No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE CACI PREMIER TECHNOLOGY, INC., *Petitioner*

On Petition for Writ of Mandamus from the United States District Court
for the Eastern District of Virginia at No. 1:08-cv-0827
(The Honorable Leonie M. Brinkema)

PETITION FOR A WRIT OF MANDAMUS

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In *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) ("*Al Shimari IV*"), this Court remanded with specific instructions that the district court conduct an evidence-based political question analysis. The Court directed the district court to **"examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place."** *Id.* (emphasis added). The district court has refused to conduct the mandated inquiry. Instead, the district court:

- Required Petitioner CACI Premier Technology, Inc. ("CACI") to file its political question challenge *before* allowing discovery from the United States, the sole source of evidence regarding Plaintiffs' treatment, the source of direction for that treatment, and CACI's involvement or lack thereof;
- Denied the challenge the district court had required, observing that it was premature to grant a political question motion because the district court "ha[dn't] finished the job for the Fourth Circuit"; but then
- Refused to consider CACI's post-discovery political question challenge, brought after CACI had taken discovery regarding Plaintiffs' treatment, ruling that the district court's pre-discovery ruling was the law of the case.

In eschewing this Court's explicit remand instructions, the district court instead has stated that remand is not for an evidence-based consideration of justiciability, but to ready the case for trial. As a result, the district court has set this case for an April 23, 2019 trial, assuming jurisdiction without *ever* having made the fact-based justiciability determination that this Court specifically required. CACI files this petition reluctantly, recognizing that this case arises from

the Abu Ghraib prison scandal, presents many novel and difficult issues, and has a long and meandering procedural history. But this Court's remand instructions were clear that the political question doctrine must be decided on an evidentiary basis, which the district court has declined to do. A district court's refusal to comply with remand instructions is a quintessential circumstance justifying mandamus relief. Accordingly, the Court should issue a writ of mandamus directing the district court to conduct the political question inquiry this Court required in *Al Shimari IV* and to make specific evidence-based findings in support of the district court's ruling.

I. RELIEF SOUGHT: A WRIT DIRECTING THE DISTRICT COURT TO COMPLY WITH THIS COURT'S REMAND INSTRUCTIONS AND CONDUCT THE EVIDENCE-BASED POLITICAL QUESTION EVALUATION THAT THIS COURT REQUIRED

This Court's 2016 remand instructions directed the district court to reevaluate justiciability by "examin[ing] the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160. The district court has refused. Accordingly, CACI seeks a writ of mandamus directing the district court to vacate its February 27, 2019 order (Ex. 1)[1] rejecting CACI's political question challenge and to conduct the evidence-based evaluation this

[1] All exhibit citations are to the Declaration of John F. O'Connor.

Court directed but which the district court refused to conduct. This Court should further direct that the district court and to make specific findings of fact based on the evidentiary record in support of the district court's ruling.

II. THE ISSUE PRESENTED: WHETHER THE DISTRICT COURT HAS DEFIED THIS COURT'S EXPRESS REMAND INSTRUCTIONS BY REFUSING TO CONSIDER CACI'S EVIDENCE-BASED POLITICAL QUESTION CHALLENGE

In 2016, this Court remanded this action to the district court for further consideration of the applicability of the political question doctrine. This Court was clear on the evidence-based inquiry that its remand instructions required:

> Accordingly, on remand, the district court will be required to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review. The district court also will be required to identify any "grey area" conduct that was committed under the actual control of the military or involved sensitive military judgments and, thus, is protected under the political question doctrine.
>
> This "discriminating analysis" **will require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place.**

Al Shimari IV, 840 F.3d at 160 (emphasis added) (internal citations and footnotes omitted). The issue presented by this petition is whether the district court failed to

comply with this Court's instructions when it refused to consider CACI's post-discovery political question challenge.

III. PROCEDURAL BACKGROUND

A. Proceedings Through *Al Shimari IV*

CACI provided civilian interrogators to support the United States military's interrogation efforts in Iraq. CACI has been sued under the Alien Tort Statute ("ATS") by three Iraqis alleging that they were mistreated while in U.S. military custody in Iraq. Plaintiffs admit that CACI personnel never laid a hand on them,[2] and seek to hold CACI liable solely on co-conspirator and aiding and abetting theories. *Al Shimari v. CACI Premier Tech. Inc.*, 1:08-cv-0827 (E.D. Va.).[3]

In *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413, 420 (4th Cir. 2011) ("*Al Shimari I*"), a panel of this Court reversed the decision by the district court (Hon. Gerald Bruce Lee, J.) denying CACI's motion to dismiss Plaintiffs' common-law claims, holding that such claims were preempted. On rehearing *en banc*, a

[2] 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs.") (Ex. 2).

[3] Upon this Court's remand in 2016, Plaintiffs voluntarily dismissed all of their common-law claims, leaving only claims asserted under the ATS. In 2018, the district court granted CACI's motion to dismiss Plaintiffs' claims of direct abuse by CACI personnel, leaving only conspiracy and aiding and abetting claims. On February 27, 2019, the district court granted CACI's motion for summary judgment with respect to one of the four Plaintiffs who were parties at the time of this Court's 2016 remand.

majority of this Court concluded that it lacked jurisdiction to hear CACI's appeal, and remanded the case to the district court for further proceedings. *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205 (4th Cir. 2012) ("*Al Shimari II*"). After the 2012 remand, the parties began taking discovery. CACI did not know if Plaintiffs had been interrogated, and if so by whom, because that information is classified and in the United States' exclusive possession. Accordingly, CACI filed a motion to compel the United States to disclose the identities of CACI's interrogators so that CACI could take discovery regarding Plaintiffs' treatment. Dkt. #275.[4]

On June 25, 2013, the district court dismissed Plaintiffs' ATS claims as involving an impermissible extraterritorial application of the statute pursuant to *Kiobel v. Royal Dutch Petroleum Co.*, 569 F.3d 108 (2013), and dismissed Plaintiffs' common-law claims on a variety of other grounds. Dkt. #460. The district court's order mooted CACI's motion to compel disclosure of the interrogation personnel with whom Plaintiffs interacted. Dkt. #460 at 30. On appeal, this Court held that the district court erred in concluding that *Kiobel* barred Plaintiffs' ATS claims. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*").

[4] All "Dkt." citations are to the district court's *Al Shimari* docket.

With respect to the political question doctrine, this Court's decision in *Al Shimari III* held that the district court's denial of CACI's political question challenge had occurred "before any discovery had been conducted," and before this Court had "formulated a test for considering whether litigation involving the actions of certain types of government contractors is justiciable under the political question doctrine." *Id.* at 532-33. Accordingly, this Court "remand[ed] this case to the district court for further consideration with respect to the application" of the political question doctrine. On remand, the district court ruled that the political question doctrine applied and entered judgment for CACI. Dkt. #547.

On appeal, a different panel than that which decided *Al Shimari III* vacated the district court's political question ruling and remanded the case for further proceedings. *Al Shimari IV*, 840 F.3d at 160. The panel in *Al Shimari IV* concluded that Judge Lee had erred in two respects: (1) by not considering whether "conduct by CACI employees . . . was unlawful when committed," *id.* at 151, which was not part of the remand instructions in *Al Shimari III*; and (2) by focusing on formal control over CACI PT interrogators rather than on the extent of the U.S. military's "actual control" over CACI interrogators. *Id.* at 156. Having found error, this Court specifically directed the district court to conduct an evidence-based political question analysis on remand:

> Accordingly, on remand, the district court will be required to determine which of the alleged acts, or

> constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review. The district court also will be required to identify any "grey area" conduct that was committed under the actual control of the military or involved sensitive military judgments and, thus, is protected under the political question doctrine.
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> This "discriminating analysis" **will require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place.**

Id. (emphasis added) (internal citations omitted).

B. Proceedings After the 2016 Remand

On the same day that this Court decided *Al Shimari IV*, Judge Lee recused himself from further participation in the case (Dkt. #562), and the case was reassigned to the Honorable Leonie M. Brinkema. CACI filed a statement regarding proceedings on remand in which it observed that discovery should precede briefing and resolution of justiciability. Dkt. #564 at 3. Plaintiffs "largely agree[d] with CACI's proposal." Dkt. #568 at 2.

At the first post-remand hearing, however, the district court rejected the parties' proposed approach to remand, and rejected CACI's request to take discovery from the United States in order to develop evidence bearing on Plaintiffs' treatment. 12/16/16 Tr. at 3-4, 11-13 (Ex. 3). Instead, the Court limited discovery at that time to videotaped depositions of the three Plaintiffs who had

been barred from entry into the United States when CACI sought their depositions in 2013. *Id.* As the case proceeded, CACI repeatedly asked the district court to permit it to begin seeking discovery from the United States for the purpose of developing the evidentiary record bearing on the political question doctrine. The district court repeatedly rejected CACI's requests.[5]

With CACI still barred from beginning efforts to obtain discovery from the United States, the district court issued an order on June 28, 2018 that directed CACI, within 21 days, to "file a motion addressing any Rule 12 arguments it may wish to raise." Dkt. #616. Because the district court had not allowed CACI to begin discovery from the United States, CACI filed a motion asking the district court to "clarify whether the Court's order contemplates briefing of political question arguments at this juncture given that the steps mandated by the Fourth Circuit for consideration of political question have not yet occurred." Dkt. #617. The district court entered an order stating that "it is appropriate to require that all jurisdictional arguments be raised at this stage of the proceedings" because the district court's "task on remand is to determine which of the *alleged* acts, or constellation of *alleged* acts, violated settled international law and criminal law

[5] *See* 12/16/16 Tr. at 11-12 (Ex. 3); 1/27/17 Tr. at 6-7 (Ex. 4); Dkt. #582 at 12-13 (filed 2/3/17); 2/9/17 Tr. at 10-12 (Ex. 5); Dkt. #592 at 7-8 (filed 4/20/17); 4/28/17 Tr. at 8-9 (Ex. 6); 6/9/17 Tr. at 9-12; Dkt. #618 at 4 (filed 6/30/17).

governing CACI's conduct and therefore are subject to judicial review." Dkt. #620 at 1-2 (internal quotations omitted).

When CACI filed its Rule 12 motion to dismiss on July 19, 2017, it included a political question challenge as directed by the district court. That political question analysis, however, included no evidence from any of the participants in Plaintiffs' interrogations – eyewitnesses all – as CACI had not yet been permitted *any* discovery from the United States as to whether Plaintiffs had been interrogated, the identities of any participants in any interrogations of Plaintiffs, or the opportunity to take the depositions of any such participants. The district court's mandated political question challenge also occurred before CACI was permitted to move to compel production of interrogation plans and unredacted interrogation reports that document Plaintiffs' treatment in connection with interrogations.[6] The *only* discovery regarding Plaintiffs' treatment that the district court permitted prior to its mandated briefing of justiciability was Plaintiffs' own deposition testimony.

[6] *After* the district court denied CACI's Rule 12(b)(1) motion, it permitted CACI to commence discovery from the United States. The United States asserted the state secrets privilege to deny CACI access to the only interrogation plan it had retained from a Plaintiff's interrogation, the approved plan for Al Shimari's single interrogation, and also asserted the state secrets privilege to shield from discovery portions of interrogation reports detailing the interrogation approaches used during Plaintiffs' interrogations. The district court upheld the state secrets assertions.

Indeed, after specifically requiring that CACI brief the political question doctrine *before* taking discovery regarding Plaintiffs' treatment, the district court acknowledged that the lack of discovery required denial of CACI's motion. Specifically, the district court stated:

> MR. O'CONNOR [CACI's counsel]: Your Honor, on the political question, we also agree that the Fourth Circuit's instructions to the Court were very clear on remand, and what the Fourth Circuit said was that this Court should conduct a discriminating analysis that involves, quote, examining the evidence regarding the specific conduct to which plaintiffs were subjected and the source of any direction under which the acts took place. That's *Al Shimari IV*, at 160 to -61.
>
> THE COURT: **Now, we have half of that**; that is, we have the depositions of the three plaintiffs remaining in this case, right?
>
> MR. O'CONNOR: We do have the three plaintiffs deposed.
>
> THE COURT: Right. How much evidence is yet to be developed about CACI's alleged involvement in that conduct?
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> MR. O'CONNOR: There's basically been no development at this point, Your Honor, because --
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> **THE COURT: That's the problem.**
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> MR. O'CONNOR: Your Honor is preaching to the choir. I mean, we feel very strongly that we need discovery, and we've said so at every step, that --
>
> **THE COURT: Which means it's premature to be talking about dismissing a political question case. I**

haven't finished the job for the Fourth Circuit, have I?

MR. O'CONNOR: Well, Your Honor, we would say that briefing the political question was premature, and that's why we had -- when Your Honor had --

THE COURT: We wanted to get -- we've been taking this case sort of step by step --

MR. O'CONNOR: Yes, Your Honor.

THE COURT: -- because in the previous iterations of this case, you know, there had not been enough development. We've now gotten the depositions of the three plaintiffs. We now have the very specific description of all the alleged conduct upon which the plaintiffs are relying, **so that half of the assignment from the Fourth Circuit, I think, has been achieved.**

MR. O'CONNOR: Well, I wouldn't say completely achieved, Your Honor, because the second part of the assignment, as Your Honor has cast it, would be sorting out what, if any, involvement CACI personnel had with that treatment.

THE COURT: Correct.

MR. O'CONNOR: But as part of that, it would also double back to the first point, because at this point, we just have to accept what the plaintiffs say about what happened because we don't have any access to information from anyone else who can say, well, I was the interrogator, or I was the linguist, or I was the analyst at that interrogation, and that's not what happened. This is what happened.

THE COURT: Right.

9/22/17 Tr. at 9-11 (Ex. 2).

On February 23, 2018, fourteen months after the first post-remand status conference in the case, and *after* the district court had decided the political question challenge it required CACI to assert, the district court for the first time allowed CACI to begin seeking discovery from the United States to identify the participants in Plaintiffs' interrogations. Dkt. #687. The United States refused to identify such participants on the grounds that their identities were classified state secrets. Instead, the United States assigned pseudonyms to all of the participants, including to the two CACI employees who had each participated in one intelligence interrogation of a Plaintiff. Ex. 7 at 4-6.[7] The United States also advised that a witness had testified that another CACI employee had once questioned Plaintiff Al-Ejaili, but that "[t]here was nothing violating the [interrogation rules of engagement] in that particular Interrogation." Ex. 7 at 16. Subsequently, the United States also assigned pseudonyms to translators participating in interrogations of Plaintiffs, thus shielding their identities from the parties as well.

[7] The United States' interrogatory response only listed one pseudonymous interrogator as a CACI employee ("CACI Interrogator A"), listed four pseudonymous interrogators as soldiers, and listed two more pseudonymous interrogators for which the United States had not yet determined their identities. The United States later advised that one of the two unknown interrogators was a CACI employee ("CACI Interrogator G") and that the other was a soldier.

The district court upheld the United States' two assertions of the state secrets privilege to shield from the parties the identities of the participants in Plaintiffs' interrogations, including the identities of CACI personnel participating in such interrogations. Dkt. #791, 850, 886, 921. The district court further ruled that CACI could depose the participants in Plaintiffs' interrogations only by telephone and that their identities could be shielded from the parties. Between June 2018 and February 2019, CACI took pseudonymous depositions by telephone of eleven of the fourteen participants in intelligence interrogations of Plaintiffs, every participant who the United States could locate. The district court's rulings prohibited CACI from videotaping the depositions, and prohibit CACI from calling any of these eyewitnesses, including CACI's own employees, to testify at trial.

CACI was hampered in taking these pseudonymous depositions because the United States' assertion of the state secrets privilege not only shielded the deponents' identities, but also shielded any background or other information that, by itself or in conjunction with other information, could identify the witness. Moreover, a *third* state secrets assertion upheld by the district court (Dkt. #1012) shielded from discovery the military-approved interrogation plan for the sole interrogation of Al Shimari (in which CACI Interrogator A participated). Ex. 8 at ¶ 19. The district court also upheld the state secrets assertion to shield from discovery the portions of interrogation reports for the interrogations of Al Shimari

and Al-Zuba'e that contained "interrogator notes regarding the effectiveness of the approach used, the mood of the detainee, the overall assessment of the detainee during the interrogation and recommended future approaches." *Id.*; *see also id.* at ¶¶ 20-21.

Nevertheless, while none of the participants in Plaintiffs' interrogations remembered these specific interrogations,[8] the pseudonymous deponents all were able to offer "evidence regarding the specific conduct to which the plaintiffs were subjected." *Al Shimari IV*, 840 F.3d at 160. Specifically, all of the pseudonymous deponents testified that the types of mistreatment alleged by Plaintiffs had never occurred in connection with any interrogation in which they participated. Ex. 9 at 16-20; Ex. 10 at 2-3. With respect to "the source of any direction under which the acts took place," *Al Shimari IV*, 840 F.3d at 160, the pseudonymous witnesses testified that they had not directed others to abuse detainees, that no CACI personnel directed or encouraged them to abuse detainees, and that they had not entered into any agreement with CACI personnel to abuse detainees. Ex. 9 at 16-20; Ex. 10 at 6-7. The witnesses also testified that CACI personnel had no operational control over their performance of the interrogation mission; that operational control was vested solely in the U.S. Army chain of command. *Id.* at

[8] One of the pseudonymous deponents remembered his interrogation, but he had interrogated Plaintiff Rashid, who has since been dismissed from the case.

20-22. None of these witnesses, however, may be called by CACI to testify at trial.

C. CACI's Post-Discovery Political Question Challenge

Because the district court's only consideration of the political question doctrine had occurred *before* CACI was allowed any discovery from participants in Plaintiffs' interrogations, CACI asserted that the political question doctrine applied in a post-discovery subject matter jurisdiction challenge it filed on January 3, 2019. Ex. 9. CACI's subject matter jurisdiction challenge also argued that the presumption against extraterritoriality barred Plaintiffs' claims under ATS, relying on the extraterritoriality framework that the Supreme Court mandated two years after this Court decided *Al Shimari III*. *See RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2101 (2016).

CACI's political question challenge included extensive citation to the evidentiary record developed from depositions of the participants in Plaintiffs' interrogations "regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160. This evidence, of course, was not available to CACI or the district court when the Court required CACI to file its Rule 12(b)(1) motion because the Court at that time was prohibiting CACI from commencing discovery from the United States to identify the participants in Plaintiffs' interrogations.

At the February 27, 2019 hearing on CACI's dispositive motions, which included CACI's subject matter jurisdiction challenge as well as a summary judgment motion and motion to dismiss based on the state secrets privilege, the district court advised that the only argument it would entertain was limited argument on the summary judgment motion. 2/27/19 Tr. at 4-8. In announcing the district court's ruling on CACI's subject matter jurisdiction challenge, the district court did not even mention the political question doctrine. Instead, the district court's recitation of its ruling only addressed extraterritoriality.

With respect to extraterritoriality, the district court noted that *RJR Nabisco* created a "possibly new standard," but that the district court was "not reversing the Fourth Circuit." *Id.* at 5. CACI had brought to the district court's attention this Court's decision from two days earlier in *Roe v. Howard*, ___ F.3d ___, 2019 WL 903983, at *7 (4th Cir. 2019), in which this Court declined to affirm the district court's reliance on *Al Shimari III* and applied the framework required by *RJR Nabisco* to affirm on alternative grounds. Nevertheless, the district court recited the domestic connection on which it relied to assert subject matter jurisdiction, all of which are simply mundane actions of a domestic corporation and none of which involved domestic violations of international law. 2/27/19 Tr. at 5-6 ("The contract, for example, that gets CACI involved in this in the first place was issued in the United States. We have a United States corporation. We have United States

staff over there at Abu Ghraib. We have people from CACI traveling from the United States to Abu Ghraib.") (Ex. 11).

Toward the end of the hearing, after the district court had addressed trial logistics, CACI pointed out that the district court had not addressed political question at all in announcing its decision, but also had not allowed argument on it. The district court responded as follows:

> No, we've already addressed that. That's the law of the case.
>
> I think I told you-all when I first got this case, you know, given its tortured history, I said we're going to have lots of motions practice, but you should expect if you don't settle this case, it's going to go to trial. I mean, and that's what's going to happen. It's going to go to trial unless it settles, all right?

Id. at 52-53. Thus, while this Court ruled in *Al Shimari IV*, 840 F.3d at 156, that the district court erred by not addressing "actual" military control based on the facts relating to control over Plaintiffs' specific treatment and interrogations, the district court's requirement that political question be briefed and considered only *before* allowing discovery from the eyewitnesses to Plaintiffs' interrogations made compliance with this Court's remand instructions impossible.

IV. ARGUMENT

CACI indisputably has a right to bring an evidence-based political question challenge and to have that challenge considered by the district court. In ordinary

cases, this indisputable right flows from the nature of subject matter jurisdiction, which can be raised at any time, must be resolved before a court reaches the merits, and can be made facially or based on the facts. But this is not the ordinary case. In addition to all of these generally-applicable principles, this Court *specifically directed* the district court to conduct the evidence-based evaluation CACI seeks. *Al Shimari IV*, 840 F.3d at 160. The district court's refusal to conduct an evidence-based political question analysis is a judicial usurpation of power in defiance of this Court's remand instructions. Issuance of a writ of mandamus is the proper, and only, vehicle for enforcing compliance with this Court's remand instructions and CACI's indisputable right to an evidence-based challenge to the district court's jurisdiction before proceeding to trial.

A. The Standard for a Petition for a Writ of Mandamus

Mandamus relief is appropriate in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotations and citations omitted). A party seeking issuance of a writ of mandamus must demonstrate each of the following requirements:

> (1) he has a clear and indisputable right to the relief sought; (2) the responding party has a clear duty to do the specific act requested; (3) the act requested is an official act or duty; (4) there are no other adequate means to

> obtain the relief he desires; and (5) the issuance of the writ will effect right and justice in the circumstances.

In re Braxton, 258 F.3d 250, 261 (4th Cir. 2001). CACI satisfies all of these requirements and a writ of mandamus should issue.

B. CACI Has a Clear and Indisputable Right to Having Its Evidence-Based Political Question Challenge Considered By the District Court

A district court in this Circuit must "implement both the letter and the spirit" of this Court's directives. *Id.* at 67. "[T]he mandate of a higher court is 'controlling as to matters within its compass.'" *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). "The mandate rule governs what issues the lower court is permitted to consider on remand – it is bound to carry out the mandate of the higher court, but may not reconsider issues the mandate laid to rest. *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012); *Doe v. Chao*, 511 F.3d 461, 464-65 (4th Cir. 2007) (the mandate must be "scrupulously and fully carried out").

As the Supreme Court has observed:

> When a lower federal court refuses to give effect to, or misconstrues [a reviewing court's] mandate, its action may be controlled by [the reviewing] court, either upon a new appeal or by writ of mandamus. . . . It is well understood that [a reviewing] court has power to do all that is necessary to give effect to its judgments."

Baltimore & Ohio R. Co. v. United States, 279 U.S. 781, 785 (1929); *see also United States v. Haley*, 371 U.S. 18, 83 (1962).

Mandamus relief is available "if the lower court does not proceed to execute the mandate, or disobeys and mistakes its meaning." *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978) (internal quotations omitted); *see also, e.g.*, *Bucolo v. Adkins*, 424 U.S. 641, 643-44 (1976); *United States v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263-64 (1948) ("It was held that mandamus was the proper remedy to enforce compliance with the mandate."); *In re Conde Vidal*, 818 F.3d 765, 767 (1st Cir. 2016); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1078-1085 (9th Cir. 2010) ("[W]hen a lower court obstructs the mandate of an appellate court, mandamus is the appropriate remedy . . . ." (quoting *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 718-19 (9th Cir. 1999))); *In re MidAmerican Energy Co.*, 286 F.3d 483, 486, 488 (8th Cir. 2002) ("A federal court's power to utilize mandamus to enforce its prior mandate is firmly established."); *Lindland v. U.S. Wrestling Ass'n, Inc.*, 228 F.3d 782, 783 (7th Cir. 2000); *In re FCC*, 217 F.3d 125 (2d Cir. 2000); *In re Chambers Dev. Co., Inc.*, 148 F.3d 214 (3d Cir. 1998).

That the district court's actions are not in compliance with this Court's remand instructions is not reasonably debatable. The Court's decision in *Al Shimari IV* concluded by "vacat[ing] the district court's judgment, and remand[ing] this case for further proceedings consistent with the principles and instructions

stated in this opinion." *Al Shimari IV*, 840 F.3d at 162; *see also id.* at 151 ("We remand the case for the district court to re-examine its subject matter jurisdiction under the political question doctrine in accordance with the above holdings."). The "principles and instructions" stated in the Court's opinion clearly directed the district court to conduct an evidence-based reevaluation of the political question issue:

> This "discriminating analysis" will require the district court to examine ***the evidence*** regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place.

Id. at 160. This, the district court clearly did not do.

On remand, the district court barred CACI from taking any discovery from the United States, which had exclusive possession of information regarding Plaintiffs' treatment. Instead, the only discovery the district court permitted were depositions of Plaintiffs. While CACI labored under this prohibition on discovery from the United States, the district court directed CACI to file its political question challenge, which the district court denied. In denying that challenge, the district court noted that the lack of discovery from the United States meant that "it's premature to be talking about dismissing a political question case" because the district court ha[dn't] finished the job for the Fourth Circuit." Ex. 2 at 9-11.

Once CACI *did* obtain discovery from the participants in Plaintiffs' interrogations, degraded as it was by the United States' assertion of the state

secrets privilege, it filed the evidence-based political question challenge that this Court dictated, and the district court openly refused to consider it, stating that its pre-discovery denial (which the district court had recognized was premature) was "law of the case." Ex. 11 at 52-53. By essentially forcing CACI to file a pre-discovery political question challenge, and then using that to justify denying CACI an evidentiary challenge to jurisdiction, the district court defied this Court's clear mandate.

The district court's actions not only defy this Court's remand instructions, but are incompatible with virtually every principle applicable to subject matter jurisdiction. The political question doctrine implicates a court's subject matter jurisdiction. *Al Shimari IV*, 840 F.3d at 151. It is black-letter law that a party may challenge subject matter jurisdiction at any time,[9] but the district court's actions limit CACI to a pre-discovery challenge only. Moreover, by refusing to consider a post-discovery political question challenge, the district court effectively prohibited a fact-based challenge to jurisdiction when the law is clear that challenges to subject matter jurisdiction can be brought facially or based on evidence. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) ("*Burn Pit*"); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). Finally, by directing

[9] Fed. R. Civ. P. 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *United States v. Beasley*, 495 F.3d 142, 147 (4th Cir. 2007)

this case to trial without even considering CACI's evidence-based political question challenge, the district court has acted inconsistent with the rule that jurisdiction be established before proceeding to the merits, a rule that is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017) (a court may not "assume subject matter jurisdiction merely to reach a less thorny issue").

Indeed, while the district court has failed to give effect to this Court's *explicit* remand instructions, it has acknowledged being guided by its perception that this Court's *unwritten* message was to resolve this case without further involvement by this Court. Early on after remand, the district court suggested that CACI consider settlement because this Court "may or may not be sending a certain amount of signal," and added that "there aren't going to be any more interlocutory interruptions." 2/9/17 Tr. at 8, 12 (Ex. 5). Finally, in refusing to entertain CACI's evidence-based political question challenge, the district court acknowledged that its intent from the moment of remand in 2016 was to send the case to trial if it did not settle:

> I think I told you-all when I first got this case, you know, given its tortured history, I said we're going to have lots of motions practice, but you should expect if you don't settle this case, it's going to go to trial. I mean, and that's what's going to happen. It's going to go to trial unless it settles, all right?

