No. 09-1335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Suhail Nazim Abdullah AL SHIMARI,
Taha Yaseen Arraq RASHID,
Sa'ad Hamza Hantoosh AL-ZUBA'E, and
Salah Hasan Nusaif Jasim AL-EJAILI,
Plaintiffs-Appellees,

v.

CACI INTERNATIONAL INC and
CACI PREMIER TECHNOLOGY, INC.,
Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:08-cv-00827
The Honorable Gerald Bruce Lee, United States District Judge

BRIEF OF APPELLANTS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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CORPORATE DISCLOSURE STATEMENT

Appellant CACI Premier Technology, Inc. is a privately-held company. Appellant CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. Appellants' liability insurers, St. Paul Fire and Marine Insurance Co., Travelers Insurance Company, and The Chartis Companies, may have a financial interest in the outcome of the litigation. No other publicly-traded company has either a 10% or greater ownership interest in CACI International Inc or CACI Premier Technology, Inc., or a direct financial interest in the outcome of this litigation. There are no similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded.

/s/ John F. O'Connor

John F. O'Connor

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JURISDICTION

Defendants-Appellants CACI International Incorporated and CACI Premier Technology, Incorporated (collectively, "CACI") appeal the district court's order entered March 19, 2009 denying CACI's motion to dismiss. JA.0403. CACI's notice of appeal was timely filed March 23, 2009. JA.0474.

A. Appellate Jurisdiction

This Court has jurisdiction to review the district court's denial of CACI's assertions of immunity under the collateral order doctrine. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-46 (2009).

The Court has jurisdiction to review the sufficiency of Plaintiffs' Amended Complaint because the issue is inextricably intertwined with and necessary to ensure meaningful review of CACI's assertion of immunity. *Id.* at 1946-47.

The Court has jurisdiction to review the district court's determination that the political question doctrine does not bar Plaintiffs' suit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (appellate courts must ensure Article III's case-or-controversy requirement is satisfied.).

The Court has jurisdiction to review the district court's determination that Plaintiffs' claims are not preempted because that question is inextricably intertwined with and necessary to ensure meaningful review of both the immunity and political question issues. *See, e.g.*, *Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006) (collecting cases). The immunity, political question, and preemption issues all turn on the same inextricably intertwined determinations: whether warfighting

is an area of unique federal concern, constitutionally committed to Congress and the federal Executive; and whether, as a result, the Plaintiffs' claims are barred.

B. District Court Jurisdiction

The district court had diversity jurisdiction. Plaintiffs are citizens of Iraq and both CACI entities are Delaware corporations headquartered in Virginia. JA.0017-18. *See* 28 U.S.C. § 1332(a)(2), (c)(1).

ISSUES PRESENTED

I. Are the Defendants, who were performing military interrogations in a theater of war under contract with the U.S. Government, immune from suit –

A. under the Court's decision in *Mangold v. Analytic Services, Inc.*, which extends absolute immunity to government contractors performing governmental functions?

B. under the law of military occupation as recognized and implemented by Coalition Provisional Authority Order 17?

II. Do Plaintiffs' conclusory allegations state a plausible claim for relief under *Ashcroft v. Iqbal* and *Bell Atlantic Corporation v. Twombly*?

III. Is Plaintiffs' suit preempted by the Constitution's exclusive commitment of war powers to Congress and the Commander-in-Chief and by the "combatant activities" exception to the Federal Tort Claims Act?

IV. Is Plaintiffs' suit, which seeks redress for alleged abuse of U.S. military detainees during war and which challenges military interrogation techniques authorized by the Executive Branch, nonjusticiable under the political question doctrine?

STATEMENT OF THE CASE

A. Nature of the Case

This is a tort suit brought by four Iraqis who were detained by the U.S. military at Abu Ghraib prison in Iraq. Plaintiffs seek damages from CACI, which provided civilian interrogators to the U.S. military.

Plaintiffs do not allege any contact with CACI employees, but allege CACI conspired with military personnel to torture detainees and is liable for the actions of alleged co-conspirators. Plaintiffs have not sued the U.S. military or any of its members.

B. Course of Proceedings

Plaintiff Al-Shimari filed suit in the Southern District of Ohio. After the suit was transferred to the Eastern District of Virginia, the remaining Plaintiffs joined. Plaintiffs filed their Amended Complaint, JA.0016, and CACI moved to dismiss. JA.0042. Plaintiffs opposed, JA.0121, CACI replied, JA.0163, and the district court heard argument. Plaintiffs submitted a post-argument brief. JA.0289; Dkt. 86.

After argument, CACI submitted, with leave, a memorandum addressing the Executive Summary of the Senate Armed Services Committee's Report, *Inquiry Into the Treatment of Detainees in U.S. Custody*. Dkt. 77-79.[1] Plaintiffs responded. JA.0380.

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[1] The full Senate Report was declassified and released April 22, 2009. *See Inquiry Into the Treatment of Detainees in U.S. Custody, available at* http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202

(Continued …)

On March 18, 2009, the district court granted in part and denied in part CACI's motion to dismiss. JA.0403.

Plaintiffs moved in the district court to strike CACI's notice of appeal, Dkt. 96, 99, 103, which was denied. Dkt. 109. Plaintiffs' motion in this Court to dismiss the appeal was deferred. App.Dkt. 25.

Discovery is stayed pending resolution of CACI's appeal. Dkt. 64.

C. Disposition Below

The district court denied CACI's motion to dismiss in every respect but one, and did not dismiss any of Plaintiffs' claims. JA.0404-05.[2]

Immunity: The district court rejected CACI's claim of derivative absolute immunity. JA.0428-42. The district court did not address CACI's argument that it is immune under the law of military occupation and Coalition Provisional Authority ("CPA") Order No. 17. *Compare* JA.0069-74 (argument presented in CACI's motion to dismiss) *with* JA.0428-42 (not addressing argument).

Sufficiency of the Complaint: The district court held that the Amended Complaint alleged sufficient facts to state plausible conspiracy claims and direct involvement of CACI employees in injuring Plaintiffs. JA.0466-71.

009.pdf ("Sen. Rep."). This Court may take judicial notice of the full Senate Report under Fed. R. Evid. 201(e).

[2] The district court concluded it lacked jurisdiction over Plaintiffs' claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and granted Defendants' motion to dismiss to that extent. JA.0404, 457-64. That ruling is not at issue in this appeal.

Political Question Doctrine: The district court ruled that "Plaintiffs' claims are justiciable because Defendants are private corporations and civil tort claims against private actors for damages do not interfere with the separation of powers." JA.0413-28.

Preemption: The district court rejected CACI's claim of constitutional preemption by failing to decide the issue. The district court also rejected CACI's preemption claim based on the "combatant activities" exception to the Federal Tort Claims Act ("FTCA"). JA.0443-57.

STATEMENT OF FACTS

A. Standards Governing Consideration of the Facts

Because CACI's political question defense challenges the district court's jurisdiction under Rule 12(b)(1), *Republican Party v. Martin*, 980 F.2d 943, 949 n.13 (4th Cir. 1992), the Court need not treat Plaintiffs' allegations as true, and may consider matters outside the complaint. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995).

For the remainder of CACI's contentions, on a Rule 12(b)(6) motion, the Court treats the Plaintiffs' factual allegations as true and views them favorably to Plaintiffs. *Mylan Labs v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The Court considers only "well-pleaded factual allegations," to determine whether those allegations "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1949-50. The Court may consider other sources, such as documents incorporated

into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007).

B. Plaintiffs' Allegations

1. Background

After a U.S.-led coalition invaded Iraq in March 2003, the U.S. military captured Abu Ghraib prison, a 280-acre compound near Baghdad. JA.0407. "The military used [Abu Ghraib] to detain three types of prisoners: (1) common criminals, (2) security detainees accused or suspected of committing offenses against the [U.S.-led] Coalition Provisional Authority, and (3) 'high-value' detainees who might possess useful intelligence (insurgency leaders, for example)." JA.0407-08. "A U.S. Army military police brigade and a military intelligence brigade were assigned to the prison. The intelligence operation at the prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with private corporations to provide civilian interrogators and interpreters." JA.0408. "Beginning in September 2003, [CACI] provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison." JA.0409.

2. The Amended Complaint

Plaintiffs allege that while imprisoned at Abu Ghraib, they were subjected by unidentified actors to abuse. JA.0016-29. Nowhere in their complaint do Plaintiffs say who allegedly abused them. Every allegation of abuse is phrased in the passive voice, without identifying the alleged abuser. (*E.g.*, "Mr. Al Shimari

was beaten." JA.0018; *id.* at JA.0018-21). The Amended Complaint does not allege any contact between a CACI employee and any Plaintiff. JA.0016-39.

Plaintiffs allege a "torture conspiracy" between CACI, acting through its employees, and U.S. military personnel. JA.0021-23. The Amended Complaint relies exclusively on speculative allegations of what "reasonable discovery" will "likely establish" regarding the alleged conspiracy, JA.0021-22, and on two references to unspecified testimony by unnamed alleged military co-conspirators. JA.0016, 22.

