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

SUHAIL NAJIM ABDULLAH AL SHIMARI *et al*.,	)	
Plaintiffs,	)	
	)	**C.A. NO. 08-cv-827 GBL-JFA**
v.	)	
CACI PREMIER TECHNOLOGY, INC.	)	**PUBLIC REDACTED VERSION**
Defendant	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT CACI PREMIER TECHNOLOGY'S MOTION TO DISMISS

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INTRODUCTION

This motion represents Defendant CACI Premier Technology's ("CACI") third attempt to dismiss this case pursuant to the political question doctrine ("PQD"). This Court rejected CACI's first attempt, at the outset of the case, concluding that this case "challenges not the government itself or the adequacy of official government policies, but the conduct of government contractors carrying on a business for profit." *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 708-14 (E.D. Va. 2009). The Fourth Circuit likewise rejected CACI's contention that this case raises considerations of national defense requiring dismissal, explaining that "the fact that a military contractor was acting pursuant to orders of the military does not, in and of itself, insulate the claim from judicial review," and remanded for consideration of the PQD defense on a full factual record. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 531-37 (4th Cir. 2014).

In this motion, as before, CACI conflates the government's legitimate authority to lawfully interrogate individuals, not at issue in this case, with a license to torture—which is proscribed by settled law. Although PQD may bar judicial second-guessing of the wisdom of discretionary policy decisions made by the military, it can never bar judicial evaluation of the *illegality* of the conduct of a party before the court. Thus, even on a full factual record, CACI still cannot make out a PQD defense.

First, CACI *still* cannot demonstrate as a matter of law that its employees at Abu Ghraib were under the plenary control of the U.S. military in committing the abuse of detainees, and CACI cannot put forth a scrap of evidence that such unlawful conduct was dictated by the military. To the contrary, the acts of torture and abuse of which Plaintiffs complain *could not lawfully have been ordered by the U.S. military*. After extensive discovery, the record is clear: it was the *CACI interrogators who directed the military police guards to mistreat the detainees.*

Second, because Plaintiffs seek to enforce prohibitions on torture and cruel, inhuman and degrading treatment that are governed by established statutory and common law standards—and to enforce them against private individuals—there is no need or occasion for this Court to evaluate sensitive military judgments in adjudicating Plaintiffs' Alien Tort Statute ("ATS") claims. Unlike the negligence cases CACI relies upon—none of which involves allegations of *unlawful* conduct—these claims do not call into question the wisdom of discretionary policy judgments of military officials. This straightforward application of facts-to-law is a "familiar judicial exercise." *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012). Indeed, the United States government has already advised the Fourth Circuit that this case could proceed on Plaintiffs' torture claims without questioning political judgments of the executive branch.

The PQD defense should therefore be rejected. At minimum, there are genuine issues of disputed fact as to the elements of the PQD defense which, in accordance with Fourth Circuit law, must be submitted to the jury to resolve along with the merits.

STATEMENT OF FACTS

A. CACI Employees Directed the Abuse of Prisoners

In 2003, in an attempt to control the insurgency in Iraq, the United States apprehended large numbers of Iraqis, often with little or no reason to suspect their involvement in hostile activity. Plaintiffs are among those Iraqis who were detained as a result of this effort. They were imprisoned in Tier 1A of the "Hard Site" at Abu Ghraib, which was under exclusive U.S. control and reserved for interrogation of prisoners thought to be of intelligence value. The Tier 1 organizational chart dated November 2003 shows CACI employees assigned to 7 of the 20 interrogation cells. *See* Third Amended Complaint [hereinafter "TAC"] at ¶ 16; *see also* Ex. MM (JIDC Organizational Chart).

The military police ("MPs") guarding the detainees in Tier 1 were under command of then-Sgt. Frederick, who was later court-martialed and sentenced to eight years imprisonment for his abuse of detainees. In a deposition in this case, Frederick testified [redacted] TAC ¶¶ 23, 85; *see also* Ex. A (Frederick Dep.) at 79:11-82:9, 84:6-85:8, 90:19-92:7.[1] Similarly, then-Cpl. Charles Graner, who was also later convicted in a court martial for abusing detainees, gave sworn testimony to the Criminal Investigation Division ("CID") that [redacted] TAC ¶¶ 100, 126; *see also* Ex. B (Graner Dep.) at 24:5-25:11, 35:17-38:15, 49:22-50:11. Those orders were a blank check for the military police to abuse the prisoners. The specific acts of abuse that Frederick and Graner testified they were ordered by CACI personnel to perpetrate on the prisoners are the same acts described by the Plaintiffs in this case as having been performed on them. TAC ¶¶ 100, 111, 116, 126; *see also* Ex. C (Al-Ejaili Resp. Interrog.) at No. 4, 7; Ex. D (Al-Ejaili Dep.) at 63:2-65:16, 68:2-18, 81:18-83:11, 89:9-92:19, 101:5-103:3. No other superiors have been identified as procuring, authorizing or encouraging the abuse of the detainees at the Hard Site during the relevant time frame. According to the expert report of Darius Rejali, Ph.D., an internationally-recognized expert on government interrogation and torture, many of these techniques have been characterized by courts and governments, including the United States government, as torture. TAC ¶ 127; *see also* Ex. E (Rejali Expert Report) at lines 71-77.

Subsequent military investigations into detainee abuse at Abu Ghraib concluded that CACI employees were complicit in the abuse of detainees. The investigation of Maj. Gen.

[1] "Ex. __" refers to exhibits to the Declaration of Peter Nelson.

Antonio Taguba identified CACI employee Stefanowicz as responsible for abuses at Abu Ghraib and for lying to him. TAC ¶¶ 83, 87; *see also* Ex. F (Taguba Report). Col. Henry Nelson, a trained psychologist who assisted Gen. Taguba's investigation of the Abu Ghraib abuse, concluded that a "collaboration" and "conspiracy of silence" to abuse detainees existed between the MPs and interrogators, including CACI civilian employees. TAC ¶ 84; *see also* Ex. F (Taguba Report) Annex 1. Maj. Gen. George R. Fay's investigation found that CACI employees, among others, had "responsibility or complicity in the abuses that occurred at Abu Ghraib." TAC ¶ 81; *see also* Ex. G (Fay Report) at 8. The Fay Report included at least five CACI employees, identified by pseudonym, but three of whom CACI admitted to be CACI employees Stefanowicz, Johnson, and Tim Dugan. Ex. G (Fay Report) at 63, 79, 82, 130-32, 134-35; Ex. K (Def.'s Resp. to Req. for Admissions) at Nos. 23, 24, 25.

