APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1328

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs – Appellees,

and

TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant and Third-Party Plaintiff – Appellant,

and

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

Defendants,

v.

UNITED STATES OF AMERICA; JOHN DOES 1-60,

Third-Party Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae,

THE CENTER FOR JUSTICE AND ACCOUNTABILITY; RETIRED MILITARY OFFICERS; EARTHRIGHTS INTERNATIONAL,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:08-cv-00827-LMB-JFA)

Argued: July 10, 2019 Decided: August 23, 2019

Before FLOYD, THACKER, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished opinion. Judge Floyd wrote the opinion, in which Judge Thacker joined in full. Judge Quattlebaum wrote a separate opinion concurring in the judgment.

ARGUED: John Frederick O'Connor, STEPTOE & JOHNSON LLP, Washington, D.C., for Appellant. Baher Azmy, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Appellees. H. Thomas Byron, III, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus

Curiae. **ON BRIEF:** Linda C. Bailey, Molly B. Fox, STEPTOE & JOHNSON LLP, Washington, D.C.; William D. Dolan, III, LAW OFFICES OF WILLIAM D. DOLAN, III, PC, Tysons Corner, Virginia, for Appellant. Katherine Gallagher, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Jeena Shah, CUNY SCHOOL OF LAW, Long Island City, New York; Peter A. Nelson, Matthew Funk, Jared S. Buszin, Jeffrey C. Skinner, PATTERSON BELKNAP WEBB & TYLER LLP, New York, New York; Shereef Hadi Akeel, AKEEL & VALENTINE, P.C., Troy, Michigan, for Appellees. Joseph H. Hunt, Assistant Attorney General, Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; G. Zachary Terwilliger, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Amicus Curiae United States of America. Daniel McLaughlin, Carmen Cheung, Elzbieta T. Matthew, THE CENTER FOR JUSTICE & ACCOUNTABILITY, San Francisco, California, for Amicus The Center for Justice & Accountability. Lawrence S. Lustberg, GIBBONS P.C., Newark, New Jersey, for Amicus Retired Military Officers. Marco B. Simons, Michelle C. Harrison, EARTHRIGHTS INTERNATIONAL, Washington, D.C., for Amicus EarthRights International.

Unpublished opinions are not binding precedent in this circuit.

FLOYD, Circuit Judge:

Plaintiffs are Iraqi citizens who allege that they were tortured while detained at Abu Ghraib. Defendant CACI Premier Technology, Inc. (CACI) is a U.S. government contractor that provided civilian interrogators at Abu Ghraib. Plaintiffs allege that CACI interrogators abused them—or conspired in or aided and abetted their abuse—in ways amounting to torture and other war crimes. In this interlocutory appeal, CACI asks us to reverse the district court's order denying it derivative sovereign immunity.

We dismiss because we lack jurisdiction. This conclusion follows from the reasoning of a prior en banc decision in which we dismissed CACI's interlocutory appeal from the district court's denial of similar defenses. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 213 (4th Cir. 2012) (en banc). As relevant here, we explained that "fully developed rulings" denying "sovereign immunity (or derivative claims thereof) may not" be immediately appealable. *Al Shimari*, 679 F.3d at 217 n.3. Indeed, we have never held, and the United States government does not argue, that a denial of sovereign immunity or derivative sovereign immunity is immediately reviewable on interlocutory appeal.

But even if a denial of derivative sovereign immunity may be immediately appealable, our review is barred here because there remain continuing disputes

of material fact with respect to CACI's derivative sovereign immunity defenses.[*] *See id.* at 221 (distinguishing between the interlocutory appealability of immunity denials premised on "fact-based" versus "abstract" issues of law and noting that only the latter supply a proper foundation for immediate appeal). Below, the district court concluded that even if the United States were entitled to sovereign immunity, "it is not at all clear that CACI would be extended the same immunity" due to continuing factual disputes regarding whether CACI violated the law or its contract. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 970 (E.D. Va. 2019). The district court also denied CACI's motion for summary judgment on plaintiffs' ATS claims based on evidence showing "material issues of fact that are in dispute," J.A. 2238–50, and these factual disputes are substantially related, if not identical, to the elements of CACI's derivative sovereign immunity defense. Given these continuing factual disputes, this appeal does not turn on an abstract question of law and is not properly before us.

For these reasons, this appeal is

DISMISSED.

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[*] Even if we assumed that our jurisdiction would permit us to determine whether CACI would be entitled to derivative sovereign immunity if the plaintiffs succeeded in proving their factual allegations, we would not, and do not, have jurisdiction over a claim that the plaintiffs have not presented enough evidence to prove their version of events. *Id.* at 221.

QUATTLEBAUM, Circuit Judge, concurring in judgment:

The order appealed involves important issues with potentially far-reaching implications. Despite that, our precedent compels me to join the judgment of the Court. In *Al Shimari v. CACI International, Inc.*, our Court, sitting en banc, determined that the only potential basis for interlocutory appeal here would be an appeal from an order on derivative sovereign immunity that involves an abstract issue of law. *Al Shimari v. CACI Int'l., Inc*., 679 F.3d 205, 220–22 (4th Cir. 2012) (en banc). CACI insists we have such a situation and argues plaintiffs present no evidence representatives of CACI engaged in any of the alleged improper conduct as to these plaintiffs. But from my review of the record, I cannot reach that conclusion as a matter of law. Therefore, I agree the requirements for us to exercise appellate jurisdiction for an interlocutory appeal are lacking.

However, I write separately because in contrast to the majority's reading of the case, *Al-Shimari* explicitly held that the denial of derivative sovereign immunity may be appealable if the appeal involves an "abstract issue of law" or a "purely legal question." 679 F.3d at 221–22. We as a panel do not have the authority to alter that previous conclusion.

Yet despite this disagreement, being bound by our precedent, I concur with the majority's judgment. But I do so only reluctantly. Our narrow interpretation of the collateral order doctrine in this case has taken us down a dangerous road. This proceeding has allowed discovery into sensitive military judgments and wartime activities. It has also opened the door to an order

that the United States has no sovereign immunity for claims that our military activities violated international norms—whatever those are. These may seem like minor inconveniences given the conduct at issue has been uniformly condemned and because the defendant here is a private contractor. But while we have no jurisdiction to address them now, the implications from these proceedings are potentially quite significant. We will see whether this case progresses to a point where we have jurisdiction to address the important questions it raises.

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1831

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

Plaintiffs – Appellants,

and

SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiff,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant – Appellee,

and

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

Defendants.

PROFESSORS OF CONSTITUTIONAL LAW AND FEDERAL COURTS; JUAN E. MENDEZ, U.N. SPECIAL RAPPORTEUR ON TORTURE; RETIRED

MILITARY OFFICERS; AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMNESTY INTERNATIONAL, AND HUMAN RIGHTS WATCH; ALBERTO MORA, FORMER GENERAL COUNSEL, U.S. DEPARTMENT OF THE NAVY; ABUKAR HASSAN AHMED, DR. JUAN ROMAGOZA ARCE, ZITA CABELLO, AZIZ MOHAMED DERIA, CARLOS MAURICIO, GLORIA REYES, OSCAR REYES, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ, AND BASHE ABDI YOUSUF,

Amici Supporting Appellants,

PROFESSIONAL SERVICES COUNCIL – THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY; COALITION FOR GOVERNMENT PROCUREMENT; KBR, INC.,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:08-cv-00827-GBL-JFA)

Argued: May 12, 2016 Decided: October 21, 2016

Before KEENAN, FLOYD, and THACKER, Circuit Judges.

Vacated and remanded by published opinion. Judge Keenan wrote the opinion, in which Judge Floyd and

Judge Thacker joined. Judge Floyd wrote a separate concurring opinion.

ARGUED: Baher Azmy, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Appellants. John Frederick O'Connor, Jr., STEPTOE & JOHNSON, LLP, Washington, D.C., for Appellee. **ON BRIEF**: Katherine Gallagher, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Robert P. LoBue, PATTERSON BELKNAP WEBB & TYLER LLP, New York, New York; Shereef Hadi Akeel, AKEEL & VALENTINE, P.C., Troy, Michigan; Jeena Shah, CONSTITUTIONAL RIGHTS & INTERNATIONAL HUMAN RIGHTS CLINIC, Newark, New Jersey, for Appellants. Stephen I. Vladeck, Washington, D.C.; Charles S. Barquist, Los Angeles, California, Betre M. Gizaw, MORRISON & FOERSTER LLP, Washington, D.C., for Amici Professors of Constitutional Law and Federal Courts. Eric L. Lewis, A. Katherine Toomey, James P. Davenport, Waleed Nassar, LEWIS BAACH PLLC, Washington, D.C.; Melissa Hooper, HUMAN RIGHTS FIRST, New York, New York, for Amici Retired Military Officers. Dror Ladin, Hina Shamsi, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York, for Amici American Civil Liberties Union Foundation, Amnesty International, and Human Rights Watch. George M. Clarke, III, BAKER & MCKENZIE LLP, Washington, D.C.; Alberto Mora, Carr Center For Human Rights Policy, HARVARD KENNEDY SCHOOL, Cambridge, Massachusetts, for Amicus Alberto Mora. William J. Aceves, CALIFORNIA WESTERN SCHOOL OF LAW, San Diego, California; Deena R. Hurwitz, International Human Rights Law Clinic,

AMERICAN UNIVERSITY, Washington, D.C., for Amicus Juan E. Mendez. L. Kathleen Roberts, Nushin Sarkarati, THE CENTER FOR JUSTICE & ACCOUNTABILITY, San Francisco, California; Michael E. Tigar, Oriental, North Carolina; Ali A. Beydoun, UNROW HUMAN RIGHTS IMPACT LITIGATION CLINIC, Washington, D.C., for Amici Abukar Hassan Ahmed, Dr. Juan Romagoza Arce, Zita Cabello, Aziz Mohamed Deria, Carlos Mauricio, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi Yousuf. Lawrence S. Ebner, Lisa N. Himes, Tami Lyn Azorsky, Jessica C. Abrahams, DENTONS US LLP, Washington, D.C., for Amici Professional Services Council-The Voice of the Government Services Industry, and Coalition for Government Procurement. Raymond B. Biagini, Daniel L. Russell Jr., Herbert L. Fenster, COVINGTON & BURLING LLP, Washington, D.C., for Amicus KBR, Incorporated.

BARBARA MILANO KEENAN, Circuit Judge:

Suhail Al Shimari, Taha Rashid, Salah Al-Ejaili, and Asa'ad Al-Zuba'e (the plaintiffs), four Iraqi nationals, alleged that they were abused while detained in the custody of the United States Army at Abu Ghraib prison, located near Baghdad, Iraq, in 2003 and 2004. They were detained beginning in the fall of 2003, and ultimately were released without being charged with a crime. In 2008, they filed this civil action against CACI Premier Technology, Inc. (CACI), which provided contract interrogation services for the military at the time of the alleged mistreatment.

In their third amended complaint, the plaintiffs alleged pursuant to the Alien Tort Statute (ATS), 28 U.S.C. § 1350, that CACI employees committed acts involving torture and war crimes, and cruel, inhuman, or degrading treatment. The plaintiffs also asserted various tort claims under the common law, including assault and battery, sexual assault and battery, and intentional infliction of emotional distress.

This case is before this Court for the fourth time. In our most recent decision, we remanded the case to the district court to conduct jurisdictional discovery on the issue whether the political question doctrine barred the plaintiffs' claims. On remand, after reopening discovery, the district court dismissed the plaintiffs' complaint on the ground that it presented a non-justiciable political question. The court based its decision on three grounds: (1) that the military exercised direct control over interrogation operations at Abu Ghraib; (2) that adjudication of the plaintiffs' claims would require the court improperly to question sensitive military judgments; and (3) that the court

lacked any judicially manageable standards to resolve the plaintiffs' claims.

The plaintiffs once again appeal. Upon our review, we conclude that the district court erred in its analysis by failing to determine whether the military exercised actual control over any of CACI's alleged conduct. We hold that conduct by CACI employees that was unlawful when committed is justiciable, irrespective whether that conduct occurred under the actual control of the military. We further hold that acts committed by CACI employees are shielded from judicial review under the political question doctrine if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments.

We therefore vacate the district court's judgment. We remand the case for the district court to re-examine its subject matter jurisdiction under the political question doctrine in accordance with the above holdings.

I.

We recounted the circumstances underlying the plaintiffs' complaint and the complicated procedural history of this case at length in our previous opinion, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014) (Al Shimari III). We will review here only the facts relevant to the present appeal.

Following the invasion of Iraq in 2003, the United States took control of Abu Ghraib prison (Abu Ghraib), a facility located near Baghdad, Iraq that previously was under the control of Saddam Hussein. Upon assuming control of the facility, the United States military used the prison to detain criminals,

enemies of the provisional government, and other persons held for interrogation related to intelligence gathering. Due to a shortage of military interrogators, the United States government entered into a contract with CACI to provide additional interrogation services at Abu Ghraib.

As documented in a later investigation conducted by the United States Department of Defense, "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at Abu Ghraib between October and December 2003. Al Shimari III, 758 F.3d at 521 (citing Maj. Gen. Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade 16 (2004) (Taguba Report)). Department of Defense investigators concluded that CACI interrogators as well as military personnel engaged in such abusive conduct. Id. (citing Taguba Report at 48 and Maj. Gen. George R. Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 7-8, 84, 86-87, 89, 116-17, 132-35 (2004)). Numerous service members were disciplined administratively or punished under military law by court martial for conduct related to these acts. Some service members received significant terms of imprisonment for their role in these offenses.

The plaintiffs alleged in their complaint that CACI interrogators entered into a conspiracy with low-ranking military police officials to commit abusive acts on the plaintiffs, in order to "soften up" the detainees so that they would be more responsive during later interrogations. The plaintiffs further alleged that they were victims of a wide range of mistreatment, including being beaten, choked, "subjected to

electric shocks," "repeatedly shot in the head with a taser gun," "forcibly subjected to sexual acts," subjected to sensory deprivation, placed in stress positions for extended periods of time, deprived of food, water, and sleep, threatened with unleashed dogs and death, and forced to wear women's underwear.

Additionally, the plaintiffs alleged that CACI interrogators "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." According to the plaintiffs, most of these acts of abuse occurred during the nighttime shift at the prison, in order to reduce the likelihood that nonparticipants would learn of this conduct. The plaintiffs contend that these acts of abuse were possible because of a "command vacuum" at Abu Ghraib, caused by the failure of military leaders to exercise effective oversight over CACI interrogators and military police.

CACI moved to dismiss the plaintiffs' complaint on several grounds, including the political question doctrine, federal preemption, derivative sovereign immunity, and lack of subject matter jurisdiction under the ATS. The district court denied the defendants' motion, holding in part that the plaintiffs' claims did not present a political question. Nevertheless, the court concluded that it lacked jurisdiction over the plaintiffs' ATS claims, because CACI was a private party rather than a governmental actor, and opined that those claims could only proceed under diversity or federal question jurisdiction.

On appeal, a panel of this Court concluded that the plaintiffs' claims were preempted by federal law

under the Supreme Court's decision in Boyle v. United Technologies Corp., 487 U.S. 500 (1988). Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011) (Al Shimari I), vacated, 679 F.3d 205 (4th Cir. 2012) (en banc). On rehearing en banc, this Court vacated the panel decision and dismissed CACI's appeal as interlocutory. Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (Al Shimari II).

On remand from Al Shimari II, the district court reinstated the plaintiffs' ATS claims, but dismissed without prejudice the plaintiffs' claims alleging a conspiracy between CACI and the military.[1] The district court dismissed as barred by the statute of limitations the common law claims brought by all the plaintiffs except Al Shimari. In response, the plaintiffs filed a third amended complaint to supplement their allegations of conspiracy, limit their common law claims to Al Shimari, and name CACI as the only defendant. The third amended complaint (the complaint) is the complaint at issue in this appeal.

In April 2013, shortly after the third amended complaint was filed, the deadline for discovery on the merits of the plaintiffs' claims expired. The same week, the Supreme Court issued its decision in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), which imposed certain limitations on extraterritorial application of the ATS. Relying on Kiobel, the district court dismissed the plaintiffs' ATS claims, because the underlying conduct occurred exclusively in Iraq. The district court also dismissed Al Shimari's common

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[1] The court also dismissed with prejudice the plaintiffs' claims against the parent company of CACI, CACI International, and the conspiracy claims against individual CACI employees.

law tort claims under Federal Rule of Civil Procedure 12(b)(6), holding that Iraqi law did not permit imposition of liability on CACI.

On appeal from that decision, in Al Shimari III we concluded that the district court had jurisdiction over the plaintiffs' ATS claims under the Supreme Court's reasoning in Kiobel. 758 F.3d 516 (4th Cir. 2014). Although CACI also argued that the case should be dismissed pursuant to the political question doctrine, we declined to decide the political question issue based on the limited appellate record available at the time. Instead, we vacated the district court's order dismissing the ATS and common law claims, and remanded the entire case for the district court to develop the factual record regarding the extent of the military's control over CACI interrogators and whether CACI's intended defenses raised any political issues. Id. at 536-37.

On remand from Al Shimari III, the district court reopened the record for jurisdictional discovery on the issue of the political question doctrine, although it appears that minimal, if any, additional discovery was taken.[2] As noted above, following the reopened discovery period, the district court dismissed all the plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1) on the ground that they presented a non-justiciable political question. The plaintiffs now appeal the district court's dismissal of their complaint on this ground.

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[2] Notably, after eight years of litigation, to date only one of the plaintiffs has been deposed in this case, because the United States government has not allowed the plaintiffs to enter the United States.

II.

The plaintiffs contend that the district court erred in dismissing their complaint as non-justiciable under the political question doctrine. They first assert that the district court erred in finding that the military had direct control over formal interrogations at Abu Ghraib prison, and in failing to evaluate whether the military actually exercised such control during related activities that occurred outside the formal interrogation process. In the plaintiffs' view, we are not presented with a political question, because a "command vacuum" existed at Abu Ghraib in which the military did not exercise actual control over the conduct of the military police and the CACI interrogators.

The plaintiffs also argue that their claims would not require the courts to evaluate sensitive military judgments because the claims challenge the legality, rather than the reasonableness, of CACI's conduct. Separately, the plaintiffs assert that the district court erred in concluding that it lacked manageable standards for resolving their claims.

In response, CACI contends that the district court properly concluded that this case presents a political question. According to CACI, the district court's finding that the military exercised control over interrogation operations at Abu Ghraib ends the issue of justiciability in this case. CACI also maintains that the district court correctly held that the case is non-justiciable because judicial review of the interrogation tactics used would require a court to question sensitive military judgments. Finally, CACI asserts that the

district court correctly concluded that it lacked manageable standards for resolving the plaintiffs' claims. We disagree with CACI's arguments.

III.

In reviewing a district court's dismissal of a claim for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), we review the court's factual findings for clear error and its legal conclusions de novo. In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 333 (4th Cir. 2014). We may consider the plaintiffs' pleadings as "mere evidence" on the question of jurisdiction, and may also consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. Id.

The district court is authorized to resolve factual disputes in evaluating its subject matter jurisdiction. United States ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 348 (4th Cir. 2009); Williams v. United States, 50 F.3d 299, 304 (4th Cir. 1995); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). However, "when the jurisdictional facts and the facts central to a tort claim are inextricably intertwined," the district court ordinarily should withhold a determination regarding subject matter jurisdiction and proceed to the merits of the case. Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009).

A.

The political question doctrine derives from the principle of separation of powers, and deprives courts of jurisdiction over "controversies which revolve around policy choices and value determinations constitutionally committed" to Congress or, as alleged in this case, to the executive branch. Japan Whaling

Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). This doctrine is a "narrow exception" to the judiciary's general obligation to decide cases properly brought before the courts. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012). Although most military decisions are committed exclusively to the executive branch, a claim is not shielded from judicial review merely because it arose from action taken under orders of the military. Burn Pit, 744 F.3d at 334; see also Japan Whaling, 478 U.S. at 229-30 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.") (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)) (internal quotation marks omitted).

The Supreme Court established a six-factor test in Baker v. Carr, 369 U.S. 186 (1962) (the Baker factors), to aid courts in determining whether a case presents a political question. These factors ask whether there is: "(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving the issue, (3) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution of the issue without expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Burn Pit, 744 F.3d at 334 (citing Baker, 369 U.S. at 217) (internal quotations and alterations omitted).

In Taylor v. Kellogg Brown & Root Services, Inc., 658 F.3d 402 (4th Cir. 2011), we considered the proper application of the Baker factors to cases involving the civil liability of a government contractor in a negligence case. We distilled the Baker factors into two questions for consideration in determining whether a court has subject matter jurisdiction in a suit against a government contractor. We first asked "whether the government contractor was under the 'plenary' or 'direct' control of the military" (direct control). Al Shimari III, 758 F.3d at 533 (quoting Taylor, 658 F.3d at 411). Second, we asked whether "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.'" Id. at 533-34 (quoting Taylor, 658 F.3d at 411). An affirmative response to either of the two Taylor factors, namely, the fact of direct control or the need to question sensitive military judgments, generally triggers application of the political question doctrine. Id.

The plaintiff in Taylor, a Marine who suffered injuries resulting from an electrical shock sustained on a military base in Iraq, asserted a negligence claim against a government contractor based on the contractor's activation of a generator while the plaintiff was performing work on a wiring box. 658 F.3d at 403-04. We concluded that because the contractor intended to assert as a defense that the military was contributorily negligent, the district court would be forced to "question actual, sensitive judgments made by the military." Id. at 411-12 (internal quotation marks omitted). We therefore held that the political question

doctrine deprived the court of jurisdiction to consider the plaintiff's negligence claim. Id. at 412.

Our holding in Taylor reflected our concern that when national defense interests are at stake, courts must carefully assess the extent to which these interests may be implicated in any litigation of a plaintiff's claims involving the conduct of a military contractor. Taylor, 658 F.3d at 409-10. We give this question particular attention because courts are ill-equipped to evaluate discretionary operational decisions made by, or at the direction of, the military on the battlefield. See generally Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271 (11th Cir. 2009).

B.

The present case requires us to examine the factors and related considerations discussed in Taylor. However, because Taylor was a negligence case and the present case involves allegations of intentional acts, we frame our analysis in accordance with that distinction.

i.

As stated above, the first Taylor factor asks whether the acts occurred while the government contractor was under the direct control of the military. Taylor, 658 F.3d at 411. In Al Shimari III, we also described this factor in terms of "the extent to which military personnel actually exercised control" over the contractor's acts. Al Shimari III, 758 F.3d at 535. In the present case, after considering this first Taylor factor, the district court credited the evidence that the military maintained formal control over the interro-

gations, and concluded that the case presented a political question depriving the court of subject matter jurisdiction.

In the district court, the evidence regarding the military's control over the CACI interrogators proceeded on parallel tracks, with evidence demonstrating formal military control presented alongside evidence showing that the military failed to exercise actual control over the interrogators. With regard to formal control, the record shows that the military was in charge of the official command structure at Abu Ghraib and instituted procedures governing the interrogation process. For example, in September and October 2003, military leadership located in Baghdad issued two memoranda establishing the particularized rules of engagement for interrogations (IROEs) conducted at Abu Ghraib, which authorized the use of several, specific interrogation techniques.[3] In addition, all interrogators were required to submit interrogation plans to the military chain of command for advance approval. These plans specified the interrogation methods that the particular interrogators intended to employ and included requests for separate approval of more aggressive tactics, if necessary.

Other evidence in the record, however, indicated that the military failed to exercise actual control over the work conducted by the CACI interrogators. In one

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[3] We observe that the September 2003 IROE memorandum authorized aggressive interrogation tactics to be used under certain conditions, including the use of stress positions and "sleep management." The later, superseding memorandum removed these tactics.

government report, an investigator unequivocally concluded that military leaders at Abu Ghraib "failed to supervise subordinates or provide direct oversight" of the mission, and that the "lack of command presence, particularly at night, was clear."[4] Lt. Gen. Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade 1137 (2004). The same report emphasized that interrogation operations were "plagued by a lack of an organizational chain of command presence and by a lack of proper actions to establish standards and training" by senior leadership. Id. Additional evidence in the record also indicates that CACI interrogators ordered low-level military personnel to mistreat detainees. This evidence supported the plaintiffs' contention that the formal command authority held by the military did not translate into actual control of day-to-day interrogation operations.

