No. 15-1831

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN ARRAQ ASHID; SALAH HASAN NUSAIF AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellants,

—and—

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

—v.—

CACI PREMIER TECHNOLOGY, INC.,
Defendant-Appellee,

—and—

TIMOTHY DUGAN; CACI INTERNATIONAL, INC.; L-3 SERVICES, INC.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

BRIEF OF *AMICUS CURIAE* ALBERTO MORA, FORMER GENERAL COUNSEL, U.S. DEPARTMENT OF THE NAVY SUPPORTING APPELLANTS AND REVERSAL OF THE DECISION BELOW

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IDENTITY AND INTEREST OF AMICUS CURIAE

Alberto Mora is a Senior Fellow with the Carr Center for Human Rights Policy at the Harvard Kennedy School in Cambridge, Massachusetts. As the General Counsel of the Department of the Navy during the period from 2001 to 2006,[1] Mr. Mora is able to provide a unique perspective on the application of law to military affairs and national security strategy in the post-9/11 era. He is representative of the current and former senior civilian political appointees and military officials who believe that protecting human dignity by respecting the right to be free from cruelty, even in wartime, is legally required and a critical national security objective. His principled opposition to the abuse of military prisoners in Guantanamo is a matter of public record. Moreover, his experiences formerly as a State Department Foreign Service Officer and currently as a Senior Fellow at Harvard's Carr Center for Human Rights Policy, where he is teaching and conducting research on the public policy consequences of the use of torture as a weapon of war, make him uniquely qualified to aid the Court in its consideration of the interplay of human rights, law, foreign policy, and national security strategy.

[1] Though Mr. Mora's tenure overlapped with the events at issue, to the best of his knowledge neither he nor the attorneys reporting to him had any direct or indirect responsibility, legal or otherwise, for any of the parties or matters in dispute and he obtained no information pertaining to the underlying controversy through official channels. In addition, he does not address the merits of the underlying claims but limits his opinion to the justiciability of military, or military-sponsored, torture. This brief does not, of course, purport to represent the views of the U.S. Government, the Department of the Navy, or the Carr Center.

RULE 29 STATEMENT

All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any other person or entity made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Factually, this case is about torture, that wanton application of cruelty that ranks among the most heinous and destructive of crimes against individual dignity and integrity and against the very fabric of civilization; it is a crime that has been categorically outlawed for generations by overlapping and mutually reinforcing U.S. and international laws that reflect and embody both our deepest values and the settled international consensus and law that torture is always and everywhere illegal. More particularly, this case is about what may be the most notorious use of torture[2] in United States history: the photographically documented, sexually degrading torture of defenseless captives held in custody in the U.S. military prison at Abu Ghraib, Iraq.

Legally, this case is about whether the political question doctrine divests the courts of subject matter jurisdiction. The court below wrongfully holds that it does, for two reasons. First, the court is of the view that it cannot address this dispute because the issues concern military activities and complex questions of policy that are too politically sensitive to be adjudicated particularly where, the

[2] Amicus recognizes that the treatment accorded to individual plaintiffs could range across the legal spectrum of abuse, including rough treatment; cruel, inhuman, and degrading treatment; and torture. Amicus will use the term "torture" to characterize the abuse because it has entered the lexicon to refer to all types of serious abuse, and because the Abu Ghraib photographs are suggestive, even probative, of that level. The actual level (or levels) of abuse suffered by each plaintiff, if any, on every occasion of abuse is necessarily a matter for the fact-finder.

district court imagined (albeit without evidence), torture in this case was ordered or authorized by the military. This holding is wrong because it fails to take into account that Congress, under its long-established and settled Article I authority to establish rules of conduct for the military, has statutorily and categorically prohibited the military from using torture. And because the military has no legal latitude to use torture, there is correspondingly no judicial basis or need to invoke the political question doctrine so as to protect any lawful military discretion.

