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

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	Case No. 1:08-CV-00827-LMB-JFA
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

DEFENDANT'S STATUS REPORT

I. INTRODUCTION

As we discuss below, substantial discovery is required regarding Plaintiffs' claims that survive the pending motion to dismiss. CACI PT[1] has vigorously pursued discovery throughout this case, and continues to need discovery to learn the identity of any participants or witnesses to the facts alleged by Plaintiffs and then discovery as to the knowledge possessed by those participants and witnesses. This discovery is neither optional nor collateral. The Fourth Circuit ordered that this basic fact discovery is necessary to determine whether Plaintiffs' claims implicate nonjusticiable political questions. This discovery also is necessary to a determination of some of CACI PT's other legal defenses – such as immunity and preemption – as well as to determining the factual sufficiency and merits of Plaintiffs' claims.

Plaintiffs were detained by the U.S. military at the battlefield detention facility at Abu Ghraib prison – in some cases for years – based on credible reports that they had participated in

[1] "CACI PT" refers to CACI Premier Technology, Inc.

attempts to kill U.S. soldiers in Iraq. Plaintiffs allege that they were mistreated by soldiers while in U.S. custody. Plaintiffs further allege that CACI PT – which provided some of the civilian interrogators at Abu Ghraib prison – is liable under the Alien Tort Statute as the supposed co-conspirator of whoever allegedly mistreated Plaintiffs.

This case has a long and complex procedural history, described below, which informs the discovery needs in this case. The major points regarding discovery are as follows:

1. For the first nine years of this case, Plaintiffs alleged that CACI PT personnel directly abused them. Plaintiffs now admit that this is not true, and that their sole theory of liability is "accessorial" liability – that CACI PT supposedly conspired with or aided those who allegedly mistreated Plaintiffs. As Plaintiffs recently conceded, "We are not contending that the CACI interrogators laid a hand on the plaintiffs." 9/22/17 Tr. at 15.

2. Plaintiffs do not identify the soldiers who mistreated them, nor do they identify any CACI PT personnel as having given soldiers directions regarding *Plaintiffs'* treatment. Rather, Plaintiffs proceed on the circular theory that any soldiers who mistreated them were part of a conspiracy with CACI PT personnel, and this is proven by the fact that the soldiers mistreated them.

3. The Fourth Circuit has directed that an appropriate political question determination must involve development of a factual record regarding Plaintiffs' treatment. As the Court of Appeals stated, "[t]his discriminating analysis will require the district court to examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 160-61 (4th Cir. 2016) (internal citations and quotations omitted). This required *examination* of that evidence necessarily requires the *discovery and development* of that evidence. These facts also are highly relevant to CACI PT's immunity and preemption defenses as well as to the merits. At a minimum, this involves discovery of the identities of any participants or witnesses regarding Plaintiffs' treatment, the facts possessed by such participants and witnesses, and the source of any instructions concerning Plaintiffs' treatment.

4. Information regarding interrogations at Abu Ghraib prison is, in all material respects, classified. This includes the identity of a detainee's assigned interrogator(s), interrogation plans, and interrogation reports. Such information is in the exclusive possession of the U.S. Government. CACI PT does not have that information and never has had it. CACI PT's interrogators at Abu Ghraib prison were integrated into the military intelligence chain of command, *see Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009), and all operational reporting occurred exclusively through that chain of command. Thus, if Plaintiffs were

interrogated, CACI PT does not know by whom, and CACI PT also does not have records regarding interrogation operations at Abu Ghraib prison.

5. From the earliest stages of this case, CACI PT has sought discovery from the United States regarding detainee operations and Plaintiffs' experiences at Abu Ghraib prison. In 2013, the United States produced heavily-redacted detainee files for each Plaintiff, but the redactions prevented CACI PT from identifying any persons with whom Plaintiffs interacted. CACI PT also deposed several current and former soldiers regarding Plaintiffs, but the United States' counsel directed those witnesses not to provide testimony that could identify any detainee's interrogator(s). CACI PT moved to compel production by the United States of information relevant to Plaintiffs' treatment at Abu Ghraib prison but those motions were mooted by the Court's 2013 entry of judgment in favor of CACI PT.

6. CACI PT's efforts to obtain discovery from the United States regarding Plaintiffs' treatment has continued since the most recent remand. CACI PT has, at Judge Brinkema's direction, conferred with the United States to discuss the discovery needs of this case. On May 3, 2017, CACI PT sent the United States a nonexclusive list of necessary discovery and requested a meeting. *See* Exhibit 1. CACI PT did not receive a substantive response. In October 2017, CACI PT renewed its request for a meeting with the United States' counsel, and that meeting occurred on December 6, 2017. CACI PT suggested that it would be useful for the United States' counsel to attend the January 3, 2018 status conference in this case, and also asked the United States to estimate the time it would need to address renewed discovery requests. The United States has not provided any guidance as of the date of this report.

7. Once the Court issues its decision on CACI PT's motion to dismiss the Third Amended Complaint, CACI PT will file an Answer to any claims that remain in the case. CACI PT also intends to file a third party complaint against the United States and/or those Government personnel ("John Does") who allegedly actually mistreated these Plaintiffs. (CACI PT shared a draft of a third party complaint with the United States' counsel on October 5, 2017). Once the John Does are identified, questions regarding Westfall certification are likely to arise.

II. BACKGROUND

A. U.S. Military Intelligence Operations at Abu Ghraib Prison

Abu Ghraib prison was used as a combat-zone detention facility by the United States military during the invasion and occupation of Iraq. The vast majority of persons detained at Abu Ghraib prison were determined by the United States military to have no intelligence value. These detainees were housed in tent camps within the Abu Ghraib complex and were not

interrogated. The U.S. military determined that a small percentage of the detainees had battlefield intelligence value and should be interrogated. These detainees were housed at the "hard site," a prison cell complex named as such because, unlike the tent camps, these cells were within a cement building.

The Senate Armed Services Committee's Report, *Inquiry Into the Treatment of Detainees in U.S. Custody*, explains in great detail the role of the United States in the detention and treatment of detainees at Abu Ghraib.[2] After a U.S.-led coalition invaded Iraq in March 2003, the U.S. military captured Abu Ghraib prison, a 280-acre compound near Baghdad. The military used Abu Ghraib prison to detain three types of prisoners: (1) common criminals, (2) security detainees accused or suspected of committing offenses against the U.S.-led Coalition Provisional Authority, and (3) 'high-value' detainees who might possess useful intelligence (insurgency leaders, for example). A U.S. Army military police brigade and a military intelligence brigade were assigned to the prison. The intelligence operation at the prison suffered from a severe shortage of military personnel, prompting the U.S. Government to contract with private corporations to provide civilian interrogators and interpreters. Beginning in September 2003, CACI PT provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison.