C. Executive Branch Approval of Enhanced Interrogation Techniques

CACI received leave to supplement the motion to dismiss record with the Executive Summary of the Senate Armed Services Committee's report, *Inquiry Into the Treatment of Detainees in U.S. Custody*. JA.0352. As the summary explained, 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 Secretary of Defense. *Id.* Vice President Cheney said of the CIA's 2002 proposed program, the techniques from which later migrated to Afghanistan and Iraq, "We all approved it."[3]

In October 2002, the Secretary of Defense personally approved aggressive interrogation techniques for use at the military detention center at Guantanamo Bay

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

(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." JA.0358, 360.

The Secretary of Defense later established a Working Group to review interrogation techniques. JA.0362. Relying on legal 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." JA.0363. The Secretary of Defense approved 24 techniques including "dietary manipulation, environmental manipulation, and sleep adjustment." *Id.*

The Executive Summary traces how techniques authorized for GTMO made their way to Afghanistan and then to Iraq. JA.0363-65, 369-70.[4] In September 2003 (the month CACI began furnishing interrogators), the Coalition Joint Task Force-7 ("CJTF-7") Commander issued an interrogation Standard Operating Procedure that "authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations." JA.0365. The CJTF-7 Commander issued a revised policy the next month that eliminated some techniques. *Id.* "The new policy, however,

[4] The full Senate Report traces the migration of these techniques to Iraq, and the influence of the Secretary of Defense's approval of them. Sen. Rep., *supra* note 1, at 153-58, 166-70, 195-97, 201.

contained ambiguities with respect to certain techniques, such as the use of dogs in interrogations, and led to confusion about which techniques were permitted." *Id.*[5]

Plaintiffs have argued that the Executive Summary "spells out in some detail how high-level Executive Branch and military officials conspired to encourage the torture of detainees." JA.0382. Thus, according to Plaintiffs, their alleged "torture conspiracy," JA.0021-22, extended up the chain of command to include the officials named in the Executive Summary, including the Interrogation Officer in Charge at Abu Ghraib, the Commander of the 205th Military Intelligence Brigade, the CJTF-7 Commanding General, the Secretary of Defense, the National Security Advisor, the CIA Director, and the legal counsel to the President, Vice President, National Security Council, and Defense Department.

D. Related Abu Ghraib Detainee Lawsuits

A number of other Iraqi detainees, most represented by these Plaintiffs' counsel, filed similar lawsuits against CACI, L-3 Services (formerly Titan Corporation), and/or individual CACI or L-3 employees.

1. The *Ibrahim* and *Saleh* Actions

In 2004, thirteen Iraqi detainees (the "*Saleh* plaintiffs") filed a putative class action against CACI and Titan, alleging abuse by military personnel and civilian contractors pursuant to a conspiracy between high-ranking government officials, dozens of military personnel of all grades, and CACI and Titan. *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55 (D.D.C. 2006). Also in 2004, seven Iraqi detainees or

[5] *See also* Sen. Rep., *supra* note 1, at 205.

their widows (the "*Ibrahim* plaintiffs") sued CACI and Titan in the District of Columbia. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

In both *Ibrahim* and *Saleh*, Judge Robertson dismissed Plaintiffs' claims under ATS, RICO, and government contracting laws, but denied motions to dismiss the plaintiffs' tort claims on preemption and political question grounds. *Ibrahim*, 391 F. Supp. 2d at 13-14, 19-20; *Saleh*, 436 F. Supp. 2d at 57-58 After consolidating the cases for limited discovery on preemption issues, Judge Robertson granted summary judgment on preemption grounds to Titan (which provided interpreters), but denied summary judgment to CACI. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007).

On appeal, the D.C. Circuit reversed as to CACI. *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). The court held that Plaintiffs' tort claims were preempted by two independent sources of federal law: (1) the federal interests embodied in the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j); and (2) the wartime policy-making prerogatives entrusted by the Constitution exclusively to the federal government. *Saleh*, 580 F.3d at 5-14.

With respect to preemption under the combatant activities exception, the D.C. Circuit explained:

> [T]he policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity).

Saleh, 580 F.3d at 7.

In addition, the court held that the constitutional scheme expressly forbids states from exercising war powers or regulating the conduct of war. *Id.* at 11. Based on the constitutional allocation of war powers, the court held Plaintiffs' claims preempted based on the "broader rationale" that the very imposition of any state or foreign tort law would create a conflict with federal foreign policy interests. *Id.*

2. The 2008 Abu Ghraib Detainee Actions

While *Saleh* and *Ibrahim* remained pending, Plaintiffs' counsel began forum shopping. In 2008, Plaintiffs' counsel filed five new actions against CACI, L-3, and some of their respective employees, raising substantially identical claims as alleged *Ibrahim* and *Saleh*:

- *Al-Janabi v. Stefanowicz, et al.*, No. 2:08-CV-2913-GAF (C.D. Cal.) (filed May 5, 2008)
- *Al-Ogaidi v. Johnson, et al.*, No. 08-CV-1006 (W.D. Wash.) (filed June 30, 2008)
- *Al-Shimari v. Dugan, et al.*, No. 2:08-CV-637 (S.D. Ohio) (filed June 30, 2008)
- *Al-Quraishi v. Nakhla, et al.*, No. 8:08-CV-01696-PJM (D. Md.) (filed June 30, 2008)

- *Al-Taee v. L-3 Servs.*, No. 2:08-CV-12790-LPZ-MKM (E.D. Mich.) (filed June 30, 2008)

On CACI's motions, *Al-Janabi*, *Al-Ogaidi*, and *Al Shimari* were transferred to the Eastern District of Virginia. *Al Shimari* was assigned to Judge Lee (No. 1:08-cv-00827, the instant lawsuit); *Al-Ogaidi* to Judge Ellis (No. 1:08-cv-00844-TSE-TCB); and *Al-Janabi* to Judge O'Grady (No. 1:08-cv-00868-LO-TRJ). Plaintiffs' counsel announced a desire to have the three actions consolidated before Judge Lee. When CACI stated its intent to move to consolidate the actions and leave assignment of a judge to the clerk's office, Plaintiffs' counsel promptly dismissed the actions assigned to Judges Ellis and O'Grady without prejudice, and added those plaintiffs to the *Al-Quraishi* suit pending in Maryland. They then dismissed CACI from the *Al-Quraishi* suit, and dismissed L-3 and Dugan from the *Al Shimari* suit reviewed here. Plaintiffs dismissed the *Al-Taee* action.

SUMMARY OF ARGUMENT

CACI is entitled to immunity on two independent grounds. First, CACI is entitled to derivative absolute official immunity because government contractors are immune for their performance of governmental functions for the United States to the extent the public benefits of granting immunity outweigh the costs. Here, CACI personnel were retained by the United States to assist in the battlefield interrogation of persons captured by the military in Iraq during a period of armed conflict and in connection with hostilities. CACI's performance of interrogation services for the United States thus constituted a governmental function. Moreover, the benefits of granting CACI immunity in performing interrogation services for

the United States outweigh the costs. The United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law, regardless of whether the military uses soldiers or civilians to perform such interrogations.

Second, CACI is entitled to immunity under the law of military occupation, a doctrine recognized by the Supreme Court and codified by the military occupation government in Iraq. Plaintiffs' tort claims are indisputably a product of Iraqi law, and under the law of military occupation the law of an occupied territory applies only with respect to internal relations between its citizens, and not to occupying personnel. The law of military occupation also immunizes CACI from civil suit for acts taken in the prosecution of a public war.

Plaintiffs' Amended Complaint also must be dismissed because Plaintiffs have not supported their claims with well-pleaded facts that establish a plausible entitlement to relief. Plaintiffs do not allege *any* facts asserting that CACI employees abused Plaintiffs, or facts sufficient to establish co-conspirator liability.

Further, Plaintiffs' claims are preempted by federal law. The Constitution vests the war power exclusively in the federal government and preempts the field with respect to regulation of war. Moreover, the combatant activities exception to the FTCA provides an independent basis for preempting Plaintiffs' claims. Detention and interrogation of enemies in war are classic combatant activities, and the federal interests associated with the combatant activities exception requires preemption of Plaintiffs' claims.

Finally, Plaintiffs' suit is nonjusticiable under the political question doctrine. The subject matter of Plaintiffs' Amended Complaint – the adoption of interrogation techniques, and their use by the military and contractors performing interrogation during war – is not appropriate for judicial resolution because these matters are committed exclusively to the political branches.

STANDARD OF REVIEW

This Court reviews the denial of CACI's motion to dismiss *de novo*. *See Iqbal*, 129 S. Ct. at 1950 (sufficiency of factual allegations); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997) (immunity); *AES Sparrow Point LNG v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008) (preemption); *Martin*, 980 F.2d at 950 n.14 (political question). Plaintiffs bear the burden of showing the district court has jurisdiction to decide the dispute. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

The standards for this Court's consideration of the facts are set out in Section A of the Statement of Facts, *supra*.

