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

SUHAIL NAJIM ABDULLAH AL SHIMARI, ASA'AD HAMZA HANFOOSH AL-ZUBA'E, and HASAN NSAIF JASIM AL-EJAILI, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	No. 1:08-cv-0827 LMB-JFA **PUBLIC VERSION**
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	

THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

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I. INTRODUCTION

After nearly ten years of litigation, Plaintiffs admit that "CACI interrogators [never] laid a hand on them."[1] This Court formalized this shift in Plaintiffs' theory and dismissed Plaintiffs' direct counts (Counts I, IV, and VII), holding that Plaintiffs' allegations of direct "contact" with CACI PT[2] personnel "are insufficiently plausibl[e] to establish CACI's direct liability."[3] Nevertheless, the Court allowed Plaintiffs' conspiracy and aiding and abetting claims to proceed, holding that CACI PT could be held liable for mistreatment inflicted on Plaintiffs by soldiers. Dkt. #679 at 38-45. The Court even went so far to hold that CACI PT could be held liable for mistreatment of Plaintiffs by soldiers that was unbeknownst to CACI PT and its employees, if a CACI PT employee, also unbeknownst to CACI PT, had entered into a conspiracy with the perpetrating soldiers. *Id.* at 42-43. Moreover, the Court's motion to dismiss ruling rejected CACI PT's argument that general conditions of detention adopted at the highest levels of the United States government could not form the basis of claims against CACI PT. *Id.* at 31-32 (holding that forced nudity, sleep management, dietary management, use of stress positions, and other generally-approved conditions of detention could constitute torture or war crimes).

The question posed by the United States' motion to dismiss is whether CACI PT can be held liable for torture or war crimes committed by soldiers, and/or approved by high-level Executive Branch officials, while the United States, which employed, deployed, and commanded

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[1] *See* 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); *see also* Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting"); *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability.").

[2] "CACI PT" refers to Defendant/Third-Party Plaintiff CACI Premier Technology, Inc.

[3] Dkt. #679 at 37-38.

the soldiers in Iraq, is relieved of liability. No reasonable application of law leaves CACI PT, but not the United States, as a source of liability in such circumstances.

Predictably, the United States asserts that it is immune from liability.[4] It starts with the assumption that Plaintiffs are "jurisdictionally barred" from bringing suit against the United States. U.S. Mem. at 1. Ordinarily, CACI PT would agree that the United States is immune from suit for Plaintiffs' claims of battlefield injuries, but CACI PT must take this case as it finds it. If CACI PT can be held in this case to answer for torture and war crimes committed by soldiers or Executive Branch officials, even where neither CACI PT nor any of its employees knew particular mistreatment was occurring, the same result must apply to the United States. If torture and war crimes are sufficiently egregious that they justify a special set of legal rules applicable to CACI PT, those same rules must apply to the United States.

II. BACKGROUND

A. Factual Background

Plaintiffs are Iraqis who were detained by the U.S. military at Abu Ghraib prison during the Iraq War. Third-Party Complaint ("TPC") at ¶ 23. Plaintiffs allege that they were mistreated during their detention, but seek no recovery from the United States or any soldiers. Instead, they have sued CACI PT, a contractor that provided interrogators at Abu Ghraib prison. Plaintiffs' Third Amended Complaint ("TAC") does not allege a single instance in which a CACI PT employee mistreated Plaintiffs. TPC ¶ 24. Accordingly, the Court dismissed Plaintiffs' direct-liability claims against CACI PT. Dkt. #679 at 37-38. Plaintiffs now proceed against CACI PT solely on claims of conspiracy with and aiding and abetting U.S. military personnel.

[4] The United States did not move to dismiss any of the claims against the John Doe third-party defendants. CACI PT is seeking discovery to identify and serve the John Does.

As alleged in the TPC, a number of Plaintiffs' allegations of abuse by soldiers, which the Court has allowed to proceed as claims of torture, war crimes, or cruel, unusual, and degrading treatment ("CIDT") involve general conditions of detention established by the military chain of command at Abu Ghraib or interrogation techniques adopted and approved by the U.S. military. These include:

- Forced nudity
- Implementation of sleep management by handcuffing detainees to the bars of their cells
- Cold temperatures in the hard site cells
- Forced grooming and bathing
- Capitalization on religious or cultural sensitivities
- Removal or denial of religious items
- Significantly increasing the fear level in a detainee
- Use of a "Mutt and Jeff" routine where one interrogator is friendly and another interrogator is harsh.
- Dietary manipulation
- Environmental manipulation
- Sleep adjustment and management
- Isolation
- Sensory deprivation
- Use of military working dogs to unsettle a detainee during interrogations
- Yelling, loud music, and light control
- Use of stress positions

TPC ¶¶ 27-28.

Plaintiffs also seek recovery from CACI PT for alleged mistreatment that occurred during the intake process at Abu Ghraib prison, before Plaintiffs were designated as having intelligence

value and housed at the hard site so that an interrogator could be assigned. By way of example, Plaintiff Al-Zuba'e alleged in his deposition that he was forced to disrobe and subjected to unwanted sexual contact and other demeaning treatment during intake at Abu Ghraib prison, before he ever reached the hard site or was interrogated by anyone. TPC ¶ 29. In addition, Plaintiffs seek to hold CACI PT liable for assaults allegedly committed by soldiers that appear to have no connection to interrogation operations or the interrogation mission. TPC ¶ 30.

The dismissal of Plaintiffs' direct-liability claims was necessary given Plaintiffs' admitted lack of allegations or evidence connecting any Plaintiff with a CACI PT interrogator and the substantial evidence that military police committed the abuse associated with Abu Ghraib. Since word of the detainee abuse scandal first broke, it has been clear that U.S. military personnel were the source of the misconduct. The U.S. military commissioned numerous investigatory reports related to the interrogation and detention of persons at Abu Ghraib. As a result of these investigations, the government instituted court-martial proceedings against offending military personnel. *Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009). Conversely, no CACI PT interrogators were ever charged with any wrongdoing. *Id.* Indeed, one government investigation found "very few instances of abuse involving contractors" and concluded that intelligence contractors—such as the interrogators provided by CACI PT—complied with DoD policy, operated under government command and control, and provided a satisfactory level of experience. *See* Review of Department of Defense Detention Operations and Detainee Interrogation Techniques by Vice Admiral Albert Church, III at 17 (Ex. 1).[5]

The acts and omissions giving rise to the Abu Ghraib scandal, however, were not limited to the military personnel on the ground. As the Senate Committee on Armed Services

[5] All exhibit citations are to the exhibits filed with the accompanying Declaration of Linda C. Bailey.

determined, culpability for the mistreatment of detainees at Abu Ghraib and other locations extended up to the highest ranks of the U.S. government. S. Comm. on Armed Servs., 110th Cong., Rep. on Inquiry Into the Treatment of Detainees in U.S. Custody (Comm. Print 2008) ("Senate Rep.") (Ex. 2). The Committee concluded:

> The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.

