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-827 (LMB/JFA)
v.	)	
CACI PREMIER TECHNOLOGY, INC.,	)	
Defendant.	)	

[PROPOSED] BRIEF OF EXPERTS IN MILITARY LAW AND POLICY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION *IN LIMINE* REGARDING THE BORROWED SERVANT DEFENSE

Plaintiffs have moved *in limine* against Defendants' use of the borrowed servant defense. Dkt. 1718-1. As Plaintiffs demonstrate in their Motion, federal law at the time of the Abu Ghraib scandal explicitly excluded contractors from the chain of military command, and require a contractor to undertake the full supervision of its own employees. *Id.* at 7-13. As experts in military law and policy, *amici* offer this brief to explain *why* this exclusion is so vitally important to the United States military, and given this critical federal interest, to urge the Court to exclude the borrowed servant defense as a matter of law.[1]

INTEREST OF *AMICI*

Amici are a diverse collection of experts in military law and policy. Included among them are former service legal counsel, former military judge advocates, private

[1]Plaintiffs have consented to the filing of this brief; Defendant has not. No party has made a monetary contribution to its preparation or filing.

practitioners, and legal scholars. They believe this brief is necessary because it provides a perspective on the case not presented by the or any anticipated *amici*.

Alberto Mora served as General Counsel of the Department of the Navy from 2001 to 2006. The John F. Kennedy Library Foundation awarded him the Profile in Courage Award in 2006 for his opposition, while serving as Navy General Counsel, to the U.S. use of torture as a weapon of war in the post-9/11 period. More recently, Mora served as the American Bar Association's Associate Executive Director for Global Affairs and Director of the ABA Rule of Law Initiative.

Professor Rachel E. VanLandingham is the Irwin R. Buchalter Professor of Law and Co-Associate Dean for Research at Southwestern Law School, Los Angeles, California where she currently teaches criminal law, criminal procedure, international humanitarian law and national security law. Prior to teaching, Prof. VanLandingham was on active duty in the U.S. Air Force for 24 years, including more than a decade as a Judge Advocate, with tours focusing on both criminal law as well as the law of armed conflict. As the legal advisor for international law at Headquarters, U.S. Central Command, she advised on operational and international legal issues related to the armed conflicts in Afghanistan and Iraq; she was also the command's first formal liaison officer to the International Committee of The Red Cross. After leaving active duty Professor VanLandingham led the National Institute of Military Justice, the only non-profit dedicated to the fair administration of U.S. military justice, and currently serves on its board of directors. She is a co-editor of the military criminal law casebook Military Justice: Cases and Materials, 3rd ed. Professor VanLandingham is also the author of numerous law review articles regarding military criminal law and international humanitarian law.

Brenner M. Fissell is a Professor of Law at Villanova University, where he teaches courses on Military Law and National Security Law, The Class of 1964 Fellow at the U.S. Naval Academy, and Co-Editor of CAAFlog. He served as an attorney-advisor for Chief Judge Scott Stucky of the U.S. Court of Appeals for the Armed Forces and as a GS-15 appellate defense counsel at the Guantanamo Bay Military Commissions. He is Vice-President of the National Institute for Military Justice.

Michel Paradis is a leading military justice practitioner and national security scholar. He is a Lecturer at Columbia Law School, where he teaches courses in the Jurisprudence of War and the Military and the Constitution, while writing in the area of national security and international law. He is the author of several books on US military history, including the critically-acclaimed *Last Mission to Tokyo* (Simon & Schuster 2020), about war crimes trials in the Pacific after World War II. His most recent book is the critically-acclaimed, *The Light of Battle: Eisenhower, D-Day, and the Birth of the American Superpower* (HarperCollins 2024). He is a fellow at the Center on National Security and the National Institute for Military Justice.

Jonathan Hafetz is a Professor of Law at Seton Hall Law School and an internationally recognized scholar of constitutional law and international criminal law. He has written numerous books and scholarly articles about constitutional law, international humanitarian law, and military law, including P*unishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge Univ. Press 2018), and *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (NYU Press 2011), which received the American Bar Association's Silver Gavel Award for Media and the Arts.

ARGUMENT

DEFENDANT'S USE OF THE BORROWED SERVANT DOCTRINE UPENDS MILITARY LAW AND POLICY AND SHOULD BE EXCLUDED AS A MATTER OF LAW

a. Defendant's Argument Offends the Foundational Military Principle That Contractors Cannot Be Treated as Soldiers and Be Subjected to Military Commands

Though Plaintiffs recite the relevant regulations, it is important to underscore just how plainly the military has spoken in this matter. At the time of the Abu Ghraib scandal, Army Regulation 715-9, for instance, provided that "[c]ontracted support service personnel **shall not be supervised or directed** by military or Department of the Army (DA) civilian personnel." Likewise, "[t]he commercial firm(s) providing battlefield support services will perform the necessary supervisory and management functions of their employees," and not the military. "Contractor employees are not under the direct supervision of military personnel in the chain of command." U.S. Dep't of the Army, Reg. 715- 9, Contractors Accompanying the Force (1999), Secs. 3-3(b); 3-2(f) (emphasis added).

In the same way, the 2003 Army Field Manual insisted that **"[o]nly the contractor can directly supervise its employees**," and that "[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command." U.S. Dep't of the Army, Field Manual 3- 100.21 (100-21), Contractors on the Battlefield (2003), Secs. 1-25, 1-22. "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**." *Id* (emphasis added); *see also* U.S. Dep't of the Army, Field Manual 3-100.21 (100-21), Contractors on the Battlefield (2003), Sec. 4-45.

("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command. The contractor, through company policies, has the most immediate influence in dealing with infractions involving its employees. It is the contractor who must take direct responsibility and action for his employee's conduct").

And though much has changed since Abu Ghraib, the Department of Defense continues to maintain that commanders in the field have "no direct contractual relationship with or authority over the contractor." The contractor, and not the military, "is responsible for disciplining contingency contractor personnel." Even in a life-threatening emergency "(e.g. enemy or terrorist actions or natural disaster)", the ranking military commander in the field can do no more than "urgently recommend or issue warnings or messages urging that [contractors] take emergency actions to remove themselves from harm's way." U.S. Dep't of Def., Instruction No. 3020.41, Operational Contractor Support at ¶ 4.d (2018).

All of this is no mere accident of drafting. Rather, it reflects a vital principle of military life. This principle can be expressed in a number of ways, but at its core, it is as simple as it is critical: contractors do not wear the uniform of the United States military. To a soldier, this is no small thing. Unlike an American soldier, contractors have not taken an oath to protect and defend the United States Constitution. They have not willingly chosen to fight, and perhaps to die, for their country. Without taking anything away from the valuable service contractors provide, sometimes under very trying circumstances, the fact is that a contractor is not in the military chain of command. They perform services that help the U.S. military accomplish its mission, but they are not members of the armed forces, with all its attendant responsibilities and consequences.

For that reason, as a matter of military law and policy, contractors must always be supervised, regulated, and disciplined by their civilian employers, who alone must have complete responsibility for what their employees do.

This foundational principle—*viz.*, that a contractor is not a soldier subject to a chain of command—laces throughout U.S. military regulations. But more than that, it is how the military has internalized and given expression to a long line of Supreme Court jurisprudence. In a line of cases that stretches back more than a century and a half, the Court has repeatedly held that military jurisdiction depends on "the military status of the accused." *Solorio v. United States*, 483 U.S. 435, 439 (1987) (collecting cases). Just as a civilian is not a soldier, a civilian may not be subject to court martial, at least so long as the civilian courts are open and functioning. *See, e.g., Kinsella v. United States ex rel. Singleton, 361 U.S. 234*, 240-41 (1960); *Reid v. Covert, 354 U.S. 1, 22-23 (1957)* (plurality opinion); *Grafton v. United States, 206 U.S. 333*, 348 (1907); *Ex Parte Milligan*, 4 Wall. 2, 71 U.S. 123 (1866).

By the time of the Abu Ghraib scandal, the military had thoroughly absorbed the lesson of this jurisprudence: soldiers were subject to court martial, but civilians were not. Indeed, the military personnel found to have committed atrocities at Abu Ghraib were subject to discipline under the UCMJ, which included a court martial and term of imprisonment. Private contractors such as Defendant, who are alleged to have conspired with these same military personnel, were categorically exempted from that UCMJ process, and thus must be held accountable by some other vehicle, including via the civil tort litigation in this case. *See Al Shimari v. CACI Int'l*, No. 09-1335 (4th Cir. Dec. 20, 2011), Br. Am. Cur. Retired Military Officers at 24-26 (explaining that private tort law is

appropriate vehicle to regulate contractor misconduct, as reflected in Defense Department regulations).

Finally, the principle that a contractor cannot be in the military chain of command or otherwise subject to military command is vital to the laws of war. Though international humanitarian law can be maddeningly complex, at least one thing is clear: in an international armed conflict, soldiers who comply with the laws of war enjoy the combatant's privilege, which provides prosecutorial immunity for lawful acts of war. Contractors, however, do not enjoy this privilege because they are civilians, not combatants. They are not entitled to wield force, even if such use of force is otherwise in compliance with the law of war. While contractors may accompany the armed forces, this is a far cry from the relationship of direct control that exists within the U.S. military. Accordingly, compliance with the architecture and the fundamental protections of the laws of war mandates a strict separation of civilians from military control–an interest the foregoing federal regulations and policies also endeavors to protect.

The United States military goes to great lengths to preserve and protect the law of war distinction between soldiers and contractors. Thus, the military carefully limits what contractors can do, precisely so that they are not conflated with combatants. In addition to the regulations requiring contractor supervision of its own employees, cited above and in Plaintiffs' brief, the military specifically prohibits contractors from carrying a weapon except for "individual self-defense," which excludes contractors from combat operations. U.S. Dep't of Def., Instruction No. 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces at ¶ 6.3.4.1 (2005); *id.*, Operational Contractor Support at ¶ 4.e.2 (2018). The military also bars contractors from wearing the uniform of the U.S. military, which prevents confusion with U.S. soldiers. *Id.* at ¶

6.2.7.7 (2005); *id.*, Operational Contractor Support at ¶ 3.j (2018). And of course, the military prohibits contractors from commanding military forces, "especially the leadership of military personnel who are members of the combat, combat support, or combat service support role," which ensures that no soldier is ever subject to the command of a person who may not be trained in the laws of war. 48 C.F.R. 7, Federal Acquisition Regulation, Subpart 7.5—Inherently Governmental Functions at ¶ 7.503 (c)(3) (1996, 2024); *see also* U.S. Joint Publication (JP) 4-0, Doctrine For Logistics Support of Joint Operations, Contractors In The Theater (Apr. 2000), ch, V., para. l.d) ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants").

In sum, there is a reason the regulations of the United States military clearly separate contractors from soldiers. When civilians join the armed forces, they assume a burden and responsibility that no contractor bears. This distinction means a great deal to the United States military. Contractors are important, but they are not soldiers and accordingly cannot be subject to military command. *Amici* strongly urge this Court to reject any argument that blurs this elemental distinction.

b. Defendant's Argument Contemplates a Legal Impossibility and Moral Obscenity—That the Military Could Order the Violation of a *Jus Cogens* Norm

Even if the military regulations did not rigorously separate contractors from soldiers, and even if this separation were not compelled by the Constitution, the laws of war, and military policy, CACI's borrowed servant defense would still fail as a matter of law. No soldier may order another to commit torture, and CACI cannot hide behind an illegal order to excuse its conduct.

The U.S. military is entirely a creature of the Constitution, laws and regulations of the United States. It simply has no life separate from the law. For that reason, the military has neither the power nor the authority to order an illegal act, much less a violation of a *jus cogens* norm. If a commander were to order a subordinate to torture a prisoner, the order would be void the moment it left their lips. Under the law, their subordinate would have the right and the obligation to disobey it. And just as the military cannot order its own soldiers to torture a prisoner, it cannot order or direct a contractor to do the same. The order would be void the moment it was uttered, and under the terms of the contract, the contractor would have the right and the obligation to disobey it. Or, as Plaintiffs say in their Motion, just as the prohibition on torture is non-derogable, it is also non-delegable. Plaintiffs' Motion *in Limine,* Dkt. 1718-1 at 5. If Defendant's employees tortured prisoners at Abu Ghraib, they acted without authority or excuse, and in violation of the law.

But this is not simply the view of *amici*. It is the necessary implication of prior holdings in this case. At a prior stage of this litigation, the Court recognized that the prohibition against torture is among those few "fundamental human rights laws" to "have achieved the status of a *jus cogens*." *Al Shimari, et al. v. CACI Premier Tech, Inc.*, 368 F. Supp. 3d 935, 956 (E. D. Va. 2019) (internal citations omitted). Torture and cruel, inhuman or degrading treatment ("CIDT") are prohibited by international treaty, customary international law, international humanitarian law and federal criminal law, as well as the regulations governing every branch of the armed services. Befitting this status, the United States government itself has taken the position that, when a contractor has tortured a prisoner, there is a "strong federal interest[] ... in providing a basis for holding the contractor accountable for its conduct." *Al Shimari, et al. v. CACI*

Premier Tech, Inc., Brief for the United States as *Amicus Curiae* at 22, Appeal No. 09-1335, Dkt. No. 146 (4th Cir. Jan. 14, 2012); *see also Al Shimari*, 368 F. Supp. 3d at 959 ("Once it is determined that *jus cogens* violations infringe on federal rights, it becomes clear that there must be a remedy available to the victims.")

Yet CACI invokes the borrowed servant doctrine precisely in order to frustrate this federal interest and escape this accountability. It argues that the military directed CACI employees to engage in torture or CIDT. But as the Fourth Circuit has already recognized, "the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity." *Al Shimari, et al. v. CACI Premier Tech., Inc.*, 840 F.3d 147, 157 (4th Cir. 2016). To accept CACI's argument is to imagine that it can evade responsibility for the violation of a *jus cogens* norm because the military unlawfully ordered it to do so. But no member of the military may order someone to violate the laws of war, much less a *jus cogen* norm, and "when a contractor has engaged in [torture], irrespective of the nature of control exercised by the military, the contractor cannot claim protection" under the common law. *Id.*

CONCLUSION

Under military law and policy, military commanders are strictly prohibited from treating civilians, including contractors, as subordinates. There is a reason why civilian contractors are not the servants of the military, borrowed or otherwise, and the Court should reject Defendant's borrowed servant defense as a matter of law.

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Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, with the understanding that the Clerk will send notification of such filing (NEF) to all counsel of record.

//s// Victor M. Glasberg
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