ARGUMENT

A. The District Court Erred in Declining to Dismiss Plaintiffs' Claims on Immunity Grounds

CACI argued in the district court that it was entitled to derivative absolute official immunity under *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996), an argument the district court erred in rejecting. CACI argued that it was also entitled to immunity based on the law of military occupation, a doctrine recognized by the Supreme Court and by the military occupation government in Iraq. JA.0069-74. The district court declined to address this argument, effectively rejecting it.[6] This, too, was error.

1. CACI Has Derivative Absolute Official Immunity From Plaintiffs' Suit

a. The Legal Framework for Derivative Absolute Official Immunity

In *Mangold*, this Court held that government contractors were absolutely immune from a defamation action based on allegedly false statements they made to government investigators. 77 F.3d at 1447-50. The Court's analysis began with the common-law rule that federal officials acting within the scope of their employment were absolutely immune whenever "the public benefits obtained by granting immunity outweighs its costs." *Mangold*, 77 F.3d at 1446-47 (citing *Barr v. Matteo*, 360 U.S. 564, 569-73 (1959) (plurality opinion), and *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)). While Congress established a statutory framework for immunity for government employees, the Court held that the *Barr*/*Westfall* test

[6] *See Voliva v. Seafarers Pension Plan*, 858 F.2d 195, 197 (4th Cir. 1988).

continued to apply to private contractors. Thus, contractors are entitled to absolute immunity for their performance of governmental functions for the United States to the extent the public benefits of granting immunity outweigh the costs. *Id.*

The Court noted in *Mangold* that if the defendants had *performed* the investigation at issue, their immunity would have been clear. *Id.* at 1448. While *responding* to a government investigation was not, strictly speaking, a governmental function, the Court held that the government's interest in investigating allegations of contracting abuse supported the imposition of absolute immunity. *Id.* at 1449-50. Many other courts have followed *Mangold* and held contractors immune when performing delegated governmental functions.[7] As this Court observed, "[e]xtending immunity to private contractors to protect an important government interest is not novel." *Id.* at 1448. The same result is appropriate here, as CACI's employees were performing delegated governmental functions and the benefits of immunity outweigh the costs.

[7] *See, e.g.*, *Murray v. Northrop Grumman Information Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (government contractor absolutely immune from tort liability for performing contracted-for government function) (citing *Mangold*, 77 F.3d at 1447); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998) (same); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998) (common-law official immunity barred tort suit against Medicare insurer); *Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1289 (D.C. Cir. 1997); *TWI d/b/a Servco Solutions v. CACI Int'l Inc*, 2007 WL 3376661, at *1 (E.D. Va. 2007).

b. CACI's Work at Abu Ghraib Constituted a Governmental Function for which Absolute Immunity is Available

In determining whether official immunity applies, the first question is whether CACI was "carrying out a governmental function" in providing interrogation services to the military. *Murray*, 444 F.3d at 174. Clearly, CACI was doing so. Plaintiffs allege that CACI personnel had been retained by the United States to assist it in the battlefield interrogation of persons captured by the military,[8] and that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032.

The district court, however, failed to analyze whether CACI was performing a governmental function. Instead, the court concluded that CACI must show that its personnel were performing a "discretionary function." JA.0433-37. This legal conclusion is both erroneous and beside the point. It is erroneous because a discretionary function is not the sole basis for a finding of absolute official immunity. This is manifest from *Mangold*, where this Court acknowledged that the defendants were not themselves performing a discretionary function and yet were absolutely immune from suit. *Mangold*, 77 F.3d at 1448.

[8] JA.0018 ¶ 10; *see also* JA.0408 ("The intelligence operation at [Abu Ghraib] prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with private corporations to provide civilian interrogators and interpreters."); JA.0409 ("This case arises out of the detention, interrogation and alleged abuse of four Iraqi citizens detained as suspected enemy combatants at Abu Ghraib . . . .")

While the district court held *Mangold* was limited to its precise facts, and created a narrow "response-to-government inquiries" exception to the requirement of a discretionary function, JA.0433, *Mangold* is not so limited. As this Court explained:

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

Mangold, 77 F.3d at 1447-48.

Thus, under *Mangold*, immunity is available to contractors for any delegated governmental function for which the United States is immune, so long as the benefits of immunity outweigh the costs. *Id.* at 1447. Indeed, this Court, in the related area of derivative foreign sovereign immunity, described *Mangold* as extending immunity to delegated "governmental functions" for which the United States is itself absolutely immune, and not solely to discretionary functions. *See Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) ("Sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions. This public interest remains intact when the government delegates that function down the chain of command. . . . As a result, courts have extended derivative immunity to private contractors, 'particularly in light of the government's unquestioned need to delegate governmental functions.'" (quoting *Mangold*, 77 F.3d at 1448)).

While a discretionary function is a quintessential situation where the United States has absolute immunity, so too are the other exceptions to the FTCA's waiver of sovereign immunity. These include the combatant activities exception, 28 U.S.C. § 2680(j), an exception that clearly applies to Plaintiffs' claims. *Saleh*, 580 F.3d at 6; *see* Section C.2.b, *infra* (explaining why Plaintiffs' claims implicate the combatant activities exception). While discretionary functions surely are important federal activities, the combatant activities exception retains immunity for perhaps the most critical function of the federal government, the provision of a national defense through the prosecution of war. *See Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). Thus, CACI's employees' performance of delegated functions for which the United States is itself immune satisfies the first requirement for derivative absolute official immunity.

Moreover, even if (as the district court concluded) the discretionary function exception had an exalted status, and is the *only* FTCA exception of sufficient importance to support derivative absolute official immunity, CACI would satisfy such a requirement. Interrogations and investigations are classic discretionary functions of government.[9] This Court noted in *Mangold* that the *investigation* of contracting abuses in that case, including the questioning of the defendants, was a

[9] *Suter v. United States*, 441 F.3d 306, 311-12 (4th Cir. 2006) (agent's performance of criminal acts during undercover investigation was a discretionary function); *Blakey v. U.S.S. Iowa*, 991 F.2d 148, 153 (4th Cir. 1993) (conduct of investigation into shipboard explosion was a discretionary function); *see also Murray v. Earle*, 405 F.3d 278, 294 (5th Cir. 2005) (interrogations are discretionary functions); *O'Ferrell v. United States*, 253 F.3d 1257, 1267 (11th Cir. 2001) (same).

discretionary function even though the contractor's responses to the questioning, strictly speaking, were not. *Mangold*, 77 F.3d at 1447.

The district court attempted to distinguish this aspect of *Mangold* by stating that the investigative techniques in *Mangold* were lawful and Plaintiffs here allege the use of unlawful techniques. JA.0434. *Mangold*, however, recognized that immunity does not apply only after a defendant establishes its blamelessness, but also when the plaintiff has alleged "illegal and even offensive conduct." *Mangold*, 77 F.3d at 1447; *see also Blakey*, 991 F.2d at 153 ("The exception covers all discretionary acts, whether shown to be abusive or not."). In *Mangold*, the defendants were absolutely immune from suit even though they allegedly provided knowingly *false* information to government investigators, *Mangold*, 77 F.3d at 1445, conduct that would violate federal law. *See* 18 U.S.C. § 1001.

Thus, CACI satisfies the first requirement for derivative absolute official immunity, that its employees performed delegated governmental functions for which the United States is immune. While the district court erred in concluding that the conduct alleged must fit within the discretionary function exception, the claims against CACI implicate that exception as well.

c. The Public Interest in Holding CACI Immune Outweighs the Costs of Immunity

The public interest served by immunity is clear. The United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law, regardless of whether the military uses soldiers or civilians to perform such interrogations. *Saleh*, 580 F.3d at 7 ("[I]t is the imposition *per se*

of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare.");[10] *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Ex parte Quirin*, 317 U.S. 1 (1942))); *Butters*, 225 F.3d at 466 ("All sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions.").[11]

The district court understated the public interest in immunity in two ways. First, the district court evaluated the public interest in immunizing the wrongful conduct alleged (allegedly abusive treatment of detainees), rather than the public interest in immunity for the function being performed: the battlefield interrogation of enemies captured by the U.S. military. JA.0439-40. This was clear error. The defendants in *Mangold* were held immune because the *function* at issue (facilitating government investigations) involved a weighty public interest that supported immunity, even though there is no public interest in the wrongful conduct alleged (providing *false* information to investigators). *Mangold*, 77 F.3d at 1447 ("[T]he scope of that immunity is defined by the nature of the *function* being performed . . . ."); *id.* at 1449 (grounding defendants' immunity in "the

[10] As the court noted in *Saleh*, the defendants in that case asserted an immunity defense, but immunity was not before it on appeal. *Saleh*, 580 F.3d at 5.

[11] The Supreme Court recently recognized the overriding public interest involved in avoiding judicial interference in matters relating to military *training*, an interest that pales when compared to the exigencies of actual war. *Winter v. Nat'l Res. Def. Council*, 129 S. Ct. 365, 377 (2008).

public interest in identifying and addressing fraud, waste, and mismanagement in government"). By focusing on the public interest in immunity for the misconduct alleged, rather than the governmental function performed, the district court misapplied *Mangold*.

