15-1831

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiffs-Appellants,

−and−

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

−v.−

CACI PREMIER TECHNOLOGY, INC.,

Defendant-Appellee,

−and−

TIMOTHY DUGAN; CACI INTERNATIONAL, INC.; L-3 SERVICES, INC.,

Defendants.

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

BRIEF OF *AMICI CURIAE* RETIRED MILITARY OFFICERS IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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INTERESTS OF *AMICI CURIAE*

Amici are retired military officers who have held senior staff and command positions in the U.S. Armed Forces.[1] Consistent with their fidelity to the laws of the United States and the law of nations, they maintain a strong interest in continuing this Nation's long tradition of according humane treatment to detainees held by the United States. With a wealth of experience regarding the practical realities of military operations abroad, *amici* provide a unique perspective on the relationship between, and respective responsibilities of, U.S. military personnel and private military contractors hired to assist them.

This case raises issues cutting to the core of what defines us as a Nation, the values these *amici* and others who have served made great and enduring sacrifices to defend. The unconscionable treatment of detainees at Abu Ghraib prison damaged the credibility of the U.S. military and the American people. The rogue individuals responsible caused immeasurable damage to our security interests, our national honor, and to the values and ideals essential to our country and its armed forces.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution funding the preparation or submission of this brief.

Based on their training and wide service experience in military operations, *amici* understand the realities of combat and the legal framework of warfare. As this training and experience reflect, the decision to torture detainees in Abu Ghraib prison was not – and could not lawfully have been – directed or sanctioned by the U.S. military. Nor did such detainee abuses result from implementation of military judgments or strategy; they were in defiance of the explicit directions of the military chain of command.

Military personnel involved in such abuses are subject to military discipline and have been held accountable, sanctioned, and even imprisoned under the authority of the Uniform Code of Military Justice for their misconduct. This formal structure serves to maintain the hard-earned reputation and strength of the American armed forces. In contrast, private, civilian military contractors are not accountable under the military system of justice. They must be held accountable in the United States courts. Without this commensurate mechanism of accountability, civilian contractors remain free to engage in the kinds of abuses for which service members were rightfully punished. Exempting civilian contractors from such accountability while punishing members of the armed services would be unjust and incongruous. When civilian contractors put our national honor at risk in violating clearly established laws prohibiting torture and inhumane treatment of detainees,

they must face accountability for their heinous wrongs – as members of the armed forces already have – in an appropriate court of law.

The retired senior military officers subscribing to this amicus brief respectfully offer this Court the perspective of their training and service experience on these vital issues.

Lieutenant General Robert G. Gard, Jr., USA (Ret.), currently serves as a consultant on international security and education and serves as senior military fellow at the Center for Arms Control and Non-Proliferation. He was president of the Monterey Institute of International Studies and director of the Johns Hopkins University Bologna (Italy) Center. He retired from the U.S. Army as a lieutenant general in 1981; assignments during his 31-year military career included Assistant to the Secretary of Defense and President of the National Defense University. He earned a PhD in Political Economy and Government from Harvard University (1962).

Vice Admiral Lee F. Gunn, USN (Ret.), served as the Inspector General of the Department of the Navy from 1997 until retirement in August 2000. Admiral Gunn's sea duty included: command of the frigate USS Barbey; command of Destroyer Squadron 31, the Navy's tactical and technical development anti-submarine warfare squadron; and command of Amphibious Group Three, supporting the First Marine Expeditionary Force in Southwest Asia and East

Africa. Gunn is from Bakersfield, California and is a graduate of UCLA, having received his commission from the Naval ROTC program at UCLA in June 1965.

Lieutenant General Charles Otstott, USA (Ret.), served 32 years in the Army. As an Infantryman, he commanded at every echelon including command of the 25th Infantry Division (Light) from 1988-1990. His service included two combat tours in Vietnam. He completed his service in uniform as Deputy Chairman, NATO Military Committee, 1990-1992.

Rear Admiral Don Guter, JAGC, USN (Ret.), served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as President and Dean of the South Texas College of Law in Houston, Texas.

