



Peruvian Army officer, violated these federal statutes in 1985 while repressing rebel groups in Peru during the Peruvian civil war. By contrast, this case involves tort actions by persons who were captured and detained as enemies by the United States military in the course of prosecuting the war in Iraq.

Because *Lizarbe* involves the alleged actions of a *Peruvian* official against *Peruvians* in *Peru*, the court's decision involves none of the separation of powers issues or constitutional allocation of war powers that underlies virtually every argument made in the CACI Defendants' motion to dismiss. For example, the CACI Defendants' political question argument concerns the constitutional commitment of war powers to the political branches of the United States and the longstanding principle that reparations for injuries in an external war are available only through administrative proceedings. The CACI Defendants' political question argument also concerns the lack of judicial standards to instruct a jury on the tort duties owed to foreign nationals detained as enemies and held by the United States military in a war zone. CACI Mem. in Support of Mot. to Dismiss ("CACI Mem.") at 6-12. *See also Thomasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996); *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991). *Lizarbe*, which did not involve United States military operations or an external war, implicates none of these legal principles.

Similarly, the CACI Defendants' immunity argument is based entirely on the absolute immunity of United States officials, applied to contractors performing government functions in *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996), as well as the international law principle that invading or occupying personnel are immune from application of the occupied nation's laws. CACI Mem. at 13-19. These issues are not implicated in a case,

such as *Lizarbe*, that involves neither operations of the United States government nor an external war.

This same analysis applies to the CACI Defendants' preemption argument. This argument is based on two principles that simply have no application to claims against a non-United States defendant for conduct not involving the United States' prosecution of war abroad. First, the CACI Defendants' preemption argument is based on the Constitution's allocation of war powers exclusively to the federal government, and its concomitant denial of any role for the states in regulating war and foreign policy. *See* U.S. Const. art. I, § 8, cls. 1, 11-15; art. I, § 10, cls. 1, 3; art. II, § 2, cls. 1, 2. This allocation of power precludes Plaintiffs from asserting state-law tort claims arising out of the United States' prosecution of war. Second, the combatant activities exception to the Federal Tort Claims Act precludes tort suits against the United States arising out of the United States military's combatant activities, and that statutory provision preempts tort suits against contractors performing combatant activities for the United States military. CACI Mem. at 26-32. *Lizarbe*, by contract, implicates none of these principles.

Finally, the CACI Defendants' arguments for dismissal of Plaintiffs' Alien Tort Statute claims are based on the fact that Plaintiffs' claims arise out of the operations of the *United States* armed forces in an external war. Because Plaintiffs' claims arise out of the United States' prosecution of an external war, the constitutional commitment of warfighting decisions to the political branches, combined with the judiciary's corresponding lack of an historically-recognized role in such matters, requires that the Court exercise the "great caution in adapting the law of nations to private rights" against recognizing the torts asserted by Plaintiffs here. CACI Mem. at 32-36; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Again, these

arguments were not at issue in *Lizarbe*, which involved no separation of powers issues, and the *Lizarbe* decision consequently has nothing to say about them.

For all of these reasons, the District Court's decision in *Lizarbe* does nothing to undermine the CACI Defendants' entitlement to dismissal of Plaintiffs' Amended Complaint.

Respectfully submitted,

/s/ J. William Koegel, Jr.

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J. William Koegel, Jr.  
Virginia Bar No. 38243  
John F. O'Connor (admitted *pro hac vice*)  
Attorneys for Defendants CACI Premier  
Technology, Inc. and CACI International Inc  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000 - telephone  
(202) 429-3902 – facsimile  
[wkoegel@steptoe.com](mailto:wkoegel@steptoe.com)  
[joconnor@steptoe.com](mailto:joconnor@steptoe.com)

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## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Susan L. Burke  
William Gould  
Attorneys for Plaintiff  
Burke O'Neil LLC  
4112 Station Street  
Philadelphia, PA 19127  
(215) 487-6596 – telephone  
[sburke@burkeoneil.com](mailto:sburke@burkeoneil.com)  
[wgould@burkeoneil.com](mailto:wgould@burkeoneil.com)

*/s/ J. William Koegel, Jr.*

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J. William Koegel, Jr.  
Virginia Bar No. 38243  
Attorney for Defendant CACI-Athena, Inc.  
STEPTOE & JOHNSON LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000 - telephone  
(202) 429-3902 – facsimile  
[wkoegel@steptoe.com](mailto:wkoegel@steptoe.com)