Nos. 13-1937(L), 13-2162

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-Appellants,

v.

CACI INTERNATIONAL INC, and **CACI PREMIER TECHNOLOGY, INC.,**

Defendants-Appellees,

and

Timothy DUGAN, 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 APPELLEES CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

ACTS

STATUTES

BOOKS AND ARTICLES

JURISDICTION

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

The district court correctly found that it lacked subject-matter jurisdiction claims asserted under the Alien Tort Statute, 28 U.S.C. § 1350 (Counts I-IX of the Third Amended Complaint), because Plaintiffs' claims are based on conduct allegedly occurring outside the United States. *See* Argument, § A. The district court also lacked subject-matter jurisdiction over all of 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

I. **Did the district court correctly determine, following *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), that it lacked jurisdiction under the Alien Tort Statute because Plaintiffs' claims are based on alleged conduct occurring outside the United States?**

II. **Did the district court correctly determine that the common-law claims asserted by Plaintiffs Rashid, Al-Ejaili, and Al-Zuba'e are time-barred?**

III. **Did the district court correctly determine that Plaintiff Al Shimari's common-law claims are barred pursuant to governing law?**

IV. **Did the district court abuse its discretion in awarding costs to CACI PT?**

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

STATEMENT OF THE CASE

Appellees supplement and correct Plaintiffs' Statement of the Case as follows:

A. Plaintiffs' Lack of Contacts With CACI PT Personnel

Plaintiffs' Statement of the Case asserts that "Plaintiffs are four Iraqi civilians who were tortured and abused while detained by the U.S. military at Abu Ghraib prison." Pl. Br. at 4. This case, however, proceeded through discovery and Plaintiffs neither alleged nor established that they had *any* contact with an employee of CACI PT,[1] or that CACI PT employees had any interaction with whatever unnamed persons allegedly mistreated Plaintiffs. *See* A436-88. Each Plaintiff confirmed in interrogatory responses that he "cannot currently identify CACI employees with whom he had contact." A522, A746, A750, A753. Plaintiff Al Shimari even signed a declaration upon his release stating that he "was not mistreated during [his] detention." A308.

B. Transfer of Case from Ohio to Virginia

Plaintiffs' state that "the defendants obtained a transfer of venue to the Eastern District of Virginia" (Pl. Br. at 5), but omit that the motion to transfer was filed "with the concurrence of all other parties."

[1] CACI PT is the appellee that had a contract with the United States to provide interrogation support personnel in Iraq. Appellee CACI International Inc is CACI PT's parent company.

Dkt. #15 at 1; *see* A91. This action began as a single-Plaintiff action filed by Plaintiff Al Shimari, and was transferred to the Eastern District of Virginia along with single-plaintiff cases filed simultaneously by the same plaintiffs' counsel in California and Washington. *Al-Ogaidi v. Johnson*, No. 1:08-cv-844 (E.D. Va.) (Ellis, J.); *Al-Janabi v. Stefanowicz*, No. 1:08-cv-868 (E.D. Va.) (O'Grady, J.).

Upon the transfer of the three cases to Virginia, plaintiffs' counsel asked CACI PT and CACI International to agree that the cases should be consolidated before Judge Lee. Dkt. #47 at ¶¶ 12-18. When Appellees' counsel stated that the selection of a judge should be made according to internal court procedures, plaintiffs' counsel abruptly dismissed the cases assigned to Judges Ellis and O'Grady. *Id.* After those machinations, Plaintiffs Rashid, Al-Ejaili, and Al-Zuba'e (the "Rashid Plaintiffs"), none of whom had ever asserted a claim against CACI PT or CACI International in any venue, joined the present case through an Amended Complaint filed in the Eastern District of Virginia. Dkt. #28. Thus, the Rashid Plaintiffs were not parties while this action was pending in Ohio.

C. Dismissal of Plaintiffs' Conspiracy Allegations

Plaintiffs state that the district court first denied a motion to dismiss their conspiracy claims and then, post-remand, granted a motion to dismiss such claims (Pl. Br. at 8-9). But Plaintiffs omit that

the Supreme Court decided *Ashcraft v. Iqbal*, 556 U.S. 662 (2009), after the district court's original ruling, and that the district court's dismissal order was based on developments in the *Twombly*/*Iqbal* standard for evaluating conspiracy claims. Dkt. #215. Plaintiffs note their filing of a Third Amended Complaint with new conspiracy allegations, but omit that CACI PT moved to dismiss those new claims because they still did not satisfy the requirements for pleading a conspiracy claim. Dkt. #312. That motion was mooted by the district court's entry of judgment. A1833.

Plaintiffs state that their Third Amended Complaint included conspiracy allegations supported by former soldiers' deposition testimony "that they were acting under direction from CACI-PT personnel at Abu Ghraib." Pl. Br. at 9. Plaintiffs cite no such testimony, as deposition testimony in this case does not support, but refutes, Plaintiffs' premise that CACI PT personnel advised soldiers to take any inappropriate action with detainees.

STATEMENT OF FACTS

Plaintiffs' Statement of Facts is misleading and/or incomplete in several respects.

A. Discovery into Plaintiffs' Experiences at Abu Ghraib Prison

Despite being given four opportunities to file complaints in this action, Plaintiffs never identified a single interaction between themselves and any employee of CACI PT. *See* Statement of the Case, § A. Accordingly, CACI PT sought discovery from the United States as to the identity of any personnel who participated in an interrogation of the Plaintiffs.[2] The United States refused to produce records containing this information on the grounds that the United States designated as classified any information tying interrogation personnel to a particular detainee. A564 ¶ 13(a). The United States also refused to allow deponents to divulge any information that would identify a particular detainee's interrogator(s). A578-84.

Because of the United States' monopoly on information identifying any interrogation personnel interacting with Plaintiffs, CACI PT moved to compel. A491, 507-13. Tellingly, Plaintiffs apparently had no desire for discovery as to who might have interrogated them. Rather than

[2] The United States is the sole custodian of files relating to any detainees in Iraq. CACI PT has no information regarding detainees other than what the United States has produced in discovery.

joining in CACI PT's motion to compel, or seeking production of this information themselves, Plaintiffs took the position that the district court could deny CACI PT access to this information because "this information is not necessary to resolve this case." A618. CACI PT's motion to compel, which would have required the United States to assert the state secrets privilege to avoid disclosing this information, was mooted by the district court's entry of judgment. A1833.

The United States did produce to CACI PT some information from the Plaintiffs' detainee files, though it redacted any information identifying interrogation personnel or techniques employed during Plaintiffs' interrogations. The detainee files contradict Plaintiffs' assertions that they were innocent Iraqis erroneously detained by the United States. The detainee files identify Al Shimari as a former high-ranking member of the Ba'ath Party who was captured after a search of his premises turned up improvised explosive devices, bags of gunpowder, blasting caps, a machine gun, and six rocket-propelled grenade launchers. A737, 741. Rashid's detainee file identifies him as a "suspected terrorist" who "poses a threat to Coalition Forces" (A731), and who was observed detonating an improvised explosive device (A733-35). Al Zuba'e's detainee file identifies him as "planning attacks against U.S. and coalition installations." A727. The United States placed both Al Shimari and Rashid on the Biometric Watchlist in 2010

(after the filing of this action) because they were viewed as threats to coalition personnel. A731, 743.

B. Facts Establishing the Military's Plenary Operational Control Over CACI PT Interrogation Personnel

CACI PT took the deposition of Major Carolyn Holmes, U.S. Army, who was the Officer in Charge of the Interrogation Control Element at Abu Ghraib prison. Major Holmes confirmed that the military exercised plenary operational control over CACI PT interrogation personnel. A1442.2 to 1442.13. For operational purposes, the Army chain of command managed and controlled CACI PT interrogators in the same way as it managed and controlled military interrogators. *Id.* The Army's Contracting Officer's Representative, Colonel William Brady, confirmed that "the CACI PT interrogators were under the functional control and supervision of the United States military," and were "integrated within the military interrogation process of the military units to which they were assigned to support." A1438-39.

SUMMARY OF ARGUMENT

The district court correctly entered judgment on Plaintiffs' claims under the ATS because that statute does not confer subject-matter jurisdiction over alleged violations of the law of nations occurring outside the United States. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.

Ct. 1659, 1669 (2013). The district court's ruling is consistent with the many post-*Kiobel* decisions that have dismissed ATS claims based on alleged law of nations violations occurring overseas.

The district court also correctly concluded that the common-law claims of the three Plaintiffs asserting their claims only in Virginia (the "Rashid Plaintiffs") were time-barred under Virginia's statute of limitations jurisprudence. Virginia's statute of limitations applies, and there is no basis for declining to enforce a Virginia Supreme Court decision that is directly on point, *Casey v. Merck & Co.*, 722 S.E.2d 842, 846 (Va. 2012).

The district court properly dismissed Plaintiff Al Shimari's common-law claims. A common-law claim by Al Shimari, if it exists, must be cognizable under Coalition Provisional Authority ("CPA") Order 17. CPA Order 17 permits no remedy for combat-related claims, and for non-combat claims the sole remedy is an administrative claim submitted to the United States for consideration under the Foreign Claims Act.

An alternative ground for affirmance is that Plaintiffs' claims present nonjusticiable political questions. CACI PT interrogators were under the plenary control of the U.S. military chain of command, which renders Plaintiffs' claims nonjusticiable pursuant to *Taylor v. KBR Servs.,* 658 F.3d 402, 410-11 (4th Cir. 2011). This case also lacks judicially discoverable and manageable standards for resolution.

