No. 09-1335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Nazim Abdullah AL SHIMARI,
Taha Yaseen Arraq RASHID,
Sa'ad Hamza Hantoosh AL-ZUBA'E, and
Salah Hasan Nusaif Jasim AL-EJAILI,
Plaintiffs-Appellees,

v.

CACI INTERNATIONAL INC and
CACI PREMIER TECHNOLOGY, INC.,
Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:08-cv-00827
The Honorable Gerald Bruce Lee, United States District Judge

BRIEF OF APPELLANTS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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CORPORATE DISCLOSURE STATEMENT

Appellant CACI Premier Technology, Inc. is a privately-held company. Appellant CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. Appellants' liability insurers, St. Paul Fire and Marine Insurance Co., Travelers Insurance Company, and The Chartis Companies, may have a financial interest in the outcome of the litigation. No other publicly-traded company has either a 10% or greater ownership interest in CACI International Inc or CACI Premier Technology, Inc., or a direct financial interest in the outcome of this litigation. There are no similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

/s/ John F. O'Connor

John F. O'Connor

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A. Appellate Jurisdiction

Defendants-Appellants CACI International Inc and CACI Premier Technology, Inc. (collectively, "CACI") appeal the district court's Memorandum Order denying in part CACI's motion to dismiss (J.A.0403-73), which was entered March 19, 2009 (JA-12, Dkt. 94). CACI's notice of appeal (JA-474) was timely filed March 23, 2009. JA-12 (Dkt. 96); F.R.A.P. 4(a)(1)(A).

CACI's three issues for appeal, and their bases for immediate appealability, are as follows:[1]

(1) Absolute Immunity. CACI is absolutely immune from suit (a) under the law of war, and (b) based on derivative absolute official immunity. It is well settled that denials of absolute immunity are immediately appealable under the collateral order doctrine.

(2) Political Question. Plaintiffs' claims present nonjusticiable political questions. (*See* JA-413-28.) Justiciability is a threshold issue implicating this Court's (and the district court's) subject matter jurisdiction under Article III.

[1] In his dissent in *Al Quraishi*, Judge King stated his view that denials of motions to dismiss cases involving battlefield conduct were appropriate candidates for 28 U.S.C. § 1292(b) certification. *Al Quraishi v. L-3 Svcs., Inc.*, 657 F.3d 201, 213 (4th Cir. 2011), *vacated* (4th Cir. Nov. 8, 2011). Guided by Judge King's observations, after this Court granted *en banc* review, CACI sought, over Plaintiffs' objection, to alleviate any potential concerns about appellate jurisdiction by seeking 28 U.S.C. § 1292(b) certification in the district court. On November 23, 2011, the district court concluded it lacked jurisdiction to issue the requested certification during the pendency of this appeal. That holding is contradicted by, among other cases, *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 532 (4th Cir. 1991), and *Pelt v. Utah*, 539 F.3d 1271, 1274 (10th Cir. 2008).

(3) Preemption. Plaintiffs' common-law claims are preempted (a) by the Constitution's exclusive grant of war powers to the federal government, and (b) by the overriding federal interest embodied in the "combatant activities" exception to the Federal Tort Claims Act. The questions controlling the preemption analysis overlap and are inextricably intertwined with the immunity and political question issues, and are appropriate subjects for exercise of pendent appellate jurisdiction.

1. The District Court's Denial of Derivative Absolute Immunity And Immunity Under the Law of War Is An Immediately Appealable Collateral Order

It is black-letter law that a district court's denial of an assertion of absolute immunity is immediately appealable. *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *Roberson v. Mullins*, 29 F.3d 132, 134 n.1 (4th Cir. 1994).[2] CACI has asserted two bases for absolute immunity from suit: derivative absolute official immunity, *see Mangold v. Analytic Svcs., Inc.*, 77 F.3d 1442, 1446-47 (4th Cir. 1996); and (2) absolute immunity under the law of war, *see, e.g.*, *Dow v. Johnson*, 100 U.S. 158, 165 (1879). The district court denied the former, *see* JA.0428-42, and ignored the latter, effectively denying it as well. *See Voliva v. Seafarers*

[2] District court denials of other forms of immunity from suit from are also immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (qualified immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (Eleventh Amendment immunity); *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (Speech or Debate Clause); *Abney v. United States*, 431 U.S. 651, 660 (1977) (Double Jeopardy); *Osborn v. Haley*, 549 U.S. 225, 237 (2007) (rejection of government's Westfall Act certification); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 225-27 (4th Cir. 1997) (absolute immunity and Eleventh Amendment immunity).

Pension Plan, 858 F.2d 195, 197 (4th Cir. 1988) (district court's failure to address issue is an implicit denial, reviewable by this Court).

With respect to law of war immunity, this immunity is an "exempt[ion] from civil and criminal jurisdiction." *Dow*, 100 U.S. at 165.[3] Because this immunity is "not simply from liability, but from suit," a district court's denial of such immunity is subject to immediate appeal. *Osborn v. Haley*, 549 U.S. 225, 237 (2007). The panel dissent in this appeal expressed doubt that the district court's *Mangold* decision was immediately appealable because the district court had stated a theoretical willingness to revisit certain aspects of its ruling after discovery. *See Al Shimari*, 658 F.3d at 428 (King, J., dissenting). No such argument is available regarding law of war immunity, as the district court rejected this defense without any comment, and therefore expressed no tentativeness in its denial.

With respect to derivative absolute official immunity, this Court held in *Mangold* that a district court's denial of a contractor's assertion of derivative absolute immunity is immediately appealable under the collateral order doctrine. *See* 77 F.3d at 1453-54 (Part II of Judge Phillips' opinion for the Court).[4] With all respect to the panel dissent in this appeal, its suggestion that the district court rulings were inconclusive, and deprived this Court of appellate jurisdiction, is at odds with the settled precedents of this Court and the Supreme Court.

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[3] *See also id.* at 162 (if occupying forces were subject to suit, "there might spring up such a multitude of suits as to keep the officers of the army stationed [there] so busy that they would have little time to look after the enemy and guard against his attacks"); *id.* at 165-66.

[4] *Accord id.* at 1446 (Part I of Judge Niemeyer's opinion for the Court).

In *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998), this Court ruled that a district court's conclusion that further record development was necessary before ruling on qualified immunity was an immediately appealable order: "[I]n rejecting the immunity defense 'at this early stage,' the district court necessarily subjected the [defendants] to the burden of further trial procedures and discovery, perhaps unnecessarily." *Id.* at 276. In doing so, the district court "risk[ed] unwittingly the forfeiture of some protections afforded by [the qualified immunity] defense." *Id.* As in *McVey*, the district court's decision at this stage, based on the facts *as pled*, is immediately appealable, notwithstanding the district court's expectation of further factual development in discovery.

McVey followed *Behrens v. Pelletier*, 516 U.S. 299 (1996), where the Supreme Court stated that the qualified immunity defense

> is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery . . . , as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'' Whether or not a later summary judgment motion [based on immunity] is granted, denial of a motion to dismiss is conclusive as to this right.

Id. at 308 (quoting *Mitchell*, 472 U.S. at 526, and *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). For this reason, it has been well-established since *Mitchell* and *Nixon v. Fitzgerald* that denials of absolute or qualified immunity at the motion-to-dismiss stage are immediately appealable. *See Behrens*, 516 U.S. at 308 (citing *Mitchell* and *Harlow*).[5] The Supreme Court recently reiterated this point in

[5] The Supreme Court in *Behrens* rejected the approach adopted by the First (Continued …)

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), holding that a denial of immunity at the motion-to-dismiss stage is a conclusive determination, even if subject to reconsideration as the case progressed, because the ruling "conclusively determine[s] that the defendant must bear the burdens of discovery."

This Court's *en banc* ruling in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), confirms the availability of immediate appeal. Citing *Behrens*, this Court held:

> When a district court denies a motion to dismiss that is based on qualified immunity . . . the action is a final order reviewable by this court. . . . The defense exists to 'give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery.''

Id. at 1159 (quoting *Behrens*). This Court followed *Behrens* for the proposition that "[a]n order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the summary-judgment stage is a 'final' judgment subject to immediate appeal." *Id.* at 1159 n.2 (quoting *Behrens*, 516 U.S. at 307). This is true even where the district court's denial of immunity was on the grounds that assertion of immunity was procedurally premature. *See Jenkins*, 119 F.3d at 1159 (district court refused to rule on immunity because no answer had been filed); *Behrens*, 516

Circuit in *Kaiter v. Boxford*, 836 F.2d 704, 707 (1st Cir. 1988), and by the panel dissent here because denial of immunity at the motion-to-dismiss stage *is* conclusive as to whether the defendant could avoid pretrial burdens including discovery. *Behrens*, 516 U.S. at 307-08.

U.S. at 303 (district court denied immunity motion "without prejudice, on the ground that it was premature given the lack of discovery").

2. The Political Question Doctrine is a Threshold Hurdle to This Court's Review of the Immunity Issue

Though this Court's appellate jurisdiction arises from the district court's denial of immunity, every appellate court must assure itself that the case falls within the Judicial power under Article III. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." (citation omitted)).

