IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

—v.—

CACI PREMIER TECHNOLOGY, INC., CACI INTERNATIONAL, INC.,

Defendants-Appellees,

—and—

TIMOTHY DUGAN, L-3 SERVICES, INC.,

Defendants.

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

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INTRODUCTION

CACI Premier Technology, Inc. ("CACI-PT") continues to press for impunity for its documented role in the atrocities at Abu Ghraib. Yet, the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as interpreted by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and the law governing Iraq during the U.S.-led occupation each demand that U.S.-domiciled entities such as CACI-PT be subject to accountability in U.S. courts for unlawful conduct, all of which was undertaken away from any "battlefield," divorced from legitimate "combat activities," and in violation of U.S. military law and policy on interrogations. Indeed, as the United States government has already represented to this Court, adjudicating Plaintiffs' torture claims would advance, rather than threaten, U.S. interests. Our system of law is ennobled, not undermined, by hearing the claims of these torture victims.

ARGUMENT

I. CACI-PT MISCHARACTERIZES THE FACTS

A. Plaintiffs Are Innocent Iraqi Civilians Bringing Suit for Universally-Condemned Conduct

CACI-PT's characterization of Plaintiffs as "enemy combatants" is both irrelevant and incorrect. It is irrelevant because individuals are protected from universally condemned torture and war crimes regardless of their status. *See*,

e.g., Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 5 ("Fourth Geneva Convention"). It is incorrect because, despite CACI-PT's selective culling of detention records, CACI-PT Br. 7, the U.S. government designated Plaintiffs as "civilian internees," who were rounded up like thousands of other Iraqi citizens in a chaotic military occupation and later released from detention without charge, *see* A1115-18, A1126, A946 ¶60, A1129; *see also Independent Panel to Review DoD Detention Operations*, Honorable James R. Schlesinger (August 24, 2004), at 29.[1]

B. CACI-PT's Conspiracy and Aiding and Abetting Liability Do Not Require Direct Contact with CACI-PT Interrogators

CACI-PT repeatedly complains that Plaintiffs have not alleged direct contact between a CACI-PT employee and Plaintiffs. This is irrelevant in two respects. First, the sufficiency of Plaintiffs' conspiracy and aiding and abetting allegations in their Third Amended Complaint ("TAC") has not been reviewed by the district court and is not under review here. Second, neither of these theories requires such proof. CACI-PT is liable for the reasonably foreseeable harms (torture and abuse of detainees, including Plaintiffs) committed by co-conspirators (low-level military personnel), either in furtherance of a conspiracy (mistreating

[1] Plaintiffs' "low" scores on the "Biometric Watchlist" were not national security designations. *See* A1112-13, A1122-23, A1130-31. Plaintiff Al-Ejaili had been placed on this watchlist but was able to travel to the U.S. for this litigation. *See* A1133.

detainees at the Hard Site to "soften them up" for interrogation), *see, e.g.*, *United States v. Oliver*, 513 Fed. Appx. 311, 315 (4th Cir. Mar. 8, 2013), or for which CACI-PT provided substantial assistance, *see, e.g.*, *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *see also United States v. Shibin*, 722 F.3d 233, 242 (4th Cir. 2013) ("It is common in aiding-and-abetting cases for the facilitator to be geographically away from the scene of the crime.").

Nevertheless, Plaintiffs' allegations directly connect CACI-PT interrogators Steven "Big Steve" Stefanowicz, Daniel "DJ" Johnson, and Timothy Dugan to the harms Plaintiffs suffered. *See* A388 ¶23, A399 ¶110, A400-06 ¶¶116, 119-25, 131-42. Plaintiffs alleged, based in part on the deposition testimony of military co-conspirators, that Big Steve and other CACI-PT interrogators ordered court-martialed military personnel Ivan Frederick and Charles Graner to abuse detainees in the same manner and during the same period in which Plaintiffs were abused. *See* A399-405 ¶¶109-11, 116, 119-22, 125, 131-32, 134-35. These allegations are confirmed by military investigative reports. A393-395 ¶¶81-84, 87-88. Plaintiffs further allege that CACI-PT interrogators were directly involved in the abuse and/or interrogation of Plaintiffs Al-Ejaili, A402-403 ¶124, A405-406 ¶¶138-42, and Al Shimari, A404 ¶133.

C. CACI-PT Cannot Establish that the Military Had Plenary Control over CACI-PT Interrogators

By cherry-picking various pieces of discovery evidence, CACI-PT attempts to prove the factual proposition that it was subject to complete U.S. military control, even though this is an appeal from a motion to dismiss on the pleadings not addressed to that issue and the appellate record is, accordingly, incomplete. Nevertheless, even a cursory review of Plaintiffs' allegations undermines CACI-PT's efforts. For example, by the terms of its contract, CACI-PT—not the military—was obligated to supervise and discipline its employees, A384-385 ¶15, A412 ¶162, and had in-house CACI-PT supervisors at Abu Ghraib, A412-413 ¶¶163-67. Sworn testimony by military co-conspirators such as Frederick and Graner also show that, in the command vacuum that existed at the Hard Site, A385-86 ¶18, A395 ¶¶87-89, they viewed CACI-PT interrogators Big Steve and DJ as authority figures, and that they and their subordinates took orders from CACI-PT interrogators to torture and seriously mistreat detainees. A397 ¶¶98-100, A399-400 ¶¶111-12.

