Nos. 10-1891 & 10-1921

In the United States Court of Appeals for the Fourth Circuit

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, ET AL.,
APPELLEES,

v.

L-3 SERVICES, INC. & ADEL NAKHLA,
APPELLANTS.

ON REHEARING EN BANC OF AN APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NO. 08-1696)
(THE HONORABLE PETER J. MESSITTE)

BRIEF FOR APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS

L-3 Services, Inc. is wholly owned by L-3 Communications Corporation, which in turn is wholly owned by L-3 Communications Holdings, Inc. No publicly held company owns 10% or more of L-3 Communications Holdings stock.

The following insurance companies have a potential obligation to indemnify appellant L-3 Services, Inc.: American International Group, Inc.; National Union Fire Insurance Co. (AIG); Lexington Insurance Co. (AIG); The Insurance Company of the State of Pennsylvania (AIG); Zurich Financial Services; Western Risk Insurance; Travelers Company Inc.; Westchester Fire Insurance; Steadfast Insurance Co.; AXIS Insurance Co. (Axis Capital Holdings Ltd.); Endurance Specialty Holdings Ltd.; Starr Excess International Liability Insurance Co. Ltd.; Arch Insurance Group; Great American Insurance Group; Allied World Assurance Co. Holdings Ltd.; General Indemnity Insurance Co. (Gen Re); XL Capital Ltd.; and Illinois Union Insurance Co.

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STATEMENT OF JURISDICTION

The district court order denying defendants' motions to dismiss was entered on July 29, 2010. (J.A.923.) Defendant-Appellant L-3 Services, Inc., filed a notice of appeal on August 4, 2010. (J.A.929.) Defendant-Appellant Adel Nakhla filed a notice of appeal on August 6, 2010. (J.A.932.)

This Court has jurisdiction under the collateral order doctrine to review the district court's denial of defendants' assertions of immunity. *See* Part I.A, *infra*.

The Court also has jurisdiction under the collateral order doctrine to review the district court's determination that plaintiffs' claims are not preempted and barred. Alternatively, the Court has pendent jurisdiction over that decision because review of the bases for the preemption and bar of plaintiffs' claims is inextricably intertwined with review of the immunity issues. *See* Part II.A, *infra*.

The Court has jurisdiction to review the district court's determination that the political question doctrine does not apply because it implicates the court's subject-matter jurisdiction and is inextricably intertwined with the immunity analysis. *See* Part III.A, *infra*.

The district court had diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs are citizens of Iraq; Mr. Nakhla is a citizen of Maryland; and L-3 is incorporated under the law of Delaware and headquartered in Virginia.

(J.A.22.) Plaintiffs also asserted jurisdiction under 28 U.S.C. § 1331 (federal question); § 1350 (Alien Tort Statute); and § 1367 (supplemental jurisdiction). (J.A.22.)

STATEMENT OF THE ISSUES

Where enemy aliens file suit against government contractors that supplied linguists and interrogators who were integrated into United States military detention and interrogation functions, based on injuries allegedly incurred during their wartime detention and interrogation on a foreign battlefield:

1. Are the contractors and the supplied personnel immune from such suits?
2. Are such suits preempted and barred by federal law?
3. Are such suits nonjusticiable under the political question doctrine?

STATEMENT OF THE CASE

Plaintiffs are 72 Iraqis detained by the U.S. military in Iraq, including at Abu Ghraib. (J.A.14-85, 831.) They filed this tort suit seeking money damages from L-3, a company that contracted with the government to supply linguists and interrogators to be used by military units in Iraq, and Adel Nakhla, a linguist supplied by L-3. (J.A.14-85, 831-832.) Plaintiffs allege de-

fendants are liable because some of these loaned employees, while assigned to military units that controlled detention facilities in Iraq and conducted interrogations of detainees, allegedly mistreated plaintiffs or joined a country-wide conspiracy to do so. (J.A.14-85.) Plaintiffs seek money damages from defendants under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and applicable state common law (which the district court found to be that of Iraq, *see* J.A.909-912).

Defendants moved to dismiss all claims based on law-of-war immunity, derivative immunity, preemption, and the political question doctrine, among other grounds. After full briefing and oral argument, the district court denied the motions to dismiss. (J.A.831-922.)

These timely appeals followed (J.A.929, 932-933), and were consolidated. (Case No. 10-1891, Dkt. 3, Aug. 12, 2010.) A panel of this Court reversed the district court and ordered the case dismissed. (Dkt. 52, Sept. 21, 2011.) The Court subsequently ordered the case to be reheard en banc. (Dkt. 59, Nov. 8, 2011.)

STATEMENT OF THE FACTS

A. The War in Iraq

After Congress enacted the Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498, 1500-01 (2002), the President announced the commencement of military operations "to disarm Iraq, to

free its people and to defend the world from grave danger." Presidential Address to the Nation (Mar. 19, 2003). U.S. military forces, in conjunction with other members of the Multi-National Force in Iraq, remained actively engaged in combating hostile forces in Iraq during the period relevant to this case. *See* J.A.173; *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 415 (4th Cir. 2011), *vacated and reh'g en banc granted* (4th Cir. Nov. 8, 2011).

Due to a shortage of qualified Arabic speakers and interrogators in the ranks, the military was required to use contractor employees to serve as linguists and interrogators assigned to military units engaged in combatant and occupation activities in Iraq. *See id.*; *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5-6 (D.D.C. 2007), *aff'd in part*, *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011); J.A.193. To fill this critical role, the government contracted with L-3's predecessor The Titan Corporation[1] and CACI to supply linguists and interrogators to military units in Iraq. *See Al Shimari*, 658 F.3d at 415; *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 202 (4th Cir. 2011), *vacated and reh'g en banc granted* (4th Cir. Nov. 8, 2011); *Saleh*, 580 F.3d at 2. L-3's linguists "were in fact integrated and performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7.

[1] L-3 acquired The Titan Corporation; we use "L-3" throughout to refer to L-3 Services, Inc. as well as The Titan Corporation.

In 2004, the news media broadcast pictures depicting apparent abuse of prisoners. Shortly thereafter, the media reported details leaked from a classified investigation by Major General Antonio Taguba, which concluded that Iraqis detained by the U.S. military had been mistreated by members of the military police and intelligence units at Abu Ghraib. The government conducted extensive investigations into these allegations of abuse, resulting in the court-martial of eleven soldiers. *See Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005), *aff'd in part*, *Saleh*, 580 F.3d at 2, *cert. denied*, 131 S. Ct. 3055. No L-3 employees were criminally charged, though some were investigated, and the government did not pursue contractual remedies against L-3. *See Saleh*, 580 F.3d at 2.

In the wake of the Abu Ghraib scandal, senior military officials were called to testify before Congress about the alleged abuses and the military chain of command responsible for detention facilities and interrogation centers in Iraq. These officials explained that detention and interrogation operations are inherently governmental functions such that contract linguists and interrogators worked under the direct supervision of the military chain of command in Iraq. (J.A.193, 199-200.)

Secretary of Defense Donald Rumsfeld testified that civilian linguists and interrogators at Abu Ghraib are "responsible to [military intelligence] personnel who hire them and have the responsibility for supervising them."

(J.A.193.) Acting Secretary of the Army Les Brownlee confirmed that civilian linguists and interrogators "work under the supervision of officers or noncommissioned officers (NCOs) in charge of whatever team or unit they are on." (J.A.193.) He added that, "any contract employee like that . . . is supposed to work under the direct supervision of an officer or noncommissioned officer who would be the supervisor of that person." (J.A.200.) Finally, Army Inspector General Paul Mikolashek testified, with regard to civilian linguists and interrogators, that "their overs[eer] on a day-to-day basis was that military supervisor, that [military intelligence] person in that organization to whom they reported." (J.A.199.) The Senate Armed Services Committee subsequently conducted a comprehensive inquiry into alleged mistreatment of detainees in U.S. custody and found an erosion of standards attributable to policy decisions of senior government officials, not individual misconduct. *See* J.A.545, 549, 566.