Second, the court is of the view that a "cloud of ambiguity" served to occlude the definition of torture "during the relevant time period," and thus the court lacks "judicially manageable standards" to apply. *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-00827, at 25 (E.D. Va. June 18, 2015) (the "Order"). This nebulous ruling – which possesses more poetic charm than legal precision – is also wrong. The definition of torture was no more mysteriously clouded during the "relevant time period" than it was before that period or now. Wherever the "cloud" may have originated, it certainly was not from Congress, and neither the Executive nor its agent, the military, have the legal authority to nullify, suspend, modify, or "cloud" Congress' statutory exercise of its legislative authority in the area of torture. This "cloud" is imaginary and cannot blind the Judiciary.

Thus, the court *can* and *must* adjudicate the case: it has all the tools to do so; the political question doctrine is inapplicable; the judicial standards that apply to claims of torture are judicially manageable; and failure to do so would cause massive damage to our national identity and values, our laws and legal system, our foreign policy and national security interests, and to the architecture of international human rights. In the United States, our independent courts were founded on the proposition that they should neither be completely submissive to the military nor willing to become submissive by disregarding the clear mandates of the law. Whether this proposition continues to be true is put to the test in this appeal.

ARGUMENT

I. BECAUSE THE POLITICAL BRANCHES HAVE ENACTED AND SUPPORTED LEGISLATION CATEGORICALLY PROHIBITING THE USE OF TORTURE, AND BECAUSE THE PUBLIC POLICY INTEREST IS SO STRONGLY OPPOSED TO TORTURE, THE POLITICAL QUESTION DOCTRINE DOES NOT PROVIDE A BASIS TO ALLOW THE JUDICIAL BRANCH TO AVOID ADJUDICATING CLAIMS OF TORTURE

The Order dismissing Plaintiffs' complaint for lack of subject matter jurisdiction provides precisely the type of "blank check" that the Supreme Court warned may *not* be given to the Executive, even in times of war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (claims of military necessity do not justify overriding

congressional authority or binding international humanitarian law); *see also Mistretta v. United States*, 488 U.S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (recognizing constitutional limitations on the President's commander-in-chief authority in the face of countervailing statutory restrictions).

In its opinion, the lower court – strangely – fails to consider that: (i) Congress has both criminalized torture (and other forms of cruel, inhuman and degrading treatment) and categorically barred the military from its use; (ii) the Executive, deferring to Congress' legislative authority in this area, has always recognized that torture constitutes a prohibited criminal act; and (iii) U.S. public policy, core national interests, foreign policy strategy, and national security strategy – including military policy – all strongly and uniformly disavow the use of torture. These failings are fatal to the court's conclusion that acts of military torture are shielded from adjudication by the political question doctrine. As discussed below, because the two political branches are in agreement that torture is legally prohibited and have historically collaborated to promote global acceptance of U.S. and international laws and human rights norms banning torture, the political question doctrine is inapposite in this case and the judiciary is not at

liberty to declare that a matter of settled law can be converted to a political question. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (explaining that it "is a familiar judicial exercise" to enforce statutory rights once foreign policy decisions have been made by the political branches); *see also Baker v. Carr*, 369 U.S. 186, 212 (1962) (once a political matter is "determined and declared, courts may examine the resulting status and decide independently whether a statute applies"). Indeed, the political question doctrine, when properly analyzed, leads to the conclusion that the adjudication of claims of torture is not only permitted, but is favored as a matter of constitutional law and public policy.

A. Congress Has Categorically Criminalized Torture and Precluded Anyone, including the Military, from Using It

Among the express, enumerated powers of Congress is the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8. Exercising this authority, Congress has statutorily prohibited the military from the use of torture and has made its use a criminal offense for military members and others. U.C.M.J. arts. 90, 134, 10 U.S.C. §§ 890, 934; War Crimes Act of 1996, 18 U.S.C § 2441(d)(1)(A); Torture Act, 18 U.S.C. § 2340A. These prohibitions are not diluted by distinctions between torture committed abroad or at home, during peace or wartime, or by any purported authority conferred upon the Executive. Because a military order to apply torture would be manifestly unlawful, members of the military are permitted to disobey it and, indeed, would

have a duty to do so. U.C.M.J. art. 90, 10 U.S.C. § 890 (requiring obedience only to a "lawful" order); *see also United States v. Calley*, 22 C.M.A. 534, 544 (1973) ("palpably illegal" order to kill infants and unarmed civilians is no defense to murder even in a combat zone).