Permitting litigation of this case also would show a lack of respect for the political branches, as it would require second-guessing Executive branch decisions on interrogation policy and Congress's decision not to create a private right of action.

Finally, the district court correctly concluded that there is no basis for exempting Plaintiffs from an award of costs.

STANDARD OF REVIEW

In addition to the standards of review identified in Plaintiff's brief, this Court assesses *de novo* whether the political question doctrine deprives the district court of subject-matter jurisdiction, *Repub. Party of N.C. v. Martin*, 980 F.2d 943, 950 n.14 (4th Cir. 1992), and Plaintiffs have the burden of establishing jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). In deciding questions of subject-matter jurisdiction, Plaintiffs' allegations are not accepted as true, the Court may consider matters outside the complaint, and the Court may resolve factual disputes. *Thigpen v. United States*, 400 F.2d 393, 396 (4th Cir. 1986).

ARGUMENT

A. The District Court Correctly Determined that It Lacked Jurisdiction Under the ATS for Plaintiffs' Allegations of Tortious Conduct Occurring in Iraq.

The district court gave Plaintiffs every opportunity to make out a claim under the ATS. Upon remand from this Court, the district court reinstated Plaintiffs' previously-dismissed ATS claims and permitted Plaintiffs to take full discovery. After discovery closed, the court dismissed Plaintiffs' claims because the ATS does not apply extraterritorially. *Kiobel*, 133 S. Ct. at 1665. Because ***all*** of the relevant conduct alleged by Plaintiffs occurred in Iraq, this Court should affirm the district court's judgment.

1. The District Court Correctly Evaluated Plaintiffs' ATS Claims Under Rule 12(b)(1)

As an initial matter, Plaintiffs and *amici* Civil Procedure Professors argue that *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2875 (2010), requires that extraterritorially be assessed as a merits question rather than a jurisdictional question. But Plaintiffs and their *amici* fail to acknowledge the fundamental differences between ATS and the statute involved in *Morrison*. They also ignore the Supreme Court's observation that such an error, when it occurs, is harmless.

Morrison involved the extraterritorial reach of Section 10(b) of the Securities Exchange Act, which regulates conduct by prohibiting securities fraud. *Id.* at 2877. As the Supreme Court observed, "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." *Id.* By contrast, ATS prohibits no conduct at all; it is a purely jurisdictional statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). In *Kiobel*, the Supreme Court recognized this distinction, noting that *Morrison*, in evaluating Section 10(b), "held that the question of extraterritorial application was a 'merits question,' not a question of jurisdiction." *Kiobel*, 133 S. Ct. at 1664. In the same breath, the Court distinguished ATS: "The ATS, on the other hand, is strictly jurisdictional. It does not directly regulate conduct or afford relief." *Id.*

The district court's conclusion that ATS does not apply to Plaintiffs' claims is a determination that the statute fails to confer subject-matter jurisdiction, as jurisdiction is the only thing conferred by ATS. Whether Plaintiffs' claims involve the substantive conduct barred by ATS is the wrong question, as ATS bars no conduct. *Id.* Indeed, Plaintiffs do not cite a single case treating the extraterritoriality inquiry under ATS as a merits question, and avoid citation of the

myriad post-*Kiobel* decisions expressly treating the inquiry as one of subject-matter jurisdiction.[3]

Moreover, even if the district court had erred in treating ATS's extraterritoriality as a question of jurisdiction, it would not affect the

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[3] *See, e.g.*, *Ben-Haim v. Neeman*, ___ F. App'x ___, 2013 WL 5878913, at *2 (3d Cir. 2013) ("[T]he conduct that formed the basis of the ATS claims took place in Israel, and thus subject matter jurisdiction . . . is lacking in the federal courts."); *Kaplan v. Central Bank of Islamic Repub. of Iran*, ___ F. Supp. 2d ___, 2013 WL 4427943, at *15 (D.D.C. 2013) ("The Court . . . dismisses the claims for lack of subject matter jurisdiction."); *Mohammadi v. Islamic Repub. of Iran*, ___ F. Supp. 2d ___, 2013 WL 2370594, at *15 (D.D.C. 2013) ("[T]he Court does not have subject-matter jurisdiction to hear such claims . . . ."), *appeal docketed*, No. 13-7109 (D.C. Cir.); *Chen Gang v. Zhao Zhizhen*, No. 3:04-cv-1146, 2013 WL 5313411, at *1 (D. Conn. Sept. 20, 2013) ("[S]ubject matter jurisdiction is lacking under the ATS . . . ."), *notice of appeal filed* (2d Cir. Sept. 23, 2013); *Muntslag v. N.V. Beerens*, No. 12-cv-7168, 2013 WL 4519669, at *3 (S.D.N.Y. Aug. 26, 2013); *Ahmed-Al-Khalifa v. Al-Assad*, No. 1:13-cv-48, 2013 WL 4401831 at *2 (N.D. Fla. Aug. 13, 2013) ("In light of *Kiobel*, the ATS cannot confer subject-matter jurisdiction onto Plaintiffs' claims . . . ."); *Hua Chen v. Honghui Shi*, No. 09-civ-8920, 2013 WL 3963735, at *4 (S.D.N.Y. Aug. 1, 2013) ("Nevertheless, the Court may not reach the merits of Plaintiffs' claims because . . . the Court lacks jurisdiction to do so. Not only does the Court not have personal jurisdiction over Defendant, but it lacks subject matter jurisdiction over Plaintiffs' ATS claims as well."); *Mwangi v. Bush*, No. 5:12-cv-373, 2013 WL 3155018, at *4 (E.D. Ky. June 18, 2013) ("Because all of the conduct which provides the basis for Mwangi's claims occurred in Kenya, the Court lacks jurisdiction under the ATS to reach it."); *Muntslag v. D'Ieteren*, No. 12-cv-7038, 2013 WL 2150686, at *2 (S.D.N.Y. May 17, 2013) (The [*Kiobel*] court held that the ATS does not provide the federal courts of the United States with subject matter jurisdiction over torts that occur outside of the United States."), *appeal dismissed as frivolous*, No. 13-2406 (2d Cir. Sept. 19, 2013).

result. In *Morrison*, the Supreme Court held that such an error, where it occurs, is harmless when the district court's ultimate conclusion does not turn on any distinction between a 12(b)(1) analysis and a 12(b)(6) analysis. *Morrison*, 130 S. Ct. at 2877. Neither Plaintiffs nor *amici* point to any such distinction between the district court's analysis and that required for a Rule 12(b)(6) motion.[4] The district court dismissed Plaintiffs' claims because the claims alleged violations of the law of nations occurring outside the United States (A1816), a fact specifically alleged in Plaintiffs' Third Amended Complaint. A437 at ¶¶ 4-7. As in *Morrison*, even if there had been error here, affirmance would remain appropriate because Plaintiffs' claims fail equally under a Rule 12(b)(6) analysis.[5]

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[4] If *amici* Civil Procedure Professors were friends of the Court, as opposed to friends of the Plaintiffs, they would have informed the Court of the multitude of courts holding that extraterritoriality in the context of ATS is a question of jurisdiction. *See* note 3, *supra*. True *amici* also would have acknowledged that *Morrison* treated the jurisdiction/merits distinction as harmless error instead of advising this Court that reversal was the proper result in the event the Court agreed with *amici*.

[5] Plaintiffs also argue that the Court has diversity jurisdiction (Pl. Br. at 20 n.5). But Plaintiffs *have to* proceed under ATS because courts have applied a ten-year statute of limitations to ATS claims. *See Chavez v. Carranza*, 559 F.3d 486, 491-92 (6th Cir. 2009). If Plaintiffs proceed based on diversity jurisdiction, the Rashid Plaintiffs' claims are time-barred (*see* Section B, *infra*), and Al Shimari's claims would be barred by CPA Order 17 (*see* Section C, *infra*).

2. The District Court Correctly Concluded That the Presumption Against Extraterritoriality Bars Plaintiffs' ATS Claims

The district court concluded that "the presumption against extraterritoriality applies to ATS claims" (A1816), which Plaintiffs acknowledge is correct.[6] The district court also held that "Plaintiffs are barred from asserting ATS jurisdiction because the alleged conduct giving rise to their claims occurred exclusively on foreign soil" and because their claims "do not allege that any violations occurred in the United States or any of its territories." A1816. This is a faithful application of *Kiobel*, and the Court should affirm the dismissal of Plaintiffs' ATS claims on this basis.