Rear Admiral John D. Hutson, JAGC, USN (Ret.), served in the U.S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is Dean Emeritus & Philosopher in Residence at the University of New Hampshire School of Law in Concord, New Hampshire.

Major General Michael R. Lehnert, USMC (Ret.), served as Commanding General, Marine Corps Installations West and graduated from Central Michigan University with an undergraduate degree in History, the U.S. Army Advanced Engineer School at Fort Belvoir, Virginia, the Armed Forces Staff College, and the Naval War College. He has served as commander of Joint Task Group Bulkeley

(JTF 160) at Guantanamo Bay, Marine Wing Support Group 27 at Cherry Point, North Carolina, and Joint Task Force 160 at Guantanamo Bay. During this tour, JTF 160 constructed and operated the detention facilities for Taliban and Al Qaeda detainees. General Lehnert subsequently served as Commander, Marine Logistics Command for Operation Iraqi Freedom, and was assigned as Chief of Staff, U.S. Southern Command, followed by command of Marine Corps Base Camp Pendleton, and Marine Corps Installations West.

Major General William L. Nash, USA (Ret.) served in the U.S. Army for 34 years, and is a veteran of Vietnam and Operation Desert Storm. He has extensive experience in peacekeeping operations, both as a military commander in Bosnia-Herzegovina (1995-1996) and as a civilian administrator for the United Nations in Kosovo (2000). Since his retirement in 1998, General Nash has been a fellow and visiting lecturer at Harvard's John F. Kennedy School of Government (1998); Director of Civil-Military Programs at the National Democratic Institute for International Affairs (1999-2000); a professorial lecturer at Georgetown University (2000-2008); a Senior Fellow at the Council on Foreign Relations (2001-2009); and a military consultant for ABC News (2003-2009). Today, he is a visiting lecturer at Princeton University and an independent consultant on national security issues, civil-military relations and conflict management.

Major General Eric T. Olson, USA (Ret.), served as the Deputy Director of the Iraq Reconstruction Management Office, Civil-Military Affairs in the U.S. Embassy, Baghdad from 2006-2007. Following that, from 2007-2008 he served as the Chief of Staff and Principal Advisor to the Special Inspector General for Iraq Reconstruction. An Army officer for 34 years, he commanded infantry units at all levels from platoon to division, achieving the rank of major general and serving his last three years as the Commanding General of the 25th Infantry Division (Light), which included duty as the Commander of Combined Joint Task Force 76, during Operation Enduring Freedom in Afghanistan (2004-2005).

Major General Antonio ”Tony” M. Taguba, USA (Ret.) served 34 years on active duty until his retirement in 2007. He has served in numerous leadership and staff positions, most recently as Deputy Commanding General, Combined Forces Land Component Command during Operations Iraqi Freedom in Kuwait and Iraq, as Deputy Assistant Secretary of Defense for Reserve Affairs, and as Deputy Commanding General for Transformation, U.S. Army Reserve Command. Born in Manila, Philippines in 1950, he graduated from Idaho State University in 1972 with a BA degree in History. He holds MA degrees from Webster University in Public Administration, Salve Regina University in International Relations, and U.S. Naval War College in National Security and Strategic Studies.

Brigadier General John Adams, USA (Ret.), retired from the U.S. Army in 2007 following more than thirty years on active duty, in a variety of command and staff assignments worldwide, culminating in assignment as Deputy United States Military Representative to the NATO Military Committee from 2005 to 2007. As an Army Foreign Area Officer, intelligence officer, and aviator, he has more than a decade of senior-level political-military experience working with foreign military forces and governments in Europe, Asia, and Africa, and two assignments in the Pentagon (Army Staff and Office of the Secretary of Defense). A graduate of North Carolina State University and a former faculty member at the U.S. Military Academy at West Point, John also holds graduate degrees in international relations from Boston University, English from the University of Massachusetts, and strategic studies from the U.S. Army War College.

Brigadier General Stephen A. Cheney, USMC (Ret.), served nine years on the Marine Corps' two Recruit Depots, including a tour as the commanding general at Parris Island. He was also the inspector general for the Marine Corps. Brigadier General Cheney retired in 2001; he is now the president of the Marine Military Academy in Harlingen, Texas, and is on the board of directors for the American Security Project.