There was a considerable prologue to CACI PT's involvement in detainee operations. As the Senate Report explained, in Spring 2002, the CIA proposed a program of enhanced interrogation techniques for suspected al-Qaeda terrorists that received personal attention from

[2] The Senate Report was declassified and released on April 22, 2009. *See Inquiry Into the Treatment of Detainees in U.S. Custody, available at* https://www.armed-services.senate.gov/download/inquiry-into-the-treatment-of-detainees-in-us-custody ("Sen. Rep.").

the National Security Advisor, the CIA Director, principals of the National Security Council, the Attorney General, and the Secretary of Defense. Vice President Cheney said of the CIA's 2002 proposed program, the techniques from which later migrated to Afghanistan and Iraq, "We all approved it."[3]

In October 2002, the Secretary of Defense personally approved aggressive interrogation techniques for use at the military detention center at Guantanamo Bay (GTMO). The techniques included "stress positions, exploitation of detainee fears (such as fear of dogs), removal of clothing, hooding, [and] deprivation of light and sound." Sen. Rep. at xvii. The Secretary of Defense later established a Working Group to review interrogation techniques. Relying on legal advice from the Department of Justice's Office of Legal Counsel, the Working Group recommended interrogation techniques including "[r]emoval of clothing, prolonged standing, sleep deprivation, dietary manipulation, hooding, [exploiting fear of] dogs, and face and stomach slaps." *Id.* at xxii. The Secretary of Defense approved 24 techniques including "dietary manipulation, environmental manipulation, and sleep adjustment." *Id.*

The Senate Report traces how techniques authorized for GTMO made their way to Afghanistan and then to Iraq. In September 2003 (the month that CACI PT began furnishing interrogators), the Coalition Joint Task Force-7 ("CJTF-7") Commander issued an interrogation Standard Operating Procedure that "authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations." *Id.* at xxiv. The CJTF-7 Commander issued a revised policy the next month that eliminated some techniques. "The new policy, however, contained ambiguities with respect to certain

[3] Paul Kane & Joby Warrick, "Cheney Led Briefings of Lawmakers To Defend Interrogation Techniques," *The Washington Post*, A1, A4 (June 3, 2009).

techniques, such as the use of dogs in interrogations, and led to confusion about which techniques were permitted." *Id.* Many of Plaintiffs' allegations of mistreatment, detailed in Section III.A, *infra*, involve conditions authorized at the highest levels of the U.S. military and the Executive branch.

B. CACI PT's Involvement at Abu Ghraib Prison

Because the military did not have a sufficient number of interrogators at Abu Ghraib prison to interrogate detainees deemed to have intelligence value, it supplemented the military interrogators with civilian interrogators provided by CACI PT. All interrogators provided by CACI PT to the U.S. military were required to be United States citizens and have current security clearances. The military chain of command approved each interrogator before he or she deployed to an interrogation facility. The majority of interrogators at Abu Ghraib prison were active duty military interrogators. Another contractor (Titan Corporation) provided linguists to translate during interrogations. There were also civilian interrogators at Abu Ghraib prison from Other Government Agencies.

When CACI PT personnel were deployed to Abu Ghraib prison, it was an active war zone. The prison was under regular attack from sniper fire, mortar fire, and rocket-propelled grenades. Military personnel at Abu Ghraib prison were killed by incoming mortar fire and one soldier was shot by a detainee. The prison was overcrowded, and conditions were austere in the extreme.

With respect to the interrogation operations at Abu Ghraib prison, the U.S. military decided who to detain and for how long, which detainees would be interrogated, who would be assigned to interrogate individual detainees, what interrogation techniques were permitted, and the intelligence priorities for interrogations. The U.S. military leadership required that all interrogations be preceded with an interrogation plan that was approved by the military chain of

command, and that all interrogations be followed by an interrogation report filed in a classified U.S. military database. For all operational purposes, CACI PT interrogators at Abu Ghraib prison were integrated into the U.S. military chain of command. *Saleh*, 580 F.3d at 10.

There were a number of military investigations relating to operations at Abu Ghraib prison. Indeed, the Abu Ghraib prison scandal entered the public consciousness when a classified report by Major General Taguba (the "Taguba report") was leaked to the media. Notably, the Taguba report investigated the military police brigade at Abu Ghraib prison, and was not focused on the military intelligence assets at the facility. The Taguba report detailed several instances of detainee abuse at Abu Ghraib prison. Notably, the Taguba report does not refer to these Plaintiffs *at all*.

The Taguba report recommended further investigation to determine whether adverse action should be taken against two U.S. Army officers and two civilians involved in military intelligence operations at Abu Ghraib prison, Colonel Thomas Pappas, Lieutenant Colonel Steve Jordan, Titan Corporation linguist John Israel, and CACI PT interrogator Stephen Stefanowicz. With respect to Mr. Stefanowicz, he is referenced in the "Recommendations" section of the Taguba report, where he was alleged to have misled investigators and also:

> Allowed and/or instructed MPs, who were not trained in interrogation techniques, to facilitate interrogations by "setting conditions" which were neither authorized and in accordance with applicable regulations/policy. He clearly knew his instructions equated to physical abuse.

Taguba report at 48. The same passage of the report states, however, that this conclusion relates to acts by Mr. Stefanowicz "which have been previously referred to in the aforementioned findings." *Id.* But Mr. Stefanowicz is not mentioned, not even once, in the "aforementioned findings." As for the four non-MPs identified in the Taguba report, Colonel Pappas was never charged with wrongdoing involving detainee treatment. Lieutenant Colonel Jordan was

acquitted by a court-martial of all charges involving alleged detainee abuse. He was convicted of violating an order not to speak with potential witnesses, but the Army officer convening the court-martial disapproved that finding, acquitting him of that charge as well. Mr. Israel was never charged with any wrongdoing, and the subsequent Jones/Fay report explicitly exonerated him of any wrongdoing. Mr. Stefanowicz was never charged with any wrongdoing. These facts are telling. As the D.C. Circuit noted in the related *Saleh* case:

> To be sure, the executive branch has broadly condemned the shameful behavior at Abu Ghraib documented in the now infamous photographs of detainee abuse. This disavowal does not, however, bear upon the issue presented in this tort suit against these defendants. Indeed, the government acted swiftly to institute court-martial proceedings against offending military personnel, but no analogous disciplinary, criminal, or contract proceedings have been so instituted against the defendants. This fact alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal.

Saleh, 580 F.3d at 10.

While the Taguba investigation's mandate was to investigate military police operations, a subsequent military investigation of the military intelligence operation at Abu Ghraib prison (the "Jones/Fay report") catalogued all of the instances of misconduct (some involving detainees, some not) that the authors could identify. The Jones/Fay report concludes that a preponderance of the evidence supports a conclusion that more than forty-five military and civilian personnel committed some form of misconduct at Abu Ghraib prison. Four of the persons identified were CACI PT employees:

- CIVILIAN-55 allegedly pulled an Iraqi general (not one of the Plaintiffs) from the back of a jeep and dragged him on the ground; drank alcohol while at Abu Ghraib prison; and refused to take instructions by mouthing off to a sergeant and not paying attention in a training session. Jones/Fay report at 131, *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf. These allegations have nothing to do with Plaintiffs' claims.

- CIVILIAN-11 is alleged to have engaged in misconduct during IP Roundup, when military and civilian interrogators questioned Iraqi police officers and detainees after an Iraqi police officer smuggled a pistol to a detainee, who used it to shoot a soldier. The alleged misconduct for CIVILIAN-11 involved allegedly encouraging abuse of an Iraqi police officer (not one of the Plaintiffs) by allowing an MP to twist the handcuffs on the Iraqi police officer, causing pain; allowing an MP to cover the Iraqi police officer's nose and mouth for a few seconds; threatening to bring the MP back into the cell if the Iraqi police officer did not answer questions; placing the Iraqi police officer in an unauthorized "stress position" by interrogating the police officer while he squatted in a plastic chair; telling a detainee that he would get a working dog on him if the detainee did not provide information; and failing to prevent a detainee from being photographed. *Id.* at 132. These allegations also have nothing to do with Plaintiffs' claims.

- CIVILIAN-21 is alleged to have used working dogs during certain interrogations without authorization; "push[ed] (kick[ed]) a detainee into a cell with his foot"; lied to investigators about using working dogs during interrogations; failed to report a detainee's allegation that he had been struck by a civilian linguist; and humiliated a detainee by shaving his beard and requiring him to wear women's underwear. *Id.* at 134. CACI PT has no reason to believe these allegations relate to Plaintiffs' claims.