II. *KIOBEL* DOES NOT BAR PLAINTIFFS' CLAIMS

CACI-PT mistakes a concurring opinion for a holding of the Court. It replicates the district court's mistake in adopting the broad, preclusive approach to the presumption against extraterritoriality advanced in Justice Alito's concurrence, rather than the majority opinion of the *Kiobel* Court, which unambiguously

anticipated that the presumption was not irrebuttable and would have to be applied on a claim-by-claim basis. CACI-PT further ignores the long line of cases discussing the application of the presumption in territories where the U.S. exercises "some measure of legislative control," and oversimplifies the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which called on lower courts to analyze whether the claims could displace a presumption against extraterritoriality based on the "focus" of the statute.

A. *Kiobel* Presents a Question on the Merits

As *Kiobel* itself explains, just because a statute is "strictly jurisdictional" does not mean that a claim *arising under* that statute implicates the subject matter jurisdiction of the court. *See, e.g.*, 28 U.S.C. § 1331. The ATS only provides federal courts with the power to hear substantive claims asserting violations of "specific, universal and obligatory" international law norms, *Kiobel*, 133 S.Ct. at 1665 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)); the common law cause of action (not the ATS itself) regulates conduct, *id.* at 1664. Since "to ask what conduct [the law] reaches is to ask what conduct [it] prohibits," *Morrison*, 130 S.Ct. at 2877, the presumption against extraterritoriality necessarily applies to the cause of action brought under the ATS. Accordingly, *Kiobel* held that the presumption "applies to *claims under* the ATS," not to the ATS itself. 133 S.Ct. at 1669 (emphasis added).

Addressing this question under Fed. R. Civ. P. 12(b)(6) rather than under 12(b)(1) properly directs courts to review the specific claims before them under *Kiobel*'s "touch and concern" analysis. In either circumstance, however, "touch and concern" is central to *Kiobel*'s holding and must be applied on a claim-by-claim basis.

B. *Kiobel*'s "Touch and Concern" Test Requires a Claim-by-Claim Analysis

CACI-PT's explanation of *Kiobel* mirrors Justice Alito's concurrence, which explains what he would have preferred the majority holding to be, but was not. Justices Alito and Thomas wrote separately to set out a "broader standard" for barring ATS claims. *Id*. at 1669-70 (Alito, J. concurring) (characterizing the majority opinion as a "narrow approach"). Under this minority view, "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—*unless the domestic conduct is sufficient to violate an international law norm that satisfies Sosa's requirements* of definiteness and acceptance among civilized nations." *Id*. at 1670 (emphasis added). CACI-PT asserts that the "conclusion that *the alleged violation of the law of nations* is what must occur domestically for ATS to apply flows directly from *Kiobel*." CACI-PT Br. 15 (emphasis in original). This is false—any such conclusion flows from two concurring justices alone.

CACI-PT asserts that "the Supreme Court could not have been clearer in holding that the violation of the law of nations has to occur in the United States." CACI-PT Br. 19. But, the Court could have stated that proposition, just as Justice Alito did. And, had it stated such a categorical rule, Justices Alito and Thomas would not have felt compelled to write a separate concurrence. Nor would any of the seven justices who joined concurring opinions have needed to highlight just how "careful" the Court was "to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring) (explaining that for this reason, the majority's holding was the "proper disposition"); how the Court's "formulation obviously leaves much unanswered," *id*. (Alito, J., concurring); or how the Court "leaves for another day the determination of just when the presumption against extraterritoriality may be 'overcome,'" *id*. at 1673 (Breyer, J., concurring in judgment).[2]

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[2] Had *Kiobel* presented the simple bright-line rule that CACI-PT asserts, the Supreme Court would not have remanded *Rio Tinto PLC v. Sarei*, No. 11-649 (which involved torts arising in Papau New Guinea) "for further consideration" in light of its *Kiobel* ruling. 133 S. Ct. 1995 (U.S. Apr. 22, 2013). (On remand, the court affirmed dismissal on other grounds.) Moreover, the majority of cases CACI-PT cites to demonstrate "the clarity of the Supreme Court's holding" dismissed the ATS claims because either, like *Kiobel*, they were foreign-cubed, *see*, *e.g.*, *Ben-Haim v. Neeman*, 2013 U.S. App. LEXIS 22339 (3d Cir. Nov. 4, 2013) (high-ranking Israeli officials and charitable entities for torts in Israel), or were frivolous, *see*, *e.g.*, *Ahmed-Al-Khalifa v. Al-Assad*, 2013 U.S. Dist. LEXIS 115448 (N.D. Fl. Aug. 13, 2013) (claims against the heads of state of several

The majority's summary of its analysis quoted by CACI-PT does nothing more than state that the presumption against extraterritoriality is held to apply to the ATS, as "nothing in the statute rebuts that presumption." *See* CACI-PT Br. 16 (quoting *Kiobel*, 133 S.Ct. at 1669). The Court proceeds to articulate the *application* of the now-adopted presumption in Part IV of the opinion, where it sets forth the "touch and concern" displacement test and finds a foreign corporation's public relations office in New York with no connection to the torts alleged to be insufficient to meet this test.