[redacted] TAC ¶ 124; *see also* Ex. I (Beachner CID Statement); Ex. J (Beachner Dep.) at 18:8-20:5. Al-Ejaili was picked up solely because he was a credentialed reporter for Al-Jazeera, the Middle Eastern news service, Ex. D (Al-Ejaili Dep.) at 9:8-15, 10:5-11:1, and there is no evidence that Al-Ejaili was involved in any action hostile to the United States. Plaintiff Al-Ejaili identified Graner and Frederick as individuals who guarded him at the Hard Site. *Id.* at 63:8-64:7, 89:13-15, 96:16-19, 99:19-21, 155:7-17.

Al-Ejaili was stripped naked, subjected to extremes of temperature and hot and cold water, placed in stress positions, threatened with dogs, deprived of food, deprived of sleep, and repeatedly beaten. These were all "conditions" or methods of "softening up" ordered and endorsed by CACI employees for Hard Site detainees, according to Frederick and Graner. Ex. A (Frederick Dep.) at 80:12-82:9, 84:6-85:8, 125:10-25, 126:20-127:3, 127:14-130:3, 134:13-17,

181:20-182:15, 236:23-237:10; Ex. B (Graner Dep.) at 47:17-50:11. As described by Al-Ejaili in his deposition in this case, a photograph exists of him standing in a pool of his own vomit after being mistreated by Graner. Ex. D (Al-Ejaili Dep.) at 63:2-65:16, 68:2-18; *see also* Ex. L (Al-Ejaili Photo).

The other Plaintiffs—Al Shimari, Al Zuba'e and Rashid—also identified Frederick and Graner as men who hurt the detainees often and specifically mistreated them. TAC ¶¶ 121-122, 132, 134-135; *see also* Exs. M, N, O (Al Shimari Resp. Interrog.; Al Zuba'e Resp. Interrog.; Rashid Resp. Interrog.) at Nos. 7. Most acts of abuse of which the Plaintiffs complain took place outside of formal interrogation sessions, typically on the night shift in Tier 1A. TAC ¶ 78.

B. The CACI Contract Reserved Control of Employees to CACI

The terms of CACI's contract with the United States and other applicable rules placed civilian interrogators outside of the military command structure. The CACI Statement of Work annexed to its contract with the United States required CACI "to assist, supervise, coordinate, and monitor all aspects of interrogation activities," and stated that "[t]he Contractor is responsible for providing supervision for all contractor personnel." Ex. P (Delivery Order 35) at ¶ 5. Under this document, CACI had significant discretion to plan and execute interrogations. Because CACI was afforded significant discretion, the Statement of Work required CACI to hire managers who had knowledge of intelligence gathering and had sufficient security clearances to enable them to directly and independently supervise CACI interrogators. *See id.*; Ex. Q (Delivery Order 71) at ¶ 4.a.

C. CACI Established Its Own Reporting Lines and Control Structure

CACI employees at Abu Ghraib were, first and foremost, subject to the rules of their employer. CACI employees deployed to Iraq were subject to the same corporate policies and the same corporate Code of Conduct as employees in the United States. Ex. R (Monahan Dep.) at

64:20-65:24. Under that Code, CACI management maintained extensive control, including the right "to be the sole judge of the consistency and performance of employees," "to determine the means and name in which the business is to be conducted, including assignment of employees," and "to direct, supervise, control, and when it deems appropriate, discipline the work force." Ex. S (Porvaznik Dep.) at 192:15-193:3; Ex. T (CACI Code of Conduct) at 7-8.

Consistent with its Code, CACI established and implemented a chain of reporting lines back to the company that was separate from and independent of the military chain of command. Ex. S (Porvaznik Dep.) at 90:6-93:23. CACI "always put someone representing CACI in charge" at any location with CACI employees. Ex. U (Mudd Dep.) at 178:13-14; Ex. S (Porvaznik Dep.) at 234:12-235:21 ("Somebody had to be in charge" from CACI at each site in which CACI provided interrogators); Ex. Y (Billings Dep.) at 48:23-49:7. This structure consisted of an on-the-ground supervisor called a "Site Lead" and a country manager, both of whom were exclusively engaged in managerial responsibilities. *See* Ex. R (Monahan Dep.) at 117:9-19; Ex. S (Porvaznik Dep.) at 101:15-102:14; 109:19-110:6. The Site Lead held weekly meetings for CACI staff to discuss any issues. Ex. S (Porvaznik Dep.) at 152:6-152:20; Ex. U (Mudd Dep.) at 179:19-20. A CACI executive from Virginia also visited the site at least 17 times to ensure that CACI employees were performing properly. Ex. U (Mudd Dep.) at 67:2-24, 78:5-79:1, 178:11-18; Ex. R (Monahan Dep.) at 117:9-118:7. This management team served as a reporting chain back to the company. Ex. S (Porvaznik Dep.) at 90:18-93:23. CACI on-site management was in constant contact with CACI corporate in the United States. Ex. R (Monahan Dep.) at 67:3-9. CACI daily reports were sent up the CACI hierarchy "so they could keep a grip on what was happening" and were not shared with the military contracting officer representative. Ex. X (Northrop Dep.) at 188:15-188:22.

CACI executive Mudd testified that CACI employees did not have to take directions from military personnel; instead, "[t]hey took direction from the person that they're working for. If they did get direction from someone else, and they thought it was bad direction, they would take it to the Site Lead, and the Site Lead would work with the customer, get it worked out." Ex. U (Mudd Dep.) at 90:14-19. CACI personnel were directed to bring *all* issues to CACI management, not to the customer (*i.e.* the military). *Id.* at 200:16-204:14.

CACI interrogators at Abu Ghraib were not subject to military discipline:

> Contract employees are disciplined by the contractor through the terms of the employee and employer relationship. Employees may be disciplined for criminal conduct by their employer per the terms of their employment agreement . . . . Commanders have no penal authority to compel contractor personnel to perform their duties or to punish any acts of misconduct.[2]

While immune from military discipline, CACI employees were not free to ignore orders from CACI Site Leads. Ex. S (Porvaznik Dep.) at 185:1-14. CACI officials had the power to investigate allegations of prisoner abuse, to order it stopped, and to discipline violators among its employees without consulting the military. *Id.* at 142:23-144:6; Ex. X (Northrop Dep.) at 182:4-12; Ex. U (Mudd Dep.) at 172:12-174:6, 185:6-17, 223:3-224:22, Ex. Y (Billings Dep.) at 50:4-11, 88:13-17. CACI consistently dealt with disciplinary matters internally. Ex. U (Mudd Dep.) at 208:4-11.) [redacted] Ex. W (Brady Dep.) at 25:7-26:6.