The above evidence of a "command vacuum" raises the question whether the military exercised actual control over any interrogation-related activities during which the challenged conduct occurred. Also,

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[4] Generally, investigative government reports of this nature are admissible as an exception to the rule against hearsay under Federal Rule of Evidence 803(8)(A)(iii).

through operation of the Army Field Manual[5] and IROEs, the military may have expressly prohibited the use of certain interrogation methods, but failed to enforce these prohibitions in practice.

Rather than addressing the issue of actual control, the district court began and ended its analysis by drawing conclusions based on the evidence of formal control. This approach failed to address the full scope of review that the district court needed to conduct on remand. We explained in Al Shimari III that the record was inconclusive "regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions." Al Shimari III, 758 F.3d at 535. We further observed that we were "unable to determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations, which is particularly concerning given the plaintiffs' allegations that '[m]ost of the

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[5] The United States Department of the Army Field Manual 34-52, Intelligence Interrogation (Sept. 28, 1992) (the Field Manual or Manual), in effect at the time of the alleged events in this case, states that interrogations must occur within the "constraints" of the Uniform Code of Military Justice as well as the Geneva Conventions. Id. preface at iv-v. The Manual expressly prohibits "[p]hysical or mental torture and coercion," defining "torture" as "the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure." Id. at 1-8. The Manual also lists examples of prohibited practices, including some of the techniques challenged in this case, such as electric shocks, food deprivation, "[a]ny form of beating," "[f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time," mock executions, and "[a]bnormal sleep deprivation." Id. The Field Manual cautions that any "[s]uch illegal acts are not authorized and will not be condoned" by the military. Id.

abuse' occurred at night, and that the abuse was intended to 'soften up' the detainees for later interrogations." Id. at 536.

We thus asked the district court to consider whether the military actually controlled the CACI interrogators' job performance, including any activities that occurred outside the formal interrogation process. The first Taylor factor is not satisfied by merely examining the directives issued by the military for conducting interrogation sessions, or by reviewing any particular interrogation plans that the military command approved in advance. Instead, the concept of direct control encompasses not only the requirements that were set in place in advance of the interrogations, but also what actually occurred in practice during those interrogations and related activities.

In examining the issue of direct control, when a contractor engages in a lawful action under the actual control of the military, we will consider the contractor's action to be a "de facto military decision[ ]" shielded from judicial review under the political question doctrine. Taylor, 658 F.3d at 410. However, the military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity. Thus, when a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine. The district court failed to draw this important distinction. Accordingly, we conclude that a contractor's acts may be shielded from judicial review under the first prong of Taylor only to the extent that those acts (1) were committed under actual control of the military; and (2) were not unlawful.

ii.

We turn now to consider the district court's treatment of the second Taylor factor, which asks whether a decision on the merits of the claim would require the court to "question actual, sensitive judgments made by the military." Al Shimari III, 758 F.3d at 533-34 (quoting Taylor, 658 F.3d at 411). The district court concluded that the plaintiffs' claims were non-justiciable under this second Taylor factor. The court explained that it was unequipped to evaluate whether the use of certain "extreme interrogation measures in the theatre of war" was appropriate or justified. In the court's view, adjudicating the plaintiffs' claims would impinge on the military's authority to select interrogation strategies and rules of engagement. Debates existing within the executive branch at that time regarding the propriety of certain aggressive interrogation tactics reinforced the court's conclusion.

We conclude that the above analysis that the district court conducted was incomplete. In addressing the second Taylor factor, the district court erred in failing to draw a distinction between unlawful conduct and discretionary acts that were not unlawful when committed.

The commission of unlawful acts is not based on "military expertise and judgment," and is not a function committed to a coordinate branch of government. See Carmichael, 572 F.3d at 1282 (emphasis omitted). To the contrary, Congress has established criminal penalties for commission of acts constituting torture and war crimes. See 18 U.S.C. §§ 2340A, 2441. Therefore, to the extent that the plaintiffs' claims rest

on allegations of unlawful conduct in violation of settled international law or criminal law then applicable to the CACI employees, those claims fall outside the protection of the political question doctrine. On remand, the district court must first segregate such justiciable claims in its analysis before proceeding to determine whether any claims alleging conduct that was not unlawful implicated sensitive military judgments under the second prong of Taylor.

iii.

In reaching this conclusion, we emphasize the long-standing principle that courts are competent to engage in the traditional judicial exercise of determining whether particular conduct complied with applicable law. See El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (majority opinion) ("[T]hat a case may involve the conduct of the nation's foreign affairs does not necessarily prevent a court from determining whether the Executive has exceeded the scope of prescribed statutory authority or failed to obey the prohibition of a statute or treaty."); cf. Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973) ("[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel.") (emphasis added). Accordingly, when a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review. See Baker, 369 U.S. at 217.

For the same reasons, this principle generally renders justiciable claims against a government contractor alleging a statutory violation. See El-Shifa, 607 F.3d at 851 (Ginsburg, J., concurring in the judgment). The adjudication of such a claim requires a court only to engage in the traditional judicial function of "say[ing] what the law is," and of determining how that law applies to the facts of a particular case, rather than passing judgment on a discretionary policy choice. Burn Pit, 744 F.3d at 334 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

The Supreme Court likewise has explained that the political question doctrine does not strip courts of their authority to construe treaties and agreements entered into by the executive branch, despite the potential political implications of judicial review. Japan Whaling, 478 U.S. at 230. Courts thus retain the ability to apply traditional rules of statutory interpretation to the facts presented in a particular case. Id. Conducting a "textual, structural, and historical" examination of a statute or treaty "is what courts do" and typically is not barred by the political question doctrine. Zivotofsky, 132 S. Ct. at 1427, 1430; see also El-Shifa, 607 F.3d at 856 (Kavanaugh, J., concurring

in the judgment) ("The Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations.") (emphasis in original).[6]

iv.

Applying the Taylor factors in accordance with the above-stated principles, we hold that any conduct of the CACI employees that occurred under the actual control of the military or involved sensitive military judgments, and was not unlawful when committed, constituted a protected exercise of discretion under the political question doctrine. Conversely, any acts of the CACI employees that were unlawful when committed, irrespective whether they occurred under actual control of the military, are subject to judicial review. Thus, the plaintiffs' claims are justiciable to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred.[7] Cf. Japan Whaling, 478 U.S. at 230; Hamdi

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[6] Given the nature of the claims alleged in this case, we are not presented at this stage of the litigation with "policy choices and value determinations" embedded within a claim alleging a violation of customary international law. See El-Shifa, 607 F.3d at 843-44 (majority opinion) (citation omitted) (holding non-justiciable a claim under the law of nations requiring the court to determine whether a U.S. military attack was "mistaken and not justified").

[7] We decline CACI's invitation to rely on out-of-circuit precedent cited in its letter submitted to the Court after oral argument. These citations are not the proper subject of a submission pursuant to Federal Rule of Appellate Procedure 28(j). And, in any event, these authorities only reinforce our view that, when a plaintiff's claim challenges a core foreign policy decision made by the political branches of government, the political question doctrine bars review.

v. Rumsfeld, 542 U.S. 507, 536 (2004) (explaining that "a state of war is not a blank check for the President" with respect to individual rights) (opinion of O'Connor, J.).

We remain mindful, however, that this dichotomy between lawful discretionary acts and unlawful activity will not always be clear when applied to particular conduct. Although alleged conduct that on its face is aggravated and criminal in nature, such as sexual assault and beatings, clearly will present a subject for judicial review unaffected by the political question doctrine, other conduct may not be capable of such clear categorization. In instances in which the lawfulness of such conduct was not settled at the time the conduct occurred, and the conduct occurred under the actual control of the military or involved sensitive military judgments, that conduct will not be subject to judicial review. Cf. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 123 (2d Cir. 2008) (dismissing claims under the ATS because the plaintiffs did not "ground[ ] their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged"). The absence of clear norms of international law or applicable criminal law regarding the lawfulness of a particular mode of treatment will render that "grey area" conduct non-justiciable under the political question doctrine, as long as the conduct was committed under the actual control of the military or implicated sensitive military judgments.

Here, the plaintiffs alleged pursuant to the ATS that CACI interrogators engaged in a wide spectrum of conduct amounting to torture, war crimes, and/or cruel, inhuman, or degrading treatment, as well as

various torts under the common law. Among other things, the plaintiffs alleged that they were subjected to beatings, stress positions, forced nudity, sexual assault, and death threats, in addition to the withholding of food, water, and medical care, sensory deprivation, and exposure to extreme temperatures. Counsel for CACI conceded at oral argument that at least some of the most egregious conduct alleged, including sexual assault and beatings, was clearly unlawful, even though CACI maintains that the plaintiffs cannot show that CACI interrogators perpetrated any of these abuses.

We decline to render in the first instance a comprehensive determination of which acts alleged were unlawful when committed, or whether the plaintiffs have stated claims to relief that could survive a motion filed under Federal Rule of Civil Procedure 12(b)(6). Nevertheless, as noted above, some of the alleged acts plainly were unlawful at the time they were committed and will not require extensive consideration by the district court. Accordingly, on remand, the district court will be required to determine which of the alleged acts, or constellations of alleged acts, violated settled international law and criminal law governing CACI's conduct and, therefore, are subject to

judicial review.[8] The district court also will be required to identify any "grey area" conduct that was committed under the actual control of the military or involved sensitive military judgments and, thus, is protected under the political question doctrine.

This "discriminating analysis," see Baker, 369 U.S. at 211, 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 "inextricably 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, 585 F.3d at 193.

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[8] As with the ATS claims, to the extent that conduct underlying the common law claims was unlawful, those claims also will be justiciable. We observe, however, that certain allegations underlying the common law claims may involve conduct that, although tortious under the common law, did not constitute a violation of applicable criminal or international law. A nonconsensual touching that might constitute battery, or conduct that might amount to intentional infliction of emotional distress, under the common law nevertheless may have been an interrogation tactic that the military lawfully could have authorized. Accordingly, we express no view on the justiciability of common law claims alleging conduct that was not unlawful at the time. We leave this determination to the district court in the first instance.

In the event that the district court determines that any of the common law claims are justiciable, the court nevertheless may elect to reinstate its prior order dismissing those claims under Rule 12(b)(6), which order this Court has not yet reviewed.

C.

Distinct from its holding of non-justiciability under Taylor, the district court separately concluded under the second Baker factor that the case lacked manageable standards for judicial resolution of the plaintiffs' claims. The court emphasized that its general lack of expertise in applying international law, and the difficulty of determining the constraints of such law, also rendered the case non-justiciable. We disagree with the district court's conclusion.

Unlike in negligence cases calling into question military standards of conduct, the district court in the present case is called upon to interpret statutory terms and established international norms to resolve the issues presented by the ATS claims. See Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) ("[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act."). Compare also Carmichael, 572 F.3d at 1287 ("[O]nly the military was in a position to meaningfully balance [the] risks [of the mission] in light of its broader strategies and objectives; and only the military possessed the competence to make the many critical tactical decisions concerning the safest and most efficacious way to conduct the convoy."), with Japan Whaling, 478 U.S. at 230 (noting courts' competency to apply traditional rules of statutory interpretation, even in cases presenting "political overtones").

With regard to the present case, the terms "torture" and "war crimes" are defined at length in the United States Code and in international agreements to which the United States government has obligated

itself. See, e.g., 18 U.S.C. §§ 2340-2340A (implementing the United States' obligations as a signatory of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); 18 U.S.C. § 2441 (prescribing criminal penalties under the United States Code for "war crimes," including "grave breaches" of the Geneva Conventions). Courts also have undertaken the challenge of evaluating whether particular conduct amounts to torture, war crimes, or cruel, inhuman, or degrading treatment. See, e.g., United States v. Belfast, 611 F.3d 783, 828 (11th Cir. 2010) (torture); Kadic, 70 F.3d at 243 (war crimes and torture); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) (torture and cruel, inhuman, or degrading treatment). Likewise, in his common law claims, Al Shimari has alleged familiar torts based on long-standing common law principles.

Although the substantive law applicable to the present claims may be unfamiliar and complicated in many respects, we cannot conclude that we lack manageable standards for their adjudication justifying invocation of the political question doctrine. In reaching this conclusion, we agree with the observation that courts may not "decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches." Zivotofsky, 132 S. Ct. at 1432 (Sotomayor, J., concurring in part and concurring in the judgment); cf. Hamdi, 542 U.S. at 536 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions

a role for all three branches when individual liberties are at stake.") (opinion of O'Connor, J.).

IV.

We recognize that the legal issues presented in this case are indisputably complex, but we nevertheless cannot abdicate our judicial role in such cases. Nor will we risk weakening prohibitions under United States and international law against torture and war crimes by questioning the justiciability of a case merely because the case involves the need to define such terms. The political question doctrine does not shield from judicial review intentional acts by a government contractor that were unlawful at the time they were committed.

Accordingly, we vacate the district court's judgment, and remand this case for further proceedings consistent with the principles and instructions stated in this opinion.

VACATED AND REMANDED

FLOYD, Circuit Judge, concurring:

I am pleased to join in Judge Keenan's fine opinion in this case. I write separately to articulate my understanding of one aspect of our holding. I agree that the "dichotomy between lawful discretionary acts and unlawful activity will not always be clear when applied to particular conduct." Ante at 26. In discussing this concept with the term "grey area," ante at 26-28, I do not understand the opinion to suggest that courts cannot adjudicate close questions of lawfulness regarding military affairs. Courts can adjudicate such questions without offending the political question doctrine.

"The nonjusticiability of a political question is primarily a function of the separation of powers" under our constitutional scheme. Baker v. Carr, 369 U.S. 186, 210 (1962). That scheme does not assign military decision making to the judiciary and, as a consequence, questions of military policy are not for us to resolve. But this does not mean that every case touching military affairs is nonjusticiable. In separating the powers of government, the Constitution assigns to the judiciary the power to resolve "what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Thus although the reasonableness of military conduct may not be justiciable, the lawfulness of that conduct assuredly is. Cf., e.g., Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

The precise contours of "what the law is" may be uncertain until a court evaluates the lawfulness of specific conduct. For example, despite repeated judicial application of torture laws, see ante at 30, the pre-

cise legal scope of the prohibition on torture is not perfectly defined. There is, in other words, conduct for which the judiciary has yet to determine the lawfulness: loosely, a grey area.

But this greyness does not render close torture cases nonjusticiable merely because the alleged torturer was part of the executive branch. While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful. The same is true for any other applicable legal prohibition. The fact that the President--let alone a significantly inferior executive officer--opines that certain conduct is lawful does not determine the actual lawfulness of that conduct. The determination of specific violations of law is constitutionally committed to the courts, even if that law touches military affairs. Cf., e.g., Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973).

Of course the fact that a claim is justiciable under the political question doctrine says very little about that claim's procedural or substantive merits. Among other things, a claim may be inadequately alleged, barred by other jurisdictional doctrines, or ultimately not proven. "In instances in which the lawfulness of . . . conduct was not settled at the time the conduct occurred," ante at 26, a defendant may be able to avoid liability through the doctrine of qualified immunity, the ATS requirement that conduct violate customary international law, the requirement of Federal Rule of Civil Procedure 12 that a claim be stated for which relief may be granted, or other applicable law. See, e.g., Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 123 (2d Cir. 2008) (adjudicating and

dismissing claims brought pursuant to the ATS because the plaintiffs did not allege conduct proscribed by a sufficiently universal customary international law norm). However, the judiciary is well equipped to adjudicate such issues without impermissibly answering political questions.

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1937

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

Plaintiffs – Appellants,

v.

CACI PREMIER TECHNOLOGY, INC.; CACI INTERNATIONAL, INC.,

Defendants – Appellees,

and

TIMOTHY DUGAN; L-3 SERVICES, INC.,

Defendants.

CIVIL PROCEDURE PROFESSORS; DOLLY FILARTIGA; ABUKAR HASSAN AHMED; DANIEL ALVARADO; DR. JUAN ROMAGOZA ARCE; ALDO CABELLO; ZITA CABELLO; AZIZ MOHAMED DERIA; NERIS GONZALES; CARLOS MAURICIO; GLORIA REYES; OSCAR REYES; CECILIA SANTOS MORAN; ZENAIDA VELASQUEZ; BASHE

ABDI YOUSUF; INTERNATIONAL LAW SCHOLARS; WILLIAM R. CASTO; MARTIN S. FLAHERTY; NASSER HUSSEIN; STANLEY N. KATZ; MICHAEL LOBBAN; JENNY S. MARTINEZ; RETIRED MILITARY OFFICERS; UNITED NATIONS SPECIAL RAPPORTEURS ON TORTURE,

Amici Supporting Appellants.

No. 13-2162

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

Plaintiffs – Appellants,

v.

CACI PREMIER TECHNOLOGY, INC.; CACI INTERNATIONAL, INC.,

Defendants – Appellees,

and

TIMOTHY DUGAN; L-3 SERVICES, INC.,

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CIVIL PROCEDURE PROFESSORS; DOLLY FILARTIGA; ABUKAR HASSAN AHMED; DANIEL ALVARADO; DR. JUAN ROMAGOZA ARCE; ALDO CABELLO; ZITA CABELLO; AZIZ MOHAMED DERIA; NERIS GONZALES; CARLOS MAURICIO; GLORIA REYES; OSCAR REYES; CECILIA SANTOS MORAN; ZENAIDA VELASQUEZ; BASHE

ABDI YOUSEF; INTERNATIONAL LAW SCHOLARS; WILLIAM R. CASTRO; MARTIN S. FLAHERTY; NASSER HUSSEIN; STANLEY N. KATZ; MICHAEL LOBBAN; JENNY S. MARTINEZ; RETIRED MILITARY OFFICERS; UNITED NATIONS SPECIAL RAPPORTEURS ON TORTURE,

Amici Supporting Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:08-cv-00827-GBL-JFA)

Argued: March 18, 2014 Decided: June 30, 2014

Before KEENAN and FLOYD, Circuit Judges, and Max O. COGBURN, Jr., United States District Judge for the Western District of North Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Keenan wrote the opinion, in which Judge Floyd and Judge Cogburn joined.

ARGUED: Baher Azmy, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Robert P. LoBue, PATTERSON, BELKNAP, WEBB & TYLER, New York, New York, for Appellants. Joseph William Koegel, Jr., STEPTOE & JOHNSON LLP, Washington, D.C., for Appellees. **ON BRIEF**: Katherine Gallagher, Jeena Shah, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Shereef Hadi Akeel, AKEEL & VALENTINE, P.C., Troy,

Michigan; George Brent Mickum IV, LAW FIRM OF GEORGE BRENT MICKUM IV, Bethesda, Maryland, for Appellants. John F. O'Connor, STEPTOE & JOHNSON LLP, Washington, D.C., for Appellees. Tyler R. Giannini, Sarah P. Alexander, International Human Rights Clinic, HARVARD LAW SCHOOL, Cambridge, Massachusetts, for Amici William R. Casto, Martin S. Flaherty, Nasser Hussain, Stanley N. Katz, Michael Lobban, and Jenny S. Martinez. Stephen B. Pershing, THE CHAVERS FIRM, LLC, Washington, D.C.; Ralph G. Steinhardt, Arin Melissa Brenner, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, Washington, D.C., for Amicus International Law Scholars. Jonathan Hafetz, Rachel Godsil, Jon Romberg, Chelsea Jasnoff, Matthew Mierswa, Center for Social Justice, SETON HALL UNIVERSITY SCHOOL OF LAW, Newark, New Jersey, for Amicus Retired Military Officers. L. Kathleen Roberts, Nushin Sarkarati, Scott A. Gilmore, THE CENTER FOR JUSTICE & ACCOUNTABILITY, San Francisco, California; Ali A. Beydoun, UNROW HUMAN RIGHTS IMPACT LITIGATION CLINIC, Washington, D.C., for Amici Dolly Filartiga, Abukar Hassan Ahmed, Daniel Alvarado, Juan Romagoza Arce, Aldo Cabello, Zita Cabello, Aziz Mohamed Deria, Neris Gonzales, Carlos Mauricio, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi. Deena R. Hurwitz, Lauren Schnyer, Second Year Law Student, Jennifer Tian, Third Year Law Student, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Amicus United Nations Special Rapporteurs on Torture. Joshua S. Devore, Agnieszka M. Fryszman, CHOEN MILSTEIN SELLERS & TOLL PLLC, Wash-

ington, D.C., for Amici Civil Procedure Professors, Erwin Chemerinsky, Helen Hershkoff, Allan Paul Ides, Stephen I. Vladeck, and Howard M. Wasserman.

BARBARA MILANO KEENAN, Circuit Judge:

In this appeal, we consider whether a federal district court has subject matter jurisdiction to consider certain civil claims seeking damages against an American corporation for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq.[1] The primary issue on appeal concerns whether the Alien Tort Statute, 28 U.S.C. § 1350, as interpreted by the Supreme Court in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), provides a jurisdictional basis for the plaintiffs' alleged violations of international law, despite the presumption against extraterritorial application of acts of Congress. We also address the defendants' contention that the case presents a "political question" that is inappropriate for judicial resolution under our decision in Taylor v. Kellogg Brown & Root Services, Inc., 658 F.3d 402 (4th Cir. 2011).

We conclude that the Supreme Court's decision in Kiobel does not foreclose the plaintiffs' claims under the Alien Tort Statute, and that the district court erred in reaching a contrary conclusion. Upon applying the fact-based inquiry articulated by the Supreme Court in Kiobel, we hold that the plaintiffs' claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the Alien Tort Statute. See Kiobel, 133 S. Ct. at 1669. However, we are unable to determine from the present record

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[1] Some of the information pertinent to this appeal has been filed under seal. This Court has avoided reference to sealed documents to the greatest extent possible and has made any necessary redactions to the publicly available version of the opinion.

whether the claims before us present nonjusticiable political questions. Therefore, we do not reach the additional issue of the district court's dismissal of the plaintiffs' common law claims, and we vacate the district court's judgment with respect to all the plaintiffs' claims and remand the case to the district court. We direct that the district court undertake factual development of the record and analyze its subject matter jurisdiction in light of our decision in Taylor and the principles expressed in this opinion.

I.

In 2003, a multi-national force led by the United States and the United Kingdom invaded Iraq and deposed its sovereign leader, Saddam Hussein. The United States took control of Abu Ghraib, the site of a prison facility near Baghdad, and used the prison to detain various individuals, including criminals, enemies of the provisional government, and other persons selected for interrogation because they were thought to possess information regarding Iraqi insurgents.

Due to a shortage of trained military interrogators, the United States hired civilian contractors to interrogate detainees at Abu Ghraib. During the time period relevant to this civil action, those private interrogators were provided exclusively by CACI Premier Technology, Inc. (CACI), a corporation domiciled in the United States. CACI's corporate headquarters is located in Virginia, and CACI is a wholly-owned subsidiary of CACI International, Inc. (CACI International), a publicly traded Delaware corporation that also has corporate headquarters in Virginia.

According to an official investigation commissioned by the United States Department of Defense

(Defense Department), "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees" at the Abu Ghraib prison between October and December 2003. MAJ. GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004) [hereinafter REPORT OF MAJ. GEN. TAGUBA]. These atrocities were condemned by the President of the United States as being "abhorrent" practices that "don't represent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). Both houses of Congress condemned the abuses, stating that those acts "contradict[ed] the policies, orders, and laws of the United States and the United States military," H.R. Res. 627, 108th Cong. (2004), and "urg[ing] that all individuals responsible for such despicable acts be held accountable," S. Res. 356, 108th Cong. (2004). Investigations conducted by the Defense Department concluded that CACI interrogators directed or participated in some of the abuses, along with a number of military personnel. See REPORT OF MAJ. GEN. TAGUBA 48; MAJ. GEN. GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 7-8, 84, 86-87, 89, 116-17, 132-35 (2004).