The district court also erred in concluding that the public interest was best served by having tort law (indeed, the tort law of another sovereign) impact the decision-making of commanders in combat. JA.0441-42 ("[T]he decision to employ civilian contractors instead of military personnel is one that commanders must make in consideration of all the attendant costs and benefits."); JA.0442 (declining to "shield the military from the consequences of one of [its] decisions, namely to employ civilian contractors, who normally are not immune from suit, instead of soldiers, who normally are"). The district court's opinion expressly embraces the notion that tort law should weigh upon a military commander's combat decisions – encouraging the commander to forgo contractor support if he or she does not want to operate under the specter of tort regulation.

The district court's reasoning turns the separation of powers on its head. "[J]udges are not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). The Constitution vests war powers exclusively in the political branches of the federal government. *See* U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad – it is obvious." *Saleh*, 580 F.3d at 11. Based on these principles, states and foreign nations constitutionally

are prohibited from having, and traditionally have not had, any role in regulating the federal conduct of war, through tort regulation or otherwise. *Id.*; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). The public interest is not in using tort law to influence the combat decision-making of military officials; the public interest is in having military commanders select the most appropriate strategies, tactics, and solutions without such choices being skewed by considerations of tort law.

By contrast, the costs of immunity here are slight. The vast majority of persons injured in war are entitled to no recovery whatsoever. *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992) ("War produces innumerable innocent victims of harmful conduct – on all sides. It would make little sense to single out for compensation a few of these persons – on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other."); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993). If immunity meant Plaintiffs had no way to assert a claim, it would merely place them on the same footing as virtually all persons injured in war. But these Plaintiffs have an available administrative remedy. As the court noted in *Saleh*, "[t]he U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act, 10 U.S.C. § 2734." *Saleh*, 580 F.3d at 2-3. Therefore, Plaintiffs, *even without* an ability to pursue a tort claim, still have greater opportunities for recompense than most persons injured in war.

2. CACI Is Immune from Plaintiffs' Claims Under the Law Of Military Occupation

The district court erred in failing to consider CACI's separately-captioned argument that it was immune from suit based on the law of military occupation, a doctrine applied by the Supreme Court and adopted in CPA Order No. 17.

CACI's immunity under the law of military occupation flows from two interrelated doctrines recognized by the Supreme Court and applied by the military occupation government in Iraq. In *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878), the Court held that the law of an occupied territory applies only to internal relations between its citizens, and not to occupying personnel. *Id.* Just as the laws of occupied Tennessee could not apply to Coleman, an occupying Union soldier, Iraqi law cannot be applied to non-Iraqis participating in the occupation of that country. This immunity, though arising only sporadically, has been repeatedly enforced by the Supreme Court and other federal courts.[12]

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[12] *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341, 345 n.6 (1952) (dependent of American servicemember immune from jurisdiction of local courts in occupied Germany); *Dooley v. United States*, 182 U.S. 222, 230 (1901) ("Upon occupation of the [Philippines] by the military forces of the United States the authority of the Spanish government was superseded . . . ."); *Leitensdorfer v. Webb*, 61 U.S. 176, 177 (1857) (local laws of occupied New Mexico governed solely internal relations between inhabitants); *Dostal v. Haig*, 652 F.2d 173, 176-77 (D.C. Cir. 1981) (U.S. military and government officials immune from local law of occupied West Berlin); *Hamilton v. McClaughry*, 136 F. 445, 447-48 (C.C. D. Kan. 1905) (soldier participating in operation to quell Boxer rebellion not subject to Chinese law); *In re Lo Dolce*, 106 F. Supp. 455, 460-61 (W.D.N.Y. 1952) (American soldier operating behind enemy lines in German-occupied Italy not subject to Italian law); *Aboitiz & Co. v. Price*, 99 F. Supp. 602, 617 (D. Utah 1951) (military occupation severs governance relationship between occupied territory and its former sovereign); *see also* 2 William Winthrop, *Military Law and Precedents* 1246-47

(Continued …)

Indeed, CPA Order No. 17, issued by the military occupation government in Iraq and in effect at the time of Plaintiffs' detention, reflects this fundamental immunity. JA.0102. CPA Order No. 17 observed that "under international law occupying powers, including their forces, personnel, property, and equipment, funds and assets, are not subject to the laws or jurisdiction of the occupied territory." *Id*.[13] The same order provided that coalition contractors, such as CACI, were not "subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts," JA.0103, which is also consistent with the immunity required under *Coleman*.[14]

The immunity adopted in *Coleman*, and recognized in CPA Order No. 17, bars Plaintiffs' claims because a choice of law analysis establishes that any tort

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(2d rev. ed. 1896) ("Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, [the occupation government] is the government of and for all of the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist.").

[13] CPA Order No. 17 defines "Coalition Personnel" to include "all non-Iraqi military and civilian personnel assigned to or under the command of the Commander, Coalition Forces, or all forces employed by a Coalition State, including attached civilians, as well as all non-Iraqi military and civilian personnel assigned to, or under the direction or control of the Administrator of the CPA." JA.0102.

[14] CPA Administrator Bremer subsequently issued a revised CPA Order 17 on June 27, 2004. The original CPA Order 17 governs CACI because it was the order in effect at the time of the events alleged in Plaintiffs' complaint. Regardless, the revised CPA order 17 in no way suggests a change in the customary immunity from local law provided to personnel – such as the CACI PT interrogators – accompanying an occupying force.

claim must be a product of Iraqi law, from which CACI is immune. "Under Virginia law, the rule of *lex loci delicti*, or the law of the place of the wrong, applies to choice-of-law decisions in tort actions." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007); *see also Saleh*, 580 F.3d at 11 (noting that it was "far from unlikely that the applicable substantive law [for the plaintiffs' detainee abuse claims] would be that of Iraq").

Where, as here, the governing law does not permit a cause of action, courts must respect the governing law and dismiss the suit.[15] Thus, *Coleman* and CPA Order No. 17 provide one strain of military occupation immunity that requires dismissal of Plaintiffs' claims.

In *Dow v. Johnson*, 100 U.S. 158, 165 (1879), the Supreme Court recognized a similar, but distinct, immunity flowing from military occupation, one that immunizes personnel from civil suit under any jurisdiction's laws for conduct in furtherance of a military occupation. As the *Dow* Court explained, personnel from the occupying force are subject only to their country's criminal laws, and absolutely immune from civil suit for occupation-related conduct:

> If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be

[15] *See Smith v. United States*, 507 U.S. 197, 202 n.3 (1993) (plaintiff could not avoid sovereign immunity by asking court to apply the law of another jurisdiction); *Milton v. ITT Research Inst.*, 138 F.3d 519, 523 (4th Cir. 1998) (dismissing tort claim where governing law did not recognize cause of action).

> hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression."

Id. at 166.

The *Dow* Court described this immunity from civil suit as extending to acts of a "military character, whilst in the service of the United States,"[16] "acts of warfare,"[17] and to the exercise of a "belligerent right."[18] The Court later refined its holding and observed that *Dow* immunity protects parties "from civil liability for any act done in the prosecution of a public war." *Freeland v. Williams*, 131 U.S. 405, 417 (1889).[19] Importantly, this immunity is not limited to uniformed soldiers. *Ford v. Surget*, 97 U.S. 594, 606-07 (1878) (holding civilian citizen of Mississippi immune from civil suit for destroying another citizen's cotton in support of the occupying Confederate forces).[20] Given the historical paucity of tort suits against occupying personnel, *Dow* immunity has arisen as a litigated issue only occasionally, but has been enforced when implicated.[21]

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[16] *Dow*, 100 U.S. at 163.

[17] *Id.* at 169.

[18] *Id.* at 167.

[19] The immunity recognized in *Dow* is not defeated by an allegation that the conduct was "unauthorized by the necessities of war." *Id.* at 169.

[20] Because the Supreme Court treated the Confederate government as illegitimate, its forces were viewed as occupying powers in the seceding states until such time as the occupied territory reverted back to Union control. *Ford*, 97 U.S. at 606; *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 10-12 (1868).

[21] *See Moyer v. Peabody*, 212 U.S. 78, 237 (1909) (*Dow* immunized Colorado governor from civil suit for actions taken in putting down labor unrest); *Freeland*, 131 U.S. at 417 (Confederate soldier immune from suit for alleged theft

(Continued …)

Plaintiffs' claims fall squarely within the immunity recognized in *Dow*. Plaintiffs specifically allege that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032 at ¶ 142. Plaintiffs allege, and the district court acknowledged, that CACI personnel supported the military's battlefield interrogation mission, at a prison captured and operated by the U.S. military as an expeditionary interrogation facility. JA.0016-17 at ¶ 1; JA.0018 at ¶ 10; JA.0407-08. Plaintiffs were at Abu Ghraib prison because they were captured by the U.S. military as enemies. JA.0016-17 at ¶ 1; JA.0409.[22] Because CACI's employees were acting at Abu Ghraib "in the prosecution of a public war," *Freeland*, 131 U.S. at 417, they are immune under *Dow* from civil suit. This immunity would apply even if Plaintiffs' unfounded allegations of misconduct by CACI employees were true. *Dow*, 100 U.S. at 166.