Sound public policy and legal reasons certainly exist to support judicial abstention in many cases where lawful military discretion, judgment or policy is called into question and where the only criteria for evaluating the wisdom of such judgments are uniquely military criteria. This is not such a case: this case does not "require the Court to question actual sensitive, military judgments made by the military." Order at 21. This is because, even *if* the military had ordered the abuse of detainees – and there is no evidence that such abuses were ordered or authorized for detainees in Abu Ghraib, a place where the Geneva Conventions concededly applied – the military *never* had the legal discretion to apply torture. Thus, a military decision to use torture is not the type of decision that the political question doctrine is intended to shield, or legitimately could shield. To hold otherwise would be to allow "the political branches to govern without legal constraint." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (discussing whether the Executive can evade the jurisdiction of U.S. laws over a territory by ceding formal sovereignty to a third party then leasing it back).

Both the strength of Congress' constitutional authority to regulate military conduct and the clarity of its prohibition of military torture are, standing alone, sufficient to preclude the application of the political question doctrine, even if the President or his subordinates were to attempt to order the commission of torture. Indeed, if Congress' authority coupled with its clear statutory language prohibiting torture are not sufficient to trigger judicial adjudication of well-pled cases – as the holding below would suggest – then Congress' very authority to regulate military conduct at all is thrown into question. When the military judgment at issue is outside its lawful boundaries, the duty of the judiciary is not to abstain, but to help ensure that Congress' constitutional authority is upheld and that the military and its agents are held accountable.[3]

B. The Executive Branch Acknowledged the Binding Nature of the Statutory Prohibitions Against Torture, Even in Wartime

Prior to and at all times relevant to this dispute, the Executive Branch acknowledged that all federal and state officials were prohibited from applying

[3] As the Supreme Court noted in *Boumediene*, abstaining in the appropriate cases (such as in cases of sovereignty and territorial governance) is one thing, but to "hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" 553 U.S. at 775 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

torture. For instance, in a 1999 submission to the U.N. Committee Against Torture, the U.S. State Department represented as follows:

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention [Against Torture] constitutes a criminal offence under the law of the United States. No official of the Government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on ground of exigent circumstances (for example, during a "state of public emergency") or upon orders from a superior officer or public authority and the protective mechanisms of an independent judiciary are not subject to suspension.

Addendum to the United States Report to the Committee Against Torture, para. 6, UN Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

In addition, President George W. Bush [4] and all senior administration officials, including Attorney General Gonzalez,[5] also acknowledged that torture

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[4] Typical of the President's statements on torture is the following: "Torture anywhere is an affront to human dignity everywhere. We are committed to building a world where human rights are respected and protected by the rule of law. Freedom from torture is an inalienable human right…. I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating and prosecuting all acts of torture…." Press Release, President George W. Bush (June 26, 2003) (statement on the occasion of the 2003 United Nations International Day in Support of Victims of Torture), available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/06/20030626-3.html.

was a crime and that the administration was bound by the statutory prohibition against torture. The President, Secretary of Defense Rumsfeld and Congress all condemned the atrocities at Abu Ghraib and called for accountability.[6] At no time did the administration claim that the President's commander-in-chief authority enabled him to override the statutory prohibition against torture or that, even if he possessed this authority, he had invoked it.[7]

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[5] At his Attorney General confirmation hearing then-White House Counsel Alberto Gonzalez, referring to President Bush's position that "American stands against and will not tolerate torture under any circumstances," stated: "I share his resolve that torture and abuse will not be tolerated by this administration, and commit to you today that … I will ensure that the Department of Justice aggressively pursues those responsible [for Abu Ghraib]." Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States, Before the Sen. Comm. on the Judiciary, 109th Cong., 14 (Jan. 6, 2005) (opening statement of Alberto R. Gonzales).