The district court's conclusion that *the alleged violation of the law of nations* is what must occur domestically for ATS to apply flows directly from *Kiobel*. With respect to statutes that, like the ATS, do not apply extraterritorially, the Supreme Court has explained that the conduct that is the "focus" of the statute is the "relevant conduct" that must occur domestically for the statute to apply. Thus, in *Morrison*, the relevant conduct under the Securities Exchange Act was transactions in securities listed on domestic exchanges and domestic transactions in other securities. *Morrison*, 130 S. Ct. at 2885-86. In *Aramco*, the Court

[6] Pl. Br. at 23 ("Plaintiffs do not dispute that the presumption applies to the ATS at the threshold.").

concluded that the focus of Title VII was domestic *employment*, not domestic *hiring* or domestic *citizenship*. *Aramco*, 499 U.S. at 247, 255.[7]

As for what "relevant conduct" must occur domestically for ATS to apply, the Supreme Court did not simply pronounce in *Kiobel* that the presumption against extraterritoriality applied and then call it a day. The Court took the next step and specified that the *alleged violation of the law of nations* is the "relevant conduct" that must occur domestically. After noting that "all the relevant conduct took place outside the United States," the Court summarized its holding as follows:

> We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. [T]here is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

Id. at 1669 (internal quotations omitted) (alteration in original); *see also id.* at 1665 ("Nor does the fact that the text [of the ATS] reaches '*any* civil action' suggest application *to torts committed abroad*." (second emphasis added)); *id.* at 1667 ("These prominent contemporary examples . . . provide no support for the proposition that Congress expected causes of action to be brought under the statute *for violations*

[7] In a case predating *Morrison* and *Kiobel*, this Court applied a similar test for determining whether a claim is domestic or extraterritorial. *In re French,* 440 F.3d 145, 149-50 (4th Cir. 2006).

of the law of nations occurring abroad." (emphasis added)). As the Second Circuit aptly put it, "if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*." *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013).

Given the clarity of the Supreme Court's holding, it is not surprising that, since the Supreme Court decided *Kiobel*, federal courts have regularly dismissed ATS claims where the alleged violations of international law, like the violations alleged here, occurred outside the United States.[8] Tellingly, Plaintiffs' brief neither cites nor discusses a single case applying *Kiobel*.

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[8] *See Balintulo*, 727 F.3d at 189-93 (denying *mandamus* in case involving ATS suits against American and foreign companies allegedly assisting South African apartheid regime because "the Supreme Court's holding in *Kiobel* plainly bars the plaintiffs' claims, and the defendants will therefore be able to obtain relief in the District Court by moving for judgment on the pleadings."); *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013); *Ben-Haim*, ___ F.3d ___, 2013 WL 5878913, at *2 (dismissing ATS claims because "the conduct that formed the basis of the ATS claims took place in Israel"); *Mohammadi*, 2013 WL 2370594, at *14-15; *Kaplan*, 2013 WL 4427943, at *16; *Chen Gang*, 2013 WL 5313411, at *3-4; *Tymoshenko v. Firtash*, No. 11-cv-2794, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013); *Muntslag*, 2013 WL 4519669, at *3; *Adhikari v. Daoud & Ptnrs.*, No. 09-cv-1237, 2013 WL 4511354, at *6-7 (S.D. Tex. Aug. 23, 2013) (granting judgment to American defendant based on *Kiobel* for alleged violations of law of nations occurring in Iraq); *Ahmed-Al-Khalifa*, 2013 WL 4401831, at *2; *Ahmed v. Comm'r for Educ. Lagos State*, No. 1:13-cv-0050, 2013 WL 4001194, at *2 (N.D. Fla. Aug. 6, 2013), *appeal docketed*, No. 13-14367-B (11th Cir); *Hua Chen*, 2013 WL 3963735, at *6-7; *Giraldo*, 2013 WL 3873960, at *8 (granting judgment to American defendants on ATS claims alleging violation of law of nations occurring outside United States);

(Continued …)

While conceding that the presumption against extraterritoriality applies, Plaintiffs argue that courts may find the presumption displaced by conducting a "fact-sensitive" inquiry to determine if ATS should apply *even where all of the "relevant conduct," as identified by the Supreme Court, occurred extraterritorially*.[9] Boiled down, Plaintiffs argue that even if the "relevant conduct" occurred overseas, a court nonetheless may consider other facts (*i.e.*, the "irrelevant conduct") and change the result. Or, as the Second Circuit put it, Plaintiffs argue that "a common-law cause of action brought under the ATS [can] have extraterritorial reach simply because some judges, in some cases, conclude that it should." *Balintulo*, 727 F.3d at 192. *Kiobel* neither requires nor permits such an analysis.

If disregarding the "relevant conduct" in favor of a "fact-sensitive" multi-factor inquiry was required or appropriate, the Supreme Court would have either performed such an inquiry in *Kiobel* or would have remanded for consideration of whatever multi-factor test Plaintiffs advocate. But once the Supreme Court concluded that the presumption

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Ahmed-Al-Khalifa v. Obama, No. 1:13-cv-49, 2013 WL 3797287, at *2 (N.D. Fla. July 19, 2013); *Ahmed-Al-Khalifa v. Trayers*, No. 3:13-cv-869, 2013 WL 3326212, at *2 (D. Conn. July 1, 2013); *Mwangi*, 2013 WL 3155018, at *4; *Ahmed-Al-Khalifa v. Salvation Army*, No. 3:13-cv-289, 2013 WL 2432947, at *2-3 (N.D. Fla. June 3, 2013), *notice of appeal filed* (11th Cir. Oct. 1, 2013); *Muntslag*, 2013 WL 2150686, at *2.

[9] Pl. Br. at 17, 22, 23.

against extraterritoriality applied and that the relevant conduct was the conduct constituting the alleged violation of the law of nations, the Court stopped writing and affirmed because the claims in *Kiobel* "seek[] relief for violations of the law of nations occurring outside the United States." *Kiobel*, 133 S. Ct. at 1669.

Plaintiffs' hook for their argument is a misreading of *Kiobel*'s caution that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669. This single sentence in *Kiobel* does not undo everything that came before it. Rather, it is a reminder that having a claim that "touches and concerns the territory of the United States" in some way is not enough, as the presumption bars claims that do not touch and concern the territory of the United States "*with sufficient force* to displace the presumption." *Id.* (emphasis added). As for what is "sufficient force," the Supreme Court could not have been clearer in holding that the *violation of the law of nations* has to occur in the United States for the claim to be domestic and not barred by the presumption against extraterritoriality. *Id.* at 1665, 1667, 1669. Thus, the "touch and concern" language on which Plaintiffs rely reinforces not only the Court's holding in *Kiobel*, but also its holding in *Morrison*, where the Court noted that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its

kennel whenever *some* domestic activity is involved in the case." *Morrison*, 130 S. Ct. at 2884.

Indeed, as the Second Circuit explained in *Balintulo*, an interpretation of *Kiobel* that allows an *ad hoc* interest analysis to decide whether to apply ATS extraterritorially "seeks to evade the bright-line clarity of the Court's actual holding," and to replace the *Kiobel* majority opinion with the approach favored by the concurrence. *Balintulo*, 727 F.3d at 189.[10] Whether a statute applies extraterritorially is made on a statute-by-statute basis, and not on a case-by-case basis:

> The canon against extraterritorial application is a presumption about *a statute's meaning*. Its wisdom, the Supreme Court has explained, is that *[r]ather than guess anew in each case*, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. For that reason, the presumption against extraterritoriality applies to the *statute*, or at least the part of the ATS that carries with it an opportunity to develop common law, and allows federal courts to recognize certain causes of action."

Balintulo, 727 F.3d at 191 (citations and quotations omitted) (alteration in original). Because the presumption against extraterritoriality is a matter of *statutory construction*, any decision to allow extraterritorial

[10] Plaintiffs' discussion of the *Kiobel* concurrences hardly merits mention. Pl. Br. at 25-26. Plaintiffs' attempt to promote Justice Kennedy's concurrence as authoritative because "it represented the fifth vote for what would have been a plurality approach" fails on its face – Justice Kennedy joined the majority opinion in full.

application must be made by Congress and not by individual judges or panels of judges. *Kiobel*, 133 S. Ct. at 1669 ("If Congress were to determine otherwise, a statute more specific than ATS would be required."); *United States v. Shibin*, 722 F.3d 233, 245 (4th Cir. 2013) ("To be sure, statutes extend extraterritorially only *if Congress* clearly so provides." (emphasis added)).

3. Plaintiffs' Arguments Based on Factors Other Than the Place of the Alleged Law of Nations Violations Cannot Be Squared with *Kiobel*

Plaintiffs offer three other reasons why this Court should sanction ATS claims that are based on alleged law of nations violations occurring outside the United States: (1) Plaintiffs have alleged enough other types of domestic conduct to allow ATS to apply (Pl. Br. at 39-40); (2) allowing ATS claims to proceed would further United States policy interests in not providing a safe haven for "torturers" (*id.* at 34-39); and (3) a different rule should apply to Iraq (*id.* at 28-30).

The threshold flaw in each of Plaintiffs' arguments is that they contradict the clear holding in *Kiobel* that the *violation of the law of nations* must occur domestically for a claim under the ATS to be actionable. *Kiobel*, 133 S. Ct. at 1669 ("[P]etitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred."); *see also id.* at 1665, 1667. In addition, as detailed below, each of these arguments suffers from other fundamental flaws.

a. Plaintiffs' Allegations of Domestic Conduct Are Both Irrelevant and Unsupported

Undeterred by *Kiobel*'s holding, Plaintiffs argue that they have alleged enough domestic conduct to apply the ATS to claims involving violations of the law of nations occurring in Iraq. Plaintiffs note that CACI PT is an American corporation headquartered in Virginia and that CACI PT hired interrogators to deploy to Iraq from the United States. Pl. Br. at 39-40. But *Kiobel* was clear that "it would reach too far to say that mere corporate presence [in the United States] suffices" to create jurisdiction under ATS. *Kiobel*, 133 S. Ct. at 1669. Many of the post-*Kiobel* cases that Plaintiffs ignore involve the dismissal of ATS claims against American corporations and citizens.[11]

Indeed, the Supreme Court summarily remanded to the Ninth Circuit an ATS suit against the mining company Rio Tinto for reconsideration in light of *Kiobel*. Even though 47% of Rio Tinto's $13 billion in assets are located in the United States,[12] the *en banc* Ninth Circuit concluded that the plaintiffs' claims must be dismissed with prejudice. *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013).