Unlike soldiers, CACI employees had the unfettered ability to depart at will from the theater of war, Ex. S (Porvaznik Dep.) at 223:19-224:2; Ex. X (Northrop Dep.) at 40:11-41:3,

[2] *See* Ex. Z (Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations). This publication was prepared under the direction of the Chairman of the Joint Chiefs of Staff setting forth the "joint doctrine for the activities and performance of the Armed Forces of the United States in joint operations and provides the doctrinal basis for the conduct of joint logistics."

140:1-141:5, and at least one did just that when he was threatened by his co-workers for reporting to the Army their participation in prisoner abuse. Ex. AA (Nelson Dep.) at 54:7-62:3.

D. The Facts on the Ground: CACI Interrogators Were Not Controlled by the Military

These separate and distinct chains of command—military and civilian—existed on paper and in practice. Plaintiffs have collected abundant evidence that neither CACI employees nor military personnel at Abu Ghraib observed or believed that CACI interrogators were supervised by military officers. As CACI employees who were present at Abu Ghraib have testified, they understood that they were not required by law or contract to obey military orders.

CACI's control of its employees was not just administrative but extended to interrogations. CACI management at Abu Ghraib monitored how its employees' conducted interrogations. Ex. U (Mudd Dep.) at 106:2-107:6, 180:22-181:12, 183:9-185:4; Ex. S (Porvaznik Dep.) at 142:23-144:6. The CACI Site Lead at Abu Ghraib had full access, equal to that of high-ranking military personnel, to information and meetings concerning the conduct of interrogations. Ex. S (Porvaznik Dep.) at 157:2-158:19. As a general matter, CACI managers observed interrogations and reviewed reports and interrogation notes. *Id.* at 142:23-144:6, 151:23-152:13; 164:7-22. CACI interrogators would consult the Site Lead about how to conduct interrogations. *Id.* at 161:4-14. CACI interrogators would independently write interrogation plans based on their training, skill sets, and experience. *Id.* at 325:12-327:4. The CACI Site Lead had the ability to object to the contents of those plans and offer suggestions. *Id.* at 164:7-22. CACI interrogators were obligated to follow directions from the Site Lead concerning interrogations, and ignoring those directions or instructions would result in termination or other forms of discipline. *Id.* at 182:5-185:14.

Military officials, by contrast, did not personally supervise CACI interrogators during the conduct of interrogations. Ex. V (Daniels Decl.) at ¶ 5. One former CACI interrogator who worked at Abu Ghraib while Plaintiffs were imprisoned there stated that he was never told that he was required to follow orders from the military and that no military personnel directly supervised his conduct of an interrogation from an interrogation booth. Ex. OO (Nelson Decl.) at ¶¶ 5-8. [redacted] Ex. W (Brady Dep.) at 70:11-14. There was no formal system for the military to monitor contractor performance. *Id.* at 100:22-101:15.

Testimony from individuals who served in military intelligence at Abu Ghraib confirms that the military did not supervise CACI interrogators. For example, Col. Thomas Pappas—the highest-ranking military intelligence officer at Abu Ghraib—testified during a court martial proceeding that [redacted] He further testified that [redacted] Ex. PP (Pappas Testimony at Smith Court Martial) at 50:20-51:15. In a similar vein, Capt. Carolyn Wood, the Officer in Charge with the Joint Interrogation and Debriefing Center, testified to military investigators that [redacted] Ex. BB (Wood Statement to Fay-Jones) at 3-4; Ex. G (Fay Report) at 40, 52 (recounting Woods' testimony that CACI personnel "supervised" the military). Sgt. Teresa Adams, a military intelligence section leader at Abu Ghraib, testified [redacted] Ex. CC (Adams Statement to Fay-Jones). Col.

William Brady similarly testified that [redacted] Ex. W (Brady Dep.) at 62:1-63:24, 100:22-101:13. Warren Hernandez, a military analyst who served at Abu Ghraib, testified about interrogators, including CACI interrogators: [redacted] Ex. QQ (Hernandez Dep.) at 36:16-37:10.

The lack of supervision of CACI interrogators by military officers was symptomatic of the profound command vacuum that existed at Abu Ghraib, which ultimately enabled the abuses to occur. The findings of the report of Maj. Gens. Fay and Jones[3] could not be clearer:

> The leaders from 205th [Military Intelligence ("MI")] and 800th MP Brigades located at Abu Ghraib or with supervision over Abu Ghraib, failed to supervise subordinates or provide direct oversight of this important mission. The lack of command presence, particularly at night, was clear. Ex. H (Jones Report) at 17.
>
> At Abu Ghraib, the lack of an MI commander and chain of command precluded the coordination needed for effective operations. . . . At Abu Ghraib, the delineation of responsibilities seems to have been blurred when military police Soldiers, untrained in interrogation operations, were used to enable interrogations. *Id.* at 13.
>
> At Abu Ghraib, interrogation operations were also plagued by a lack of an organizational chain of command presence and by a lack of proper actions to establish standards and training by the senior leaders present. *Id.* at 17.
>
> In addition to individual criminal propensities, leadership failures and, multiple policies, many other factors contributed to the abuses occurring at Abu Ghraib, including: . . . [f]ailure to effectively screen, certify, and then integrate contractor interrogators/analysts/linguists. . . . *Id.* at 5-6.
>
> The general policy of not contracting for intelligence functions and services was designed in part to avoid many of the problems that eventually developed at Abu Ghraib, i.e., lack of oversight to insure that intelligence operations continued to fall within the law and the authorized chain of command, as well as the government's ability to oversee contract operations. Ex. G (Fay Report) at 49.

[3] These reports and the Taguba Report are admissible pursuant to Fed. R. Evid. 803(8).

> It is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib. *Id.* at 52.

The facts on the ground, as testified to by innumerable witnesses and found to be true by several senior Generals in their investigations, make a mockery of the "One Team, One Fight" sloganeering that CACI wraps itself in as its only defense.

E. CACI Interrogators Controlled the MPs

Largely as a result of the command vacuum, CACI interrogators exercised *de facto* control over MPs at Abu Ghraib. Military police at Abu Ghraib looked to CACI interrogators for guidance and followed their orders as they would those of a superior. One former Abu Ghraib MP testified that he [redacted] Ex. DD (Joyner Testimony at Smith Court Martial) at 22. Another MP, Frederick, testified that [redacted] Ex. A (Frederick Dep.) at 45:15-46:4; 66:22-25. He testified that [redacted] *Id.* at 70:15-18. Frederick testified that he took orders from CACI interrogators, *id.* at 111:10-14, and that [redacted] *Id.* at 81:11-19, 84:6-9. Frederick also testified that [redacted] *Id.* at 131:3-132:25. Other MPs testified that [redacted] Ex. B (Graner Dep.) at 40:20-24, 43:14-19; Ex. EE (Ambuhl Dep.) at 20:10-16. Thus, not only were CACI

interrogators *not* under the control of the military at Abu Ghraib—the inverse was true: junior military personnel, on a daily basis, were under the control of CACI interrogators.

