15-1831

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN ARRAQ RASHID; SALAH HASAN NUSAIF AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellants,

—and—

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

—v.—

CACI PREMIER TECHNOLOGY, INC.,

Defendant-Appellee,

—and—

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

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

CORRECTED REPLY BRIEF FOR PLAINTIFFS-APPELLANTS [REDACTED]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

CACI contends that Plaintiffs' position on the political question doctrine ("PQD") represents a "plea [] for lawlessness," CACI Br. 46, even as it demands impunity from the universal legal prohibitions on torture and despite the criminal punishment imposed on several of CACI's co-conspirators. CACI's demand has no support in the law or the record.

First, CACI ignores critical legal facets of Plaintiffs' claims that preclude a political question determination. Unlike the negligence-based claims in *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011), and related cases, which could trigger judicial scrutiny of the reasonableness of discretionary military policy decisions, Plaintiffs' claims require application of the well-established *statutory* and universal common law prohibitions that limit military discretion. Under Supreme Court doctrine (and *Taylor*), the judiciary is constitutionally obligated to apply governing legal norms to facts before the court.

Second, like the District Court, CACI fails to answer the factual question mandated by this Court on remand: what was the extent of military control at night, "outside the context of required interrogations." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 536 (4th Cir. 2014) ("*Al Shimari II*"). Focusing exclusively on how formal military-contractor arrangements were *supposed* to work (but obviously failed given the well-documented atrocities at Abu Ghraib),

CACI leaves unrebutted the substantial record evidence demonstrating a command vacuum on the ground at Abu Ghraib, through which CACI interrogators took control of MPs and ordered detainee abuse of the kind Plaintiffs suffered here.

Third, despite CACI's request that this Court attribute the horrific abuses at Abu Ghraib to the decisions of the United States military, adjudicating Plaintiffs' claims will not implicate sensitive military judgments. There is *no* evidence that the U.S. military ordered or authorized these abuses and, as a matter of law, the District Court could not defer to military or contractor judgments taken in contravention of law, particularly where the standards for assessing the legality of CACI's action are codified in statutes and defined through judicial interpretation.

Finally, CACI's heavy focus on an asserted lack of direct interaction between CACI personnel and Plaintiffs, CACI Br. 2-4, 6-10, 54-56, is not only immaterial under the governing law of conspiracy, it surfaces, at most, a *merits* question irrelevant to this appeal.[1]

[1] As CACI itself conceded in earlier proceedings, conspiracy liability exists "even if the defendant had no involvement with the actions that injured the plaintiff." *See* Dkt. No. 222, at 11-12; *see also United States v. Oliver*, 513 Fed. App'x 311, 315 (4th Cir. 2013); *United States v. Shibin*, 722 F.3d 233, 242 (4th Cir. 2013).

ARGUMENT

I. CACI's INTERPRETATION OF THE PQD CONTRAVENES LIMITS SET BY *TAYLOR* AND THE SUPREME COURT.

Contrary to CACI's distortion of Plaintiffs' position, Plaintiffs do not argue that the District Court should have abandoned *Taylor*'s plenary control test on remand. CACI Br. 46. Rather, Plaintiffs argue that the court's "interpretation of the *Taylor* test" expands the PQD beyond *Taylor*'s logic and the constitutional boundaries set forth by the Supreme Court, Pl. Br. 31-32,[2] and Plaintiffs devote the remainder of their brief to demonstrating that any application of the *Taylor* test does not support dismissal on this record. Pl. Br. 9-25, 40-60; *see also* Br. Am. Cur. Constitutional Law Professors 7-8 ("while the District Court *quoted Taylor* correctly, it then proceeded to *apply* it in a manner deeply inconsistent with the narrowness and nuance upon which courts have insisted in other political question doctrine cases").[3]

CACI simply ignores the substantive reasons why the District Court's application of *Taylor* is inconsistent with the constitutional requirements of the

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[2] References to the Plaintiffs' brief are to the corrected brief filed October 9, 2015.

[3] In footnote 7, which CACI focuses exclusively upon, Plaintiffs suggest that this Court further clarify the *Taylor* test to ensure other district courts do not stretch it beyond constitutional parameters. Pl. Br. 34 n.7. This clarification would help ensure what a proper application of *Taylor* otherwise demands: the PQD would not cover intentional torts or statutory violations by contractors that do not call into question lawful, discretionary military decisions.

PQD. First, contrary to CACI's categorical view, courts cannot so indiscriminately frame the legal question as implicating the "conduct of war." CACI Br. 46. Courts must police the boundaries of justiciability more carefully. Claims that question the *wisdom* of *discretionary* military judgments may be beyond judicial cognizance. *See El Shifa Pharm. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (questioning reasonableness of military decision to mistakenly bomb a target); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (seeking injunction over military training and control over Ohio national guard responsible for Kent State killings).