B. Plaintiffs Have Not Alleged Sufficient Facts To Show A Plausible Entitlement To Relief

Apart from CACI's immunity from suit, the Amended Complaint falls far short of the pleading requirements of *Iqbal*, 129 S. Ct. at 1949-50, and *Bell*

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of cattle during occupation of West Virginia); *Ford*, 97 U.S. at 606-07 (civilian immune from suit for destruction of cotton in support of Confederate occupation); *United States v. Best*, 76 F. Supp. 857, 860 (D. Mass. 1948) (*Dow* immunizes American civilian in occupied Austria from search warrants issued by Austrian courts).

[22] For purposes of immunity, it is unnecessary to determine whether Plaintiffs were in fact personally hostile to the United States. *Dow*, 100 U.S. at 164 (all inhabitants of occupied territory may be treated as enemies and are "liable to be dealt with as such without reference to their individual opinions or dispositions"); *In re Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404, 419 (1864).

Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). In holding to the contrary, the district court erred.

Plaintiffs allege that three CACI interrogators abused unidentified detainees, and that Plaintiffs also were abused. JA.0018-22. But what the Court ***will not find*** in the Amended Complaint is a single allegation *that CACI employees abused Plaintiffs*, or even that Plaintiffs had *any contact* with CACI PT employees. While Plaintiffs' claims therefore depend on co-conspirator liability, set forth below is the sole "fact" alleged concerning CACI's entry into such a conspiracy:

> CACI conveyed its intent to join the conspiracy by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators.

JA.0022 at ¶ 72.

Plaintiffs do not allege who supposedly caused CACI to enter into this fanciful conspiracy, what such person's authority was, what such person said, to whom such words were spoken, when or where CACI signaled an intent to join a "torture conspiracy," or why it would be a purpose of this alleged conspiracy to injure Plaintiffs. Plaintiffs do not even identify the alleged co-conspirators whose actions they hope to attribute to CACI on the basis of co-conspirator liability.

Plaintiffs' allegations fall far short of the pleading requirements set forth in *Twombly* and *Iqbal* in at least two ways. First, Plaintiffs' allegations are classic "threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements," and are not entitled to an assumption of truth.[23] Second, allegations that three CACI employees abused other detainees in Iraq do not, without more, create a *plausible* entitlement to relief for these Plaintiffs.

1. Plaintiffs' amended complaint contains nothing but threadbare legal conclusions

Under *Iqbal*, courts begin "by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct at 1951. Courts should not credit "a legal conclusion couched as a factual allegation" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id*. at 1949-50. Thus, in *Iqbal*, the Court held that allegations that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [the petitioner]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" were not entitled to the assumption of truth because they were nothing more than a "formulaic recitation of the elements of a constitutional discrimination claim." *Id.* at 1951.

The Court held in *Twombly* that allegations that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another" and that the defendants

[23] *See Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555); *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) ("[N]aked assertions of wrongdoing necessitate some factual enhancement within the complaint to cross the line between possibility and plausibility of entitlement to relief" (internal citations omitted)).

"engaged in a 'parallel course of conduct . . . to prevent competition' and inflate prices" were not entitled to the assumption of truth. *Id*. (citing *Twombly*, 550 U.S. at 555). In the wake of *Iqbal* and *Twombly*, this Court has refused to accept as true conclusory allegations of a defendant's wrongdoing unsupported by well-pleaded facts.[24]

The district court ignored the first prong of the *Iqbal/Twombly* framework and instead accepted as true every one of Plaintiffs' unsupported legal conclusions. *See* JA.0466-71. In holding that Plaintiffs had alleged sufficient facts to support vicarious liability against CACI, the district court relied on Plaintiffs' statement that "[t]he acts of CACI employees constitute the acts of CACI. CACI conveyed its intent to join the conspiracy, and ratified its employees' participation in the conspiracy, by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." JA.0466 (citing JA.0022 at ¶ 72). The district court erred in relying on such legal conclusions.[25]

Like the "unadorned" allegations in *Iqbal* and *Twombly*, Plaintiffs' allegation that someone employed by CACI said something to someone, at some time and some place, to signal an intent to join an ongoing conspiracy, is not

[24] *See, e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009); *Walker v. Prince George's County*, 575 F.3d 426, 431 (4th Cir. 2009); *Shonk v. Fountain Power Boats*, 338 F. App'x 282, 287 (4th Cir. 2009); *Francis*, 588 F.3d at 196-97; *Ruttenberg v. Jones*, 283 F. App'x 121, 132-33 (4th Cir. 2008).

[25] *See also* JA.0022-27 at ¶¶ 71, 73, 77-80, 90-92, 101-06.

entitled to the assumption of truth. There are no factual allegations showing how CACI, along with the military, created an agreement to abuse the Plaintiffs.

2. The district court erred in holding that Plaintiffs' allegations state a plausible entitlement to relief

Plaintiffs' Amended Complaint also fails under the second prong of *Iqbal*. Plaintiffs' failure to allege any contacts with CACI employees, and failure to allege well-pleaded facts that plausibly would establish co-conspirator liability, is fatal to Plaintiffs' claims. By crediting Plaintiffs' rote recitation of legal conclusions and labels, the district court erred.

The district court found that Plaintiffs alleged that "CACI employees Steven Stefanowicz, Daniel Johnson, and Timothy Dugan tortured Plaintiffs and instructed others to do so." JA.0466. *But this is not what Plaintiffs alleged*. Plaintiffs do not allege that CACI employees "tortured Plaintiffs" but that "groups of persons conspiring together" tortured Plaintiffs and that CACI employees were "among the conspirators." JA.0021 at ¶ 64. The district court's conclusion that Plaintiffs alleged they were directly injured by CACI employees is contradicted by the Amended Complaint.

As Plaintiffs have not alleged that any CACI employee directly caused them injury, Plaintiffs are left with trying to hold CACI liable on a co-conspirator theory for the acts of others. But *Twombly* squarely held that unsupported claims of conspiracy, or allegations of parallel conduct with no evidence of a conspiratorial agreement, do not create a plausible claim of co-conspirator liability. *Twombly*, 550 U.S. at 555; *see also Iqbal*, 129 S. Ct. at 1951. This Court has recognized that

aspect of *Twombly*, and has held that a litigant cannot identify parallel conduct and then defeat a motion to dismiss by merely alleging that the parties were engaged in a conspiracy:

> Under *Twombly*, Appellants were required to allege enough facts to state a claim that is plausible on its face. This requires a plausible suggestion of conspiracy, and Appellants needed to plead facts that would reasonably lead to the inference that Appellees positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan. The complaint makes the bare, conclusory allegation that the defendants conspired to violate his constitutional rights and that the conspiracy culminated in the fabricated testimony. No common purpose is alleged and nothing beyond conclusory allegations of conspiracy are made. We therefore affirm the dismissal of the § 1983 conspiracy claim.

Ruttenberg, 283 F. App'x at 132.

The same is true of Plaintiffs' Amended Complaint. Plaintiffs allege that they were abused by *somebody*. Plaintiffs then try to hold CACI liable based on a single paragraph that does nothing more than recite the legal conclusion that CACI personnel somehow entered into a conspiracy with whomever injured Plaintiffs. JA.0021-22 at ¶¶ 64, 72. Because Plaintiffs have not alleged any facts to support their claim that CACI entered into a conspiratorial agreement with whomever allegedly harmed Plaintiffs, they are not entitled to have the district court "send[] the parties into discovery when there is no reasonable likelihood that the plaintiffs

can construct a claim from the events related in the complaint." *Twombly*, 550 U.S. at 558.[26]

C. Plaintiffs' Claims are Preempted by Federal Law

In *Saleh*, 580 F.3d at 8-12, the D.C. Circuit held that two aspects of federal law each preempted tort claims brought against CACI by detainees at Abu Ghraib prison: (1) the Constitution's allocation of war powers exclusively to the federal government; and (2) the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j). *Saleh* is on all fours with the present action – indeed, these Plaintiffs were members of the putative class in *Saleh*. Therefore, the Court should dismiss the Amended Complaint for the reasons set forth in *Saleh*.

1. The Constitution's Allocation of War Powers Preempts Application of the Tort Law of Any State or Foreign Nation

CACI argued in the district court that the Constitution's allocation of war powers to the federal government preempted the field, and precluded the application of the tort law of any state or a foreign nation to conduct occurring in the United States' prosecution of war. JA.0080-81. The district court did not address this argument, stating that the parties would be permitted to address choice

[26] With no well-pleaded allegations of direct contact between Plaintiffs and CACI employees, or facts sufficient to establish co-conspirator liability, Plaintiffs' effort to hold CACI vicariously liable for its employees' conduct is of no moment. Regardless, Plaintiffs' attempt to plead vicarious liability, like their allegation of co-conspirator liability, is limited to a legal conclusion with no factual support. JA.0022 at ¶ 72 ("CACI ratified its employees' participation in the conspiracy, by making a series of verbal statements and by engaging in a series of criminal acts of torture . . . .").

of law issues "at a later date," and then only "[i]f and when it should become relevant." JA.0456 n.7.