Brigadier General Leif H. Hendrickson, USMC (Ret.), served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine

Corps University and as Commanding General, Education Command. General Hendrickson amassed over 5,000 flight hours. His personal decorations include the Distinguished Service Medal, Defense Superior Service Medal, Defense Meritorious Service Medal, Meritorious Service Medal with two gold stars, Air Medal and the Joint Staff Badge.

Brigadier General David R. Irvine, USA (Ret.), enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for eighteen years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th Regional Readiness Command. General Irvine is an attorney, and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

Brigadier General Murray G. Sagsveen, USA (Ret.), entered the U.S. Army in 1968, with initial service in the Republic of Korea. He later joined the North Dakota Army National Guard, where his assignments included Staff Judge Advocate for the State Area Command, Special Assistant to the National Guard Bureau Judge Advocate, and Army National Guard Special Assistant to the Judge

Advocate General of the Army (the senior judge advocate position in the Army National Guard). General Sagsveen currently serves as the general counsel of the American Academy of Neurology in St. Paul, Minnesota.

PRELIMINARY STATEMENT

Six years ago, the district court rejected defendant's motion to dismiss this action on political question grounds. The court assessed the issue pursuant to the factors listed in the Supreme Court's seminal decision, *Baker v. Carr*, 369 U.S. 186 (1962), and ruled that none of them precluded justiciability of this case. In discussing one of *Baker*'s listed factors – "the potentiality for embarrassment from multifarious pronouncements by various departments on one question" – the court had this to say:

> While it is true that the events at Abu Ghraib pose an embarrassment to this country, it is the misconduct alleged and not the litigation surrounding this misconduct that creates the embarrassment. This Court finds that the only potential for embarrassment would be if the Court declined to hear these claims on political question grounds.

Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 714 (E.D. Va. 2009). Swallowing its embarrassment, the district court now dismisses on precisely these grounds. Its decision should be reversed.

It is not mere embarrassment, however, that prompts the filing of the instant amicus brief by these retired military officers. It is rather the affront that this disposition represents to the long and honored tradition of humane treatment of

military detainees, a tradition inculcated in these *amici* by their training and over 300 years of collective experience in service to their country. The decision below represents as well a fundamental misunderstanding of the military chain of command and its relationship to civilian contractors in this setting. If allowed to stand, the district court's disposition will leave these contractors unaccountable for misconduct that has subjected their military counterparts to conviction by courts martial. And it could well disrupt the military's future working relationship with civilian contractors and compromise its mission.

ARGUMENT

I. The Tradition and The Command of Humane Treatment of Military Detainees and Its Application at Abu Ghraib

At the heart of the district court's decision is its announced confusion over what standards apply in determining what misconduct in the treatment of military detainees constitutes torture or cruel and degrading treatment. Thus the court asserted that the definition of torture is enveloped in "a cloud of ambiguity" and the meaning of cruel and degrading treatment is "so malleable" that the court would "have a difficult time" fashioning jury instructions. (A1403, 1404.) To *amici*, these assertions are astonishing. Far from being "ambiguous" or "malleable," the U.S. Armed Forces have long promulgated clear and mandatory standards for humane treatment of prisoners and routinely train personnel to comply with these obligations. The court's professed confusion is entirely at odds

with both international and domestic law and the long tradition of humane treatment of detainees by the U.S. military.

This tradition dates from the country's very founding. After winning the Battle of Trenton, George Washington ordered his troops to give refuge to hundreds of surrendering Hessian soldiers. While European military tradition allowed field commanders to decide whether to put captured enemy soldiers "to the sword" or to keep them captive, Washington instructed his lieutenants to treat captured German mercenaries fighting alongside British troops "with humanity," and to "[l]et them have no reason to complain of our copying the brutal example of the British army." David Hackett Fischer, *Washington's Crossing*, 377-79 (2004).

