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

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs, v. CACI PREMIER TECHNOLOGY, INC., Defendant.	Case No. 1:08-cv-0827 LMB-JFA **STATUS REPORT OF PLAINTIFFS**

Plaintiffs Al Shimari, Rashid, Al-Ejaili, and Al-Zuba'e respectfully submit this Status Report in response to the Statement of Defendant CACI Premier Technology, Inc. ("CACI") Regarding Proceedings on Remand and the Court's November 29, 2016 Order, to advise the Court of Plaintiffs' position regarding the appropriate course of action following the Court of Appeals' October 21, 2016 decision in *Al Shimari v. CACI Premier Technology, Inc.* (4th Cir. Oct. 21, 2016) ("*Al Shimari IV*").

INTRODUCTION

This case was brought by four Iraqi civilians who were victims of the infamous Abu Ghraib prison torture scandal in 2003 and 2004. These Plaintiffs were subjected to horrific treatment at the Abu Ghraib "hard site" predominantly by U.S. military personnel who conspired with, and acted at the direction of, CACI employees to inflict severe pain on detainees. CACI, a for-profit U.S. corporation, was hired by the U.S. government to provide interrogation services at Abu Ghraib, and was implicated in the abuses at Abu Ghraib by several military investigations. The Court of Appeals rejected CACI's argument that it could evade liability on the ground that violations of clear domestic and international law prohibitions on torture, war crimes, and cruel,

inhuman and degrading treatment could somehow be lawfully authorized by the military and therefore beyond judicial review. *See* Slip Op. at 5. The Court simplified the case by acknowledging and affirming that unlawful conduct is always justiciable and cannot escape review under the political question doctrine ("PQD") and that the issue of military (or other governmental) control is irrelevant when the conduct is unlawful. *Id*. Following more than eight years of litigation, and four trips to the Court of Appeals, Plaintiffs look forward to finally proceeding to the merits of their claims and having their day in court.

With respect to the order of proceedings on remand, Plaintiffs largely agree with CACI's proposal to begin with resolution of the parties' pending motions (motions to dismiss followed by discovery motions), followed by a brief period of discovery to the extent authorized by the Court's resolution of pending discovery motions and summary judgment. Then—because there are significant disputes of material fact and any remaining fact issues related to the political question doctrine are intertwined with the merits of Plaintiffs' claims—the case should proceed to trial. *See* Slip Op. at 13, 29.

As to the remaining issues raised by CACI, first, any concerns about the availability of Plaintiffs for deposition and trial can be resolved through the use of video conferencing technology if Plaintiffs are unable to travel to the United States, and the parties should be directed to meet and confer to address the logistics of doing so. Second, Plaintiffs request that all pending motions be decided on the already-filed briefs. If the Court prefers updated briefing, Plaintiffs request that all pending motions to dismiss be consolidated into a single brief from CACI (plus opposition and reply briefs) and all remaining, pending discovery motions be consolidated into a single brief from each side (plus opposition and reply briefs). Finally, it is unnecessary to invite the U.S. government to join the litigation, because (i) the Government has

already declined to do so while making its views on the merits clear to the Fourth Circuit through an amicus brief, (ii) appropriate discovery from the Government has been and can be taken without the need for intervention, and (iii) the Government has been and will be able to protect its interests in connection with such discovery, if any.

BACKGROUND

Plaintiffs are four Iraqi civilians who were tortured while detained in the custody of the United States at Abu Ghraib prison.[1] Rounded up in military sweeps as part of the sometimes chaotic effort by the U.S. military to control the insurgency,[2] they were all designated as "civilian internees" and released without charge. In 2008, Plaintiffs sued CACI, a corporation hired by the U.S. government to provide interrogation services, for conspiring with low-level U.S. military personnel to torture and otherwise seriously abuse detainees at the Abu Ghraib "Hard Site" beginning in the fall of 2003 and continuing into early 2004.

The Third Amended Complaint ("TAC") (Dkt. 251) alleges that CACI participated in a conspiracy to commit—and actually committed and aided and abetted the commission of—war crimes, torture, and cruel, inhuman, or degrading treatment ("CIDT") against Plaintiffs under the Alien Tort Statute, 28 U.S.C. § 1350, for conduct prohibited by federal criminal law in 18 U.S.C. § 2340 (Torture Statute) and 18 U.S.C. § 2441 (War Crimes Act), and international law. The

[1] Contrary to CACI's assertion, the Abu Ghraib prison complex was not a "combat-zone detention facility." (Dkt. 564 at 3.) The Geneva Conventions require that war-time prisons be established outside of combat, outside the battlefield. See Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 Art 83 ("[t]he Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war") and Arts. 84-88.

[2] *See Final Report of the Independent Panel To Review DoD Detention Operations*, Honorable James R. Schlesinger (August 24, 2004), at 29 (finding the military, lacking sufficient resources, "reverted to rounding up any and all suspicious-looking persons—all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals").

TAC also alleges common law claims on behalf of Plaintiff Al Shimari for, *inter alia*, assault and battery, sexual assault and battery, intentional infliction of emotional distress, and negligent hiring and training.

