No. 09-1335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

v.

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

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

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TABLE OF CONTENTS

Table of Contents…….....i
Table of Authorities…….....iv

I. Jurisdictional Statement.....1
II. Statement of the Issues.....2
III. Statement of the Case.....3
IV. Statement of the Facts.....4
A. Torture of Detainees.....5
B. Rules of Engagement.....8
V. Standard of Review.....9
VI. Summary of Argument.....9
VII. Argument……..…….....11
A. CACI is Not Entitled to Derivative Sovereign Immunity.....11
1. CACI's Appeal is Premature.....12
2. CACI's Cannot Meet the Prerequisites for Application of Derivative Sovereign Immunity.....19
3. There is No Public Interest in Granting a Government Contractor Engaging in War Crimes *Absolute* Immunity From Tort Lawsuits.....24
4. Multiple Public Interests Are Served by Permitting this Lawsuit to Proceed to Discovery.....30
5. The Law of Occupation Does Not Support CACI's Immunity Claim......37
B. This Court Should Not Exercise Pendent Appellate Jurisdiction.....40

1. The Detainees' Lawsuit Does Not Raise a Non-Justiciable Political Question 40
a. Damage claims are constitutionally committed to the judiciary 41
b. There are judicially discoverable and manageable standards 42
c. Detainees' claims do not require the Court to make policy decisions 46
d. The Court can adjudicate Detainees' claims without expressing any disrespect towards the Executive and Legislative branches 47
e. Detainees' claims do not challenge adherence to any political decision 48
f. Detainees' claims against torture do not contradict pronouncements by the Executive and Legislative branches 48
C. The Detainees' Claims Are Not Preempted 49
1. The Supreme Court Has Repeatedly Permitted Wartime Tort Claims to Proceed 50
2. Congress Has Never Extended Wartime Sovereign Immunity To Include Defense Contractors Providing Services in War Zones 54
a. The Supreme Court created a narrow judicial immunity from product liability lawsuits for weapons manufacturers in *Boyle v. United Technologies* 55
b. The "government contractor defense" does not preempt Detainees' claims 57

Conclusion……………………………………………………………………………………….59

TABLE OF AUTHORITIES

Cases

Abdullah v. American Airlines, Inc., 181 F.3d 363 (3rd Cir. 1999) 53

Abney v. United States, 431 U.S. 651, 662 n.8 2

Adams v. Alliant Techsystems Inc. 201 F. Supp. 2d 700 (W.D. Va. 2002) 16

American Insurance Association v. Garamendi, 539 U.S. 396 (2003) 51

Bailey v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993) 11, 50

Baker v. Carr, 369 U.S. 186 (1962) ..... passim

Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper of the U.S. Senate, 471 F.3d 1341 (D.C. Cir. 2006).....15

Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208 (4th Cir. 2002).....8

Baum v. United States, 986 F.2d 716 (4th Cir. 1993) 33

Bell Atlantic Corp, et al. v. Twombly, 550 U.S. 544 (2007).....10

Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486 (C.D. Cal. 1993).....16

Berkovitz v. United States, 486 U.S. 531 (1988) 45

Boumediene v. Bush, 128 S. Ct. 2229 (2008) 42

Boyle v. United States Technologies Corp., 487 U.S. 500 (1988)..... 28, 55

Butz v. Economu, 438 U.S. 478 (1978).....33

CACI Premier Technology, Inc. v. Rhodes, 536 F. 3d 280 (4th Cir. 2008)22, 23, 45

Carmichael v. Kellogg, Brown & Root Service, Inc. 572 F.3d 1271 (11th Cir. 2009).....17

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).....53

Clearfield Trust Co. v. United States 318 U.S. 363 (1943) 53

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 1

Converse v. Portsmouth Cotton Oil Refining Corp., 281 F. 981 (4th Cir. 1922) ... 16

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 14, 15

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 51, 52

Cunningham v. Hamilton County, 527 U.S. 198 (1999) 15

Dames & Moore v. Regan, 453 U.S. 654 (1981) 47

Densberger v. United Technologies Corp., 297 F.3d 66 (2d Cir. 2002) 11, 50

Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003) 43

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 16

Doe v. Exxon, 473 F.3d 345 (D.C. Cir. 2007) 40

Dow v. Johnson, 100 U.S. 158 (1879) 39

Dreher v. Budget Rent-A-Car System, Inc., 634 S.E.2d 324 (Va. 2006) 38

Feres v. United States, 340 U.S. 135 (1950) 54

Ford v. Surget, 97 U.S. 594 (1878) 27, 42, 50

Griggs v. WMATA, 232 F.3d 917 (D.C. Cir. 2000) 34

Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 47

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 47

Harris v. Kellogg, Brown & Root Service, Inc., 618 F. Supp.2d 400 (W.D. Pa. 2009) 17, 42

Hudgens v. Bell Helicopters, 328 F.3d 1329 (11th Cir. 2003) 57

Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005) 11, 50

Ibrahim v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007).....18

In Re XE Svcs. Alien Tort Litigation, 665 F.Supp.2d 569 (E.D.Va. 2009).....10

In re: Xe Services Alien Tort Litig., 695 F. Supp. 2d 569 (E.D. Va. 2009).....55

Iqbal v. Ashcroft, 129 S. Ct. 1937 (2009).....10

Jamison v. Wiley, 14 F.3d 222 (4th Cir. 1994) 15

Johnson v. United States, 170 F.2d 770 (9th Cir. 1948).....58

Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 937 F.2d 44 (2d Cir. 1991).....41

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992)..... 41, 43, 58, 59

Laber v. Harvey, 438 F.3d 404 (4th Cir.2006) (en banc) 10

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 20

Lessin, 2006 WL 3940556.....42

Linder v. Portocarrero, 963 F. 2d 332 (11th Cir. 1992).....42

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804)..... 38, 39, 42

Mangold v. Analytic Services, Inc., 77 F.3d 1442 (4th Cir. 1996) 12, 25, 26, 32

Martin v. Halliburton, 601 F.3d 381 (5th Cir. Mar. 23, 2010) 17, 18

McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007)..... passim

Medellin v. Texas, 552 U.S.491 (2008).....52

Medina v. United States, 259 F.3d 220 (4th Cir. 2001).....33

Medtronic, Inc. v. Lohr, 518 U.S.496 (1996).....53

Miree v. DeKalb County, 433 U.S. 25 (1977)..... 35, 53

Mitchell v. Forsyth, 472 U.S. 511 (1985)……34

Mitchell v. Harmony, 54 U.S. (12 How.) 115 (1851) 39

Mitchell v. Harmony, 54 U.S. 115 (1851)..... 27, 39, 42, 50

Mohawk Indus. v. Carpenter, 130 S. Ct. 599 (2009).....1

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 2

Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008).....34

Paquete Habana, 175 U.S. 677 (1900)..... 27, 39, 42, 51

Passaro, F.3d 207 (4th Cir. 2009)……21

Perkins v. United States, 55 F.3d 910 (4th Cir. 1995).....33

Plowman v. United States Dep't. of Army, 698 F.Supp. 627 (E.D.Va. 1988) 38

Presbyterian Church of Sudan v. Talisman, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) 46

Product Liability Action, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005).....24

Richardson v. McKnight, 521 U.S. 399 (1997).....36

Saleh v. Titan Corp, 580 F.3d 1 (D.C. Cir. 2009)..... 18, 52

Saucedo-Gonzales v. United States, 2007 WL 2319854 (W.D.Va. 2007).....33

Schrader v. Hercules, 489 F.Supp. 159 (W.D. Va. 1980) 16

Sciolino v. City of Newport News, 480 F.3d 642 (4th Cir.2007) 10

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984).....53

South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006).....15

Sterling v. Constantin, 287 U.S. 378 (1932).....43

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995).....15

Terry v. June, 420 F.Supp.2d 493 (W.D.Va. 2006).....38

United States v. Gaubert, 499 U.S. 315 (1991) 33

United States v. Head, 697 F.2d 1200 (4th Cir. 1982) 2

United States v. Passaro, 577 F.3d 207 (4th Cir. 2009)..... 19, 20, 58

Velasco v. Government of Indonesia, 370 F.3d 392 (4th Cir.2004) 9

Westfall v. Erwin, 484 U.S. 292 (1988) 32, 33

Will v. Hallock, 546 U.S. 345 (2006).....1

Williard v. Aetna Cas. & Sur. Co., 193 S.E.2d 776 (Va. 1973).....38

Yearsely v. W.A. Ross Construction Co., 309 U.S. 18 (1940) 12, 15

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 48

Statutes

10 U.S.C. § 801..... 43, 44

10 U.S.C. §881……..31

10 U.S.C. § 948a(1)(A) (2006) 31

10 U.S.C. § 950v.....44

18 U.S.C. §2340.....46

18 U.S.C. § 2340A..... 31, 43

18 U.S.C. § 2340A(a).....44

18 U.S.C. § 2441..... 31, 32, 44

22 U.S.C. § 2152.....44

22 U.S.C. § 2656.....44

28 U.S.C. § 1291.....1, 40

28 U.S.C. § 1346(b) 11, 54

28 U.S.C. § 1350 44

28 U.S.C. § 2671 24

28 U.S.C. § 2679 ..... 24, 27

28 U.S.C. § 2679(d)(1) 55

28 U.S.C. § 2680(a) 55, 56

42 U.S.C. § 2000dd 44

Rules and Regulations

Fed. R. App. P. 32(a)(5) 61

Fed. R. App. P. 32(a)(6) 61

Fed. R. App. P. 32(a)(7)(B) 61

Fed. R. Civ. P. 12(b)(6) 4, 8

Fed.R.Civ.P 15(a) 10

28 C.F.R. § 0.72 44

32 C.F.R. § 116 44

73 Fed. Reg. 16, 768 (Mar. 31, 2008) 28, 29, 35

73 Fed. Reg. 16764-16768 (Mar. 30, 2008) 9

Other Authorities

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1094) 37

International Covenant on Civil and Political Rights, S. Exec. Doc. No. 95 37

Jack Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1711 (1997).....52

I. JURISDICTIONAL STATEMENT

This Court lacks jurisdiction over CACI's appeal from the District Court's preliminary order denying absolute immunity.[1] Congress limited appellate jurisdiction to final, not interlocutory, decisions of the district courts. *See* 28 U.S.C. § 1291. There is a narrow judicially-created exception to this statutory rule set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), which permits review of orders that: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from the final judgment. As the Supreme Court held, "[t]his admonition [to keep the doctrine narrow] has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 609 (2009). *See also Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (holding conditions for collateral appeal are stringent, and must be kept so to prevent the doctrine from overwhelming the statutory finality requirement).

