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**

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

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I. INTRODUCTION

CACI PT's political question memorandum quotes extensively from the testimony of military and civilian personnel who served at Abu Ghraib prison. CACI PT did that so the Court could see *exactly* what these witnesses said about command and control at Abu Ghraib prison. These witnesses confirm that it was "One Team, One Fight," with the U.S. military directing all aspects of the team and the fight. Plaintiffs' opposition, by contrast, rarely quotes more than three or four consecutive words from *any* witness, essentially avoiding what the witnesses actually say. Plaintiffs' opposition paints of a picture of CACI PT being responsible for prosecuting the war effort in Iraq and dictating to the U.S. military how it would be done. That characterization is both absurd and unsupported. When the Court reads the record, it will find that Plaintiffs rarely offer an accurate characterization of the exhibits to which they cite.

Plaintiffs' claims must be dismissed if either (1) CACI PT's interrogators were under the "plenary" or "direct" control of the military, ***or*** (2) national defense interests are "closely intertwined" with military decisions governing the contractor's conduct, such that a decision on the merits of Plaintiffs' claims "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). When the actual record is considered, rather than the record as mischaracterized by Plaintiffs, it is clear that both of these tests are satisfied. There also is no basis for granting Plaintiffs' plea to defer a ruling on justiciability, as there are no more facts to be developed and the Fourth Circuit was quite clear that the Court should decide political question before proceeding any further in this case. *Id.* at 537. The time to decide justiciability is now, based on the record as it is and not on the record Plaintiffs wish they had.

II. PLAINTIFFS' OPPOSITION MISCHARACTERIZES THE RECORD

Plaintiffs' opposition paint a false picture of the factual record in an attempt to mask the U.S. military's *total control* over the interrogation mission at Abu Ghraib prison. Plaintiffs' distorted picture of operations at Abu Ghraib prison, however, cannot withstand even the most cursory review of the actual record.

The witnesses providing testimony by declaration or deposition agree that the U.S. Army: (1) decided which detainees would be incarcerated at Abu Ghraib prison; (2) established the detention conditions before CACI PT personnel ever arrived at Abu Ghraib prison; (3) decided which detainees would be interrogated; (4) decided who would interrogate any detainee who was interrogated; (5) decided which interrogation techniques would be permitted generally, and which would require special approval; (6) required preparation of an interrogation plan before each interrogation and required military approval of the interrogation plan before any interrogation could proceed; and (7) required that military and civilian interrogators prepare an interrogation report and enter that report into a classified military database. Pappas Decl. ¶ 8-10; Brady Decl. ¶ 4-5; Porvaznik Decl. ¶¶ 11-16; Holmes Dep. at 28-29, 33-36, 69-70, 121-24, 126.

CACI PT also presented testimony that one of CACI PT's interrogators at Abu Ghraib prison was designated as administrative site lead, but that the site lead's duties were limited to administrative matters such as processing leave requests and handling pay issues. Holmes Dep. at 140-42; Brady Decl. ¶ 5; Porvaznik Decl. ¶ 18. Plaintiffs' opposition tries to distort this record by mischaracterizing the clear testimony concerning the military's total control over operations at Abu Ghraib prison, and by painting a false picture of the roles played by CACI PT's administrative site lead and by managerial personnel in Virginia. The record tells a different story.

A. Plaintiffs Mischaracterize the Testimony of Military Officers Concerning the Military's Plenary Control Over Interrogation Operations

Plaintiffs' opposition basically calls Colonel Pappas and Colonel Brady liars. These senior military officers, who have no stake in this litigation, provided sworn declarations that confirmed the U.S. military's plenary and direct control over operations at Abu Ghraib prison. Plaintiffs imply that these officers were dishonest in their declarations, asserting that the officers' declarations are "undercut by prior inconsistent statements." Pl. Opp. at 12. In CACI PT's view, if a party is going to impugn the integrity of senior, decorated military officers, it should not be fast and loose with the facts. Plaintiffs apparently do not feel so constrained.