As underscored by the Court of Appeals, several military investigations attributed responsibility to CACI employees for directing and participating in abuses at Abu Ghraib. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521 (4th Cir. 2014) ("*Al Shimari III*") (citing reports of Major General Antonio M. Taguba ("Taguba Report") and Major General George R. Fay ("Fay Report")).[3] A number of CACI co-conspirators, including military police officers ("MPs") Charles Graner and Ivan Frederick II, who also provided testimony in this case implicating CACI, were convicted by U.S. courts martial for their role in abusing detainees. Plaintiffs have described in detail the torture and cruel treatment they experienced at the hands of members of this conspiracy and their accounts are consistent with the conduct attributed to CACI personnel and the MPs with whom they conspired. It is undisputed that all four Plaintiffs were detained in Tier 1A of the "Hard Site" at Abu Ghraib during the time CACI personnel were working there.

A. Plaintiffs' Allegations

Undeterred by the Court of Appeals' conclusion to the contrary (as well as the conclusions of the Department of State in granting them U.S. entry visas, as discussed below), CACI continues in its Status Report, as it has throughout this litigation, to falsely claim that Plaintiffs are terrorists who "would kill Americans." (Dkt. 564 at 10.) The Court of Appeals has shown considerable impatience with this strategy, going out of its way to underscore that "[t]he

[3] Maj. Gen. Antonio M. Taguba, Investigating Officer, Article 15-6 Investigation of the 800th Military Police Brigade (U) (2004); Maj. Gen. George R. Fay, Investigating Officer, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (U) (2004). Those reports are generally admissible under Federal Rule of Evidence 803(8)(A)(iii). *See* Slip Op. at 18 n. 4

record does not contain any evidence that the plaintiffs were designated 'enemy combatants' by the United States government." *Al Shimari III*, 758 F.3d at 521 n. 2.

Plaintiff Al-Ejaili testified at his deposition in March 2013 that he was detained by the U.S. Army on or around November 3, 2003, solely because he was a credentialed reporter for Al Jazeera, the Middle Eastern news service. (*See* Dkt. 528-4 (Al-Ejaili Dep. Tr.) at 9:8-15, 10:5-11:1.) There is no evidence that he was involved in any action hostile to the United States. At the Hard Site, Plaintiff Al-Ejaili was subjected to repeated beatings, stripped and kept naked, imprisoned in a solitary cell in conditions of sensory deprivation, subjected to extremes of temperature, 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. He was released without charge on or about February 1, 2004. (TAC ¶¶ 69-77.)

Plaintiff Al Shimari, a teacher, was imprisoned at the Abu Ghraib Hard Site for approximately two months after being arrested on or about November 7, 2003.[4] At the Hard Site, Plaintiff Al Shimari was subjected to electric shocks, struck with a baton-like instrument, beaten, deprived of food, deprived of sleep for extended periods of time, threatened with dogs, subjected to sensory deprivation and to extreme temperatures, stripped and kept naked in his cell, threatened with death, and forced to engage in physical activities to the point of exhaustion, forcibly shaved, kept in a cage, and choked. He was detained for nearly five years before being released without being charged with a crime. (*Id.* ¶¶ 24-38.)

[4] The U.S. case file on Plaintiff Al Shimari states that he was found not to be "an international terrorist or member of an international terrorist organization who poses a threat to the United States or U.S. interests" and that "the detainee ***is not*** an Enemy Combatant in the Global War on Terror." (*See* Dkt. 409 at 23 (emphasis in original).) *See also Al Shimari III*, 758 F.3d at 521 n. 2.

Plaintiff Rashid, a farmer at the time of his arrest, was imprisoned at the Abu Ghraib Hard Site for approximately three months after being arrested on or about September 22, 2003.[5] At the Hard Site, he was stripped and kept naked, deprived of oxygen, subjected to sensory deprivation, placed in stress positions for extended periods of time, deprived of food and water, forcibly subjected to sexual acts by a female as he was cuffed and shackled to cell bars, beaten with wooden sticks, repeatedly shot in the head with a taser gun, subjected to electric shocks, suffered from a broken arm, broken leg, inability to walk, and loss of vision as a result of the beatings, suffered abuses to his genitals, hung from the ceiling by a rope tied around his chest, subjected to mock execution, shot in the leg, subjected to having woman's underwear placed over his head while handcuffed, detained naked in the same cell as a female detainee, forced to watch as the conspirators raped a female detainee, and was removed from his cell by stretcher and hidden from the International Committee of the Red Cross, who visited Abu Ghraib shortly after Plaintiff Rashid had been brutally and repeatedly beaten. He was released without being charged with a crime. (*Id.* ¶¶ 39-58.)

