No. 15-1831

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Nazim Abdullah AL SHIMARI, Taha Yaseen Arraq RASHID, Salah Hasan Nusaif Jasim AL-EJAILI, Asa'ad Hamza Hanfoosh AL-ZUBA'E,

Plaintiffs-Appellants,

and

Sa'ad Hamza Hantoosh Al-Zuba'e,

Plaintiff,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant-Appellee,

and

Timothy Dugan, CACI International Inc, L-3 Services, Inc.,

Defendants.

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

BRIEF OF APPELLEE CACI PREMIER TECHNOLOGY, INC. [REDACTED]

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CORPORATE DISCLOSURE STATEMENT

Appellee CACI Premier Technology, Inc. ("CACI PT") is a privately-held company. CACI PT is wholly owned by CACI, Inc. – FEDERAL, which is in turn wholly owned by CACI International Inc, a publicly-traded company. Other than CACI International Inc, no publicly-traded company has either a 10% or greater ownership interest in CACI PT 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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JURISDICTION

This Court has appellate jurisdiction under 28 U.S.C. § 1291.

The district court correctly found that it lacked subject-matter jurisdiction over Plaintiffs' claims because they present nonjusticiable political questions. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

ISSUES PRESENTED

1. Whether it was clearly erroneous for the District Court to find that CACI PT personnel at Abu Ghraib prison served under the plenary and direct control of the U.S. military.

2. Whether the District Court correctly concluded that resolution of Plaintiffs' claims would require the Court to question sensitive military judgments.

3. Whether the District Court correctly concluded that there is a lack of judicially manageable standards for resolving Plaintiffs' claims.

STATEMENT OF THE CASE

Plaintiffs are Iraqis who were detained by the United States at Abu Ghraib prison in Iraq. They filed this action in 2008, seeking to hold CACI Premier Technology, Inc. ("CACI PT") liable for injuries they allege that they suffered while in military custody. CACI PT provided a few dozen civilian interrogators to augment the military interrogators supporting the U.S. military's war efforts in Iraq, including some interrogators who served at Abu Ghraib prison.

Though they amended their complaint three different times, none of Plaintiffs' complaints alleges any direct contact between themselves and any CACI PT employees. *See* Dkt. #2, 28, 177, 254.[1] Accordingly, this case has proceeded on a theory of co-conspirator liability, with Plaintiffs seeking to hold CACI PT liable for mistreatment they allegedly suffered at the hands of soldiers. The District Court, however, found Plaintiffs' conspiracy allegations so deficient that it dismissed them from Plaintiffs' Second Amended Complaint. Dkt. #215. Though Plaintiffs were granted leave to replead, the conspiracy allegations in their Third Amended Complaint were equally lacking in substance, and CACI PT once again moved to dismiss. Dkt. #312. The District Court did not reach CACI PT's motion to dismiss, having dismissed the case on other grounds. Dkt. #460.

[1] All "Dkt." citations are to the District Court docket in this case.

Discovery similarly did not turn up facts connecting CACI PT personnel to Plaintiffs or their alleged mistreatment. This case proceeded through full discovery, which closed in April 2013. Dkt. #160. If Plaintiffs were interrogated at Abu Ghraib prison, the identity of such interrogators remains unknown because the United States has classified this information and refuses to disclose it. Dkt. #325.

Moreover, the United States refused to allow three of the four Plaintiffs to appear in this country for court-ordered depositions. While the District Court repeatedly extended Plaintiffs' deadline to appear, the United States government remained steadfast in its refusal to allow Plaintiffs into the United States. Dkt. #214, 244, 309. This is hardly surprising. As an example, Plaintiff Al Shimari's detainee file identifies him as a "high ranking member of the Ba'ath Party" and former Iraqi military officer, and states that he was captured when a search of his property revealed a machine gun, six rocket launchers, ammunition, blasting caps, gun powder, and two improvised explosive devices. He was held by the U.S. military for nearly five years, and for nearly four years after CACI PT ceased providing interrogators to support the U.S. military in Iraq. Dkt. #369 at Exs. 20, 22-23 (excerpts from Al Shimari's detainee file).

In addition to the merits discovery taken in this case, the District Court also ruled that any discovery taken in *Saleh v. Titan Corp.*, 580

F.3d 1 (D.C. 2009),[2] a case filed in 2004, would be treated as having been taken in the present case. Dkt. #211 at ¶ 14. And on remand from this Court, Plaintiffs were permitted to take as much additional discovery as they deemed necessary to address the political question doctrine. A139. Though given leave to take jurisdictional discovery, Plaintiffs sought no additional discovery and did not move to compel discovery from CACI PT or any third party. All told, **after nearly eleven years of litigation and discovery**, Plaintiffs have not identified any mistreatment they suffered at the hands of a CACI PT interrogator, nor have they developed evidence that CACI PT personnel directed anyone to mistreat any of these Plaintiffs or even that a CACI PT interrogator was assigned to interrogate any of the Plaintiffs.

The District Court judgment currently on appeal was the product of this Court's remand instructions in 2014. When this Court vacated the District Court's prior dismissal of this action, it remanded the case with instructions that the District Court, before proceeding any further with the case, determine whether the political question doctrine barred Plaintiffs' claims. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 537 (4th Cir. 2014). In its remand instructions, the Court directed the District Court to apply the political question test this Court

[2] Plaintiffs were part of the putative class in *Saleh*, and the plaintiffs' counsel in *Saleh* included many of the counsel who have represented Plaintiffs in this action.

had adopted in *Taylor v. Kellogg Brown & Root Services Inc.*, 658 F.3d 402 (4th Cir. 2011).

On June 18, 2015, the District Court issued an order granting CACI PT's motion to dismiss based on the political question doctrine. A744. The District Court concluded that the political question doctrine barred Plaintiffs' claims for three reasons: (1) CACI PT interrogators had been under the plenary and direct control of the U.S. military (A754); (2) resolving Plaintiffs' claims would require second-guessing actual, sensitive military judgments (A760); and (3) there were no judicially manageable standards for resolving Plaintiffs' claims (A764). Plaintiffs' motion papers did not meaningfully contradict CACI PT's evidence that the U.S. military in fact exercised plenary, direct, and total control over personnel and operations at Abu Ghraib prison. The District Court entered final judgment on June 24, 2015 (A772), and Plaintiffs appealed (A773).

As a result of the District Court's ruling on the political question doctrine, the District Court did not need to resolve a panoply of motions that were pending at the time of the District Court's 2013 dismissal of this action or which had been scheduled for briefing. These motions included a motion by CACI PT to compel the United States to disclose who, if anyone, interrogated Plaintiffs or to formally assert the state secrets privilege as a basis for refusing to disclose this information (Dkt. #275); a motion by CACI PT to dismiss three of the Plaintiffs' claims as

a sanction for their failure to appear for depositions (Dkt. #367); CACI PT's motion to dismiss the conspiracy counts reasserted in Plaintiffs' Third Amended Complaint (Dkt. #312); and summary judgment motions that would have addressed, among other things, whether Plaintiffs' claims were preempted,[3] whether CACI PT was immune from suit,[4] and whether Plaintiffs had developed any evidence tying the actions of CACI PT personnel to any injuries Plaintiffs allegedly suffered (Dkt. #446).

STATEMENT OF FACTS

A. Plaintiffs Have Not Developed Evidence Tying Their Alleged Treatment at Abu Ghraib Prison to the Actions of Any CACI PT Employee

This is a case in which Plaintiffs seek to hold CACI PT liable for injuries that military personnel allegedly inflicted on Plaintiffs. As noted in the Statement of the Case, Plaintiffs have no evidence that CACI PT personnel mistreated them, or that CACI PT personnel directed anyone else to mistreat these Plaintiffs. In fact, Plaintiffs' interrogatory responses admit that they have no evidence of any CACI PT personnel being involved in causing them injury. See A172-73, A179, A185, A190 (responses to Interrogatory No. 5). Plaintiffs deposed

[3] *See Saleh*, 580 F.3d at 9.

[4] *See Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

several military policemen ("MPs") who were court-martialed for abusing detainees at Abu Ghraib prison and, in response to follow-up questioning by CACI PT, these witnesses testified that they had no information at all about these Plaintiffs. A953-55 (Frederick Dep.); A987-88 (C. Graner Dep.).

It was CACI PT that pursued discovery from the United States as to who, if anyone, actually interrogated these Plaintiffs. Dkt. #276. When the United States refused to provide this information on the grounds that it was classified (Dkt. #325), CACI PT moved to compel. Plaintiffs did not join the effort to compel disclosure of who, if anyone, interrogated them. To the contrary, Plaintiffs' response simply told the District Court that it could safely deny CACI PT's motion because, in a lawsuit against a company providing civilian interrogators, the identity of Plaintiffs' alleged interrogators "is not necessary to resolve this case." Dkt. #328 at 1.[5]

Because they have no evidence of contact between themselves and CACI PT employees, Plaintiffs' case has rested on a theory that CACI PT employees, and the company itself, entered into a "torture conspiracy" with soldiers whereby the interrogators "set the conditions"

[5] CACI PT's motion to compel discovery of the identity of Plaintiffs' interrogators, if any, was mooted by the District Court's 2013 entry of judgment. Dkt. #460. On remand from this Court, the District Court directed the parties not to renew discovery motions that were not necessary for considering justiciability. A140.

for abuse and the MPs carried them out. A95-98. But Plaintiffs' allegations fail for lack of proof with respect to the general allegation of a "torture conspiracy," and also as to the specific allegation that CACI PT personnel had any involvement in *these Plaintiffs' treatment* at Abu Ghraib prison.