Choice of law, however, has nothing to do with CACI's constitutional preemption argument. Although Plaintiffs have avoided identifying the law that governs their claims,[27] preemption is required because the Constitution preempts the field, precluding application of *all* state and foreign tort law to Plaintiffs' claims. This is exactly as the D.C. Circuit held in *Saleh*:

> Arguments for preemption of state prerogatives are particularly compelling in times of war. In that regard, even in the absence of [*Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988)], the plaintiffs' claims would be preempted. The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making.

Saleh, 580 F.3d at 11-12 (internal citations and quotations omitted).

As this Court has recognized, "[f]ederal law that may give rise to preemption may be the Constitution itself." *City of Charleston, S.C. v. A Fisherman's Best, Inc.*, 310 F.3d 155, 168 (4th Cir. 2002). That is precisely the case here. The Constitution expressly commits this Nation's foreign policy and war powers to the federal government. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. Conversely, it expressly forbids the states from exercising those powers. U.S. Const. art. I, § 10, cls. 1, 3. Indeed, a significant impetus behind enactment of the

[27] In *Saleh*, when pressed at oral argument in the D.C. Circuit, plaintiffs' counsel – who also represents Plaintiffs here – offered that the plaintiffs' tort claims were governed by "all law," before retreating and suggesting that the local law of the District of Columbia might apply. *Saleh*, 580 F.3d at 11.

Constitution was the unworkable experience under the Articles of Confederation, where states interfered with the national government's ability to provide for the national defense.[28] The constitutional scheme adopted by the Framers precludes such interference.

Consistent with its view that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942), the Supreme Court regularly invalidates state regulations that frustrate the federal government's constitutionally-committed role as the sole voice on war and foreign affairs.[29] The Constitution forbids states from interfering with the federal government's warfighting prerogatives through imposition of their own statutory or tort norms on the conduct of war. Providing redress to foreign nationals for injuries allegedly sustained in a foreign country

[28] *See, e.g.*, The Federalist No. 22 (Hamilton), at 145-46 (Clinton Rossiter ed., 1961) (noting the national government's inability under the Articles of Confederation to effectively respond to Shays' Rebellion because of the states' counterproductive role in raising an Army under the Articles).

[29] *See, e.g.*, *Garamendi*, 539 U.S. at 413-14; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380-81 (2000); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 65-68 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[C]omplete power over international affairs is in the national government and cannot be subject to any curtailment or interference on the part of the several states.").

during a war waged by the United States is not a traditional state responsibility or one permitted under the constitutional scheme. *Saleh*, 580 F.3d at 11.[30]

The constitutional preemption of Plaintiffs' claims is a matter properly decided on a motion to dismiss. Plaintiffs' Amended Complaint acknowledges that they are seeking to impose tort regulation on interrogations performed "during a period of armed conflict, in connection with hostilities." JA.0016-17 at ¶ 1; JA.0032 at ¶ 142. No other facts are necessary to decide the pure legal question whether a state or foreign sovereign may regulate, through its tort laws, the United States' conduct of war. *Saleh*, 580 F.3d at 11.[31] Therefore, the Court should reverse the district court and direct dismissal of Plaintiffs' claims.

2. The Federal Interests Embodied in the Combatant Activities Exception Provide an Independent Basis for Preemption

CACI argued that the federal interests embodied in the combatant activities exception to the FTCA, 28 U.S.C. § 2680(j), preempt Plaintiffs' tort claims. Against the weight of precedent, the district court expressed doubt that Plaintiffs' claims arise out of combatant activities. JA.0443-46. The district court also held that even if Plaintiffs' claims involved combatant activities, preemption was unavailable because Plaintiffs' claims did not implicate unique federal interests,

[30] The federal interest in not having a *foreign* sovereign's tort law apply to the United States' conduct of war is even more acute. *Saleh*, 580 F.3d at 11.

[31] Congress has not seen fit to impose a federal common-law tort regime on the conduct of war. The district court correctly ruled that ATS does not apply to Plaintiffs' claims, a ruling not at issue in this appeal. JA.0464.

and did not conflict with federal policies. JA.0448. All of these holdings are contrary to existing precedent, and two of the three are so clearly unsupportable that Plaintiffs did not assert them in the district court in any serious way.

a. Legal Framework for *Boyle* Preemption

Sovereign immunity bars suits against the United States absent an explicit waiver. *Dep't. of Army v. Blue Fox*, 525 U.S. 255, 261 (1999). While the FTCA, 28 U.S.C. § 1346(b)(1), waives the United States' sovereign immunity for certain tort claims, it contains a number of exceptions. The combatant activities exception retains the United States' immunity for claims arising out of combatant activities of the military during time of war. 28 U.S.C. § 2680(j).

In *Boyle*, 487 U.S. at 500, the Court announced the framework under which FTCA exceptions preempt tort claims against government contractors. The first requirement is that the dispute involve "'uniquely federal interests' [that] are . . . committed by the Constitution and laws of the United States to federal control." *Id*. at 504 (citations omitted). Once a unique federal interest is shown, preemption is appropriate where "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation." *Id*. at 507 (internal citations omitted). As the D.C. Circuit found in *Saleh*, on identical facts, CACI meets this test and preemption is required. *Saleh*, 580 F.3d at 10.

b. Plaintiffs' Claims Arise out of Combatant Activities

In the district court, Plaintiffs did not dispute that their claims arise out of combatant activities, and their counsel conceded the point in *Saleh*, 580 F.3d at 6. Nevertheless, the district court *sua sponte* concluded that Plaintiffs' claims likely did not arise out of combatant activities, JA.0443-46, even though Plaintiffs expressly alleged that CACI's conduct ***"took place during a period of armed conflict, in connection with hostilities."*** JA.0032 (emphasis added)**.**

The district court reached its erroneous result by adopting a cramped construction of "combatant activities" as including only the infliction of "actual physical force," and then concluding that battlefield interrogations do not qualify. JA.0446. The district court looked past settled case law construing the combatant activities exception more broadly, relying on a single district court decision from 1947 that understandably ruled that tort claims arising out of a *training exercise* in the *Gulf of Mexico* did not arise from the military's "combatant activities." JA.0444-45 (citing *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947)).

It is well settled, however, that "combatant activities . . . include not only physical violence, but activities necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). "Aiding others to swing the sword of battle is certainly a 'combatant activity.'" *Id*. Several courts have held that actions that are not themselves the infliction of physical force nonetheless constitute combatant activities for purposes of the FTCA.[32] Consistent

[32] *Koohi*, 976 F.2d at 1336 (combatant activities exception shields (Continued …)

with these decisions, the district court in *Skeels* concluded that no combatant activities were involved in that case largely because the injuries arose "in practice and training, far removed from the zone of combat." *Skeels*, 72 F. Supp. at 374.

Unlike training exercises far from the theater of war, battlefield intelligence efforts directly support combat operations and constitute "combatant activities." *Hamdi*, 542 U.S. at 518 (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (citing *Quirin*, 317 U.S. at 1)). As such, the D.C. Circuit concluded in *Saleh* that claims relating to detention and interrogation operations at Abu Ghraib prison arose out of "combatant activities." *Saleh*, 580 F.3d at 6-7.[33] As that court observed, the combatant activities exception, unlike the discretionary function exception, is "more like a field preemption because it casts an immunity net over any claim that *arises* out of combat activities." *Id.* at 6.

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contractors "who supply a vessel's weapons"); *Johnson*, 170 F.2d at 770 ("The act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a 'combatant activity . . . .'"); *Vogelaar v. United States*, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) ("accounting for and identifying soldiers" in Vietnam was a combatant activity); *Goldstein v. United States*, No. 01-0005, 2003 WL 24108182, at *4 (D.D.C. Apr. 23, 2003) (decision *not to select* a potential military target is a combatant activity).

[33] The district court opinion reviewed in *Saleh* had found it rather obvious that detainee tort claims arise out of combatant activities. *Ibrahim*, 556 F. Supp. 2d at 9 ("There can be no question that the nature and circumstances of the activities that CACI employees were engaged in – interrogation of detainees in a war zone – meet the threshold requirement for preemption pursuant to the combatant activities exception."), *aff'd in part, rev'd in part sub nom. Saleh*, 580 F.3d at 10.

The district court's conclusion that Plaintiffs' claims likely did not arise out of combatant activities ignores the broad "arising out of" language of the statute. It also ignores the substantial body of case law construing the combatant activities exception and the clear connection between war and the conduct of in-theater interrogations. Common sense, to say nothing of precedent, dictates that the interrogation of individuals detained as enemies by the military in a war zone prison constitutes combatant activity.

c. Plaintiffs' Claims Implicate Uniquely Federal Interests

Plaintiffs did not seriously dispute in the district court that their claims implicated a uniquely federal interest.[34] Yet the district court held that no uniquely federal interests were implicated because (1) Plaintiffs were pursuing their claims against private parties, (2) the district court thought allowing Plaintiffs' claims to proceed would incentivize contractors to "comply with their contractual obligations to screen, train and manage employees," and (3) the states and the federal government have a shared interest in enforcing the laws against torture arising out of a foreign war. JA.0449-50. The district court erred in reaching this conclusion, which is clear from *Boyle* itself.