[6] Accordingly, public reports reveal that eleven of the soldiers involved in the torture of prisoners at Abu Ghraib have been convicted by courts martial for offenses. *See* Ben Nuckols, *Abu Ghraib Probe Didn't Go Far Enough*, Army Times (Jan. 13, 2008); Eric Schmitt & Kate Zernike, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times (Mar. 22, 2006). Between October 2001 and March 2006, 251 officers and enlisted soldiers were punished in some fashion – criminally or administratively – for mistreating prisoners. Eric Schmitt, *Iraq Abuse Trial is Again Limited to Lower Ranks*, N.Y. Times (Mar. 23, 2006).

[7] After the abuses at Abu Ghraib had been publically revealed, President Bush stated: "We will investigate and prosecute all acts of torture…. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees." Press Release, *supra* note 4. And, with respect to Abu Ghraib itself, he stated: "These acts were wrong. They were inconsistent with our policies and values as a Nation." *Id.*

To be sure, the Department of Justice did issue memoranda authorizing certain "enhanced interrogation techniques," related to the treatment of so-called "enemy combatants" (suspected members of Al Qaeda and the Taliban) detained at the U.S. military base in Guantanamo Bay and CIA detention sites. There is no evidence that these memoranda authorized any such enhanced techniques in Abu Ghraib, where the Geneva Conventions and the Army Field Manual unambiguously applied, but in any case these memoranda consistently recognized the validity of the law's prohibition of torture in these detention and interrogation settings, at the same time that they maintained that the authorized techniques fell short of breaching the threshold of unlawful torture. *See, e.g.*, Memorandum from Ass't Att'y Gen. Jay S. Bybee to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 1 ("[18 U.S.C.] Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture…."), available at http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf (last visited Sept. 28, 2015). That the assertions in these memoranda about the scope or barbarity of the conduct authorized may have been false, insincere, or even designed to help manipulate a legal position are all irrelevant to the key point here: the Executive Branch always correctly recognized that it was

bound by the law against torture, even with respect to actions taken abroad in the extremely exigent circumstances of interrogations of purportedly high-level al-Qaeda members captured by the CIA in paramilitary operations.

The acknowledgement by the Executive that the Congressional prohibitions against torture bind it even in such circumstances fatally undermines the idea that such prohibitions do not apply, at a minimum, to the conduct of contractors working in a secure Iraqi prison or that the military could have lawfully ordered contractors to engage in torture. The detention cycle of prisoners captured in the battlefield includes the initial point of capture on the battlefield, conveyance away from the battlefield to the rear, detention in temporary holding facilities, and, ultimately, imprisonment in secure detention facilities located away from the battlefield. This controversy concerns only the treatment afforded plaintiffs in the last location, the one farthest from the heat and confusion of combat and most akin to incarceration in a domestic U.S. prison and in a context where the prohibitions on torture and cruel treatment from the Geneva Conventions and the Army Field Manual unambiguously applied. In this set of narrow circumstances, the purely military interests are at their weakest and the legal and public policy interest to enforce the prohibition against torture is at its strongest.