Plaintiffs' opposition quotes two sentences from Colonel Pappas's testimony in the *Smith* court-martial to create the false impression that Colonel Pappas had testified that CACI PT interrogator Steven Stefanowicz's chain of command was solely through CACI PT personnel. Pl. Opp. at 9, 13-14. Plaintiffs notably omit the testimony immediately before and after the language they quote, where Colonel Pappas makes clear that for operational matters, the CACI PT interrogators and military interrogators had an identical *military* chain of command:

> Q: Did all the interrogators have direct access to the brigade commander?
>
> A: Yes. My office was down in the JIDC area; I would wander through the JIDC from time to time. In fact, different interrogators would talk to me about different things.
>
> Q: What was Sergeant Ashton's chain of command?
>
> A: Sergeant Ashton's chain of command, as far as I know, went through the – it went – I think he was at the supervisor level, and then it went back through the ICE – the interrogation control element – through the operations section, up to his battalion commander, and then to me.
>
> Q: What was Big Steve's leadership chain of command?
>
> A: He worked as an interrogator inside the interrogations thing; his actual chain of command, he was a contractor, and he went back through the

> contractor lead, who was on site, back to the contracting officer representative."
>
> Q: Let me follow up on that. These contractors, were they performing some of the missions of some of your soldiers – some of the same exact missions, in terms of interrogating?
>
> A: ***Yes, that's correct. In terms of their supervisory, their day-to-day supervisory thing, that would've been just like Sergeant Ashton, back through the ICE, to the operations section, and ultimately, to me.***

Nelson Decl., Ex. PP at 50-51 (emphasis added). Thus, Colonel Pappas' testimony makes the same point as CACI PT, that CACI PT provided administrative supervision to its employees but that they were under the operational control of the military chain of command. By omitting the testimony immediately before and after the language quoted in their opposition, Plaintiffs cynically represent Colonel Pappas's testimony as the opposite of what it actually was.

Similarly, Plaintiffs assert that Colonel Brady's prior deposition testimony [redacted] Pl. Opp. at 13. That is a false characterization of Colonel Brady's deposition testimony. The deposition passage Plaintiffs cite has *nothing to do with interrogators*. Colonel Brady was asked about a specific assertion that a CACI PT *screener* had supervised *screening operations* for a period of time. Brady Dep. at 62. Colonel Brady testified that he had no knowledge of that specific incident, but Plaintiffs misrepresent this testimony as applying generally to supervision of *interrogators* at Abu Ghraib prison. Similarly, Plaintiffs sarcastically credit Colonel Brady with "a remarkable recovery of memory" in his declaration testimony that he approved promotions of CACI PT screeners to interrogators. Pl. Opp. at 12. But it is hardly surprising that a witness would not recall something off-the-cuff in a deposition, but would recall it when given the time to contemplate a written declaration. Moreover, multiple witnesses testified,

without contradiction, that promotions within the contract required Army approval, so this fact is not seriously in dispute. Monahan Dep. at 31-32; Billings Dep. at 44-46; Mudd Dep. at 68-70.

Plaintiffs' opposition represents that Major Holmes provided a sworn statement to the effect that [redacted] Pl. Opp. at 9. But Major Holmes never said that. Major Holmes states in the very statement on which Plaintiffs rely that she briefed CACI PT interrogators on the mandatory interrogation rules of engagement, standards of conduct, performance expectations, and "the military chain of command and to whom to report any incidents." Nelson Decl., Ex. BB at 3. Moreover, Major Holmes testified in her deposition that she and the rest of the military chain of command provided identical operational supervision to CACI PT interrogators and military interrogators. Holmes Dep. at 33-36, 69-70, 121-24, 126.

Plaintiffs brazenly mischaracterize the declaration of Major Daniels, who succeeded Colonel Brady as Contracting Officer's Representative. Plaintiffs rely solely on Major Daniels's declaration for this proposition: "Military ***officials***, by contrast, did not personally supervise CACI interrogators during the conduct of interrogations." Pl. Opp. at 9 (emphasis added). But all Major Daniels states is that ***he*** did not supervise interrogations: "I never personally supervised any CACI contract interrogator during the conduct of an interrogation." Nelson Decl., Ex. V at ¶ 5. And Plaintiffs' mischaracterization of Major Daniels's declaration ignores the testimony by several other witnesses about military officials observing interrogations by military and civilian interrogators. Holmes Dep. at 35-36; Porvaznik Dep. at 140-42; Mudd Dep. at 106-07.