Id. at xii. On December 2, 2002, Secretary of Defense Donald Rumsfeld approved fifteen interrogation techniques for use at Guantanamo Bay, which were subsequently exported to Abu Ghraib, including "stress positions, removal of clothing, use of phobias (such as fear of dogs), and deprivation of light and auditory stimuli." *Id.* at xix, xxiii. Secretary Rumsfeld rescinded these techniques weeks later, but the initial approval continued to influence interrogation policies. *Id.* at xxii. It became standard operating procedure in Iraq to use "techniques such as yelling, loud music, and light control, environmental manipulation, sleep deprivation/adjustment, stress positions, 20-hour interrogations, and controlled fear (muzzled dogs)." *Id.* at xxiii, xxix. The interrogation policy for Abu Ghraib containing these techniques was issued in September 2003 and superseded in October 2003. *Id.* at xxix. The new policy, however, contained serious ambiguities regarding some of the aggressive interrogation techniques and led to confusion regarding which techniques—for example the use of dogs—were permissible. *Id.*[6] The Committee determined that the use of these policies and procedures in Iraq "were a direct cause

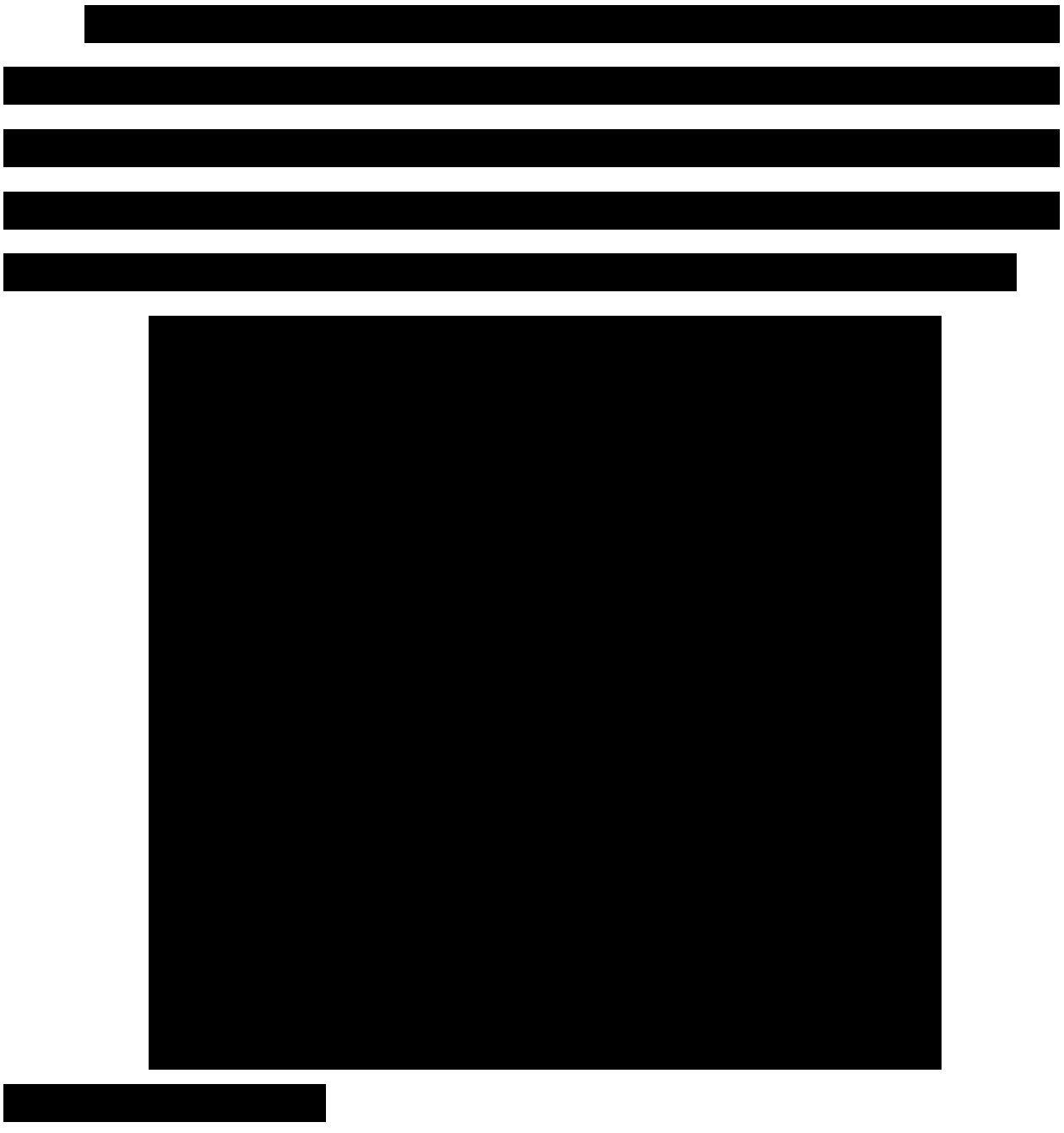
[6] The superseding interrogation policy mirrored the 1987 version of FM-34-52, "which authorized interrogators to control all aspects of interrogation to include light, heating, food, clothing and shelter given to detainees." The Hon. James R. Schlesinger et al., Final Report of the Independent Panel to Review DoD Detention Operations 68 (Aug. 2004) ("Schlesinger Rep.") (Ex. 3).

of detainee abuse and influenced interrogation policies at Abu Ghraib." *Id.* at xxviii-xxix. The techniques and policies approved by Secretary Rumsfeld as well as "senior military and civilian officials" encouraged and incentivized detainee abuse at Abu Ghraib prison. *Id.* at xxix.

