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-00827-GBL-JFA **PUBLIC VERSION**

MEMORANDUM OF DEFENDANT CACI PREMIER TECHNOLOGY, INC., IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTUAL BACKGROUND 3

A. Plaintiffs Have Not Established Any Connection Between Themselves and CACI PT Interrogators 3

B. The U.S. Military Chain of Command Exercised Total Control Over How Military and Civilian Interrogators Performed the Interrogation Mission at Abu Ghraib Prison 4

1. CACI PT's Contracts Called for Plenary and Direct U.S. Military Control Over Those Performing Interrogation Operations 4

2. The U.S. Military Provided the Sole Operational Chain of Command for Military and Civilian Interrogators at Abu Ghraib Prison 6

3. The U.S. Military Exclusively Controlled All Aspects of Interrogations at Abu Ghraib Prison 10

III. APPLICABLE STANDARD 13

IV. THIS CASE PRESENTS NONJUSTICIABLE POLITICAL QUESTIONS 14

A. This Case Satisfies the "Plenary or Direct Control" Test for Political Questions 16

B. Resolution of this Case Would Require Questioning Actual, Sensitive Military Judgments in a War Zone 20

C. There Are No Judicially-Manageable Standards for Resolving This Case 28

V. CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Al Shimari v. CACI Premier Technology, Inc.,
758 F.3d 516 (4th Cir. 2014) ..... passim

Baker v. Carr,
369 U.S. 186 (1962).....15, 28

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

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006).....14

Dow v. Johnson,
100 U.S. 158 (1879).....2

In Re KBR, Inc., Burn Pit Litig.,
744 F.3d 326 (4th Cir. 2014) 14, 15, 16, 18

Lebron v. Rumsfeld,
670 F.3d 540 (4th Cir. 2011) 14

Richmond, Fredericksburg & Potomac R. Co. v. United States,
945 F.2d 765 (4th Cir. 1991) 14

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

Taylor v. Kellogg Brown & Root Svcs., Inc.,
658 F.3d 402 (4th Cir. 2011) ..... passim

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) (en banc) 14

Tiffany v. United States,
931 F.2d 271 (4th Cir. 1991) 14

United States v. Moussaoui,
382 F.3d 453 (4th Cir. 2004) 14

Williams v. United States,
50 F.3d 299 (4th Cir. 1995) 14

RULES

Fed. R. Civ. P. 12(b)(1).....4, 9, 14, 16

Fed. R. Civ. P. 12(b)(6).....13

I. INTRODUCTION

"One Team, One Fight."

> *- Major Eugene Daniels, U.S. Contracting Officer's Representative for CACI PT's work in Iraq, describing the role and relationship to the military of CACI PT's interrogators.*

The political question doctrine bars this action. The political question doctrine bars this action because the U.S. military exercised plenary and direct control over the CACI PT interrogators in Iraq. Indeed, the military not only established the goals for the interrogation mission, but controlled *how* military and civilian interrogators performed the interrogation mission. As a result, the interrogation function performed by CACI PT interrogators was indistinguishable from that function as performed by U.S. military personnel. The D.C. Circuit held precisely that, concluding that CACI PT's interrogators "were in fact integrated and performing a common mission under ultimate military command." *Saleh v. Titan Corp.*, 580 F.3d 1, 6-7 (D.C. Cir. 2009). As succinctly stated by Major Daniels, it was "One Team, One Fight" during the war in Iraq. O'Connor Decl., Ex. 1.

As the Fourth Circuit has directed, the political question doctrine requires dismissal of this case if either (1) the government contractor was under the "plenary" or "direct" control of the military; ***or*** (2) national defense interests were "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of the claim "would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 533-34 (4th Cir. 2014) (quoting *Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011)). An affirmative answer to either question "will signal the presence of a nonjusticiable political question." *Id.* at 734.

The facts here demonstrate beyond doubt that both standards are satisfied. The U.S. military exercised total, plenary and direct operational control over CACI PT's interrogators.

The military established the interrogation rules of engagement, determined who would conduct each interrogation, reviewed and approved all interrogation plans (including techniques), and determined how intelligence adduced through interrogations would be used to prosecute the war in Iraq. Concomitantly, the national defense interests of the United States were an inherent, definitional component of U.S. interrogation operations at Abu Ghraib prison. The Court will not find a more compelling case than this one for dismissal under the political question doctrine.

The horrific allegations made by the Plaintiffs do not change this outcome. As the Fourth Circuit made clear in directing this Court to apply the *Taylor* political question tests, there is no "Abu Ghraib" exception to the political question doctrine. Plaintiffs' graphic allegations do not create a justiciable claim. As the Supreme Court recognized long ago, "[i]f such epithets could confer jurisdiction, they would always be supplied in every variety of form." *Dow v. Johnson,* 100 U.S. 158, 165 (1879). That principle applies with particular force here. If the case is not dismissed, CACI PT will seek summary judgment based in part on the one fact that pervades this case: **After full discovery, Plaintiffs cannot identify one instance in which a CACI PT employee inflicted injury on them, directed or encouraged anyone else to injure them, or was even aware of anyone else inflicting injury on these Plaintiffs**. Put another way, CACI PT's interrogators are wrongly accused. *After ten years of searching for something, anything, that would support their claims, these Plaintiffs have nothing that even remotely implicates CACI PT in their alleged treatment while in U.S. custody.*[1] Lacking any connection between Plaintiffs and CACI PT interrogators, Plaintiffs resort to attempting to impose liability on CACI PT for abuse allegedly perpetrated by soldiers, bringing military decisions regarding detainee treatment

[1] The Plaintiffs were members of the putative class in *Saleh*, which was filed in 2004. By agreement of the parties and Order of this Court, discovery taken in *Saleh* is deemed to have been taken in this action. Dkt. #211 at ¶ 14.

to the forefront of this case. Under the Fourth Circuit's tests for political questions, the facts developed in discovery demonstrate the nonjusticiability of this case. Dismissal is required.