F. Testimony of CACI's Military Officer Declarants Is Contradicted by Their Prior Inconsistent Statements and Admitted Lack of Personal Knowledge

CACI offers in support of its motion the declarations of two former military officers, Cols. Brady and Pappas. They each testify, in conclusory terms, that the CACI interrogators were under the control of the U.S. military. But these declarations, at most, testify to these officers' perceptions of the official command structure that, on paper, they believed to govern the conduct of the formal interrogation sessions. They say nothing about the actual "facts on the ground," particularly the interaction between CACI interrogators and MPs or the treatment of detainees in Tier 1A outside of formal interrogations. Indeed, as the declarants have previously admitted, they have no personal knowledge of those circumstances. Their testimony, moreover, is undercut by prior inconsistent statements and contrary testimony of other witnesses. These declarations are against the weight of the evidence; at most, they create issues of disputed fact that must be resolved by the trier of fact. *See* Argument Section I, *infra*.[4] The following presents just a sample of the evidentiary weaknesses in these declarations.

In his May 6, 2013 declaration, Col. Brady swears: "I also reviewed and approved changes in status for CACI PT screeners in those cases where a screener's duties were changed to instead perform work as an interrogator." O'Connor Decl. Ex. 2 at ¶ 3. That represents a remarkable recovery of memory. In his April 17, 2007 deposition, Col. Brady testified:

[4] The Brady and Pappas declarations were obtained by unusual means. Plaintiffs discovered by happenstance that the government had granted CACI *ex parte* access to these witnesses for the purpose of obtaining the declarations now submitted to this Court, when the government mentioned the declarations in a footnote to its brief in opposition to a motion by CACI to compel depositions of several other senior members of the military. *See* dkt. 285 at n. 2. Plaintiffs promptly filed *Touhy* requests with the Army for the depositions of these declarants. Ex. FF (4/11/2013 *Touhy* request letter), which the Army denied, Ex. GG (4/30/2013 response).

[redacted]

In his declaration, Col. Brady swears:

> During all relevant times, the civilian interrogators provided by CACI PT in support of the United States Army's mission at the theater interrogation site were under the supervision of military personnel from the military unit to which they were assigned to support under contract. For example, CACI PT interrogators serving at Abu Ghraib prison were directly supervised by the chain of command for the 205th Military Intelligence Brigade and Joint Interrogation and Debriefing Center ("JIDC").

O'Connor Decl. Ex. 2 at ¶ 4. But in his deposition, Col. Brady testified: [redacted] Ex. W (Brady Dep.) at 62:1-16. And, of course, Col. Brady's assertion in his declaration is contradicted by the findings of Maj. Gens. Fay and Jones. *See* Facts Sections A & D, *supra*.

Similarly, in his October 29, 2014 declaration, Col. Pappas swears:

> Exhibit 1, attached hereto is an organizational chart that shows the chain of command for the JIDC. It accurately reflects the fact that CACI PT interrogators were fully integrated into the Military Intelligence mission and operationally indistinguishable from their military counterparts. O'Connor Decl. Ex. 3 at ¶ 8.

But in a prior proceeding, Col. Pappas testified to the actual facts on the ground:

> [redacted] Ex. PP (Pappas Testimony at Smith Court Martial) at 50:20-51:15.

G. The Conduct Alleged by Plaintiffs Was Either Expressly Prohibited or Not Specifically Authorized by Governing Laws and Military Regulations

Under the CACI contract, CACI employees were obliged to act "IAW [in accordance with] Department of Defense, US Civil Code, and International Regulations." *See* Ex. P (Delivery Order 35) at ¶ 4; *see also* Ex. R (Monahan Dep.) at 87:22-24 (affirming that "CACI promised to provide the government only services rendered in a lawful manner"). Army Regulations prohibit "cruel and degrading treatment," Ex. HH (Army Reg. 190-8) at § 1-5(b), (c); any form of "physical torture or moral coercion" to obtain information, *id.*, § 5-1(a)(1); and "any other measure of brutality," *id.*, § 5-1(a)(6)(a) (incorporating to Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 31, 32, Aug. 12, 1949, 75 U.N.T.S. 287); s*ee also* Ex. II (Field Manual FM-34-52) at iv-v, 1-7 - 1-10, D-1. Federal criminal statutes further criminalize such acts in 18 U.S.C. § 2441 (defining "war crimes" as any "grave breach" under the Geneva Conventions of 1949, including "torture" and "inhuman treatment" under the Fourth Geneva Convention) and 18 U.S.C. §§ 2340-2340B (criminalizing as "'torture' any act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control").

The Geneva Conventions similarly prohibit torture and cruel, inhuman and degrading treatment, and serious violations of the conventions constitute war crimes. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 31, 32, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 17, Aug. 12, 1949, 75 U.N.T.S. 135. All CACI intelligence staff going to Iraq were briefed on Geneva Convention protections, Ex. S (Porvaznik Dep.) at 111:16-112:4, and [redacted] *See* Ex. NN

(JIDC Memorandum of Understanding). An order for a CACI employee to treat a detainee "in violation of the Geneva Conventions" would have been outside the scope of the CACI contract. Ex. R (Monahan Dep.) at 87:10-20.

Two separate IROEs were issued at Abu Ghraib during the relevant time period. While the first, issued on September 14, 2003, authorized interrogation techniques such as the use of military working dogs, stress positions and sleep management, the second, issued on October 12, 2003, removed authorization from those and certain other techniques. *Compare* Ex. JJ (CJTF-7 Interrogation and Counter-Resistance Policy ("IROE I")) at ¶¶ Y, Z, CC *with* Ex. KK (CJTF-7 Interrogation and Counter-Resistance Policy, enclosure 1 ("IROE II")).[5] In any event, the CACI Site Lead testified that he "would not have approved" an interrogation plan that included use of dogs. Ex. S (Porvaznik Dep.) at 166:3-167-2. And neither IROE ever authorized beatings, electric shocks, deprivation of food and water, sexual abuse, unmuzzled dogs, the stripping naked of detainees or other humiliations inflicted on Plaintiffs. *See generally* IROE I; IROE II.