The tradition was codified during the Civil War, when President Lincoln signed General Orders No. 100 in 1863, also known as the Lieber Code. Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, United States War Department General Orders No. 100 (April 24, 1863). The Lieber Code declared that military law "be strictly guided by the principles of justice, honor and humanity – virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed." *Id.* at § I, art. 4. The Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war. *Id.* at § III, art. 56. It specified that prisoners of

war "are to be subjected to no other intentional suffering or indignity" and "treated with humanity." *Id.* at art. 75-76. It prohibited the use of violence in extracting information from captured enemy forces. *Id.* at § I, art.16.

The Lieber Code served as the basis of every subsequent international convention concerning the treatment of wartime detainees, including the Hague Conventions of 1899 and 1907, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, and the four Geneva Conventions adopted at the end of the Second World War.[2] These conventions provide comprehensive standards for the treatment of persons detained in armed conflicts. As particularly pertinent here, Common Article III, contained in all four Geneva Conventions – addresses the treatment of persons detained in armed conflicts that do not involve conflicts between nation states, such as civil wars and insurgencies, and provides a minimum standard that prohibits "violence to life and person . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular,

[2] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively, the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9,958-73 (1955).

humiliating and degrading treatment" against all detainees, regardless of their status.

As *amici* know through their own experience, the military maintained this commitment to humane treatment of detainees in armed conflicts in contemporary campaigns, even if the detainees did not technically qualify for treatment as "prisoners of war" under the Third Convention. During the Vietnam War, the United States extended prisoner of war protections as articulated in the Geneva Conventions to all captured combatants – including captured Viet Cong, who did not follow the laws of war. *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., *Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968).

The law governing the conduct of military personnel is set forth in the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 801, *et seq.*, and Field Manuals issued by the Armed Forces. The UCMJ and the Field Manuals have consistently prohibited the mistreatment of detainees. The UCMJ prohibits military personnel from committing acts of "cruelty toward, or oppression or maltreatment of any person subject to his orders." 10 U.S.C. § 893. Actual and attempted murder, manslaughter, rape, maiming and assault are punishable under

the UCMJ. 10 U.S.C. §§ 918-920, 924, 928. Extorting or threatening a detainee for information is also prohibited, pursuant to 10 U.S.C. §§ 927 and 934.

U.S. Dep't of the Army Field Manual 27-10, *The Law of Land Warfare* (July 18, 1956) ("FM 27-10") contains the Army's interpretation of the law of war, incorporating reference to international conventions – including the 1949 Geneva Conventions – and rules of the customary law of war. It mandates that prisoners of war must "at all times be humanely treated . . . [and] protected, particularly against acts of violence or intimidation and against insults and public curiosity." *See* FM 27-10, art. 89. It prohibits the use of "physical or moral coercion" in obtaining information from prisoners of war or captured civilians. *Id*. at art. 270. The U.S. Dep't of the Army Field Manual 34-52, *Intelligence Interrogation* (May 1987) ("FM 34-52"), in effect at the time of CACI's alleged conduct, sets forth acceptable interrogation techniques and prohibited conduct. It expressly recognizes that all principles and techniques of interrogations outlined in the manual are to be used only "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. The manual makes clear that the Geneva Conventions and United States policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8, 1-12.

These authorities governing military conduct, of course, have their counterpart in domestic law, including the Anti-Torture Statute, 18 U.S.C. §§ 2340-2340B, and the War Crimes Act, 18 U.S.C. § 2441. These domestic law sources are discussed fully in plaintiff/appellants' brief.

Without examining these extensive authorities, the district court simply abdicated its role to ascertain and administer here the applicable standards those authorities describe. Even though the court acknowledged that parties themselves were in general agreement about the elements of a claim alleging torture, the court announced that it could not fathom what that term means. It reached this remarkable conclusion based on its broad and wholly unexamined assertion that the definition of torture was enveloped in "enough of a cloud of ambiguity" that the court had no way even to consider the issue. The so-called cloud to which the court referred was induced by the Yoo memoranda addressing what harsh techniques could be justified in interrogating Al Qaeda and Taliban captives held at Guantanamo Bay, an enclave that some wrongly regarded as beyond the reach of the U.S. courts. Whatever controversy was raised by the Yoo memoranda about Al Qaeda and Taliban detainees at Guantanamo, that controversy had nothing to do with what standards governed captives taken by U.S. forces in the invasion of Iraq.