The MPs testified that military and civilian interrogators sometimes provided instructions concerning conditions of detention for particular detainees, but that the instructions always were specific to a detainee assigned to that interrogator. A966-67, A972-73, A976 (Frederick Dep.); A989-90 (C. Graner Dep.). There is, however, no evidence that a CACI PT interrogator was ever assigned to interrogate these Plaintiffs, and thus no evidence that CACI PT personnel gave instructions to MPs regarding these Plaintiffs.[6]

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[6] [redacted] Pl. Br. at 21. [redacted] Mr. Stefanowicz was part of a task force that questioned detainees to determine if there were other weapons in the possession of detainees. A959-61. [redacted]

(Continued …)

Plaintiffs' statement of facts cites to Plaintiff Al-Ejaili's deposition testimony, and to interrogatory responses for the others, as to the mistreatment they allege to have received, but none of these materials ties such alleged mistreatment to CACI PT personnel. Pl. Br. at 10-11. To the contrary, Plaintiffs' own interrogatory responses, as noted above, disclaim any knowledge of any interactions with CACI PT personnel. A172-73, A179, A185, A190. At most, Plaintiffs' evidence, after all discovery has concluded, is limited to their own statements that *somebody* mistreated them, followed by an assertion that CACI PT should be liable as a co-conspirator of whomever mistreated Plaintiffs.[7] Plaintiffs' conclusion of CACI PT liability is, on these facts, a total *non sequitur*.

[redacted]

[7] Even the hearsay government reports on which Plaintiffs almost exclusively rely are of no assistance in establishing a link between Plaintiffs and CACI PT personnel. The Taguba report states, without any detail, that CACI PT interrogator Steven Stefanowicz gave some MPs instructions regarding detainee treatment that were contrary to Army regulations and policy. A341. But the MPs were deposed and testified that all instructions from interrogators related only to detention conditions for their assigned detainees. A966-67, A972-73, A976; A989-90. The Jones/Fay report found that three CACI PT interrogators engaged in discrete misconduct, none of which involved these Plaintiffs. A636-37, A638, A640. Moreover, as the United States has observed, these reports are based on "information obtained second-hand, third-hand, or more remotely," Dkt. #285 at 10 n.7, and therefore are neither reliable nor admissible.

Thus, after eleven years of litigation and discovery, the state of the record is as follows: (1) there is no evidence that any CACI PT employee was assigned to interrogate any Plaintiff; (2) Plaintiffs have no evidence that any CACI PT employees mistreated them; (3) Plaintiffs have no evidence that CACI PT employees directed others to mistreat them; and (4) the MPs testified that any instructions provided by interrogators regarding detainee treatment were always specific to the detainees assigned to that interrogator.

B. The United States Military Directed and Controlled CACI PT Interrogators

The discovery taken in this case demonstrates beyond any doubt that the U.S. military exercised plenary, direct, and exclusive control over operations at Abu Ghraib prison and the activities of military and CACI PT personnel deployed to the prison. The District Court credited the extensive first-hand testimony of military officers, MPs, and CACI PT personnel on issues of command and control. The District Court's conclusions on this issue are not clearly erroneous; indeed, they are clearly correct.

The U.S. military established an Interrogation Control Element, or "ICE", to conduct the interrogation mission at Abu Ghraib prison. The U.S. Army's 205th Intelligence Brigade provided intelligence personnel to conduct interrogations under the auspices of the ICE.

A154 (Pappas Decl.). The U.S. Army, however, did not have enough interrogators to fill all of the interrogation teams, also called "Tiger Teams," needed to interrogate detainees, so the United States contracted with CACI PT to provide civilian interrogators to augment the military interrogator force. A155 (Pappas Decl.); A150 (Brady Decl.).[8]

When the CACI PT interrogators arrived at Abu Ghraib prison, it was an active war zone. A967 (Frederick Dep.); A155 (Pappas Decl.). The prison was subject to attacks from mortars, rocket-propelled grenades, and sniper fire, some of which killed or injured U.S. soldiers. A155 (Pappas Decl.); A967-68 (Frederick Dep.); A1007-08 (Harman Dep.).

The general conditions of detention at Abu Ghraib prison were established by the U.S. military before CACI PT personnel arrived on the scene. The first CACI PT interrogators did not arrive in Iraq until September 28, 2003. A1011. [redacted] By the time CACI PT interrogators arrived at Abu Ghraib prison, detainees were already being kept naked or nearly naked; were being required to wear women's underwear; were

[8] A "Tiger Team" included an interrogator, an intelligence analyst, and a linguist. A167.

being subjected to stress positions; were being handcuffed to the bars of their cells; were being subjected to dietary restrictions; and were being subjected to environmental manipulation. A962-63 (Frederick Dep.).

1. Witnesses on the Ground at Abu Ghraib Prison Repeatedly Testified to the U.S. Army's Total Control Over All Interactions With Detainees

Plaintiffs' brief contends that CACI PT's evidence of the U.S. military's plenary and direct control over CACI PT interrogators is based solely on a "formal" chain of command without regard to the "facts on the ground." Pl. Br. at 21. But it is Plaintiffs who have averted their eyes from the testimony of witnesses who were on the ground.

Witnesses confirming the U.S. Army's plenary and direct control over CACI PT personnel include:

- Major Carolyn Holmes, U.S. Army, the Officer in Charge of the ICE at Abu Ghraib prison (A559, A883-84)[9]
- Colonel Thomas Pappas, U.S. Army, who commanded the military intelligence brigade at Abu Ghraib prison. A154-55.
- Colonel William Brady, U.S. Army, the Contracting Officer's Representative for the CACI PT interrogation contracts. As the Contracting Officer's Representative in Iraq, he was required to know the manner in which contractor personnel were supervised. A149.

[9] At the time of Plaintiffs' detention by the United States, Major Holmes was known as Captain Carolyn Wood.

- Daniel Porvaznik, a CACI PT interrogator who also acted as CACI PT's administrative site lead at Abu Ghraib prison. A164.
- Charles Mudd, a CACI PT executive who made multiple visits to Abu Ghraib prison. A594.
- Torin Nelson, a CACI PT interrogator who performed his duties at Abu Ghraib prison. A610.

Plaintiffs did not present evidence on command and control from anyone similarly situated to the above-listed witnesses.

All of these witnesses testified, from first-hand knowledge, that the U.S. military's control over Abu Ghraib prison and the interrogation mission was clear, direct and unqualified. Indeed, given that Abu Ghraib prison was a military detention facility in a war zone, and was under regular attack, to say that the U.S. military insisted on total control at the facility is an understatement.

When a CACI PT interrogator arrived at Abu Ghraib prison, the military leadership would approve placement of the interrogator on one of the military's Tiger Teams. A150 (Brady Decl.), A155 (Pappas Decl.); A887 (Holmes Dep.). Once a CACI PT interrogator was placed on a Tiger Team, the military chain of command regulated and controlled all aspects of his or her performance of the interrogation mission. The military chain of command provided all arriving personnel, whether soldiers or CACI PT employees, a memorandum of understanding that explained the rules and procedures at Abu Ghraib prison. A887-88

(Holmes Dep.); A218. The memorandum was identical for soldiers and CACI interrogators. A888. As the memorandum explained, personnel at Abu Ghraib prison – both military and civilian – reported to the military intelligence chain of command for all operational matters. A219. Major Holmes confirmed this arrangement:

> Q: With respect to interrogation operations, who did CACI interrogators report to?
>
> A: They would have reported to their section – section sergeant and then also to Sergeant Johnson, Chief Graham, and myself. Major – Major Price, I believe he was the operational sergeant. So they fell under the same chain of command, if you will.

