLEES:

23 SUSAN L. BURKE, ESQ.  
24  
25

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JUDGE GARLAND: Does it matter at all that the

1 government has, to the extent it can, disowned these  
2 interrogation policies, that no one in the government is  
3 defending it, that the President at the time and the President  
4 elect, or the President now who is now the President but as a  
5 candidate both disowned these, that Secretary Rumsfeld  
6 disowned them. Not to the question of whether there was  
7 supervision, but the question of whether these, this kind of  
8 behavior was beyond the pail.

9 JUDGE SILBERMAN: Judge Garland, what record  
10 references are you making?

11 JUDGE GARLAND: Right, I'm only talking about the  
12 public record of the President's statements during --

13 MR. KOEGEL: I believe --

14 JUDGE GARLAND: -- his press conferences --

15 MR. KOEGEL: -- Judge Garland is referring to  
16 Executive Order I believe it's 39421 issued by President Obama  
17 on January --

18 JUDGE GARLAND: Right.

19 MR. KOEGEL: -- 22nd in which he --

20 JUDGE GARLAND: Right. That's true with respect to  
21 him, and then with respect to President Bush there was a press  
22 conference in which he said this, and Rumsfeld at the hearing  
23 said this. Unless you -- I mean, you're free to --

24 MR. KOEGEL: That overstates I believe the content  
25 of that press conference.

1 JUDGE GARLAND: Yes. Okay.

2 MR. KOEGEL: I do not believe the President, or the  
3 Secretary of Defense, or any other individual in a position of  
4 responsibility repudiated or otherwise rescinded the  
5 interrogation rules of engagement --

6 JUDGE GARLAND: No, no. I'm not --

7 MR. KOEGEL: -- that were in force and effect.

8 JUDGE GARLAND: That's why I'm trying to be careful  
9 about this. So, we use the hypothetical provided by the  
10 opposing side that no one in a position of authority in the  
11 United States government has ever said that piling people up  
12 in a naked pyramid is lawful, appropriate, or any other way  
13 aimed at yielding information in interrogations, I'm not wrong  
14 about that, am I?

15 MR. KOEGEL: You're correct.

16 JUDGE GARLAND: All right. So, imagine there were  
17 that circumstance where there is no, there's just no argument  
18 from any government official, or even from the people who did  
19 it that they were doing this for the purpose of getting  
20 information. Under those circumstances I'm going to ask you  
21 the same question I asked you before, which is a political  
22 question, but we're not talking about political question now,  
23 is your position still that it would -- that that would be  
24 preempted, and that it would be bad for the courts to look  
25 into that question even with the Executive's blessing?

1           MR. KOEGEL: If the claims arise out of the  
2 combatant activities of the military that's correct --

3           JUDGE GARLAND: Okay.

4           MR. KOEGEL: -- Judge Garland. That exception to  
5 the FTCA, however, is not the only basis for the court --

6           JUDGE SILBERMAN: The last words that Judge Garland  
7 asked was with the Executive's blessing. We do not have an  
8 Executive position in this case, do we?

9           MR. KOEGEL: We do not have a statement of interest  
10 from the United States, Judge --

11          JUDGE SILBERMAN: Yes.

12          MR. KOEGEL: -- Silberman.

13          JUDGE SILBERMAN: Yes.

14          MR. KOEGEL: You're correct.

15          JUDGE GARLAND: But that's what I was asking you. I  
16 understand that point, and I was just asking is the  
17 implication of where we're going here that if the Executive  
18 came in and said, say we get past this case and it goes to the  
19 Supreme Court, and an amicus the solicitor general says this  
20 is beyond the pail, government completely and totally disowns  
21 this, that wouldn't make any difference with your analysis?

22          MR. KOEGEL: I don't believe that it would, Judge  
23 Garland, because the Constitution commits the war fighting  
24 prerogative to the Executive, and to Congress to the federal  
25 government exclusively, it affirmatively prohibits the states

1 from regulating foreign affairs, including waging war. You  
2 take those constitutional provisions combined with the  
3 congressional determination reflected in the combatant  
4 activities exception to the FTCA, that a clear congressional  
5 determination that there should be no claims arising out of  
6 the combatant activities during time of war.

7 JUDGE GARLAND: But it doesn't --

8 JUDGE SILBERMAN: One could easily imagine the  
9 government taking the position that the activities alleged  
10 here should be criminally prosecuted, but there should be no  
11 civil liability under the Federal Tort Claims Act.

12 MR. KOEGEL: That's correct, Judge Silberman. And  
13 that, of course, reflects the Executive prerogative to conduct  
14 precisely such an investigation and prosecution.

15 JUDGE GARLAND: I understand that. And I'm sorry to  
16 push this hypothetical. I know I'm pushing you in an  
17 uncomfortable area, but I do want to know. Imagine Congress  
18 passed a statute that said contractors are civilly liable  
19 under state law, and imagine the President said contractors  
20 are civilly liable under state law, and both of them said this  
21 would not interfere with the Executive's work, either with  
22 congressional war power, or with the Executive's power to wage  
23 war. Your position is the court should still say that it  
24 would?

25 MR. KOEGEL: Would in your hypothetical, Judge

1 Garland --

2 JUDGE GARLAND: Yes, in mine.

3 MR. KOEGEL: -- Congress be amending the combatant  
4 activities exception --

5 JUDGE SILBERMAN: They just amend --

6 MR. KOEGEL: -- to the FTCA?

7 JUDGE SILBERMAN: -- the FTCA to say we want to be  
8 clear that the *Boyle* analysis does not apply to the combatant  
9 exception, and that there are no circumstances under which a  
10 contract is immune.