B. The *Saleh* and *Ibrahim* Cases

On June 9, 2004, plaintiffs' counsel here filed the *Saleh* action against L-3, CACI, and several employees of each company (including Mr. Nakhla) in the Southern District of California on behalf of a class including all detainees at U.S. military prisons throughout Iraq. *See Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56-57 & n.1 (D.D.C. 2006), *aff'd in part*, *Saleh*, 580 F.3d 1, *cert. denied*, 131 S. Ct. 3055. On July 27, 2004, other Iraqi nationals filed the

Ibrahim action against L-3 and CACI in the district court for the District of Columbia. *Ibrahim*, 391 F. Supp. 2d at 12. These actions alleged that L-3 linguists participated in a conspiracy to torture them (or their relatives) at Abu Ghraib and other prisons in Iraq; the *Saleh* plaintiffs also contended that United States senior military officials were members of the conspiracy and set the policies under which they were mistreated at Abu Ghraib and other military prisons in Iraq. The *Saleh* action was transferred to the District of Columbia, where the two cases were consolidated for purposes of discovery. *See Saleh*, 436 F. Supp. 2d at 57 n.1, 60. Plaintiffs in both cases brought tort claims under the ATS and the common law. The district court dismissed the ATS claims against all defendants and granted summary judgment to L-3, finding it undisputed that L-3's linguists were under the exclusive direction and control of the military chain of command and performing as soldiers in all but name. *Saleh*, 580 F.3d at 2. The claims against the individuals were dismissed for lack of personal jurisdiction. The district court denied summary judgment to CACI, finding that it was disputed whether its employees were exclusively supervised by the military chain of command. *Id.* at 4.

On appeal, the D.C. Circuit rejected tort law as an appropriate means of regulating conduct within U.S. military detention facilities on the battlefield. *Id.* at 2-17. The court of appeals broadened the rationale of the district

court, holding that even if exclusive control by the military was disputed, it did not change the outcome. "[W]here a private service contractor is integrated into combatant activities over which the military retains command authority," *id.* at 9, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place," *id.* at 7. This barred all common law tort claims against L-3 and CACI. The court of appeals had "little difficulty" in concluding that plaintiffs' attempt to claim that international law prohibited the conduct at issue on appeal was "stunningly broad" and based on "an untenable, even absurd, articulation of a supposed consensus of international law." *Id.* at 15. The court of appeals also noted that there were numerous other bases for upholding the dismissal of plaintiffs' claims, including that the contractors may be entitled to immunity, *id.* at 5; that Congress had legislated in the area without creating an available cause of action, *id.* at 16; and that recognizing a cause of action here "would impinge on the foreign policy prerogatives of our legislative and executive branches," *id.* Judge Garland dissented with regard to the state common-law tort claims only. *Saleh*, 580 F.3d at 17-36 (Garland, J., dissenting). Although he agreed with the majority that *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), supplied the correct analytical framework for the preemption analysis; that the area implicated uniquely federal interests; and that, at least in theory, it might be

proper to find preemption under *Boyle* for some combatant activities, he argued for a narrower test for preemption.

The D.C. Circuit denied rehearing en banc and the plaintiffs petitioned for certiorari. The Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. 131 S. Ct. 379 (2010). After receiving the Solicitor General's brief opposing certiorari, *see* Case No. 10-1891, Dkt. 44, June 1, 2011 (Brief for the U.S. as Amicus Curiae, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011) ("U.S. Br. (*Saleh*)")), the Supreme Court denied certiorari, 131 S. Ct. 3055 (2011).

C. This Case

In May and June of 2008, *Saleh* plaintiffs' counsel filed a second wave of five actions on behalf of five plaintiffs in five different venues against L-3, CACI, three individual CACI interrogators, and Adel Nakhla, a former L-3 linguist. After a series of transfers, voluntary dismissals, and amendments, this second wave comprises this case against L-3 and Mr. Nakhla and one case against CACI, *Al Shimari v. CACI International, Inc.*, No. 09-1335, *reh'g en banc granted*, that is on appeal to this Court from the Eastern District of Virginia.

Plaintiffs in this case allege mistreatment during their capture and detention by the U.S. military in Iraq for periods ranging from six days to almost five years during the period July 2003 until May 2008. Plaintiffs allege

a wide range of tortious conduct against primarily unnamed "co-conspirators," from allegations of shocking abuse to simple assault. Sixty-eight of the 72 plaintiffs do not allege any abuse by an L-3 employee; rather, they seek to hold defendants vicariously liable for alleged abuse by soldiers or others with whom they came in contact in U.S. military detention facilities. As to Mr. Nakhla, the Second Amended Complaint alleges that he had contact with exactly one plaintiff. (J.A.101-04.) It does not allege that he had any contact with—much less abused—the other 71 plaintiffs, 52 of whom allege that they were detained and abused only *after* Mr. Nakhla's employment in Iraq allegedly ceased. (J.A.106-08.)

The district court denied L-3's and Mr. Nakhla's motions to dismiss. The district court concluded that the plaintiffs were "enemy aliens" (J.A.840 n.3), but refused to apply well-settled law-of-war immunity because plaintiffs alleged illegal conduct inconsistent with the laws of war and because defendants were not soldiers. (J.A.836-851.) Narrowly reading this Court's derivative immunity precedents, the district court rejected the motion to dismiss on the basis of derivative immunity, asserting that derivative immunity would only attach if alleged torts were affirmatively directed by the government; furthermore, the court rejected that immunity would attach to the assertions of torture. (J.A.833, 864-869.)

The district court squarely rejected immunity under, and preemption by, the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), because, in its view, preemption is never appropriate based on the combatant activities doctrine. (J.A.870-877.) The district court declined to follow the D.C. Circuit's decision in *Saleh*, which involved the same defendants, the same plaintiffs' attorneys, and a would-be class that included the plaintiffs in this case. The district court not only rejected the majority position that these claims are preempted, but went further than the *Saleh* dissent in finding preemption never appropriate for this type of wartime claim, even where contractor employees are integrated into the military command structure. (J.A.874-877.)

Finally, the district court concluded that suits against private actors do not implicate separation-of-powers concerns even when the private actors are supplying personnel to be integrated into military units. (J.A.851-864.) Rejecting application of this Court's precedent finding a political question in a suit involving military activities, *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), the court held the case justiciable (J.A.861, 864).[2]

[2] The district court also denied Mr. Nakhla's motion to dismiss the claims of the 71 plaintiffs who did not allege contact with him. The district court denied this motion based upon plaintiffs' conclusory allegations of conspiracy alone (J.A.920 n.27), despite the absence of factual allegations that support the implausible assertion that Mr. Nakhla entered a conspiracy spanning 26 facilities, 25 of which he is not alleged to have visited, and five years, more than four of which were after he was alleged to have departed Iraq.

A panel of this court reversed, for the reasons set forth in *Al Shimari*, *see Al-Quraishi*, 657 F.3d at 203, concluding that "[t]he uniquely federal interest in conducting and controlling the conduct of war, including intelligence-gathering activities within military prisons, . . . is simply incompatible with state tort liability . . . ." *Al Shimari*, 658 F.3d at 419-20. Over the dissent of Judge King, the majority adopted the reasoning of the D.C. Circuit in *Saleh* and held that "where a civilian contractor is integrated into wartime combatant activities over which the military broadly retains command authority, tort claims arising out of the contractors' engagement in such activities are preempted." *Id.* at 420. The majority opinion did not address defendants' immunity and political question defenses, but Judge Niemeyer wrote separately that the political question doctrine and derivative sovereign immunity also require dismissal. *See id.* (Niemeyer, J., writing separately).

The panel determined that interlocutory appeal of the preemption issue was appropriate because the federal interest in the "elimination of tort from the battlefield," like immunity from suit, could only be preserved by immediate appeal. *Al-Quraishi*, 657 F.3d at 205. Judicial scrutiny of military policies and practices could not be remedied on appeal from final judgment. *See id.* The majority emphasized that "an appeal from the denial of immunity and preemption in the battlefield context must be immediately appealable" to serve the strong public policy interest in "free[ing] military

operatives from the fear of possible litigation and the hesitancy that such fear engenders." *Id.* at 206.

Judge King dissented from the merits on the basis of Judge Garland's dissent in *Saleh* and from jurisdiction on the basis that the collateral order doctrine did not grant the Court jurisdiction to decide the preemption issue. *See Al-Quraishi*, 657 F.3d at 206 & n.1 (King, J., dissenting); *Al Shimari*, 658 F.3d at 427 (King, J., dissenting). The dissent did not dispute that the district court conclusively determined the preemption issue or that the issue was collateral to resolution on the merits, but only whether the decision was effectively unreviewable on appeal from final judgment. *See Al-Quraishi*, 657 F.3d at 209-10 (King, J., dissenting). Although Judge King acknowledged that the denial of law-of-war immunity could afford the Court jurisdiction over the appeal, *id.* at 206, 214, he argued that the Court lacked pendent jurisdiction over the preemption issue because the Court could decide one issue "without having to resolve" the other, *id.* at 215.

