19-1328

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,
Defendant and 3rd-Party Plaintiff-Appellant,

—and—

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

—v.—

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellees,

—and—

TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E,
Plaintiffs,

—and—

UNITED STATES OF AMERICA; JOHN DOES 1-60,
Third-Party Defendants.

UNITED STATES OF AMERICA,
Amicus Supporting Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:08-CV-00827 HON. LEONIE M. BRINKEMA

BRIEF OF *AMICI CURIAE* RETIRED MILITARY OFFICERS IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are retired military officers who have held senior command and staff positions in the U.S. Armed Forces. *See* Appendix 1 (full list of signatories). Consistent with their fidelity to the laws of armed conflict, they maintain a strong interest in continuing this Nation's long tradition of according humane treatment to detainees captured during wartime. With a wealth of experience regarding the practical realities of combat operations abroad, *Amici* provide a unique perspective on the appropriate relationship between, and respective responsibilities of, U.S. military personnel and the private military contractors hired to assist them.

Amici write because they are deeply concerned about Defendant-Appellant CACI Premier Technology, Incorporated ("CACI")'s attempt to equate its immunity with that of the sovereign, particularly where private persons are engaging in shocking behavior that the U.S. military does not itself tolerate for its own members. Specifically, *Amici* disagree with CACI's argument that private military contractors are essentially the functional equivalent of uniformed U.S. soldiers; *Amici* submit that such a conclusion is inconsistent with the law of war and defies expert military judgment. Although *Amici* recognize that civilian contractors often perform vital

[1]All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

functions in support of U.S. military operations, they maintain that the law should not allow private contractors to operate with impunity, particularly where well-settled, and time-honored laws and regulations demand that our own armed forces treat prisoners and civilians in their custody humanely, and where our own armed forces are subject to a rigorous system of discipline, training, and—critically—accountability.

SUMMARY OF ARGUMENT

This case arises out of one of most shameful episodes in our Nation's otherwise honorable military history—an episode that damaged our country's hard-earned reputation for lawful and humane treatment of wartime detainees. The torture and abuse of prisoners at Abu Ghraib was rightly condemned by President George W. Bush, former Secretary of Defense Donald Rumsfeld, and a number of independent military and civilian investigators. Numerous military personnel were sanctioned, and even imprisoned, for the abuse and torture of detainees, including personnel identified by Plaintiffs as co-conspirators of CACI personnel in the abuse and torture of detainees. Yet, despite evidence of similar, unlawful conduct undertaken by private military contractors, including by employees of the CACI, no civilians have yet been held accountable for their role in the Abu Ghraib scandal.

This Court should not grant CACI the expansive protections of sovereign immunity. As an initial matter, CACI does not explain why it, as a civilian

contractor, is entitled to invoke the exception to the Federal Tort Claims Act ("FTCA") that bars damages suits for the "combatant activities" of the "military or naval forces or the Coast Guard." 28 U.S.C. § 2680(j). *See* Brief of Appellant CACI ("CACI Brief") at 20-21 (arguing that the combatant activities exception applies to the United States, but stating nothing regarding why that exception is applicable to CACI itself). And to the extent CACI articulates its reasoning elsewhere in its brief, it appears to argue that private contractors are functionally equivalent to U.S. soldiers because "CACI interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." CACI Brief at 42 (quoting JA 1264-65).

As *Amici* know well, however, merely being embedded with U.S. soldiers or performing military functions and taking commands from military officers does not transform a civilian into a soldier and combatant. As a matter of law and policy, private contractors cannot be seen as equivalent to soldiers. Under the Geneva Conventions and fundamental law of war principles, civilian contractors cannot be considered "combatants" or lawfully engage in "combatant activities" because they are simply not, as a matter of law, part of the armed forces of a state party to the Conventions, such as the U.S., or subject to a military chain of command, though regardless of a party's status as a combatant or non-combatant, U.S. military law and policy certainly prohibit torturing or mistreating detainees in the manner alleged

by Plaintiffs in this case.

Finally, the doctrine of derivative sovereign immunity, which is narrowly construed, should not be extended to cover CACI in the circumstances of this case. Unlike private contractors and their employees, membership in the armed forces carries with it unique responsibilities that may justify special immunity under tort law.[2] Soldiers are subject to rigorous training and discipline, and are at all times accountable to the military chain of command. At the same time, military commanders, as leaders of a government entity, are ultimately accountable to the American people for the behavior of soldiers under their command. But employees of civilian contractors indisputably are not subject to the military chain of command, and therefore cannot be disciplined or held accountable by the military or the electorate. This lack of meaningful accountability fundamentally undermines one of the core purposes of the sovereign immunity doctrine, which seeks to balance the imperative of accountability with the need to shield actors from harassment, distraction, and liability when they perform their duties reasonably. Thus, even if the U.S. government can claim sovereign immunity protection, CACI is still not

[2] *Amici* take no position on whether the U.S. should be entitled to invoke sovereign immunity protection from the alleged *jus cogens* violations at issue in this case, but write to stress that even if there may be reasons to extend such immunity to the U.S. government, *derivative* sovereign immunity would not, and should not, be extend to civilian contractors.

entitled to derivative immunity because the purposes that underpin the doctrine of derivative sovereign immunity do not support immunity in these circumstances.