Had the court actually examined how torture was understood in the field, it would have discovered what *amici* know well from their own training and

experience as senior military officers: the prohibition against torture, including specific abusive techniques that characterized it, were well established and unambiguous. As applied to the war in Iraq, that prohibition was particularized in even greater detail in the rules of engagement specifically adopted by the chain of command for the custody and interrogation of Abu Ghraib detainees. Lieutenant General Ricardo S. Sanchez, Commander of Army forces in Iraq, promulgated these rules of engagement by orders issued on September 14, 2003, and October 12, 2003. (A1127, A1134.) The Interrogation and Counter-Resistance Policies set out in these orders specifically barred beatings, electric shocks, deprivation of food and water, sexual abuse, unmuzzled dogs, stripping detainees naked, and other humiliations. These rules unambiguously barred the inhumane abuses CACI is charged with inflicting.

The standards embodied in these sources of authority are no less applicable to the conduct of civilian contractors and their employees than to military officers and their subordinates. To hold the latter accountable through the UCMJ but leave the former unaccountable in the civil courts is deeply offensive to all those who served in the military and who conformed their own conduct to these commands. In *amici*'s view, it would also be disruptive of the military operation in which both soldiers and contractors were engaged, if the latter were free to ignore the standards applicable to the military.

II. The Requirement of Humane Treatment of Military Detainees Through the Lens of the Political Question Doctrine

The district court was mandated to consider the standards governing humane treatment of military detainees through the lens of the political question doctrine. Specifically, the court was instructed to examine whether the inhumane abuses CACI is alleged to have inflicted on these detainees were directed or under the plenary (meaning full, complete, absolute) control of the military chain of command. It was to examine as well whether trial of CACI on these charges would inescapably require the court to second-guess sensitive military judgments constitutionally committed to the political branches of government. In *amici*'s view – which is based on their decades of collective experience – the court's analysis of both issues misconceives the relationship between civilian contractors and the military that they are contracted to serve.

A. The Abuse of Abu Ghraib Detainees by CACI Employees Occurred Outside the Direct or Plenary Control of the Military Chain of Command.

As *amici* know from their own service, it is rare for a civilian contractor's work to be performed under the express direction or absolute control of the military. In most circumstances, the contractor will retain a measure of discretion as to how it performs, and, even where that discretion is formally constrained, the contractor is almost always capable of exceeding or violating its authority and engaging in conduct outside of the military's control and, indeed, in defiance of it.

The CACI contract does not purport to set out precise requirements for every aspect of CACI's work. While it establishes broad parameters, it acknowledges CACI as "functioning as resident experts" in interrogation matters and not just as aides whose every action was to be subject to military direction. (A438, ¶ 3.) It calls upon CACI's employees not just to assist military interrogators and to act under their hands-on direction but for CACI itself to "supervise, coordinate, and monitor all aspects of interrogation activities." (*Id*. at ¶ 4.) It stipulates as well that "the Contractor is responsible for providing supervision for all contractor personnel." (A439.) These provisions recognize that CACI was expected to perform with wide-ranging discretion and to be responsible for how that discretion was exercised.

And, as with most contractors assisting the military, CACI's contract did not exist in isolation. It required CACI's employees to conduct themselves "[in accordance with] Department of Defense, U.S. Civil Code, and International Regulations." (A438, Delivery Order 35, Statement of Work at ¶ 4.) Under those regulations, it was clear that CACI, not the military, bore sole responsibility for its own employees' activities. For instance, U.S. Dep't of the Army, Reg. 715-9, Contractors Accompanying the Force § 3-2(f) (1999), states that "[t]he commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees. Contractor employees

are not under the direct supervision of military personnel in the chain of command." Similarly, § 3-3(b) disavows military oversight over contractor behavior, stating "[c]ontracted support service personnel shall not be supervised or directed by military or Department of the Army (DA) civilian personnel." *See also* U.S. Dep't of the Army, Field Manual 3-100.21, *Contractors on the Battlefield* § 1-25 (2003) ("Field Manual on Contractors") ("Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract") and § 1-22 ("Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees").