"It is familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question[.]" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). Like standing, the political question doctrine concerns the extent of the judicial power under Article III of the Constitution. Because the political question doctrine is a limit on the federal judicial power established in Article III, it is a threshold issue concerning this Court's subject matter jurisdiction. *See Steel Co.*, 523 U.S. at 94-95; *see also Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402, 403, 412 (4th Cir. 2011).

Thus, before deciding whether CACI is immune from suit (whether under derivative absolute immunity or the law of war), this Court must first decide whether this suit is justiciable under the political question doctrine.[6] If it is not,

[6] Judge King did not address the applicability of the political question doctrine to this case because he believed the political question doctrine, standing (Continued …)

the suit may not proceed further. "When the lower federal court lacks jurisdiction, [the appellate court has] jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95 (citation, internal quotation marks and alterations omitted).

3. The Federal Preemption Question Is Inextricably Intertwined With the Justiciability and Immunity Questions

The panel majority in *Al Quraishi* held that orders denying battlefield preemption are immediately appealable collateral orders because a purpose of battlefield preemption is "elimination of tort from the battlefield . . . to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[7] As the majority explained, eliminating tort concerns from a military commander's battlefield calculus and freeing military personnel from the distractions of pretrial discovery are values that cannot be remedied through post-judgment appeal, thereby making denials of battlefield preemption appropriate candidates for collateral order appeal. The Court need not decide whether the district court's battlefield preemption ruling satisfies the collateral order test,

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alone, does not satisfy the collateral order requirement. *Al Shimari*, 658 F.3d at 428 (King, J., dissenting). Because this Court has appellate jurisdiction to review the denial of CACI's immunity defenses, however, it has appellate jurisdiction over this appeal, and consequently must confront the threshold justiciability question.

[7] 657 F.3d at 205-06; *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

however, because the district court's orders denying CACI's immunity defenses are clearly immediately appealable and the district court's preemption ruling falls within the Court's pendent appellate jurisdiction.

Where an appeal from a denial of immunity is properly before the Court, this Court may also review issues that are inextricably intertwined with, or necessary for meaningful review of, the immunity issue. *See, e.g.*, *Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006) (collecting cases). Issues are "inextricably intertwined" when (1) this Court must decide a pendent issue to ensure effective review of the claims properly raised on interlocutory appeal, or (2) when resolution of a properly appealed issue resolves the pendent issue. *Id.* at 976.

Here, the three issues presented—whether Plaintiffs' claims are barred by (I) CACI's immunity from suit, (II) the political question doctrine, or (III) federal preemption—are all inextricably intertwined, as they turn on the same underlying determinations: whether warfighting is an area of unique federal concern, constitutionally committed to Congress and the federal Executive; and whether claims against CACI arising out of its employees' performance of U.S. military functions in a theater of war are precluded as a result. This Court's decision on either CACI's immunity defenses or the political question doctrine will necessarily answer the central question presented by CACI's appeal regarding preemption: namely, whether the Constitution's commitment of war powers to the political

branches of the federal government bars judicial review, through state tort law, of battlefield conduct. Because these issues are inextricably intertwined and logically interdependent, this Court may exercise its pendent appellate jurisdiction to review the federal preemption issue. *See Rux*, 461 F.3d at 475; *see also Iqbal*, 129 S. Ct. at 1946-47 (citing *Swint*, 514 U.S. at 51, and *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006)).

For instance, the Constitution's commitment of war powers exclusively to Congress and the President[8] bears equally on the political question doctrine, CACI's constitutional preemption defense, and CACI's combatant activities preemption defense. The fact that CACI's interrogators were integrated into the military chain of command, and were performing an important military function (interrogation of military detainees) in a theater of war likewise bears equally on the issues of law of war immunity, derivative absolute official immunity, political question, constitutional preemption, and combatant activities preemption.[9] The important federal policy interest in eliminating tort duties from the battlefield, and the related constitutional prohibition on state regulation of military affairs

[8] *See Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950); *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (*en banc*).

[9] *Compare Freeland v. Williams*, 131 U.S. 405, 417 (1889) (occupying personnel immune "from civil liability for any act done in the prosecution of a public war") *with Mangold*, 77 F.3d at 1446-47 (contractors immune for governmental functions for which the benefits of immunity outweigh its costs).

committed to Congress and the President, bear heavily on all of the above questions, as does the fact that neither courts nor jurors have the knowledge or expertise to delineate or apply appropriate standards of care in a wartime setting.

Thus, the questions that the Court must decide to determine the issues of immunity and political question are the same questions that will govern determination of CACI's preemption defense. Because Article III jurisdiction is the paramount threshold issue (once this Court's appellate jurisdiction over the immunity defense issues is established), that justiciability issue should dispose of the case. But should the Court conclude that the case is justiciable (or that at this early stage it has not been proven nonjusticiable), the Court still may (and should) decide the preemption issue, which is inextricably intertwined with, and directly implicated by, consideration of the immunity issues. *Iqbal*, 129 S. Ct. 1946-47; *Rux*, 461 F.3d at 475.

B. District Court Jurisdiction

The district court had statutory jurisdiction under 28 U.S.C. § 1332(a)(2) (diversity), but lacked constitutional jurisdiction under Article III, because the suit presents a nonjusticiable political question.

Plaintiffs are citizens of Iraq. JA.0017. Defendants are Delaware corporations headquartered in Virginia. JA.0018. Plaintiffs sued for more than $75,000. JA.0028. *See* 28 U.S.C. § 1332(a)(2), (c)(1).

Plaintiffs-Appellants further asserted district court jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1350 (Alien Tort Statute), and 1367 (supplemental jurisdiction), but did not identify any federal laws giving rise to their claims. JA.0017. The district court ruled it lacked jurisdiction under the Alien Tort Statute. JA.00457-64. CACI does not challenge that ruling, and decision of that issue is unnecessary to this appeal.

ISSUES PRESENTED

I. Are the Defendants, who were performing military interrogations in a theater of war under contract with the U.S. Government, immune from suit –

A. under the law of war?

B. based on derivative absolute official immunity?

II. Is Plaintiffs' suit preempted by the Constitution's exclusive commitment of war powers to the federal government and by the "combatant activities" exception to the Federal Tort Claims Act?

III. Is Plaintiffs' suit, which seeks redress for alleged abuse of U.S. military detainees during war and which challenges military interrogation techniques authorized by the Executive Branch, nonjusticiable under the political question doctrine?

STATEMENT OF THE CASE

A. Nature of the Case

This is a tort suit brought by four Iraqis who were detained as enemies by the U.S. military at Abu Ghraib prison in Iraq. Plaintiffs seek damages from CACI, which provided civilian interrogators to the U.S. military.

Plaintiffs do not allege any contact with CACI employees, but allege CACI conspired with military personnel to torture detainees and is liable for the actions of alleged co-conspirators. Plaintiffs have not sued the U.S. military or any of its members.

B. Course of Proceedings

Plaintiff Al Shimari filed suit in the Southern District of Ohio. After transfer to the Eastern District of Virginia, the remaining Plaintiffs joined. Plaintiffs filed their Amended Complaint, JA.0016, and CACI moved to dismiss. JA.0042. Plaintiffs opposed, JA.0121, CACI replied, JA.0163, and the district court heard argument. Plaintiffs submitted a post-argument brief. JA.0289; Dkt. 86.

After argument, CACI submitted, with leave, a memorandum addressing the Executive Summary of the Senate Armed Services Committee's Report, *Inquiry Into the Treatment of Detainees in U.S. Custody*. Dkt. 77-79.[10]

[10] The full Senate Report was declassified and released April 22, 2009. *See Inquiry Into the Treatment of Detainees in U.S. Custody, available at* http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf ("Sen. Rep."). This Court may take judicial notice of the full Senate Report under Fed. R. Evid. 201(e).

On March 18, 2009, the district court granted in part and denied in part CACI's motion to dismiss. JA.0403.

Plaintiffs moved in the district court to strike CACI's notice of appeal, Dkt. 96, 99, 103, which was denied. Dkt. 109. Plaintiffs' motion in this Court to dismiss the appeal was deferred. App.Dkt. 25.

On September 21, 2011, a panel of this Court, with one judge dissenting, reversed the district court on preemption grounds, and remanded with instructions to dismiss this action. On November 8, 2011, this Court granted Plaintiffs' petition for rehearing *en banc*.

Discovery is stayed pending resolution of CACI's appeal. Dkt. 64.

C. Disposition Below

The district court denied CACI's motion to dismiss in every respect but one, and did not dismiss any of Plaintiffs' claims. JA.0404-05.[11]

Immunity: The district court rejected CACI's claim of derivative absolute immunity. JA.0428-42. The district court did not address CACI's argument that it is immune under the law of war. *Compare* JA.0069-74 (argument presented in CACI's motion to dismiss) *with* JA.0428-42 (not addressing argument).

Political Question Doctrine: The district court ruled that "Plaintiffs' claims are justiciable because Defendants are private corporations and civil tort

[11] The district court concluded it lacked jurisdiction over Plaintiffs' claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, but dismissed no claims as a result of that ruling. JA.0404, 457-64.

claims against private actors for damages do not interfere with the separation of powers." JA.0413-28.