- CIVILIAN-20 is alleged to have used one or more interrogation techniques that he or she believed in good faith were approved but which were not. The recommendation was that no adverse action be taken against this employee. *Id.* at 135. CACI PT has no reason to believe this allegation relates to Plaintiffs' claims, and CACI PT has no idea as to the identity of CIVILIAN-20.

To CACI's knowledge, none of the alleged acts of misconduct detailed in the Jones/Fay report involve the mistreatment of these Plaintiffs, and Plaintiffs have not alleged to the contrary. To CACI PT's knowledge, the four Plaintiffs in this case are not in any of the photographs from Abu Ghraib prison.[4] As with the findings and recommendations of the Taguba report, no CACI

[4] Indeed, the photographs that the Court may have seen depicting forced nudity, naked pyramids, simulated sex acts and the like were of detainees who were not interrogated at all, by anyone. These detainees had been moved from one part of the Abu Ghraib prison complex (Camp Ganci) to the Abu Ghraib hard site where interrogations occurred because they were suspected of starting a riot at Camp Ganci. Discovery in this case confirmed that the MPs, with no interrogator involvement at all, simply decided to abuse these detainees. Similarly, the iconic photograph of the detainee with a hood over his head, and standing on a box with wires attached to his fingers was not a military intelligence hold, but had been brought to the complex and

PT employee identified in the Jones/Fay report – indeed, no CACI PT employee, period – has ever been charged with a crime arising out of detainee treatment in Iraq.

Vice Admiral Church, who was appointed to investigate Defense Department detainee operations, concluded that, the hardships present at Abu Ghraib prison notwithstanding, CACI PT personnel "made a significant contribution to U.S. intelligence efforts." Church report at 17. He noted that "[o]n average, contractors were more experienced than military interrogators and that this advantage enhanced their credibility with detainees and promoted successful interrogations." *Id.* Indeed, Vice Admiral Church concluded that despite the publicity surrounding Abu Ghraib, "we found very few instances of abuse involving contractors." *Id.*

C. The Related *Saleh* Case

In 2004, several Iraqis filed a putative class action against CACI PT and others, alleging common-law and Alien Tort Statute claims based on alleged mistreatment of detainees at Abu Ghraib prison and elsewhere in Iraq. Plaintiffs in the present action were members of the putative class in *Saleh*. After the district court denied class certification, the D.C. Circuit held that the plaintiffs' Alien Tort Statute and common-law claims were preempted both by the federal interests underlying the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j), and the Constitution's allocation of war powers to the political branches of the federal government. *Saleh*, 580 F.3d at 10-12. This decision resolved claims brought by about 250 Iraqis, most of whom allegedly were detained at Abu Ghraib prison and subject to the same conditions of detention, interrogation rules of engagement, and military intelligence protocols as the Plaintiffs in the present case.

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interrogated by an Army Criminal Investigation Division soldier, with no military intelligence or civilian interrogator involvement at all.

III. THE PRESENT ACTION

A. Plaintiffs' Allegations of Mistreatment

After having asserted for nine years that CACI PT personnel directly abused them, Plaintiffs have backtracked and now admit that "the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting." Dkt. #639 at 31 n.30; *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability."). Indeed, Plaintiffs' counsel recently conceded that Plaintiffs "are not contending that the CACI interrogators laid a hand on the plaintiffs." 9/22/17 Tr. at 15; *id.* at 17 ("[W]e're not saying they were in the cell committing the acts of abuse . . . .").[5]

That said, Plaintiffs assert a number of allegations of mistreatment by soldiers. Their allegations appear to fall into two categories. The first category involves allegations of simple assault by soldiers, principally by MPs. For these allegations, identification of and discovery from alleged participants and/or other witnesses is essential to development of the facts. The second category of allegations by Plaintiffs involves conditions of detention or treatment that were adopted and approved by the U.S. military intelligence leadership and in many cases by high-ranking Executive branch officials. These allegations require identification of, and discovery from, alleged participants and witnesses, but also will involve judicial review of the strategies and tactics employed on the battlefield by the U.S. military and Executive branch. Notably, there is zero corroboration thus far of Plaintiffs' allegations of mistreatment other than generally-applicable conditions of detention adopted by the military, nor have Plaintiffs

[5] The Third Amended Complaint ("TAC") identifies three instances of "direct contact" between Plaintiffs and CACI PT personnel, all of which are innocuous. *See* Dkt. #639 at 31 n.30.

identified any facts showing that any mistreatment they suffered came at the direction or encouragement of a CACI PT employee.

As for Plaintiffs' specific allegations, Plaintiff Al Shimari complains that on various occasions he was required to kneel on stones during an interrogation while being pushed and/or stepped on by guards or an interrogator, Al Shimari Dep. 41-42, 47-49, 118-19, pushed into a wall, *id.* at 54-57, struck on various parts of his body, *see, e.g.*, *id.* at 77, 96-98, 105, 123, hit with a baton and a rifle, *id.* at 102, dragged or pulled by the hood tied around his neck, *id.* at 103-04, and threatened with dogs without injury, *id.* at 64-66, 77-78. Al Shimari also alleged that he received a single shock on one occasion, on his hand, from a purported lie detector, with no apparent injury resulting therefrom. *Id.* at 102-03. Al Shimari complains of being required to stand on his toes with his nose against a wall during an interrogation and with his nose against a wall through the night once. *Id.* at 55-57, 120-21. He also alleges that an MP digitally penetrated is rectum on one occasion. *Id.* at 125.

Plaintiff Al-Ejaili alleges that he was punched and kicked in various parts of his body, Al-Ejaili Dep. 79-82, had hot and cold liquids thrown on him, *id.* at 100-01, was "hurt with pipes," *id.* at 102, and was threatened with dogs without injury, *id.* at 201. Al-Ejaili sustained no physical injuries that required medical care after departing Abu Ghraib. *Id.* at 130. Al-Ejaili states that he was put in painful stress positions, but suffered no serious injury. *Id.* at 68, 201.

Al Zuba'e asserts that he was hit, punched, and kicked, Al Zuba'e Dep. 50-51, 58-59, 106, dragged while crawling on the ground after he fell, which caused him to bleed, *id.* at 57-61, shaken, *id.* at 94, and thrown toward a wall twice, *id.* at 76, 106. Al Zuba'e also asserts that on his first day at Abu Ghraib – prior to any interrogations – a dog was allowed to bite him on his hand and legs, with no apparent lasting injury. *Id.* at 61-62. Al Zuba'e further testified that he

was handcuffed to a bed with his hands above his head for 24 hours, during which he had to urinate and/or defecate on himself. *Id.* at 79-81, 136-37. On a separate occasion, Al Zuba'e stated that he was handcuffed in a bent-down position to his cell door. *Id.* at 102-03. Plaintiff Al Zuba'e also described being hit on his genitalia, Al Zuba'e Dep. 134-35, as well as manually aroused and photographed prior to being sent to the hard site where CACI PT interrogators and military interrogators worked, *id.* at 37-42.

Plaintiffs also complain of general conditions at Abu Ghraib prison, involving exposure to cold, lack of clothing, wet clothing, sandbag pillows, cells which were kept light or dark, music being played loudly, humidity, lack of space, someone hitting their cell door hard, being forced to sleep during the day and be awake at night, food deprivation, lack of toilet paper, and being restrained – not in stress positions – with handcuffs or ties in a cell. *See* Al Shimari Dep. 53-54, 58-60, 86-87, 94, 122; Al-Ejaili Dep. 64-68, 69-72, 101-02, 217; Al Zuba'e Dep. 65-66, 87-98. Al Shimari asserts that he was forced to shower in cold water until a bar of soap was dissolved, Al Shimari Dep. 67-74, 77, and was forcibly shaved, *id.* Plaintiff Al Zuba'e states that he was forced to shower in cold water and that the man showering him intentionally put soap in his eyes. Al Zuba'e Dep. 54-56. These allegations, again, call for judicial review of battlefield strategies and tactics in determining whether tort remedies should be available for conditions employed by the U.S. military in a combat zone.

