

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

SUHAIL NAJIM ABDULLAH)	
AL SHIMARI, et al.,)	
)	
Plaintiffs,)	
)	No. 1:08-CV-827-GBL-JFA
v.)	
)	
CACI INTERNATIONAL INC, et ano.,)	
)	
Defendants.)	
)	

**MEMORANDUM REGARDING SUPPLEMENTAL
AUTHORITY SUBMITTED IN SUPPORT OF DEFENDANTS
CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY,
INC.'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

I. INTRODUCTION

On December 11, 2008, the United States Senate Armed Services Committee issued the executive summary of its *Inquiry into the Treatment of Detainees in U.S. Custody*. See Koegel Decl., Ex. A (the "Report"). The Report provides direct and compelling support for the political question argument presented in CACI's motion to dismiss.

The Report details the involvement of the highest levels of the United States government and United States military in formulating and implementing the policies and practices for the interrogation of detainees held by the United States in Iraq. The Report concludes that the detainee abuse at Abu Ghraib was the byproduct of policies spawned by a 2002 memo, signed by President Bush, declaring that the Geneva Conventions for humane treatment of detainees did not apply to enemy fighters in the war on terror. The Report chronicles Secretary Rumsfeld's

approval of aggressive interrogation techniques for Guantanamo, including removing prisoners' clothes, stress positions, and exploitation of fears (such as by using dogs). The military, the Report continues, subsequently adopted similar practices for Afghanistan and Iraq, including at Abu Ghraib.

“The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees,” the Report finds. Report at xii. The Report notes that in early 2002, not long after the Defense Department legal counsel's office started exploring the application of the practices later documented at Abu Ghraib, President Bush signed a memo exempting war-on-terror detainees from the Geneva Conventions. “[T]he decision to replace well established military doctrine, *i.e.*, legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in U.S. custody,” the Report states. *Id.* at xiii.

The Report then concludes:

The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at [Guantanamo]. Secretary of Defense Donald Rumsfeld's December 2, 2002 authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody. What followed was an erosion in standards dictating that detainees be treated humanely.

Id. at xxix.

The findings and conclusions of the Report, regardless of their accuracy, evidence that interrogation policies and practices, almost all of which are alleged and challenged in this action,

were conceived, formulated, approved and implemented by executive branch and military personnel. As the Fourth Circuit has held, that is what our Constitution provides: “[t]he decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches.” *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991) (citing U.S. Const. art. II, § 2; art. I, § 8). As a result of that allocation of responsibility for the prosecution of war, “[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review.” *Id.* at 278. “National defense decisions . . . also require policy choices, which the legislature is equipped to make and the judiciary is not.” *Thomasson v. Perry*, 80 F.3d 915, 925 (4th Cir. 1996). While interrogation policies and practices are an appropriate subject for Congressional inquiry, the political question doctrine does not permit a corresponding judicial review.

In this action, Plaintiffs seek tort-based compensation based on policies and practices formulated, approved and administered by U.S. civilian and military personnel. Although the plaintiffs argue (wrongly) that they challenge only specific acts and not general executive branch warfighting decisions, this action indisputably seeks determinations whether the alleged abusive conduct *should* have occurred, which impermissibly would require examining the wisdom of the underlying interrogation policies. This the political question doctrine does not permit.

II. BACKGROUND AND FINDINGS OF THE SENATE ARMED SERVICE COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN CUSTODY

In the course of its more than 18-month long investigation, the Senate Armed Services Committee reviewed hundreds of thousands of documents and conducted extensive interviews with more than 70 individuals.¹ The full Report – apparently 250 pages – is under review by the

¹ Congressional Press Release, Dec. 11, 2008 (Koegel Decl., Ex. B).

Department of Defense for classification.² The Report addresses detainees held by the United States at Guantanamo Bay, Cuba, as well as in Afghanistan and Iraq. As it relates to detainees held in Iraq, the executive summary of the Report makes the following findings:

1. “[T]hat senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.” Report at xii.