[1] Detainees' arguments regarding the lack of jurisdiction were set forth at some length in the motion to dismiss, and are only briefly reiterated here.

CACI seeks to invoke this Court's appellate jurisdiction on the ground that the District Court denied CACI, a private party, sovereign immunity. Although denials of sovereign immunity may be appealed under *Cohen*, the party seeking review of a denial must have a substantial immunity claim grounded in the Constitution, a statute or well-established common law principles. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742-43, 747-48 (1982); *see also Abney v. United States*, 431 U.S. 651, 662 n.8, *United States v. Head*, 697 F.2d 1200, 1204 (4th Cir. 1982). CACI cannot cite to any such substantial claim, seeking instead to persuade the Court to establish a novel absolute immunity. Because CACI's immunity claim lacks substance, this Court lacks jurisdiction.

II. STATEMENT OF THE ISSUES

First, does this Court have jurisdiction to review a non-final Order issued by a District Court merely because defense contractor CACI seeks a novel immunity that lacks any statutory, Constitutional or common law basis?

Second, if the Court accepts jurisdiction over the immunity issue (which Detainees submit it should not), should the Court:

(a) Bestow absolute immunity on a corporation that has failed to articulate any credible public interest served by immunity?

(b) Exercise supplemental jurisdiction and hear CACI's preemption and political question arguments before the parties have conducted any discovery?

III. STATEMENT OF THE CASE

On September 15, 2008, Detainees filed their Amended Complaint (hereinafter "Complaint"). JA.0016-0041.

On September 24, 2008, CACI filed a motion to stay discovery. JA.005. The Magistrate Judge granted this motion, and stayed discovery. JA.0010. To date, there has not been any discovery in this lawsuit.

On October 10, 2008, CACI filed a motion for partial summary judgment based on a statute of limitations argument. On November 25, 2008, the Court denied that motion. JA.0009-10.

On October 10, 2008, CACI filed a motion to dismiss Detainees' lawsuit. CACI did not append its contract with the government (the Interior Department) to the motion. On March 18, 2009, the Court granted in part and denied in part CACI's motion to dismiss. JA.0012.

The Court issued a 71-page Memorandum Opinion explaining its reasoning. JA.0403-0473. The District Court held that the lawsuit did not raise a nonjusticiable political question because "courts are wholly competent to resolve private actions between private parties, even where the defendant is a government

contractor." JA.0413. The Court's analysis of the political question doctrine is found at JA.0413-0428.

The Court preliminarily rejected CACI's argument that principles of derivative sovereign immunity required dismissal, holding that the necessary evidentiary record to support such an immunity was lacking. JA.0428. The Court's analysis of the immunity claim is found at JA.0428-0442.

The Court also rejected CACI's preemption claim based on the Federal Tort Claims Act's "combatant activities" exception. The Court "expresse[d] doubt as to whether Defendants' actions constituted combatant activities and [held] that, even if they did, Plaintiffs' claims are not preempted because they do not present uniquely federal interests, nor do they pose a significant conflict with state law." JA.0443. The Court's analysis of the preemption claims is found at JA.0442-0457.

The Court granted CACI's claim that the Alien Tort Statute ("ATS") claims failed to state a claim under Fed. R. Civ. P. 12(b)(6). JA.0457. The Court ruled that "ATS does not confer original jurisdiction over civil causes of action against government contractors under international law because such claims are fairly modern and therefore not sufficiently definite among the community of nations as required under *Sosa*." JA.0458. The Court's analysis of the ATS claims is found at JA.0457-71.

IV. STATEMENT OF THE FACTS

The Abu Ghraib prison gained international attention when pictures of Iraqi torture victims surfaced around the world, prompting considerable anger towards the United States. The photographs showed "naked detainees stacked in a pyramid; . . . two naked and hooded detainees, positioned as though one was performing oral sex on the other; . . . a naked male detainee with a female U.S. soldier pointing to his genitalia and giving a thumbs-up sign; . . . hooded detainee standing on a narrow box with electrical wires attaches to his head; [and]. . .dead detainee who had been badly beaten." JA.0408.

A. TORTURE OF DETAINEES

Plaintiff Suhail Najim Abdullah Al Shimari was imprisoned at Abu Ghraib for two months after being arrested in November 2003. Among the acts of torture he experienced at Abu Ghraib at the hands of CACI and its co-conspirators, Plaintiff Al Shimari was beaten, threatened with dogs, subjected to electric shocks, stripped naked, deprived of food and sleep and kept in a cage. He was released in March 2008 without ever being charged with a crime. JA.0017-29.

Plaintiff Taha Yaseen Arraq Rashid was imprisoned at Abu Ghraib for two months after being arrested in September 2003. Among the acts of torture he experienced at Abu Ghraib at the hands of CACI and its co-conspirators, Plaintiff

Rashid was forced to watch the rape of a female prisoner by conspirators. He was also tasered in the head, subjected to electric shocks and mock execution, hung from the ceiling by a rope tied around his head, beaten so badly that he experienced broken bones and loss of vision and hidden from the International Committee of the Red Cross during its visit to Abu Ghraib. Plaintiff Rashid was released in May 2005 without ever being charged with a crime. JA.0019-20.

Plaintiff Sa'ad Hamza Hantoosh Al Zuba'e was imprisoned at Abu Ghraib for one year after being arrested in November 2003. Among the acts of torture he experienced at Abu Ghraib at the hands of CACI and its co-conspirators, Plaintiff Zuba'e was repeatedly beaten, stripped, kept naked, subjected to extreme temperatures and to having cold water poured over his naked body, hooded and chained to the bars of his cell and imprisoned in a solitary cell in conditions of sensory deprivation for almost a full year. Plaintiff Zuba'e was released from Abu Ghraib in October 2004 without ever being charged with a crime. JA.0020-21.

Plaintiff Salah Hasan Nusaif Jasim Al-Ejaili was imprisoned at Abu Ghraib after being arrested on November 3, 2003. Among the acts of torture he experienced at Abu Ghraib at the hands of CACI and its co-conspirators, Plaintiff Al-Ejaili was beaten repeatedly, stripped and kept naked, subjected to extreme temperatures with both hot and cold water thrown on his naked body, placed in stress positions for extended periods of time, threatened with unleashed dogs and

deprived of food and sleep. Plaintiff Al-Ejaili was released from Abu Ghraib in February 2004 without ever being charged with a crime. JA.0021.

Plaintiffs Al Shimari, Rashid, Al Zuba'e and Al-Ejaili (hereafter collectively "Detainees") were all tortured by a group of persons working together, *i.e*. a conspiracy. JA.0021-23. One member of this conspiracy, a former military police officer named Charles Graner, is now serving a prison sentence at Fort Leavenworth. When interviewed by the United States military investigators after his conviction, Graner identified CACI employees Stefanowicz and Johnson as among the ringleaders in the Abu Ghraib torture scandal. JA.0016-17, JA.0021-22.

Detainees' Complaint expressly alleges Steven Stefanowicz (known as "Big Steve") and Daniel Johnson (known as "DJ") personally instigated, directed, participated in, and aided and abetted conduct towards Detainees that is in clear and direct violation of international and federal laws. JA.0016, JA.0021-27.

Detainees also obtained testimony from a former CACI colleague, and alleged CACI employee Timothy Dugan physically harmed Detainees and otherwise participated in the ongoing conspiracy to torture Detainees and other prisoners. JA.0021-25.

In addition to the direct physical contacts by Stefanowicz, Johnson and Dugan, Detainees allege CACI revealed its participation in the torture conspiracy

by several other means, including by establishing code words for specific types of torture. JA.0022. CACI tried to cover up its role in the torture conspiracy by destroying documents, videos and photographs. JA.0022-25. CACI also filed a frivolous lawsuit against a radio station seeking to stifle public debate on its participation in the Abu Ghraib scandal. JA.0024.[2]

B. RULES OF ENGAGEMENT

The grave misconduct by CACI employees violated United States law, the terms of CACI's contract and existing military's directives prohibiting torture. JA.0025-27. Among other things, CACI's misconduct violated the military's "Interrogation Rules of Engagement (IROE)" in effect at Abu Ghraib prison. These rules are appended as JA.0118 and state (with emphasis in original):

> "Detainees will NEVER be touched in a malicious or unwanted manner."
>
> "The Geneva Conventions apply with CJTF-7."
>
> "Approaches must always be humane and lawful.
>
> "Everyone is responsible for ensuring compliance to the IROE."

[2] CACI sued a radio commentator who criticized the role that CACI employees played in the Abu Ghraib abuse. After discovery, the District Court (J. Lee) granted summary judgment in favor of the Defendant radio commentator on summary judgment. CACI appealed that ruling to this Court, which upheld the District Court (J. Lee). See *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008), upholding the District Court decision, 2006 U.S. Distr. LEXIS 96057 (E.D. Va. 2006).

"Violations must be reported immediately to the OIC [Officer in Charge]." Id. JA.0118.