As noted above, Plaintiffs admit that none of the alleged incidents was committed by an interrogator employed by CACI PT. Instead, Plaintiffs claim that CACI PT or its interrogators conspired with U.S. Army MPs to mistreat them. Plaintiffs have specified that the conspiracy they now allege spanned the five-month period from October 2003 through February 2004, a time period coinciding with the time frame in which *soldiers* committed acts of detainee abuse

against other detainees for which they were court-martialed. Third Am. Compl. ¶¶ 78-79; Dkt. #653 at 3. Plaintiffs' allegation of co-conspirator liability is based solely on Plaintiffs' assertion that CACI PT interrogators – like military interrogators at Abu Ghraib prison – provided instructions to MPs regarding the treatment of detainees assigned to such interrogators. Indeed, multiple MPs have testified to receiving instructions regarding detainees from military and civilian interrogators, but also made clear that interrogators provided such instructions only with respect to their own assigned detainees. CACI PT attacked the sufficiency of Plaintiffs' conspiracy allegations as failing to meet the requirements of *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009). The deficiencies in Plaintiffs' conspiracy allegations include that Plaintiffs do not allege facts concerning an agreement to conspire by CACI PT employees or by anyone authorized to act for CACI PT, a plausible motive for CACI PT to enter into the alleged conspiracy, a connection between actions by CACI PT personnel and any injuries allegedly incurred by Plaintiffs, or facts showing that whoever allegedly mistreated Plaintiffs was part of the amorphous conspiracy alleged by Plaintiffs.

To the extent the Court permits Plaintiffs' conspiracy claims to proceed, one of many critical facts in this case in who, if anyone, interrogated these Plaintiffs and, if Plaintiffs were interrogated, what instructions the assigned interrogators provided to MPs regarding these Plaintiffs' treatment. Plaintiffs claim not to know who interrogated them. CACI PT does not know who interrogated these Plaintiffs or if they were interrogated at all. To the extent that Plaintiffs' heavily-redacted detainee files suggest that interrogations occurred, the dates of such interrogations generally are redacted, so CACI PT cannot determine if potential interrogations occurred during the period during which Plaintiffs now allege a conspiracy existed.

As discovery proceeded in 2013, the U.S. Government refused to provide information regarding the identity of interrogators assigned to any particular detainee – either through production of records or deposition testimony – on the grounds that the information was classified.[6] CACI PT cannot obtain this information outside of the discovery process because: (1) the military supervised all aspects of the intelligence gathering operations at Abu Ghraib and has exclusive access to records of such operations; (2) CACI PT cannot ask its former employees or others to disclose classified information that the U.S. government has thus far refused to divulge; (3) even if CACI PT did choose to violate the law and encourage its former employees or others to divulge this classified information, the persons possessing such information would and should refuse to provide it absent Government authorization; and (4) none of the Government reports cataloging misconduct at Abu Ghraib describe a CACI PT interrogator as being assigned to or mistreating any of these Plaintiffs. CACI PT moved to compel production by the United States of materials and information regarding Plaintiffs' treatment in U.S. military custody. Several of CACI PT's motions to compel were mooted by the Court's entry of judgment in CACI PT's favor in 2013.

IV. PROCEDURAL HISTORY

A. The First Five Years

Plaintiffs filed their actions in 2008 in various district courts, and they were ultimately joined into a single action in this Court before Judge Lee. CACI PT noticed an interlocutory appeal under the collateral order doctrine of the Court's 2009 denial of CACI's motion to

[6] The United States has the prerogative to withhold classified material from discovery in this action. In that event, the United States must assert the state secrets privilege. *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007); *see also Abilt v. Central Intelligence Agency*, 848 F.3d 305, 311-12 (4th Cir. 2017); *Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005). It has not yet done so.

dismiss on immunity and preemption grounds. A Fourth Circuit panel, in a 2-1 decision, reversed this Court and held that CACI PT was entitled to dismissal on preemption grounds. *Al Shimari v. CACI Int'l Inc*, 658 F.3d 413, 420 (4th Cir. 2011) ("*Al Shimari I*"). One of the judges on the panel concluded that dismissal was also appropriate based on the political question doctrine. *Id.* at 420 (Niemeyer, J., concurring). The Fourth Circuit reheard the appeal *en banc* and held, three years after CACI PT had noticed its appeal, that the court lacked appellate jurisdiction to hear the appeal. *Al Shimari v. CACI Int'l Inc*, 679 F.3d 205 (4th Cir. 2012) ("*Al Shimari II*"). The *en banc* majority decision comprises twenty pages in the *Federal Reporter*, while the two judges issued dissenting opinions totaling forty-five pages. In Judge Wilkinson's view, two dissents were necessary because "the difficulties with [the majority's] actions are so legion that no single dissent could hope to cover them all. *Id.* at 225 (Wilkinson, J., dissenting).

On remand, the parties commenced discovery. CACI PT took the position that there should be no limits on discovery that would shield the truth from the light of day. In short, CACI PT had nothing to hide and desired to develop all relevant facts concerning Plaintiffs and their treatment. Indeed, CACI PT has, from the earliest stages of this case, made multiple efforts to learn in discovery the identity of those with whom Plaintiffs allegedly interacted at Abu Ghraib prison. CACI PT served interrogatories on Plaintiffs asking them to identify interactions with CACI PT employees. Plaintiffs' responses confirm that they cannot identify any abuse inflicted on them by a CACI PT employee or even identify a meaningful interaction between themselves and a CACI PT employee.

CACI PT also served Plaintiffs with notices of depositions and medical examinations. Plaintiffs failed to appear in this District as required by Local Rule 30. CACI PT moved to compel. Noting that Plaintiffs' credibility was a key issue in this case, and that Plaintiffs were

parties to the case and not mere corroborating or tangential witnesses, the Court rejected Plaintiffs' arguments and ordered them to appear in this District for depositions and medical examinations by February 2013. Only one Plaintiff (Al-Ejaili) appeared for deposition. He confirmed that he could not identify his interrogators or testify to any interaction with CACI PT personnel.

The other three Plaintiffs, Al Shimari, Al-Zuba'e, and Rashid, who has since been dismissed (collectively, the "Absentee Plaintiffs"), failed to appear. The Court extended the Absentee Plaintiffs' deadline to appear multiple times [*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.[7] As a result, the Absentee Plaintiffs were not deposed at that time. CACI PT moved to dismiss their claims based on their failure to appear.

[7] It is unsurprising that the United States would not permit the Absentee Plaintiffs to enter the United States. Indeed, the Government acts sensibly when excluding those who would kill Americans. Plaintiff Al Shimari's detainee file, while heavily redacted, nevertheless 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 IEDs, RPGs, a machine gun, ammunition, blasting caps, and gun powder. Plaintiff Rashid was captured when one of his improvised explosive devices exploded near a coalition convoy. Plaintiff Al Zuba'e's detainee file, while heavily redacted, states that he was detained because he was responsible for planning attacks on coalition forces. [Dkt. #368 at 5-6 (quoting and citing to detainee files filed with the Court)].

Release from detention does not equate with exoneration. It was not the role of the U.S. military or the detainee review board to charge detainees with offenses, and neither the U.S. military conducted trials or held evidentiary hearings to adjudicate allegations of criminal activity of those detained. The detainee review board balanced each detainee's threat against the needs and policies of the United States occupation force. To CACI PT's understanding, all detainees at Abu Ghraib prison were eventually released from detention, though it bears mention that the United States military saw fit to hold Plaintiff Al Shimari in detention for five years. In any event, the United States' refusal to allow the Absentee Plaintiffs into this country speaks volumes.

