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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
	)	Case No. 1:08-cv-827 (LMB/JFA)
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE THE BORROWED SERVANT DEFENSE

Plaintiffs respectfully submit that, at the upcoming trial, this Court should preclude CACI from advancing the "borrowed servant" defense because that defense is foreclosed as a matter of law. First, CACI's borrowed servant defense—*i.e*., the deflection of legal liability from itself to the Army for acts amounting to torture and cruel, inhuman and degrading treatment ("CIDT")—turns on a rationale this Court and the Fourth Circuit have repeatedly rejected. Because the Court has held that the military could not lawfully commit torture or claim immunity from acts constituting torture, it plainly follows that the military could not lawfully order, supervise or borrow others to commit torture.

Second, the substantial federal interests reflected in, and codified by, governing military law and policy as well as federal regulations, were incorporated into the operative contract between CACI and the military, and in CACI's corporate code of conduct. Those federal authorities prohibit the military command from supervising or controlling civilian

contractors, in order to adhere to the significant interests the United States has in the strict separation of civilians from combatants and the military chain of command—a separation required by the laws of war. The federal interests reflected in law and policy override and displace the borrowed servant defense as a matter of law.

If the Court is nonetheless inclined to allow CACI to present a borrowed servant defense, Plaintiffs respectfully request that the Court instruct the jury to consider that where an employee is performing services for *both* the "general" (CACI) and "special" (Army) employers, the general employer (CACI) remains liable if the employee was acting simultaneously on behalf of both employers when that employee conspired and aided and abetted torture and CIDT. In the circumstances of this case, this concept of "dual agency" or "dual servant" is necessarily connected with the borrowed servant doctrine and the relevant agency principles. Where CACI benefitted—to the tune of millions of dollars—from the performance of the work in question, *e.g.*, the interrogations by its contractors that CACI contracted to do, CACI's liability under dual agency is obvious. Given the prior jury's repeatedly expressed confusion regarding application of the borrowed servant legal defense, such an instruction on dual agency (appended as **Appendix A**) would also be consistent with the specific evidentiary realities presented in this unique, if not unprecedented, context of a military contractor invoking the borrowed servant doctrine. The instruction is also critical to the just resolution of the upcoming retrial.

ARGUMENT

I. THE BORROWED SERVANT DEFENSE IS FORECLOSED AS A MATTER OF LAW

A. This Court and the Fourth Circuit Have Already Found that the Rationale Underlying the Borrowed Servant Defense Is Inapplicable and Foreclosed

To begin, it is important to recognize that CACI's borrowed servant defense arises from nearly identical defenses or immunities that CACI has raised before in its attempts to deflect responsibility away from itself and onto the Army. This Court and/or the Fourth Circuit have rejected the rationale underlying all of these defenses, including borrowed servant, over the course of this long-running case for reasons that similarly foreclose invocation of the borrowed servant defense at a retrial as a matter of law.

First, CACI claimed that the political question doctrine precluded judicial review of its actions because its employees at Abu Ghraib were purportedly under the Army's "control" when they engaged in the alleged misconduct. *See*, *e.g.*, ECF No. 1058 at 26-28. The Fourth Circuit rejected that defense, noting that the U.S. military could not, as a matter of law, ever confer authority to CACI to subject detainees to treatment that has been proscribed by Congress and international law. *See Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016). In other words, because "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity" such as torture and CIDT, "when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine." *Id.* Accordingly, the Fourth Circuit held that "conduct by CACI employees that was unlawful when committed is justiciable, irrespective whether that conduct occurred under the actual control of the military."

Id. at 151. It follows from the Fourth Circuit's view that the Army cannot lawfully order torture and that CACI cannot disclaim liability for engaging in acts that amount to torture or CIDT, which violate federal law, *see, e.g.*, 18 U.S.C. § 2340 and 18 U.S.C. §2441(d)(1), *even if* under the control of the Army.

Second, in rejecting CACI's claim to derivative sovereign immunity on the grounds that the Army commanded and controlled its employees, *see, e.g.*, ECF No. 1150 at 17-19, this Court held that even the United States government is not entitled to claim sovereign immunity for violations of the *jus cogens* norms against torture and CIDT (and, that under binding Supreme Court precedent, CACI cannot otherwise generally benefit from derivative sovereign immunity where it violated federal law prohibitions on torture and CIDT). *See Al Shimari v. CACI Premier Tech., Inc*., 368 F. Supp. 3d 935, 968, 970-71 (E.D. Va. 2019), *appeal dismissed*, 775 Fed. Appx. 758 (4th Cir. 2019). If acts of torture cannot ever be sovereign acts shielded by any immunity, it follows that the government cannot command, supervise, or borrow someone to engage in torture—as a matter of law. Put another way, because the prohibition on torture is non-derogable, it is also therefore non-*delegable*; thus, the Court can no more sanction at law via a borrowed servant instruction an effort to *delegate* torture than it could sanction the commission of torture in the first instance. Short of abandoning its prior ruling, the Court cannot give judicial imprimatur to such legal impossibility via an instruction permitting invocation of the borrowed servant defense.