II. FACTUAL BACKGROUND

A. Plaintiffs Have Not Established Any Connection Between Themselves and CACI PT Interrogators

Plaintiffs have accused CACI PT of torture, war crimes, and cruel and inhumane treatment. The Court would expect that there is some evidentiary support for these claims. There is not. Plaintiffs' Third Amended Complaint ("TAC") does not assert contact between anyone affiliated with CACI PT and themselves. The record developed in discovery is similarly lacking, bereft of any evidence that any of these Plaintiffs had any meaningful contact with anyone employed by CACI PT or acting at the behest of CACI PT. Instead, Plaintiffs allege that "somebody" mistreated them and that CACI PT ought to pay for that mistreatment even without evidence of the claimed abuse or any connection between CACI PT interrogators and Plaintiffs.

Plaintiffs' interrogatory responses admit that they have no evidence of any CACI PT personnel being involved in causing them injury. *See* O'Connor Decl., Exs. 10-13 (responses to Interrogatory No. 5). The parties deposed several military policemen ("MPs") who were court-martialed for abusing detainees at Abu Ghraib prison, and these witnesses had no information at all about these Plaintiffs. Frederick Dep. at 185-87; C. Graner Dep. at 53-54.

The MPs testified that military and civilian interrogators sometimes provided instructions concerning conditions of detention for particular detainees, but that the instructions always were specific to a particular detainee assigned to that interrogator, and there is no evidence that any of the Plaintiffs were assigned to a CACI PT interrogator. Frederick Dep. at 208-09, 226-27, 230; C. Graner Dep. at 55-56. While there were hundreds of military intelligence holds at Abu Ghraib prison (C. Graner Dep. at 61-62), the few instances where former MPs testified about

CACI PT interrogators being assigned to detainees or giving MPs instructions concerning treatment of particular detainees all involved detainees *other than Plaintiffs*.[2]

B. The U.S. Military Chain of Command Exercised Total Control Over How Military and Civilian Interrogators Performed the Interrogation Mission at Abu Ghraib Prison

This Court will not be the first to assess whether the U.S. military or CACI PT controlled interrogation operations at Abu Ghraib prison. In *Saleh*, 580 F.3d at 6-7, the district court and the D.C. Circuit determined that CACI PT's preemption defense would be controlled by who exercised operational control at Abu Ghraib prison. After full discovery on command and control issues, the D.C. Circuit held that the plaintiffs' claims were preempted because "there is no dispute that [CACI PT's employees at Abu Ghraib prison] were in fact integrated and performing a common mission with the military under ultimate military command." *Id.* While the present motion does not require a showing of undisputed facts – it is a Rule 12(b)(1) motion and not a summary judgment motion – the record in this action reaffirms the D.C. Circuit's assessment of the facts – "One Team, One Fight" – as the U.S. military had total dominion and control over the conduct of the interrogation mission at Abu Ghraib prison.

1. CACI PT's Contracts Called for Plenary and Direct U.S. Military Control Over Those Performing Interrogation Operations

The U.S. military established an Interrogation Control Element, or "ICE", to conduct the interrogation mission at Abu Ghraib. The U.S. Army's 205th Intelligence Brigade provided

[2] [redacted] Frederick Dep. at 44-48; M. Graner Dep. at 32-35. [redacted] Frederick Dep. at 54-60, 102-03, 167-68, 189-93. [redacted] C. Graner Dep. at 43-44; 56-57.

intelligence personnel to conduct interrogations under the auspices of the ICE. Pappas Decl. ¶ 3. The U.S. Army, however, did not have enough interrogators to fill all of the Tiger Teams[3] needed to interrogate detainees, so the United States contracted with CACI PT to provide civilian interrogators to augment the military interrogator force. *Id.* ¶ 7; Brady Decl. ¶ 3.

When the CACI PT interrogators arrived at Abu Ghraib prison, it was an active war zone. Frederick Dep. at 209; Pappas Decl. ¶ 5. The prison was subject to attacks from mortars, rocket-propelled grenades, and snipers. Frederick Dep. at 209; Harman Dep. at 45-46. The general conditions of detention at Abu Ghraib prison were established by the U.S. military before CACI PT personnel ever arrived on the scene. The first CACI PT interrogators did not arrive in Iraq until September 28, 2003. O'Connor Decl., Ex. 14. By that time, detainees at Abu Ghraib prison were already being kept naked or nearly naked; were being required to wear women's underwear; were being subjected to stress positions; were being handcuffed to the bars of their cells; were being subjected to dietary restrictions; and were being subjected to environmental manipulation. Frederick Dep. at 194-95.

The operative contract provisions reflect exclusive military control of interrogation operations. CACI PT provided interrogators under two delivery orders, Delivery Order 35 ("DO 35") and Delivery Order 71 ("DO 71").[4] DO 35 provided for integration of CACI PT interrogators into the military's interrogation teams in order to accomplish intelligence priorities established by Coalition Joint Task Force-7 ("CJTF-7"):

> Identified personnel supporting this effort will be integrated into MIL/CIV analyst, screening, and interrogation teams (both static/permanent facilities and mobile locations), in order to

[3] A Tiger Team typically consisted of an interrogator and an interpreter, and sometimes also included an intelligence analyst. Pappas Decl. ¶ 12.

[4] DO 35 and DO 71 are submitted as Exhibits 16 and 17 to the O'Connor Declaration.

> accomplish CDR CJTF-7 priorities and tasking IAW Department of Defense, U.S. Civil Code and International Regulations.

DO 35 at ¶ 4. DO 35 provided that CACI PT interrogators would conduct interrogations in accordance with "local SOP and higher authority regulations," would review data and cross-reference intelligence collection priorities and plans "IAW interrogation SOPs and plans," would conduct other intelligence activities "*as directed*," and "will report findings of interrogation IAW with local reference documents, SOPs, and higher authority regulations *as required/directed*." DO 35 at ¶ 6 (emphasis added).

The Statement of Work for DO 71 provided similarly:

> As the operational element, HSTs (HUMINT Support Teams) support the overall divisional/separate Brigade HUMINT mission, and *perform under the direction and control of the unit's MI chain of command or Brigade S2, as determined by the supported command.*

DO 71 at ¶ 3 (emphasis added). DO 71 also provided at "[a]ll actions [of the interrogators provided under DO 71] will be managed by the Senior [Counter-Intelligence] Agent," a member of the United States military. DO 71 at ¶ 4.d. The practice of interrogation operations followed the contractual requirements.