Plaintiff Al Zuba'e, a farmer, was imprisoned at the Abu Ghraib Hard Site for approximately one year after being arrested on or about November 1, 2003. In the Hard Site, he was repeatedly beaten, stripped and kept naked, subjected to extremes of temperature and to having cold water poured over his naked body, hooded and chained to the bars of his cell, threatened with unleashed dogs, beaten on his genitals with a stick, and imprisoned in a solitary

[5] CACI, without any basis (or citation), erroneously asserts that Plaintiff Rashid "was captured when one of *his* improvised devices exploded near a coalition convoy." (Dkt. 564 at 10 (emphasis added).) Reports from Plaintiff Rashid's case file are utterly equivocal ("was seen in the vicinity of an IED explosion. He appeared to be signaling to detonate the IED and was possibly the trigger man. […] He may have been holding something in his left hand."), and he has consistently asserted his innocence. Indeed, when his case was reviewed in March 2004, the conclusion was: "No Prosecution- Case file lacks sufficient information to warrant a prosecution." (*See* Dkt. 409 at 23-24.)

cell in conditions of sensory deprivation for almost a full day. He too was released without being charged with a crime. (*Id.* ¶¶ 59-67.)

One of Plaintiffs' experts, Professor Darius Rejali, detailed the ways in which many of these techniques have been used historically by repressive regimes and have been determined to be "torture" by the United States and other nations. (*Id*. ¶ 128.)

B. The Conspiracy

1. Duration and Scope of the Conspiracy

The conspiracy between CACI and U.S. military personnel began no later than October 2003, when the conspirators named in the Third Amended Complaint were working in the Hard Site at Abu Ghraib, and ended in approximately February 2004 when photographs and information about abusive conduct at Abu Ghraib was disclosed to military authorities. At the Hard Site, MPs guarded detainees, under the direction of CACI employees and Military Intelligence personnel ("MIs") who conducted interrogations. (*See id.* ¶ 17.) The MPs were supposed to have been commanded by officers of the MP Company, but military investigations later revealed that there was a command vacuum at Abu Ghraib. In this command vacuum and the absence of supervision by military officers, CACI and the MIs took over. (*Id.* ¶ 18.) CACI employees had unsupervised access to the areas of Abu Ghraib where detainees were imprisoned, causing confusion among MPs as to whether CACI employees were MI personnel or civilian contractors and leading them to perceive CACI employees as authority figures, as CACI employees positioned themselves at the top of the power structure and gave directions to military personnel. (*Id.* ¶¶ 89, 96.) These were the conditions "on the ground" in which the conspiracy to abuse, torture, and otherwise degrade Plaintiffs and other detainees flourished. (*Id.* ¶¶ 144-145.)

Then-Staff Sergeant Ivan Frederick, who was sentenced by court martial to eight years imprisonment for his participation in torture in Abu Ghraib and had his rank reduced to Private,

testified in this case that civilian interrogators employed by CACI filled the command vacuum by assuming *de facto* positions of authority. (*Id.* ¶ 18.) CACI interrogators Steven Stefanowicz, Daniel Johnson, and Timothy Dugan instructed Frederick and other MPs to "soften up" detainees at the Hard Site for interrogation using the specific techniques described by Plaintiffs. (*Id.* ¶¶ 18, 78, 118.) Frederick testified in a deposition in this case that CACI personnel ordered him to set the conditions for abusing detainees, and ordered some of the more severe forms of abuse, (*id.* ¶¶ 18, 115, 116), which often occurred during the night shift, (*id.* ¶ 78). CACI employees knew, and military personnel understood, that "setting conditions" for interrogations equated to serious physical and mental harm in an attempt to make detainees more responsive to questioning. (*Id.* ¶ 114.)

CACI personnel also sometimes bypassed Frederick and directly instructed lower-ranking MPs—including then-Corporal Charles Graner—to rough up, humiliate, abuse, and torture detainees. (*Id.* ¶¶ 18, 111.) Graner, who was sentenced by court martial to ten years imprisonment for his participation in torture in Abu Ghraib and had his rank reduced to Private, testified that he tortured detainees on the instructions of CACI interrogators Stefanowicz and Johnson. (*Id.* ¶ 100.)

Plaintiffs identified Graner and Frederick as individuals who beat and/or abused them and other detainees at the Hard Site. (*Id.* ¶¶ 131-135.) Plaintiff Al-Ejaili also testified that civilian interrogators were authority figures who instructed MPs, and recognized at least one CACI interrogator as someone who stood outside of detainee cells giving instructions. (*Id.* ¶¶ 138-142.)

2. Military Investigative Reports Implicating CACI in the Conspiracy

The Taguba Report and Fay Reports found that acts of "sadistic, blatant, and wanton criminal" abuse occurred at Abu Ghraib (*id.* ¶ 78) and that CACI employees, along with other

conspirators, had "responsibility or complicity in the abuses that occurred at Abu Ghraib" (*id.* ¶ 81). The Fay Report concluded that, "[w]hat started as nakedness and humiliation, stress and physical training (exercise), carried over into sexual and physical assaults by a small group of morally corrupt and unsupervised soldiers and civilians." (*Id.* ¶ 82.) The civilians identified by the Fay Investigation included at least five CACI employees, identified by pseudonym, among them individuals known to be Stefanowicz, Johnson, and Dugan. (*Id.*) The Taguba Report identified CACI employee Stefanowicz, other military personnel, and another contractor working at Abu Ghraib, as directly or indirectly responsible for the Abu Ghraib abuses. (*Id.* ¶ 83.)