A888-89.[10] Colonel Pappas testified similarly: "CACI PT interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." A155-56. As Colonel Brady put it, the CACI PT interrogators "were

[10] *See also* A155-56 (Pappas Decl.) ("Specifically, Tiger Teams reported to Captain Carolyn A. Wood, the Officer in Charge of the Interrogation Collection Element ("ICE"), and Chief Warrant Officer John D. Graham, an interrogation operations officer for the ICE. Captain Wood, in turn, reported to the Operations Officer, Major Michael Thompson, who in turn reported to Lieutenant Colonel Jordan, the director of the JIDC and my direct subordinate."); A167 (Porvaznik Decl.) ("As the CACI PT Site Lead at Abu Ghraib, I (and all CACI PT interrogators) reported directly to Captain Carolyn Wood, U.S. Army, in her capacity as Officer in Charge ('OIC') of the Interrogation Control Element ('ICE'). I (and all CACI PT interrogators) also reported to the Non-Commissioned Officer in Charge ('NCOIC'), who reported to Captain Wood.").

under the functional control and supervision of the United States military." A151. The organizational chart for the ICE made clear that interrogators, whether military or civilian, reported to a U.S. Army sergeant section chief, and then to the military intelligence leadership in the ICE. A158; A559.[11]

The U.S. military not only supplied the chain of command, but the military officers who comprised that chain of command confirmed their total control over all aspects of interrogation operations. As Colonel Pappas stated in his Declaration:

> The military decided where each detainee would be incarcerated within Abu Ghraib prison, which detainees would be interrogated, and who would conduct the interrogations of a given detainee. Both military and CACI PT interrogators were required to prepare an interrogation plan for a detainee, which was reviewed and approved by the U.S. military leadership in the ICE. At the conclusion of an interrogation, military and civilian interrogators were required to prepare an interrogation report and enter it into a classified military database. The

[11] *See also* A150-51 (Brady Decl.) ("During all relevant times, the civilian interrogators provided by CACI PT in support of the U.S. Army's mission at the theater interrogation site were under the supervision of the military personnel from the military unit to which they were assigned to support under contract. For example, CACI PT interrogators serving at Abu Ghraib were directly supervised by the chain of command for the 205th Military Intelligence Brigade and Joint Interrogation and Debriefing Center."); A156 (Pappas Decl.) ("In all respects, CACI PT interrogators were subject to the operational control of the U.S. military.").

> military then decided what use to make of information obtained during interrogations.

A156; *see also* A167 (Porvaznik Decl.) (providing similar testimony).

Major Holmes testified similarly. She confirmed [redacted] that military and CACI PT interrogators were required to draft an interrogation plan; that all interrogation plans required approval by the military chain of command; that the permitted interrogation techniques were the same for military and CACI PT interrogators; and that all non-standard interrogation techniques proposed by an interrogator required the approval of Major Holmes, Colonel Pappas. or General Sanchez. A892-94.

Other witnesses also testified that an interrogation plan approved by military authorities was "absolutely necessary" before an interrogation could go forward. A619-20 (Nelson Dep.); A687-88 (Porvaznik Dep.). Interrogation plans included a description of the detainee to be interrogated, the information the detainee might have, the interrogation techniques and approaches that the interrogator proposed to use, and any information known as to the detainee's likely level of cooperation and knowledge. A620-22 (Nelson Dep.); A168 (Porvaznik Decl.).

The military leadership at Abu Ghraib prison also monitored interrogations, as interrogations took place in booths with one-way

glass. A894-95 (Holmes Dep.); A597 (Mudd Dep.); A685-86 (Porvaznik Dep.). Major Holmes testified that she observed interrogations but could not distinguish in her mind between interrogations by military interrogators and by CACI PT interrogators because she "treated them all the same." A895, A900-01.

[redacted]

[redacted]

Indeed, a Senate Armed Services Committee Report documented the process by which IROES approved for use by interrogators at Guantanamo Bay migrated through the military leadership to Afghanistan and then to Iraq. A234-36, A240-41. With regard to the initial development of the list of permitted interrogation techniques for Guantanamo Bay, Vice President Cheney said of the program, "We all approved it."[12]

2. The U.S. Army Chain of Command Controlled Not Only All Aspects of the Performance of Interrogations, But Also Controlled the General Conduct of Soldiers and Civilian Personnel at Abu Ghraib Prison

The U.S. military's exercise of control over CACI PT interrogators was not limited to detainee interrogations. As Major Holmes testified,

[12] Paul Kane & Joby Warrick, "Cheney Led Briefings of Lawmakers To Defend Interrogation Techniques," *The Washington Post*, A1, A4 (June 3, 2009).

"[b]asically, we treated the CACI personnel the same way that we did military intelligence,"[13] which meant that virtually all everyday activities within Abu Ghraib were subject to the U.S. military's regulation and control. Given that Abu Ghraib prison was occupied and operated by the U.S. Army in the middle of a war zone, and was under regular attack, it is hardly surprising that the Army leadership insisted on controlling all aspects of life at the facility.

Every witness who provided testimony on the subject of command and control was clear that the military control at Abu Ghraib was plenary, direct, pervasive, and all-encompassing. As CACI PT interrogator Daniel Porvaznik testified, "CACI PT employees were *at all times* under the supervision, control and direction of U.S. military personnel in the Iraqi theater of operations." A166 (Porvaznik Decl.) (emphasis added). Colonel Pappas testified at length that CACI PT interrogators, were subject to the same general standards of conduct established by the U.S. military for soldiers deployed at Abu Ghraib prison:

> CACI PT interrogators were subject to the same standards of conduct as military members. On or about Jan 16, 2004, I issued a memorandum . . . reiterating the standards of conduct at Abu Ghraib prison. These standards of conduct applied equally to military personnel

[13] A886 (Holmes Dep.); *see also* A895 (Holmes Dep.); A150 (Brady Decl.); A156 (Pappas Decl.).

> and to civilian contractors working under the direction and control of the military at Abu Ghraib. There was no distinction between the conduct standards for military members and the standards for civilian contractors – they were one and the same.

A156 (internal citations omitted).

The standards of conduct applied by the U.S. military to soldiers and CACI PT personnel alike went far beyond the conduct of interrogations themselves. The standards of conduct prohibited the possession, use or sale of privately-owned firearms, ammunition, and explosives; prohibited alcoholic beverages; banned pornography and sexually-explicit materials; prohibited gambling and sports pools; prohibited the exchange of currency at other than the host-nation exchange rate; prohibited personnel from adopting or caring for pets or mascots; prohibited proselytizing of any religion; prohibited taking or retaining personal souvenirs; and provided for routine inspections of living areas and personal effects. A160. Indeed, the U.S. military conducted unannounced inspections of the living spaces and personal effects of CACI PT personnel at Abu Ghraib prison. A599 (Mudd Dep.).

A separate memorandum provided by Major Holmes to incoming CACI PT and other civilian personnel explained that civilians at Abu Ghraib were held to the same timeliness and cleanliness standards as soldiers, were prohibited from using computers to access pornography or music sharing websites, and were required to comply with generally-applicable standards regarding the wearing of body armor. The

memorandum also dictated appropriate attire to be worn within and outside the Abu Ghraib compound. A218.

3. Plaintiffs' Statement of Facts Misrepresents the Testimony of Military Officers on Command and Control Issues

Plaintiffs' brief basically calls Colonel Pappas and Colonel Brady liars, asserting that their testimony in this case is undercut "by prior inconsistent statements." Pl. Br. at 21. But it is Plaintiffs who are playing fast and loose with the facts.

Plaintiffs' brief quotes two sentences from Colonel Pappas's testimony in the *Smith* court-martial to create the false impression that Colonel Pappas had testified that CACI PT interrogator Steven Stefanowicz's chain of command was solely through CACI PT personnel. Pl. Br. at 22. Plaintiffs' brief omits the testimony from Colonel Pappas (bolded below) surrounding the language they quote:

> Q: **Did all the interrogators have direct access to the brigade commander?**
>
> A: **Yes. My office was down in the JIDC area; I would wander through the JIDC from time to time. In fact, different interrogators would talk to me about different things.**
>
> Q: **What was Sergeant Ashton's chain of command?**
>
> A: **Sergeant Ashton's chain of command, as far as I know, went through the – it went – I think he was at the supervisor level, and then it went back through the ICE – the interrogation control**

> **element – through the operations section, up to his battalion commander, and then to me.**
>
> Q: What was Big Steve's leadership chain of command?
>
> A: He worked as an interrogator inside the interrogations thing; his actual chain of command, he was a contractor, and he went back through the contractor lead, who was on site, back to the contracting officer representative."
>
> Q: **Let me follow up on that. These contractors, were they performing some of the missions of some of your soldiers – some of the same exact missions, in terms of interrogating?**
>
> A: **Yes, that's correct. In terms of their supervisory, their day-to-day supervisory thing, that would've been just like Sergeant Ashton, back through the ICE, to the operations section, and ultimately, to me.**

A1381-82 (emphasis added). Thus, Colonel Pappas's actual testimony was that the CACI PT interrogator in question had the exact same day-to-day military chain of command as a military interrogator. By omitting the testimony immediately before and after the language quoted in their brief, Plaintiffs misrepresent Colonel Pappas's testimony as the opposite of what it actually was.

Similarly, Plaintiffs assert that Colonel Brady's prior deposition testimony [redacted] Pl. Br. at 23. But the deposition passage Plaintiffs cite has nothing to do with interrogators. Colonel Brady was asked about a specific assertion that

a CACI PT screener had supervised screening operations for a period of time. Colonel Brady testified that he had no knowledge of that specific incident (A566), but Plaintiffs misrepresent this testimony as addressing the supervision of interrogators at Abu Ghraib prison.

Plaintiffs also exhibit a striking lack of candor in describing the declaration of Major Daniels, who replaced Colonel Brady as the Contracting Officer's Representative. Plaintiffs' brief cites to Major Daniels' declaration for the proposition that "*[m]ilitary officials* did not personally supervise CACI interrogators during the conduct of interrogations." Pl. Br. at 16 (emphasis added). What Major Daniels actually said was that *he*, as someone located away from Abu Ghraib prison and not involved in the interrogation mission, "never *personally supervised* any CACI contract interrogator during the conduct of an interrogation." A478 (emphasis added). Several other witnesses, however, testified that military personnel regularly monitored interrogations. A894-95 (Holmes Dep.); A685-86 (Porvaznik Dep.); A597 (Mudd Dep.).