In pressing for a categorical rule, CACI-PT also replicates the district court's misunderstanding about the logic underlying the presumption against extraterritoriality. *See* CACI-PT Br. 20-21. Once the Court determines that the presumption applies to claims brought under a given statute, there must be a second-step inquiry to identify how the statute-specific presumption should apply to particular claims. As explained in Plaintiffs' Opening Brief, this two-step process explains why lower courts have interpreted *Morrison*'s presumption to

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countries, brought *pro se* by a Nigerian resident, seeking redress for crimes in Syria with no connection to plaintiff). Most courts have affirmatively *applied* the "touch and concern" test, rather than follow the bright-line rule CACI-PT presses. Some have found the claims before them, involving law of nations violations occurring abroad, to survive *Kiobel*. *See* Br. Amicus Curiae Dolly Filártiga et al, dkt. 41-1 at 8-9. CACI-PT relies heavily on *Balintulo v. Daimler AG*, 727 F.3d 174 (2d. Cir. 2013) without acknowledging that the court's discussion of *Kiobel*, following denial of a writ of mandamus leaving the court without jurisdiction, is *dicta*.

nevertheless permit certain extraterritorial claims to displace the presumption. Pl. Br. 22.

C. Plaintiffs' Claims Sufficiently Touch and Concern the U.S.

1. The Level of U.S. Control Over Iraq and Abu Ghraib is Sufficient to Displace the *Kiobel* Presumption

CACI-PT fails to apprehend the operation of the presumption against extraterritoriality in territories subject to U.S. control, and cannot escape the import of *Rasul v. Bush*, 542 U.S. 466 (2004), merely because it was decided "nine years before *Kiobel*." CACI-PT Br. 29. *Rasul*, applying concepts established in foundational cases such as *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*Aramco*), *Foley Bros. v. Filardo*, 336 U.S. 281 (1949), and *Vermilya-Brown v. Connell*, 335 U.S. 377 (1948)—cases ignored by CACI-PT— ruled that the presumption against extraterritorial application of statutes would not apply to claims arising out of the Guantánamo Bay Naval Base because of the extent of "jurisdiction and control" the U.S. exercised over the base, 542 U.S. at 480, and thus detainees could assert claims under both the habeas statute and the ATS, *id*. at 484-85. *See also Boumediene v. Bush*, 553 U.S. 723, 764 (2008) (explaining that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism").

Following a U.S.-led invasion and occupation, the U.S.-controlled Coalition Provisional Authority ("CPA")—which was created by the United States,

directed by U.S. Ambassador Bremer, funded by Congress and directly answerable to the President of the United States—exercised plenary legal and political authority in Iraq throughout the duration of the conspiracy, *i.e.*, fall 2003 to spring 2004. *See* Pl. Br. 32-35. The extent of U.S. "jurisdiction and control" (or the U.S.'s "rights, power or authority," *Vermilya*, 335 U.S. at 382, or "measure of legislative control," *Foley Bros.*, 336 U.S. at 285) means that applying U.S. law (via the ATS) presents no risk of conflict with a foreign sovereign's laws; indeed, the relevant Iraqi law at the time mandated the application of U.S. law over CACI-PT. *See* CPA 17, A666-669. Thus, claims arising out of Abu Ghraib sufficiently "touch and concern" the United States so as to "displace" the *Kiobel* presumption. *See* Pl. Br. 30-34. *See also* Br. Amicus Curiae Retired Military Officers, dkt. 45 at 14 (control means presumption does not apply in first instance).

CACI-PT's attempt to escape the force of this precedent by pressing narrow distinctions is unavailing. The U.S.'s perpetual leasehold interest in Guantánamo Bay was one but hardly a dispositive factor to the Court's analysis in *Rasul*, *see* 542 U.S. 480-82, and it formed no part of the Court's analysis in *Vermilya*.[3] Nor is it significant that other countries were participants in the

[3] In *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), the D.C. Circuit applied *Boumediene*'s particular three-part test governing the application of the Suspension Clause, and denied the habeas writ because prisoners there were held "pursuant to a cooperative arrangement with Afghanistan on territory as to which Afghanistan is sovereign." 605 F.3d at 97-99. Adjudicating habeas claims,

Coalition, or that the Iraq Governing Council had a nominal and subservient role in governance. As a factual matter, during the relevant period, the U.S. exercised final authority via the CPA over Iraqi governance, dominant over other countries and over any Iraqi body. *See*, *e.g.*, CPA Regulation 1, A643-644 (CPA Orders require only "the approval or signature of the Administrator" and no other entities); *see also* Br. Amicus Curiae Retired Military Officers, dkt. 45 at 18-23. As a legal matter, *Munaf v. Geren*, 553 U.S. 674, 680 (2008), which CACI-PT ignores, has already foreclosed this line of argument. *See* Pl. Br. 31.