ARGUMENT

I. ANY CONTESTED ISSUES OF JURISDICTIONAL FACT THAT ARE INTERTWINED WITH THE MERITS CANNOT BE RESOLVED AT THE MOTION-TO-DISMISS STAGE

A challenge under the PQD is a challenge to a court's subject matter jurisdiction to be resolved under Federal Rule of Civil Procedure 12(b)(1). *Al Shimari*, 758 F.3d at 531-32. The court may consider the pleadings as evidence on the issue as well as other evidence in the record. *Id*. The court, however, may not resolve factual disputes that are interwoven with a plaintiff's substantive claim: "[W]hen the jurisdictional facts and the facts central to a tort claim are inextricably intertwined, the trial court should ordinarily assume jurisdiction and proceed to the

[5] Only Plaintiff Rashid arrived at Abu Ghraib prior to the issuance of IROE II, *see* Ex. O (Rashid Interrog. Resp.) at No. 3; the remaining plaintiffs arrived in November 2003.

intertwined merits issues." *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009); *see also CBX Techs., Inc. v. GCC Techs., LLC*, 457 Fed. Appx. 299, 301 (4th Cir. 2011) (reversing dismissal under 12(b)(1) in a diversity breach-of-contract action because jurisdictional and merits facts were intertwined); *Adams v. Bain*, 697 F.2d 1213, 1220 (4th Cir. 1982) ("[T]he [jurisdictional] facts are so intertwined with the facts upon which the ultimate issues on the merits must be resolved, that 12(b)(1) is an inappropriate basis upon which to ground the dismissal."). Even where the merits and jurisdictional questions are "not identical," a court should not dismiss an action if the two are "so closely related that the jurisdictional issue is not suited for resolution in the context of a motion to dismiss." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999).

In such a situation, "the proper course of action . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits." *United States v. North Carolina*, 180 F.3d at 580 (citation and quotation marks omitted). The 12(b)(1) motion can then be treated as a motion for summary judgment under Rule 56(c). *See Kerns*, 585 F.3d at 193 n.6; *see also Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 239 (4th Cir. 1988).

As with summary judgment motions, disputed issues of material fact should be resolved at trial. *See Richmond, F. & P. R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (12(b)(1) motions are appropriate "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law"); *Havard v. Perdue Farms, Inc.*, 403 F. Supp. 2d 462, 464 n.1 (D. Md. 2005) ("But the law is settled that where jurisdictional facts are intertwined with legal issues material to the merits of a dispute, the Seventh Amendment right to a jury trial requires that such disputes be submitted to the jury."); c*f. Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("If satisfaction of an essential element of a claim for relief is at issue

[in resolving jurisdiction], however, the jury is the proper trier of contested facts."). The only exception to this rule is when the jurisdictional allegations are "clearly . . . immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous." *Kerns*, 585 F.3d at 193 (quoting *Bell v. Hood*, 327 U.S. 678 (1946)).

In this case, as the Fourth Circuit just recognized, "CACI's arguments are based on constitutional considerations and factual assertions that are intertwined in many respects." *Al Shimari*, 758 F.3d at 533. They are also closely intertwined with the merits of Plaintiffs' case. The existence of a command vacuum at Abu Ghraib, including the lack of oversight of CACI by military officials and CACI's control of the MPs, is dispositive of the jurisdictional issue of whether the military had plenary control over CACI. It is also central to Plaintiffs' theory of their case, as it was the lack of control by military officials that allowed the abuses to occur. Plaintiffs' conspiracy and aiding and abetting claims, for example, are in large part based on CACI's ordering of the MP guards to mistreat detainees. TAC ¶ 158, 222. The issue of control is thus inextricably woven into the merits of the case, namely the existence of the conspiracy, as well as the plenary control element of the PQD inquiry under *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402, 411 (4th Cir. 2011).

II. THIS CASE DOES NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

To determine whether a claim against a government contractor who performs services for the military presents a non-justiciable political question, the court must consider "(1) whether the government contractor was under the 'plenary' or 'direct' control of the military; and (2) whether national defense interests were 'closely intertwined' with military decisions governing the contractor's conduct, such that a decision on the merits of the claim 'would require the judiciary

to question actual, sensitive judgments made by the military.'" *Al Shimari*, 758 F.3d at 533-34 (quoting *Taylor*, 658 F.3d at 411). Neither requirement is met here.

A. CACI Was Not Under the Plenary or Direct Control of the Military

In *Al Shimari*, the Fourth Circuit directed this Court to consider evidence "regarding the extent to which military personnel *actually* exercised control over CACI employees in their performance of their interrogation functions," not just whether the military was formally or theoretically in control. 758 F.3d at 535 (emphasis added). The overwhelming weight of evidence collected in this case shows that the military did not exercise direct or plenary control over CACI, either in theory or in practice. The discretion given to CACI to conduct interrogations, the lack of actual military supervision of CACI personnel inside and outside of formal interrogations,[6] and the military's inability to discipline CACI personnel are all fatal to CACI's claim that the military exercised plenary or direct control over CACI.

The Fourth Circuit explained that "the critical issue with respect to the question of 'plenary' or 'direct' control is not whether the military 'exercised some level of oversight' over a contractor's activities. Instead, a court must inquire whether the military clearly 'chose how to carry out these tasks,' rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed." *Id.* at 534 (quoting *Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326, 339 (4th Cir. 2014)). In its brief, CACI calls *Taylor* and *Carmichael v. Kellogg, Brown & Root Service Inc.*, 572 F.3d 1271 (11th Cir. 2009), the "two guideposts for analysis of the 'plenary or direct control' test." CACI Br. at 16. CACI fails to mention *Harris v.*

[6] CACI claims that "military leadership at Abu Ghraib prison also monitored interrogations," but nothing that CACI cites supports this. CACI Br. at 12. Although Maj. Holmes testified that anyone could observe CACI interrogations through a one-way glass in the interrogation rooms, she never affirmatively stated that she or anyone else from military leadership monitored CACI interrogations. Ex. RR (Holmes Dep.) at 36:19-21 ("I can't say for sure.").

Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3d Cir. 2013), and *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007)—both cases endorsed and discussed by the Fourth Circuit, and both cases in which the court found no plenary control even where the military had provided the contractor defendants with some level of direction and oversight. The descriptions of control in these four cases are instructive and together they underscore the marked absence of plenary control in this case.