On a dispositive issue such as command and control, Plaintiffs' abject mischaracterization of these military officers' testimony is nothing short of an affirmative effort to mislead the Court. The District Court credited these military officers' testimony as it was actually presented, and not as twisted by Plaintiffs. A755-56 ("The declaration of Colonels Pappas and Brady, along with the deposition testimony of

other military personnel, are convincing as to who maintained the chain of command at Abu Ghraib – the military."). This Court should do the same.

4. CACI PT Provided a "Site Lead" at Abu Ghraib Prison, But the Site Lead's Responsibilities Extended Only to Purely Administrative Matters Such as Pay Issues and Processing Leave Requests

Each interrogator, whether military or civilian, also had an administrative chain of command for mundane matters such as leave and pay issues, but the administrative chain of command had no role in detainee treatment or the interrogation mission. A918 (Holmes Dep.) (the CACI PT site lead made no operational decisions and could not approve interrogation plans); A917-19 (Holmes Dep.) (CACI PT site lead was an "administrative go-to guy" for "corporate issues, like leave and things of that nature," but with no authority "over the mission itself").

Witness after witness testified similarly. *See* A593 (Mudd Dep.) ("[The CACI PT site lead] did the briefings on the admin stuff, here is how we do time sheets, this says you have to keep a daily time sheet. So they did the CACI admin type stuff, make sure they understand their chain of command."); *see also* A573 (Monahan Dep.) ("[A site lead's] responsibility was to assist administratively with the project manager back in the States, since we were not physically there."); A574,

A576 (Monahan Dep.); A615 (Nelson Dep.) (the CACI PT site lead "handled mainly administrative affairs as a site manager.").

Plaintiffs' brief mischaracterizes the testimony of CACI PT witnesses in seeking to paint a misleading picture of the role of a CACI PT site lead in Iraq. Plaintiffs quote one-half of one sentence from the Mudd deposition for the proposition that a CACI PT site lead was "in charge" (Pl. Br. at 14). But the full quote from which Plaintiffs pull the "in charge" snippet is as follows: "We always had – we always put someone representing CACI in charge. Even when [a site lead] went on vacation, we had a backup person that would become Acting Site Lead *just to handle time sheets and dealing with the customer and doing the admin stuff that had to be done*." A604 (Mudd Dep.) (emphasis added).

Plaintiffs similarly quote a half-sentence from the Porvaznik deposition in which he described a site lead as being "in charge" (Pl. Br. at 14), while failing to disclose that Mr. Porvaznik was clear in his testimony that a site lead was "in charge" of solely administrative matters: "There were a lot of administrative issues that had to be handled, quite a few actually. Anything from insurance, pay issues, mail, living quarters – establishing living quarters, that was a – that was a big thing; getting the equipment from – you know, once it arrived in Iraq, getting it out to Abu Ghraib. . . ." A682 (Porvaznik Dep.); *see also* A683, A687-88, A689-90, A691-92, A693-94 (Porvaznik Dep.).

Plaintiffs' brief misleadingly asserts that "CACI supervisors monitored how CACI employees conducted interrogations, including observing interrogations and reviewing reports and interrogation notes." Pl. Br. at 13. As for "observing interrogations," Plaintiffs rely on testimony by CACI PT executive Charles Mudd that he visited Abu Ghraib several times to check on employee welfare. Pl. Br. at 13. But on those visits, Mr. Mudd spent most of his time in the CACI PT employees' living area "because I was there working – housing problems and making sure they're comfortable and what else they need to be happy so they'll stay longer in Iraq." A1261 (Mudd. Dep.). Indeed, Mr. Mudd testified that he "didn't go around watching operations because [he] wasn't there for operational issues. The government ran that." *Id.*

During one or more of his visits, Mr. Mudd passed through the interrogation area just to gain a general understanding of the conditions and what the CACI PT employees were doing on a daily basis. A597 (Mudd Dep.). But Mr. Mudd testified that he "never witnessed a full interrogation, just walked by and watch[ed] them." *Id.* By contrast, when Mr. Mudd walked through the interrogation area, he saw *military personnel* observing the interrogations behind a one-way mirror. *Id.* Mr. Mudd could not have been clearer in testifying that operational matters were under the exclusive control of the U.S. military. A584, A586-87, A588, A591, A593, A595, A597-98, A599, A601, A604.

Plaintiffs also note that CACI PT site lead Daniel Porvaznik "review[ed] reports and interrogation notes." Pl. Br. at 13. But Plaintiffs' brief fails to disclose that Mr. Porvaznik had access to this material not for any supervisory purpose, but because the site lead also held a functional position on the contract – in Mr. Porvaznik's case as an interrogator.[14] Mr. Porvaznik had access to interrogation reports because, like all interrogators, he had the security clearance to access them, but he was not expected to review the work of CACI PT interrogators.[15]

Plaintiffs also mischaracterize Mr. Porvaznik's deposition testimony to create the false impression that CACI PT's administrative managers "maintained reporting lines" back to the company for operational matters. Pl. Br. at 14. But Mr. Porvaznik's actual testimony expressly rejects this characterization. A681 ("The client will

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[14] A569-70 (Monahan Dep.) ("In most cases, the site lead is also – holds a functional position on the contract, but they just help assist with administrative responsibilities, knowing who is coming to work on time, who's absent, assisting with time cards, doing customer liaison support.").

[15] A616 (Nelson Dep. at 25) ("Dan Provoznik [sic] would have [had access to interrogation reports] – although he probably had access to them because he had the security clearance to look at those and then check on what our status was – was more concerned with administrative matters, and so forth; and so during normal parts of work he was not expected to really be checking up on our – on our work.").

supervise the work. [CACI PT] will talk to the client or, you know, the immediate client supervisor and just get a feel for, you know, how Mr. Porvaznik or Mr. Smith or whoever is – you know, how well they're doing or they're not doing."). Amy Monahan, who served as project manager in Virginia, testified that her communications with CACI PT interrogators involved administrative issues such as pay problems. A576.

Indeed, former CACI PT interrogator Torin Nelson, who participated in an *ex parte* deposition-style interview with Plaintiffs' counsel, with no notice to CACI PT, flatly refuted Plaintiffs' false narrative that CACI PT management personnel in Virginia were involved in providing operational supervision:

> Q: What about back in the United States; did you know who was operationally in the line of – of command at CACI, back in the United States?
>
> A: The operations side, to my knowledge there was nobody at home office or stateside that was CACI that was even concerned with operational matters, and that their concern was administrative matters solely.

A618.

Thus, while Plaintiffs try to cast CACI PT's site lead as someone involved in supervising the interrogation mission, the record does not support this narrative. Rather, as multiple witnesses confirmed, the U.S. military controlled everything at Abu Ghraib prison, and CACI

PT's site lead simply addressed administrative issues such as pay and leave.

5. In Addition to the Facts "On the Ground," the Delivery Orders Under Which CACI PT Provided Interrogators to the U.S. Military Contemplated the Military Chain of Command Controlling CACI PT Interrogators

The operative contract provisions reflect exclusive military control of interrogation operations. CACI PT provided interrogators under two delivery orders, Delivery Order 35 ("DO 35") and Delivery Order 71 ("DO 71"). DO 35 provided for integration of CACI PT interrogators into the military's interrogation teams in order to accomplish intelligence priorities established by Coalition Joint Task Force-7 ("CJTF-7"):

> Identified personnel supporting this effort will be integrated into MIL/CIV analyst, screening, and interrogation teams (both static/permanent facilities and mobile locations), in order to accomplish CDR CJTF-7 priorities and tasking IAW Department of Defense, U.S. Civil Code and International Regulations.

A199 (DO 35 at ¶ 4). DO 35 provided that CACI PT interrogators would conduct interrogations in accordance with "local SOP and higher authority regulations," would review data and cross-reference intelligence collection priorities and plans "IAW interrogation SOPs and plans," would conduct intelligence activities "as directed," and "will report findings of interrogation IAW with local reference documents,

SOPs, and higher authority regulations as required/directed." A201-02 (DO 35 at ¶ 6) (emphasis added).

The Statement of Work for DO 71 provided similarly:

> As the operational element, HSTs (HUMINT Support Teams) support the overall divisional/separate Brigade HUMINT mission, and perform *under the direction and control of the unit's MI chain of command or Brigade S2, as determined by the supported command*.

A212 (DO 71 at ¶ 3) (emphasis added). DO 71 also provided at "[a]ll actions [of the interrogators provided under DO 71] will be managed by the Senior [Counter-Intelligence] Agent," a member of the United States military. A213 (DO 71 at ¶ 4.d).

As the District Court found, "CACI PT's contracts show that the military was to have plenary and direct control." A756. In that sense, the contracts matched the facts on the ground as to actual command and control at Abu Ghraib prison.