The four plaintiffs in this case are foreign nationals who allege that they were tortured and otherwise

mistreated by American civilian and military personnel while detained at Abu Ghraib.[2] Among many other examples of mistreatment, the plaintiffs describe having been "repeatedly beaten," "shot in the leg," "repeatedly shot in the head with a taser gun," "subjected to mock execution," "threatened with unleashed dogs," "stripped naked," "kept in a cage," "beaten on [the] genitals with a stick," "forcibly subjected to sexual acts," and "forced to watch" the "rape[ ] [of] a female detainee." Many of the acts allegedly were perpetrated "during the night shift" in order to "minimize the risk of detection by nonparticipants" and to "soften up" the detainees for later interrogation.

The plaintiffs allege that CACI employees "instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States." In particular, the plaintiffs allege that in the "command vacuum at Abu Ghraib," CACI interrogators operated with "little to no supervision" and were perceived as superiors by United States military personnel. Military personnel allegedly carried out orders issued by the CACI civilian interrogators to "soften up" and "set conditions" for the abuse of particular detainees, contrary to the terms of CACI's contract with the United States government.

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[2] The record does not contain any evidence that the plaintiffs were designated "enemy combatants" by the United States government. In fact, Defense Department documents in the record state that plaintiff Al Shimari "is not an Enemy Combatant in the Global War on Terror." (Emphasis in original.)

In that contract, which was executed in August 2003, CACI agreed to provide interrogation-related services to the military. This contract was not awarded by the Defense Department or military sources, but by the Department of the Interior (Interior Department). The contract, which was issued by an Interior Department contracting officer in Arizona, authorized CACI to collect payments in excess of $19 million by mailing invoices to Interior Department accounting offices in Colorado.

Under the terms of the Statement of Work (SOW) governing CACI's contract with the government, CACI was obligated to supply interrogation "management and support" and to "function[ ] as resident experts" in interrogation regulations and procedures. The SOW stated that CACI would "provide Interrogation Support Cells, as directed by military authority, . . . to assist, supervise, coordinate, and monitor all aspects of interrogation activities." The SOW further specified that "[t]he Contractor is responsible for providing supervision for all contractor personnel."

The plaintiffs allege that during CACI's performance of this contract, CACI's managers failed to hire suitable interrogators, insufficiently supervised CACI employees, ignored reports of abuse, and attempted to "cover up" the misconduct. The plaintiffs further allege that CACI's site manager at the Abu Ghraib prison, Daniel Porvaznik, reviewed interrogation reports that "raised concerns of potential abuse" by CACI employees, established "daily contact with CACI [ ] in the United States," and submitted reports that were reviewed weekly by CACI's executive team in the United States "to assess the company's overall worldwide business situation." The plaintiffs also

claim that CACI vice-president Chuck Mudd traveled "regularly" to Iraq to become familiar with the interrogation operation at Abu Ghraib.

In addition, the plaintiffs allege that, despite troubling reports from CACI employees, CACI management failed to investigate or to report accusations of wrongdoing and repeatedly denied that any CACI employees had engaged in abusive conduct. Also, according to the complaint, CACI management [Redacted]

The present litigation began with a civil action filed in June 2008 by plaintiff Suhail Najim Abdullah Al Shimari (Al Shimari) against CACI, CACI International, former CACI employee Timothy Dugan, and L-3 Services, Inc., another government contractor. The action originally was filed in the Southern District of Ohio, where defendant Timothy Dugan resided. In the complaint, Al Shimari alleged claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, including claims of war crimes, torture, and cruel, inhuman, or degrading treatment (collectively, the ATS claims). The complaint also contained numerous common law claims, including claims of assault and battery, sexual assault and battery, intentional and negligent infliction of emotional distress, and negligent hiring and training (collectively, the common law tort claims).

In August 2008, Al Shimari's action was transferred to the Eastern District of Virginia, where the corporate headquarters of CACI and CACI International are located. The following month, Al Shimari submitted an amended complaint that included the similar claims of three other plaintiffs, namely, Taha Yaseen Arraq Rashid, Salah Hasan Nusaif Al-Ejaili,

and Asa'ad Hamza Hanfoosh Al-Zuba'e[3] (collectively, the Rashid plaintiffs). The amended complaint also identified the names of three CACI employees who allegedly "directed and caused some of the most egregious [acts of] torture and abuse at Abu Ghraib," which information was based on post-conviction testimony and statements given by military personnel who had been prosecuted for their misconduct.

In October 2008, the defendants moved to dismiss the amended complaint on numerous grounds, including the political question doctrine, federal preemption, derivative sovereign immunity, and lack of subject matter jurisdiction under the ATS. The district court denied the defendants' motion and held that the plaintiffs' allegations did not present a political question. However, the court concluded that it lacked jurisdiction over the plaintiffs' ATS claims because of the novelty of asserting such claims against private parties as opposed to state actors, and indicated that those claims could only proceed under diversity or federal question jurisdiction rather than under the ATS. CACI filed an interlocutory appeal of the district court's decision.

On appeal, a panel of this Court concluded that the district court erred in permitting the plaintiffs' claims to proceed because they were preempted by federal law under the Supreme Court's reasoning in Boyle v. United Technologies Corp., 487 U.S. 500

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[3] We note that various spellings of the name of one of the plaintiffs, Asa'ad Hamza Hanfoosh Al-Zuba'e, appear in documents filed with the district court and in the parties' appellate briefs. For the purposes of this opinion, we adopt the spelling that appears on the face of the plaintiffs' third amended complaint and in the plaintiffs' opening brief.

(1988). Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), vacated, 679 F.3d 205 (4th Cir. 2012) (en banc). However, after granting the plaintiffs' petition for rehearing en banc, this Court vacated the panel's decision and dismissed the defendants' interlocutory appeal. See Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc).

Our en banc decision was based on the conclusion that we lacked appellate jurisdiction because the district court's rulings were not appealable under the collateral order doctrine articulated by the Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). See Al Shimari, 679 F.3d at 212-13. We observed that a denial of a motion to dismiss on political question grounds does not itself constitute an immediately appealable collateral order. Id. at 215. We also explained that we were unable to exercise "pendent" appellate jurisdiction because there was no independent jurisdictional basis for the appeal. See id. at 210, 224 (rejecting existence of an independent basis for jurisdiction by virtue of the defendants asserting the "law-of-war defense" under Coleman v. Tennessee, 97 U.S. 509 (1878), and Dow v. Johnson, 100 U.S. 158 (1879); preemption by the "combatant activities" exception to the Federal Tort Claims Act, as recognized by Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009); or absolute official immunity under Mangold v. Analytic Services, Inc., 77 F.3d 1442 (4th Cir. 1996)).

The case was returned to the district court, which entered a number of orders that are relevant to this appeal. First, the district court reinstated the plaintiffs' ATS claims, observing that "a growing body of law . . . suggests that plaintiffs' claims . . . are within

the purview of international law." The court dismissed some of the plaintiffs' claims as insufficiently pleaded, but permitted the plaintiffs to amend their pleadings to allege a conspiracy between CACI and the United States military. The court also dismissed the Rashid plaintiffs' common law tort claims with prejudice, concluding that Virginia law applied to the common law claims and that those claims were barred by the applicable statute of limitations and by a recent decision of the Supreme Court of Virginia holding that equitable tolling was unavailable under Virginia law.

The plaintiffs filed a third amended complaint against CACI only, which contained all four plaintiffs' ATS claims and only plaintiff Al Shimari's common law tort claims. The deadline for discovery in the case expired in April 2013. However, the record reflects that only a limited amount of information was obtained during discovery. Three of the four plaintiffs did not give deposition testimony in the case. Also, no depositions appear to have been taken of any individuals who served as former interrogators at Abu Ghraib, including the CACI interrogators who were identified specifically by the plaintiffs as participants in the alleged abuse.

Within weeks of the close of discovery, the Supreme Court issued its decision in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). In the majority opinion in that case, the Court discussed limitations on the scope of ATS jurisdiction imposed by a canon of statutory interpretation known as the presumption against extraterritorial application. Id. Based on the decision in Kiobel, the district court dismissed all four plaintiffs' ATS claims, concluding that the court "lack[ed] ATS jurisdiction over Plaintiffs'

claims because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign."

The district court also dismissed Al Shimari's remaining common law tort claims, holding that governing Iraqi law promulgated by the Coalition Provisional Authority (CPA)[4] precluded imposition of liability on the defendants, and awarded CACI $13,731.61 in costs as the prevailing party in the civil action. The plaintiffs timely appealed the district court's entry of final judgment with respect to all four plaintiffs' ATS and common law claims, as well as the district court's taxation of costs against the plaintiffs.

II.

We address CACI's two challenges to our subject matter jurisdiction. Because the district court dismissed the plaintiffs' claims under the ATS for lack of jurisdiction, we first consider the jurisdictional scope of the ATS and whether the plaintiffs' ATS claims fall within the reach of the statute. Based on our conclusion that the plaintiffs' ATS claims are within the statute's reach, we also address whether those claims or the plaintiffs' common law tort claims raise any nonjusticiable political questions.

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[4] The CPA was a temporary governing body that was created by U.S. Army General Tommy Franks, the Commander of Coalition Forces, and recognized by a United Nations Security Council resolution. See, e.g., U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 297 (4th Cir. 2009). The CPA governed Iraq from May 2003 to June 2004, when governing authority passed to the Interim Government of Iraq. Id. at 298.

A.

The plaintiffs seek to impose liability on CACI for alleged violations of international law, including torture. They assert that the claimed violations fall within the jurisdictional scope of the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS, which was created as part of the Judiciary Act of 1789, enables federal courts to consider a limited category of claims that are defined by the law of nations. Sosa v. Alvarez-Machain, 542 U.S. 692, 712, 724-25 (2004).

The international law violations that may be asserted under the ATS must be sufficiently definite in their content and acceptance among civilized nations that they reflect "historical paradigms" that were familiar at the time that the ATS was enacted. Id. at 732. Paradigmatic violations of the law of nations that were "probably on [the] minds" of the drafters of the ATS include "violation of safe conducts, infringement of the rights of ambassadors, and piracy." Id. at 715; see also id. at 720. The Supreme Court also has suggested that the prohibition against torture exemplifies a norm that is "specific, universal, and obligatory." Kiobel, 133 S. Ct. at 1665 (citation omitted); see also Filartiga v. Pena-Irala, 630 F.2d 876, 884-87 (2d Cir. 1980) (holding that "official torture is now prohibited by the law of nations" and that federal courts may exercise jurisdiction under the ATS concerning such international violations). Indeed, in the present case, the district court held that the plaintiffs' ATS claims

for torture, war crimes, and cruel, inhuman, or degrading treatment alleged sufficiently definite and universal violations of international law.

We emphasize, however, that we do not have before us the question whether the plaintiffs sufficiently have stated or established claims under the ATS alleging violations of international law.[5] Instead, we address our subject matter jurisdiction under the ATS, and decide whether the district court erred in holding that the ATS does not provide a cause of action for tortious conduct occurring outside the United States.

We begin by observing that the ATS is a jurisdictional statute that addresses "the power of the courts to entertain cases concerned with a certain subject," and does not authorize the courts to "mold substantive law." Sosa, 542 U.S. at 713-14; see also id. at 712 (stating that "the statute is in terms only jurisdictional"); id. at 717 (comparing the ATS to other grants of original jurisdiction in the Constitution and the Judiciary Act of 1789); id. at 724 (stating that the ATS "is a jurisdictional statute creating no new causes of action"). Thus, the ATS confers jurisdiction on the district courts to consider certain types of tort claims asserted by aliens based on alleged violations of the law of nations, but does not create any particular causes of action. See Kiobel, 133 S. Ct. at 1663; Sosa, 542 U.S. at 712.

In Kiobel, the Supreme Court considered "whether a claim [brought under the ATS] may reach

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[5] We also do not have before us the question whether a corporation can be held liable for the tortious conduct of its employees constituting international law violations under the ATS.

conduct occurring in the territory of a foreign sovereign." 133 S. Ct. at 1664. In that case, Nigerian nationals (the petitioners), who became legal residents of the United States after being granted political asylum, brought tort claims under the ATS against certain British, Dutch, and Nigerian corporations. Id. at 1662-63. In their complaint, the petitioners contended that the corporate defendants violated the law of nations by aiding and abetting atrocities committed by Nigerian military and police forces,[6] in providing those forces with food, transportation, compensation, and access to property. Id. at 1662-63.

All the atrocities were alleged to have been committed in Nigeria, and it was undisputed that none of the conduct alleged in the complaint occurred within the territory of the United States. Id. at 1662-63. Moreover, none of the defendants had engaged in any activities in the United States that appeared relevant to the claimed tortious acts that occurred in Nigeria. The ATS claims' only connections to the territory of the United States consisted of the foreign corporate defendants' listings on the New York Stock Exchange and their affiliation with a public relations office in New York City. Id. at 1677 (Breyer, J., concurring in the judgment).

The Supreme Court held that the petitioners' ATS claims were barred. Id. at 1669 (majority opinion). In reaching this conclusion, the Court primarily relied on

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[6] The petitioners alleged that Nigerian police and military forces were responsible for "beating, raping, killing, and arresting residents and destroying or looting property." Kiobel, 133 S. Ct. at 1662.

the principles underlying an established canon of statutory interpretation, which raises a presumption against extraterritorial application of acts of Congress ("the presumption," or "the presumption against extraterritorial application"). See id. at 1664-65, 1669. The presumption reflects the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" because "Congress ordinarily legislates with respect to domestic, not foreign matters." Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (citations and internal quotation marks omitted).

The Supreme Court explained that the principles underlying the presumption restrain courts in their consideration of causes of action that may be brought under the ATS. Kiobel, 133 S. Ct. at 1664. Those principles reflect "foreign policy concerns" arising from potential "unintended clashes between our laws and those of other nations which could result in international discord," and from "the danger of unwarranted judicial interference in the conduct of foreign policy." Id. (citation omitted).

Under the presumption, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none[.]" Id. (quoting Morrison, 561 U.S. at 255). After considering the text of the ATS, the Court held in Kiobel that nothing in the statutory language provided a clear indication that the statute was intended to have extraterritorial reach. Id. at 1669. The Court concluded that although "Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad," Congress failed to do so when it enacted the ATS. Id. at 1665.

Thereafter, the Supreme Court held that the "petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred." Id. at 1669.

Crucially, however, the Court explained its holding by stating that "[o]n these facts, all the relevant conduct took place outside the United States." Id. The Court elaborated that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." Id. And, in a reference to the fact that the petitioners had not alleged any connection with the territory of the United States other than the physical presence of the foreign corporate defendants, the Court explained that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." Id.

We observe that the Supreme Court used the phrase "relevant conduct" to frame its "touch and concern" inquiry, but never defined that term. Under the facts presented, there was no need to do so because all the conduct underlying the petitioners' claims occurred outside United States territory. We also note that the Court broadly stated that the "claims," rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action. Id.; see, e.g., Black's Law Dictionary 281 (9th ed. 2009) (defining "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court").

The Court's choice of such broad terminology was not happenstance, as illustrated by the opinions of concurring Justices who offered alternative views. For example, Justice Alito, in a concurring opinion in which Justice Thomas joined, advocated a "broader" view of the presumption's effect on ATS jurisdiction, which would bar an ATS action "unless the domestic conduct is sufficient to violate an international law norm" that is sufficiently definite and accepted among civilized nations. Kiobel, 133 S. Ct. at 1670 (Alito, J., concurring). Under the standard proposed by Justice Alito, courts could consider only the domestic tortious conduct of the defendants. Such an analysis is far more circumscribed than the majority opinion's requirement that "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." Id. at 1669 (majority opinion).

The "touch and concern" language set forth in the majority opinion contemplates that courts will apply a fact-based analysis to determine whether particular ATS claims displace the presumption against extraterritorial application. In an opinion concurring in the judgment, Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined, would have allowed jurisdiction whenever: "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest." Id. at 1674 (Breyer, J., concurring in the judgment). And, as Justice Kennedy observed in his concurring opinion, the Supreme Court evidently left unanswered "significant ques-

tions regarding the reach and interpretation of the Alien Tort Statute" that "may require some further elaboration and explanation" of the "proper implementation" of the presumption in cases that are not "covered . . . by the reasoning and holding of [Kiobel]." Id. at 1669 (Kennedy, J., concurring).

In the present case, the plaintiffs argue that based on Kiobel, the ATS provides jurisdiction for claims that "touch and concern" United States territory with "sufficient force to displace" the presumption. See id. (majority opinion). The plaintiffs contend that their claims' substantial connections to United States territory are sufficient to rebut the presumption.

In response, the defendants argue that, under the decision in Kiobel, the ATS does not under any circumstances reach tortious conduct occurring abroad. The defendants maintain that the sole material consideration before us is the fact that the plaintiffs' claims allege extraterritorial tortious conduct, which subjects their claims to the same fatal outcome as those in Kiobel. We disagree with the defendants' argument, which essentially advances the view expressed by Justices Alito and Thomas in their separate opinion in Kiobel.

Because five justices, including Justice Kennedy, joined in the majority's rationale applying the presumption against extraterritorial application, the presumption is part of the calculus that we apply here. However, the clear implication of the Court's "touch and concern" language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the "touch and concern" language, a

fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims. Accordingly, the presumption against extraterritorial application bars the exercise of subject matter jurisdiction over the plaintiffs' ATS claims unless the "relevant conduct" alleged in the claims "touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption . . . ." 133 S. Ct. at 1669.

In Kiobel, the Court's observation that all the "relevant conduct" occurred abroad reflected those claims' extremely attenuated connection to United States territory, which amounted to "mere corporate presence." Indeed, the only facts relating to the territory of the United States were the foreign corporations' public relations office in New York City and their listings on the New York Stock Exchange. Because the petitioners in Kiobel were unable to point to any "relevant conduct" in their claims that occurred in the territory of the United States, the presumption was conclusive when applied to the facts presented.

In the present case, however, the issue is not as easily resolved. The plaintiffs' claims reflect extensive "relevant conduct" in United States territory, in contrast to the "mere presence" of foreign corporations that was deemed insufficient in Kiobel. When a claim's substantial ties to United States territory include the performance of a contract executed by a United States corporation with the United States government, a more nuanced analysis is required to determine whether the presumption has been displaced. In such cases, it is not sufficient merely to say that because the actual injuries were inflicted abroad, the

claims do not touch and concern United States territory.

Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.

In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.

Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These ties to the territory of the United States are far greater than those considered recently by the Second Circuit in Balintulo v. Daimler AG, 727 F.3d 174

(2d Cir. 2013). In that case, the Second Circuit declined to extend ATS jurisdiction to claims involving foreign conduct by South African subsidiaries of American corporations. See id. at 189-94. The plaintiffs in Balintulo alleged that those corporations "s[old] cars and computers to the South African government, thus facilitating the apartheid regime's innumerable race-based depredations and injustices, including rape, torture, and extrajudicial killings." Id. at 179-80. Interpreting the holding of Kiobel to stand for the proposition that "claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States," id. at 189 (citing Kiobel, 133 S. Ct. at 1662, 1668-69), the Second Circuit construed the Court's "touch and concern" language as impacting the exercise of jurisdiction only "when some of the relevant conduct occurs in the United States." Id. at 191 (footnote omitted) (emphasis in original); see also Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 45-46, 49-50 (2d Cir. 2014) (applying Kiobel to foreclose jurisdiction over ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner).

Although the "touch and concern" language in Kiobel may be explained in greater detail in future Supreme Court decisions, we conclude that this language provides current guidance to federal courts when ATS claims involve substantial ties to United States territory. We have such a case before us now, and we cannot decline to consider the Supreme Court's guidance simply because it does not state a precise formula for our analysis.

Applying this guidance, we conclude that the ATS claims' connection to the territory of the United States and CACI's relevant conduct in the United States require a different result than that reached in Kiobel. In its decision in Morrison, the Supreme Court emphasized that although the presumption is no "timid sentinel," its proper application "often[ ] is not self-evidently dispositive" and "requires further analysis." 561 U.S. at 266. We have undertaken that analysis here, employing the "touch and concern" inquiry articulated in Kiobel, by considering a broader range of facts than the location where the plaintiffs actually sustained their injuries.

Indeed, we observe that mechanically applying the presumption to bar these ATS claims would not advance the purposes of the presumption. A basic premise of the presumption against extraterritorial application is that United States courts must be wary of "international discord" resulting from "unintended clashes between our laws and those of other nations." Kiobel, 133 S. Ct. at 1664 (citation omitted). In the present case, however, the plaintiffs seek to enforce the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced. Thus, any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable. Moreover, this case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens. Cf. Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322-24 (D. Mass. 2013)

(holding that Kiobel did not bar ATS claims against an American citizen, in part because "[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself").

We likewise note that further litigation of these ATS claims will not require "unwarranted judicial interference in the conduct of foreign policy." Kiobel, 133 S. Ct. at 1664. The political branches already have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals.

The plaintiffs do not appear to have access to federal courts under the Torture Victim Protection Act of 1991 (TVPA), presumably because they did not suffer injury "under actual or apparent authority, or color of law, of any foreign nation . . . ." Pub. L. No. 102-256, 106 Stat. 73, note following 28 U.S.C. § 1350 (emphasis added). Nevertheless, the TVPA's broad prohibition against torture reflects Congress's recognition of a "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." Kiobel, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment). This conclusion is reinforced by the fact that Congress has authorized the imposition of severe criminal penalties for acts of torture committed by United States nationals abroad. See 18 U.S.C. § 2340A. The Supreme Court certainly was aware of these civil and criminal statutes when it

articulated its "touch and concern" language in Kiobel.[7] See Kiobel, 133 S. Ct. at 1669 (Kennedy, J., concurring) (predicting that "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons" that are "covered neither by the TVPA nor by the reasoning and holding of today's case").

We conclude that the plaintiffs' ATS claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit ap-

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[7] We also note that ATS jurisdiction is not precluded by the fact that the alleged conduct occurred while the plaintiffs in this case were detained in the custody of the United States military. In Rasul v. Bush, the Supreme Court considered this issue with regard to detainees at Guantanamo Bay, Cuba, where the United States maintains a Naval Base under a treaty and a long-term lease with the government of Cuba. See 542 U.S. 466, 471 (2004). There, briefly addressing the jurisdiction of federal courts to consider the petitioners' ATS claims, the Court stated that "nothing . . . categorically excludes aliens detained in military custody outside the United States from [asserting an ATS claim] in U.S. courts." Id. at 484.

proval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.[8] Accordingly, we hold that the district court erred in concluding that it lacked subject matter jurisdiction under the ATS, and we vacate the district court's judgment dismissing the plaintiffs' ATS claims on that basis.

B.

Our decision regarding the ATS answers only the first issue of subject matter jurisdiction presented in this appeal. We also must consider whether the record before us adequately supports a finding that litigation of the plaintiffs' ATS claims and common law tort claims will avoid any "political questions" that would place those claims outside the jurisdiction of the federal courts.

The political question doctrine is a "function of the separation of powers," and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-

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[8] Because of our holding that the plaintiffs' ATS claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application, we need not address the plaintiffs' alternative argument that the relevant conduct did not occur within the territory of a foreign sovereign because the Abu Ghraib prison constituted the "de facto territory" of the United States.

equipped to address. Baker v. Carr, 369 U.S. 186, 217 (1982); see also Tiffany v. United States, 931 F.2d 271, 276 (4th Cir. 1991) (stating that the constitutional separation of powers "requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power"). The Supreme Court has defined a political question by reference to whether a case presents any of the following attributes: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217.