2/27/19 Tr. at 52-53 (Ex. 11).[10]

The district court's treatment of motions practice as a mere speed bump on the road to trial is exemplified by its treatment of CACI's dispositive motions. As described above, the district court simply refused to consider a post-discovery political question challenge. With respect to extraterritoriality, the district court allowed no argument and relied on mundane domestic actions by CACI as supporting ATS jurisdiction, an analytical framework rejected by the Supreme Court in *RJR Nabisco*, 136 S. Ct. at 2101, and by this Court's decision two days earlier in *Roe v. Howard*, ___ F.3d ___, 2019 WL908983, at *7. Indeed, 'the case is going to trial no matter what' approach was further reflected in the district court's treatment of preemption. In *Saleh v. Titan Corp.*, 580 F.3d 1, 16-17 (D.C. Cir. 2009), the D.C. Circuit held that ATS claims against CACI arising from the same nucleus of operative facts as those here were preempted. This Court has

[10] *See Roy Stone Transfer Corp. v. Budd Co.*, 796 F.2d 720, 722 n.4 (4th Cir. 1986) ("The district court had no jurisdiction to force a party to settle and conversely could not penalize a party for refusing to do so."); *see also Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995) (settlement "achieved through coercion . . . cannot be tolerated"); *In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993) ("Although judges should encourage and aid early settlement, however, they should not attempt to coerce that settlement."); *In re Ashcroft*, 888 F.2d 546, 547 (8th Cir. 1989) ("The law does not countenance attempts by courts to coerce settlements."); *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) ("At the outset, it is important to note that a district court cannot coerce settlement."); *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985).

expressly adopted the *Saleh* preemption test. *Burn Pit*, 744 F.3d at 351 ("Due to the closer fit between the *Saleh* test and the interest at play in this case, we adopt the *Saleh* test here."). The district court neither allowed argument on CACI's preemption argument nor mentioned it. The district court's order disposes of CACI's summary judgment motion "[f]or the reasons stated in open court." Ex. 1. But the district court gave no reasons for its *sub silentio* ruling, leaving its rejection of the rule and/or result in *Saleh* unexplained.

The district court had a clear obligation to conduct the justiciability analysis set forth in this Court's remand instructions. The district court did not conduct that analysis. Issuance of a writ of mandamus is the proper vehicle for enforcing the mandate of this Court.

C. The District Court Has a Clear Duty to Vacate Its Order Refusing to Consider CACI's Political Question Challenge and the Relief Sought Involves an Official Act or Duty

The second and third requirements for issuance of a writ of mandamus are not seriously in dispute. The requested relief – vacatur of the district court's order refusing to consider CACI's evidence-based political question challenge – is an official act of the district court for a case pending before it, and is based on the express instructions provided to the district court in *Al Shimari IV*, 840 F.3d at 160.

D. There Are No Other Adequate Means to Obtain the Relief CACI Seeks

CACI has no other way to obtain compliance with this Court's remand instructions other than to petition for a writ of mandamus. The reply memorandum CACI filed in support of its political question challenge quoted this Court's remand instructions explained in great detail that the pre-discovery political question challenge that the district court required CACI to file in 2017 was not the evidence-based justiciability inquiry that this Court required. Dkt. #1119 at 2, 11-13. The district court not only was unmoved, but advised that it had decided as early as the first post-remand hearing in 2016, that "we're going to have lots of motions practice, but you should expect if you don't settle this case, it's going to go to trial." 2/27/19 Tr. at 52-53 (Ex. 11).

Appellate courts regularly issue writs of mandamus when a district court is not complying with remand instructions because relief from such action is not remediable through a regular appeal. *See* Section IV.B (citing cases). This is particularly true where, as here, the district court's failure to comply with remand instructions involves a mandate from this Court to conduct an inquiry bearing on whether the district court even has subject matter jurisdiction. *Al Shimari IV*, 840 F.3d at 151. It is an "inflexible" principle of law that a district court cannot turn to the merits of a case without first determining whether it has subject matter jurisdiction. *Steel Co.*, 523 U.S. at 94-95. While the district court might have

concluded that its pre-discovery political question decision resolved the issue, the district court's ruling did not address subject matter jurisdiction in the way this Court determined it must be analyzed. Accordingly, without the mandamus relief regularly provided when district courts have deviated from remand instructions, this case will proceed to trial on April 23, 2019, and the merits will be resolved, before subject matter jurisdiction is determined in the way this Court found necessary.

E. Issuance of the Writ Will Effect Right and Justice in the Circumstances

Issuance of the writ serves the interests of justice in this case. All CACI seeks is the subject matter jurisdiction assessment that this Court specifically directed. CACI was a participant at sufferance in the pre-discovery political question determination, as the district court sequenced events in a way that required briefing of political question before *any* of the discovery necessitated by this Court's remand instructions had occurred. Having acknowledged that it would be "premature" to grant a political question dismissal at that stage because the district court "ha[dn't] finished the job for the Fourth Circuit" (Ex. 2 at 9-11), it is entirely unjust to CACI to treat that premature assessment of justiciability as the final word on the subject. Therefore, justice requires issuance of a writ of

mandamus so that CACI can be heard on the political question challenge dictated by this Court's mandate.

V. CONCLUSION

For all of these reasons, the Court should issue a writ of mandamus directing the district court to vacate its order refusing to consider CACI's political question challenge, to conduct the evidence-based justiciability analysis directed by this Court, and to make specific findings of fact based on the evidentiary record in support of the district court's ruling.

Respectfully submitted,

/s/ John F. O'Connor

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 4th day of March, 2019, in the manner indicated below, on the following:

The Honorable Leonie M. Brinkema (by hand delivery)
United States District Judge
United States District Court
for the Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314

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/s/ John F. O'Connor

John F. O'Connor

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE CACI PREMIER TECHNOLOGY, INC. Petitioner,	Case No. _____ On Petition for Writ of Mandamus from the United States District Court for the Eastern District of Virginia at No. 1:08-cv-827

DECLARATION OF JOHN F. O'CONNOR

I, John F. O'Connor, hereby declare as follows:

1. I am a partner in the law firm of Steptoe & Johnson LLP. I am one of the counsel for Petitioner CACI Premier Technology, Inc. ("CACI") in connection with the Petition for Writ of Mandamus filed by CACI on March 4, 2019 regarding the district court's justiciability rulings in *Al Shimari v. CACI Premier Technology, Inc.*, No. 1:08-cv-827 (E.D. Va.).

2. Attached hereto are true copies of the following exhibits, all of which were filed in the district court or are transcripts of hearings in the district court:

Exhibit No.	Description
1	Order of February 27, 2019
2	Excerpts from the hearing transcript of September 22, 2017
3	Excerpts from the hearing transcript of December 16, 2016

Exhibit No.	Description
4	Excerpts from the hearing transcript of January 27, 2017
5	Excerpts from the hearing transcript of February 9, 2017
6	Excerpts from the hearing transcript of April 28, 2017
7	United States Response to CACI's First Set of Interrogatories (public version)
8	Declaration of Secretary of Defense James Mattis dated November 9, 2018
9	CACI's Memorandum in Support of Its Suggestion of Lack of Subject Matter Jurisdiction dated January 3, 2019 (public version)
10	CACI's Supplemental Memorandum Regarding Dispositive Motions (Public Version) originally filed on February 13, 2019 but filed in lesser redacted form on March 4, 2019 as re result of narrowed confidentiality designations by the United States
11	Hearing transcript of February 27, 2019

3. Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true. Executed at Washington, D.C. this 4th day of March, 2019.

/s/ John F. O'Connor

John F. O'Connor

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 4th day of March, 2019, in the manner indicated below, on the following:

The Honorable Leonie M. Brinkema (by hand delivery)
United States District Judge
United States District Court
for the Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314

John Kenneth Zwerling (by email and U.S. Mail)
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/s/ John F. O'Connor

John F. O'Connor

Exhibit 1

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:08-cv-827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant/Third-Party Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Third-Party Defendants.	)	

ORDER

For the reasons stated in open court, defendant/third-party plaintiff CACI Premier Technology's ("CACI") Motion to Dismiss Based on State Secrets Privilege [Dkt. No. 1040] and Motion to Dismiss for Lack of Jurisdiction [Dkt. No. 1057] are DENIED. CACI's Motion for Summary Judgment [Dkt. No. 1033] is GRANTED with respect to plaintiff Taha Yaseen Arraq Rashid and is DENIED in all other respects. Plaintiffs' Motion in Limine Regarding the Taguba and Jones/Fay Reports [Dkt. No. 1078] is HELD IN ABEYANCE. In addition, it is hereby

ORDERED that the parties inform the Court by 5:00pm on Friday, March 8, 2019 whether plaintiffs will testify live in court or via video.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 27th day of February, 2019.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

Exhibit 2

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs, vs. CACI PREMIER TECHNOLOGY, INC., Defendant.	Civil Action No. 1:08cv827 Alexandria, Virginia September 22, 2017 11:06 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

THE COURT: Well, let me hear any response on the political question issue.

MR. AZMY: Okay.

MR. O'CONNOR: Your Honor, on the political question, we also agree that the Fourth Circuit's instructions to the Court were very clear on remand, and what the Fourth Circuit said was that this Court should conduct a discriminating analysis that involves, quote, examining the evidence regarding the specific conduct to which plaintiffs were subjected and the source of any direction under which the acts took place. That's *Al Shimari IV,* at 160 to -61.

THE COURT: Now, we have half of that; that is, we have the depositions of the three plaintiffs remaining in this case, right?

MR. O'CONNOR: We do have the three plaintiffs deposed.

THE COURT: Right. How much evidence is yet to be developed about CACI's alleged involvement in that conduct?

MR. O'CONNOR: There's basically been no development at this point, Your Honor, because --

THE COURT: That's the problem.

MR. O'CONNOR: Your Honor is preaching to the choir. I mean, we feel very strongly that we need discovery, and we've said so at every step, that --

THE COURT: Which means it's premature to be talking

about dismissing a political question case. I haven't finished the job for the Fourth Circuit, have I?

MR. O'CONNOR: Well, Your Honor, we would say that briefing the political question was premature, and that's why we had -- when Your Honor had --

THE COURT: We wanted to get -- we've been taking this case sort of step by step --

MR. O'CONNOR: Yes, Your Honor.

THE COURT: -- because in the previous iterations of this case, you know, there had not been enough development.

We've now gotten the depositions of the three plaintiffs. We now have the very specific description of all the alleged conduct upon which the plaintiffs are relying, so that half of the assignment from the Fourth Circuit, I think, has been achieved.

MR. O'CONNOR: Well, I wouldn't say completely achieved, Your Honor, because the second part of the assignment, as Your Honor has cast it, would be sorting out what, if any, involvement CACI personnel had with that treatment.

THE COURT: Correct.

MR. O'CONNOR: But as part of that, it would also double back to the first point, because at this point, we just have to accept what the plaintiffs say about what happened because we don't have any access to information from anyone

else who can say, well, I was the interrogator, or I was the linguist, or I was the analyst at that interrogation, and that's not what happened. This is what happened.

THE COURT: Right.

MR. O'CONNOR: So the second step, if that's where we're going to go, will also inform the first steps. So I wouldn't say it's complete, but we do at least, I think, have clarity on what the plaintiffs say happened to them.

Now, our, our assumption when Your Honor directed us to file a Rule 12 motion was that we were not going to be dealing with political question at this point because, as the parties had said back in the summer, we thought that sort of trying to narrow the case, if 12(b)(6) motions and things like that made sense, before we confronted some pretty difficult questions on political question, but Your Honor said: Brief it, so we did, and they do have the burden, and so if --

THE COURT: Well, the briefing has helped the Court to see even more clearly, although still not totally clearly, some of the other legal arguments that you have percolating in this case.

MR. O'CONNOR: Yes, Your Honor.

THE COURT: I mean, you've made, you've made, you know, arguments involving preemption and other issues that I'm not going to address today, all right? Because the bottom, the bottom line is that the Fourth Circuit has sent this Court, as

both sides agree, a clear direction to develop this record as fully as it can be developed. And I've told you I've tried to see if we can fully develop this record without having to get into the whole morass of elements from the government. That's hopefully way down the road. But the next step that has to be taken is to thoroughly get discovery as to CACI, as to who from CACI was on the scene, what was going on.

So where are you in terms of -- and this is another Judge Anderson case. Have we stayed all discovery pending the outcome of this particular round of briefing?

MR. O'CONNOR: Yes. Your Honor, we've asked for discovery many times, and the Court has said: Hold on, let's -- you've not permitted us to take discovery yet.

THE COURT: Well, wait. But that's you -- I'm only looking at the plaintiffs getting discovery from you-all, from CACI.

MR. O'CONNOR: Your Honor, I just want to make sure the Court understands that they've taken discovery from CACI personnel over the past 10 years --

THE COURT: Of course they have.

MR. O'CONNOR: -- or 12 years, but the problem is we are -- without the United States, we are never going to find out who, if anyone, was, as the Court said, on the scene with these plaintiffs, because the United States has a monopoly on that information.

It's not knowable.

THE COURT: All right, but here's the point: As I understand the Fourth Circuit's position, and I think they're correct, is that if the conduct -- first of all, the plaintiffs have the hurdle of showing that the conduct actually was CACI's conduct, right?

MR. O'CONNOR: Agreed.

THE COURT: But if that conduct was unlawful, it doesn't make any difference whether the government ordered you to do it or not. You're going to be liable.

MR. O'CONNOR: But they're never going to -- but my only point is taking discovery from CACI will not shed any light on whether anyone from CACI gave instructions for these plaintiffs. We've never shirked -- we've never avoided discovery. We don't have much to give because we don't know who's on the scene for these plaintiffs. We've been trying to get that from the United States for years, and until we get that, that will tell them who they should ask about --

THE COURT: Why does CACI not know whether its own employees or subcontractors were actually on the scene at any particular time? Why would you not know that?

MR. O'CONNOR: Your Honor, when you say "on the scene," if the Court means who was at Abu Ghraib prison, we know that, but who, if anyone, from CACI was involved with these plaintiffs? We don't know that because that information

is classified, and so we -- CACI management was not monitoring or overseeing these interrogations. We put people in, and the government, you know, the Army did that.

So we don't know -- management at CACI had no -- they weren't getting operational reports. They have no idea who was interrogating whom. So, but the information is classified, and they --

THE COURT: I'm sorry, but CACI had to have had supervisors on the scene. Let me ask the plaintiff, what discovery have you actually gotten from CACI at this point? I thought that you had gotten discovery in the past.

MR. LoBUE: Yes. Your Honor, Robert LoBue for the plaintiffs.

THE COURT: Yeah.

MR. LoBUE: We had a significant amount of discovery taken in a companion case, the one in the D.C. Circuit ultimately, which by agreement is admissible here to the same extent, and so we do have a significant amount of discovery, and so here are some of the things that discovery shows:

We have the, the detainee files from the government for our plaintiffs. So, for example, the government's records identify who the lead interrogator for Mr. Al Shimari was, and it was an employee of CACI.

We have testimony from our own, one of our own plaintiffs that he saw a civilian interrogator outside his cell

instructing the MP what to do with him and then the MP came in and committed acts of abuse. The only civilian interrogators at Abu Ghraib in the hard site Tier 1A were CACI employees.

THE COURT: Now, is that something -- is that a fact that you-all have agreed to? I thought the last time, there was discussion of other contractors being on the scene.

MR. LoBUE: There were translators to be sure. There were other cases brought against, against the translation company. Those are no longer pending.

But my point simply, Your Honor, is I don't want the sense to be left on the record that we have no evidence connecting CACI interrogators on the site to these plaintiffs. We have testimony from the MPs who were ultimately court-martialled that they took their orders from CACI -- the CACI interrogators how to treat the detainees. They were trained by the CACI interrogators how to inflict these forms of abuse on the detainees. And we have testimony from our own witnesses that those same MPs practiced the same forms of abuse on them.

So there -- and remember, this is a conspiracy and aiding and abetting case. We are not contending that the CACI interrogators laid a hand on the plaintiffs. That's not the way it worked, as the investigations have all made quite clear.

There was a command vacuum. The CACI interrogators assumed de facto positions of control, and they dictated to the

MPs how to treat the detainees, and they praised the MPs when they committed the acts that they were instructed to do.

So if you compare this case, for example, to the *Al-Quraishi* decision, which is cited in our briefs, in the context of conspiracy and aiding and abetting, Judge Messitte in that case said this is not merely a plausible, indeed, almost conclusive inference that they were acting in concert in the confines of, of the hard site Tier 1A.

So I think the -- I think what Mr. O'Connor is getting at is he has a pending motion to get discovery from the government as to specifically which interrogators were assigned to which detainees, and we've taken no position on that because our case does not turn on placing a particular CACI interrogator on a particular detainee. We think they set the example. They set the tone. They instructed. They praised. And if you look at *Al-Quraishi*, that should be enough.

I'd just like to bring to the Court's attention the recent decision that didn't quite make it into our briefs in the case of the *Salim* case. This is the case of the CIA psychologists, *Salim v. Mitchell*.

THE COURT: That was just settled. That was a settlement.

MR. LoBUE: That was settled days after this decision issued denying summary judgment to the defendants, and that was the case where the defendants are sitting in their medical

Exhibit 3

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs,	Civil Action No. 1:08cv827
vs.	Alexandria, Virginia December 16, 2016 10:11 a.m.
CACI PREMIER TECHNOLOGY, INC., Defendant.	

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 31)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

THE CLERK: Civil Action 08-827, Suhail Najim Abdullah Al Shimari, et al. v. CACI Premier Technology, Inc. Would counsel please note their appearances for the record.

MR. O'CONNOR: Good morning, Your Honor. John O'Connor and Conor Brady for defendant, CACI Premier Technology, Inc., and we're joined by Bill Koegel from CACI.

THE COURT: Good morning.

MR. ZWERLING: Good morning, Your Honor. Your Honor, John Zwerling for the plaintiff, Al Shimari, et al, and I'd like to introduce to the Court three attorneys who are pro hac vice'd into this case but I don't believe the Court has met yet: Baher Azmy and Katherine Gallagher from the Center for Constitutional Rights up in New York, and Robert LoBue from Patterson Belknap Webb & Tyler.

THE COURT: Good morning, counsel. All right. Well, as you know, I have inherited this case from Judge Lee, and so I am still relatively new to it, although I have a companion case, the Steptoe folks know about that one, *Abbass v. CACI*, and so -- but again, that case was stayed, because there's such an overlap of issues, to see what happened with the Al Shimari case, which is now before us.

I had requested that both sides submit status reports, with suggestions as to how to proceed after the Fourth Circuit issued its remand, and I've looked at both sets of

papers; and actually, I'm not going to accept either of your plans because as I look at the issues -- and, you know, a court's first obligation is always to determine whether it has jurisdiction; and the issue, it seems to the Court, that must first be fully resolved, and that's certainly what the Fourth Circuit instructed, is the issue as to whether or not the conduct that's been alleged by the plaintiffs in the third amended complaint, which is the only complaint that's actually before us, was unlawful when committed, and if not, did that conduct occur under the actual control of the military or involve sensitive military judgment.

That's the key issue. I've got to decide that. If I find, for example, that the conduct was lawful or was not unlawful, that puts us in one direction. If we find that the conduct was unlawful, then it's irrelevant in terms of the issue of control. Courts clearly have said that. It will definitely change how we go about the discovery.

I think that was essentially the fourth point on CACI's list in terms of the push-down order, but in my view, that's the issue that has to get resolved first, and so I've decided that.

Now, the only thing I want to sort of talk to you about a little bit is how we go about addressing that particular issue, so we're going to talk a little bit about how we're thinking about the case. And again, I'm still new to it.

I have a couple of just sort of procedural questions. Was there actual discovery engaged in during the previous iterations of this case? In other words, have you had some discovery in the case?

MR. O'CONNOR: Your Honor, John O'Connor.

THE COURT: Yes.

MR. O'CONNOR: There was full discovery. We had a full discovery period, and that period closed in 2013.

THE COURT: All right. Now, during that, during that period then, were the plaintiffs deposed?

MR. O'CONNOR: Only Al-Ejaili, Your Honor. The other three, Judge Lee had ordered them to appear in this district. They were not permitted by the United States to come into this district.

THE COURT: All right. But you have fully deposed one plaintiff?

MR. O'CONNOR: That's true, Your Honor.

THE COURT: And this plaintiff is which of the four? I'm sorry, I know one was an Al Jazeera reporter and one --

MR. O'CONNOR: That's the one.

THE COURT: So I would -- did he speak English?

MR. O'CONNOR: No, Your Honor. We used a translator here and there. It appeared that he could understand, you know, words, but he was deposed through a translator.

THE COURT: All right. Do we have a transcript of

complaint -- we have a complaint, but we do think that the Fourth Circuit's remand instructions require more than that, and so for Al-Ejaili, for instance, he actually had to testify about what -- you know, and was subject to cross-examination about what actually happened to him.

And in all these cases, we spend a lot of time at the allegation stage, and I think the Fourth Circuit's instructions are that that's not sufficient anymore. We're now at the point where -- the evidence stage, because they use "evidence." They don't say "allegation."

THE COURT: I understand that. Well, there are different ways of getting evidence. One would be sworn affidavits. One would be answers to interrogatories or depositions.

MR. O'CONNOR: Yes, Your Honor.

THE COURT: And I'm not -- I have -- I do not agree with how Judge Lee approached the issue about the depositions of the, of the plaintiffs. I in my experience have had witnesses who couldn't get into the United States and we -- and have had parties who couldn't get into the United States, and we've done it by video. There's no reason that can't be done, and I think that was offered at one point.

We could also have you-all go over to Istanbul or Amman, Jordan, or someplace which is relatively safe to take the depositions. I think the least expensive way of doing it

would be by video.

But there's no reason in my view why the testimony of these plaintiffs cannot be obtained, and it would make the record complete, and my reading of the Fourth Circuit is that my job in this case is to develop the full facts -- I agree with you, we have to develop the full factual record. The issues in this case are very important, and both sides plus, frankly, you know, the American people and the people of Iraq have a right to get the full record developed here, and so I feel that we are going to need to get the testimony of the three remaining plaintiffs.

The fourth one, you've already got his testimony, and I would assume whatever description he has provided of the conduct is what it is.

However, so that we don't waste time, some of the allegations to some degree overlap. I mean, the use of the dogs, for example, to scare people. So there's no reason why even while we're getting a complete record as to the other three plaintiffs, the lawyers can't start looking at the legal question, I mean, because you have some genuine specific detail already as to the type of conduct that's at issue in the plaintiffs' case.

MR. O'CONNOR: Your Honor, we agree that the Fourth Circuit's instructions here are to develop the full record. What we -- one concern we have is that a deposition of a

plaintiff is not the full record because the United States certainly has records and information about the treatment of everybody who was detained in Abu Ghraib prison. Those were discovery motions that had been brought, had not been ruled on because Judge Lee entered judgment.

So unless --

THE COURT: But why would that be relevant to this case? We have four individual plaintiffs who have said certain things happened to us at Abu Ghraib, right? That's it.

MR. O'CONNOR: Yes, Your Honor.

THE COURT: All right. Their description of what happened forms the parameters of the legal analysis as to whether that conduct was unlawful under the law, whatever law it is, that existed at that time. That's the issue for the jurisdictional -- to get it over this jurisdictional problem.

MR. O'CONNOR: But, Your Honor, on a 12(b)(1) motion, we think that the Court resolves conflicts in the evidence, and I don't think --

THE COURT: But what other -- your only evidence would be it didn't happen to them?

MR. O'CONNOR: Didn't happen to them, that's right, the surrounding circumstances. Also, legality will be greatly informed by what was authorized by the United States at the time that these alleged events occurred.

THE COURT: Well, but that goes -- that's a question

of law. That goes to what are we looking at in terms of what makes something unlawful.

In other words, if, if -- anyway, I'm not going to start giving you a view of how I think the case will ultimately wind up because I don't know how it's going to wind up. I haven't seen your briefs.

But we're not going to delay this case ad infinitum. This case needs to get -- these issues need to get resolved, and I think the most efficient and clearest way is to go right to the essence of the case, and the essence of the case, as I said before, is the specific allegations of the four plaintiffs as to the conduct that they, they allege they experienced, and then to look at what sources of law which were in effect in that 2003-2004 time period, what was clearly established law.

Remember, the Fourth Circuit also talked about the gray zone. Again, if certain conduct is not clearly against whatever legal standard I find is the proper legal standard, then you do have to look at whether there was direct direction from the military or sensitive military judgment involved. That analysis comes in in the gray zone or in the zone where the conduct is not unlawful.

But the first and key question is whether the conduct was unlawful, and that's -- I think there are only two things you need to do for that. One is what is the conduct and what is the law that you're -- that it's going to be weighed

against, and that's how I want these first round of motions to proceed.

I'm going to do the following: I'm going to give you-all some time limits in which I want to have certain things done. Do the plaintiffs' counsel feel there's going to be any problem in organizing the depositions of the three remaining plaintiffs? I assume you've been in touch with them since the decision of the Fourth Circuit?

And who's the spokesperson on this issue? Your name again, please?

MR. AZMY: Baher Azmy.

THE COURT: Yes, sir.

MR. AZMY: Your Honor, yes, we have been in touch with them, and we have been in the process of preparing for the possibility of entry into the United States, which requires for two of the three plaintiffs renewing their passports and then a visa process, but as we urged in the earlier proceedings, we can also make them available for video depositions or for in person depositions in a neutral city like Istanbul.

So we would propose to meet and confer with the defendants to identify a timetable by which we could complete the video depositions, but we also agree with Your Honor that for purposes of political question, the Court can decide on the evidence. We don't think it necessarily has to be evidence that is subject to cross-examination in a, in a deposition. We

Exhibit 4

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs, vs. CACI PREMIER TECHNOLOGY, INC., Defendant.	Civil Action No. 1:08cv827 Alexandria, Virginia January 27, 2017 10:30 a.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Telephonically)

FOR THE PLAINTIFFS:	ROBERT P. LoBUE, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10046
FOR THE DEFENDANT:	JOHN F. O'CONNOR, ESQ. Steptoe & Johnson LLP 1330 Connecticut Avenue, N.W. Washington, D.C. 20036
ALSO PRESENT:	J. WILLIAM KOEGEL, JR., ESQ.
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

Now, please keep in mind that's because I -- every question I ask has to be translated, and every answer has to be translated, so the transcript pages are probably half of what you'd think of as a seven-hour deposition, and the number of questions is probably half, but just the logistical problems of translation makes it -- that's probably a reasonable estimate.

We've got the further complication that this is going to occur with the witness sitting probably in Beirut, and so there's, you know, Lord knows what hiccups we might have from that, but in terms of question and answer, it's probably a seven-hour period of time.

Now, plaintiffs had indicated an intent to ask roughly a direct examination of their clients, which in a deposition, they're certainly entitled to question their own clients, so that would be on top of, I think, what we would have in mind.

THE COURT: Well, I will tell you, what I envision is that these depositions as a practical matter really will probably be serving as the trial testimony for these witnesses -- these individuals. The likelihood of their able -- their being able to get visas to come into the United States, I think, given the current political environment, is probably highly questionable, and I remember from some of the filings in this case that there were, you know, issues about the ability of these people to get into the United States.

If they're taken as substitutions for the trial -- for physical presence at the trial, then in some respects, the plaintiff can go first in doing the questioning. This is -- I don't see these as discovery depositions. These are depositions to take the place of being able to testify live in court.

Now, if for some reason should this case get a trial date, I mean, should it go to trial and they're able to come here, this would not foreclose them from being here physically at the courthouse to testify, but I think that the -- I had always envisioned that -- and that's the reason why I wanted them done at the courthouse, so that I would be here. If you ask a question that I wouldn't let you ask during the trial, I would sustain an objection. It would be just as if they were here at the courthouse.

MR. O'CONNOR: Your Honor?

THE COURT: Yeah.

MR. O'CONNOR: John O'Connor for defendant. If these aren't deposition -- if these are not discovery depositions at least in part, when do I get discovery from these plaintiffs? I mean, I mean, it's great to say, well, let's just jump ahead to a trial. They certainly got to take discovery depositions of anybody they wanted, and I don't get to take discovery depositions of the most important witnesses for the other side? I think -- I mean, I don't think that gives us a fair

opportunity to move this case along.

And I'll also add that I think given the order that we're proceeding here, we are -- you know, I don't think I could do a trial cross, because the Court has determined that we're going to do this for political question purposes before we deal with the motions to compel, and, and the Fourth Circuit has directed us to find out exactly what happened to these plaintiffs, and a lot of that's in the possession of the United States, which we are not being permitted to litigate those motions to compel at this point.

So I, I want to lay down that marker that, I mean, I don't think we view these depositions, one, as a substitute for trial at this point, and two, we can't imagine that we could finish our questioning and say, well, we're done with these witnesses forever and ever, because there's a lot of discovery, a lot of important discovery issues to be resolved in this case that will bear directly on the questions we would ask these witnesses.

THE COURT: Mr. LoBue?