ARGUMENT

I. AS A MATTER OF LAW AND POLICY, THE FEDERAL INTEREST IN COMBATANT ACTIVITIES SHOULD NOT COVER CIVILIAN CONTRACTORS THAT ENGAGE IN PLAINLY UNLAWFUL CONDUCT.

A. Under the Law of War, Civilian Contractors Cannot be Denominated Combatants.

CACI argues that tort claims against private military contractors are preempted by the provision of the FTCA that preserves federal sovereign immunity for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war." 28 U.S.C. § 2680(j). That conclusion is inconsistent with the law of war—also referred to as the law of armed conflict or international humanitarian law—which regulates the methods of waging war and describes the protections due to persons caught in such conflicts. *See* U.S. Dep't of the Army, *Field Manual 27-10: The Law of Land Warfare*, ¶¶ 2-3 (July 18, 1956, updated July 15, 1976) ("Land Warfare Manual"). As *Amici* explain below, the law of war, as well as U.S. Armed Forces' rules and regulations, recognize a basic distinction between combatants and non-combatants, the latter of which includes contractors. CACI's position, which is predicated on the notion that it stands in the shoes of the sovereign and assumes its combatant status, ignores this crucial

distinction in interpreting combatant activities exception of the FTCA.[3]

The law of war is founded primarily upon the four Geneva Conventions[4] and upon the customary international law derived over time from the common practices of nations. *Id*. at ¶¶ 4, 6. In the wake of World War II, the United States played a leading role in codifying the rules governing humanitarian conduct in wartime, in

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[3]This Court's decision in *In re KBR, Inc., Burn Pit Litig.*, does not undermine these principles or, for that matter, require a particular outcome in this case. 744 F.3d 326 (4th Cir. 2014). Critically, that decision focused on preemption of state tort law, while Plaintiffs' claims are brought pursuant to federal law, namely the Alien Tort Statute ("ATS"). *See Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 700 (E.D. Va. 2018) ("[I]n the present civil action, plaintiffs' claims are exclusively brought pursuant to federal law . . . . [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."). Moreover, *Burn Pit* was particularly concerned with subjecting contractors to the state tort law of 51 separate jurisdictions, a concern not present in the current case, where the ATS provides a single regime of liability. *See id.* ("[T]he dictates of the ATS are far less intrusive than the state tort law preempted in *Saleh* [*v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009)], both because the ATS represents a single regime of liability, rather than fifty-one separate regimes, and because the ATS, unlike traditional tort law, only recognizes a small number of particularly egregious intentional torts—those committed in violation of the law of nations.").

[4]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("GC I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("GC II"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GC III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC IV").

large part in order to "enable [the United States] to invoke them for the protection of our nationals" in future conflicts.[5]

Since the Founding of the Republic, treaties and customary international law have been recognized as "part of" U.S. law. *The Paquette Habana*, 175 U.S. 677, 700 (1900); U.S. Const. art. VI, cl. 2. The Supreme Court has therefore repeatedly held that U.S. law should be construed in a manner consistent with the law of nations. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any possible construction remains."). And under that law, civilian contractors cannot be considered combatants; nor can they lawfully engage in "combatant activities." As explained below, in a theater of armed conflict, a civilian contractor cannot be transformed into a soldier.

The Third Geneva Convention sets out the humanitarian protections due to privileged combatants and other prisoners of war ("POWs"). Under Article 4 of the Third Convention, POW status is authorized for "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." GC III, art. 4(A)(1). Persons who are not members of a

[5]*Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955) (Statement of Secretary of State Dulles).

state's armed forces—*i.e.*, "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements," GC III, art. 4(A)(2)—may still be regarded as combatants entitled to POW status if they possess four well-established attributes of membership in a state's regular armed forces, *i.e.*, when they are "commanded by a person responsible for his subordinates," wear "a fixed distinctive sign recognizable at a distance," carry "arms openly" and conduct "operations in accordance with the laws and customs of war."

Civilian contractors, who lack these attributes, fall under GC III, Article 4(A)(4), which covers logistical support personnel accompanying armed forces. While all individuals described in GC III Article 4(A)(1)-(6) receive POW status, only those in GC III Article 4(A)(1)-(3) and (6) are considered combatants. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 50(1) ("AP I"). Those described in Articles 4(A)(4) and (5)—that is, contractors accompanying the military—thus remain civilians under the Geneva Conventions. *Id.*

The law of war not only sets out the precise—and binding—obligations of parties to an armed conflict. Of equal importance, these rules seek to foster broader humanitarian values and thus protect all persons, including U.S. soldiers, in a theater of war. Specifically, by privileging (*i.e.*, authorizing) certain kinds of behavior when

armed conflict occurs, the law of war creates incentives for such conflicts to be conducted humanely. That law recognizes that if conflict must occur, it should be undertaken only by soldiers of a regular state army or other specified militia members who themselves abide by the law of war and are subject to a responsible chain of command. *See* GC III, arts. 4(A)(1)-(3). Combatants (as defined by GC III) are permitted to engage in hostilities against other combatants and to utilize lethal force without fear of criminal prosecution for their acts, provided that they observe the law of war. *See* GC III, arts. 87, 99; AP I, art. 43(2). Further, lawful combatants who are captured are denominated POWs and are entitled to a host of additional legal and humanitarian protections not available to noncombatant civilians who engage in unprivileged belligerency. *See, e.g.*, GC III, Parts II-V.