In considering these issues when a defendant challenges subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), a court may evaluate the pleadings as evidence on the issue and may consider other evidence in the record "without converting the proceeding to one for summary judgment." Velasco v. Gov't of Indon., 370 F.3d 392, 398 (4th Cir. 2004) (citation omitted). "However, when the jurisdictional facts are inextricably intertwined with those central to the merits, the district court should resolve the relevant factual disputes only after appropriate discovery." In re KBR, Inc., Burn Pit Litig., 744 F.3d

326, 334 (4th Cir. 2014) (hereinafter Burn Pit) (quoting Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009) (brackets and internal quotation marks omitted)).

We first observe that CACI's position asserting the presence of a political question was resolved by the district court in the plaintiffs' favor much earlier in this litigation. In March 2009, before any discovery had been conducted, CACI challenged the court's subject matter jurisdiction on political question grounds, based on the allegations in the complaint.

At that time, the district court analyzed the six factors set forth by the Supreme Court in Baker solely by reference to the plaintiffs' complaint, and rejected CACI's jurisdictional challenge. The court concluded that the case was not "constitutionally committed" to the executive branch because the case "challenges not the government itself or the adequacy of official government policies, but the conduct of government contractors carrying on a business for profit." Next, the court found that in view of the allegations of a conspiracy between "low-level contractors and military personnel," the court "could analyze this low-level conspiracy" without questioning the interrogation policies authorized by "top military and government officials."

The district court further concluded that there were "judicially discoverable and manageable standards" for evaluating the plaintiffs' claims, citing other "extensive" litigation regarding the events at Abu Ghraib prison, the availability of eyewitness testimony based on courts martial of military personnel,

and the limited nature of any classified discovery material. The court stated that "manageable judicial standards are readily accessible through the discovery process," and that the court "suspect[ed] that the contract [between CACI and the government] details CACI's responsibilities in conducting the interrogations, outlines the applicable laws and rules that CACI personnel are bound by, and sets further restrictions on the type of conduct permitted."

The district court also noted that the process of reviewing CACI's conduct would not demonstrate a "lack of respect" for the political branches, because "matters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs." The court found that the case could be decided without the need for policy determinations clearly requiring "nonjudicial discretion," see Baker, 369 U.S. at 217, stating that "the policy determination central to this case has already been made; this country does not condone torture, especially when committed by its citizens." Finally, the court concluded that consideration of the other Baker factors did not render the case nonjusticiable, and held that the case did not present a political question barring the exercise of its subject matter jurisdiction.

Although CACI appealed the district court's ruling on numerous bases, including justiciability, our conclusion that we lacked jurisdiction over the interlocutory appeal under the collateral order doctrine returned the case to the district court without a decision whether the case presented a political question. See Al Shimari, 679 F.3d at 224. On remand, the district court dismissed the plaintiffs' ATS claims for lack of jurisdiction under Kiobel, and also dismissed the

plaintiffs' remaining common law tort claims under Federal Rule of Civil Procedure 12(b)(6).

In this appeal, CACI renews its political question challenge, contending that the treatment and interrogation of detainees during war is a key component of national defense considerations that are committed to the political branches of government. CACI also asserts that there are no judicially discoverable standards for deciding intentional tort claims in the context of a war zone, and that CACI interrogators were performing a "common mission" with the military and were acting under direct military command and control. CACI further maintains that most of the alleged forms of abuse at issue "were approved by the Secretary of Defense and incorporated into rules of engagement by military commanders at Abu Ghraib."

CACI's arguments are based on constitutional considerations and factual assertions that are intertwined in many respects. We begin our consideration of these arguments by recognizing that "most military decisions" are matters "solely within the purview of the executive branch," Taylor, 658 F.3d at 407 n.9, and that the Constitution delegates authority over military matters to both the executive and legislative branches of government. See Burn Pit, 744 F.3d at 334; Lebron v. Rumsfeld, 670 F.3d 540, 548 (4th Cir. 2012).

Nevertheless, the fact that a military contractor was acting pursuant to "orders of the military does not, in and of itself, insulate the claim from judicial review." Taylor, 658 F.3d at 411. Accordingly, before declaring such a case "to be nonjusticiable, a court

must undertake 'a discriminating analysis' that includes the litigation's 'susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.'" Lane v. Halliburton, 529 F.3d 548, 559 (5th Cir. 2008) (quoting Baker, 369 U.S. at 211-12). Such an analysis involves a "delicate exercise in constitutional interpretation." Baker, 369 U.S. at 211.

Importantly, in the present case, more than five years have elapsed since the district court rendered its initial determination of justiciability. During the intervening period, this Court has formulated a test for considering whether litigation involving the actions of certain types of government contractors is justiciable under the political question doctrine. See Taylor, 658 F.3d at 411.

In our decision in Taylor, we adapted the Supreme Court's analysis in Baker to a particular subset of lawsuits, namely, those brought against government contractors who perform services for the military. See Burn Pit, 744 F.3d at 334 (observing that Taylor "adapted Baker to the government contractor context through a new two-factor test"). The factual record in Taylor involved a soldier who was performing work on an electrical box at a military base in Iraq, and was electrocuted when an employee of a government contractor activated a nearby generator despite an instruction from military personnel not to do so. Taylor, 658 F.3d at 404. When the soldier sued the military contractor for negligence, the government contractor claimed that the case presented a nonjusticiable political question. Id.

In analyzing the justiciability of the soldier's negligence claim, we recognized the need to "carefully assess the relationship" between the military and the contractor, and to "gauge the degree to which national defense interests may be implicated in a judicial assessment" of the claim. Id. at 409-10. We distilled the six Baker factors into two critical components: (1) whether the government contractor was under the "plenary" or "direct" control of the military; and (2) whether 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." Id. at 411 (quotation omitted). We noted that an affirmative answer to either of these questions will signal the presence of a nonjusticiable political question. See Burn Pit, 744 F.3d at 335 (stating that under Taylor, a formal "Baker-style analysis" is not necessary, and that "if a case satisfies either factor [articulated in Taylor], it is nonjusticiable under the political question doctrine").

We further explained in Taylor that, in conducting this two-part inquiry, a court must "'look beyond the complaint, and consider how [the plaintiffs] might prove [their] claim[s] and how [the contractor] would defend." Taylor, 658 F.3d at 409 (quoting Lane, 529 F.3d at 565) (original brackets omitted) (alterations added) (emphasis in original). This determination requires consideration of the facts alleged in the complaint, facts developed through discovery or otherwise made a part of the record in the case, and the legal theories on which the parties will rely to prove their case.

In Taylor, we stated that "if a military contractor operates under the plenary control of the military, the contractor's decisions may be considered as de facto military decisions." 658 F.3d at 410. Based on the factual record presented in that case, we concluded that the military did not exercise "direct control" over the contractor because the record showed that responsibility for the manner in which the job was performed was delegated to the contractor. Id. at 411. In drawing this conclusion, we relied on the parties' contract, which recited that "[t]he contractor shall be responsible for the safety of employees and base camp residents during all contractor operations," and that "the contractor shall have exclusive supervisory authority and responsibility over employees." Id. at 411.

We contrasted these facts with those reviewed in Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F.3d 1271, 1275-79 (11th Cir. 2009), a case in which the plaintiff had sued a military contractor for negligence resulting from injuries sustained when the plaintiff's husband, a sergeant in the United States Army, was thrown from a vehicle in a military convoy that was driven by the contractor's employee. In deciding whether the case presented a political question, the Eleventh Circuit observed that there was no indication in the record that the contractor had any role in making decisions regarding the movement of the military convoy vehicle. Id. at 1282. Thus, the court held that the case was nonjusticiable, "[b]ecause the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, [and] it would be impossible to make any determination regarding [either party's] negli-

gence without bringing those essential military judgments and decisions under searching judicial scrutiny." Id. at 1282-83. Because the facts in Taylor did not manifest such "direct control" over the contractor's performance of its duties, we resolved this factor in the plaintiff's favor. 658 F.3d at 411.

Since our decision in Taylor, we have clarified that the critical issue with respect to the question of "plenary" or "direct" control is not whether the military "exercised some level of oversight" over a contractor's activities. Burn Pit, 744 F.3d at 339. Instead, a court must inquire whether the military clearly "chose how to carry out these tasks," rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed. Id. (emphasis added); see also Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458, 467 (3d Cir. 2013) (stating that plenary control does not exist when the military "merely provides the contractor with general guidelines that can be satisfied at the contractor's discretion" because "contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions"); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1359-61 (11th Cir. 2007) (holding that a contract for aviation services in Afghanistan did not manifest sufficient military control to present a political question because the contractor retained authority over the type of plane, flight path, and safety of the flight).

The second Taylor factor concerns whether "a decision on the merits . . . would require the judiciary to question actual, sensitive judgments made by the military." Taylor, 658 F.3d at 412 (internal quotation marks omitted). In analyzing this factor, a court must

focus on the manner in which the plaintiffs might attempt to prove their claims, and how the defendants are likely to defend against those claims. See id. at 409. Addressing this issue in Taylor, we held that a political question was presented because a military contractor's contributory negligence defense to the plaintiff's common law negligence claim "would invariably require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box," and would oblige the court to evaluate the reasonableness of military decisions. Id. at 411-12.

By contrast, in Burn Pit we analyzed a military contractor's "proximate causation" defense, in which the contractor maintained that the plaintiffs' alleged injuries were caused by military decisions and conduct. 744 F.3d at 340. After examining the record that the district court considered, we concluded that the contractor's causation defense would require an examination of the reasonableness of military decisions only if the case ultimately proceeded under the law of a state having a proportional-liability system that assigns liability based on fault. Id. at 340-41; see also Harris, 724 F.3d at 463 (holding that the contractor's assertion that the military was a proximate cause of the alleged injury did not present a political question under a joint-and-several liability regime, and that even if proportional liability applied, the plaintiffs could proceed on any damages claim that did not implicate proportional liability); Lane, 529 F.3d at 565-67 (concluding that the assertion of a causation defense to fraud and negligence claims did not necessarily implicate a political question).

In the present case, however, we do not have a factual record developed by the district court like the records considered in Taylor and in Burn Pit. And, from our review of the record before us, we are unable to determine whether a political question exists at this stage of the litigation.[9]

With respect to the first Taylor factor, the evidence in the record is inconclusive regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions. CACI argues that military control is evidenced by the contract's stipulation that CACI would provide services "as directed by military authority." CACI also cites a deposition in which a military officer stated that [Redacted] According to that officer, [Redacted] Finally, a military contracting officer declared that [Redacted]

The plaintiffs argue in response that there was an absence of "direct control" by the military over the manner in which CACI's contract was to be performed, and that the contract language reflects a broad grant of discretion to CACI. See Taylor, 658 F.3d at 411. In support of their position, the plaintiffs point to the contract's statement that "[t]he Contractor is responsible for providing supervision for all con-

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[9] We also observe that the United States has not sought to intervene or file an amicus brief with respect to the present appeal. We note, however, that during earlier proceedings in this case, the United States represented that "[t]he Court need not resolve defendants' political question arguments at this stage of the litigation." Brief for the United States as Amicus Curiae, Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (Nos. 09-1335, 10-1891, 10-1921), at 9.

tractor personnel," and that CACI was required to "supervise, coordinate, and monitor all aspects of interrogation activities." The plaintiffs also note that the military officer upon whose testimony CACI relies [Redacted] Additionally, the record lacks any evidence whether any of the alleged acts of abuse by CACI personnel ever were ordered, authorized, or approved by the United States military or by other governmental authority.

This limited record suggests that, at least for required interrogations, CACI interrogators may have been under the direct control of the military if they submitted and executed interrogation plans approved by the military, and if those interrogation plans detailed particular methods for treating detainees. However, based on the minimal evidence before us, we are unable to determine whether the actual content of any interrogation plans subjected the CACI interrogators to such direct control. We also are unable to determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations, which is particularly concerning given the plaintiffs' allegations that "[m]ost of the abuse" occurred at night, and that the abuse was intended to "soften up" the detainees for later interrogations.

A thorough analysis of these matters, as mandated by Taylor, cannot be achieved simply by reviewing the plaintiffs' pleadings and the limited record on appeal, but also will require factual development of the record by the district court and possibly additional jurisdictional discovery. Therefore, we will remand this case to the district court for further consideration

with respect to the application of the first Taylor factor of "direct control." See Burn Pit, 744 F.3d at 334 (noting that "when the jurisdictional facts are inextricably intertwined with those central to the merits, the district court should resolve the relevant factual disputes only after appropriate discovery").

We reach a similar conclusion with respect to the second Taylor factor, because the record does not reveal the defenses that the defendants intend to employ with regard to the merits of the plaintiffs' claims. Indeed, the district court has not yet identified the precise elements that the plaintiffs will be required to prove in their ATS claims for the alleged international law violations. Thus, we are unable to assess whether a decision on the merits would require the judiciary "to question actual, sensitive judgments made by the military." See Taylor, 658 F.3d at 411 (internal quotation marks omitted).

Although the plaintiffs' remaining common law tort claims are premised on familiar causes of action, which the district court thoroughly analyzed in its decision regarding the sufficiency of those claims under Federal Rule of Civil Procedure 12(b)(6), we do not know the degree to which CACI's defenses to these claims might implicate any political questions until the contours of all the plaintiffs' claims are further developed. We therefore refrain from reaching the additional issues presented on appeal regarding whether

the plaintiffs' common law claims properly were dismissed under Rule 12(b)(6).[10]

Based on the issues we have identified that cannot be resolved on the present record, we are unable to perform a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling . . . , and of the possible consequences of judicial action." Baker, 369 U.S. at 211-12. Accordingly, we vacate the district court's dismissal of all four plaintiffs' common law tort claims, and instruct the district court to reexamine the justiciability of the ATS claims and the common law tort claims before proceeding further in the case.

III.

For these reasons, we vacate the district court's judgment and, consequently, the court's award of costs, and remand all the plaintiffs' claims for further proceedings in accordance with the principles expressed in this opinion.

VACATED AND REMANDED

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[10] In remanding the plaintiffs' common law claims for further proceedings under Federal Rule of Civil Procedure 12(b)(1), we express no opinion regarding the correctness of the district court's dismissal of those claims under Federal Rule of Civil Procedure 12(b)(6).

APPENDIX D

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1335

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL–ZUBA'E; SALAH HASAN NUSAIF JASIM AL–EJAILI,

Plaintiffs – Appellees,

v.

CACI INTERNATIONAL, INCORPORATED; CACI PREMIER TECHNOLOGY, INCORPORATED,

Defendants – Appellants.

KELLOGG BROWN & ROOT SERVICES, INCORPORATED,

Amicus Supporting Appellants,

PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS, ERWIN CHEMERINSKY, DEAN AND DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW, ERIC M. FREEDMAN, MAURICE A. DEANE, DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, HOFSTRA UNIVERSITY

SCHOOL OF LAW, JENNIFER M. GREEN, DIRECTOR, HUMAN RIGHTS LITIGATION AND INTERNATIONAL ADVOCACY CLINIC, UNIVERSITY OF MINNESOTA LAW SCHOOL, JONATHAN HAFETZ, ASSOCIATE PROFESSOR OF LAW, SETON HALL UNIVERSITY SCHOOL OF LAW, ALAN B. MORRISON, LERNER FAMILY ASSOCIATE DEAN FOR PUBLIC INTEREST AND PUBLIC SERVICE LAW, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW, STEPHEN I. VLADECK, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; RETIRED MILITARY OFFICERS; EARTHRIGHTS INTERNATIONAL; INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS, HUMAN RIGHTS FIRST, THE CENTER FOR VICTIMS OF TORTURE, THE INTERNATIONAL COMMISSION OF JURISTS, THE WORKING GROUP ESTABLISHED BY THE COMMISSION ON HUMAN RIGHTS ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF–DETERMINATION, HUMAN RIGHTS WATCH, ILIAS BANTEKAS, JOHN CERONE, GEOFFREY CORN, DAVID GLAZIER, KEVIN JON HELLER, MICHAEL NEWTON, MARCO SASSOLI, GARY SOLIS, SCOTT M. SULLIVAN, DR. ANICEE VAN ENGELAND,

Amici Supporting Appellees,

United States of America,

Amicus Curiae.

No. 10-1891

WISSAM ABDULLATEFF SA'EED AL–QURAISHI,

Plaintiff – Appellee,

v.

L–3 SERVICES, INCORPORATED,

Defendant – Appellant,

and

ADEL NAKHLA; CACI INTERNATIONAL, INCORPORATED; CACI PREMIER TECHNOLOGY, INCORPORATED,

Defendants.

PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS, ERWIN CHEMERINSKY, DEAN AND DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW, ERIC M. FREEDMAN, MAURICE A. DEANE, DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW, JENNIFER M. GREEN, DIRECTOR, HUMAN RIGHTS LITIGATION AND INTERNATIONAL ADVOCACY CLINIC, UNIVERSITY OF MINNESOTA LAW SCHOOL, JONATHAN HAFETZ, ASSOCIATE PROFESSOR OF LAW, SETON HALL UNIVERSITY SCHOOL OF LAW, ALAN B. MORRISON, LERNER FAMILY ASSOCIATE DEAN FOR PUBLIC INTEREST AND PUBLIC SERVICE LAW, GEORGE WASHINGTON UNIVERSITY

SCHOOL OF LAW, STEPHEN I. VLADECK, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; RETIRED MILITARY OFFICERS; EARTHRIGHTS INTERNATIONAL; INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS, HUMAN RIGHTS FIRST, THE CENTER FOR VICTIMS OF TORTURE, THE INTERNATIONAL COMMISSION OF JURISTS, THE WORKING GROUP ESTABLISHED BY THE COMMISSION ON HUMAN RIGHTS ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF–DETERMINATION, HUMAN RIGHTS WATCH, ILIAS BANTEKAS, JOHN CERONE, GEOFFREY CORN, DAVID GLAZIER, KEVIN JON HELLER, MICHAEL NEWTON, MARCO SASSOLI, GARY SOLIS, SCOTT M. SULLIVAN, DR. ANICEE VAN ENGELAND,

Amici Supporting Appellee,

UNITED STATES OF AMERICA,

Amicus Curiae.

No. 10-1921

WISSAM ABDULLATEFF SA'EED AL–QURAISHI,

Plaintiff – Appellee,

v.

ADEL NAKHLA,

Defendant – Appellant,

and

L–3 SERVICES, INCORPORATED; CACI INTERNATIONAL, INCORPORATED; CACI PREMIER TECHNOLOGY, INCORPORATED,

Defendants.

PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS, ERWIN CHEMERINSKY, DEAN AND DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW, ERIC M. FREEDMAN, MAURICE A. DEANE, DISTINGUISHED PROFESSOR OF CONSTITUTIONAL LAW, HOFSTRA UNIVERSITY SCHOOL OF LAW, JENNIFER M. GREEN, DIRECTOR, HUMAN RIGHTS LITIGATION AND INTERNATIONAL ADVOCACY CLINIC, UNIVERSITY OF MINNESOTA LAW SCHOOL, JONATHAN HAFETZ, ASSOCIATE PROFESSOR OF LAW, SETON HALL UNIVERSITY SCHOOL OF LAW, ALAN B. MORRISON, LERNER FAMILY ASSOCIATE DEAN FOR PUBLIC INTEREST AND PUBLIC SERVICE LAW, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW, STEPHEN I. VLADECK, PROFESSOR OF LAW AND ASSOCIATE DEAN FOR

SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW; RETIRED MILITARY OFFICERS; EARTHRIGHTS INTERNATIONAL; INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND EXPERTS, HUMAN RIGHTS FIRST, THE CENTER FOR VICTIMS OF TORTURE, THE INTERNATIONAL COMMISSION OF JURISTS, THE WORKING GROUP ESTABLISHED BY THE COMMISSION ON HUMAN RIGHTS ON THE USE OF MERCENARIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF–DETERMINATION, HUMAN RIGHTS WATCH, ILIAS BANTEKAS, JOHN CERONE, GEOFFREY CORN, DAVID GLAZIER, KEVIN JON HELLER, MICHAEL NEWTON, MARCO SASSOLI, GARY SOLIS, SCOTT M. SULLIVAN, DR. ANICEE VAN ENGELAND,

Amici Supporting Appellee,

UNITED STATES OF AMERICA,

Amicus Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:08-cv-00827-GBL-JFA, 8:08-cv-01696-PJM)

Argued: January 27, 2012 Decided: May 11, 2012

Before TRAXLER, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, KING, GREGORY, SHEDD, DUNCAN, AGEE, DAVIS, KEENAN, WYNN, DIAZ, and FLOYD, Circuit Judges.

Appeals dismissed by published opinion. Judge KING wrote the opinion, in which Chief Judge TRAXLER and Judges MOTZ, GREGORY, DUNCAN, AGEE, DAVIS, KEENAN, WYNN, DIAZ, and FLOYD joined. Judge DUNCAN wrote a concurring opinion, in which Judge AGEE joined. Judge WYNN wrote a concurring opinion. Judge WILKINSON wrote a dissenting opinion, in which Judge NIEMEYER and Judge SHEDD joined. Judge NIEMEYER wrote a dissenting opinion, in which Judge WILKINSON and Judge SHEDD joined.

ARGUED: Joseph William Koegel, Jr., STEPTOE & JOHNSON, LLP, Washington, D.C.; Ari S. Zymelman, WILLIAMS & CONNOLLY, LLP, Washington, D.C., for Appellants. Baher Azmy, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Susan L. Burke, BURKE PLLC, Washington, D.C., for Appellees. H. Thomas Byron, III, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. **ON BRIEF**: John F. O'Connor, STEPTOE & JOHNSON, LLP, Washington, D.C., for Appellants CACI International, Incorporated and CACI Premier Technology, Incorporated. Eric R. Delinsky, ZUCKERMAN SPAEDER LLP, Washington, D.C.; F. Whitten Peters, F. Greg Bowman, WILLIAMS & CONNOLLY, LLP, Washington, D.C., for Appellants L–3 Services, Incorporated and Adel Nakhla. Susan M. Sajadi, BURKE PLLC, Washington, D.C.; Katherine Gallagher, J. Wells Dixon, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; Joseph F. Rice, MOTLEY RICE LLC, Mt. Pleasant, South Carolina; Shereef Hadi Akeel, AKEEL &

VALENTINE, PC, Troy, Michigan, for Appellees. Raymond B. Biagini, Lawrence S. Ebner, MCKENNA LONG & ALDRIDGE LLP, Washington, D.C., for Kellogg Brown & Root Services, Incorporated, Amicus Supporting Appellants CACI International, Incorporated, and ACI Premier Technology, Incorporated; Joshua S. Devore, Agnieszka M. Fryszman, Maureen E. McOwen, COHEN MILSTEIN SELLERS & TOLL PLLC, Washington, D.C., for Professors of Civil Procedure and Federal Courts, Amici Supporting Appellees. Jennifer B. Condon, SETON HALL UNIVERSITY SCHOOL OF LAW, CENTER FOR SOCIAL JUSTICE, Newark, New Jersey; John J. Gibbons, Lawrence S. Lustberg, Jonathan M. Manes, GIBBONS P.C., Newark, New Jersey, for Retired Military Officers, Amici Supporting Appellees. Gabor Rona, Melina Milazzo, HUMAN RIGHTS FIRST, New York, New York; Robert P. LoBue, Ella Campi, Richard Kim, Elizabeth Shofner, PATTERSON BELKNAP WEBB & TYLER LLP, New York, New York, for International Human Rights Organizations and Experts, Amici Supporting Appellees. Marco Simons, Richard Herz, Marissa Vahlsing, Jonathan Kaufman, EARTHRIGHTS INTERNATIONAL, Washington, D.C., for Earthrights International, Amicus Supporting Appellees. Tony West, Assistant Attorney General, Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

KING, Circuit Judge:

Following the 2003 invasion of Iraq, the United States military took control of Abu Ghraib prison near Baghdad, using it to detain criminals, enemies of the provisional government, and other persons thought to possess information regarding the anti-Coalition insurgency. The United States contracted with CACI International, Incorporated (with CACI Premier Technology, Incorporated, together referred to herein as "CACI"), and Titan Corporation, now L–3 Services, Incorporated ("L–3"), to provide civilian employees to assist the military in communicating with and interrogating this latter group of detainees.