Thus, even if the Executive had sought to override the congressional prohibition on torture, such efforts would have been ineffective to nullify the law

or to preclude the courts from adjudicating the violation. Significant "military necessity" was not sufficient even to undertake far less controversial matters such as non-statutory military commissions proceedings. *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) (plurality opinion); *see also Youngstown Sheet & Tube Co.*, 343 U.S. at 587 (rejecting government attempts to justify actions outside of military exigencies through citation to "cases upholding broad powers of military commanders engaged in day-to-day fighting in a theater of war"). To hold that torture and other cruel and inhuman treatment was not unquestionably banned in circumstances lacking military exigency – it is in fact banned in all circumstances – would be to vest the President's commander-in-chief authority with unrestrained and unreviewable authority that the Supreme Court has held on multiple occasions is contrary to the constitutional order. *See, e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties."); *see also* The Federalist No. 8 (warning against the frequent infringement and weakening of individual rights when "[t]he military state becomes elevated above the civil").

C. The Prohibition of Torture Is in Our Core National Interest and Is Inextricably a Part of U.S. Values and Identity, Our Constitutional Order and Laws, and Our Foreign Policy and National Security Strategies, Factors That Must Not Be Disregarded in the Political Question Analysis of Military Torture Claims

The lower court's casual and careless invocation of the political question doctrine fails to accord any weight to the importance that the right to be free from cruelty – and its corollary, the prohibition against torture – are to be accorded, not only to our national values and identity, but also to our core national interests, including deeper and broader military interests than those identified by the court as favoring abstention. Indeed, it is a settled fact that the public policy and military interests of the United States have long favored the elimination of torture in any manifestation and accountability for its application.

The right to be free from cruelty, and particularly torture, is regarded as a core human right by the United States and all other civilized countries. *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 ("Convention Against Torture") (statement in preamble). Since at least World War II, the United States has consistently pursued a foreign policy that sought to advance U.S. interests by promoting the observance of human rights, including the

right to be free from cruelty. The Nuremberg Trials and Nuremberg Principles[8]; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; the Convention Against Torture, *supra*; the International Covenant of Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5 (1968), among other institutions or treaties, all prohibit torture and all came into being in no small measure through the efforts of the United States. Along with the prohibition of slavery, the prohibition of torture is so fundamental and so established that it is regarded as *jus cogens* under customary international law, peremptory norms from which no derogation is permitted. *See*, *e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). A central element of the norm is that persons that violate it should be held individually accountable. *See* Convention Against Torture, art. 2.3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture.").

The refusal of the U.S. military to allow cruelty to be applied to captives originated with orders issued by our first commander-in-chief, George

[8] The Principles refer to those principles of international law recognized in the Charter of the Nuremberg Tribunal and its judgments. *See* United Nations Yearbook, 1950-2 U.N.Y.B. 374-78 (1950).

Washington.[9] Subsequent presidents, including Abraham Lincoln,[10] Theodore Roosevelt,[11] Ronald Reagan,[12] and the present-day commander-in-chief, Barack Obama, have also condemned the abuse of captives. The U.S. military tried, convicted, and executed Confederate Captain Henry Wirz, the jailor of the infamous Andersonville Prison for, among other things, the "torture and great suffering" he imposed on Union soldiers imprisoned at his facility.[13] Likewise, Japanese General Shigeru Sawada was tried, convicted, and sentenced to five years hard labor, for subjecting the captured Doolittle airmen "to various forms of torture

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[9] George Washington admonished his soldiers that anyone engaging in torture "bring[s] shame, disgrace and ruin to themselves and their country." Gen. George Washington, *Charge to the Northern Expeditionary Force* (Sept. 14, 1775).

[10] Abraham Lincoln personally approved the adoption of the Lieber Code to govern the conduct of U.S. forces in wartime. Article 6 of the Code categorically prohibits the use of torture. General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field" (April 24, 1863). The Code formed the basis for the Geneva Conventions. *See generally* John Fabian Witt, *Lincoln's Code* (2012).

[11] In 1902, Roosevelt ordered the prosecution of U.S. soldiers who abused Filipino prisoners (including through waterboarding) during the Philippine War. Witt, *supra* note 10, at 359.

[12] Reagan submitted the Convention Against Torture for Senate ratification in 1988.