2. The U.S. Military Provided the Sole Operational Chain of Command for Military and Civilian Interrogators at Abu Ghraib Prison

The U.S. military's total control over the interrogation mission was clear, direct and unqualified. Major Carolyn Holmes, U.S. Army, the Officer in Charge of the ICE at Abu Ghraib prison,[5] Colonel Thomas Pappas, U.S. Army, who commanded the military intelligence brigade at Abu Ghraib prison, Colonel William Brady, U.S. Army, the Contracting Officer's Representative for the CACI PT interrogation contracts, and Daniel Porvaznik, CACI PT's

[5] At the time she served at Abu Ghraib prison, Major Holmes was known as Captain Carolyn Wood.

administrative site lead at Abu Ghraib prison all confirm that the military exercised *plenary and direct control* over how interrogations were conducted at Abu Ghraib prison by both military and CACI PT interrogators. *There is no record evidence to the contrary.*

When a CACI PT interrogator arrived at Abu Ghraib prison, CACI PT would propose that the interrogator fill one of the vacancies the military had on its Tiger teams, which required the approval of the military leadership. Pappas Decl. ¶ 8; Brady Decl. ¶ 4; Holmes Dep. at 27. Once a CACI PT interrogator was placed on a Tiger Team, the military chain of command controlled all aspects of his or her performance of the interrogation mission. As Major Holmes testified, "[b]asically, we treated the CACI personnel the same way that we did military intelligence." Holmes Dep. at 26; *see also id.* at 36; Brady Decl. ¶ 4; Pappas Decl. ¶ 9.

The military chain of command provided all arriving personnel, whether soldiers or CACI PT employees, a memorandum of understanding that explained the rules and procedures at Abu Ghraib prison. Holmes Dep. at 27-28; O'Connor Decl., Ex. 17. The memorandum was identical for soldiers and CACI interrogators. Holmes Dep. at 28. As the memorandum makes clear, personnel at Abu Ghraib prison – both military and civilian – reported to the military intelligence chain of command for all operational matters. O'Connor Decl., Ex. 17 at ¶ 6. Major Holmes confirmed this arrangement:

> Q: With respect to interrogation operations, who did CACI interrogators report to?
>
> A: They would have reported to their section – section sergeant and then also to Sergeant Johnson, Chief Graham, and myself. Major – Major Price, I believe he was the operational sergeant. So they fell under the same chain of command, if you will.
>
> Q: Were there any differences in their chain of command?
>
> A: I don't know on the CACI side, but as far as the day-to-day operations that had to do with – with the mission, no, there was no difference.

Holmes Dep. at 28-29; Brady Decl. ¶¶ 4-5; Pappas Decl. ¶ 9; *see also* Pappas Decl. Ex. 1 (organizational chart showing that interrogators, whether military or civilian, reported to a U.S. Army sergeant section chief, and then to the military intelligence leadership in the ICE).

Each interrogator, whether military or civilian, also had an administrative chain of command for mundane matters such as leave and pay issues, but the administrative chain of command had no role in overseeing the interrogation mission. As Major Holmes testified:

> Q: And when you say the administrative person in charge, did he make any decisions regarding interrogation operations?
>
> A: As far as policy or as far as teams or as far as what?
>
> Q: Any – did he make any operational decisions, who would interrogate someone, who would be –
>
> A: No.
>
> Q: Okay. Did he receive reports or any interrogation plans?
>
> A: He was not an approving authority for them, no.

Id. at 141; *id.* at 140-42 (CACI PT site lead was an "administrative go-to guy" for "corporate issues, like leave and things of that nature," but with no authority "over the mission itself").

Colonel Brady, a Contracting Officer's Representative, provided similar testimony:

> During all relevant times, the civilian interrogators provided by CACI PT in support of the U.S. Army's mission at the theater interrogation site were under the supervision of the military personnel from the military unit to which they were assigned to support under contract. For example, CACI PT interrogators serving at Abu Ghraib were directly supervised by the chain of command for the 205th Military Intelligence Brigade and Joint Interrogation and Debriefing Center ("JIDC"). The CACI PT interrogators were integrated within the military interrogation process of the military units to which they were assigned to support. That is, the CACI PT interrogators received the same operational taskings and direction from the military as their military interrogator counterparts. . . . All of the interrogators – military and civilian – were treated as part of one team and as

> having the same interrogation responsibilities, reporting obligations, and mission direction.

Brady Decl. ¶ 4; *see id.* at ¶ 5. Thus, as Colonel Brady put it, the CACI PT interrogators "were under the functional control and supervision of the United States military." *Id.* ¶ 5.

Colonel Pappas, who commanded the 205th Military Intelligence Brigade at Abu Ghraib prison, confirmed that "[i]n all respects, CACI PT interrogators were subject to the operational control of the U.S. military," and that "CACI PT interrogators were fully integrated into the Military Intelligence mission and [were] operationally indistinguishable from their military counterparts." Pappas Decl. ¶¶ 8, 9. CACI PT interrogators, just like military interrogators, were assigned to Tiger Teams staffed by military and civilian personnel, and the Tiger Teams reported to the military chain of command:

> Specifically, Tiger Teams reported to Captain Carolyn A. Wood, the Officer in Charge of the Interrogation Collection Element ("ICE"), and Chief Warrant Officer John D. Graham, an interrogation operations officer for the ICE. Captain Wood, in turn, reported to the Operations Officer, Major Michael Thompson, who in turn reported to Lieutenant Colonel Jordan, the director of the JIDC and my direct subordinate.

Id. Daniel Porvaznik, CACI PT's administrative site lead testified similarly:

> As the CACI PT Site Lead at Abu Ghraib, I (and all CACI PT interrogators) reported directly to Captain Carolyn Wood, U.S. Army, in her capacity as Officer in Charge ("OIC") of the Interrogation Control Element ("ICE"). I (and all CACI PT interrogators) also reported to the Non-Commissioned Officer in Charge ("NCOIC"), who reported to Captain Wood.