On June 30, 2008, a number of Iraqis who had been detained at Abu Ghraib and elsewhere filed lawsuits against CACI and L–3 in the Southern District of Ohio and the District of Maryland, alleging that the contractors and certain of their employees were liable in common law tort and under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for torturing and abusing them during their incarceration. Following the unopposed transfer of the Ohio action to the Eastern District of Virginia, where CACI is headquartered, Suhail Najim Abdullah Al Shimari and three co-plaintiffs submitted an Amended Complaint asserting that CACI, through its employees, agents, and government coconspirators, deprived them of basic human necessities, beat them and ran electric current through their bodies, subjected them to sexual abuse and humiliation, and traumatized them with mock executions and other sadistic acts. In the operative Second Amended Complaint filed in the companion litigation, seventy-two plaintiffs, headed by Wissam Abdullateff Sa'eed Al–Quraishi, detailed similar allegations

against L–3 and Adel Nakhla, an L–3 employee residing in Maryland.[1]

I.

A.

On September 15, 2008, CACI moved to dismiss the Amended Complaint filed in the Eastern District of Virginia, maintaining generally that, among other things: (1) the dispute presented a nonjusticiable political question; (2) the inevitable application of the law of occupied Iraq rendered CACI, as part of the occupying power, immune from suit under *Coleman v. Tennessee,* 97 U.S. 509, 24 L.Ed. 1118 (1878), and *Dow v. Johnson,* 100 U.S. 158, 25 L.Ed. 632 (1879); (3) the plaintiffs' claims were preempted by the "combatant activities" exception to the Federal Tort Claims Act (the "FTCA"), *see* 28 U.S.C. § 2680(j), discussed in *Ibrahim v. Titan Corp.,* 556 F.Supp.2d 1 (D.D.C.2007), and subsequently adopted on appeal, *see Saleh v. Titan Corp.,* 580 F.3d 1 (D.C.Cir.2009) (citing *Boyle v. United Tech. Corp.,* 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988)); and (4) the company was entitled to absolute official immunity in accordance with *Mangold v. Analytic Services, Inc.,* 77 F.3d 1442 (4th Cir.1996), because its employees had performed delegated governmental functions. With respect to the

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[1] CACI and L–3 were each initially named as defendants in both lawsuits. Within a couple of months following commencement of the litigation, however, CACI was voluntarily dismissed from the Maryland action and the same was accomplished with respect to L–3 in the Virginia proceedings. *See* Fed.R.Civ.P. 41(a)(1)(A)(i). On March 9, 2009, the district court in Maryland denied without prejudice L–3's motion to transfer venue of that case to the Eastern District of Virginia.

ATS claims, CACI proffered several additional arguments, none of them relevant here in light of the claims' eventual dismissal. *See infra* at 210.

L–3's motion to dismiss the Second Amended Complaint in the Maryland action, filed on November 26, 2008, and in which Nakhla joined, was predicated essentially along the same lines as CACI's, though it characterized *Mangold* as involving the application of derivative sovereign immunity instead of absolute official immunity. As CACI had previously done, L–3 invoked the political question doctrine, cited the Supreme Court's decisions in *Coleman* and *Dow* (the "law-of-war defense"), and requested (through supplemental briefing) that the court adopt the combatant activities exception ultimately applied in *Saleh* ("*Saleh* preemption"). L–3 similarly advocated for dismissal of the ATS claims on substantially the same grounds identified by CACI.[2]

1.

On March 19, 2009, the district court in Virginia entered a Memorandum Order dismissing the ATS claims against CACI, but permitting the common-law tort claims to proceed. *See Al Shimari v. CACI Premier Tech., Inc.,* 657 F.Supp.2d 700 (E.D.Va.2009). In so ruling, the court acknowledged its considerable reservations that the action implicated a political question, in that CACI, a private entity, was not the

[2] The Maryland district court denied L–3's dismissal motion as to the ATS claims. *See infra* at 212. L–3 maintains on appeal that this ruling was in error, but it confines its argument to the identical grounds urged in support of its primary contention that the court below incorrectly declined to dismiss the state-law tort claims.

United States, and only low-level military and governmental personnel appeared to have been involved in the alleged mistreatment. *See id.* at 708–14. The court was similarly doubtful that the foreseeable application of Iraqi law required dismissal in light of CACI's apparent status as an arms-length contractor, "because even if the law of a foreign jurisdiction were to govern any of the Plaintiffs' claims, it would not regulate the conduct of the United States, a non-party to this suit between private parties." *Id.* at 725.

The dividing line between the bona fide military and its civilian support personnel also fueled the district court's uncertainty that the latter could have engaged in wartime activities as a "combatant" for purposes of adopting the D.C. Circuit's theory of FTCA preemption. *See Al Shimari,* 657 F.Supp.2d at 720–21. The court concluded that, in any event, the plaintiffs' allegations of torture at the hands of CACI failed to implicate the uniquely federal interests or irreconcilable conflict with state law that animated the Supreme Court's decision in *Boyle,* on which *Saleh* relied. *See id.* at 722–25.

Regarding CACI's claim of derivative immunity under *Mangold,* the district court set forth its view that the validity of such a claim depends on whether its proponent, in committing the act complained of, was " 'exercising discretion while acting within the scope of their employment.'" *Al Shimari,* 657 F.Supp.2d at 715 (emphasis omitted) (quoting *Mangold,* 77 F.3d at 1446). Citing "a very limited factual record," the court expressed its skepticism that CACI had established at the dismissal stage that its treatment of the plaintiffs at Abu Ghraib involved the exercise of discretion. *Id.* The court stated further that

it was "completely bewildered" by the suggestion that it could accept CACI's representations that the company had performed within the scope of its agreement with the government "when the contract is not before the Court on this motion." *Id.* at 717. On March 23, 2009, CACI noted its appeal (No. 09–1335) from the district court's ruling.

2.

The assertion of *Mangold* immunity was viewed much the same way by the district court in Maryland, which, in its Opinion of July 29, 2010, concluded that, "relying on the information in the [Second Amended] Complaint, it is clearly too early to dismiss Defendants." *Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702, 735 (D.Md.2010).[3] The district court perceived no such

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[3] In *Mangold*, we reversed the district court's denial of immunity to the defendant government contractor and its employees in a lawsuit brought by an Air Force officer and his wife for statements the contractor made to military officials investigating the officer's alleged misconduct. L–3 and CACI have each relied heavily on *Mangold* for the proposition that our decision in that case likewise entitles them to immunity for the tort claims asserted by the plaintiffs here. The Maryland district court, noting the defendants' additional reliance on *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir.2000), characterized the immunity claimed as being in the nature of derivative sovereign immunity, which the court described as "protect[ing] agents of the sovereign from liability for carrying out the sovereign's will." *Al–Quraishi*, 728 F.Supp.2d at 736. The court distinguished *Mangold*, opining that the immunity discussed therein "was based on a combination of derivative absolute official immunity and witness immunity, doctrines that differ from derivative sovereign immunity." *Al–Quraishi*, 728 F.Supp.2d at 736.

The distinction drawn by the district court finds support in the text of *Mangold*, as expressed by our careful observation that the public policy justifying the grant of absolute immunity to federal officials exercising job-related discretion "provide[d] only a partial foundation for protecting" the defendant contractor in that case. *Mangold*, 77 F.3d at 1448 (citing *Westfall v. Erwin*, 484 U.S. 292, 300, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988)). The remainder of that foundation was supplied by "the common law privilege to testify with absolute immunity in courts of law, before grand juries, and before government investigators." *Id*. at 1449. According to the Maryland district court, derivative absolute official immunity (invoked by CACI and more directly addressed by the Virginia district court in *Al Shimari*) "ensures that discretionary governmental decision makers are able to efficiently exercise their discretion in the best interests of the Government without 'the potentially debilitating distraction of defending private lawsuits.'" *Id*. (quoting *Mangold*, 77 F.3d at 1446). While *Mangold* immunity certainly has the effect of removing the potential distraction of litigation, it is important to note the narrow scope of the immunization actually authorized in that case, which we applied "only insofar as necessary to shield statements and information, whether truthful or not, given by a government contractor and its employees *in response to queries* by government investigators engaged in an official investigation." 77 F.3d at 1449. In light of our disposition of these appeals, *infra*, we express no opinion as to the merits of any immunity asserted by the defendants in general, or as to the pertinence of our *Mangold* precedent in particular, but instead leave those matters for the district courts to consider in the first instance should they arise on remand.

record deficiencies concerning L–3's and Nakhla's alternative bases for dismissal, however, deeming the facts as pleaded sufficient to reject outright both defendants' arguments. The court thus denied the motion to dismiss with respect to all claims, including those premised on the ATS. *See id.* at 724–33, 736–60. From the court's accompanying Order, L–3 noted its appeal (No. 10–1891) on August 4, 2010, followed two days later by another appeal (No. 10– 1921) noted on behalf of Nakhla.

B.

The appeals in *Al–Quraishi* were consolidated and argued in seriatim with the *Al Shimari* appeal before a panel of this Court on October 26, 2010. Apart from

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The difference between derivative sovereign immunity and derivative absolute official immunity (including any offshoots thereof) appears to be a fine one that may depend on the degree of discretion afforded the contractor by the government, which, at this stage of the litigation, is not a question capable of final resolution in either proceeding. Were that not the case, the distinction could be crucial, in that fully developed rulings denying absolute official immunity are immediately appealable, while denials based on sovereign immunity (or derivative claims thereof) may not be. *See Hous. Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265, 279 (5th Cir.2007) (denial of derivative sovereign immunity not appealable); *Alaska v. United States*, 64 F.3d 1352, 1356 (9th Cir.1995) (denial of sovereign immunity not appealable); *Pullman Const. Indus., Inc. v. United States*, 23 F.3d 1166, 1168 (7th Cir.1994) (same). *But see In re World Trade Ctr. Disaster Site Litigation*, 521 F.3d 169, 191 (2d Cir.2008) (disagreeing with foregoing authorities). Although the degree to which *Mangold* controls the specific assertions of immunity in these cases is yet to be decided, we will, for simplicity's sake, continue to refer to L–3 and CACI as having asserted "*Mangold* immunity."

urging our affirmance on the merits, the plaintiffs in each matter alternatively maintained that we lacked appellate jurisdiction over the district courts' non-final orders denying the contractors' respective motions to dismiss. On September 21, 2011, we issued opinions in both cases, in which a majority of the panel concluded that jurisdiction was proper in this Court, and that the district courts had erred in permitting the claims against the contractors to proceed. *See Al Shimari v. CACI Int'l, Inc.,* 658 F.3d 413 (4th Cir.2011); *Al–Quraishi v. L–3 Servs., Inc.,* 657 F.3d 201 (4th Cir.2011).[4] Consistently therewith, we entered separate judgments reversing the orders on appeal and remanding with instructions to dismiss both proceedings.

On November 8, 2011, upon the timely petitions of the plaintiffs, *see* Fed. R.App. P. 35(b)-(c), we entered an Order granting en banc rehearing of all three appeals, thereby vacating our prior judgments. The appeals were thereafter consolidated for purposes of oral argument, which was conducted before the en banc

[4] We released both of our panel opinions on September 21, 2011, following the Supreme Court's denial of certiorari in *Saleh* on June 27, 2011. We had previously, on March 11, 2011, placed these appeals in abeyance pending resolution of the *Saleh* certiorari petition.

Court on January 27, 2012.[5] Having fully considered the briefs and arguments of the parties, together with the written and oral submissions of the amici curiae permitted leave to participate, we conclude that we lack jurisdiction over these interlocutory appeals, and we therefore dismiss them.[6]

II.

A.

Except for the limited categories of interlocutory orders set forth at 28 U.S.C. § 1292, federal appellate jurisdiction is reserved for "final decisions of the district courts of the United States." 28 U.S.C. § 1291. It is undisputed that the decisions underlying these putative appeals are interlocutory, at least in the procedural sense, in that no final order or judgment has been entered by either district court. It is also without contest that neither order has been certified appealable by the issuing court pursuant to 28 U.S.C.

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[5] At our invitation, the Department of Justice, on behalf of the United States, submitted an amicus brief and participated in oral argument. Therein, the government took the position that we were without jurisdiction to decide these appeals. Just prior to argument, we granted the defendants leave to submit supplemental briefs in response to the government's amicus submission, after which the plaintiffs moved to tender their own supplemental briefs. We grant the plaintiffs' motions and accept their supplemental replies for consideration.

[6] The arguments and contentions before us in these appeals, though not identically presented or emphasized, are nonetheless substantially similar enough that we are content to continue the appeals' consolidation for purposes of decision. Hereinafter, we shall refer to L–3 and Nakhla together as "L–3," and both of them collectively with CACI as the "appellants."

§ 1292(b), and that none of that statute's provisions otherwise apply to confer jurisdiction on this Court.

Consequently, the only way we may be entitled to review the orders on appeal is if they are among "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Expounding on the topic, the Supreme Court has emphasized that an appealable *Cohen* order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock,* 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (alterations in original) (internal quotation marks omitted).

Cohen involved a stockholder's derivative action for mismanagement and fraud, in which the Supreme Court reviewed the district court's threshold decision declining to enforce a state law requiring plaintiffs in such cases to post security ensuring payment of attorney fees in the event the defendant corporation prevailed. Deeming the appeal properly taken, the Court declared no exception to the jurisdictional prerequisites of 28 U.S.C. § 1291, but instead described what would subsequently be coined the "collateral order doctrine," *MacAlister v. Guterma,* 263 F.2d 65, 67 (2d Cir.1958), as a "practical, rather than a technical construction" of the statute. *Cohen,* 337 U.S. at 546, 69 S.Ct. 1221.

The federal courts of appeals have consistently been charged with keeping a tight rein on the types of orders suitable for appeal consistent with *Cohen.* We are therefore bound to maintain "a healthy respect for the virtues of the final-judgment rule." *Mohawk Indus., Inc. v. Carpenter,* —— U.S. ——, 130 S.Ct. 599, 605, 175 L.Ed.2d 458 (2009); *see also Will,* 546 U.S. at 350, 126 S.Ct. 952 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope.").[7]

The Supreme Court's concern, as expressed through its repeated admonitions, is amply justified. The appellate courts are, by design, of limited jurisdiction; thus, accepting prejudgment appeals as a matter of course would "undermine[ ] efficient judicial administration and encroach[ ] upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk,* 130 S.Ct. at 605 (internal quotation marks omitted). In addition, routine interlocutory review would unacceptably subject

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[7] This "modest scope" is apparent from the short list of orders approved by the Supreme Court for immediate review under *Cohen. See Osborn v. Haley*, 549 U.S. 225, 238–39, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007) (denial of substitution of United States under Westfall Act); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (denial to state of claimed Eleventh Amendment immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (denial of qualified immunity from suit pursuant to 42 U.S.C. § 1983); *Nixon v. Fitzgerald*, 457 U.S. 731, 742, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (denial to president of absolute immunity); *Helstoski v. Meanor*, 442 U.S. 500, 508, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979) (denial of Speech and Debate Clause immunity); *Abney v. United States*, 431 U.S. 651, 660, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (denial of double jeopardy bar).

meritorious lawsuits to "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (internal quotation marks omitted).

Moreover, there is no need to construe *Cohen* broadly given the existence of a suitable alternative. The "safety valve" of discretionary interlocutory review under 28 U.S.C. § 1292(b) is frequently a "better vehicle for vindicating [certain] serious . . . claims than the blunt, categorical instrument of [a] § 1291 collateral order appeal." *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 883, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). Accordingly, the collateral order doctrine should "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Id.* at 868, 114 S.Ct. 1992 (citation omitted).

B.

Although a properly appealable collateral order under *Cohen* must of course satisfy all of the *Will* requirements, its hallmark is the encapsulation of a right whose abridgement is "effectively unreviewable" should appellate review await final judgment. *See Henry v. Lake Charles Am. Press LLC,* 566 F.3d 164, 177 (5th Cir.2009) (describing unreviewability as "the fundamental characteristic of the collateral order doctrine" (citation omitted)). The "critical question" in determining whether the right at issue is effectively unreviewable in the normal course "is whether the essence of the claimed right is a right not to stand

trial"—that is, whether it constitutes an immunity from suit. *Van Cauwenberghe v. Biard,* 486 U.S. 517, 524, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988) (internal quotation marks omitted). Absent an immediate appellate review of the denial of an immunity claim, the right not to stand trial "would be irretrievably lost." *Id.* (internal quotation marks omitted). By contrast, if the right at issue is one "not to be subject to a binding judgment of the court"—that is, a defense to liability—then the right can be vindicated just as readily on appeal from the final judgment, and the collateral order doctrine does not apply. *Id.* at 527, 108 S.Ct. 1945.

In assessing whether the right sought to be protected constitutes a true immunity and not merely a defense, "§ 1291 requires [the court] of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip.,* 511 U.S. at 873, 114 S.Ct. 1992. As the Supreme Court has cautioned, "[o]ne must be careful . . . not to play word games with the concept of a 'right not to be tried,'" *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989), as "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial," *Digital Equip.,* 511 U.S. at 873, 114 S.Ct. 1992. It is within the foregoing framework that we review de novo the appealability of the district courts' denial orders. *See Mitchell v. Forsyth,* 472 U.S. 511, 528–30, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (equating denials of qualified immunity to collateral denials of other asserted immunities or of dou-

ble jeopardy invocations, and deeming de novo standard proper based on non-deferential review of latter claims).

III.

In *Doe v. Exxon Mobil Corp.,* 473 F.3d 345 (D.C.Cir.2007), the District of Columbia Circuit confronted an attempted appeal from the district court's interlocutory order refusing to dismiss an action brought by Indonesian villagers alleging serious injuries visited upon them by members of that nation's military in the defendants' private employ. According to the defendants, the dispute presented a nonjusticiable political question. The court of appeals declined to address the merits of the issue, noting the absence of "a single case in which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order." *Id.* at 352.[8]

That case yet appears to be lacking, and the appellants do not contend to the contrary. L–3, however, ventures that an appellate court may determine whether an action is a political question or otherwise

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[8] The D.C. Circuit was presented in *Doe* with the same argument the appellants make here: that the denial of a dismissal motion premised on the separation of powers doctrine is an appealable collateral order under *Cohen* because immediate review "is necessary to protect the executive branch from judicial intrusion into sensitive foreign policy matters" that could not be remedied on appeal from a final judgment. 473 F.3d at 351. The *Doe* court squarely rejected that mistaken notion, however, explaining that although the Supreme Court has "identif[ied] 'honoring the separation of powers' as a value that could support a party's interest in avoiding trial, [the Court has] only d[one] so while discussing cases involving immunity." *Id*.

nonjusticiable when it has proper jurisdiction over a different issue pursuant to *Cohen* or § 1292(b), if consideration of the former is "necessary to ensure meaningful review." *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). We may also exercise so-called "pendent" appellate jurisdiction in circumstances where the question is "inextricably intertwined" with another that may be immediately reviewed. *Id.; see Rux v. Republic of Sudan,* 461 F.3d 461, 476 (4th Cir.2006).

L–3's argument necessarily supposes the existence of an otherwise valid jurisdictional basis for its appeal. Absent an independently reviewable issue with which the political question doctrine may be inexorably bound, or one that cannot be reviewed in a meaningful fashion without addressing the justiciability of the underlying dispute, we are without authority to make any pronouncement on that aspect of the appellants' defense. We therefore withhold for the moment substantive comment on the political question doctrine, at least until we evaluate whether the law-of-war defense, *Saleh* preemption, or *Mangold* immunity provides the jurisdictional green light for us to proceed.

A.

The appellants characterize their former presence in Iraq as "occupying forces" (L– 3) or "occupying personnel" (CACI) that are answerable "only to their country's criminal laws," Opening Br. of CACI at 25, and thus "not subject to civil suits by the occupied," Opening Br. of L–3 at 22–23. In that regard, the appellants equate their situation with those of the Civil War soldiers in *Coleman v. Tennessee,* 97 U.S. 509, 24

L.Ed. 1118 (1878), and *Dow v. Johnson,* 100 U.S. 158, 166, 25 L.Ed. 632 (1879), who sought relief from judgments entered against them for their wartime acts. The defendant in *Coleman* had been convicted and sentenced to death by a Tennessee state court for murdering a civilian, though the same judgment and sentence had been previously imposed as the result of a United States Army court-martial. *Dow,* by contrast, involved a challenge to a civil judgment entered in Louisiana against a Union general after forces under his command had seized the plaintiff's private property in furtherance of the war effort.

Neither judgment was permitted to stand. In both cases, the Supreme Court considered the states of the Confederacy to have been "the enemy's country," to whose tribunals the "[o]fficers and soldiers of the armies of the Union were not subject." *Coleman,* 97 U.S. at 515. The Court expressed its bewilderment that a contrary result could obtain "from the very nature of war," concluding that "the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announcement." *Dow,* 100 U.S. at 165.

Some differences between the disputes at bar and those underlying *Coleman* and *Dow* are readily evident. Most salient is that the civilian employees of CACI and L–3 assigned to Abu Ghraib were not soldiers. The idea that those employees should nonetheless be treated like full-fledged members of the military pervades this litigation, though the concept resonates with more force as to some of the appellants' other defenses, particularly *Saleh* preemption and

Mangold immunity. *But cf. Ford v. Surget,* 97 U.S. 594, 601–02, 24 L.Ed. 1018 (1878) (relieving Mississippi civilian from liability for burning landowner's cotton where destruction ordered by Confederate army in face of Union advance and those "commands would have been undoubtedly enforced by the same means of coercion as if he had been an enlisted soldier"). The potential liability of government contractors was front and center in both *Saleh* and *Mangold,* and if the legal principles in either case (or both) are deemed apposite to the dispute at bar, there is little question that the appellants, as contractors themselves, may avail themselves of them.

Another distinction is that the appellants attempt to invoke the law-of-war defense exclusively on the assertion that their alleged wrongs will be evaluated under Iraqi law, and not the laws of Virginia, Maryland, or another state. If true, that may or may not be enough to bring *Coleman* and *Dow* into play, inasmuch as the overriding concern in those cases appears to have been less about the application of the criminal law of Tennessee or of Louisiana tort law (there being no suggestion that either differed significantly from the analogous law applied by the defendants' states of citizenry), and more about the jurisdiction of the "foreign" courts. *See Coleman,* 97 U.S. at 516 (musing that "there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy"); *Dow,* 100 U.S. at 163 (identifying "[t]he important question" for resolution as whether nation's military could be held liable "in the local tribunals"). Here, of course, the appellants are being sued on their home turf, in courts that are indisputably domestic.

Even assuming that the facts before us can be viewed in such a fashion to permit *Coleman* and *Dow* to apply, there is no indication from the opinions in those cases that the Supreme Court intended to construe the law-of-war defense as an immunity from suit, rather than merely an insulation from liability. *See Dow,* 100 U.S. at 165 (characterizing dispute as concerning personal jurisdiction); *Lauro Lines s.r.l. v. Chasser,* 490 U.S. 495, 500, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989) ("[W]e have declined to hold the collateral order doctrine applicable where a district court has denied a claim . . . that the suit against the defendant is not properly before the . . . court because it lacks jurisdiction."). In its subsequent *Ford* opinion, with judgment having been entered against the defendant on a jury verdict, the Court in no way indicated that trial should not have been had.

Indeed, it seems a bit curious to imagine the nineteenth century Court regarding its decisions in the Civil War cases as having durable precedential effect; the appeals afforded an unusual opportunity for substantive domestic review of what were, in effect, foreign pronouncements of judgment. But to the extent that *Coleman* and *Dow* possess continued relevance beyond their immediate context, it is nonetheless clear that the issues presented in those cases were effectively reviewed and disposed of on appeal, and, as such, the manner in which the Supreme Court chose to resolve them fails to compel the conclusion that immunity must be accorded all prospective defendants who insist they are similarly situated. The law-of-war defense thus provides no basis for an interlocutory appeal in this case.