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[11] *See, e.g.*, *Balintulo*, 727 F.3d at 189-90; *Adhikari*, 2013 WL 4511354, at *7 (rejecting ATS claim against KBR); *Giraldo*, 2013 WL 3873960, at *8 (American corporations); *Ahmed-Al-Khalifa*, 2013 WL 3797287, at *2 (ATS claims against U.S. President); *Mwangi*, 2013 WL 3155018, at *4 (ATS claims against former U.S. President).

[12] *See Sarei v. Rio Tinto PLC*, 671 F.3d 736, 744 (9th Cir. 2011).

This leaves Plaintiffs' representation that their allegations (and presumably the record) support an assertion that CACI PT exercised operational control over its employees and the interrogation mission from the United States. Pl. Br. at 39-40. *Id.* Plaintiffs have taken considerable liberties with their description of their own complaint and with the record.

Plaintiffs assert in their brief that "CACI-PT ratified and encouraged the role its employees played in the torture conspiracy through decisions it made in Virginia." The sole support offered by Plaintiffs for this proposition is Paragraph 8 of the Third Amended Complaint, which merely recites that CACI PT is a Virginia corporation. *See* Pl. Br. at 39 (citing A437-38 at ¶ 8). Plaintiffs' Third Amended Complaint does not allege a single interaction between Plaintiffs and any employee of CACI PT, or even tie any action by CACI PT to any mistreatment that *these Plaintiffs* allegedly suffered.

Contrary to the intimations in Plaintiffs' brief, the record in this case does not show that CACI PT had any role in directing operations at Abu Ghraib prison. CACI PT provided *administrative* support to its employees who were embedded within Army units in Iraq. Supervision of interrogators and interrogation operations in Iraq remained under the exclusive purview of the U.S. military. As explained by Colonel William Brady, who was the contracting officer's representative on the CACI PT contracts:

> The CACI PT interrogators were integrated within the military interrogation process of the military units to which they were assigned to support. That is, CACI PT interrogators received the same operational interrogation taskings and direction from the military as their military interrogator counterparts. . . .
>
> While the CACI PT interrogators were under the functional control and supervision of the United States military, CACI PT did have a country manager and site leads who provided administrative support for these interrogators. For example, if a CACI PT interrogator had a pay issue, he or she would address that administrative issue through the CACI PT site leads and country manager. . . . With respect to the conduct of required interrogations and related operational issues, however, CACI PT interrogators reported directly to the United States Army personnel who supervised them.

A1436-40 at ¶¶ 4-5; *see also* A1442.2 to 1442.13 (deposition testimony of Major Carolyn Holmes). This evidence is unrebutted. Plaintiffs have neither alleged nor established a single instance when CACI PT personnel in the United States had any involvement in setting interrogation policy, approving interrogation techniques, setting interrogation priorities, or determining whom to interrogate.

Plaintiffs' lack of record support for their position is noteworthy given the procedural posture of this case. Discovery in this action concluded *before* the district court dismissed Plaintiffs' ATS claims, and *all* of the evidence developed in discovery shows that operational control over the interrogation mission in Iraq was the exclusive province of the United States military.

b. Plaintiffs' Policy-Based Arguments Provide No Basis for Judicial Rewriting of ATS to Change the Supreme Court's Construction of that Statute

Despite *Kiobel*, a torture case itself, specifying that ATS applies only to law of nations violations occurring in the United States, Plaintiffs argue that the Court essentially should adopt a "torture exception"[13] to *Kiobel*'s holding. Plaintiffs assert that "lower courts should find the presumption [against extraterritoriality] displaced where claims sufficiently touch and concern U.S. territory so as to oblige the United States – from the perspective of the international community – to provide a civil remedy for grave violations of the law of nations or suffer 'diplomatic strife.'" Pl. Br. at 27. Basically, Plaintiffs argue that the judiciary should decide what will or will not be good for United States diplomatic relations, and to expand or contract ATS accordingly. Plaintiffs' suggestion turns the principles animating the presumption against extraterritoriality on their head. As the Supreme Court explained, "For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention

[13] Plaintiffs' argument brings to mind the Supreme Court's admonition that it makes no difference "with what denunciatory epithets the complaining party may characterize [the defendants'] conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Dow v. Johnson*, 100 U.S. 158, 165 (1879).

of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 133 S. Ct. at 1664 (citation omitted) (quoting *Aramco*, 499 U.S. at 248).

Plaintiffs nonetheless forge ahead and claim that their "constellation of facts" supports displacing the presumption of extraterritoriality because: (1) their "claims arise out of universally condemned acts," (2) the acts allegedly were committed by U.S. actors who conspired with the U.S. military, and (3) the acts were "supported and facilitated" by "U.S.-based" corporate conduct. Pl. Br. at 28. As an initial matter, Plaintiffs' references to supposed "U.S.-based corporate conduct" are decidedly lacking in candor, as Plaintiffs have neither alleged nor demonstrated "U.S.-based corporate conduct" other than the mundane process of hiring and paying employees. *See* Section A.3.a, *supra*. Moreover, Plaintiffs' alleged "facts" have nothing whatsoever to do with the locus of the relevant conduct – the alleged human rights violations. In Plaintiffs' view, the Court should simply sidestep *Kiobel*'s clear holding about ATS's extraterritorial reach and apply ATS extraterritorially here "to punish American tortfeasors," remedy victims, and "ensure the United States does not provide 'safe haven' to torturers." Pl. Br. at 28.

Plaintiffs' premise not only does great violence to *Kiobel*'s holding, but is factually inaccurate. Disregarding *Kiobel* is not required in order to ensure that the United States "does not provide a safe haven to torturers." Pl. Br. at 28. The Executive branch has access to the full panoply of criminal and civil remedies under various U.S. laws to address such misconduct. These tools include expressly extraterritorial criminal statutes such as the Anti-Torture Statute, 18 U.S.C. § 2340A; the War Crimes Act, 18 U.S.C. § 2441; and the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261. Various administrative remedies, including contract termination, or suspension and debarment, are also available to the United States. *Saleh*, 580 F.3d at 2. The absence of a *tort* remedy in a *court* does not even leave Plaintiffs empty-handed. *If* they had a valid claim of mistreatment while in United States custody, the United States has committed to providing an administrative remedy under the Foreign Claims Act. *See* note 29, *infra*.

Plaintiffs' grievance seems to be with the U.S. government, which through two administrations has not deemed it appropriate to pursue prosecution of any CACI PT employees or to take administrative action against CACI PT with regard to detainee abuse at Abu Ghraib prison. To Plaintiffs, the United States' position is a reason for this Court to step in and create a federal cause of action so as to protect American diplomacy. Not surprisingly, Plaintiffs cite no authority for that

approach. With respect to all of the remedial tools at the United States' disposal, the D.C. Circuit observed:

> To be sure, the executive branch has broadly condemned the shameful behavior at Abu Ghraib documented in the now infamous photographs of detainee abuse. . . . Indeed, the government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal, or contract proceedings have been so instituted against the defendants. This fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal.

Saleh, 580 F.3d at 10. Equally telling is that Plaintiffs have not submitted an administrative claim to the United States, the entity best positioned to assess the veracity of their allegations. The presumption against extraterritoriality may not be disregarded simply because a court concludes that it would better serve American interests if Congress had enacted a different statute. *Morrison*, 130 S. Ct. at 2886.

c. Neither Iraq Nor Abu Ghraib Prison Are Within the Territory of the United States

The district court appropriately rejected Plaintiffs' assertion that Iraq, and Abu Ghraib in particular, were within the United States' territorial control and that, therefore, the presumption against extraterritoriality should not apply. A1817. Iraq, of course, is not within the territorial jurisdiction of the United States. The fact that Iraq was subject to invasion and occupation during some of the time of Plaintiffs' detention does not make any difference. *See Adhikari*, 2013

WL 4511354, at *7 (entering judgment for KBR on ATS claims involving injury in Iraq).

Plaintiffs cite *Rasul v. Bush*, 542 U.S. 466 (2004), a case decided nine years before *Kiobel*, for the proposition that "the Supreme Court rejected the assertion that the presumption against extraterritoriality would preclude application of the Alien Tort Statute or federal habeas statute to claims asserted by persons detained at the U.S. Naval Base in Guantánamo Bay." Pl. Br. at 28-29. To the contrary, the issue in *Rasul* was whether petitioners' presence in military custody at Guantánamo Bay categorically deprived them of the "privilege of litigation" in United States courts. *Rasul*, 542 U.S. at 484. *Rasul* says nothing about the presumption against extraterritoriality, or what must occur domestically for a claim to proceed under ATS, or whether the petitioners could have presented a viable ATS claim once they exercised their "privilege of litigation." *Kiobel* controls these questions.

Indeed, the Supreme Court based its holding in *Rasul* in large part on the specific nature of United States control over Guantánamo Bay, where the United States has a long-term lease and the right "to exercise [complete] control permanently if it so chooses." *Rasul*, 542 U.S. at 484. By contrast, Plaintiffs here were detained during a time of open insurgency in a war zone, where control over Iraq was being fought for every day. In the context of an open insurgency, the idea of

"control" is a misnomer even if that concept could somehow bear on the presumption against extraterritoriality.