Lastly, CACI sought to obtain the benefit of the United States' immunity under the "combatant activities" exception to liability under the Federal Torts Claim Act ("FTCA"), arguing that the Army—and not CACI—controlled its employees when they committed the

egregious misconduct at Abu Ghraib. *See* ECF No. 627 at 44-45, 46-49. Indeed, CACI contended that the Army had command of the CACI interrogators at Abu Ghraib. *Id*. at 46-49. But this Court rejected CACI's argument, explaining that "although Congress has decided that the federal government is not itself amenable to suit for activities arising out of combatant activities, it has not extended that immunity to private contractors operating alongside military forces." *Al Shimari v. CACI Premier Tech., Inc*., 300 F. Supp. 3d 758, 789 (E.D. Va. 2018).[1] The Court continued, "[i]nstead, [Congress] has determined that such contractors, like any other defendant, should be liable in federal district court when they commit violations of the law of nations." *Id.* at 789; *see also Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 217-18 (4th Cir. 2012) (*en banc*) (dismissing CACI's appeal based on, *inter alia*, the government contractor defense).

Equally significant, the United States government made its position clear that the federal interests "in ensuring that a contractor's involvement in detention operations is conducted in a manner consistent with" the federal prohibition on torture is so significant that it "weighs in favor of allowing a state-law tort claim to proceed to the extent a civilian contractor actually engaged in torture in violation of federal law," thereby denying application of the government contractor defense to such claims. Declaration of Muhammad U. Faridi dated Sept. 27, 2024 (the "Faridi Decl."), Ex. 1, Brief for the United States as *Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc*., No. 09-1335 (4th Cir. Jan. 14, 2012), Dkt. 146 at 29.

CACI's borrowed servant defense, just like all of the other prior defenses that CACI has unsuccessfully invoked over many years of litigation, seeks to deflect liability from itself and

[1] Congress expressly excluded contractors from the definition of "federal agency"—and their employees—that retains sovereign immunity under the exceptions to the FTCA. *See* 28 U.S.C. § 2671.

onto the Army based on the common premise that CACI interrogators were under the control of the military when they engaged in the unlawful conduct at issue in this case—a premise that this Court and the Fourth Circuit have rejected time and again, not least because acts of torture, as a *jus cogens* violation, are never sovereign acts and cannot be lawfully undertaken or ordered. Indeed, as Plaintiffs showed during the April 2024 trial through the admission of military documents and cross-examination of CACI's own witnesses, the borrowed servant defense is *counter* to military doctrine that *requires* contractors—as in the case of CACI—to retain supervisory authority over its employees. That is, as detailed below, military law and policy codifies the strong federal interests prohibiting *military* supervision of *civilian* contractors, and expressly assigns liability for contractor misconduct to the *contractor*, not the government. CACI agreed to this condition in its contract governing its interrogation services, through which it stood to receive tens of millions of dollars precisely *because* it was providing those services and assuming that liability; indeed, it is a key component of the military rules allowing for the hiring of private contractors. Accordingly, prior rulings in this case foreclose invocation of the borrowed servant defense.

B. The Federal Interests Embedded in Military Law and Policy Foreclose, as a Matter of Law, the Application of the Common Law Borrowed Servant Defense

The Supreme Court has made it clear that where a matter involves "uniquely federal interests … [that] are so committed … to federal control," the federal interest displaces state law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). That is particularly true when it comes to, as here, the terrain of military affairs, which implicates uniquely federal interests of the most fundamental sort. *See In re Tarble,* 80 U.S. (13 Wall) 397, 20 L.Ed. 597

(1871). That federal interest is so strong that it is "implicated … even [if] the dispute is one between private parties." *Boyle*, 487 U.S. at 506. Indeed, "the interests of the United States" are "directly affected" when the dispute relates to "the imposition of liability on Government contractors." *Id.* at 506-07. Where there is a "significant conflict" that "exists between an identifiable federal policy or interest and the operation of state law or the application of state law would frustrate specific objectives of federal legislation," the substantial federal interests act to displace conflicting common law. *Id.* at 507 (internal citations and alterations omitted).