Porvaznik Decl. ¶ 10. In sum, every source of evidence confirms "One Team, One Fight," with the U.S. Army chain of command directing all aspects of the team and all aspects of the fight. Indeed, this evidence caused the D.C. Circuit to conclude in *Saleh* that the U.S. Army's operational control over the interrogation mission at Abu Ghraib was *undisputed*, a burden CACI PT does not face on this Rule 12(b)(1) motion. 580 F.3d at 6-7.

3. The U.S. Military Exclusively Controlled All Aspects of Interrogations at Abu Ghraib Prison

The U.S. military not only supplied the chain of command, but the military officers who comprised that chain of command confirmed their total control over all aspects of the conduct of interrogations. As Colonel Pappas stated in his Declaration:

> The military decided where each detainee would be incarcerated within Abu Ghraib prison, which detainees would be interrogated, and who would conduct the interrogations of a given detainee. Both military and CACI PT interrogators were required to prepare an interrogation plan for a detainee, which was reviewed and approved by the U.S. military leadership in the ICE. At the conclusion of an interrogation, military and civilian interrogators were required to prepare an interrogation report and enter it into a classified military database. The military then decided what use to make of information obtained during interrogations.

Pappas Decl. ¶ 10; Porvaznik Decl. ¶ 13 (providing similar testimony).

Major Holmes [redacted]

Q: [redacted]

A: [redacted]

. . . .

Q: [redacted]

A: [redacted]

Q: [redacted]

A: [redacted]

[redacted]

Q: [redacted]

A: [redacted]

Q: [redacted]

A: [redacted]

Q: Who did the interrogation plans get submitted to?

A: Either myself, the NCOIC [non-commissioned officer in charge], the operations officer, which was a major, or my – my CW2 [Chief Warrant Officer-2].

Q: Okay. If a CACI interrogator filled out an interrogation plan, did it ever get sent to someone else?

A: No, same – same personnel.

Q: Were CACI interrogators allowed to use any different techniques or strategies than military intelligence?

A: No, ma'am.

Q: Who approved or disapproved nonstandard interrogation techniques?

A: The nonstandard interrogation techniques, it depended on the technique that was proposed. It could either be myself, Colonel Pappas, or General –

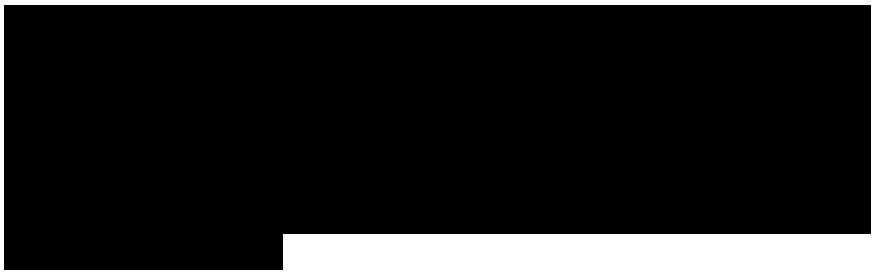
Q: Sanchez?

A: Sanchez, on the tip of my tongue.

Holmes Dep. at 33-35.

The military leadership at Abu Ghraib prison also monitored interrogations, as interrogations took place in booths with one-way glass. Holmes Dep. at 35-36. Major Holmes, consistent with her identical role in supervising military and CACI PT interrogators, testified that she observed interrogations but could not recall whether the interrogations she observed were by military or CACI PT interrogators because she "treated them all the same." *Id.* at 36.

As the testimony from Major Holmes makes clear, the U.S. military chain of command approved non-standard interrogation techniques on a detainee-by-detainee basis. In addition, the U.S. military leadership decided what interrogation techniques would be permitted with respect to detainees generally. A Senate Armed Services Committee Report documented the process by which interrogation rules of engagement [IROEs] approved for use by military interrogators at Guantanamo Bay migrated through the military leadership to Afghanistan and then to Iraq. O'Connor Decl., Ex. 18 at xxii-xxiv, xxviii-xxix. With respect to military's sole role in establishing permissible interrogation techniques at Abu Ghraib prison, Major Holmes confirmed in her deposition that the following prior testimony by her was true:



. . . .

. . . .

[redacted]

Holmes Dep. at 69-70.

As Major Holmes further explained, [redacted]

III. APPLICABLE STANDARD

This is not a Rule 12(b)(6) motion or a summary judgment motion. The political question doctrine implicates the Court's subject-matter jurisdiction and is considered under a

Rule 12(b)(1) standard. A court considering a Rule 12(b)(1) motion is not bound by the allegations in the complaint, "and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *In Re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) ("*Burn Pit*"). Moreover, a court considering a subject-matter jurisdiction challenge must act as a finder of fact for purposes of the motion and must resolve any disputes in the evidence presented. *Id.* (citing and quoting *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995)). The plaintiff has the burden of proving subject-matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

IV. THIS CASE PRESENTS NONJUSTICIABLE POLITICAL QUESTIONS

The Fourth Circuit's remand instructions agreed with CACI PT's view of the political question tests applicable in this Circuit, and a handful of decisions demonstrate the proper application of those tests. This Court's task is to assess whether the facts of this case satisfy the well-established tests for a political question. On this record, that is a straightforward task.

This case arises in the context of the war in Iraq and concerns the interrogation of Iraqis detained by the U.S. military and held in military custody. No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *United States v. Moussaoui*, 382 F.3d 453, 469-70 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority." *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

In *Al Shimari*, the Fourth Circuit confirmed this principle, observing that "'most military decisions' are matters solely within the purview of the executive branch . . . and that the Constitution delegates authority over military matters to both the executive and legislative branches of government." 758 F.3d at 533 (quoting *Taylor*, 658 F.3d at 407 n.9). That said, not every claim touching on military operations poses a political question, and a court "must undertake a discriminating analysis that includes the litigation's susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* (citations and internal quotations omitted).

For tort suits against civilian contractors supporting military operations, the Fourth Circuit has created two tests for identifying political questions:

> (1) whether the government contractor was under the "plenary" or "direct" control of the military; or
>
> (2) whether national defense interests were "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of the claim "would require the judiciary to question actual, sensitive judgments made by the military."