2. That the treatment of detainees in Iraq was directly traceable to the standards for detainee treatment in Guantanamo Bay and Afghanistan, as the detainee treatment standards adopted by high-level government and military officials for Guantanamo Bay migrated first to Afghanistan and then to Iraq. *Id.* at xxviii.

3. That the interrogation methods and detainee treatment standards approved for Guantanamo Bay can be traced in part to the President’s conclusion that the Third Geneva Convention “did not apply to the conflict with al Qaeda and [his conclusion] that Taliban detainees were not entitled to prisoner of war status or the legal protections afforded by the Third Geneva Convention.” *Id.* at xiii. The Senate Armed Services Committee (the “Committee”) concluded that “the decision to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in U.S. custody.” *Id.*

4. That even before the President declared that the Third Geneva Convention did not apply to al Qaeda or the Taliban, the Department of Defense General Counsel’s office had solicited information on detainee “exploitation” from the Joint Personnel Recovery Agency (“JPRA”), the agency that trains military personnel to withstand interrogation techniques that are

² Statement of Senator Carl Levin, Chairman, Senate Armed Services Comm., Dec. 11, 2008 (Koegel Decl., Ex. C).

considered illegal under the Geneva Conventions. The JPRA runs “SERE” schools for military personnel at which those personnel were, as a training exercise, subjected to interrogation techniques (such as waterboarding, face slaps, and body claps) that are illegal under the Geneva Conventions. *Id.*

5. That in response to the inquiry from the Department of Defense General Counsel’s office, the JPRA provided information on a number of coercive interrogation techniques, some of which do not comply with the Geneva Conventions. *Id.* at xiv. The interrogation techniques used during SERE training was a topic of discussion among the high-level government officials overseeing the war in Iraq. *Id.*

6. That the Department of Justice Office of Legal Counsel, in a series of memoranda, redefined what would constitute “torture” under United States law. *Id.* at xv-xvi.

7. That, at the same time “senior government lawyers were preparing to redefine torture,” the JPRA provided training on coercive interrogation techniques used at SERE school for interrogators and behavioral scientists assigned to detainees at Guantanamo Bay, Cuba. Just two days after this training, a delegation of high-level Executive Branch officials, including those involved in pursuing enhanced interrogation techniques, visited the detention facilities at Guantanamo Bay. One week after the site visit from these high-level administration officials, two of the behavioral scientists who had been briefed on SERE interrogation techniques drafted a memorandum proposing new interrogation techniques for use at Guantanamo Bay. One of these behavioral scientists explained that by October 2002 there was “increasing pressure to get ‘tougher’ with detainee interrogations.” *Id.* at xvii.

8. That, in addition to the JPRA, the CIA’s CounterTerrorist Center provided advice to Guantanamo Bay staff on “aggressive interrogation techniques including sleep deprivation,

death threats, and waterboarding.” The CIA official providing this advice further advised that “the language of the statutes is written vaguely” as it relates to the legal obligations in interrogating the Guantanamo Bay detainees. *Id.*

9. That on October 11, 2002, the commander of the joint task force at Guantanamo Bay transmitted a memorandum to higher headquarters seeking “authority to use aggressive interrogation techniques.” *Id.* “Several of the techniques requested were similar to techniques used by JPRA and the military services in SERE training, including stress positions, exploitation of detainee fears (such as the fear of dogs), removal of clothing, hooding, deprivation of light and sound, and the so-called wet towel treatment or the waterboard.” *Id.*

10. That although several judge advocates in the military services expressed reservations about the proposed enhanced interrogation techniques, *id.* at xviii-xix, the Department of Defense’s General Counsel sent a one-page memorandum to Secretary Rumsfeld recommending approval for all but three of the eighteen proposed enhanced interrogation techniques. *Id.* at xix. Secretary Rumsfeld adopted his General Counsel’s recommendation, adding a notation that he did not understand why standing was limited to four hours per day. *Id.* Secretary Rumsfeld approved the enhanced interrogation techniques “without apparently providing any written guidance as to how they should be administered.” *Id.*

11. That once Secretary Rumsfeld approved the proposed enhanced interrogation techniques, two instructors from the Navy SERE school arrived at Guantanamo Bay and began providing training in the interrogation techniques used in SERE training. These instructors also explained “Biderman’s Principles” – which were based on coercive interrogation methods used by the Chinese Communists to elicit false confessions from American prisoners of war during the Korean War. *Id.* at xx.