B.

In a like fashion, *Saleh* preemption falls squarely on the side of being a defense to liability and not an immunity from suit. Immunity, according to the Supreme Court, derives from "an *explicit* statutory or constitutional guarantee that trial will not occur." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (emphasis added).[9] There is no contention that the Supreme Court in *Boyle v. United Technologies Corp.,* 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), from which *Saleh* preemption is derived, relied on any such explicit guarantee embodied in statute or in the Constitution. *Boyle* preemption (and, thus, *Saleh* preemption) is, *ipso facto,* not immunity.

We are not the first court to arrive at this ineluctable conclusion. In *Martin v. Halliburton,* 618 F.3d

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[9] The Supreme Court has properly dismissed the mistaken notion that *Midland Asphalt* 's "explicit . . . guarantee" requirement is in tension with the immediate appealability of an order denying qualified immunity, an inherently equivocal term that appears to connote only an implicit guarantee against the burdens of trial. Any tension can only be characterized as chimerical, however, in light of qualified immunity's "good pedigree in public law," which more than makes up for its implicitness. *Digital Equip.*, 511 U.S. at 875, 114 S.Ct. 1992. The argument that an immunity need not be explicit in order for jurisdiction to lie under the collateral order doctrine "only leaves [the proponent of jurisdiction] with the unenviable task of explaining why other rights that might fairly be said to include an (implicit) 'right not to stand trial' aspect are less in need of protection by immediate review, or more readily vindicated on appeal from final judgment, than" the right the proponent asserts is an implicit right to be free from suit. *Id*. at 875–76, 114 S.Ct. 1992.

476, 487 (5th Cir. 2010), the Fifth Circuit similarly reckoned that "the combatant activities exception is not subject to a *sui generis* exemption from the ordinary jurisdictional requirements for denials of preemption claims." [10] Indeed, the *Boyle* Court itself repeatedly framed the preemption it recognized as creating a mere defense to liability. *See, e.g.,* 487 U.S. at 507, 108 S.Ct. 2510 ("The imposition of liability on Government contractors [in the military procurement context] will directly affect the terms of Government contracts."); *id.* at 511–12, 108 S.Ct. 2510 ("The financial burden of judgments against the contractors would ultimately be passed through . . . to the United States itself."); *id.* at 512, 108 S.Ct. 2510 ("[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced.").

It is tempting, we suppose, to blur the line between an eventual frustration of liability and the more immediate right to avoid suit altogether. One might be persuaded to consider the words "preemption" and

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[10] *See also Rodriguez v. Lockheed Martin Corp.*, 627 F.3d 1259 (9th Cir.2010), in which the court addressed its jurisdiction over an interlocutory appeal premised on the discretionary functions exception to the FTCA. According to the *Rodriguez* court, because the right recognized by *Boyle* was merely a "defense to judgment"—and not, like qualified immunity, a "right not to be required to go to trial"—nothing is irretrievably lost by the lack of an immediate appeal from an adverse pretrial ruling. *Rodriguez*, 627 F.3d at 1266. The Ninth Circuit emphasized that *Boyle* did not devise a new species of immunity, but merely recognized that " 'whether the facts establish the conditions for the [government contractor] defense is a question for the jury.'" *Id*. at 1265 (quoting *Boyle*, 487 U.S. at 514, 108 S.Ct. 2510).

"immunity" as mere labels that are more or less synonymous with each other, or to presume that the former can effectively operate as the latter. But merely repackaging for the sake of convenience the preemption defense derived from *Boyle* as "combatant activities immunity," as our good colleague Judge Niemeyer does in speaking for the dissenters, *post* at 259, is patently incorrect.

Though *Boyle* preemption, like sovereign immunity, may be invoked to bar state law claims, the encapsulated rights serve distinct purposes. State law claims are preempted under *Boyle* simply because the imposition of liability in such situations is irreconcilable with uniquely federal interests. The right conferred through federal preemption, in other words, is the right not to be bound by a judgment stemming from state law duties.

In stark contrast, immunity has consistently been administered as a protection against the burden of litigation altogether. *See Mitchell v. Forsyth,* 472 U.S. 511, 525– 27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Further, as the court of appeals explained in *Rodriguez v. Lockheed Martin Corp.,* 627 F.3d 1259, 1265 (9th Cir.2010), "[a]l-though the source of the government contractor defense [recognized in *Boyle*] is the United States' sovereign immunity," the preemption defense is not itself a species thereof. To the contrary, entitlement to preemption "is only a corollary financial benefit flowing from *the government's* sovereign immunity." *Id.* Accordingly, *Boyle*'s "government contractor defense does not confer sovereign immunity on contractors," and as such, the denial of the defense is not immediately appealable. *Id.* (internal quotation marks omitted).

Importantly, the law requires that we assess the appealability of a potentially qualifying collateral order in a categorical sense, and not on a case-by-case basis.[11] Conducting that assessment here leads to the conclusion that the denial of a preemption claim stemming from the combatant activities exception would not necessarily entail significant scrutiny of sensitive military issues. Fundamentally, there is little intrusion because the court's inquiry focuses on whether the contractor complied with the government's specifications and instructions, and not the wisdom or correctness thereof. The *Boyle* and *Saleh* decisions themselves well illustrate the lack of intrusion that would result from deferring review until after entry of a final judgment. *Boyle,* for example, involved an appeal

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[11] Whether to recognize an order as collateral is not "an individualized jurisdictional inquiry," but rather is based "on the entire category to which a claim belongs." *Mohawk*, 130 S.Ct. at 605. Consequently, "we do not now in each individual case engage in ad hoc balancing to decide issues of appealability." *Johnson v. Jones*, 515 U.S. 304, 315, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). It follows that "the issue of appealability under § 1291 is to be determined . . . without regard to the chance that the litigation at hand might be speeded, or a particular justice averted, by a prompt appellate court decision." *Digital Equip.*, 511 U.S. at 868, 114 S.Ct. 1992. Although the presence of a "substantial public interest," or "some particular value of a high order," is a necessary prerequisite to a collateral order appeal, *Will*, 546 U.S. at 352–53, 126 S.Ct. 952, the identification of such a public interest is not the end of the inquiry. As the Supreme Court explained in *Mohawk*, "[t]he crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." 130 S.Ct. at 606.

from a jury verdict for the plaintiff, while "the two appeals in *Saleh* reached the D.C. Circuit using the normal machinery of §§ 1291 and 1292(b)." *Martin,* 618 F.3d at 488.[12]

Moreover, the district court in *Saleh* had conducted extensive discovery "regarding the military's supervision of the contract employees as well as the degree to which such employees were integrated into the military chain of command," 580 F.3d at 4, with no ill effects. The Fifth Circuit, while acknowledging that *Boyle* preemption is underpinned by "a respect for the interests of the Government in military matters," has nonetheless reasoned that those interests can be safeguarded without resort to interlocutory review. *Martin,* 618 F.3d at 488. For example, a district court "should take care to develop and resolve such defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives." *Id.* Additionally, a trial court should consider "limiting discovery initially to such defenses" and

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[12] It is of no moment that the plaintiffs have alleged a conspiracy among the contractors, their employees, and certain military personnel. The conspiracy allegation does not transform this civil action into a challenge to the government's policy or interests, or into an attempt to hold its contractors liable for acting in accord with governmental decisions. Just as in *Saleh*, where some of the plaintiffs alleged a similar conspiracy, "there is no allegation, and no evidence, that" the "low-level soldiers" alleged to be acting in conspiracy with contractor personnel "had any control, de jure or de facto, over the" contractor personnel. 580 F.3d at 20 (Garland, J., dissenting). As such, these proceedings—like *Saleh*—constitute direct challenges only to "the unlawful and unauthorized actions of private contractors," *id*., based on the pleadings and record to date.

"certifying orders denying [the] defense[ ] where the law is unsettled but, after refinement on appeal, might warrant dismissing plaintiffs' claims." *Id.*[13]

When properly conducted, suits against private contractors pose minimal risk that military personnel will be improperly haled into court or their depositions taken, because "[w]here discovery would hamper the military's mission, district courts can and must delay it." *Saleh,* 580 F.3d at 29 (Garland, J., dissenting) (citing, inter alia, *Watts v. SEC,* 482 F.3d 501, 508–09 (D.C.Cir.2007)). Other procedural and substantive rules, such as Rule 45 of the Federal Rules of Civil Procedure and the state secrets doctrine, also adequately safeguard military interests. *See id.* at 29 n. 18 (Garland, J., dissenting). Accordingly, we decline to recognize denials of *Saleh* preemption as a new class of collateral order.[14] Insofar as it would be founded on the false premise that immediate appeals are necessary in preemption cases to protect the government's legitimate military interests, such recognition would reflect an impermissibly indulgent view of appellate jurisdiction.

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[13] The government's amicus submission agrees, observing that concerns over postponing review "can and should be addressed by careful limitation and close supervision of any necessary discovery by the district courts, and by the use of existing mechanisms for interlocutory appellate review, including certification under 28 U.S.C. § 1292(b)." Br. for the United States as Amicus Curiae at 4.

[14] And, indeed, it remains to be seen whether we will adopt the substantive concept of "battlefield preemption" espoused by the *Saleh* majority. For the purposes of our decision today, however, we assume but do not decide that such a defense may be available to the appellants.

C.

Before jurisdiction can be invoked under the collateral order doctrine, a district court must issue a "fully consummated decision" that constitutes "a complete, formal, and . . . final" resolution of the issue. *Abney v. United States,* 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). In other words, the court's ruling must be "the final word on the subject addressed." *Digital Equip.,* 511 U.S. at 867, 114 S.Ct. 1992. If a ruling lacks finality, the threshold requirement for collateral order review—that the question in dispute be definitively resolved—is likewise left wanting. *See Will v. Hallock,* 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (confining review of non-final orders to disputed questions conclusively determined, which raise important non-merits issues that are effectively unreview-able if not immediately appealed).

A question in dispute cannot be said to have been conclusively resolved if a district court "ma[kes] clear that its decision [is] a tentative one, . . . and that it might well change its mind" after further proceedings. *Jamison v. Wiley,* 14 F.3d 222, 230 (4th Cir.1994). Disputed questions that arise with respect to claims of immunity are not the exception to that ironclad rule. Fundamentally, a court is entitled to have before it a proper record, sufficiently developed through discovery proceedings, to accurately assess any claim, including one of immunity. And even a party whose assertion of immunity ultimately proves worthy must submit to the burdens of litigation until a court becomes sufficiently informed to rule.

Manifestly, with respect to the appellants' attempts to invoke *Mangold* immunity in their respective actions, sufficient information was lacking. The Maryland and Virginia district courts each perceived that the validity of such invocations depended in significant part on whether the contractor involved was acting within the scope of its agreement with the United States. One could hardly begin to answer that question without resort to any and all contracts between the appellants and the government pertinent to the claims, defenses, and related matters below. *See, e.g., Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702, 741 n. 11 (D.Md.2010) (reasoning that contract could show, for example, that " 'federal wartime policy-making' was not behind Defendants' alleged actions," in which case plaintiffs' "state law claims [would] not intrude upon the preempted field"). While other evidence and testimony could also be relevant to ascertain the appellants' business relationship with the government in general, and the parties' agreed duties and responsibilities in Iraq and at Abu Ghraib in particular, the analysis must necessarily begin with the written contract or contracts. *Cf. Harris v. Kellogg Brown & Root Servs., Inc.,* 618 F.3d 398, 402 (3d Cir.2010) (rejecting appellate jurisdiction for failure of *Will's* "conclusively determined" requirement, where

only limited discovery had been conducted on combatant activities and political question defenses).[15]

In dissent, Judge Niemeyer contends that *Behrens v. Pelletier,* 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), each a qualified immunity proceeding, provide for collateral order jurisdiction of the district courts' orders denying *Mangold* immunity, as illustrated by other of our qualified immunity cases. *See post* at 254, 255 (citing *McVey v. Stacy,* 157 F.3d 271 (4th Cir.1998); *Jenkins v. Medford,* 119 F.3d 1156 (4th Cir.1997) (en banc); *Winfield v. Bass,* 106 F.3d 525 (4th Cir.1997) (en banc)). According to Judge Niemeyer, *Behrens* and *Iqbal* counsel that Rule 12 denials of immunity invariably constitute final decisions appealable under § 1291, and those authorities "clearly establish that these appeals fit comfortably with the *Cohen* collateral order doctrine." *Post* at 249.

It is more accurate to say that orders denying dismissal motions, insofar as those motions are based on immunities that are not absolute but conditioned on context, such as qualified immunity in a § 1983 action

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[15] As the Virginia district court pointed out, the contracts "will shed much light on the responsibilities, limitations and expectations that [the appellants] were bound to honor as government contractors. In addition, consideration of [their] course of dealing with the government may reveal whether deviations from the contract occurred and, if so, whether they were tolerated or ratified." *Al Shimari v. CACI Premier Tech., Inc.*, 657 F.Supp.2d 700, 717 (E.D.Va.2009). Of course, the district court can receive this evidence under seal, or otherwise, if the circumstances so warrant.

or the derivative immunities at issue here, are, in accordance with *Behrens* and *Iqbal,* sometimes immediately appealable. *Winfield* makes the point:

> [W]e possess no jurisdiction over a claim that a plaintiff has not presented enough evidence to prove that the plaintiff's version of the events actually occurred, but we have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them.

106 F.3d at 530. More generally, we would have jurisdiction over an appeal like the ones attempted here "if it challenge[d] the materiality of factual issues." *Bazan ex rel. Bazan v. Hidalgo Cnty.,* 246 F.3d 481, 490 (5th Cir.2001). By contrast, we lack jurisdiction if such an appeal "challenges the district court's genuineness ruling—that genuine issues exist concerning material facts." *Id.* Of course, "[w]e always have jurisdiction to determine whether the facts relevant to our jurisdiction exist." *Wireko v. Reno,* 211 F.3d 833, 835 (4th Cir.2000) (citation omitted).

In *Iqbal,* the Supreme Court framed the genuineness-materiality distinction as one between "fact-based" or "abstract" issues of law, with only the latter supplying a proper foundation for immediate appeal. 556 U.S. at 674, 129 S.Ct. 1937 (quoting *Johnson v. Jones,* 515 U.S. 304, 317, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)). The *Iqbal* Court concluded that whether a particular constitutional right was clearly established for qualified immunity purposes presents an abstract issue of law that permits an appeal at the dismissal stage. *See id.* at 674–75, 129 S.Ct. 1937. Here,

as in *Iqbal,* there is no "vast pretrial record" to encumber our decisionmaking, *id.* at 674, 129 S.Ct. 1937, but the issues before us are more factually entrenched and far less amenable to meaningful analysis by resort merely to the plaintiffs' pleadings. Thus, unlike *Iqbal,* these appeals encompass fact-based issues of law, with the need for additional development of the record being among those "matters more within a district court's ken." *Id.*

Hence, insofar as an interlocutory appeal of a denial of immunity requires resolution of a purely legal question (such as whether an alleged constitutional violation was of clearly established law), or an ostensibly fact-bound issue that may be resolved as a matter of law (such as whether facts that are undisputed or viewed in a particular light are material to the immunity calculus), we may consider and rule upon it. *See Behrens,* 516 U.S. at 313, 116 S.Ct. 834 (deeming appellate jurisdiction to have been properly asserted over denial of summary judgment in § 1983 action where adverse ruling was premised on defendant's alleged conduct having violated clearly established law); *McVey,* 157 F.3d at 276 (approving jurisdiction over similar legal issue at dismissal stage, where appeal did not "raise factual questions concerning the defendants' involvement, which would not be appealable").[16]

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[16] *See also Jenkins*, 119 F.3d at 1159–60 (noting existence of appellate jurisdiction over denial of qualified immunity on motion to dismiss, based in part on defendant's assertion that alleged violation did not implicate clearly established constitutional right); *Winfield*, 106 F.3d at 530 (recognizing jurisdiction over appeal of denial of qualified immunity insofar as district court ruled on summary judgment that asserted legal right was clearly established).

Behrens, then, confers jurisdiction of these appeals only if the record at the dismissal stage can be construed to present a pure issue of law. We might discern such an issue if we were of the opinion, as the dissenters evidently are, that persons similarly situated to the appellants are inevitably and invariably immune from suit premised on any and all conduct occurring (1) when they are in a war zone, by virtue of (2) a contract with the government. But not even *Saleh*, which receives a ringing endorsement in both dissents, went that far.

The court in *Saleh* adopted the following rule: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." 580 F.3d at 9. The D.C. Circuit therefore conditions preemption on the presence of a certain level of public/private integration, the conduct of activities that may be classified as combat, and the military's retained prerogative concerning the decisionmaking process. Though the *Saleh* court had the luxury of a complete record developed through discovery to assist it in pondering those issues, there has

been no discovery in the cases at bar, and the pleadings provide nothing approaching definitive answers.[17]

Indeed, the questions that will require proper answers in order to gauge the appellants' entitlement to immunity have yet to be fully ascertained. In *Mangold v. Analytic Services, Inc., supra* note 3, the relevant issues on appeal from summary judgment in-

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[17] Judge Wilkinson, on behalf of our dissenting friends, assumes as fact that the contractors were "integrated into wartime combatant activities under control of the U.S. military," *post* at 226, notwithstanding that there is no record evidence to support that assumption, or even what "integration" means in the context of war. Judge Wilkinson appears to equate integration with the plaintiffs' assertion of a conspiracy. *See post* at 227 (citing conspiracy allegations of Amended Complaint in *Al Shimari* in support of notion "that the contractors here were acting in collaboration with U.S. military personnel"); *see also supra* note 12. But there is simply no reason to believe that the integration of separate entities into a more or less unified whole is necessarily the legal equivalent of a collaboration or conspiracy between those entities.

It is also far from clear that, with respect to the torture and abuses alleged by the plaintiffs, the appellants were "acting under U.S. military authority," *post* at 230, as presumed by Judge Wilkinson. If one felt constrained to form a conclusion on the authorization question based on the available record, then one would be better served to reference the pertinent allegations of the plaintiffs that, for example, "CACI knew that the United States government has denounced the use of torture and other cruel, inhuman, or degrading treatment," *Al Shimari* Amended Complaint at ¶ 95; "L–3 permitted [its] translators to ignore—repeatedly—the military's instructions to abide by the Geneva Conventions," *Al–Quraishi* Second Amended Complaint at ¶ 430; and "L–3 affirmatively hid the misconduct of its employees from the United States military," *id*. at ¶ 433.

cluded whether government personnel were conducting an "official investigation," and whether the contractors' statements giving rise to potential liability were responsive to the investigators' queries, as opposed to being extraneous thereto. *See Mangold v. Analytic Services, Inc.,* 77 F.3d at 1449–50. Subsequently, in *Butters v. Vance International, Inc., supra* note 3, also a summary judgment appeal, we were constrained to decide whether withholding a job promotion from the plaintiff was a "commercial activity," and whether that employment decision was made by the defendant or the foreign government with which it had contracted. *See Butters v. Vance International, Inc.,* 225 F.3d at 465–67. As with *Mangold* and *Butters,* this case too requires careful analysis of intrinsically fact-bound issues, which may resemble any or all of the *Saleh* considerations, and will almost certainly entail an exploration of the appellants' duties under their contracts with the government and whether they exceeded the legitimate scope thereof.

The appellants are requesting immunity in a context that has been heretofore unexplored. These are not disputes in which facts that might be material to the ultimate issue have been conclusively identified. Moreover, those facts that may have been tentatively designated as outcome-determinative are yet subject to genuine dispute, that is, a reasonable fact-finder could conclude in favor of either the plaintiffs or the defendants. *See Metric/Kvaerner Fayetteville v. Fed. Ins. Co.,* 403 F.3d 188, 197 (4th Cir.2005). Because the courts' immunity rulings below turn on genuine-

ness, we lack jurisdiction to consider them on an interlocutory appeal. *See Winfield,* 106 F.3d at 530; *Bazan,* 246 F.3d at 490.[18]

Thus, although *Mangold* immunity confers upon those within its aegis the right not to stand trial, the appellants have yet to establish their entitlement to it. *See Martin,* 618 F.3d at 483 (concluding that claims of immunity must be "substantial," and not "merely colorable"). Because these appeals were taken before the district courts could reasonably render a decision on the applicability of *Mangold* and, perhaps, *Butters,* there is no collateral order fulfilling the *Will* requirements for appealability pursuant to

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[18] The Supreme Court's recent decision in *Filarsky v. Delia*, — U.S. ——, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012), is not at all to the contrary. The issue in *Filarsky*, an appeal by a private lawyer from the denial of qualified immunity in a § 1983 case, was "whether an individual hired by the government to do its work is prohibited from seeking such immunity." *Id*. at 1660. The Supreme Court concluded in the negative, and, consistent therewith, we have not curtailed the opportunity of the appellants herein to seek immunity from the plaintiffs' claims; such immunity may yet be had. It is also worth noting that the appeal in *Filarsky* was taken only after the district court had ruled on summary judgment, *see id*. at 1660–61, ascertaining that the issues in controversy were strictly legal, i.e., whether qualified immunity could be extended to private parties, and whether the alleged constitutional violation was one of clearly established law.

Cohen, and therefore no jurisdiction in this Court to review any related aspect of the proceedings below.[19]

D.

There being no independent basis for appellate jurisdiction premised on the law-of-war defense, *Saleh* preemption, or *Mangold* immunity, we are without pendent jurisdiction to further consider the appellants' contentions that the plaintiffs' claims present nonjusticiable political questions. Our rejection of each of the three proffered bases also precludes the

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[19] The same lack of jurisdiction obtains with respect to L–3's attempted appeal of the Maryland district court's denial of its motion to dismiss the ATS claims, insofar as that appeal is grounded in any of the derivative immunities we have discussed. *See supra* note 2 (observing winnowing of L–3's ATS arguments from those presented to the district court). Similar unsettled questions pertain ing to potentially relevant considerations such as agency, the scope of L–3's duties under the contracts, and the degree of integration may bear on whether the asserted immunities are properly "derived" to defeat the plaintiffs' claims. Further, we agree with the court below that although the Maryland plaintiffs have sued under the ATS, that litigation strategy should not be construed as a judicial admission that the actions of L–3 were those of the United States, thereby crystallizing access to a sovereign immunity defense and providing, through the denial of such immunity, an independent basis for appellate juris diction. *See Al–Quraishi v. Nakhla*, 728 F.Supp.2d 702, 751–53 (D.Md.2010). Our conclusion in that regard is buttressed by *Sosa v. Alvarez–Machain*, 542 U.S. 692, 732 & n. 20, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), in which the Supreme Court carefully left open the question of whether ATS liability may be imposed on private actors. Obviously, if the plaintiffs' ATS claims may be maintained against L–3 as a private actor but not as an agent of the government acting within the scope of its agency, L–3's status is one more issue that may be appropriate for the district court to resolve following discovery.

exercise of jurisdiction regardless of whether the appellants' political question defense is inextricably intertwined with any of them, or whether those bases are similarly interdependent with one another.

IV.

Pursuant to the foregoing, these consolidated appeals must be dismissed.

APPEALS DISMISSED

DUNCAN, Circuit Judge, concurring:

I respect the majority's well-reasoned opinion in this case and therefore fully concur in its conclusion that we lack jurisdiction to hear this appeal. I write separately only to express my hope that the district courts in these consolidated appeals will give due consideration to the appellant's immunity and preemption arguments—especially in light of the Supreme Court's recent opinion in *Filarsky v. Delia,* —— U.S. ––—, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012), as discussed in Judge Niemeyer's dissent—which are far from lacking in force.

Judge Agee has authorized me to indicate that he joins in this concurrence.