Here, just as there are significant federal interests in prohibiting torture and CIDT, *see supra* Faridi Decl., Ex. 1, Brief for the United States as *Amicus Curiae*, there are profound federal interests in ensuring a strict division of supervisory authority as between the military chain of command on the one hand and civilian contractors on the other, including a paramount interest in ensuring the United States' adherence to the critical "principle of distinction" in international humanitarian law requiring separation of civilians from combatants, particularly in the context of an armed conflict. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 48, June 8, 1977, 1125 U.N.T.S. 3. Those interests, codified in law and policy that foreclose any blurring of such lines between civilian contractors and military personnel, make clear that the military does not—and cannot—exercise supervision or control over civilian contractors. This is no doubt why the contract that CACI signed with the government so stipulated, stating that CACI—*and not the military*—"is responsible for providing supervision for all contractor personnel." Faridi Decl., Ex. 2, PTX-83 at 7; *see also id.* at 6

(CACI's "resident experts" would "assist, supervise, coordinate, and monitor all aspects of interrogation activities"). CACI's own corporate policies reflected the same responsibilities. *See* Faridi Decl., Ex. 3, PTX-85 (CACI Code of Ethics and Business Conduct Standards) at 7-8 ("CACI management retains all rights … to direct, supervise, control, and when it deems appropriate, discipline the work force."). Thus, a common law defense of borrowed servant—*i.e.*, one that contemplates that the Army supervised and controlled CACI personnel such that the Army could be liable for civilian contractor misconduct—is in significant conflict with the substantial federal interest in ensuring that the contractor, and not the military, must supervise and control its employees. This common law defense is accordingly displaced as a matter of law. *See Boyle*, 48 U.S. at 504.

Military law and policy reflect this mandate across its regulatory field. To begin military doctrine demarcates civilians and combatants: "[c]ontractors and their employees are not combatants, but civilians." Faridi Decl., Ex. 4, PTX-207 at 14, Dep't of the Army, Contractors on the Battlefield, Field Manual 3-100.21 (100-21) (Jan. 2003). Indeed, the Joint Chiefs of Staff have prohibited contractors from engaging in any activity that would "jeopardize" their status as civilians. *See id.*, Ex. 5, PTX-208 at 59, U.S. Joint Chiefs of Staff, Joint Publication 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, CONTRACTORS IN THE THEATER (Apr. 2000) ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."). As an *amicus* brief filed by retired military officers in the Fourth Circuit *en banc* proceedings in this case explained, a strict separation of military personnel under the military chain of command—with all of its attendant training, duties, status, and disciplinary

fora—from civilian at-will contractor employees, who are not, and cannot, be integrated into the command structure of a state party to the Geneva Conventions, is critical to ensure adherence to the laws of war. *See id.*, Ex. 6, Br. of Retired Military Officers as *Amicus Curiae*, *Al Shimari v. CACI International, Inc.*, Nos. 09-1335, 10-1891, 10-1921, Dkt. 120-1 at 15-23 (4th Cir. Dec. 20, 2011) (citing Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War, art. 4); *see also id*. at 18 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 50(1)). As the retired military officers succinctly stated, "[p]rivate military contractors, by contrast [to military personnel], are corporate entities, whose activities are governed only by contractual relationships with the military and who are primarily accountable to private shareholders"—not to the military chain of command, the Uniform Code of Military Justice, and ultimately, the Constitution of the United States. *Id*. at 23, 24-28.

Accordingly, the military's joint operations doctrine, which puts forth "authoritative" and "[f]undamental principles that guide the employment of US military forces in coordinated action" and apply across military departments,"[2] makes clear that "[t]he management and control of contractors is significantly different than the [command and control] of military personnel." Faridi Decl., Ex. 5, PTX-208 at 59, Joint Publication 4-0, DOCTRINE FOR LOGISTICS SUPPORT OF JOINT OPERATIONS, CONTRACTORS IN THE THEATER. This fundamental distinction is operationalized in *all* military contracting via "[t]he terms and conditions of the contract" that "establish the legal relationship between the Government and contractor"; accordingly, the

[2] Faridi Decl., Ex. 7, U.S. Joint Chiefs of Staff, Joint Publication 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Apr. 2001), at 245.

military's "link to the contractor is through the contracting officer or the contracting officer's representative"—not the operational military commander. *Id*.[3]