V. STANDARD OF REVIEW

This Court reviews the District Court's order discovery for abuse of discretion. *See Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208, 216 n.3 (4th Cir. 2002) ("the decision of whether or not to permit jurisdictional discovery is a matter committed to the sound discretion of the district court") (citing *Cent. States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988)). It reviews any findings of jurisdictional fact for clear error. *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004).

VI. SUMMARY OF ARGUMENT

CACI and *amici* KBR urge this Court to create a novel *absolute* immunity for defense contractors supporting the United States military in contingency operations. CACI and KBR urge that this Court bestow this absolute immunity without regard to whether the contractor abided by United States laws and complied with its contractual duties to the United States. Congress and the Executive have uniformly rejected defense contractors' pleas for such absolute

immunity from lawsuits.[3] This Court should also reject the defense contractors' appeal and request, as hearing the appeal and granting the requested immunity would contradict well-established Supreme Court and Fourth Circuit jurisprudence. See below, Section VII. A.

Nor should this Court exercise supplemental jurisdiction to review the District Court's preliminary rulings on the political question doctrine and preemption. As explained below in Section VII. B.1 this lawsuit raises justiciable claims well within the Judiciary's power to adjudicate. As explained below in Section B.2, CACI lacks the requisite factual record to support its invocation of the "government contractors' defense."

CACI cites *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp, et al. v. Twombly*, 550 U.S. 544 (2007), and argues Detainees' claims lack plausibility, an argument the District Court rejected for the reasons set forth at JA.0464-71. Detainees are confident their Complaint complies with the pleadings standards, and do not brief that issue here. If this Court disagrees, Detainees stand ready to amend their Complaint with further details drawn from documentary and testamentary evidence provided by military and former CACI employees. *See* Fed. R. Civ. P 15(a); *Sciolino v. City of Newport News*, 480 F.3d 642, 651 (4th Cir.

[3] *See* Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 -2680; and Defense Federal Acquisition Regulation Supplement, 73 Fed. Reg. 16764-16768 (Mar. 30, 2008).

2007); *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (*en banc*) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)); *In Re XE Svcs. Alien Tort Litigation*, 665 F. Supp. 2d 569, 591-92 (E.D.Va. 2009).

VII. ARGUMENT

A. CACI IS NOT ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY.

CACI advances a theory of absolute derivative sovereign immunity that would immunize defense contractors supporting the United States military in contingency operations from lawsuits. *See* CACI Brief at 16-24. The courts, the Congress and the Executive, however, have all rejected defense contractors' pleas for such absolute immunity. This Court should do likewise. Whether the doctrine of derivative sovereign immunity applies is a fact-specific inquiry, requiring analysis of, amongst other things, the scope of the contract under which the defense contractor was operating, whether the defense contractor was in compliance with the contract, and whether the conduct of the defense contractor was lawful. When CACI's conduct is viewed in this context, as it must be, it is clear that CACI is not entitled to immunity. In any event and at a minimum, given the lack of any evidentiary record whatsoever before the District Court or this Court, any such determination is premature.

1. CACI's Appeal Is Premature.

Derivative sovereign immunity has its roots in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and is an affirmative defense. *McMahon v. Presidential Airways, Inc*., 502 F.3d 1331, 1354 (11th Cir. 2007); *Densberger v. United Technologies Corp*., 297 F.3d 66, 69 (2d Cir. 2002); *Bailey v. McDonnell Douglas Corp*., 989 F.2d 794, 802 (5th Cir. 1993); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 17-18 (D.D.C. 2005). Specifically, derivative sovereign immunity provides that a government contractor's actions will be immunized from liability where the contractor is acting pursuant to authority "validly conferred" and the government contractors' actions are within and consistent with that conferred authority. *See Yearsely v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940) ("[i]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for exercising its will. . . . Where an agent or officer of the Government purporting to act on its behalf has been held liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred."); *accord Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1446-47 (4th Cir. 1996) (immunizing conduct for "exercising discretion while acting within the scope of

their employment," but "only to the extent that the public benefits obtained by granting immunity outweigh its costs").

CACI is appealing the District Court's denial *without prejudice* of a motion to dismiss on grounds of derivative sovereign immunity. In fact, in its Memorandum Opinion, the District Court expressly reserved the option to grant CACI such immunity at a later stage in the proceedings, holding, "Defendants are not entitled to immunity ***at the dismissal stage*** because discovery is necessary to determine both the extent of Defendants' discretion in interaction with detainees and to weigh the costs and benefits of granting Defendants immunity in this case." *See* JA.404 (emphasis added). The District Court analyzed CACI's immunity argument at length, *see* JA. 428-442, but found the necessary evidentiary record lacking. *See* JA.0434.

In particular, the District Court explained it could not rule without reviewing the underlying contract, which is the source for any form of immunity enjoyed by CACI. *See* JA.436. The District Court found it "cannot determine the scope of the Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place." *See* JA.0428-429; *see also* JA.0431 ("The Court has insufficient information at this stage in the litigation to conclude that Defendants had either the authority to

exercise discretion in how they conducted interrogations or that they did so within the scope of their government contract."). The District Court expressly spelled out why discovery is needed:

> The Court is completely bewildered as to how Defendants expect the Court to accept this scope of contract argument when the contract is not before the Court on this motion. There are many ways in which discovery will answer unresolved questions that must be answered before the Court can reasonably determine whether Defendants are entitled to immunity. For example, Defendants' contract with the government will shed much light on the responsibilities, limitations and expectations that Defendants were bound to honor as government contractors. In addition, consideration of Defendants' course of dealing with the government may also reveal whether deviations from the contract occurred and, if so, whether they were tolerated or ratified. The scope of Defendants' contract is thus an open issue that requires discovery.

See JA.0436.

While the District Court expressed skepticism about whether CACI would be able to prove its assertion that the United States military authorized CACI employees to torture detainees -- particularly in light of the United States military's own statements to the contrary -- the District Court reserved the right to grant CACI immunity if CACI is able to develop a record to support its factual assertions about being ordered to torture by the military. *See, e.g.*, JA.0433 (stating "[a]lthough the Court agrees with Defendants that the mere allegation of serious abuse does not automatically strip Defendants of any immunity to which they might otherwise be entitled, the Court is unpersuaded ***at this early stage of***

proceedings and in light of a very limited factual record that Defendants performed a discretionary function entitling them to absolute immunity.") (emphasis added). Such a record, however, was not currently before the District Court and likewise is not before this Court.

In such circumstances, Supreme Court and Fourth Circuit jurisprudence controls, and prevents this Court from exercising jurisdiction over CACI's premature appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (collateral review not appropriate where district court decision is "subject to revision"); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (collateral review not appropriate where district court's decision is tentative, informal, incomplete, or otherwise subject to reconsideration); *Jamison v. Wiley*, 14 F.3d 222, 230 (4th Cir. 1994) (district court decision not sufficiently final under collateral order doctrine where prospect of reconsideration and alteration is held open by the district court itself); *see also Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper of the U.S. Senate*, 471 F.3d 1341, 1344 (D.C. Cir. 2006) (holding "[t]he final judgment rule . . . relieves appellate courts from the immediate consideration of questions that might later be rendered moot"). *See also Cunningham v. Hamilton County*, 527 U.S. 198, 206 (1999) (collateral order review not appropriate where "an inquiry would differ only marginally from an inquiry into the merits"); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12

(1978) (collateral review not appropriate where review involves questions of law or fact common to merits); *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006) (same).

Simply put, the arguments advanced by CACI (and KBR) do not suffice to overcome an essential predicate: any immunity CACI might enjoy flows from and is defined by the terms of its contract with the United States. *See, e.g., Yearsely*, 309 U.S. at 20-21. Immunity is intended to protect the United States, not any private party. This is in line with precedents by federal courts in this Circuit. Thus, discovery is needed before the District Court or this Court is able to make a reasoned decision. *See Schrader v. Hercules*, 489 F. Supp. 159 (W.D. Va. 1980) ("Unlike the sovereign, however, a third party may not set up the sovereign immunity defense in bar of suit. Rather, it is a defense which must be established on summary judgment or at trial by demonstrating that plaintiff's injury occurred solely by reason of carrying out the sovereign's will.") (citing *Converse v. Portsmouth Cotton Oil Refining Corp.*, 281 F. 981 (4th Cir. 1922)). *See also Adams v. Alliant Techsystems Inc.* 201 F. Supp. 2d 700 (W.D. Va. 2002).

While many private parties (such as CACI here) claim immunity should entitle them to avoid discovery, the Supreme Court has cautioned the "jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in so characterizing the right asserted." *Digital Equipment Corp. v. Desktop Direct,*

Inc., 511 U.S. 863, 871-72 (1994). The Supreme Court has instructed the lower courts "to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *See Digital Equipment Corp.*, 511 U.S. at 873. For that reason, with rare exception,[4] the federal courts confronting derivative sovereign immunity arguments by defense contractors have required discovery to proceed before issuing definitive rulings. *See Carmichael v. Kellogg, Brown & Root Service, Inc.* 572 F.3d 1271 (11th Cir. 2009); *see also Harris v. Kellogg*, Brown & Root Service, Inc., 618 F. Supp.2d 400 (W.D. Pa. 2009*); McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1359 (11th Cir. 2007).[5]

The Court of Appeals for the Fifth Circuit confronted an identical procedural situation in an appeal brought by Halliburton (corporate parent to KBR, the *amici* here) in *Martin v. Halliburton*, 601 F.3d 381 (5th Cir. 2010). There, the Fifth Circuit held that Halliburton was not entitled to immediate interlocutory appeal of

[4] The exceptions are those in which the United States itself has intervened to support the immunity claim because discovery would intrude on classified information. *Bentzlin v. Hughes Aircraft Co.,* 833 F. Supp. 1486 (C.D. Cal. 1993). In stark contrast here, the United States did not intervene in the *Saleh* matter, and it did not intervene here.