In *United States v. Custer Battles*, 444 F. Supp. 2d 678 (E.D. Va. 2006), Judge Ellis rejected the government's position that the CPA could be classified as an "instrumentality of the United States" as that term is differently—and stringently—defined for purposes of False Claims Act liability. *See id.* at 688 (CPA does not meet threshold of a congressionally-created "wholly owned government corporation" (quoting *Rainwater v. U.S.*,356 U.S. 590, 591-92 (1958)). However, his conclusion that the CPA "was principally controlled and funded by the U.S.," *id*. at 689, *would* be sufficient to meet the standard for displacing the extraterritoriality presumption pursuant to *Foley Bros./Vermilya/Rasul/Kiobel*. Indeed, in *Souryal v. Torres Advanced Enter. Solutions, LLC*, 847 F. Supp. 2d 835

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particularly during a time of active hostilities, would have been "disruptive of that relationship" with the sovereign Afghan government. No disruption to international relations of the kind contemplated by *Kiobel* is present here.

(E.D. Va. 2012), Judge Ellis described the extraterritoriality test to be whether "the U.S. has *jurisdiction to regulate conduct* by virtue of the conduct occurring within that region." *Id*. at 840 (emphasis added). While a Family Medical Leave Act claim arising out of employment with the U.S. Embassy in Iraq could not displace the presumption because by 2009, the U.S. no longer exercised "some measure of legislative control" in Iraq, *id*. (quoting *Foley Bros.*, 336 U.S. at 285), the torts alleged by Plaintiffs here did arise in a time and place where the U.S. exercised "some measure of legislative control."

2. Claims against a U.S.-Domiciled Corporation for Conspiring with U.S. Soldiers to Commit Torture and War Crimes Is Sufficient to Displace the *Kiobel* Presumption

Plaintiffs do not argue that "the judiciary should decide what will or will not be good for United States diplomatic relations." CACI-PT Br. 25. Congress has already made this determination and defined the judiciary's role, via the ATS, in protecting U.S. interests: "to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable." Suppl. Br. Amicus Curiae United States, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, at 3 (filed June 13, 2012) ("U.S. *Kiobel* Br."). *See also* Br. Amicus Curiae Professors of Legal History, dkt. 52. The State Department also explained that "recognizing a cause of action in the circumstances of *Filartiga* [where defendant resided in the U.S.] is consistent with the foreign

relations interests of the United States." U.S. *Kiobel* Br. 13; *see also id*. at 4-5, 19-20.[4]

Ensuring accountability of U.S. entities for human rights violations is not a "policy-based argument," CACI-PT Br. 25, but a consideration mandated by the application of the *Kiobel* presumption. *Morrison* instructed lower courts to consider the "focus" of Section 10(b) of the Exchange Act when determining whether a particular claim is beyond the scope of the statute, and contemplated that extraterritorial claims could, in certain circumstances, proceed. *See* Pl. Br. 26-27. *Kiobel* and *Sosa* recognized the focus of the ATS as avoiding "diplomatic strife" by providing jurisdiction over claims by aliens for certain international law violations when those claims could be attributed to the United States. Pl. Br. 27. Indeed, in addressing the exterritorial scope of the ATS, *Kiobel* acknowledged that ATS claims against *U.S. citizens* have been historically accepted and are categorically distinguishable from the nature of the foreign-cubed claims at issue in *Kiobel*. *See* Pl. Br. 38 (discussing *Kiobel*'s treatment of Bradford Opinion). Where the tortfeasor is a U.S. subject, who acted in concert with U.S. military personnel through its contract with the U.S. government, in a U.S.-controlled

[4] In this case, the U.S. government stressed the importance of private civil suits in holding accountable contractors who committed torture at Abu Ghraib, without expressing any concern for its diplomatic relations. *See* Br. of Amicus Curiae United States, *Al Shimari v. CACI-PT International, Inc*., No. 09-1335, dkt. 146 at 22-23, 26 (4th Cir. Jan. 14, 2012) ("U.S. *Al Shimari* Br.").

prison on U.S.-occupied territory, a grave breach of international law would be attributable to the U.S. in the eyes of the international community, thus making the U.S. responsible for making available a remedy. Pl. Br. 28.

3. CACI-PT's Domiciliary and U.S.-based Conduct Compels Displacement of the *Kiobel* Presumption

That CACI-PT is a U.S.-domiciled corporation triggers the focus of the ATS in a way that the "mere presence" of a foreign corporation in *Kiobel* (one public relations office in New York, not connected to the alleged violations in Nigeria) could not. CACI-PT management provided far more than "administrative support." CACI-PT Br. 24, 26. With management personnel based in Virginia, A437-38 ¶8, the decision-making vital to the conspiracy (*e.g.*, hiring and supervision, *see* A406-08 ¶¶143-148; acquiescence, *see* A409 ¶154, and cover-up, *see* A408-09 ¶¶149, 152, 153, 155) necessarily took place in the U.S. in order to continue earning millions of dollars from its contract with the U.S. government, A409-10 ¶¶156-157. *See* Pl. Br. 39-40.

III. THE RASHID PLAINTIFFS' COMMON LAW CLAIMS ARE TIMELY

A. Ohio Choice-of-Law Principles Apply

The Rashid Plaintiffs entered this case via an amended complaint, joining an action initially brought in Ohio and transferred on CACI-PT's motion pursuant to

28 U.S.C. § 1404(a).[5] They were added to Al-Shimari's action pursuant to Fed. R. Civ. P. 15(a)(1) and 20(a)(1) because their claims arose from the same series of occurrences as Al-Shimari's claims and included common legal and factual questions. CACI-PT did not challenge that joinder or move to sever.