Id. at 733-34 (quoting *Taylor*, 658 F.3d at 411). "[A]n affirmative answer to either of these questions will signal the presence of a nonjusticiable political question." *Id.* (quoting *Burn Pit*, 744 F.3d at 335). In conducting this inquiry, a court must "look beyond the complaint and consider how [the plaintiffs] might prove [their] claim[s] *and* how [the contractor] would defend. *Id.* (quoting *Taylor*, 658 F.3d at 409 (alterations in original)). That inquiry informs not only the two tests identified above, but also shows that there are no judicially-manageable standards for resolving Plaintiffs' claims. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

A. This Case Satisfies the "Plenary or Direct Control" Test for Political Questions

As the Fourth Circuit has explained,

> the critical issue with respect to the question of "plenary" or "direct" control is not whether the military "exercised some level of oversight" over a contractor's activities. Instead, a court must inquire whether the military clearly "chose *how* to carry out these tasks," rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed.

Al Shimari, 758 F.3d at 534 (quoting *Burn Pit*, 744 F.3d at 339). The D.C. Circuit found it *undisputed* that the U.S. military controlled the conduct of interrogations by military and CACI PT interrogators at Abu Ghraib prison. *Saleh*, 580 F.3d at 6-7. CACI PT is not held to the "undisputed fact" burden on this Rule 12(b)(1) motion; indeed, *Plaintiffs* have the burden of proving subject-matter jurisdiction. *See* Section III, *supra*. But under any standard, the facts are clear that the U.S. Army had the sole power to dictate *how* military and CACI PT interrogators performed the interrogation mission at Abu Ghraib prison. That fact requires dismissal.

There are two guideposts for analysis of the "plenary or direct control" test. The first is *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1275-82 (11th Cir. 2009), which the Fourth Circuit has endorsed as a correct application of the "plenary or direct control" test. The second guidepost is the Fourth Circuit's decision in *Taylor*, 658 F.3d at 403, the only case in which the Fourth Circuit has applied the *Carmichael* test to facts developed in discovery.

In *Carmichael*, the Eleventh Circuit held that the political question doctrine barred claims arising out of a contractor's convoy accident because the U.S. military exercised plenary control over the convoy. *Carmichael*, 572 F.3d at 1275-82. "At the broadest level," the military had judged it appropriate "to utilize civilian contractors in conducting the war in Iraq, and [to] use the contractors specifically in connection with fuel transportation missions." *Id.* at 1281. On a more granular level, the U.S. military "decided the particular date and time for the convoy's

departure; the speed at which the convoy would travel; the decision to travel along a particular route (ASR Phoenix); how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel; the distance to be maintained between vehicles; and the security measures that were to be taken." *Id.* As a result of the military's plenary control, the court thus concluded that military judgments and balancing of interests in a war zone so pervaded the plaintiff's claims that the political question doctrine required dismissal.

In *Taylor*, the Fourth Circuit endorsed the analysis in *Carmichael* and applied it to claims arising from a contractor's electrocution of a soldier while performing generator maintenance in Iraq. *Taylor*, 658 F.3d at 403. The Fourth Circuit identified two tests for identifying political questions in suits against defense contractors – the "plenary or direct control" test first applied in *Carmichael*, and a second test that evaluated whether national defense interests were "closely intertwined" with military decisions governing the contractor's conduct. *Id.* at 411. While affirming dismissal based on the second test for political questions, the *Taylor* court concluded that the facts did not satisfy the "plenary or direct control" test:

> Unlike the situation in *Carmichael*, where the KBR truck driver was under the military's plenary control, the Contract specifies that "[t]he contractor shall be responsible for the safety of employees and base camp residents during all contractor operations. Moreover, the Contract provides that "the contractor shall have exclusive supervisory authority and responsibility over employees." In other words, unlike in *Carmichael* – where the military had plenary control over both the convoy and KBR – in this case the military was not exercising direct control.
>
> . . . .
>
> Indeed, with respect to generator maintenance at the Camp, KBR was nearly insulated from direct military control and was itself solely responsible for the safety of all "camp residents during all contractor operations."

Id. (citations omitted) (alteration in original). Thus, the Fourth Circuit adopted *Carmichael*'s "plenary or direct control" test, but held that the test was not satisfied in *Taylor* because ***KBR*** exercised the operational control over its employees performing the generator maintenance. *Id.*[6]

The upshot of *Carmichael* and *Taylor* is that if the U.S. military simply handed detainees over to CACI PT for interrogation, and allowed CACI PT to decide who would interrogate which detainees, establish the approved interrogation techniques, approve interrogation plans, and supervise the interrogation mission, the "plenary or direct control" test would not be satisfied. If, however, the military did not just tell CACI PT to obtain intelligence from detainees, but "chose how to carry out these tasks," the first *Taylor* test for a political question is satisfied and dismissal is required. *Al Shimari*, 758 F.3d at 534 (quoting *Burn Pit*, 744 F.3d at 339). The record in this case leaves no doubt as to the side of the fence on which this case sits.

As witness after witness has confirmed, the U.S. military established a chain of command that exercised total control over operational matters for both military and CACI PT interrogators. Holmes Dep. at 27-29; Brady Decl. at ¶¶ 4-5; Pappas Decl. ¶¶ 8-9; Porvaznik Decl. ¶¶ 7-16. The military chain of command approved the placement of a CACI PT interrogator on a Tiger Team; [redacted] decided whether a detainee would be interrogated and, if so, by whom; [redacted] decided when non-standard interrogation techniques would be approved on a detainee-by-detainee basis; reviewed and approved interrogation plans in advance of all interrogations; monitored interrogations; and required that interrogation reports be filed by all

[6] In *Burn Pit*, the Fourth Circuit once again stated its agreement with the result in *Carmichael*, but held that the political question issue could not be decided at the outset of the case because resolution of the issue required discovery. *Burn Pit*, 744 F.3d at 338. By contrast, the parties have taken full discovery in the present case.

interrogators in a single classified database. Holmes Dep. at 27, 33-36, 41-42, 69-70, 121-24, 126; Pappas Decl. ¶ 10; Brady Decl. ¶ 4; Porvaznik Decl. ¶¶ 11-16.