SUMMARY OF ARGUMENT

1. Defendants are immune from these claims brought by enemy aliens based upon injuries during their wartime capture, detention, and interrogation by the U.S. military. There is appellate jurisdiction because these immunities implicate the right not to be tried for reasons of substantial public interest.

a. Occupying forces are immune from suits brought by residents of the occupied land. *See Dow v. Johnson*, 100 U.S. 158, 170 (1880); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1879). This rule remains vital today. *See Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981). The public interests undergirding law-of-war immunity from enemy suits are so compelling that they preclude even constitutionally-protected civil remedies such as habeas corpus and takings claims. The common law tort claims at issue in this case (which do not enjoy special constitutional status) are clearly barred. Comprehensive disciplinary, criminal, and compensatory regimes establish that it is the role of the United States to discipline and punish violations, and expressly provide that military personnel *and* contractors such as defendants are immune from suit for such matters. Tort law would be an inappropriate addition to the regulation of conduct in military prisons in occupied lands.

b. Defendants are entitled to derivative immunity because they are performing essential functions for the U.S. military (whose immunity is rooted in separation of powers) and because they served alongside and under the supervision of soldiers (who have law-of-war immunity). Extending immunity to defendants is necessary to protect the immunity of the United States and the interests giving rise to law-of-war immunity. *See Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

2. This Court should follow the decision of the D.C. Circuit in *Saleh* and hold that plaintiffs' claims are preempted and barred by federal law based upon the same policies and concerns that undergird law-of-war and derivative immunity. The combatant activities exception to the FTCA, 28 U.S.C. § 2680(j) and the laws committing policy of the battlefield to the Executive with a private right of action, indicates congressional intent to cast an immunity net over any claim that arises out of combatant activities. Moreover, the exclusive allocation of the war power in the political branches of the federal government preempts the field with respect to regulation of combatant activities. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). There is jurisdiction over this issue because it implicates the right not to be tried for reasons of substantial public interest and because it is pendent to the immunity claims. *See Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995); *Rux v. Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006).

3. Finally, plaintiffs' claims for injuries incident to their detention by the U.S. military present non-justiciable political questions under *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011). This issue is reviewable as going to the district court's subject matter jurisdiction and because it is pendent to the immunity claims. *See Rux*, 461 F.3d 461.

STANDARD OF REVIEW

This Court reviews de novo the district court's legal conclusions in denying defendants' motions to dismiss. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir.), *cert. denied*, 130 S. Ct. 229 (2009); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997).

The issues in this appeal implicate the district court's subject matter jurisdiction and thus are evaluated under Federal Rule of Civil Procedure 12(b)(1). *See Smith v. Reagan*, 844 F.2d 195, 196 (4th Cir. 1988); *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995). Evidence outside the pleadings can be properly considered under Rule 12(b)(1), and this Court reviews the district court's factual findings for abuse of discretion. *Jadhav*, 555 F.3d at 347; *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Plaintiffs bear the burden of persuasion when a motion to dismiss challenges the court's subject-matter jurisdiction. *Piney Run Pres. Ass'n v. County Comm'rs*, 523 F.3d 453, 459 (4th Cir. 2008); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

ARGUMENT

Plaintiffs' fundamental premise, accepted by the district court, is that civil litigation against contractors can be used to regulate the conduct of wartime U.S. military operations upon a foreign battlefield. That premise is wrong. There is no support for it in the law developed over centuries of U.S.

military conflict; on the contrary, the precedent uniformly supports the proposition that the forces of the United States (including contractors integrated into those forces) are not answerable in court for civil tort suits by enemy aliens for injuries arising from the conduct of wartime operations such as military detention and interrogation.

While the factual setting of this case—alleged mistreatment within U.S. military battlefield detention facilities—has not been passed upon by the Supreme Court, the Court has decided that in the context of U.S. wartime military operations and occupation, no suits by the enemy will lie. The courts of appeals have uniformly rejected the premise that enemies can file civil suits to regulate U.S. battlefield operations or to seek compensation from the government, officials, or government contractors. Until the district court decisions here and in *Al Shimari*, no federal court had held differently. And for good reason. Tort law conflicts with the constitutional allocation of war powers to the political branches of the federal government and would provide competing supervision of war-making that would hinder the military's conduct of war. The detention facilities at issue here lie at the very core of military war-making and its regulatory scheme. And like all combatant activities, interrogation, detention, and the supervision of those working in those activities pose competing interests of international obligations, military objectives, manpower allocation, and security concerns—all in real time

and often under fire—that are committed to the military to balance. Detainees cannot use the courts to second-guess that balance or seek compensation by suing contractors whose personnel were integrated into those operations. Even subjecting contractors to suit, much less liability, in such circumstances would imperil the substantial public interest in honoring the separation of powers, preserving military authority over the conduct of war, and freeing the military and those assisting it on the battlefield from the burden of civil litigation over those activities.

Some of the allegations in the complaint, presumed true at this stage, recount reprehensible conduct (principally by unidentified or military "co-conspirators") that indicates a breakdown of military discipline and control in its detention facilities. These were revealed to the world in shocking photographs from Abu Ghraib in the early days of the Iraq conflict. But the question presented by this case is not whether such conduct is lawful or justifiable, or whether victims of abuse should be compensated and the perpetrators held to account. The question is whether civil tort suits by alien detainees should be added to the system that regulates battlefield military prisons: a combination of civilian criminal law, military justice, and administrative compensation, all of which are controlled by the Executive to which war-making is entrusted. Common law tort is the only one of these systems within the exclusive province of plaintiffs and the judiciary and is furthest removed

from the political branches. Plaintiffs here seek to engraft this system—for the first time—to administration of U.S. military detention facilities on a foreign battlefield during wartime. *See Al-Quraishi v. L-3 Servs., Inc.*, No. 10-1891 (4th Cir.), Arg. Rec., Oct. 26, 2010, at 37:51-38:39 (Q: "[C]an a foreign enemy soldier sue one of our soldiers in an American court?" . . . A: "The answer is yes . . .").

The Supreme Court has never allowed the objects of U.S. military force to bring suit for torts committed during the military's wartime operations. Nor has any court of appeals done so; in fact, confronted with the same allegations, the D.C. Circuit in *Saleh* categorically rejected the very propositions advanced by the same counsel on behalf of a would-be class that included these plaintiffs. This Court should not be the first to allow such suits. In addition to the uniform precedent, Congress has spoken in the FTCA and the myriad statutes governing the conduct of the U.S. wars, which uniformly do not provide for a civil cause of action.

The district court in this case relied upon dicta and incorrect inference to cast aside centuries of settled law and reach a troubling result: that enemy aliens can hale into court those engaged in or assisting the U.S. military's combatant activities and demand that the judiciary apply international norms and Iraqi law to regulate core military operations on the battlefield. Criminal law (both civilian and military) and the administrative compensation

scheme enacted and administered by the political branches are the appropriate tools for regulating battlefield detention and interrogation, activities at the very core of war-making and exclusively vested in those branches. Subjecting contractors and the military (even just as witnesses) to suit is not. The district court order should be reversed.

I. DEFENDANTS ARE IMMUNE FROM PLAINTIFFS' CLAIMS

L-3 and its employees—who were in Iraq at the behest of the U.S. military to support detention and interrogation operations—are immune from suit by enemy aliens under well-settled principles of law-of-war and derivative immunity.

A. This Court Has Jurisdiction To Review the District Court's Denial of Defendants' Immunity Defenses

This Court has jurisdiction to review the district court's denial of law-of-war immunity and derivative immunity. Conclusive orders denying immunity, even in its derivative form, are appealable collateral orders. *See, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996); *Eckert Int'l, Inc. v. Fiji*, 32 F.3d 77, 79 (4th Cir. 1994). Immunity from suit is separate from the merits of plaintiffs' tort claims, and the entitlement to immunity is effectively unreviewable on appeal from final judgment. *Metcalf & Eddy*, 506 U.S., at 143-44; *see Smith v. McDonald*, 737 F.2d 427, 428 (4th Cir. 1984), *aff'd*, 472

U.S. 479 (1985). The particular immunities that defendants assert here implicate "substantial public interests"—such as separation-of-powers concerns—that the Supreme Court has recognized justify immediate appeal. *Will v. Hallock*, 546 U.S. 345, 352 (2006); *see Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

The district court's denial of immunity was conclusive. The court "squarely rejected" law-of-war immunity. *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 207 (4th Cir. 2011) (King, J., dissenting), *vacated and reh'g en banc granted* (4th Cir. Nov. 8, 2011); *see* J.A.848-51. Specifically, the district court held that law-of-war immunity (i) does not apply to government contractors (J.A.850), (ii) does not apply to suits brought in U.S. courts (J.A.849-50), and (iii) does not extend to violations of the law of war (J.A.849). The denial of law-of-war immunity therefore affords this Court jurisdiction, as even the dissenting member of the panel suggested. *See Al-Quraishi*, 657 F.3d at 206, 214 (King, J., dissenting).