This action is therefore governed by Ohio choice-of-law principles, which call for the application of Ohio's statute of limitations. *See Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue."); *Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC*, 702 F. Supp. 2d 826, 834 (N.D. Ohio 2010) (Ohio courts apply Ohio statute of limitations, even if action would be time-barred under another state's law).

Ferens v. John Deere Co., 494 U.S. 516 (1990), is distinguishable. Unlike the plaintiffs in *Ferens*, the Rashid Plaintiffs did not file a new action; they joined an existing action governed by Ohio choice-of-law principles. Amendments to the complaint after transfer are controlled by the law of the transferor court. *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994); *see also Van Dusen*, 376 U.S. at 631-33 (citing *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 654 (2d Cir. 1962)).

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[5] When CACI-PT first moved to dismiss on these grounds in 2008, the Rashid Plaintiffs indicated that they would re-file their claims in Ohio, where they originally intended to litigate this case, if their claims were dismissed. *Al Shimari v. CACI*, 08-cv-827, dkt. 59 at 4 n. 2. The district court's denial of that motion in 2008 made re-filing in Ohio unnecessary.

The application of Ohio limitations law would not offend due process because the constitutional limits on state choice-of-law decisions do not apply to procedural matters. *Goad v. Celotex*, 831 F.2d 508, 512-13 (4th Cir. 1987); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988). *Goad* makes clear that a defendant has no expectation that any limitations law other than that of the transferor forum will apply and, absent a statute of repose—none at issue here—no right to any other limitations period. *Id.* at 513. In *Ferens*, the lower courts initially held that application of the transferor court's statute of limitations was unconstitutional because of the defendant's minimal ties to that jurisdiction. *Ferens v. Deere & Co.*, 819 F.2d 423, 427 (3d Cir. 1987). That decision, however, was vacated by the Supreme Court in light of *Sun Oil*. *Ferens v. Deere & Co.*, 487 U.S. 1212, 1213 (1988). When the case came before the Supreme Court again, the Court expressed no due process reservations about applying the Mississippi statute of limitations to the action that had been transferred to Pennsylvania, despite the minimal connections to Mississippi.[6]

[6] CACI-PT's citation to *Atlantic Marine Construction Co. v. U.S. Dist. Ct.*, No. 12-929, ___ U.S. ___ (Dec. 3, 2013), is inapposite. *Atlantic Marine* addressed circumstances not present here: motions to transfer to a venue in which the parties contracted to litigate.

B. Even if Virginia Choice-of-Law Principles Apply, the *Casey* Decision Does Not Have Retroactive Effect

CACI-PT claims that the rule announced in *Casey v. Merck & Co.*, 722 S.E.2d 842 (Va. 2012) can be applied retroactively to Plaintiffs (who brought their claims more than three years before *Casey*) because the principles of *Casey* have "always been a part of Virginia law." CACI-PT Br. 37. The Supreme Court has warned against such sophistry in retroactivity cases. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) ("We should not indulge in the fiction that the law now announced has always been the law") (citation and internal quotations omitted). CACI-PT's argument would certainly surprise the courts that predicted the Virginia Supreme Court would decide the issue the other way, *Al-Shimari v. CACI-PT Int'l Inc.*, 1:08-cv-00827, 2008 U.S. Dist. LEXIS 112067 (E.D. Va. Nov. 25, 2008) and *Torkie-Tork v. Wyeth*, 739 F. Supp. 2d 887, 894 (E.D. Va. 2010), and the Second Circuit Court of Appeals, which believed that the relevant question of Virginia law was "an open one," warranting certification to the Virginia Supreme Court, *Casey v. Merck & Co.* 653 F.3d 95, 103 (2d Cir. 2011). *Casey* decided "an issue of first impression whose resolution was not clearly foreshadowed," and therefore should not be applied retroactively. *City of Richmond v. Blaylock*, 440 S.E.2d 598, 599 (Va. 1994).

IV. CPA ORDER 17 DID NOT, *SUB-SILENTIO*, RELEGATE TORTURE VICTIMS TO A DISCRETIONARY SYSTEM OF ADMINISTRATIVE REMEDIES

CACI-PT employs a labored reading of CPA Order 17 § 6 to suggest that torture victims are limited to filing administrative claims under the Foreign Claims Act ("FCA")—a convenient result for CACI-PT because the FCA does not apply to government contractors and provides no compensation for torts committed by them.[7] This interpretation is unsupportable.

CACI-PT's attempts to find significance in CPA Order 17 § 6's use of the words "submitted" and "dealt" instead of "filed" and "adjudicated" are fanciful: there is no indication that these are purposeful distinctions or that they are code words for "administrative handling" and *sub silentio* shut the courthouse doors to torture victims. The public notice that accompanied CPA Order 17 makes no reference to an administrative payment scheme and specifically expressed that the order "*will not prevent legal proceedings* against Coalition personnel for unlawful acts they may commit." A1183 (emphasis added).