B. Plaintiffs Mischaracterize the Witness Testimony Concerning the Role of CACI PT's Administrative Site Lead and Other Administrative Personnel

CACI PT personnel and military officials repeatedly testified about the clear line between operational control exercised by the military and the mundane administrative matters handled by CACI PT personnel. Major Holmes testified without equivocation that the CACI PT site lead at

Abu Ghraib prison was just an "administrative go-to guy" who had no role whatsoever in making operational decisions. Holmes Dep. at 140-42; *see also* CACI PT Mem. at 7-9. Plaintiffs ignore Major Holmes' unambiguous testimony, and instead mischaracterize the testimony of Charles Mudd, Daniel Porvaznik, and Amy Monahan in seeking to paint a misleading picture of the role of a CACI PT site lead in Iraq. Plaintiffs quote one-half of one sentence from the Mudd deposition for the proposition that a CACI PT site lead was "in charge" (Pl. Opp. at 6), but Mr. Mudd clearly testified that a site lead provided only *administrative* support, and that operational control was exercised at all times by the United States Army. The full quote from which Plaintiffs pull the "in charge" snippet is as follows: "We always had – we always put someone representing CACI in charge. Even when [a site lead] went on vacation, we had a backup person that would become Acting Site Lead *just to handle time sheets and dealing with the customer and doing the admin stuff that had to be done*." Mudd Dep. at 178 (emphasis added).

Mr. Mudd also described the site lead's responsibilities elsewhere in his deposition as purely administrative in nature: "They did the briefings on the admin stuff, here is how we do time sheets, this says you have to keep a daily time sheet. So they did the CACI admin type stuff, make sure they understand their chain of command." *Id.* at 93. Plaintiffs represent that Mr. Mudd "visited [Abu Ghraib] at least 17 times to ensure that CACI employees were performing properly" (Pl. Opp. at 6). In actuality, Mr. Mudd testified that he visited Iraq to check on employee welfare and the U.S. military's general satisfaction with CACI PT performance, but that he had no role in supervising the operational mission. Mudd Dep. at 28-29, 99, 109-11, 145. Indeed, Mr. Mudd explicitly testified that he lacked the background in intelligence that would have been required to supervise the operational work performed by CACI PT personnel, and that he did not even have access to the interrogation rules of engagement until

after the detainee abuse at Abu Ghraib prison was reported in the media. *Id.* at 108. Mr. Mudd could not have been clearer in testifying that operational matters were under the exclusive control of the U.S. military. Mudd Dep. at 57-58, 63-65, 75, 93, 108-09, 132-33, 143, 178.

Finally, Plaintiffs mischaracterize Mr. Mudd's deposition testimony as supposedly stating that "CACI employees did not have to take directions from military personnel." Pl. Opp. at 7. That is not what Mr. Mudd said. Rather, in response to a question asking whether CACI PT employees were required "to take directions from *any* soldier, from *any* military personnel," Mr. Mudd responded, "No. They took direction from their person that they're working for." Mudd Dep. at 90. Contrary to Plaintiffs' intimation, CACI PT employees were advised that they were required to take their operational directions from the relevant military personnel. Billings Dep. at 112. Indeed, Major Holmes specifically briefed CACI PT interrogators on "the military chain of command and to whom to report any incidents." Nelson Decl., Ex. BB at 3.[1]

Plaintiffs also quote a half-sentence from the Porvaznik deposition in which he characterized a site lead as being "in charge," while failing to disclose that Mr. Porvaznik was clear in his testimony that a site lead was "in charge" of solely administrative matters such as handling pay problems and the like: "There were a lot of administrative issues that had to be handled, quite a few actually. Anything from insurance, pay issues, mail, living quarters – establishing living quarters, that was a – that was a big thing; getting the equipment from – you know, once it arrived in Iraq, getting it out to Abu Ghraib. . . ." Porvaznik Dep. at 103-104; *see also id.* at 132-33, 161-62, 201-04, 317-18, 325-26.

[1] Plaintiffs misconstrue a CACI PT memorandum as suggesting that "CACI personnel were directed to bring *all* issues to CACI management, not to the customer (*i.e.*, the military). Pl. Opp. at 7. Mr. Mudd, who wrote the memo, testified that CACI PT personnel were advised that "admin type business" should be dealt with internally, and CACI PT personnel should not complain to the military about administrative issues such as pay. Mudd Dep. at 201, 203-04.

Plaintiffs also mischaracterize Mr. Porvaznik's deposition testimony to create the false impression that CACI PT's administrative managers "served as a reporting chain back to the company" for operational matters. Pl. Opp. at 6. But Mr. Porvaznik's actual testimony on the pages cited by Plaintiffs expressly rejects this characterization. Porvaznik Dep. at 91 ("The client will supervise the work. [CACI PT] will talk to the client or, you know, the immediate client supervisor and just get a feel for, you know, how Mr. Porvaznik or Mr. Smith or whoever is – you know, how well they're doing or they're not doing."). Amy Monahan, who served as project manager in Virginia, testified that her communications with CACI PT interrogators involved administrative issues such as pay problems. Monahan Dep. at 67-68.