But, claims that challenge the *legality* of military judgments are not. *See Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (rejecting adequacy of military administrative conclusions regarding status of Guantanamo detainees and ordering "meaningful" judicial review of legality of military detentions); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (rejecting military's composition of tribunals and requiring compliance with domestic legal requirements for military tribunals and with Geneva Conventions); *Gilligan*, 413 U.S. at 5 (recognizing availability of damages for legal violations by Ohio national guard); *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974) (affirming availability of "accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel" via damages and citing *Gilligan*); *see also Little v. Barreme*, 6 U.S. 170, 176-78 (1804) (upholding damages suit by foreign national against military captain for

ship seizure that exceeded congressional authorization); *Mitchell v. Harmony*, 54 U.S. (12 How) 115 (1851) (same).

CACI and the District Court err in lumping all "military decisions" together as a category, as if military discretion cannot be bounded by law. The Supreme Court has "long since made clear that a state of war is not a blank check for the President," *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), and while "core strategic matters of warmaking" may be beyond judicial review, questions involving "individual liberties" or legally cognizable wrongs require a "role for all three branches." *Id.*

Taylor and its progeny in no way disrupt this elementary constitutional distinction, as all of these PQD cases involved claims of *negligence* and, therefore, a possible judicial inquiry into a range of discretionary and facially legal military decisions, the *reasonableness* of which would turn on military—not legal—criteria. *See* Pl. Br. 47-50. *Taylor* does not contemplate or countenance contractor violations of established legal constraints, let alone constraints set forth in congressional enactments and *jus cogens* international law norms.

Ultimately, CACI offers no answer to this dispositive point: adjudication of Plaintiffs' claims will not require a court to opine on whether it was wise to use a particular interrogation technique (or indeed, contractors for interrogations). Rather, Plaintiffs ask the court to assess the legality of the abusive conduct by

CACI and its co-conspirators by comparing such conduct against statutory norms (embodied in the War Crimes Act and Torture Statute) and universal common-law criteria (via the Alien Tort Statute). As such, they "present[] purely legal issues such as whether the government had legal authority to act," which are always justiciable. *See El Shifa*, 607 F.2d at 842.[4] Indeed, the Supreme Court has *never* found a political question when the governing rule of decision turned on statutory obligations (a point CACI likewise ignores), *see* Pl. Br. 47-48, no doubt because the Executive Branch—and its contractors—are not above the law.

From its first political question decision to its most recent, the Supreme Court has emphatically stressed that it is the "province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and that application of a statutory right to factual allegations is "a familiar judicial exercise"—one that courts are constitutionally obligated to undertake. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

Taylor's plenary control test cannot and *need not* be read, as CACI and the District Court propose, to contravene these foundational constitutional principles.

[4] *See also* Br. Am. Cur. Constitutional Law Professors 8-9 (the "fundamental distinction" between this case and *Taylor* is "the complete absence of discretion on the part of the military or Appellees" to abuse detainees in violation of law).

II. THE MILITARY DID NOT EXERCISE DIRECT OR PLENARY CONTROL OVER CACI PERSONNEL'S ABUSIVE CONDUCT SO AS TO SATISFY *TAYLOR* PRONG ONE.

A. The Record Conclusively Demonstrates that the Military Lacked Plenary Control Over CACI Outside of Formal Interrogations.

In considering the application of *Taylor* Prong One's plenary control test, this Court stressed that evidence of conduct outside of formal interrogations "is particularly concerning given the Plaintiffs' allegations that '[m]ost of the abuse' occurred at night, and that the abuse was intended to 'soften up' the detainees for later interrogation." *Al Shimari II*, 758 F.3d at 536. Yet, as previously detailed, Pl. Br. 15, the District Court simply failed to abide by this Court's mandate to "determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations." *Al Shimari II*, 758 F.3d at 536.

CACI repeats the District Court's error and, by discussing only evidence of the formal command structure or lists and rules that were *intended* to govern conduct at Abu Ghraib (but which manifestly failed), CACI has effectively conceded the inquiry mandated on remand. It is undisputed that the military did not control CACI personnel during the time the abuses occurred and there is no evidence that the military *actually* directed the abuses, as CACI necessarily posits.

On this record, the Court should find that *Taylor* Prong One cannot be met.

1. The Undisputed Facts on the Ground Demonstrate an Absence of Military Control Over Abuses.

Plaintiffs' opening brief details the substantial record evidence demonstrating the absence of military control at Abu Ghraib "outside the context of required interrogations," *see* Pl. Br. 9-25, including undisputed evidence that: (i) the abuses Plaintiffs suffered occurred largely at night and frequently in the detention blocks, outside of formal interrogations, *id.* at 9-11, and (ii) a command vacuum existed on the ground at Abu Ghraib where the military did not supervise all CACI interrogators and was frequently unaware of which CACI interrogators were even present, *id.* at 16. Indeed, CACI does not attempt to rebut the substantial evidence—from two court-martialed co-conspirators of CACI—that it was CACI personnel [redacted] who gave orders to MPs and directed the MPs to abuse detainees in the manner Plaintiffs themselves suffered. *Id*. at 18-20.