Moreover, the CPA (which is distinct from the United States anyway) did not claim a right to exercise control over Iraq into perpetuity. CPA Order 1 expressly states that "[t]he CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq," A642 at § 1.1, and the U.N. Security Council repeatedly noted the temporary nature of the Coalition presence in Iraq. A645-52, A656-60. If anything, the better analogy to Iraq is not Guantánamo, where the United States has a contractual right to perpetual control, but Bagram Air Base in Afghanistan, where detainees do not even have *habeas* rights, much less actionable tort claims under ATS. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

Plaintiffs next proclaim that the United States had legislative control over Iraq, and that this ought to somehow override the presumption against extraterritoriality. But the United States did not exercise "legislative control" over Iraq. *See Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp. 2d 835, 840 (E.D. Va. 2012) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Plaintiffs try to skip over this inconvenient fact by claiming that the United States "created, commanded and controlled the CPA," which exercised temporary governance over Iraq. Pl. Br. at 32. The CPA, however, was

not an instrumentality of the United States, but was a multi-national entity. *See United States v. Whiteford*, 676 F.3d 348, 351 (3d Cir. 2012); *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678, 688-89 (E.D. Va. 2006), *aff'd in part, rev'd in part*, 562 F.3d 295, 306 (4th Cir. 2009).[14] It was the CPA and its Iraqi delegates, and not the Congress of the United States, that legislated for Iraq. *See* A643 at § 1; A646; A654 at § 1 (recognizing Governing Council of Iraq as "the principal body of the Iraqi interim administration"); A662. Indeed, CPA Order 1 specifically provided that unless suspended or replaced, "laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq . . . ." A643 at § 2.

Kiobel means what it says. The alleged violation of the law of nations is the "relevant conduct" that must occur domestically for a claim to be actionable under ATS. *Kiobel*, 133 S. Ct. at 1669. As the Second Circuit noted, Plaintiffs' request that this Court judicially amend ATS to allow for extraterritorial application based on amorphous policy considerations "seeks to evade the bright-line clarity of the Court's actual holding." *Balintulo*, 727 F.3d at 189. If ATS is to apply

[14] This Court did not disturb the district court's holding in *Custer Battles* that the CPA was not an instrumentality of the United States. Rather, this Court held that the False Claims Act applied to claims submitted to a United States official, even if that official was detailed to an entity, such as the CPA, that is not an instrumentality of the United States. 562 F.3d at 306.

extraterritorially, *Congress* must enact a statute so providing. *Kiobel*, 133 S. Ct. at 1669.

B. The District Court Correctly Concluded That the Rashid Plaintiffs' Common-Law Claims Were Untimely

The Rashid Plaintiffs filed suit, in Virginia, more than three years after they were released from U.S. custody.[15] The Rashid Plaintiffs do not dispute that Virginia has a two-year statute of limitations for tort claims,[16] or that Virginia law does not toll the statute of limitations based on a putative class action in which the plaintiffs were not named plaintiffs.[17] Instead, the Rashid Plaintiffs try to avoid clear Virginia law by arguing that (1) the district court should have applied *Ohio's* statute of limitations, and (2) if Virginia law applied, the district court should have tolled the running of the statute of limitations anyway. Both contentions are meritless.

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[15] *See* Third Am. Compl. (A436-490) ¶ 58 (39 months for Rashid), ¶ 67 (49 months for Al-Zuba'e), ¶ 77 (55 months for Al-Ejaili).

[16] *See* Va. Code. Ann. §§ 8.01-243; 8.01-230.

[17] *See Casey*, 722 S.E.2d at 846.

1. The District Court Correctly Concluded That Virginia's Statute of Limitations Applies

A district court sitting in diversity applies the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under Virginia choice of law rules, statutes of limitations are procedural and are applied even where another jurisdiction's substantive law applies. *Jones v. R.S. Jones & Assocs., Inc.*, 431 S.E.2d 33, 34-35 (Va. 1993). The district court must also apply the forum state's rule on equitable tolling when applying that state's statute of limitations. *Wade v. Danek Med., Inc.*, 182 F.3d 281, 289 (4th Cir. 1999).

While Plaintiff Al Shimari originally asserted his claims in Ohio, and then consented to transfer to Virginia, none of the Rashid Plaintiffs asserted any claims in Ohio. Rather, after transfer of Al Shimari's case to Virginia, the Rashid Plaintiffs joined this case through an amended complaint. Nevertheless, the Rashid Plaintiffs contend that Ohio's choice of law rules should apply to them because somebody else (Plaintiff Al Shimari) asserted *his claims* in Ohio. The Rashid Plaintiffs are late converts to this view; they originally acknowledged that Virginia's choice of law rules applied but argued that Virginia allowed tolling. Dkt. #59 at 1. Once the Virginia Supreme Court decided *Casey*, 722 S.E.2d at 846, the Rashid Plaintiffs changed their position, arguing that Ohio law should apply.

The Rashid Plaintiffs are wrong on the law. A plaintiff must actually assert claims in the transferor court in order to invoke the transferor court's choice of law rules; a plaintiff cannot assert his claims in a forum and then invoke the choice of law rules of a different jurisdiction where he *could have* asserted his claims. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). As the Court explained:

> [O]ne might ask why we require the Ferenses to file in the District Court in Mississippi [the transferor forum] at all. Efficiency might seem to dictate a rule allowing plaintiffs in the Ferenses' position not to file in an inconvenient forum and then to return to a convenient forum through a transfer of venue, but instead simply to file in the convenient forum and ask for the law of the inconvenient forum to apply. Although our rule may invoke certain formality, one must remember that § 1404(a) does not provide for an automatic transfer of venue. The section, instead, permits a transfer only when convenient and "in the interest of justice." ***Plaintiffs in the position of the Ferenses must go to the distant forum*** because they have no guarantee, until the court there examines the facts, that they may obtain a transfer.

Id. at 531 (emphasis added). The reason why the choice of law rules of the transferor court apply to plaintiffs whose claims are transferred under 28 U.S.C. § 1404 is because it "allow[s] plaintiffs to retain whatever advantages may flow *from the state laws of the forum they have initially selected*." *Van Dusen v. Barrack*, 376 U.S. 612, 633 (1964) (emphasis added). The forum the Rashid Plaintiffs initially selected was Virginia. The Rashid Plaintiffs did not do what is required to

exempt themselves from Virginia's choice of law rules, as they did not actually "go to the distant forum" and assert their claims. *Ferens*, 494 U.S. at 531.

Plaintiffs cite a few cases where courts have allowed a plaintiff *who actually filed suit in the distant forum* to continue to take advantage of the transferor court's choice of law rules after a post-transfer amendment of the complaint. Pl. Br. at 41-42. These decisions, however, are consistent with *Ferens* because they involve a plaintiff who actually filed suit in another jurisdiction.[18] Plaintiffs have not cited, and CACI PT has not found, a single case decided in the twenty-three years since *Ferens* that allowed a plaintiff who joined a suit only after transfer to invoke the choice of law rules of a transferor court in which he never appeared.

In addition to being inconsistent with *Ferens*, applying Ohio choice of law rules to plaintiffs who never filed suit in Ohio would violate due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). For the law of a state to be applied consistent with due process, the

[18] Indeed, courts have rejected the argument made by Plaintiffs that the transferor court's choice of law rules could apply with respect to claims against a defendant only added after transfer. *Ormond v. Anthem, Inc.*, No. 1:05-cv-1908, 2009 WL 102539, at *5 (S.D. Ind. Jan. 12, 2009); *Z-Rock Commc'ns Corp. v. William A. Exline, Inc.*, No. C 03-02436, 2004 WL 1771569, at *6 (N.D. Cal. Aug. 6, 2004); *cf. Lombard v. Economic Dev. Admin. of Puerto Rico*, No. 94 CIV 1050, 1995 WL 447651, at *2 n.1 (S.D.N.Y. July 27, 1995).

state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests.'" *Id.* (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)). *Shutts* requires that contacts be assessed on a plaintiff-by-plaintiff basis, and the Rashid Plaintiffs have neither alleged nor established a single connection between their claims and the State of Ohio.

In the district court, Plaintiffs cited *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988), as supposedly providing that the *Shutts* due process analysis does not apply to statutes of limitations. But *Sun Oil* merely provides that due process is satisfied when a forum court applies *its own statute of limitations*. *Id.* The Rashid Plaintiffs asked a federal court in Virginia to apply Ohio's statute of limitations to Plaintiffs whose claims have no connection with Ohio. The district court correctly declined this invitation.

2. There Is No Basis for Refusing to Give Effect to Virginia's Tolling Rules

Casey reaffirmed that Virginia law would not toll the running of the statute of limitations based on the pendency of a putative class action in which the Rashid Plaintiffs were not named plaintiffs. 722 S.E.2d at 845-46. Plaintiffs concede this aspect of Virginia law, but argue that if Virginia's limitations jurisprudence applies, the Court

should apply *Casey* only prospectively. There is no basis for declining to apply clear Virginia law.