The Fourth Circuit noted that one relevant area of inquiry was whether the interrogation plans approved by the military involved approval of specific interrogation techniques. *Al Shimari*, 758 F.3d at 536. The record confirms that interrogation plans submitted to the military chain of command for approval identified the proposed interrogation techniques, [redacted] Porvaznik Decl. ¶ 14; Holmes Dep. at 33-35, 69-70. The control exercised by the military over interrogation operations is indistinguishable from the military control exercised over the convoy in *Carmichael*, and stands in clear contrast to *Taylor*, where the contractor's employees were "nearly insulated from direct military control." *Taylor*, 658 F.3d at 411.

The Fourth Circuit's opinion in *Al Shimari* also noted that the Court should evaluate whether the military "controlled the conduct of the CACI interrogators outside the context of required interrogations," particularly given the allegation in Plaintiffs' complaint that "[m]ost of the abuse' occurred at night, and that the abuse was intended to 'soften up' the detainees for later interrogations." *Al Shimari*, 758 F.3d at 536. The starting point for this inquiry is the single fact that pervades any analysis of Plaintiffs' claims: **Plaintiffs have taken full discovery and have not developed evidence that any CACI PT interrogator was assigned to them, or that they had any contact with a CACI PT interrogator outside the context of an interrogation**. The MPs convicted of detainee abuse testified without equivocation that any instructions they received from interrogators regarding conditions of detention were detainee-specific and were limited to detainees assigned to a particular interrogator. Frederick Dep. at 208-09, 226-27, 230;

C. Graner Dep. at 55-56. Thus, the discovery in this case has not established any link between CACI PT personnel and abuse MPs may have committed with respect to these Plaintiffs. As the Fourth Circuit has made clear, the political question inquiry is case specific, and is based on how *these Plaintiffs* will seek to prove *their claims*, and how CACI PT would defend against *these Plaintiffs' claims*. *Al Shimari*, 758 F.3d at 534. *These Plaintiffs* have not developed evidence that any CACI PT employee told MPs to mistreat them, so the misconduct of MPs on the night shift has nothing to do with the political question inquiry in this case.[7]

The Fourth Circuit has made clear that when the U.S. military controls *how* the contractor employees perform tasks in support of military operations, the "plenary or direct control" test is satisfied and, as in *Carmichael*, dismissal based on the political question doctrine is the required result. The facts of this case clearly satisfy this requirement, and dismissal is required.

B. Resolution of this Case Would Require Questioning Actual, Sensitive Military Judgments in a War Zone

Even where the military does not exercise plenary or direct control over its contractor's actions, the political question doctrine will apply if "a decision on the merits . . . would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari*, 758 F.3d at 535 (omission in original) (quoting *Taylor*, 658 F.3d at 412). In *Taylor*, the Fourth Circuit found this test satisfied, even where there was not plenary military control over the contractors, because resolving Taylor's claims "would invariably require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box" at the military base in

[7] Indeed, the photos that brought Abu Ghraib into the public consciousness – showing MPs chaining naked detainees together, forcing naked detainees to perform demeaning acts and being pushed into piles and stacked in pyramids – involved detainees who were not military intelligence holds, but were common criminals brought to the Abu Ghraib hard site after starting a riot in another camp within the Abu Ghraib complex. These detainees were not interrogated and the mistreatment of these detainees was simply sadism by the MPs without the involvement of any interrogators, military or civilian. Frederick Dep. at 222-23.

Iraq where the plaintiff was electrocuted. *Taylor*, 658 F.3d at 411-12. As the Fourth Circuit observed, the courts would have had to address the issue of the Marines' reasonableness because the contractor would have defended by arguing that the Marines had been contributorily negligent. *Id.* The same reasoning applies with even greater force here.

In addressing the second *Taylor* test, the Court must "look beyond the complaint and consider how [the plaintiffs] might prove [their] claim[s] *and* how [the contractor] would defend." *Al Shimari*, 758 F.3d at 534 (quoting *Taylor*, 658 F.3d at 409 (alterations in original)). At the threshold, Plaintiffs have asserted claims of torture and cruel, inhuman and degrading treatment ("CIDT"). If these claims are cognizable under ATS, they require proof that a public official "have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." CACI PT ATS Elements Mem. at 8, 10-11, 14 (Dkt. #512). A war crimes claim requires a showing that Plaintiffs are "innocent civilians," an element that would require second-guessing the military's judgment in capturing and imprisoning Plaintiffs as insurgents hostile to the United States. CACI PT ATS Elements Mem. at 15 (elements), 16 (addressing facts surrounding Plaintiffs' capture and imprisonment).

But even more to the point, Plaintiffs have no evidence of any meaningful contact between themselves and any employee of CACI PT. Accordingly, Plaintiffs' claims, and proof, must proceed on theories of secondary liability such as conspiracy and aiding and abetting. Plaintiffs' conspiracy and aiding and abetting theories directly seek to hold CACI PT liable for conditions of confinement imposed at Abu Ghraib prison by the military leadership and for actions by military personnel in their treatment of these Plaintiffs. CACI PT will defend against Plaintiffs' claims by showing that the U.S. military was responsible for the conditions at Abu Ghraib prison and that any mistreatment that these Plaintiffs allegedly suffered was attributable

to the United States military and not to CACI PT. This requires the Court to question military decisions and conduct. Indeed, the facts developed in discovery make clear that national defense interests are "closely intertwined" with the decisions and conduct at issue in this case.

The events at Abu Ghraib occurred in the context of the Iraq War, and the prison itself was located in the midst of the war zone and under regular attack. Frederick Dep. at 209; Harman Dep. at 45-46. The current lawsuit challenges the interrogation of detainees – an effort to prosecute the war by obtaining information from persons the military deemed likely sources of actionable intelligence. The CACI PT interrogators were integrated into the military intelligence operation at Abu Ghraib, their conduct was supervised by military officers, and their interrogation practices were governed by military rules and regulations. In fact, CACI PT interrogators used the same interrogation techniques and followed the same rules as their military counterparts. Brady Decl. ¶ 2; Pappas Decl. ¶ 9; Holmes Dep. at 26; Porvaznik Decl. ¶ 13.