Both the District Court and CACI ignore these facts on the ground—which indisputably demonstrate that the military did not exercise direct or plenary control over CACI personnel outside of formal interrogations.

Tellingly, CACI ignores the substantive findings of the Taguba and Fay-Jones reports, which reflect the results of military investigations and attribute responsibility to CACI employees for directing and participating in those abuses. *See* Pl. Br. 16-18. In a footnote, CACI contends that these reports are hearsay and

are "neither reliable nor admissible," without citation to authority. CACI Br. 9 n.7. CACI is mistaken. These reports are admissible public records that set out "factual findings from a legally authorized investigation," pursuant to Federal Rule of Evidence 803(8)(A)(iii).[5]

CACI argues that these reports "address only the *effectiveness*, and not the existence, of the military leadership." CACI Br. 43. That assertion actually proves that the reports are relevant to the point this Court directed the District Court to focus on: to understand not the formal structure of military leadership, but the extent to which "military personnel actually exercised control over CACI employees in their performance of their interrogation functions," particularly "outside the context of required interrogations." *Al Shimari II*, 758 F.3d at 535, 536.

Generals Taguba, Fay, and Jones found undisputed evidence of a command vacuum at Abu Ghraib, *despite* a formal command structure, which led to a lack of supervision, allowing CACI interrogators in turn to enable "sadistic, blatant,

[5] The Taguba and Fay-Jones Reports fall squarely within this hearsay exception. *See, e.g.*, *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988) (report from Navy officer's investigation is admissible); *Kennedy v. Joy Techs., Inc.*, 269 Fed. App'x 302 (4th Cir. 2008) (Mine Safety and Health Administration report investigating a mining accident is admissible).

wanton criminal abuses." A787-88 ¶ 78 (quoting Taguba Report). As explained in the opening brief, the military investigations found that military leaders "failed to supervise subordinates or provide direct oversight" and that "[t]he lack of command presence, particularly at night, was clear." A400 ¶ 8(f)(1); *see also* Pl. Br. 17-18 (detailing numerous other findings regarding command vacuum). These findings are corroborated by undisputed evidence that, in light of the command vacuum, CACI personnel assumed positions of authority over MPs and directed MPs to abuse detainees. Pl. Br. 18-20.

CACI has no response to these facts. Its rote recitation of the formal command structure should be given no weight in determining the actual military control when, according to these military investigations, "[i]t is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib," A368, and where evidence demonstrates CACI was in substantial control over the abuses that occurred there.

2. CACI Offers No Evidence that the Military Actually Controlled CACI on the Ground or Directed the Abuses.

No doubt recognizing that it lacks evidence to address the central question of control outside of formal interrogations, CACI simply attempts to slap a "facts on the ground" label onto evidence that relates only to military structure. CACI Br. 12-18. This lip service to the governing standard is insufficient, as the intended

design of the command structure CACI highlights does not account for failures in the practice of that command structure. It does not meet this Court's mandate.

For example, CACI repeatedly cites the military's Interrogation Rules of Engagement ("IROEs"), CACI Br. 10-11, but presents no evidence that interactions with detainees were conducted in accordance with the IROEs. That Plaintiffs experienced horrific abuses, including beatings, electric shocks, food and water deprivation, sexual abuse, unmuzzled dogs, being stripped naked and other humiliations not authorized by the IROEs—in addition to other well-documented incidents of detainee abuse at Abu Ghraib—demonstrates that the IROEs were not always followed. *See generally* A542-45; A550-51.

Likewise, CACI's claim that certain aggressive interrogation techniques were authorized under the IROEs and used prior to the arrival of CACI personnel, CACI Br. 11-12, 17-18, 53, is misleading. CACI acknowledges that two separate IROEs were issued during the relevant time period but ignores the fact that, while the first authorized certain aggressive interrogation techniques, the second—issued before three Plaintiffs were even brought to Abu Ghraib, and before almost all of the abuses suffered by Plaintiffs—removed all of those authorizations. *Compare* A545 ¶¶ Y, Z, CC, *with* A550-51. That Major Holmes "announced and explained the changes" via a PowerPoint slide, CACI Br. 17-18, addresses only the formal process, and not whether her instructions were followed outside required

interrogations. Ultimately, CACI offers no evidence that the military ordered or authorized any of the abuses suffered by Plaintiffs or others at Abu Ghraib.