Plaintiffs cite to Ms. Monahan's deposition for the proposition that the person who was "in charge" was known as the "site lead." As with every other witness, Ms. Monahan was clear on the limited administrative role of a site lead. Monahan Dep. at 13-14 ("In most cases, the site lead is also – holds a functional position on the contract, but they just help assist with administrative responsibilities, knowing who is coming to work on time, who's absent, assisting with time cards, doing customer liaison support."); *id.* at 42 ("[A site lead's] responsibility was to assist administratively with the project manager back in the States, since we were not physically there."); *id.* at 43, 60-61, 68.

Apart from the CACI PT administrative management personnel, Plaintiffs inexplicably rely on testimony from former CACI PT interrogator Torin Nelson, but Mr. Nelson's actual testimony strongly supports CACI PT's position.[2] Mr. Nelson testified that he reported "to the U.S. military because they ran operations there." Nelson Dep. at 13. Mr. Nelson also explained

[2] Plaintiffs' opposition falsely states that Mr. Nelson reported detainee abuse by CACI PT personnel to the Army. Pl. Opp. at 8. Mr. Nelson actually testified that he did not "really have anything damning" to say about Messrs. Johnson and Dugan, but that maybe Army CID should investigate them. Nelson Dep. at 55-56.

that "CACI interrogators at Abu Ghraib reported, through our chain of command, to the military personnel who were running the J-I-D-C, the JIDC, at Abu Ghraib; we would report to them, as far as operational matters go." *Id.* at 24. Mr. Nelson testified that the military briefed him on the interrogation rules of engagement, including which interrogation techniques were approved generally, and which techniques required the commanding general's approval. *Id.* at 30-31.

Mr. Nelson also testified that he was required to submit an interrogation plan for approval before proceeding with any interrogation. *Id.* at 28-29. Indeed, when Plaintiffs' counsel tried to get Mr. Nelson to testify that the interrogation plan " was not necessary," Mr. Nelson corrected counsel and advised that it "was absolutely necessary." *Id.* at 28. Indeed, Mr. Nelson testified that if his interrogation plan had not been approved as written, he had to get a modified plan approved before he could proceed. *Id.* As Mr. Nelson testified, the interrogation plan set forth background information on the detainee, the possible intelligence information the detainee might have, and the interrogation techniques that the interrogator intended to use. *Id.* at 29.

Mr. Nelson also testified about CACI PT interrogator Dan Porvaznik's role as administrative site lead, a role in which "he handled mainly administrative affairs as a site manager." *Id.* at 24. While Mr. Porvaznik was a very experienced interrogator (*see* Porvaznik Decl. ¶¶ 2-5), which made him an ideal colleague to consult for interrogation advice, Mr. Nelson testified unequivocally that Mr. Porvaznik's supervisory role was solely administrative and that the U.S. Army had total control over operational matters:

> At our location at Abu Ghraib, our top person for CACI was Dan Provaznik [sic], as far as administrative duties go; that he was the site manager. But he was also the senior intel person, really; that if you had problems even with some intelligence matters, ***that you should take it through the military chain of command, obviously***, but you should also let the CACI chain of command, Dan Provaznik [sic], know about it.

> Not that CACI – ***we knew that CACI couldn't do anything really about operational affairs, intelligence affairs, anything like that, but at least that they should be aware of the fact that some of the CACI personnel were dealing through the military chain of command with intelligence matters or operational matters***.

Nelson Dep. at 22-23 (emphasis added). Plaintiffs argue that Mr. Porvaznik had access to the interrogation reports prepared by CACI PT personnel (Pl. Opp. at 8), but Mr. Nelson noted that Mr. Porvaznik had access to interrogation reports entered by civilian and military interrogators because, like all interrogators, he had the security clearance to access them, but that he was not expected to review the work of CACI PT interrogators. *Id.* at 25 ("Dan Provoznik [sic] would have [had access to interrogation reports] – although he probably had access to them because he had the security clearance to look at those and then check on what our status was – was more concerned with administrative matters, and so forth; and so during normal parts of work he was not expected to really be checking up on our – on our work.").

