



unidentified “civilian” interrogators praised or gave them instructions. At the same time, Plaintiffs gave the jury the misimpression that the only civilian interrogators at Abu Ghraib were CACI employees. In opening argument, Plaintiffs referenced civilian interrogators and stated they were CACI employees, without acknowledging that some of the civilian interrogators were employed by OGAs.

The discovery record in this case, however, makes clear that not only were there civilian OGA interrogators conducting interrogations at Abu Ghraib, but the presence of those OGA interrogators was a substantial factor contributing to the abuses committed by military police. Indeed, while the most comprehensive government report on the abuse at Abu Ghraib (the Jones-Fay Report) identified only a few allegations involving CACI interrogators and their assigned detainees (none of which are Plaintiffs), it determined that OGA interrogators had a much more global ill effect that “encouraged Soldiers to deviate from prescribed techniques.” PTX-23 (attached as Exhibit 1) at 24. In other words, the record in this case shows that civilian interrogators from CACI had a few limited instances of potential misconduct while civilian interrogators from OGAs contributed to a paradigmatic shift in detainee treatment.

This evidence is critical given what the Court described as Plaintiffs’ “shaky theory” for conspiracy, that “CACI staff encouraged or directed military police to rough up, soften up the detainees, they created the environment in which some other people, other actors, did, in fact, rough up the plaintiffs.” Dkt. #1625 at 114:13-23. When the jury is made aware of the multitude of OGA interrogators at Abu Ghraib prison, the jurors will understand that they cannot simply equate “civilian interrogator” with CACI. Basic fairness requires that CACI be permitted to give the jury an accurate understanding of operations at Abu Ghraib prison.

## II. BACKGROUND

After Plaintiffs backtracked on their false allegations that CACI interrogators directly mistreated them, this case has centered on whether or not to hold CACI vicariously liable for the purported secondary liability of its employees for Plaintiffs' alleged torture and cruel treatment. Under this theory, Plaintiffs assert that a few instances of alleged misconduct by CACI interrogators against detainees to whom they were assigned somehow evolved into a conspiratorial agreement that resulted in Plaintiffs' unrelated torture and mistreatment. Perhaps fearing a jury would agree with the Court that this is a "shaky theory" at best, Dkt. #1625 at 114:13-23, Plaintiffs nonetheless peddled all manner of allegations of abuse they claimed were directly committed by civilian interrogators. *See, e.g.*, Dkt. #1631 at 48:22-50:17, 72:12-73:2 (Al Ejaili Test.); Dkt. #1623 at 8:18-10:15, 30:7-31:10, 65:7-67:4 (Al Zuba'e Test.); Dkt. #1624 at 14:25-15:9, 19:5-11 (Al Shimari Test.). Indeed, Plaintiffs' focused so heavily on these allegations and unrelated allegations against CACI employees that the Court saw the plain necessity for an instruction clarifying for the jury that there are no allegations of direct abuse in this case. Dkt. #1626 at 90:13-15.

At trial, CACI was not allowed to elicit testimony that there were interrogators from other government agencies. *See, e.g.*, Dkt. #1591 at 77 (Fay Test.). This was based on an objection from the government that doing so would reveal classified information, *id.*, a false premise as unclassified government reports address the presence of OGA interrogators and the significant problems caused by their conduct. *See, e.g.*, PTX-23 at 5, 24, 33, 43, 79-80, 88, 89.<sup>1</sup>

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<sup>1</sup> Abuse that occurred related to OGA interrogations was also widely reported by public interest groups and media outlets. *See, e.g.*, "U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq," ACLU, Press Release (Oct. 24, 2005) *available at* <https://www.aclu.org/press-releases/us-operatives-killed-detainees-during-interrogations-afghanistan-and-iraq>; M. Benjamin, M. Scherer, "Other Government Agencies," Salon.com

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The only evidence in the trial record that acknowledges the misconduct of OGA agents at Abu Ghraib is an oblique reference in the Jones-Fay Report that mentions “the death of a detainee in OGA custody.” PTX-23 at 105.