Further, under military directives, only contractor personnel, not military commanders, are responsible for hiring, instructing and disciplining the contractors' employees.[4] The rules make clear that the involvement of commanders is typically limited to recommending instructions to designated contracting officers, who act as liaisons and can accept or reject the suggestions from commanders.[5] Army Regulation 715-9, which prescribes "policies, procedures, and responsibilities" of the Army, contains similar directives. Faridi Decl., Ex. 10, PTX-227 at 3, U.S. Dep't of the Army, Reg. 715-9, Contractors Accompanying the Force, p. 1 (1999). Specifically, Army Regulation 715-9 provides that "[t]he commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees" because "[c]ontractor employees are not under the direct supervision of military personnel in the chain of command." *Id.* at 16. Section 3-3(b) of the same Army Regulation thus expressly disavows military oversight over contractor behavior, stating

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[3] *See also* Faridi Decl., Ex. 8, Gordon L. Campbell, Presentation to Joint Services Conference on Professional Ethics 2000 (January 27-28, 2000), archived on February 8, 2003, https://web.archive.org/web/20030208084548/http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html ("The commander has no 'Command & Control' authority over contractor personnel. While the contract can require contractor personnel to abide by all guidance and obey all instructions and general orders applicable to U.S. Armed Forces and Department of Defense Civilians, they cannot be 'commanded'. Their relationship with the government is governed by the Terms and Conditions of their contract. Only the Contracting Officer has the authority to direct the Contractor (not contractor employees—that would be personal services: a real 'no, no' in government contract law) through the contract.").

[4] Faridi Decl., Ex. 9, U.S. Dep't of Def., Instruction No. 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces ¶ 6.3.3 (2005).

[5] *Ibid*.

"[c]ontracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." *Id.* at 17. As such a "commercial firm," CACI was mandated (and paid) to provide the *sole* "direct supervision" of its civilian contractor employees.

Additionally, the Army Field Manual, which "incorporates lessons learned from recent operations" and "conforms to Army doctrine and policy," provides that military "[c]ommanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees." Faridi Decl., Ex. 4, PTX-207 at 5, 15, Dep't of the Army, Contractors on the Battlefield, Field Manual 3-100.21 (100-21). The Field Manual emphasizes that "[o]nly the contractor can directly supervise its employees" and that "[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command." *Id.* at 15. Indeed, the military personnel primarily responsible for interfacing with contractors are "prohibited from … [i]nterfering with the contractor's *management prerogative* by 'supervising' contractor employees or otherwise directing their work efforts." *Id.* at 90-91 (emphasis added). Again, "[m]aintaining discipline of contractor employees is the responsibility of the contractor's management structure, *not* the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct. *Id.* at 68 (emphasis added).

Consistent with the military regulations and the Army Field Manual, and the critical federal interests that they codify, the Joint Chiefs of Staff made clear that "[c]ontract

employees are disciplined by the contractor" and "[c]ommanders have no penal authority to compel contractor personnel to perform their duties or to punish any acts of misconduct." Faridi Decl., Ex. 5, PTX-208 at 66, U.S. Joint Chiefs of Staff, Joint Publication 4-0, DOCTRINE OF LOGISTIC SUPPORT OF JOINT OPERATIONS (Apr. 2000). And the military regulations underscore that the "Contractor assumes responsibility for all damage or injury to persons or property occasioned through … the action of the Contractor or the Contractor's employees and agents." *See* 48 CFR § 52.247-21(a); *see also* Faridi Decl., Ex. 11, Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, 73 Fed. Reg. 16,764 (Mar. 31, 2008) (48 C.F.R. § 252.225-7040(b)(3)(iii)) (reminding military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation.") (emphasis added).

The government procurement rules also codify the substantial federal interest in separating civilians from the military's supervision, and in ensuring that contractors such as CACI must remain responsible for the supervision of, and control over, its personnel. These rules also fundamentally undermine the applicability of the borrowed servant doctrine to contractors such as CACI. Specifically, government procurement rules draw a distinction between "personal" services and "*non*-personal" services contracts. CACI's contract with the government at issue in this case can only be a *non*-personal services contract. That is so because the law prohibits government officials from entering into personal service contracts without

specific statutory authorization.[6] Faridi Decl., Ex. 12, 48 C.F.R. § 37.104(b) (Oct. 1, 2002); *id*., Ex. 13, Federal Acquisition Regulations ("FAR") Part 37.104(b) ("Agencies shall not award personal services contracts unless specifically authorized by statute . . . to do so."). There was no such authorization here, which makes sense given the military policies and regulations set out above that prohibit civilian contractors from being considered military "personnel." The federal regulations define a non-personal services agreement as "a contract under which the personnel rendering the services are *not* subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." *id*., Ex. 14, 48 Fed. Reg. 41,749 (Sept. 19, 1983) (codified at 48 C.F.R. § 37.101) (emphasis added). Consistent with that definition, CACI's contract stipulates that it is CACI alone—and not the military—that "is responsible for providing supervision for all contractor personnel." Faridi Decl., Ex. 4, PTX-83 at 7.