Indeed, Mr. Nelson's testimony flatly refutes Plaintiffs' false narrative that CACI PT management personnel in Virginia were involved in in providing operational supervision:

> Q: What about back in the United States; did you know who was operationally in the line of – of command at CACI, back in the United States?
>
> A: The operations side, to my knowledge there was nobody at home office or stateside that was CACI that was even concerned with operational matters, and that their concern was administrative matters solely.

Id. at 27.

C. Plaintiffs Misrepresent the Interactions Between CACI PT Interrogators and Military Police Personnel

Plaintiffs assert that former MP Ivan Frederick [redacted] Pl. Opp. at 3; *see also* Pl. Opp. at 11. That is not a

candid representation of Frederick's testimony. Frederick testified that interrogators, both CACI PT and military interrogators, would sometimes give MPs instructions concerning the conditions of detention for specific detainees assigned to them. Frederick Dep. at 79-80, 208-09, 226-27, 230. No interrogator – civilian or military – provided MPs with general instructions concerning detainee treatment, but only described protocols for their own assigned detainees. *Id.* Private Charles Graner testified similarly. C. Graner Dep. at 55-56. Given that there is no evidence that any Plaintiff was assigned to a CACI PT interrogator, there is no evidence that CACI PT interrogators provided instructions concerning conditions of detention for any of these Plaintiffs.

D. Plaintiffs Misrepresent the One Possible Interaction Between a Plaintiff and a CACI PT Interrogator

Discovery established one interaction between CACI PT employee Steven Stefanowicz and a reporter that possibly could be Plaintiff Al-Ejaili, but Plaintiffs misrepresent the record concerning that encounter. And even if Plaintiffs' rank speculation about a possible interaction between Al-Ejaili and Mr. Stefanowicz had a sounder factual basis, that one possible encounter has no bearing on the command and supervision issues that control the political question inquiry.

An Iraqi police officer working at Abu Ghraib smuggled a pistol to a detainee who then used the pistol to shoot a U.S. soldier. In response, Lieutenant Colonel Steve Jordan led an impromptu task force to question detainees and Iraqi policemen regarding the smuggled pistol, and to determine of there were other weapons that had been smuggled into the prison. Discovery indicates that [redacted] who might have been Plaintiff Al-Ejaili, as part of this impromptu task force, [redacted] Sgt. Beachner testified that [redacted] Sgt. Beachner further

reaffirmed that [redacted] Beachner Dep. at 18-20, 30-31. [redacted]. [redacted] Somehow, in their discussion of Sgt. Beachner's testimony, Plaintiffs left out that [redacted].

Plaintiffs also argue that they were subjected to conditions of detention – such as stress positions, forced nudity, dietary restrictions, and environmental manipulation – and that CACI PT employees endorsed use of the same conditions at Abu Ghraib. Pl. Opp. at 4. But Plaintiffs do not offer any evidence that CACI PT personnel directed anyone to impose such conditions *on these Plaintiffs*. Indeed, Plaintiffs do not even provide evidence that CACI PT personnel were assigned to interrogate these Plaintiffs or that there was any connection between the conduct of CACI PT personnel and the treatment of these Plaintiffs. Even worse, Plaintiffs ignore the that all of these conditions of detention were in general use before any CACI PT interrogators arrived at Abu Ghraib prison. Frederick Dep. at 194-95; CACI PT Mem. at 5. Plaintiffs argue that abuses occurred at Abu Ghraib prison that were unrelated to formal interrogations, but there is no evidence linking CACI PT interrogators with any detainees outside of the interrogation context. The MPs deposed confirmed that they did not receive instructions from CACI PT interrogators that were unrelated to the interrogation of their assigned detainees. Frederick Dep. at 79-80, 208-09, 226-27, 230; C. Graner Dep. at 55-56. The record testimony is clear that the mistreatment of detainees by the night shift that was unrelated to interrogations did not involve participation by interrogators, military or civilian. Frederick Dep. at 222-23.

E. The Government Reports Cited By Plaintiffs Do Not Undermine CACI PT's Political Question Arguments

Plaintiffs invoke the Taguba and Jones/Fay Reports (Pl. Opp. at 3-4), but seem unsure how to use these reports on the issue of justiciability. For good reason, as these reports, if anything, support CACI PT's position on command and control as well as the extent to which this case implicates sensitive military judgments made concerning detainee treatment.