[13] Gen. N.P. Chipman, *The Tragedy of Andersonville* 32 (1911).

during interrogations" while there were imprisoned.[14] U.S. military members were court-martialed for torturing Philippine insurgents by the use of waterboarding and other brutal methods during interrogations.[15] U.S. ratification of and observance of these principles is not only consistent with our national values, it is grounded in the common-sense understanding that humane treatment of the enemy is often reciprocated and that enemy soldiers are less likely to fight to the last bullet if they expect to be treated humanely if captured. This helps to explain why the U.S. military is so strongly in favor of the humane treatment requirements of the Geneva Conventions and has incorporated them into its military ethos.[16]

The effects of humane treatment by the U.S. military have helped to enhance American security and have helped to save the lives of American soldiers. Ample evidence – ironically, including from Abu Ghraib – also exists that the contrary is equally true: inhumane behavior by American troops has caused the loss of American lives. In 2006, *amicus* was informed by a flag-rank member of the Joint Chiefs of Staff that the first and second identifiable causes of U.S. combat deaths

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[14] U.S. Naval War College, *Documents of Prisoners of War*, Doc. No. 78 at 2 (1979).

[15] Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468, 500-1 (2007).

[16] *See, e.g.*, Off. of the Gen. Couns., Dep't of Def., *Law of War Manual* § 8.2 (2015) (Humane Treatment of Detainees); Dep't of the Army Field Man. 34-52 *Intelligence Interrogation* 1-8 (Sept. 28, 1992) (citing practical reasons why the abuse of prisoners is against military interests).

in Iraq were, respectively, Abu Ghraib and Guantanamo because of their emotional potency in the hands of enemy recruiters. Similar evidence is found in a report of a 2006 meeting of high-ranking U.S. national security and foreign policy officials, who observed that the "single most important motivating factor" helping generate enemy foreign fighter inflows into Iraq was the mistreatment of detainees in U.S. captivity. Harvard Kennedy School, Carr Center for Human Rights Policy, *The Costs & Consequences of Torture* (available at http://carrcenter.hks.harvard.edu/programs/costs-consequences-torture/goals) (last visited Sept. 28, 2015). These general considerations will be meaningless if U.S. courts do not have the power to apply these principles to see justice done in a specific case.[17]

The United States has a clear obligation under U.S. and international law to prohibit, investigate, and punish cases of torture. If the courts were now to abstain from adjudicating claims arising from the use of torture in locations where it was unambiguously unlawful – as in Abu Ghraib – the additional damage to our nation would be incalculable. Such a decision would serve to signal that the right to be free from cruelty is no longer a protected individual right; it would immunize the

[17] Indeed, it is easy to imagine how a non-independent court in a country that habitually abuses human rights might articulate its own version of the political question doctrine or "cloud of ambiguity" using language similar to that contained in the Order below. Judicial abstention from cases dealing with military torture was to be expected from the Chilean or Argentinean judiciaries during the 1980s, but it cannot be countenanced in our country.

government and its agents from its unlawful behavior, and declare that Congress is without authority to regulate the military or to criminalize torture. It would deal a blow to the architecture of human rights that the United States has labored so long and so effectively to construct. In addition, such a decision would compromise our nation's heritage of and dedication to building a country and a world that are less – not more – cruel, and more – not less – protective of individual human dignity; for where torture exists, law does not.

II. FAR FROM LACKING "JUDICIALLY MANAGEABLE STANDARDS" WITH WHICH TO ADJUDICATE A CLAIM OF TORTURE, THE JUDICIARY HAS ALL THE TOOLS NEEDED TO DISCHARGE ITS FUNCTION OF ADJUDICATING THIS CASE; THERE IS NO "CLOUD OF AMBIGUITY" OBSCURING THE RIGHT TO BE FREE FROM TORTURE