11 MR. KOEGEL: Congress could not consistent with the  
12 Constitution delegate responsibility to the states for --

13 JUDGE KAVANAUGH: Well, sure it could --

14 MR. KOEGEL: -- regulating --

15 JUDGE KAVANAUGH: -- borrow a state, it can create a  
16 cause of action borrowing state law, or it can enact a statute  
17 indicating that state law is not preemptive in the area. It  
18 could do that.

19 MR. KOEGEL: I don't believe that Congress --

20 JUDGE KAVANAUGH: I mean, your political question --

21 MR. KOEGEL: -- could --

22 JUDGE KAVANAUGH: -- theory would throw that out,  
23 but your preemption theory would allow that kind of suit to go  
24 forward, as I understand your two theories.

25 MR. KOEGEL: Perhaps, Judge Kavanaugh, although

1 Congress --

2 JUDGE GARLAND: Though in this case you'll take  
3 Judge Kavanaugh's answer.

4 MR. KOEGEL: Congress could not assign to the states  
5 a role in regulating waging war. The Constitution --

6 JUDGE KAVANAUGH: I'm not sure about that. But  
7 anyway, it's kind of --

8 MR. KOEGEL: The Constitution reserves --

9 JUDGE KAVANAUGH: -- pretty hypothetical.

10 MR. KOEGEL: -- that exclusively to the federal  
11 government.

12 JUDGE GARLAND: But can't the Executive --

13 JUDGE KAVANAUGH: They can --

14 JUDGE GARLAND: -- say this --

15 JUDGE KAVANAUGH: What about the National Guard?

16 MR. KOEGEL: That's correct, Judge Kavanaugh, but  
17 that would not necessarily fall within conducting foreign  
18 relations in the United States. In fact --

19 JUDGE KAVANAUGH: Well, it's war.

20 MR. KOEGEL: *Scheuer v. Rhodes* is a good example of  
21 that where the federal government in a non-wartime context had  
22 not asserted the political question doctrine. It was a  
23 domestic security matter involving the National Guard. The  
24 political question doctrine was neither raised nor viewed as  
25 precluding the causes of action there.

1 JUDGE SILBERMAN: We're getting pretty far afield.

2 JUDGE KAVANAUGH: Yes.

3 JUDGE GARLAND: Yes. Go ahead. I'm sorry. This is  
4 the problem of having a professor on my left here, am I right?

5 MR. KOEGEL: The District Court here fashioned a new  
6 test for combatant activities preemption, and we submit that  
7 that test is fundamentally flawed, requiring --

8 JUDGE GARLAND: I take it that any test would be  
9 new, right? Because we don't have a --

10 MR. KOEGEL: In this circuit that's correct, Judge  
11 Garland.

12 JUDGE GARLAND: We don't have anyone in which  
13 contractors acting in this way, that is not as providing a  
14 product, but as actually acting as if they were combatants  
15 under your view. There's no case on that, is there?

16 MR. KOEGEL: In this circuit that's correct.

17 JUDGE GARLAND: In any circuit, is there one in any  
18 circuit? The California, the Ninth Circuit cases they  
19 produced a product which American soldiers or --

20 MR. KOEGEL: There are lower --

21 JUDGE GARLAND: -- sailors actually used.

22 MR. KOEGEL: -- court decisions, but not at the  
23 appellate level there are some decisions in which services --

24 JUDGE SILBERMAN: *Koohi* and *Johnson*, but they're not  
25 really directly on the question of how do you define combat

1 activities.

2 JUDGE GARLAND: I guess what I'm saying is you can't  
3 blame the District Court for designing a new test when  
4 there was --

5 JUDGE SILBERMAN: Yes. No, you had to.

6 JUDGE GARLAND: -- no test to begin with.

7 MR. KOEGEL: We believe that the *Koohi* decision  
8 supplies the correct test. The court need only look at  
9 whether the complaint of activities constituted combatant  
10 activities of the military during time of war. That should be  
11 dispositive as to whether preemption applies by --

12 JUDGE GARLAND: The gun in that case was fired by a  
13 member of the United States military. It wasn't fired by an  
14 independent contractor. The actual physical activity was done  
15 by --

16 MR. KOEGEL: That's correct. That's correct.

17 JUDGE GARLAND: The question was a product --

18 MR. KOEGEL: The -- missile defense system --

19 JUDGE GARLAND: -- sort of a product liability issue  
20 about the --, but it wasn't a question of the actual direct  
21 application.

22 MR. KOEGEL: But the same federal interests that  
23 support preemption with respect to a product liability case  
24 support preemption where there are services involved, the  
25 federal interest is the same.

1 JUDGE GARLAND: No, I understand that. I just  
2 wondered whether the test has to be the same, that's all.

3 MR. KOEGEL: Well, for combatant activities, which  
4 admittedly is a broader exception to the FTCA, then the  
5 discretionary function exception requiring exclusive  
6 operational control conflicts with the very nature of the  
7 combatant activities exception. It imposes a duty of care on  
8 the battlefield. It subjects military commanders --

9 JUDGE SILBERMAN: Suppose a government contractor  
10 working for Iraq, not for the United States government, had  
11 been in Baghdad when a fire fight developed, and the  
12 government contractor perhaps, wasn't there one once hired by  
13 Perot, as I recall, for an independent action, I don't know  
14 whether it was in Iraq, but suppose the --

15 JUDGE GARLAND: Iran.

16 JUDGE SILBERMAN: I'm talking about a corporation,  
17 not necessarily a government contractor, but even a government  
18 contractor who was not dealing with the military in any way  
19 was drawn into a conflict, and used force, would that  
20 individual, that contractor be entitled to an exemption under  
21 the FTCA?