Preemption: The district court rejected CACI's claim of constitutional preemption by failing to decide the issue. The district court also rejected CACI's preemption claim based on the "combatant activities" exception to the Federal Tort Claims Act ("FTCA"). JA.0443-57.

STATEMENT OF FACTS

A. Standards Governing Consideration of the Facts

Because CACI's political question defense challenges the district court's jurisdiction under Rule 12(b)(1), *Republican Party v. Martin*, 980 F.2d 943, 949 n.13 (4th Cir. 1992), the Court need not treat Plaintiffs' allegations as true, and may consider matters outside the complaint. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

For the remainder of CACI's contentions, the Court treats the Plaintiffs' well-pleaded factual allegations as true and considers whether they state a plausible claim for relief. *Mylan Labs v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993); *see also Iqbal*, 129 S. Ct. at 1949-50. The Court may consider other sources, such as documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007).

B. Plaintiffs' Allegations

1. Background

After a U.S.-led coalition invaded Iraq in March 2003, the U.S. military captured Abu Ghraib prison, a 280-acre compound near Baghdad. JA.0407. "The military used [Abu Ghraib] to detain three types of prisoners: (1) common criminals, (2) security detainees accused or suspected of committing offenses against the [U.S.-led] Coalition Provisional Authority, and (3) 'high-value' detainees who might possess useful intelligence (insurgency leaders, for example)." JA.0407-08. "A U.S. Army military police brigade and a military intelligence brigade were assigned to the prison. The intelligence operation at the prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with private corporations to provide civilian interrogators and interpreters." JA.0408. "Beginning in September 2003, [CACI] provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison." JA.0409.

2. The Amended Complaint

Plaintiffs allege that while imprisoned at Abu Ghraib, they were subjected by unidentified actors to abuse. JA.0016-29. Every allegation of abuse is phrased in the passive voice, without identifying the alleged abuser. (*E.g.*, "Mr. Al Shimari was beaten." JA.0018). The Amended Complaint does not allege any contact between a CACI employee and any Plaintiff. JA.0016-39.

Plaintiffs allege a "torture conspiracy" between CACI and U.S. military personnel. JA.0021-23. The Amended Complaint relies exclusively on

speculative allegations of what "reasonable discovery" will "likely establish" regarding the alleged conspiracy, JA.0021-22, and on two references to unspecified testimony by unnamed alleged military co-conspirators. JA.0016, 22. Plaintiffs also seek to hold CACI liable for injuries allegedly arising out of the Central Intelligence Agency's "ghost detainee" practices, where United States officials determined that certain high-value detainees would not be recorded as having been captured by the United States. JA.0022.

C. Executive Branch Approval of Enhanced Interrogation Techniques

CACI received leave to supplement the record with the Executive Summary of the Senate Armed Services Committee's report, *Inquiry Into the Treatment of Detainees in U.S. Custody*. JA.0352. As the summary explained, in October 2002, the Secretary of Defense personally approved aggressive interrogation techniques for use at the military detention center at Guantanamo Bay (GTMO). The techniques included "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, [and] deprivation of light and sound." JA.0358, 360.

The Secretary of Defense later established a Working Group to review interrogation techniques. JA.0362. Relying on advice from the Department of Justice's Office of Legal Counsel, the Working Group recommended interrogation techniques including "[r]emoval of clothing, prolonged standing, sleep deprivation, dietary manipulation, hooding, [exploiting fear of] dogs, and face and stomach slaps." JA.0363. The Secretary of Defense approved 24 techniques including

"dietary manipulation, environmental manipulation, and sleep adjustment." *Id.*

The Executive Summary traces how techniques authorized for GTMO made their way through military channels to Afghanistan and Iraq. JA.0363-65, 369-70.[12] In September 2003 (the month CACI began furnishing interrogators), the Coalition Joint Task Force-7 ("CJTF-7") Commander issued an interrogation protocol that "authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations." JA.0365. The CJTF-7 Commander issued a revised policy the next month. *Id.* "The new policy, however, contained ambiguities with respect to certain techniques, such as the use of dogs in interrogations, and led to confusion about which techniques were permitted." *Id.*[13]

Plaintiffs acknowledge that the Executive Summary "spells out in some detail how high-level Executive Branch and military officials conspired to encourage the torture of detainees." JA.0382. Thus, according to Plaintiffs, their alleged "torture conspiracy," JA.0021-22, extended up the chain of command to include the officials named in the Executive Summary, including the Interrogation Officer in Charge at Abu Ghraib, the Commander of the 205th Military Intelligence Brigade, the CJTF-7 Commanding General, the Secretary of Defense, the National Security Advisor, the CIA Director, and the legal counsel to the

[12] The full Senate Report traces the migration of these techniques to Iraq, and the influence of the Secretary of Defense's approval of them. Sen. Rep., *supra* note 10, at 153-58, 166-70, 195-97, 201.

[13] *See also* Sen. Rep., *supra* note 10, at 205.

President, Vice President, National Security Council, and Defense Department.

D. Related Abu Ghraib Detainee Lawsuits

A number of other Iraqi detainees, most represented by these Plaintiffs' counsel, filed similar lawsuits against CACI, L-3 Services (formerly Titan Corporation), and/or individual CACI or L-3 employees.

1. The *Ibrahim* and *Saleh* Actions

In 2004, thirteen Iraqi detainees (the "*Saleh* plaintiffs") filed a putative class action against CACI and Titan, alleging abuse by military personnel and civilian contractors pursuant to a conspiracy between high-ranking government officials, dozens of military personnel of all grades, and CACI and Titan. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006). The Plaintiffs here were members of the putative class. Also in 2004, seven Iraqi detainees or their relatives (the "*Ibrahim* plaintiffs") sued CACI and Titan. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

In *Ibrahim* and *Saleh*, Judge Robertson dismissed Plaintiffs' claims under ATS, RICO, and government contracting laws, but denied motions to dismiss the plaintiffs' tort claims on preemption and political question grounds. *Ibrahim*, 391 F. Supp. 2d at 13-14, 19-20; *Saleh*, 436 F. Supp. 2d at 57-58 After consolidating the cases for limited discovery on preemption issues, Judge Robertson granted summary judgment on preemption grounds to Titan, but denied summary judgment to CACI. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007).

On appeal, the D.C. Circuit reversed as to CACI, holding that Plaintiffs' tort claims were preempted by two independent sources of federal law: (1) the federal

interests embodied in the combatant activities exception to the FTCA; and (2) the wartime policy-making prerogatives entrusted by the Constitution exclusively to the federal government. *Saleh*, 580 F.3d at 5-14.

With respect to preemption under the combatant activities exception, the D.C. Circuit explained:

> [T]he policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity).

Saleh, 580 F.3d at 7.

The *Saleh* court also held that the constitutional scheme forbids states from regulating the conduct of war. *Id.* at 11. As a result, the court held Plaintiffs' claims preempted based on the "broader rationale" that the very imposition of any state or foreign tort law would create a conflict with federal foreign policy interests. *Id.*

The D.C. Circuit subsequently denied the plaintiffs' petition for an *en banc* rehearing. Or. of 1/25/10, *Saleh v. CACI Int'l Inc*, No. 08-7001 (D.C. Cir.). When plaintiffs sought a writ of *certiorari*, the Supreme Court invited the United States to submit a brief setting forth the government's position. In recommending denial of *certiorari* in *Saleh*, the United States opined that "[i]n giving effect to the unique federal interests at issue, the court of appeals reasonably turned to the FTCA's combatant activities exception for guidance," and that "[t]he court of

appeals' recognition of a federal preemption defense informed by the FTCA is generally consistent with the approach [the Supreme Court] took in *Boyle*." Brief of United States at 13, 15, *Saleh v. Titan Corp.*, No. 09-1313 (U.S., filed May 2011). As the United States noted in *Saleh*, both of the then-existing appellate decisions considering combatant activities preemption—*Saleh* and *Koohi*—were in harmony (*id.* at 17). The Supreme Court denied *certiorari*. 131 S. Ct. 3055 (2011).

2. The 2008 Abu Ghraib Detainee Actions

In 2008, while *Saleh* and *Ibrahim* were pending, Plaintiffs' counsel filed five new actions against CACI, L-3, and some of their respective employees, raising substantially identical claims as alleged in *Ibrahim* and *Saleh*:

- *Al-Janabi v. Stefanowicz, et al.*, No. 2:08-CV-2913-GAF (C.D. Cal.) (filed May 5, 2008)
- *Al-Ogaidi v. Johnson, et al.*, No. 08-CV-1006 (W.D. Wash.) (filed June 30, 2008)
- *Al-Shimari v. Dugan, et al.*, No. 2:08-CV-637 (S.D. Ohio) (filed June 30, 2008)
- *Al-Quraishi v. Nakhla, et al.*, No. 8:08-CV-01696-PJM (D. Md.) (filed June 30, 2008)
- *Al-Taee v. L-3 Servs.*, No. 2:08-CV-12790-LPZ-MKM (E.D. Mich.) (filed June 30, 2008)

On CACI's motions, *Al-Janabi*, *Al-Ogaidi*, and *Al Shimari* were transferred to the Eastern District of Virginia. *Al Shimari* was assigned to Judge Lee (No. 1:08-cv-00827); *Al-Ogaidi* to Judge Ellis (No. 1:08-cv-00844-TSE-TCB); and *Al-Janabi* to Judge O'Grady (No. 1:08-cv-00868-LO-TRJ). Plaintiffs' counsel

announced a desire to have the three actions consolidated before Judge Lee. When CACI stated its intent to move to consolidate the actions and leave assignment of a judge to the clerk's office, Plaintiffs' counsel dismissed the actions assigned to Judges Ellis and O'Grady without prejudice, and added those plaintiffs to the *Al-Quraishi* suit pending in Maryland. They then dismissed CACI from the *Al-Quraishi* suit, and dismissed L-3 and Dugan from the *Al Shimari* suit. Plaintiffs dismissed *Al-Taee*.