CACI's heavy reliance on *Carmichael* is remarkable given the categorical differences with Plaintiffs' case. In *Carmichael*, a soldier sued KBR for negligence after being injured when a truck driven by a KBR employee in a fuel safety convoy flipped over, and the Eleventh Circuit found a political question due to the military's plenary control over the contractor's activities. 572 F.3d at 1281-82. In that case, the military had near-absolute control over the convoy, including "the particular date and time for the convoy's departure; the speed at which the convoy was to travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken." *Id.*; *see also id.* at 1278 ("each vehicle [in the convoy] was instructed to follow in the tire tracks of the vehicle ahead of it"). The contractor had *no* discretion. According to the court, there was "not the slightest hint in the record suggesting that KBR played even the most minor role in making any of these essential decisions." *Id.* at 1282.[7]

In *Taylor*, by contrast, the Fourth Circuit found that the plaintiff's claims against KBR for negligently wiring military bases would be justiciable where the contract required KBR to "be

[7] In *Carmichael*—in contrast with the facts here—military officials were *present and supervising* the convoy when the conduct giving rise to liability occurred. *See* 572 F.3d at 1276 ("The [convoy] missions were led by a military convoy commander, or 'C-2,' in accordance with strict military regulations.").

responsible for the safety of employees and base camp residents during all contractor operations" and "have exclusive supervisory authority and responsibility over employees." *Taylor*, 658 F.3d at 411.[8] Similarly, in *Harris*, the Third Circuit rejected a PQD defense because "the lack of detailed instructions in the work orders and the lack of military involvement in completing authorized work orders" evidenced KBR's "significant discretion" in completing assignments. 724 F.3d at 467. And in *McMahon*, the Eleventh Circuit rejected the defendant's PQD defense because the plaintiff's allegations related to conduct by the contractor "for which [the contractor] retained residual responsibility under the terms of the [Statement of Work]" and because the defendant "ha[d] not shown that the military retained control or responsibility over the aspects of [the contractor's] operations that McMahon [was] challenging." 502 F.3d at 1361-62.[9]

In this case, as in *Taylor*, *Harris*, and *McMahon*, CACI was contractually obligated to supervise its own employees. CACI also established its own reporting lines and chain of command and retained the exclusive right to discipline its own employees. The legal significance of the lack of military plenary control is seen in the fact that the CACI employees were not subject to military discipline (court-martial), which is how the military enforces the ban on abusive treatment by its own soldiers.

The facts in this case are radically different from the facts in *Carmichael*, which is the only decision cited by CACI in which a court found that the plenary control test was met. CACI was given significant discretion—within the bounds of the law—in supervising its employees.

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[8] The Fourth Circuit dismissed the case on PQD grounds, but only because KBR's contributory negligence defense attributed fault to the military and thereby directly invited judicial scrutiny of military judgments. *Taylor*, 658 F.3d at 411-12. The Court found no plenary control. *Id.*

[9] The court in *McMahon* noted that McMahon was not "challenging, on any level, the military's ultimate decision to use private contractors to transport soldiers in Afghanistan. Rather, she is challenging the way in which [the contractor] performed the duties it was given by the military." 502 F.3d at 1361. The same is true for the Plaintiffs' claims here.

Although some CACI interrogation plans may have been reviewed by the military, CACI interrogators were not supervised by members of the military during interrogations. There is also no evidence that the military commanders controlled or even knew about the conduct of the CACI interrogators outside of formal interrogations—a critical fact issue the Fourth Circuit directed this Court to consider, since the Plaintiffs' allegations relate primarily to conduct that occurred at night and outside of formal interrogations. *Al Shimari*, 758 F.3d at 536. Moreover, CACI interrogators exploited their discretionary authority and the well-documented command vacuum at Abu Ghraib by assuming *de facto* positions of authority and instructing low-level military police personnel to abuse detainees. And, conclusively, nowhere does CACI assert that military commanders directed CACI interrogators or the MPs working with them to inflict the acts of abuse practiced on the Plaintiffs. Conspicuously absent from the record is any testimony from CACI's interrogator employees on this or any issue.

Finally, CACI mischaracterizes the D.C. Circuit's decision in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). The *Saleh* case concerned preemption of state law claims, not the PQD question at issue here. The preemption defense in *Saleh* turned on the degree of integration with which the contract employees were melded into a military mission, a different standard than the "plenary or direct control" required under *Taylor*. The D.C. Circuit's conclusion in *Saleh* that contract employees were "integrated and performing a common mission with the military under ultimate military command," *id.* at 6-7, falls short of suggesting plenary or direct control sufficient to support a political question defense. *See In re KBR, Inc.*, 925 F. Supp. 2d 752, 763 (D. Md. 2013) ("the military does not exercise 'control' over a contractor simply because the military orders a contractor to perform a certain service" (citing *Taylor*, 658 F.3d at 411)). The D.C. Circuit in *Saleh* also accepted and *affirmed* the district court's factual findings that

> [a]lthough CACI's employees were also integrated with military personnel and were within the chain of command, *they were nevertheless found to be subject to a "dual chain of command"* because the company retained the power to give "advice and feedback" to its employees and because interrogators were instructed to report abuses up both the company and military chains of command. The CACI site manager, moreover, said that he had authority to prohibit interrogations inconsistent with the company ethics policy, which the district court deemed to be evidence of "dual oversight."

580 F.3d at 4 (emphasis added).[10] The district court's factual finding that the military did not have exclusive control over CACI—accepted by the D.C. Circuit—is in itself sufficient to demonstrate the lack of plenary control required under *Taylor* in the PQD context.

B. Plaintiffs' Claims Can Be Resolved by Judicially Manageable Standards Without Questioning Discretionary Judgments of the Military

CACI's claim that the U.S. military authorized some of the techniques that form the basis of Plaintiffs' ATS and common law claims is both factually false and legally irrelevant to the PQD defense. It is factually false because there is no record evidence that the U.S. military authorized any, let alone all, of the abuses CACI and its co-conspirators caused Plaintiffs to suffer. It is legally irrelevant because U.S. government officials have no authority or discretion to order a violation of clearly established U.S. and international law. This is no doubt why the U.S. government *itself* has represented that Plaintiffs' torture-related claims can proceed, consistent with this Court's duty to enforce the federal government's statutory prohibition against torture, without implicating sensitive military judgments. Brief of United States as Amicus Curiae, *Al Shimari v. CACI International, Inc.*, No. 09-1335, 8 n.1, 9 (4th Cir. Jan. 14, 2012); *see also*

[10] This Court is not bound by the preemption analysis in *Saleh*, and Plaintiffs respectfully disagree with the D.C. Circuit's holding both as a matter of law and fact. *See, e.g.*, Ex. H (Jones Report) at 5-6 (blaming Abu Ghraib abuse in part on the "[f]ailure to effectively screen, certify, and then integrate contractor interrogators/analysts/linguists"). The preemption defense is not, however, before this Court.

McMahon, 502 F.3d at 1365 ("We have previously found the opinion of the United States significant in deciding whether a political question exists.").

In sum, Plaintiffs *accept* the judgment of Congress and the military that torture and abuse of detainees is impermissible, *see* Facts Section G, *supra*, and seek to *enforce* these judgments in this Court through traditional, cognizable causes of action.