MR. LoBUE: Yes, Your Honor, Robert LoBue. I think there are ways to deal with this. I hear what the defense is saying, but -- so, for example, we could go first and, and do a, what I imagine would be a relatively short direct, and as Your Honor, I think, fully understands, we're doing this protectively because we realize it's at best unclear whether

Exhibit 5

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs, vs. CACI PREMIER TECHNOLOGY, INC., Defendant.	Civil Action No. 1:08cv827 Alexandria, Virginia February 9, 2017 2:30 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Telephonically)

FOR THE PLAINTIFFS:	ROBERT P. LoBUE, ESQ. PETER A. NELSON, ESQ. MATTHEW FUNK, ESQ. Patterson Belknap Webb & Tyler LLP 1133 Avenue of the Americas New York, NY 10046
FOR THE DEFENDANT:	JOHN F. O'CONNOR, ESQ. LINDA C. BAILEY, ESQ. Steptoe & Johnson LLP 1330 Connecticut Avenue, N.W. Washington, D.C. 20036
ALSO PRESENT:	J. WILLIAM KOEGEL, JR., ESQ.
OFFICIAL COURT REPORTER:	ANNELIESE J. THOMSON, RDR, CRR U.S. District Court, Fifth Floor 401 Courthouse Square Alexandria, VA 22314 (703)299-8595

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

I think it would behoove me to confer with my client before --

THE COURT: Obviously, I'm not asking you to make any kind of a commitment, but Mr. Koegel is there, correct, from CACI?

MR. O'CONNOR: He's on the line, Your Honor.

THE COURT: Yeah, all right.

The other thing is unless you're uncomfortable -- and I take no offense if you decide you don't want to say it -- other than the *Abbass* case, are there any other cases pending against CACI in the country?

MR. O'CONNOR: John O'Connor. No, Your Honor, these are the last two.

THE COURT: These are the last two.

And remind me, I know that the ATS has a fairly long statute of limitations. Is it ten years or twenty years?

MR. O'CONNOR: Your Honor, John O'Connor. There's case law suggesting that ten years is the appropriate statute --

THE COURT: That's what I thought. You know, even with the *Abbass* case, I don't think the universe of plaintiffs is more than 40 or 50 between the two cases. I mean, I could be wrong as to how many are in the *Abbass* case.

MR. O'CONNOR: Your Honor, I believe it's a little higher, but you're in the ballpark.

THE COURT: All right. You know, it would not be unwise to just give some serious thought at this point because there's a lot of litigation ahead of you. There's constant expense. There's still public relations issues. There could be appropriate, appropriate ways of handling this, and you-all think about it.

I mean, if you are interested, I see that Judge Anderson is a -- who is a very excellent mediator, probably has a 95 percent success rate, is the judge assigned to this case, and if you were -- if you thought there was some merit to making an effort, I mean, from the plaintiffs' standpoint, I recognize that your first obligation is to your individual clients, and if they are in need of finances for medical issues or other types of problems that they feel are connected to what's happened to them, it would certainly in my view be your responsibility to do what you could to, you know, get some resolution, because we're talking even if we move this case quickly, several months before resolution at this level, and you-all know whatever I do, it's going to get appealed. So we're talking a couple more years of this ongoing litigation, and from CACI's standpoint, the *Abbass* case is still hanging out there.

So I think, you know, both sides might want to give some serious consideration to whether or not there is a way to resolve the dispute. If not, I've given you some extra time to

work on the depositions.

Now, there were a couple of other minor issues -- not minor but issues raised in the motion to reconsider. Mr. O'Connor, I must tell you so that you can put your efforts in different direction, I'm not going to entertain a 12(b)(6) motion at this point. I'm satisfied that this complaint, read as you read it with a great deal of deference to the pleading, is sufficient to withstand that, and it's been enough of those preliminary types of motions.

And in terms of discovery from the United States, again, I think that's premature, and so at this point, while I'm not, you know, putting an absolute kibosh on it, I'm not going to open that up at this point. Let's focus on what these plaintiffs have to say, focus on the, me getting you my ruling on the alien tort statute, and then you-all give some serious thought to whether you can resolve this case, all right?

MR. O'CONNOR: Your Honor, John O'Connor. Do I understand that on the 12(b)(6) issue, that functionally, the Court is just denying a 12(b)(6) motion? Not denying us the opportunity to file one at this time but saying we're not doing 12(b)(6) motions in this case?

THE COURT: You've had so many shots at -- preliminary shots at this pleading for various reasons, we're not going to have another one at this point as to the adequacy of the allegations in the complaint. Yeah, that's right.

MR. O'CONNOR: Your Honor, we won the last one that we had on the second amended complaint, and this complaint has never been tested on 12(b)(6) because Judge Lee entered judgment on other drafts.

MR. LoBUE: Your Honor, Robert LoBue. If I may, I would just point out that earlier in this case, Judge Lee sustained the sufficiency of an earlier complaint that was less detailed on the, on the allegations of conspiracy than the one that is now offered.

THE COURT: Yeah.

MR. LoBUE: So I -- that's all I really have to say.

THE COURT: Yeah, I think, Mr. O'Connor, that CACI has had sufficient opportunities to test at the pleading stage -- at the pleading stage, there's enough. The Fourth Circuit wants this case addressed on more of the merits, the legal merits, not the pleading merits per se. We're going to get the depositions done, and let's see where we go from there. But this case does have to move one way or the other, and there aren't going to be any more interlocutory interruptions. We need to get it done.

So that's my ruling. Hopefully, you'll be able to work these depositions out as expeditiously as possible, and I think you should give serious thought to seeing if you can resolve this litigation, but if not, we'll see you down the road. All right?

Exhibit 6

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs, vs. CACI PREMIER TECHNOLOGY, INC., Defendant.	Civil Action No. 1:08cv827 Alexandria, Virginia April 28, 2017 10:14 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

ROBERT P. LoBUE, ESQ.
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

international Red Cross visit. That's our quick analysis of claims specific to Mr. Rashid that are not included among the claims of the other three.

Now, as you know, right now we're still at a somewhat preliminary stage of the proceedings in that I do have pending before me and I'm going to try to get to you in the near future a resolution of the, the legal issue that you posited to us, but obviously, the nature of the Court's analysis of this case may be quite different if Mr. Rashid's claims are not among the claims that are being considered.

So his presence or absence from this case is significant, and that being the case, I'm going to give the plaintiff one more chance to see if you can find him and get him to a position -- and get us to a position where we know whether he's going to be subject to deposition or not.

So I am over the defendant's objection going to grant the motion, but I'm changing your request slightly. This has to be done. I mean, you can't just have this hanging in limbo, all right? And so you must report back to the Court with a definitive position as to whether you know where he is and he can be deposed on a date certain or you can't find him, in which case we'll have to decide, you know, whether it's a dismissal with or without prejudice. All right?

MR. LoBUE: Thank you, Your Honor.

THE COURT: So that's my ruling. So you requested

until I think it's the end of May? By May what, 30th?

MR. LoBUE: 31st, I think we said.

THE COURT: 31st.

MR. LoBUE: If that's acceptable to the Court.

THE COURT: I think we should push it back a little bit. By May 25.

MR. LoBUE: Okay.

THE COURT: And that gives us that long weekend to be looking at it, all right?

In the meantime, I hope to get you an opinion out by that time, too, on the issue that you have briefed at this point, and then we'll see where the case goes from there. All right, counsel?

MR. LoBUE: Thank you, Your Honor.

MR. O'CONNOR: Your Honor?

THE CLERK: Civil Action 17-94 --

MR. O'CONNOR: Your Honor?

THE COURT: Yes, sir.

MR. O'CONNOR: Could I be heard very briefly on the, sort of the process going forward?

THE COURT: Yes.

MR. O'CONNOR: We understand the Court's ruling, and we agree with the Court that we are in a preliminary stage here. I mean, at this point, very little has been done since remand. Under any circumstance, I believe that the discovery

from the United States is going to be --

THE COURT: You keep wanting to bring the United States into this case.

MR. O'CONNOR: Well, we want to -- we want to take discovery at a minimum, Your Honor.

THE COURT: Well, I understand that, but they have never chosen, as I understand it, to intercede in this case, right? Did they ever ask to be part of this case?

MR. O'CONNOR: They've -- they have never -- they filed an amicus brief on request in the Fourth Circuit. They've appeared in a couple hearings here on motions to compel, things like that, but, I mean, they are a third party that has, I think, very highly relevant discovery, and at some point, we're going to have to confront that, and if we have time, because Rashid, we're in a holding pattern, then it might make sense to start that process.

THE COURT: I'm not starting the discovery yet, but you can certainly start talking to your contacts at the U.S. Attorney's Office and see what position the Civil Division wants to take in this case. I mean, that certainly would not be unwise, but I'm trying to avoid overly complicating this case as well, all right?

MR. O'CONNOR: So are we, Your Honor. Thank you.

THE COURT: The other thing I would ask you-all to do, you'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? I mean, I'm certainly going to follow what the Fourth Circuit has done, but just because certain things were done or not done previously, don't assume that will be the case with me, all right?

MR. O'CONNOR: We understand that, Your Honor.

THE COURT: Okay. Very good. Thank you.

MR. O'CONNOR: Thank you.

MR. LoBUE: Thank you.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson

Exhibit 7

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	No. 1:08–cv–827 (LMB/JFA)
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1–60, Third-Party Defendants.	

THE UNITED STATES' RESPONSES TO INTERROGATORIES NO. 1 AND NO. 2 OF DEFENDANT CACI PREMIER TECHNOLOGY INC.'S FIRST SET OF INTERROGATORIES TO THE UNITED STATES

Pursuant to Federal Rules of Civil Procedure 26 and 33 and the Local Rules of the United States District Court for the Eastern District of Virginia, third-party Defendant, the United States of America, hereby submits through undersigned counsel the following objections and responses

to Interrogatories Nos. 1 and 2 of the first set of Interrogatories from CACI Premier Technology ("CACI PT").[1]

INTRODUCTION

The United States' responses are provided in accordance with Federal Rule 26(b)(1), which permits the discovery of any information, not privileged, that is both (1) relevant to any party's claim or defense, and (2) proportional to the needs of the case. The United States does not, by providing such information, waive any objection to its admissibility on the grounds of relevance, proportionality, accessibility, materiality, or other appropriate ground. The inadvertent disclosure by the United States of information protected by any privilege or other protection shall not constitute a waiver of the applicable privilege or protection as to any information disclosed. The United States reserves the right to supplement or amend its responses should additional or different information become available.

In responding to the Interrogatories, the United States responds based upon information in the U.S. Department of Defense's and U.S. Department of the Army's possession, custody, or control. To the extent that CACI PT seeks information beyond the possession of the U.S. Department of Defense and/or U.S. Department of the Army, the United States objects that such information is not proportional to the needs of the case and that the burden in responding outweighs any likely benefit.

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[1] Pursuant to the Court's Orders of February 23, 2018, and March 14, 2018, the United States' response to CACI PT First Set of Interrogatories and First Requests for Production of Documents Requests on the United States on February 23, 2018, are currently stayed except for the United States' responses to Interrogatories Number 1 and Number 2. *See* Docket Nos. 687, 695. Accordingly, the United States' response herein is limited to those two interrogatories. Nothing in this response should be construed as waiving any objection to the remaining set of interrogatories or to any of the requests for production of documents.

SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES

Interrogatory No. 1: *Identify any interrogator who interrogated any Plaintiff at Abu Ghraib Prison.*

Objections: The United States objects to this interrogatory on grounds that the phrase "interrogated" is vague and ambiguous in this context and potentially seeks information that is not proportional to the needs of this case. The term "interrogation" is defined by CACI PT as including "any process of interviewing or questioning of a detainee for the purpose of obtaining information." That definition is overly broad to the extent it encompasses, for example, mere intake of the detainee's personal information. Moreover, the disclosure of an intake officer's identity, or of the identity of any individual who posed a casual question to a detainee, would unduly invade that individual's privacy and would be unrelated to the allegations in this action. For purposes of responding to this interrogatory, the United States is limiting its responses to "intelligence interrogations," which is defined in Department of Defense Directive ("DoDD") 3115.09 as "[t]he systematic process of using interrogation approaches to question a captured or detained person to obtain reliable information to satisfy foreign intelligence collection requirements." DoDD 3115.09, *Glossary*, p. 31.

The United States also objects that disclosure of identifying information concerning anyone who "interrogated" any of the Plaintiffs would be an unwarranted invasion of the individual's personal privacy and constitutes information the disclosure of which is routinely protected by the Department of Defense for security reasons. Further, this information is considered classified under DoD Directive 3115.09, and therefore this interrogatory seeks information subject to the state secrets privilege.

The United States further objects to the extent that CACI PT does not first avail itself of alternative methods for obtaining relevant information before implicating classified information or the state secrets privilege. *United States v. Reynolds*, 345 U.S. 1, 11 (1953) (counseling against "forcing a showdown on the claim of [the state secrets] privilege"); September 23, 2009 Attorney General Memorandum Governing Invocation of the State Secrets Privilege (Exhibit 1) (requiring that the state secrets privilege "should be invoked only to the extent necessary to protect against the risk of significant harm to national security"). The United States renews a proposal laid out in a March 22, 2013, letter authorizing pseudonymous depositions of individual interrogators. *See* March 22, 2013, Department of Justice Letter to Counsel for CACI PT (Exhibit 2) (authorizing "depositions of Abu Ghraib interrogation personnel, including the authorization of questions about specific detainees, subject to conditions to protect their names, identities, and visual representations from disclosure"). To the extent that CACI PT seeks information beyond what is authorized in the March 22, 2013, letter, the United States objects that such a request for information is not proportional to the needs of the case and the burdens of invoking the state secrets privilege outweighs any benefit of deciding that issue at this time.

Response: Subject to and without waiving these objections, the United States identifies the following information:

On December 15, 2003, Plaintiff Suhail Najim Abdulla Al Shimari ("Plaintiff Al Shimari") was interrogated by a CACI interrogator assigned Field Reporter Number (FRN)

[redacted] ("CACI Interrogator A") and an Army interrogator assigned FRN [redacted] ("Army Interrogator B").[2]

On November 7, 2003, Plaintiff Asa'ad Hamza Hanfoosh Al-Zuba'e ("Plaintiff Al-Zuba'e") was interrogated by an Army interrogator assigned FRN [redacted] ("Army Interrogator C") and an interrogator assigned FRN [redacted] ("Unidentified Interrogator F"). On November 18, 2003, Plaintiff Al-Zuba'e was interrogated by Army interrogators assigned FRN's [redacted] ("Army Interrogator D"), and [redacted] ("Army Interrogator E"). On December 23, 2003, Plaintiff Al-Zuba'e was interrogated by an interrogator assigned FRN [redacted] ("Unidentified Interrogator G") and Army Interrogator B. The Department of Defense has been unable to ascertain the identity or affiliation (military or contractor) of Unidentified Interrogator F or Unidentified Interrogator G.

The Department of Defense has not located any record that would formally document any intelligence interrogation of Plaintiff Salah Hasan Nsaif Jasim Al-Ejaili ("Plaintiff Al-Ejaili"), such as an interrogation plan, an interrogation report, or interrogator notes. However, as described below in response to Interrogatory #2, the Department of Defense has located and produced other information suggesting that Plaintiff Al-Ejaili may have been interrogated by an Army interrogator and a CACI interrogator during his detention at Abu Ghraib.

The United States is continuing to exercise its due diligence to determine if there is any additional information it can provide. Should it come across additional responsive information,

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[2] On November 28, 2003, prior to his transfer to Abu Ghraib, Plaintiff Al Shimari was interrogated at a Coalition Forward Operating Base near where he was detained. Although outside the scope of this interrogatory, recently declassified information regarding that interrogation is being produced to the parties as DoD – 01204 thru DoD – 01207. The identity and affiliation of the interrogator who conducted this pre-Abu Ghraib interrogation is not known; however, an interrogator assigned FRN [redacted] developed the questions for and prepared a summary report of that interrogation.

the United States will supplement its responses consistent with Rule 26(e) of the Federal Rules of Civil Procedure.

Interrogatory No. 2: *For each interrogator identified in response to Interrogatory #1, describe the facts relating to such interrogator's interactions with Plaintiff(s), including the specific conduct to which such interrogator's subjected any Plaintiff and the source of any direction under which the acts took place.*

Objections: The United States objects to this request to the extent it seeks the same information requested in Interrogatory #1 to which the United States objected. In particular, the United States renews its proposal of March 22, 2013, of pseudonymous depositions, subject to certain conditions, which would address the matters requested in this interrogatory. For purposes of responding to this interrogatory, the United States is again limiting its responses to "intelligence interrogations," which is defined in DoDD 3115.09 as "The systematic process of using interrogation approaches to question a captured or detained person to obtain reliable information to satisfy foreign intelligence collection requirements." DoDD 3115.09, *Glossary*, p. 31. For the reasons articulated in response to Interrogatory #1, the United States objects to this request to the extent it seeks information beyond what is defined in DoDD 3115.09.

The United States also objects to the term "facts" as vague and ambiguous in this context and potentially seeks information that is not proportional to the needs of this case, including information that is not relevant to the subject matter of the interrogatory. The United States further objects to providing this additional information to the extent that such material would be protected by the state secrets privilege.

Response: Subject to and without waiving these objections, the United States identifies the following information:

A. Plaintiff Al Shimari

On December 15, 2003, CACI Interrogator A served as the lead interrogator and Army Interrogator B served as the assistant interrogator/analyst in the intelligence interrogation of Plaintiff Al Shimari. According to the interrogators' report and notes, the interrogation lasted two hours and fifty-five minutes.

[redacted]

The interrogators reported using the [redacted] approaches in this interrogation. [redacted]

In connection with the December 15, 2003 interrogation, CACI Interrogator A and Army Interrogator B were subject to the direction of the military chain of command, beginning with their military section leader, an Army non-commissioned officer, who was to be briefed both prior to and following the interrogation to ensure that the interrogators were focused on answering CJTF-7's priority intelligence requirements, human intelligence (HUMINT) requirements, and source directed requirements. Their military section leader was also responsible for strictly enforcing the interrogation rules of engagement (IROE). From their military section leader, the interrogators' chain of command flowed through the military non-commissioned officer in charge (NCOIC) and officer in charge (OIC) of the Interrogation and Control Element (ICE), to the military chain of command at the Joint Interrogation and Detention Center (JIDC).

No CACI personnel were in this chain of command. While the CACI site manager at Abu Ghraib, Daniel Porvaznik, managed CACI personnel issues and the ICE OIC relied on him as one source of information regarding the abilities and qualifications of CACI interrogators, the military chain of command controlled the interrogation facility, set the structure for interrogation operations, and was responsible for how interrogations were to occur during both the planning and execution phases.

The reported approaches used in this interrogation were authorized by the IROE (*see* DoD – 00027), the CJTF-7 Interrogation and Counter-Resistance Policy memorandum, dated October 12, 2003 (*see* DoD – 00062 thru DoD – 00066), and Army Field Manual 34-52, September 28, 1992 ("1992 FM 34-52), which is publicly available at https://www.loc.gov/rr/frd/Military_Law/pdf/intel_interrogation_sept-1992.pdf. A summarized description of the approaches used in this interrogation follows.

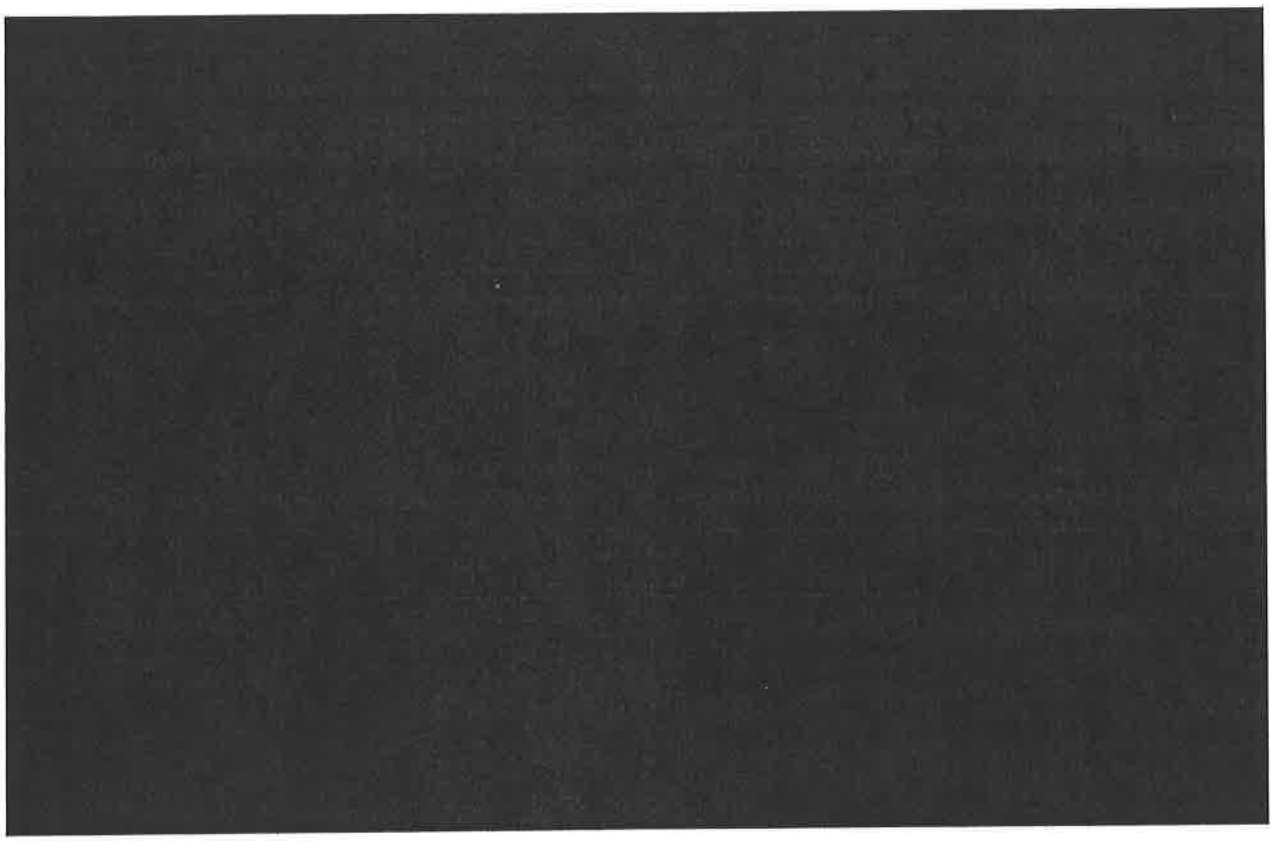
[redacted] Oversight in the use of these approaches is provided by the interrogators' military section and ICE leaders.

B. Plaintiff Al-Zuba'e

On November 7, 2003, Army Interrogator C served as the lead interrogator in the initial intelligence interrogation of Plaintiff Al-Zuba'e. Unidentified Interrogator F, an individual who the Department of Defense has been unable to identify by name or affiliation, assisted in this interrogation. According to the interrogators' report and notes, the interrogation lasted one hour and thirty minutes.

Two days prior to this interrogation, November 5, 2003, the Military Police log for the Abu Ghraib "hard site" contains an entry at 1850 hours (6:50 p.m.) referencing military intelligence instructions to the military police: "New MI [Military Intelligence hold] #152529 placed in isolation per MI [Military Intelligence] instructions. *See* Army 20141202-00001. Following the shift change at 6:00 a.m. on November 6, 2003, the Military Police log contains an entry: "Note – MI instructed night shift to keep new prisoner #152529 in the hole overnight. Removed prisoner from hole at 0645 [6:45 a.m.] and placed in cell #20." *See* Army 20141202-00002.

[redacted]



The reported and recommended interrogation approaches, [redacted], are authorized techniques. *See* IROE (*see* DoD – 00027), the CJTF-7 Interrogation and Counter-Resistance Policy memorandum, dated October 12, 2003 (*see* DoD – 00062 thru DoD – 00066), and Army Field Manual 34-52. Oversight in the use of these approaches was provided by the section and ICE military leaders.

[redacted]

[redacted]

The Military Police log for November 12-13, 2003, contains entries relating to instructions from unidentified military intelligence personnel: "2145 [9:45 p.m.] – Stripped civilian property from #152529 cell #1A20; placed in property room (done@0230)." The log continues with an entry at "0230 [2:30 a.m., November 13, 2003] – Civilian property/Government property removed from #152529 in cell 1A20. MI handlers will be turning on heat to this one. Sleep management program was requested but paperwork has not been approved yet. Property placed in storage and CI [Civilian Internee] only has his jump suit."[3]

On November 18, 2003, Army Interrogator D and Army Interrogator E served as lead and assistant interrogators, respectively, in the second intelligence interrogation of Plaintiff Al-Zuba'e. According to the interrogators' notes, the interrogation lasted one hour and twenty eight minutes.

[redacted]

[3] Use of Sleep Management for more than 72 hours would have required approval of the CJTF-7 Commanding General. The Department of Defense was unable to locate records that might confirm the Military Police log entry that approval for Sleep Management for Plaintiff Al-Zuba'e had been requested or whether it had been approved or disapproved.

[redacted]

The approaches used in this interrogation included [redacted] These interrogation approaches are all authorized by then-applicable authorities and have been described previously.

[redacted]

Suggested approaches for future interrogations were [redacted] These recommended approaches have been previously described and are authorized.

[redacted]

On December 23, 2003, Unidentified Interrogator G, an individual whom the Department of Defense has been unable to identify by name or affiliation, served as the lead interrogator and Army Interrogator B served as the assistant interrogator/analyst in the third intelligence interrogation of Plaintiff Al-Zuba'e. According to the interrogators' report and notes, the interrogation lasted two hours and forty minutes.

[redacted]

In connection with the three intelligence interrogations of Plaintiff Al-Zuba'e, all interrogators were subject to the direction of their military chain of command, beginning with their military section leader, an Army non-commissioned officer, who was to be briefed both prior to and following the interrogation to ensure that the interrogators were focused on answering CJTF-7's priority intelligence requirements, HUMINT requirements, and source directed requirements. The section leader was also responsible for strictly enforcing the IROE during each interrogation. From their military section leader, the interrogators' chain of

command flowed through the ICE military NCOIC and OIC to the military leadership at the JIDC.

C. Plaintiff Al-Ejaili

Although, as noted in response to Interrogatory 1, the Department of Defense has found no formal record of an intelligence interrogation of Plaintiff Al-Ejaili, other records in its possession reference military intelligence activity during Plaintiff Al-Ejaili's detention at Abu Ghraib, including suggestions that Plaintiff Al-Ejaili may have been interrogated by a CACI interrogator and a military interrogator.

In the Military Police log for the Abu Ghraib hard site, there is a reference on November 9, 2003: "2015 [8:15 p.m.] - New Civilian Internee #152735 works for Al Jezera [sic]; say he is a reporter; moved to 1A-28." On the following day, November 10, 2003, after the opening of the log at 1600 [4:00 p.m.] there is this entry: "Note: per the Chief [not further identified, but presumably a military Chief Warrant Officer], #152735 is to have contact with no one except his team [there is a parenthetical that includes the first names of two individuals who are not further identified and the last names of two known Army interrogators]; if anyone attempts to speak with this person and gives a problem notify the Chief @ [provides apparent phone number]. Log everyone who trys to or speaks with this person. – [Military Policeman] Graner." (*See* Army 20141202-0003).

In this same time period, emails were exchanged between intelligence officials at CJTF-7 and the Abu Ghraib ICE. The CJTF-7 official forwarded a Draft Intelligence Information Report (DIIR) regarding another Al-Jazeera employee who had been detained by the Coalition and remarked that the DIIR was "Something of interest/possible assistance in dealing with our Al Jazeera TV guy." The ICE military official responded: "Will put this in Al Jazeera dude's file.

My last marching orders for this guy was not to talk to him. He's currently in ISO." The CJTF-7 official replied: "Be advised. The subject in the DIIR is not, again not the same as the guy at Abu Gharayb. The material may still be helpful for background, but please do not confuse the two. [redacted] (*See* DoD – 01173).