22 MR. KOEGEL: As I understand your hypothetical  
23 perhaps not, Judge Silberman, because those activities  
24 wouldn't be combatant activities of the military, which is one  
25 of the tests inherent in the combatant activities exception.

1 It's not all combatant activities --

2 JUDGE SILBERMAN: Well, it would arise out of  
3 combatant activities of the military, but it would involve  
4 someone who did not have any privity with the military.

5 MR. KOEGEL: It's difficult to imagine a scenario  
6 where there's a lack of privity with the United States --

7 JUDGE SILBERMAN: You think the privity is  
8 essential?

9 MR. KOEGEL: I think privity would be in certainly  
10 most instances as least indispensable to constituting  
11 combatant activities of the military. That reflects the  
12 government's interest in the control of how war is waged. And  
13 absent that privity it's difficult to reconcile the federal  
14 interest in waging war --

15 JUDGE SILBERMAN: Judge Garland earlier on said  
16 after all, the statute exempts government contractors.

17 MR. KOEGEL: The statute provides immunity -- or I'm  
18 sorry, it preempts claims against government contractors, it  
19 immunizes --

20 JUDGE GARLAND: No.

21 JUDGE SILBERMAN: No.

22 MR. KOEGEL: -- claims against --

23 JUDGE GARLAND: He means -- Judge Silberman --

24 JUDGE SILBERMAN: Yes.

25 JUDGE GARLAND: -- was asking about the express

1 language, not implied. There's an independent contractor,  
2 there's a contractor exclusion, right, with respect to the  
3 government's ability to get --

4 MR. KOEGEL: For the discretionary --

5 JUDGE GARLAND: -- sovereign immunity.

6 MR. KOEGEL: -- function exception, that's correct,  
7 Judge Garland. But on that --

8 JUDGE SILBERMAN: You see, I thought Judge  
9 Garland --

10 JUDGE GARLAND: No.

11 JUDGE SILBERMAN: -- was reading --

12 MR. KOEGEL: -- on that point --

13 JUDGE SILBERMAN: -- the statute to say there was a  
14 general exception for government contractors. Do you have the  
15 statute in front of you --

16 JUDGE GARLAND: Yes. There's two, and I didn't  
17 actually mean to define exactly how they applied. So, there's  
18 two, one it says the term federal agency does not include any  
19 contractor with the United States; and the second, employee of  
20 the government --

21 JUDGE SILBERMAN: Is that, that's 13 --

22 JUDGE GARLAND: -- that's --.

23 JUDGE SILBERMAN: Does that apply to the combat  
24 activities exception? Do you have the statute in front of  
25 you?

1 MR. KOEGEL: I do not, Judge Silberman. I  
2 believe --

3 JUDGE SILBERMAN: Does your --

4 MR. KOEGEL: -- it applies to the discretionary  
5 function exception. I'm not at all certain it applies to the  
6 combatant activities exception. But it's important to note  
7 that --

8 JUDGE SILBERMAN: Well, let's see if we nail that  
9 down.

10 MR. KOEGEL: -- that *Westfall* --

11 JUDGE SILBERMAN: Why don't we just see if we can  
12 nail it down now. Does it, or doesn't? I know that, I know  
13 you can argue that *Boyle* has made this extension, but I wonder  
14 what the literal language of the statute says.

15 JUDGE GARLAND: It could be, because that one  
16 uses --

17 MR. KOEGEL: Assuming that that caveat applies to  
18 contractors, I think --

19 JUDGE SILBERMAN: Well, does it? I mean, this is  
20 sort of an -- I grant you we can go to *Boyle*, but I'm trying  
21 to get the sense of what the exact language of the statute  
22 means, and I was a little surprised at what Judge Garland said  
23 earlier, and I thought you would certainly be familiar with  
24 the exact language.

25 MR. KOEGEL: Well --

1 JUDGE SILBERMAN: Is there a provision in the  
2 statute which limits the exemption for activities to -- limits  
3 the exemption for government contractors?

4 MR. KOEGEL: For the discretionary function, yes.

5 JUDGE SILBERMAN: But not -- there's not a provision  
6 for the combat activities?

7 MR. KOEGEL: I need to check into that. I don't  
8 believe that it --

9 JUDGE SILBERMAN: I don't understand why --

10 MR. KOEGEL: -- that that caveat applies --

11 JUDGE SILBERMAN: -- in this case --

12 MR. KOEGEL: -- to government contractors.

13 JUDGE SILBERMAN: -- in this case of -- importance  
14 why nobody would have that right at their fingertips. Does  
15 anybody have it?

16 JUDGE GARLAND: Okay. We'll worry about that --

17 JUDGE SILBERMAN: You cause so much trouble.

18 JUDGE GARLAND: I'm sorry.

19 MR. KOEGEL: Judge Silberman, the statute by  
20 definition applies to government employees, and it also  
21 defines employees, and it has also been held to apply to  
22 agents of the government. So, even if the exclusion  
23 applies --

24 JUDGE SILBERMAN: Defines or has been held?

25 MR. KOEGEL: It has been, that has been held.

1 JUDGE GARLAND: Right. So, there are a series of  
2 cases about contractors, and it depends on right, physical  
3 control over the contractors.