[5] In May 2010, the Solicitor General for the United States filed an *amicus curiae* brief regarding a petition for certiorari before the Supreme Court, No. 09-683 arising from the Eleventh Circuit's ruling in *Carmichael v. Kellogg, Brown & Root Service, Inc.* 572 F.3d 1271 (11th Cir. 2009). Although the Solicitor General thought the Supreme Court should decline certiorari until more circuits had weighed in, the United States expressed significant reservations about the Eleventh Circuit's application of the political question doctrine.

the district court's preliminary refusal to dismiss on derivative sovereign immunity and political question grounds. The Fifth Circuit found that the district court had properly denied the motion and permitted discovery to proceed, as a record was needed in order to rule on the arguments. The Fifth Circuit explained that Halliburton's reliance on *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007) ("*Ibrahim II*") and *Saleh v. Titan Corp*, 580 F.3d 1, 7 (D.C. Cir. 2009), *petition for certiorari* filed April 26, 2010, No. 09-13131, as support for its absolute immunity argument was unsound because "[i]n those cases, the courts relied "upon the facts obtained through the discovery process. . . . Here, by contrast, we are confronted with circumstances comparable to those present in *Ibrahim I—a record too scant to permit an informed decision about the applicability of preemption under the combatant activities exception. . . ." See Martin*, 601 F.3d at 392 (emphasis added). The Fifth Circuit dismissed for lack of appellate jurisdiction, finding that Halliburton could not make the "substantial" showing of immunity needed for an immediate appeal in the absence of an evidentiary record. *See Martin*, 601 F.3d at 389.

Here, where Detainees allege misconduct that constitutes war crimes, there is an even more compelling need for discovery. This Court, bound by the same Supreme Court jurisprudence on collateral appeal as the Fifth Circuit, should likewise refrain from exercising appellate jurisdiction.

2. CACI Cannot Meet the Prerequisites for Application of Derivative Sovereign Immunity.

As explained above, nothing in the law supports the proposition that there is an absolute derivative sovereign immunity for CACI and other defense contractors supporting the United States military in contingency operations. Rather, the analysis focuses on scope of the contract under which the defense contractor was operating, whether the defense contractor was in compliance with the contract, and whether the conduct of the defense contractor was lawful. If, despite Detainees' claim that appeal of this issue in not ripe, this Court nonetheless hears CACI's appeal on the merits, it should rule that CACI cannot be immunized from lawsuits arising from its employees' torture of detainees under the derivative sovereign immunity doctrine.

In support of its claim of derivative sovereign immunity, CACI argues (without any support from record evidence) that (1) CACI was conducting "battlefield interrogations," *see* CACI Brief at 13; (2) the United States delegated to CACI the authority to conduct such battlefield interrogations by contract, *see* CACI Brief at 13; and (3) CACI employees engaged in a contractually-delegated governmental function when they engaged in torturing the detainees, *see* CACI Brief at 18. CACI's assertions do not stand up to scrutiny.

First, the torturing of detainees does not constitute the function of "battlefield interrogation." This Court has already considered and rejected the very same argument being made by CACI here. In *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), this Court ruled that torture cannot be considered as conduct falling within the battlefield interrogation function. There, a civilian contractor was being prosecuted for brutally beating and kicking a detainee during an interrogation at Asadabad Firebase, a U.S. Army outpost in Afghanistan.[6] The civilian contractor claimed, as CACI does here, that he was protected by the political question doctrine because he was interrogating a detainee on behalf of the military.

The Court ruled that abusing detainees cannot be considered as within the battlefield interrogation function. As the Court explained, "[n]o true "battlefield interrogation" took place here; rather, Passaro administered a beating in a detention cell. . . . . ***To accept [Passaro's] argument would equate a violent and unauthorized 'interrogation' of a bound and guarded man with permissible***

[6] Here, CACI wrongly assumes as a factual predicate for its argument that all of Abu Ghraib torture occurred during interrogations. *See* CACI Brief at 13. This is factually inaccurate. CACI's claims cannot be accepted as fact in the absence of discovery. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

battlefield conduct. To do so would ignore the high standards to which this country holds its military personnel." *Id.* at 218 (emphasis added.)

The ruling in *Passaro* governs here. If discovery establishes that detainees were brutally tortured, as they allege, CACI cannot equate such conduct with interrogation, and enjoy immunity based on performing the governmental function of interrogation under its contract. The District Court below articulated this commonsense distinction between torture and interrogation during its discussion of the political question doctrine:

> [T]orture has an existence all its own. Plaintiffs allege that they were, among other things, beaten, stripped naked, deprived of food, water and sleep, subjected to extreme temperatures, threatened and shocked. (JA.0018-21). Unlike the fighter intercept in *Tiffany*, this conduct does not depend on the government for its existence; private actors can and do commit similar acts on a regular basis. Separation of powers is not implicated where the conduct is already separate and distinct from the government.

JA.0419

In sum, as a matter of law, subjecting detainees to electric shocks, tasering detainees in the head, forcing detainees to watch the rape of a female detainee, subjecting detainees to mock execution, suffocation and a full year of complete sensory deprivation, and dragging detainees across a concrete floor by ropes tied to their genitalia do not constitute "battlefield interrogation." *See Passaro,* 577 F.3d 207, 218, If CACI employees had limited themselves to conducting battlefield

interrogations, there would not be a lawsuit. Instead, CACI employees tortured detainees, and CACI failed to stop them from doing so. Those acts and omissions take the conduct outside of any colorable claim of derivative sovereign immunity.

Second, CACI has not produced any contracts with the United States military purporting to authorize the torturing of detainees as a means of "battlefield interrogation." Rather, CACI has attempted to cobble together an argument that the Executive authorized CACI employees to torture detainees based on solely on a report released by the Senate Armed Services Committee. *See* JA.0059-61. This argument does not withstand scrutiny.

CACI tries to illogically morph the fact that the Senate Armed Services Committee Report "outline[s] all of the underlying problems that ultimately paved the way for events at Abu Ghraib," JA.0025, into Executive approval for CACI's misconduct. Nowhere, however, in the Report did it state that the Executive authorized CACI to subject Abu Ghraib detainees to electric shocks, tasers to the head, mock executions, suffocation, twelve months of complete sensory deprivation, and being dragged across a concrete floor by ropes tied to their genitalia. JA.0018-21. Nor did the Report state that the Executive authorized CACI or anyone else to force detainees to watch the rape of a female detainee. JA.0020. All of that conduct is well beyond the boundaries set by any "enhanced" interrogation techniques. In fact, as noted by the District Court, the Senate Armed

Forces Committee Report reached a conclusion that supports Detainees' claims: "[W]hat happened at Abu Ghraib was wrong." *See* JA.0025.

As this Court found in *CACI Premier Technology, Inc. v. Rhodes*, 536 F. 3d 280, 285 (4th Cir. 2008), the abuse of detainees at Abu Ghraib was not authorized but rather "stunned the U.S. military, public officials in general, and the public at large." The Court cited two official military investigations that described the torture of prisoners at the hard site as "sadistic, blatant, and wanton criminal abuses," *id.* (quoting investigative report by Major General Antonio Taguba), and as "shameful events" perpetrated by "a small group of morally corrupt soldiers and civilians" that "violated U.S. criminal law" or were "inhumane and coercive without lawful justification," *id.* at 286 (quoting investigative report by Major General George Fay). As documented in these reports, the military, after learning of the pivotal role played by CACI employees in the abuse scandal, referred CACI employees to the Department of Justice for criminal prosecution. *Id.* at 287 (quoting investigative report by Major General George Fay).

Third, even assuming for the sake of argument that CACI is able after discovery to introduce some evidence that Executive officials purportedly "authorized" CACI employees to engage in the unlawful conduct of torturing detainees, there is no legal reason why such wrongdoing would provide CACI with any legal excuse or immunity. CACI employees are not subject to the military

chain of command, and are not bound to obey illegal orders given by military officials or executive branch officials. *See McMahon v. Presidential Airways*, 502 F.3d 1331, 1359 (11th Cir. 2007) ("a private contractor is not in the chain of command"). Indeed, unlike soldiers who cannot leave Iraq without formal discharge from the military, CACI employees are free to quit and leave Iraq at any time. *See* JA.0301. As eloquently stated (albeit in dicta) by the District Court in the Eastern District of New York when a defense contractor tried to claim coercion by the military during the Vietnam War, "[w]e are a nation of free men and women habituated to standing up to government when it exceeds its authority. . . . Under the circumstances of the present case, necessity is no defense. ***If defendants were ordered to do an act illegal under international law they could have refused to do so, if necessary by abandoning their businesses.***" *In Re "Agent Orange" Product Liability Action*, 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005) (emphasis added). Thus, even if the military wanted CACI employees to torture detainees, there was nothing to stop CACI from refusing to participate in such illegal behavior.

3. There Is No Public Interest in Granting a Government Contractor Engaging in War Crimes *Absolute* Immunity from Tort Lawsuits.

CACI (and *amici* KBR) cannot make a textual Constitutional or statutory claim to *absolute* immunity based on its status as a government contractor supporting the United States military in a contingency operation. The Constitution

does not immunize private corporations merely because they serve the government. Nor does the Federal Tort Claims Act, which expressly excludes from its scope corporations working under government contract. *See* 28 U.S.C. § 2671. The Westfall Act, which immunizes federal officials acting within the scope of their employment from state tort liability, also expressly excludes corporate contractors. *See* 28 U.S.C. § 2679 (1988).

CACI relies solely on *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996), to argue that this Court should immunize CACI in order to further the public interest. *See* JA.0064. KBR echoes this reliance. *See* KBR Brief at 9-12. CACI's (and KBR's) reliance on *Mangold*, however, is unavailing.

In *Mangold*, a military official under investigation for defrauding the United States sued Analytic Services, claiming defamation. *See* 77 F.3d at 1445. The military official alleged that Analytic Services gave false sworn statements in response to government investigators during the course of an official interview conducted as part of the ongoing government investigation. *See id.* at 1444. The District Court denied Analytic Services' request for immunity.