CACI PT had nothing to do with the establishment of detention conditions or interrogation policies at Abu Ghraib. Indeed, the general conditions of detention at Abu Ghraib prison were established by the U.S. military before CACI PT personnel ever arrived on the scene. The first CACI PT interrogators arrived in Iraq on September 28, 2003. Ex. 4. By that time, detainees at Abu Ghraib prison were already being kept naked or nearly naked; were being required to wear women's underwear; were being subjected to stress positions; were being handcuffed to the bars of their cells; were being subjected to dietary restrictions; and were being subjected to environmental manipulation. Frederick Dep. at 194-95 (Ex. 5).

The U.S. military, on the other hand, had exclusive control over detention and interrogation operations at Abu Ghraib prison. Pappas Decl. ¶ 10 ("The military decided where each detainee would be incarcerated within Abu Ghraib prison, which detainees would be interrogated, and who would conduct the interrogations of a given detainee.") (Ex. 6); Porvaznik Decl. ¶ 13 (providing similar testimony) (Ex. 7). For example, the U.S. military provided the sole operational chain of command for both military and civilian interrogators at Abu Ghraib prison and directed the conduct of all interrogations. This was confirmed by Colonel Thomas Pappas, Commanding Officer of the military intelligence brigade at Abu Ghraib prison; Colonel William Brady, the contracting officer overseeing CACI PT's work; and Major Carolyn Holmes, the Officer in Charge of the Interrogation Control Element at Abu Ghraib prison. *See* Holmes Dep. at 28-29 (Ex. 8); Brady Decl. ¶¶ 4-5 (Ex. 9); Pappas Decl. ¶ 8-9 (Ex. 6); *see also* Pappas Decl. Ex. 1 (organizational chart showing that interrogators, whether military or civilian,

reported to a U.S. Army sergeant section chief, and then to the military intelligence leadership in the ICE); TPC ¶¶ 18-21 (detailing the United States military chain of command's exclusive control over all aspects of operations at Abu Ghraib prison, including the United States military's plenary operational control over CACI PT interrogators).



With respect to detention operations, the U.S. military's performance was, by all accounts, deficient. Abu Ghraib prison was understaffed for the prisoner population assigned to the facility over time, the MPs did not receive adequate training and supervision, and the documentation of permissible tactics, techniques and procedures was incomplete and ambiguous. *See, e.g.*, Schlesinger Rep. at 10-11, 55, 60. In fairness, CACI PT notes that Abu Ghraib prison was located in a war zone during significant insurgent activity, which included regular mortar attacks on the prison itself.

B. Procedural Background

Since this case's inception in 2008, it has endured a lengthy and meandering procedural history, including several district judges and multiple trips to the Fourth Circuit, a recitation of which is unnecessary here. Two of the Fourth Circuit's decisions, however, are significant to the Court's analysis of the government's motion to dismiss: *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*") and *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016) ("*Al Shimari IV*").[7]

In *Al Shimari III*, the Fourth Circuit considered whether the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), holding the ATS does not apply to extraterritorial conduct, barred Plaintiffs' claims in this case and, at least at the motion to dismiss stage, concluded it does not. According to the Fourth Circuit, Plaintiffs' allegations "'touch and concern' the territory of the United States with sufficient force" to permit jurisdiction under the ATS. *Al Shimari III*, 758 F.3d at 520. The Fourth Circuit based this conclusion on:

[7] The United States cites CACI PT's memoranda and briefs as well as commentary from Judge Wilkinson's *en banc* dissent as though they govern this case. *See, e.g.*, U.S. Mem. at 7, 8, 10, 17. CACI PT shares the government's belief that its arguments were correct and that Judge Wilkinson's analysis was both sound and prescient. Alas, neither CACI PT nor the dissent won the day and now—much like CACI PT—the government must live with law of the case as it exists.

> (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.

Id. at 530-31. The Fourth Circuit noted that CACI PT's corporate headquarters is located in Virginia and cited various allegations implicating the corporation's domestic conduct, for example: an alleged failure to hire suitable interrogators, an alleged failure to supervise employees, allegedly ignoring reports of abuse and denying and allegedly attempting to cover up misconduct. *Id.* at 521-22; *see also id.* at 528.

In *Al Shimari IV*, the Fourth Circuit reviewed this Court's determination that the political question doctrine rendered Plaintiffs' claims against CACI PT nonjusticiable. *Al Shimari IV*, 840 F.3d at 151. The appellate court did not decide the justiciability of Plaintiffs' claims, but instead remanded the issue after clarifying the standard announced in *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011) (cases are nonjusticiable if (1) a contractor operates under the direct control of the military and (2) the case would require inquiry into sensitive military judgments), for making such a determination. In doing so, the court created an additional consideration that it held applies to both prongs of the analysis: whether the conduct at issue was unlawful. *Id.* at 157, 158. The Fourth Circuit highlighted the concern that courts should not evaluate the "discretionary operational decisions made by, or at the direction of, the military on the battlefield." *Id.* at 155. The court, however, concluded that "the military cannot

lawfully exercise its authority by directing a contractor to engage in unlawful activity." *Id.* at 157. It further held that "[t]he commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function" committed to the Executive Branch. *Id.* at 158. Therefore, to the extent conduct is found to be unlawful, it "fall[s] outside the protection of the political question doctrine." *Id.*

III. ANALYSIS

A. Applicable Legal Standards

The United States' assertion of sovereign immunity challenges the subject matter jurisdiction of this Court. 28 U.S.C. § 1346(b)(1). On a motion to dismiss for lack of subject matter jurisdiction, the Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014). A court considering a subject matter jurisdiction challenge acts as finder of fact for purposes of the motion and resolves any evidentiary disputes. *Id.* (citing *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). That said, this Court has expressly held in this case that subject matter jurisdiction can be established, at least for purposes of defeating a motion to dismiss, through considerations of the plaintiff's allegations in its complaint. Dkt. #620 at 1-2. As addressed below, the allegations in CACI PT's TPC sufficiently state facts establishing subject matter jurisdiction, and CACI PT's allegations are sufficiently established by the evidence supported in connection with this Opposition.