CACI PT also took the depositions of a number of former MPs who had been deployed to Abu Ghraib prison. None of them testified to knowing Plaintiffs by name or photograph. Counsel for the United States objected and directed the witnesses not to provide responses to any questions that would disclose the identity of an interrogator assigned to interrogate any particular detainee, including these Plaintiffs. Apart from deposition questioning, CACI PT sought document discovery from the United States as to the identity of persons, if any, who interrogated these Plaintiffs. The United States refused to produce documents identifying any interrogators who may have been assigned to these Plaintiffs on the grounds that the information was classified.

CACI PT moved to compel disclosure of the identity of Plaintiffs' interrogators [Dkt. #275]. Surprisingly, Plaintiffs were completely uninterested in learning who might have interrogated them and advised the Court that it could hold a trial in this case while denying CACI PT discovery as to who, if anyone, actually interrogated or otherwise interacted with these Plaintiffs. The Court's 2013 entry of judgment in favor of CACI PT mooted CACI PT's motion to compel interrogator information.

CACI PT also sought the depositions of the authors of the Army investigation reports and for production of unredacted copies of the reports. Given that Plaintiffs appear to rest most or all of their merits case on the Taguba and Jones/Fay reports, even though the reports do not reference these Plaintiffs, CACI PT's position was that it should be permitted to test the admissibility and reliability of these reports by deposing their authors and reviewing the exhibits to the reports or else the reports should be excluded from evidence. The United States opposed depositions of the report authors, arguing that they had little of value to contribute because their reports were based on "information obtained second-hand, third-hand, or more remotely." [Dkt.

#285 at 10 n.7]. Judge Lee denied CACI PT's motion to compel depositions of the report authors. 4/12/13 Tr. at 24. CACI PT's motion to compel production of unredacted copies of the reports on which Plaintiffs rely was mooted by the Court's 2013 entry of judgment.

B. The District Court's 2013 Entry of Judgment and 2014 Fourth Circuit Decision

As the discovery deadline approached, and after CACI PT had filed a number of motions to compel discovery from the United States, the Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), in which the Court held that the presumption against extraterritoriality applied to claims brought under the Alien Tort Statute. When CACI PT advised Judge Lee of the *Kiobel* decision, the Court held off on hearing the pending motions to compel and directed the parties to brief the applicability of *Kiobel* to Plaintiffs' claims. On June 25, 2013, the Court held that the presumption against extraterritoriality barred Plaintiffs' Alien Tort Statute claims, and also dismissed Plaintiffs' remaining common-law claims on other grounds. Dkt. #460. At the time the Court dismissed all of Plaintiffs' claims and entered judgment, discovery had closed, but the summary judgment deadline had not passed. In addition, as noted above, there were a number of pending motions, including some motions to compel discovery referenced in the preceding section, that were mooted by the Court's dismissal of all remaining claims.[8]

[8] CACI PT's Motion to Dismiss Plaintiffs' Third Amended Complaint. [Dkt. #312]; CACI PT's Motion to Strike Non-Conspiracy Allegations from the Third Amended Complaint. [Dkt. #300]; CACI PT's renewed motion to dismiss Plaintiffs' common-law claims [Dkt. #460]; CACI PT's renewed motion to dismiss the Rashid Plaintiffs' common-law claims as time barred [Dkt. #226]; CACI PT's Motion to Compel Interrogator Information from the United States. [Dkt. #275]; CACI PT's Motion to Compel Complete and Unredacted Government Reports from the United States. [Dkt. #279]; Plaintiffs' Motion to Compel the United States to Produce Documents and Information. [Dkt. #380]; Plaintiffs' Motion to Compel 30(b)(6) Deposition Testimony from Defendant CACI Premier Technology, Inc. and CACI International, Inc. [Dkt. #392].

Plaintiffs appealed the 2013 entry of judgment in favor of CACI PT, and the Fourth Circuit vacated the entry of judgment and remanded for further proceedings in 2014. The 2014 Fourth Circuit decision held that the presumption against extraterritoriality did not bar Plaintiffs' ATS claims. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 531 (4th Cir. 2014) ("*Al Shimari III*").[9] The Fourth Circuit next turned to the political question issue raised by CACI PT as an alternative ground for affirmance. The Fourth Circuit concluded that the "limited record on appeal" did not allow it to determine whether a political question existed. *Id.* at 536. Accordingly, the Court "remand[ed] this case to the district court for further consideration with respect to the application" of the political question doctrine as developed in *Taylor v. Kellogg Brown & Root Svcs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011). *Id.*[10] The *Taylor* test held that a tort suit against a government contractor was barred if (1) "the government contractor was under the 'plenary' or 'direct' control of the military," *or* if (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 IV*, 758 F.3d at 533-34 (quoting Taylor, 658 F.3d at 411).

[9] The Fourth Circuit's decision in *Al Shimari III*, while binding on this Court for now, is an outlier. Other courts of appeals have recognized that the conduct that must be domestic for purposes of ATS jurisdiction is the conduct that is the *focus* of the Alien Tort Statute, *i.e.*, the acts that are in violation of the law of nations. These courts have explicitly or implicitly rejected the notion stated in *Al Shimari III* that the presumption against extraterritoriality can be assessed based on a wide array of factors other than the conduct that is the focus of the Alien Tort Statute. *See, e.g., Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 193 (5th Cir. 2017); *Doe v. Drummond Co.*, 782 F.3d 576, 599-600 (11th Cir. 2015); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014).

[10] As for the other two rulings appealed by Plaintiffs – related to their common-law claims – the Fourth Circuit did not decide those issues. The Court stressed it did not express an opinion on the correctness of the Court's rulings (*id.* at 537 n.10), but vacated the rulings so the Court could first consider whether those claims were barred by the political question doctrine. *Id.* at 47.

C. The Court's 2015 Entry of Judgment and the Fourth Circuit's 2016 Decision

On remand, the Court applied *Taylor* and concluded that CACI PT employees were at all times under the plenary and direct control of the U.S. military and that this case would require the Court to question actual, sensitive judgments of the U.S. military. *Al Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 446-49 (E.D. Va. 2015). Accordingly, the Court entered judgment in favor of CACI PT. In short, the Court did exactly what the Fourth Circuit had instructed.

Notably, the *Taylor* test for political questions that the Fourth Circuit directed Judge Lee to apply did not involve a consideration of the "lawfulness" of the conduct at issue. It is difficult to reconcile that requirement with the command that courts first decide subject matter jurisdiction, and the political question doctrine is a subject matter jurisdiction issue. Indeed, as the D.C. Circuit observed, requiring a court to assess the lawfulness of conduct in order to determine whether it is the province of the judiciary to evaluate the conduct "puts the cart before the horse, requiring the district court to first decide the merits of a claim and, only thereafter, determine whether that claim was justiciable." *bin Ali Jaber v. United States*, 861 F.3d 241, 247 n.1 (D.C. Cir. 2017).

Nevertheless, a different panel of the Fourth Circuit concluded that Judge Lee "erred" by failing to make additional determinations addressed nowhere in the *Al Shimari III* remand instructions. The court decided that it was error not to consider whether "the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred." *Al Shimari IV*, 840 F.3d at 159. If the conduct "violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred," the *Al Shimari IV* panel held that the political question doctrine cannot apply. *Id.* If the conduct was lawful, or was a "grey area" where lawfulness at the time

of the conduct was not clear, the political question doctrine would bar the claim if either of the *Taylor* tests applied. *Id.* at 160. The *Al Shimari IV* panel also stated that the pertinent inquiry for control was whether the U.S. military exercised "actual" control and concluded that Judge Lee erred by focusing on the formal control exercised by the U.S. military. *Id.* at 156-57. The Fourth Circuit's conclusion that Judge Lee focused only on formal control rather than actual control is difficult to understand, as the record developed in discovery and presented on the issue of justiciability included testimony from several military officers (including Colonel Pappas, the military intelligence brigade commander, and Major Holmes, the Officer-in-Charge of the Interrogation Control Element) as to the U.S. Army's identical actual control over both military and CACI PT interrogators.