This Court reversed the District Court, and dismissed the defamation lawsuit against Analytic Services. *See id.* at 1446. This Court reasoned that Analytic Services should be immunized to serve two important public interests. *See id.* at 1447. It explained the immunity being bestowed had "two roots, one drawing on

the public interest in identifying and addressing fraud, waste, and mismanagement in government, and the other drawing on the common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators." *Id.* at 1449. The Court noted that the testimonial immunity was well established in the common law, *see id.*, and took "care to apply it to witnesses in the private sector only to the extent necessary to serve the greater public interest." The Court limited the immunity to "*response to queries* by government investigators engaged in an official investigation." *Id.* (emphasis in original).

CACI and amici KBR seek to extend *Mangold* to create an *absolute* immunity for government contractors coextensive with sovereign immunity that applies without regard to whether the contractors even complied with the terms of their government contracts. CACI claims that under *Mangold*, contractors are immune "for any delegated governmental function for which the United States is immune, so long as the benefits of immunity outweigh the costs."[7] CACI Brief at 21.

[7] CACI actually misstates the holding of *Mangold*, which concerns contractors' eligibility to invoke *federal official* immunity, not sovereign immunity itself. *See Mangold*, 77 F.3d at 1447. As explained by the Eleventh Circuit, federal employees do not enjoy automatic immunity from their status; they enjoy, only immunity that can "be affirmatively justified." *McMahon v. Presidential Airways*, 502 F.3d 1331, 1343 (11th Cir. 2007) (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)).

This effort to expand *Mangold* fails because CACI cannot identify even one, let alone two, well-established public interest akin to those found in *Mangold* to support its claim of immunity. *See* CACI Brief at 21. Instead, CACI identifies a public interest that simply does not exist: "The United States has a compelling interest in conducting battlefield interrogations free from the interference of tort law, regardless of whether the military uses soldiers or civilians to perform such interrogations." *See* CACI Brief at 21.

There simply is no public interest of the type CACI and KBR rely upon. Congress and the Executive have repeatedly rejected corporate efforts to carve out a tort-free zone for government contractors assisting the military in contingency operations. Congress expressly excluded government contractors from sovereign immunity under the Federal Tort Claims Act, and from official immunity under the Westfall Act. *See* 28 U.S.C. § 2679 (1988). CACI and KBR seek from this Court what Congress has denied them.

The Executive, namely, the Department of Defense (DoD), has also repeatedly refused to immunize defense contractors from tort liability. Battlefield commanders have been on notice since at least 1900 that tort liability may arise from battlefield actions. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900) (damages awarded for unlawful capture of Spanish fishing vessels); *Mitchell v. Harmony*, 54 U.S. 115 (1851) (U.S. soldier may be sued for trespass for

wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act not done in accordance with the usages of civilized warfare).

There has been no effort by the Executive to alter this long-standing rule of law for purposes of the contingency operations in Iraq and Afghanistan. Instead, in March 2008, the DoD went on record through the regulatory process stating that creating a liability-free zone does *not* serve their interests. During a period of public notice and comment on revisions to procurement regulations, defense contractors sought to amend the regulations governing government contractors to insulate themselves from tort claism arising from assisting the military in contingency operations. *See* Federal Acquisition Regulation, 73 Fed. Reg. 16,764 -16,777. The DoD went on record *against* insulating corporate contractors from tort liability. *Id.* The DoD reasoned that "[c]ontractors are in the best position to plan and perform their duties in ways that avoid injuring third parties." They are able to assess the risks and then "negotiate and price the terms of each contract effectively." Federal Acquisition Regulation, 73 Fed. Reg. 16,768.

The DoD further reasoned that absolute immunity is not necessary because the "government contractor defense" created by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), suffices to protect those defense

contractors who are truly serving the public interest, such as those who design and manufacture sophisticated weaponry according to federal government specifications. *See* Federal Acquisition Regulation, 73 Fed. Reg. 16,768 (noting that "[c]ontractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government").

The DoD expressly found, however, that *service* contractors such as CACI and KBR are not in the same posture as those who manufacture weapons to specific government standards:

> The public policy rationale behind *Boyle* does not apply when a performance based state of work is used in a services contract, ***because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors***. Asking a contractor to ensure it employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions.

Id. (emphasis added). In fact, the DoD found potential liability serves as a powerful incentive for government contractors to perform properly. *See id.* ("The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions"). The DoD concluded that requiring defense contractors (such as CACI) to carry insurance for liability, and then hold them accountable to the extent their employees' negligence harms third parties, best serves the public interest:

> Accordingly, the clause retains the current rule of law, ***holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors.*** This is consistent with the existing laws and rules, including the clause at FAR 52.228-7, Insurance – Liability to Third Persons, and FAR Part 50, Extraordinary Contractual Actions, as well as the court and board decisions cited in the comments.

Id. (emphasis added).

Further, CACI's own conduct contradicts the existence of it claimed public interest against tort suit. As the District Court noted, "CACI itself brought a civil suit involving most of the same facts present in this case. . . . The Court finds it ironic that CACI argues that this case is clouded by the 'fog of war' yet CACI saw only clear skies when it conducted discovery to develop its defamation case." *See* JA.0422. The self-serving nature of CACI's arguments in this case is revealed in the company's lack of analytical consistency: tort law on the battlefield is fine if CACI is the plaintiff, but not if CACI is the defendant.

In sum, the purported "public interest" identified by CACI does not withstand scrutiny. The District Court properly rejected CACI's absolute immunity argument, and ordered the lawsuit to proceed to discovery. This Court should do likewise.

4. Multiple Public Interests Are Served by Permitting this Lawsuit To Proceed To Discovery.

As taught by *Mangold*, and recognized by the District Court, any public interest identified by CACI must be weighed against the public interest at stake in this lawsuit against CACI.

First, there is a public interest in holding accountable corporate contractors who fail to abide by the terms of their government contracts. By definition, a corporate contractor who flouts the terms of its contract with the United States is acting directly contrary to the public interest as memorialized by the contract terms. This lawsuit seeks to hold CACI responsible for the part it played in the Abu Ghraib scandal.

Second, there is a strong public interest in preventing torture from being used against Detainees. As the District Court noted, this strong public interest in prohibiting torture has been repeatedly expressed by Congress. *See, e.g.,* War Crimes Act, 18 U.S.C. § 2441 (1996); Military Commission Act, 10 U.S.C. § 948a(1)(A) (2006); Anti-Torture Act, 18 U.S.C. § 2340A. This strong public interest also has been expressed by the military through its regulations, which exclude torture from being used during interrogations. *See* U.S. Army Field Manual 34-52, Intelligence Interrogation (Sept. 1992),at p. 1-8; U.S. Army

Regulation 190-8 § 1-5 (a)-(c); Geneva Convention Relative to the Treatment of Civilian Persons In Time of War, Aug. 12, 1949 ("Fourth Geneva Convention"), 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 3, 27, 31, 32, 37, 100, 147; 10 U.S.C. §§881, 892, 893, 928 (2008) (Uniform Code of Military Justice articles defining the criminal offenses of conspiracy, cruelty and maltreatment, dereliction of duty, and assault).

This lawsuit arises from CACI employees torturing Detainees. CACI's co-conspirators were prosecuted by the United States military, and convicted. JA.0016. CACI studiously ignores the actual allegations made in the lawsuit, and instead cites to the "the public interest is in having military commanders select the most appropriate strategies, tactics, and solutions without such choices being skewed by consideration of tort law." *See* CACI Brief at 24; *see also* KBR Brief at 9-12.

CACI's argument lacks merit. As pointed out above, the military relies on tort liability as a tool to incentivize corporate contractors to act in accord with the terms of their government contractors. But CACI's argument also makes ***no*** sense for another obvious reason: the law of the United States already prevents the military from using torture as one of the "appropriate strategies, tactics and solutions" to elicit information from Detainees. *See* War Crimes Statute, 18 U.S.C. §2441.

Third, there is a strong public interest in encouraging adherence to the rule of law and preventing war crimes. As this Court recognized in *Mangold*, absolute immunity "tends to undermine the basic tenet of our legal system that individuals be held accountable for their wrongful conduct," 77 F.3d 1442, 1446-47 (4th Cir. 1996), and courts must carefully limit granting immunity even to high ranking government officials.

The Supreme Court held in *Westfall v. Erwin*, 484 U.S. 292 (1988), that the courts may confer absolute immunity from suit only in those instances when the alleged misconduct is both *"within the scope of their official duties and the conduct is discretionary in nature*." *Westfall*, 484 U.S. at 297 (emphasis added).

A federal employee's actions are not within the scope of employment and discretionary "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). *See also Butz v. Economu*, 438 U.S. 478, 489 (1978) (stating that "a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers."); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes."); *Perkins v. United States*, 55 F.3d 910, 914 (4th Cir. 1995)

("Obviously, failure to perform a *mandatory* function is not a *discretionary* function"); *Baum v. United States*, 986 F.2d 716, 720 (4th Cir. 1993) (if federal "statute, regulation or policy applies, then the conduct involves no legitimate element of judgment or choice…if the plaintiff can show that the actor in fact failed to so adhere to a mandatory standard then the claim does not fall within the discretionary function exception"); *Saucedo-Gonzales v. United States*, 2007 WL 2319854 (W.D.Va. 2007) (if correctional officers "utilized a constitutionally excessive amount of force," their actions are not protected discretionary functions).

The Supreme Court has held that citing to "national security," as CACI does, fails to alter the analysis, because national security interests do not suffice to support automatic and absolute immunity. In *Mitchell v. Forsyth*, the former Attorney General for the United States claimed he was entitled to absolute immunity for performance of the "national security function." 472 U.S. 511 (1985). The Court rejected this claim, finding "no analogous historical or common-law basis for [the] absolute immunity" being sought. *Id*. at 521.