On a Rule 12(b)(6) motion, the Court must accept CACI PT's well-pleaded and plausible allegations as true, and may grant the United States' motion only if CACI PT's well-pleaded allegations, if true, would not support liability on the United States' part. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. The Court Cannot Dismiss CACI PT's Tort Claims on Immunity Grounds While Simultaneously Subjecting CACI PT to Plaintiffs' Suit

The United States makes several arguments as to why it believe immunity shields it from suit for claims of torture, CIDT, and war crimes committed by soldiers while performing their duties in a combat-zone detention facility. And, to be clear, this case is *entirely* about identifying entities that may be held liable for torture, CIDT, and war crimes committed by soldiers, as Plaintiffs have now abandoned any claim that they were mistreated by any CACI PT employee. Before reaching the United States' specific arguments, there are two threshold legal issues that the Court must confront: (1) whether the Court can justify holding the United States immune from suit in this case while denying the same immunity to CACI PT; and (2) whether the United States successfully may assert immunity from suit for *jus cogens* violations by its own soldiers.

1. The United States' Immunity Is Coextensive With CACI PT's Immunity So Long As CACI PT Personnel Were Acting Within the Scope of Their Employment and the Benefits of Immunity Outweigh Its Costs

CACI PT recognizes that the issue of *CACI PT's* entitlement to immunity is not before the Court on the present motion. Nevertheless, we note that this Court previously denied a motion to dismiss asserted by CACI PT on immunity grounds. Dkt. #94 at 26-40.[8] While the Court has indicated that the parties should not assume that district court orders issued in this case prior to the 2016 remand will continue to be followed,[9] the current state of affairs is that CACI PT has been denied immunity. Over the past decade, this case has changed to one involving allegations of abuse committed exclusively by soldiers, with the Court left to decide who can be

[8] The Court's denial of CACI PT's motion to dismiss was reversed by a panel of the Fourth Circuit on other grounds, *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413, 420 (4th Cir. 2011), although the Fourth Circuit ultimately held on *en banc* rehearing that it lacked appellate jurisdiction. *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205 (4th Cir. 2012).

[9] 4/28/17 Tr. at 9-10 ("[Y]ou're with a new judge now, and with all due respect to my colleague, I mean, I'm treating this case pretty much as it's starting with me, all right?").

held liable for any proven abuse. The law has changed as well. Under the circumstances, the correct answer cannot be "CACI PT can be held liable but the United States is immune."

In *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), the Supreme Court held that a contractor was entitled to derivative immunity, noting that "it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. The Fourth Circuit has held similarly:

> If absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions.

Mangold v. Analytic Svcs., Inc., 77 F.3d 1442, 1447-48 (4th Cir. 1996).

Indeed, the Fourth Circuit, in the related area of derivative foreign sovereign immunity, described *Mangold* as extending immunity to delegated "governmental functions" for which the United States is itself absolutely immune, and held that a contractor was entitled to immunity based on acts performed for the sovereign if the sovereign itself would be immune from suit. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (quoting *Mangold*, 77 F.3d at 1448)).

Accordingly, the rule in this Circuit is that a contractor is entitled to immunity if it is performing a governmental function for which absolute immunity is available to federal officials or a sovereign government, the contractor was acting within the scope of its employment, and the benefits of immunity outweigh its costs. *Id.* at 1446-47 (citing *Barr v. Matteo*, 360 U.S. 564, 569-73 (1959) (plurality opinion), and *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)).

This Court has already held that CACI PT "interrogators' actions were undeniably related to and within the scope of their employment." Dkt. #679 at 42. With respect to the benefits and

costs of immunity, the Fourth Circuit was clear in *Mangold* that they are to be determined based on "the nature of the function being performed," *id.* at 1447, not by the nature of the alleged misconduct. The Fourth Circuit recognizes the benefits of extending immunity to contractors:

> Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions. This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.
>
> As a result, courts have extended derivative immunity to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions.

Butters, 225 F.3d at 466 (internal citations and quotations omitted). By all accounts, the United States military had a severe shortage of intelligence and interrogation personnel in Iraq during a time of substantial insurgent activity. Allowing the Government to shield itself with immunity, for conduct committed by soldiers, while leaving supporting contractors hanging out to dry, will make it that much more difficult, and that much more expensive, for the United States to obtain contractor support in times of dire need and in treacherous situations.

By contrast, the costs of derivative immunity are slight. The vast majority of persons injured in war are entitled to no recovery whatsoever. *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992). Even if Plaintiffs' claims here were precluded by immunity, they, unlike most persons injured in war, have an administrative claim process available to them. *Saleh v. Titan Corp.*, 580 F.3d 1, 2-3 (D.C. Cir. 2009) ("The U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734.").

Because this Court has already held that CACI PT personnel were acting in the scope of their employment, and the public benefits of immunity outweigh its costs, the immunity of CACI PT and the United States is coextensive with respect to the claims at issue in this case. If the United States is immune from suit by CACI PT for claims arising out of injuries inflicted by soldiers and resulting from United States detention policies, CACI PT is equally immune from suit by Plaintiffs seeking to tag CACI PT with such liability.

2. The Court Must Consider Whether Immunity Is Available to the United States for *Jus Cogens* Violations

By definition, a claim is cognizable under the ATS only if the conduct at issue violates an international norm that is "specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). This Court has held that Plaintiffs' claims of torture, CIDT, and war crimes satisfy this requirement, and the Court also has held that Plaintiffs have alleged treatment by soldiers that, if true, could qualify as torture, CIDT, or war crimes. Dkt. #692 at 36. These issues are, of course, questions for the jury if the case proceeds to trial. The Fourth Circuit has held that torture and CIDT constitute *jus cogens* violations of international law, *Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012), and this Court has held that torture and CIDT also constitute war crimes (Dkt. #679 at 36), meaning that Plaintiffs' war crimes claims also involve alleged *jus cogens* conduct by soldiers. That Plaintiffs' claims, by definition, allege *jus cogens* violations of international law raises the question whether the *jus cogens* nature of Plaintiffs' allegations categorially bars an assertion of immunity by the United States.

In *Yousuf*, the Fourth Circuit confronted whether to extend immunity to an individual foreign official for claims under the Torture Victim Protection Act of 1991 and the ATS for torture and other atrocities. *Id.* at 766-67. The court first determined that Samantar sought conduct-based immunity, or "immunity based on acts—rather than status." *Id.* at 769 (quoting

Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009)). With respect to conduct-based immunity, the court determined that officials were immune only from "claims arising out of their official acts while in office," but not for private acts. *Id.* at 774-75. The court then explained that U.S. courts typically conclude that *jus cogens* violations—*i.e.*, violations of international norms—are "not legitimate official acts" that merit immunity "even if the acts were performed in the defendant's official capacity." *Id.* at 776-77.