Because CACI entered into a contract that paid it to supervise and control its own employees in a manner mandated by federal law, and because military law and policy prohibits military supervision of contractors—in order to effectuate paramount federal interests—CACI is foreclosed as a matter from invoking the state common law defense of borrowed servant.

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[6] The reason for that requirement is that "[a] personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." Faridi Decl., Ex. 12, 48 C.F.R. § 37.104(b) (Oct. 1, 2002). "The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract." *Ibid*.; *id*., Ex. 13, FAR Part 37.104(a) (same); 28 U.S.C. § 2671 (explicitly excluding contractors from the definition of federal agencies or their employees).

II. If CACI Is Allowed to Offer the Borrowed Servant Defense, Then an Instruction on Dual Servants Is Warranted Under the Governing Law

If the Court disagrees with Plaintiffs as to the applicability of the borrowed servant doctrine and permits CACI to again advance that defense at trial, then Plaintiffs respectfully submit that the Court must provide an instruction to the jury that takes into account the particular and specific regulatory framework in which private military contractors operate, such that it makes clear that CACI *remains* liable if its employee was performing work on behalf of both CACI and the government. Exempting CACI from liability altogether where it was contractually bound to maintain control of its employees, even if those employees also received some instruction from the Army regarding interrogations, and where CACI itself benefitted financially from the shared work, is contrary to law and fundamentally unfair.

Under the caselaw of the borrowed servant doctrine, which developed in a context devoid of the particularities of and specific obligations for military contractors, an employee, although directly employed by one entity, may be transferred to the service of another so that he or she becomes the employee of the second entity "with all the legal consequences of the new relation." *Standard Oil v. Anderson*, 212 U.S. 215, 220 (1909). As the Supreme Court explained, the key inquiry in evaluating whether the borrowed servant doctrine applies "is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." *Id.* at 222. The Court elaborated: "In order to relieve the defendant [general employer] from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended and a new like relation between the [employee] and the [special employer] had been created." *Id.* at 225. There, the *Standard Oil* Court found that the general employer was liable because, like here, that employer is the one "who selected

[the employee], paid his wages, and had the right to discharge him for incompetency, misconduct or any other reason." *Id.* at 225. The Court found that the fact that the employee "depended upon signals … given by an employee of the [special employer]" was insufficient to shift liability away from the general employer." *Id.* at 219.

Accordingly, in discussing *Standard Oil*, the Fourth Circuit has explained that, for the borrowed servant doctrine to apply, the special employer must have "authoritative direction and control over a worker … encompass[ing] the servant's performance of the particular work in which he is engaged at the time of the [tort]." *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000). Yet while "control" over the employee's work is an important factor in considering whether a borrowed servant relationship exists, the Virginia Supreme Court has cautioned that "it alone may not be dispositive." *Metro Machine Corp. v. Mizenko*, 419 S.E.2d 632, 635 (1992). In *Metro*, the Court outlined nine "factors generally accepted as appropriate considerations" in evaluating the application of the borrowed servant doctrine. *Id.* There, the Court found that the general employer was not liable because, unlike here, the special employer "exercised *complete* control" over the employee's work and, under the parties' contract, "had the right to remove or discharge the employee." *Id.* (emphasis added)*; see also US Methanol, LLC v. CDI Corp.*, 2022 WL 2752365, at *5 n. 4 (4th Cir. July 14, 2022) (noting that "[u]nder the borrowed servant doctrine, a 'general employer' remains liable for the negligent conduct of his employee unless he has "*completely* relinquished control" of the employee's conduct to a third party for whom the employee is performing some service.") (emphasis added).

Importantly, the facts of the foregoing cases did not require the courts to consider the

doctrine of "dual servants," which should govern here, where the facts show both the general and special employers share control over the employee, let alone the specific regulatory framework governing civilian contractors working with the military. *See* Section I(B). Section 226 of the Restatement (Second) of Agency allows for liability on the part of the general employer where the general and special employers share control over the employee. Specifically, Section 226 provides that "[a] person may be the servant of two masters, not joint employers, at one time as to one act, provided that the service to one does not involve abandonment of service to the other." Restatement (Second) of Agency § 226. Comment b to Section 226 elaborates, explaining that two masters may agree "to share services of a servant," and "if there is one agreement with both of them, the actor is the servant of both at such times as the servant is subject to joint control." *Id.* § 226 cmt. b. "[A] single act may be done to effect the purposes of two independent employers," and "if the act is within the scope of his employment for both [employers]," then a person may cause the general employer "to be responsible for [that] act." *Id.* § 226 cmt a; *see also* Res. (Third) of Agency § 7.03 cmt. d(2) (explaining that some courts "allocate liability to both general and special employer on the basis that both exercised control over the employee and both benefited to some degree from the employee's work").