4 MR. KOEGEL: Agency --

5 JUDGE GARLAND: Right.

6 MR. KOEGEL: -- is determined based upon the day to  
7 day control --

8 JUDGE GARLAND: Right.

9 MR. KOEGEL: -- of the duties --

10 JUDGE GARLAND: Right.

11 MR. KOEGEL: -- of the contractor under --

12 JUDGE GARLAND: But that's not your position here?  
13 You don't think there has to be any day to day control, right?

14 MR. KOEGEL: Not for preemption under the combatant  
15 activities exception. Given the unique federal interest in  
16 conducting war.

17 JUDGE SILBERMAN: Explain why you think that is a  
18 broader term than the discretionary function exemption.

19 MR. KOEGEL: Discretionary function protects the  
20 policy making prerogatives of the United States. And in *Boyle*  
21 the Supreme Court determined that it was necessary to fashion  
22 a two-part test.

23 JUDGE SILBERMAN: Although the language specifies  
24 the discretionary activities of the government, right. And  
25 *Boyle* had to take an extension, a considerable extension under

1 the preemption theory in order to reach the --

2 MR. KOEGEL: That's right.

3 JUDGE SILBERMAN: -- contractor. But the direct  
4 language of the combat activities language, the direct  
5 language of that section easily applies to government  
6 contractors on its face.

7 MR. KOEGEL: That's our position, Judge Silberman.  
8 That a --

9 JUDGE SILBERMAN: Now you add *Boyle* to it, but you  
10 don't really need it.

11 MR. KOEGEL: And you add the constitutional  
12 provisions that prohibit the states from regulating foreign  
13 affairs including the conduct of war. Taken alone or taken  
14 together they lead to preemption. In this case the District  
15 Court found that the exclusive operational control test was  
16 not satisfied, and we submit that there were two fundamental  
17 flaws in that, the District Court failed to define what it  
18 meant by operational control, and in the process completely  
19 ignored the military's definition of operational control, and  
20 under that definition --

21 JUDGE SILBERMAN: Isn't your theory that operational  
22 control is a misnomer anyway? You're asking whether the  
23 contractors' activities are integrated in with the military  
24 and under the ultimate control of the military, isn't that  
25 your basic point?

1           MR. KOEGEL: If the activities constitute combatant  
2 activities of the military that's sufficient for preemption.  
3 The court might inquire into the degree of control for  
4 purposes of assessing whether the activities are of the  
5 military.

6           JUDGE GARLAND: Your position is a little broader  
7 then because of the way the case turned out than counsel in  
8 the previous case, right?

9           MR. KOEGEL: That's correct.

10          JUDGE GARLAND: Right. That's right. He was  
11 willing to accept the Court's definition with respect to the  
12 kind of supervision that was provided, and you're taking a --  
13 you want to take both positions, you want to say even taking  
14 the Court's position you're right, but otherwise there should  
15 just be broad field prevention and such.

16          JUDGE SILBERMAN: No, no, no. Wait a minute. I  
17 don't think you're saying field preemption -- or excuse me.  
18 You're saying the exemption for combat activities would cover  
19 a contractor --

20          JUDGE GARLAND: Regardless.

21          JUDGE SILBERMAN: -- who is integrated in with the  
22 military --

23          MR. KOEGEL: Yes.

24          JUDGE SILBERMAN: -- and under the mission control  
25 of the military, and --

1 MR. KOEGEL: Precisely.

2 JUDGE SILBERMAN: -- you wouldn't look at exclusive  
3 operation control, you'd ask the basic functional questions.

4 MR. KOEGEL: That's correct.

5 JUDGE SILBERMAN: Yes.

6 MR. KOEGEL: Looking at exclusive --

7 JUDGE KAVANAUGH: You said that plus field  
8 preemption just now, didn't you? Because you said taking the  
9 constitutional structure, and you said taking them separately  
10 or together --

11 JUDGE SILBERMAN: You would add field --

12 JUDGE KAVANAUGH: -- you would --

13 JUDGE SILBERMAN: -- preemption to it, but you don't  
14 need it.

15 MR. KOEGEL: That's correct.

16 JUDGE KAVANAUGH: Yes.

17 JUDGE GARLAND: But you didn't argue for that in  
18 your brief, this is --

19 MR. KOEGEL: That's correct.

20 JUDGE GARLAND: -- limitation.

21 JUDGE KAVANAUGH: Yes, you did.

22 MR. KOEGEL: Well, we --

23 JUDGE KAVANAUGH: Page 29 to 31 you did, and it's  
24 responded to on 52 to 54 --

25 MR. KOEGEL: We argue --

1 JUDGE KAVANAUGH: -- of the red brief.

2 MR. KOEGEL: -- that in the context of the unique  
3 federal interest because we're here on a 1292B appeal --

4 JUDGE SILBERMAN: Yes.

5 MR. KOEGEL: -- where the only issue before the  
6 Court is the combatant activities preemption test adopted by  
7 the District Court. And we take issue with that test, and in  
8 doing so reflect the unique federal interest in waging war as  
9 reflected in the constitutional provisions that assign  
10 responsibility exclusively to the federal government for that.  
11 As a result, that field is occupied --

12 JUDGE KAVANAUGH: Right.

13 MR. KOEGEL: -- by --

14 JUDGE KAVANAUGH: And you had those as two separate  
15 arguments in your District Court briefs, and they're melded --

16 MR. KOEGEL: That's correct.

17 JUDGE KAVANAUGH: Yes.

18 MR. KOEGEL: And which is why I began this argument  
19 by saying whether the Court goes through field preemption  
20 analysis or conflict analysis the result is the same.