SUMMARY OF ARGUMENT

CACI is entitled to immunity on two independent grounds. First, CACI is entitled to immunity under the law of war. Plaintiffs' specifically allege that "Defendants' acts took place during a period of armed conflict, in connection with hostilities" in Iraq (JA.0033), thus directly implicating law of war immunity.

Second, CACI is entitled to derivative absolute official immunity. CACI's performance of interrogation services for the United States constituted a governmental function, and the benefits of immunity outweigh its costs. The United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law, regardless of whether the military uses soldiers or civilians to perform such interrogations.

Further, Plaintiffs' claims are preempted by federal law. The Constitution vests the war power exclusively in the federal government and prohibits the states from regulating battlefield conduct. Moreover, the combatant activities exception to the FTCA provides an independent basis for preempting Plaintiffs' claims. The

combatant activities exception embodies the federal interest in eliminating tort duties from the battlefield. Plaintiffs' claims arise out of combatant activities, and the federal interests associated with the combatant activities exception requires preemption of Plaintiffs' claims.

Finally, Plaintiffs' suit is nonjusticiable under the political question doctrine. The subject matter of Plaintiffs' Amended Complaint—the adoption of interrogation techniques, and their use in battlefield interrogations—is not appropriate for judicial resolution.

STANDARD OF REVIEW

This Court reviews the denial of CACI's motion to dismiss *de novo*. *See Suarez Corp.*, 125 F.3d at 226 (immunity); *AES Sparrow Point LNG v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008) (preemption); *Martin*, 980 F.2d at 950 n.14 (political question). Plaintiffs bear the burden of showing the district court has jurisdiction to decide the dispute. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

The standards for this Court's consideration of the facts are set out in Section A of the Statement of Facts.

ARGUMENT

A. The District Court Erred in Declining to Dismiss Plaintiffs' Claims on Immunity Grounds

1. CACI Is Immune from Plaintiffs' Claims Under the Law Of War

The district court erred in failing to consider CACI's separately-captioned argument that it was immune from suit based on the law of war. *See* JA.0069-74.

Plaintiffs are Iraqi citizens who were captured by the U.S. military forces on the battlefield in Iraq and imprisoned by the U.S. military in a battlefield detention facility. JA.0018-21. Under longstanding precedent, all persons residing within invaded or occupied territory are "liable to be treated as enemies," and this designation "does not in any manner depend on [their] personal allegiance." *The Prize Cases*, 67 U.S. 635, 674 (1862).[14]

There are several permissible ways to address claims by enemy aliens that they have been mistreated in a theater of war, but those avenues for redress are limited by the realities and necessities of war. On one hand, occupying personnel remain subject to prosecution under their own country's criminal laws,[15] and

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[14] *See also Eisentrager*, 339 U.S. at 772 ("[I]n war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because [he is] the enemy of his country.'" (quoting *The Rapid*, 8 U.S. 155, 161 (1814))); *Dow*, 100 U.S. at 164 (all inhabitants of occupied territory may be treated as enemies and are "liable to be dealt with as such without reference to their individual opinions or dispositions"); *United States v. Farragut*, 89 U.S. 406, 423 (1874); *The Gray Jacket*, 72 U.S. 342, 369-70 (1866); *In re Mrs. Alexander's Cotton*, 69 U.S. 404, 419 (1864); *The Venice*, 69 U.S. 258, 275 (1864);

[15] *See, e.g.*, 18 U.S.C. § 3261 *et seq.* (creating federal court forum for crimes committed by civilians serving with the armed forces overseas); Uniform Code of

(Continued …)

enemy aliens may assert an administrative claim for damages to the occupying sovereign.[16] The United States also can take adverse contract action against government contractors where appropriate. *Saleh*, 580 F.3d at 2. Notably, these available options leave control and discretion in the hands of the Executive, the branch of government constitutionally charged with prosecuting the war effort.

By contrast, however, enemy aliens captured and imprisoned in an active theater of war do not have *habeas corpus* rights[17] and, most important for present purposes, occupying personnel are immune from enemy aliens' tort suits.

CACI's immunity under the law of war flows from two interrelated doctrines recognized by the Supreme Court and applied by the military occupation government in Iraq. In *Dow v. Johnson*, 100 U.S. at 165, the Supreme Court explained that occupying personnel are subject only to their country's criminal laws, and absolutely immune from civil suit for occupation-related conduct:

> If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be

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Military Justice art. 2(a)(10), 10 U.S.C. § 802(a)(10) (designating civilians serving with the armed forces "in the field" during time of war as subject to trial by court-martial)

[16] *See Saleh*, 580 F.3d at 2-3 ("The U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734.").

[17] *Eisentrager*, 339 U.S. at 784-85; *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).

> hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

Id. at 166.

The *Dow* Court described this immunity from civil suit as extending to acts of a "military character, whilst in the service of the United States,"[18] "acts of warfare,"[19] and to the exercise of a "belligerent right."[20] The Court later reaffirmed the immunity it applied in *Dow* and held that this immunity protects parties "from civil liability for any act done in the prosecution of a public war." *Freeland*, 131 U.S. at 417.[21] Importantly, this immunity is not limited to uniformed soldiers. *Ford v. Surget*, 97 U.S. 594, 606-07 (1878) (holding civilian citizen of Mississippi immune from civil suit for destroying another citizen's cotton in support of the occupying Confederate forces).[22] Given the historical paucity of tort suits against occupying personnel, *Dow* immunity has arisen as a litigated issue only occasionally, but has been enforced when implicated.[23]

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[18] *Dow*, 100 U.S. at 163.

[19] *Id.* at 169.

[20] *Id.* at 167.

[21] The immunity recognized in *Dow* is not defeated by an allegation that the conduct was "unauthorized by the necessities of war." *Dow*, 100 U.S. at 169.

[22] Because the Supreme Court treated the Confederate government as illegitimate, its forces were viewed as occupying powers in the seceding states until such time as the occupied territory reverted back to Union control. *Ford*, 97 U.S. at 606; *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 10-12 (1868).

[23] *See Moyer v. Peabody*, 212 U.S. 78, 237 (1909) (*Dow* immunized Colorado governor from civil suit for actions taken in putting down labor unrest); *Freeland*, 131 U.S. at 417 (Confederate soldier immune from suit for alleged theft

(Continued …)

Plaintiffs' own allegations bring their claims squarely within the scope of *Dow*'s law of war immunity. While occupying personnel are immune from suit for "any act done in the prosecution of a public war,"[24] Plaintiffs specifically allege that ***"Defendants' acts took place during a period of armed conflict, in connection with hostilities."*** JA.0032 (emphasis added). Plaintiffs allege, and the district court acknowledged, that CACI personnel supported the military's battlefield interrogation mission, at a prison captured and operated by the U.S. military as an expeditionary interrogation facility. JA.0016-17; JA.0018; JA.0407-08. Plaintiffs were at Abu Ghraib prison because they were captured by the U.S. military as enemies. JA.0016-17; JA.0409. Because CACI's employees were acting at Abu Ghraib "in the prosecution of a public war," *Freeland*, 131 U.S. at 417, they are immune under *Dow* from civil suit. This immunity would apply even if Plaintiffs' unfounded allegations of misconduct by CACI employees were true. *Dow*, 100 U.S. at 166. Indeed, Plaintiffs' counsel admitted at oral argument that Plaintiffs' argument against immunity logically would allow enemy aliens to sue U.S. soldiers for alleged mistreatment on the battlefield.[25] *Dow* and its progeny do

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of cattle during occupation of West Virginia); *Ford*, 97 U.S. at 606-07 (civilian immune from suit for destruction of cotton in support of Confederate occupation); *United States v. Best*, 76 F. Supp. 857, 860 (D. Mass. 1948) (*Dow* immunizes American civilian in occupied Austria from search warrants issued by Austrian courts).

[24] *Freeland*, 131 U.S. at 417.

[25] *See Al-Quraishi v. L-3 Servs., Inc.*, No. 10-1891 (4th Cir.), Arg. Rec., Oct. 26, 2010, at 37:51-38:39 (Q: "[C]an a foreign enemy soldier sue one of our soldiers in an American court?" . . . A: "The answer is yes . . .").

not permit such interference with conduct taken in prosecuting war, whether the defendant is a soldier or a civilian working side-by-side with soldiers in support of the war effort.