To determine liability on the part of the general employer under the dual servant doctrine, the relevant inquiry is whether the acts of its employee were taken within the scope of employment; if they were, the general employer is remains liable. *See* Restatement (Second) of Agency § 226; *Garnett v. Remedi Seniorcare of Virginia, LLC*, 892 F.3d 140, 145 (4th Cir. 2018) ("In Virginia, 'an employer is liable for the tortious acts of its employee if the employee was performing his employer's business and acting within the scope of his employment when the

tortious acts were committed.'" (quoting *Plummer v. Ctr. Psychiatrists, Ltd*., 252 Va. 233, 235 (1996)). As the Fourth Circuit has explained, an employee's act falls within the scope of his employment with an employer if "(1) the act 'was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed ... with the intent to further the employer's interest.'" *Garnett*, 892 F.3d at 145 (quoting *Kensington Assocs. v. West*, 234 Va. 430, 432 (1987)). "Where an agent's tortious actions promote an employer's interests, *respondeat superior* generally applies." *Id*. An employee may be acting within the scope of employment even if the employee engages in acts "specifically forbidden" by the employer and uses "forbidden means of accomplishing results." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 543 (1999) (citations omitted); *see also* Restatement (Second) of Agency § 230 (same).

Applying the framework set forth in Restatement (Second) on Agency, numerous courts have recognized the reality that shared control gives rise to liability on the part of the general employer.[7] The Fourth Circuit has also weighed in on this issue, albeit in cases that did not address the specific regulatory and doctrinal framework for military contractors, which informs (if not precludes, as Plaintiffs submit, *see* Section I) the application of borrowed servant in this case. For instance, in *Estate of Alvarez v. Rockefeller Foundation*, after concluding that

[7] *See, e.g*., *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 94–95 (1995) (describing "[t]he Restatement's hornbook rule" as providing that a "person *may* be the servant of two masters ... *at one time as to one act*, if the service to one does not involve *abandonment* of the service to the other"); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (explaining that an employee "could be deemed to be acting for two masters simultaneously"); *Pridemore v. Hryniewich*, 2022 WL 4542250, at *6 (E.D. Va. Sept. 28, 2022) (explaining that "[defendant's] possible status as a borrowed employee of Willard Marine, by itself, may *not release the City from all liability*" because "[e]ven if a party is deemed to be a borrowed servant of one employer, this does not automatically indicate that he is no longer the servant of the initial employer" (emphasis added)).

the borrowed servant doctrine applied, the court nonetheless went on to consider the extent of the general employer's control over the employee for purposes of the dual servant doctrine and concluded there were no facts in the case suggesting *any* residual control by the employer. 96 F.4th 686, 694-95 (4th Cir. 2024). And in *Vance Trucking Co. v. Canal Ins. Co*., the Fourth Circuit affirmed the trial court's ruling, reflecting the dual servant doctrine, that the general employer of a truck driver remained liable where "[the driver] had not abandoned the service of [the special employer] or his [general] employer Forrester in making the trip" and "[o]n the contrary, he continued to act for their mutual benefit and was subject to their joint control." 249 F. Supp. 33, 38 (D.S.C. 1966), *aff'd*, 395 F.2d 391, 393 (4th Cir. 1968); *see also Sharpe v. Bradley Lumber Co*., 446 F.2d 152, 155 (4th Cir. 1971) (finding general employer was liable for an employee working also for a special employer, because "an agent can be in the service of two principals simultaneously, provided *both have a right to exercise some measure of control*, and there is a common or *joint participation in the work and benefit to each from its rendition*" (emphasis added)); *Brooks v. Blueridge Gen., Inc*., 67 Va. Cir. 274 (2005) (explaining that "[w]here both the general employer and the special employer exercise the requisite degree of control over the employees work, both will be liable for compensation payments").[8]