21 JUDGE GARLAND: I have a question I meant to Mr.  
22 Zymelman, and I apologize for not asking you because you are  
23 very good at answering my questions, but you have a stand in  
24 here for this one. So, if the -- under the UCMJ if the  
25 military supervisor of the contract ordered the contractor to

1 do something, that is the individual employee, and they refuse  
2 the order could they be punished under the UCMJ?

3 MR. KOEGEL: The UCMJ is applied to civilian  
4 contractors now --

5 JUDGE GARLAND: Going forward. Right.

6 MR. KOEGEL: -- going forward --

7 JUDGE SILBERMAN: And it wasn't applied at that  
8 time, right?

9 MR. KOEGEL: It was not in -- the UCMJ was not  
10 applicable at the time of the actions complained of here.

11 JUDGE SILBERMAN: With respect to going forward --

12 MR. KOEGEL: On a going forward basis I believe that  
13 yes, the contractor could be --

14 JUDGE SILBERMAN: Even refusing to follow an order?  
15 I'm not talking about don't do a war crime, I'm talking about  
16 any order. Your understanding is that the UCM -- I have no  
17 idea --

18 MR. KOEGEL: I don't know.

19 JUDGE SILBERMAN: -- what the answer is.

20 MR. KOEGEL: I can't --

21 JUDGE SILBERMAN: In order to figure out whether  
22 these people are like soldiers, I appreciate this may be  
23 totally irrelevant to your own analysis, but it's helpful to  
24 mine, I guess what I want to know is even if they are in the  
25 chain of command are they subject to punishment for other

1 than, you know, you're out of the contract, or we don't pay  
2 you, are they subject to military punishment for refusing an  
3 order the way a normal soldier would be?

4 MR. KOEGEL: I can't give you an exhaustive answer  
5 to that question right now, Judge Garland.

6 JUDGE GARLAND: Can you give me an unexhausted, or  
7 can't give me anything?

8 JUDGE SILBERMAN: What is it about the question, you  
9 recall a question I asked the other side in this case which is  
10 since the District Judge relied importantly, as Judge Garland  
11 said not exclusively, but importantly on the proposition that  
12 the supervisor there, the civilian supervisor testified that  
13 he could have complained about behavior up through the civil  
14 ranks, up through the contractors ranks about behavior he  
15 thought was abusive. You recall that I asked counsel if that  
16 was a factor to be used to apply liability wouldn't that have  
17 an absolutely perverse economic incentive creating a situation  
18 where government contractors were not supposed to object to  
19 war crimes?

20 MR. KOEGEL: Absolutely, Judge Silberman. And it  
21 would also be inconsistent with the DFAR's (phonetic sp.)  
22 regulation that requires a civilian contractor to have a code  
23 of ethics, and that that code of ethics must require the  
24 reporting of wrong-doing.

25 JUDGE SILBERMAN: And what is the DFAR's regulation?

1           MR. KOEGEL: The DFAR's regulation, which is set  
2 forth in our brief, and I'll give you the page number for  
3 that, Judge Silberman, we referenced this because when Judge  
4 Robertson concluded that the presence of CACI's code of ethics  
5 might be viewed as establishing a dual chain of command, he  
6 did so without awareness of DFAR's 48 C.F.R. 203.7000-.7001.  
7 It's set forth on page 53 and 54 of our brief. We believe  
8 that it's counterintuitive for a contractor to be penalized  
9 for having a code of ethics that requires wrong-doing, but  
10 worse yet --

11           JUDGE SILBERMAN: Requires reporting of wrong-doing.

12           JUDGE GARLAND: No, it requires reporting of wrong-  
13 doing.

14           MR. KOEGEL: Requires -- thank you -- reporting of  
15 wrong-doing, but worse yet, when that code of ethics is  
16 affirmatively required by federal regulation that's an indicia  
17 of more rather than less control of the contractor.

18           JUDGE SILBERMAN: That makes it another *Boyle* point.

19           MR. KOEGEL: That's correct.

20           JUDGE SILBERMAN: So, the government is requiring  
21 you to do.

22           MR. KOEGEL: The government required the company to  
23 have --

24           JUDGE SILBERMAN: So, you're really being hoisted on  
25 your own petard.

1 MR. KOEGEL: We were penalized for compliance with  
2 the Defense Department regulation. That's exactly correct.

3 JUDGE GARLAND: Okay. Like every other attorney  
4 you're way over your time, but it's because of us and not you.  
5 Ms. Burke. We have exhausted ourselves, I think.