Colonel Henry Nelson, a psychologist who assisted General Taguba in his investigation, concluded that MPs Frederick and Graner "collaborated with other MP Soldiers and several unknown MI personnel, to include Soldiers as well as their United States civilian contract interrogators and interpreters. Witnesses report pairs of civilian interrogators and interpreters carrying out detainee abuse, as well as an interpreter raping a male juvenile detainee. In fact, the MI unit seemed to be operating in a conspiracy of silence." (*Id.* ¶ 84.) Colonel Nelson concluded that "the behavior at [Abu Ghraib] crossed the line. The sadistic and psychopathic behavior was appalling and shocking." (*Id.*)

3. CACI's Liability for Conspiracy and Aiding and Abetting Unlawful Acts

The wrongful acts of the CACI personnel were carried out within the scope of their employment and were foreseeable to CACI, particularly because interrogation presents a high risk of leading to abuse without sufficient controls. (*Id.* ¶ 145.) CACI acquiesced in its employees' misconduct, turning a blind eye to reports of employee abuse and failing to adequately train and supervise employees to prevent reasonably foreseeable abuses of detainees at Abu Ghraib. CACI also attempted to cover up the misconduct of its employees, failed to

conduct inquiries into complaints that were made by military officers or CACI personnel, failed to discipline or terminate employees accused of misconduct, failed to report any issues to the U.S. government, and generally encouraged and facilitated the participation of its employees in a conspiracy in the hopes of creating "conditions" in which they could extract more information from detainees to please their client. (*See id.* ¶¶ 143-157.)

4. Plaintiffs' Conspiracy and Aiding and Abetting Claims Do Not Require Direct Contact Between Plaintiffs and CACI Personnel

In addition to direct liability for the abuse of Plaintiffs, Plaintiffs have alleged liability on theories of civil conspiracy and aiding and abetting. As Plaintiffs explained to the District Court (*see generally* Dkt. 509), neither conspiracy nor aiding and abetting requires evidence of direct contact between Plaintiffs and any CACI personnel, as CACI claims in its status report. Under both common law and international law, a defendant may be held liable for the substantive offenses that his co-conspirators committed in furtherance of the conspiracy. *See, e.g.*, *United States v. Oliver*, 513 F. App'x 311, 315 (4th Cir. 2013). As CACI itself has acknowledged in this case, "[a] fundamental feature of conspiracy claims is that a party to a conspiracy can be held liable for actions of co-conspirators in furtherance of the conspiracy, even if the defendant had no involvement with the actions that injured plaintiffs." (*See* Dkt. 222 at 11 (citing Fourth Circuit precedent).) It is bound by this position, which accurately describes the law.

Similarly, for aiding and abetting liability, "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of the facilitating the commission of that crime." *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011) (quoting *Presbyterian Church of Sudan v.*

Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009)). As with conspiracy, evidence of direct contact between Plaintiffs and any CACI personnel is not required.

C. Relevant Procedural History

1. Early Proceedings and Discovery

This case has a lengthy procedural history. After the case was filed by Plaintiff Al Shimari in Ohio in 2008 and subsequently transferred to Virginia,[6] CACI filed a motion to dismiss Plaintiffs' claims under the PQD and various other theories. The District Court denied the PQD motion on March 18, 2009, but dismissed Plaintiffs' ATS claims.[7] (Dkt. 94.) CACI appealed the decision denying its motion to dismiss. The Court of Appeals initially reversed on appeal. *See Al Shimari v. CACI Int'l Inc.*, 658 F.3d 413, 420 (4th Cir. 2011) ("*Al Shimari I*"). In May 2012, however, the Court of Appeals sitting *en banc* held that it lacked jurisdiction over CACI's premature appeal. *Al Shimari v. CACI Int'l, Inc.,* 679 F.3d 205, 212 (4th Cir. 2012) (en banc) ("*Al Shimari II*"*), vacating Al Shimari I*, 658 F.3d 413. Upon the Fourth Circuit's invitation in that appeal, the United States filed an amicus brief asserting that Plaintiffs' claims should move forward based on "the strong federal interest" in remediating violations of the federal torture statute (18 U.S.C. § 2340), but did not seek to intervene in the litigation. *See* Brief

[6] Contrary to CACI's claim that "Plaintiffs filed their actions in 2008 in various district courts, and they were ultimately joined in a single action in this court" (Dkt. 564 at 8), only Plaintiff Al Shimari filed his initial complaint in another district (District Court for the Southern District of Ohio). His case was transferred to the Eastern District of Virginia upon an unopposed motion by CACI to transfer venue. (Dkt. 15.) Plaintiffs Rashid, Al-Zuba'e and Al-Ejaili entered the case with the filing of the Amended Complaint. (Dkt. 28.)