SUMMARY OF ARGUMENT

Plaintiffs' claims present nonjusticiable political questions. In *Taylor*, 658 F.3d at 410-11, this Court held that suits against contractors supporting military operations involved nonjusticiable political questions if either of two criteria was satisfied: (1) "the government contractor was under the 'plenary' or 'direct' control of the military"; or (2) "national defense interests were 'closely intertwined' with military decisions governing the contractor's conduct, such that a

decision on the merits of the claim 'would require the judiciary to question actual, sensitive judgments made by the military.'" *Id.*

The District Court correctly found that both of these criteria were satisfied. With respect to the first *Taylor* inquiry, dealing with plenary and direct control, the record is one-sided. Witness after witness testified, without contradiction, that the U.S. military controlled all aspects of detainee and interrogation operations at Abu Ghraib prison, and the District Court's findings of fact in this regard are not clearly erroneous. Indeed, the District Court's findings are clearly correct.

With respect to the second *Taylor* inquiry, the record is equally one-sided. Plaintiffs are seeking, on a vague co-conspirator theory, to hold CACI PT liable for injuries that were allegedly inflicted on Plaintiffs *by U.S. soldiers*. The very nature of this case would require the judiciary to second-guess military decisions regarding permissible interrogation techniques, the use of civilian contractors for battlefield interrogations, the appropriate level of supervision for military and civilian interrogators, and the use of military police personnel to implement the conditions of detention determined to be most advantageous for successful interrogations.

In addition, this case presents a nonjusticiable political question because there are no judicially manageable standards for deciding this case. These obstacles include not only the usual difficulties in litigating battlefield conduct, but also include the classified nature of the identify

of anyone who might have been assigned to interrogate these Plaintiffs, and the state secrets implication of the United States' refusal to disclose this information. In addition, the Department of Homeland Security, charged with preserving domestic security, has determined that three of the four Plaintiffs should not set foot in this country.

The District Court correctly concluded that both *Taylor* inquiries were satisfied, and that dismissal also was warranted because of the insuperable manageability problems associated with this case. This Court should affirm the District Court.

STANDARD OF REVIEW

The political question doctrine implicates the District Court's subject matter jurisdiction and is considered under a Rule 12(b)(1) standard. A district court considering a Rule 12(b)(1) motion is not bound by the allegations in the complaint, "and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *In Re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) ("*Burn Pit*"). Moreover, a district court considering a subject matter jurisdiction challenge must act as a finder of fact for purposes of the motion and must resolve any disputes in the evidence presented. *Id.* (citing and quoting *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)). The plaintiff has the burden of proving subject-matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S.

332, 342 (2006); *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

The District Court's findings of plenary and direct control are findings of fact that are reviewed for clear error. *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *see also Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279-80 (11th Cir. 2009) (applying clearly erroneous standard of review to district court's findings of plenary and direct control). The District Court's ultimate conclusions that resolution of this case would require second-guessing sensitive military judgments and that the case lacks judicially-manageable standards for resolution are reviewed *de novo*, though the factual findings supporting these conclusions are subject to the clearly erroneous standard. *Velasco*, 370 F.3d at 398 ("We review the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom *de novo*.").

ARGUMENT

No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *United States v. Moussaoui*, 382 F.3d 453, 469-70 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

In *Taylor* and *Al Shimari*, this Court confirmed these principles, observing that "'most military decisions' are matters solely within the purview of the executive branch . . . and that the Constitution delegates authority over military matters to both the executive and legislative branches of government." *Al Shimari*, 758 F.3d at 533 (quoting *Taylor*, 658 F.3d at 407 n.9). That said, not every claim touching on military operations poses a political question, and a court "must undertake a discriminating analysis that includes the litigation's susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* (citations and internal quotations omitted).

For tort suits against civilian contractors supporting military combat operations, this Court has identified two inquiries for identifying political questions:

> (1) whether the government contractor was under the "plenary" or "direct" control of the military; or
>
> (2) whether national defense interests were "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of the claim "would require the judiciary to question actual, sensitive judgments made by the military."

Id. at 533-34 (quoting *Taylor*, 658 F.3d at 411). "[A]n affirmative answer to either of these questions will signal the presence of a nonjusticiable political question." *Id.* at 534 (quoting *Burn Pit*, 744 F.3d at 335). In conducting this inquiry, a court must "look beyond the complaint and consider how [the plaintiffs] might prove [their] claim[s] and how [the contractor] would defend. *Id.* (quoting *Taylor*, 658 F.3d at 409 (alterations in original)).

After reviewing the record developed in discovery, the District Court held that the political question doctrine barred this action for three reasons: (1) CACI PT's interrogators were under the plenary and direct control of the U.S. military; (2) deciding Plaintiffs' claims would require questioning actual, sensitive judgments made by the military; and (3) there is a lack of judicially discoverable and manageable standards for resolving Plaintiffs' claims. While affirming any one of these grounds for dismissal is sufficient to confirm the nonjusticiability

of this case, all three of the District Court's grounds are legally correct and amply supported by the record.

A. This Case Satisfies the "Plenary or Direct Control" Test for Political Questions

1. The Legal Framework for the "Plenary and Direct Control" Test

In remanding the present case, this Court determined that "the evidence in the record is inconclusive regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions." 758 F.3d at 535-36.[16] Accordingly, this Court directed the District Court to allow development of a record on command and control, and identified the key inquiry in applying the *Taylor* "plenary and direct control" test:

> [T]he critical issue with respect to the question of "plenary" or "direct" control is not whether the military "exercised some level of oversight" over a contractor's activities. Instead, a court must inquire whether the military clearly "chose how to carry out these tasks," rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed.

Al Shimari, 758 F.3d at 534 (quoting *Burn Pit*, 744 F.3d at 339).

[16] The appellate record in the last appeal in this case was not focused on the facts relevant to the political question doctrine. A political question ruling had not been appealed in the last appeal, and justiciability had been raised by CACI PT only as an alternative ground for affirmance.

As Plaintiffs largely concede (Pl. Br. at 28-29), the District Court's finding that the U.S. military exercised plenary and direct control over CACI PT interrogators is a finding of fact that is not to be disturbed unless it is clearly erroneous. The clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, NC*, 470 U.S. 564, 573 (1985); *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Thus, the District Court's finding of plenary and direct control would be entitled to deference even if there were conflicting evidence in the record.

There are two guideposts for analysis of the "plenary or direct control" test. The first is the Eleventh Circuit's decision in *Carmichael*, 572 F.3d at 1275-82, which this Court has endorsed as a correct application of the "plenary or direct control" test. *Taylor*, 658 F.3d at 410. The second guidepost is this Court's decision in *Taylor*, the only case in which this Court has applied the *Carmichael* test to facts developed in discovery.

In *Carmichael*, the Eleventh Circuit held that the political question doctrine barred claims arising out of a contractor's convoy accident because the U.S. military exercised plenary control over the

convoy. *Carmichael*, 572 F.3d at 1275-82. The court reached this conclusion because the military controlled whether "to utilize civilian contractors in conducting the war in Iraq, and [to] use the contractors specifically in connection with fuel transportation missions"; "decided the particular date and time for the convoy's departure; the speed at which the convoy would travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken." *Id.* at 1281. As a result of the military's plenary control, the court concluded that military judgments and balancing of interests in a war zone so pervaded the plaintiff's claims that the political question doctrine required dismissal. *Id.* The court reached this conclusion even though the precise conduct that caused injury – driving the convoy truck off the side of the road – was itself neither directed nor desired by the military.

In *Taylor*, this Court endorsed the *Carmichael* analytical framework and applied it to claims arising from KBR's electrocution of a soldier while performing generator maintenance in Iraq. *Taylor*, 658 F.3d at 403. This Court identified two tests for identifying political questions in suits against defense contractors – the "plenary or direct control" test first applied in *Carmichael*, and a second test that evaluated whether national defense interests were "closely intertwined"

with military decisions governing the contractor's conduct. *Id.* at 411. While affirming dismissal based on the second test for political questions, the *Taylor* court concluded that the facts did not satisfy the "plenary or direct control" test because unlike the convoy drivers in *Carmichael*, "KBR was nearly insulated from direct military control." *Id.* As a result, this Court adopted *Carmichael*'s "plenary or direct control" test, but held that the test was not satisfied in *Taylor* because KBR exercised the operational control over its employees performing the generator maintenance. *Id.*

As the District Court found here, the control exercised by the U.S. military over CACI PT personnel was at least as plenary as that exercised by the military over the convoy drivers in *Carmichael*, and the CACI PT interrogators were not "nearly [as] insulated from direct military control" as were the civilian mechanics in *Taylor*. *Id.*

2. The District Court's Finding of Plenary and Direct Control Was Not Clearly Erroneous

After allowing the parties another opportunity for jurisdictional discovery, the District Court surveyed the record evidence and made the following finding regarding command and control at Abu Ghraib prison:

> The Court finds that the record demonstrates that the military maintained control over all relevant aspects of Abu Ghraib, including the manner in which interrogations were carried out. Because the Court finds the Pappas declaration and other testimony presented by Defendant persuasive, it follows that the Court finds that the

> military exercised "plenary" and "direct" control over ***how*** Defendants interrogated detainees at Abu Ghraib. The military clearly chose ***how*** to carry out tasks related to the interrogation mission, while CACI had no discretion in any operational matters.

A759.