In this respect, the trial record stands in stark contrast with the discovery record in this case. In particular, the unredacted Jones-Fay Report concluded, “It is clear that the interrogation practices of other government agencies led to a loss of accountability at Abu Ghraib.” PTX-23 at 5. The Report found that “[i]nteraction with OGA and other agency interrogators who did not follow the same rules as U.S. Forces” gave rise to “at least the perception, and perhaps the reality, that non-DOD agencies had different rules regarding interrogation and detention operations.” *Id.* at 24. According to the Report, these circumstances “encouraged Soldiers to deviate from prescribed techniques.” *Id.* “[T]he inter-mingling of tactical, strategic, and other agency interrogators at the central detention facility of Abu Ghraib, provided a permissive and compromising climate for Soldiers.” *Id.* at 33.

The Jones-Fay investigation determined that OGAs “conducted unilateral and joint interrogation operations at Abu Ghraib” and that their “detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib.” *Id.* at 43. This occurred because – unlike CACI interrogators who operated within the military chain of command – OGA officers “convinced military leaders that they should be allowed to operate outside the established local rules and procedures.” *Id.* “The lack of OGA adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules.” *Id.* at 79-80.

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(Mar. 14, 2006), available at [https://www.salon.com/2006/03/14/chapter\\_5/](https://www.salon.com/2006/03/14/chapter_5/) (“According to logbook entries, OGA detainees sometimes accounted for roughly one-fifth of the 30 to 50 inmates included in the daily head count in the military intelligence wing.”).

Beyond generating an environment that contributed to the abuse at Abu Ghraib, specific OGA interrogators were implicated in gross deviations from interrogation protocols, detainee abuse, and even the death of a detainee. *See id.* at 88 (OGA officer “entered the interrogation room after a break in the interrogation, drew his weapon, chambered a round, and placed the weapon in his holster”), *id.* (“Detainees who have been interrogated by CIA officers have alleged abuse.”), *id.* at 87 (OGA Detainee-28 died during interrogation and was kept in ice in a shower at the hard site until transported to a morgue). Other incidents remain unknown, in part because “OGA never provided results of their abuse investigations to Commander, CJTF-7.” *Id.* at 89.

The Jones-Fay Report concluded that “Other Government Agency (OGA) interrogation practices led to a loss of accountability at Abu Ghraib” and “the treatment and interrogation of OGA detainees occurred under different practices and procedures which were absent any DoD visibility, control, or oversight” which “added to the confusion over proper treatment of detainees and created a perception that OGA techniques and practices were suitable and authorized for DoD operations.” *Id.* at 152. CACI was not permitted to present this evidence.

### III. ANALYSIS

#### A. The Presence and Conduct of Civilian Interrogators Not Associated with CACI at Abu Ghraib Is Relevant to CACI’s Defense

Federal Rule of Evidence 401 sets the standard for relevance of trial evidence:

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401. As the Court has acknowledged, CACI’s argument that “its personnel were not the only ones in civilian clothing at the site” is “relevant.” Dkt. #1631 at 4:22-25. But it is not just the fact that other people in civilian clothes were present at the hard site that is relevant.

Indeed, it is of particular relevance that other *interrogators* in civilian clothes conducted interrogations at the hard site and that those interrogators have been implicated in the abuse and even death of detainees.