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[8] The Third, Eighth, Ninth, Eleventh, and DC Circuits have likewise recognized the dual servant doctrine and its implications for the liability of the general employer. *See, e.g.*, *Faush v. Tuesday Morning, Inc*., 808 F.3d 208, 215 (3d Cir. 2015) (recognizing that a person "could be a 'dual servant acting for two masters simultaneously' or a 'borrowed servant' who by virtue of being directed or permitted by his master to perform services for another may become the servant of such other."); *Williamson v. Consol. Rail Corp*., 926 F.2d 1344, 1349, 1351-52 (3d Cir. 1991) (noting plaintiff's argument on appeal had "elements of the borrowed servant and dual servant concepts" and that the "close relationship" the two employers as well as both employers' control over the employee and holding there was evidence "sufficient to support the jury's finding that [employee] was either ConRail's borrowed servant or the dual servant of ConRail

Here, the evidence is overwhelming that CACI interrogators were performing work that fell well within their scope of employment by CACI. Critically, CACI employees' unlawful acts were committed while carrying out the services that CACI was hired to perform by the United States—interrogations. Thus, the CACI interrogators' actions were undeniably related to, and within the scope of, their employment by CACI, because the entire purpose of their employment by CACI was to direct the interrogation of detainees at Abu Ghraib.

At the April trial, Plaintiffs also adduced significant evidence reflecting many aspects of CACI's supervision and control of its personnel at Abu Ghraib. For example:

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and Penn Trucks when he was injured"); *Minnkota Power Co-op., Inc. v. Manitowoc Co*., 669 F.2d 525, 532 (8th Cir. 1982) (recognizing that "[a] total shift in liability does not occur … when the servant simultaneously performs an act which falls within the scope of employment for both the general employer and the borrowing employer"; explaining that if "the servant simultaneously performs an act which falls within the scope of employment for both" employers, then the original employer is still liable); *Dazo v. Globe Airport Sec. Servs*., 295 F.3d 934, 940 (9th Cir. 2002) ("In operating the security checkpoint, [the agent], therefore, was acting on behalf of all three Airlines, not solely on behalf of the carrier-principal who actually provided Dazo's international carriage"); *Ward v. Gordon*, 999 F.2d 1399, 1404 (9th Cir. 1993) (explaining that the original employer is not necessarily precluded from liability because an individual simultaneously can be the servant of both the "lending" and the "borrowing" master); *Abraham v. United States*, 932 F.2d 900, 902–03 (11th Cir. 1991) ("a single act may be done with the purpose of benefiting two masters and both may then be liable for the servant's negligence"); *Browning-Ferris Indus. of California, Inc. v. Nat'l Lab. Rels. Bd*., 911 F.3d 1195, 1211 (D.C. Cir. 2018) (explaining that "'[a] person may,' under certain circumstances, 'be the servant of two masters at one time as to one act,' as long as "the service to one [master] does not involve abandonment of the service to the other,' and 'the act is within the scope of his employment for both.'" (quoting cmt. a to Res. (Second) of Agency § 226)); *Dellums v. Powell*, 566 F.2d 216, 221 (D.C. Cir. 1977) (where there is a "coordinated action by two masters … liability attaches to both masters"); *see also Mastro v. Maritrans Operating Partners, L.P*., 1992 WL 396785, at *2–3 (E.D. Pa. 1992) (explaining "[a] person may be the servant of two masters ... at one time as to one act, if the service to one does not involve the abandonment of the service to another" and "[i]n situations where there is a continuation of general employment such that the general or lending employer exercises some control over the temporary employee, or where the temporary employee is acting on behalf of the general employer, liability will not be imposed on the temporary employer for the employee's actions.").

- CACI was responsible for recruiting and hiring the interrogators that it sent to Abu Ghraib. ECF No. 1624 (Apr. 17, 2024 (morning)) Trial Tr. (Monahan) 87:12-19; ECF No. 1625 (Apr. 18, 2024) Trial Tr. (Billings) 42:20-22.
- CACI was responsible for paying and providing benefits for its employees at Abu Ghraib. ECF No. 1624 (Apr. 17, 2024 (morning)) Trial Tr. (Monahan) 83:18-84:4; ECF No. 1600, Ex. B, Pappas Tr. 63:5-9.
- CACI was responsible for supervising, managing, and disciplining CACI employees at Abu Ghraib, and, if necessary, firing them. ECF No. 1591, Ex C, CACI Corporate Representative (Morse) Tr. 171:23-172:03, 172:14-24; ECF No. 1624 (Apr. 17, 2024 (morning)) Trial Tr. (Monahan) 85:7-17; ECF No. 1600, Ex. B. Pappas Tr. 57:12-19.
- CACI had its own company leader, Dan Porvaznik, who was stationed at Abu Ghraib as the on-site "operational supervisor." Porvaznik was "charged with supervising all aspects of interrogation activity at Abu Ghraib." ECF No. 1591, Ex. C., CACI Corporate Representative (Morse) Tr. 171:23-172:03, 172:14-20.
- CACI's Porvaznik was responsible for determining where and how CACI personnel would be assigned to interrogation teams at Abu Ghraib. Faridi Decl. Ex. 15, PTX-23 at 74.
- CACI's Porvaznik reviewed and offered feedback on interrogation plans and had the power (indeed, the obligation) to instruct CACI interrogators not to follow plans that violated CACI rules or to stop abusive interrogations. *See* ECF No. 1634 (Apr. 19, 2024) Trial Tr. (Porvaznik) at 105:2-16, 106:1-23, 107:9-15,

108:13-23.