The District Court supported its finding of plenary and direct control in part with the following additional findings of fact: that a CACI PT interrogator was placed in an interrogation team only with military approval; that once a CACI PT interrogator was placed on an interrogation team, "the military chain of command controlled all aspects of the interrogation and CACI interrogators were ultimately subjected to the same treatment as military personnel"; that "[i]n all respects, CACI PT interrogators were subject to the operational control of the U.S. military"; that "CACI PT interrogators were fully integrated into the Military Intelligence mission" and were "operationally indistinguishable from their military counterparts"; that the military decided which detainees would be incarcerated at Abu Ghraib prison, and which detainees would be interrogated; that the military decided who would interrogate those detainees who were interrogated; that the military required military approval of interrogation plans[17] and also

[17] In its remand instructions, this Court noted that one relevant area of inquiry was whether the interrogation plans approved by the military involved approval of specific interrogation techniques. *Al Shimari*, 758 F.3d at 536. The record confirms that interrogation plans submitted to the military chain of command for approval identified the

(Continued …)

monitored interrogations; that "[t]he record also makes clear that the military was solely responsible for establishing permissible interrogation techniques"; and that while CACI provided an administrative "site lead" at Abu Ghraib prison, "this person primarily performed administrative duties and made no operational decisions." A755-56.

Each of the District Court's findings is supported by substantial record evidence.[18] Indeed, the District Court's findings are supported by the testimony of military officers, CACI PT employees, and military police personnel who had been on the ground at Abu Ghraib prison and testified from first-hand knowledge. As these witnesses testified, the control exercised by the military over interrogation operations is indistinguishable from the military control exercised over the convoy in *Carmichael*, and stands in clear contrast to *Taylor*, where the

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proposed interrogation techniques. A168 (Porvaznik Decl. ¶ 14); A620-22 (Nelson Dep.).

[18] *See* A150, A155, A887 (military approved placement of CACI PT interrogators on Tiger Team); A150-51, A155-56, A158, A167-68, A559, A619-22, A687-88, A886-89, A895 (military exercised full operational control and treated military and CACI PT interrogators the same); A156, A167, A892-94 (military decided who to detain, which detainees to interrogate, and who would interrogate each detainee); A892-94, A900-01, A909-12 [redacted]; A573-74, A576, A593, A917-19 (CACI PT site lead provided administrative support only). *See generally* Statement of Facts §§ B.1, B.4.

contractor's employees were "nearly insulated from direct military control." *Taylor*, 658 F.3d at 411.

3. Plaintiffs' Attacks on the Soundness of the District Court's Factual Findings Are Unavailing

Plaintiffs argue that the District Court's factual findings ought to be rejected on the grounds that the District Court considered "only the formal command structure at Abu Ghraib without grappling with the realities on the ground," and that the District Court failed to "examine military control outside of formal interrogations." Pl. Br. at 40-41. Plaintiffs' argument conveniently and myopically distorts the District Court's opinion as well as the record regarding the facts on the ground.

The District Court's opinion focused nearly exclusively on how command and control occurred "on the ground." Indeed, the District Court found that the declaration testimony from Colonels Pappas and Brady, and the deposition testimony from Major Holmes and former MPs Ivan Frederick, Charles Graner, Megan Graner, and Sabrina Harman was "convincing as to who maintained the chain of command at Abu Ghraib prison – the military." A755-56 & n.2. Indeed, outside of a few mundane administrative matters such as dealing with pay problems, the military witnesses on the ground testified that CACI PT interrogators were controlled in exactly the same way as military interrogators. A755 (District Court finding); A155-57 (Pappas Decl.); A151 (Brady Decl.); A895 (Holmes Dep.).

The District Court also did not limit its inquiry to the formal conduct of an interrogation session. The District Court made findings that, as one would expect in a combat environment, the military actually exercised plenary and direct control over CACI PT interrogators "*at all times*," that once a CACI PT interrogator was placed on a Tiger team, the U.S. military "controlled *all aspects* of the interrogation," and that "the military maintained control over *all relevant aspects of Abu Ghraib*, including the manner in which interrogations were carried out." A756, 759 (emphasis added). By contrast, the District Court found that the CACI PT site lead "primarily performed administrative duties *and made no operational decisions*." A755 (emphasis added). The District Court's findings are amply supported by the record of witnesses who were "on the ground" at Abu Ghraib prison. *See* Statement of Facts § B.

Having accused the District Court of ignoring the evidence "on the ground," Plaintiffs ironically rely on hearsay reports by authors who were *not* "on the ground" for the supposed premise that there was a "command vacuum" at Abu Ghraib and therefore no supervision at all. Pl. Br. at 41. But even the hearsay reports, if taken at face value, address only the *effectiveness*, and not the existence, of the military leadership that was in place at Abu Ghraib prison. Indeed, Plaintiffs' argument would require the judiciary to pass judgment on the quality of U.S. military leadership in a war zone.

Moreover, Plaintiffs' examples from first-hand testimony of a supposed lack of supervision mischaracterize the witnesses' actual testimony. Plaintiffs disingenuously rely on Major Daniels' declaration for the proposition that "military officials" did not observe interrogations by CACI PT interrogators (Pl. Br. at 16), when all Major Daniels actually said was that *he*, as someone not in the interrogation chain of command, had not *personally observed a CACI PT interrogation*. A478. By contrast, several other witnesses testified that military personnel regularly monitored interrogations. A894-95 (Holmes Dep.); A685-86 (Porvaznik Dep.); A597 (Mudd Dep.). The District Court appropriately resolved this question of fact in CACI PT's favor, finding that in addition to approving interrogation plans, "the military also monitored interrogations." A756.

Plaintiffs also argue that CACI PT interrogators gave instructions to MPs guarding detainees, as if this shows a lack of military control. Pl. Br. at 42. But the MPs were deposed in this action, and they testified without equivocation that any instructions they received from interrogators – military or civilian – regarding conditions of detention were detainee-specific and were limited to detainees assigned to a particular interrogator. A966-67, A972-73, A976 (Frederick Dep.); A989-90 (C. Graner Dep.). There is no evidence that any of these Plaintiffs was assigned to a CACI PT interrogator (Statement of Facts § A). Accordingly, there is no evidence that any CACI PT interrogators

ever gave MPs *any* instructions regarding any of these Plaintiffs. *See Al Shimari*, 758 F.3d at 534 (the political question inquiry is case specific, and is based on how these Plaintiffs will seek to prove their claims).

Even more to the point, the MP testimony is that *both military and CACI PT interrogators* provided MPs with instructions regarding their own assigned detainees. A966-67, A976 (Frederick Dep.). Regardless of whether, with the benefit of hindsight, that protocol appears wise, the fact remains that this was a *military protocol* established by the military leadership. This was one more way in which the U.S. military exercised control by deciding *how* conditions of detention would be implemented.

Finally, Plaintiffs argue that this case is akin to *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013), and that the political question doctrine should not apply because of "the lack of detailed instructions in the work orders and the lack of military involvement in completing authorized work orders." Pl. Br. at 44. But CACI PT's contracts provide for military supervision of CACI PT interrogators (Statement of Facts § B.5), and discovery has yielded extensive evidence of the military's actual, pervasive role in overseeing the interrogation mission. Statement of Fact § B.1. Thus, the District Court had ample evidence of the U.S. military's plenary and direct control over *how* interrogation functions would be performed, *Al*

Shimari, 758 F.3d at 535-36, and Plaintiffs' attempts to mischaracterize the record do not render the District Court's factual findings clearly erroneous.

4. Plaintiffs' Argument That the District Court Should Have Refused to Apply the Plenary and Direct Control Test Are Inconsistent with this Court's Remand Instructions

Saddled with an extensive record of military control over CACI PT interrogators, and a clearly erroneous standard of review, Plaintiffs argue that the District Court should have refused to apply the plenary and direct control test on remand. Plaintiffs' plea is for lawlessness, that the District Court should have simply refused to follow this Court's instructions on remand.

Relying on *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), Plaintiffs imply that the political question doctrine is a narrow doctrine that should not be applied to cases involving allegedly intentional torts and asserted violations of individual rights. Pl. Br. at 32. But *Zivotofsky* says nothing about application of the political question doctrine to the conduct of war, makes no distinction between intentional torts and negligence, and says nothing about special rules relating to alleged violations of individual rights. *Zivotofsky*, 132 S. Ct. at 1427-29. Indeed, this Court decided *Al Shimari* after the Supreme Court decided *Zivotofsky* and saw no reason to jettison the *Taylor* political question framework. *Al Shimari*, 758 F.3d at 534.

Moreover, Plaintiffs' suggestion that this Court "may wish to ensure that the *Taylor* Two-Prong test is applied in the conjunctive, not disjunctive" (Pl. Br. at 34 n.7), is disingenuous. There is no confusion over whether the *Taylor* inquiries are conjunctive or disjunctive. This Court was explicit in both *Al Shimari* and *Burn Pit* that "an affirmative answer to *either* of these questions will signal the presence of a nonjusticiable political question." *Al Shimari*, 758 F.3d at 534 (emphasis added) (quoting *Burn Pit*, 744 F.3d at 335).