In addition, in 2013, the Department of the Army approved the deposition of Army Interrogator James Lee Joseph Beachner. During the April 25, 2013 deposition of Sergeant Beachner, the United States permitted Beachner to affirm that statements he made to military investigators in a June 4, 2004 sworn statement were true. According to Beachner's 2004 statement, Beachner had been assigned to interrogate "the AL JAZEER reporter" and that on one occasion he found out that CACI Interrogator Steve Stefanowicz "was questioning him." According to Beachner's statement, "[W]hen I found this out, I told him to stop because this was my detainee. He stopped. There was nothing violating the IROE in that particular Interrogation."

The United States is continuing to exercise its due diligence to determine if there is any additional information it can provide. Should it come across additional responsive information, the United States will supplement its responses consistent with Rule 26(e) of the Federal Rules of Civil Procedure.

Dated: *March 26, 2018*

Signature for Objections:

/s/ Eric J. Soskin

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Dated: *March 26, 2018*

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CERTIFICATE OF SERVICE

I certify that on March 26, 2018, I electronically served the foregoing to the following counsel of record:

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/s/
[Signature of Server]

Exhibit 8

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLLAH AL SHIMARI, *et al.*, **Plaintiffs,** **v.** **CACI PREMIER TECHNOLOGY, INC.,** **Defendant.**	**No. 1:08-cv-827 (LMB-JFA)**
CACI PREMIER TECHNOLOGY, INC., **Third-Party Plaintiff,** **v.** **UNITED STATES OF AMERICA, and JOHN DOES 1-60,** **Third-Party Defendants.**	

DECLARATION AND THIRD ASSERTION OF STATE SECRETS PRIVILEGE BY JAMES N. MATTIS, SECRETARY OF DEFENSE

I, James N. Mattis, do hereby state and declare as follows:

1. I am the Secretary of Defense and have served in this capacity since January 20, 2017. I am the head of the Department of Defense ("DoD") and the principal assistant to the President in all matters relating to DoD. The Secretary of Defense has authority, direction, and control

over DoD and its components, activities, and information. *See* 10 U.S.C. § 113(b). As more fully detailed in the declaration I submitted in connection with this litigation on April 27, 2018, prior to serving as the Secretary of Defense, I served more than four decades in uniform, commanding Marines at all levels, including during combat operations. *See* Declaration and Assertion of State Secrets Privilege by James N. Mattis, Secretary of Defense, Dkt. No. 775-1 (Apr. 27, 2018).

2. Since the filing of my April 27, 2018 declaration in which I asserted the state secrets privilege with respect to the names and visual representations of all individuals who served as interrogators and interrogation analysts in intelligence interrogations of the plaintiffs, and the filing of my July 18, 2018 declaration in which I asserted the state secrets privilege with respect to the names and visual representations of all individuals who supported the interrogations of the plaintiffs, including linguists and interpreters, and through the exercise of my official duties, I have been kept informed of significant developments in this litigation. The purpose of this declaration is to formally assert the state secrets privilege in order to protect a focused and discrete set of classified information of DoD contained in the unredacted versions of various redacted documents produced in this case. As summarized in this declaration, public disclosure of the information covered by my privilege assertion reasonably could be expected to cause serious damage to the national security of the United States. As the Secretary of Defense and pursuant to Executive Order 13256, "Classified National Security Information," I hold original classification authority up to the TOP SECRET level. This means that I have been authorized by the President to make original classification decisions. I make the following statements pursuant to that authority and based upon my personal knowledge and on information made available to me in my official capacity.

I. ASSERTION OF THE STATE SECRETS PRIVILEGE

3. As described further in the following paragraphs, and after personal consideration of the matter, I am asserting the state secrets privilege over classified information implicated by this litigation described below, which consists generally of: (a) the names and/or visual representations of individuals who either conducted or supported the intelligence interrogation or questioning of specific detainees, other than plaintiffs, at Abu Ghraib or other detention facilities in Iraq and the names or identities of specific detainees, other than plaintiffs, in connection with the names and/or visual representations of personnel who either conducted or supported the interrogation or questioning of these detainees; (b) the alpha-numeric portion of the plaintiffs' internment serial numbers ("ISNs"); (c) certain records of intelligence interrogations, detainee debriefings, or intelligence questioning related to transcribed interrogator notes, summary interrogation reports, an interrogation plan, and other related records pertaining to the plaintiffs; and (d) information relating to specific intelligence-gathering efforts and results, unrelated to plaintiffs, as well as information relating to non-DoD intelligence sources. Parts I.A. through I.D. of this Declaration describe these categories of information in more detail and set forth my conclusion regarding the consequences of unauthorized disclosure for each category of information: that such disclosure reasonably could be expected to cause serious damage to the national security of the United States. Parts II.A. through II.D. set forth in detail the explanation, corresponding to each category, of why I have reached that conclusion. In preparation for my assertion of the state secrets privilege over the information covered by this declaration, all of the disputed documents (27 documents consisting of approximately 300 pages) containing privileged information were made available to me for review in unredacted form. In the majority of these documents, DoD has disclosed to the parties in this litigation extensive portions of the

documents at issue, with redactions used narrowly and sparingly to protect only the information for which disclosure reasonably could be expected to cause serious damage to the national security of the United States. Significantly, given the subject matter of this litigation and the allegations of the plaintiffs, none of the withheld material discusses or describes the use of enhanced interrogation techniques or techniques not authorized by Army Field Manual ("FM") 34-52. I have personally reviewed all of these documents that contain information in each of the above categories. I have also discussed the details of the documents and information sought in this case with knowledgeable members of my staff to ensure that the bases for the privilege assertions set forth in this Declaration are appropriate.

A. Statements Containing Protected Identities.

4. DoD classifies as "SECRET" the names and visual representations of DoD interrogators, debriefers, contract interrogators, support personnel, and foreign government interrogators when their identities are associated with the interrogation, debriefing, or other intelligence questioning of a specific detainee, pursuant to section 1.4(c) of Executive Order 13526. This is reflected in DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning." I previously asserted the state secrets privilege over information in this category pertaining to the interrogation personnel involved with intelligence interrogations of the plaintiffs in this litigation; however, other information properly classified and protected from disclosure by these authorities is contained in a statement at Annex 53 to the *Army Regulation 15-6 Investigation of the 800th Military Police Brigade*, conducted by Major General Antonio M. Taguba ("Taguba Report"), and in 13 statements in Annex B to the *Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, conducted by Lieutenant General Anthony Jones and Major General

George Fay ("Jones-Fay Report"). In contrast to my two previous assertions of the state secrets privilege in this category, much of the information redacted from the documents now at issue comprises detainee identities (other than the plaintiffs') rather than the identities of interrogation personnel. This permitted production of documents such as witness statements with the information most relevant to this litigation (such as the names of the witnesses providing the statements), while at the same time protecting the relationship between interrogation personnel and the intelligence interrogations of specific detainees. In my judgment, unauthorized disclosure of this information reasonably could be expected to cause serious damage to the national security of the United States.

B. Alpha-Numeric Portion of the Internment Serial Number (ISN).

5. Executive Order 13526, section 1.4(a), permits the classification of military plans, weapons systems, or operations. DoD classifies as "SECRET" the alpha-numeric portion of the ISN. This alpha-numeric portion of the ISN describes the capturing power (*i.e.*, the country that captured the individual), the theater code (*i.e.*, the theater where the individual was captured), and the serving power of the captured individual (*i.e.*, the individual's country of military allegiance). The capturing country and military allegiance of the captured individual are denoted by letters, while the conflict zone is denoted by a number.[1] While that information remains redacted and classified[2], the unique six digit number portion of the ISN is unredacted for the

[1] For example, if the United States (referred to as "US" in this system) were to capture a Syrian fighter (referred to as "SY") in Iraq (referred to as "9"), that individual's complete ISN would be: US9SY-123456EPW. The "EPW" (Enemy Prisoner of War) portion references the detainee classification. Depending on the circumstances, this could be "CI" (Civilian Internee), among others. The six digit number portion of the ISN for this individual (123456) is releasable, but the alpha-numeric portion of the ISN would remain classified.

[2] Although the capture of the four plaintiffs in this case in Iraq is not a classified fact, it is impractical for DoD to declassify and unredact individual characters in an alphanumeric string

plaintiffs.[3] Information properly classified and protected from disclosure by this authority is contained throughout the detainee files of Plaintiffs Al Shimari, Rashid, and Al Zubae. In my judgment and for the reasons outlined below, unauthorized disclosure of this information reasonably could be expected to cause serious damage to the national security of the United States.

C. Portions of Documents Created Before or After Intelligence Interrogations.

6. Pursuant to section 1.4(c) of Executive Order 13526 and DoD Manual 5200.01, "DoD Information Security Program," DoD classifies as "SECRET" all transcribed interrogator notes, memoranda for the record, summary interrogation reports, and all other related records of intelligence interrogations, detainee debriefings, or intelligence questioning in accordance with the relevant security classification guides. *See* DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," Enclosure 4, paragraph 13b. Within these documents, I am asserting the state secrets privilege over (i) counterintelligence (CI) information reports [AS-USA-054188 thru -054190, -054213 thru -054215, -054241 thru -054243], (ii) summary interrogation reports containing analyst and interrogator intelligence focus comments [AS-USA-054169, -054195, -054224; AS-USA-053950, -053954, -054113], (iii) interrogation collector comments [AS-USA-053945, -053948, -053949, -054122], (iv) detainee interrogation plans [AS-USA-053958], (v) approaches used during interrogation [AS-USA-053943,'-053970; -054175, -054201, -054230]; (vi) observations related to the

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while leaving the remainder classified and redacted. Attempting to do so would carry a high risk that portions of the adjacent characters would be inadvertently exposed through errors or imperfections in the redaction process, thereby causing the harms described in this declaration that would occur if the other portions of the alphanumeric string were to be released.

[3] Al Shimari's six digit ISN is 153913, Rashid's is 150803, Al Zubae's is 152529, and Al Ejaili's is 152735. Their six digit ISN is unique, as is every other one issued. They are never re-issued to another detainee.

mood/attitude of the detainee [AS-USA-053943, -053970; -054176, -054202, -054231]; (vii) assessments by the interrogator regarding the truthfulness of the detainee [AS-USA-053943, -053970; -054176, -054202, -054231]; (viii) interrogator recommendations and/or suggested future approaches that may work with the detainee [AS-USA-053943, -053970; -054176, -054202, -054231]; and (ix) suggestions for when future interrogations should occur [AS-USA-054176, -054202, -054203], except where such information has been produced in discovery pursuant to a determination by DoD personnel that disclosure would not reasonably be expected to cause serious damage to the national security of the United States. The remainders of those documents have been produced in this litigation, and the information redacted is narrowly tailored to the information over which I am asserting the state secrets privilege. Such discrete information, properly classified and protected from disclosure as explained below, is contained within the written interrogation plan and interrogation reports for Plaintiff Al Shimari, and the interrogator notes for Plaintiffs Al Shimari and Al Zubae. In my judgment and for the reasons explained below, unauthorized disclosure of this information reasonably could be expected to cause serious damage to the national security of the United States.

D. Intelligence-Gathering Sources, Efforts, and Results, Unrelated to Plaintiffs.

7. Executive Order 13526, Section 1.4(c), authorizes the classification of intelligence activities and intelligence sources or methods. Annex H, Appendix 6-A of the Jones-Fay Report consists of a command briefing prepared by the 205th Military Intelligence Brigade regarding the Brigade's operations at Abu Ghraib in early 2004. Thirty-four of the 36 pages in that briefing have been declassified, including all pages in the mission, overview, internee operations, community outreach, and magistrate operations sections. In the interrogation operations section of the briefing, nine of the eleven pages have been declassified in full and the remaining two

pages have been declassified in part. I have reviewed and determined that the information in the remaining two pages that was not declassified is currently and properly classified as it contains detailed, sensitive information regarding two specific interrogation-based operations and includes specific actionable intelligence obtained from two identified detainees, other than plaintiffs in this litigation. For the reasons detailed below, it is my judgment that the unauthorized release of this information reasonably could be expected to cause serious damage to the national security.

8. Similarly, Annex H, Appendix 10 of the Jones-Fay Report contains a classified September 2003 briefing prepared for the Commander, Combined Joint Task Force 7, the senior military commander in Iraq at that time. Of the 27 pages of the briefing, styled as a "concept brief" for interrogation operations in Iraq, 23 pages have been declassified and released in full and the remaining four pages have been declassified in large part. I have reviewed and determined that the information withheld on the four partially-declassified pages is currently and properly classified pursuant to EO 13526, Section 1.4(c). The protected information relates to a non-DoD intelligence source and a proposal for integrating this source into the overall interrogation processes in Iraq. Although this particular briefing was presented 15 years ago, the information I am protecting by asserting the state secrets privilege remains applicable to some interrogation operations today. As more fully described below, failure to prevent unauthorized disclosure of this information reasonably could be expected to cause serious damage to our national security.

II. HARM TO NATIONAL SECURITY THAT REASONABLY COULD RESULT FROM DISCLOSURE OF PRIVILEGED INFORMATION

A. Statements Containing Protected Identities.

9. Disclosure of the identities of intelligence interrogators and support personnel, in connection with the interrogation of specific detainees, reasonably could be expected to cause serious damage to the national security of the United States. DoD human intelligence (HUMINT) collection activities, including intelligence interrogations, provide the President, the National Security Council, Congress, the Secretary of Defense, commanders at every echelon, and other U.S. Government departments and agencies the intelligence they need to protect the national security. The identities of intelligence interrogators and support personnel, when associated with the interrogation of specific detainees, and the identities of specific detainees, in connection with the names and/or visual representations of individuals who either conducted or supported the intelligence interrogation or questioning of these detainees, could expose intelligence interrogators and support personnel, and their families, to an unacceptable risk of harm through possible retribution by the detainees, groups to which the detainees belong, or other sympathizers. Failure to protect the identities of intelligence interrogators and support personnel in connection with the interrogations of specific detainees would also have a chilling effect on DoD's ability to recruit and retain intelligence interrogators and support personnel and to collect intelligence on these dangerous groups and individuals. DoD asks its intelligence interrogators and support personnel to assist in the collection of information from persons who belong to or are associated with some of the most dangerous enemies of the United States, including individuals who belong to or are associated with al Qaeda or its affiliates or with the Islamic State of Iraq and ash-Sham ("ISIS"), organizations whose stated purpose is to kill Americans, military or civilian, wherever they are found. Intelligence interrogators and support personnel who assist in the conduct of interrogation operations do so with the expectation that their identities and involvement with interrogations of particular detainees will be protected from

public disclosure. For these reasons, I previously asserted the state secrets privilege over other information in this category and explained the reasons for doing so in my April 27, 2018 and July 18, 2018 declarations. I hereby provide a renewed explanation of the importance of protecting this information for the Court's convenience.

10. The risk of harm to U.S. national security interests from the disclosure of the intelligence interrogator and support personnel information at issue is not merely theoretical. Terrorist groups and their affiliates have targeted U.S. military personnel and contractors supporting U.S. military operations for attacks for many years, sometimes with devastating consequences. For the past few years, ISIS sympathizers and hackers have periodically published "kill lists" online, which include personally identifiable information, such as the names and home addresses of DoD personnel. As recently as December 2017, a "kill list" that included the names and contact information of DoD military and civilian personnel was posted to the Internet by ISIS supporters who encouraged "lone wolves" to use the information for targeting purposes. In addition, there have been actual attacks against DoD interrogators by detainees. If the names of these intelligence interrogators and support personnel were disclosed in court in connection with their interrogations of specific detainees, then they could be added to the "kill lists." In my judgment, the likelihood that such kill lists will inspire action by ISIS, Al Qaeda, their sympathizers, or lone wolves is substantially greater where such action can be linked to the actual interrogation of a detainee and characterized as retribution on behalf of that individual detainee.

11. Despite the passage of time since the events at Abu Ghraib that are the subject of this lawsuit, violent extremist organizations continue to look to capitalize on existing, lingering resentment towards the United States from these events. Indeed, pursuant to the Protected

National Security Documents Act of 2009, Section 565 of the Department of Homeland Security Appropriations Act of 2010 (Public law 111-83), three of my predecessors, former Secretaries of Defense Gates, Panetta, and Carter, have all certified that the public release of photos of detainee mistreatment, including at Abu Ghraib, would continue to endanger U.S. citizens, including members of the Armed Forces and employees of the U.S. government abroad. On November 2, 2018, based on recommendations from the commanders of U.S. Central Command, U.S. Africa Command, and U.S. Forces—Afghanistan, I determined that public disclosure of certain detainee abuse photos continues to pose a danger to U.S. personnel abroad and renewed the statutory certification. My certification will remain in effect until November 2021. *See* Section 565(d)(2) (certifications expire three years after issued). It is my assessment that these violent extremist groups would similarly exploit the disclosure of the identities of the Abu Ghraib personnel who were confirmed to have participated in the interrogation of specific Abu Ghraib detainees in order to inspire and recruit individuals in support of their causes and encourage attacks on identified individuals. I am confident they will try to kill them. In my view, if any of these groups or their allies or sympathizers were successful in targeting intelligence interrogators or support personnel, or their families, and could claim successful retribution for Abu Ghraib, it would be a significant propaganda event. Indeed, it would strengthen our adversaries in their recruiting and ability to propagandize effectively, which in turn would be to the significant detriment of our national security. Thus, I am asserting the state secrets privilege to protect the safety of intelligence interrogators and support personnel, and their families, both now and in the future. In addition, I make this assertion to prevent the damage to national security that actions by violent extremist groups based on a disclosure could cause to the important missions of DoD.

12. Since the issuance of DoD Directive 3115.09, DoD has, to my knowledge, never declassified the identity of an intelligence interrogator or anyone who has supported an intelligence interrogator when their identity has been associated with the interrogation of a particular detainee or otherwise officially acknowledged such an identity. In addition, public speculation about the identity of an individual who either interrogated or supported the interrogation of a particular detainee—whether through allegations in a lawsuit, media reporting, or conjecture based on a partial picture of the facts—does not constitute an official declassification or acknowledgment. The disclosure of national security information only through official acknowledgment or confirmation is vital to the protection of intelligence information and personnel. The absence of official confirmation leaves an important element of doubt about the veracity of speculation and reports, and thus provides an essential additional layer of protection and confidentiality. That protection would be lost, however, if the Government were forced to confirm or deny the accuracy of speculation or unofficial disclosures.

B. Alpha-Numeric Portion of the Internment Serial Number (ISN).

13. Disclosure of the alpha-numeric portions of ISNs reasonably could be expected to cause serious damage to the national security of the United States. As explained in paragraph 5 and note 1, *supra*, throughout the detainee files for Plaintiffs Al Shimari, Rashid, Al Zubae, and Al Ejaili, there is a unique ISN for each individual. Each individual was assigned a six digit number that remains unredacted. This information was previously provided to the parties. In many instances, this six-digit number appears on its own in the documents produced in this case; however, there are numerous other instances where more than a six digit number is present. Where more than six digits appear, the portion immediately preceding that unique six digit

number has been redacted. The specific information redacted is referred to as the alpha-numeric portion of the ISN. This alpha-numeric portion of the ISN describes the capturing power (i.e, the country that captured the individual), the theater code (i.e., the theater where the individual was captured), and the serving power of the captured individual (i.e., the individual's country of military allegiance). The capturing country and military allegiance of the captured individual are denoted by letters, while the conflict zone is denoted by a number. As explained previously, the alpha-numeric portion of the ISN remains redacted in whole, as it is not practical to segregate individual characters within an alphanumeric string without a substantial risk that other information in the alphanumeric string would be disclosed; thus, specific information, such as the numeric identifier for the theater, is not segregable.

14. This information remains classified because its protection is critical to fostering and maintaining sensitive coalition relationships in combined military operations.[4] From the beginning of Operation Iraqi Freedom, as well as in other military operations around the world, such as Operation Enduring Freedom in Afghanistan, the United States has relied on international military partners to assist in its operations. These partners contribute specialized capabilities and facilitate diplomacy, and their participation serves as a force multiplier by permitting the United States and its partners to direct their resources collectively at common, shared goals. The participation of coalition partners is essential to accomplishing the United States' military and national security objectives, as well as to safeguarding the lives of American military service members participating in military operations. Foreign partners are also vital to our world-wide efforts to collect intelligence and thwart terrorist attacks. Although DoD has

[4] As commonly used by the United States and DoD in connection with military activities, a coalition is a group of countries engaged in military operations together under a unified command structure.

publicly acknowledged the participation of many coalition partners and the approximate troop numbers associated with those partners, acknowledgment of general participation in American-led military operations is not the same as describing the specific operational functions performed. Frequently, our coalition partners do not want it to be publicly acknowledged that they participated in a specific mission, or that they captured an individual and turned the individual over to the United States for interrogation and/or detention, and disclosure of such information is likely to be viewed as a breach of the trust on which our military partnerships are based and lead to a less robust relationship in the future. The latter, in particular, could negatively impact their military at home.

15. In these detainee files, the alpha-numeric portion of the ISN for one of the individuals establishes that a coalition partner was the capturing power. This was a combined mission led by that capturing power, although the actual detaining soldier was an American as reflected in the apprehension form. Our coalition partners are aware that we classify and safeguard this information, and expect us to continue to do so long after a military operation has occurred. The passage of time since the events at issue in this litigation has not eliminated the risk of serious damage to the national security; indeed, many coalition partners continue to participate alongside the United States in ongoing military activities in Iraq and Afghanistan and continue to perform in similar roles. Thus, the unauthorized disclosure of their participation in specific events 15 years ago reasonably could be expected to undermine the willingness of foreign partners to assist the United States in the future and cause the foreign governments to distance themselves publicly from the U.S. Government or U.S. military. This could result in the withdrawal of coalition forces from current, ongoing military activities or a future unwillingness of coalition forces to participate in military operations or to turn captured individuals over to

United States military units for interrogations and/or detention in the future. The loss or diminution of coalition military partners and the support they provide reasonably could be expected to cause serious damage to the national security of the United States.

16. The concerns described above also require nondisclosure of the "US" where the United States was the capturing power. If DoD disclosed that the United States was the capturing power in such cases, it would be apparent by implication that a coalition partner was the capturing power in all cases where the alpha-numeric string was redacted. And because there may be other information that is publicly-available about capture locations, including information about which other nations were operating in a specific sector at a specific time, it would then be likely that the specific country involved with a particular capture could be identified. This is particularly true because there were a limited number of coalition partners operating in conjunction with the United States in the Iraq theater at any given time. For this reason, disclosure of the alpha-numeric string in cases where the United States was the capturing power also reasonably could be expected to cause the serious damage to national security described above.

C. Portions of Documents Created Before or After Intelligence Interrogations.

17. Disclosure of information about the selection of methods used to interrogate particular military detainees, evaluations of the effectiveness of those methods, and other judgments related to those methods, reasonably could be expected to cause serious damage to the national security of the United States. As previously noted, the intelligence interrogation of detainees is critical to the mission of collecting information from human sources. This, in turn, greatly aids in the DoD's ability to fight and win the nation's wars. In conducting these intelligence interrogations, DoD personnel seek information regarding, among other things, the

identities of individual terror suspects, terrorist methods of operation, and terrorist plans and intentions with regard to U.S. military and civilian targets in the United States and abroad. Timely collection of intelligence information from detainees is critical to the DoD's ability to analyze, produce, and disseminate foreign and military intelligence to support national security decision making by senior civilian and military leaders within the DoD and the United States Government. In general, and as described more fully below, the unauthorized disclosure of details about the selection of methods used to interrogate particular military detainees and evaluation of the effectiveness of those methods would significantly limit the DoD's future ability to collect actionable intelligence from detainees and, thus, reasonably could be expected to cause serious damage to national security.[5] In some cases, information of this nature may be sufficiently innocuous such that under the specific facts and circumstances its unauthorized disclosure may pose no risk of damage to the national security. This is because adversaries would be unable to derive any useful information to thwart our intelligence gathering capabilities. The mere fact that some information has been determined to not require SECRET classification does not necessarily mean that the unauthorized disclosure of other similar information would not cause serious damage to the national security.[6]

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[5] Congress has separately recognized the importance of protecting intelligence sources and methods from unauthorized disclosure. Public Law 108-458, the Intelligence Report and Terrorism Prevention Act of 2004, imposes an obligation on the Director of National Intelligence to ensure that he U.S. Intelligence Community adequately protects intelligence sources and methods from unauthorized disclosure. That requirement is now codified in 50 U.S.C. § 403-1(i), and my conclusion here that disclosure of information about intelligence methods could reasonably be expected to cause serious damage to national security is consistent with Congress's enactment of this statute.

[6] It is the role of individuals with original classification authority and other classification experts to make determinations regarding whether particular information should be classified because disclosure of that information reasonably could be expected to cause serious damage to national security. An untrained eye may look at a document released in full and see no apparent

18. The interrogation techniques described in the documents that are subject to this state secrets privilege assertion are still in use today. Although the United States Government has publicly disclosed the interrogation methods and approaches that it may use with detainees in general,[7] the DoD necessarily exercises a high degree of judgment in choosing which methods to use with a particular detainee, when to use a given method, how to modify an interrogation plan as the interrogation proceeds, and otherwise how best to interrogate a particular detainee. These judgments, which are extremely subjective, reflect an assessment of the detainee's background and conduct, as well as observation of the detainee while in custody. The judgments are incorporated into a written interrogation plan – that is, a plan to use certain specific methods and approaches with the detainee in specific ways and at specific times – which may be modified from time to time depending on the progress of interrogation and continued observations of the detainee. In general, disclosing the details of the decisions DoD made regarding how to interrogate a given detainee would enlighten our adversaries about the orchestration of interrogation methods, thereby increasing the likelihood of effective resistance to interrogation. For example, our adversaries could use this information to develop, and train their personnel to use, techniques that would channel DoD interrogators towards the use of a particular interrogation method. Then, knowing the likely interrogation method that would be employed, such personnel could be specifically trained in how to resist that interrogation method. Thus, although the interrogation methods themselves are unclassified, disclosure of the manner in

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difference between it and one with portions withheld as SECRET, but an individual making such judgment may lack important context or understanding of how disclosure of the particular information could damage national security.

[7] Army Field Manual (FM) 2-22.3, Human Intelligence Collector Operations, establishes Army doctrine on approach techniques and detainee questioning and is an unclassified document for official use only.

which they may be applied as part of a specific detainee's interrogation plan and recommendations for future approaches based on the results of interrogations as documented in interrogation reports and interrogator notes reasonably could be expected to cause serious damage to the national security.

19. Plaintiff Al Shimari's Interrogation Plan, Interrogation Reports, and Interrogator Notes. Unlike the United States Government's general, unclassified descriptions of authorized interrogation methods, the tailored interrogation plan [Bates AS-USA-053958] actually used for a lengthy interrogation of Plaintiff Al Shimari provides a focused assessment of the approach best suited to assist the interrogators in obtaining his cooperation in responding to questions and disclosing information about subjects into which interrogators wished to inquire.[8] Disclosing this interrogation plan would reveal the subjective judgments made by the interrogation team involved in developing, using, and modifying an interrogation plan in an attempt to obtain this information from Plaintiff Al Shimari. Likewise, portions of the documents titled Summary Interrogation Reports and Interrogator Notes [AS-USA-053943, -053945, -053948, -053949, -053970, -054113, and -054122] related to interrogations of Plaintiff Al Shimari were redacted for the same reasons as his interrogation plan. These documents summarize the results of interrogations and were completed close in time to their conclusion. While these documents were not redacted in full, the portions containing interrogator notes regarding the effectiveness of the approach used, the mood of the detainee, the overall assessment of the detainee during the interrogation and recommended future approaches were redacted.

[8] The plan for interrogating Plaintiff Al Shimari never contemplated the use of enhanced interrogation techniques or techniques not authorized by FM 34-52.

20. If our adversaries were aware of the information redacted from Plaintiff Al Shimari's interrogation plan, summary interrogation reports, and interrogator notes, they could develop strong counter-interrogation tactics and hinder our ability to gather intelligence through interrogations. This is because disclosure of the specific circumstances in which these approaches were employed would shed light on how those approaches are chosen for a specific detainee, permitting adversaries to train their personnel how to thwart our interrogation approaches. Such training could seriously undermine our ability to collect intelligence from detainees. Thus, disclosure of information of this type reasonably could be expected to cause serious damage to the national security.