This Circuit has held in police brutality cases that government officials who inflict "unnecessary and wanton pain and suffering" to individuals in their custody are not immune from suit. *See Orem v. Rephann*, 523 F.3d 442-449 (4th Cir. 2008) (police officer not immune for tazing a handcuffed suspect); *see also Griggs v. WMATA*, 232 F.3d 917, 921 (D.C. Cir. 2000) (affirming district court's holding

that a transit police officer who ordered a police dog to attack a suspect was not entitled to absolute immunity).

This strong public interest in preventing unnecessary brutality applies with equal force in contingency operations. When CACI and other corporate contractors engage in war crimes and other misconduct, they improperly tarnish the reputation of the United States military. For that reason, DoD regulations warn that "[***i]nappropriate use of force*** could subject a contractor or its subcontractors or employees to prosecution or ***civil liability*** under the laws of the United States and the host nation." *See* Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008) (emphasis added) (hereinafter DFARS Rule 73). This Court should decline to immunize CACI from civil liability for CACI's illegal and inappropriate use of force against Detainees. Granting CACI immunity would encourage corporate contractors to use excessive force and commit abuses with impunity.

Fourth, there is a strong public interest in using tort liability to incentivize government contractors to adhere to the terms of their government contract, especially those terms directed to the health and safety of other human beings. The Supreme Court articulated this interest in *Miree v. DeKalb County,* 433 U.S. 25 (1977). There, persons injured and families of those killed in an airline crash sued DeKalb County. *Id.* at 26. Their lawsuit alleged that DeKalb County had failed to

abide by its contract with the federal government, which prohibited DeKalb County from establishing a garbage dump beside an airport. *Id.* at 27. This garbage dump attracted birds, which were ingested into the airline engines and caused the crash. *Id.* DeKalb County sought to dismiss the lawsuit, arguing that the application of state law would interfere with the federal government's important interest in federal aviation. *Id.* at 32-33. The Court of Appeals agreed, finding that because the United States was a party, federal common law should be applied, and the plaintiffs' state law claims should be dismissed. *Id.* at 28. The Supreme Court reversed. *Id.* at 28, 34. The Supreme Court reasoned that "since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome," there was no reason to dismiss a tort lawsuit. *Id.* at 31. The Supreme Court also found that resolution of the claims would not have any direct effect upon the United States or its Treasury because the contractor, not the United States, would have to pay any judgment. *Id.* at 29. Indeed, the Supreme Court found that permitting private law suits premised on defendants' breach of duties to the federal government actually furthered, not burdened, the interests of the United States because "such lawsuits might be thought to advance federal aviation policy by ***inducing compliance with FAA safety provisions.***" *Id.* at 32 (emphasis added). *See also Richardson v. McKnight*,

521 U.S. 399 (1997) (private prison guards not entitled to government immunities in part because of the need to deter constitutional violations.)

Fifth, there is a public interest in complying with our international obligations, which requires the United States to permit torture victims to seek redress in our federal court system. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) ("CAT"); International Covenant on Civil and Political Rights, S. Exec. Doc. No. 95-E, art. 7, 999 U.N.T.S. 171 (Dec. 16, 1966) ("ICCPR").

In sum, if the Court were to hear CACI's appeal (which it should not), the Court should rule that CACI is not entitled to an absolute immunity. CACI failed to articulate any legitimate public interest served by immunity. In contrast, as described in this Subsection, there are multiple strong public interests served by permitting this lawsuit to proceed.

5. The Law of Occupation Does Not Support CACI's Immunity Claim.

The District Court has not ruled yet on which law governs the Detainees' claims against CACI. It is likely that either federal or Virginia law will govern. CACI ignores this reality, and creates a circular immunity argument that Iraq law applies, but the law of occupation prevents Iraqi law from applying, so therefore

CACI is immune from any law. In constructing this artifice, CACI seeks to create for itself (and other defense contractors such as KBR) a corporate safe haven where companies may profit without worrying about tort liability. Such a haven simply does not exist, and cannot be created consistent with controlling precedents. The District Court refrained from ruling on this argument, commenting it was premature to rule on choice-of-law issues. JA.456.

Federal courts sitting in Virginia and following Virginia choice-of-law rules have applied United States federal and state law to tort claims arising from events on military bases in foreign countries. *See Plowman v. United States Dep't. of Army,* 698 F. Supp. 627 (E.D.Va. 1988) (applying Virginia law to a tort suit for injuries that occurred in South Korea because the plaintiffs' injuries occurred "at the hands of American citizens on a United States military base abroad.").

Virginia's choice-of-law principles do not prevent the application of United States federal and state law to torts occurring in Iraq and Virginia. Indeed, as in most states, Virginia looks to public policy when it selects the appropriate substantive law. *See Dreher v. Budget Rent-A-Car System, Inc.*, 634 S.E.2d 324, 300 (Va. 2006), *Terry v. June,* 420 F.Supp.2d 493, 506 (W.D.Va. 2006), *Williard v. Aetna Cas. & Sur. Co.*, 193 S.E.2d 776, 778 (Va. 1973).

CACI also argues for the first time here that the law of occupation, standing alone, prohibits any tort lawsuits. This is simply wrong as a matter of law. The

Supreme Court has repeatedly permitted damage actions arising out of battlefield conduct to proceed directly against military officials. For example, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), Chief Justice Marshall spoke for a unanimous court in holding a captain in the U.S. Navy liable for damages to a ship owner for the illegal seizure of his vessel during wartime. The Court held that the President's orders authorizing seizure of the ship did not immunize the captain from a lawsuit for civil damages where the President's instructions *went beyond his statutory authority*, and rejected the argument that the owner's claim should be resolved by "negotiation" with the government and not through a damage action. *Id*. at 179.

This is not an isolated holding by the Supreme Court, but has been repeated again and again. *See, e.g.*, *Mitchell v. Harmony*, 54 U.S. (12 How.) 115 (1851) (holding that a U.S. soldier may be sued for trespass for seizing a citizen's goods while in Mexico during the Mexican War and that "it can never be maintained that a military officer can justify himself for doing an unlawful act, by production the order of his superior"); *The Paquete Habana*, 175 U.S. 677 (1900) (Court imposed damages for seizure of fishing vessels during a military operation). In *Dow v. Johnson*, 100 U.S. 158 (1879), the Supreme Court affirmed the holding in *Mitchell v. Harmony*, stating "the military should always be kept in subjection to the laws of the country to which it belongs… [H]e is no friend to the Republic who advocates

the contrary." *Id.* at 169. *See also Coleman*, 97 U.S. at 515 (Union soldiers during Civil War "*were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished."*) (emphasis added).

The District Court, not this Court, should rule at the appropriate juncture on which law governs this lawsuit. JA.0456.Such a ruling requires more than merely argument.

B. THIS COURT SHOULD NOT EXERCISE PENDENT APPELLATE JURISDICTION.

CACI also asks this Court to exercise pendant appellate jurisdiction, and find detainees' claims are preempted by federal law, and are barred by the political question doctrine. CACI concedes, as it must, that those rulings are not subject to the collateral order doctrine. *See* CACI Brief at 1. *See also* 28 U.S.C. § 1291; *Doe v. Exxon*, 473 F.3d 345, 353 (D.C. Cir. 2007) (holding denial of motion to dismiss on political question grounds is not immediately appealable collateral order). For all the reasons set forth above, CACI's appeal is not ripe in any way. As a result, this Court should not exercise pendent appellate jurisdiction.

1. The Detainees' Lawsuit Does Not Raise A Non-Justiciable Political Question.

If the Court does hear CACI's appeal on the political question doctrine, it should uphold the District Court's well-reasoned decision. JA.0413-427. The

Court correctly applied the legal standard set forth by the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

a. Damage claims are constitutionally committed to the judiciary.

The purpose of the political-question doctrine is to protect "the coordinate branches of the Federal Government" through separation of powers, *Baker*, 369 U.S. at 210, and the most important *Baker* factor is whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political branch." *Baker*, 369 U.S. at 217. At the outset, adjudication of damage claims are constitutionally committed to the Judiciary, not to the Executive or Congress. S*ee, e.g., Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991) (tort issues "constitutionally committed" to the judiciary); *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("damage actions are particularly judicially manageable" and "are particularly nonintrusive").

But here Detainees' tort claims do not even arise out of actions by a coordinate political branch. Rather, the tort claims arise out of conduct by CACI, which is "not, itself, a coordinate branch of the United States government. Nor is it, like the military, part of a coordinate branch of the United States government." *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007) ("*McMahon II*") (rejecting political-question argument of private contractor

providing logistical support in Afghanistan). As the District Court properly pointed out, that fact alone weighs heavily against finding a nonjusticiable political question.

Further, contrary to CACI's arguments, the military has gone on record stating that it *never* authorized CACI to commit those challenged acts of torture against Detainees. *See* JA.0025-27. In any event, even had someone in the military authorized CACI's torture of Detainees (which it did not), that fact alone would not mean the Detainees' lawsuit raises a non-justiciable political question. The Judiciary is constitutionally permitted to adjudicate Detainees' claims. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

As discussed above in Section VII.A.2 on the law of occupation, the Supreme Court has repeatedly permitted damage actions arising out of battlefield conduct to proceed directly against military officials. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), *Mitchell v. Harmony*, 54 U.S. (12 How.) 115 (1851), *Ford v. Surget*, 97 U.S. 594 (1878), and *The Paquete Habana*, 175 U.S. 677 (1900).

Here, of course, Detainees are asking the Court to review decisions and actions taken by CACI, an American corporation, not the military. Claims against corporations that do not challenge military conduct have repeatedly been found to be justiciable. *See Harris*, 618 F. Supp. 2d at 424; *McMahon II*, 502 F.3d at 1358; *Lane*, 529 F.3d at 560; *Lessin*, 2006 WL 3940556, at *3.

b. There are judicially discoverable and manageable standards.