1. Plaintiffs' Challenge to the Legality of CACI's Actions Does Not Implicate Discretionary Military Judgments

First, CACI can provide no factual support for its opaque suggestion that the U.S. military actually authorized the torture and abuse of Plaintiffs. They can point to no order, decree or document to demonstrate that the brutality Plaintiffs suffered was at the direction of U.S. military authority. The record suggests the reverse: in the command vacuum at Abu Ghraib, it was CACI interrogators, occupying positions of authority, who directed MPs to torture and abuse detainees. *See* Facts Sections A & E *supra*. Nor can CACI plausibly claim that any of the abusive techniques were generally authorized to be used against civilians in Abu Ghraib. The governing Geneva Conventions and the Army Field manual unambiguously prohibit "cruel and inhuman treatment," and numerous other categorical prohibitions on detainee abuse, all of which are incorporated by the IROEs and CACI's contract. *See* Facts Section G, *supra*. Moreover, there was unambiguously *no* authority to use electric shocks, deprivation of food and water, sexual abuse, unmuzzled dogs, the stripping naked of detainees or other humiliations inflicted on Plaintiffs. *See also* Ex. LL (Interrogation Rules of Engagement) (ordering that "detainees will NEVER be touched in a malicious or unwanted manner").[11]

[11] Even if there were some theoretical ambiguity about which techniques were generally authorized in Abu Ghraib, this could not excuse CACI's conduct. The Nuremburg trials, directed by the United States, demonstrated that "following orders" is no defense under U.S. or international law. *See also Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("[I]f [the

These clear prohibitions are no doubt why the U.S. military, including Defense Secretary Rumsfeld and President Bush, called for punishment for those who committed abuses at Abu Ghraib, and why *CACI co-conspirators*, Charles Graner and Ivan Frederick, were court martialed—and served years in prison—for carrying out abuses against detainees. It would be anomalous for government co-conspirators to face criminal liability while private co-conspirators—operating for profit—are given immunity from *civil* liability for their conduct.

Second, as a matter of law, the Court's adjudication of Plaintiffs' claims would not implicate any sensitive military judgments sufficient to raise a political question defense. *See Taylor*, 658 F.3d at 409 (court must "consider how [plaintiffs] might prove [their] claim"). Contrary to CACI's attempted obfuscation, resolving Plaintiffs' ATS and common law tort claims is a straightforward judicial exercise: it merely requires the Court to measure Plaintiffs' allegations against clear statutory provisions (*e.g.*, War Crimes, 18 U.S.C. § 2441; Torture, 18 U.S.C. § 2340-2340B) and common law standards. *See* dkt. 509 (Plaintiffs' Memo of Law Regarding Elements of ATS Claims) at 6-11. Where "judicial action [is] governed by *standard*, by *rule*," there is no political question. *Veith v. Jubelirer*, 541 U.S. 267, 278 (2004) (emphasis in original). Similarly, because these legal provisions provide "judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. 186, 217 (1962), and in no way implicate military judgment, expertise or discretion, this case represents nothing more than an application of the law to the facts. As the Supreme Court's most recent pronouncement on the PQD emphasizes, this process—even in the context of war or policy making—"is a familiar judicial

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defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense."). The defense makes even less sense for private military contractors who have no legal obligation to follow military commands. *See In re "Agent Orange" Product Liability Action*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005) ("If defendants were ordered to do an act illegal under international law they could have refused to do so.").

exercise," *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012), and courts cannot "avoid their responsibility merely 'because the issues have political implications.'" *Id*. (quoting *INS v. Chadha*, 462 U.S. 919 (1983)).[12]

This case is categorically distinct from cases like *Carmichael* and *Harris*, where the courts anticipated that discretionary judgments and expertise would be implicated in assessing the reasonableness of the defendant-contractors' behavior. First, in *Carmichael* and *Harris*, plaintiffs each asserted negligence claims; their adjudication would, based on the defendants' causation and contributory negligence defenses, draw the reasonableness of military judgments (to route a convoy, *Carmichael*, or to locate barracks in high-risk areas, *Harris*) directly into the case before the court. Unlike here, the court would have had to question those discretionary military judgments in order to allocate liability between defendant and the military.

In *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008), the court underscored this distinction between negligence torts—which can be barred because they might implicate the reasonableness of military judgments—and intentional torts, because the latter "allow causation to be proven under one tort doctrine without questioning the Army's role." *See Taylor*, 658 F.3d at 411 (quoting *Lane*, 529 F.3d at 561-62); *see also id.* at 410-11 (contrasting *Carmichael*, where "there were no judicially discoverable and manageable standards for resolving the dispute . . . because the claim was for KBR's negligence, the court had no way of assessing reasonableness in the context of military orders and regulations," with *Lane*, where "at least on the fraud and misrepresentation claims, jurisdiction was not necessarily barred by the political question

[12] *Compare Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex, subtle and professional decisions as to the composition, training, equipping and control of a military force are essentially military judgments").

doctrine"). Here, as in *Lane*, adjudication of Plaintiffs' intentional torts—based on statutory and common law criteria—will be independent of military judgment.

Any military judgments that might have been implicated in *Carmichael* and *Harris* (reasonableness of military convoy routes or barracks locations) are necessarily discretionary; and they are, on their face, *lawful*. Those cases would have required the court to question the wisdom and expertise of discretionary judgments subject only to military criteria—which courts are ill-equipped to second-guess. The two-prong *Taylor* test was made for legal conduct alleged to have been carried out tortiously, not for illegal conduct. Here, the military has no discretion to order torture, and this Court is in the familiar position of evaluating whether conduct violated statutory, military and international legal prohibitions; military judgment and expertise is irrelevant. The United States government shares this view. Brief of United States as Amicus Curiae, *Al Shimari v. CACI International, Inc.*, No. 09-1335, 8 n.1, 9 (4th Cir. Jan. 14, 2012).

2. Proving the Elements of Plaintiffs' ATS Claims Will Not Implicate Military Judgments.

In its Memorandum of Law on the Elements of Plaintiffs' ATS Claim, CACI twists international law beyond recognition, in order to suggest, incorrectly, that proving the elements of Plaintiffs claims might implicate political questions.