Later regulations spell out the liability ramifications that had long been understood to flow logically from the above regulations. 48 C.F.R. § 52.247.21, for instance, provides:

> The Contractor assumes responsibility for all damage or injury to persons or property occasioned through the use, maintenance, and operation of the Contractor's vehicles or other equipment by, or the action of, the Contractor or the contractor's employees and agents. … The Contractor, at the Contractor's expense, shall maintain adequate public liability and property damage insurance...insuring the Contractor against all claims for injury or damage.

Additionally, the Department of Defense warns contractors that they are subject to traditional liability rules for their misconduct and do not derive protection from traditional notions of sovereign immunity accorded government officials to defeat litigation in U.S. Courts.[3] The Department also advises military contractors that "[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation." 73 Fed. Reg. 10,943, 10,947 (Feb. 28, 2008).

The regulations cited above provide additional clarity on what was always the case, and, more pertinent to the instant appeal, they constitute a clear expression of the military chain of command's position on the absence of direct or plenary control over contractors like CACI in their treatment of Abu Ghraib detainees. In providing combat support services, these contractors bear ultimate responsibility for the legality of their own conduct, and they are not afforded space to operate with impunity. Commenting on this, the U.S. State Department has noted that "the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions."[4]

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[3] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces (DFARS Case 2005–D013), 73 Fed. Reg. 16,764, 16,767 (Mar. 31, 2008) (codified at 48 C.F.R. § 252.225-7040(b)(3)(iii)).

[4] U.S. Dep't of State, Press Release, Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies (Sept. 17, 2008).

As career military officers, it is clear to *amici* that the court's failure to understand and properly apply this clear-cut relationship between the military and contractors could cause significant disruption to that relationship and to military order. When a soldier exceeds his authority or acts in defiance of lawful orders, he is subject to discipline under the military system of justice. Precisely that occurred in the aftermath of the scandal at Abu Ghraib, where ten rogue soldiers were convicted by courts martial. But civilian contractors are not combatants and thus are not accountable for their conduct under the military system of justice.[5] For misconduct outside of the military's control or in defiance of it, they are subject to sanctions for breach of contract for any damages to the military and to civil liability in favor of individuals whom their misconduct has caused to suffer.

The district court's decision also appears to have analyzed the wrong question – whether the military exercised plenary or direct control "over how [CACI] interrogated detainees at Abu Ghraib." (A1389.) Yet the "interrogation mission" is not what is at issue here. As the military reports reviewing the Abu

[5] The Field Manual on Contractors, ¶ 1-21, recognizes that "[c]ontractors and their employees are not combatants, but civilians" and prohibits contractors from engaging in any activity that would "jeopardize" their status as civilians. Joint Chiefs of Staff, Joint Pub. 4-0, Doctrine for Logistic Support of Joint Operations, at V-8 (2000), recognizes that "contract employees are discipline by the contractor" and "commanders have no penal authority to compel contractor personnel to perform their duties."

Ghraib atrocity have shown, CACI's misconduct largely involved brutal and abusive treatment of detainees outside the interrogation room, often in the dead of night, and hidden from the chain of command.[6] The challenged conduct was far removed from any control by the military chain of command, much less was it under its direct or plenary control.

B. The Propriety of CACI's Challenged Misconduct Can Be Litigated Wholly Without the Need to Question Sensitive Military Judgments.