Detainees' lawsuit raises traditional tort claims, claims that "are uniquely suited for judicial resolution." *Lane*, 529 F.3d at 561; *see also McMahon II*, 502 F.3d at 1364 ("common law of tort provides clear and well-settled rules on which the district court can easily rely"); *Linder v. Portocarrero*, 963 F. 2d 332, 337 (11th Cir. 1992)(rejecting political-question challenge to tort suit). Indeed, "American courts have resolved such matters between private litigants since before the adoption of the Constitution. *See* THE FEDERALIST NO. 80 (Alexander Hamilton)." *Lane*, 529 F.3d at 561. "The flexible standards of negligence law are well-equipped to handle varying fact situations. This case does not involve a *sui generis* situation such as military combat or training, where courts are incapable of developing judicially manageable standards." *McMahon II*, 502 F.3d at 1364.

Courts have even found judicially discoverable and manageable standards to adjudicate even *direct* challenges to *United States* military actions. *See, e.g.*, *Koohi*, 976 F.2d at 1331; *Sterling v.Constantin*, 287 U.S. 378, 401 (1932). As explained in *Koohi*, "federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians." 976 F.2d at 1331. *See also Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n. 11 (9th Cir. 2003).

Here, there are judicially discoverable and manageable standards for Detainees' tort damages claims and the Court is "capable of granting relief in a

reasoned fashion." *See Alperin*, 410 F.3d at 553, *Koohi*, 976 F.2d at 1332; *Kadic*, 70 F.3d at 249. After discovery, the fact-finder will be asked to measure CACI's conduct against United States laws and regulations, which are incorporated into CACI's contract with the federal government. Federal statutory and common law imposes a duty on every American not to torture.[8] *See* 10 U.S.C. § 801 ("the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States"); 18 U.S.C. §§ 2441; 22 U.S.C. § 2152; 22 U.S.C. § 2656; 28 U.S.C. § 1350; 42 U.S.C. § 2000dd; 10 U.S.C. § 801; 10 U.S.C. § 950v; 32 C.F.R. § 116; 28 C.F.R. § 0.72.

CACI expressly agreed to abide by United States federal laws and regulations governing the military's conduct (as well as federal procurement laws) in return for being paid to provide services. *See* 48 C.F.R. §§203.7000-203.7001 (procurement regulations); U.S. Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999) §3-2(c), §3-2(f) (military contractors must supervise and manage their employees); U.S. Army Field Manual 3-100.21, Contractors on the Battlefield (Jan. 2003) §1-25, §4-45 (military contractors are

[8] *See* 18 U.S.C. § 2340A, which defines "torture" as act "intended to inflict severe physical or mental pain or suffering."

responsible for disciplining their employees and ensuring their compliance with the law). Further, CACI is required to notify their U.S. citizen employees that they are subject to prosecution under the War Crimes Act for violations of the laws of war. *See* 48 C.F.R. § 252.225-7040(e)(2)(ii).

The presence of judicially discoverable and manageable standards (namely, United States laws and regulations) by which to measure CACI's misconduct distinguishes this case from *Tiffany*.[9] In *Tiffany*, the lawsuit was against the United States government itself, not against a for-profit corporation. This Court was asked to determine whether government employees could be sued for engaging in the very conduct for which they were employed – tracking aircraft and deploying fighter planes in order to defend American air space. 931 F.2d at 273-75. These government employees were operating the national air defense system, and mistakenly collided with a plane. There was no allegation that the government employees had acted unlawfully or maliciously in doing so. Rather, the lawsuit alleged negligence. The Fourth Court held that the judiciary should not intrude on the exercise of professional judgments of the military personnel who were making

[9] Had the *Tiffany* decision barred the victims' claims, this Court would have refused to adjudicate the dispute presented in *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008).

split-second decisions on whether aircraft invading United States airspace were hostile or not.

The Fourth Circuit, however, expressly cautioned in *Tiffany* against accepting the very argument now being made by CACI and KBR. The Court stated that its political question analysis would be wholly different if the plaintiffs were arguing, as the plaintiffs did in *Berkovitz v. United States*, 486 U.S. 531 (1988), "that the government violated any ***federal laws contained either in statutes or in formal published regulations such as those in the Code of Federal Regulations***." The Court went on to state "[t]here can be no doubt that the mandate of a federal statute is ***a far stronger foundation for the creation of an action duty . . .than [an] administrative directive***." *Tiffany*, 931 F.2d at 280 (citations omitted) (emphasis added).

c. Detainees' claims do not require the Court to make policy decisions.

The third *Baker* factor turns on whether the Court would be forced to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. Here, as aptly stated by the District Court, "[a]s this legislation [the Torture Statute, 18 U.S.C. §2340] makes clear, the policy determination central to this case has already been made; this country does not condone torture, especially when committed by its citizens." JA.0426. The

District Court also pointed out that the Senate Report relied upon CACI as evidence that the Executive condoned CACI's torture of Detainees actually results in the opposite conclusion. The Report made clear that "what happened at Abu Ghraib was wrong." *See also Presbyterian Church of Sudan v. Talisman,* 244 F. Supp. 2d 289, 347 (S.D.N.Y. 2003) (no need to make "initial policy decisions of the kind normally reserved for nonjudicial discretion.").

d. The Court can adjudicate Detainees' claims without expressing any disrespect towards the Executive and Legislative branches.

The fourth *Baker* factor looks to whether the Court is able to adjudicate the claims "without expressing lack of respect due coordinate branches of government." *Baker*, 369 U.S. at 217. CACI cannot show that the military or anyone else in the Executive directed or authorized CACI to torture these detainees. Indeed, CACI knew that the policy of the military and the laws passed by Congress prohibited CACI from torturing detainees. JA.0025-27. CACI's conduct violated the Rules of Engagement. JA.0118. By torturing detainees, it was *CACI* who violated the policies of the Executive and law of Congress against torture. JA.0018-19. Holding CACI to account in this Court will thus vindicate the policies of the political branches, not disrespect them.

As put by the district court, "matters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs. . . . Surely, if

courts can review the actions of the President of the United States without expressing a lack of respect for the political branches, this Court can review the actions of a contracted, for-profit corporation without doing so as well." JA.0425 (citing, *inter alia*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Hence, the fourth *Baker* factor does not bar Detainees' claims.

e. Detainees' claims do not challenge adherence to any political decision.

As aptly recognized by the District Court, because the political branches have already made the policy decisions against torture in general and against torture of Abu Ghraib detainees specifically, adjudication of this case against CACI for torturing detainees at Abu Ghraib "in no way countermands a need for a need for adherence to a political question already made, because, as mentioned above, the decision made is one against torture." JA.0025. Hence, as this case will not undermine an "unusual need for unquestioning adherence to a political decision already made," the fifth *Baker* factor does not bar Detainees' claims. *See Baker*, 369 U.S. at 217.

f. Detainees' claims against torture do not contradict pronouncements by the Executive and Legislative branches.

Moreover, there is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question," *See Baker*, 369 U.S. at 217, because "the political branches of government have already spoken out against torture" by enacting the Anti-Torture Statute. *See* JA.0427-28. This action seeking to hold CACI to account for torturing Detainees thus accords with the "codified consensus" of the Executive and Legislative branches, not contradicts it. JA.0428. Indeed, "the only potential for embarrassment would be if the Court declined to hear these claims on political question grounds." *Id.* Hence, the sixth *Baker* factor does not bar Detainees' claims.

Especially where, as here, "no discovery has been completed" and the "evidence before us does not show a conflict between the allegations in the complaint and decisions made by the U.S. military," this Court "cannot say that resolution of this case will require the court to decide a political question." *See McMahon II*, 502 F.3d at 1365. Based on the limited record in this case bereft of discovery, "[i]t would be inappropriate to dismiss the case on the mere chance that a political question may eventually present itself." *Id.*

In sum, this Court should affirm the District Court's holding that Detainees' claims pose no political question and thus are justiciable.

C. THE DETAINEES' CLAIMS ARE NOT PREEMPTED.

CACI sought derivative sovereign immunity below, arguing that the Detainees' claims are impliedly preempted by federal law. The District Court properly refrained from ruling at this early procedural juncture. The decisional law holds that contractors may invoke "government contractor" preemption only ***after*** discovery, as it is an affirmative defense with the burden of production and proof borne by defendants. *McMahon*, 502 F.3d 1331, 1354 (11th Cir. 2007); *Densberger v. United Technologies Corp*., 297 F.3d 66, 69 (2d Cir. 2002); *Bailey v. McDonnell Douglas Corp*., 989 F.2d 794, 802 (5th Cir. 1993); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 17-18 (D.D.C. 2005) ("*Ibrahim I*"). This Court should not hear CACI's premature appeal on this issue, and should instead remand the Detainees' claims for discovery. If this Court decides to hear CACI's appeal on preemption, it should follow controlling Supreme Court jurisprudence, and permit the Detainees' tort claims to proceed.

1. The Supreme Court Has Repeatedly Permitted Wartime Tort Claims To Proceed.

CACI argues the Constitution's allocation of war powers to the federal government impliedly preempts the *entire body of common tort law*. *See* CACI

Brief at 35. CACI, however, does not – and cannot – identify any specific state law or regulation intruding on foreign policy or war making. Instead, CACI claims that permitting the federal judiciary to apply facially-neutral common law tort law constitutes state "interference" with federal war-making. *See* CACI Brief at 37.