Under the reasoning of the Fourth Circuit's holding in *Yousuf*, the United States' claim of immunity can have merit only if it is a status-based immunity. However, the United States explicitly *waived* its status-based immunity as a sovereign in the Federal Tort Claims Act. 28 U.S.C. § 1346(b)(1). All the immunity that the United States retained for itself was *conduct-based*, that is, immunity for tort claims arising out of particular types of conduct. Thus, the United States can assert sovereign immunity only if the conduct at issue falls within one of the pigeon-holes of retained sovereign immunity—such as combatant activities of the armed forces that give rise to a claim, or conduct causing a claim that arises in a foreign country. 28 U.S.C. § 2680(j), (k). In the context of former foreign official immunity, *Yousuf* held that conduct-based immunity is inapplicable to allegations of *jus cogens* violations such as torture CIDT, and war crimes, and the same analysis presumably applies to other types of immunity as well.

Accordingly, before reaching the United States' substantive theories of immunity, the Court will have to decide whether the United States' retained sovereign immunity is conduct-based immunity. If conduct based, the Court must decide whether *Yousuf* categorically bars the United States from obtaining immunity from suit for *jus cogens* violations committed by soldiers and/or arising out of detention policies adopted at the highest levels of the Executive Branch.

The availability of immunity for *jus cogens* allegations should be the same for the United States' claim of sovereign immunity as for CACI PT's assertions of derivative immunity.

C. The United States Consented to Third-Party Suit Under the FTCA

The Federal Tort Claims Act ("FTCA") waives sovereign immunity "in sweeping language." *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951). Under the FTCA:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Section 2674 provides that the United States will be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. These provisions provide an explicit grant of jurisdiction and waiver of sovereign immunity for tort claims against the United States. The Supreme Court has determined that the FTCA provides for third-party liability where the United States is a joint tortfeasor "as if the United States were a private individual." *Yellow Cab Co.*, 340 U.S. at 527, 547 (holding government liable as a joint tortfeasor for contribution). The high court reasoned:

> Of course there is no immunity from suit by the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasor as a third-party defendant. It is fair that this should work both ways.

Id. at 551-52. The Court found it incongruous to allow the government the benefit of recovering contribution from joint tortfeasors while barring a private party from obtaining the same

recovery from the government under the reverse circumstances. *Id.* at 552 ("Such a result should not be read into this Act without a clearer statement of it than appears here.").

D. Fourth Circuit Precedent Defeats the United States' Reliance on the "Foreign Country" Exception to the FTCA

As noted above, before the Court even reaches the "foreign country" exception to the FTCA, the Court first must conclude that the *jus cogens* nature of Plaintiffs' allegations does not categorically defeat an assertion of immunity. If the United States can satisfy that hurdle, the Court must consider whether the foreign country exception applies under its plain terms.

The foreign country exception retains sovereign immunity for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Determining whether a claim arises in a foreign country focuses on the place of injury. *Sosa*, 542 U.S. at 712. However, the Supreme Court has squarely held that the foreign country exception applies only to territory "subject to the sovereignty of another nation." *United States v. Spelar*, 338 U.S. 217, 220 (1949) ("We know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation."). Here, Plaintiffs' claims arise in a location in which the sovereign government had been forcibly displaced by the United States military and its allies, occupied by United States military forces, and governed by a military occupation government—the Coalition Provisional Authority—established by the invading and occupying forces:

> The Coalition Provisional Authority in Iraq ("Coalition Authority") governed Iraq from May 2003 to June 28, 2004, when it turned over governing authority to the Interim Government of Iraq. The Coalition Authority's administrator, L. Paul Bremer, was appointed by the U.S. President and the U.S. Secretary of Defense, and the large majority of the Coalition Authority's personnel were either U.S. civilian contractors and employees or in the U.S. Military. The remainder of the Coalition Authority's personnel were from other countries in the coalition occupying Iraq, including Australia, the Czech Republic, Denmark, Italy, Japan, Poland, Romania, Spain, the United Kingdom, Ukraine, and others.

United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 298 (4th Cir. 2009). Indeed, the Fourth Circuit has held—at the United States' insistence—that United States-occupied facilities in occupied territory of far less permanent character than Abu Ghraib prison are within the special maritime and territorial jurisdiction of the United States. *United States v. Passaro*, 577 F.3d 207, 214 (4th Cir. 2009) (holding that a cave in Afghanistan was within the special maritime and territorial jurisdiction of the United States.

Nor will the general presumption against extraterritoriality support dismissal on immunity grounds. *See Smith v. United States*, 507 U.S. 197, 204 (1993); *see also* U.S. Mem. at 6, 14-16. The Fourth Circuit has held, at least at the motion to dismiss stage, that Plaintiffs' claims "'touch and concern' the territory of the United States *with sufficient force to displace the presumption against extraterritorial application* of the Alien Tort Statute." *Al Shimari III*, 758 F.3d at 520 (emphasis added). The same reasoning should apply to the FTCA's application here.

The Fourth Circuit identified the operative facts showing that Plaintiffs' allegations of domestic conduct by CACI PT overcame the presumption against extraterritoriality: (1) CACI PT is a U.S. corporation, (2) its employees are U.S. citizens, (3) the relevant contract was issued in the United States, (4) CACI's U.S.-based managers allegedly approved and encouraged detainee abuse and attempted to "cover up" the misconduct, and (5) congressional intent "to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Id.* at 530-31.

The same and significantly more facts demonstrate domestic conduct supporting a claim against the United States. For example the U.S. military approved the establishment and staffing of the detention center at Abu Ghraib prison. *See* Section II.A, *supra*. The U.S. government employed or controlled all of the personnel who Plaintiffs allege mistreated them. *Id.* The U.S.

government established the interrogation techniques and policies implemented at Abu Ghraib. *Id.* The U.S. government determined the lawfulness and approved of specific interrogation techniques Plaintiffs assert constituted mistreatment. *Id.* Much of this conduct was undertaken by the Secretary of Defense and other personnel whose offices are within the Pentagon. TPC ¶¶ 18-21, 27-30.[10] Under the same analysis to which the Fourth Circuit subjected CACI PT, the United States' conduct was in significant respects domestic, not foreign, such that the presumption against foreign application cannot be applied to dismiss the United States from a tort suit in which CACI PT is required to remain.