There is a fundamental problem with reliance on the Taguba and Jones/Fay Reports for any purpose. As the United States acknowledged, these reports are not based on the authors' first-hand knowledge, but are based on "information obtained second-hand, third-hand, or more remotely, *e.g.*, from reports of investigations previously conducted." Dkt. #285 at 10 n.7. Thus, they are hearsay within hearsay. The reports in some ways contradict each other. CACI PT sought to depose the report authors in order to take discovery on the reliability of these reports, and the Court denied CACI PT's motion to compel. Dkt. #309. The reports are not admissible because they are redacted, CACI PT had no rights as a party to the investigations, CACI PT was denied depositions of the authors, and the authors were not exercising any particular expertise, but were simply collecting statements and making credibility determinations properly reserved to the finder of fact. *See United States v. MacDonald*, 688 F.2d 224, 230 (4th Cir. 1982) (government reports involving credibility determinations "tend to undermine the exclusive province of the jury"); *Rambus, Inc. v. Infineon Techs.*, 222 F.R.D. 101, 108-09 (E.D. Va. 2004).

But even if the government reports were admissible, they do not help Plaintiffs on the command and control issues that govern the political question analysis. The Taguba Report recommends action be taken against CACI PT interrogator Steven Stefanowicz[3] on the grounds

[3] Recommendation #11 relates to Mr. Stefanowicz. Recommendation #12 purports to relate to a CACI PT interpreter, but this is an error. The recommendation relates to Titan Corporation interpreter John Israel. CACI PT supplied no interpreters. Notably, General

that he "[a]llowed and/or instructed MPs . . . to facilitate interrogations by 'setting conditions' which were neither authorized and in accordance with applicable regulations/policy." Nelson Decl., Ex. F at 48. The report states that this recommendation is based on "acts which have been previously referred to in the aforementioned findings." Unfortunately, there are no "aforementioned findings" that referred to any conduct by Mr. Stefanowicz. More important, there is nothing in the Taguba Report that is inconsistent with MP testimony that interrogators such as Mr. Stefanowicz provided instructions on detainee treatment only for their own assigned detainees (Frederick Dep. at 79-80, 208-09, 226-27, 230; C. Graner Dep. at 55-56).

The more comprehensive Jones/Fay Report makes CACI PT's point about command and control while rejecting the grand conspiracy theory that underlies Plaintiffs' claim on the merits. The Jones/Fay Report found two causes of detainee abuse at Abu Ghraib. The first is intentional abuses that were caused by "individual criminal misconduct, clearly in violation of law, policy, and doctrine and contrary to Army values." Supp. O'Connor Decl., Ex. 27 at 1135-36.

The second cause of abuses involved "incidents that resulted from misinterpretation of law or policy or resulted from confusion about what interrogation techniques were permitted by law or local SOPs." *Id.* at 1136. The Jones/Fay Report found that

> misinterpretation as to accepted practices or confusion occurred due to the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between permitted interrogation techniques in other theater environments and Iraq. These abuses include some cases of clothing removal (without any touching), some use of dogs in interrogations (uses without physical contact or extreme fear) and some instances of improper imposition of isolation. . . . [A]t the time some of the Soldiers or contractors committed the acts, they may have honestly believed the techniques were condoned. Some of these incidents consisted

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Taguba's recommendation regarding Mr. Israel was expressly rejected in the Jones/Fay Report, which exonerated Mr. Israel. Nelson Decl., Ex. G at 131 (Finding #24).

> of MP Soldiers, rather than MI personnel, implementing interrogation techniques.

Id. This conclusion is consistent with the recent Senate Select Committee on Intelligence report on the CIA's interrogation program, which details the process by which enhanced interrogation techniques were developed and approved at the highest levels of the Executive Branch for use at Guantanamo Bay and in CIA facilities overseas.[4] The Senate Armed Services Committee Report on the Treatment of Detainees in U.S. Custody detailed how the enhanced interrogation techniques that were approved at the highest Executive Branch levels for use at Guantanamo Bay made their way to Major Holmes in Afghanistan and how Major Holmes then implemented these same interrogation protocols at Abu Ghraib prison. O'Connor Decl., Ex. 18 at xxii-xxv.