Judicial decisions are rarely given only prospective effect. *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *see also Am. Canoe Ass'n v. Murphy Farms*, 326 F.3d 505, 515 (4th Cir. 2003); *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988). Limiting precedent to prospective treatment is not only rare, but is limited to decisions that "establish a new principle of law." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *City of Richmond v. Blaylock*, 440 S.E.2d 598, 599 (Va. 1994). When the Virginia Supreme Court decided *Casey*, it did not provide for prospective application only. Indeed, the Virginia Supreme Court made clear in *Casey* that it was not establishing new law, but enforcing principles that had always been a part of Virginia law.

As the court explained in *Casey*, there was no equitable basis for tolling the statute of limitations because Virginia law *never* recognizes equitable tolling:

> It is well-established that statutes of limitations are strictly enforced and must be applied unless the General Assembly has clearly created an exception to their application. A statute of limitations may not be tolled, or an exception applied, in the absence of a clear statutory enactment to such effect.
>
> Given these principles, there is no authority in Virginia jurisprudence for the equitable tolling of a statute of limitations based on the pendency of a putative class action in another jurisdiction.

Casey, 722 S.E.2d at 845 (internal citations and quotations omitted). The Virginia Supreme Court further noted in *Casey* that there was no statutory basis for tolling the running of a statute of limitations based on a prior suit unless the plaintiff was a *named plaintiff* in the other action, as opposed to a putative class member. *Id.* *Casey* did not establish new Virginia law; it merely applied Virginia law as it has always existed.

The Rashid Plaintiffs argue that they could not have foreseen the absence of tolling under Virginia law. But this Court had held *in 1999* that Virginia law would not toll the running of the statute of limitations in these circumstances, *and did not limit its holding to prospective application only*. *Wade*, 182 F.3d at 288-89. That this Court applied the rule enforced in *Casey* thirteen years before *Casey* even issued ought to end any debate on Plaintiffs' nonretroactivity argument. The Rashid Plaintiffs curiously avoid citation to *Wade* when representing that the result in *Casey* was "novel" and "an issue of first impression that was not foreshadowed in Virginia law." Pl. Br. at 45. That argument is disingenuous.

Notably, every court applying Virginia law after the *Casey* decision issued has applied its holding, and none has held that *Casey* applies only prospectively. *Casey v. Merck & Co.*, 678 F.3d 134, 138 (2d Cir. 2012); *Sanchez v. Lasership*, No. 1:12-cv-246, 2012 WL 3730636, at *15 (E.D. Va. Aug. 27, 2012); *Flick v. Wyeth, LLC*, No. 3:12-cv-0007,

2012 WL 4458181, at *6 (W.D. Va. June 6, 2012).[19] Thus, there is no basis for tolling the running of the Rashid Plaintiffs' statute of limitations in contravention of clear Virginia law.

C. Plaintiff Al Shimari's Common-Law Tort Claims Are Not Cognizable Under Applicable Law

In Section B, *supra*, we explained why the Rashid Plaintiffs, who *only* asserted claims in Virginia, are bound by Virginia's statute of limitations jurisprudence. In a strange irony, Plaintiff Al Shimari, who originally filed suit in Ohio, argues that the district court erred by *not applying Virginia law* to his common-law claims. The district court correctly held, however, that Al Shimari's common-law claims were governed by Iraq law, and that Iraq law, specifically CPA Order 17, did not permit a common-law tort suit.

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[19] The Rashid Plaintiffs cite two unpublished Virginia Court of Appeals decisions reaching the unremarkable conclusion that prospective application is sometimes appropriate when the Virginia Supreme Court overrules its prior precedent. *See Fieldcrest Cannon, Inc. v. Marshall*, No. 2567-96-2, 1997 Va. App. LEXIS 195 (Va. Ct. App. Apr. 1, 1997); *Piedmont Mfg. Co. v. East*, No. 1546-96-3, 1997 Va. App. LEXIS 90 (Va. Ct. App. Feb. 25, 1997). *Casey*, however, overrules no prior decisions and simply applies Virginia law as it has always existed, *Casey*, 722 S.E.2d at 845.

1. Ohio's Choice of Law Rules Require Application of Iraq Law

While he argues that the district court erred in its choice of law analysis, Al Shimari's brief does not invoke the choice of law rules of *any* jurisdiction. Because Plaintiff Al Shimari originally filed suit in Ohio, the starting point is Ohio's choice of law rules.[20] Under Ohio choice of law rules, the law of the place of injury (here, Iraq) presumptively applies to tort claims. *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 288-89 (Ohio 1984). When Ohio's choice of law rules call for application of the law of a jurisdiction that would bar the plaintiff's claims, Ohio courts dismiss or enter judgment for the defendant. They do not cast about in search of a jurisdiction that *would* allow the plaintiff's claims.[21]

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[20] *See Ferens*, 494 U.S. at 523. If Ohio was not a proper venue, then Virginia's choice of law rules would apply. *Myelle v. Am. Cyanamid Co.*, 57 F.3d 411, 413 (4th Cir. 1995). Under Virginia's choice of law rules, Al Shimari's common-law claims would be time-barred. *See* Section B, *supra*.

[21] *See, e.g.*, *Sholes v. Agency Rent-a-Car*, 601 N.E.2d 634, 641 (Ohio Ct. App. 1991) (holding that Texas tort law governed plaintiff's claims and affirming entry of judgment because cause of action not permitted under Texas law); *Baumgardner v. Bimbo Food Bakeries Distrib., Inc.*, 697 F. Supp. 2d 801, 816 (N.D. Ohio 2010) (dismissing unjust enrichment claim because New York law, unlike Ohio law, does not allow alternative pleading of breach of contract and unjust enrichment claims); *Hagberg v. Delphi Auto. Sys.*, 268 F. Supp. 2d 855, 860 (N.D. Ohio 2002) (holding that Michigan law, and not Ohio law, applied to dispute, and then granting summary judgment to defendant because Michigan law, unlike Ohio law, did not give plaintiff the right

(Continued …)

2. Iraq Law, Through CPA Order 17, Bars Common-Law Tort Claims By Plaintiff Al Shimari

Plaintiff Al Shimari contended in the district court that Iraq law did not govern his common-law claims. Dkt. #404 at 10. On appeal, he concedes that the availability of his common-law claims is controlled by CPA Order 17, which was Iraq's law of the land. Pl. Br. at 47 ("The governing legal regime *in Iraq* requires application of Virginia law." (emphasis added)). Plaintiff Al Shimari, however, misconstrues CPA Order 17 as allowing (1) *tort suits*, (2) to be filed *in a court*, (3) based on *the substantive law of the Commonwealth of Virginia*.

In construing legislation, the Court begins with the language of the legislation itself. *United States v. Ashford*, 718 F.3d 377, 382 (4th Cir. 2013). "To determine a statute's plain meaning, [the Court] not only look[s] to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole." *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013).

CPA Order 17 begins by observing "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." A666. Accordingly, CPA Order 17 includes a

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to sue on insurance policy).

broad preemption provision that bars application of substantive Iraqi law to contractors supporting the occupation:

> Coalition contractors and their sub-contractors as well as their employees not normally resident in Iraq, shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA.

A667 at § 3(1).

Plaintiffs' brief is schizophrenic regarding Section 3(1) of CPA Order 17. On one hand, Al Shimari acknowledges that "Iraq was under occupation and its local laws did not apply to occupation forces or their contractors." But nine pages later, he appears to argue that the district court erred in concluding that CPA Order 17 precludes application of Iraqi law to CACI PT. Pl. Br. at 56.[22] In the district court, however, Plaintiffs agreed that Section 3(1) precluded application of Iraq law to CACI PT.[23] If Plaintiffs are indeed now arguing to the contrary, that argument is unavailable to them, as "[i]t has long been recognized that

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[22] Al Shimari cites to the Fifth Circuit's decision in *McGee v. Arkel Int'l, LLC*, 671 F.3d 539 (5th Cir. 2012), but even Al Shimari admits that *McGee* involved construction of a later version of CPA Order 17 that Al Shimari acknowledges does not apply to his claims. Pl. Br. at 56.

[23] *See* Dkt. #399 at 20 ("CPA Order 17, immunized U.S. personnel and U.S. contractors from the application of Iraqi law, and specifically stipulated that contractors are subject to liability under U.S. domestic law."); *id.* at 14 n.10 ("[CPA Order 17] also reaffirmed the inapplicability of Iraqi law to U.S. contractors or U.S. forces . . . .").

a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request."[24] Moreover, even if such an argument were not barred by the invited error doctrine, the district court's construction of Section 3(1) is plainly correct, as that provision uses broad "relating to" preemption language[25] and Plaintiffs' Complaint *repeatedly* makes an express connection between their claims and the terms and conditions of CACI PT's contracts.[26]

That said, the proper construction of Section 3(1) is in some ways beside the point because Section 6 of CPA Order 17 sets forth a mandatory process for claims "arising from or attributed to Coalition personnel or any persons employed by them." A668. Section 6 provides:

> Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to

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[24] *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994) (quotations omitted); *see also Ridge v. Cessna Aircraft Co.*, 117 F.3d 126, 129 (4th Cir. 1997).

[25] *See Altria Group, Inc. v. Good*, 555 U.S. 70, 85 (2008) ("relating to" preemption language is synonymous with "having a connection with" and is intended to preempt a "large area of state law"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) ("relating to" language confers broad preemptive effect); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

[26] Third Am. Compl. (A436-489) at ¶¶ 15, 96, 162, 192, 202, 205, 212.

> Coalition personnel or any persons employed by them, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Parent State whose Coalition personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Parent State.

A668.