CACI similarly explains that the military established "Tiger Teams" for interrogations, CACI Br. 10-11, and required interrogation plans for all interrogations, *id.* at 16, but does not address whether all interactions with detainees were conducted by the full Tiger Teams or whether these facts have any relevance to determining whether the Tiger Team process controlled the conduct of the CACI interrogators *outside the context of required interrogations*. There is ample evidence that it did not. [redacted] A797 ¶ 124; *see also* A1116; A1126-28, at 18:8-20:5. With respect to the interrogation plans, neither CACI nor the District Court addressed evidence that the military did not always supervise CACI interrogators, even during formal interrogations. *See* Pl. Br. 16. Nor is there any evidence that shows that interrogation plans were used outside of formal interrogations.

CACI's single assertion regarding military control outside of required interrogations falls flat. CACI Br. 18-21. Testimony from Major Holmes and Colonel Pappas states that they held CACI and military personnel to the same standards, including prohibitions on private firearms, alcohol, pornography, and gambling, and standards regarding timeliness and cleanliness. *Id.* Yet these

aspirational standards say nothing about what *actually* happened to detainees. Indeed, CACI ignores the critical point that the military lacked the ability to discipline CACI personnel, which was the exclusive prerogative of CACI. *See* Pl. Br. 12-13, 16; *see also* Br. Am. Cur. Retired Military Officers 2, 18-21. CACI also ignores evidence showing that it reserved parallel or exclusive control over the conduct of its own employees, necessarily diminishing the military's control over CACI personnel. *See* Pl. Br. 12-15.

In addition, Major Holmes testified that [redacted] A492-93, [redacted] A894-95. CACI also had the authority to prevent its personnel from engaging in abuse, even if that abuse had been ordered by the military—another fact inconsistent with plenary military control. For example, Porvaznik testified that he "would have voiced" objections to "any possible illegal or wrong[ful]" interrogation techniques included in CACI's interrogation plans. A1193-95.

Even within the context of formal relationships, CACI's control over its personnel was not "purely administrative," as CACI contends. For instance, Porvaznik testified that (1) unsatisfactory job performance went through CACI, not the military, A684; (2) CACI collected and monitored CACI interrogators' performance, A1197, at 168:3-22; (3) CACI had the authority to prevent the use of

certain interrogation techniques, A1203-05, at 183:3-185:14; and (4) CACI could stop any CACI interrogation if the Site Lead did not agree with the techniques being applied. A1195, at 166:13-23. Similarly, CACI employee Charles Mudd testified that if a CACI interrogator got "bad direction" from military personnel, "they would take it to the Site Lead, and the Site Lead would work with the customer, get it worked out." A1244; *see also* A1376 ¶¶ 5-6.

Regarding formal contractual arrangements, CACI misleadingly quotes the delivery orders under which it provided interrogators. CACI Br. 29-30. CACI (like the District Court) omits reference to language requiring CACI to "assist, supervise, coordinate, and monitor all aspects of interrogation activities," and providing that "[t]he Contractor is responsible for providing supervision for all contractor personnel." A444-46 ¶¶ 3, 5. Nor does CACI address governing military regulations that required civilian control over contractor-employees. *See* U.S. Dep't of the Army, *Field Manual 3-100.21 (100-21): Contractors on the Battlefield*, ¶ 1-22 (Jan. 2003) ("Commanders do not have direct control over contractors or their employees . . . ; only contractors manage, supervise, and give directions to their employees.").

CACI (and the District Court) relies heavily on declarations from Colonels Brady and Pappas. CACI Br. 12-24. Even setting aside the parties' dispute about their inconsistent testimony, *see* infra II.C, these declarations, like all of the

evidence cited by CACI, are simply characterizations of the official structure that was supposed to govern formal interrogations.[6] They do not address the critical inquiry for resolving the PQD: what happened "on the ground" at Abu Ghraib? Indeed, the findings from the Fay-Jones and Taguba investigations demonstrate that these declarants cannot reliably account for what happened on the ground. *See* Pl. Br. 17-18.

B. Under Governing Precedent the Military Lacked Sufficient Control Over CACI's Abuses to Satisfy the PQD.

The two guideposts for interpreting *Taylor* Prong One are *Taylor* itself and *Carmichael v. Kellogg, Brown & Root Service, Inc.*, 572 F.3d 1271 (11th Cir. 2009). Both demonstrate that the factual record does not support a finding of plenary control in this case. *See also Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013) (finding no plenary control despite military direction and oversight); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007) (same).

CACI's assertion that military control over CACI personnel in this case "was at least as plenary as that exercised by the military over the convoy drivers in

[6] While CACI attempts to drape itself in the flag by accusing Plaintiffs of calling Colonels Brady and Pappas liars, CACI Br. 21, it is CACI who is effectively calling these Colonels torturers. By using their declarations to prove that the military, including the Colonels themselves, *actually* controlled all conduct that occurred at Abu Ghraib, CACI is implying that the Colonels ordered and authorized the horrific abuses that occurred at Abu Ghraib.