Similarly, in *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878), the Court held that the law of an occupied territory applies only to internal relations between its citizens, and not to occupying personnel.[26] Coalition Provisional Authority ("CPA") Order No. 17, issued by the military occupation government in Iraq and in effect at the time of Plaintiffs' detention, reflects this immunity. JA.0102. CPA Order No. 17 observed that "under international law occupying powers, including their forces, personnel, property, and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory." *Id.*[27] The same order provided that coalition contractors, such as CACI, were not "subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts," JA.0103.[28]

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[26] The rule of law announced in *Coleman* is well established. *See Madsen v. Kinsella*, 343 U.S. 341, 345 n.6 (1952) (dependent of American servicemember immune from jurisdiction of local courts in occupied Germany); *Dooley v. United States*, 182 U.S. 222, 230 (1901); *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857); *Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981); *Hamilton v. McClaughry*, 136 F. 445, 447-48 (C.C. D. Kan. 1905); *In re Lo Dolce*, 106 F. Supp. 455, 460-61 (W.D.N.Y. 1952); *Aboitiz & Co. v. Price*, 99 F. Supp. 602, 617 (D. Utah 1951).

[27] CPA Order No. 17 defines "Coalition Personnel" to include "all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State, including attached civilians . . . ." JA.0102.

[28] CPA Administrator Bremer subsequently issued a revised CPA Order 17 (Continued …)

Thus, the immunity adopted in *Coleman*, and recognized in CPA Order No. 17, bars Plaintiffs' claims because a choice of law analysis establishes that any tort claim must be a product of Iraqi law, from which CACI is immune. "Under Virginia law, the rule of *lex loci delicti*, or the law of the place of the wrong, applies to choice-of-law decisions in tort actions." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007); *see also Saleh*, 580 F.3d at 11. Where, as here, the governing law does not permit a cause of action, courts must respect the governing law and dismiss the suit.[29] Thus, in addition to the immunity applied in *Dow*, *Coleman* and CPA Order No. 17 provide another strain of law of war immunity that requires dismissal of Plaintiffs' claims.

2. CACI Has Derivative Absolute Official Immunity From Plaintiffs' Suit

a. The Legal Framework for Derivative Absolute Official Immunity

In *Mangold*, this Court held government contractors absolutely immune from a defamation action based on their allegedly false statements to government investigators. 77 F.3d at 1447-50. The Court acknowledged the common-law rule

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on June 27, 2004. The original CPA Order 17 governs CACI because it was the order in effect at the time of the events alleged in Plaintiffs' complaint. Regardless, the revised CPA order 17 in no way suggests a change in the customary immunity from local law provided to personnel accompanying an occupying force.

[29] *See Smith v. United States*, 507 U.S. 197, 202 n.3 (1993) (plaintiff could not avoid sovereign immunity by asking court to apply the law of another jurisdiction); *Milton v. ITT Research Inst.*, 138 F.3d 519, 523 (4th Cir. 1998) (dismissing tort claim where governing law did not recognize cause of action).

that federal officials acting within the scope of their employment were absolutely immune whenever "the public benefits obtained by granting immunity outweighs its costs." *Id.* at 1446-47 (citing *Barr v. Matteo*, 360 U.S. 564, 569-73 (1959) (plurality opinion), and *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)). While Congress established a statutory framework for immunity for government employees, the Court held that the *Barr*/*Westfall* test continued to apply to contractors. *Id.*

The Court noted in *Mangold* that if the defendants had *performed* the investigation, their immunity would have been clear. *Id.* at 1448. While *responding* to a government investigation was not, strictly speaking, a governmental function, the Court held that the government's interest in investigating allegations of contracting abuse supported the imposition of absolute immunity. *Id.* at 1449-50. Many other courts have followed *Mangold* and held contractors immune when performing delegated governmental functions.[30]

b. CACI's Work at Abu Ghraib Constituted a Governmental Function for which Absolute Immunity is Available

CACI personnel in Iraq clearly were performing a "governmental function." Plaintiffs allege that CACI personnel had been retained by the United States to

[30] *See, e.g.*, *Murray v. Northrop Grumman Information Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998); *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997); *TWI d/b/a Servco Solutions v. CACI Int'l Inc*, 2007 WL 3376661, at *1 (E.D. Va. 2007).

assist it in the battlefield interrogation of persons captured by the military,[31] and that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032.

The district court erred in concluding that CACI must show that its personnel were performing a "discretionary function," rather than a "governmental function" for which the United States is immune. JA.0433-37. This error is manifest from *Mangold* itself, where this Court acknowledged that the defendants were not themselves performing a discretionary function and yet were absolutely immune from suit. *Mangold*, 77 F.3d at 1448.

While the district court held that *Mangold* created a narrow "response-to-government inquiries" exception to the requirement of a discretionary function, JA.0433, *Mangold* is not so limited. As this Court explained:

> If absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions.

Mangold, 77 F.3d at 1447-48. Indeed, this Court, in the related area of derivative foreign sovereign immunity, described *Mangold* as extending immunity to

[31] JA.0018 ¶ 10; *see also* JA.0408 ("The intelligence operation at [Abu Ghraib] prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with private corporations to provide civilian interrogators and interpreters."); JA.0409 ("This case arises out of the detention, interrogation and alleged abuse of four Iraqi citizens detained as suspected enemy combatants at Abu Ghraib . . . .")

delegated "governmental functions" for which the United States is immune, and not solely to discretionary functions. *See Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000).

While a discretionary function is one type of governmental function where the United States has absolute immunity, so too is the combatant activities exception, which clearly applies to Plaintiffs' claims. *Saleh*, 580 F.3d at 6; *see* Section B.2.b, *infra*. The combatant activities exception retains immunity for perhaps the most critical function of the federal government, the provision of a national defense through the prosecution of war. *See Thomasson*, 80 F.3d at 924. Thus, CACI's employees' performance of delegated functions for which the United States is itself immune satisfies the first requirement for derivative absolute official immunity.

Moreover, even if (as the district court concluded) the discretionary function exception had an exalted status, and is the *only* FTCA exception of sufficient importance to support derivative absolute official immunity, CACI would satisfy such a requirement. Interrogations and investigations are classic discretionary functions of government.[32]

The district court also distinguished *Mangold* by stating that the investigative techniques in *Mangold* were lawful and Plaintiffs here allege the use

[32] *Suter v. United States*, 441 F.3d 306, 311-12 (4th Cir. 2006); *Blakey v. U.S.S. Iowa*, 991 F.2d 148, 153 (4th Cir. 1993); *see also Murray v. Earle*, 405 F.3d 278, 294 (5th Cir. 2005); *O'Ferrell v. United States*, 253 F.3d 1257, 1267 (11th Cir. 2001).

of unlawful techniques. JA.0434. But *Mangold* held that immunity applies to allegations of "illegal and even offensive conduct." *Mangold*, 77 F.3d at 1447. In *Mangold*, the defendants were immune from suit even though they allegedly provided knowingly *false* information to government investigators, *Mangold*, 77 F.3d at 1445, conduct that would violate federal law. *See* 18 U.S.C. § 1001.

c. The Public Interest in Holding CACI Immune Outweighs the Costs of Immunity

The United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law, regardless of whether the military uses soldiers or civilians to perform such interrogations. *Saleh*, 580 F.3d at 7;[33] *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Ex parte Quirin*, 317 U.S. 1 (1942))); *Butters*, 225 F.3d at 466 ("All sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions.").

The district court understated the public interest in immunity in two ways. First, the district court evaluated the public interest in immunizing the wrongful conduct alleged (allegedly abusive treatment of detainees), rather than the public interest in immunity for the function being performed: the battlefield interrogation of enemies captured by the U.S. military. JA.0439-40. This was clear error. *Mangold*, 77 F.3d at 1447 ("[T]he scope of that immunity is defined by the nature

[33] As the court noted in *Saleh*, the defendants in that case asserted an immunity defense, but immunity was not before it on appeal. *Saleh*, 580 F.3d at 5.

of the *function* being performed . . . ."). The defendants in *Mangold* were held immune because the *function* at issue (facilitating government investigations) involved a weighty public interest, even though there is no public interest in the wrongful conduct alleged (providing *false* information to investigators).

The district court also erred in concluding that the public interest was best served by having tort law (indeed, the tort law of another sovereign) apply to military operations because of tort law's ability to affect the decisions of military commanders. JA.0441-42 ("[T]he decision to employ civilian contractors instead of military personnel is one that commanders must make in consideration of all the attendant costs and benefits."); JA.0442 (declining to "shield the military from the consequences of one of [its] decisions, namely to employ civilian contractors, who normally are not immune from suit, instead of soldiers, who normally are").

The district court's holding clearly violates the intergovernmental immunity doctrine. That doctrine prohibits the States, without Congressional authorization, from regulating the federal government's operations or property. *See Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 188 (1956); *United States v. Virginia*, 139 F.3d 984, 988 (4th Cir. 1998). Yet the district court's ruling expressly allows states to establish the standard of care, through tort law, of personnel conducting battlefield interrogations for the United States.

The district court's reasoning also turns the separation of powers on its head. "[J]udges are not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). The Constitution vests war powers exclusively in the political branches of the federal government. *See* U.S. Const. art. I, § 8, cls. 1, 11-15;

art. II, § 2, cls. 1, 2. "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad—it is obvious." *Saleh*, 580 F.3d at 11.