The dissent also did not disagree that the denial of derivative immunity would meet the requirements for a collateral order appeal, but believed that the district court had not conclusively determined the issue because of an asserted need for discovery. *Id.* at 214. The district court, however, unequivocally rejected the form of derivative immunity claimed by defendants, concluding that immunity would attach only if the alleged conduct was requested

by the contracts (notwithstanding defendants' contention that the content of the contracts was irrelevant to the immunity determination). (J.A.832-833, 864-869.) This Court has made clear that a party asserting an immunity defense has a right to collateral order review of a district court's legal ruling denying immunity, even when the district court concluded that discovery is necessary to resolve the defense. *See McVey v. Stacy*, 157 F.3d 271, 275-76 (4th Cir. 1998); *Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997) (en banc). Whether the content of the contracts is legally relevant to the immunity determination is the very question at issue, and review of the district court's ruling on the immunity issue would therefore not be premature. *See Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006).

B. Under the Law of War, Defendants Cannot Be Sued for Claims Arising out of Plaintiffs' Detention by the U.S. Military in Iraq

Occupying forces cannot be sued by enemy aliens for claims arising during war or occupation. *See Dow v. Johnson*, 100 U.S. 158, 170 (1880); *Coleman v. Tennessee*, 97 U.S. 509, 517 (1879); *New Orleans v. Steamship Co.*, 87 U.S. 387, 394 (1874). This rule is essential to the efficient conduct of war by the political branches: the threat of judicial intrusion would chill and hinder combatant activities, and the pendency of a lawsuit hampers efficient military efforts. *Dow*, 100 U.S. at 165-66. Based on these powerful concerns, the Court long ago held that occupying forces are not subject to civil suits by

the occupied. *Id.*; *Coleman*, 97 U.S. at 515. Indeed, three decades after the end of World War II, the D.C. Circuit held that modern conceptions of due process do not override such "normal and customary" law-of-war immunities or require a judicial forum to address injuries arising from the operations of U.S. armed forces in foreign countries. *Dostal v. Haig*, 652 F.2d 173, 177 (D.C. Cir. 1981).

As is the case with other forms of immunity, law-of-war immunity depends upon the function the defendant was performing, not the plaintiffs' characterization of the alleged conduct as heinous or illegal: it does not "make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Dow*, 100 U.S. at 163-66; *see also Coleman*, 97 U.S. at 515-19. Thus, the occupied cannot sue occupying forces of the United States under the law of the occupied or of the occupier, even if the actions were not justified by the necessities of war. *Dow*, 100 U.S. at 166. The proper remedy for an aggrieved resident of an occupied country is to report the injuries to the military command, which might provide compensation or punish the offender. *Id.* at 167; J.A.176. Even a member of the occupying forces who commits murder (in violation of federal law and the laws of war) is immune, although subject to criminal prosecution by the occupying power. *Coleman*, 97 U.S. at 515-19.

The district court acknowledged that *Dow* "suggests" military actions are "immune from civil liability in domestic courts *even for acts which violate the laws of war*," but contended that *Dow*'s holding was later limited to immunity for acts "'done in accordance with the usages of civilized warfare under and by military authority.'" (J.A.849 (emphasis added) (quoting *Freeland v. Williams*, 131 U.S. 405, 416 (1889)).) But this was the position of the dissent in *Dow*, not the opinion of the Court. *See* 100 U.S. at 170 (Clifford, J., dissenting). There is no basis to interpret *Freeland* as substituting the dissent for the majority opinion on this issue. *Freeland* explicitly stated it was *not* reconsidering the doctrine articulated in *Dow*, and reaffirmed that parties are protected "from civil liability *for any act done in the prosecution of a public war*." *Freeland*, 131 U.S. at 417 (emphasis added).[3] More fundamentally, in addition to the cases discussed above, the doctrine of immunity from suits by the occupied continues without the limitation asserted by the district court. *See, e.g., Moyer v. Peabody*, 212 U.S. 78, 85-86 (1909) (applying *Dow* immunity to civil suit against Colorado governor); *Dostal*, 652 F.2d at 176 (law-of-war immunity arising from occupation of West Berlin); *In re Lo*

[3] It is not surprising that *Freeland* used language about "the usages of civilized warfare" because the statute under review in the first part of the opinion used those terms. And, because nothing turned on whether the conduct was authorized by the laws of war, the language on which the district court mistakenly relied is dicta. *Freeland*, 131 U.S. at 416-17.

Dolce, 106 F. Supp. 455, 460-61 (W.D.N.Y. 1952) (American soldier operating behind enemy lines in German-occupied Italy not subject to Italian law); *United States v. Best*, 76 F. Supp. 857, 860 (D. Mass. 1948) (applying *Dow* immunity in context of occupied Austria); *Hamilton v. McClaughry*, 136 F. 445, 448-49 (D. Kan. 1905) (soldier participating in operation to quell Boxer rebellion not subject to Chinese law).

The district court also claimed that *Dow* (and presumably *Coleman* and later cases) were "outlier[s]" that were contrary to holdings that allowed suits against the military or denied them on the merits. (J.A.849-50.) But the cases relied upon by the district court do not support its rejection of the immunity set forth in the law-of-war cases. *Mitchell v. Harmony*, 54 U.S. 115 (1852), for example, allowed an action for trespass by a citizen—not an enemy—who was invited to accompany and trade with military forces, and the holding was distinguished by *Dow* based on these key differences. *See Dow*, 100 U.S. at 169. *Little v. Barreme*, 6 U.S. 170 (1804), allowed a claim by a neutral, not an enemy. *The Paquete Habana*, 175 U.S. 677, 680 (1900), was an action "in prize," a specialized type of *in rem* proceeding brought by the military forces themselves, which allowed the ship owner to contest the condemnation. *Lamar v. Browne*, 92 U.S. 187 (1876), specifically reaffirmed immunity of the military from tort suits in capture situations, even when Congress created a statutory right in the Court of Claims to seek compensa-

tion for such capture. *Id.* at 196-99. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), and *Ford v. Surget*, 97 U.S. 594 (1878), clearly reaffirmed law-of-war immunity. In *Luther*, the claims (that Rhode Island militia members unlawfully broke into the plaintiff's house in the middle of the night to arrest him) were not actionable because "a state of war" existed that immunized the allegedly unlawful conduct. 48 U.S. at 45-46. And in *Ford*, the Court went further, holding that a civilian was protected by the law of war, not because the acts were lawful, but because they were on behalf of the Confederate Army, which was accorded the status of a recognized military. 97 U.S. at 604-07.

The district court also asserted that law-of-war immunity does not apply to non-military personnel because civilians were not answerable to military tribunals until 2006, and because immunity from suit in occupied courts did not mean immunity from civil suit in domestic courts. (J.A.850-51.) The district court erred by misapprehending the historical context of *Dow* and the other cases it sought to limit. When those cases were decided, civilians accompanying military forces in the field *were* amenable to trial by military tribunals. *See, e.g.*, *Madsen v. Kinsella*, 343 U.S. 341, 349 & n.15 (1952).[4]

[4] It was not until 1957 that the Supreme Court limited the trial by military tribunal of civilians abroad. *See Reid v. Covert*, 354 U.S. 1 (1957). At any rate, the existence of federal criminal jurisdiction to try such contractors exposes the fallacy of the district court's suggestion that immunity from tort suit would create a "lawless loophole" (J.A.851). *See, e.g.*, 18 U.S.C. § 7; *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1551 (2010). As the Solicitor General has recently and repeatedly ex-

Nor do the holdings of *Dow* and later cases turn on the venue (local courts of the occupied country versus home courts of the occupying force), as the district court erroneously held based on another misapprehension of historical context. Under uniformly applicable choice of law principles in force when those cases were decided, "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will also be barred in the domestic courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004) (internal quotations omitted); Restatement (First) of Conflict of Laws §§ 377-390, 412-424. *Dow* itself makes clear that neither the civil law of the invaded country nor that of the conquering country govern an invading army. *Dow*, 100 U.S. at 170. And *Ford* held that tort claims against a civilian were barred by law-of-war immunity despite that they were brought in domestic courts after restoration of peace following the Civil War. 97 U.S. at 607-08.

Even where the Constitution directs that there should be supervision of government action through civil remedy—*e.g.*, review of detention through habeas corpus or damage actions for government takings—there is immunity in the context of military operations abroad. In *Johnson v. Eisentrager*, 339

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plained, "[t]he United States has at its disposal a variety of tools, enhanced in the wake of events at Abu Ghraib, to punish the perpetrators of acts of torture to prevent acts of abuse and mistreatment, and to compensate individuals who were subject to abusive treatment while detained by the United States military." U.S. Br. (*Saleh*) at 8; *see also* J.A.821 n.7.