[7] Notably, in its 2009 denial of CACI's PQD argument the District Court found, as the Fourth Circuit recently did, that "the policy determination central to this case has already been made; this country does not condone torture, especially when committed by its citizens" (referencing 18 U.S.C. § 2340). 657 F. Supp. 2d 700, 713 (E.D. Va. 2009). *See also id.* at 714 ("While it is true that the events at Abu Ghraib pose an embarrassment to this country, it is the misconduct alleged and not the litigation surrounding that misconduct that creates the embarrassment.").

of United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335, at 22 (4th Cir. Jan. 14, 2012).

On remand, the District Court granted Plaintiffs' motion to reinstate their ATS claims on the ground that torture, war crimes, and CIDT are torts whose prohibition is "specific and universal and obligatory" under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). (Dkt. 159; Dkt. 471, at 26:11-23.) The Court subsequently dismissed as time-barred the common law claims of all Plaintiffs other than Plaintiff Al Shimari (Dkt. 226), and dismissed the conspiracy allegations in the Second Amended Complaint as legally insufficient (Dkt. 215), even though the factual allegations were more detailed than those in the prior complaint that the Court had already found sufficient. Plaintiffs filed a Third Amended Complaint with additional support for their conspiracy allegations on March 28, 2013.

The parties engaged in fact and expert discovery in late 2012 and early 2013. Discovery closed on April 26, 2013.

2. The Court of Appeals' *Kiobel* Decision

On June 25, 2013, following the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the District Court dismissed the case, finding that it lacked ATS jurisdiction and that Iraqi law governed the remaining common law claims of Plaintiff Al Shimari but precluded liability. (Dkt. 460.) CACI, a billion dollar corporation, sought costs against the four Iraqi plaintiffs for approximately $13,700. Plaintiffs appealed the District Court's ruling. On appeal, CACI renewed its argument that the PQD required dismissal of Plaintiffs' claims.

On June 6, 2014, the Court of Appeals reversed the District Court's ruling that it lacked ATS jurisdiction under *Kiobel*, finding that this case "touches and concerns" the United States, and vacated the dismissal of all of Plaintiffs' common law claims. *See Al Shimari III*, 758 F.3d at

537. The Court of Appeals also rejected CACI's proposed alternate PQD argument because it was unable to determine whether Plaintiffs' claims present nonjusticiable political questions on the record before it. It remanded for a "discriminating analysis" of the PQD defense on a full record, *id.* at 531-37, and instructed that the District Court should "determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations, which is particularly concerning given the Plaintiffs' allegations that '[m]ost of the abuse' occurred at night, and that the abuse was intended to 'soften up' the detainees for later interrogation," *id.* at 536.

3. The Court of Appeals' Political Question Doctrine Decision

On remand, CACI filed a new motion to dismiss under the PQD. On June 18, 2015, the District Court granted CACI's PQD motion and dismissed all of Plaintiffs' claims. (Dkt. 547.) In its ruling, the District Court did not address the substantial evidence introduced by Plaintiffs that contested the extent of military control over CACI in Abu Ghraib, including the lack of military control over CACI interrogators outside the formal interrogation sessions. Despite an absence of evidence in the record that any military officer ordered CACI personnel to abuse detainees, the District Court also assumed that CACI "would likely defend against the allegations by asserting that their actions were ordered by the military," which would implicate sensitive military judgments. Finally, the District Court found that Plaintiffs' ATS claims for torture, war crimes, and CIDT lacked judicially manageable standards. (Dkt. 159; Dkt. 471, at 24:17-24; 26:20-23 (quoting *Sosa*, 542 U.S. at 725).) Plaintiffs appealed again.

On October 21, 2016, the Court of Appeals vacated the District Court's PQD decision, rejecting CACI's argument that its conduct is beyond the reach of the courts. Slip Op. at 5.[8] In an

[8] CACI attempts to sow some illegitimacy to the Court of Appeals ruling by suggesting that it was rendered by a "different panel" and that the district court "did ***exactly*** what the Fourth

important vindication of the rule of law, the Court of Appeals concluded that the PQD can never apply to conduct that is unlawful, even when that conduct was at the direction of the military. *Id*. The Court of Appeals found that "[t]he commission of unlawful acts is not based on 'military expertise and judgment,' and it is not a function committed to the coordinate branches of government." *Id.* at 22. Thus, "any acts of the CACI employees that were unlawful when committed, irrespective whether they occurred under actual control of the military, are subject to judicial review." *Id*. at 25. The Court of Appeals observed that "some of the alleged acts are plainly unlawful at the time they were committed," *id.* at 28, and that "[c]ounsel for CACI conceded at oral argument that at least some of the most egregious conduct alleged, including sexual assault and beatings, was clearly unlawful." *Id.* at 27. For that conduct which is not unlawful, and thus *could* be shielded from judicial review under the political question doctrine, the Court must look to the test set forth in *Taylor v. Kellogg Brown & Root Services Inc.*, 658 F.3d 402 (4th Cir. 2011) (*i.e.*, whether it occurred under the actual control of the military or involved sensitive military judgments) to determine if it is, in fact nonjusticiable. *Id.* at 25. Applying this standard, the Court of Appeals found that the District Court erred in its analysis of both prongs of the political question inquiry for claims against military contractors set forth in *Taylor*, and also incorrectly held that there are no judicially manageable standards for Plaintiffs' ATS claims.