The Army Colonel responsible for overseeing the CACI PT contracts explained how the CACI interrogators operated in a climate of pervasive military decision-making. "CACI interrogators were integrated within the military interrogation process." Brady Decl. ¶ 2. They were "supervised by the chain of command for the 205th Military Intelligence Brigade and Joint Interrogation and Debriefing Center" and received the "same operational interrogation taskings and direction from the military as their military counterparts." *Id.* CACI PT and military interrogators "were treated as part of one team and as having the same interrogation responsibilities, reporting obligations, and mission direction." *Id.* These facts are identical to those developed in *Saleh*, where the D.C. Circuit found it undisputed that CACI PT interrogators "were in fact integrated and performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7.

The facts of this case are analogous to those in *Carmichael*, on which this Court relied when setting forth the two-part standard for applying the political question doctrine to military contractors. *See Taylor*, 658 F.3d at 410-411. In *Carmichael*, the Eleventh Circuit considered a challenge to the conduct of a KBR convoy driver whose truck overturned and critically injured a soldier. Though the driver was a contractor, decisions regarding the convoy itself – including its route and speed – were made by the military. Any evaluation of the driver's negligence would therefore require "reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Carmichael*, 572 F.3d at 1281. Those ranged from the broad decision to use contractors to the specific military decisions surrounding the convoy at issue.

Here, similarly, the military controlled interrogations at Abu Ghraib so that Plaintiffs' suit implicates a number of interrogation decisions by the military command structure. The military set all of the rules governing interrogations. "The military decided where each detainee would be incarcerated . . . , which detainees would be interrogated, and who would conduct the interrogations . . . ." Pappas Decl. ¶ 10; Porvaznik Decl. ¶¶ 7-16. "United States Army personnel" had "functional control over the [CACI PT] interrogator[s]." Brady Decl. ¶ 3. [redacted] Porvaznik Decl. ¶ 14. [redacted] Holmes Dep. at 124. An examination of CACI PT interrogators' conduct would therefore require a "reexamination" of "sensitive judgments" to hire contractor interrogators, on which detainees to use contractors, with what supervision, and using which interrogation techniques, notwithstanding that these decisions have been "entrusted to the military in a time of war." *Carmichael*, 572 F.3d at 1281.

If anything, the case for applying the political question doctrine is stronger here than in *Carmichael*. Ultimately, the KBR convoy driver's conduct taken alone amounted to nothing more than garden-variety negligence – allowing "the tanker's rear end [to] veer[] off the road, eventually causing the vehicle to roll over." 573 F.3d at 1278. Though intertwined with critical military decision-making, the driver's alleged misconduct was a failure to exercise adequate skill in driving. Here, by contrast, plaintiffs challenge the actual conduct of interrogations and the rules under which the U.S. military caused those interrogations to proceed. Plaintiffs' allegations question the propriety of interrogation techniques that were used by military personnel as well as CACI PT contractors and that were approved by the military chain of command.

Thus, "decisions requir[ing] the specific exercise of *military* expertise and judgment" are not merely implicated by the litigation as they were in *Carmichael*, but are actually the gravamen of the suit itself. 572 F.3d at 1282. For example, plaintiffs complain of the alleged use of dogs, shaving, sleep deprivation, sensory deprivation, diet manipulation, stress positions, and other interrogation techniques. TAC ¶¶ 23-77. Whether to approve these methods was a military decision. Indeed, interrogation techniques were approved at the highest levels of the Defense Department, and those decisions migrated to Abu Ghraib prison through the military chain of command. O'Connor Decl., Ex. 18 at xxii-xxiv, xxviii-xxix. [redacted] Holmes Dep. at 124.

Several of the techniques of which plaintiffs complain were, in fact, approved for use at Abu Ghraib. For example, Major Holmes testified that [redacted] and Ivan Frederick testified that, prior to the arrival of the first CACI PT interrogators, detainees were already being kept nude or partially nude, were being dressed in women's underwear, were being placed in stress positions, were being handcuffed to the bars of their cells, and were being subjected to dietary and environmental manipulation. *See* Holmes Dep. at 105-07, 112; Frederick Dep. at 194-95. Thus, military officers made the very decisions that Plaintiffs now assert violate international law.

Deciding whether to approve these interrogation techniques and then to apply them to specific detainees requires the application of military judgment and expertise. The military must make sensitive judgments regarding the proper balance between respect for detainees and the military imperative of intelligence gathering during an ongoing war. *See Carmichael*, 572 F.3d at 1282 (political question doctrine applies where the military must "calibrate the risks" and perform a "delicate balancing of considerations").

Nor can Plaintiffs evade the political question doctrine by claiming to accept the military's rules and standards for interrogations and to question only the particular decisions that CACI PT interrogators made when applying those rules. The *Taylor* plaintiff made just such an argument "that [a court] should evaluate the reasonableness of [a contractor's] acts within the parameters of the military's orders – that is, deeming such orders to be 'external constraints' within which KBR's allegedly negligent acts should be assessed." 658 F.3d at 410. And the Fourth Circuit held that Taylor's argument was flawed for the same reason that a similar argument was rejected in *Carmichael*: where a contractor is "under military orders" a defense will "inevitably rely on such orders." *Id*.

In any event, three particular features of the present litigation make it unavoidable that a decision on the merits would require the Court "to question actual, sensitive judgments made by the military." *Al Shimari*, 758 F.3d at 533-34 (quoting *Taylor*, 658 F.3d at 411). First, military interrogators used the exact same techniques as CACI PT interrogators pursuant to the same set of rules and orders. Brady Decl. ¶ 2. Major Holmes testified that "we treated the CACI personnel the same way that we did the military intelligence." Holmes Dep. at 26. The "standing operating procedures and the rules and polices" were not "any different for CACI interrogators" versus "military intelligence." *Id.* at 28. They had no "different performance requirements." *Id.* at 29. And they were not "allowed to use any different techniques or strategies than military intelligence." *Id.* at 35. [redacted] *Id.* at 109. Thus, any decision on CACI PT interrogation techniques will, in effect, constitute a ruling on the propriety of the identical techniques used by military personnel. *See also* Porvaznik Decl. ¶ 13; Pappas Decl. ¶ 9.