12. That “[s]hortly after Secretary Rumsfeld’s December 2, 2002 approval of his General Counsel’s recommendation to authorize aggressive interrogation techniques, the techniques – and the fact the Secretary had authorized them – became known to interrogators in Afghanistan. A copy of the Secretary’s memo was sent from GTMO to Afghanistan. Captain Carolyn Wood, the Officer in Charge of the Intelligence Section at Bagram Airfield in Afghanistan, said that in January 2003 she saw a power point presentation listing the aggressive techniques that had been authorized by the Secretary.” *Id.* at xxii.

13. That although Secretary Rumsfeld rescinded his authority for the enhanced interrogation techniques for Guantanamo Bay on January 15, 2003, the prior approval of those techniques continued to influence interrogation policies in Afghanistan. Indeed, nine days after Secretary Rumsfeld had rescinded his approval of the enhanced interrogation techniques, the U.S. Central Command issued an “interrogation techniques” memorandum that included some of the interrogation techniques (such as removal of clothing and exploitation of detainees’ fear of dogs) that previously had been approved by the Secretary for Guantanamo Bay. *Id.* at xxii-xxiii.

14. That “[f]rom Afghanistan, the techniques [approved by Secretary Rumsfeld] made their way to Iraq.” *Id.* at xxiii. These techniques were used by special mission forces in Iraq and included “yelling, loud music, and light control, environmental manipulation, sleep deprivation/adjustment, stress positions, 20-hour interrogations, and controlled fear (muzzled dogs).” *Id.* “And not only did those techniques make their way into official interrogation policies in Iraq, but instructors from the JPRA SERE school followed. The DoD IG reported that in September 2003, at the request of the Commander of the Special Mission Unit Task Force, JPRA deployed a team to Iraq to assist interrogation operations. During that trip, which was explicitly approved by U.S. Joint Forces Command, JPRA’s higher headquarters, SERE

instructors were authorized to participate in the interrogation of detainees in U.S. military custody using SERE techniques. *Id.* at xviii.

15. That the interrogation techniques used by the Special Mission Unit Task Force in Iraq “made their way into Standard Operating Procedures (SOPs) issued for all U.S. forces in Iraq. In the summer of 2003, Captain Wood, who by that time was the Interrogation Officer in Charge at Abu Ghraib, obtained a copy of the Special Mission Unit interrogation policy and submitted it, virtually unchanged, to her chain of command as proposed policy.” *Id.*

16. That Captain Wood submitted her proposed interrogation policy “around the same time that a message was being conveyed that interrogators should be more aggressive with detainees.” *Id.* at xxiv. During this time frame, higher headquarters had asked subordinate units for a “wish list” of proposed interrogation techniques, advising that “the gloves are coming off” and that “we want these detainees broken.” *Id.* In August 2003, Major General Geoffrey Miller, the commander at Guantanamo Bay, visited detention facilities in Iraq and advised that the interrogation personnel in Iraq “had to get tougher with the detainees.” *Id.* Major General Miller described interrogation facilities in Iraq as “running a country club” for detainees. *Id.*

17. That on September 14, 2003, Lieutenant General Ricardo Sanchez, commander of Combined Joint Task Force-7 issued the first interrogation SOP for Iraq. That document “authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations.” *Id.* On October 12, 2003, Lieutenant General Sanchez issued a new interrogation SOP that eliminated many of the previously-approved interrogation techniques, but that new SOP “contained ambiguities with respect to certain techniques, such as the use of dogs in interrogations, and led to confusion about which techniques were permitted.” *Id.*