In sum, consistent with this fundamental distinction in the law of war between combatants and civilians, the FTCA's immunity for "combatant activities of the military and naval forces," 28 U.S.C. § 2860(j), should not be interpreted to preempt tort claims against *civilian* contractors, nor to support the creation of an immunity for their activities.

B. In the U.S. Military's Expert Judgment, Civilian Contractors Should Not Be Treated as Combatants.

In accordance with the law of war, U.S. military regulations specifically establish a clear and meaningful distinction between combatants on the one hand and civilians on the other—a distinction that does not support CACI's attempt to

avail itself of derivative sovereign immunity. More specifically, Army regulations implementing law-of-war principles expressly recognize that "[c]ontractors and their employees are not combatants, but civilians" and specifically prohibit contractors from engaging in any activity that would "jeopardize" their status as civilians. U.S. Dep't of the Army, *Field Manual 3-100.21 (100-21): Contractors on the Battlefield*, ¶ 1-21 (Jan. 2003). Accordingly, CACI's own Statement of Work, consistent with this distinction, states clearly that "Contractors are considered non-combatants . . . ." JA at 1350 & JA 1394.

The military recognizes that by limiting combat to organized armies, the law of war promotes a vital system of command responsibility. *See, e.g.*, AP I, art. 43; *Land Warfare Manual*, ¶ 501. Specifically, the military chain of command exposes combatants to the sanctions of both international law and domestic military discipline, and ensures that military superiors are also held responsible by virtue of their command responsibility. *Id.* These enforceable disciplinary procedures, as well as training in the law of armed conflict, make it less likely that violations of the law of war will occur than if non-accountable persons engage in combatant activities. Military leaders like *Amici* recognize that maintaining systems of clear command structure and accountability are essential to the U.S. military's lawful, as well as effective, participation in any armed conflict. Likewise, military leaders like *Amici* firmly believe that fidelity to law-of-war principles furthers the United States'

commitment to humane treatment, and thereby ultimately preserves the hard-earned reputation and strength of this country's armed forces even as it promotes the safety of our military.

In attempting to invoke the "combatant activities" exception to the FTCA to cover civilian contractors, CACI thus ignores time-honored distinctions between combatants and civilians embodied in humanitarian law principles, as well as in the experienced judgment of the U.S. military. That attempt should be rejected.

C. U.S. And Military Law And Policy Clearly Prohibit The Torture, Cruel, Inhuman, And Degrading Treatment, And War Crimes Alleged In This Case.

Regardless of CACI's status as a non-combatant under the law of war, *Amici* emphasize that certain conduct is always unlawful—regardless of an entity's status. As this Court has explained, conduct "that was unlawful when committed is justiciable, irrespective of whether that conduct occurred under the actual control of the military." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 151 (4th Cir. 2016). *Amici* likewise agree with this Court's statement that "[t]he commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function committed to a coordinate branch of government." *Id.* at 159. Thus, even if CACI could somehow be considered equivalent to a combatant for purposes of the FTCA, it should not receive immunity for the plainly unlawful conduct alleged in this case, in which Plaintiffs allege that interrogators mistreated them by, *inter alia*: shackling

Plaintiffs in painful stress positions; subjecting them to isolation, sleep deprivation, and sensory deprivation; repeatedly beating and physically abusing them; subjecting them to hot and extreme cold temperatures, including by pouring cold water on them during winter while they were naked; employing military working dogs to threaten and bite them; sexually assaulting them; and subjecting them to a variety of abuses intended to humiliate and degrade them, particularly given the cultural norms associated with their religious beliefs. *See* Plaintiffs-Appellees's Brief at 4-5 (citing Joint Appendix).

In order to prevent the types of abuses alleged here, the U.S. Armed Forces have long promulgated, and adhered to, clear and mandatory standards for humane treatment of prisoners. The Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801, *et seq.*, and Field Manuals issued by the Armed Forces prohibit mistreatment of detainees. In particular, the UCMJ prohibits military personnel from committing acts of "cruelty toward, or oppression or maltreatment of any person subject to his orders," 10 U.S.C. § 893, including by extorting or threatening a detainee for information. *See* 10 U.S.C. §§ 927 & 934.