Circuit had instructed." (Dkt. 564 at 15.) This is a peculiar claim given that (i) the panel in *Al Shimari III* and *Al Shimari IV* was the same but for one judge and both decisions were unanimous; (ii) the Court of Appeals in *Al Shimari IV* specifically identified that the District Court did not make, as it had instructed in *Al Shimari III*, findings about the level of military control "*outside* the context of required interrogations"; and (iii) Supreme Court and Fourth Circuit precedent unambiguously demonstrate that intentional, unlawful acts (as opposed to discretionary, lawful ones) are not insulated from judicial review. *See* Slip Op. at 24-25.

As to the first prong of the *Taylor* test, the Court of Appeals held that the District Court "fail[ed] to determine whether the military exercised actual control over any of CACI's alleged conduct." Slip Op. at 5. The Court of Appeals properly distinguished, as it had in its prior decision, between the military's "formal control" (the theoretical or official command structure at Abu Ghraib) and "actual control" (what happened "on the ground" at Abu Ghraib, at night, and *outside* of the formal interrogation process). *Id.* at 20-21. This distinction is critical because "when a contractor engages in a lawful action under the actual control of the military, [the Court] will consider the contractor's action to be a 'de facto military decision[]' shielded from judicial review under the political question doctrine." *Id.* at 21 (quoting *Taylor*, 658 F.3d at 410). However, when a contractor's tortious acts were not "committed under actual control of the military," regardless of the formal arrangements between the contractor and the military, the political question doctrine does not apply under the first prong of *Taylor*. *Id*.

Again, the Court of Appeals underscored that the first prong of the *Taylor* test can never apply to unlawful conduct: "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity . . . when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine." *Id.*

As to the second prong of the *Taylor* test—whether resolution of Plaintiffs' claims would require the court to question actual, sensitive judgments made by the military—the Court of Appeals held that "the district court erred in failing to draw a distinction between unlawful conduct and discretionary acts that were not unlawful when committed." *Id.* at 22. This is because, as, the Court repeatedly stressed, unlawful conduct, including violations of international law, cannot call into question sensitive military judgments. *Id*. at 22-23 ("Therefore, to the extent

that the plaintiffs' claims rest on allegations of unlawful conduct in violation of settled international law or criminal law then applicable to CACI employees, those claims fall outside the protection of the political question doctrine.").

The Court noted that some conduct may fall into a "grey area" where there is an "absence of clear norms of international law or applicable criminal law." *Id.* at 27.[9] Conduct that falls into this grey area is "protected under the political question doctrine" to the extent that it "was committed under the actual control of the military or involved sensitive military judgments" and was not unlawful when committed. *Id.* at 28.

The Court recognized—and counsel for CACI conceded at oral argument—"that at least some of the most egregious conduct alleged, including sexual assault and beatings, was clearly unlawful." *Id.* at 27. It "decline[d] to render in the first instance a comprehensive determination of which acts alleged were unlawful when committed" and observed that the District Court on remand will be required "to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to judicial review" *id.* at 27-28, while also observing that "some of the alleged acts plainly were unlawful at the time they were committed and will not require extensive consideration by the district court." *Id.* at 28. The Court also observed that the District Court would at some point be required to determine whether any "grey area" conduct "was committed

[9] The Court of Appeals relied on *Viet. Ass'n for Victims of Agent Orange v Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008), to raise this concern. Slip Op. at 26-27. The claims in that case were dismissed "under the ATS because plaintiffs did not 'ground[] their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged.'" By contrast, here, Plaintiffs ATS claims of torture, war crimes and cruel, inhuman or degrading treatment have been found to arise under international—and domestic criminal—law at the time of the events. (*See* Dkt. 159; *see also* Slip Op. at 30-31; Plaintiffs' Memorandum of Law in Support of their Motion Seeking Reinstatement of the Alien Tort Statute Claims, Oct. 11, 2012, Dkt. 145.)

under the actual control of the military or involved sensitive military judgment and, thus, is protected under the political question doctrine." *Id.* However, because these jurisdictional facts are likely intertwined with the merits of Plaintiffs' claims, the Court of Appeals reaffirmed that they should be resolved when the merits are addressed. *Id.* at 13 ("'when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined,' the district court ordinarily should withhold a determination regarding subject matter jurisdiction and proceed to the merits of the case" (quoting *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009))); *see also id.* at 29.

The Court of Appeals also rejected the District Court's analysis of judicially manageable standards. In doing so, it "emphasize[d] the long-standing principle that courts are competent to engage in the traditional judicial exercise of determining whether particular conduct complied with applicable law." *Id.* at 23. The Court pointed out that definitions exist for torture, war crimes, and CIDT and that courts have previously decided such claims. *Id*. at 30. The Court of Appeals also emphasized the importance of deciding cases alleging violations of torture and war crimes such as this one: "[w]e recognize that the legal issues presented in this case are indisputably complex, but we nevertheless cannot abdicate our judicial role in such cases." *Id.* at 32. In his concurrence, Judge Floyd emphasized that "it is beyond the power of even the President to declare [torture] lawful . . . . The determination of specific violations of law is constitutionally committed to the courts, even if that law touches military affairs." *Id.* at 34.