18. That the investigation by Major General George Fay had found that “interrogation techniques developed for GTMO became ‘confused’ and were implemented at Abu Ghraib. For example, Major General Fay said that removal of clothing, while not included in CJTF-7’s SOP, was ‘imported’ to Abu Ghraib, and could be ‘traced though Afghanistan and GTMO,’ and contributed to an environment at Abu Ghraib that appeared to ‘condone depravity and degradation rather than humane treatment of detainees.’” *Id.*

III. THE REPORT REINFORCES THE NONJUSTICIABLE NATURE OF PLAINTIFFS’ CLAIMS³

The Supreme Court has held that the political question doctrine bars judicial resolution of certain issues textually and exclusively committed by the Constitution to one or both of the other branches of the federal government. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Nixon v. United States*, 506 U.S. 224 (1993); *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court in *Baker* also held that the political question doctrine applies when there is a “lack of judicially discoverable and manageable standards for resolving” a case. *Baker*, 369 U.S. at 217.

Although those first two factors – textual commitment and lack of judicially manageable standards – are the most important, the Court also considers others: “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”; the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; “an unusual need for unquestioning adherence to a political decision already made”; and “the potentiality of embarrassment from multifarious pronouncements by various departments on one questions.” *Id.* As the *Baker* Court recognized in discussing those political question factors, judicial restraint in the area of foreign affairs is

³ Because the political question doctrine challenges the Court’s subject-matter jurisdiction, the Court may consider matters beyond the allegations of the Amended Complaint, such as the Report. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

particularly appropriate because such cases “frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature. *Id.* at 211. This is precisely such a case.

First, interrogation policies and practices – wise or unwise – are constitutionally committed to the executive and legislative branches of government. “The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches.” *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991) (citing U.S. Const. art. II, § 2; art. I, § 8). That includes interrogation of individuals, such as plaintiffs here, detained as enemies by the U.S. military. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (arrest and detention activities “by ‘universal agreement and practice,’ are ‘important incident[s] of war’” (citing *Ex parte Quirin*, 317 U.S. 1 (1942))). Indisputably, as the Report shows, Executive branch officials and military personnel devoted extensive efforts to the review, adoption and employment of interrogation techniques for use in Iraq. “The strategy and tactics employed on the battlefield are clearly not subject to judicial review.” *Tiffany*, 931 U.S. at 278.

The Report, the product of a congressional inquiry, addresses the treatment of detainees in Iraq and – regardless of accuracy – has found in painstaking detail that the interrogation techniques used there were directly traceable to the decisions and actions of high-ranking executive branch officials, including the President and Secretary of Defense, as well as the military leadership tasked with prosecuting the war in Iraq. Indeed, many of the acts of alleged abuse about which Plaintiffs complain are specifically identified in the Report as having been approved for use in Iraq by high-level government officials. Amnd. Compl. ¶¶ 16 (sleep deprivation), 17 (threat of dogs), 18 (sensory deprivation), 19 (clothing removal), 21 (clothing removal), 22 (forcible shaving), 27 (clothing removal), 29 (sensory deprivation), 30 (stress

positions), 41 (clothing removal), 47 (clothing removal), 49 (hooding, stress position), 50 (threat of dogs), 52 (sensory deprivation), 56 (clothing removal), 57 (sensory deprivation), 59 (stress positions), 60 (threat of dogs), 62 (sleep deprivation).⁴ As such, Plaintiffs' claims present a direct challenge to actions approved and undertaken by a coordinate branch of government. Official complicity by government officials in matters constitutionally committed to the political branches raises quintessential political questions that are not subject to resolution by the judicial branch. *Tiffany*, 931 F.2d at 275-78; *Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988).