E. To the Extent Plaintiffs' Claims Against CACI PT Are Not Barred by the FTCA's Combatant-Activity Exception, CACI PT's Claims Against the United States Likewise Are Not Barred

As with the United States' arguments regarding the foreign country exception, the first step in assessing the United States' argument regarding application of the combatant activities exception is to determine whether the *jus cogens* nature of Plaintiffs' allegations forecloses the United States' arguments for immunity. *See* Section III.B.2. If the United States can clear that hurdle, CACI PT and the United States should share the same fate—dismissal or continued participation in this case. This is particularly true given that the TPC specifically seeks recovery from the United States to the extent CACI PT is held liable for abuses committed by soldiers (TPC ¶ 30), or for conditions of detention or interrogation techniques specifically approved and implemented by the U.S. military and Executive Branch officials. TPC ¶¶ 27-29.

CACI PT agrees, generally speaking, that the combatant activities exception and the principles underlying that exception should foreclose Plaintiffs' claims against CACI PT and the

[10] The Pentagon is located in Arlington, Virginia. *See* https://pentagontours.osd.mil/Tours/facts-zip.jsp (last viewed Mar. 22, 2018).

United States, and thus eliminate the need for CACI PT's third-party claims against the United States. This Court and the Fourth Circuit have not yet so held. Accordingly, for the reasons explained below, the Court should not dismiss the United States based on the combatant activities exception *even if* immunity is available to the United States for *jus cogens* allegations.

The purpose of the combatant-activity exception is "to foreclose state regulation of the military's battlefield conduct and decisions." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014) (quotation omitted). Like the political question doctrine, the combatant-activity exception is designed to protect from review "discretionary operational decisions made by, or at the direction of, the military on the battlefield." *Al Shimari IV*, 840 F.3d at 155. Because the political question doctrine and the combatant-activity exception rest on nearly identical policies, the same exclusions should apply to both. Specifically, if the unlawfulness exception to the political question doctrine applies to a subject matter jurisdiction defense based on the political question doctrine, that same exception should apply to the United States' assertion of immunity.

The reasoning is the same. The Fourth Circuit held in *Al Shimari IV* that "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity." *Al Shimari IV*, 840 F.3d at 157. It further held that "[t]he commission of unlawful acts is not based on 'military expertise and judgment,' and is not a function" committed to the Executive Branch. *Id.* at 158. Therefore, to the extent conduct is found to be unlawful, it "fall[s] outside the protection of the political question doctrine." *Id.*

The Fourth Circuit has held that torture and CIDT constitute *jus cogens* violations of international law, and this Court has held similarly for war crimes. *See* Section III.B.2, *supra*. Torture and war crimes committed by U.S. soldiers unquestionably constitute unlawful conduct. *See* 18 U.S.C. § 2340A (Anti-Torture Act); 18 U.S.C. § 2441 (War Crimes Act). As explained

above, the combatant-activity exception appears to be a conduct-based immunity that "foreclose(s) state regulation of the military's battlefield conduct and decisions." *Burn Pit Litig.*, 744 F.3d at 348. But unlawful conduct and *jus cogens* violations arguably cannot be considered legitimate battlefield conduct and decisions. Accordingly, the United States should not be permitted immunity while these same concepts are used to deny dismissal to CACI PT.

F. CACI PT's Claims Are Actionable Under Virginia Law

1. The FTCA Makes Virginia Law Applicable to These Claims

The government argues that CACI PT's claims fail because Virginia law does not have extraterritorial effect. But, as explained above, the Fourth Circuit has concluded that Plaintiffs' claims against the United States would implicate domestic conduct that occurred in Virginia. *See* Section II.B, *supra*. "[T]o be actionable under [the FTCA], a claim must allege . . . that the United States 'would be liable to the claimant' as 'a private person' 'in accordance with the law of the place where the act or omission occurred.'" *Glob. Mail, Ltd. v. United States Postal Serv.*, 142 F.3d 208, 211 (4th Cir. 1998) (citations omitted). The "law of the place" refers to the state in which *the conduct* occurred. *Id.* Conduct occurring in Virginia includes, for example, conditions of confinement and interrogation techniques adopted and approved by Executive Branch officials who served at the Pentagon. TPC ¶¶ 18-21, 27-28; *see also* Section II.A, *supra* (detailing domestic development of detention and interrogation policies). Indeed, it is difficult to square the United States' position on extraterritoriality, as much as CACI PT ordinarily might agree with it, with the Fourth Circuit's holding in *Al Shimari III* that Plaintiffs' claims sufficiently involve domestic conduct so as to overcome, at the motion to dismiss stage, the presumption against extraterritoriality. 758 F.3d at 530-31. Since much of the United States' conduct that allegedly injured Plaintiffs "occurred in Virginia, the substantive law of Virginia

applies." *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001) (citing *United States v. Neustadt*, 366 U.S. 696, 706 n.15 (1961)); *Unus v. Kane*, 565 F.3d 103, 117 (4th Cir. 2009).

2. The United States Is Amenable to Suit With Respect to Plaintiffs' Claims

The United States appears to argue that CACI PT's contribution claim fails because "the United States cannot be liable to Plaintiffs," U.S. Mem. at 17. *Id.* at 17-18. CACI PT does not dispute that under Virginia law "'a contribution plaintiff cannot recover from a contribution defendant unless the injured party could have recovered against the contribution defendant.'" *See Woodson v. City of Richmond*, 2 F. Supp. 3d 804, 810 (E.D. Va. 2014) (quoting *Pierce v. Martin for Benefit of Comm. Union Ins. Co.*, 230 Va. 94, 96 (Va. 1985)). But, as explained in Section III.B, *supra*, the United States has waived immunity with respect to these claims. In addition, the United States has an administrative claims process from which injured detainees can assert a claim against the United States, and the U.S. government has pledged to approve such claims where credible allegations of abuse are present. *Saleh*, 580 F.3d at 2-3. Therefore, Plaintiffs could have and should have recovered against the government for any mistreatment borne at the hands of U.S. military personnel at Abu Ghraib prison.