21. Counterintelligence (CI) Information Reports and Interrogator Notes Related to Plaintiff Al Zubae. Portions of three versions of the same document titled CI Information Report related to Plaintiff Al Zubae were redacted [AS-USA-054188 thru -054190, -054213 thru -054215, -054241 thru -054243]. The redactions included a specific intelligence requirement [AS-USA-054188, -054213, -054241], intelligence comments on the source [AS-USA-054189, -054214, -054242], and intelligence field comments regarding the specific information provided [AS-USA-054190, -054215, -054243]. This report is included in Plaintiff Al Zubae's detainee file because he was subsequently captured in a vehicle that coalition forces were looking for as a result of the underlying CI information report. The unauthorized disclosure of information of this type would provide our adversaries with insight regarding how we identify and evaluate intelligence sources and information, which reasonably could be expected to cause serious damage to the national security. Further, portions of some of the documents titled "Interrogator Notes" related to interrogations of Plaintiff Al Zubae were redacted for the same reasons previously discussed for Plaintiff Al Shimari. These documents summarize the results of

interrogations and were completed close in time to their conclusion. While these documents were not redacted in full, some of the portions containing interrogator notes regarding the effectiveness of the approach used, the mood of the detainee, the overall assessment of the detainee during the interrogation, and recommendations/suggested future approaches were redacted.[9] Plaintiff Al Zubae's interrogator notes illustrate how interrogations build off previous ones with the interrogator noting what approach was utilized, how that impacted the mood/attitude of the detainee, and recommended future approaches that would work well. Each of the three interrogator notes is more detailed than the previous notes, offering additional insight into interrogation methods. As previously discussed in connection with Plaintiff Al Shimari, disclosure of this information would enlighten our adversaries about why and when a specific approach is used, thereby increasing the likelihood of them developing effective resistance techniques. Thus, the unauthorized disclosure of information of this type reasonably could be expected to cause serious damage to the national security.

22. Counter-Interrogation Techniques and Resistance Training. For the reasons already referred to above and for other reasons, disclosure of information regarding the effectiveness of interrogation techniques and methods, as well as the decisions regarding which techniques to employ while in military custody, would assist terrorist organizations, and thus could reasonably be expected to cause serious damage to the national security of the United States. At least one terrorist organization has studied and learned many counter-interrogation measures, and this organization's training has already apparently changed over time in response to the conduct of

[9] DoD personnel concluded that some other portions of Plaintiff Al Zubae's interrogator notes, although superficially pertaining to detainee mood and assessment, or the effectiveness and selection of approaches, were innocuous, did not need to be redacted and withheld, and would not substantially enlighten or assist our adversaries.

U.S. interrogations. As that terrorist organization has gained insights into the interrogation process, more recent detainees have shown that organization's ability to adopt new counter-interrogation methods. Disclosing information about specific interrogations, such as the interrogations of these detainees, could allow terrorist organizations to further modify their counter-interrogation techniques, particularly when many of the same interrogation methodologies are in use today. Disclosure of this information would provide terrorist organizations' trainers and operators extremely valuable insights into how DoD intelligence interrogators approach the subject of an interrogation on a practical level. Information of this type is contained within the interrogation plan for Al Shimari [Bates AS-USA-053958], as well as summary interrogation reports and interrogator notes for Al Shimari [AS-USA-053943, -053945, -053950, -053954, -053970, -054113, and -054122] and interrogator notes for Al Zubae [AS-USA-054169, -054175 thru -054176, -054195, -054201 thru -054202; -054224, -054230 thru -054231].

D. Intelligence-Gathering Sources, Efforts, and Results, Unrelated to Plaintiffs.

23. Disclosure of specific, actionable intelligence obtained from identified detainees (other than plaintiffs) reasonably could be expected to cause serious damage to the national security of the United States. As described in paragraph 7, *supra*, two pages in Annex H, Appendix 6-A of the Jones-Fay Report contain detailed information regarding specific interrogation-based operations, including specific actionable intelligence obtained from two identified detainees (other than plaintiffs in this litigation), and other sensitive details about these detainees, their capture, and relationships with certain organizations. DoD's ability to obtain timely, actionable intelligence from those responsible for attacks against our forces is critical to our ability to deter and prevent future similar attacks. For the reasons described in paragraphs

17-22, *supra*, divulging the details of successful interrogations of specific detainees would provide our adversaries valuable insights into our interrogation operations and permit them to develop effective counter-interrogation techniques and train potential future detainees on those procedures. Because of the nature of these two pages, however, there are further harms that would likely occur in the event of disclosure. Our experience in military and intelligence operations indicates that it is likely that our adversaries would attempt to retaliate against a former detainee who is identified as having provided valuable, actionable information to our intelligence collectors. Such retaliation may occur not only for the purpose of retribution, but also in order to make an example of any detainee who provides information to our intelligence collectors.[10] Such acts of reprisal would undoubtedly further deter future detainees from providing information, hampering our human intelligence collection operations. Accordingly, I have concluded that the release of the portions of the two pages from Annex H, Appendix 6, Tab A of the Jones-Fay Report that contain this information – which, again, is unrelated to any of the plaintiffs – reasonably could be expected to cause serious damage to national security.

24. Disclosure of the limited withheld portions of the "concept brief" for interrogation operations in Iraq also reasonably could be expected to cause serious damage to the national security of the United States. As set forth in paragraph 8, *supra*, information has been withheld from four of the 27 pages of the briefing. This information relates to a non-DoD intelligence

[10] In light of the affirmative steps to bring this litigation taken by the plaintiffs (thereby exposing their identities as detainees), the allegations set forth in their complaint, and the relatively unremarkable nature of plaintiffs' information, it is DoD's experience and predictive judgment that it is unlikely that they will face retaliation for any intelligence they provided to our intelligence collectors, and thus, that there is no serious risk of harm to national security from disclosing the detainees' statements during their detention, including, for example, plaintiff Al Zubae's forewarning of a rumored attack on American forces and identification of individuals who may be involved. *See, e.g.*, AS-USA-054189 thru AS-USA-054190.

source and a proposal for integrating this source into overall interrogation processes in Iraq. Safeguarding DoD's intelligence activities and methodologies, including if, when, and how non-DoD actors may be integrated into DoD operations, is of paramount importance in preserving the integrity and effectiveness of the overall human intelligence collection efforts. In order to avoid undermining the activities of non-DoD actors, DoD employs all available measures to ensure that the identity of non-DoD intelligence sources is not disclosed without specific authorization. Unauthorized disclosure of such information is reasonably likely to thwart the independent activities of non-DoD actors and reduce their willingness to participate in coordinated endeavors with DoD.

25. I do not make this assertion of the state secrets privilege lightly. I have attempted to limit the scope of the privilege asserted, consistent with my responsibilities to protect classified information and comply with the Attorney General's guidance. See Attorney General's September 23, 2009 Memorandum on Policies and Procedures Governing Invocation of the State Secrets Privilege.

26. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 9TH day of November 2018.

James N. Mattis
Secretary of Defense

Exhibit 9

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, 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.	

DEFENDANT/THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS SUGGESTION OF LACK OF SUBJECT MATTER JURISDICTION

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I. INTRODUCTION

CACI PT's pending motions for summary judgment and to dismiss based on the state secrets privilege detail a multitude of reasons why this case cannot proceed. After forty-two depositions and production of hundreds of thousands of documents, Plaintiffs lack evidence tying any mistreatment they allege to CACI PT. Dkt. #1035. Moreover, discovery has made clear that the United States' three assertions of the state secrets privilege, all of which have been upheld by the Court, make it impossible for CACI PT to fairly defend itself. Dkt. 1042. This motion presents an even more fundamental reason why this case cannot proceed – after full discovery,[1] it is clear that this Court has no jurisdiction to entertain Plaintiffs' claims.

First, there is no evidence that CACI PT personnel engaged in conduct in the United States violating international law. The absence of evidence of a domestic violation of international law is fatal to Plaintiffs' assertion of jurisdiction under the Alien Tort Statute ("ATS") because that statute does not apply extraterritorially. The Fourth Circuit's decision in *Al Shimari III* addressed extraterritoriality by relying on matters relevant in any way to Plaintiffs' claims. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"). Intervening Supreme Court precedent holds that the *only* domestic conduct that matters in an extraterritoriality analysis is the conduct that is the focus of the statute in question, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016), which for the ATS is the conduct constituting a violation of international law. The Fifth and Ninth Circuits, as well as other courts, have recognized that *RJR Nabisco* precludes the holistic approach to extraterritoriality previously taken both by the Ninth Circuit and by the Fourth Circuit in *Al Shimari III*. The

[1] There is one pseudonymous interrogator – CACI Interrogator G – who has been located by the United States but not yet been deposed. The timing of his deposition is unclear. CACI PT will supplement the record as appropriate once CACI Interrogator G has been deposed.

absence of evidence of a domestic violation of international law by CACI PT thus requires dismissal of Plaintiffs' claims.

Second, this Court lacks jurisdiction because Plaintiffs' claims present nonjusticiable political questions. The Fourth Circuit remanded this case to this Court with explicit instructions to assess the applicability of the political question doctrine by considering specific factual issues regarding Plaintiffs' interrogations. In particular, the Fourth Circuit directed the Court "to examine the *evidence* regarding the *specific conduct* to which *the plaintiffs* were subjected and the source of any direction under which the acts took place." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160 (4th Cir. 2016) (emphasis added) ("*Al Shimari IV*"). If the "acts committed by CACI [PT] employees . . . were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments," the political question doctrine bars jurisdiction over Plaintiffs' claims. *Id.* at 151.

After the case returned to this Court, Plaintiffs abandoned their claims of direct abuse by CACI PT personnel, and the Court dismissed those claims. The significance of this recasting of Plaintiffs' case cannot be overstated. Plaintiffs' abandonment of allegations that CACI PT personnel directly abused them means that CACI PT has no liability to Plaintiffs, *even if Plaintiffs were in fact abused*, unless CACI PT conspired with or aided and abetted any soldiers who actually abused Plaintiffs. On remand, discovery proceeded on Plaintiffs' conspiracy and aiding and abetting claims. CACI PT took court-ordered pseudonymous depositions of the personnel who actually participated in Plaintiffs' interrogations, and sought documents from the United States detailing Plaintiffs' treatment and military approvals in connection therewith. The United States' assertion of the state secrets privilege thwarted much of the factual development dictated by the Fourth Circuit, but the discovery CACI PT was permitted to take demonstrates

that there is no evidence of conduct by CACI PT personnel in connection with these Plaintiffs that violated any international norm, and that CACI PT personnel operated at all times under the direct and plenary control of the U.S. military chain of command. These facts demonstrate the applicability of the political question doctrine under the evidence-based test dictated by the Fourth Circuit in *Al Shimari IV*.

Plaintiffs' claims also involve nonjusticiable political questions because resolving Plaintiffs' claims requires the Court to second-guess sensitive military judgments. This case arises out of the United States' conduct of war, at a war-zone interrogation facility under constant enemy attack, in a foreign country that the U.S. military invaded with Congressional authorization. The sensitive military judgments inherent in Plaintiffs' interrogations and treatment are exemplified by Secretary Mattis's assertion of the state secrets privilege to shield information about Plaintiff's treatment. Indeed, most of the mistreatment Plaintiffs allege involves conditions and interrogation techniques approved by the U.S. military and Executive Branch officials in their efforts to obtain battlefield intelligence and save American lives.

The extraterritoriality prohibition and the political question doctrine are each sufficient to deprive the Court of subject matter jurisdiction. Dismissal is therefore required.

II. LEGAL STANDARD

A challenge to the Court's subject matter jurisdiction may be brought at any time, and "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *United States v. Beasley*, 495 F.3d 142, 147 (4th Cir. 2007); *Green v. Sessions*, No. 1:17-cv-1365-LMB-TCB, 2018 WL 2025299, at *7 (E.D. Va. May 1, 2018). While a subject-matter jurisdiction challenge often is brought under Rule 12(b)(1), the proper vehicle once the defendant has answered the complaint is a suggestion of lack of subject-matter jurisdiction. 5B Wright &

Miller, *Federal Practice & Procedure* § 1350, at 138 (3d ed. 2004); *see also S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 418 n.1 (6th Cir. 2004). To determine 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). The court acts as factfinder for the motion and resolves any evidentiary disputes. *Id.*; *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). The plaintiff has the burden of proving jurisdiction. *Demetres v. E.W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015).

III. ANALYSIS

A. This Court Lacks Subject Matter Jurisdiction Due to the Absence of Evidence of Domestic Conduct Comprising the International Law Violations

In *Al Shimari III*, the Fourth Circuit held that under a test derived from *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the claims in this action sufficiently "touched and concerned" United States territory to provide subject matter jurisdiction. *Al Shimari III*, however, is no longer good law. In a subsequent decision, the Supreme Court rejected the Fourth Circuit's test and established a dramatically different test. Specifically, the Supreme Court held that in determining ATS jurisdiction, a court does not review claims, but examines only a statute's focus – the conduct the statute seeks to regulate. The Supreme Court also held that if there is insufficient *domestic* conduct comprising the statutory violation, a federal court has no jurisdiction. Application of the focus test here shows that jurisdiction is lacking because, on the evidentiary record, there is ***no*** evidence that any conduct comprising international law violations occurred in the United States. For these reasons, this Court should dismiss this case for lack of subject matter jurisdiction.

1. The ATS, *Kiobel*, and *Al Shimari III*

The ATS provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute allows federal courts to "recognize private claims under federal common law" for a "modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724, 732 (2004). In *Kiobel*, the Supreme Court addressed whether a claim brought pursuant to the ATS "may reach conduct occurring in the territory of a foreign sovereign." 569 U.S. at 115. The Supreme Court reviewed the history of the ATS and held that the statute does not apply extraterritorially and therefore courts lack jurisdiction over claims for violations of the law of nations occurring outside the United States. *Id.* at 124 (citing *Morrison v. Nat'l Austrl. Bank, Ltd.*, 561 U.S. 247, 264 (2010)). In *Kiobel*, "all of the relevant conduct took place outside the United States," and thus the plaintiffs' claims were barred. *Id.*

In a cryptic statement at the end of the decision, the Court recognized that claims could be actionable under the ATS where they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 124-25. The Court did not provide guidance on the application of the "touch and concern" standard, leaving its interpretation uncertain, though it noted that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.* at 125.[2]

Unsurprisingly, lower courts took disparate approaches in applying *Kiobel*, disagreeing on the factors relevant to whether a case involved an impermissible extraterritorial application of

[2] The Supreme Court subsequently determined that "foreign corporations may not be defendants in suits brought under the ATS." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018). The Court held that the question of corporate liability under ATS is for Congress, not the courts, to decide. *Id.* at 1403. This Court's approach to the issue violates that admonition.

the ATS.[3] Applying *Kiobel*, this Court dismissed this action. *Al Shimari v. CACI Prem. Tech., Inc.*, 933 F. Supp. 2d 793 (E.D. Va. 2013). The Fourth Circuit vacated that decision and remanded the case. *Al Shimari III*, 758 F.3d 516 (4th Cir. 2014). The Court of Appeals focused on Plaintiffs' claims in finding that the case sufficiently touched and concerned the United States territory to provide jurisdiction. The Court of Appeals concluded that a "claim[] covered all the facts relevant to the lawsuit, including the parties' identities and their relationship to the causes of action," not just the particular acts that may have violated international law. *Id.* at 527. In other words, the Fourth Circuit distinguished *matters* relevant to a *plaintiff's claim* from *conduct* relevant to a *statute's focus* and adopted a test for ATS jurisdiction centered on the former.

On a limited record, the Fourth Circuit attached significance to numerous factors: (1) CACI PT was a U.S. corporation; (2) CACI PT hired U.S. citizens with security clearances granted by the United States to provide intelligence support services, and who allegedly perpetrated torture in Iraq; (3) CACI PT received payments in the U.S. based on contracts issued by the U.S. government; (4) Congress intended to provide access to the U.S. federal courts by adopting statutes such as the Torture Victims Protection Act; (5) important American foreign policy interests were implicated by the nature of the allegations against CACI PT; and (6) CACI PT's managers in the United States allegedly gave approval to the acts of torture, encouraged the misconduct, and attempted to cover up misconduct when it was discovered. 758 F.3d at 530-31. The court characterized these facts and allegations, cumulatively, as "extensive 'relevant conduct' in United States territory" sufficient to establish jurisdiction. *Id.* at 528.[4]

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[3] *See, e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014); *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Al Shimari III*, 758 F.3d at 516.

[4] The Fourth Circuit reiterated this approach in another case that predated *RJR Nabisco*, *Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016), stating that an ATS jurisdiction exists "when

The Fourth Circuit thus took an expansive approach in *Al Shimari III* in evaluating the Plaintiffs' claims. The Fourth Circuit conspicuously did not confine its analysis to the conduct that the ATS seeks to regulate, *i.e.*, the torts committed in violation of international law. Since *Al Shimari III* was issued, however, two significant developments have occurred. *First*, the Supreme Court held that in assessing extraterritorial application of a statute, such as ATS, a court does not review all facts relevant to the claims. Rather, a court examines *only* the conduct that the statute seeks to regulate, *i.e.*, the conduct comprising the violations of international law, and the parties it seeks to protect. This examination, excluding as it does almost all the factors on which the Fourth Circuit relied, is dramatically narrower than the holistic analysis conducted in *Al Shimari III*. It is this examination which this Court must now undertake because, on remand, a district court must apply intervening Supreme Court law that has altered controlling principles. *United States v. Robinson*, 390 F.3d 833, 837 (4th Cir. 2004).

Second, discovery has completed the record with respect to the facts relevant to jurisdiction: conduct comprising the alleged international law violations. Facts matter, and the record establishes that there is no evidence of domestic conduct by CACI PT comprising international law violations. Since the ATS does not apply extraterritorially, there is no subject matter jurisdiction for this action.

2. Intervening Supreme Court Precedent Has Rejected the Analytical Approach Used in *Al Shimari III* for Determining Subject Matter Jurisdiction and Established the Analysis Courts Must Perform

Subsequent to *Al Shimari III*, the Supreme Court's decision in *RJR Nabisco*, 136 S. Ct. at 2101, established a two-step framework for applying the presumption against extraterritoriality, a

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extensive United States contacts are present and the alleged conduct bears . . . a strong and direct connection to the United States." The Fourth Circuit's decision in *Warfaa* predated the Supreme Court's decision in *RJR Nabisco*, which issued later the same year.

framework that does not allow consideration of the mélange of factors on which *Al Shimari III* was based. Under *RJR Nabisco*, a court first "ask[s] whether the presumption against extraterritoriality has been rebutted – that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* If there is no such indication, the court proceeds to the second step, which "determine[s] whether the case involves a *domestic* application of the statute." *Id.* at 2101 (emphasis added). To do so, it "look[s] to the statute's 'focus'" and determines if there is sufficient conduct relevant to that focus that occurred in United States territory. *Id.* As the Court explained:

> If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but ***if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory***.

Id. (emphasis added). The Supreme Court confirmed the application of the focus test in *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), applying *RJR Nabisco*'s two-step framework in deciding questions of extraterritoriality to a claim under the Patent Act.[5]

RJR Nabisco was recognized as intervening Supreme Court precedent for extraterritorial application of the ATS by the Ninth Circuit in *Doe II v. Nestle*, 906 F.3d 1120 (9th Cir. 2018). In 2014, shortly after *Kiobel* was decided, the Ninth Circuit held that *Kiobel* had not adopted the focus test for extraterritoriality under ATS, concluding that the Supreme Court in *Kiobel* "chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). The case was remanded to the district court to allow the plaintiffs to amend their complaint to show whether "some of the activity underlying their ATS claims took place in the United States." *Id.*

[5] *WesternGeco* only reinforces that courts must use the focus test. *See In re Apple, Inc. Device Performance Litig.*, No. 18-md-2827, 2018 WL 4772311, at *7 (N.D. Cal. Oct. 1, 2018).

On remand, the district court found the Ninth Circuit's conclusion that the focus test did not apply to ATS claims to be "in irreconcilable conflict" with the intervening decision in *RJR Nabisco*. *Doe v. Nestle*, No. CV 05-5133, 2017 WL 6059134, at *2 (C.D. Cal. Mar. 2, 2017). The court then applied the focus test that *RJR Nabisco* was "extremely clear" in requiring. *Id.* Finding that the focus of the ATS is the "conduct that violates international law, which the ATS 'seeks to "regulate"' by giving federal courts jurisdiction over such claims," the court found the relevant conduct had occurred outside the United States and dismissed the case. *Id.* at *3-7. On appeal, the Ninth Circuit agreed with the district court that *RJR Nabisco* required application of the focus test. *Doe II*, 906 F.3d at 1125.[6] As in *Nestle*, the Fourth Circuit's analysis in *Al Shimari III* is in irreconcilable conflict with the focus test required by *RJR Nabisco*.

3. The *RJR Nabisco/WesternGeco* Analysis Requires this Court to Determine Whether There is Sufficient Domestic Conduct Comprising the Alleged International Law Violation

Because *Kiobel* established that the ATS does not apply extraterritorially, this Court need only conduct the second step of the analysis, *i.e.*, reviewing the ATS's focus and determining whether sufficient conduct relevant to that focus occurred in the United States. The focus of a statute is the object of its solicitude, which includes the conduct it seeks to regulate and the parties it seeks to protect. *WesternGeco*, 138 S. Ct. at 2137-38; *Morrison*, 561 U.S. at 266-67. Significantly, the Supreme Court has always identified a statute's "focus" as something explicitly mentioned in the statute's text. *See WesternGeco*, 138 S. Ct. at 2137-38 (holding that the "focus" of the Patent Act's damages provision is the underlying infringement); *RJR Nabisco*, 136 S. Ct. at 2106, 2111 (holding that the "focus" of RICO's civil suit provision is the plaintiff's

[6] Similarly, in *Adhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, 199-200 (5th Cir. 2017), the Fifth Circuit held that, in light of *RJR Nabisco*, the extraterritoriality analysis in *Al Shimari III* is "not the test" because *Morrison* and *RJR Nabisco* "require[] analysis of the conduct relevant to the statute's 'focus.'" *Id.* at 199-200.

injury); *Morrison*, 561 U.S. at 266-67 (holding that the "focus" of §10(b) of the Securities & Exchange Act is the securities transaction); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (holding that Title VII's "focus" is the worker's employment).[7]

The ATS's focus is unquestionably the tort committed in violation of the law of nations or a treaty of the United States. *Doe II*, 906 F.3d at 1125; *Adhikari*, 845 F.3d at 197; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014); *Ratha* v. *Phatthana Seafood Co., Ltd.*, No. CV-16-4271, 2016 WL 11020222, at *8 (C.D. Cal. Nov. 9, 2016). Torts committed in violation of international law are what the ATS seeks to regulate, and aliens are indisputably the parties the statute seeks to protect. The *only* relevant conduct for purposes of ATS jurisdiction is the conduct comprising the alleged international law violations.

Indeed, this Court followed the approach mandated by *RJR Nabisco* and *WesternGeco* in a case that predated both of those decisions. In *Warfaa v. Ali*, 33 F. Supp. 3d 653 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016), the Court recognized that "a cognizable ATS claim may not reach conduct occurring in the territory of a foreign sovereign," and dismissed the plaintiff's ATS claims because "[a]ll the relevant conduct alleged in the Amended Complaint occurred in Somalia." *Id.* at 658-59 (internal quotations omitted). The Court distinguished the case from *Al Shimari III* in large part on the grounds that *Al Shimari III* involved "conduct allegedly sanctioned on American soil" by CACI PT. *Id.* at 658 n.1. The present case, in its current posture, also is dramatically different from the status of the case at the time of *Al Shimari III*. The claims of direct abuse by CACI PT personnel have been abandoned by Plaintiffs and

[7] *See also U.S. ex rel. Wilson v. Graham Cty. Soil & Water Cons. Dist.*, 777 F.3d 691, 698 n.4 (4th Cir. 2015) (finding that the "focus" of the jurisdiction stripping provision of the False Claim Act is stated by its "plain language"); *Spanski Enter., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 913-14 (D.C. Cir. 2018) (holding that the "focus" of the Copyright Act, for purposes of extraterritorial application, is infringement).

dismissed by the Court. Discovery on the conspiracy and aiding and abetting claims, cabined as it was by the state secrets privilege, has concluded. The evidentiary record contains *nothing* showing that CACI PT personnel in the United States sanctioned, participated in, or otherwise facilitated any conduct comprising an international law violation.

The other factors on which the Court of Appeals relied in *Al Shimari III* – factors that comprised the vast majority of what the Court labeled "extensive relevant conduct in United States territory" – are simply not considered in assessing jurisdiction under ATS. CACI PT's citizenship, its U.S. contracts and employees, and the U.S. interests are all immaterial. Here, the alleged violations of international law – conspiracy and aiding and abetting – all occurred outside the United States. No conduct relevant to the focus of the ATS occurred in the United States.

4. The Record is Devoid of Evidence of Any Domestic Conduct Comprising the International Law Violations

Another significant development since the Fourth Circuit ruled in *Al Shimari III* is that discovery has completed the record with respect to the facts relevant to jurisdiction: the conduct comprising the alleged international law violations. The factual record establishes that there is no evidence of unlawful domestic conduct by CACI PT and, therefore, this case fails the second step of the *RJR Nabisco* test. *Kiobel* previously established the ATS does not apply extraterritorially, and, therefore, this case fails the first step of the *RJR Nabisco* analysis. Having failed both *RJR Nabisco* steps, there is no subject matter jurisdiction for this action.

This motion raises a factual challenge to jurisdiction, showing that there is no evidence of domestic conduct by CACI PT violating international law. In a factual challenge, no presumption of truthfulness attaches to the allegations. *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). The Court applies the standard applicable to a motion for summary judgment, under which the Plaintiffs must set forth specific facts beyond the pleadings to show that a

genuine issue of material facts exists, except that the Court resolves factual disputes bearing on jurisdiction. *Id.* To demonstrate jurisdiction here, Plaintiffs must provide evidence of conduct comprising international law violations *that occurred in the United States*.[8] This they cannot do, for no such evidence exists in the record.

Where discovery reveals insufficient domestic conduct involving the alleged international law violations, dismissal is required for lack of jurisdiction. *See, e.g., Sexual Minorities Uganda v. Lively*, 254 F. Supp.3d 262, 270 (D. Mass. 2017) (dismissing ATS action after discovery revealed that the only activity the defendant had engaged in within the U.S. was to send sporadic emails offering encouragement, guidance and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country), *aff'd in part, dismissed in part*, 899 F.3d 24, 30 (1st Cir. 2018). Dismissal is similarly required here, as discovery has adduced no evidence of unlawful domestic conduct.

The dearth of evidence of unlawful domestic conduct is not surprising. Even the Third Amended Complaint ("TAC") is devoid of such allegations. The TAC's allegations of conspiracy, ¶¶ 78-142, do not contain a single allegation of domestic conduct. All the conspiratorial conduct allegedly occurred in Iraq. The TAC's "Summary of Reasons for Believing the Conspiracy was Plausible," ¶ 158, also fails to allege any domestic conduct.

The TAC's allegations of aiding and abetting are little different. The TAC makes generic allegations of negligent hiring, training and oversight, alleges that CACI PT's site lead was in daily contact with CACI PT in the United States, that a CACI PT executive travelled to Iraq to

[8] Admittedly, conduct in the United States that aids and abets a violation of the law of nations in a foreign country might amount to sufficient domestic conduct to sustain jurisdiction. *See Doe II*, 2018 WL 5260852, at *5; *Mastafa*, 770 F.3d at 185. A claim of aiding and abetting an ATS violation requires proof that the defendant "provide[d] substantial assistance with the purpose of facilitating the alleged violation." *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011).

assess CACI PT's contract performance, and that CACI executives in the U.S. regularly reviewed reports "to assess the company's overall worldwide business situation." TAC ¶¶ 159-170. None of these allegations, even if they had evidentiary support, reflects domestic conduct comprising conspiracy or aiding and abetting violations of international law in Iraq. Finally, there is an allegation that "CACI PT implicitly, if not expressly, encouraged such misconduct," *i.e.*, detainee abuse. TAC ¶ 157. How, when, where and by whom are all left to the imagination. Even considered cumulatively, these allegations do not describe "substantial assistance with the purpose of facilitating the alleged violation" as required by *Aziz*, 658 F.3d at 401.