Of all the reasons cited by the lower court for its conclusion that the claims below present a nonjusticiable political question, the most puzzling, the most clearly erroneous, and the most dangerous is the finding that claims of torture are incapable of being adjudicated because of the putative lack of judicially manageable standards. Order at 21-27. Specifically, the lower court chose to believe that a "cloud of ambiguity" served to obscure the definition of torture "during the relevant time period" and thus claimed that it lacked the "judicially manageable standards" needed to adjudicate the case. Order at 25. The court's reasoning is nebulous, but seems to struggle with three factors: (i) failure to grasp the analytic method by which to determine whether the degree of abuse rises to the

level of torture; (ii) a misplaced focus on abstract individual interrogation techniques as opposed to evidence regarding the totality of the abuse and its impact on the victim; and (iii) confusion as to what legal weight to accord the Bush Administration's authorization of "enhanced interrogation techniques" for suspected Al Qaeda and Taliban detainees in Guantanamo and CIA custody.

As discussed above, U.S. military courts have analyzed the question of whether conduct was torture since at least the Civil War. *Supra* at 13-14. So have our civilian courts. The United States District Court for the Southern District of Florida had no difficulties analyzing the application of the U.S.-codified version of the Convention Against Torture found in the Torture Act (18 U.S.C. §§ 2340-2340A) in the jury trial of Charles Taylor, the infamous head of the Liberian "Demon Forces." *United States v. Emmanuel*, 2007 U.S. Dist. LEXIS 48510 (S.D. Fla. July 5, 2007). Likewise, the Eleventh Circuit had no problem affirming that Taylor's abhorrent conduct constituted torture and that the Torture Act was constitutional even when applied during armed conflicts, explaining that, as this brief has stated throughout, "[e]ven in war, torture is not authorized." *United States v. Belfast*, 611 F.3d 783, 809 (11th Cir. 2010) (quoting *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005)).

Notably, the Eleventh Circuit's interpretation of the definition of torture was in a *criminal* case, a case where the so-called "void for vagueness" principle

operates in a defendant's favor. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."); *see also United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988). But this is a civil case. If a definition is clear enough to convict one man, it is clear enough to form the basis for civil liability against another. This is particularly true with respect to the elements of the crime of torture, which have been settled for decades and have been prosecuted on countless occasions.

A. Claims of Torture Are Adjudicated By Using a "Totality of the Circumstances" Analysis

Ascertaining whether a person has been subjected to torture is a judicial function that has been performed competently by U.S. and foreign courts and courts-martial for at least over a century, demonstrating that the task is possible and that standards are present. The federal torture statute prohibits conduct "specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control." Torture Act, 18 U.S.C. § 2340(1); *see also* 18 U.S.C. § 2340(2) (defining "severe mental pain or suffering"); War Crimes Act of 1996, 18 U.S.C. § 2441(d)(1)(A) (outlawing torture and cruel, inhuman and degrading treatment); Torture Victim Prevention Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, 74 (1992) (defining torture as

"intentional infliction" of "severe pain or suffering"). Based on these prior cases, to adjudicate a claim of torture the fact-finder applies a reasonable person standard and examines the totality of the circumstances on a person-by-person basis.

Of relevance to this inquiry are: (i) the techniques or types of abuse, including their duration, intensity, and frequency; (ii) the conditions of confinement, such as: cell size and configuration; conditions of extreme heat or cold, brightness or darkness; solitary or incommunicado confinement; deprivation of medical care or legal assistance; separation from family; etc.; and (iii) the impact of these factors on the victim, which could vary enormously depending on the gender, age, degree of fitness, tolerance to abuse, and medical and psychological condition, to name just a few factors. By examining all these factors in conjunction a court (or a jury) can make a determination whether the severity of the pain and suffering reached the level that warrants the designation of "torture." Although pain is admittedly difficult to quantify scientifically, it is nonetheless indisputably a universally recognized part of the human condition and no harder to analyze than whether an action was done with "intent" or "willfulness," whether an action was taken for a "principal purpose," or even whether material was pornographic. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) ("I know it when I see it") (Stewart, J., concurring). Vague and complex phrases come across the Federal bench in countless cases every day; that doesn't allow the judiciary to abdicate its

"responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 132 S. Ct. at 1427 (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)).