As for the findings of the Jones/Fay Report regarding CACI PT interrogators, there is no finding of conspiratorial conduct. General Fay found that a preponderance of the evidence supported a finding that three of the more than thirty CACI PT interrogators at Abu Ghraib were involved in discrete acts of misconduct.[5] The evidence developed in the Jones/Fay Report was forwarded to the Justice Department for further investigation and the Justice Department did not see fit to bring charges against any CACI PT interrogator. But more important for purposes of CACI PT's motion, none of the discrete acts of alleged detainee mistreatment referenced in the Jones/Fay Report has anything to do with Plaintiffs. Timothy Dugan was alleged to have pulled an Iraqi general off a jeep and to have dragged him to an interrogation booth. O'Connor Decl., Ex. 27 at 1278-79. Daniel Johnson was alleged to have mistreated an Iraqi policeman who was being interrogated about his smuggling of a pistol to a detainee at Abu Ghraib prison. *Id.* at

[4] *See* http://www.intelligence.senate.gov/study2014/executive-summary.pdf.

[5] A fourth CACI PT interrogator was listed as someone who may have used interrogation techniques he or she mistakenly believed had been authorized. O'Connor Decl., Ex. 27 at 1283.

1280. Mr. Johnson is also alleged to have placed an unidentified detainee in a stress position by having him squat in a chair while being interrogated, with no allegation that injury resulted. *Id.*

Steven Stefanowicz is alleged to have committed the following acts of detainee abuse: (1) using a dog in connection with an interrogation and being in the area during another use of a dog; (2) pushing/kicking a single detainee into his cell with his foot; and (3) telling others that he shaved a detainee's beard and had him wear women's underwear. *Id.* at 1282. There is no evidence that any of the discrete acts of alleged detainee mistreatment by CACI PT interrogators had anything to do with these Plaintiffs. And these acts, even if true, cannot support an allegation of conspiracy involving other acts committed by other personnel at Abu Ghraib prison. *See, e.g., A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011).

III. ANALYSIS

A. There Is No Basis For Deferring a Ruling on Justiciability

After misrepresenting the record for fifteen pages, Plaintiffs' first legal argument is that the Court should defer a decision on justiciability. Pl. Opp. at 15-16. That course of action, however, is contrary to the Fourth Circuit's remand instructions. *Al Shimari*, 785 F.3d at 537 (directing this Court to "reexamine the justiciability of the ATS claims and the common law tort claims before proceeding further in the case"). Moreover, Plaintiffs' request for a free ticket to trial is not supported by the cases they cite. Plaintiffs' cases provide guidance on dealing with subject-matter jurisdiction motions presented at the outset of the case, when there has been no discovery. As the Fourth Circuit explained in *Kerns*, the leading case cited by Plaintiffs:

> [W]hen the defendant challenges the veracity of the facts underpinning subject matter jurisdiction, the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts. And when the jurisdictional facts are inextricably intertwined with those central to the merits, the court should resolve the relevant factual disputes **only after appropriate discovery**, unless the jurisdictional

> allegations are clearly immaterial or wholly unsubstantial and frivolous.

Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009) (emphasis added). CACI PT is not making a facial challenge to the Third Amended Complaint – CACI PT made a facial challenge six years ago and the Court denied CACI PT's motion so that discovery could proceed. With discovery having concluded, there are no further facts to be discovered on jurisdiction. Plaintiffs either have the facts or they don't. Thus, the justiciability of this case is ripe for decision.

B. The Military Exercised Plenary and Direct Control Over CACI PT Interrogators

The touchstone for the "plenary or direct control" test is who "chose *how* to carry out [the] tasks" performed by contractors. *Al Shimari*, 758 F.3d at 534. On that question, the record is clear, as the military decided who would be detained, whether they would be interrogated, who would interrogate a detainee, what general interrogation protocols applied, what interrogation techniques could be approved on a case-by-case basis, whether to approve the interrogation plans required before each interrogation could proceed, and where interrogators would submit their interrogation reports. Pappas Decl. ¶ 8-10; Brady Decl. ¶ 4-5; Porvaznik Decl. ¶¶ 11-16; Holmes Dep. at 28-29, 33-36, 69-70, 121-24, 126. Plaintiffs' opposition represents the record they would like to have on these issues, not the record that actually exists. The actual record demonstrates that operations at Abu Ghraib prison were under the U.S. military's exclusive control, and that fact requires dismissal under the first *Taylor* test for political questions. *Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011).