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[7] The FCA covers "civilian employee[s] of the military department concerned," *see* 10 U.S.C. § 2734(a)(3), but has been construed by the Department of Defense to not provide for compensation for the injurious acts of corporate contractors. *See, e.g.*, American Civil Liberties Union, Documents Received From the Department of the Army in Response to ACLU FOIA Request (released on Oct. 31, 2007) (http://www.aclu.org/natsec/foia/pdf/Army0555_0557.pdf) (denying claim by widow whose husband was killed by contractors because "private contractors are not qualified governmental employees as enumerated in paragraph [2-2 of Army Regulations 27-20], and as such, their acts are not within the scope of the [FCA]").

CACI-PT's claim that the reference to "national laws" in § 6 refers to federal law (to the exclusion of state law) is equally unsupported and ignores the context in which this provision arose—a multi-national coalition that was determining how to handle legal disputes arising from its work. References here to "national law" mean the laws of a particular nation, in contrast to international law, not in contrast to states within a federation or system of dual sovereignty. *See, e.g.*, Restatement (Third) Foreign Relations Law of the United States § 102 cmt. *l*.

This reading is reinforced by the public notice that accompanied CPA Order 17, which construes the order as requiring only that such claims be "undertaken in accordance with the laws of the State that contributed the personnel," without any reference to "national" law. A1183. CACI-PT does not cite to a single case supporting its position. To the contrary, CPA Order 17 has been interpreted as calling for application of *state*, not national, law. *See McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 544 (5th Cir. 2012).[8]

CACI-PT's contention that CPA Order 17 relegates Plaintiffs to the FCA's claims process is further undermined by the fact that the FCA does not apply to contractors. 10 U.S.C. § 2734 (authorizing payment of claims caused by "the armed forces" or "a member thereof or by a civilian employee of the military

[8] CACI-PT attempts to distinguish *McGee* as involving a later version of CPA Order 17. This is a distinction without a difference—as the district court noted, the earlier and the later version of the order are not substantively different from one another. A1828 n.7.

department concerned or the Coast Guard"). It would make no sense to say that CPA Order 17 § 6 requires those injured by army contractors to submit to a system that will necessarily reject their claims. Had the CPA sought to immunize contractors from liability, it could have said so explicitly, rather than *sub silentio* in an order describing a mechanism for bringing personal injury claims.

CACI-PT's interpretation of "arise in connection with military combat operations" in CPA Order 17 § 6 makes the exception swallow the rule. All contractors in Iraq were there to support, in some way, the Coalition's military efforts. Interpreting this provision as CACI-PT suggests would confer complete immunity on contractors, which the CPA disclaimed at the time it promulgated the Order. A1183; *see* Pl. Br. 48-54.

Furthermore, this Court previously observed that the pleadings in this case "provide nothing approaching definitive answers" as to whether CACI-PT's work "may be classified as combat," *Al Shimari v. CACI-PT Int'l, Inc.*, 679 F.3d 205, 222 (4th Cir. 2012) (*en banc*), recognizing that detention and interrogation are not, *ipso facto*, "combat" activities. Indeed, the discovery that took place after this Court's *en banc* opinion shows that under CACI-PT's contract to supply interrogation services to the United States in Iraq, its employees were forbidden from bearing arms or engaging in any combat activities. *See* Pl. Br. 54. The exception for combat operations in CPA Order 17 § 6 is more appropriately

understood as preserving a "soldier's privilege" to inflict injuries on the battlefield in accordance with the laws of war. *See* Pl. Br. 50.

V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR THIS DAMAGES ACTION AGAINST THIS CORPORATE DEFENDANT

After five years of litigation and after discovery—including the uncontroversial production of hundreds of documents from the U.S. government—none of the threats CACI-PT imagines to Executive Branch prerogatives has emerged. Not only has the Executive Branch declined to intervene at any point in this litigation to protect its interests, but in the *en banc* proceedings in this Court, the U.S. government represented that this case could proceed without implicating political questions. *See* U.S. *Al Shimari* Br. 8 n.1, 9; *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (observing that the opinion of United States is "significant in deciding whether a political question exists"). The government was correct.

This case does not challenge the President's "war-making" power or any "strategy or tactics employed on the battlefield." CACI-PT Br. 52. In so suggesting, CACI-PT cynically conflates lawful interrogation practices (unquestioned here) with universally prohibited torture and cruel treatment. Plaintiffs embrace the correctness of military law, policy and decision-making—all of which prohibit the torture and abuse of detainees—in challenging these

"sadistic, blatant, and wanton criminal abuses" that "violated U.S. criminal law." *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 285-86 (4th Cir. 2008) (quoting Report of Major General Antonio Taguba's Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Report") and Report of Major General George R. Fay and Lieutenant General Anthony R. Jones' AR15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade ("Fay/Jones Report"). And, as this Court explained in rejecting a similar claim, "No true 'battlefield interrogation' took place here," *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009); rather, CACI "administered a beating in a detention cell," *see id*. Judicial review of such beatings and abuse strengthens, rather than undermines, our system of separation of powers.