Indeed, in *Taylor* itself this Court found one of the two political question inquiries satisfied and the other not, and then affirmed dismissal on political question grounds. *Taylor*, 658 F.3d at 411-12. Thus, the *Taylor* inquiries have applied in the disjunctive from the day this Court decided *Taylor*. Plaintiffs did not challenge the correctness of the *Taylor* framework in the District Court or argue that the inquiries should apply in the conjunctive, and thus have waived the argument.[19] Moreover, with no post-remand developments in the law, this Court's explicit adoption of the *Taylor* framework in *Al Shimari* is the law of the case,[20] and the District Court correctly followed this

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[19] *See United States v. Chase*, 466 F.3d 310, 314 n.2 (4th Cir. 2006).

[20] *See United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) ("Under the law of the case doctrine, as a practical matter, once the decision of an appellate court establishes the 'law of the case,' it must be followed in all subsequent proceedings in the same case in the trial

(Continued …)

Court's instruction to apply the *Taylor* political question criteria. *See* A751-54.

Finally, Plaintiffs argue that the District Court should have refused to make factual findings on the political question doctrine, and left the issue for resolution either on summary judgment or after a trial on the merits. Pl. Br. at 36. However, "[t]he existence of subject matter jurisdiction is a threshold issue." *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999); *see also Steel Co.*, 523 U.S. at 95 ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . ."). Moreover, a decision by the District Court to delay determining justiciability would have been in direct defiance of this Court's remand instructions. *Al Shimari*, 758 F.3d at 537 (instructing the District Court to "reexamine the justiciability of the ATS claims and the common law tort claims before proceeding further in the case"). In any event, Plaintiffs mischaracterize the case law on which they rely.

Plaintiffs' cases provide guidance on dealing with subject matter jurisdiction motions presented at the outset of the case, when there has been no discovery. As the Fourth Circuit explained in *Kerns*, the leading case cited by Plaintiffs:

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court or on a later appeal" unless the evidence has changed on remand, subsequent controlling authority has changed the law, or the prior decision was clearly erroneous. (internal quotations omitted)).

> [W]hen the defendant challenges the veracity of the facts underpinning subject matter jurisdiction, the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts. And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes *only after appropriate discovery*, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous.

Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009) (emphasis added). This Court had the same view of the law when it provided its remand instructions to the District Court in the present case. *Al Shimari*, 758 F.3d at 531-32 ("However, when the jurisdictional facts are inextricably intertwined with those central to the merits, the district court should resolve the factual disputes *only after appropriate discovery*." (emphasis added) (quoting *Burn Pit*, 744 F.3d at 334, and *Kerns*, 585 F.3d at 193)).

Plaintiffs have had full discovery, and then on remand the District Court reopened discovery so that Plaintiffs could take any additional jurisdictional discovery they desired. A139. After eleven years of litigation and discovery regarding command and control, the District Court appropriately followed this Court's remand instructions and decided CACI PT's factual challenge to the Court's subject matter jurisdiction. A757.

B. Resolution of this Case Would Require Questioning Actual, Sensitive Military Judgments in a War Zone

Even where the military does not exercise plenary or direct control over its contractor's actions, the political question doctrine will apply if "a decision on the merits . . . would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari*, 758 F.3d at 535 (omission in original) (quoting *Taylor*, 658 F.3d at 412). In addressing the second *Taylor* test, a court must "look beyond the complaint and consider how [the plaintiffs] might prove [their] claim[s] and how [the contractor] would defend." *Al Shimari*, 758 F.3d at 534 (quoting *Taylor*, 658 F.3d at 409 (alterations in original)).

In *Taylor*, this Court found that the political question doctrine barred the suit, even though there was not plenary military control over the contractors, because resolving Taylor's claims "would invariably require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box" at the military base in Iraq where the plaintiff was electrocuted. *Taylor*, 658 F.3d at 411-12. The Court reached this conclusion even though the contractors were alleged to have disregarded the Marines' instructions not to turn on the generator that electrocuted Taylor. *Id.* at 404. The present case would require second-guessing much more sensitive military decisions than the electrical design decisions made by the Marines in *Taylor*.

The events at Abu Ghraib occurred in the context of the Iraq War, and the prison was located in the midst of the war zone and under regular attack. A155 (Pappas Decl.); A967-68 (Frederick Dep.); A1007-08 (Harman Dep.). Plaintiffs' lawsuit challenges the interrogation of detainees – an effort to prosecute the war by obtaining information from persons the military deemed likely sources of actionable intelligence. A155 (Pappas Decl.). The CACI PT interrogators were integrated into the military intelligence operation at Abu Ghraib, their conduct was supervised by military officers, and their interrogation practices were governed by military rules and regulations. CACI PT interrogators used the same interrogation techniques and followed the same rules as their military counterparts. *See* Statement of Facts § B.1. Even more to the point, because Plaintiffs have not alleged direct contact between themselves and any CACI PT employees, Plaintiffs necessarily seek to hold CACI PT liable, on a vague set of co-conspirator allegations, for injuries allegedly inflicted on them *by United States soldiers*.

As the District Court observed, CACI PT would defend against Plaintiffs' claims by arguing that any treatment that Plaintiffs received was directed and/or approved by the military, which would require the District Court "to consider whether military judgments were proper." A763. Moreover, the District Court concluded that it "is simply not equipped to make judgments as to whether the techniques approved by the military were appropriate – a judgment that would no doubt come

into question during adjudication of the merits of this case." *Id.* Relying on this Court's recent decision in *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 181 (4th Cir. 2015), the District Court noted that judges are ill-equipped to second-guess "small-bore tactical decisions" and "more strategic decisions" by a military force in a combat environment, which would be required in evaluating the propriety of the detention and interrogation decisions made by the military leadership at Abu Ghraib prison. A762-63.

The District Court's conclusions are unassailable. "[D]ecisions requir[ing] the specific exercise of military expertise and judgment," *Carmichael*, 572 F.3d at 1282, are not merely implicated in this case as they were in *Carmichael*, but are actually the gravamen of the suit itself. Plaintiffs complain of the alleged use of dogs, shaving, sleep deprivation, sensory deprivation, diet manipulation, stress positions, and other interrogation techniques. A91-95 (Third Amended Compl. ¶¶ 23-77). Whether to approve these methods was a military decision. Indeed, interrogation techniques were approved at the highest levels of the Defense Department, and those decisions migrated to Abu Ghraib prison through the military chain of command. A234-36, A240-41. *See also* note 12 and accompanying text, *supra* (acknowledgement by former Vice President Cheney of approval of interrogation techniques at the highest levels of government).

[redacted]

Several of the techniques of which Plaintiffs complain were, in fact, approved for use at Abu Ghraib. For example, Major Holmes testified that sleep adjustment, isolation, and stress positions were all used at Abu Ghraib in some circumstances, and Ivan Frederick testified that, prior to the arrival of the first CACI PT interrogators, detainees were already being kept nude or partially nude, were being dressed in women's underwear, were being placed in stress positions, were being handcuffed to the bars of their cells, and were being subjected to dietary and environmental manipulation. *See* [redacted]; A962-63 (Frederick Dep.). Thus, military officers made the very decisions that Plaintiffs now assert violate international law.

Deciding whether to approve interrogation techniques and then to apply them to specific detainees requires the application of military judgment and expertise. The military must make sensitive judgments regarding the proper balance between respect for detainees and the

military imperative of intelligence gathering during an ongoing war. *Carmichael*, 572 F.3d at 1282 (political question doctrine applies where the military must "calibrate the risks" and perform a "delicate balancing of considerations").

Nor can Plaintiffs evade the political question doctrine by claiming to accept the military's rules and standards for interrogations and to question only the particular decisions that CACI PT interrogators made when applying those rules. The *Taylor* plaintiff made just such an argument "that [a court] should evaluate the reasonableness of [a contractor's] acts within the parameters of the military's orders – that is, deeming such orders to be 'external constraints' within which KBR's allegedly negligent acts should be assessed." 658 F.3d at 410. And this Court held that Taylor's argument was flawed for the same reason that a similar argument was rejected in *Carmichael*: where a contractor is "under military orders" a defense will "inevitably rely on such orders." *Id.*

But even more to the point, Plaintiffs have no evidence of any contact between themselves and any employee of CACI PT. Statement of Facts § A. Accordingly, Plaintiffs' claims, and proof, must proceed on theories of secondary liability such as conspiracy and aiding and abetting. Plaintiffs' conspiracy and aiding and abetting theories directly seek to hold CACI PT liable for conditions of confinement imposed at Abu Ghraib prison *by the military leadership* and for actions

by military personnel in their treatment of these Plaintiffs. CACI PT would defend against Plaintiffs' claims by showing that the U.S. military was responsible for the conditions at Abu Ghraib prison and that any mistreatment that these Plaintiffs allegedly suffered was attributable to the United States military and not to CACI PT.[21]

CACI PT also would defend this action on the grounds that the U.S. military insisted that the military, and not CACI PT, supervise and control operations at Abu Ghraib prison. This, in turn, would require examination of whether the degree of supervision exercised by the military was appropriate under the circumstances as they existed at Abu Ghraib prison. These issues require the Court to question military decisions and conduct.