First, CACI argues that war crimes prohibitions are limited to the protection of "innocent civilians," suggesting that Plaintiffs' protection under international law depends on their being "innocent," that the military has already supposedly decided that they are not "innocent" of some unstated crime, and that Plaintiffs' claims would require the Court to question such a military determination. CACI is incorrect. Nothing in international law is more fundamental than that all individuals are protected from universally condemned torture and war crimes *regardless of their status*. *See, e.g.*, Fourth Geneva Convention Relative to the Protection of Civilian Persons in

Time of War art. 5, Aug. 12, 1949, 75 U.N.T.S. 287. The protections of the Fourth Geneva Convention apply to any individual who is "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" with no consideration of status as "innocent civilians." *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744 (D. Md. 2010) (citing Fourth Geneva Convention art. 4). The Supreme Court has likewise reaffirmed that Article 3, Common to all the Geneva Conventions, applies to all captive individuals regardless of status, and that "grave breaches" of Common Article 3 (which would include torture) are punishable as war crimes. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006). The suggestion that war crimes apply only to "innocent civilians," *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009)—relied upon by CACI—must be read in the distinguishable context of the targeting decisions at issue in the case: combatants are naturally not exempt from being targeted but, in contrast, all individuals who are *hors de combat*—soldier and civilian alike—are entitled to protection from the war crime of torture and cruel, inhuman and degrading treatment. *See, e.g.*, *Hamdan*, 548 U.S. at 629-30.

In any event, Plaintiffs *were* innocent "civilian internees," and are protected persons entitled to assert war crimes, even under CACI's strained reading of the Geneva Conventions. Defendant's continuing and unsubstantiated characterization of Plaintiffs as "enemy combatants" was fully and finally put to rest by the Fourth Circuit. *See Al Shimari*, 758 F.3d at 521 n. 2 ("The record does not contain any evidence that the Plaintiffs were designated 'enemy combatants' by the United States government. In fact, Defense Department documents in the record state that Plaintiff Al-Shimari "is not . . . an Enemy Combatant in the Global War on Terror").

Second, CACI argues that, to raise a claim of torture, Plaintiffs must demonstrate that a public official had "awareness of such activity and thereafter breach[ed] his or her legal

responsibility to intervene to prevent such activity." (CACI Br. at 21). This is not the law. The authorities upon which CACI relies actually go to determining whether a public official can be held responsible for private conduct, not the other way around. Plaintiffs need not demonstrate state acquiescence to torture; Plaintiffs' claims require showing that CACI acted under color of law. To show color of law, it is not necessary for plaintiffs to prove that the torture was committed in accordance with official state policy since torture cannot be lawfully ordered or directed by the government. *See* dkt. 509 (Plaintiffs' Memo of Law Regarding Elements of ATS Claims) at 4 (citing cases). Plaintiffs can show CACI acted under "color of law" through "'significant' state involvement," which may be in the form of "joint action" through a conspiracy; this is precisely what Plaintiffs allege here. *Howerton v. Gabica,* 708 F.2d 380, 382-83 (9th Cir. 1983) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

3. All Questions in this Case Are Subject to Judicially Manageable Standards

The *Taylor* test incorporates the requirement for "judicially discoverable and manageable standards." *Taylor,* 658 F.3d at 411. CACI misunderstands this requirement, which merely forecloses claims based on pure policy determinations. *See Baker v. Carr*, 369 U.S. at 226 (no political question where, among other factors, the appellants did not need to "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking"). Policy determinations not central to a plaintiff's claims are not implicated by this requirement.

First, CACI incorrectly asserts that "the classified nature of interrogator identities presents an unsurmountable obstacle for adjudicating this action." CACI Br. at 29. Plaintiffs' claims do not require disclosure of "the identity of the Plaintiffs' interrogators" or any assessment of the "techniques employed during their interrogations," *id.*, because their assertions that CACI employees are responsible for their injuries are not limited to abuses conducted during

assigned interrogations. CACI interrogators directed MPs to torture and otherwise seriously abuse detainees to "soften them up" for interrogations and that serious mistreatment took place outside of the interrogation rooms.

Moreover, any evidence documenting which interrogators were officially assigned to participate in the Plaintiffs' interrogations will not contradict Plaintiffs' conspiracy and aiding-and-abetting allegations or contradict evidence that conspirators subjected Plaintiffs to torture and cruel treatment outside of official interrogations. Plaintiffs can prove their conspiracy and aiding and abetting claims without demonstrating that CACI interrogators themselves abused these Plaintiffs. CACI is liable for the reasonably foreseeable harms (torture and abuse of detainees, including Plaintiffs) committed by co-conspirators (low-level military personnel), either in furtherance of a conspiracy (mistreating detainees at the Hard Site to "soften them up" for interrogation), *see, e.g.*, *United States v. Oliver*, 513 Fed. Appx. 311, 315 (4th Cir. 2013), or for which CACI provided substantial assistance, *see, e.g.*, *Aziz v. Alcolac, Inc*., 658 F.3d 388, 401 (4th Cir. 2011); *see also United States v. Shibin*, 722 F.3d 233, 242 (4th Cir. 2013) ("It is common in aiding-and-abetting cases for the facilitator to be geographically away from the scene of the crime.").

Indeed, contrary to its current position, CACI previously acknowledged that a conspiracy does not require any showing of a direct connection between CACI employees and Plaintiffs:

> A fundamental feature of conspiracy claims is that a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, *even if the defendant had no involvement with the actions that injured the plaintiff. Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co., Ltd.*, 682 F.3d 292, 313 n.10 (4th Cir. 2012).

See dkt. 222 at 11-12 (emphasis added). Finally, discovery revealed that CACI interrogators questioned detainees to whom they were not officially assigned. *See* Facts Section A, *supra*.

Second, while three Plaintiffs were unable to travel to the U.S. for depositions CACI Br. at 29-30 there are clear judicial standards for adjudicating this issue. Federal Rule of Civil Procedure 43(a) and Local Civil Rule 30(A) permit video depositions and trial testimony under compelling circumstances. *See Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977). This is a matter of efficient judicial administration, and does not imply the lack of "judicially manageable standards" that are of concern under the PQD.

CONCLUSION

In the words of Gen. David Petraeus: "What sets us apart from our enemies in this fight . . . is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also human beings." O'Connor Decl. Ex. 18. For all of the foregoing reasons, CACI's motion to dismiss under the PQD should be denied.

Respectfully submitted,

/s/ John Kenneth Zwerling

John Kenneth Zwerling (VA Bar #08201)
The Law Offices of John Kenneth Zwerling, P.C.
114 North Alfred Street
Alexandria, VA 22314
Tel. 703-684-8000 | jz@zwerling.com

Baher Azmy, *Admitted pro hac vice*
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Robert P. LoBue, *Admitted pro hac vice*
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

Shereef Hadi Akeel, *Admitted pro hac vice*
AKEEL & VALENTINE, P.C.
888 West Big Beaver Road
Troy, MI 48084-4736

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I electronically filed the Plaintiffs' Memorandum in Opposition To Defendant CACI Premier Technology's Motion to Dismiss through the CM/ECF system, which sends notification to counsel for Defendants.

/s/ John Kenneth Zwerling
John Kenneth Zwerling (VA Bar #08201)