6 ORAL ARGUMENT OF SUSAN L. BURKE, ESQ.

7 ON BEHALF OF THE APPELLEES

8 MS. BURKE: What CACI is asking you to do is to  
9 substitute a corporate view of what's in the military's  
10 interest with the military's view of what's in their interest.  
11 The military has spoken on the issue as to whether or not it  
12 benefits the military to have private --

13 JUDGE KAVANAUGH: Why don't they speak to this Court  
14 then?

15 MS. BURKE: Well, Your Honor, I think that if you  
16 asked them to they would. Seriously, I mean, we have met with  
17 the Department of Justice, I think that, you know, they have  
18 not filed a statement of interest. I think that the, you  
19 know, the litigation branch of the military has been very  
20 actively involved in this, has attended all the depositions,  
21 and I think that the military's regulations which set out very  
22 straightforwardly their view, and the statutory law that makes  
23 it clear that corporations remain subject to civil liability,  
24 the military goes in with the expectation that that looming  
25 specter of tort law is one of the things that makes your

1 corporations abide by all the laws and continue to perform as  
2 the military expects them to do in a lawful manner. The  
3 situation that you have when you --

4 JUDGE KAVANAUGH: Just so I'm clear, the military  
5 informs contractors, at least back at the time, that they may  
6 be subject to state tort laws and to international law based  
7 ATS claims?

8 MS. BURKE: The regulations and the military's  
9 information provided to the contractors makes it clear that  
10 they are subject to all U.S. law. All U.S. law. So, there's  
11 no going --

12 JUDGE KAVANAUGH: Do you think D.C. law is U.S. law?

13 MS. BURKE: It's one of the United States laws.

14 JUDGE KAVANAUGH: Okay.

15 MS. BURKE: And I think that, you know, the real  
16 question here is when you take away the --

17 JUDGE SILBERMAN: No, wait a minute, Counsel. You  
18 don't mean to suggest that the contractor could be liable to  
19 tort and contract law of 50 different states?

20 MS. BURKE: What I'm saying --

21 JUDGE SILBERMAN: All of which might be quite  
22 different.

23 MS. BURKE: What I'm saying, Your Honor, is that  
24 when the military hires a private corporation and tells them  
25 to abide by the law, that the military is well aware of the

1 fact that one of the mechanisms in our system of American  
2 jurisprudence that keeps corporations abiding by the law is  
3 the specter of tort liability, and that the military has  
4 looked at this issue --

5 JUDGE KAVANAUGH: Is there any evidence of that?

6 MS. BURKE: Your Honor, if you look at the comments  
7 by the military in the regulations they were very clear --

8 JUDGE KAVANAUGH: No, but back at the time?

9 MS. BURKE: If you look at -- well, there's a couple  
10 of different things in the record on the -- and I'll need to  
11 get you the record cites, but if you look at the contracts  
12 themselves, which are at JA 319 to 368 --

13 JUDGE KAVANAUGH: (Indiscernible.)

14 MS. BURKE: -- the contracts themselves talk about  
15 that. And then there are manuals, as well, that are in the  
16 record that also talk about contractor being subject to the  
17 liability.

18 JUDGE KAVANAUGH: To the liability?

19 MS. BURKE: To tort liability, to private liability.

20 JUDGE GARLAND: Was there some kind of status of  
21 forces agreement that protected the contractors from host  
22 country liability in Iraq?

23 MS. BURKE: Your Honor, there was what was called  
24 the Bremmer (phonetic sp.) Order, and the Bremmer Order said  
25 that contractors operating in Iraq were not subject to Iraqi

1 jurisdiction, and that the sovereign could waive that.

2 JUDGE GARLAND: Which sovereign are we talking  
3 about?

4 MS. BURKE: The United States.

5 JUDGE GARLAND: So, would that --

6 MS. BURKE: It's a United States order.

7 JUDGE GARLAND: -- eliminate the possibility of  
8 Iraqi law governing here?

9 MS. BURKE: Your Honor, that, the Bremmer Order  
10 referred to Iraqi jurisdiction so that they couldn't be hauled  
11 into the courts in Iraq. I think it certainly would be cited  
12 as evidence that by the state courts that you would not apply  
13 Iraqi law, it would be on indicia that that was not where --

14 JUDGE SILBERMAN: But as you said earlier Iraqi law  
15 could apply.

16 MS. BURKE: And --

17 JUDGE SILBERMAN: Is that a conflict of laws theory?

18 MS. BURKE: Well, what I said is that all laws of  
19 all civilized nations, including Iraq, prohibit torture so  
20 that you don't end up with the conflicts of law analysis  
21 because the conduct is so egregious. So, we don't get to the  
22 harder question of, you know, any kind of difference between  
23 law --

24 JUDGE SILBERMAN: Well, a number of the allegations  
25 of abuse that you make are not torture under anybody's theory.

1 MS. BURKE: Well, Your Honor, I think that the --

2 JUDGE SILBERMAN: Isn't that correct? Your

3 allegations are much broader than torture.

4 MS. BURKE: No, Your Honor. If you look at the --

5 JUDGE SILBERMAN: You go to abuse, don't you?

6 MS. BURKE: Well, if you look at the conduct that's  
7 alleged for each individual, every individual was subjected to  
8 a level of physical force that rose to the level of torture.

9 JUDGE SILBERMAN: I thought your allegations were  
10 broader than that, they included abuse.

11 MS. BURKE: Well, I mean, part of it, of course, is  
12 the definition of torture, and so when you look at -- when  
13 we're looking at it, the Geneva Convention is that you're not  
14 to use any physical force, they all involve physical force.