The facts of this case are analogous to those in *Carmichael*, on which this Court relied when setting forth the two-part standard for

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[21] Indeed, Plaintiffs have asserted claims of torture under the Alien Tort Statute. If these claims are cognizable under ATS, they require proof that the conduct occurred with the consent or acquiescence of a public official. *See* Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 1, ¶ 1; 8 C.F.R. § 208.18 (2014) (defining torture as requiring that "pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" and that the public official "thereafter breach[ed] his legal responsibility to intervene to prevent such activity"). If claims for and cruel, inhuman and degrading treatment ("CIDT") are cognizable under ATS, they too require official involvement or acquiescence. Convention Against Torture, *supra*, art. 16, ¶ 1.

applying the political question doctrine to military contractors. *See Taylor*, 658 F.3d at 410-411. In *Carmichael*, the Eleventh Circuit considered a challenge to the conduct of a KBR convoy driver whose truck overturned and critically injured a soldier. Though the driver was a contractor, decisions regarding the convoy itself – including its route and speed – were made by the military. Any evaluation of the driver's negligence would therefore require "reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Carmichael*, 572 F.3d at 1281. Those ranged from the broad decision to use contractors to the specific military decisions surrounding the convoy at issue.

If anything, the case for applying the political question doctrine is stronger here than in *Carmichael*. Ultimately, the KBR convoy driver's conduct taken alone amounted to nothing more than garden-variety negligence – allowing "the tanker's rear end [to] veer[] off the road, eventually causing the vehicle to roll over." 572 F.3d at 1278. Though intertwined with critical military decision-making, the driver's alleged misconduct was a failure to exercise adequate skill in driving. Here, by contrast, Plaintiffs challenge the actual conduct of interrogations and the rules under which the U.S. military caused those interrogations to proceed, and seeks to hold CACI PT liable for injuries supposedly inflicted on Plaintiffs by military personnel.

Moreover, in *Carmichael*, the KBR driver was the one who failed to negotiate a turn and crashed his vehicle, with KBR again defending on the grounds that more remote military decisions played a role in the accident. *Carmichael*, 572 F.3d at 1275-79. In *Taylor*, KBR performed the maintenance that directly led to the electrocution, with KBR defending on the grounds that more remote military decisions played a role in the injuries. *Taylor*, 658 F.3d at 410-11. But unlike *Carmichael* and *Taylor*, Plaintiffs are seeking to hold CACI PT liable for injuries inflicted by military personnel, based on an alleged conspiracy between CACI PT employees and military personnel to mistreat detainees. A84 (Third Amended Compl. ¶ 1). As a result, while *Carmichael* and *Taylor* involved remote military conduct and decisions, this Court will be required to evaluate not only remote military decisions concerning interrogation operations, but also the actions of U.S. soldiers who are alleged to have been the direct cause of Plaintiffs' injuries.

And even if their conspiracy claims did not implicate these larger military considerations, Plaintiffs' need to establish the tort liability of individual soldiers is exactly the sort of problem that requires application of the political question doctrine pursuant to *Taylor*. The Plaintiff in *Taylor* had alleged that KBR employees negligently turned on a generator while they were working on installing a wiring box. But KBR's contributory negligence defense would "require the Court to decide whether the Marines made a reasonable decision in seeking to

install the wiring box" and "whether back-up power should have been supplied to the . . . area." *Taylor*, 658 F.3d at 411-12. Those assessments were "beyond the scope of judicial review." *Id.* at 412. Here, all of the questions regarding military participation in the alleged conspiracy require the Court to decide the reasonableness and propriety of conduct by the alleged military co-conspirators. That "deprives [a] district court of jurisdiction" under the political question doctrine. *Id.*

C. There Are No Judicially-Manageable Standards for Resolving This Case

The District Court also correctly concluded that the political question doctrine applied because there was a lack of judicially manageable standards for resolving this case.

As the District Court observed, there are no judicially-discoverable standards for applying a substantive law to Plaintiffs' common-law tort claims. A765. A federal court sitting in Virginia ordinarily would apply the law of the place of the allegedly tortious conduct to a common-law tort claim. *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007). However, the law of an occupied territory cannot be applied to regulate the conduct of the occupying force. *See Dow v. Johnson*, 100 U.S. 158, 165 (1879). And as the Court and the United States observed in *Saleh*, no state has a cognizable interest in applying its law to suits by Iraqis arising out of their detention by the U.S.

military in Iraq.[22] Moreover, as the District Court previously concluded, Coalition Provisional Authority Order 17 precluded common-law tort suits against contractors for injuries occurring during the Iraq occupation.[23] Thus, as the District Court concluded, there was no reasonable standard for identifying and applying a substantive common-law tort law to Plaintiffs' claims.

With respect to Plaintiffs' Alien Tort Statute claims, the Court identified other difficulties in discovering manageable standards for resolution. Relying on the Ninth Circuit's decision in *Padilla v. Yoo*, 678 F.3d 748, 752 (9th Cir. 2012), the District Court noted that the application of torture definitions to specific interrogation techniques, even against an American citizen such as Padilla, was a notoriously moving target in the 2003 time frame during which Plaintiffs' claims arise. A766 ("The [Ninth Circuit] found that it was unable to 'say that any reasonable official in 2001-03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.'") (quoting *Padilla*).

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[22] *Saleh*, 580 F.3d at 9; *see also* Br. for United States as Amicus Curiae, *Saleh v. Titan Corp.*, No. 09-1313, 2011 WL 2134985, at *12 (S. Ct., May 27, 2011).

[23] Dkt. #460 at 25-26. This Court vacated the District Court's ruling regarding Coalition Provisional Order 17, without expressing an opinion on the District Court's analysis, in order to ensure that the case was resolved on jurisdictional grounds if it was in fact non-justiciable. *Al Shimari*, 758 F.3d at 536-37.

With respect to Plaintiffs' CIDT claims, the District Court noted that the position of the United States, at the time of the actions at issue here, was that the portion of the Convention Against Torture addressing CIDT did not apply to aliens detained abroad.[24] Thus, Plaintiffs' CIDT claims, if they were cognizable, would require the District Court to hold CACI PT to a standard that the United States, at the time, concluded did not apply. Finally, the District Court correctly noted that a War Crimes claim would require an inquiry into whether civilians rather than insurgents, a task that would be nearly impossible given the limitations on the District Court's and the parties' ability to obtain evidence in Iraq. A769-70.

In addition to the judicial manageability problems identified by the District Court, there are myriad practical manageability obstacles inherent in Plaintiffs' claims. One of the most glaring manageability obstacles in this case is the inability to discover the identity of Plaintiffs' interrogators, if any. Plaintiffs claim not to know who

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[24] A769 n.4 (citing Letter from William E. Moschella, Assistant Atty. Gen., to Senator Patrick J. Leahy (Apr. 4, 2005) at 2, *available at* http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf). The United States did not modify this position until November 2014. *See* Opening Statement of Mary E. McLeod, Acting Legal Adviser, U.S. Dept. of State, to the UN Committee Against Torture (Nov. 12-13, 2014), *available at* https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/.

interrogated them, and government records identifying detainees' interrogator(s) are classified. A254 at ¶ 13(a). The United States refused to disclose in discovery the identity of Plaintiffs' interrogators, if any, or techniques employed during their interrogations. A939-40, A941-42, A947, A978-79.[25] CACI PT cannot reasonably be expected to defend itself while being deprived of the opportunity to discover who, if anyone, actually interrogated these Plaintiffs. As a result, this case involves state secrets that the United States refuses to divulge but which are essential to CACI PT's defense of this action. *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (recognizing state secrets doctrine); *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007)

Equally problematic is the inability of three of the Plaintiffs (Al Shimari, Rashid, and Al-Zuba'e, the "Absentee Plaintiffs") to gain entry to this country for court-ordered depositions and medical examinations. The District Court ordered Plaintiffs to appear in February 2013, but the Absentee Plaintiffs did not appear as ordered. The District Court gave the Absentee Plaintiffs three more opportunities to appear (*see* Dkt. #214, 244, 309), and the District Court's final order on the subject

[25] CACI PT moved to compel the United States to disclose this information. Dkt. #276. CACI PT's motion was mooted by the District Court's 2013 entry of judgment (Dkt. #460), and the District Court directed the parties not to reassert discovery motions on remand unless the information was needed for resolution of the political question issue. A140.

advised that the Absentee Plaintiffs' claims were subject to dismissal if they did not appear by April 26, 2013 (Dkt. #309). The Absentee Plaintiffs failed to comply, informing the District Court that they were denied entry into the United States without explanation.

There are no judicially-manageable standards for adjudicating claims where Plaintiffs cannot participate in the litigation, particularly where, as here, Plaintiffs' credibility would be a central focus of any trial. Moreover, the lack of manageable standards is compounded where, as here, Plaintiffs allege a conspiracy involving their interrogators but the United States has classified the identity of any interrogators assigned to these Plaintiffs.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the District Court.

Respectfully submitted,

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October 26, 2015

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

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

1. I am an attorney representing Appellee CACI Premier Technology, Inc.

2. This brief is in Century Schoolbook 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 Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 13,979 words.

/s/ John F. O'Connor

John F. O'Connor

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, I caused a true copy of the public version of Appellee's Brief 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, and also caused a true copy of the sealed version of Appellee's Brief to be served on the below-listed counsel of record:

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