U.S. 763 (1950), the Court concluded that even the constitutionally-enshrined writ of habeas corpus is unavailable to enemy aliens detained during occupation, explaining that judicial intervention in this area would create "a conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U.S. at 779. Absent a congressionally-created cause of action, civil claims are inappropriate, for "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.* The Court made clear that this rule concerned the proper authority for enforcement of laws of war: "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. The foreign wartime context that precludes civil remedies even where directed by the Constitution even more clearly bars tort claims that do not enjoy the special constitutional status of habeas corpus. *See* U.S. Const. art. I, § 9, cl. 2.[5]

[5] The district court erred in concluding that *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008), "significantly narrowed *Eisentrager*'s scope, making it . . . inapplicable to the present case." (J.A.838.) *Rasul* simply affirmed that Congress is empowered to create a cause of action that might override law-of-war immunity. In response to *Rasul*, Congress sought to eliminate federal jurisdiction over petitions filed by Guantanamo detainees. *Boumediene* found that this violated the Suspension Clause, 553 U.S. at 771, and reaffirmed the vitality of *Eisentrager* with regard to battlefield military prisons such as Abu Ghraib, but found Guanta-

In a similar vein, the enemy property cases—involving claims brought under the Takings Clause's waiver of sovereign immunity, *see* U.S. Const. amend. V—further reinforce that claims based on wartime combatant activities are barred. *See United States v. Caltex (Phil.), Inc.*, 344 U.S. 149, 155-56 (1952) ("[I]n wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign."); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355-56 (Fed. Cir. 2004) (allegedly wrongful destruction of factory not compensable); *Perrin v. United States*, 4 Ct. Cl. 543, 547-48 (1868), *aff'd*, 79 U.S. 315, 316 (1871) (same).

The rule drawn from the law-of-war cases has been given concrete application to the war in Iraq, illustrating the comprehensive enforcement, disciplinary, criminal, and compensatory regime in place for acts occurring during wartime—and how civil tort suits would be an inappropriate addition. Under the regulations of the Coalition Provisional Authority ("CPA"), military personnel and contractors, such as L-3, are immune from suit for mat-

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namo different. *Boumediene*, 553 U.S. at 762, 765-71. The D.C. Circuit, in finding habeas barred at Bagram Air Force Base in Afghanistan, found controlling "the rationale of *Eisentrager*, which was not only not overruled, but reinforced by . . . *Boumediene*." *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (2010); *see also* J.A.808-829. And while the *Rasul* majority discussed the rights of aliens detained by the military at Guantanamo to engage in non-habeas litigation (J.A.838), that discussion was premised on a rejection of their characterization as alien enemies, *Rasul*, 542 U.S. at 476, and was dicta because the claims had been abandoned, *id.* at 505 n.6 (Scalia, J., dissenting).

ters relating to their contracts. (J.A.211 § 4 (CPA 17 June 27, 2004); J.A.203 § 3 (CPA 17 June 26, 2003); *see* J.A.21 (alleging that the claims in this suit arise from L-3 "selling the services of Mr. Nakhla and other employees to the United States military").) Disciplinary and criminal regulation is reserved to the criminal law of the Sending State. (J.A.210 § 2(4); J.A.203 § 2(4).) Plaintiffs concede that CPA regulations immunize defendants and bar their claims, at least in Iraqi courts. *See* Br. of Appellees (Dkt. 23, Sept. 22, 2010) at 20 n.5.

The United States has aggressively enforced these disciplinary and criminal regulations to punish and court-martial those found to have engaged in abuses at Abu Ghraib. *See Ibrahim v. Titan Corp.*, 391 F. Supp. 2d at 16. Civilian contractors can likewise be prosecuted within the United States for criminal conduct at military detention facilities in Iraq. *See* 18 U.S.C. §§ 2340A, 2441, 3261. Contractual remedies can also be sought by the U.S. against contractors who exceed the scope of their contract or fail to comply with its terms. *Saleh*, 580 F.3d at 2. In addition, the U.S. has established administrative remedies to compensate for mistreatment in U.S. military detention facilities in Iraq to the extent such claims are substantiated. *Id.*; U.S. Br. (*Saleh*) at 9-10; J.A.176.

In sum, to allow plaintiffs' state law and ATS claims to proceed here would be contrary to values expressed by the cases barring suits by the oc-

cupied against the occupiers over the last two centuries, and would subject the conduct of war and occupation abroad by the U.S. military to the debilitating effects of being embroiled at home in the legal attacks of the military's detainees.

C. Defendants Are Derivatively Immune from Plaintiffs' Claims

Over twenty-five years before *Saleh* addressed these very claims and held them barred by preemption, and intimated they would be barred by immunity as well, *see* Part II, *infra*, the D.C. Circuit confronted claims under the ATS and state common law against government officials and military contractors arising out of U.S. military action overseas (the Contra Wars). *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). The *Sanchez-Espinoza* plaintiffs alleged that the defendants had engaged in outrageous (and clearly illegal) conduct that violated the common law and law of nations, including "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities." 770 F.2d at 205. As here, plaintiffs alleged that government contractors acted "in concert and conspiracy" with other defendants, including U.S. government officials, to mistreat or aid in the mistreatment of the civilian population of a foreign nation in the midst of foreign hostilities. *Id.* at 205. The court, in a unanimous opinion authored by then-Judge Scalia and joined by then-Judge Ginsburg, held that "[i]t would make a mockery of the doctrine of sovereign immunity" to permit such claims to proceed. *Id.* at 207. The same analysis applied to the claims brought against the contractor defendants, *id.* at 207

n.4, in part because the immunity that extended to the contractors and government officials was based upon separation of powers, *id.* at 207 n.5.

Sanchez-Espinoza's holding—that the military's contractors are immune from tort claims arising out of their participation in U.S. military operations overseas because subjecting them to suit would trench on the immunity of the United States—fits squarely within the framework set out by this Court for determining whether non-governmental actors are derivatively immune. Because the claims in this case arise out of L-3's provision of linguists and interrogators for detention and interrogation operations during the Iraq War—core public functions in the wartime operations of the U.S. military—defendants are derivatively immune from plaintiffs' suit.

In *Mangold v. Analytic Services, Inc.*, plaintiffs sued a government contractor for defaming them to government investigators. On interlocutory appeal under the collateral order doctrine of the district court's order denying immunity to the contractor, this Court held that the government contractor was immune notwithstanding its private status, because "the public benefits obtained by granting immunity outweigh its costs." 77 F.3d at 1446-47. It is not the governmental status of the defendant, nor the legality of the alleged conduct, but rather the nature of the function being performed by the defendant that determines whether immunity attaches. *Id.* at 1447-48. In *Mangold*, this Court exercised appellate jurisdiction and concluded that derivative immunity was appropriate, *id.*, despite the district court finding that no contractual provision required the defendants to perform the disputed ac-

tion at all, let alone to perform it in a false and perjurious manner. *See Mangold v. Anser Corp.*, 842 F. Supp. 202, 203 (E.D. Va. 1994), *rev'd* 77 F.3d 1442 (4th Cir. 1996).

The district court's cramped reading of *Mangold* as allowing derivative immunity for only the specific underlying immunities at issue there, *see, e.g.*, J.A.869 ("there is no contention by either party that Defendants' liability arises out of their testifying or cooperating with investigators"), is flatly inconsistent with this Court's broad application of *Mangold* to the different immunity in *Butters v. Vance International, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), as well as the understanding of the doctrine manifested by other courts of appeals. *See, e.g.*, *Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (citing *Mangold*, 77 F.3d at 1447); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998); *Midland Psychiatric Assocs. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998); *Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997).

The public benefits of granting immunity to defendants outweigh the costs. Defendants were integrated into uniquely governmental functions for which the government enjoys sovereign immunity—*see Saleh*, 580 F.3d at 13 (direct challenges to U.S. military action are precluded by sovereign immunity); *Sanchez-Espinoza*, 770 F.2d at 207; *see also* 28 U.S.C. § 2680(j) (FTCA)—and soldiers enjoy law-of-war immunity, *see* Part I.B, *supra*. It is in the public interest to protect battlefield operations from interference by

those detained during an occupation, and for the military to have the freedom to use contractors to fill shortages in military ranks without fear that their use will interject the courts into battlefield prisons, while the costs of immunity are diminished by the other regulatory and compensatory schemes.