WYNN, Circuit Judge, concurring:

I concur fully in the thoughtful and well-reasoned majority opinion in these cases. I write separately only to underscore the prudence of the majority's restraint, which promotes both "efficient judicial administration" and "the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter,* —— U.S. ——, 130 S.Ct. 599, 605, 175 L.Ed.2d 458 (2009).

With respect to the latter consideration, I feel compelled to reiterate the majority's holding that our limited appellate role leaves us without jurisdiction at this stage of the litigation to consider the underlying merits of these appeals. Likewise, as noted in the majority opinion, "facts that might be material to the ultimate issue have [not yet] been conclusively identified" in these cases, which are on appeal from motions to dismiss. *Ante* at 223.

Accordingly, today's opinion offers no guidance to the district court on the underlying merits of these matters. To do otherwise would, in my opinion, potentially usurp the role of the district court or risk overstepping our own. *See United States v. Fruehauf,* 365 U.S. 146, 157, 81 S.Ct. 547, 5 L.Ed.2d 476 (1961) ("Such [advisory] opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give."). Further, to the extent that my colleagues, in separate opinions, offer their views on the underlying merits of these cases, those opinions, "by their nature[,] express views that are not the law." *Arar v. Ashcroft,* 585 F.3d 559, 581 n. 14 (2d Cir.2009) (en banc).

WILKINSON, Circuit Judge, dissenting:

The majority in this case tries to present its view as some sort of innocuous jurisdictional disposition. But the jurisdictional ruling is wrong, and the decision is anything but innocuous. It inflicts significant damage on the separation of powers, allowing civil tort suits to invade theatres of armed conflict heretofore the province of those branches of government constitutionally charged with safeguarding the nation's most vital interests.

I fully join Judge Niemeyer's fine dissent. My good colleague has ably addressed many of the failings of today's decision, and I see no need to repeat those

points here. I write separately only because the difficulties with these actions are so legion that no single dissent could hope to cover them all.

The majority and I disagree on much, but there is no disagreement about the Abu Ghraib photographs that have apparently inspired this litigation. *See ante* at 209. Americans of good will were sickened by those photographs and the depraved conduct that would be reprehensible whenever, wherever, and against whomever it was applied. But acknowledging that fact answers only the question of whether this is a hard case. It does not answer the question whether it is bad law whose lasting consequences and abiding damage will long outlive the distressing photographs that have prompted the suits herein.

The actions here are styled as traditional ones and wrapped in the venerable clothing of the common law. Even on common law terms, however, they are demonstrably incorrect, and the impact which tort doctrine will have on military operations and international relations magnifies the difficulties immeasurably. I dare say none of us have seen any litigation quite like this and we default if we accept uncritically or entertain indefinitely this novel a violation of the most basic and customary precepts of both common and constitutional law.

Sadly, the majority's opinion does precisely this. After reading its decision, one could be forgiven for thinking that the issue before us is a simple jurisdictional question arising out of ordinary tort suits. But these are not routine appeals that can be quickly dismissed through some rote application of the collateral order doctrine. This case instead requires us to decide

whether the contractors who assist our military on the battlefield will be held accountable through tort or contract, and that seemingly sleepy question of common law remedies goes to the heart of our constitutional separation of powers. Tort suits place the oversight of military operations in an unelected judiciary, contract law in a politically accountable executive. And in the absence of some contrary expression on the part of the Article I legislative branch, the basic principles of Article II require that contractual, not tort, remedies apply.

The majority emphatically decides this weighty question by pretending not to decide, as its dismissal of these appeals gives individual district courts the green light to subject military operations to the most serious drawbacks of tort litigation. But arrogating power to the Third Branch in a contest over military authority is the wrong call under our Constitution, and there is no garb for this decision so benign as to obscure the import of what the majority has done.

We tread this territory at our peril. This decision is contrary to decades of Supreme Court admonitions warning federal courts off interference with international relations. Of course military contractors should be held accountable, and it is important that a framework be set in place to accomplish this task. But instead of establishing that framework, the majority succumbs to mere drift and in so doing places courts in the most damaging and least defensible legal landscape possible. None of us have any idea where exactly all this is headed or whether the damage inflicted on military operations will be only marginal or truly severe. At a minimum, however, today's deci-

sion breaches a line that was respected by our predecessors on courts high and low. I would not cross this boundary even if the collateral order doctrine could cloak my steps. With all respect for my fine colleagues, I would remand these actions to the district court with direction that they be dismissed.

Part I of my dissenting opinion discusses the utter unsuitability of tort actions such as these in the context of an international theatre of war. Part II addresses why contract law is compatible with the separation of powers and the responsibilities allocated the executive branch under Article II of our Constitution. Part III explains why the majority's application of the collateral order doctrine goes beyond being incorrect to inflicting damage on American interests overseas.

I.

Tort regimes involve well-known tradeoffs. They may promote the public interest by compensating innocent victims, deterring wrongful conduct, and encouraging safety and accountability. However, tort law may also lead to excessive risk-averseness on the part of potential defendants. And caution that may be well-advised in a civilian context may not translate neatly to a military setting, where the calculus is different, and stakes run high. Risks considered unacceptable in civilian life are sometimes necessary on a battlefield. In order to secure high-value intelligence or maintain security, the military and its agents must often act quickly and on the basis of imperfect knowledge. Requiring consideration of the costs and consequences of protracted tort litigation introduces a wholly novel element into military decisionmaking,

one that has never before in our country's history been deployed so pervasively in a theatre of armed combat.

The majority acquiesces in judicial control over these sensitive military judgments. It opens the door for the plaintiffs to conduct broad discovery based on boilerplate complaints alleging a laundry list of state law claims, including "assault and battery," "sexual assault and battery," "intentional infliction of emotional distress," and "negligent hiring and supervision." By allowing such claims to go forward against contractors integrated into wartime combatant activities under control of the U.S. military, the majority raises thorny questions of whose law should apply, compromises the military's ability to utilize contractors in the future, and nudges foreign policy and war powers away from the political branches of the federal government and into the hands of federal courts. Simply put, these state tort claims have no passport that allows their travel in foreign battlefields, and we have no authority to issue one.

The complaint makes clear, and the contractors do not dispute, that the contractors here were acting in collaboration with U.S. military personnel. *See, e.g.,* Al Shimari Amended Complaint ¶¶ 1, 70, 71, 118, 124, 135. The majority nonetheless draws the odd distinction that contractors and the military may be in a "conspiracy" without somehow being "integrated." *See ante* at 222 n. 17. In addition to the forementioned paragraphs, the complaint in fact provides ample allegations of integration. For example, the *Al–Quraishi* plaintiffs claim that "L–3 employed all the civilian translators used by the military in Iraq," Al–Quraishi Amended Complaint ¶ 78, and that "Defendants' acts

took place during a period of armed conflict, in connection with hostilities" in which the U.S. military was engaged, *id.* ¶ 280. Indeed, they allege integration so complete that civilian interrogators were giving orders to military personnel. *Id.* ¶ 221. For its contrary view, the majority departs from the well-established rule that we take the assertions of the complaint on a motion to dismiss as true. While the whole gravamen of the complaint is military-contractor cooperation and collaboration, the majority would have us believe they were more akin to strangers in the night.

The majority also suggests that the contractors may have departed from military instructions. *See ante* at 222 n. 17. If the contractors did depart from the military's instructions, that would allow the government to pursue a breach of contract claim. *See infra* Part II. Ironically, the complaint itself speaks specifically in terms of a failure to "abide[ ] by the contract terms," Al–Quraishi Amended Complaint ¶ 247, even though the plaintiffs were in no sense a party to the same. But any breach of contract does not begin to confer a cause of action in tort on the part of detainees in a theatre of armed conflict. There is no indication that Congress or any other law-making authority, federal or state, wanted foreign nationals in detention to litigate in tort the relationship between military contractors and the U.S. military when the government itself as a party to the contract has posited no need to do so.

A.

From this point, the problems with this litigation only multiply. First, due largely to their inventive nature, these suits present the difficult question of

whose law should govern them. The majority clears the way for one federal court, sitting in Maryland, to apply Iraqi tort law to the alleged conduct—in an Iraqi war zone—of a Virginia-headquartered contractor integrated into wartime combatant activities of the U.S. military, and for another federal court, sitting in Virginia, to apply Virginia tort law to a similarly situated contractor for alleged conduct also occurring in an Iraqi war zone. This is, to put it mildly, no way to run a railroad.

1.

The court below in *Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702 (D.Md.2010)— applying the principle of *lex loci delicti*— decided that "Iraqi law applies to all of Plaintiffs' state law claims." *Id.* at 763.[*] This conclusion is highly troublesome. Most fundamentally, the application of Iraqi law against agents of the U.S. military constitutes a complete surrender of sovereignty. The majority allows Iraqi citizens who were imprisoned in an active theatre of war to bring tort

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[*] The *Al–Quraishi* district court also declined to dismiss plaintiffs' Alien Tort Statute claims because, in its judgment, "Plaintiffs' claims constitute recognized violations of the law of nations, appropriately assertable against Defendants." 728 F.Supp.2d at 715. Such claims could be precluded by *Kiobel v. Royal Dutch Petroleum Co.* (No. 10–1491), in which the Supreme Court is expected to decide whether "the Alien Tort Statute . . . provide[s] subject matter jurisdiction over claims against corporations," *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir.2010), *cert. granted*, —— U.S. ——, 132 S.Ct. 472, 181 L.Ed.2d 292 (2011) (Mem), and "[w]hether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States," —— U.S. ——, 132 S.Ct. 1738, 182 L.Ed.2d 270 (2012) (Mem).

suits against the occupying authority based on Iraqi causes of action. Such suits are not only novel, to say the least, but also in conflict with Supreme Court precedent. *See, e.g., Dow v. Johnson,* 100 U.S. 158, 165, 170, 25 L.Ed. 632 (1879) (explaining that occupying forces are not subject to the laws of the occupied territory); *Coleman v. Tennessee,* 97 U.S. 509, 515, 517, 24 L.Ed. 1118 (1878) (same).

The majority does not point to a single case in which foreign citizens were allowed to sue the occupying authority in its own courts under foreign causes of action. Likewise, it offers no support for its assertion that *Dow* and *Coleman* do not apply to military contractors, citing only *Ford v. Surget,* 97 U.S. 594, 24 L.Ed. 1018 (1878), a case implying that law-of-war immunity is *not* limited to uniformed soldiers. *See Ford,* 97 U.S. at 606–08 (holding a civilian immune from civil suit for burning cotton in support of the Confederate military).

Moreover, the majority is simply wrong in suggesting that the *Dow* and *Coleman* Courts were concerned only with protecting the occupying authority from foreign tribunals, in contrast to foreign laws. *See, e.g., Dow,* 100 U.S. at 165 ("When, therefore, our armies marched into . . . the enemy's country, their officers and soldiers *were not subject to its laws,* nor amenable to its tribunals for their acts. They were subject only to their own government, and *only by its laws,* administered by its authority, could they be called to account."(emphases added)); *id.* at 170 ("The question here is, What is the law which governs an army invading an enemy's country? *It is not the civil law of the invaded country. . . .*" (emphasis added)); *Coleman,* 97 U.S. at 515 ("Officers and soldiers of the

armies of the Union *were not subject during the war to the laws of the enemy,* or amenable to his tribunals for offences committed by them. They were answerable only to their own government, and *only by its laws,* as enforced by its armies, could they be punished." (emphases added)); *id.* at 517 (Following military occupation, "the municipal laws of [the occupied territory] . . . remain in full force *so far as the inhabitants of the country are concerned*. . . . This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States . . .; for, as already said, *they were not subject to the laws* nor amenable to the tribunals of the hostile country." (emphases added)).

The application of Iraqi tort law to U.S. military contractors creates practical problems as well. American courts are ill-suited to decide unsettled questions of Iraqi law. The district court in *Al–Quraishi,* for instance, considered "Whether Aiding and Abetting and Conspiracy are Recognized Torts Under Iraqi Law and Whether Iraqi Law Allows Punitive Damages." 728 F.Supp.2d at 764. The defendants argued that aiding and abetting and conspiracy are not cognizable causes of action under Iraqi tort law, and that punitive damages are not allowed as a remedy. *Id.* The plaintiffs disagreed, and the parties "submitted affidavits from Iraqi law experts in support of their respective positions." *Id.* Not surprisingly, considering the difficulty of ascertaining foreign law, the district court decided to "defer decision with respect to the content of Iraqi law." *Id.*

Given that the district court had trouble deciding such rudimentary questions as whether aiding and

abetting and conspiracy are even causes of action under Iraqi law, and whether Iraqi law allows punitive damages, how can we expect the court to decide the far more challenging issues necessary to a full-scale trial? For instance, how will it decipher the standard of care for each cause of action, and determine whether there was a breach? It can rely on expert testimony, of course, but Iraqi law experts appear to disagree as to whether these causes of action are even cognizable. *See id.* Accordingly, the majority allows a federal court to go forward with litigation in which Iraqi citizens sue a U.S. contractor working hand-in-hand with the U.S. military in a war zone under Iraqi causes of action that may not even exist.

Under the majority's decision, military contractors face the prospect of drawn out lawsuits under the substantive tort law of every country in which they operate. Such a regime is unworkable in an era where the military has no choice but to contract with private corporations. In the present cases, for example, "a severe shortage" of military intelligence personnel "prompt[ed] the U.S. government to contract with private corporations to provide civilian interrogators and interpreters." J.A. 408. This use of private contractors was deemed essential to the achievement of U.S. military objectives. Yet, under the reasoning of the *Al–Quraishi* district court, which the majority allows to stand, the contractors should have paused to consider their potential liability under the substantive tort law of Iraq before agreeing to supply the military needed personnel under the government contract.

Of course, corporations generally must weigh their potential liabilities before agreeing to specific projects. The possibility of defending a lawsuit every

time a foreign citizen claims a violation of foreign tort law might substantially alter the profitability of government contracts. Thus, before agreeing to perform the most critical intelligence functions in support of the U.S. military, contractors would be forced to investigate and analyze the substantive tort law of every country in which its employees might work. This unenviable task would be even more burdensome when the substantive tort law varies from jurisdiction to jurisdiction within a country, as it does in the United States.

In other words, a court that understandably had difficulty deciding such elementary questions as "Whether Aiding and Abetting and Conspiracy are Recognized Torts Under Iraqi Law and Whether Iraqi Law Allows Punitive Damages," *Al–Quraishi,* 728 F.Supp.2d at 764, is implying that contractors, before playing a critical role in the U.S. military effort in Iraq, should have analyzed the nuances and permutations of every Iraqi tort law that might conceivably affect them. By forcing contractors to undertake a highly complex and deeply uncertain legal analysis before aiding our military operations, particularly those executed quickly and in countries whose legal systems are unstable and unfamiliar, the majority jeopardizes the military's ability to employ contractors in the future.

Like the courts, military contractors must rely on legal experts to analyze foreign law. One suspects that most Iraqi legal experts practice law in Iraq, and indeed, the *Al–Quraishi* plaintiffs relied on the declaration of an Iraqi attorney employed at an Iraqi law firm. Should the defendants have sought counsel from these Iraqi attorneys before helping the U.S. military

with detention and interrogation functions? Should other contractors, before agreeing to aid in the U.S. military invasion of Iraq, have reached out to Iraqi lawyers for advice on the legal ramifications of such an attack under Iraqi tort law? Until now, these questions seemed far-fetched, but they are newly valid considerations under a regime that subjects lawsuit-averse American corporations to the substantive tort law of Iraq. My point is not at all to disrespect Iraqi law or lawyers, but to query the feasibility of extensive and uncertain legal inquiries into any foreign law on the eve or in the execution of military operations.

2.

Unlike the district court in *Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702 (D.Md. 2010), the district court in *Al Shimari v. CACI Premier Technology, Inc.,* 657 F.Supp.2d 700 (E.D.Va.2009) deferred any ruling on the choice of law issues. *See id.* at 725 n. 7. As Judge King noted in his dissent from the now-vacated panel opinion, the *Al Shimari* plaintiffs argue that CACI is "liable to them *under Virginia law* for the torts of assault and battery, sexual assault, intentional and negligent infliction of emotional distress, and negligent hiring and supervision." *Al Shimari v. CACI Int'l, Inc.,* 658 F.3d 413, 427 (4th Cir.2011) (King, J., dissenting) (emphasis added). The plaintiffs, after all, are pressing Virginia causes of action, and thus if the suit is allowed to go forward, the question of whether Virginia tort law applies extraterritorially must be seriously asked. The answer to this question is clear: the application of Virginia tort law to overseas battlefield conduct by contractors acting under U.S. military authority is as problematic as the application of Iraqi law.

First, there is no indication whatsoever that the Commonwealth of Virginia has any interest in having its tort law applied abroad in these types of cases. Absent a contrary legislative intent, we assume that legislatures do not want their tort law to apply extraterritorially. For instance, in *EEOC v. Arabian American Oil Co. ("Aramco"),* 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991), the Supreme Court held that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to regulate the employment practices of U.S. employers who employ U.S. citizens abroad. *Id.* at 246–47, 111 S.Ct. 1227. In reaching this conclusion, the Court relied on the "longstanding principle" that " 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 248, 111 S.Ct. 1227 (citation omitted). Given that "Congress legislates against the backdrop of the presumption against extraterritoriality," the Court stated, "unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *Id.* (citations omitted). Ultimately, the Court concluded that the petitioners had failed to provide sufficient evidence that Congress intended Title VII to apply abroad. *Id.* at 259, 111 S.Ct. 1227.

Citing *Aramco,* the Supreme Court recently reiterated these principles in *Morrison v. National Australia Bank Ltd.,* —— U.S. ——, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), where it held that § 10(b) of the Securities Exchange Act of 1934 does not apply extraterritorially. *Id.* at 2877–78, 2883. The Court reasoned that "[t]he results of judicial-speculation-made-law—divining what Congress would have wanted if it

had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality." *Id.* at 2881. "Rather than guess anew in each case," the Court continued, "we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.*

Similarly, in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the Court concluded that judges must apply a "plain statement rule" before upsetting the standard constitutional balance of federal and state powers. *Id.* at 460–61, 111 S.Ct. 2395. "[I]f Congress intends to alter the usual constitutional balance," the Court explained, "it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460, 111 S.Ct. 2395 (internal quotation marks omitted). "In traditionally sensitive areas," the Court continued, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* at 461, 111 S.Ct. 2395 (internal quotation marks omitted).

Aramco, Morrison, and *Gregory* all involved the "longstanding principle" that " 'legislation of *Congress,* unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco,* 499 U.S. at 248, 111 S.Ct. 1227 (emphasis added) (citation omitted). However, given that the Constitution entrusts foreign affairs to the federal political branches, *see* U.S. Const. art. I, § 8, cls. 1, 11–15; art. II, § 2, cls. 1–2, limits state power over foreign affairs, *see id.* art. I, § 10, and establishes the supremacy of federal enactments over

state law, *see id.* art. VI, cl. 2, the presumption against extraterritorial application is even stronger in the context of state tort law.

It defies belief that, notwithstanding the constitutional entrustment of foreign affairs to the national government, Virginia silently and impliedly wished to extend the application of its tort law to events overseas. Or further, that it would do so in active disregard of Supreme Court pronouncements. For the Court has repeatedly stated that the federal government has exclusive power over foreign affairs, and that states have very little authority in this area. In *Chae Chan Ping v. United States,* 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889), for instance, the Court noted, " '[T]he United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments.'" *Id.* at 605, 9 S.Ct. 623 (citation omitted). The Court reiterated these principles in *United States v. Belmont,* 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937), emphasizing that "[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government." *Id.* at 330, 57 S.Ct. 758. The *Belmont* Court further noted that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Id.* at 331, 57 S.Ct. 758. Likewise, in *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), the Court stressed that "[o]ur system of government is

such that . . . the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* at 63, 61 S.Ct. 399.

Such interference is precisely what we invite by ascribing to the fifty states the unexpressed wish that their tort law govern the conduct of military operations abroad. The principle against such interference holds even where the executive branch insists that the state law does not interfere with the foreign relations power. For instance, in *Zschernig v. Miller,* 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), the Supreme Court struck down an Oregon probate law as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432, 88 S.Ct. 664. Although "[t]he several States . . . have traditionally regulated the descent and distribution of estates," the Court concluded, "those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440, 88 S.Ct. 664. In its brief amicus curiae, the Department of Justice stated, "The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Id.* at 434, 88 S.Ct. 664. The Court disregarded this statement, reasoning that the state action might cause "disruption or embarrassment" that the Justice Department failed to appreciate. *Id.* at 434–35, 441, 88 S.Ct. 664. In concurrence, Justice Stewart was even less deferential toward statements from the executive branch:

> We deal here with the basic allocation of power between the States and the Nation.

> Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. *Id.* at 443, 88 S.Ct. 664 (Stewart, J., concurring).

3.

So too here, we are hardly required to defer to the Justice Department's statements that these cases should go forward. The Department urges us to

> hold that state tort law claims against contractors are generally preempted if similar claims brought against the United States would come within the FTCA's combatant activities exception and if the alleged actions of the contractor and its personnel occurred within the scope of their contractual relationship with the government, particularly if the conduct occurred while contractor personnel were integrated with the military in its combat-related activities.

Br. of United States at 2–3.

So far, so good. And one would think that this would be the end of it. However, the Department carves out an exception where "a contractor has committed torture as defined in 18 U.S.C. § 2340," the federal anti-torture statute. *Id.* at 3. The government then elaborates further on its proposed exception by implying that state-law tort remedies need not be available going forward "in light of measures subsequently instituted by Congress and the Executive Branch, and other developments in the aftermath of

Abu Ghraib." *Id.* at 23. Like the Justice Department's brief in *Zschernig,* this vaguely explained and inexplicably derived exception is not entitled to deference by this court. As the Supreme Court only recently reiterated, "[T]he separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'" *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.,* —— U.S. ——, 130 S.Ct. 3138, 3155, 177 L.Ed.2d 706 (2010) (quoting *New York v. United States,* 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)).

The government does not point to a single expression of congressional intent in support of permitting state law tort claims to apply overseas based solely on the nature of the allegations. Instead, it asserts that "in the limited circumstances where the state law claim is based on allegations that the contractor committed torture, as defined in 18 U.S.C. § 2340, courts should take into account the strong federal interests embodied in that federal law." Br. of United States at 22. In these circumstances, the government suggests, "the totality of the federal interests is different and does not require that state-law tort suits against contractors be preempted." *Id.* at 3.

It is difficult to see how 18 U.S.C. § 2340—which exhibits an interest in punishing torture through *federal criminal* prosecution—demonstrates any congressional interest in permitting torture-based state tort claims. The federal anti-torture statute, 18 U.S.C. § 2340 *et seq.,* does not even contain a private right of action. And in any event, courts have no license to create exceptions based on helter-skelter application of federal criminal statutes, exceptions that

permit otherwise preempted state tort claims to go forward.

It is elemental that a federal court cannot simply engraft on its own a federal criminal law standard onto state tort claims. The federal judiciary is not permitted to reconfigure the elements of a state law cause of action. For as the "[Supreme] Court recognized in [*Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988),] the responsibility for defining the elements and scope of a state cause of action rests with the state legislature and state courts." *Childers v. Chesapeake & Potomac Tel. Co.,* 881 F.2d 1259, 1265 (4th Cir.1989).

This court requested the government's submission of an amicus brief here, and I am appreciative of that submission. However, the government's amicus position is at odds with its own conduct. If the government believes that there have been contractual or criminal violations on the part of its own contractors, then it should proceed to exercise its unquestioned contractual and prosecutorial authority to go after the culpable party. *See infra* Part II.B. If it does not believe such violations have occurred, it should say so. But given the significance of this case, the exclusive competence of the federal government in the field of foreign affairs, and the principles articulated in *Aramco, Morrison*, and *Gregory,* neither the federal executive nor the federal judiciary is entitled to assume that states want their tort law applied extraterritorially absent a plain statement to the contrary.