In its remand instructions, the *Al Shimari IV* panel made clear that this Court cannot make a political question decision on the basis of mere allegations:

> This "discriminating analysis," *see Baker* [*v. Carr*, 369 U.S. 186, 211 (1962)], will require the district court to *examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place*. If disputed facts are "inexplicably intertwined" with the facts underlying the merits of the plaintiffs' claims, the district court should resolve these disputed jurisdictional facts along with the intertwined merits issues. *See Kerns* [*v. United States*, 585 F.3d 187, 193 (4th Cir. 2009)].

Id. at 160-61 (emphasis added).[11] In CACI PT's view, the *Al Shimari IV* panel's direction that the Court focus on evidence, and not mere allegations, substantially affects the scope of relevant jurisdictional facts and, consequently, the scope of necessary jurisdictional discovery.

[11] While the Fourth Circuit's remand instructions reference the district court "resolving" merits issues in the case, all parties have demanded a jury. Moreover, the political question doctrine is a question of subject matter jurisdiction, *Taylor*, 658 F.3d at 403, 412, which the Court is required to decide as a threshold issue before it considers the merits of a case. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *James v. United States*, 143 F. Supp. 3d 392, 394 (E.D. Va. 2015)

Moreover, once the Court has determined the specific conduct to which the Plaintiffs were subjected – a fact-intensive inquiry – the Court will need to adjudicate the legality of that conduct. This will necessarily require passing judgment on the decisions of the Executive Branch and the military regarding treatment of detainees, and will require discovery of facts regarding the adoption and implementation of detention and interrogation policies at Abu Ghraib prison. *Id.* at 160. Indeed, as the D.C. Circuit pointed out, this approach will require deciding lawfulness of conduct in order to determine whether the Court should be deciding lawfulness consistent with the justiciability restraints on federal courts. *bin Ali Jaber*, 861 F.3d at 247 n.1.

As set forth in detail above, the strategies and tactics employed with respect to detainees at Abu Ghraib were developed and determined by the United States, not CACI PT. It is well established that the Interrogation Rules of Engagement ("IROEs") at Abu Ghraib prison were developed and approved by high-level Executive Branch officials for use at Guantanamo Bay and that those IROEs migrated through military channels to Afghanistan and Iraq.[12] These strategy and tactics regarding detainee treatment conceived, formulated and implemented by the Executive Branch and the military are now, per *Al Shimari IV*, subject to judicial review.

(citing *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548 (4th Cir. 2006)). This principle highlights the flaw in the Fourth Circuit's circular determination that the Court should consider the lawfulness of the conduct at issue in order to determine whether it has jurisdiction to evaluate that conduct. *bin Ali Jaber*, 861 F.3d at 247 n.1. In any event, while this Court may make antecedent factual determinations in assessing justiciability, such antecedent factual determinations cannot bind the jury. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."); *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) (quoting *Dimick*). Consequently, the Fourth Circuit's decision in *Kerns* at most permits the Court to resolve antecedent, non-merits factual disputes in order to determine jurisdiction, but those findings are not binding on the jury if the Court determines that subject matter jurisdiction exists. Any other reading of *Kerns* would be inconsistent with the principles discussed above.

[12] *See* Executive Summary, Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody* at xxii-xxiii (Nov. 20, 2008) ("Senate Report").

These IROEs permitted, among other things, "stress positions, environmental manipulation, sleep management, and military working dogs in interrogations."[13] The IROEs in force at Abu Ghraib prison remain classified. Discovery of the contents of the IROEs, as well as government analyses of their legality, is necessary to inform the Court's judgment as to whether whatever conduct, if any, that actually occurred and was attributable to CACI PT personnel was lawful, unlawful, or fell into a "grey area," as well as the Court's judgment about the extent of actual military control or sensitive military judgments. In other words, the remand instructions of *Al Shimari IV* require the Court to reconsider the wisdom of discretionary decisions and legal analyses made by the Executive Branch regarding the prosecution of the war in Iraq.

D. Proceedings on Remand

On the same day the Fourth Circuit vacated this Court's decision dismissing the case based on the political question doctrine, Judge Lee recused himself from the case. The case was reassigned to Judge Brinkema. On November 16, 2016, the Fourth Circuit's mandate issued and shortly thereafter the parties provided the Court with status reports summarizing the litigation to date and proposing a path forward on remand. All parties agreed that the following process was appropriate for proceedings on remand: (1) litigation and resolution of threshold dispositive motions; (2) litigation of any motions to compel relating to merits discovery or the jurisdictional inquiry on remand; (3) conduct of discovery ordered by the Court; and (4) litigation and resolution of motions addressing the political question doctrine. [Dkt. #564 at 18-21; Dkt. #568 at 2].

At a status conference on December 16, 2016, the Court rejected the parties' proposed approach and determined instead that the first step on remand would be depositions of the

[13] Senate Report, *supra*, at xxiv.

Absentee Plaintiffs via video depositions from overseas. 12/16/16 Tr. at 10. CACI PT noted that the Court's solution did not permit medical examinations. The Court stated that medical examinations were not necessary for the jurisdictional inquiry and could be addressed later in the case. *Id.* at 23. Judge Brinkema originally contemplated that the depositions of the Absentee Plaintiffs would be *de bene esse* depositions, with the questioning counsel appearing at the courthouse and the Court overseeing the depositions. Indeed, the Court's plan contemplated that *Plaintiffs* would proceed first in conducting a direct examination of their own clients and CACI PT's cross-examination would be limited to questions that would be permissible at trial. CACI PT objected and pointed out that it was entitled to *discovery* depositions in order to learn Plaintiffs' version of the facts *before* being required to conduct a trial cross-examination. Dkt. #582.

Judge Brinkema ultimately agreed, and CACI PT deposed Plaintiffs Al Shimari and Al Zuba'e from counsel's office, with the witnesses appearing via video conference from Beirut, Lebanon. Neither Al Shimari nor Al Zuba'e were able to identify their interrogators or any CACI PT personnel with whom they had significant contact. Plaintiff Rashid failed to appear for his deposition. According to Plaintiffs' counsel, Rashid was detained by a sectarian militia and then later detained by the Iraqi government in a detention center in Baghdad. Based on his inability to appear for deposition, the Court dismissed him from the case without prejudice. 6/9/17 Tr. at 6. The Court reserved judgment as to whether the statute of limitations would be tolled were Rashid ever to resurface. In October 2017, Plaintiffs' counsel advised that they had been informed that Rashid had been released from detention. He remains dismissed from the case, and CACI PT will oppose any motion seeking to permit Rashid to rejoin the case.

After Plaintiffs had been deposed, but before the Court permitted any other discovery, the Court directed CACI PT to file a Rule 12 motion asserting any grounds for dismissal it desired to assert. On September 22, 2017, the Court indicated that it was not going to dismiss the case, but the Court's remarks were ambiguous as to whether all of Plaintiffs' claims would survive. In particular, Plaintiffs admitted that their claims are entirely based on conspiracy and aiding and abetting theories, which presumably will result in dismissal of Plaintiffs' direct claims.