Moreover, Army Field Manual 27-10, *The Law of Land Warfare* (July 18, 1956) ("FM 27-10"), mandates that prisoners of war must "at all times be humanely treated . . . [and] protected, particularly against acts of violence or intimidation and against insults and public curiosity." *See* FM 27-10, art. 89. It prohibits use of

"physical or moral coercion" in obtaining information from prisoners of war or captured civilians. *Id*. at art. 270. Army Field Manual 34-52, *Intelligence Interrogation* (May 1987) ("FM 34-52"), in turn, identifies acceptable interrogation techniques; it clearly recognizes that all interrogation techniques are to be used "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. The Manual also makes clear that the Geneva Conventions and United States policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8, 1-12. In conjunction, these authorities, as well as their domestic law analogs—such as the Anti-Torture Statute, 18 U.S.C. §§ 2340-2340B, and the War Crimes Act, 18 U.S.C. § 2441—make pellucidly clear that mistreatment of detainees is prohibited. In sum, U.S. Armed Forces, through the UCMJ and Army Field Manuals, have long prohibited the plainly unlawful conduct at issue in this case, regardless of the status of the persons engaging in that conduct.

II. PRIVATE CIVILIAN CONTRACTORS LIKE CACI ARE NOT ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY FOR UNLAWFUL ACTIVITY, INCLUDING TORTURE.

Regardless of this Court's determination of whether the United States is entitled to the protection provided by the "combatant activities" exception and to sovereign immunity in this matter, CACI is not entitled to *derivative* sovereign

immunity. That is, even if the Court concludes that the actions of the U.S. Armed Forces fall under the "combatant activities" exception so that they are not actionable, the Court must determine whether the narrowly construed derivative sovereign immunity doctrine provides immunity to CACI. Thus, CACI would still not be entitled to derivative sovereign immunity because, unlike the military, it is not subject to any real form of accountability. For the reasons set forth below, as well as in Plaintiffs-Appellees's brief and in the District Court's decision, CACI is not entitled to derivative sovereign immunity.

As a general matter, the Supreme Court has emphasized that immunity "comes at a great cost." *Westfall v. Erwin*, 484 U.S. 292, 295 (1988), *superseded by statute on other grounds*, codified at 28 U.S.C. § 2679(d). If immunity is granted, "[a]n injured party with an otherwise meritorious tort claim is denied compensation," which "contravenes the basic tenet that individuals be held accountable for their wrongful conduct." *Westfall*, 484 U.S. at 295. Courts, including this one, have accordingly been "vigilant about tailoring the immunity of a private party to its perceived justification as they have been in tailoring the immunity of federal officers." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1345-46 (11th Cir. 2007); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 882 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016), *as revised* (Feb. 9, 2016) ("[I]mmunity must be extended with the utmost care."). In *Mangold v. Analytic Servs., Inc.*, for example,

this Court emphasized that private contractors are entitled to immunity "in the narrow circumstances where the public interest in efficient government outweighs the costs of granting such immunity." 77 F.3d 1442, 1447 (4th Cir. 1996), *cited in Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *see Austin Mun. Securities, Inc. v. NASD*, 757 F.2d 676, 687 (5th Cir. 1985) (holding that private companies charged with regulatory duties under the Exchange Act are entitled to immunity only "to the extent necessary to permit the proper functioning of the regulatory system").

Narrowly construing private contractor immunity is especially appropriate with regard to derivative sovereign immunity. "The concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940)." *Burn Pit Litig.*, 744 F.3d at 342. *Yearsley*, which did not use the term "derivative sovereign immunity," addressed the limited issue of "whether a private contractor could be held liable for damage resulting from a construction project that Congress authorized." *Id.* This Court has acknowledged that *Yearsley*'s holding was "quite narrow," and was applied only in circumstances where the wronged party had access to a remedy. *Id.* (noting that the Supreme Court "based its holding on the fact that the government had 'impliedly promised to pay [just] compensation [for any taking] and ha[d] afforded a remedy for its recovery.'" (quoting *Yearsley*, 309 U.S. at 21)).

Thus, "[u]nder the concept of derivative sovereign immunity . . . agents of the sovereign are also sometimes protected from liability for carrying out the sovereign's will." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 643 (4th Cir.), *cert. denied*, 139 S. Ct. 417 (2018). For example, "'government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.' That immunity, however, unlike the sovereign's, is not absolute." *Campbell-Ewald Co.*, 136 S. Ct. at 672 (citation omitted).[6]

This Court has explained that the purposes undergirding derivative sovereign immunity are similar to those that animate the doctrine of qualified immunity. *Burn Pit Litig.*, 744 F.3d at 344 (explaining that derivative sovereign immunity furthers the "same policy goals" as qualified immunity) (citing *Filarsky v. Delia*, 566 U.S. 377 (2012)). Of course, at its essence, qualified immunity, and thus derivative sovereign immunity, is about balancing the need for accountability with the need to shield actors from harassment, distraction, and liability when they perform their duties reasonably. *E.g., Smith v. Ray*, 781 F.3d 95, 100 (4th Cir. 2015) (quoting

[6]As Plaintiffs-Appellees argued, and the District Court recognized, derivative immunity, far from guaranteed, is not extended to government contractors who, like CACI, violate the law or the contract. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, WL*23 (E.D. Va. 2019) (citing *Campbell-Ewald Co.*, 136 S.Ct. at 672-74; Plaintiff's Opposition to CACI's Motion to Dismiss, ECF No. 1172).