The court was also charged to consider whether its consideration of CACI's conduct would inescapably require the court to question sensitive military judgments committed to its discretion and thereby venture into matters within the exclusive purview of the political branches. Again, *amici* respectfully submit, the court failed to properly understand and apply military law and standards in considering this question. Although CACI asserted that the abuses plaintiffs allege were inflicted in compliance with military judgments made by the chain of command, it produced not a shred of evidence to support this proposition. In fact,

[6] *See* Maj. Gen. Antonio M. Taguba, Investigating Officer, Article 15-6 Investigation of the 800th Military Police Brigade (U) (2004) (A670); Maj. Gen. George R. Fay, Investigating Officer, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (U) (2004) (A686).

as shown above, the rules of engagement expressly disapproved the very abuses plaintiffs allege.[7]

In short, *amici* see no way in which the district court's consideration of CACI's conduct *could* implicate sensitive military judgments concerning the reasonableness of approved methods of interrogation and treatment of detainees at Abu Ghraib. What CACI did violated the approved methods of interrogation and treatment of prisoners. The district court in fact was called upon to *defer to* those judgments and measure CACI's conduct against the harsh forms of treatment that international and domestic law standards – which those military judgments implemented – expressly proscribed. Far from interfering with military judgment, the court's application of those standards in the instant case could only support and reinforce military decision-making.

The critical difference between circumstances where sensitive military judgments would have to be questioned and those where they need not can readily

[7] A comparison of the complaint with the applicable Abu Ghraib rules of engagement leaves no doubt that the abuses alleged were prohibited, including: beatings; choking; electric shocks; tasering; abuse to the genitals; exposing naked body to hot or cold water or extreme temperatures; deprivation of food, water, oxygen; abnormal sleep deprivation; mock execution; sexual assault; forced to watch rape of female detainee; hiding detainee from Red Cross; other physical and mental abuses (extended stress positions, exhausting physical activities, hanging from rope tied around the chest, confinement in a cage, threatening with death, threatening with unmuzzled or unleashed dogs, kept naked in company of females, forcible shaving, garbing with women's underwear).

be gleaned from the cases where this issue has been discussed. A close analysis of the very cases that the district court relied upon in the decision under review demonstrates this difference.

Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271 (11th Cir. 2009), provides an excellent example. In *Carmichael*, the court dismissed on political question grounds a negligence action against a civilian contractor whose employee was driving a truck delivering fuel to a distant Army base. The convoy route was through hostile territory, along a damaged highway, and required navigation of perilous S-curves. The contract driver lost control of his truck on one of these curves and flipped over, severely injuring a soldier who was riding in the truck's passenger seat. The court found that the military exercised plenary control over every aspect of the convoy's mission, including the choice of the route to be traveled and the number, speed, and spacing of vehicles in the convoy. As the court observed, the military commanders had to strike a difficult balance "so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly maintained road." *Id.* at 1282. In adjudicating a negligence claim against the contractor and its employee in these circumstances, the court inescapably would need to question command decisions and judgments as to how the convoy was carried out. Unlike the standards that govern treatment of

detainees, how best to conduct a military convoy is subject entirely to military criteria and not judicial criteria.

The outcome in *Carmichael* would have been quite different had the truck driver engaged in intentional misconduct contrary to the military's plan for the convoy's mission. For instance, had the driver not simply lost control of his truck in the fast-moving convoy but instead had intentionally (and unsuccessfully) set off on a route of his own, one that the military command had specifically forbidden, his misconduct in defiance of the convoy plan would have raised no issue concerning sensitive military judgments. It would have been in utter disregard of what the chain of command required, and no political question would arise.

This Court's seminal decision in *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011), is similarly instructive. There, an electrical contractor servicing a power station at a U.S. military camp in Afghanistan negligently turned on electrical power to a tank ramp where a group of Marines were attempting to supply power to a back-up generator. This Court affirmed dismissal on political question grounds because a contributory negligence claim necessarily would have required judicial questioning of the reasonableness of the military's decision not to supply back-up power to the tank ramp, whether the Marines should have been authorized to work on the tank ramp's generator, and the quality of their training to do so.