E. Corporate Liability Under the Alien Tort Statute and Potential Further Development of Law Regarding Extraterritorial Conduct

We note that there currently is a case before the United States Supreme Court involving construction and application of the Alien Tort Statute. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015), *cert. granted sub nom. Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017). The issue on which the Supreme Court granted *certiorari* is whether the Alien Tort Statute categorically bars claims against corporations. The United States has taken the position that there is no categorical bar to corporate liability under the Alien Tort Statute. However, the United States stated its view that the presumption against extraterritoriality might require dismissal of the plaintiffs' claims and urged the Supreme Court to direct the Second Circuit to address extraterritoriality in the first instance in the event of a remand. Brief of the United States as Amicus Curiae Supporting Neither Party at 7, *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. June 27, 2017), *available at* 2017 WL 2792284. Oral argument took place in *Jesner* on October 11, 2017. Thus, it is likely that in the next several months the Supreme Court will issue a decision creating binding precedent on the issue of corporate liability, and it is possible that the Supreme Court's decision will shed further light on the proper application of the presumption against extraterritoriality.

V. ESSENTIAL DISCOVERY HAS YET TO BE TAKEN

A. Scope of Discovery

After nearly a decade, Plaintiffs have finally acknowledged that "the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting." [Dkt. #639 at 31 n.30]. The merits of this entire action, therefore, hinge on the premise that CACI PT made the corporate decision to conspire with soldiers who allegedly mistreated Plaintiffs, or that CACI PT employees entered into such a conspiracy and CACI PT is liable for acts of the employees' alleged co-conspirators. Similarly, justiciability hinges on a fact-based analysis mandated by the Fourth Circuit that will require the district court to "examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Al Shimari IV*, 840 F.3d at 160-61.

Accordingly, discovery on remand will involve, among other things, discovery into the facts regarding who (if anyone) mistreated these Plaintiffs; if mistreatment occurred, who (if anyone) directed the offender to mistreat these Plaintiffs; who (if anyone) entered into a conspiracy an object of which was the mistreatment of these Plaintiffs; although Plaintiffs are not mentioned in any government reports or investigations, whether the government reports on which Plaintiffs rely are probative and reliable; and the extent of Plaintiffs' injuries (if any) if they were in fact mistreated.

B. Critical Discovery from the Government

From the very beginning of this case, CACI PT has sought discovery that would allow it to test the veracity of Plaintiffs' versions of the facts. That discovery, including the identity of witnesses who could corroborate or refute Plaintiffs' testimony, is in the exclusive possession of the United States. CACI PT's efforts to obtain information regarding Plaintiffs' treatment while in U.S. military control has continued since the most recent remand. Even before the first

hearing in this case after remand, and continuing to this day, CACI PT repeatedly has noted its need to obtain discovery from the United States both in order to address the justiciability issues identified by the Fourth Circuit and to prepare its defense on the merits. Dkt. #564 at 19-21; Dkt. #569 at 2-3; Dkt. #582 at 12-13; Dkt. #592 at 7-8; 12/16/16 Tr. at 11-12; 4/28/17 Tr. at 8-9; Dkt. #618 at 4. The Court initially directed CACI PT to hold off on pursuing discovery from the United States until after Plaintiffs had been deposed and other preliminary matters had been addressed. The Court did advise that CACI PT would, at the appropriate time, receive the discovery needed to litigate this case. 1/27/17 Tr. At 21-22 ("I will not put CACI in the position where it has not had a fair chance to get appropriate discovery. I will assure you of that . . . ."). That time has now arrived.

All of the information regarding Plaintiffs' experiences and treatment at Abu Ghraib prison is in the exclusive possession of the United States, with the exception of the heavily-redacted detainee files the United States produced at an earlier stage of the litigation. Moreover, because the Department of Defense has classified the identity of any detainee's interrogator, counsel for the United States has directed deponents in this action not to testify as to any information that could disclose the identity of a detainee's interrogator. This makes it impossible, at this point, to determine who, if anyone, actually interrogated any of the Plaintiffs. Without that information, Plaintiffs cannot prove, even by circumstantial evidence, that any CACI PT interrogator instructed MPs to mistreat them.

It might be that Plaintiffs do not desire to have facts regarding their detention see the light of day in this case, and would prefer to take their chances that the Court will permit their vague accessorial liability theories to go to a jury without supporting facts. But even if this is the way Plaintiffs would like to proceed, CACI PT is not required to defend solely by arguing that

Plaintiffs have not met their burden of proof. CACI PT is entitled to develop relevant facts regarding Plaintiffs' treatment at Abu Ghraib prison to defend against Plaintiffs' claims *even if Plaintiffs claim they do not need these facts for their case-in-chief.* The fact that Plaintiffs do not desire to develop facts regarding their treatment, and would prefer to limit opportunities to rebut their own versions of the facts, has no effect on CACI PT's right to pursue discovery from all participants in and witnesses to the treatment of Plaintiffs while in U.S. custody. If this case involved a bar fight and Plaintiffs sought to hold CACI PT liable on a co-conspirator theory, no serious litigant would question CACI PT's right to take discovery to identify the participants in the fight, witnesses to the fight, and the connection of participants and witnesses, if any, to CACI PT. CACI PT's right to defend itself is not diminished because the claims arise not out of a bar fight but out of battlefield detention operations. Our adversarial system permits defendants to not only point out holes in plaintiffs' proof, but to develop evidence that the plaintiffs' allegations are untrue.

The Fourth Circuit's decision in *El-Masri* makes this very point. Like the present case, *El-Masri* was a suit seeking damages for injuries allegedly incurred during detention and interrogation. Like Plaintiffs here, El-Masri sought to bring his case based on "general terms" that he was subjected to the CIA's interrogation and rendition programs. *El-Masri*, 479 F.3d at 308-09. But as the Fourth Circuit observed, the merits of his case did not rise and fall merely on such generalities. Rather, "[i]f El-Masri's civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges." *Id.* This inquiry involved consideration of the evidence "not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him." *Id.*; *see also Stewart v. VCU Health Sys. Auth.*, No.

3:09-cv-738, 2011 WL 7281603, at *8 (E.D. Va. Nov. 22, 2011) ("In practice, a party cannot pursue its claims or defenses without an adequate opportunity to obtain evidence through the broad discovery contemplated by the Federal Rules." (citing *Kline v. Martin*, 345 F. Supp. 31, 32 (E.D.Va.1972)); *Wyche v. Va. State Univ.*, No. 3:04-cv-766, 2005 WL 1126829, at *2 (E.D. Va. May 12, 2005) (stating that it is an "obvious given" that a defendant has a right to obtain "pretrial discovery in order to test the facts underlying [the plaintiffs'] claims").

Each of the three Plaintiffs alleged mistreatment that occurred in the presence of soldiers and/or civilians, and the United States exclusively possesses the documentation that could identify the persons interacting with these Plaintiffs so that they could confirm or refute the Plaintiffs' testimony. To give one example from each of the three Plaintiffs' depositions:

- Plaintiff Al Shimari testified that his third interrogation was conducted by a male interrogator who wore a black shirt. Al Shimari testified that the interrogator threatened to allow a working dog into the interrogation booth to bite Al Shimari. Al Shimari also testified that after the third interrogation concluded, soldiers, who Al Shimari believes were acting on the interrogator's orders, forcibly shaved Al Shimari and cut his hair, and wet his clothes before having him put the clothes back on. Al Shimari Dep. at 62-70 (Exhibit 1).

- Plaintiff Al Zuba'e testified that during his final interrogation, three persons were present in the interrogation room with a guard outside. Al Zuba'e testified that he was facing the wall and someone pushed him against the wall a few times, causing some reddish inflammations on his skin. Al Zuba'e Dep. at 105-08. This was the only mistreatment Al Zuba'e identified in his deposition as having occurred during an interrogation or in the presence of interrogators.