A. Plaintiffs' Damages Claims Are Constitutionally Committed to the Judiciary

CACI-PT is not a coordinate branch of our government nor is it otherwise entitled to judicial solicitude. It therefore faces a very heavy burden. *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458, 465 (3d Cir. 2013) ("complaints against [contractors] for conduct that occurs while they are providing services to the military in a theater of war *rarely, if ever, directly implicate political questions*" (emphasis added)). CACI-PT must demonstrate that adjudication would question a military decision that is "closely intertwined" with national defense interests. *Taylor v. Kellogg Brown & Root Servs.*, 658 F.3d 402,

411 (4th Cir. 2011); *Harris*, 724 F.3d at 466; *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008); *McMahon*, 502 F.3d at 1359-60.

CACI-PT cannot meet that burden. First, Plaintiffs do not question any military decisions or policies. Even if clothed with interrogation authority, CACI-PT was given no authority to abuse detainees. *Compare In re KBR Inc., Burn Pit Litig.*, 925 F. Supp. 2d 752 (D. Md. 2013), *appeal docketed*, No. 13-1430 (4th Cir. Apr. 2, 2013) (finding a political question where the very decision being challenged—the decision to use burn pits—was made by the military). Such abuse violated military law and policy. *See, e.g.*, Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, §1-5. Adjudicating damages claims for violation of U.S. laws is constitutionally committed to the judicial branch. *See, e.g., Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

Second, the discretion given to CACI-PT to conduct interrogations (albeit bounded by lawful constraints) fatally undermines the claim that its decision to abuse detainees were "*de facto* military decisions." CACI Br. 53 (*quoting Taylor*, 658 F.3d at 410). In *Taylor*, this Court found that the plaintiff's claims against KBR for negligently wiring military bases *would* be justiciable where the contract required KBR to "be responsible for the safety of employees and base camp residents during all contractor operations" and "have exclusive supervisory

authority and responsibility over employees." *Taylor*, 658 F.3d at 411.[9] Likewise, in *Harris*, the Third Circuit found that "the lack of detailed instructions in the work orders and the lack of military involvement in completing authorized work orders" evidenced KBR's "significant discretion" in completing assignments. 724 F.3d at 467. By contrast, in *Carmichael*, where the plaintiff sued KBR for negligence in driving a truck within a fuel safety convoy, the Eleventh Circuit found a political question due to the military's plenary control over the contractor's activities, which would implicate military judgments. *See Carmichael v. Kellogg, Brown & Root Serv.*, 572 F.3d 1271, 1281-82 (11th Cir. 2009). Examining the Statement of Work, the court found "not the slightest hint in the record suggesting that KBR played even the most minor role in making any of these essential decisions." *Id*.

Here, like in *Taylor* and *Harris*, but unlike in *Carmichael*, CACI-PT's Statement of Work required it to "to assist, supervise, coordinate, and monitor *all aspects* of interrogation activities," A1385 ¶3 (emphasis added), and CACI-PT was given significant discretion (within the bounds of the law) in planning for and executing interrogations, *see* A1388 ¶6.c. Moreover, Plaintiffs allege that CACI-

[9] The Court nevertheless dismissed the case on political question grounds only because KBR specifically raised a contributory negligence defense, attributing fault to the military and thereby directly inviting judicial scrutiny of military judgments. *Taylor*, 658 F.3d at 411-12. The Court also noted that this analysis pertains only to negligence claims, but *not intentional torts* of the sort presented in this case. *Id*. at 411.

PT interrogators exploited their discretionary authority and the command vacuum at Abu Ghraib by assuming *de facto* positions of authority and instructing low-level military personnel to abuse detainees. A385-86 ¶18.[10]

The D.C. Circuit's observation, in connection with a preemption analysis, that contract employees were "integrated and performing a common mission with the military under ultimate military command," *Saleh v. Titan Corp.*, 580 F.3d 1, 6-7 (D.C. Cir. 2009), which would be true for most military contractors, is far short of suggesting "exclusive direction and control of the military," CACI-PT Br. 54, sufficient to support a political question defense. *See Burn Pit Litig.*, 925 F. Supp. 2d at 763 ("the military does not exercise 'control' over a contractor simply because the military orders a contractor to perform a certain service" (citing *Taylor*, 658 F.3d at 411)).

B. Plaintiffs' Claims May Be Resolved by Judicially Discoverable and Manageable Standards

Plaintiffs' intentional tort claims do not require any assessment of "interrogation techniques adopted by the United States." CACI-PT Br. 54. Plaintiffs challenge CACI-PT's violations of the rules of interrogation in acts that exceeded the authority granted in its contract with the government, making this an

[10] CACI-PT cherry-picks facts in support of its political question defense. Because the appellate factual record is incomplete, the Court should only consider Plaintiffs' allegations and the contract and its accompanying Statement of Work. *See McMahon*, 502 F.3d at 1360 n.29.

ordinary tort suit. *See McMahon*, 502 F.3d at 1364; *see also Taylor*, 658 F.3d at 411 (intentional tort claims justiciable because they "allow causation to be proven under one tort doctrine without questioning the Army's role" (quoting *Lane*, 529 F.3d at 561-62)). Nor would Plaintiffs' negligence claims require second-guessing decisions of the military because the claims turn on the standard of care established by the contract, and compliance with contract terms does not implicate military judgments. *See Harris*, 724 F.3d at 468. *Compare Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991) (no judicially manageable standards where the court would have had to impose its own concept of a "prudent intercept" by the North American Air Defense Command); *Carmichael*, 572 F.3d at 1288.