Pearson v. Callahan, 555 U.S. 223, 231 (2009)). Thus, where other remedial mechanisms exist to assure accountability, and where actors are performing their lawful duties reasonably, the purposes of derivative sovereign immunity are met. *See Yearsley*, 309 U.S. at 21 (granting immunity where the government had impliedly promised to provide a remedy); *see also In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 567 (S.D.N.Y. 2006), *aff'd in part, appeal dismissed in part*, 521 F.3d 169 (2d Cir. 2008) ("Immunity provisions are to be interpreted narrowly. Our system of justice is premised on accountability, save for specific exceptions based on statute or fundamental common law principles of necessity." (citation omitted)). But where there is no means of accountability for unlawful conduct—here, torture—a party should therefore be denied derivative sovereign immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (noting that damage suits against officials deter unlawful conduct and vindicate the rights of victims of misconduct); *Tellier v. Fields*, 280 F.3d 69, 86 (2d Cir. 2000) ("This Court will not confer immunity on any official who glaringly disregards the very regulations that he or she is entrusted to discharge dutifully and in good faith.").

A. Unlike Private Civilian Contractors, Members of the U.S. Armed Forces Are Subject to a System of Discipline, Training, and Accountability Which Is at the Core of the Military Chain of Command.

CACI is not entitled to derivative sovereign immunity, then, because it is not answerable to the system of discipline, training, and accountability to which U.S.

Armed Forces are subject. Membership in the U.S. Armed Forces carries with it significant privileges but also heavy obligations, foremost among them respect for the military chain of command and for the law of war. These cornerstones of the modern American Armed Forces reflect a culture and tradition that demands rigorous training, discipline, and accountability. Private military contractors, by contrast, bear no sovereign responsibilities and have no comparable obligations. Indeed, CACI is instead governed by contract, motivated by profit and accountable only to shareholders. Lacking both the kind of accountability to which the military is subjected, as well as any need to shield CACI for engaging in acts of torture, *Smith*, 781 F.3d at 100, CACI is not entitled to derivative sovereign immunity.

More specifically, all members of the U.S. Armed Forces adhere to a strict chain of command. At the top of the chain is the constitutionally mandated—and long-standing tradition of—civilian control of the military. *See* U.S. Const. art. I, § 8 (congressional power to declare war); art. II, § 2 (President is "commander in chief" of the Army and Navy). At the lower end of the chain, soldiers are subject to an elaborate system of discipline and training which obligates them to follow the commands of superior officers upon pain of punishment or discharge. *See United States v. Brown*, 348 U.S. 110, 112 (1954) (recognizing the "peculiar and special relationship of the soldier to his superiors").

As the Supreme Court has recognized, the military imposes "overriding

demands of discipline and duty," *Burns v. Wilson*, 346 U.S. 137, 140 (1953), which become especially "imperative in combat," *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). Over the centuries, a unique "hierarchical structure of discipline and obedience to command . . . wholly different from civilian patterns" has developed, which ensures that combatant activities are performed in accordance with the necessities of the battlefield and the law of war. *Id.* ("The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection.").

Thus, soldiers who disobey orders, unlike civilian contractors (even those who are on the battlefield), are routinely subject to discipline and punishment under the UCMJ, art. 90, 10 U.S.C. § 890. Thus, for example, eleven of the soldiers involved in the torture of prisoners at Abu Ghraib have been convicted by courts-martial for offenses ranging from dereliction of duty to assault. 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 for mistreating prisoners. Eric Schmitt, *Iraq Abuse Trial is Again Limited to Lower Ranks*, N.Y. Times, Mar. 23, 2006, https://nyti.ms/2H34j9w. Moreover, the military has

sanctioned officers administratively, by reassignment or even demotion. *Id*. Significantly, however, the military cannot exercise the same authority over CACI's employees.

For example, following revelations of abuse at Abu Ghraib, the military assigned an officer at the rank of Major General, who reported directly to the Commander of Multinational Forces in Iraq, to direct detention and interrogation operations. *See* U.N. Comm. Against Torture, *Second Periodic Reports of the States Parties Due in 1999: United States of America*, at 80, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005). The military has also increased training requirements for intelligence units,[7] commissioned reports by high-level military officials to investigate and document individual and systematic errors made by the military,[8] and applied administrative sanctions to some of those with command responsibility.[9] In short,

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[7]*See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1092, 118 Stat. 2069 (2004).

[8]*See generally* Major General Antonio M. Taguba, *Army Regulation 15-6 Investigation of the 800th Military Police Brigade* (2004); Major General George R. Fay, *Army Regulation 5-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (2004).

[9]Even the military's critics concede that administrative sanctions carry great weight within the professional officer corps. For example, Lt. Gen. Ricardo Sanchez, who was ultimately responsible for Abu Ghraib, "was never forwarded for assignments which would require a promotion. . . . [T]he military quietly ended his military career[, a sanction] in the ethic of the professional officer corps . . . typically seen as quite severe." Victor Hansen, *Creating and Improving Legal Incentives for Law of War Compliance*, 42 New Eng. L. Rev. 247, 258 (2008); *see also* Laura A.

consistent with its status as a politically and legally accountable government entity, the military has taken meaningful measures to prevent the recurrence of the abuses at Abu Ghraib.