Soon after the Court of Appeals issued it decision in *Al Shimari IV,* Judge Lee recused himself *sua sponte* and the case was reassigned to this Court.

4. Plaintiffs' Status

CACI raises the issue of the ability of Plaintiffs Al Shimari, Al-Zuba'e, and Rashid, all of whom reside in or near Baghdad (the "Baghdad Plaintiffs"), to travel to the United States for

depositions.[10] The Baghdad Plaintiffs were issued visas by the U.S. Embassy in Baghdad to travel to the United States in February 2013, pursuant to a rigorous State Department and interagency process that includes a screen for security threats. They purchased tickets and secured boarding passes for a flight to the United States in March 2013 to appear for their depositions. (*See* Dkt. 410 at ¶¶ 24, 29, 31-32.) While visas and boarding passes to the United States require prior security screenings of passengers, without any explanation, the Baghdad Plaintiffs were prevented at the airport from boarding their flight. Plaintiffs submit that the issues raised by these highly unusual circumstances—and the real possibility of CACI's involvement given its close ties and contracting with and in the government agencies potentially involved in the decision to deny the Baghdad Plaintiffs access to their flight—can and should be addressed now that this case has been remanded.

After they were prevented from boarding their flight, the Baghdad Plaintiffs contacted the United States Departments of State and Homeland Security to determine what prevented them from flying to the United States. (*See id*. at ¶¶ 33-34, 37-38, 42-45, 48-49.) As the Court of Appeals recognized, contrary to CACI's baseless and scurrilous (and frequently repeated) accusations, the "record does not contain any evidence that the plaintiffs were designated 'enemy combatants' by the United States government," and "Defense Department documents in the record state that plaintiff Al Shimari '*is not* an Enemy Combatant in the Global War on Terror.'" *Al Shimari III*, 758 F.3d at 521 n. 2 (emphasis in original). Neither Plaintiffs nor their counsel have ever been informed of the reasons they were blocked from travel notwithstanding the issuance of visas for travel to the United States.

[10] Plaintiff Al-Ejaili, who resides in Qatar, was able to travel to the United States in March 2013 to appear for a deposition in this litigation. Plaintiffs have no reason to believe Plaintiff Al-Ejaili will be unable to travel to the United States for trial.

Plaintiffs filed a motion to compel information from the United States about the Baghdad Plaintiffs' inability to board their flight. (Dkt. 380.) Plaintiffs also filed a motion to compel deposition testimony from CACI, which has significant business relationships with the Department of Homeland Security and the Transportation Security Administration (*see* Dkt. 394, Ex. 6) as to whether it had any involvement in the Baghdad Plaintiffs' inability travel to the United States for this litigation (Dkt. 392). CACI filed motions for sanctions, seeking dismissal of Baghdad Plaintiffs claims for their inability to appear for depositions in person, even though Plaintiffs offered to make themselves available for in-person depositions in Istanbul or for video depositions. (Dkt. 367; Dkt. 409 at 4, 9). Those motions were not reached by the District Court due to its dismissal of the case on other grounds.

The Baghdad Plaintiffs simultaneously applied for new visas, as instructed by an official at the State Department, and appeared for interviews. (*See* Dkt. 410 at ¶¶ 35-36.) The Baghdad Plaintiffs were still awaiting a decision on their applications for visas to travel to the United States to appear for depositions in this district when the District Court dismissed Plaintiffs' claims in June 2013. Immediately upon the issuance of the Court of Appeals' mandate to the District Court on July 22, 2014, Plaintiffs' counsel submitted letters to the United States Embassy in Baghdad and soon thereafter, to officials at the State Department, with copies of the mandate enclosed, requesting expedited processing of their visa applications.

Plaintiffs intend to renew the Baghdad Plaintiffs' visa applications or submit new applications, if necessary. Plaintiffs also intend to renew their pending discovery motions concerning the Baghdad Plaintiffs' inability to board their flight and to propound additional document requests to CACI concerning its involvement in this troubling incident.

In any event, even if the Baghdad Plaintiffs are ultimately unable to come to the United States, Plaintiffs submit that their depositions can be conducted—and, if necessary, their trial testimony can be provided—through the use of video conferencing technology. As Judge Lee suggested during oral argument on CACI's motion to dismiss under the political question doctrine, with the technology that exists today, it should be possible to conduct depositions of the Baghdad Plaintiffs and even a trial "through video uplink and live real-time communication." (*See* Dkt. 546 (Feb. 6, 2015 Tr.) at 16:3-17:5; *see also* Local Rule 30(a).)[11]

5. Pending Motions and Discovery Requests

Plaintiffs concur with CACI's description of the pending motions held in abeyance since the District Court's *Kiobel* decision. Plaintiffs also have a pending request to the U.S. government to produce additional pages from interrogation log books that were produced in incomplete form during discovery, which they intend to renew.