Carmichael," defies reason. In *Carmichael*, the military specified, from beginning to end, *every* aspect of a fuel convoy (speed, distance, direction, timing, etc.) *and* was present and supervising when a contractor negligently drove off the road. 572 F.3d at 1281-82. The contractor had no discretion whatsoever, such that 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. Here, CACI had discretion to control its personnel within and outside the context of interrogations, and there is considerable, undisputed evidence of a command vacuum.

In *Taylor*, this Court found no plenary control based on contractual discretion nearly identical to that afforded CACI here. *See* Pl. Br. 44. The Third Circuit in *Harris* and Eleventh Circuit in *McMahon* reached similar conclusions. *Id*.

CACI also has no answer to the factual finding endorsed in *Saleh v. Titan*, 580 F.3d 1, 4 (D.C. Cir. 2009), that, unlike the private interpreters accompanying the military in Iraq, CACI was subject to a "dual chain of command" and that similar evidence as is on record here regarding CACI's control over its employees proved the existence of "dual oversight." *See* Pl. Br. 46. These findings demonstrate an absence of plenary control under *Taylor* Prong One.

Ultimately, there can be no plenary control under *Taylor* Prong One in light of (i) the undisputed military "command vacuum" that existed and the significant gaps in military control outside the context of formal interrogations, *see* Pl. Br. 42; (ii) unrebutted evidence that the relevant contract assigned some control and supervision responsibilities to CACI; (iii) unrebutted evidence that CACI had authority to supervise and discipline its own employees; and (iv) evidence that CACI had some discretion with respect to the conduct of interrogations. *See* Pl. Br. 11-15.

The Court should find on the conclusive record and relevant precedent that *Taylor* Prong One is not met.

C. At a Minimum, There Are Disputed Material Facts as to the Degree of Military Control over CACI.

Should the Court get past CACI's failure to address the dispositive evidence regarding the absence of military control outside of formal interrogations, the remainder of the record, when viewed as a whole, demonstrates that at the very least there are disputed material facts concerning the level of control that the military had over CACI employees.

CACI repeatedly accuses Plaintiffs of misrepresenting the record while it simultaneously claims that its own selective citations compel the conclusion that the military exercised plenary control. But in crafting its narrative, CACI ignores

numerous instances where witnesses gave testimony indicating that the military did not exercise plenary control over CACI employees even in formal interrogations.

For instance, CACI claims that Plaintiffs distort Colonel Pappas's testimony concerning the dual chain of command that applied to CACI interrogators. CACI Br. 21-22. However, CACI's block quotation omits the very next question, which asks Colonel Pappas if "good order and discipline" became "problematic" when dealing with contractors "because they were contractors and not soldiers." He responds: "Yes, certainly, when an issue came up arising from a contractor, *we had to work those off-site*," and while he could not specifically recall an issue with CACI, he acknowledged from his experience with another contractor that *"It was a different chain* – it was a different dilemma, in terms of getting them taken care of." A1382, at 51:9-15 (emphasis added).

CACI also contends that Plaintiffs misrepresent Colonel Brady's testimony concerning his knowledge of the supervision of interrogators, stating that Plaintiffs cite testimony about a CACI screener that "has nothing to do with interrogators." CACI Br. 22-23. But the record is not as CACI suggests. CACI states that Colonel Brady was "asked about a specific assertion that a CACI PT screener had supervised screening operations." CACI Br. 22-23. Yet Colonel Brady was being asked to respond to the statement of a sergeant that included the broader observation that "CACI employees were in a position of authority, and appeared to

be supervising government personnel." A1291, at 62:1-14. CACI also completely ignores the surrounding testimony cited by Plaintiffs where Colonel Brady denies any knowledge about other instances where CACI employees were referred to as "supervisors." *See* A1291-92, at 62:17-63:24.

CACI also accuses Plaintiffs of misrepresenting the record in arguing that military officials did not personally supervise CACI interrogators during interrogations. CACI Br. 23. Yet the record makes clear that there is at least a dispute on this issue. For example, while accusing Plaintiffs of "a striking lack of candor," CACI Br. 23, CACI ignores testimony from a former CACI interrogator who testified that he "never had any military personnel directly supervise [his] conduct of an interrogation in an interrogation booth." A1376 ¶ 7.

CACI asserts that the Holmes and Mudd depositions demonstrate that "military personnel regularly monitored interrogations." *Id.* However, Major Holmes testified that she only "occasionally" monitored interrogations and she could not "say for sure" whether she ever monitored an interrogation where there was a CACI interrogator. A895, at 36:17-23. Mr. Mudd stated in his deposition that he had only seen portions of some interrogations, A597, at 106:10-22, and emphasized that he was *not* testifying "that the military watched all of the interrogation[s]." A597, at 106:18-20.