Based on these principles, states and foreign nations constitutionally are prohibited from having any role in regulating the federal conduct of war, through tort regulation or otherwise. *Id.*; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). The public interest is not in using tort law to influence the combat decision-making of military officials, but in ensuring that military commanders can select the most appropriate strategies, tactics, and solutions without having the specter of state or foreign tort law coerce them into choosing an otherwise less desirable tactic.

By contrast, the costs of immunity here are slight. The vast majority of persons injured in war are entitled to no recovery whatsoever. *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). If immunity meant Plaintiffs had no way to assert a claim, it would place them on the same footing as virtually all persons injured in war. But these Plaintiffs have an available administrative remedy. "The U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734." *Saleh*, 580 F.3d at 2-3. Therefore, Plaintiffs, *even without* an ability to pursue tort claims, still have greater opportunities for recompense than most persons injured in war.

B. Plaintiffs' Claims are Preempted by Federal Law

In *Saleh*, 580 F.3d at 8-12, the D.C. Circuit held that two aspects of federal law each preempted tort claims brought against CACI by detainees at Abu Ghraib prison: (1) the Constitution's allocation of war powers exclusively to the federal government; and (2) the combatant activities exception to the FTCA. *Saleh* is on all fours with the present action—indeed, these Plaintiffs were members of the putative class in *Saleh*.

1. The Constitution's Allocation of War Powers Preempts Application of State or Foreign Tort Law

The Constitution expressly preempts Plaintiffs' tort claims, as the power to conduct war is, unquestionably, an exclusively federal power. CACI argued in the district court that the Constitution's allocation of war powers to the federal government preempted the application of the tort law of any state or foreign nation to conduct occurring in the United States' prosecution of war. JA.0080-81. The district court did not decide this issue, stating only that the parties would be permitted to address choice of law issues "at a later date," and then "[i]f and when it should become relevant." JA.0456 n.7. This is a *non-sequitur*.

Choice of law has nothing to do with CACI's constitutional preemption argument. The Constitution preempts the application of *all* state and foreign tort law to Plaintiffs' claims. This is exactly as the D.C. Circuit held in *Saleh*:

> Arguments for preemption of state prerogatives are particularly compelling in times of war. In that regard, even in the absence of [*Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988)], the plaintiffs' claims would be preempted. The states (and certainly foreign entities)

> constitutionally and traditionally have no involvement in federal wartime policy-making.

Saleh, 580 F.3d at 11-12 (internal citations and quotations omitted).

As this Court has recognized, "[f]ederal law that may give rise to preemption may be the Constitution itself." *City of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 168 (4th Cir. 2002). The Constitution expressly commits this Nation's foreign policy and war powers exclusively to the federal government. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. Conversely, it expressly forbids the states from exercising those powers. U.S. Const. art. I, § 10, cls. 1, 3.[34] Of the 11 clauses of the Constitution granting foreign affairs powers to the President and Congress, seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution's express limitations on states' foreign affairs powers also concern war. Indeed, the Constitution prohibits state intrusion on the federal government's authority over foreign affairs even when the federal branches have not acted. *Zschernig v. Miller*, 389 U.S. 429, 432, 441 (1968). In sum, "[m]atters related to war are for the federal government alone to address." *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003).

[34] A significant impetus behind enactment of the Constitution was the unworkable experience under the Articles of Confederation, where states interfered with the national government's ability to provide for the national defense. *See, e.g.*, The Federalist No. 22 (Hamilton), at 145-46 (Clinton Rossiter ed., 1961) (noting the national government's inability to effectively respond to Shays' Rebellion because of the states' counterproductive role in raising an Army under the Articles).

The Constitution forbids states from interfering with the federal government's warfighting prerogatives through imposition of their own statutory or tort norms on the conduct of war. Consistent with the view that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942), the Supreme Court regularly invalidates state regulations that encroach on the federal government's constitutionally-committed role as the sole voice on war and foreign affairs.[35] Prior to the district court's decision here, there was no precedent allowing state regulation of the United States' conduct of war. For example, the Ninth Circuit invalidated a California law providing redress for slave labor "because it intrudes on the federal government's power to make and resolve war, *including the procedure for resolving war claims*." *Deutsch*, 324 F.3d at 712 (Reinhardt, J.) (emphasis added). Providing redress to foreign nationals for injuries allegedly sustained in a foreign country during a war waged by the United States is not a traditional state responsibility and it is not permitted under the constitutional scheme. *Saleh*, 580 F.3d at 11; *Deutsch*, 324 F.3d at 712.[36]

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[35] *See, e.g.*, *Garamendi*, 539 U.S. at 413-14; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380-81 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Hines v. Davidowitz*, 312 U.S. 52, 65-68 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

[36] The federal interest in not having a *foreign* sovereign's tort law apply to the United States' conduct of war is even more acute. *Saleh*, 580 F.3d at 11.

The constitutional preemption of Plaintiffs' claims is a matter properly decided on a motion to dismiss. Plaintiffs' Amended Complaint acknowledges that they are seeking to impose tort regulation on interrogations performed in Iraq "during a period of armed conflict, in connection with hostilities." JA.0016-17; JA.0032. No other facts are necessary to decide the pure legal question whether a state or foreign sovereign may regulate, through its tort laws, the United States' conduct of war. *Saleh*, 580 F.3d at 11. The Constitution establishes a forbidden line that Plaintiffs' claims may not cross.

2. The Federal Interests Embodied in the Combatant Activities Exception Provide an Independent Basis for Preemption

CACI argued in the district court that the federal interests embodied in the combatant activities exception to the FTCA preempt Plaintiffs' tort claims. Against the weight of precedent, the district court expressed doubt that Plaintiffs' claims arise out of combatant activities. JA.0443-46. The district court also held that even if Plaintiffs' claims involved combatant activities, preemption was unavailable because Plaintiffs' claims did not implicate unique federal interests, and did not conflict with federal policies. JA.0448. All of these holdings are contrary to existing precedent, and two of the three are so clearly unsupportable that Plaintiffs did not assert them in the district court in any serious way.

a. Legal Framework for *Boyle* Preemption

Sovereign immunity bars suits against the United States absent an explicit waiver. *Dep't. of Army v. Blue Fox*, 525 U.S. 255, 261 (1999). The combatant

activities exception to the FTCA retains the United States' immunity for injuries arising out of combatant activities of the military during time of war. 28 U.S.C. § 2680(j).

In *Boyle*, 487 U.S. at 500, the Court announced the framework under which FTCA exceptions preempt tort claims against government contractors. The first requirement is that the dispute involve "'uniquely federal interests' [that] are . . . committed by the Constitution and laws of the United States to federal control." *Id*. at 504 (citations omitted). Once a unique federal interest is shown, preemption is appropriate where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Id*. at 507 (internal citations omitted). As the D.C. Circuit found in *Saleh*, on identical facts, CACI meets this test and preemption is required. *Saleh*, 580 F.3d at 10.

b. Plaintiffs' Claims Arise out of Combatant Activities

In the district court, Plaintiffs did not dispute that their claims arise out of combatant activities, and their counsel conceded the point in *Saleh*, 580 F.3d at 6. Nevertheless, the district court *sua sponte* concluded that Plaintiffs' claims likely did not arise out of combatant activities, JA.0443-46, even though the Amended Complaint alleges that CACI's conduct ***"took place during a period of armed conflict, in connection with hostilities."*** JA.0032 (emphasis added).

The district court reached its erroneous result by adopting a cramped construction of "combatant activities" as including only the infliction of "actual

physical force," and then concluding that battlefield interrogations do not qualify. JA.0446. The district court looked past settled case law construing the combatant activities exception more broadly, instead relying on a single district court decision from 1947 that understandably ruled that tort claims arising out of a *training exercise* in the *Gulf of Mexico* did not arise from the military's "combatant activities." JA.0444-45 (citing *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947)).

The district's court's approach conflicts with the language of the statute. The application of the combatant activities exception does not depend on whether the challenged activity is itself a "combatant activity." Instead, the statute bars "any claim *arising out of* the combatant activities of the military . . . during time of war." 28 U.S.C. § 2680(j) (emphasis added). "Arising out of" is a broad, general and comprehensive term, ordinarily meaning originating from, growing out of, incident to, or having connection with. *Trex Co. v. ExxonMobil Oil Corp.*, 234 F. Supp. 2d 572, 576-77 (E.D. Va. 2002); *see also Coakley & Williams Const., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 349, 352 (4th Cir. 1992) (treating "arising out of" language as broad and comprehensive); *Aiello v. Kellogg, Brown & Root Serv., Inc.*, 751 F. Supp.2d 698, 709-10 (S.D.N.Y. 2011) (adopting expansive scope for "arising out of" language in the combatant activities exception).

Consistent with the statute, courts have held that activities necessary to and in direct connection with actual hostilities are encompassed by the combatant

activities exception.[37] Plaintiffs' claims here arise from CACI's interrogation of aliens detained as enemies by the U.S. military at a military detention facility in a war zone. It is beyond cavil that those claims arise from the military's combatant activities. *See Hamdi*, 542 U.S. at 518 (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Quirin*, 317 U.S. at 1)). For this reason, the D.C. Circuit, on *identical* facts, held that the combatant activities exception preempted those plaintiffs' claims. *Saleh*, 580 F.3d at 9. The lower court's misreading of the statute undermines, rather than promotes, the purposes of the exception: to free military commanders from the uncertainties inherent in civil litigation, to avoid second-guessing military judgments, and to prevent the costs of imposing tort liability on government contractors from being passed on to the American taxpayer. *Saleh*, 580 F.3d at 7-8.