In *Boyle*, the Court determined that there is a uniquely federal interest in "the civil liabilities arising out of the performance of federal procurement contracts," and the federal government's interest in "getting the Government's

[34] Plaintiffs' counsel also did not seriously contest the existence of a uniquely federal interest in *Saleh*, 580 F.3d at 6.

work done." *Boyle*, 487 U.S. at 505-06. Thus, the mere fact that Plaintiffs are suing a government contractor based on the performance of its work for the government is sufficient under *Boyle* to constitute a "uniquely federal interest."[35]

While a "uniquely federal interest" would exist even without the wartime character of Plaintiffs' claims, the wartime context only heightens the federal interest involved. As the district court recognized, the conduct of war is constitutionally vested exclusively in the federal government. JA.0447. Thus, Plaintiffs' claims implicate uniquely federal interests and are subject to preemption under *Boyle* if the application of state or foreign tort law would significantly conflict with these federal interests.

d. Plaintiffs' Tort Claims Would Significantly Conflict with the Federal Interests Embodied in the Combatant Activities Exception

In *Boyle*, the Court identified the federal interests embodied in the discretionary function exception (the FTCA exception at issue there) in order to fashion a test that would preempt tort law conflicting with such interests. *Boyle*, 500 U.S. at 510-12. Thus, the starting point here is identifying the federal interests embodied in the combatant activities exception.

The combatant activities exception retains sovereign immunity for "[a]ny claim arising out of the combatant activities of the military . . . during time of

[35] Under the district court's analysis, *Boyle* would have come out the other way. The federal government has no unique interest in the negligent design of helicopters. *Boyle*, 500 U.S. at 504. But as *Boyle* teaches, the federal interest comes from a plaintiff's effort to hold a government contractor liable for activities arising out of its work for the United States, something clearly present here. *Id.*

war." 28 U.S.C. §2680(j). While the legislative history is "singularly barren of Congressional observation apposite to the specific purpose of each [FTCA] exception," courts repeatedly have held that the exception reflects a congressional judgment that no tort duty should extend to those against whom combatant force is directed in time of war.[36] As the D.C. Circuit explained in *Saleh*:

> In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit. And the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control.

Saleh, 580 F.3d at 7.

Given the federal interest in eliminating battlefield tort duties, the Ninth Circuit in *Koohi* preempted state tort claims solely upon its finding that the claims

[36] *Koohi*, 976 F.2d at 1333, 1337 ("The reason [why claims against the contractor were preempted], we believe, is that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim*, 391 F. Supp. 2d at 18 ("The exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which tort claims are simply inappropriate."); *Bentzlin*, 833 F. Supp. at 1493 ("The *Koohi* court noted that in enacting the combatant activities exception, Congress recognized that it does not want the military to 'exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.'" (citation omitted)).

arose out of combatant activities. 976 F.2d at 1336-37. The D.C. Circuit's decision in *Saleh* functionally reaches the same result. As that court explained:

> In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare.[37]

Because *any* tort duties conflict with the federal interest in removing tort duties from the battlefield, the D.C. Circuit framed the appropriate preemption test as follows: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh*, 580 F.3d at 9. Both the Ninth Circuit's test, which preempts solely on a finding of a "combatant activity," *Koohi*, 976 F.2d at 1336-37, and the D.C. Circuit's "ultimate military authority" test, *Saleh*, 580 F.3d at 12, require preemption of Plaintiffs' claims.[38]

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[37] *Saleh*, 580 F.3d at 7.

[38] The district court noted that "[a] U.S. Army military police brigade and a military intelligence brigade were assigned to the prison," and that CACI "provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to Abu Ghraib prison." JA.0407-08. Plaintiffs alleged that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032. These facts and allegations satisfy the requirements for *Boyle* preemption set out in *Saleh*, 580 F.3d at 9.

As the Ninth Circuit and D.C. Circuit explained in *Koohi* and *Saleh*, respectively, their preemption tests further the purposes of the combatant activities exception and recognize that the fundamental purposes of tort law are not advanced by allowing tort duties to exist in a combat environment.[39] By failing to preempt Plaintiffs' claims on this basis, the district court erred.

D. Plaintiffs' Suit Is Nonjusticiable Under the Political Question Doctrine

The subject matter of Plaintiffs' Amended Complaint is not appropriate for judicial resolution because the adoption of interrogation techniques, and their use by the military and contractors performing interrogation during war, are matters committed exclusively to the political branches.

Political question analysis proceeds under *Baker v. Carr*, 369 U.S. 186 (1962), which set six independent tests for finding a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
>
> [2] a lack of judicially discoverable and manageable standards for resolving it; or
>
> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or

[39] "[I]t is clear that all of the traditional rationales for *tort* law – deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule." *Saleh*, 580 F.3d at 7; *see also Koohi*, 976 F.2d at 1334-35; *Bentzlin*, 833 F. Supp. at 1493.

> [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or
>
> [5] an unusual need for unquestioning adherence to a political decision already made; or
>
> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court need only find one of these tests satisfied to conclude the dispute is nonjusticiable. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

1. The Treatment and Interrogation of Wartime Detainees is Constitutionally Committed to the Political Branches

a. National Security and Military Affairs are Committed to the Political Branches

No federal power is more clearly committed to the political branches than the warmaking power. *United States v. Moussaoui*, 365 F.3d 292, 306 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson*, 80 F.3d at 924. "Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

"The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. Judges possess no power 'To declare War . . . To raise and

support Armies . . . To provide and maintain a Navy.' U.S. Const. art. 1, sec. 8, cl. 11-13. Nor have they been 'given the task of running the Army.'" *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (citation omitted). As this Court concluded in a U.S. civilian's wrongful death action arising out of an allegedly wrongful military fighter jet intercept, "[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany*, 931 F.2d at 277.

b. The Conduct of Military Interrogations in a War Zone Raises Questions Committed to the Political Branches

The Constitution's textual commitment of war powers and decisions to the political branches applies with full force to Plaintiffs' claims. Detention and interrogation of persons found in a combat theater is an inseparable component of war. *See Hamdi*, 542 U.S. at 518 (quoting *Quirin*, 317 U.S. at 28). Because prosecution of war is constitutionally reserved for the political branches, battlefield tactics, including the techniques chosen for detention and interrogation of suspected enemies, are not subject to judicial review.

That Plaintiffs sued private contractors, and have sued only for damages, not injunctive relief, does not change the analysis as the district court believed. JA.0402, 0414-17. Suits for compensation, as with suits for prospective relief, call for "determinations of whether the alleged conduct *should* have occurred, which impermissibly would require examining the wisdom of the underlying policies." *Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir. 2008).

In *Tozer*, this Court rejected tort claims against a military contractor because the suit invited the jury "to 'second-guess military decisions.'" 792 F.2d at 406 (quoting *United States v. Shearer*, 473 U.S. 52, 57 (1985)). The Court rejected the contention that claims against private contractors do not implicate separation of powers. *Id.* *Tozer* was a peacetime products liability action, and its concern about leaving military judgments to military leaders, not juries, applies even more strongly to wartime battlefield actions.

Importantly, it is clear that many if not most of the alleged forms of abuse here were interrogation techniques approved at the highest levels of the Executive Branch.[40] These techniques had been vetted by, among others, the National Security Advisor, the CIA Director, principals of the National Security Council, the Secretary of Defense, the Attorney General, and the legal counsels to the National Security Council, CIA, Defense Department, Vice President, and President.[41] They were approved by the Secretary of Defense and incorporated

[40] *Compare* JA.0028 (including "beatings, placing plaintiffs in stress positions, forced nudity, sexual assault, death threats, withholding of food, water and necessary medical care, sensory depr[i]vation, and intentional exposure to extremes of heat and cold") *with* JA.0363 (techniques approved by Secretary Rumsfeld, including "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, deprivation of light and sound," "[r]emoval of clothing, prolonged standing, sleep deprivation, dietary manipulation, hooding, [exploiting fear of] dogs, and face and stomach slaps," and "environmental manipulation").

[41] *See* Statement of Facts Sec. D, *supra*. The relevant point here is not whether the Executive Branch's chosen techniques were in fact appropriate—that is precisely the political question that the courts may not ask or answer. *See Lin v. United States*, 561 F.3d 502, 507 (D.C. Cir. 2009).

into rules of engagement by military commanders at Abu Ghraib. Statement of Facts Sec. D, *supra*.

Thus, Plaintiffs ask the district court, in a common-law tort suit, to adjudicate the propriety of wartime military intelligence decisions adopted at the highest levels of the Defense Department and the Executive Branch. "This a court cannot do. . . . [C]ourts are not a forum for second-guessing the merits of foreign policy and national security decisions textually committed to the political branches." *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263-64 (D.C. Cir. 2006); *see also Harbury*, 522 F.3d at 420; *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006); *Schneider*, 412 F.3d at 194-95; *see also Tiffany*, 931 F.2d at 277-79; *Tozer*, 792 F.2d at 406.