Finally, CACI's contention that its site lead in Iraq was in charge of only administrative matters, *see* CACI Br. 25-27, is contradicted by ample evidence of a significant non-administrative, supervisory and operational role. *See supra* II.A.2; Pl. Br. 12-15 (discussing site lead Porvaznik's primary role in supervising, evaluating and disciplining CACI employees); *see also* A1202-03, at 182:15-183:18 (testifying that "a CACI interrogator would [not] have been free to ignore [his] direction" to refrain from conduct during an interrogation).

These disputed interpretations of the record highlight why the District Court should not have made factual findings on the merits of Plaintiffs' case on a motion to dismiss. No one disputes that the jurisdictional facts regarding control at Abu Ghraib are inextricably intertwined with those central to the merits. *See, e.g.*, *Al Shimari II*, 758 F.3d at 533 ("CACI's arguments are based on constitutional considerations and factual assertions that are intertwined in many respects."); Pl. Br. 27, 29; CACI Br. 48-9 (no response).

As this Court has repeatedly held, in such cases the dispositive jurisdictional facts can only be resolved in the same fashion as facts relevant to the merits—by summary judgment if they are not subject to dispute and at trial if they are. *See United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009); *Richmond, F. & P. R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991); *Adams v. Bain*, 697 F.2d 1213, 1220 (4th Cir. 1982). The rationale for this rule is

that such jurisdictional challenges are really indirect attacks on the merits—requiring the "procedural safeguards" afforded to merits disputes, including that the resolution of contested facts be decided at trial. *See Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009).

CACI and the District Court make the same mistake in interpreting this Court's mandate and opinion in *Kerns*. When this Court remanded this case for the District Court to "reexamine" whether Plaintiffs' claims were justiciable under a more developed factual record, *Al Shimari II*, 758 F. 3d at 537, necessary to the Court's instructions was that this reexamination be conducted according to standing Fourth Circuit precedent.

CACI confuses *Kerns*'s procedural posture with its holding. Despite the fact that jurisdictional discovery had not occurred in *Kerns*, it does not hold that courts can make a merits determination involving disputed material facts on a Rule 12(b)(1) motion so long as it comes after discovery—as that would be contrary to Fourth Circuit precedent. *See* Pl. Br. 39; *see also Lutfi v. United States*, 527 Fed. App'x 236, 242 (4th Cir. 2013) (where jurisdictional and merits issues were inextricably intertwined, "under *Kerns*, the district court should have assumed jurisdiction and decided this case on a motion for summary judgment").

III. ENFORCING STATUTORY AND UNIVERSAL INTERNATIONAL LAW PROHIBITIONS ON TORTURE AND ABUSE OF DETAINEES DOES NOT QUESTION ANY DISCRETIONARY MILITARY DECISIONS SO AS TO IMPLICATE *TAYLOR* PRONG TWO.

President Bush and Defense Secretary Rumsfeld called for accountability for the atrocities in Abu Ghraib, and both Houses of Congress recognized the abuse of detainees violated "policies, orders and laws of the United States and the United States military." *Al Shimari II*, 758 F.3d at 521 (quoting H.R. Res. 627, 108th Cong. (2004)). Numerous military personnel, including several of CACI's military co-conspirators, were court martialed for the breach of these legal duties. The United States government represented to this Court that Plaintiffs' claims grounded in the federal Torture Statute could proceed without compromising the government's interests. A671. Nevertheless, CACI presses, without more than speculation and vague generalizations, that adjudication of Plaintiffs' statutory and intentional tort claims would question military judgments—even after the completion of discovery has not implicated any sensitive military judgments.

The premise of CACI's argument is manufactured—and false. The wisdom or necessity of military choices to employ certain interrogation techniques is irrelevant to the resolution of Plaintiffs' claims. Congress, the military, and universal international law norms *have already* limited the military's choices by pronouncing that, effective or not, torture and cruel, inhuman, and degrading treatment are prohibited. The only question for the court is whether the abuses

suffered by Plaintiffs rise to the level of congressionally codified prohibitions under the Torture Statute, 18 U.S.C. § 2340(A), and the War Crimes Act, 18 U.S.C. § 2441, as well as universally recognized international legal norms sufficient to trigger jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. §1350.

As such, CACI does not have impunity from war crimes and torture claims even if, as CACI repeatedly stresses, "whether to approve [certain interrogation] methods was a military decision." CACI Br. 52. Even *if* the military made such a decision (for which there is no evidence in the record) the decision would have been unlawful, triggering a constitutional obligation to adjudge the illegality against well-established standards. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Zivotofsky*, 132 S. Ct. at 1427; *see also Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 720 (D. Md. 2010) ("the law of war [ ] places some limits on the wanton and malicious treatment of human lives"). Given these legal prohibitions, the only way CACI can avoid jurisdiction is if the War Crimes Act, the Torture Statute, and the Alien Tort Statute are somehow unconstitutional (an argument CACI does not and cannot make) or if the military and its corporate delegates are beyond legal constraint—a position CACI implicitly endorses, but which has no place in a constitutional republic. *See* Br. Am. Cur. Alberto Mora, Former General Counsel, U.S. Dep't of the Navy 6. Indeed, if

courts fail to carry out their duty to "apply only law" they "cease to be civil courts and become instruments of military policy." *Korematsu v. United States*, 323 U.S. 214, 247 (1944) (Jackson, J., dissenting).