The district court's ruling is also at odds with this Court's recent decision in *Taylor*, 658 F.3d at 402. In *Taylor*, a majority of the panel rejected the narrow construction of "combatant activities" expressed by the district court here, and adopted the widespread view that the term includes "activities both necessary to

[37] *Koohi*, 976 F.2d at 1336 (combatant activities exception shields contractors "who supply a vessel's weapons"); *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) ("The act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a 'combatant activity . . . .'"); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) ("accounting for and identifying soldiers" in Vietnam was a combatant activity); *Goldstein v. United States*, No. 01-0005, 2003 WL 24108182, at *4 (D.D.C. Apr. 23, 2003) (decision *not to select* a potential military target is a combatant activity).

and in direct connection with actual hostilities." *Id.* at 413 (Shedd, J., concurring in the judgment) (quoting *Johnson*, 170 F.2d at 770); *id.* (Niemeyer, J., concurring). In *Taylor*, a majority found that the plaintiff's claims, which were based on a contractor's work on a ramp at a tank maintenance facility, were subject to dismissal based on combatant activities preemption. *Id.* (Shedd, J., concurring in the judgment).[38] Given the nexus between battlefield intelligence operations and the conduct of war, *Taylor*, *Saleh*, and the litany of cases adopting the majority construction of combatant activities, compel the conclusion that Plaintiffs' claims arose out of combatant activities.

c. Plaintiffs' Claims Implicate Uniquely Federal Interests

Plaintiffs did not seriously dispute in the district court that their claims implicated a uniquely federal interest.[39] Yet the district court held that no uniquely federal interests were implicated because (1) Plaintiffs were pursuing their claims against private parties, (2) the district court thought allowing Plaintiffs' claims to proceed would incentivize contractors to "comply with their contractual obligations to screen, train and manage employees," and (3) the states and the federal government have a shared interest in enforcing the laws against torture arising out of a foreign war. JA.0449-50. The district court erred in reaching this conclusion, which is clear from *Boyle* itself.

[38] Because a majority of the *Taylor* panel also found a nonjusticiable political question, the court affirmed on that basis. *Taylor*, 658 F.3d at 412.

[39] Plaintiffs' counsel also did not seriously contest the existence of a uniquely federal interest in *Saleh*, 580 F.3d at 6.

In *Boyle*, the Court determined that there is a uniquely federal interest in "the civil liabilities arising out of the performance of federal procurement contracts," and the federal government's interest in "getting the Government's work done." *Boyle*, 487 U.S. at 505-06. Thus, the mere fact that Plaintiffs are suing a government contractor based on the performance of its work for the government is sufficient under *Boyle* to constitute a "uniquely federal interest."

The wartime context of Plaintiffs' claims only heightens the federal interest involved. As previously noted, the Constitution makes the conduct of war an exclusively federal matter. *See* Section B.1, *supra*. Thus, Plaintiffs' claims implicate uniquely federal interests and are subject to preemption under *Boyle* if the application of state or foreign tort law would significantly conflict with these federal interests.

d. Plaintiffs' Tort Claims Would Significantly Conflict with the Federal Interests Embodied in the Combatant Activities Exception

In *Boyle*, the Court identified the federal interests embodied in the discretionary function exception (the FTCA exception at issue there) in order to fashion a test that would preempt tort law conflicting with such interests. *Boyle*, 500 U.S. at 510-12. Thus, the starting point here is identifying the federal interests embodied in the combatant activities exception.

The combatant activities exception retains sovereign immunity for "[a]ny claim arising out of the combatant activities of the military . . . during time of war." 28 U.S.C. §2680(j). While the legislative history is "singularly barren of

Congressional observation apposite to the specific purpose of each [FTCA] exception," courts repeatedly have held that the exception reflects a congressional judgment that no tort duty should extend to those against whom combatant force is directed in time of war.[40] As the D.C. Circuit explained in *Saleh*:

> In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit. And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control.

Saleh, 580 F.3d at 7.

Given the federal interest in eliminating battlefield tort duties, the Ninth Circuit in *Koohi* preempted state tort claims solely upon its finding that the claims arose out of combatant activities. 976 F.2d at 1336-37. The D.C. Circuit's decision in *Saleh* functionally reaches the same result. As that court explained:

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[40] *Koohi*, 976 F.2d at 1333, 1337 ("The reason [why claims against a contractor were preempted], we believe, is that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim*, 391 F. Supp. 2d at 18 ("The exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which tort claims are simply inappropriate."); *Bentzlin*, 833 F. Supp. at 1493 ("The *Koohi* court noted that in enacting the combatant activities exception, Congress recognized that it does not want the military to 'exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.'" (citation omitted)).

> In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare.[41]

Because *any* tort duties conflict with the federal interest in removing tort duties from the battlefield,[42] the D.C. Circuit framed the appropriate preemption test as follows: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh*, 580 F.3d at 9. Both the Ninth Circuit's test, which preempts solely on a finding of a "combatant activity," *Koohi*, 976 F.2d at 1336-37, and the D.C. Circuit's "ultimate military authority" test, *Saleh*, 580 F.3d at 12, require preemption of Plaintiffs' claims.[43]

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[41] *Saleh*, 580 F.3d at 7.

[42] "[I]t is clear that all of the traditional rationales for *tort* law – deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule." *Saleh*, 580 F.3d at 7; *see also Koohi*, 976 F.2d at 1334-35.

[43] The district court noted that "[a] U.S. Army military police brigade and a military intelligence brigade were assigned to the prison," and that CACI "provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to Abu Ghraib prison." JA.0407-08. Plaintiffs alleged that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032. These facts and allegations satisfy the requirements for *Boyle* preemption set out in *Saleh*, 580 F.3d at 9.

C. Plaintiffs' Suit Is Nonjusticiable Under the Political Question Doctrine

The subject matter of Plaintiffs' Amended Complaint is not appropriate for judicial resolution because the adoption of interrogation techniques, and their use by the military and contractors performing interrogation during war, are matters committed exclusively to the political branches.

Political question analysis proceeds under *Baker v. Carr*, 369 U.S. 186 (1962), which set six independent tests for finding a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
>
> [2] a lack of judicially discoverable and manageable standards for resolving it; or
>
> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
>
> [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or
>
> [5] an unusual need for unquestioning adherence to a political decision already made; or
>
> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court need only find one of these tests satisfied to conclude the dispute is nonjusticiable. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

In *Taylor*, this Court dismissed on political question grounds a tort suit against a contractor arising out of the contractor's maintenance activities at a tank facility in Iraq. *Taylor*, 658 F.3d at 409. In so holding, the Court acknowledged that its task is to look beyond the complaint and consider how the plaintiff might prove his or her claim, and how the contractor would defend. *Id.* Viewed through that lens, Plaintiffs' claims implicate a number of the *Baker* factors and dismissal on political question grounds is therefore required.

1. The Treatment and Interrogation of Wartime Detainees is Constitutionally Committed to the Political Branches

No federal power is more clearly committed to the political branches than the warmaking power. *United States v. Moussaoui*, 365 F.3d 292, 306 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson*, 80 F.3d at 924. "Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

"The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. Judges possess no power 'To declare War . . . To raise and support Armies . . . To provide and maintain a Navy.' U.S. Const. art. 1, § 8, cl.

11-13. Nor have they been 'given the task of running the Army.'" *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (citation omitted).

In assessing the justiciability of the claims at issue in *Taylor*, this Court looked to the Eleventh Circuit's analysis in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1275 (11th Cir. 2009), a case holding that the political question doctrine barred claims arising out of a contractor's participation in a military convoy in Iraq. *Taylor*, 658 F.3d at 410. As this Court held, "[p]ursuant to *Carmichael*, if a military contractor operates under the plenary control of the military, the contractor's decisions may be considered *de facto* military decisions" subject to the political question doctrine. *Id.* Thus, when the circumstances of an alleged injury are "thoroughly pervaded by military judgment and decisions," the question is constitutionally committed to the political branches. *Id.* (quoting *Carmichael*, 572 F.3d at 1282-83).

Moreover, even where, as in *Taylor*, the military is not exercising plenary control over the contractor, the political question doctrine requires dismissal of claims that "would require the judiciary to question actual, sensitive judgments made by the military." *Id.* at 411 (internal quotations omitted). CACI satisfies the test applied in *Taylor*, as Plaintiffs' claims and CACI's defenses clearly implicate matters over which the military had plenary control *and* also would require judicial review of sensitive military judgments.