This argument lacks merit. ***First***, this Court must follow controlling Supreme Court precedents that have permitted claims arising during war to proceed under common law torts. *See, e.g.*, *Mitchell*, 54 U.S. 115 (1851); *Ford*, 97 U.S. 594 (1878); *The Paquete Habana*, 175 U.S. 677 (1900). No Supreme Court decision supports CACI's implied preemption argument. CACI fails to distinguish these binding Supreme Court precedents and instead relies exclusively on the *Saleh* decision issued by the Court of Appeals for the District of Columbia on September 11, 2009. Such reliance is misplaced. As the well-reasoned *Saleh* dissent explains, the majority opinion fails to adhere to Supreme Court jurisprudence.[10]

CACI relies, as did the *Saleh* majority, on *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). But in those cases, this Court struck down state legislation that directly challenged and conflicted with a clearly ascertainable,

[10] The *Saleh* plaintiffs filed a petition for *certiorari* to the United States Supreme Court on April 26, 2010.

published federal law or agreement with a foreign sovereign. *See Garamendi*, 539 U.S. at 408-409 (preempting state legislation designed to force payment by defaulting insurers to Holocaust survivors in a manner contrary to an executive agreement); *Crosby*, 530 U.S. at 367 (preempting state law placing sanctions on doing business with Burma in excess of limitations enacted in federal statute).

These targeted state legislative forays into policymaking that threatened to disrupt relations with foreign sovereigns are not comparable to the body of common law tort at issue here. Here, the state laws at issue are common law torts, not state legislative initiatives designed to control the Executive's conduct. *See* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1711 (1997). In *Garamendi*, the Supreme Court noted the state law was "quite unlike a generally applicable "blue sky" law," *id.* at 425, such as a generally applicable tort law. Moreover, the Supreme Court has sharply limited preemption of state laws in the area of foreign affairs, characterizing *Garamendi* as nothing more than a "claims-settlement case[] involv[ing] a narrow set of circumstances." *See Medellin v. Texas*, 552 U.S.491, 531 (2008). As the dissent in *Saleh* notes, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." *Saleh v. Titan Corp.*, 580 F.3d 1, 22 (D.C. Cir. 2009) (Garland, J., dissenting). This Court should not ignore controlling Supreme Court precedents

(and acts of Congress) and repeat the D.C. Circuit's mistake by creating a "battlefield immunity." [11]

Second, CACI mistakenly assumes that Detainees' claims fail unless Detainees are permitted to invoke state law tort duties of care. This is wrong as a matter of law. CACI assumed federal duties of care toward Detainees by agreeing to the terms of the government contract. Thus, even if state tort standards of care are preempted, that does not mean the Detainees' *claims* are preempted. The Supreme Court permits use of state tort *remedies* that further federal standards of care. *See Silkwood v. Kerr-McGee,* 464 U.S. 238, 253 (1984) ("[f]ederal preemption of the standards of care can coexist with state and territorial tort remedies"); *Medtronic, Inc. v. Lohr*, 518 U.S.496, 513 (1996) (a statutory preemption clause did not deny states "the right to provide a traditional damages remedy for violations of common law duties when those duties parallel federal requirements.") *See also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 519 (1992) (stating that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions"); *Abdullah v. American Airlines, Inc.* 181 F.3d 363, 375 (3rd Cir. 1999).

[11] The *Saleh* majority ignored that detention centers and prisons are kept outside "the battlefield." Article 83 of the Fourth Geneva Convention.

The *Silkwood* decision noted that where the Court finds federal preemption, it "does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime." *Clearfield Trust Co. v. United States* 318 U.S. 363, 366-67 (1943). *See also Miree v. DeKalb County*, 433 U.S. 25, 32 (1977) (permitting private lawsuits premised on defendants' breach of duties to the federal government, and noting that "such lawsuits might be thought to advance federal aviation policy by inducing compliance with FAA safety.) CACI fails to demonstrate that any federal interest is harmed by permitting Detainees to seek state tort remedies or federal common law remedies for CACI's war crimes that breached its federal contractual duties of care.

2. Congress Has Never Extended Sovereign Immunity To Include Defense Contractors Providing Services in War Zones.

CACI also claims that the combatant activities exception to the overall waiver of sovereign immunity found in Federal Tort Claims Act ("FTCA") preempts the Detainees' claims. *See* CACI Brief at 38. This argument lacks merit. Congress has never passed legislation bestowing sovereign immunity on defense contractors supporting the military in Iraq or any other war zone. Sovereign immunity, or lack thereof, is governed by the FTCA. *See* 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA broadly eliminates sovereign immunities except in defined and narrow circumstances. These "exceptions" include, among other things,

claims arising out of (1) discretionary acts by federal agencies or employees, *id*. at § 2680(a), (2) combatant activities of the military or naval forces, or the Coast Guard, during time of war, *id*. at § 2680(j), or (3) any claims arising in a foreign country, *id*. at § 2680(k). The FTCA "marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres v. United States*, 340 U.S. 135, 139 (1950).

The FTCA does not protect military or government employees supporting the military, let alone government contractors, from tort liability. Congress passed a separate statute, the Westfall Act, to protect military and government employees from tort liability. The Westfall Act permits government employees to invoke the United States immunities if, and only if, the Attorney General certifies that the employees acted within the scope of his office or employment. *See* 28 U.S.C. § 2679(d)(1). The terms of that Act exclude government contractors from its scope. Although CACI is trying to stand in the shoes of the sovereign, CACI has not sought Westfall certification from the Attorney General. *Compare In re: Xe Services Alien Tort Litig.*, 695 F. Supp. 2d 569 (E.D. Va. 2009).

a. The Supreme Court created a narrow judicial immunity from product liability lawsuits for weapons manufacturers in *Boyle v. United Technologies.*

Although Congress excluded government contractors from the scope of sovereign immunity, the Supreme Court developed a narrow federal common law

doctrine that preempts lawsuits raising state law claims against weapons manufacturers. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). There, the Court held that the FTCA discretionary function exception, 28 U.S.C. §2680(a), preempted state law tort suits against weapons manufacturers if and only if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal citations and quotation marks omitted).

The Court identified three factual scenarios when a direct conflict between the federal policy interests and the application of state legal standards could not be found. The Supreme Court held that weapons manufacturers may invoke the judicially-created defense ***only*** when "the state-imposed duty of care that is the asserted basis of the contractor's liability… is ***precisely contrary*** to the duty imposed by the Government contract. . . ." *Id.* (emphasis added). The Court cautioned that even in those instances, preemption is not automatic because it would be unreasonable to say that there is always a "***significant*** conflict" between the state law and a federal policy. Instead, the Supreme Court found on the facts before it that the defense could be invoked because imposing tort liability for design defects on a government contractor that manufactured military equipment pursuant to reasonably precise specifications from the United States created a

significant conflict with the federal interest in obtaining weaponry. The Court noted, because of substantial R&D costs borne by the private sector, the United States may not be able to obtain the weaponry it needed for national defense if the manufacturers confronted state law liabilities. However, even in the face of this significant conflict, the Court added an additional requirement: the contractor must have warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.*[12]

b. The "government contractor defense" does not preempt Detainees' claims.

CACI cannot invoke the government contractor defense because discovery will reveal that CACI's conduct breached its federal duties, both statutory and contractual. Discovery will further reveal that CACI could have complied with both its contractual obligations and the tort law duties of care because those duties are identical – these duties required CACI to refrain from subjecting Detainees to electric shocks, tasering in the head, watching the rape of a female prisoner, mock executions and suffocation, and dragging across a concrete floor by ropes tied to their genitalia.

[12] *Boyle* has been extended outside the military procurement context by some circuits. See, *e.g. Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003).

In the absence of Congressional legislation, the Supreme Court's "government contractor defense" should not be extended to encompass corporate misconduct that directly contravenes the terms of the controlling government contract and the law. The DoD has urged the federal judiciary to hold corporate contractors providing services accountable for the negligence of their employees. Here, CACI has not made any factual showing that the United States would have any difficulty finding defense contractors willing to provide personnel in war zones if tort liability for torture and war crimes continues to insist. The opposite will be shown with discovery. Providing personnel does not require the same substantial investment of capital as the manufacturer of sophisticated weaponry, and there are a substantial number of defense contractors ready and able to compete for the lucrative government contracts held by CACI.

CACI relies on *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). But here, this Court lacks any record evidence on which to find CACI was engaged in combatant activities. As discovery will show, CACI is prohibited from participating in combat in any way by the terms of the federal contract. Torturing unarmed Detainees in a prison far outside the battlefield is not combat. *See United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009). As the District Court noted, "unlike soldiers engaging in actual combat, the amount of physical contact available to civilian interrogators against captive detainees in a secure prison

facility is largely limited by law, and, allegedly, by contract." *Cf. Johnson v. United States*, 170 F.2d 770 (9th Cir. 1948).

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), does not hold otherwise. There, the contractor did not engage in any wrongdoing, and complied with the terms of the government contract. The military, however, mistakenly shot down an Iranian civilian aircraft using defendant's product. The Court found permitting strict liability tort claims to proceed would unduly burden the military, which acted mistakenly but with authorization. The court's reasoning in *Koohi* was premised on the military as the actor, and acting in a lawful and authorized fashion by "firing a missile in perceived self-defense," which is "a quintessential combatant activity." 976 F.2d at 1333 n.5. The reasoning of *Koohi* has no applicability here, where Detainees' claims are premised on CACI's torture of Detainees, acts prohibited by both law and contract. The court in *Koohi* did not abandon *Boyle*'s fundamental requirement of a conflict between contractors' state and federal duties. Rather, the Ninth Circuit identified a direct conflict between applying tort liability standards and the military's ability to contract for the manufacture of weaponry. No such conflict has been identified here.

CONCLUSION

This Court should not hear this appeal because the District Court's preliminary rulings are not appealable within collateral order doctrine. If the Court opts to hear the appeal, it should limit review to the immunity issue, and rule against CACI.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Susan L. Burke, hereby certify that:

1. I am an attorney representing Appellees.
2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13475 words (excluding Table of Contents, Table of Authorities, Addendum, and Certificate of Compliance and Service).
3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-pt. type.

/s/
Susan L. Burke

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2010, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record. I also caused a copy of Appellees' Brief to be served by first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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