The allegations of the TAC are alone sufficient to warrant dismissal, as they are bereft of domestic conduct comprising conspiracy or aiding and abetting. But there is more, much more. The record evidence confirms the wholesale absence of domestic conduct with respect to the alleged violations. Specifically:

- There is no evidence that any of the allegedly tortious conduct was ***planned*** in the United States.
- There is no evidence that any CACI PT executive or employee in the United States ***conspired*** with anyone in Iraq to abuse detainees.
- There is no evidence that any CACI PT executive or employee in the United States ***participated*** in the allegedly tortious conduct.
- There is no evidence that any CACI PT executive or employee in the United States ever ***encouraged, directed or condoned*** the allegedly tortious conduct.
- There is no evidence that any CACI PT executive or employee in the United States ***made any decisions*** to further the allegedly tortious conduct.
- There is no evidence that any CACI PT executive or employee in the United States was even ***aware*** of the allegedly tortious conduct at the time it supposedly occurred.

[redacted] Ex. 27, ¶ 18; Ex. 34 at 27; Ex. 35 at 36-37, 60; Ex. 36 at 28-29; Ex. 37 at 111-13. Adducing evidence sufficient to establish jurisdiction is Plaintiffs' burden; CACI PT has no

obligation to prove the absence of jurisdictional facts. *Demetres*, 776 F.3d at; *United States ex rel. Vuyyuru v. Jadhev*, 555 F.3d 337, 347-48 (4th Cir. 2009). Plaintiffs' inability to marshal facts showing domestic conduct by CACI PT in violation of international law makes this case an impermissible extraterritorial application of the ATS and requires dismissal.

B. The Political Question Doctrine Precludes Judicial Review

"Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see also In re KBR, Inc. Burn Pit Litig.*, 893 F.3d 241, 259 (4th Cir. 2018) (political questions must be resolved within "'the halls of Congress or the confines of the Executive Branch,' not on the steps of a federal courthouse") (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *United States v. Moussaoui*, 382 F.3d 453, 469-70 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

Under some circumstances, this strict prohibition against reviewing military judgments extends to government contractors. *Taylor v. Kellogg Brown & Root Servs.*, 658 F.3d 402, 411 (4th Cir. 2011) (if the contractor "was under the military's control" or "national defense interests were closely intertwined with the military's decisions governing [the contractor's] conduct"). Without explanation, the Fourth Circuit expanded the *Taylor* test for this case and held that "acts committed by CACI [PT] employees are shielded from judicial review under the political question doctrine if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments." *Al Shimari IV*, 840 F.3d at

151.[9] To determine whether judicial review is barred by the political question doctrine, the Fourth Circuit directed the Court "to examine the *evidence* regarding the *specific conduct* to which *the plaintiffs* were subjected and the source of any direction under which the acts took place." *Id.* at 160 (emphasis added).

Thus, the Court must now examine the record developed with respect to jurisdiction in this case. *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) ("the mandate of a higher court is 'controlling as to matters within its compass.'") (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). To "implement both the letter and the spirit" of the Fourth Circuit's mandate, *id.* at 67, this "discriminating analysis" must consider *the evidence* bearing on (1) the lawfulness of CACI PT personnel's conduct, (2) the tangible and pervasive control exercised by the military over CACI PT personnel's actions, and (3) the "military expertise and judgment" that governed CACI PT personnel's job duties and performance, *Al Shimari IV*, 840 F.3d at 160-61. *See United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012); *Doe v. Chao*, 511 F.3d 461, 464-65 (4th Cir. 2007) (the mandate must be "scrupulously and fully carried out"). Plaintiffs' unsupported allegations no longer suffice. *Al Shimari IV*, 840 F.3d at 160-61.

The facts, however, are not seriously in dispute. There is no direct or indirect connection between CACI PT personnel and the unlawful treatment alleged by Plaintiffs. Moreover, there is no real dispute as to whether the military had actual control over CACI PT personnel. The evidence demonstrates that the military maintained plenary control over the contractors both on paper and on the ground. Last, there is no question that the lawful techniques and conditions of

[9] CACI PT acknowledges that, absent intervening Supreme Court precedent, this Court is bound to follow the remand instructions of the Fourth Circuit. However, as the D.C. Circuit observed in *bin Ali Jaber v. United States,* 861 F.3d 241, 247 n.1 (D.C. Cir. 2017), in rejecting *Al Shimari IV*, the Fourth Circuit's analysis "hinging on whether the conduct of defendants was 'lawful' or 'unlawful' – puts the cart before the horse, requiring the district court to first decide the merits of a claim and, only thereafter, determine whether that claim was justiciable."

confinement approved by the military at Abu Ghraib involved sensitive military judgments beyond the scope of this Court's review. Accordingly, Plaintiffs cannot shoulder their burden of proving subject matter jurisdiction and this case must be dismissed.

1. There Is No Evidence CACI PT Personnel Committed, Assisted, or Conspired to Commit Unlawful Acts Against These Plaintiffs

Under *Al Shimari IV*, the threshold question is whether CACI PT committed unlawful acts against the Plaintiffs as such acts are "justiciable, irrespective whether that conduct occurred under the actual control of the military" or involved sensitive military judgments. 840 F.3d at 151. The Fourth Circuit did not provide guidance as to how this Court should, in the context of this civil action, determine whether conduct was unlawful. Given that elements of an ATS claim are determined by specific, obligatory and universally-accepted international norms, a determination of lawfulness requires an international law standard proven by Plaintiffs. *Aziz*, 658 F.3d at 398. That requires the Court to use international law in passing judgment on the lawfulness of interrogation techniques conceived, formulated, and authorized by the highest levels of the U.S. government. To describe that exercise as unprecedented is an understatement.

CACI PT believes, however, that the Court will never need to reach that issue because there is no evidence to support a finding that CACI PT personnel either directly or tangentially committed unlawful acts against Plaintiffs. After extensive discovery – sought nearly exclusively by CACI PT and conducted in a manner prejudicial to CACI PT – Plaintiffs remain unable to support their allegations that CACI PT personnel acted unlawfully towards them.

Plaintiffs admit they cannot identify any CACI PT personnel with whom they interacted and concede that CACI PT interrogators never "laid a hand on them." *See* 9/2/17 Tr. at 15; Dkt. #639 at 31 n.30; *see also Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 693 (E.D.

Va. 2018) (dismissing direct liability claims).[10] No documents produced in this case suggest that any CACI PT interrogator mistreated a Plaintiff. CACI PT took pseudonymous depositions of every interrogator the United States could locate who participated in an interrogation of Plaintiffs. None of them witnessed CACI PT personnel mistreat any of these Plaintiffs.

According to government records, Plaintiff Rashid was interrogated only once and never by a CACI PT interrogator. Ex. 11 at 7. Plaintiff Al-Ejaili was assigned an Army interrogator but there is no record of an intelligence interrogation. CACI PT deposed Sergeant Beachner, Al-Ejaili's assigned interrogator, who learned that Steve Stefanowicz was questioning Al-Ejaili during the IP Roundup and asked him to stop. Stefanowicz complied without incident. According to Beachner, nothing about Stefanowicz's questioning of Al-Ejaili violated the applicable interrogation rules of engagement. Ex. 14 at 16; [redacted] CACI Interrogator A and Army Interrogator B conducted the only interrogation of Al Shimari identified by the United States. Ex. 14 at 4-5. [redacted] both separately testified that the types of abuses alleged by Al Shimari did not occur during any interrogation in which they participated, Ex. 1 at 93-106; Ex. 2 at 55-56, 58-62. Army Interrogator B never saw any abuse of a detainee. Ex. 2 at 85. CACI Interrogator G and Army Interrogator B conducted one of Al-Zuba'e's three interrogations. Ex. 14 at 5. Army Interrogator B did not recall Al-Zuba'e's interrogation, but did not see any abuse of detainees while at Abu Ghraib. Ex. 2 at 85. Thus, all available evidence refutes any claim that Plaintiffs were abused in the context of interrogations with CACI PT interrogators.

[10] In their interrogatory responses and depositions, Plaintiffs could not provide facts regarding any unlawful interaction between themselves and any CACI PT employee. Ex. 9 at 7; Ex. 10 at 148-49; Ex. 12 at 6; Ex. 13 at 9-10, 66, 73, 194-96, 216; Ex. 16 at 7-8; Ex. 18 at 7; Ex. 19 at 30-31, 33, 36, 44-45, 56-58, 64, 65, 81.

Plaintiffs also lack proof that any CACI PT interrogator aided or abetted the mistreatment of any Plaintiff. To show unlawful aiding and abetting, Plaintiffs must show CACI PT "'provide[d] substantial assistance with the purpose of facilitating'" violations of international law. *See Aziz*, 658 F.3d at 401. No such evidence exists.

Likewise, Plaintiffs have no proof that CACI PT conspired with anyone to mistreat them. If a conspiracy claim is permitted under ATS, CACI has shown in its summary judgment motion that there is no accepted international law standard for either *Pinkerton* liability or double vicarious liability. The only conspiracy claim available in an ATS case requires proof that (1) CACI PT and U.S. government personnel agreed to commit a recognized international law violation against these Plaintiffs; (2) CACI PT personnel joined the agreement with the purpose or intent to facilitate the commission of the violation; and (3) conspiring U.S. government personnel committed the violation. Dkt. #1035 at § IV.B.1 (stating appropriate standard for ATS conspiracy claims). After extensive discovery, Plaintiffs simply cannot meet this burden. The record refutes any conclusion that CACI PT personnel had any role with respect to detainees they were not assigned to interrogate, and there is no evidence that CACI PT personnel acted unlawfully in the two instances they were assigned to interrogate one of these Plaintiffs.

The MPs who were prosecuted for abusing detainees testified that both military and civilian interrogators sometimes gave MPs instructions concerning detainee treatment, but that those instructions pertained only to detainees assigned to that interrogator. Ex. 28 at 208-09, 226-27; [redacted]. The personnel who participated in interrogations of Plaintiffs affirmed that (1) they did not enter into nor were they aware of any conspiracies with CACI PT interrogators and (2) CACI PT personnel had no influence over interrogations of, or detention conditions for, detainees to whom they were not personally assigned. *See, e.g.*, Ex. 1 at [redacted]

111-12; Ex. 3 at 41-43; Ex. 4 at 49-52, 61-62, 69-71, 184-85; Ex. 6 at 92-93; Ex. 7 at 98-100; Ex. 38 at 106-09; Ex. 39 at 66, 77; [redacted].

As described *supra*, only two CACI PT interrogators were assigned to interrogate a Plaintiff – CACI Interrogator A once interrogated Al Shimari and CACI Interrogator G once interrogated Al-Zuba'e. CACI Interrogator A flatly denied ever abusing a detainee, directing or assisting someone to abuse a detainee, or entering an agreement or conspiracy to abuse detainees. *Id.* at 111. No witness has testified to the contrary. [redacted][11] Army Interrogator B testified that no abuse occurred during the interrogation he and CACI Interrogator G conducted of Al-Zuba'e. Ex. 2 at 85.

Unable to muster proof of unlawful or conspiratorial conduct by CACI PT, Plaintiffs urge that by their mere presence in the Hard Site, CACI PT interrogators must have been party to a conspiracy against detainees, including Plaintiffs. *See* Ex. 13 at 194; *see also* TAC ¶ 21. But allegations are irrelevant, and the testimony in this case refutes Plaintiffs' unsupported, catch-all theory of liability. Captain Carolyn Wood never witnessed nor received a report that a CACI PT interrogator acted inappropriately with a detainee. Ex. 22 at 37. She was unaware of serious abuses that later surfaced. *Id.* at [redacted] 82-84. Multiple interrogation personnel testified that they were unaware of the abuses occurring at the Hard Site during their tenure there and were unaware of the so-called code words Plaintiffs claim were in common usage in the alleged

[11] That CACI Interrogator A only requested confinement conditions for one detainee is not surprising. Sergeant Cathcart rarely interacted with interrogators because "interrogators weren't involved with the tiers with the inmates." Ex. 41 at 34. The only conditions of confinement he recalled being implemented were loud music and stress positions. *Id.* at 40.

conspiracy. *See, e.g.*, Ex. 2 at 85; Ex. 3 at 64 ("It is also my belief that the vast majority of folks working at that time had no sort of agreement or any sort of agreement to abuse detainees."); Ex. 4 at 186; Ex. 5 at 83, 94-96, 102-14 (denied hearing of abuse prior to leaving Abu Ghraib); Ex. 6 at 92-93; Ex. 38 at 136-54 (same); Ex. 39 at 74-75, [redacted].[12] Thus, Plaintiffs' theory of "mere presence in the Hard Site supports an inference of unlawful and conspiratorial conduct" is unsupported by evidence and refuted by the multitude of eyewitnesses who testified that they served regularly at the Hard Site but were unaware of the abuses later uncovered.

2. CACI PT Personnel Operated Under the Military's Actual Control

The Fourth Circuit directed the Court to consider "whether the military actually controlled the CACI interrogators' job performance, including any activities that occurred outside the formal interrogation process." *Al Shimari IV*, 840 F.3d at 157. Actual control "encompasses not only the requirements that were set in place in advance of the interrogations, but also what actually occurred in practice during those interrogations and related activities." *Id.*

As a threshold matter, the Court's rulings upholding the state secrets privilege has severely prejudiced CACI PT in its efforts to develop the complete record on military control over Plaintiffs' interrogations. As CACI PT explained in moving to dismiss the case on state secrets grounds, the Court's state secrets rulings have deprived CACI PT of evidence regarding the specific interrogation techniques and approaches approved by the U.S. military for these Plaintiffs' interrogations and contemporaneous documents detailing the events occurring during Plaintiff's interrogations. Dkt. #1042 at 25-26; *see also* Ex. 30 at ¶¶ 19-21 (Mattis Decl.). Depriving CACI PT of this crucial evidence requires dismissal on state secrets grounds. Nevertheless, to the extent CACI PT has been permitted to develop a record on actual control,

[12] There were MPs who worked directly with inmates on the Hard Site who were also unaware of the abuses occurring. *See, e.g.*, Ex. 41 at 91-93.

the evidence adduced in this case demonstrates that the military had actual and unequivocal control over both CACI PT interrogators and the treatment of detainees.

First, CACI PT's contracts expressly provided that CACI PT interrogators would (1) be integrated into the military's interrogation teams (Ex. 20 at ¶ 4), (2) conduct and report interrogations in accordance with military rules and direction, *id.* at ¶ 6 (emphasis added), (3) perform under the direction and control of the military intelligence chain of command, (Ex. 21 at ¶ 3), and (4) "be managed by the Senior [Counter-Intelligence] Agent," a member of the U.S. military, *id.* at ¶ 4.d. These contractual requirements were scrupulously followed on the ground.

Moreover, "CACI PT interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." Ex. 25 at ¶¶ 8, 9 (Pappas). Both military and civilian personnel reported to the military intelligence chain of command for all operational matters. Ex. 22 at 27-28 (Holmes); [redacted] The military chain of command controlled all aspects of a CACI PT interrogator's performance of the interrogation mission and treated CACI PT interrogators for operational purposes exactly the same as Army interrogators. Ex. 22 at 26, 28-29, 36 (Holmes Dep.); Ex. 24 at ¶¶ 4-5 (Brady); Ex. 25 at ¶ 9 (Pappas); *see also* [redacted]

The military controlled all aspects of detainee treatment at Abu Ghraib. The Army decided detainees' conditions of confinement, if they were interrogated, who interrogated them, which interrogation plans and techniques could be used, and what rules of engagement applied in interrogations. Ex. 25 at ¶ 10 (Pappas); Ex. 27 at ¶ 13 (Porvaznik); [redacted] Ex. 1 at 58-79. [redacted]

[redacted] Army interrogators similarly testified that the Army chain of command, and not CACI PT personnel, dictated the permissible interrogation techniques and conditions of confinement at Abu Ghraib. Ex. 3 at 64-67; Ex. 4 at 62-69, 184-85; Ex. 5 at 44-45, 54, [redacted] Ex. 7 at 60-62, 74.

In addition to establishing the ground rules for each and every intelligence interrogation at Abu Ghraib, the military monitored interrogations on an *ad hoc* and unscheduled basis. "[T]he interrogation booths were built specifically to allow monitoring." Ex. 22 at 35 (Holmes). The booths were designed with one-sided glass and plywood walls that permitted military leadership to see and hear what was taking place inside any interrogation booth from an administrative hallway. *Id.* at 35-36. Military leadership observed interrogations while unseen by booth occupants. *Id.* "[A]t any given time, anybody could be observed." *Id.* at 36.

Given the military's formal control over CACI PT personnel, the extensive evidence that CACI PT personnel operated within that structure, and the military's ability to monitor interrogations unseen, it is clear the military exercised actual control over CACI PT contractors.

3. CACI PT Personnel's Conduct Involved Sensitive Military Judgments

The events at Abu Ghraib occurred in the context of the Iraq War, and the prison was located in the midst of the war zone and under regular attack. Ex. 41 at 90. Plaintiffs challenge the interrogation of detainees in an effort to extract actionable intelligence. CACI PT interrogators were integrated into the military intelligence operation at Abu Ghraib and supervised by military officers. CACI PT interrogators used the same interrogation techniques and followed the same rules as their military counterparts. *See* Section III.B.2, *supra*.

[redacted] In asserting the state secrets privilege, Secretary Mattis emphasized the sensitive, subjective military decisions involved in deciding which interrogation techniques to approve and use for particular interrogations. Ex. 30 at ¶¶ 15-22. Thus, litigating this case requires a "reexamination" of "sensitive judgments" to hire contractor interrogators, on which detainees to use contractors, with what supervision, and using which interrogation techniques, notwithstanding that these decisions are "entrusted to the military in a time of war." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (relied upon by the Fourth Circuit in *Taylor*, 658 F.3d at 411).

In addition to those sensitive military judgments, there is the issue of responsibility for the interrogation techniques of which Plaintiffs complain. The interrogation techniques used at Abu Ghraib were developed and approved at the highest levels of the U.S. government. The Senate Armed Services Committee's report, *Inquiry into the Treatment of Detainees in U.S. Custody*, chronicles the development of interrogation techniques. Ex. 45.[14] As the report explains, in Spring 2002, the CIA proposed a program of enhanced interrogation techniques for suspected al-Qaeda terrorists that received personal attention from the National Security Advisor, the CIA Director, principals of the National Security Council, the Attorney General, and the

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[13] [redacted] Thus, the U.S. military made the very decisions that Plaintiffs now assert constituted torture.

[14] The Senate Report traces the migration of these techniques to Iraq, and the influence of the Secretary of Defense's approval of them. S. Armed Serv. Comm., 110th Cong., *Inquiry into the Treatment of Detainees in U.S. Custody* (Comm. Print 2008) at 153-58, 166-70, 195-97, 201.

Secretary of Defense. *Id.* at xvii. Then-Vice President Cheney said of the CIA's 2002 proposed program, the techniques from which later migrated to Iraq, "We all approved it."[15]

In October 2002, the Secretary of Defense approved aggressive interrogation techniques for use at the military detention center at Guantanamo Bay (GTMO). The techniques included "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, [and] deprivation of light and sound." *Id.* at xvii, xix. The Secretary of Defense later established a Working Group to review interrogation techniques. *Id.* at xxi. Relying on advice from the Department of Justice's Office of Legal Counsel, the Working Group recommended interrogation techniques including "[r]emoval of clothing, prolonged standing, sleep deprivation, dietary manipulation, hooding, [exploiting fear of] dogs, and face and stomach slaps." *Id.* at xxii. The Secretary of Defense approved 24 techniques including "dietary manipulation, environmental manipulation, and sleep adjustment." *Id.* Concomitantly, senior Department of Justice personnel issued memoranda on the legality of interrogation techniques that influenced the Working Group. These memos included the Bybee memo and the Yoo memo, which were in effect during the time of the actions complained of here. *Id.* at xxi-xxii.[16]

The Senate Report traces how techniques authorized for GTMO made their way to Afghanistan and then to Iraq. *Id.* at xxii-xxiv, xxviii-xxix. In September 2003 (the month CACI PT began furnishing interrogators), the Coalition Joint Task Force-7 ("CJTF-7") Commander issued an order that "authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations." *Id.* at xxiv; [redacted]

[15] Paul Kane & Joby Warrick, "Cheney Led Briefings of Lawmakers To Defend Interrogation Techniques," *The Washington Post*, A1, A4 (June 3, 2009).

[16] The Bybee memo concluded that 18 U.S.C. §§ 2340-2340A "proscribes acts inflicting, and those specifically intended to inflict, severe pain or suffering, whether mental or physical." The memo stated that for the acts to be unlawful torture, they must be "of an extreme nature."

[redacted]. The CJTF-7 Commander issued a revised policy the next month that eliminated some techniques. [redacted] Ex. 45 at xxiv. "The new policy, however, contained ambiguities with respect to certain techniques, such as the use of dogs in interrogations, and led to confusion about which techniques were permitted." Ex. 45 at xxiv.

Plaintiffs contend that these techniques constituted torture and thus were unlawful. In ruling on the lawfulness of these techniques, the Court will necessarily pass judgment – based on international law – on the actions of the Executive Branch in approving the techniques to be used in prosecuting the war in Iraq. CACI PT respectfully submits the impropriety of that exercise is self-evident.

Deciding whether to approve these interrogation techniques and then to apply them to specific detainees required the application of military judgment and expertise. Ex. 30 at ¶¶ 15-22 (Mattis Decl.). The military made sensitive judgments regarding the proper balance between respect for detainees and the military imperative of intelligence gathering during an ongoing war. *See Carmichael*, 572 F.3d at 1282 (political question doctrine applies where the military must "calibrate the risks" and perform a "delicate balancing of considerations"). [redacted] There is no evidence that CACI PT personnel ever had any role in implementing or requesting approval for enhanced interrogation techniques to be used on any of these Plaintiffs. To the extent Plaintiffs can be credited with respect to their allegations regarding their interrogations and conditions of confinement, none of which involves misconduct by CACI PT personnel, the fact remains that the decisions underlying Plaintiffs' treatment involved sensitive military judgments.

Three particular features of the present litigation make it unavoidable that a decision on the merits would require the Court "to question actual, sensitive judgments made by the military." *Al Shimari IV*, 840 F.3d at 158. First, military interrogators used the exact same techniques as CACI PT interrogators pursuant to the same set of rules and orders. *See* Section III.B.2, *supra*; *see also* Ex. 22 at 26, 28-29, 35. Thus, any decision on CACI PT interrogation techniques would, in effect, constitute a ruling on the propriety of the identical techniques used by military personnel. Second, military officers reviewed, approved, and even witnessed interrogations by CACI PT interrogators. *See* Section III.B.2, *supra*. Finally, CACI PT interrogators had the identical operational chain of command as military interrogators. Ex. 22 at 28. As a result, any attack on the interrogation techniques used by CACI PT interrogators necessarily implicates command decisions by their military superiors.

The type of inquiry necessary to adjudicate Plaintiffs' claims already has and will necessarily continue to call into question sensitive military judgments. Accordingly, Plaintiffs' claims are nonjusticiable under the political question doctrine.

IV. CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ John F. O'Connor

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Exhibit 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant,	No. 1:08-cv-0827 LMB-JFA **PUBLIC VERSION (revised to reflect narrowed confidentiality designations by the United States)**
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, v. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	

DEFENDANT/THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S SUPPLEMENTAL MEMORANDUM REGARDING DISPOSITIVE MOTIONS

CACI Premier Technology, Inc. ("CACI PT") has filed three dispositive motions noticed for hearing on February 15, 2019:

- A motion for summary judgment;
- A motion seeking dismissal Based on the United States' successful invocation of the state secrets privilege; and
- A motion to dismiss for lack of subject matter jurisdiction.

At the time CACI PT filed its supporting memoranda and replies, it had not yet had the opportunity to take the deposition of CACI Interrogator G. This is another example of a CACI PT employee *who CACI PT cannot call as a witness in its own defense*.

The United States has identified nine interrogators as having participated in an intelligence interrogation of a Plaintiff. Seven of these interrogators were U.S. soldiers. Only two were CACI PT employees. CACI Interrogator A, who has been deposed, conducted one interrogation of Al Shimari. CACI Interrogator G conducted one interrogation of Al-Zuba'e. Because of complications arising from CACI Interrogator G's pseudonymous status, CACI PT was not permitted to take CACI Interrogator G's deposition until February 12, 2019. CACI PT hereby submits the entirety of CACI Interrogator G's deposition transcript and briefly describes the manner in which his testimony further supports CACI PT's dispositive motions.[1]

A. CACI Interrogator G's Testimony Supporting CACI PT's Motion for Summary Judgment

The United States represents that Al-Zuba'e was subjected to three intelligence interrogations at Abu Ghraib prison. Ex. 14 at 5. The United States further represents that U.S. soldiers were the interrogators for Al-Zuba'e's first two interrogations and that CACI Interrogator G participated in Al-Zuba'e's third interrogation along with Army Interrogator B.

CACI PT addresses the undisputed facts regarding Al-Zuba'e's third interrogation at **Paragraph 22 of its Statement of Material Undisputed Facts**. Dkt. #1035 at 7-8. CACI Interrogator G does not remember his interrogation of Al-Zuba'e, though he is able to confirm that he did in fact participate in the December 23, 2003 interrogation of Al-Zuba'e. Ex. 55 at 41-42. [redacted]

[1] ~~Because the United States, as permitted by the protective order in this case, has designated the entirety of CACI Interrogator G's deposition testimony as confidential pending its review of the final transcript, CACI Interrogator G's deposition transcript and all discussion of it have been filed under seal.~~

[redacted] *Id.* at 30-31. For the avoidance of doubt, CACI PT's counsel asked CACI Interrogator G about every act of abuse Al-Zuba'e alleged in his interrogatory responses and in his deposition, and CACI Interrogator G confirmed that (1) he did not engage in any of these alleged acts of abuse; (2) he did not aid or encourage anyone else in committing any such acts; and (3) he did not see any acts of abuse of the types alleged by Al-Zuba'e. *Id.* at 43-60. CACI Interrogator G testified that he never used an interrogation approach at Abu Ghraib prison that involved physical pain or discomfort for the detainee. *Id.* at 65-66. Rather, CACI Interrogator G testified that he tried to obtain information from detainees by building rapport with the detainees, including acts such as bringing detainees food and tea for them to consume during their interrogations. *Id.* at 66-67. CACI Interrogator G testified that he never gave MPs instructions regarding how any detainee should be treated. *Id.* at 33-34. CACI Interrogator G further testified that he never saw a detainee being abused or mistreated at Abu Ghraib prison, never reached an agreement with anyone to abuse or mistreat detainees, never assisted or encouraged anyone to mistreat detainees, and never had anyone encourage or assist him in abusing detainees. *Id.* at [redacted] 60-61. All of this testimony is uncontroverted.

In **Paragraphs 23-28 of CACI PT's Statement of Material Undisputed Facts**, CACI PT collected record evidence that the U.S. Army had plenary, direct, and actual control over interrogation operations by U.S. Army and CACI PT interrogators at Abu Ghraib prison. CACI Interrogator G confirms the facts presented by CACI PT. CACI Interrogator G testified that his section leader at Abu Ghraib was a soldier. *Id.* at 68-69. CACI Interrogator G testified that the U.S. Army chain of command had to approve his interrogation plans before an interrogation could proceed. *Id.* at 67-69. He also testified that the U.S. Army chain of command established the rules regarding permissible interrogation approaches at Abu Ghraib prison and required that

he submit a report after each interrogation. *Id.* at 64-65. CACI Interrogator G testified that the only supervision provided by CACI PT extended to purely administrative matters, with CACI PT personnel exercising no control or supervision over operational matters. *Id.* at 69-72.

In its **reply in support of its motion for summary judgment**, CACI PT demonstrated that the record did not support an inference that interrogation operations were in such a confined space at Abu Ghraib prison that anyone interrogating detainees was aware of the detainee abuses that occurred there. Dkt. #1110 at 7-9. CACI Interrogator G's testimony further refutes this inference. CACI Interrogator G testified that he can only remember conducting one interrogation within the Hard Site, and that he certainly conducted fewer than three interrogations in the Hard Site. Ex. 55 at [redacted], 88-89. [redacted] CACI Interrogator G further testified that it was entirely possible for an interrogator, such as him, to conduct as many as 50-150 interrogations at Abu Ghraib and to be completely unaware of the detainee abuses that later were reported in the media. *Id.* at 60-63.