Amici respectfully submit that a different result would have obtained in *Taylor* had the electrical contractor caused a live power cable to fall on a Marine barrack in circumstances where the resulting injuries had nothing to do with any military judgments or the reasonableness of military conduct and no plausible issue of contributory negligence could arise. *Compare Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013) (recognizing that the fact that litigating plaintiff's electrical shock claims "will require acknowledgement of some strategic military decisions" but will not require "second-guessing the wisdom of those decisions"). Here, CACI's alleged misconduct is confined to abuses that the military's explicit rules of engagement – and the international conventions and domestic statutes which those rules implemented – had proscribed. The military did not direct or control CACI's extracurricular abuses. The military's own judgments as to proper interrogation tactics and the humane treatment of detainees are not in question. CACI acted in defiance of those military judgments, and the court will have no occasion to reexamine them.

McMahon v. Presidential Airways, Inc., an Eleventh Circuit decision that this Court expressly approved in its remand opinion, provides guideposts for evaluating the issue here. In that action, plaintiffs challenged the defendant contractor's negligence in flying the airplane that crashed. Plaintiffs had *not* challenged any military conduct or discretionary military judgments. The Court

ruled that the contractor had "not shown that resolution of McMahon's negligence claims will require reexamination of any decision made *by* the U.S. military." 502 F.3d 1331, 1361 (11th Cir. 2007). Although, as here, the contractor stressed the military's involvement in air transportation missions, including the choice of flight start and end points, when flights would be flown, and various requirements for flight equipment, loading, and safety, the court was not diverted by these irrelevancies but focused on the correct issue. It thus ruled that the contractor had not shown that the military retained control or responsibility "over the aspects of [the contractor's] operations that McMahon is challenging in the instant case," namely its pilot's negligent conduct in flying the plane. *Id.* at 1362.

It is against this formulation of the issue that the district court's analysis of the second *Taylor* factor must be measured. The issue is not whether CACI's contract performance broadly played out against a backdrop of military policies concerning detainee interrogation. It is whether this litigation over the specific CACI misconduct actually challenged in this case will require the court to second-guess sensitive military judgments.

At no point did the district court identify a single rule of engagement reflecting the judgment of the chain of command governing conduct at Abu Ghraib that plaintiffs' claims put in question. In these circumstances, the district court's citation to *Wu Tien Li-Shou v. United States*, 777 F.3d 175 (4th Cir. 2015), is

ironic. This Court in *Wu Tien Li-Shou* was at pains to identify multiple military decisions that would be called into question in that case, including the reasonableness of the warnings the U.S. ship delivered, the ordinance selected, the sort of weapons used, the range of fire, and the pattern, timing, and escalation of the fighting. *Id.* at 180. The Court explained in detail that plaintiff in that case was "quite direct" about the military decisions she was criticizing and that she was affirmatively demanding that the court second-guess.

C. The Court Has Well-Defined, Readily Accessible, and Judicially Manageable Standards for Resolving this Case.

After misanalyzing the two *Taylor* factors, the district court addressed (and misanalyzed) a third – whether there are judicially manageable standards for adjudicating these claims. In so doing, the court transmogrified what is actually a narrow issue into an overly broad one. As set forth above, the court will not be called upon to question sensitive military judgments about how Abu Ghraib detainees were to be treated and interrogated; it will not be called upon to develop standards by which those judgments might be questioned. *Amici* respectfully submit that the court's role should be to accept those judgments as articulated by the chain of command and to manage issues that may arise in this action in accordance with the relevant standards that are informed by the international conventions to which the United States is a party and applied through the military's regulations and rules of engagement. There is nothing unmanageable about this

process. The sources of authority are readily accessible to the court. Construing and applying those sources is what courts do. As the Supreme Court observed in *The Paquete Habana*, 175 U.S. 677, 700 (1900):

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The applicable standards here are fully and specifically described in the international conventions and both the U.S. statutes and military regulations that apply those conventions. The applicable standards are readily "ascertained and administered" from an examination of these sources. They have long been inculcated in the training of the U.S. military, as *amici*, who had the honor of serving as senior military officers, can and do personally attest. The notion that these standards are unfathomable to the courts represents an abdication of the judicial function, and this Court should emphatically reject it.

CONCLUSION

For the foregoing reasons, *amici curiae* retired military officers respectfully urge the Court to reverse the decision below, which creates a dangerous impunity for civilian contractors and risks the security and professionalism of our American military operations.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 6,769 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

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