Carmichael v. Kellogg, Brown & Root Service, Inc., 572 F.3d 1271 (11th Cir. 2009), is illustrative. In *Carmichael*, the Eleventh Circuit affirmed dismissal on political question grounds of tort claims against a contractor arising out of a convoy accident in Iraq. The court held that the suit necessarily involved examining "the military's decision to utilize civilian contractors in conducting the war in Iraq," as well as whether the injuries were attributable to "unsound military judgments and policies." *Id.* at 1281-83.

Military control of interrogation operations in Iraq, like its control of convoys, was pervasive and plenary. *Saleh*, 580 F.3d at 6-7. The military promulgated the rules of engagement for interrogations (JA.0118), determined who would be interrogated and by whom, and authorized all interrogation plans. JA.0408-09 (noting that Abu Ghraib prison was under control of two Army

brigades). The interrogation operations at Abu Ghraib prison were every bit as much a war function committed to the political branches as the military convoy operation in *Carmichael.* And tort law can no more provide judicially discernible standards of care for adjudicating claims arising from military intelligence gathering in a war zone prison than it can provide judicially discernible standards of care for running a fuel tanker convoy through an Iraqi combat zone.

c. The Supreme Court has not Authorized Judicial Review of Military Action Absent Independent Constitutional or Statutory Authority

The district court relied on a few cases reviewing certain wartime military or Executive decisions to conclude that "matters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs." JA.0425; *see also* JA.0420-21. But the cases the district court invoked either involved competing constitutional powers vested in the judiciary, which are absent here, or were cases where justiciability was not even at issue.

Thus, the district court relied on Supreme Court cases regarding detention and trial of "enemy combatants" in the war on terror. JA.0425 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Hamdi*, 542 U.S. at 507); *see also Boumedienne v. Bush*, 128 S. Ct. 2229 (2008). But those cases concerned habeas corpus—the constitutional right of any detainee to challenge the legality of his detention in court. *See Boumedienne*, 128 S. Ct. at 2244-47; *Hamdi*, 542 U.S. at 525. They do not support a general judicial power to review war decisions other than the fact and duration of detention. *Lin*, 561 F.3d at 507.

The district court also relied on many decisions, most pre-dating *Baker v. Carr*, in which justiciability was not at issue. JA.0419-21, 425-26. Because the federal courts' power to hear those cases was not in dispute, those cases are not precedent on the presence or absence of a political question.[42]

2. There Is No Judicially Discoverable Standard for Deciding Tort Claims by Enemy Detainees

a. Common Law Tort Duties Do Not Exist on the Battlefield

Plaintiffs are suspected enemies who were detained in a war zone by U.S. forces. Allowing our Nation's battlefield enemies to sue in our courts over their treatment in war "would hamper the war effort and bring aid and comfort to the enemy." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); *see also In re Iraq & Afghan. Det. Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007). That concern is not diminished because the military engaged civilians to assist the wartime mission.

The district court nonetheless believed it could find the appropriate standard of care in CACI's government contract. JA.0424-25. By assuming that CACI's *contract* with the United States could establish *tort* duties of care running to foreign enemies who are not parties to the contract, the district court leaped over the question of whether it is *ever* appropriate for a court to impose tort duties of care on a battlefield, duties that run in favor of the enemy against whom belligerent force is being applied. The *Eisentrager*, *Saleh*, *Schneider*, and *Iraq & Afghan*

[42] *See, e.g. Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also Waters v. Churchill*, 511 U.S. 661, 678 (1994).

Detainees decisions make clear that imposing tort duties of care on the battlefield is not appropriate.

b. Litigation of Claims Involving Military Actions in an Active War Zone Is Not Judicially Manageable

Courts lack judicially manageable standards for evaluating wartime injury claims where adjudicating the claims would require extensive review of classified materials or of evidence unlikely to be discoverable because of the "fog of war." *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Anderman v. Fed. Rep. of Austria*, 256 F. Supp. 2d 1098, 1112-13 (C.D. Cal. 2003); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 668 (N.D. Cal. 2002). "In wartime, it would be inappropriate to have soldiers assembling evidence, collected from the 'battlefield.'" *Bentzlin*, 833 F. Supp. at 1495.

Adjudicating these Plaintiffs' tort claims would require a three-stage factual inquiry: first, determining what was done to Plaintiffs, and by whom; second, determining whether interrogation techniques adopted by the United States were appropriate; and third, determining whether CACI conspired with the military to abuse Plaintiffs. These inquiries call for discovery that is likely unavailable due to national security concerns and the nature of war. All records of detainee interrogations, and the interrogation techniques used, are classified and in the United States' exclusive possession. In addition, much of the relevant evidence is located in Iraq, including the testimony of other detainees, with no reasonably-available process to obtain access to such evidence. Moreover, trying Plaintiffs'

conspiracy allegations would call for discovery from high-level Defense Department and White House sources that courts should be very reticent to order.

Worse yet, "[t]he discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command decisions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's interrogation and detention policies, practices, and procedures. . . . 'Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.'" *Iraq & Afghan. Det. Litig.*, 479 F. Supp. 2d at 105-06 (quoting *Eisentrager*, 339 U.S. at 774).

The district court was dismissive of these discovery concerns. The district court found CACI's discovery concerns "ironic" given CACI's previous defamation suit against a New York radio personality. JA.0421-22. The *Rhodes* suit, however, largely concerned Rhodes' state of mind at the time she made the statements at issue.[43] Thus, CACI took no discovery from the Government in *Rhodes* and did not pursue evidence in Iraq.

The district court further found that the limited discovery taken in *Saleh* and *Ibrahim* supports the manageability of discovery. JA.0422-23. But in *Saleh* and *Ibrahim*, the district court allowed only limited discovery on preemption, staying

[43] *See CACI Premier Tech. v. Rhodes*, 536 F.3d 280, 294-300, 304 (4th Cir. 2008); *see also id.* at 306 (Duncan, J., concurring) ("It is the absence of sufficient evidence of Rhodes's state of mind, and not any testament to the actual veracity or justifiability of her statement, that makes summary judgment appropriate here.").

all other discovery until the threshold preemption issue was resolved. *Ibrahim*, 391 F. Supp. 2d at 19; *Saleh*, 436 F. Supp. 2d at 59-60. The court in *Saleh* did *not* order general "discovery as to the evidentiary support for the plaintiffs' claims," as the district court here believed. JA.0422-23.

3. Lack of Respect for Coordinate Branches of Government

CACI addressed the lack-of-respect issue in the district court in a brief footnote, not because the argument was futile (as the district court supposed, JA.0425), but because it almost completely overlaps the other political question tests. For a court to second-guess a coordinate branch's exercise of its constitutionally-conferred war powers, and to subject that exercise to a judge's or jury's application of tort standards of care, *ipso facto* shows a lack of respect due to that coordinate branch.

4. Remaining Political Question Factors

The district court also addressed three other political question factors not raised by CACI: whether the case required an initial policy determination of a kind clearly for non-judicial discretion; whether there is a need for adherence to a political decision already made; and the potential embarrassment from multifarious pronouncements by various departments. In doing so, the district court examined legislative policies embodied in the Anti-Torture Statute, 18 U.S.C. § 2340, and the Senate Armed Services Committee's Executive Summary, JA.0426-27, summarizing what it found there as "this country does not condone torture," JA.0426, and "what happened at Abu Ghraib was wrong." JA.0427. The district court ignored that Congress, in enacting the Anti-Torture Statute, declined to create

an applicable private right of action, or that military interrogation policies were approved at the highest levels of government.

Both the Executive Branch and the Senate Armed Services Committee have weighed in on the propriety of interrogation techniques used at Abu Ghraib. Yet the district court has determined that the judiciary – with *no* constitutional role in these decisions – should also weigh in. This raises the specter of multifarious pronouncements from different departments that the political question doctrine seeks to avoid.

Further, wartime interrogation policies are decisions committed to non-judicial, *i.e.*, political, discretion. That the district court, or even the Nation, might be "embarrassed" in a colloquial sense by Executive policy decisions does not create a justiciable dispute. Accountability for the Executive's exercise of its war powers rests where the Constitution places it – with the people and their representatives.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's denial of CACI's motion to dismiss and remand this case to the district court with instructions to dismiss the Amended Complaint.

Respectfully submitted,

/s/ John F. O'Connor

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April 5, 2010

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, John F. O'Connor, hereby certify that:

1. I am an attorney representing Appellants CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, Addendum, and Certificate of Compliance and Service) contains 13,925 words.

/s/ John F. O'Connor

John F. O'Connor

ADDENDUM: STATUTES AND REGULATIONS

28 U.S.C. § 1346(b)(1)

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

28 U.S.C. § 2680(a), (j)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function

or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . .

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2010, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of Appellants' Brief to be served by first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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John F. O'Connor