Just as important to the proper functioning of the military chain of command is the duty that commanders owe to subordinates, "the legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit." U.S. Dep't of the Army, *Field Manual 101-5*: *Staff Organization and Operations*, 1-1 (May 31, 1997). Because this doctrine of command responsibility mandates that commanders have an affirmative duty to prevent the commission of war crimes, they can be court-martialed in dereliction of duty for failure to do so. *See* 10 U.S.C. § 892.

CACI, like other private military contractors, is by contrast not a part of the military chain of command, nor is it subject to "military command authority" in any meaningful sense. Military commanders can only direct the activities of contractor companies to the extent provided by the contract, which cannot be altered or augmented by "rank-and-file military" regardless of the imperatives of the battlefield. *See Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 432 (4th Cir. 2011)

Dickinson, *Torture and Contract*, 37 Case W. Res. J. Int'l L. 267, 274 (2006) ("[W]ithin the military . . . demotion and firing are sanctions that are very strongly felt.").

(King, J., dissenting), *majority opinion vacated*, 679 F.3d 205 (4th Cir. 2012) (en banc). Indeed, the Army Field Manual itself states that "[c]ommanders do not have direct control over contractors or their employees . . .; only contractors manage, supervise, and give directions to their employees." U.S. Dep't of the Army, Field Manual 3–100.21, Contractors on the Battlefield § 1–22 (2003). And consistent with commanders' lack of control, contractors must adhere to their contractual obligations without regard to the military's chain of command. Accordingly, the Army Field Manual emphasizes that "the terms and conditions of the contract establish the relationship between the military (U.S. Government) and the contractor . . . Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract." *Id.* at 3–100.21, § 1–25. The military thus recognizes that employees of private military contractors are not subject to military discipline and "[c]ommanders have no penal authority to compel contractor personnel to perform their duties." *Id.*, ¶ 4-45; *see also* Joint Chiefs of Staff, *Joint Publication 4-0: Doctrine for Logistic Support of Joint Operations*, V-8 (2000) ("Contract employees are disciplined by the contractor.").

Because employees of contractors owe no duty to a military commander comparable to that of a soldier, contractor employees may contravene or ignore a military officer's orders. *See Al Shimari*, 658 F.3d at 432 n.5 (King, J., dissenting) ("[T]he government has 'no more control than any contracting party has over its

counterparty. And that—without more—is not enough to make the conduct of a contractor 'the combatant activities of the military or naval forces.'" (citations and quotations omitted)); *see* LoBue Decl. Ex. 33 at CACI 0005, ¶ 5 (ECF No. 1090-1) (noting that CACI "is responsible for providing supervision for all contractor personnel"); LoBue Decl. Ex. 40 at 1-7 (ECF No. 1086-17) ("Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders 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."). Instead, a private military contractor owes a duty of care not to the government, but—like any private enterprise—to its shareholders. But neither the employees' contractual duty to the corporation, nor the directors' obligations to shareholders are an adequate substitute for military training and accountability. *See also* David Isenberg, Cato Institute (via DefenseNews.com) June 29, 2009, https://bit.ly/2HeWGxR (noting "[t]he grim, continuing story of just how bad oversight and accountability are in the world of private military contracting"). CACI's claim that its employees "reported to the military chain of command for all operational matters" and "were subject to the operational control of the U.S. military," CACI Brief at 9 (quotation and citation omitted), thus misapprehends the fundamental legal difference between contractual obligations and command

responsibility, and correspondingly, between civilian and combatant status. It is the military chain of command, enforced through legitimate and binding military discipline, which ensures that our soldiers obtain the privileges of genuine combatant status under the law of war and the necessities of the battlefield. *See supra* Section I. Being subject to this system of military accountability likewise entitles members of the military to immunity from a system of civilian liability for "combatant activities" during "time of war." 28 U.S.C. § 2680(j). Indeed, insistence upon these high standards and the accountability that follows is what distinguishes our fighting forces from mercenaries or unlawful combatants and is what gives our soldiers moral and legal license to take human life on this country's behalf.

In view of this unique system of training, responsibility, and justice, it makes sense that U.S. Armed Forces may be held to possess sovereign immunity. CACI, in contrast, will not be held accountable for its actions absent tort liability, and thus is not entitled to derivative sovereign immunity.

B. Exempting Civilian Contractors from Liability Provides Corporate Actors Unwarranted Impunity for Unlawful Activity, Including Torture.

Unlike U.S. Armed Forces, who, as explained above, adhere to a strict chain of command, participate in an elaborate system of discipline, training, and, critically, accountability, no meaningful mechanism exists to deter CACI's unlawful behavior. This lack of accountability, even for torture, militates against according derivative

sovereign immunity to CACI.