- CACI retained ultimately authority—over and above the Army—regarding CACI interrogators' conduct. For example, "[i]f [CACI employees] did get direction from someone else and they thought it was bad direction, they would take it to the [CACI] Site Lead." ECF No. 1598, Ex. D, Mudd Tr. 90:11-21.

In fact, the evidence at the prior trial raised questions about the degree to which the Army's chain of command had *any control at all* at the Hard Site at Abu Ghraib. *See, e.g.*, ECF No. 1623 (Apr. 16, 2024 Morning) Trial Tr. at 99:9-19 (Taguba); ECF No. 1591, Ex. B, Fay Tr. 28:20-29:06. CACI interrogators exploited the "command vacuum" at Abu Ghraib, taking it upon themselves to direct military personnel to "treat [detainees] like shit" and to "get them to talk." *See, e.g.*, ECF No. 1588, Ex. A, Frederick Tr. at 126:22-127:1, 54:13-16; ECF No. 1631 (Apr. 15, 2024 Afternoon) Trial Tr. (Nelson) at 89:6-90:9, 89:21-90:8, 95:9-96:9, 97:12-97:23. In addition, Major General Taguba documented (and lamented) the military's lack of supervisory control over the conduct of contractors. *See* ECF No. 1623 (April 16, 2024 Afternoon) Trial Tr. 17:1-4 (Taguba).

Thus, CACI remains liable for its employees' conduct so long as, by the service rendered to another—here, the Army—they were performing the business entrusted to them by CACI, even if they were also providing some service for the Army. *See, e.g.*, *Sharpe*, 446 F.2d at 155 (explaining "an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a common or joint participation in the work and benefit to each from its rendition"); *Vance*, 395 F.2d at 393 (affirming district court's finding "that, at the time of the accident, [the employee] was then and

there the agent and servant of both Vance and Forrester," with the consequence that the original employer remained responsible for the acts of the employee); *Watson v. Lambert's Point Docks, Inc.*, 1985 WL 1087835, at *3 (E.D. Va. June 23, 1983) (a person may be deemed to still be an employee of the original employer, even if he is performing work for another at the original employer's behest), *aff'd*, 732 F.2d 152 (4th Cir. 1984). This is particularly so because, the interrogators were acting within their scope of employment with CACI and their work was also *for the benefit of* CACI. Accordingly, this Court should instruct the jury on the dual servant doctrine if the Court decides to give an instruction on the borrowed servant doctrine.[9] Plaintiffs have proposed such an instruction in **Appendix A** hereto.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion *in limine* as to the borrowed servant defense.

Respectfully submitted,

/s/ Charles B. Molster, III

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[9] *See, e.g., Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991) (holding "the evidence was sufficient to permit a jury to find that [a worker] was either ConRail's borrowed servant or a dual servant of Penn Trucks and ConRail when he was injured"); *Pridemore v. Hryniewich*, 2022 WL 4542250, at *6 (E.D. Va. Sept. 28, 2022) (explaining that "[defendant's] possible status as a borrowed employee of Willard Marine, by itself, may not release the City from all liability" because "[e]ven if a party is deemed to be a borrowed servant of one employer, this does not automatically indicate that he is no longer the servant of the initial employer"); *Bright v. Cargill, Inc*., 251 Kan. 387, 404–10, (1992) (concluding "there was sufficient evidence to submit both dual employment and loaned or borrowed employment to the jury. The jury was instructed that it could find that Nanny was solely an employee of LSI, solely an employee of Cargill, or the dual employee of both."); *J & J Timber Co. v. Broome*, 932 So. 2d 1, 3 (Miss. 2006) (noting "the trial court granted Broome a new trial, stating it had misinstructed the jury [on only borrowed servant] and improperly restricted Broome by forcing him to abandon what the trial court concluded was a viable dual employment theory of liability.").

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2024, I electronically filed the foregoing, which sends notification to counsel for Defendant.

/s/ Charles B. Molster, III
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