CACI likewise fails to apprehend that contractor-PQD cases such as *Taylor*, *Carmichael*, and *Harris* are all aligned with this principle and underscore that Plaintiffs' claims are justiciable. Each of these cases involved *negligence* on the part of military decision-makers—claims which might require the court to question the *reasonableness* of that military decision. Yet the military decisions in question—where to locate a power generator (*Taylor*), where to locate military barracks in a conflict zone (*Harris*), or how to route a fuel convoy through a conflict zone (*Carmichael*)—were subject to a range of *lawful*, discretionary military choices and the reasonableness of the choices turn almost exclusively on military criteria, trade-offs, and risk assessments. There was no legal prohibition on any of those choices for the court to rely upon. *See* Pl. Br. 47-50. *Taylor*, *Carmichael*, and *Harris* recognize that the judiciary may not have authority to displace *bona fide* military discretion; they in no way contemplate that the military (and its contractors) would have discretion to avoid legal constraints imposed upon it.

In addition, as *Taylor* itself recognizes, PQD is inappropriate where the claims involved *intentional torts* as Plaintiffs allege here, rather than unintentional torts—a point CACI also ignores. Pl. Br. 50.

CACI and the District Court rely heavily on Judge Wilkerson's decision in *Wu Tien Li-Shou v. United States*, 777 F.3d 175 (4th Cir. 2015), but the case only reinforces the principle of deference to discretionary decisions by the military in the midst of conflict. CACI ignores Judge Wilkerson's decision in *Tiffany v. United States*, 931 F.3d 271, 273-75 (4th Cir. 1991), which acknowledged that the military would have had no lawful discretion and the PQD analysis would be different where a plaintiff argues that "the government violated any federal laws contained in either statutes or formal published regulations." *Id.* at 280.

Though it is not relevant to the legal analysis, it bears repeating that there is no evidence in the record that the United States military ordered or authorized the abuses Plaintiffs endured at Abu Ghraib. In fact, despite little more than insinuation and vague supposition,[7] CACI nowhere disputes the evidence that all of the abuses were specifically prohibited by the applicable Geneva Conventions, the Army Field Manual, and the governing Interrogation Rules of Engagement, *see* Pl.

[7] At most, CACI suggests that certain techniques "migrated" from Guantanamo to Abu Ghraib. CACI Br. 18. Whatever this vague term means, CACI cannot defend the legality of its actions or point to any U.S. military order, decree, or policy authorizing the use of such techniques in Abu Ghraib.

Br. 23-25, and that CACI personnel were contractually bound to abide by law and were briefed on the prohibitions of the Geneva Conventions. *Id*.

Finally, CACI suggests that this case requires judgment on the adequacy of the military's supervision of contractors, which it claims would be a political question. This argument was never pressed below and makes no sense. Plaintiffs have no negligent supervision claims—or negligence claims of any variety—against the military, nor in eight years of litigation has CACI ever asserted a contributory negligence claim against the military.[8] While the factual evidence of a command vacuum is relevant to explaining why there was an absence of plenary military control under *Taylor*, this is not the substantive ground for attributing liability in this case. If, as CACI suggests, judgment about the military's level of control is itself a political question, then the *Taylor* plenary control test collapses on itself.

IV. PLAINTIFFS' STATUTORY AND INTENTIONAL TORT CLAIMS CAN BE RESOLVED BY JUDICIALLY MANAGEABLE STANDARDS.

Beyond restating them, CACI makes no effort to defend the District Court's "frighteningly dangerous" conclusions that potentially hard or ambiguous judicial questions are beyond the competence of the courts. Br. Am. Cur. Constitutional

[8] Plaintiffs do assert negligence against CACI for negligent hiring and supervision, but the decision to hire and supervise CACI employees was CACI's alone under its contract, and does not implicate military decision-making.

Law Professors 14. Rather, it tosses out a range of technical questions relating to choice of law or discovery process, and imagines that these routine controversies are so grave that they deprive the court of jurisdiction. CACI's position fails.