This is because, absent traditional tort liability, no meaningful mechanism exists to hold accountable those who engage in patently unlawful conduct or to deter private military contractors from abusing prisoners in the future. Without the coercive effect of tort liability, corporations may simply shift responsibility to individual employees and claim that they have fulfilled their legal obligations by firing them.[10] And the reputational harm that might be visited upon a corporate entity for widespread misconduct may be largely avoided by as simple a maneuver as a name change.[11] Indeed, Retired Marine Lieutenant Colonel Mike Zacchea

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[10]The comments of former Blackwater CEO Erik Prince offer an illustrative example. In response to questions from Congresswoman Carolyn Maloney regarding an employee who shot and killed an Iraqi in the Green Zone while drunk, Prince answered, "He didn't have a job with us anymore. We, as a private company, cannot detain him. We can fire, we can fine, but we can't do anything else." *Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform,* 110th Cong. 59 (2007) (statement of Erik Prince, Chairman, the Prince Group, LLC and Blackwater USA).

[11]*See Blackwater Changes Its Name to Xe*, N.Y. Times, Feb. 13, 2009, https://nyti.ms/2VkWy3A (Blackwater Worldwide "abandon[ed] the brand name that has been tarnished by its work in Iraq, settling on Xe . . . as the new name for its family of two dozen businesses"); Nathan Hodge, *Company Once Known as Blackwater Ditches Xe for Yet Another New Name*, Wall St. J., Dec. 12, 2011, https://on.wsj.com/2JwIt0G ("Xe plans to unveil a new name—Academi—and new logo. . . . [CEO Ted] Wright said Academi will try to be more 'boring.'"); Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, N.Y. Times, Jun. 5, 2005, https://nyti.ms/30gYiii (reporting that the Titan Corporation was acquired by L-3 Communications and now operates under the "L-3" moniker).

reiterated these concerns when he said of contractors, "[T]hese guys are free agents on the battlefield. They're not bound by any law. . . . No one keeps track of them." Deborah Hastings, *Iraq Contractors Accused in Shootings*, Wash. Post, Aug. 11, 2007. Retired Army Colonel Teddy Spain also complained, "My main concern was their lack of accountability when things went wrong." Sudrasan Ragahavan & Thomas E. Ricks, *Private Security Put Diplomats, Military at Odds*, Wash. Post, Sept. 26, 2007, https://wapo.st/2HfyzPN; *see also* David Isenberg, Cato Institute (via DefenseNews.com) June 29, 2009, https://bit.ly/2HeWGxR (describing "[t]he grim, continuing story of just how bad oversight and accountability are in the world of private military contracting").

In the absence of effective forms of military justice, training and discipline, tort liability provides a critical mechanism to ensure that a corporation's employees do not engage in abusive or unlawful treatment of "innocent third parties" to whom they owe a duty of care. *See* W. Paige Keeton, *et al.*, *Prosser and Keeton on Torts* § 4, at 25 (5th ed. 1984) (stating that in the field of torts, "[t]he 'prophylactic' factor of preventing future harm" has been an important consideration for courts, which recognizes that when "defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm"); Guido Calabresi, *The Cost of Accidents* 26-29, 95-129 (1970) (observing that tort liability forces corporations to internalize costs of employees' unlawful behavior and thus provides

economic incentive to observe its duties in the future). It follows that according such employees the immunity that CACI seeks here undermines that mechanism, removing this disincentive to inappropriate conduct.

Indeed, providing for such immunity here is particularly inappropriate given that the Defense Department explicitly warned contractors that they would be subject to traditional liability rules for their misconduct and would not be protected by the sovereign immunity accorded to government officials by U.S. Courts. Specifically, the Department advised 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." Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces (DFARS Case 2005–D013), 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008) (emphasis added) (codified at 48 C.F.R. § 252.225-7040(b)(3)(iii)). Recognizing the adverse consequences of immunizing civilian contractors from tort liability, the Defense Department has taken the position that governmental immunity should not result in "courts . . . shift[ing] the risk of loss to innocent third parties" when contractors cause injuries. *Id.* at 16,768. Certainly, then, neither CACI nor its employees could have reasonably anticipated that they would be shielded from liability. *See Filarsky*, 566 U.S. at 391-92 (immunity is inappropriate where actors can "reasonably anticipate when their conduct may give

rise to liability for damages") (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)).

Moreover, the criminal sanctions contained in the UCMJ certainly do not apply to the conduct of the contractors in these cases. And, while the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. § 3261, *et seq*., provides for the criminal prosecution in certain circumstances of civilians serving abroad, it has never been used by U.S. prosecutors to address the grave abuses committed by contractors at Abu Ghraib. *See* Lieutenant General Anthony R. Jones, *Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, at 130-134 (2004). Indeed, while MEJA has been utilized in a handful of successful prosecutions outside the context of the Abu Ghraib scandal, there remain significant jurisdictional and substantive limitations to its use against contractors. *See* Jennifer K. Elsea, Cong. Research Serv., *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, R40991, at 22-24 (Jan. 17, 2010), http://www.fas.org/sgp/crs/natsec/R40991.pdf (noting groups of persons who are not covered by the statute and jurisdictional challenges made against the statute's application); *see also* Frederick Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 Hou. J. Int'l L. 579, 596-97, 603 (2005). Given the statute's onerous requirements for commencing an investigation, broad prosecutorial discretion, and other practical

obstacles to prosecution, MEJA provides limited deterrence. *See* Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Abroad*, 38 Pub. Cont. L.J. 509, 534-36 (2009).