Citing Section 6, Plaintiff Al Shimari contends that "Order 17 further directs suits against contractors to be brought in the courts of, and under the laws of, the nation from which the contractor was sent." Pl. Br. at 48. But Section 6 offers not even a hint of allowing a *tort suit in court* against a contractor. Rather, Section 6 provides no recovery for claims arising "in connection with military combat operations" (A668), though as discussed below, the United States has committed to administrative payment of valid detainee abuse claims even if technically not permitted by applicable law. For claims not arising out of combat operations, Section 6 allows submission of administrative claims that would be decided in whatever manner the Parent State has put in place under its national laws. This is clear from several elements of Section 6.

First, Section 6 provides that third party claims "shall be submitted and dealt with by the Parent State . . . ." CPA Order 17, § 6. A "Parent State" is the nation that provided the Coalition Personnel, here the United States. A666. Plaintiffs have not submitted a claim to

the United States nor is the United States dealing with the claim. And notably, Section 6 speaks of "submitting" (and not "filing") a claim, and provides that the Parent State will "deal" with the claim (as opposed to a court "adjudicating" the claim). The use of "shall" in Section 6 also makes clear the exclusive and mandatory nature of the claims process allowed by this provision. *See Angelex Ltd. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013).

Second, Section 6 provides that the Parent State will deal with claims "in a manner consistent with the *national laws* of the Parent State." A668. At last glance, the Commonwealth of Virginia was not a nation and had no "national laws." The Supreme Court and this Court speak of "national laws" specifically to distinguish between the laws of the United States – the national laws – and state law.[27]

[27] *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) ("The revised Amendment proposal did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property."); *New York v. United States*, 505 U.S. 144, 166 (1992) ("Then we are brought to this dilemma – either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do." (quoting Alexander Hamilton)); *Brzonkala v. Va. Polytechnic & State Univ.*, 169 F.3d 820, 864 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

"General principles of statutory construction require a court to construe all parts to have meaning and to reject constructions that render a term redundant."[28] The word "national" in CPA Order 17 is redundant if it is not construed to modify the rest of the sentence to specify that claims shall be submitted to the extent allowable under national law and not pursuant to state law.

Third, the dichotomy between Section 6's treatment of claims arising "in connection with military combat operations" and other claims shows that what CPA Order 17 allows in lieu of application of Iraq law is an administrative claim as permitted by the Parent State. The CPA administrator did not pull the distinction between combat and noncombat activities out of thin air. That is the exact distinction drawn in the Foreign Claims Act, which is a "national law" that allows the United States (*i.e.*, the Parent State here) to pay claims if the injury or damage that "is caused by, or is otherwise incident to noncombat activities of, the armed forces." 10 U.S.C. § 2734(a).

Thus, CPA Order 17 establishes the following rules for claims arising out of the occupation of Iraq: (1) Coalition personnel are not subject to Iraqi law; (2) if a claimant's injury arises in connection with military combat operations, there is no explicit provision for recovery,

[28] *PSINet, INc. v. Chapman*, 362 F.3d 27, 232 (4th Cir. 2004); *see also, e.g.*, *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012); *In re Total Realty Management, LLC*, 706 F.3d 245, 251 (4th Cir. 2013).

though the Executive historically has reserved the power to pay such claims when deemed advisable;[29] and (3) if a claimant's injury arises out of noncombat operations, Section 6 provides that the claimant shall submit a claim to the Parent State (here, the United States) where it will be dealt with under national law (here, the Foreign Claims Act). A668; *see also Saleh*, 580 F.3d at 2.

Plaintiff Al Shimari argues that a public notice issued in connection with CPA Order 17 eliminates "any doubt about applicability of U.S. tort law to unlawful contractor conduct." Pl. Br. at 49. If anything, the public notice buttresses CACI PT's reading of CPA Order 17. The notice on which Plaintiffs rely provides: "[Coalition personnel] are not subject to local law or the jurisdiction of local courts" but that this "will not prevent legal proceedings *against Coalition personnel* for *unlawful acts* they may commit." A1183 (emphasis added). The public notice used the word "unlawful." Not "tortious," but "unlawful." The public notice also observed that legal proceedings

[29] As a policy matter, the United States on occasion pays claims under the FCA even when the damages are not, technically speaking, within the FCA's scope. David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act*, 37 A.F.L. Rev. 191, 197 & n.52 (1994) (noting U.S. payment of combat-related claims in Grenada under FCA as a matter of policy). This is consistent with the Secretary of Defense's direction that the Army identify funds to pay abuse claims even if the claims would not be payable under a strict reading of the FCA. Dkt. #444-1, Ex. 1 at 22.

remained available against "Coalition personnel," not their contractor employers, for such unlawful acts. These representations are consistent with the actual terms of CPA Order 17 because that order bars common-law tort suits but does not preclude United States criminal prosecution of *unlawful* conduct by *Contractor personnel*.[30]

Al Shimari's claims, in his own words, arose "during a period of armed conflict, in connection with hostilities." A480 at ¶ 247. Because his claims arose in connection with combat operations,[31] Section 6 of

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[30] Plaintiffs' reliance on *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), is misplaced. While CPA Order 17 did not apply to Passaro because he was in Afghanistan, *Passaro* was a *criminal* prosecution that would not have been barred by CPA Order 17 if Passaro's misconduct had occurred in Iraq.

[31] The term "combatant activities" has been given a broad construction by the courts. *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) (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). Moreover, arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (quoting *Ex parte Quirin*, 317 U.S. 1 (1942)). The single district court case on which Plaintiffs rely in arguing that Al Shimari's claims do not arise in connection with combat operations reached the unsurprising conclusion that a *training* accident over the *Gulf of Mexico*, thousands of miles from actual hostilities, did not involve combatant activity. *Skeels v. United States*, 72 F. Supp. 372, 374 (E.D. La. 1947). Whatever

(Continued …)

CPA Order 17 permits no claim, although the United States has committed to paying valid claims of detainee abuse as a matter of Executive discretion. *See* note 29, *supra*.

3. The Absence of a Common-Law Tort Remedy Does Not Leave Al Shimari Or the United States Without Recourse For Valid Claims of Contractor Misconduct

Plaintiff Al Shimari argues is that the absence of common-law tort claims provides "blanket immunity for private contractors for their misconduct," and that "no contractor could ever be liable for any misconduct in Iraq." Pl. Br. at 56. This is rhetorical hyperbole. As detailed in Section A.3.b, *supra*, the United States has a wide range of criminal, administrative, and contractual tools at its disposal, and has, in its judgment, not charged CACI PT or its personnel with any wrongdoing. Plaintiffs' disagreement with the United States' position does not entitle them to pursue meritless tort claims.

4. Al Shimari Has Abandoned His Contention That Virginia Law Would Recognize His Negligent Hiring, Training, and Supervision Claim

By not asserting in his brief that the district court erred in holding that Virginia law, even if it applied, would not recognize Al Shimari's

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relevance it might have to training-related claims, *Skeels* has no application to battlefield interrogation operations in a combat-zone detention facility.

negligent hiring, training and supervision claim (A1831 at n.8), Al Shimari has abandoned this argument. *Ngarurih v. Ashcroft*, 371 F.3d 182, 189 n.7 (4th Cir. 2004); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

D. Plaintiffs' Action is Nonjusticiable Under the Political Question Doctrine

This action is not appropriate for judicial resolution because the interrogation techniques adopted by the United States, and their use by military and CACI PT interrogators during the war in Iraq, are matters committed exclusively to the political branches and not subject to judicial review. If this action were brought against military personnel, the political question doctrine would indisputably bar it. Under this Court's decision in *Taylor v. KBR Servs.,* 658 F.3d 402 (4th Cir. 2011), the same result obtains against a contractor integrated into the military chain of command. Accordingly, the doctrine provides an alternative ground to affirm the dismissal of this action. Indeed, since the doctrine implicates this Court's subject-matter jurisdiction, *Taylor,* 658 F.3d at 403, 412, it is a threshold issue the Court is required to decide.[32]

[32] CACI moved to dismiss under the political question doctrine in 2008. Dkt. #34. The district court denied that motion. The CACI Defendants had not yet renewed their political question argument on remand because the district court dismissed the action before the summary judgment deadline. *See* Dkt. #446.

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; *Taylor*, 658 F.3d at 408-09 & n.12. As in *Taylor*, here the first, second, and fourth factors all demonstrate the existence of nonjusticiable political questions. *See id.* at 408-09, 412 & n.13.

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. *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).

Plaintiff's allegations of abuse during the interrogation process challenge interrogation techniques that were approved at the highest levels of the Department of Defense, Department of Justice, National Security Council, CIA, and White House.[33] The unequivocal, forceful

[33] *Compare* A388, A400-05, A443, 455-60 (alleging the "conditions" requested by CACI PT interrogators included diet manipulation, environmental changes, nudity, stress positions, sleep deprivation, forced exercise, "humiliating detainees, for example by putting them in female underwear," and use of unmuzzled dogs) *with* Executive Summary of the Senate Armed Services Committee's report, *Inquiry Into the Treatment of Detainees in U.S. Custody* (Dkt. #79 at Ex. A at xxii-xxiv) (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").

and understandable assignment of responsibility to the political branches for the conduct of war, however, makes the interrogation of detainees in a war zone a nonjusticiable political question.