15 JUDGE SILBERMAN: But that doesn't necessarily mean  
16 torture.

17 MS. BURKE: You're right, Your Honor. And we are --  
18 I mean, this is not the label of --

19 JUDGE SILBERMAN: So, your allegations are broader  
20 than torture.

21 MS. BURKE: Yes. Your Honor, the allegations turn  
22 on the physical force whether or not those are labeled  
23 definitionally as torture or not really doesn't matter because  
24 we're talking about assault and batteries. And so, you know,  
25 if for example, you know, something like --

1 JUDGE SILBERMAN: So, assault and battery would be  
2 covered by the law of nations, as well.

3 MS. BURKE: And one of the ways to look at it --

4 JUDGE SILBERMAN: Is that correct?

5 MS. BURKE: -- is -- yes. Yes. In this context it  
6 would be because one of the ways to look at it --

7 JUDGE GARLAND: I'm getting confused. When you say  
8 this context are we on the ATS issue now, or are we on just  
9 your civil liability claim?

10 MS. BURKE: If you look at --

11 JUDGE GARLAND: Which are you talking about?

12 MS. BURKE: I'm talking about under the federal  
13 common law --

14 JUDGE SILBERMAN: That's the ATS.

15 MS. BURKE: -- the ATS --

16 JUDGE GARLAND: Yes.

17 MS. BURKE: -- and you look at the law of war.

18 JUDGE GARLAND: Okay. You're talking about ATS now.

19 MS. BURKE: Yes. Yes. So, if you look at the law  
20 of war, the word torture goes to the use in a coercive  
21 environment for the purposes of gathering the intelligence.  
22 The physical harms, the stacking the people up in the pyramid  
23 not necessarily torture, but it is --

24 JUDGE SILBERMAN: It isn't torture at all.

25 MS. BURKE: -- but it's a violation --

1 JUDGE SILBERMAN: Under anybody's theory.

2 MS. BURKE: It's a violation of the duty not to  
3 inflict physical harm on the detainees. And this really goes  
4 to the point of the duty of care and why the argument made by  
5 CACI that the combatant activities exception eliminates any  
6 duty of care is not accurate because when we're looking under  
7 federal common law, we're just on the federal side here now,  
8 and you have the common, the federal common law incorporating  
9 the law of war, the law of war does not eliminate a duty of  
10 care. The law of war does the opposite, it makes specific  
11 when there are duties of care. And one of the places in which  
12 there is a duty of care is when people are detained, they're  
13 no longer out in the battlefield, they're not --

14 JUDGE SILBERMAN: Do I understand correctly that you  
15 must be applying on the Federal Tort Claim Act case either  
16 D.C. law or Iraqi law, it has to be one of those two options?

17 MS. BURKE: No, it could be California. We  
18 originally sued in California so that we could --

19 JUDGE SILBERMAN: I see. So, it has to be one of  
20 those three.

21 MS. BURKE: Yes.

22 JUDGE SILBERMAN: Okay.

23 MS. BURKE: Yes.

24 JUDGE SILBERMAN: All right.

25 JUDGE GARLAND: One of the briefs I thought said you

1 were relying on D.C. law. Your brief in one of these cases I  
2 thought responded to the claim that you were applying Iraqi  
3 law --

4 JUDGE KAVANAUGH: It hinted.

5 JUDGE GARLAND: Maybe it only hinted.

6 MS. BURKE: Yes. And that's --

7 JUDGE GARLAND: Are you withdrawing your hint now,  
8 or --

9 MS. BURKE: The reality is that we have not briefed  
10 this, and so we have not taken a position in the litigation.  
11 I think that --

12 JUDGE GARLAND: Sometimes preserving every single  
13 position you could take might actually make you lose all of  
14 your positions.

15 MS. BURKE: Right. And I think that --

16 JUDGE GARLAND: So, you might want to think about  
17 that just for a minute.

18 MS. BURKE: Well, then we will take D.C. law.

19 JUDGE KAVANAUGH: Good choice.

20 MS. BURKE: Then we will select D.C. law.

21 JUDGE GARLAND: You take the hints very well.

22 JUDGE KAVANAUGH: Yes.

23 MS. BURKE: And so, going forward, the state law  
24 that we will be arguing applies will be the law of D.C. And  
25 our point remains that, you know, that does not create any

1 conflicts of law issues. So, if you look at the duty of care  
2 that would arise under D.C. assault and battery, and the duty  
3 of care under the federal common law of war it's the same  
4 duty. So, you do not get into the situation, you are in a  
5 *Maray* situation rather than a *Boyle* situation, or the third  
6 bucket.

7 JUDGE KAVANAUGH: When Congress extended the UCMJ to  
8 contractors after this incident became known why didn't it  
9 create a federal civil cause of action? Do you have any  
10 information about whether something was proposed along those  
11 lines, or what the thinking was?

12 MS. BURKE: Well, I don't know whether the thinking  
13 was that under *Sosa* it already would be a federal cause of law  
14 of action, or not. I don't have any information on what was  
15 considered.

16 JUDGE KAVANAUGH: Senator Feinstein proposed a bill  
17 that would have specified the various causes of action to  
18 eliminate what we're going through on the ATS issue. But I  
19 was thinking a more general federal civil cause of action, but  
20 you're not aware of anything targeted to contractors  
21 specifically?

22 MS. BURKE: I'm sorry, I'm not familiar enough with  
23 all the proposed legislation --

24 JUDGE KAVANAUGH: Right.

25 MS. BURKE: -- to really speak knowledgeably, and

1 there may well have been one and I may not know of it, or have  
2 forgotten it.

3 JUDGE KAVANAUGH: And in any event the question  
4 still is how to interpret that inaction.

5 MS. BURKE: Yes. Yes. And so certainly for our  
6 purposes there was no legislation that we could look to to  
7 answer these questions.