First, defendants were involved in carrying out a "governmental function." *Murray*, 444 F.3d at 174. Injuries arising during capture, detention, and interrogation by military forces clearly implicate core governmental functions: such activities "by 'universal agreement and practice,' are 'important incident[s] of war,'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (alteration in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 30 (1942)), and were an "essential tool" in combating hostile forces in Iraq (J.A.173). Because contractors were used to make up shortfalls in military ranks in the context of detention and interrogation operations, (J.A.199), such contractor employees were required to be integrated into the military chain of command and directly supervised by military personnel. *See* J.A.193; *Saleh*, 580 F.3d at 6-7. Indeed, although the district court rejected defendants' claims of immunity and preemption, it recognized the sovereign nature of their work: "Defendants' work operating alongside the military as interpreters for non-English speaking captives is fairly classifiable as a public function. Operation of a military force is one of the most basic governmental functions, and one for which there is no privatized equivalent." (J.A.891; *see also* J.A.893 ("[A]ctually working alongside the military to carry out military duties approaches the Government's core power to operate a military.").)

Second, there is an overriding public interest in permitting military commanders to act "'free from the hindrance of a possible damage suit' based on [their] conduct of battlefield activities." *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 4 (D.D.C. 2007) (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)), *aff'd in part*, *Saleh*, 580 F.3d 1, *cert denied*, 131 S. Ct. 3055. The district court's ruling—allowing civil tort suits to regulate the conduct and supervision of L-3's employees engaged in detention and interrogation operations in military battlefield prisons—would interfere with the Executive's conduct of war and foreign policy. Military commanders would be forced to choose between doing without such contractors to aid core functions or subjecting the battlefield to tort regulation and the intrusion of civil suits. In the context of Iraq, this was a false choice, insofar as the military could not have conducted the necessary wartime interrogation and detention functions without L-3's loaned employees.

Under the district court's view, L-3 would be precluded from providing employees to the military as it did. Instead, L-3 would be required to inject supervisors between its linguists and the military units to which they were assigned by the military and to insist that military operations and employee supervision be undertaken in a manner consistent with, in this case, the law of Iraq. This result would, in the language of *Sanchez-Espinoza*, make a mockery of the doctrine of sovereign immunity. Finally, there is a heightened interest in this context in avoiding "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings . . .

where, as here, contract employees are so inextricably embedded in the military structure." *Saleh*, 580 F.3d at 8; *see also Dow*, 100 U.S. at 160, 165.

Third, balanced against the public benefits of immunity in this context are the costs of such immunity; i.e., that "illegal and even offensive conduct may go unredressed" and that individuals might escape accountability for their wrongful conduct. *Mangold*, 77 F.3d at 1447. The balance here tips even more in favor of immunity than it did in *Mangold*. Here, the Court is not presented with a choice between the application of tort law and no compensation or accountability. Congress has created an administrative remedy through which the military has offered compensation to victims of abusive conduct such as that alleged here. *See* 10 U.S.C. § 2734 (Foreign Claims Act); J.A.176 (describing administrative compensation system for allegations of abuse and mistreatment); *Saleh*, 580 F.3d at 2-3; U.S. Br. (*Saleh*) at 9-10. In *Mangold*, by contrast, plaintiffs had no remedy. And the fact that this compensation is paid by the military and not L-3 does not mean that L-3 cannot be held accountable. There are a variety of criminal and contractual tools under which the military holds accountable those found to have engaged in such illegal conduct. *See* U.S. Br. (*Saleh*) at 8-9. That no L-3 employees were prosecuted and no contractual remedies pursued against L-3 suggests an absence of culpability, not an absence of remedial tools. Balanced against this diminished cost is the heightened importance of insulating

the conduct of U.S. military operations in war from the intrusion of civil suits as compared to the more generalized federal interest in government peace-time investigation identified in *Mangold*..

At any rate, the plaintiffs in *Dow, Ford, Freeland*, *Sanchez-Espinoza*, and *Saleh* were denied civil tort remedies. Plaintiffs cannot explain why they should fare better. *Cf. Wilson v. Libby*, 535 F.3d 697, 703, 710 (D.C. Cir. 2008) (holding omission of remedy does not require access to judicial forum particularly where claims "inevitably require judicial intrusion into matters of national security and sensitive intelligence information"), *cert. denied* 129 S. Ct. 2825 (2009).

This balance in favor of immunity is not thwarted by plaintiffs' allegations of illegal conduct, or in the language of *Dow*, "denunciatory epithets" characterizing the conduct. *Mangold*, which did not involve the constitutional war-making and foreign policy interests here, recognized that immunity covers "illegal and even offensive conduct," but accepted that cost to protect the government's ability to delegate essential tasks. 77 F.3d at 1446-47. As plaintiffs never cease to repeat, torture, rape, and other heinous conduct are not the policy of the United States, any more than maliciously destroying property in *Dow* or murder in *Coleman*, or torture, rape, and extra-judicial killing in *Sanchez-Espinoza* or making false statements in *Mangold* were the policies in the times of those cases. Yet immunity attached because the claims arose out of functions that, on balance, needed to be protected from

civil litigation. In particular, other courts have consistently held that allegations of torture do not vitiate immunities or permit civil litigation over U.S. operations abroad. *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir.) (dismissing claims alleging torture by military at Guantanamo), *cert. denied*, 130 S. Ct. 1013 (2009); *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) (alleged CIA torture and execution non-justiciable); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (alleged conspiracy with Chilean officials to torture non-justiciable); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (alleged torture and other violations of international law non-justiciable); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (alleged torture and killing of a Chilean general non-justiciable); *see also El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (state secrets dismissal of claims against officials and contractors); *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007) (dismissing claims alleging torture by military in Iraq), *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

II. PLAINTIFFS' CLAIMS ARE PREEMPTED AND BARRED

As noted above, the very claims pursued by a would-be class that included these plaintiffs were squarely rejected by the D.C. Circuit. *Saleh*, 580 F.3d at 2. Because of the posture of *Saleh*, the D.C. Circuit focused on whether the claims were preempted and barred by federal law and whether plaintiffs had stated an ATS claim against L-3. This Court should follow the

D.C. Circuit and the panel majority in ruling that plaintiffs' claims are preempted and barred by federal law.

A. This Court Has Jurisdiction To Review the District Court's Preemption Ruling

As the panel majority correctly determined, "battlefield preemption" established by *Saleh* fits within the Court's collateral order jurisdiction.[6] *See Al-Quraishi*, 657 F.3d at 205-06. Under *Saleh*'s preemption analysis, federal law not only prevails over state law but replaces it with immunity from "even the *possibility* of suit," *Saleh*, 580 F.3d at 9, "where a private service contractor is integrated into combatant activities over which the military retains command authority," *id.* (noting that the battlefield context, standing alone, is not sufficient for preemption).

While the dissent was correct that not every defense constitutes a right not to be tried, the preemption defense presented in this case is precisely that. The federal interest that justifies preemption here is in shielding military operations from the hindrance of possible damages suits, including the prospect of "lengthy and distracting court or deposition proceedings." *Id.* at 8; *see id.* at 7. In contrast to preemption by analogy to the discretionary function exception, which is focused on protecting federal discretion and

[6] The conclusiveness of the district court's preemption ruling is not in question. The district court squarely rejected the D.C. Circuit's analysis in *Saleh*, as well as that of the Ninth Circuit in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). (J.A.874-77.)

avoiding pass-through liability, *see Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-12 (1988), preemption by analogy to the combatant activities exception is concerned with preventing intrusion upon sensitive military decision-making and erosion of military efficiency by litigation of such issues, *see Saleh*, 580 F.3d at 7. These different concerns animated *Dow*, 100 U.S. at 170, and *Eisentrager*, 339 U.S. at 779 ("It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . ."), and remain vital today, *see* U.S. Br. (*Saleh*) at 11-12. The federal policy in this unique context dictates protection from suit, not merely protection from liability. As with immunity, immediate appeal is necessary to protect that federal interest. *See Al-Quraishi*, 657 F.3d at 205-06. Just as the denial of immunity from suit is subject to immediate appeal, *see* Section I.A, *supra*, and for the reasons stated in the panel's opinion, *see Al-Quraishi*, 657 F.3d at 205, collateral order review of the district court's preemption ruling is proper.