3. The Claims for which CACI PT Seeks Indemnification, Exoneration, and Contribution Predominantly Do Not Accuse CACI PT of Moral Turpitude

The government asserts that CACI PT cannot recover as a joint tortfeasor under Virginia law because Plaintiffs' allegations against CACI PT, by virtue of being found cognizable under the ATS, do not involve negligence, but rather "particularly egregious intentional torts." U.S. Mem. at 19. The government's characterization of Plaintiffs' claims against CACI PT as "not based on negligence" is inaccurate. *Id.* Many of Plaintiffs' allegations against CACI PT in support of its purported conspiracy accuse CACI PT of negligent conduct, for example under the

heading "SUMMARY OF REASONS FOR BELIEVING THE CONSPIRACY WAS PLAUSIBLE," Plaintiffs allege the following:

- "CACI PT acted negligently and wrongfully by failing to prevent employees from engaging in foreseeable and predictable wrongful acts." TAC ¶ 197.
- "CACI PT acted negligently and wrongfully by failing to discipline those who they knew, or with reasonable investigation could have determined, had engaged in wrongful acts at Abu Ghraib." *Id.* ¶ 198.
- "CACI PT acted negligently and wrongfully by failing to take due care in hiring employees who had sufficient experience or training or certification in conducting interrogations of detainees, and deploying those employees to undertake interrogations in prisons in Iraq." *Id.* ¶ 199.
- "CACI PT acted negligently and wrongfully by failing to train employees for the specialized task of interrogating detainees and by failing to sufficiently train employees about the United States military law and policy prohibitions on war crimes, torture and cruel, inhuman and degrading treatment." *Id.* ¶ 200.
- "CACI PT acted negligently and wrongfully by failing to adequately supervise its employees." *Id.* ¶ 202.
- "CACI PT acted negligently and wrongfully by failing to investigate and report accusations of wrongdoing referred to it by CACI PT employees and military personnel, and committed or witnessed by its employees and agents, despite an obligation under United States law to discipline employees for improper conduct and to timely report misconduct to appropriate United States government officials." *Id.* ¶ 203.
- "CACI PT profited financially from its negligent misconduct." *Id.* ¶ 204

The Court upheld Plaintiffs' conspiracy claims and appears to have relied on the above-listed allegations as supporting an inference of intent to participate in the alleged conspiracy. Dkt. #679 at 40-41. To the extent CACI PT could be held liable for negligently allowing employees to participate in a conspiracy, CACI PT is entitled to recover from the United States.

To the extent Plaintiffs' claims describe intentional conduct that rises to moral turpitude sufficient to eliminate joint tortfeasor liability, CACI PT's potential liability is predominantly based on the legal technicality of vicarious liability and reflects no wrongdoing, let alone

intentional wrongdoing, by CACI PT whatsoever. Indeed, this Court explicitly has held that CACI PT can be held liable for abuse of Plaintiffs *that was unknown to CACI PT and unknown to CACI PT employees* if one or more CACI PT employees, unbeknownst to CACI PT, had entered into a conspiracy with the U.S. soldier perpetrator. Dkt. #679 at 42. The United States is entitled to dismissal only if CACI PT is not entitled to relief under any legal theory that might plausibly be suggested by the facts alleged. *Mylan Labs. Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The scenario of "vicarious liability squared" expressly approved by the Court—where Plaintiffs can stack vicarious liability on top of co-conspirator liability to hold CACI PT liable for alleged co-conspirators of CACI PT employees—is a clear case where CACI PT could be held liable in circumstances where CACI PT had no moral turpitude at all. To assume that any potential liability faced by CACI PT would involve moral turpitude, when Plaintiffs have alleged negligence and the Court has endorsed theories of recovery not requiring moral turpitude on CACI PT's part, would be premature in the extreme. This is particularly true given the United States' undeniable culpability in the mistreatment of detainees at Abu Ghraib prison.

4. The United States Has Greater Culpability for Any Alleged Abuse of Plaintiffs and Should Indemnify and Exonerate CACI PT

As with the United States' "moral turpitude" argument, its argument concerning relative degrees of culpability can succeed at the motion to dismiss stage only if there is no possible way that a jury could find for Plaintiffs but conclude that the United States is more culpable than CACI PT. *Mylan Labs.*, 7 F.3d at 1134. The allegations in the TPC, which must be treated as true for purposes of the United States' motion to dismiss, state facts which, if proven, would entitle a jury to find that the United States was more culpable than CACI PT.

Plaintiffs seek to hold CACI PT vicariously liable for its employees' alleged secondary liability—as conspirators or aiders and abettors—for conduct committed by soldiers. In essence,

by Plaintiffs' admission, CACI PT is at least two steps removed from any conduct that allegedly harmed Plaintiffs. Indeed, the Court ruled that "even if an employee without authority to bind CACI [PT] may not appropriately enter into a conspiracy on CACI [PT]'s behalf, CACI [PT] may be held liable for its employees' participation in the conspiracies—including for tortious acts committed by its employees' co-conspirators." Dkt. #679 at 42. Under the Court's decision, CACI PT could be held responsible for actions by soldiers in furtherance of a conspiracy about which CACI PT had no knowledge, entered into by employees without authority, and committed by soldiers without the knowledge of even CACI PT's employees.

Unlike CACI PT, the United States—the employer for the persons who allegedly harmed Plaintiffs—is only one step removed from direct culpability. And, as reflected in the chart below, the distinctions do not end there. As alleged in the TPC, and confirmed by supporting evidence [redacted] the United States controlled every aspect of detainee life at Abu Ghraib prison and therefore shoulders culpability for the misconduct that occurred there beyond mere vicarious liability for the perpetrators:

Relevant U.S. Conduct	Relevant CACI PT Conduct
➢ Personnel at the highest levels of the U.S. government created and approved detention conditions and interrogation techniques that this Court has determined amount to torture and war crimes. TPC ¶¶ 18-21, 27-30.[11]	➢ CACI PT had no input whatsoever on the conditions of detention or interrogation techniques used at Abu Ghraib prison. TPC ¶ 21.
➢ The general conditions of detention at Abu Ghraib prison were established by the U.S. military before CACI PT personnel arrived. Detainees were kept naked or nearly naked, required to wear women's underwear, subjected to stress positions, handcuffed to the bars of	➢ Neither CACI PT nor its employees had anything to do with the establishment of aggressive interrogation techniques and harsh conditions of detention at Abu Ghraib prison. TPC ¶ 18.

[11] *Compare* Senate Rep. at xix- xxix (Ex. 2) *with* Dkt. #679 at 31-33 (describing, *inter alia*, stress positions, nudity, sleep deprivation, threats with dogs, etc.).