8 JUDGE GARLAND: Are you exhausted?

9 MS. BURKE: I am a bit tired, but I'm happy to  
10 answer any further questions.

11 JUDGE GARLAND: Hearing none, we'll take the matter  
12 under consideration. Oh, no, you've got to reply. You've got  
13 to reply, but a little shorter. A little shorter since she  
14 didn't take all of her time.

15 MR. KOEGEL: I'll be brief.

16 JUDGE GARLAND: Okay.

17 ORAL ARGUMENT OF J. WILLIAM KOEGEL, JR., ESQ.

18 ON BEHALF OF THE APPELLANTS

19 MR. KOEGEL: In response to your earlier question,  
20 Judge Garland, when Congress amended Article 2 of the  
21 Uniform --

22 JUDGE GARLAND: Yes.

23 MR. KOEGEL: -- Code of Military Justice to render  
24 contractors in the field subject to the law, it did include  
25 Article 92, failure to obey an order, and Article 134, conduct

1 contrary to good order and discipline as applicable to  
2 civilian contractors. So, yes, they could be charged and  
3 disciplined for failure to obey an order.

4 JUDGE GARLAND: And that's going forward from 2007  
5 or something like that?

6 MR. KOEGEL: That's correct. Yes. And in response  
7 to Judge Kavanaugh's question about the amendment to the UCMJ,  
8 Senator Graham's amendment was included without debate or  
9 committee consideration, and as a result there is no amplified  
10 discussion on the decision that Congress made to extend UCMJ  
11 to contractors in the field. It was done very, very quickly,  
12 and without any congressional debate or discussion.

13 JUDGE GARLAND: Can I just ask back on the other  
14 one. If -- imagine there weren't any contractors at all, but  
15 you had the regulations that said that the contractor -- or  
16 maybe you had both a contract and you had regulations that  
17 said the contractors are not in the chain of command, they are  
18 not supervised by the military, imagine it said they are  
19 supervised only by their civilian supervisor, would the UCMJ  
20 require them to follow an order of -- could they be punished  
21 for not following an order which would really be an illegal  
22 order under those circumstances?

23 MR. KOEGEL: (No audible response.)

24 JUDGE GARLAND: See, I'm having this difficulty with  
25 the regulations, right. I understand all the other arguments,

1 but I'm having difficulty. The regulations say you're not in  
2 the chain of command, and you're not subject to command.  
3 Whether it actually happens in practice or not I don't  
4 understand how there's authority for it to happen in practice,  
5 and therefore I don't see how even if the UCMJ covered it  
6 somebody could be punished for following an order when the  
7 government's regulations and contracts say you don't have to  
8 follow orders.

9 MR. KOEGEL: I think there are several questions  
10 there, Judge Garland, I'll --

11 JUDGE GARLAND: There are. There are.

12 MR. KOEGEL: -- try to answer them in sequence.  
13 First, if there is a federal statute adopted by Congress that  
14 imposes affirmative obligations on a contractor, that's going  
15 to trump a Defense --

16 JUDGE GARLAND: Yes.

17 MR. KOEGEL: -- Department regulation.

18 JUDGE GARLAND: So, do you think the UCMJ says not  
19 only that they can be punished for not following lawful  
20 orders, but they can be punished for following orders even if  
21 there's no -- the UCMJ by itself is an obligation to follow  
22 orders regardless, is that right?

23 MR. KOEGEL: Yes. Yes. And in certain  
24 circumstances that's correct. Even in the absence of a  
25 contractual obligation.

1 JUDGE GARLAND: And even in the face of regulations  
2 that say the opposite?

3 MR. KOEGEL: The regulations don't provide that it  
4 is impermissible for a contractor --

5 JUDGE GARLAND: It says they're not subject to the  
6 direct command, and it says they're not in the chain of  
7 command.

8 MR. KOEGEL: And that's correct, Your Honor,  
9 although that is better read as a reference to administrative  
10 supervision, and we believe the Secretary of Defense and the  
11 Defense Department do have flexibility with respect to the  
12 formulation of government contracts because the contract here  
13 that CACI had to provide interrogators is replete with  
14 references to being required to follow the direction and  
15 supervision --

16 JUDGE GARLAND: Right. But better read is not  
17 usually the argument that we follow before somebody can be put  
18 in the brig, or before somebody can be put in jail. The law  
19 is that unclear, in fact the express language seems otherwise.  
20 Are you saying that your employees from now on can be put in  
21 the brig for failing to follow an order even if the contract  
22 and regulations say they don't have to follow orders? I just  
23 wonder.

24 MR. KOEGEL: I don't believe that the government by  
25 contract can exempt a civilian contractor from federal law.

1 JUDGE GARLAND: Okay.

2 MR. KOEGEL: That a government contracting  
3 officer --

4 JUDGE GARLAND: All right. You've satisfied me. Do  
5 you have any other questions?

6 MR. KOEGEL: Thank you.

7 JUDGE GARLAND: Anything more? Judge Silberman just  
8 nudged me that we're about 50 minutes, maybe an hour over.

9 MR. KOEGEL: Thank you.

10 JUDGE GARLAND: All right. Thank you very much. We  
11 appreciate this is a difficult case, and I thought the  
12 arguments were very good today. I appreciate it.

13 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, reading "Paula Underwood", is displayed on a light gray rectangular background.

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Paula Underwood

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February 16, 2009

DEPOSITION SERVICES, INC.