C. Plaintiffs' Claims "Would Require the Judiciary to Question Actual, Sensitive Judgments Made By the Military"

In *Taylor*, the Fourth Circuit found a nonjusticiable political question because litigation would require the judiciary to question the sensitive judgment made by the military regarding

installation of a wiring box. *Taylor*, 658 F.3d at 411-12. As CACI PT pointed out in its political question memorandum, this case would require judicial second-guessing of infinitely more sensitive military judgments. These include the conditions of detention – such as forced nudity, required wearing of women's underwear, use of stress positions, handcuffing detainees to the bars of their cells, dietary restrictions, and environmental manipulation – that the U.S. military put in effect before CACI PT interrogators arrived at Abu Ghraib. Frederick Dep. at 194-95.

Litigation of this case would require questioning the interrogation techniques that were approved at the highest levels of the U.S. government and which made their way to Abu Ghraib prison through *military* channels. Supp. O'Connor Decl., Ex. 27 at 1136. It would also require judicial questioning of the degree of supervision provided by the military chain of command with respect to detainees captured by U.S. forces and held in U.S. military detention facilities.

Indeed, the recent Senate report on the CIA's interrogation program demonstrates the sensitive judgments involved in questioning interrogation policies developed at a time of great uncertainty and concern about the risk of subsequent acts of terror. The Senate Select Committee on Intelligence detailed the development of interrogation policies at the highest levels of government, and criticized aspects of that process. And yet, no tort remedies have been provided by the judiciary for those injured in the CIA detention and interrogation program, which essentially leaves those detainees without a remedy. By contrast, the United States has made an administrative remedy available to Abu Ghraib detainees who have legitimate claims of mistreatment, *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009), which Plaintiffs have declined to pursue.

Plaintiffs' response on the second *Taylor* test begins by creating a straw man – that no sensitive military judgments are involved in the use of "electric shocks, deprivation of food and

water, sexual abuse, unmuzzled dogs, the stripping naked of detainees or other humiliations inflicted on Plaintiffs." Pl. Opp. at 23. But there is not one scintilla of evidence implicating CACI PT interrogators in the use of electric shocks, deprivation of food and water, or sexual abuse with respect to any detainee. None. And there is no evidence at all connecting CACI PT personnel to anything that might or might not have occurred to these Plaintiffs. At bottom, Plaintiffs want the Court to focus on their unsupported allegations about what happened to them, instead of the two *Taylor* tests for political questions, which rise and fall based on who was responsible for determining how the interrogation mission would proceed.

Plaintiffs also cite to the United States' *amicus curiae* brief before the *en banc* Fourth Circuit, but misrepresent the contents of that brief. The United States did not take the position, that "Plaintiffs' torture-related claims can proceed . . . without implicating sensitive judgments." Pl. Opp. at 22, 26. All the United States said about political question in its *amicus* brief was that "political question arguments typically do not require interlocutory appellate intervention," and thus the collateral order doctrine did not apply to this Court's prior political question decision. Supp. O'Connor Decl., Ex. 28 at 8. CACI PT agreed with this statement of the law. *Id.* Nowhere in the United States' *amicus* brief does the United States address the merits of political question; Plaintiffs' intimation to the contrary is lacking in candor.

Finally, Plaintiffs dispute CACI PT's contention that Plaintiffs' torture and cruel, inhuman and degrading treatment ("CIDT") claims require a showing of official acquiescence. Pl. Opp. at 27-28. Plaintiffs are wrong. CACI PT cited United States authorities for the proposition that claims of torture and CIDT require a showing that a public official had "awareness of such activity and thereafter breach[ed] his or her legal responsibility to intervene to prevent such activity." CACI Mem. at 21; CACI PT ATS Elements Mem. at 8 (citing 8

C.F.R. § 208.18 (2014)). Plaintiffs represent that CACI PT's authorities "go to determining whether a public official can be held responsible for private conduct, not the other way around." Pl. Mem. at 28. Plaintiffs offer no citation for that proposition, and their premise is wrong. The federal regulation CACI PT cites implements the Convention Against Torture and has nothing to do with holding anyone liable for anything. The regulation simply defines torture. *See* 8 C.F.R. § 208.18 (2014). The cases cited by CACI PT stand for the proposition that private acts of torture are not cognizable under ATS. CACI PT ATS Elements Mem. at 10. Plaintiffs themselves admit that "significant state involvement" is required for their torture claim (Pl. Opp. at 28), which demonstrates the intertwinement between Plaintiffs' claims and military decisions. Moreover, it bears repetition that Plaintiffs have no evidence connecting CACI PT personnel to any mistreatment they suffered, and that none of the discrete acts of potential misconduct by CACI PT personnel identified in the government reports would remotely quality as torture.

IV. 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 2nd day of January, 2015, 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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