A. CACI Does Not Dispute that Plaintiffs' Claims Are Governed by Established Statutory and Common Law Standards.

CACI makes *no* attempt to counter the wealth of authority cited by Plaintiffs and *amici* articulating judicially manageable standards for ATS claims of torture, cruel, inhuman, and degrading treatment ("CIDT"), and war crimes. *See* Pl. Br. 53-60. Courts have long found torture claims to be justiciable. *See*, *e.g.*, Br. Am. Cur. American Civil Liberties Union Foundation, Amnesty International, and Human Rights Watch (hereinafter "Am. Cur. ACLU") 7 (collecting cases); Br. Am. Cur. Abukar Hassan Ahmed, et al. 6-9 (same). CACI likewise fails to address the reasons why the Ninth Circuit's qualified immunity finding in *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) is irrelevant to the PQD analysis before the Court—*i.e.*, the competence of courts to determine whether conduct constitutes torture. Pl. Br. 56-57; *see also* Br. Am. Cur. ACLU 11. Moreover, the relevant inquiry is not whether individual interrogation techniques in the abstract amount to torture, but whether "the totality of the abuse and its impact on the victim" amounts to torture. *See* Br. Am. Cur. Alberto Mora 17-23.

Plaintiffs' CIDT claims are similarly justiciable. Pl. Br. 57-58; *see also* Br. Am. Cur. ACLU 7 (collecting cases); Br. Am. Cur. Abukar Hassan Ahmed 18-20

(same). Because Plaintiffs' claims rely on a *jus cogens* norm of customary international law that prohibits CIDT from which no derogation is permitted, *see Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012), the United States' assertions purportedly circumscribing its obligations under the Convention Against Torture are inapposite. *See* Pl. Br. 58-59; Br. Am. Cur. ACLU 4.

Finally, contrary to CACI's unsubstantiated assertion, Plaintiffs' war crimes claims do not require any "inquiry into whether [Plaintiffs are] civilians rather than insurgents." CACI Br. 60. A war crime is any "grave breach" of the Geneva Conventions, which protect all individuals *regardless* of their status, *i.e.* civilian or combatant. *See Hamdan*, 548 U.S. at 631-32; *see also* Br. Am. Cur. ACLU 17.

B. The Discovery Disputes and Choice of Law Questions CACI Raises Are Judicially Manageable.

CACI resurfaces from its last appeal a number of garden-variety discovery disputes, seeking again to transform them into constitutional questions. First, the identity of interrogators officially assigned to interrogate Plaintiffs is unnecessary to adjudicate Plaintiffs' claims that CACI interrogators directed others to torture and mistreat them. Nor can this information contradict the evidence that Plaintiffs were tortured outside of official interrogations or that CACI interrogators interrogated and directed the torture of detainees other than those to whom they were assigned. Even if interrogator information were relevant, judicially enforced limitations on access to this information would not transform this case into a

political question. *See also Al Shimari v. CACI*, 679 F.3d 205, 219 (4th Cir. 2012) (*en banc*) (identifying judicial mechanisms to "adequately safeguard military interests").[9]

Likewise, that three (of four) Plaintiffs were unable to travel to the United States for depositions does not make this case judicially unmanageable. *See* Fed. R. Civ. P. 43(a) (permitting video depositions and trial testimony under compelling circumstances); E.D. Va. Local R. 30(A) (same); *see also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977). Other than as a platform to continue to insinuate that Plaintiffs—who were innocent of any wrongdoing and never charged—are a threat, CACI fails to explain how this even raises a political question.[10]

Finally, CACI's attempt to transform a choice-of-law question (which, at most would apply to state law claims, not ATS claims) into a political question makes no sense. While Plaintiffs disagree with, and appealed, the District Court's

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[9] CACI baldly asserts that this case "involves state secrets," CACI Br. 61, but the United States government—to whom this justiciable, evidentiary privilege belongs—has never asserted the privilege in this case.

[10] This insinuation, which is irrelevant both to PQD analysis and the merits, has already been rejected by this Court. *Al Shimari II*, 758 F.3d at 521 n. 2. Plaintiffs' motions to compel discovery from both CACI and the Department of Homeland Security ("DHS") regarding any communications the two entities may have had concerning the Plaintiffs' peculiar inability to board their flights, given that they had received visas to travel to the United States, Dkt. Nos. 380, 392, had not been ruled on by the District Court before it dismissed this case.

choice of Iraqi law and its subsequent interpretation of CPA Order 17 as creating blanket immunity for contractors operating in Iraq, the District Court's adjudication of this issue demonstrates it is not a political question.[11]

* * *

Under these circumstances, the Court has a duty to act. These four victims of the atrocities at Abu Ghraib do not come to court to question military policy or necessity. They seek only the vindication that comes from judicial enforcement of the law. This is a straightforward but powerful demand which "signif[ies] about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order granting CACI's motion to dismiss Plaintiffs' ATS claims and Plaintiff Al Shimari's common law claims.

By /s/ *Baher Azmy*

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[11] The D.C. Circuit's decision in *Saleh*, 580 F.3d at 9, concerns preemption analysis, where federal interests in displacing state law claims are a relevant consideration; the analysis has nothing to do with whether there are standards to adjudicate Plaintiffs' ATS or state law claims under the PQD.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 6,885 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

By /s/ *Baher Azmy*

Baher Azmy

November 9, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing this brief to be filed electronically via this Court's CM/ECF system, which will automatically serve the following counsel of record:

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