B. CACI Interrogator G's Testimony Supporting Dismissal Based on the State Secrets Privilege

At **page 7 of CACI PT's state secrets memorandum** (Dkt. #1042), CACI PT detailed the interrogation records it had been denied, and explained that these documents were crucial because the pseudonymous interrogators generally did not remember their interrogations of Plaintiffs. As it relates to CACI Interrogator G's interrogation of Al-Zuba'e, the United States has withheld on state secrets grounds portions of interrogator notes "completed close in time" to the interrogation that address the approaches used, their effectiveness, the detainee's mood, and recommendations/suggested future approaches. Ex. 30 at ¶ 21. As with every other

pseudonymous interrogator except one, CACI Interrogator G did not remember his single interrogation of Al-Zuba'e. Ex. 55 at 37-41. Accordingly, contemporaneous records of this interrogation are irreplaceable evidence of the events occurring during this interrogation.

At **pages 7-8 of the same memorandum**, CACI PT detailed some of the information pseudonymous deponents had been prohibited from providing regarding their backgrounds and the interrogations of Plaintiffs. As with the other pseudonymous interrogators, the United States' assertion of the state secrets privilege during CACI Interrogator G's deposition has denied CACI PT access to crucial facts bearing on its defenses. A few examples are set out below:

- Plaintiffs' motion *in limine* states that Plaintiffs seek to rely on excerpts from the Taguba and Jones/Fay reports alleging "involvement of CACI personnel in detainee abuse" on the theory that "these excerpts document that CACI personnel were directly involved in the abuse of detainees at Abu Ghraib." Dkt. #1080 at 5. CACI Interrogator A and CACI Interrogator G are the only CACI PT interrogators who participated in an intelligence interrogation of these Plaintiffs. As CACI explained at **page 8 of its state secrets memorandum**, the United States directed CACI Interrogator A not to disclose whether he was accused of misconduct in either report. The United States similarly directed CACI Interrogator G not to disclose whether he was accused of wrongdoing in the Taguba or Jones/Fay reports, or if he was any of the CACI PT interrogators named in those reports. Ex. 55 at 20-24. Thus, Plaintiffs intend to tar CACI PT with findings and recommendations from the Taguba and Jones/Fay reports while the state secrets privilege denies CACI PT the opportunity to present evidence on whether the CACI PT interrogators interacting with Plaintiffs were even implicated in those reports.

- Plaintiffs' also intend to introduce excerpts from the Taguba and Jones/Fay reports for the premise that CACI PT personnel lacked "training or experience" and that "this lack of qualifications among . . . interrogator personnel regarding their jobs is relevant because it increases the likelihood that the abuse and conspiracy occurred." Dkt. #1080 at 5. During CACI Interrogator G's deposition, the United States asserted the state secrets privilege and instructed the witness not to answer as to whether he had prior military service; whether, before joining CACI PT, he had "formal interrogation training from the United States military," "military experience as an interrogator," and/or "military training regarding the permissible interrogation approaches for a military interrogator." Ex. 55 at 15-16. Thus, Plaintiffs intend to pursue a factual theory that CACI PT personnel were inexperienced and insufficiently trained while the United States has instructed

the only CACI PT employee interacting with Al-Zuba'e not to disclose his interrogation training and experience.

- CACI Interrogator G was not permitted to disclose when he arrived at Abu Ghraib prison. Ex. 55 at 12-13. This fact is essential because CACI Interrogator G only participated in the *third* interrogation of Al-Zuba'e, and not the first two interrogations that occurred more than a month earlier. Ex. 14 at 5. Al-Zuba'e testified that the same three persons conducted all of his interrogations. Ex. 19 at 70, 76, 85, 88, 101. If CACI Interrogator G did not arrive at Abu Ghraib prison until after Al-Zuba'e's first two interrogations, it would eliminate him – the only CACI PT employee interacting with Al-Zuba'e – as part of the team that Al-Zuba'e implicates in his alleged abuse. The state secrets privilege prevents CACI PT from pursuing this factual defense.

- The United States directed CACI Interrogator G, on state secrets grounds, not to disclose the approximate dates he was at Abu Ghraib prison; how many months he was there; when his employment with CACI PT began and ended; whether the witness served at locations in Iraq other than Abu Ghraib prison; whether the witness had prior U.S. military service; the characterization of any military discharge; any military awards or honors received; whether the witness has ever been accused of misconduct in the treatment of detainees at Abu Ghraib prison; whether anyone has ever alleged that he used an unauthorized interrogation technique; and the witness's educational level and work history. Ex. 55 at 12-20, 24. As explained at **pages 22-23 of CACI PT's state secrets memorandum**, CACI PT cannot fairly defend without being allowed to provide background information as to why CACI Interrogator G's denial of involvement in detainee abuse should be believed.

C. CACI Interrogator G's Testimony Supporting Dismissal for Lack of Subject Matter Jurisdiction

CACI PT's pending suggestion of lack of subject matter jurisdiction makes two arguments as to why the Court lacks jurisdiction: (1) that Plaintiffs lack proof of domestic violations of international law; and (2) the political question doctrine renders Plaintiffs' claims nonjusticiable. Dkt. #1061.

With respect to Plaintiffs' lack of proof of domestic international law violations (**Dkt. #1061 at 4-14**), CACI Interrogator G testified that he had no dealings whatsoever with CACI PT personnel who were located in the United States; that CACI PT personnel did not have any role in supervising the operational mission at Abu Ghraib prison; that CACI PT personnel did not

have a role in approving his interrogation plans; that CACI PT personnel did not have "any role in deciding how detainees assigned to [him] were treated while in U.S. custody"; that CACI PT personnel did not have "any role in selecting the interrogation approaches or techniques that [he] used in [his] interrogations"; and that he did not do any occupational reporting to CACI PT personnel in the United States. Ex. 55 at 69-72. Thus, CACI Interrogator G's testimony is consistent with the testimony detailed in CACI PT's subject matter jurisdiction memorandum that CACI PT personnel in the United States had no role in connection with detainee treatment in Iraq. **Dkt. #1061 at 13-14.**

With respect to the political question doctrine, CACI Interrogator G repeatedly testified that he was under the direct and actual control of the U.S. military chain of command for all matters relating to detainee treatment at Abu Ghraib prison. U.S. military personnel dictated and supervised how CACI Interrogator G "performed the operational mission." Ex. 55 at 70. CACI Interrogator G's operational supervisors were all soldiers. *Id.* at 69-71. The U.S. military dictated the permissible interrogation approaches and was the sole approval point for interrogation plans. *Id.* at 67-72. While CACI PT designated an employee at Abu Ghraib prison to serve as the site lead, CACI Interrogator G testified that the site lead's responsibilities were administrative only, and that the site lead did not "have any operational role in how [he] performed the mission." *Id.* at 71.

Respectfully submitted,

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Exhibit 11

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

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SA'AD HAMZA HANTOOSH AL-ZUBA'E, AND SALAH HASAN NUSAIF JASIM AL-EJAILI, Plaintiffs, vs. CACI PREMIER TECHNOLOGY, INC., Defendant.	Civil Action No. 1:08cv827 Alexandria, Virginia February 27, 2019 9:59 a.m.
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff, vs. UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

(Pages 1 - 53)
COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

THE CLERK: Civil Action 08-827, Suhail Najim Abdullah Al Shimari, et al. v. CACI Premier Technology, Inc. v. United States of America, et al. Would counsel please note their appearances for the record.

MR. O'CONNOR: Good morning, Your Honor. John O'Connor and Bill Dolan for CACI PT.

THE COURT: Good morning.

MR. LoBUE: Good morning, Your Honor. Robert LoBue for the plaintiffs, together with my cocounsel, Baher Azmy to my right and John Zwerling, and if the Court would indulge me, I'd like to introduce some of my colleagues who have worked long and hard on this case: Matthew Funk, Jared Buszin from my law firm, and Katherine Gallagher from the Center for Constitutional Rights. Thank you.

THE COURT: Good morning.

Ms. Wetzler?

MS. WETZLER: Good morning, Your Honor. Lauren Wetzler from the United States Attorney's Office. With me are Eric Soskin and Elliott Davis from the Department of Justice.

With the Court's permission, Mr. Soskin is prepared and would like to address if the Court has any questions from the United States on the motion to dismiss based on the state secrets privilege or the motion in limine regarding the reports. Mr. Davis would like to address the Court, if he may,

if the Court has questions regarding the other two motions for the government. Thank you.

THE COURT: All right. Well, the government has no motions pending today. You've got a summary judgment motion down the road.

MS. WETZLER: That's correct, Your Honor. We do not, and it's only if Your Honor has questions regarding the pending motions.

THE COURT: All right, that's fine.

Well, I recognize that you-all sent me a letter a couple of days ago asking if I could let you know if there were particular issues I was concerned about. In part, I didn't totally want to tip my hand. In other parts, I was too busy going through the records.

There are a lot of issues that I don't feel I need any oral argument about at all. I'm going to just tell you what I'm going to do, but there are then definitely some issues I want to discuss with you, all right?

So we have first of all, I want to address the two motions to dismiss. The defendant has filed a motion to dismiss for lack of subject matter jurisdiction, once again raising issues that I feel I've already addressed. You're now talking about the *Nabisco* case, which, of course, is a case that was issued by the Supreme Court in 2016, which was before *Jesner*.

This is the first that you've raised the *Nabisco* argument. It is an interesting one; however, I'm satisfied, number one, that the law of this case is the law established by the Fourth Circuit, and I'm not reversing the Fourth Circuit in this case. They may want to reverse themselves. I mean, down the road, that's something that may happen because of some of the things that have happened since they issued the remand, but there's no question that *Kiobel* is still good law.

Jesner, which again is the most recent of these cases, did not overrule *Kiobel*, and the Fourth Circuit's opinion was based primarily on the *Kiobel* analysis.

Even under the relatively possibly new standard that *Nabisco* has applied, where the Court has to look at two factors, whether the statute gives a clear affirmative indication that it applies extraterritorially and what the law would be for this case if the ATS does not, and then if not, then we have to look at whether the case, and that is the specific case, involves domestic application of the statute, and you look at the statute's focus.

Now, in this case, you know, the conduct here, while some of the conduct occurred at Abu Ghraib, there's clearly significant conduct that occurs in the United States. The contract, for example, that gets CACI involved in this in the first place was issued in the United States. We have a United States corporation. We have United States staff over there at

Abu Ghraib. We have people from CACI traveling from the United States to Abu Ghraib. You've got Northrop doing that, you have others, and I think there's enough connection.

In any case, you know, the Supreme Court -- I'm sorry, the Fourth Circuit has sent this case back to us on the -- their conclusion that there was enough conduct alleged in this case that touched and concerned United States territory with sufficient force, *Kiobel* is still good law, and I'm not reversing the Fourth Circuit. So I'm going to deny the motion to dismiss that's been argued -- or written -- sorry, filed by CACI, and I don't need to hear any argument on that.

The other motion is the motion to dismiss based on state secrets, and there the defendant is arguing that the United States' invocation of the state secrets to prevent a full questioning of multiple witnesses in this case has created a problem for CACI because, for example, they'll be unable to raise issues about credibility or the lack of credibility of various witnesses.

There may be issues about whether the witnesses will be physically present in the courtroom or will have some sorts of disguises, and those types of problems -- and I recognize the frustration; it was frustrating to me, too, as I read through those depositions -- to some degree affect both sides.

Moreover, I'm satisfied that I can give curative instructions to the jury, but besides which -- and I think it

is interesting the plaintiffs point out there's sort of an irony here because on the one hand, CACI is arguing we couldn't get enough information to defend ourselves, and yet they're moving for summary judgment on an argument that we have enough evidence in this record that judgment should be granted to us as a matter of law.

So I don't feel that CACI has been unfairly prejudiced to such an extent that it can't be worked out with the proper instructions given to the jury, and so I'm going to deny that motion as well.

Now, the really interesting motion is the motion for summary judgment, and here I want to hear, Mr. LoBue, from you. I have a real concern that most of Mr. Rashid's allegations cannot go forward in this case, because as I understand, the uncontested facts were that CACI did not -- no CACI personnel arrived at Abu Ghraib before September 28 of 2003. I think that's actually a stipulation.

And the Interrogation No. 1, which is the one that I've seen the deposition, that's the one where all of these -- incredibly troubling conduct occurred: the shooting of Mr. Rashid in the leg, being hung from a ceiling fan to be interrogated. All of that occurs in Interrogation No. 1, which occurs according to the interrogation report which is in this record on September 28.

That's before CACI's people are on site, and the

interrogators involved in that interrogation were military people. That's also uncontestable, I think, in this record. Moreover, some of the allegations that Rashid said about the sexual misconduct and a particular female who was tormenting him he describes as occurring before the first interrogation, which again is before CACI is on the scene.

So I don't know how any of those allegations from Mr. Rashid can stay in this case. I think there it would be poisonous and unfairly prejudicial to CACI to have any reference be made to gunshots or being hung from a chandelier -- or a ceiling fan.

The only things that -- the only allegations, I believe, that are still in this case that would have occurred after the first interrogation and after CACI is now on board would be Rashid's claim that he was part of a naked pyramid, that he was hidden from a human rights delegation visit, and that there may have been some continuing tormenting by this female soldier about putting plastic ties over parts of his body, etc.

But the plaintiff needs to address that because I think the Rashid case is extremely weak and possibly shouldn't be in this case at all, all right?

MR. LoBUE: Yes, Your Honor. I'm happy to address that, of course. I readily concede that any acts of abuse that occurred before the demonstrable date that CACI personnel were

present should not be part of the case; however, I think there are substantial allegations and testimony concerning both abuse and connection between Mr. Rashid and CACI that transpired thereafter.

And I, I would begin by pointing out that the testimony is that a CACI employee was the head of the two-person interrogation team that was responsible for the interrogation of Mr. Rashid at precisely the time he was interrogated, and if you'll bear with me for one moment, the -- that's the testimony of Army Interrogator H, which is Exhibit 26, at pages 121 through 122. So that's one point.

And in addition, there are -- I agree with the Court that the naked pyramid is an allegation that was later in time. There were also -- there was also testimony from Mr. Rashid that he was burned with cigarettes during his interrogation, suffered electric shocks, that he was dragged naked on the floor from the interrogation --

THE COURT: But wasn't that all Interrogation 1?

MR. LoBUE: Your Honor, I'm not sure I can respond to that.

THE COURT: I'm --

MR. LoBUE: If it's Interrogation No. 1 and if it's before the date that CACI was there, I agree it should not be in the case, but, you know, being hidden from the International Red Cross, that was later. Sleep deprivation, that almost by

definition was over a period of time.

And -- so I think there are certainly, there are certainly allegations that postdate that, that first interrogation.

THE COURT: All right. I'll let -- Mr. O'Connor, do you want to respond?

MR. O'CONNOR: I do, Your Honor. And thank you for the Court's guidance this morning. Your Honor mentioned an irony that we're seeking summary judgment while saying we can't defend. The lion's share of our summary judgment isn't -- we developed facts. The lion's share of our judgment is they don't have any facts and so that there's no inconsistency at all between state secrets and this.

But turning to Rashid, Your Honor asked is this Rashid Interrogation No. 1? There is only one. That's it. That is the United States' interrogatory response. There's no evidence to the contrary of that, that he was interrogated once, just once.

THE COURT: But -- we'll have to look at that. I'm going to probably take the Rashid evidence back and look at it one more time, but I am concerned about the -- the plaintiffs' theory of this case, again, because there is no evidence of any of the interrogators who interrogated the four named plaintiffs -- there's no evidence and that plaintiffs have taken a step back from a claim that there was direct conduct by

any CACI people as to them.

The problem -- the case is a case based on conspiracy, a theory of conspiracy and aiding and abetting, and the motivation for that conduct was to soften up the detainees for interrogation purposes.

So there's an interesting question. If there's no further interrogation going on, what would be -- what's the motivation or purpose to continue that kind of conduct?

MR. O'CONNOR: And where's the evidence connecting any of that to CACI with respect to Rashid? With Rashid, Your Honor mentioned some things that occurred after CACI people had reached Abu Ghraib Prison or reached Iraq.

Your Honor mentioned a naked pyramid. The record evidence of that is that that was just MPs, and what happened is, according to the record, and there's no evidence to the contrary, is some rioters were brought from a tent camp that weren't intelligence -- they weren't people who were being interrogated for intelligence value. They were there because they were criminals or otherwise they were at a tent camp.

They rioted. They got brought to the Hard Site because they wanted to get the rioters away from the hundreds of detainees held in these open air tent camps, and the MPs were completely sadistic that night and did all sorts of horrible things to them. And Private Frederick, who, who was court-martialed for that conduct, testified that that was MPs,

that there was no military -- there was no interrogator involvement whatsoever in the treatment of the detainees that night, and that's the naked pyramid.

The -- you know, this Rashid interrogation, you know, plaintiffs' counsel says that, well, CACI had the head of the two-person Tiger Team. That's not exactly what the record says in our view.

What the record says is that a CACI -- when CACI personnel first reached Abu Ghraib Prison, the Army said, oh, great, we have more interrogators, and because there was one team, one fight, they integrated them, and they said, oh, you know, we're going to have this person -- who I don't even know who it is, because I can't know, I'm not allowed to know -- we're going to have this CACI employee be a section leader, which is not someone who's out conducting these interrogations. He's got five sets of interrogators underneath him, and according to Interrogator H, the role of the section leader was take a look at the interrogation plan and then send it to the Army to approve it or disapprove it.

And the evidence undisputed is that this section leader from CACI, who didn't participate in any interrogations but was reviewing plans and sending them to Capt. Wood, the undisputed evidence is that that section leader, who was only in the role for about two weeks until they realized shouldn't be really doing this, did not suggest any mistreatment of any

detainee, did not encourage the interrogators to mistreat any detainee.

That's the only evidence about this section leader, whose name, identity, and everything else is unknown to me because I'm not allowed to know.

So if, if plaintiffs' sole thread that they're hanging onto is a CACI person for two weeks was a section leader, which apparently was after the one Rashid interrogation that occurred, you have to take that evidence as it sits, and that evidence is he was there, did never encourage, suggest, or do anything to want to abuse anyone, and left it at that and two weeks later was out of the job.

And there's also zero evidence in the record, zero, of CACI involvement in any way in hiding anyone from the Red Cross or any other human rights agency, zero. I mean, we've got, we've got a foot of paper that's double-sided --

THE COURT: I know.

MR. O'CONNOR: -- and there's zero evidence of CACI personnel having any role in that.

If plaintiffs have something that suggests that, it was incumbent on them to present that on summary judgment. They don't because it doesn't exist.

THE COURT: All right.

MR. LoBUE: May I briefly respond, Your Honor?

THE COURT: Go ahead.

MR. LoBUE: The point I was, I was trying to convey regarding the Tiger Team leader, who is concededly a CACI employee, is that the testimony of Interrogator H is that that CACI employee was installed in that position at the time that Mr. Rashid was being interrogated, so it cannot be the case that the only interrogation of Mr. Rashid was before CACI arrived. It's simply not possible.

THE COURT: Well, I'm, I'm not comfortable -- that's in my view not sufficient evidence to let this go forward. The Rashid allegations are very, very strong, very vivid, very troubling. I accept them as accurate at this point, but the problem is there's a stipulation in this case that the CACI people did not arrive on scene until the 28th of September, and I cannot believe that they would have been doing interrogations the first day they get there or doing anything, and there's no question that the people who did the actual interrogation, who were on the scene with Mr. Rashid, were both military people. There's no evidence that there was a third person in the room involved in that.

And as I said, Rashid's own testimony -- and I'm going to do you a favor because there's been, as Mr. O'Connor pointed out, well over a foot of, of paper, most of it double-sided, that we've had to go through and a whole bunch of different issues. I will go through the depositions that I have of Rashid one more time to make sure that I didn't -- that

I didn't overlook something, but my understanding of his testimony has been that he was being mistreated before the first interrogation and then terribly mistreated during the interrogation, and CACI's not on the scene.

So CACI can't be held liable for that, and injecting any of that evidence in the case would, I believe, make it unfairly prejudicial to the defendant. So I'm going to determine whether Mr. Rashid should remain in this case or not.

MR. LoBUE: Okay. Thank you.

THE COURT: All right? But most likely, I'm probably going to grant summary judgment to the defendant on that -- on his case, all right?

MR. LoBUE: Your Honor, would it be helpful for the Court if I submit a brief memorandum specifying what transpired --

THE COURT: No. I have enough evidence.

MR. LoBUE: Thank you.

THE COURT: We'll go through it ourselves, thank you. All right?

As for the other three individuals, however, there are in my view -- I'm sorry, the other three plaintiffs, they've made allegations of conduct that does qualify in my view to keep them in this case. We have the testimony of Sgt. Frederick, who clearly talks about CACI employee Stefanowicz. He claims that that employee told him, Frederick, to treat

certain detainees, quote, like "S"; that another CACI employee, Johnson, asked him to show where there were pressure points on people and then instructed him to hit a detainee on pressure points if he didn't answer questions.

You've also got Cpl. Graner, who testified about Big Steve -- again, that's Stefanowicz -- forcing a detainee to stand on a box, and there's a photo of Johnson with a detainee in one of those problematic positions.

You've got the testimony of CACI former employee Nelson, who expressed serious concerns about Dugan and Johnson. You've got evidence in this case that Mr. Porvaznik, who was the person, the CACI lead person on board for several months during this critical time period, not bringing any of these concerns to the attention of anybody at CACI or, or following up on problems with the military.

You've got CACI Interrogator A admitting that he had seen naked detainees. It's unclear in my view whether it's two or three, but more than one naked detainee.

You've got evidence in the record that CACI promoted Stefanowicz, that they fought the firing of Johnson, that they made no effort to contact Nelson.

I mean, there's enough evidence in my view to show -- to let this case go forward. In other words, there are material issues of fact that are in dispute, and given the broad concepts of both conspiracy liability and aiding and

abetting liability, there's enough to go forward.

So on the remaining three plaintiffs, I'm going to let that portion of the case go forward. Most likely, as I said, Rashid will probably be dismissed out of this case.

So I really want to spend time with you-all talking about the, how this case is going to get tried. Now, I know that plaintiffs' motion in limine is out there as well, but some of these -- some of how I resolve the motion in limine depends upon how this case is going to be tried.

We should know at this point, number one, are the plaintiffs going to be here live? What's the status of that situation?

MR. LoBUE: Your Honor, the status is this: We made applications for special parole and/or for visas. Those applications have not been resolved as yet, so we still have some hope they will be permitted to come here for trial.

Plan B would be to get them to a location where they can testify by live VideoLink, and we are working -- we are working seriously on, on Plan B.

The problem we face is that in their current locale, which is Baghdad for three of them and Sweden for one of them, there is a time difference. There is also a -- we have been told that they will not be permitted to testify from the U.S. Embassy, so we're going to have to arrive at an alternative venue for them to, to be present when their testimony is

brought in by video.

THE COURT: You're going to need to start working well in advance of the trial date with our court technology people, Lance Bachman, all right? This is one of the courtrooms that's set up for that kind of live video testimony.

We actually during the *Moussaoui* case took a deposition from somebody in Jakarta, so I know we can do it. I'm assuming that the transmission lines are better now than they were then, because at that point, we were using satellites, and you had to go off when the satellite got out of sync, you had to stop.

I'm not going to waste the jury's time, so the problem is the plaintiffs are -- you're obligated to make sure your evidence is well organized and we're not going to have huge gaps in the evidence, all right? And you need to let us know as soon as you know for certain whether we're talking about, you know, live presentation or by video.

Now, the depositions were done by video, is that correct, or were you all in one location?

MR. LoBUE: Three of them were done by VideoLink. The one gentleman who came to the U.S., Mr. Al-Ejaili, my recollection was not videotaped. Perhaps the defense recalls.

THE COURT: Mr. O'Connor?

MR. LoBUE: Was he videotaped?

MR. O'CONNOR: My recollection is that we took a

videotape deposition --

THE COURT: All right.

MR. O'CONNOR: -- at my office of Al-Ejaili.

THE COURT: All right. The ones that were done by video, how difficult was that in terms of a good, clear signal?

MR. O'CONNOR: Very. There were problems with transmission being lost at times. There were -- there was a time lag. It was very difficult to -- Your Honor probably knows this: None of them speak English.

THE COURT: I know that.

MR. O'CONNOR: So it was a very difficult process of translating questions to then be presented to someone who's on a time delay, having them answer and then having it translated back, so those were also issues, but there were -- it was not a perfect process.

THE COURT: And because we won't have simultaneous translation, I'm sure the Arabic or Iraqi languages can't be done that way, how long was that taking? In other words, you'd ask a question in English. It has to be -- and I assume it was not translated simultaneously, or was it?

MR. O'CONNOR: I would ask the question --

THE COURT: Yeah.

MR. O'CONNOR: -- and then the interpreter who was at my office would then translate it.

Sometimes there were debates --

THE COURT: I saw that in the transcript, yeah.

MR. O'CONNOR: -- as to whether the, whether the translator should change his, the way he translated the question or translated the answer, but basically it was seriatim.

I asked a question. The translator would translate, which usually took longer than my question, because he might even ask me to clarify what I mean. Then the witness would answer in Arabic, and then the translator would translate it back, which again might involve a debate over exactly what the proper translation of the answer was.

So if I asked a relatively short question, I would say it took 30 seconds or 45 seconds to kind of do all four of those.

THE COURT: All right. Well, that makes -- that logistically makes things very difficult.

The translator you used, was it the same person for everybody?

MR. O'CONNOR: Oh, it's funny, Your Honor, for Al-Ejaili, we had a translator who was, did not translate the next round, as I recall it. The next round were Al Shimari, you know, it was five years later, Al Shimari and Al-Zuba'e, and we had someone that -- we took it on ourselves to get a translator, and we had someone that plaintiffs didn't like the person we had, so then we got another person, and that person

did those two, and then for Rashid, plaintiffs got the translator, and ironically they got the guy that I had originally had for the prior two that they didn't like.

THE COURT: Because I notice the translators were fairly interactive with you-all. I mean, their names appear in the transcripts.

MR. O'CONNOR: They had a lot of questions.

THE COURT: But they've obviously heard these people's voices. Are you going to use the same ones? That's what I guess I'm asking. Is the plan to have the people who've had some involvement already in the case be the ones who are going to work during the trial?

MR. LoBUE: Your Honor, I -- my recollection is not quite the same as Mr. O'Connor's. There was an interpreter retained by defendants who was not conversant in the Iraqi idiom or dialect of Arabic, and that presented some problems.

The, the translater that we obtained for the last deposition was an Iraqi-American and far more fluent, and that went a lot more smoothly. We are making inquiries to see if he is available or another certified translator who has the proper idiom, and our proposal would be to have that translator here.

So the witnesses will be sworn from this courtroom, the translator will be here in proximity to the court reporter, and I, I don't suggest this won't be a challenge, but I think we can do it.

THE COURT: All right. Okay. That's fine.

MR. O'CONNOR: And, Your Honor --

THE COURT: Yeah.

MR. O'CONNOR: -- just -- Your Honor asked about the status of the plaintiffs, and my latest knowledge is that Al-Ejaili was denied a visa to come here in January.

Maybe that's changed, but if he's not getting in the country, none of them are getting in the country.

THE COURT: Yeah.

MR. O'CONNOR: So we probably ought to be looking hard at --

THE COURT: I would just given the nature of the political world these days, I would be really surprised if any of these three men are able to come here, but I think you've got to start making the logistical plans now. You've got to talk with Mr. Bachman, and I want to make sure that there's been a test run a couple of days before trial, because what I don't -- what's not going to happen is I'm not going to have, you know, eight or ten civilians sitting in the jury box just, you know, twiddling their thumbs while we're trying to hook up the signals and that sort of thing, so it's got to be worked out ahead of time, all right?

Now, the next witness I'm concerned about is is Gen. Taguba going to be testifying?

MR. LoBUE: Your Honor, it's our intention to serve a

trial subpoena on him.

THE COURT: All right. And he's within 100 miles of the court, as I understand it.

MR. LoBUE: I believe he is. I don't know if there's going to be an objection to that from the government, but if there is, we'll, we'll have to deal with it.

THE COURT: All right, you-all have a seat.

Let me hear from the government. Ms. Wetzler, is there going to be any objection to the general testifying live?