Second, military officers reviewed, approved, and even witnessed the CACI PT interrogations. CACI PT interrogators "reported to their section sergeant and then also to Sergeant Johnson, Chief Graham, and [Major Holmes]" with "no difference" in operational chain of command from military interrogators. Holmes Dep. at 28. The military leadership instituted rules on interrogation techniques that applied equally to military and civilian interrogators. *Id.* at 121-26; Pappas Decl. ¶ 8; Porvaznik Decl. ¶ 10. "Both military and CACI PT interrogators were required to prepare an interrogation plan for a detainee, which was reviewed and approved by the U.S. military leadership." Pappas Decl. ¶ 10. Interrogators "filled out an interrogation plan . . . and then had it approved" by military leadership. Holmes Dep. at 21-24, 34. [redacted]

[redacted] Holmes Dep. at 34. Any "nonstandard interrogation techniques" were approved by Major Holmes, Colonel Pappas, or General Sanchez. *Id.* at 35. Finally, the interrogation booths were designed so that military officers could monitor interrogations. *Id.* at 35-36. As a result, any attack on the interrogation techniques used by CACI PT interrogators necessarily implicates command decisions by their military superiors.

Finally, there is a fundamental difference between this case and *Taylor* and *Carmichael* that makes the existence of a political question even more pronounced. In *Taylor*, KBR performed the maintenance that directly led to the electrocution, with KBR defending on the grounds that more remote military decisions played a role in the injuries. *Taylor*, 658 F.3d at 410-11. In *Carmichael*, the KBR driver was the one who failed to negotiate a turn and crashed his vehicle, with KBR again defending on the grounds that more remote military decisions played a role in the accident. *Carmichael*, 572 F.3d at 1275-79. Similar to *Taylor* and *Carmichael*, CACI PT will defend this case in part on the grounds that the military's policy decisions controlled how detainees were treated at Abu Ghraib prison. But unlike *Taylor* and *Carmichael*, there is no evidence here at all that CACI PT personnel ever directly inflicted any injury on Plaintiffs. Rather, Plaintiffs' claims are based entirely on an alleged "conspiracy between CACI PT Employees and military personnel to torture and otherwise seriously mistreat detainees." TAC at ¶ 3. As a result, while *Carmichael* and *Taylor* involved remote military conduct and decisions, this Court will be required to evaluate military decisions and behavior that is alleged to have been the direct cause of Plaintiffs' injuries.

Thus, Plaintiffs must show that military personnel actually committed torts against them in order to hold CACI PT vicariously liable for injuries that Plaintiffs cannot prove CACI PT's

employees inflicted directly. Indeed, because Plaintiffs cannot prove even that particular *military personnel* caused their injuries, they must show that the military *chain of command* that approved interrogation techniques and set policies regarding the administration of Abu Ghraib was part of the conspiracy. Doing so implicates exactly the sort of sensitive decisions regarding operation of a military prison and choice of interrogation tactics that are committed to a coordinate branch of government.

And even if their conspiracy claims did not implicate these larger military considerations, Plaintiffs' need to establish the tort liability of individual soldiers is exactly the sort of problem that requires application of the political question doctrine pursuant to *Taylor*. The Plaintiff in *Taylor* had alleged that KBR employees negligently turned on a generator while they were working on installing a wiring box. But KBR's contributory negligence defense would "require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box" and "whether back-up power should have been supplied to the . . . area." *Taylor*, 658 F.3d at 411-12. Those assessments were "beyond the scope of judicial review." *Id*. at 412. Here, all of the questions regarding military participation in the alleged conspiracy require the Court to decide the reasonableness and propriety of conduct by the alleged military co-conspirators. That "deprives [a] district court of jurisdiction" under the "political question doctrine." *Id*.

C. There Are No Judicially-Manageable Standards for Resolving This Case

While the Fourth Circuit has established two tests, discussed above, for identifying political questions in tort suits against contractors, these tests are not intended to supplant the holding in *Baker v. Carr* that a political question exists when there are no "judicially discoverable and manageable standards for resolving" a case. 369 U.S. at 217; *Taylor*, 658 F.3d at 408-09 & n.12.

Plaintiffs claim not to know who interrogated them, and all records identifying any detainees' interrogator(s) are classified and in the United States' exclusive possession. O'Connor Decl., Ex. 19 at ¶ 13(a). The United States refused to disclose in discovery the identity of the Plaintiffs' interrogators or techniques employed during their interrogations. Frederick Dep. at 82-83, 95-96, 161, 233-34; O'Connor Decl., Ex. 20. Unless the Court is inclined to overrule the United States' refusal to identify the interrogators, if any, assigned to these Plaintiffs, the classified nature of interrogator identities presents an insurmountable obstacle for adjudicating this action.

Equally problematic is the inability of three of the Plaintiffs (Al Shimari, Rashid, and Al-Zuba'e, the "Absentee Plaintiffs") to gain entry to this country for court-ordered depositions and medical examinations. This Court ordered Plaintiffs to appear in February 2013, but the Absentee Plaintiffs did not appear as ordered. The Court gave the Absentee Plaintiffs three more opportunities to appear (see Dkt. #214, 244, 309), and the Court's final order on the subject advised that the Absentee Plaintiffs' claims were subject to dismissal if they did not appear by April 26, 2013 (Dkt. #309). The Absentee Plaintiffs failed to comply, informing the court that they were denied entry into the United States without explanation.

The only explanation for the Absentee Plaintiffs' failure to appear is that the United States views them as a threat to U.S. security. Plaintiff Al Shimari's detainee file identifies him as a "high ranking member of the Ba'ath Party" and former Iraqi military, and states that he was captured when a search of his property revealed a machine gun, six rocket launchers, ammunition, blasting caps, gun powder, and two improvised explosive devices. According to his detainee file, Plaintiff Rashid was captured when one of his improvised explosive devices exploded near a coalition convoy. Plaintiff Al Zuba'e's detainee file states that he was captured

based on a "be on the lookout" notice as someone responsible for planning attacks on coalition forces. Dkt. #368 at 5-6 (quoting and citing to detainee files filed with the Court). There are no judicially manageable standards for adjudicating claims where Plaintiffs cannot participate in the litigation, particularly where that disability is self-inflicted. This is even more true here, where Plaintiffs' credibility would be a central focus of any trial. Thus, it is not manageable litigation where Plaintiffs cannot appear and where they allege a conspiracy involving their interrogators but the U.S. has classified the identity of any interrogators assigned to these Plaintiffs.

V. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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