PROCEEDINGS ON REMAND

Plaintiffs agree with CACI that the remaining jurisdictional issues do not need to be briefed at this time. CACI conceded before the Court of Appeals that certain of Plaintiffs' claims represent clearly unlawful conduct. Slip Op. at 27. Another round of PQD briefing would not be dispositive as the Court indisputably has jurisdiction to proceed to the merits on Plaintiffs' claims related to CACI's admittedly unlawful conduct. For any conduct that may fall into the "grey area," and which may require analysis pursuant to the *Taylor* test, CACI has also conceded that "many facts ordinarily associated with the merits are also plainly 'jurisdictional facts.'" (Dkt. 564 at 18.) As the Court of Appeals reaffirmed in *Al Shimari IV*, when the jurisdictional facts and merits are inextricably intertwined, the Court should accept jurisdiction and proceed to

[11] This Court has also permitted the use of satellite technology to conduct depositions of witnesses unable to travel to the United States. *See United States v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004).

the merits of the case. Slip Op. at 13. If genuine disputes of material, intertwined facts remain after summary judgment—which will certainly be true in this case—then those facts will need to be resolved at trial by a jury.

Accordingly, Plaintiffs do not oppose the sequence for proceeding on remand proposed by CACI. To summarize, CACI proposes four stages: (1) resolving CACI's prior motions to dismiss/strike; (2) resolving the parties' pending discovery motions in light of the decision on the motions to dismiss/strike; (3) taking newly authorized discovery, if any; and (4) proceeding to summary judgment, if such a motion is made, and trial. Plaintiffs agree that proceeding in this manner makes sense, subject to the following revisions and suggestions:

First, Plaintiffs propose that the pending motions be resolved by the Court based on the existing briefs, rather than having the parties prepare revised briefs on all motions. If, however, the Court requires additional briefing on any fully-submitted motions, Plaintiffs request that a briefing schedule and date for argument be set on the motions to dismiss/strike by the Court at the upcoming status conference.

Second, Plaintiffs disagree with CACI's contention that any of the discovery motions will dispose of the case. CACI seeks to renew its motion to compel the United States to produce interrogator identity information and unredacted portions of the Taguba and Fay Reports, and claims that its inability to access this information will somehow deprive CACI of its due process rights. However, as explained above, Plaintiffs' theory of conspiracy (and aiding and abetting) liability does not require evidence that CACI employees had direct contact with Plaintiffs, so the identity of specific interrogators assigned to Plaintiffs is unnecessary and inconsequential. Nor does CACI's possible inability to access complete, unredacted Taguba and Fay Reports—the majority of which are already publicly available—prevent CACI from defending against

Plaintiffs' claims, notwithstanding CACI's ominous invocation of the state secrets doctrine or a nebulous due process concern. In any event, Plaintiffs do not oppose either of these motions (although they consider them unnecessary) and plan to renew their own efforts to obtain interrogation log books from the military and information related to the Baghdad Plaintiffs' inability to travel to the United States. Similarly, CACI's concerns regarding its ability to depose the Baghdad Plaintiffs in the United States are overstated. Plaintiffs will try once again to bring the Baghdad Plaintiffs to the United States for depositions (and trial). In the event those efforts are not successful, video depositions and trial testimony are a viable alternative.

Third, Plaintiffs do not see a need for the United States to participate in this litigation as an intervenor. The United States has been aware of this litigation for years. It has been involved in discovery requests and disputes with both parties, participated as an *amicus* in the Court of Appeal's *en banc* review of CACI's first appeal, and appeared by counsel in numerous depositions of current and former military personnel. Yet the United States has never sought to intervene in the litigation and, until now, no parties have sought to join the United States as a party. The issues that CACI claims necessitate the United States' involvement are discovery disputes and are the subject of pending motions to compel against the United States. The Court should have no trouble gaining "a full understanding of the United States' position" through its briefing on the discovery motions. (Dkt. 564 at 23.) CACI has identified no reason why the United States' participation has suddenly become "inevitable" eight and a half years into this litigation or how its involvement to date has been deficient. (*Id*. at 21.) Plaintiffs therefore oppose CACI's request to involve the United States as an intervenor at this time.

Finally, much of the record in this case is currently filed under seal. Plaintiffs have complied with the requirements of the protective order and local rules in their past filings, which

require a party to file material under seal if the party that produced the material designated it confidential. Plaintiffs believe, however, that much of what has been designated confidential does not meet the criteria for sealing and should be made public. Unsealing material in the record will ease the burden on the parties and the Court in resolving the pending and anticipated motions by reducing the need for redactions and cumbersome sealing motions. It will also increase the public's access to a case of national interest, one that involves a notorious instance of abuse committed by for-profit corporate contractors and the United States military at Abu Ghraib. Plaintiffs therefore propose to move to unseal documents prior to the Court's consideration of CACI's motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2016, I electronically filed the Status Report of Plaintiffs through the CM/ECF system, which sends notification to counsel for Defendant.

/s/ John Kenneth Zwerling
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