MR. SOSKIN: Your Honor, plaintiffs' counsel had inquired as to whether we would accept a trial subpoena for Gen. Taguba. I had asked our clients at the Army to reach out to him regarding his testimony, but it is our intention to accept the subpoena on his behalf.

I don't think there will be any problem securing his appearance as long as he remains here, which he -- within this jurisdiction, which he was the last time we were in touch with him.

THE COURT: All right. Well, while you're here, do I understand that the -- one of the reasons for invoking the state secret privilege during many of these depositions was to protect the identity of the interrogator?

MR. SOSKIN: Yes, Your Honor. The predominant reason was that.

THE COURT: What if an interrogator doesn't care

about his or her identity being revealed?

MR. SOSKIN: Well, Your Honor, as we set forth in our briefing at the time of the state secrets privilege assertions and as I think came up in some of our discussions, there are two separate interests.

There is the interrogators' own interest and those four folks who were unrepresented during the motions practice, and we set that forth, as well as the United States' interest, national security interest in the potential harms that could come about if interrogator identities were disclosed, and those harms exist whether or not an interrogator is willing to voluntarily disclose his or her identity.

We do not authorize them to discuss classified information such as their identities in connection with a specific interrogation with the public, whether or not they wish to do so.

THE COURT: And do you have case law that supports that concept that that by itself can be enough to justify a state secret invocation?

MR. SOSKIN: That classified information --

THE COURT: No. No, no.

MR. SOSKIN: -- is the government's information and not --

THE COURT: No, I don't think --

MR. SOSKIN: -- individuals'?

THE COURT: No. That if an individual, private citizen, not a member of the military, who happened to at one point be a government contractor working on -- at a military base on a project, the project itself is no longer classified, I mean, there's been plenty of public exposure about what happened at Abu Ghraib, and there's a lot of information just in this case alone that's public, if -- and I'm not saying any of these interrogators would necessarily be concerned, well, for example, Nelson, I mean, his name is out there, Stefanowicz, a whole bunch of these interrogators' names are out there, so the name of a particular interrogator, I don't see how that remains a state secret.

Why is one interrogator's name a state secret and the other's is not?

MR. SOSKIN: So two points, Your Honor. First, what is classified and what the Court has previously affirmed as a state secret here is the name of an interrogator in connection with the identity of a specific individual who that person interrogated.

So the names of the interrogators and the fact that they may have been, for example, named in the Taguba report is not a classified fact, and it is not something over which we asserted the state secrets privilege or over which the Court affirmed the state secrets privilege.

Second --

THE COURT: Then why, why was there an objection during one of these depositions when the question was asked of the witness: Did you give a statement, I guess it was either to CID or Taguba, and the witness said he gave a statement, and then I think the question was was it oral or was it written, and you invoked the state secret as to those two questions? What difference does it make if he's already admitted that he's made a statement, whether it was written or oral?

MR. SOSKIN: So, Your Honor, there is a universe of information that has been made public about the interrogators, including, as you know, some information about the names of some of these individuals in some portions of the Taguba and Jones/Fay and other reports, and as part of our state secrets assertion, what we have permitted is for an individual to be identified by pseudonym in connection with the interrogation of a specific plaintiff.

So many of the questions to which we instructed witnesses not to answer in the depositions were questions for which the answer would have narrowed the pool of potential individuals who, say, Interrogator B was, and by narrowing that pool could have been easily pieced together with other facts such that it would become apparent who Interrogator B was and, thus, would allow the combination of that name with the name of the person who he interrogated, thus revealing the information over which the United States asserted and this Court affirmed

the state secrets privilege.

THE COURT: What about the background and training for these people? Certainly whether or not a CACI interrogator was properly trained in the, in the principles of the Geneva Convention and in proper interrogation techniques is a very relevant issue and can't possibly reveal the identity of a person.

MR. SOSKIN: Your Honor, many of the questions that relate to the training that individuals, that individuals had were raised in the course of depositions in connection with who their previous employers were and over what time, and again, revealing whether someone was in the Army or in the Navy or in the Air Force previously would permit a significant narrowing -- or whether they are currently in the Armed Services would permit a significant narrowing of the pool for whom an individual could be, and that is, you know, that is what is relevant here.

I believe there may be record facts also about whether CACI provided training to particular individuals, and that may have been involved in the, you know, particular instructions not to answer.

Now, one, you know, one sort -- one big picture issue that's important to keep in mind is that many -- all of these interrogation personnel who were deposed by pseudonym are, are persons who we assured we would protect the identity of in

connection with the state secrets privilege assertion, and to a person, for all of the depositions I was involved in -- and Mr. Davis, I think, can speak to the others -- those are individuals who informed us that they were gravely concerned about the possibility their identities would be exposed, and their willingness to give fulsome answers in the course of these depositions was based on their understanding that we would protect those identities.

THE COURT: All right. Which of the, what I'll call the named or identified CACI people, that is, Dugan, Johnson, Stefanowicz, those three in particular, which was the 22-year-old?

MR. O'CONNOR: Johnson. Johnson, Your Honor.

THE COURT: He's the young one?

MR. O'CONNOR: Yes.

THE COURT: I thought Johnson was the gray-haired one.

MR. O'CONNOR: No, Johnson --

THE COURT: That's Dugan?

MR. O'CONNOR: I'm not sure if he was exactly 22, but he was, he was in his early to mid-early twenties.

THE COURT: Okay. All right. At trial, CACI needs to be able, it seems to me, to at least get out what training in terms of what, what CACI provided in terms of training to its people. You don't have an objection to that.

In particular, what, what training, if any, they got in the proper ways to interrogate someone, the Geneva Convention, that sort of thing. It's directly relevant to this case, and I would think that that can't possibly be a state secret. We're not talking about specific techniques for interrogation but just the general rules of what you should not be doing, let's say.

MR. SOSKIN: Your Honor, your instinct is an instinct or an intuition that I share. I think we would want, of course, to look closely at what information, you know, needed to be brought out to share that in connection with specific individuals.

It's unclear to me which specific individuals, you know, standing here we would be talking about or why we would have an objection, but we can certainly work with them to figure out whether and how that information will be made available.

THE COURT: All right. Because -- okay. That's fine.

I think you can go back now. Thank you.

Mr. O'Connor?

MR. O'CONNOR: Your Honor, on the question of training --

THE COURT: Yeah.

MR. O'CONNOR: -- I want to put down a marker that

what training CACI provided isn't the right question because what, what the right question is, what training and experience did they have, because that is what's important.

If we have -- if we hire someone who is a trained Army interrogator, nobody could say that we need to train them to be an interrogator. Send them over and the Army is in charge of making sure they're doing what they're supposed to be doing over there.

And we provided our supplement of the Interrogator G deposition, which took place after briefing, and we asked: What training did you have prior to going to Abu Ghraib from any source, and what experience did you have? And he wasn't allowed to answer that.

So the, the question isn't what training did CACI generally provide, because the question is did the people who interacted with plaintiffs, were they adequately trained and did they have adequate experience, and that we are not by any stretch allowed to have.

Also, on -- Your Honor asked about, well, what if an interrogator agrees to be unmasked, and Mr. Soskin said that everyone they've talked with was very concerned about having their identity revealed. I can tell Your Honor that there is zero chance that CACI Interrogator A would agree to have his identity revealed. I don't have direct, person-to-person knowledge, but I have been told that the same is true of CACI

Interrogator G, but I think -- I just want to make sure the Court understands that what the -- what Mr. Soskin said about all the pseudonymous interrogators certainly applies to the two CACI pseudonymous interrogators to the best of my knowledge and understanding.

THE COURT: All right.

MR. O'CONNOR: Also, Your Honor, in terms of trial planning and preparation, I think we're in a bit of a -- we have a bit of a problem right now because, you know, the United States has a motion to dismiss that's been pending for a year, and we don't know are they going to be in the case at trial, which of the allegations in the third amended complaint do they admit --

THE COURT: Well, I don't -- okay.

MR. O'CONNOR: -- which ones do they deny.

THE COURT: I've, I've looked at the motion for summary judgment. You've not responded to it yet.

MR. O'CONNOR: We haven't.

THE COURT: Yeah. Quite frankly, I don't mind sharing this with you, the reason I -- I haven't just been sitting on it. I've been agonizing over the motion to dismiss because as you know, the government is arguing sovereign immunity, and I'm, I'm struggling with the concept that sovereign immunity should protect any government from suit for jus cogens violations.

There's not much case law out there. There's a bit, and I've looked at it, and I still haven't decided how I want to resolve it, but, but I did look at the motion for summary judgment, and that looks very powerful. If, in fact, you-all entered into a settlement agreement where you basically said no more liability for anything connected to these work orders, I'm not so sure you're going to survive with your case.

So I'm waiting to see your response on that, and that may avoid having to address the motion to dismiss entirely.

MR. O'CONNOR: And at this point, Your Honor has only heard one-half of the argument.

THE COURT: That's what I'm saying. So I haven't ruled on that yet, yeah. Okay? But when is your -- when is your response coming in on that?

MR. O'CONNOR: It's due on Friday.

THE COURT: All right. Well, we'll know pretty soon. So you'll get an answer pretty soon on that then probably.

MR. LoBUE: Your Honor, may I have just a brief comment on, on some of the trial processes?

THE COURT: Yeah.

MR. LoBUE: There's nothing that stops CACI from calling Steve or DJ or Tim Dugan to the stand and asking about their training, and if they do, I mean, they're listed as trial witnesses. If they do, we're the ones who are going to be prejudiced because we weren't allowed to hear the answers to

those questions, either.

So, so CACI can still do that. They can also call pseudonymous interrogators, as many as they like, who presumably could testify behind a screen or, or with a suitable disguise and recite all the testimony -- all the other testimony that, that was elicited.

So I think the prejudice falls on us. We're the ones who, who, in fact, asked many of those questions but were blocked.

THE COURT: Well, both sides have problems. That's why, as I said, I think that's why we did not dismiss the case on the state secrets issue. I mean, it's frustrating, but that's how it goes.

And I still strongly recommend that some of those issues be reconsidered. There may be ways of fashioning questions that can still get at some of this information without such that they would lead to identification of the individuals.

I mean, rather than asking have you served in the Army or the Air Force, just have you ever been in the military? I mean, there have been hundreds of thousands of people in the military. The ability to single out somebody based on that broad a question it seems to me would be practically impossible.

But anyway, on the motion in limine, which is the

only motion that's remaining on the docket, most of what are in those reports, and I've read them both over again, involve issues that I'm not at all sure are really being contested. I mean, the plaintiff wants those reports to come in to establish four things, and the first is to establish the abuse of detainees by Military Police and others similar to what the plaintiffs have described.

Now, I don't think CACI is going to be making any argument that the type of abuse discussed by these plaintiffs did not occur at Abu Ghraib. Are you arguing that that did not occur?

In other words, the fact that detainees were kept naked -- some of them were kept naked, that there were stress positions used, sleep deprivation, dogs, isolation, those types of things, is there really a factual dispute about that?

MR. DOLAN: Well, Your Honor, please, if I could --

THE COURT: And, Mr. Dolan, you've been in this court long enough to know that with motions in limine, many times the answer is if you open the door, then the other side can walk right in. But, I mean, it seems to me that most of the things that are discussed in those reports are really not subject to honest contest.

MR. DOLAN: Okay. The issue, it seems to me, Your Honor, is in balancing whether or not they are relevant to the

claims of these plaintiffs against the prejudice that necessarily flows from some of the allegations, when you have repeated instances where it's described in the report of other detainees, military personnel, no CIA -- no CACI involvement, it becomes what is the relevance to the individual claim.

When we are denied -- and I take exception to the Court's description of the state secrets impact on our discovery. We're denied access to eyewitnesses in case -- in a case that turns on eyewitnesses.

It seems to me that when you have, for instance, several of these descriptions, just not to belabor the point, but just to make sure that you see the point that we're trying -- that I'm trying to make, when you see a paragraph in the Fay report that goes into great detail about head blows rendering detainees unconscious, sexual posing and forced participation in group masturbation, extremes where the death of a detainee in CIA custody, an alleged rape committed by a U.S. translator and observed by a female soldier, and the alleged sexual assault of a female detainee, that -- and then including, same paragraph, to go on to simply say at the end: What started as nakedness and humiliations, stress and physical training, exercise, carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised soldiers and civilians.

So therefore, CACI is within the ambit of, of that

list of horribles by being named as a civilian, when we know that the only civilian activity in that paragraph was the rape by a translator -- alleged rape by a translator, and the paragraph does not relate factually to anything that CACI people have done.

The difficulty with putting that all in by way of background and then always using the umbrella of conspiracy in order to get anything in, there has to be some link between those horribles and our, our employees, and that's why just simply saying that these things happened as a matter of fact makes the report admissible throughout this entire -- both reports, Fay particularly, there are countless examples of that kind of inference, and when you then say it's Abu Ghraib and there's a contract and they're going to profit, the jury is then subjected to data unrelated to CACI, and the only reason they're in for conspiracy and aiding and abetting is because of the conspiracy umbrella, it becomes impossible for us to answer, for instance, that paragraph when it didn't have anything to do with our people.

So we simply cannot say to you, Judge, that's an illustration of uncontested facts; why would you object to it? Because it did happen. It did happen. Many things happened at Abu Ghraib.

And I think it's -- for the fact finder, it's critically important to distinguish between those events that

occurred and those events that are fairly linked as a theory under conspiracy or aiding and abetting to CACI.

THE COURT: All right. Mr. LoBue?

MR. LoBUE: Your Honor, briefly, the defendant clings to the theory that unless we can place a CACI employee at the precise physical site where an abuse occurred, we have no case. We've been through this before. We've been through this on the motion to dismiss of the third amended complaint, which was filed after our discovery was substantially taken and pleaded robustly the facts on which we rely, and the Court in denying in relevant part the motion to dismiss said: Given the confined and relatively small nature of the Hard Site and the commonalities among the different detainees' description of the abuse they suffered and the concerted efforts to conceal the mistreatment, the allegations in this paragraph support an inference not merely of individual conspiracies between specific interrogators and specific MPs, but instead a broad-ranging conspiracy involving a number of interrogators and military personnel to torture detainees.

So I am not going to be able to place the CACI employees in physical proximity to every one of these acts that we're complaining about, but we do know from the depositions taken most recently, for example, CACI Interrogator A was in the Hard Site every day. We do know that when Gen. Taguba was investigating, he saw CACI interrogators walking freely around

the Hard Site. We have testimony from others that entry to the Hard Site was, was open to the interrogators, that they could see into all the cells.

So, so there is -- there is perhaps circumstantial but there is relevance to the atmosphere of humiliation and mistreatment and fear that was prevalent at the site, which according to the general's reports was largely provoked by the actions of the interrogators, including specifically and by name three of their employees.

So I do think we will be offering and I hope the Court will admit at least some of the evidence of the general conditions and the abuses visited upon other detainees at the relevant time period in this confined locale.

THE COURT: Well, I think, again, because of the strange way in which this case is postured, that is, based on the conspiracy and aiding and abetting theories, there is a kind of broad approach that is not inappropriate. I think probably a significant part of this case is going to involve some very careful cautionary instructions to the jury, and you're both -- both sides are fortunate, we have very intelligent juries in this district. I am constantly amazed at the questions that they ask, and I am satisfied that with proper instructions, the jury can sort through this.

I am still much more in favor of live testimony, and if General Taguba, for example, is called as a witness, that

avoids much of the problems that might otherwise occur when just entering the report itself. As I said earlier, the whole report is not going in. Specific -- the specific sections which the plaintiff has indicated, there are still way too many of them, and many of them may not be necessary if, for example, he's here to testify live.

So on the motion in limine, I'm not going to resolve it today other than to suggest that both sides see if you can work it out. Again, to the extent that there are statements in there that are hypotheses or not really sufficiently reliable, they're not going to come in, all right?

And I think some of the extreme issues, I mean, for example, the -- the detainee who was brought in by an OGA and died and then was packed up in ice, that shouldn't come into this case. There's absolutely no indication that any of the CACI people or the interrogators would have been involved with that. That to me is too incendiary.

So I would expect both sides to think wisely about some of these what I'll call really extreme incidents that ought not to be in the case at all. And the same way, that's why the Rashid things are not going to be in the case, and as I said, probably he won't be at all.

But that's what I think both sides should be trying to, to think about in terms of getting this case, you know, in a better situation.

Now, the other thing I want to warn both sides about is probably three-quarters of the materials I reviewed for these motions are under seal. There are no national security reasons why they're under seal, we haven't had CIPA hearings on any of this, and I'm not worrying about what's under seal or not under seal in any opinions that I write, and when the case goes to trial, whatever evidence comes in is publicly available, and I think we have to at this point as we're getting close to trial start looking at whether there is any really proper reason for any of this material staying under seal.

There is legitimate public interest in this case, and I recognize that, you know, a lot of times, up until cases get ready for trial, the lawyers do exchange a lot of things under seal, but it's always been the practice in this court that when we actually get into litigation, that changes, and so I want you to be aware that when I write, you know, any opinions down the road which may now refer to evidence that you submitted under seal, I'm not going to worry about the -- that context, and I think you have to be prepared to have everything unsealed in the very near future, all right?

So I think that takes care of what I had on my list. I again would like both sides to really think more carefully now about their witness lists. It will make a big difference, I think, for everybody to know exactly who's going to be here

live.

To the extent that any of the interrogators -- well, I should ask this of you, Mr. O'Connor: We've talked before about the problem with some of the witnesses not being within the subpoena power of the Court. How many witnesses do you think you're going to have to call by deposition, in other words, having the transcript read into the record?

MR. O'CONNOR: Read into the record, Your Honor?

THE COURT: Yeah.

MR. O'CONNOR: Interrogator A, Interrogator B, Interrogator C. They couldn't find Interrogator D. Interrogator E, Interrogator F, Interrogator G, Interrogator H, Interrogator I. I believe they couldn't find J or maybe he's deceased. Interpreter K, Interpreter L, Interpreter M, and Interpreter N.

I believe everyone else that we took a deposition of who's outside the Court's subpoena power was videotaped. I'm not going to swear on that, but it's either -- substantially all the rest of them were videotaped, but there may be one or two others that we have to read.

THE COURT: Interrogator A was not videotaped?

MR. O'CONNOR: Well, we were prohibited by Your Honor. The pseudonymous depositions were not permitted to be videotaped. We weren't even allowed to retain -- keep a recording.

We have no -- we have a written transcript. That's all that we were allowed for all, I think, 11 pseudonymous interrogators. I can't do anything more.

We would like to bring them here. We're told now that they're all outside the subpoena power of the Court. We'd like to present a de bene esse where they're videotaped and they could do -- and the jury could actually look at them and view their demeanor and all of that stuff, but we've been barred by the Court from doing that.

THE COURT: And that was originally Judge Anderson's rule, and then I affirmed it.

MR. O'CONNOR: Yes.

THE COURT: I mean, I know I affirmed the use of -- I affirmed doing these under pseudonyms. I did not realize that part of that motion actually involved not being able to video because I --

MR. O'CONNOR: If we had been able to videotape them, then their identities would have been known because we'd all look at their faces, but we were not permitted to take videotape of any of the pseudonymous witnesses.

THE COURT: Of those -- of those A through N, and some missing, who do you think are the most critical for your case?

MR. O'CONNOR: Well, certainly A and G. Those are the CACI employees who did the only two interrogations that we

invocation of privilege and a moment to discuss it, and then authorizing a yes-or-no answer, that sort of thing.

MR. O'CONNOR: That's true.

THE COURT: A lot of that went on.

MR. O'CONNOR: That's true.

THE COURT: So what I am thinking, because I can tell you that, that trials are -- first of all, they're deadly boring when you have to have a -- although my law clerks are very good at reading these things, but it's deadly boring, and you can -- it goes in in a time concentration that no other type of testimony goes in.

What I am thinking is to order that there be re-depositions of those three or four key people, not all of them. It can be done with a screen so that the jury isn't going to see the person but they can at least hear it, it will go in live, and you and Mr. LoBue or whoever is going to do it for the other side can ask questions.

You've already got the script. Basically, it would be the questions you've already asked them. Perhaps you can work with the government on getting ahead of time a few more of these background questions of a more general nature, a bit more of that, and then that can be played for the jury rather than having to read those transcripts in.

And there's no danger of the person's identity being revealed, especially if the, you know, these are former CACI

people. How -- do you think you-all can get that done before the trial?

MR. O'CONNOR: Well, we could -- talking about CACI, we could get that done. You know, we don't have much control over the process. We don't have the power to compel any of these people to appear anywhere, and for virtually all of them, we don't know who they are, so it's really a question that the United States would have to have a better sense of than us.

I mean, if somebody told me: You're going to take a, what I guess would be mostly a recorded deposition tomorrow of one of them, I'd do it, but I don't -- the logistics are completely out of my control.

THE COURT: All right. I assume plaintiffs' counsel can handle that.

MR. LoBUE: We can, Your Honor. I, I might inquire through the Court whether any of the parties actually retained an audio recording. We did not, but --

MR. O'CONNOR: We were prohibited from having one, so --

THE COURT: But does one exist?

MR. LoBUE: Maybe the government has one. I don't know.

MR. SOSKIN: Your Honor, we did not create recordings of the depositions, of the pseudonymous depositions. I would note that with regard to the appropriate protective measures to

protect identities, we believe we would need to look into what those specific measures would be. In addition to the visual depiction that you referenced, we also have concerns that the voices of the individuals you mentioned may --

THE COURT: Now, look, I tried a case involving an active CIA agent who testified live in court behind a screen, and the voice was never an issue, and if the CIA isn't worried about their people, this doesn't rise to that level. I would expect that's overreaction.

We've got to get this case into a format that is appropriate, and I would not expect the government to have an issue about the voice. Unless there's something so amazingly unique, a stutter or something that would absolutely identify the person, that's just beyond the pale, but I do not want to have to have this case done by deposition if it can reasonably be done -- and I'm shocked, most court reporters keep an audio transcript. That's a standard practice in case there's a problem in getting an accurate transcript.

Who was the court reporter on this, a government person or a private party?

MR. O'CONNOR: We used Alderson Reporting for every one of them, Your Honor.

THE COURT: Were they told not to make a tape recording?

MR. O'CONNOR: I don't know what the government told

them. I know the order said that we were not to have an audio recording. That's the extent of my knowledge.

THE COURT: Do you know for a fact whether an audio recording was made or not made?

MR. O'CONNOR: No.

THE COURT: I'm asking the government counsel.

MR. SOSKIN: Your Honor, I don't know for these. I was with the witness, which was not at the same location as the court reporter.

MR. DAVIS: Your Honor, I have not -- this is Elliott Davis for the government. I have not looked at the protective order that relates to depositions in some time. I seem to recall that the protective order prohibited anyone apart from the government from retaining an audio recording, and the government did not retain an audio recording, but I believe that was part of the protective order that was signed by Judge Anderson.

THE COURT: Well, I'm going to amend it then. Let's see what you can do about getting hold of these people. Now, I don't know whether they're in the United States or not. I mean, that possibly complicates things but doesn't make it impossible. Technology would still permit that if we can get the depositions of the plaintiffs from Iraq, we should be able to get these people as well. I expect the government to find where these guys are and see if you can work it out.

MR. SOSKIN: And, Your Honor, just so you're aware, two of the individuals who are mentioned do have their own counsel as well, so --

THE COURT: You need to check with their counsel.

MR. SOSKIN: They will need to be consulted as well.

THE COURT: All right, that's fine. All right? See if you can work that out, but I would much prefer that than to have to read the depositions in. And obviously, if ultimately this can't be worked out and we have to work with the depositions, then we need to make sure that those pages are properly, you know, indicated.

Also, another problem with Mr. Rashid was the transcript. I don't know what the printing errors were, and I don't know if any of you read the transcript, but it was very hard to read.

MR. O'CONNOR: I saw that on the hard copy --

THE COURT: Yeah.

MR. O'CONNOR: -- as I was preparing for this, Your Honor.

THE COURT: Yeah, all right.

MR. O'CONNOR: Your Honor, just to fill in a data point that the Court was wondering about, I was, I was present for every one of these pseudonymous depositions, and I would not say that any of the witnesses had, you know, a stutter or a, you know, a very hard accent.

Well, the interpreters, they all had accents because most of them were not native English speakers --

THE COURT: Yeah.

MR. O'CONNOR: -- but the interrogation personnel, I didn't notice anything noteworthy about their voices, for what that's worth.

THE COURT: All right, all right. I'm sure we will have a couple more sessions. The motion for summary judgment from the United States I may resolve on the papers. I'm really looking forward to seeing what the defendant's response is on that. Again, I have looked at that already.

But I think I've covered everything I had on my list, so what I want to hear from you-all, number one, is as soon as possible, the plaintiffs need to let us know for certain whether the three remaining plaintiffs are going to be here in person or are going to have to testify by video, and if they do have to testify by video, then you've got to start making arrangements in advance.

Now, I'm assuming that of the three that are left, one is in Sweden; is that correct?

MR. LoBUE: Yes, Your Honor.

THE COURT: And the other two are in Baghdad?

Well, Sweden shouldn't be as big a problem.

MR. LoBUE: The only problems are, number one, the time zone.

THE COURT: Well, they're going to -- the witnesses will have to struggle with that.

MR. LoBUE: They will --

THE COURT: Yeah.

MR. LoBUE: They will have to conform to our time.

There may be an issue that the government has -- diplomatic issue that the government has raised regarding the giving of testimony from Sweden which we'll have to work out with the government.

THE COURT: The government of Sweden has problems with that?

MR. LoBUE: No, the government of the United States has a, has a potential problem with that. They, they have told us that they need to make a diplomatic overture to the government of Sweden to seek their permission to permit testimony to be beamed to a U.S. court from Sweden.

THE COURT: All right, let me hear about that. Such a problem does not exist for Iraq, or is there a problem like that for Iraq as well?

MR. LoBUE: It has not been a problem.

MR. DAVIS: My understanding is --

THE COURT: Yeah.

MR. DAVIS: -- that's not an issue for Iraq.

Because Sweden is a, a party to conventions on the taking of evidence that we are, the way -- and it doesn't have

to do with the fact that the United States is a party to the case, as I understand it from my colleagues in different branches.

The issue is that the Court will be hearing testimony -- the Court is a, you know, an entity of the United States -- will be hearing videotape testimony from a non-U.S. citizen in a foreign country that's a party to conventions.

So even if we were not in the case, we would -- or plaintiffs would need to request permission from the government of Sweden to do so. The information that we need from plaintiffs is the location from which Mr. Al-Ejaili will be put up so that our colleagues with State Department can send a diplomatic note to our colleagues in the embassy in Sweden -- the Swedish Embassy, rather, to permit -- they do not anticipate issues with that. We just need to send a note out.

THE COURT: Well, I recommend it be done soon because with letters rogatory and some of those other types of international judicial assistant matters, they could take some time, so this can't wait until two weeks before the trial.

MR. DAVIS: Right. And we'll do that as soon as we receive the location from which Mr. Al-Ejaili will be providing videotaped deposition if he's -- video deposition if he's unable to make it into the country.

THE COURT: All right. Now, I know in past experience, some of the large hotels, like especially an

American hotel like a Hilton or whatever, some of them have, you know, business facilities. I did a conference from Kenya, and we did it from a hotel. That beam worked quite well.

But you'd better check with Mr. Bachman right away so he can tell you the types of parameters that are needed to make it a worthwhile video situation, all right?

MR. LoBUE: We will do so, Your Honor.

THE COURT: All right, very good.

All right, any other logistical issues out there?

MR. O'CONNOR: One housekeeping that I think I know the answer, Your Honor.

THE COURT: Yeah.

MR. O'CONNOR: When Your Honor began today, Your Honor listed issues that the Court did not need argument on and then dealt with summary judgment.

THE COURT: Yeah.

MR. O'CONNOR: Your Honor talked about subject matter jurisdiction but then only dealt with extraterritoriality. I assume from that that the Court does not want argument on political question.

THE COURT: No, we've already addressed that. That's the law of the case.

I think I told you-all when I first got this case, you know, given its tortured history, I said we're going to have lots of motions practice, but you should expect if you

don't settle this case, it's going to go to trial. I mean, and that's what's going to happen. It's going to go to trial unless it settles, all right? And that's always out there as a possibility for both sides to think about. There are lots of logistical issues and hurdles in this case yet to be addressed.

All right, is there anything further? If not, we'll recess for the day.

MR. LoBUE: Thank you, Your Honor.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson