

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

SUHAIL NAJIM ABDULLAH AL SHIMARI <i>et al.</i> , Plaintiffs,	)	
	)	
v.	)	Case No. 1:08-cv-827 (LMB/JFA)
	)	
CACI PREMIER TECHNOLOGY, INC. Defendant.	)	
	)	
	)	
	)	
	)	
CACI PREMIER TECHNOLOGY, INC., Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, and JOHN DOES 1-60, Third-Party Defendants.	)	
	)	
	)	
	)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANT CACI PREMIER  
TECHNOLOGY, INC.’S SUGGESTION OF LACK OF SUBJECT  
MATTER JURISDICTION BASED ON DERIVATIVE IMMUNITY**

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Plaintiffs respectfully submit this opposition to the motion by Defendant CACI Premier Technology, Inc. (“CACI”) to dismiss this case based on its suggestion that the Court lacks subject matter jurisdiction because of CACI’s purported derivative immunity.

### **PRELIMINARY STATEMENT**

This, CACI’s seventeenth dispositive motion, was filed one day after this Court denied dispositive motions number fourteen, Dkt. 1033 (summary judgment, in substantial part), number fifteen, Dkt. 1040 (seeking dismissal based on state secrets privilege), and number sixteen, Dkt. 1057 (ATS jurisdiction). CACI’s latest motion is foreclosed by the Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), precluding contractor immunity for unlawful conduct that violates federal law and government commands.

Nevertheless, CACI recycles a derivative sovereign immunity argument that it has lodged in various forms since 2008. *See Al Shimari v. CACI Premier Technology, Inc.*, 657 F.Supp. 2d 700, 714-20 (E.D. Va. 2009) (denying CACI’s motion to dismiss on grounds of “derivative absolute immunity” because of absence of discovery on the terms of the contract with the United States, but also expressing serious skepticism that the “public benefits obtained by granting immunity outweigh the costs” and the possibility of immunity under the limited doctrine of *Mangold v. Analytic Services*, 77 F.3d 1442 (4th Cir. 1996)); *Al Shimari v. CACI Int’l Inc.*, 679 F.3d 205, 218 (4th Cir. 2012) (en banc) (observing that “*Boyle*’s ‘government contractor defense does not confer sovereign immunity on contractors,’ and as such, the denial of the defense is not immediately appealable” under the collateral order doctrine); CACI Motion to Dismiss Based on State Secrets Privilege, at 26-27 (Dkt. 1042) (arguing that government’s invocation of state secrets privilege prevents CACI from fairly litigating its derivative sovereign immunity defense).

As constructed again here, CACI's argument is nothing short of derivative; it is derivative of virtually every defense CACI has asserted again and again in this litigation without avail: i.e., that CACI itself has not directly harmed any plaintiffs, CACI Br. at 2, 13 (Dkt. 1150); that it is entitled to the same privileges and immunities as the sovereign, (*id.* at 6-7); that the Federal Tort Claims Act "combatant activities" exception to the waiver of the government's sovereign immunity likewise immunizes CACI, (*id.* at 8); that CACI was fully integrated into the U.S. military chain of command, (*id.* at 12); and that Plaintiffs' treatment was fully authorized by the United States and otherwise not torture, (*id.* at 14). CACI concludes with the indecipherable observation that the government's not having brought criminal charges against CACI employees somehow "speaks volumes" – apparently about the U.S. government's desire to vest a contractor with the same immunity the government purportedly enjoys so as to categorically avoid liability in this civil case, even as the government has expressly argued that Plaintiffs' claims related to torture can proceed because they seek to vindicate an important national interest: the prohibition of torture. *See* Brief for the United States as Amicus Curiae at 22-23, 26, *Al Shimari v. CACI International, Inc.*, No. 09-1335 (4th Cir. Jan. 14, 2012) (Dkt. 146); *see also id.* at 21 (confirming that the Westfall Act "applies by its terms only to federal employees, not to government contractors").

CACI's rehash of these variegated defenses looks no better when viewed through the lens of derivative sovereign immunity. As with the substantively similar motion to dismiss on political question grounds, the Court's disposition of this motion is resolved by decisions of the Fourth Circuit and this Court. The Supreme Court has recently clarified that contractors do not enjoy coterminous immunity with the United States government and specifically held that derivative immunity is not available to contractors for violations of federal law. *Campbell-*

*Ewald Co.*, 136 S. Ct. at 672; *see also Cunningham v. Gen. Dynamics Info. Tech.*, 888 F.3d 640, 647 (4th Cir. 2018). This Court has already found numerous allegations – substantiated by correspondingly voluminous evidence – that CACI violated federal law by conspiring and aiding and abetting in conduct that amounted to torture; cruel, inhuman and degrading treatment (“CIDT”); and war crimes. That, too, resolves this motion.

In addition, there is not a shred of evidence in the record that military officials demanded that CACI order MP co-conspirators, including several who were court martialed for the acts in furtherance of the conspiracy, to “soften up” detainees outside of interrogations. That would indeed be odd, since the governing contract between CACI and the United States prohibited mistreatment of detainees and because the abuses Plaintiffs endured, which this Court already found constituted torture – were outlawed by the Geneva Conventions, the governing Rules of Engagement and the contract between CACI and the United States. Indeed, as the Fourth Circuit has stressed, the U.S. military could not validly confer authority to subject detainees to abuses that Congress and international law expressly proscribe. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016) (*Al Shimari IV*).

If CACI’s legal arguments were not misguided enough, the morality of the dystopian corporate-immunity proposition it advances is more troubling. CACI is not the sovereign. Unlike the United States government and its officials, including military personnel, CACI bears zero sovereign responsibilities. Its reason for existence is to serve one singular purpose: profit; failing that, it ceases. It is accountable to no one other than undifferentiated shareholders; it bears no public trust or electoral accountability, let alone accountability to the Uniform Code of Military Justice or a military chain of command. When the Abu Ghraib scandal developed and outraged the public, President Bush, Secretary of Defense Rumsfeld, Congress and the military

responded by condemning the conduct and demanding accountability for its victims. CACI went about doing an internal “investigation” to render a self-serving narrative for its shareholders in the form of a book written by its chairman, *Our Good Name: A Company’s Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib*.<sup>1</sup>

It is outlandish for this multi-billion dollar corporation to complain, in a suit seeking justice for three individuals who suffered from CACI’s role in one of the worst scandals in modern American history, that it may be left “holding the bag.” In fact, CACI got the benefit of the bargain it – and its shareholders – sought: it was paid millions of dollars from the United States for its work on a contract; and it seeks to pass the bag to several of CACI’s co-conspirators who spent time in a military brig for their concerted conduct. This Court, the Fourth Circuit and even the United States government have recognized that all of the factual and legal circumstances surrounding this case mandate the availability of judicial process. The Court is correct to embrace its role as a forum for accountability for grave injustices.

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<sup>1</sup> CACI certainly sees no concern when it is the party seeking the privilege of litigation, having unsuccessfully sued a radio host for stating CACI engaged in torture at Abu Ghraib. *CACI Premier Tech., Inc. v. Randi Rhodes & Piquant, LLC*, 2006 U.S. Dist. LEXIS 96057 (E.D. Va. Sept. 21, 2006), *aff’d*, 536 F.3d 280 (4th Cir.2008). As this Court earlier observed, it is “ironic” for CACI to claim a case cannot proceed because of a generalized “fog of war,” even as it saw “only clear skies when it conducted discovery to develop its defamation case.” *Al Shimari*, 657 F. Supp. 2d at 711.



## ARGUMENT

### **I. BECAUSE THIS COURT HAS ALREADY FOUND EVIDENCE SUFFICIENT TO SHOW CACI VIOLATED FEDERAL LAW, CACI IS NOT ENTITLED TO THE IMMUNITY OF THE SOVEREIGN.**

#### **A. CACI's Unlawful Conduct Is Not Subject to Derivative Sovereign Immunity**

CACI proceeds from the unsupportable premise that it enjoys an immunity that is interchangeable with the United States government's sovereign immunity. CACI Br. at 6-7 (“[T]he relevant question for purposes of derivative sovereign immunity is whether the United States would have sovereign immunity for Plaintiffs’ ATS claims if they had been brought against the United States instead of CACI PT.”). This premise is false. The Supreme Court recently stressed that contractor immunity, “unlike the sovereign’s, is not absolute.” *Campbell-Ewald Co.*, 136 S. Ct. at 672. Indeed, there is “no authority for the notion that private persons performing Government work acquire the Government’s embracive immunity.” *Id.* Accordingly, derivative sovereign immunity does not “shield[] the contractor from suit” if the “contractor violates both federal law and the government’s explicit instructions.” *Id.*; accord *Cunningham*, 888 F.3d at 647 (same).

This elementary principle maps with a proper understanding of what is justiciable under the political question doctrine, that is: “any acts of the CACI employees that were unlawful when committed, irrespective of whether they occurred under actual control of the military, are subject to judicial review.” *Al Shimari IV*, 840 F.3d at 159. This Court has already determined that CACI’s acts of conspiracy and aiding and abetting the torture; CIDT; and war crimes Plaintiffs endured – supported by hundreds of pages of evidence submitted in support of Plaintiffs’ opposition to CACI’s motion for summary judgment – violates federal law. As with the political question doctrine, this should dispose of CACI’s derivative sovereign immunity defense.

**B. CACI Was Not Directed by the Government or Its Contract to Torture and Abuse Detainees**

CACI does not attempt to argue that the government gave it “explicit instructions,” *Campbell-Ewald*, 136 S. Ct. at 672, to undertake the conduct this Court found unlawful, i.e., to coordinate with military police (some of whom the government court martialled) to abuse detainees. Nor could they. The evidence the Court has already reviewed shows that the instructions to abuse detainees – especially outside of interrogations – came as a result of a “command vacuum” at Abu Ghraib, which permitted CACI and other Military Intelligence personnel to assume positions of authority, and in the closed confines of Tier 1A, order MPs to “set the conditions” for abuse of detainees, typically outside formal interrogations. *See* Pltfs.’ Opp. to Summary Judgment at 6-11(Dkt. 1090). Steve Stefanowicz ordered Ivan Frederick to abuse detainees, not the other way around.

CACI points to general terms of its contract with the government and offers this circular, self-serving conclusion: “CACI acted precisely as directed – it provided interrogation personnel to the Army chain of command in Iraq so they could operate under the command and control of the U.S. Army,” CACI Br. at 11. CACI then walks through the contract terms at a high level of generality to say it did, in fact, supply contractors who worked under the formal control of the military. *Id.* at 12. But, this is just another way of relitigating the legality of their conduct – an issue that was fully aired in the summary judgment motion already decided,<sup>2</sup> and the Court has already rejected this identical attempt to evade responsibility for its role in unlawful activity.

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<sup>2</sup> CACI continues to operate in defiance of the Court’s instructions not to file motions *seriatim*. Given the obvious overlap with both their political question motion and the summary judgment motion, there is no reason CACI could not have asserted derivative sovereign immunity all together with these, as one omnibus motion.

Critically, moreover, CACI's contract with the government in fact did not regulate every jot and tittle of CACI's work; it granted CACI substantial discretion to carry out the contract's broad parameters. The contract recognized CACI's "function[] as resident experts" in interrogation matters, ¶ 3; directed CACI employees to "supervise, coordinate and monitor all aspects of interrogation activities, ¶ 3; and stipulated that CACI "is responsible for providing supervision for all contractor personnel," ¶ 5. LoBue Decl. Ex. 33 at CACI 0005 (Dkt. 1090-1); *accord* LoBue Decl. Ex. 40 at 1-7 (Dkt. 1086-17) ("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.").

Yet the contract contains one critical requirement that limits the grant of discretion to CACI: lawful conduct. It expressly required CACI's employees to conduct themselves "[in accordance with] Department of Defense, U.S. Civil Code, and International Regulations." LoBue Decl. Ex. 33 ¶ 4 (Dkt. 1090). This Court has already held that Defense Department regulations, the U.S. Code and international law all prohibit the torture and mistreatment of detainees that occurred here.

Thus, pursuant to *Campbell-Ewald Co.* and also *Yearsley*, when an agent of the government "exceeded [its] authority," it is not entitled to sovereign immunity. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *see also Campbell-Ewald Co.*, 136 S. Ct. at 673 n.7 (stressing that immunity was available in *Yearsley* because the "contractors performance was in

compliance with *all* federal directions” (emphasis added)).<sup>3</sup> Alternatively, if CACI wishes to argue that its biggest client, the United States military and its generals, gave CACI “explicit instructions” to engage in numerous acts of “sadistic, blatant and wanton criminal abuses” that were inflicted on detainees, LoBue Decl. Ex. 27 at AS-USA-007255 (Dkt. 1086), it should more directly state what those explicit instructions were. Until then, derivative sovereign immunity is unavailable.

The Defense Department has, accordingly, warned contractors that they are subject to the traditional rules of civil liability for misconduct and cannot normally claim sovereign immunity. *See* 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); *see also* 48 CFR § 52.247-21(a) (“The Contractor assumes responsibility for all damage or injury to persons or property occasioned through . . . the action of the Contractor or the contractor’s employees and agents.”).

To be clear, because CACI violated federal law and the terms of its government contract by engaging in the unlawful conduct this Court has already attributed to it, CACI is not entitled to derivative sovereign immunity. But it is also worth noting that CACI cannot properly claim the authority that is the subject of the immunity was “validly conferred.” CACI argues that the only kind of conferral from the contract that must be valid, is congressional authorization to enter

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<sup>3</sup> This case is thus unlike *Butters v. Vance International, Inc.*, 225 F.3d 462, 467 (4th Cir. 2000), as the contractor’s illegal conduct there was *specifically* ordered by the Saudi government, which had hired a private security contractor for a royal family visit instead of the more qualified Butters. Discovery revealed that the Saudi government directed the contractor to place a man as head of the security detail rather than the more qualified Butters. Had the contractor made the direct hiring decision on its own, immunity would not have been available. *Id.* at 467.

the contract, and because Congress authorized federal agencies to generally enter into contract such as the one at issue, CACI was acting with the valid authority of the government and can stand in its shoes. This cannot be the standard. Congress may authorize the creation of contracts, but Congress cannot authorize contracts that would immunize clear violations of law. As Judge Agee explained in his concurrence, “it is beyond the power of even the President to declare such conduct lawful.” *Al Shimari IV*, 840 F.3d at 162. At the core of a grant of public immunity is the need to ensure that “the public benefits obtained by granting immunity outweigh [the] costs.” *Mangold*, 77 F.3d at 1446 (citing *Westfall v. Ervin*, 484 U.S. 292, 296 n.3 (1988)).<sup>4</sup> Granting CACI immunity under a theory that the United States could validly confer authority to inflict torture would tip that balance too far away from the public interest.

CACI’s reliance on *Filarksy v. Delta*, 566 U.S. 377 (2012), is unavailing. That case considered whether a private attorney retained temporarily as an investigator by a municipality is entitled to a defense of qualified immunity under Section 1983, for performing the same discretionary function as a government prosecutor. *Id.* at 380-82. CACI is not asking for *qualified* immunity for individual officials which is, by its own terms, limited; it is asking for the absolute immunity of the sovereign. But the doctrine of qualified immunity “is bounded in a way that . . . ‘derivative immunity’ . . . is not.” *Campbell-Ewald*, 136 S. Ct. at 673. An entity is not entitled to qualified immunity for violations of law that are “clearly established,” *id.*, and the decisions of the Fourth Circuit and this Court demonstrate that the *jus cogens* prohibitions on torture and war crimes are certainly established.

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<sup>4</sup> See *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 716 (E.D. Va. 2009) (finding “the limited *Mangold* extension inapplicable to the present case”).

**C. Equating CACI with the Sovereign Raises Significant Policy Concerns**

There are obvious reasons that CACI is not entitled to commensurate immunity conferred on the sovereign. CACI is not a sovereign entity. It bears no public responsibility nor is it accountable to any chain of command or electoral constituency that could otherwise remediate wrongdoing outside of a judicial process. All members of the U.S. Armed Forces adhere to a strict chain of command: at the top, they are answerable to civilian authority via Congressional declaration-of-war powers and the President as Commander-in-Chief; toward the bottom, they are subject to an elaborate system of training and discipline that obliges them to follow orders upon pain of punishment or discharge. Overall, the military imposes a unique “hierarchical structure of discipline and obedience to command . . . wholly different from civilian patterns,” that ensures that combatant activities are performed in accordance with the laws of war.

*Chappell v. Wallace*, 462 U.S. 296, 300 (1983). At the same time, the principle of command responsibility represents the “legal and ethical obligation a commander assumes for the actions, accomplishments, or failures of a unit.” U.S. Dep’t of the Army, *Field Manual 101-5: Staff Organization and Operations*, 1-1 (May 31, 1997), available at <https://www.globalsecurity.org/military/library/policy/army/fm/101-5/f540.pdf>.

Thus, unlike contractors, soldiers are subject to discipline and punishment under the Uniform Code of Military Justice (“UCMJ”), art. 90, 10 U.S.C. § 890. Eleven of the soldiers – including several of the CACI co-conspirators who were involved in abuse of detainees at Abu Ghraib – were convicted of crimes under the UCMJ and 251 officers and soldiers were punished in some manner for mistreating prisoners. Eric Schmitt & Kate Zernicke, *Abuse Convictions in the Abu Ghraib Prison Abuse Cases, Ordered by Date*, N.Y. Times, Mar. 22, 2006; Eric Schmitt, *Iraq Abuse Trial is Again Limited to Lower Ranks*, N.Y. Times, Mar. 23, 2006. CACI is not

subject to the UCMJ or military discipline.<sup>5</sup> It is accountable only to the terms of the contract, upon which it was already paid.

By facing the civilian liability the military itself contemplated for contractors that violate the law and the terms of their contracts, CACI is not left “holding the bag.” Far from it. To permit CACI to evade the only accountability possible for its conduct – civil legal accountability – would in fact leave CACI’s co-conspirators who served time in a military brig, “holding the bag.” Especially given the evidence of CACI’s rush to fill Iraq with any interrogator bodies, its poor hiring and training practices, and its decision to promote abusive interrogators,<sup>6</sup> this Court has recognized the value of civil liability in a case like this, “because the threat of tort liability creates incentives for government contractors engaged in service contractors at all levels of government to comply with their contractual obligations to screen, train and manage employees.” *Al Shimari*, 657 F.Supp. 2d at 722-23 (citing *Richardson v. McKnight*, 521 U.S. 399, 409 (1997)). Thus, liability in this case “will advance the federal interest in low cost, high quality contractors by forcing CACI to ‘face threats of replacement by other firms with records that demonstrate their ability to do both a safer and more effective job’.” *Id.* at 723 (quoting *Richardson*, 521 U.S. at 409).

## CONCLUSION

For all of the foregoing reasons, CACI’s motion to dismiss should be denied.

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<sup>5</sup> While the Military Extraterritorial Jurisdiction Act (“MEJA”), 18 U.S.C. § 3261, authorizes limited criminal prosecutions for civilians serving abroad, it has not been used by U.S. prosecutors to address abuses at Abu Ghraib. *See* LoBue Decl. Ex. 28 at 130-134 (Dkt. 1086).

<sup>6</sup> *See* Pltfs.’ Opp. to Summary Judgment at 3-17 (Dkt. 1090) (describing how (1) Tim Dugan, Steve Stefanowicz, and Dan Johnson were hired without any interrogation experience, (2) CACI provided no training to interrogators, and (3) CACI promoted Stefanowicz and other interrogators to positions of authority with greater pay). This kind of “business” should not be rewarded with impunity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2019, I electronically filed Plaintiffs' Opposition to Defendant's Suggestion of Lack of Subject Matter Jurisdiction through the CM/ECF system, which sends notification to counsel for Defendants and the United States.

/s/ John Kenneth Zwerling  
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