Plaintiffs expressly seek recovery from CACI, on a co-conspirator theory, for actions taken by soldiers. J.A.0021-22 ("CACI employees repeatedly conspired with military personnel to harm Plaintiffs in the various manners and

methods referred to above."). A court considering Plaintiffs' claims, as a prerequisite to recovery, would have to determine whether military personnel, performing a military mission in a combat theater, acted in a tortious manner such that their supposed co-conspirators may be held liable for the soldiers' conduct. Thus, Plaintiffs are not merely seeking to hold CACI liable for "*de facto* military decisions"—for which the political question doctrine would bar recovery—but for *actual* military decisions made by the soldiers in Iraq. *Id.* at 411-12 (political question doctrine bars claims that require the court to decide the reasonableness of military decisions in a theater of war); *Tozer*, 792 F.2d at 406 (political question doctrine bars claims that would require the jury to 'second-guess military decisions'" (quoting *United States v. Shearer*, 473 U.S. 52, 57 (1985))).

Moreover, detention and interrogation of persons found in a combat theater is, by its very nature, an inseparable component of war. *See Hamdi*, 542 U.S. at 518 (citing *Quirin*, 317 U.S. at 28). The record before the district court establishes the military's pervasive role in setting interrogation policy and controlling the intelligence-gathering operation at Abu Ghraib prison. *See* J.A.0118 (military established interrogation rules of engagement); J.A.0363-65 (detailing military's development of interrogation rules in Iraq); J.A.0369-70 (detailing migration of aggressive interrogation techniques established by Secretary of Defense to Army detention facilities in Afghanistan and Iraq). The military determined who would be interrogated and by whom, and authorized all interrogation plans. JA.0408-09 (noting that Abu Ghraib prison was under control of two Army brigades).

Importantly, many of the alleged forms of abuse here were interrogation techniques specifically approved at the highest levels of the Executive Branch.[44] These techniques had been vetted by, among others, the National Security Advisor, the CIA Director, principals of the National Security Council, the Secretary of Defense, the Attorney General, and the legal counsels to the National Security Council, CIA, Defense Department, Vice President, and President.[45] They were approved by the Secretary of Defense and incorporated into rules of engagement by military commanders at Abu Ghraib. Statement of Facts Sec. D, *supra*; J.A.0370 (detailing involvement of Secretary Rumsfeld and Lieutenant General Sanchez in developing interrogation rules used at Abu Ghraib prison).

Plaintiffs' other allegations—including that CACI participated in the CIA's "ghost detainee" program—squarely present a political question unfit for judicial review. A government investigation of military intelligence practices noted that

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[44] *Compare* JA.0028 (including "beatings, placing plaintiffs in stress positions, forced nudity, sexual assault, death threats, withholding of food, water and necessary medical care, sensory depr[i]vation, and intentional exposure to extremes of heat and cold") *with* JA.0363 (techniques approved by Secretary Rumsfeld, including "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, deprivation of light and sound," "[r]emoval of clothing, prolonged standing, sleep deprivation, dietary manipulation, hooding, [exploiting fear of] dogs, and face and stomach slaps," and "environmental manipulation").

[45] *See* Statement of Facts Sec. C, *supra*. The relevant point here is not whether the Executive Branch's chosen techniques were in fact appropriate—that is precisely the political question that the courts may not ask or answer. *See Lin v. United States*, 561 F.3d 502, 507 (D.C. Cir. 2009).

the United States' "ghost detainee" program, where United States officials determined that certain high-value detainees would not be recorded as having been captured by the United States, was an official program of the CIA, and not the military forces that CACI supported.[46] By definition, seeking to hold CACI liable for the United States' "ghost detainee" program implicates government actions, official complicity, and high-level determinations made as part of the United States' war effort. This is the type of official involvement in foreign affairs decisions "traditionally reserved to the political branches and removed from judicial review." *Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988).

Plaintiffs ask the district court, in a common-law tort suit, to adjudicate the propriety of wartime military intelligence decisions adopted at the highest levels of the Defense Department and the Executive Branch. "This a court cannot do. . . . [C]ourts are not a forum for second-guessing the merits of foreign policy and national security decisions textually committed to the political branches." *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263-64 (D.C. Cir. 2006); *see also Taylor*, 658 F.3d at 410-12; *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006); *Schneider*, 412 F.3d at 194-95; *see also Tiffany*, 931 F.2d at 277-79; *Tozer*, 792 F.2d at 406. Because prosecution of war is constitutionally reserved for the political branches, battlefield tactics, including the policies adopted for detention and interrogation of suspected enemies, are not subject to judicial review.

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[46] MG George Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, at 53, *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf.

2. There Is No Judicially Discoverable or Manageable Standards for Deciding Tort Claims by Enemy Detainees

Allowing our Nation's battlefield enemies to sue in our courts over their treatment in war "would hamper the war effort and bring aid and comfort to the enemy." *Eisentrager*, 339 U.S. at 779; *see also Mohammed v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011). That concern is not diminished because the military engaged civilians to assist the wartime mission.

Plaintiffs' claims would require the district court to decide, and instruct the jury on, the proper standard of care owed to enemy aliens held in a battlefield detention facility. The district court would have to make this determination even though military commanders on the field (1) had overall control over the interrogation policies employed, and (2) were urgently seeking actionable battlefield intelligence that would assist in protecting American soldiers from insurgent attacks. *See* JA.0363-65; 0370 (detailing involvement of senior military personnel in establishing interrogation policies in Iraq); JA.0407-08 (detailing efforts by military intelligence to develop information on insurgency leaders).

In *Taylor*, this Court held that it lacked judicially discoverable standards for evaluating "how electric power is supplied to a military base in a combat theatre or who should be authorized to work on the generators supplying that power." 658 F.3d at 412 n.13. As in *Taylor*, this Court and the district court are not in a position to perform the difficult balancing required to determine the degree of coercion, and conditions of detention, that were advisable and appropriate for combat-zone detainees in light of the exigencies of war. Such a determination

would require the Court to weigh the need for actionable intelligence and to second-guess decisions made by military commanders as to what interrogation policies were reasonable under the circumstances. *Id.*

Moreover, courts lack judicially manageable standards for evaluating wartime injury claims where adjudication would require extensive review of classified materials or of evidence unlikely to be discoverable because of the "fog of war." *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Anderman v. Fed. Rep. of Austria*, 256 F. Supp. 2d 1098, 1112-13 (C.D. Cal. 2003); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 668 (N.D. Cal. 2002). "In wartime, it would be inappropriate to have soldiers assembling evidence, collected from the 'battlefield.'" *Bentzlin*, 833 F. Supp. at 1495.

Adjudicating these Plaintiffs' tort claims would require determining what was done to Plaintiffs, and by whom; whether interrogation techniques adopted by the United States were appropriate; and whether CACI conspired with the military to abuse Plaintiffs. All records of detainee interrogations, and the interrogation techniques used, are classified and in the United States' exclusive possession. Moreover, trying Plaintiffs' conspiracy allegations would call for discovery from high-level Defense Department and White House sources that courts should be very reticent to order.

Worse yet, "[t]he discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command decisions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's

interrogation and detention policies, practices, and procedures. . . . 'Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.'" *In re Iraq & Afghan. Det. Litig.*, 479 F. Supp. 2d 85, 105-06 (D.D.C. 2007) (quoting *Eisentrager*, 339 U.S. at 774), *aff'd*, 649 F.3d 762 (D.C. Cir. 2011).

The district court was dismissive of these discovery concerns. The district court found CACI's discovery concerns "ironic" given CACI's previous defamation suit against a New York radio personality. JA.0421-22. The *Rhodes* suit, however, largely concerned Rhodes' state of mind at the time she made the statements at issue.[47] Thus, CACI took no discovery from the Government in *Rhodes* and did not pursue evidence in Iraq.

The district court further found that the limited discovery taken in *Saleh* and *Ibrahim* supports the manageability of discovery. JA.0422-23. But in *Saleh* and *Ibrahim*, the district court allowed only limited discovery on preemption, staying all other discovery until the threshold preemption issue was resolved. *Ibrahim*, 391 F. Supp. 2d at 19; *Saleh*, 436 F. Supp. 2d at 59-60. The court in *Saleh* did *not* order general "discovery as to the evidentiary support for the plaintiffs' claims," as the district court here believed. JA.0422-23.

[47] *See CACI Premier Tech. v. Rhodes*, 536 F.3d 280, 294-300, 304 (4th Cir. 2008); *see also id.* at 306 (Duncan, J., concurring) ("It is the absence of sufficient evidence of Rhodes's state of mind, and not any testament to the actual veracity or justifiability of her statement, that makes summary judgment appropriate here.").

3. Lack of Respect for Coordinate Branches of Government

CACI addressed the lack-of-respect issue in the district court in a footnote, not because the argument was futile (as the district court supposed, JA.0425), but because it almost completely overlaps the other political question tests. In *Taylor*, this Court found that it would show a lack of respect to the Executive branch to review decisions concerning the provision of electrical power at a tank maintenance facility in Iraq. 658 F.3d at 412 n.13. This consideration is all the more evident here, where Plaintiffs ask the district court and this Court to pass judgment on the Executive's decisions concerning the core military function of battlefield detainee operations.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and remand this case with instructions to dismiss the Amended Complaint.

Respectfully submitted,

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November 29, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, John F. O'Connor, hereby certify that:

1. I am an attorney representing Appellants CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, Addendum, and Certificate of Compliance and Service) contains 13,925 words.

/s/ John F. O'Connor

John F. O'Connor

ADDENDUM: STATUTES AND REGULATIONS

28 U.S.C. § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(a), (j)

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function

or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2011, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of Appellants' Brief to be served by first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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