- Plaintiff Al-Ejaili testified that there were two or three persons present during his first interrogation at the Abu Ghraib hard site, but that he does not know who they were because he was hooded. Al-Ejaili testified that he was punched, kicked, and slapped during this interrogation. Al-Ejaili Dep. at 78-79.

Thus, the Plaintiffs are not able to identify the personnel with whom they interacted in any meaningful way. Discovery from the United States is necessary in order to identify those with whom Plaintiffs interacted and to test the veracity of Plaintiffs' testimony.

In short, discovery from the United States is indispensable to the political question doctrine inquiry mandated by the Fourth Circuit, as well as to any further proceedings in the event the Court declines – once it is able to review a complete record – to dismiss on justiciability grounds. Discovery from the United States also will be essential to litigation of the third party complaint CACI PT intends to file with its Answer to the Third Amended Complaint, as identifying any persons (if any) who directly mistreated Plaintiffs is essential to CACI's claims against those primarily liable for Plaintiffs' treatment. Without discovery from the United States, the Court cannot possibly evaluate whether *any* acts were committed by CACI PT employees against Plaintiffs in the first place (directly or indirectly), let alone the lawfulness of those acts, or whether any such acts occurred under the military's control or involved sensitive military judgments.

Without prejudice to CACI PT's right to expand its discovery requests based on the progression of the case, the following are the currently known categories of discovery in the United States' possession that are necessary to the fair resolution of this matter:

- Documents and testimony identifying interrogation personnel and others having contact with Plaintiffs during their period of detention;
- Unredacted copies of government reports concerning detainee abuse at Abu Ghraib Prison, including the Taguba Report, the Jones/Fay Reports, the Church Report, and the Mikolashek Report;
- Depositions with the authors of those four government reports;[14]

[14] CACI PT recognizes that prior to dismissing the case Judge Lee denied the motion to depose the report authors. CACI PT nonetheless intends to revisit this request based on the obvious relevance of the reports under the Fourth Circuit's new political question doctrine analysis and Judge Brinkema's caution that the parties should recognize that decisions made prior to her inheriting the case are essentially null and void. *See id.* at 9-10 ("[Y]ou're with a new judge now, and with all due respect to my colleague, I mean, I'm treating this case pretty much as it's starting with me, all right? . . . [J]ust because certain things were done or not done previously, don't assume that will be the case with me, all right?").

- Unredacted detainee files;
- Documents relating to any interrogation of any of the Plaintiffs, including but not limited to detainee interrogation logs, interrogation plans and any record of approval or disapproval of those plans, and reports of interrogation;
- Documents reflecting particular methods of interrogation or techniques used on any named Plaintiff and whether they were or were not approved;
- Any allegations of abuse or mistreatment made by any Plaintiff during his time at Abu Ghraib prison or elsewhere in the custody of the United States;
- Documents reflecting an investigation conducted by the United States of any Plaintiff;
- All documents reflecting "Lessons Learned," sensing sessions, Memoranda for Record (MFRs), or after-action reports (AARs) that relate to any Plaintiff;
- Any claims submitted to the United States by any Plaintiff seeking redress for injuries allegedly sustained in Iraq from 2003-2005;
- Documents relating to any investigation of any person employed by or affiliated with CACI PT with respect to any activity related to any Plaintiff.
- Documents relating to the United States' assessment of the lawfulness of the treatment of detainees at Abu Ghraib prison, including but not limited to the lawfulness of interrogation techniques approved for use at Abu Ghraib prison.

CACI PT has diligently pursued this discovery from the Government from the beginning of this case, but has thus far been thwarted from obtaining the discovery it needs to clear its name. Given the Fourth Circuit's mandate for an evidence-based assessment of CACI PT interrogators' conduct – if any – with respect to these Plaintiffs, Plaintiffs' admission that they do not allege any CACI PT personnel directly abused them, and the obvious need for CACI PT to be able to test the veracity of Plaintiffs' claims, the above evidence is critical and potentially dispositive. Moreover, the above-listed evidence will take on additional relevance in the likely event that CACI PT files a third party complaint against the Government and John Does representing the Government personnel Plaintiffs claim mistreated them.

C. Medical Exams for Plaintiffs Al Shimari and Al Zuba'e

Plaintiffs have alleged that they suffered severe physical and emotional injuries while in U.S. custody. But Plaintiffs' document production did not include a single record of treatment by a medical professional in the several years after their release from U.S. custody. Indeed, the documents provide no indication that Plaintiffs saw any medical professional other than their January 2013 visit with Plaintiffs' litigation medical expert.

Plaintiff Al Shimari said in his deposition that he saw a doctor for numbness in his hands and "the problem in my eye and my head." Al Shimari Dep. 112. According to Al Shimari, the doctor he saw told him the problems stemmed from his alleged mistreatment at Abu Ghraib. *Id.* There are, however, no records from any of these appointments and no other evidence corroborating this self-serving testimony. Further, there is no indication of when this appointment purportedly occurred.

Plaintiff Al Zuba'e claims that he continues to have injuries on his hand and wrist and "a spinning in my head" from his alleged mistreatment at Abu Ghraib. Al Zuba'e Dep. 117. He asserts he went to a doctor about the spinning in his head and obtained a medication for it. *Id.* There is, however, no indication that any doctor attributed the injuries he claims to any alleged mistreatment at Abu Ghraib and there are no records verifying any of the information to which he testified. *Id.* There is also no information about when this appointment purportedly occurred.

In other words, Plaintiffs Al Shimari and Al Zuba'e claim to have sought only minimal medical attention for the allegedly severe injuries they claim to have sustained while incarcerated at Abu Ghraib and there is no objective corroboration that they even did that much. The only medical evaluations of these Plaintiffs were drafted by a hired expert for litigation purposes. Moreover, those evaluations are replete with details of mistreatment and injuries that these Plaintiffs themselves did not corroborate during their depositions. To put it mildly, Plaintiffs'

alleged injuries and the conclusions of their litigation medical expert are in dispute. To effectively defend against these allegations, CACI PT must have an opportunity to have its own experts assess the Plaintiffs and the veracity of their claims. Moreover, it is patently unreasonable to require CACI PT to locate a medical expert willing to travel to the most unsafe parts of the world, where ISIS remains a significant threat and acts of terrorism are ubiquitous, in order to defend a case these Plaintiffs made the conscious choice to bring in this Court.

D. Rashid

Rashid is not a party in this case. He is a former Plaintiff. He did not appear in this District for a deposition and medical examination when ordered to do so in 2013. He did not comply with Judge Brinkema's order directing him to appear anywhere in the world for a videotaped deposition. At first, Plaintiffs' counsel advised, with no supporting evidence, that Rashid supposedly was located in a part of Iraq where he could not travel. Plaintiffs' counsel later advised, with no supporting evidence, that Rashid had been taken into custody by a sectarian militia. Plaintiffs' counsel later advised, again with no supporting evidence, that Rashid was incarcerated by the Iraqi government in Baghdad. Now, Plaintiffs' counsel advises that Rashid has been released by the Iraqi government, with no description of the circumstances of his arrest and detention. Judge Brinkema stated in open court that the argument for Rashid's reentry into the case would depend in part on the circumstances of his incarceration, as he would have no reasonable argument for the Court's indulgence "if he's been involved in some misconduct that would make that custody legitimate." 6/9/17 Tr. at 6.

At this point, there is nothing for the Court to do with respect to discovery involving Rashid. He is not a part of this case, and his claims are now time-barred. He does not appear to have discovery bearing on the current Plaintiffs' claims. If Rashid seeks to rejoin the case, CACI PT will oppose a request for such relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2017, 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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