In any event, the Court need not reach the question of whether the district court's ruling on preemption in this case is immediately appealable because the Court has pendent appellate jurisdiction over the issue. *See Rossignol v. Voorhaar*, 316 F.3d 516, 527 n.3 (4th Cir. 2003); *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 615 (4th Cir. 2001). Defendants have substan-

tial claims to law-of-war and derivative immunity, *see* Parts I.B. and C., *infra*, which are closely intertwined with preemption (and thus give rise to pendent jurisdiction regardless of whether defendants ultimately prevail on immunity). *See Nixon*, 457 U.S. at 743; *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1339 n.6 (11th Cir. 2007); *Rux*, 461 F.3d at 475. The close relationship between preemption and immunity that the panel observed in this case demonstrates the intertwinedness of the issues. *See Al-Quraishi*, 657 F.3d at 205-06. All three issues are rooted in the same federal policies and concerns about civil law interference with military judgments and activities. *See id.* at 205. The legal question whether those policies and concerns extend to private contractors in the preemption context significantly overlaps the same question in the immunity context (over which, as we have explained, the Court unquestionably has collateral order jurisdiction). *See McMahon*, 502 F.3d at 1357 (exercising pendent jurisdiction because the appealable (but unsuccessful) claim to *Feres* immunity and the non-appealable issue both concerned "the need to avoid judicial interference with sensitive military judgments"). Moreover, in this case, both immunity and preemption turn on the contractor's involvement in activities which the military controls, the battlefield context, the nature of the function performed, and the nature of the claims being asserted. *Cf. Rossignol*, 316 F.3d at 527 n.3 (holding that issues were intertwined because "the same retaliatory suppression of core political

speech lies at the heart of each"). This relationship between the immunity and preemption issues is sufficient to give the Court pendent jurisdiction to review the preemption ruling. *See Jenkins*, 119 F.3d at 1159 n.2.; *cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946-47 (2009) (jurisdiction to review whether complaint states a claim on interlocutory appeal of immunity ruling); *Wilkie v. Robbins*, 551 U.S. 537, 550 n.4 (2007) (jurisdiction to review whether a *Bivens* action exists on appeal of immunity ruling).

The decisions from other circuits relied upon by the dissent are inapposite. In contrast to this case, no substantial claim to immunity justified pendent jurisdiction in *Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir. 2010), or *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010). Moreover, the preemption defenses in those cases were different from the preemption asserted here, such that, even if those defendants had raised substantial claims to immunity, jurisdiction would not necessarily exist. *Rodriguez* involved the discretionary function exception to the FTCA, which is rooted in different concerns than the combatant activities exception. 627 F.3d at 1265. In *Martin*, a truck driver's family sued his contractor-employer over a friendly-fire death, a situation far removed from an enemy alien suing an integrated contractor for abuse while detained and interrogated in military battlefield prisons. It is not at all clear that the claim in *Martin* met the requirements for battlefield preemption or could be intert-

wined with the different claim of immunity there. And *Martin*'s denial of collateral order review of the battlefield preemption ruling is flawed because it failed to address the very different considerations underlying that preemption and *Boyle* preemption based on the discretionary function exception.

B. The Court Should Adopt the D.C. Circuit's Reasoning in *Saleh*

1. The D.C. Circuit Correctly Found "Battlefield Preemption" Based on *Boyle* and Field Preemption

The D.C. Circuit's rationale in *Saleh* tracks the concerns that undergird law-of-war immunity for soldiers and the prohibition of alien enemies challenging their detention during occupation. During U.S. military operations abroad "all of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place." *Saleh*, 580 F.3d at 7. The court added that the costs of imposing tort liability would be passed through to the government (and thus to the American taxpayer), *id.* at 8, and that imposing tort liability on contract employees would mean that the military would be "haled into lengthy and distracting court or deposition proceedings," *id.* at 8. Based on those considerations, the court of appeals concluded that, "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Id.* at 9.

In addition to finding that there was a conflict with congressional intent to cast an immunity net over claims arising out of combatant activities, the court of appeals found an independent basis in the commitment of war-making to the federal government, "because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests." *Id.* at 13. "The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." *Id.* at 11 (citing U.S. Const. art. I, § 10, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), and *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429, 433 (1968) (facially valid state law preempted because it conflicted with federal interests as applied); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

This rationale reflects that the "clarity or substantiality" of the conflict required to preempt state law varies directly with the "strength or the traditional importance of the state concern asserted" and inversely with "the strength of the federal foreign policy interest." *Garamendi*, 539 U.S. at 419 n.11 (citing *Hines*, 312 U.S. at 613, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and *Boyle*, 487 U.S. at 507-08). Federal wartime policy-making is constitutionally and traditionally the *exclusive* province of the po-

litical branches of the federal government,[7] and, in contrast with more generalized foreign policy concerns, is within the "inner core" of the foreign affairs power. *Deutsch*, 324 F.3d at 711-12; *see* U.S. Br. (*Saleh*) at 11-12 (explaining that the treatment of prisoners during wartime implicates "uniquely federal interests"). On the other side of the balance, as *Saleh* recognized, the state interest is negligible. *Saleh*, 580 F.3d at 11 ("[T]he interests of any U.S. state (including the District of Columbia) are *de minimis* in this dispute—all alleged abuse occurred in Iraq against Iraqi citizens."); *see* U.S. Br. (*Saleh*) at 12. These core federal interests readily displace and bar state law claims by foreign battlefield detainees of the U.S. military in Iraq.

In rejecting *Saleh*, the district court erroneously applied a presumption against preemption applicable to "traditional areas of state power." (J.A.877.) But no rationale for allowing tort regulation of the battlefield was advanced to offset *Saleh*'s observation that "[u]nlike tort regulation of dangerous or mislabeled products, the Constitution specifically commits the Na-

[7] *See* U.S. Const. art. II, § 2, cl. 1 (making President Commander-in-Chief); *id.* cl. 2 (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces"). Moreover, most of the Constitution's express limitations on states' foreign affairs powers also concern war. *See Deutsch v. Turner Corp.*, 324 F.3d 692, 711 & n.10 (9th Cir. 2003) (Reinhardt, J.).

tion's war powers to the federal government, and as a result, the states have traditionally played no role in warfare." *Saleh*, 580 F.3d at 11. Indeed, the presumption on which the district court relied to reject *Saleh* is properly reversed in the area of military and national security affairs, which lie outside traditional areas of state power. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *see also United States v. Stanley*, 483 U.S. 669, 681 (1987) (no cause of action where judicial intrusion might interfere with military decision-making even though defendants were civilian personnel); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Even the dissent in the D.C. Circuit agreed that preemption of *Iraqi* law—which the district court would apply here (J.A.914)—is appropriate. *Saleh*, 580 F.3d at 30 n.20 (Garland, J., dissenting).

The district court also erred in focusing on Congress's alleged failure to extend FTCA coverage to contractors in these circumstances. (J.A.875-76.) In doing so, the district court quarrels with *Boyle* itself, which held that there was preemption even when the defendants were explicitly not covered by the FTCA. *See Saleh,* 580 F.3d at 6; U.S. Br. (*Saleh*) at 13. *Saleh* instead properly focused on congressional intent expressed in the combatant activities exception and Congress's significant legislation on the issue. *See Saleh*,

580 F.3d at 13 n.9 ("Congress has declined to create a civil tort cause of action that plaintiffs could employ.").

Congress's extensive legislation in the areas of torture and war crimes strongly suggests that its failure to create a cause of action that plaintiffs can pursue was purposeful. Congress has created comprehensive criminal statutes to punish torture and war crimes, which the Executive chose not to pursue against L-3's employees. *See* 10 U.S.C. § 948a *et seq.*; 18 U.S.C. §§ 2340-2340A; 18 U.S.C. § 2441; *see also* U.S. Br. (*Saleh*) at 8-10. In addition, when Congress created a statutory civil cause of action to remedy torture, it expressly excluded the subject of plaintiffs' claims here by limiting the action to torture in connection with *foreign* state action. *See* 28 U.S.C. § 1350 note (Torture Victim Protection Act or TVPA); *cf.* Statement by President George [H.W.] Bush upon Signing H.R.2092, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992) ("I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of U.S. military operations abroad...."). And Congress precluded judicial review of the Executive's resolution of claims under the comprehensive administrative compensation system it created. *See* 10 U.S.C. § 2735.

2. The Government Has Rejected Many of the Bases Relied Upon by the District Court and the Dissent

After this case was briefed and argued to the panel, the Solicitor General filed a brief in the Supreme Court opposing certiorari in *Saleh*. The So-

licitor General expressed no reservation about the outcome in *Saleh* and rejected key premises of the district court opinion and the panel dissent, while endorsing the factors that animated the decision in *Saleh* and the panel majority.

The United States agreed that tort claims regarding "the treatment of prisoners during wartime" implicate "uniquely federal interests," U.S. Br. (*Saleh*) at 11, and therefore, "reliance on a presumption against preemption . . . is misplaced." *Id.* at 12. While the government has an interest in ensuring that contractors are held accountable "by appropriate means," *id.*—civil suits not being one of those means identified by the Solicitor General at pages 8-10—it made clear that the government is interested in ensuring "appropriate limits" on tort suits based on combat-related activities. *Id.* at 12.