In these circumstances, extending sovereign immunity to private military contractors would not only misapprehend the unique obligations of U.S. military service, but would also sanction a troubling—and anomalous—lack of accountability for egregious misconduct undertaken by civilian actors. Because this Court should narrowly construe the doctrine of derivative sovereign immunity, and because the purposes of that doctrine are not advanced here—given that CACI, in contrast to U.S. Armed Forces, is not subject to meaningful accountability—the Court should reject's CACI's argument for derivative sovereign immunity.

CONCLUSION

Based upon their unique expertise, *Amici Curiae* Retired Military Officers respectfully urge the Court to hold that CACI is not entitled to the protections of the "combatant activities" exception to the FTCA. And CACI is also not entitled to derivative sovereign immunity. Accordingly, the Court should affirm the decision of the District Court.

May 21, 2019

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Appendix 1: List of Signatories

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, including a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he retired. An attorney, he is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association.

Rear Admiral Donald J. Guter was a line officer in the U.S. Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter is now President and Dean of South Texas College of Law in Houston, Texas.

Brigadier General David R. Irvine, USA (Ret.), enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for eighteen years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th

Regional Readiness Command. General Irvine is an attorney, and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

Vice Admiral Lee Gunn, U.S. Navy (Retired) served as a surface line officer for 35 years. He began as a destroyer division officer and department head during the Vietnam conflict, was second-in-command and commanding officer of frigates, commanded Destroyer Squadron 31 and, finally, at sea, commanded the Third Fleet Amphibious Force. Ashore, Gunn served in a succession of manpower, personnel and training assignments, culminating in command of the Navy Personnel Command. Gunn's final uniformed assignment was as The Inspector General of the Department of the Navy, with authority over the Navy and Marine Corps.

Alberto Mora served as the General Counsel of the Department of the Navy during the period from 2001 to 2006. As the chief legal officer for both the Navy and Marine Corps, he managed more than 640 attorneys and personnel across 146 offices throughout the United States and overseas and oversaw the Navy's Judge Advocate General Corps and the Marine Corps Staff Judge Advocates. Currently, he is a Senior Fellow at the Harvard Kennedy School of Government's Carr Center for Human Rights Policy, where he teaches and conducts research on issues related to human rights, foreign policy, and national security strategy.

Charles P. Otstott, Lieutenant General, US Army (Ret) served for 32 years before retirement from the Army. A West Point graduate in the Class of 1960, he served in the infantry and commanded at every level from platoon to division. He served two one-year tours in Vietnam in combat. As a company commander there, he had a number of opportunities to insure the laws or armed conflict were adhered to by troops under his command. His last command assignment was the Commanding General of the 25th Infantry Division (Light) in Hawaii during the period 1988-90. His final assignment in the Army was as Deputy Chairman of the NATO Military Committee. After retiring from the Army, he worked with other retired flag officers and Human Rights First to insure the proper treatment of detainees on the battlefield following the disclosure of torture and mistreatment at Abu Ghraib.

Brigadier General Leif H. Hendrickson, USMC (Ret.), served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine Corps University and as Commanding General, Education Command. General Hendrickson amassed over 5,000 flight hours. His personal decorations include the Distinguished Service Medal, Defense Superior Service Medal, Defense Meritorious Service Medal, Meritorious Service Medal with two gold stars, Air Medal and the Joint Staff Badge.

Major General Michael R. Lehnert, USMC (Ret.), served as Commanding

General, Marine Corps Installations West and graduated from Central Michigan University with an undergraduate degree in History, the U.S. Army Advanced Engineer School at Fort Belvoir, Virginia, the Armed Forces Staff College, and the Naval War College. He has served as commander of Joint Task Group Bulkeley (JTF 160) at Guantanamo Bay, Marine Wing Support Group 27 at Cherry Point, North Carolina, and Joint Task Force 160 at Guantanamo Bay. During this tour, JTF 160 constructed and operated the detention facilities for Taliban and Al Qaeda detainees. General Lehnert subsequently served as Commander, Marine Logistics Command for Operation Iraqi Freedom, and was assigned as Chief of Staff, U.S. Southern Command, followed by command of Marine Corps Base Camp Pendleton, and Marine Corps Installations West.

Brigadier General Murray G. Sagsveen, USA (Ret.), entered the U.S. Army in 1968, with initial service in the Republic of Korea. He later joined the North Dakota Army National Guard, where his assignments included Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, and Army National Guard Special Assistant to the Judge Advocate General of the Army (the senior judge advocate position in the Army National Guard).

CERTIFICATIONS

1. Certification of Word Count and Typeface Requirements

I hereby certify that this brief complies with the type and volume limitations of Fed. R. App. P. 28.1(e)(2), 29(d) and 32(a)(7)(B) because, according to the word-count feature of Microsoft Office Word 2016, this brief contains 6,204 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using a proportionally spaced serif typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

2. Certification of Service

I hereby certify that I have this day caused a true and correct copy of the foregoing brief to be served upon counsel of record for all parties through the Court's CM/ECF System.

Dated: May 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2019, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record. I also mailed seven (7) courtesy copies to the Court.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(party name)

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