At trial, Plaintiffs each claimed to have been directly abused by civilian interrogators. *See, e.g.*, Dkt. #1631 at 48:22-50:17, 72:12-73:2 (Al Ejaili Test.); Dkt. #1623 at 8:18-10:15, 30:7-31:10, 65:7-67:4 (Al Zuba'e Test.); Dkt. #1624 at 14:25-15:9, 19:5-11 (Al Shimari Test.). Not only is this inconsistent with Plaintiffs' prior statements, but it is wildly inconsistent with the U.S. government's detailed records regarding Plaintiffs' interrogations, which reflect only two CACI interrogators were involved in Plaintiffs Al Shimari and Al Zuba'e's interrogations and that Plaintiff Al Ejaili was never interrogated. There are two possibilities, both of which may be true: either Plaintiffs were embellishing civilian involvement or civilians outside of military intelligence operations, *i.e.*, OGA interrogators, interrogated them. Although the first possibility is more likely, the second possibility finds some support in Mr. Al Shimari's testimony, in which he confirms that one of his male civilian interrogators had a ponytail. Dkt. #1624 at 48:19-49:18. No CACI male interrogator at Abu Ghraib had a ponytail. Whichever is the case, CACI must be allowed to present evidence and argue both explanations in its defense. The evidence shows that it is equally if not more probable that any abuse by civilians occurred at the hands of OGA interrogators and not CACI interrogators.

In their closing rebuttal argument, Plaintiffs' counsel told the jury, "the only thing that we have to prove is that CACI interrogators, along with military intelligence, created an environment by giving instructions to the military police to abuse the detainees, to soften them up for the interrogations." Dkt. #1626 at 72:18-22. CACI, obviously, disagrees with this statement of the elements for conspiracy. *See id.* at 100:18-21 (Plaintiffs must prove "an

agreement between two or more persons to inflict torture or cruel, inhuman or degrading treatment on detainees at the Abu Ghraib hard site”) (Jury Instructions). Regardless, Plaintiffs’ statement highlights their theory of the case that they pressed throughout the trial: that the jury can and should extrapolate a wide-ranging conspiracy from a handful of allegations involving CACI interrogators even though (1) the allegations had nothing to do with Plaintiffs and (2) the CACI interrogators involved are not connected to Plaintiffs. In Plaintiffs’ view, this alleged conduct “created an environment” in which torture occurred and, because Plaintiffs were present in that environment and claim to have been tortured, CACI should pay them millions of dollars. There is no doubt Plaintiffs will preach this “shaky theory” again at the upcoming trial.

But the discovery record evidence demonstrates that the government investigations on which Plaintiffs rest their case reached the conclusion that it was OGA interrogators’ “detention and interrogation practices [that] contributed to a loss of accountability and abuse at Abu Ghraib.” PTX-23 at 43. According to the Jones-Fay report, it was the perception “that non-DOD agencies had different rules regarding interrogation and detention operations . . . [that] encouraged Soldiers to deviate from prescribed techniques.” *Id.* at 24. It was “the intermingling of tactical, strategic, and other agency interrogators at the central detention facility of Abu Ghraib, [that] provided a permissive and compromising climate for Soldiers” – *i.e.*, not CACI interrogators. *Id.* at 33. Plaintiffs cannot be allowed to use the reports to smear CACI interrogators with hearsay allegations while CACI is denied the ability to demonstrate that those same reports concluded OGA interrogators’ conduct had a systemic effect on the treatment of detainees at the Hard Site.

**B. Sabrina Harman’s Testimony Related to OGA Interrogators Is Relevant to Demonstrate MP Misconduct Was Influenced by OGA Interrogators and to Her Credibility**

To ensure her availability, CACI has subpoenaed Sabrina Harman for trial. Among other topics, CACI anticipates that Ms. Harman will provide testimony that OGA interrogators ordered military police to set conditions for interrogations. As explained above, the involvement of other civilian interrogators in alleged abuses at Abu Ghraib is transparently relevant to CACI’s defense. In addition, CACI anticipates questioning Ms. Harman about the photographs she took of herself giving a thumbs-up next to a detainee who died in OGA custody. This questioning will give the jury grounds to evaluate Ms. Harman’s credibility and judgment, as well as demonstrate military police involvement in abusive conduct that had nothing to do with military intelligence or CACI interrogators.

**IV. CONCLUSION**

For the foregoing reasons, the Court should allow CACI to present evidence regarding the presence and conduct of OGA interrogators at Abu Ghraib who were not employed by CACI.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

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