Relevant U.S. Conduct	Relevant CACI PT Conduct
their cells, and subjected to dietary restrictions and to environmental manipulation. TPC ¶¶ 27-28 [12]	
➢ The U.S. military provided the sole operational chain of command for both military and civilian interrogators at Abu Ghraib prison and directed the conduct of all interrogations. TPC ¶19-20; [redacted].[13]	➢ CACI PT had no operational authority over either the military personnel or even its own employees serving at Abu Ghraib prison. TPC ¶¶ 18-20.
➢ The U.S. military understaffed Abu Ghraib prison with military police, failed to provide them with detention-specific or theater-specific training, failed to make documentation on permissible tactics, techniques and procedures available, and then failed to adequately supervise their conduct. TPC ¶¶ 13, 18-21.[14]	➢ CACI PT had no responsibility or role in military police staffing, training, education, or supervision. TPC ¶¶18-20.

[redacted] Accordingly, the government's attempt to avoid third-party liability on the grounds that its conduct was "no more blameworthy than that of CACI [PT]," U.S. Mem. at 21, should be rejected.

[12] Frederick Dep. at 194-95 (Ex. 5).

[13] *See, e.g.*, Holmes Dep. at 28-29 (Ex. 8); Brady Decl. ¶¶ 4-5 (Ex. 9); Pappas Decl. ¶ 8-9 (Ex. 6); *see also* Pappas Decl. Ex. 1.

[14] Schlesinger Rep. at 10-11, 55, 60 ("The detainee population of approximately 7,000 out-manned the 92 MPs by approximately a 75:1 ratio.") (Ex. 3).

G. This Court has Jurisdiction to Hear CACI's Breach of Contract Claim

1. The Contract Disputes Act ("CDA") Does Not Apply

With virtually no analysis, the government claims that because the United States issued task orders to CACI PT, its claim for breach of the implied duty of good faith and fair dealing is subject to the CDA. U.S. Mem. at 22. CACI PT agrees with the government that when the CDA applies to a claim, its procedures provide the exclusive remedy for that dispute, and this Court lacks jurisdiction to hear it. 28 U.S.C. § 1346(a)(2). But the CDA does not apply here.

The CDA does not define the type of "claim" that it governs. 41 U.S.C. § 7101 *et seq.* Case law makes clear, however, that claims are not necessarily rendered contractual for CDA purposes simply because the parties' relationship is contractual in nature. For example, in *Commercial Drapery Contractors, Inc. v. United States*, there was a contractual relationship between plaintiff and defendant, but nonetheless the CDA did not apply because of the "claim and type of relief requested thus reveal that this is not 'at its essence' a contract action" *even though the claim asserted was a breach of contract claim.* 133 F.3d 1, 4 (D.C. Cir. 1998).

Courts look at three factors when determining whether plaintiff's claims implicate the CDA. First, courts consider the type of relief sought. *See Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); *Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 67 (D.D.C. 2009) (holding that the CDA does not apply because "plaintiff seeks damages that cannot be ascertained by reference to her contract"), *aff'd sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011). Second, courts assess the "basis" for plaintiff's claims and if "it is possible to conceive of this dispute as entirely contained within the terms of the contract." *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 77-78 (D.C. Cir. 1985); *United Fed. Leasing, Inc. v. United States*, 33 F. App'x 672, 675 (4th Cir. 2002); *Navab-Safavi*, 650 F. Supp. 2d at 67 ("[T]he CDA is inapplicable to the present dispute, because plaintiff's claim does not relate to the

terms of her contract . . . ."). Third, courts often consider if the dispute falls within the expertise of the Court of Claims. *United States v. J & E Salvage Co.*, 55 F.3d 985 (4th Cir. 1995).

The government points to *J & E Salvage Co.*, 55 F.3d 985, to argue that Count IV is barred by the CDA. U.S. Mem. at 22. But in *J & E Salvage* "the principal remedy sought by the government and granted by the district court was rescission of the sale and the return of the transmissions. This was, of course, a contract remedy." *Id.* at 989. Next, the court observed that the parties' dispute required construing express contract terms. *Id.* at 988. Finally, the Court noted that the dispute "calls for background in the field of government contracting—a subject within the unique expertise of the Court of Claims." *Id.*

At each step of the way, this case is dramatically different. First, CACI PT's damages equal the amount any theoretical tort judgment in this case against CACI PT up to $10,000. TPC ¶ 58. CACI PT's claim is not seeking payment of invoices or an equitable adjustment to the contract based on a change in the scope of work. Rather, CACI PT's claim seeks recovery of any *tort judgment* against it up to $10,000. Where the damages sought are not contractual in nature, the CDA does not apply even if the claim is denominated as a breach of contract claim. *Commercial Drapery Contractors*, 133 F.3d at 4. Second, the express terms of the agreement between CACI PT and the Department of the Interior are irrelevant to the dispute. Finally, the Court of Claims has no special expertise which would allow it resolve this claim. Rather the claim is best heard in this Court—the Court that will hear the tort suit which controls the damages sought against the United States. Ultimately, the CDA does not apply here.

The United States oddly devotes nearly a page of its memorandum to arguing that the Court of Federal Claims "would not currently possess jurisdiction to adjudicate" CACI PT's claim if CACI PT had asserted Count IV in that court. U.S. Mem. at 28. CACI PT presumes

that the United States embarked on this detour in order to raise issues of exhaustion, but the exhaustion statute on which the United States relies (without citing it) specifically excludes "such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." 28 U.S.C. § 2675(a).

2. CACI PT Asserts a Valid Damages Claim

CACI PT agrees that the Little Tucker Act grants this court original jurisdiction over civil suits not exceeding $10,000. 28 U.S.C. § 1346(a)(2). While CACI PT did not expressly waive its right to recover more than $10,000 in the TPC, it does so now. *Randall v. United States*, 95 F.3d 339, 347 n.8 (4th Cir. 1996) ("A plaintiff can waive damages in excess of $10,000 to remain in district court.").[15] Finally, the United States' argument that CACI PT's damages are "conditional" and not ripe is nonsense. Federal Rule of Civil Procedure 14 specifically permits third-party practice where the ultimate liability, if any, of the third-party plaintiff has not yet been determined. Fed. R. Civ. P. 14(a)(1). If ripeness required that the third-party plaintiff's liability be fixed, there would never be a third party complaint.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the United States' motion.

[15] To the extent CACI PT's waiver in this Opposition is insufficient, it requests leave to amend its third party complaint to add an express waiver. *See Hahn v. United States*, 757 F.2d 581, 587 (3d Cir. 1985) ("We can, however, remand with leave to amend the complaint to waive damages in excess of $10,000 . . . .")

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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