In *Taylor*, this Court affirmed the dismissal on political question grounds of a tort suit against a private contractor performing tank ramp maintenance in Iraq. *Taylor*, 658 F.3d at 409. While military contractors are not automatically shielded from liability where national defense interests are at issue, *id.* at 409-10, this Court held that dismissal on political question grounds was required (1) when the contractor was under plenary military control, or (2) when the military did not exercise plenary control but deciding the case "would require the judiciary to question actual, sensitive judgments made by the military." *See Taylor*, 658 F.3d at 410-11; *In re KBR Inc., Burn Pit Litig.*, 925 F. Supp. 2d 752, 761-62 (D. Md. 2013). In conducting this inquiry, the Court "look[s] beyond the complaint, and consider[s] how [the plaintiffs] might prove [their] claim *and* how [the contractor] would defend." *Taylor*, 658 F.3d at 409 (citations omitted).

"The key inquiry under . . . *Taylor* is whether the government directly controls contractor employees." *Burn Pit Litig.*, 925 F. Supp. 2d at 763. "[I]f a military contractor operates under the plenary control of the military, the contractor's decisions may be considered as *de facto* military decisions." *Taylor*, 658 F.3d at 410; *accord Carmichael v. Kellogg, Brown, & Root Servs.*, 572 F.3d 1271 (11th Cir. 2009). As

outlined *supra* at Section A.3.a, the record here shows that CACI PT's interrogators operated at all times under the exclusive direction and control of the military. A1436-40 at ¶¶ 4-5; A1442.2-1442.8. The D.C. Circuit, on the precise facts present in the record here, found that CACI PT's interrogators "were in fact integrated and performing a common mission with the military under ultimate military command," and "subject to military direction." *See Saleh*, 580 F.3d at 6-7.

Satisfaction of the second, alternative *Taylor* test is, in this action, self-evident. The detention and interrogation of suspected enemies in a combat theater of war is "closely intertwined" with national defense interests (*Taylor*, 658 F.3d at 411) – it is an inseparable component of war. *Hamdi*, 542 U.S. at 518 (citing *Quirin*, 317 U.S. at 30). Interrogation of suspected enemies is an infinitely more sensitive military judgment than the electrical maintenance decisions found judicially unreviewable in *Taylor*, 658 F.3d at 411-12, the fuel convoy decisions in *Carmichael*, 572 F.3d at 1281-83, or the waste disposal decisions in *Burn Pit Litigation*, 925 F. Supp. at 761-64.

2. There Is No Judicially Discoverable or Manageable Standard for Deciding Tort Claims Involving Military Actions in an Active War Zone

Adjudicating 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 PT conspired with the military to abuse Plaintiffs. These inquiries call for discovery that is unavailable to the litigants.

Plaintiffs claim not to know who interrogated them, and all records identifying any detainees' interrogator(s) are classified and in the United States' exclusive possession. A564 ¶ 13(a). The United States refused to disclose in discovery the identity of the Plaintiffs' interrogators or techniques employed during their interrogations. A578-84, 587.[34] That presents an insurmountable obstacle for adjudicating this action.

Equally problematic is the inability of three of the Plaintiffs (Al Shimari, Rashid, and Al-Zuba'e, the "Absentee Plaintiffs") to gain entry to the United States to appear for court-ordered depositions and medical examinations. After the Plaintiffs refused to appear for properly-noticed depositions, the district court issued an order in February 2013 compelling the Plaintiffs to appear within 30 days. A378. The Absentee Plaintiffs did not appear as ordered, and the district court gave them three more extensions of their deadline to appear. Dkt. #214; A380; A588. The last extension explicitly warned that their claims were subject to dismissal if they did not comply. A588. The Absentee Plaintiffs failed to comply, informing the court that they

[34] CACI PT's motion to compel this information from the United States (A495) became moot upon entry of judgment. *See* A1832-33.

were denied entry into the United States without explanation.[35] CACI PT then moved to dismiss their claims as a sanction for the Absentee Plaintiffs' failure to appear as ordered, a motion that was mooted by the district court's entry of judgment. A1833.

The only conceivable explanation for the Plaintiffs' failure to appear is that their activity hostile to U.S. forces in Iraq supplies the basis for the derogatory information that lands known or suspected enemies on the Terrorist Watchlist. A772-73.[36] These Plaintiffs were detained at Abu Ghraib prison because they engaged in enemy activity against the United States. A727-29, 731, 733-34, 737, 741, 743. They were classified as threats to Coalition forces even *after* their release. A731, 743. There are no judicially manageable standards for adjudicating claims where the plaintiffs cannot participate in the litigation, particularly where that disability is self-inflicted.

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[35] It is the policy of the United States not to inform a traveler if they are in any part of the Terrorist Screening Database or the substance of an individual's data. A775.

[36] "Any alien" who (1) "has engaged in terrorist activity"; (2) who "a consular office, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable grounds to believe, is engaged in or is likely to engage after entry in any terrorist activity"; or (3) who "has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity," is inadmissible to the United States. 8 U.S.C. §1182(a)(3)(B).

3. Lack of Respect for Coordinate Branches of Government

Finally, this case is nonjusticiable because the courts cannot resolve it "without expressing lack of the respect due to coordinate branches of government" – both the Executive Branch and Congress. *Taylor*, 658 F.3d at 409, 412 n.13.

Most of the alleged forms of abuse that Plaintiffs characterize as "torture" were approved by the Secretary of Defense and incorporated into rules of engagement by military commanders at Abu Ghraib.[37] It would be impossible for federal courts to adjudicate Plaintiffs' claims without expressing lack of due respect to the President's performance of his constitutional duty to command the nation's defense forces and protect the nation's security.

It is equally impossible for the federal courts to allow this action to proceed without expressing a lack of respect for Congressional action. Congress has legislated extensively regarding treatment of detainees, torture, and war crimes.[38] Congress has also enacted an administrative

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[37] *See* note 33, *supra*.

[38] *See* the Anti-Torture Statute, 18 U.S.C. §2340A; the War Crimes Act, 18 U.S.C. §2441; the Torture Victim Protection Act, 28 U.S.C. §1350 note; the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600; the Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190; the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739; the Uniform Code of Military Justice, 10 U.S.C. §801 et seq., and the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §3261.

compensation scheme, the Foreign Claims Act, 10 U.S.C. §2734, as well as contract remedies against contractors who engage in wrongdoing.[39]

In *none* of this legislation did Congress authorize a tort action by wartime detainees against United States forces or military contractors. Rather, Congress chose to address such conduct only through criminal prohibitions, not private civil liability. *See Lebron*, 670 F.3d at 552; *Saleh*, 580 F.3d at 13 n.9. To allow this action to proceed would reflect a judicial determination that what Congress did just wasn't good enough, a determination that, under our constitutional allocation of authority, falls of its own weight.

E. The District Court Did Not Abuse Its Discretion in Awarding Costs

Plaintiffs have not paid the costs awarded to CACI PT. They have not posted a supersedeas bond and have neither sought nor received a stay of the award. Thus, it appears Plaintiffs intend to comply with a decision on costs only if that decision is in their favor. Plaintiffs do not challenge any items comprising the award of costs as unallowable, but instead assert that they should be exempted from the costs assessed to every other losing litigant.

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[39] *See* Brief for United States as *Amicus Curiae*, *Al Shimari v. CACI Int'l*, No. 09-1335, at 22 (Jan. 14, 2012).

Federal Rule of Civil Procedure 54(d) "creates the presumption that costs are to be awarded to the prevailing party." *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999). "Costs may be denied to the prevailing party only when there would be an element of injustice in a presumptive cost award." *Id.* A district court abuses its discretion in denying costs because of the economic disparity between the parties. *Id.* at 447, 448.

These Plaintiffs caused CACI PT to incur enormous litigation expenses, with no allegation that they had *any* contact with a CACI PT employee. Three of the Plaintiffs repeatedly urged the district court to delay their deadline for appearing for depositions, increasing the costs incurred by CACI PT, and in the end they were viewed as sufficient security risks that the United States never allowed them to enter this country.

Plaintiffs say that they are financially unable to pay costs, but there is no basis for that conclusion. Plaintiff Al-Ejaili, employed as a reporter for *Al Jazeera*, has made no such assertion. *See* Dkt. #467 at 7; Pl. Br. at 56-57. The other three Plaintiffs provided the district court with no evidence to support their assertion. *See* Dkt. #468.

Plaintiffs also contend that it would be unjust to award costs because it is "of significant national interest" to have litigants vigorously pursue human rights claims. Pl. Br. at 58. But that is equally true of Title VII claims, and this Court nonetheless held that it

was an abuse of discretion to *deny* costs to the prevailing defendant in *Cherry*, 186 F.3d at 447. Here, where the district court adhered to the presumptive rule that an award of costs is appropriate, it did not abuse its discretion.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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

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

1. I am an attorney representing Appellees CACI International Inc and 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, Addendum, and Certificates of Compliance and Service) contains 13,984 words.

/s/ John F. O'Connor

John F. O'Connor

ADDENDUM: STATUTES AND REGULATIONS

10 U.S.C. § 2734

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than $100,000, a claim against the United States for—

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Commonwealths or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. An officer or employee may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

. . . .

18 U.S.C. § 2340

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2441

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

. . . .

18 U.S.C. § 3261

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States; or

(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice),

shall be punished as provided for that offense.

. . . .

28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 note

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Torture Victim Protection Act of 1991'.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

. . . .

28 U.S.C. § 2680(j)

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

. . . .

(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 2nd day of December, 2013, 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:

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