CACI-PT confuses potentially unfavorable discovery rulings with a lack of manageable standards. It asserts that the United States' refusal to disclose "the identity of the Plaintiffs' interrogators or techniques employed during their interrogations…presents an insurmountable obstacle for adjudicating this action." CACI-PT Br. 55. The U.S. government already collected much of the documentation and court-martial testimony needed to prove Plaintiffs' allegations and, in response to requests pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), has produced it in this litigation. More fundamentally, CACI-PT's argument only underscores why adjudicating this defense is premature. CACI-PT's motion to compel U.S. disclosure of this information, undertaken

pursuant to established judicial standards, *has not been ruled upon*. Even if the Court denied CACI-PT's motion, or limited disclosure, there would be no "insurmountable obstacle," as such information would not be necessary to adjudicate to Plaintiffs' claims. *See supra* Part I.B.

Finally, CACI-PT attempts to transform a routine discovery dispute into a constitutional question. While three Plaintiffs have so far been unable to travel to the U.S. for depositions, CACI Br. 55-56, there are clear judicial standards for adjudicating this issue, *see* Fed. R. Civ. P. 43(a) and E.D. Va. Local R. 30(A) (permitting video depositions and trial testimony under compelling circumstances); *see also Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977). Plaintiffs presented such compelling circumstances to the district court: after making every effort to appear in the district—including obtaining visas under a process that would deny a visa to anyone suspected of having terrorist associations, *see* INA § 212 (a)(3)(B), purchasing tickets, and obtaining boarding passes—they were prevented from boarding a flight at the last moment under unusual circumstances. A1489-91 ¶¶24, 29, 32; A1496 ¶¶53-54.[11] CACI-PT's

[11] Because of CACI's long-standing relationship with the Department of Homeland Security (DHS) and connections to Iraq, Plaintiffs filed motions to compel the DHS and CACI to disclose any communications between them regarding the Plaintiffs, which might help to explain the unusual circumstances of their having been granted visas and boarding passes, but denied boarding at the last moment. The district court had yet to rule on those motions before dismissing this case.

continued references to Plaintiffs as "terrorists," CACI Br. 56, are both false and irrelevant. *See supra* Part I.A. Moreover, CACI-PT's own submission makes clear that, despite its speculative (and irrelevant) supposition that Plaintiffs are on a watchlist, the U.S. government would not have told either party such information. *See* A775 ¶16.c.

C. Adjudicating Plaintiffs' Claims Would Vindicate Policies of the Political Branches, Rather than Disrespect Them

Adjudicating torture claims from Abu Ghraib would promote national interests. *See* U.S. *Al Shimari* Br. at 22-23, 26. The highest levels of the U.S. government and the military have unambiguously condemned the atrocities at Abu Ghraib, *see, e.g.*, *Saleh*, 580 F.3d at 17-18 & n.2 (Garland, J., dissenting), and found that they violated U.S. law and military policy, *see generally* Taguba Report; Fay/Jones Report. CACI-PT can point to no order to torture or otherwise seriously mistreat detainees. Even if the government had permitted certain similar techniques in some contexts, that cannot foreclose adjudication of the legality of the range and combination of acts alleged committed by private actors on their own accord.

VI. PLAINTIFFS' SUBSTANTIAL ALLEGATIONS OF TORTURE, WAR CRIMES, AND ABUSE AGAINST A MULTIBILLION DOLLAR CORPORATION RENDERS THE AWARD OF COSTS AN ABUSE OF DISCRETION

An award of costs to CACI-PT is not appropriate here because the issues in this case "were close and difficult." *Ellis v. Grant Thornton LLP*, 434 Fed. Appx. 232, 235 (4th Cir. 2011). *See* Pl. Br. 6-7. In the course of five years of litigation, Plaintiffs survived an omnibus motion to dismiss in 2009 and dismissed CACI's meritless appeal in 2011. Plaintiffs' ATS claims were reinstated in 2012, only to be dismissed because of questions raised by *Kiobel* that were so novel that they could not have been anticipated by the parties or the court. *See* Pl. Br. 57-58. *Compare Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 445 (4th Cir. 1999).

While many federal statutes, like Title VII, "already contain[] incentives to serve the public interest as identified by Congress," *Cherry*, 186 F.3d at 448, district courts must exercise discretion to ensure that meritorious common law claims, particularly those arising out of one of the most notorious human rights abuses in U.S. history, are not chilled in the manner CACI-PT seeks through onerous cost awards against indigent victims. *See Bowoto v. Chevron Corp.*, 2009 U.S. Dist. LEXIS 38174 at *12-13 (N.D. Cal. Apr. 22, 2009).

CONCLUSION

For the foregoing reasons, the Court should reverse (1) the district court's order granting CACI-PT's motion to dismiss Plaintiffs' ATS claims and

Plaintiff Al Shimari's common law claims and (2) the district court's order dismissing the Rashid Plaintiffs' common law claims as untimely, and remand this case to the district court. The Court should also vacate the finding of Plaintiffs' liability for costs.

By /s/ *Robert P. LoBue*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 6,957 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

By */S/ Robert P. LoBue*

December 16, 2013

CERTIFICATE OF SERVICE

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

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