Plaintiffs do not allege that they seek recourse based on actions taken solely by employees of the CACI Defendants. Indeed, *the Amended Complaint does not allege any interaction between any of the Plaintiffs and anyone affiliated with CACI. All of plaintiffs' allegations hinge upon their vast but vague conspiracy theory, i.e., an undefined "torture conspiracy" between CACI and members of the military. See Amnd. Cplt. ¶¶ 64-72. It is impossible to litigate this action without examining the government's underlying interrogation policies as well as the actions of the military in conducting interrogations. Compounding this problem, the Court would need to develop a standard to determine whether the CACI Defendants are somehow liable for the conduct of military personnel who were engaged in conduct that was either authorized, or believed to be authorized, as interrogation techniques in Iraq. It is not for the Court, however, to approve or disapprove interrogation policies and practices during time of war or otherwise.*

Second, the Report reinforces the lack of judicially-cognizable standards for resolving Plaintiffs' claims. Plaintiffs' Amended Complaint alleges that each Plaintiff is an "innocent

⁴ The Report does not claim an exhaustive list of all techniques either approved or apparently approved for use in Iraq. Accordingly, some of Plaintiffs' other allegations may similarly implicate explicitly-approved interrogation techniques.

Iraqi” who was allegedly subject to a variety of interrogation techniques or practices that they now claim to be tortious. Amnd. Compl. ¶¶ 4-7. Plaintiffs’ claims necessarily would require the Court to review interrogation plans approved by the military to determine what interrogation techniques and treatment were authorized, and what interrogation tactics were reasonable under the circumstances, and these determinations will vary depending on the military’s assessment of each detainee’s intelligence value and the degree to which each detainee is hostile to the United States. There are no judicially cognizable standards for such inquiries. Not surprisingly, no court has undertaken inquiries of this nature.

The Supreme Court recently restated its longstanding view that courts should not substitute their assessment of military need for that of the military:

This case involves complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force, which are essentially professional military judgments. We give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. As this Court emphasized just last Term, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.

Winter v. Nat’l Resources Def. Council, Inc., 129 S. Ct. 365, 377 (2008) (internal quotations and citations omitted) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), and *Boumediene v. Bush*, 2008 WL 4722127 (U.S. 2008)). The Report confirms that the Court would have to take whatever acts of alleged mistreatment Plaintiffs are able to prove, and then determine whether those acts constituted techniques that were approved and/or appropriate in light of the military’s assessment of each Plaintiff and his likely intelligence value.

The Court also would have to consider, or instruct a jury on how to consider, whether the CACI Defendants may be held liable for any such actions of military personnel, other

government agencies such as the Central Intelligence Agency, Iraqi citizens hired by the military, and/or other civilian contractors in Iraq. These are not determinations that are either constitutionally committed to the judicial branch or for which the judicial branch has any institutional expertise in addressing. *Thomasson*, 80 F.3d at 925-26. Rather these are judgment more appropriate for the political branches, whether it is the Executive branch making judgments on whether an administrative claim should be paid⁵ or the Congress using its investigatory powers such as in the Report.

Third, resolving Plaintiffs' claims in court would require the Court to make initial policy determinations more properly made by the branches of government constitutionally tasked with prosecuting wars and regulating the armed forces. Essentially, the Court would be required to take the interrogation techniques duly approved by the Secretary of Defense, senior administration officials, and the military leadership, and determine whether those approved techniques are tortious, not tortious, or sometimes tortious, and *when* such techniques are tortious if they are tortious some of the time. The law of this Circuit is clear that the courts should not become involved in making war policy, or determining the policies that should be applied by the military branches in furtherance of their duty to provide for the national defense. *Tiffany*, 931 F.2d at 277. The Report makes clear that the treatment of detainees in Iraq and elsewhere was subject to detailed oversight and policy-making by the highest levels of the Executive branch and the United States armed forces. The political question doctrine does not allow judicial second-guessing of those determinations in the guise of a tort suit. Therefore, for these reasons, as well as the other reasons argued in the CACI Defendants' memorandum in support of their motion to

⁵ As stated at pages 35-36 of the CACI Defendants' memorandum in support of their motion to dismiss, the United States Army claims service has stated that it *will* pay administrative claims involving allegations of detainee abuse, provided that there is a factual basis for such allegations.

dismiss, the Court should dismiss Plaintiffs' Amended Complaint as presenting nonjusticiable political questions.

Respectfully submitted,

/s/ J. William Koegel, Jr.

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

December 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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

/s/ J. William Koegel, Jr.

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