B. The Abuse Suffered by Each Victim Defines Torture, Not Individual Interrogation Techniques in the Abstract

Part of the lower court's error in determining whether a manageable judicial standard exists appears to stem from the court's mistaken impression that one is required to adjudicate the issue of whether torture was inflicted or suffered *vel non* by limiting its analysis to each of the interrogation techniques applied in the abstract and in isolation from other circumstances and from their impact on the victim.[18] Not only is this approach not required, the court could not possibly make an accurate assessment of the degree of pain and injury suffered by any victim if it were to limit its analytical methodology to this highly artificial approach (and it certainly could not make it on a motion to dismiss, without a trial of the facts). For example, a technique described in the abstract may be completely different from what it was like as applied. For example, a "stress position" – such as hanging from shackles – may produce different degrees of pain depending on the duration and height of the shackles from the floor. The pain felt by the individual cannot

[18] For example: "there was widespread disagreement about whether the term 'torture' applied to particular interrogation practices," Order at 23; and, the *Padilla* court was unable to say whether the "specific interrogation techniques" applied against Padilla "necessarily amounted to torture." Order at 24 (citing *Padilla v. Yoo*, 678 F.3d 748, 768 (9th Cir. 2012)).

possibly be deduced simply from a description of the technique. The same technique will produce different effects – including different levels of pain and suffering – on different people. Also, the belief that an individual interrogation technique will not produce torture does not address what happens when a technique's guidelines are exceeded or a number of such techniques are applied simultaneously or under varying conditions of confinement. *See, e.g.*, *Belfast*, 611 F.3d. at 794-799 (cataloging multiple techniques and the duration applied in each of the various counts against Mr. Taylor).

C. The "Enhanced Interrogation Techniques" Memoranda Do Not Cloud the Definition of Torture

The court's frequent references to "specific" or "particular" interrogation techniques suggests that this aspect of the court's analysis was influenced by the fact that the Office of Legal Counsel approved the use of the so-called "enhanced interrogation techniques" in the period from 2001 to 2003, *see* Order at 23, techniques that have been widely criticized as themselves constituting torture and *never* were authorized for application in detention centers in Iraq and would, even on their own terms, have zero relevance to the facts of this case. Nevertheless, these limited authorizations appear to lie at the heart of the court's overly broad ruling that it lacks judicially manageable standards due to a "cloud of ambiguity" caused by "the lack of clarity as to the definition of torture during the relevant time period." Order at 25. The reference to "the relevant time period" signals that,

presumably, no such "cloud" existed to fog the court's vision before that period and that none exists at the present time. How this cloud was dissipated is unclear.

The elements of the crime of torture – which have been settled for decades and have been prosecuted in the United States and internationally on countless occasions – could not have been obscured from the court's vision so mysteriously, so completely, and for such a precisely limited period of time. No congressional action during the period in question generated the "cloud" by modifying Congress' previously clear and categorical statutory prohibition on torture. That being the case, the origins of this "cloud" can only be ascribed to those actions taken by the Executive Branch during the period in question to obscure the definition of torture. The Eleventh Circuit saw through this reasoning, holding that the Executive Branch memoranda referenced above did not confuse or cloud the Torture Act or the Convention Against Torture's "unambiguous definition of torture" applicable under our laws. *Belfast*, 611 F.3d at 823. Indeed it is impossible for the Executive to have clouded its own obligations under the law. In the United States of America, a law "must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 766 (discussing the Suspension Clause).

There is no "cloud of ambiguity" over torture in U.S. courts; there never was and cannot be so long as ours is a country of laws.

CONCLUSION

The Order below dismissing Plaintiffs' complaint for lack of subject matter jurisdiction must be reversed.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Undersigned counsel certifies that this amicus brief was prepared using Microsoft Word with Times New Roman 14 point font. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) it contains 6,138 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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