In the government's view, the court's "recognition of a federal preemption defense informed by the FTCA is generally consistent with the approach [the Supreme Court] took in *Boyle*," *id.* at 15, and the *Saleh* court "reasonably turned to the FTCA's combatant activities exception for guidance," *id.* at 13. While the government differed with the D.C. Circuit on the focus of the test for preemption—opining that combatant activities preemption "does not turn on whether a challenged act is itself a 'combatant activity,' or whether the alleged tortfeasor is himself engaging in a 'combatant activity,'" but on whether the claims arise out of the *military's* combatant activities, *id.* at

16—it rejected appellees' and the dissent's assertion that the United States had previously stated that tort claims against contractors should not be preempted, and more generally rejected reliance on the Department of Defense regulations and the response to public comments as opining on the state of the law. *Id.* at 14 n.6.

The government perceived a lack of clarity in how limitations might apply in *future* cases with different facts and the contours of the defense, *id.* at 15-18, but rejected the contention that *Saleh* immunizes all contractors supporting the military during a time of war, *id.* at 18, or that L-3 could be liable if its employees were acting outside the scope of their employment or L-3's contract, *id.* at 17. Since it filed its brief in *Saleh*, moreover, the government has cited the panel opinion in *Al Shimari* in support of the proposition that "conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation." Pet. for Reh'g and Suggestion for Reh'g En Banc of the Defendant-Appellant at 9-10, *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *vacated and reh'g en banc granted* (7th Cir. Oct. 28, 2011).

3. Battlefield Preemption Equally Bars Claims Under the ATS

Allowing ATS claims to proceed where state law claims are barred would repudiate the Supreme Court's instruction to use "great caution" in implying federal common law claims under the ATS, particularly where, as

here, a court's reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004); *Saleh*, 580 F.3d at 16 & n.14 ("'[T]he [ATS] is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security[,] and any remedies for such actions are appropriately matters for resolution by the political branches, not the courts.'" (quoting Brief for the United States as Amicus Curiae, *Alvarez-Machain v. Sosa*, No. 99-56880 (9th Cir. Mar. 20, 2000))); *Sanchez-Espinoza*, 770 F.2d at 206-07. Particularly in such sensitive areas, creating a private cause of action is "better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727.

This is just such a case. As discussed above, Congress has repeatedly declined the opportunity to create such a cause of action. And caution is particularly apt here because creation of such a claim "raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.*; *see also* U.S. Br. (*Saleh*) at 22 (a suit brought by foreign nationals against U.S. persons based on conduct occurring in a military setting in a foreign country raises a threshold question whether a federal common-law cause of action based on the jurisdictional grant in the ATS should be created).

Moreover, plaintiffs' ATS claims run directly afoul of *Saleh*'s preemption analysis. *See Saleh*, 580 F.3d at 16. *Saleh* explained that "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.* at 7. Indeed, "it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare." *Id.* Permitting ATS claims would undermine this Congressional intent to eliminate tort from the battlefield. In short, the application of international law to support a tort action on the battlefield is equally barred by the federal interests that displace state law. *See id.* at 16.

III. THE CASE PRESENTS NON-JUSTICIABLE POLITICAL QUESTIONS

A. This Court Has Jurisdiction To Review the District Court's Political Question Ruling

This Court may review defendants' political question defense because it implicates the Court's subject-matter jurisdiction. *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). Because a court without jurisdiction has no authority to render a decision on the merits, *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 101-102 (1998), resolving the justiciability of plaintiffs'

claims here is "necessary to ensure meaningful review" of the denial of defendants' immunity, *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995). *See Larsen v. Senate of the Commonwealth of Pa.*, 152 F.3d 240, 245-46 (3d Cir. 1998) (asserting the obligation to decide whether the case presented a political question before "reaching the merits of the issues certified for appeal"); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 960-61 (9th Cir. 2004) (reviewing subject-matter jurisdiction on interlocutory appeal consistent with *Swint*); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002) (same); *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999) (same); *cf. In re Sealed Case*, 131 F.3d 208, 210-12 (D.C. Cir. 1997) (in criminal case, considering issue of subject-matter jurisdiction before addressing issue that qualified for interlocutory appeal under collateral order doctrine).[8]

Moreover, defendants' political question defense is intertwined with the law-of-war and derivative immunity issues over which the Court has collateral order jurisdiction. *See Rux*, 461 F.3d at 475. The political question

[8] *Rux* is not to the contrary. There, the Court concluded that an issue of statutory standing was neither "inextricably intertwined" with nor necessary to ensure review of the claims properly on interlocutory appeal. *Rux*, 461 F.3d at 476. Statutory standing does not implicate a court's subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 97; *accord Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011); *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 295 (3d Cir. 2007).

doctrine derives from the separation of powers and insulates sensitive military judgments from judicial scrutiny. *Tiffany*, 931 F.2d at 277-78. The same separation-of-powers concerns, and the policy of avoiding judicial interference with military judgments, underlie the immunity inquiries in this case. *See McMahon*, 502 F.3d at 1357 (holding that political question defense is reviewable as inextricably intertwined with derivative immunity under *Feres v. United States*, 340 U.S. 135 (1950), even though the court declined to recognize the immunity claimed).

B. The Case Presents Non-Justiciable Political Questions

Claims by enemy aliens for injuries during their detention by the U.S. military present non-justiciable political questions under *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The choice of system to regulate battlefield military operations is a political question committed by the text of the Constitution to the political branches. U.S. Const. art. I, § 8; *id.* art. II, § 2, cl. 1; *see supra* Part I. So too with supervising military detention and interrogation operations, which fall within the core of the war-making powers committed to the political branches. *See Hamdi*, 542 U.S. at 518.

Accordingly, how to imprison enemy aliens and how effectively to supervise soldiers and civilians performing such core military functions are matters of military judgment and discipline not amenable to judicial resolu-

tion. *Tiffany*, 931 F.2d at 277 ("The strategy and tactics employed on the battlefield are clearly not subject to judicial review."); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010). Nor can plaintiffs' characterization of their allegations as involving illegal torture make the case justiciable because the task of investigating and punishing unlawful conduct occurring in the course of combatant activities is committed to the Executive. *See Tiffany*, 931 F.2d at 279-82; *Schneider*, 412 F.3d at 195-96. The allegations in the complaint are thus barred by the first test for identifying political questions. *See Baker*, 369 U.S. at 217.

In addition, there are no judicially discoverable and manageable standards for resolving this case. Common law tort principles do not govern wartime military detention and interrogation, and courts lack the standards and expertise to evaluate military decisions on supervision in battlefield detention operations, detainee treatment, and interrogation. *Tiffany*, 931 F.2d at 278-79. In sum, this complaint is barred under both the first and second *Baker* factors, and dismissal is thus required for lack of jurisdiction.

This Court's recent decision in *Taylor v. Kellogg Brown & Root Services. Inc.*, 658 F.3d 402 (4th Cir. 2011)—argued the same day as this case and *Al Shimari* and authored by Judge King—underscores this result. There, an American soldier sued a military contractor in tort, alleging that he was elec-

trocuted due to the contractor's negligence in repairing a generator at a base in Iraq. This Court reasoned that reaching the merits of the claim would require the court to assess "actual, sensitive" military judgments about base management and maintenance policies even though the contractor "was nearly insulated from military control" and by contract was solely responsible for the safety of all camp residents during its operations. *Taylor*, 658 F.3d at 411 (internal quotation marks omitted). If the claims and defenses in *Taylor* presented a political question, how much more so do those here, where L-3 was integrated and supervised by the military chain of command, *Saleh*, 580 F.3d at 6-7; J.A.874-877, and carried out a function that "approache[d] the Government's core power to operate a military." (J.A.893.) To a greater degree than *Taylor*, this case implicates sensitive military decision-making, including interrogation techniques, supervision of battlefield prisons, and detention policies. Because plaintiffs' claims and the defenses thereto cannot be separated from the context of battlefield detention and interrogation, they are inappropriate for judicial resolution.

CONCLUSION

The district court's order denying defendants' motions to dismiss should be reversed.

Respectfully submitted,

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

I, Ari S. Zymelman, hereby certify that:

1. I am an attorney representing Appellant L-3 Services, Inc.

2. This brief is in proportionally spaced 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 13,293 words.

/s/ Ari S. Zymelman
Ari S. Zymelman

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of November, 2011, I caused a true copy of the foregoing Brief for Appellants to be filed through the Court's electronic case filing system, served through the Court's electronic filing system, and sent by United Postal Service, postage prepaid, to the below-listed counsel of record.

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