Here there is no indication that the Commonwealth of Virginia intended to apply its laws of as-

sault, battery, sexual assault, intentional and negligent infliction of emotional distress, and negligent hiring and supervision to the battlefield conduct of contractors integrated into the wartime activities abroad of the U.S. military. A state's interest in employing a tort regime is largely confined to tortious activity within its own borders or against its own citizens. It is anything but clear that Virginia has any interest whatsoever in providing causes of action that allow foreign citizens that have never set foot in the Commonwealth to drag its own corporations into costly, protracted lawsuits under who-knows-what legal authority.

Notwithstanding the presumption against extraterritorial application of state law and the absence of any indication that the Commonwealth wants its tort law applied to battlefield conduct, the *Al Shimari* plaintiffs ask the district court to apply Virginia tort law to war-zone conduct that took place over 6,000 miles away. It is difficult to find a limiting principle in the plaintiffs' analysis. Under their approach, Virginia tort law—and the tort regimes of all fifty states—can be applied to conduct occurring in every corner of the earth. By allowing plaintiffs' causes of action to go forward, the majority lends its imprimatur to the extraterritorial application of state tort law. Reading the majority's opinion, I wonder if my friends will next launch state tort law into outer space.

4.

Even if the Commonwealth had somehow intended the extraterritorial application of its tort law, which it has not, the Supreme Court has made clear that state laws aimed at influencing foreign relations

cannot stand when they conflict with federal objectives. In *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), for example, the Court invalidated a Massachusetts law that restricted state agencies from purchasing goods or services from companies doing business with Burma. *Id.* at 366, 120 S.Ct. 2288. The Court reasoned that the state law was "an obstacle to the accomplishment of Congress's full objectives" under a federal law that directed the President to develop a comprehensive, multilateral strategy toward Burma. *Id.* at 369, 373, 120 S.Ct. 2288. By "imposing a different, state system of economic pressure against the Burmese political regime," the Court explained, "the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach." *Id.* at 376, 120 S.Ct. 2288. Consequently, the Court explained, the Massachusetts law could not stand because it "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* at 381, 120 S.Ct. 2288.

Similarly, in *American Insurance Ass'n v. Garamendi,* 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003), the Court struck down California's Holocaust Victim Insurance Relief Act, which required any insurer doing business in the state to disclose information about Holocaust-era insurance policies. *Id.* at 401, 123 S.Ct. 2374. The Court began by noting,

> There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Govern-

> ment's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.

Id. at 413, 123 S.Ct. 2374 (citation omitted). In the context of Holocaust-era insurance claims, explained the Court, "California seeks to use an iron fist where the President has consistently chosen kid gloves." *Id.* at 427, 123 S.Ct. 2374. Accordingly, the Court held that the state statute was preempted because it "interferes with the National Government's conduct of foreign relations." *Id.* at 401, 123 S.Ct. 2374.

Under *Crosby* and *Garamendi,* states are prohibited from obstructing the foreign policy objectives of the federal government. There can be no question that there is obstruction here, where the federal law, speaking with one voice, can potentially be supplanted by the fifty different voices of varying state tort regimes, each one potentially working at cross-purposes with federal aims. Thus, even if Virginia wanted to extend its tort law to overseas battlefield conduct of military contractors, it cannot create an "obstacle to the accomplishment of Congress's full objectives" under federal law. *Crosby,* 530 U.S. at 373, 120 S.Ct. 2288. Because Congress has emphatically forbid tort law from governing battlefield conduct, any attempt to "impos[e] a different, state system" on the battlefield, *id.* at 376, 120 S.Ct. 2288, would impermissibly "interfere[ ] with the National Government's conduct of foreign relations," *Garamendi,* 539 U.S. at 401, 123 S.Ct. 2374.

B.

In contrast to the Commonwealth of Virginia, Congress has a constitutionally protected role in foreign affairs. *See* U.S. Const. art. I, § 8, cls. 1, 11–15. Congress undoubtedly has the power to allow private parties to pursue tort remedies against war-zone contractors operating under military authority. "[T]he Constitution contemplated that the Legislative Branch have plenary control over . . . regulations, procedures and remedies related to military discipline. . . ." *Chappell v. Wallace,* 462 U.S. 296, 301, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). Congress could thus do what the majority has asserted its own right to do, namely to authorize foreign nationals as private attorneys general to police contractor conduct in theatres of armed combat. However, contrary to the plaintiffs' assertions, there is no indication that Congress has pursued any such course.

Plaintiffs contend that the Federal Tort Claims Act ("FTCA") permits private parties to bring state law tort suits against military contractors for wartime conduct. In analyzing this claim, we must adhere to the longstanding presumption that Congress does not permit private parties to interfere with military operations absent explicit statutory authorization. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs," *Dep't of Navy v. Egan,* 484 U.S. 518, 530, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), and this hesitance to transgress constitutional boundaries applies fully to our interpretation of statutes. *See Feres v. United States,* 340 U.S. 135, 146, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (declining to read the

FTCA's broad waiver of sovereign immunity to allow military personnel to sue the government for service-related injuries even though no provision explicitly prevents them from doing so); *see also United States v. Johnson,* 481 U.S. 681, 690, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987) (reaffirming the holding in *Feres* because "suits brought by service members against the Government for injuries incurred incident to service . . . are the '*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" (emphasis in original) (citation omitted)).

To adopt plaintiffs' reading of the FTCA would require us to abandon this tradition of restraint. This broadly phrased statute does not contain anything close to a congressional authorization to private parties to hale war-zone military contractors into civilian courts. At most, it provides that "the term 'Federal agency' . . . does not include any contractor with the United States." 28 U.S.C. § 2671. But that broad definitional provision does not mean that "contractors . . . are expressly excluded from the FTCA's reach" in the area of battlefield torts. *Al Shimari,* 658 F.3d at 435 (King, J., dissenting). For a "general statutory rule usually does not govern unless there is no more specific rule," *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 524, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989), but here there is another provision of the FTCA that speaks more specifically to whether military contractors are immune from these tort actions.

That provision is the combatant activities exception, which preserves the government's sovereign im-

munity against "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Multiple textual clues in this exception indicate that Congress wanted to keep tort law out of the battlefield regardless of a defendant's status as a soldier or a contractor.

To start with, the exception bars claims "arising out of" combatant activities, *id.,* and this phrase is among the broadest in the law. "[I]n workmen's compensation statutes," for instance, "[t]he arising-out-of test is a familiar one used . . . to denote *any* causal connection between the term of employment and the injury." *Saleh v. Titan Corp.,* 580 F.3d 1, 6 (D.C.Cir.2009) (emphasis in original) (footnote omitted). Indeed, the use of this phrase in other FTCA exceptions has precluded a wide range of actions. For instance, the "sweeping language" of 28 U.S.C. § 2680(h)—which preserves the government's sovereign immunity against claims "arising out of assault [or] battery"—bars not only battery actions, but negligence claims that "stem from a battery" as well. *United States v. Shearer,* 473 U.S. 52, 55, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) (plurality opinion); *see also Kosak v. United States,* 465 U.S. 848, 854, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (equating "arising in respect of" in 28 U.S.C. § 2680(c) with "arising out of" and observing that the former "encompassing phrase . . . seems to sweep within the exception all injuries associated in any way with the 'detention' of goods"). Congress wanted to forbid tort suits stemming from combatant activities, and it chose in "[a]ny claim arising out of" a broad and widely recognized prohibitory term.

The exception's use of the term "combatant activities" does not denote a narrow subset of military operations but a legislative intention to prevent tort from entering the battlefield. This term encompasses "not only physical violence, but activities both necessary to and in direct connection with actual hostilities," *Johnson v. United States,* 170 F.2d 767, 770 (9th Cir.1948), and therefore has a considerable sweep. As the Supreme Court has noted, this provision "paint[s] with a far broader brush" than other FTCA exceptions that bar suits arising out of a subset of harms associated with a particular area. *See Dolan v. U.S. Postal Serv.,* 546 U.S. 481, 489–90, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006) (contrasting the combatant activities exception in § 2680(j) with § 2680(b), which preserves immunity for "just three types of harm" associated with mail delivery). Given the broad language of the combatant activities exception, it is difficult to believe that Congress wanted the sensibilities of tort to govern the realities of war.

Indeed, as the District of Columbia Circuit recognized, "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield." *Saleh,* 580 F.3d at 7. Congress insulated the theatre of war from tort law because it "recognize[d] that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi v. United States,* 976 F.2d 1328, 1337 (9th Cir.1992). In order to shield "[a]ny claim arising out of the combatant activities of the military" from tort liability, Congress used some of the broadest language possible when drafting this exception. It is not our

role to dismember this exclusion's text in order to determine when and to what extent torts can arise from combatant activities after all.

If this textual evidence were not enough, the Supreme Court has refused to read the FTCA to authorize tort suits against defense contractors, albeit in a slightly different context. *See Boyle v. United Techs. Corp.,* 487 U.S. 500, 511–12, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). The contractor in *Boyle* provided a helicopter for the military rather than aid in a warzone, *id.* at 502, 108 S.Ct. 2510, but the logic is the same. Because the FTCA's discretionary function exception precluded suits against the government for design defects in military equipment, *Boyle* held that it barred those actions against defense contractors as well. *Id.* at 511–12, 108 S.Ct. 2510. As the Court observed, "[i]t makes little sense to insulate the Government against financial liability . . . when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512, 108 S.Ct. 2510.

I recognize that the temptation exists to exalt the brave men and women who defend our nation in time of war, and then, in the next breath, to disparage contractors as some sort of evil twin responsible for wars' inevitable missteps and excesses. But the FTCA does not permit such a dichotomy. It makes even less sense than in *Boyle* to shield the military from litigation for the battlefield activities of soldiers but not contractors. In *Boyle,* the Supreme Court did not even require a military-specific exception before insulating military contractors from design-defect liability. Instead, the Court relied on the discretionary function exception, which is not specific to military operations

but instead broadly precludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680(a); *Boyle,* 487 U.S. at 511–12, 108 S.Ct. 2510. Here, by contrast, Congress has provided an exception that singles out claims "arising out of . . . combatant activities." 28 U.S.C. § 2680(j). If the Supreme Court was willing to read the former general provision to cover military contractors, it would not hesitate to do the same with the latter more targeted exception.

In addition to enacting the combatant activities exception, Congress has indicated its desire to keep tort law off the battlefield by subjecting certain military contractors to other forms of discipline for warzone conduct. For instance, the Uniform Code of Military Justice ("UCMJ") applies not only to members of our military, but to "persons serving with or accompanying an armed force in the field" in "time of declared war or a contingency operation" as well. 10 U.S.C. § 802(a)(10). The Military Extraterritorial Jurisdiction Act likewise subjects these contractors to domestic criminal sanctions by punishing anyone who, "while employed by or accompanying the Armed Forces" abroad, "engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 3261(a)(1). Unlike the application of state tort law, these procedures for holding contractors accountable were approved by Congress.

Ignoring the military risks and legal constraints that prohibit extraterritorial application of state tort law, the majority inserts tort into the battlefield by allowing these suits to go forward. But before applying state tort law to the combat activities of contractors working under the U.S. military, we should make certain that the legislative branch has authorized us to do so. As the Supreme Court explained in *United States v. Stanley,* 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987), "[T]he insistence . . . with which the Constitution confers authority over the Army, Navy, and militia upon the political branches . . . counsels hesitation in our creation of damages remedies in this field." *Id.* at 682, 107 S.Ct. 3054. Because I find no evidence that Congress has recruited private parties—much less foreign nationals—to police the frontline, I cannot join my colleagues' decision to the contrary.

C.

Instead of deferring to Congress's valid exercise of its constitutionally granted powers, the majority places contractor accountability in the hands of the unaccountable. Thanks to the majority's efforts, contractors that were previously subject to the control of the executive have new judicial masters. But when unelected judges render contestable decisions about military policy in the course of applying tort law to contractors, the public will be unable to remove them from their posts. This flies in the face of our constitutional tradition of ensuring some popular control over the prosecution of a war. As the Supreme Court has explained, "[M]atters of war-making belong in the hands of those who are . . . most politically accountable for making them." *Hamdi v. Rumsfeld,* 542 U.S.

507, 531, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion).

No one will contend that tort law, however derived and defined, is a field excelling in precision. The vagueness and indeterminacy of these cut-and-paste causes of action will permit judicial discretion and jury variability to govern this most sensitive of areas. Courts must henceforth set the standards of care in matters of wartime captures, detentions, and interrogations as well as the measure of damages for the same. Not only that, but methods of interrogation and procurement of intelligence will be at the sufferance of a single judicial officer, safely ensconced in a secure courtroom, passing judgment on battlefield conduct thousands of miles away. Litigants will plead as a matter of course to the breach of whatever may seem the prevailing standard of care, thus setting in motion logistical problems inherent in transcontinental tort suits of such novel stripe.

The results of the rising tide of litigation will be both unpredictable and contradictory, as particular judges and juries debate and disagree over which methods of detention and interrogation are permissible. And as detention of the enemy becomes a more litigious enterprise, the incentives to shortcut capture with more lethal and unmanned measures may rise. Whether or not one approves of transplanting the delicacy and etiquette of the judicial branch into a theatre of war is not the question. These lawsuits presage a massive transfer of authority reserved to the political branches under Articles I and II of our Constitution into judicial hands, and to a single trial judge and jury to boot. This is a subject one would expect Congress to address in great and meticulous detail, as it

has, for example, in the Military Commissions Act of 2009, Pub.L. 111–84, 123 Stat. 2190, 2574–614, the Military Commissions Act of 2006, Pub.L. 109–366, 120 Stat. 2600, and the Detainee Treatment Act of 2005, Pub.L. 109–148, 119 Stat. 2739, and I respectfully take issue with the matter-of-fact manner in which the gravity of the step taken is not even acknowledged by the majority, much less addressed.

By opening the door to the extraterritorial application of different state tort regimes, the majority allows for unlimited variation in the standard of care that is applied to critical combatant activities. There is not a widely agreed upon standard of care for overseas detentions and interrogations, and different states will allow different causes of action to go forward and will apply different standards to them. And even if there were an agreed upon standard—which there is not—particular judges and juries would apply that standard inconsistently. Such a standard would probably bottom out on some version of reasonableness. But in the context of detention and interrogation, what exactly does reasonableness mean? That question could provoke innumerable answers, and the very vagueness of tort formulations as to the standard of care means that civilian jurors will be setting the standards for detention and interrogation of military detainees without knowledge of conditions that obtain in a zone of combat halfway across the globe. I imply no disrespect of jurors who give of their time and good sense to our system of justice, but this system will provide no guidance and no predictability whatsoever because it will leave the conduct of military functions to the fortuities of litigious hindsight.

Contractors can be forgiven for not wanting to entrust their employees to the vagaries and caprice of individual verdicts and trials. Add to that the prospect of punitive damages and other uncertain measures of recovery, and one will introduce into the detention and interrogation process a degree of risk aversion that could well result in the gathering of as little vital intelligence as possible. While some may regard reduced interrogations with satisfaction, those whose lives and fortunes depend upon the acquisition of vital intelligence are not likely to join any chorus of approval.

The majority's response is undoubtedly that all these questions remain to be "ironed out." But such words are small comfort to those who must make critical decisions in the field while we sit here in Virginia or Maryland or whatever other venue is doing the "ironing."

By dismissing these appeals, the majority only drifts and dawdles, sparing itself the need to come to grips with the issues, and kicking the can far down the road. The majority fails to recognize that this is a matter of some urgency. Just for starters, commanders in the field need actionable battlefield intelligence in order for soldiers to survive. Few wars have been or will be prosecuted successfully without intelligence that permits units to plan accurate strikes against enemy forces, and every bit as importantly, to know when lethal force is plotted against Americans themselves. Actionable intelligence has always had both offensive and defensive value. In other words, intelligence not only assists us in prevailing; it saves American lives.

While there is legitimate debate about how intelligence is best obtained, a tort suit is probably the very worst forum in which that issue can or should be resolved. The judges and juries who review those matters cannot fairly be expected to possess a background in the utility of different forms of military intelligence, and to ask them to decide such sensitive, delicate, and complicated questions is, in a word, unrealistic. *See Carmichael v. Kellogg, Brown & Root Servs., Inc.,* 572 F.3d 1271, 1286–87 (11th Cir.2009) (explaining that military intelligence-gathering is traditionally insulated from judicial review); *United States v. Truong Dinh Hung,* 629 F.2d 908, 913– 14 (4th Cir.1980) (noting that "the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon" matters of intelligence). None of this is to say, of course, that military contractors are without fault or that abuses should ever go unremedied. It is simply to make the point that something as mischievous as the placement of tort law in military calculations should be approved by some body capable of appreciating the consequences of its action and constitutionally entrusted with the task.

II.

A.

While the present suits may focus upon methods of interrogation and conditions of detention, the issue is larger even than that. In assuming that tort suits are a preferred method of policing the contractors who assist military operations, the majority obscures the fact that there exists a more proper remedy in this area. In the absence of some contrary expression by the Congress, the most basic precepts of separation of

powers require that the alleged abuses of military contractors must be addressed through the medium of contract, not through tort. In short, without a clear manifestation of Article I congressional intent, Article II mandates that contractual, not tort remedies, be utilized.

It is a truism that government, including the military, must contract. Few, if any, governmental tasks are undertaken today without some form of public-private partnership. The federal government routinely carries out sensitive public functions through private entities, from running background checks, *see United States v. Virginia,* 139 F.3d 984, 986 (4th Cir.1998), to rehabilitating prisoners, *see Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 63 n. 1, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001), to investigating criminal activity, *see United States v. Warshak,* 631 F.3d 266, 320 (6th Cir. 2010). Assisting with combat operations is no different. There is "ample evidence that the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Halliburton,* 529 F.3d 548, 554 (5th Cir.2008). The Department of Defense "employs around 170,000 military contractors on a yearly basis, having more than doubled its use of contracting services since 2001." Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering how Human Rights Obligations Are Applied to Private Military Security Firms,* 35 Hastings Int'l & Comp. L.Rev. 29, 38 (2012).

Apart from being necessary, the military's partnership with private enterprise has salutary aspects as well. For one thing, it permits our all-volunteer military to handle troop shortages in a cost-efficient

manner. According to the Army Field Manual, "[r]ecent reductions in military structure, coupled with high mission requirements and the unlikely prospect of full mobilization, mean that to reach a minimum of required levels of support, deployed military forces will often have to be significantly augmented with contractor support." U.S. Dep't of the Army, Field Manual 3–100.21, Contractors on the Battlefield Preface (2003). Because of these changes in our military, "the future battlefield will require ever increasing numbers of often critically important contractor employees." *Id.*

These partnerships also allow the military and its contractors to pool their respective expertise and bring the best of public service and private industry to bear on the mission at hand. This reliance on contractor expertise will become only more necessary as warfare becomes more technologically demanding. As the Army Field Manual notes, "the increasingly hi-tech nature of our equipment . . . [has] significantly increased the need to properly integrate contractor support into all military operations." *Id.* War is not a static enterprise, and our military will need every bit of the edge that technological expertise affords in order to face the hostilities of the future. Only the clueless believe future battlefields will not prominently feature private contractors.

B.

Given these realities, it is illusory to pretend that these suits are simply ordinary tort actions by one private party against another. Instead, because contractors regularly assist in "the type of governmental action that was intended by the Constitution to be left

to the political branches directly responsible . . . to the electoral process," *see Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), a decent respect for the separation of powers compels us to consider what sort of remedy would best ensure the authority of the executive over those with whom it partners in carrying out what are core executive functions. The answer is obvious. Unlike tort, contract law gives the executive branch a mechanism of control over those who regularly assist the military in performing its mission.

For one thing, contract law is a more textually precise field than tort law, allowing the executive branch to set the standard of care in the terms of the contract. In contrast to tort suits in which judges would have to decide what constitutes a "reasonable bombing," *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1350 (11th Cir.2007), a "prudent intercept," *Tiffany v. United States,* 931 F.2d 271, 279 (4th Cir.1991), or a legitimate interrogation method, contract cases would turn on more definite language in the contract it-self—language that reflected the policy choices of a democratically accountable branch. Rather than rely on the judicial application of some indeterminate standard of reasonable care, the executive branch could require contractors to abide by well-established military rules and manuals in the terms of its contractual agreement. For instance, the government could direct military contractors to "adhere to the standards of conduct established by the operational or unit commander." *See Ibrahim v. Titan Corp.,* 556 F.Supp.2d 1, 6 (D.D.C.2007) (internal quotation mark and citation omitted). Focusing on the government's contract rather than theories of tort

would also ensure that important federal interests were not "left to the vagaries of the laws of the several States," but instead "governed by uniform rules" in the contracts themselves. *Carlson v. Green,* 446 U.S. 14, 23, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). The majority, however, appears to prefer judicial supervision through malleable and multiple tort standards to executive control through clearer and more consistent contractual provisions.

Contract law also gives the executive branch, as party to the contract, the opportunity to pursue a variety of remedies. In addition to being able to sue a contractor in the event of a breach, the executive can create more tailored sanctions in the terms of the contract itself. The government, for example, could contractually reserve the right to demand that its contractor "remove . . . any employee for reasons of misconduct," *see Ibrahim,* 556 F.Supp.2d at 7 (omission in original), thereby allowing it to jettison bad apples without jeopardizing an entire military operation.

These contractual tools are not the only ones available to the executive branch. They are augmented by a web of regulations to which contractors subject themselves by partnering with the military. Army Regulations, for example, permit commanders to "apprehend and detain contractors for violations of the law" as well as "restrict or revoke . . . access to Army facilities or installations for disciplinary infractions." Army Reg. 715–9 § 4–2(e). What is more, the government can pursue military sanctions against contractors for battlefield misconduct under the UCMJ, *see* 10 U.S.C. § 802(a)(10), as well as domestic criminal punishments against contractors for crimes committed abroad, *see* 18 U.S.C. § 3261(a)(1). Just

within this circuit, in *United States v. Passaro,* 577 F.3d 207 (4th Cir.2009), a "paramilitary contractor" was convicted of federal assault charges arising out of the lethal interrogation of a detainee in Afghanistan. *See id.* at 210–12. The government has employed its prosecutorial powers to punish rogue interrogators in the past, and I see little reason why it would forswear the use of such sanctions in the future. *See Saleh,* 580 F.3d at 2 (noting that in the wake of the events at Abu Ghraib, the executive branch obtained convictions of a number of soldiers involved and pursued "extensive investigations" into allegations of abuse by contractors).

When combined with contractual tools, these laws provide the executive branch with an arsenal of remedies ranging from removal of a specific contractor to criminal punishment. The executive requires "a degree of discretion" in the area of national security, *see United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936), and this selection of sanctions gives it an appropriate amount of flexibility. Because the military and its contractors are tightly bound, litigation in federal court often subjects both to judicial process. Unlike tort suits instigated at the behest of private parties, contractual and criminal enforcement permits the executive to protect military commanders and contractors from being "unnecessarily and dangerously distracted by litigation half a world away" and to prevent "discovery into military operations" from "intrud[ing] on the sensitive secrets of national defense." *See Hamdi,* 542 U.S. at 532, 124 S.Ct. 2633 (plurality opinion).

In sum, it is silly to think that without tort suits, military contractors will simply be wandering around war zones unsupervised. What the chain of command does for military officers, contract law does for military contractors. As the Army Field Manual notes, "The military chain of command exercises management control through the contract." U.S. Dep't of the Army, Field Manual, *supra,* § 1–25. "[P]roper military oversight of contractors is imperative" to integrating these private actors into military operations, *id.* § 1–23, and contract law achieves this goal in ways that tort law cannot. Even though contractors are not formally "part of the operational chain of command," they are "managed in accordance with the terms and conditions of their contract" through the Contracting Officer Representative, who "serves as the operational commander's primary oversight." Army Reg. 715–9 § 4–1(c)–(d). Thus, contract law ensures that these contractors are "subject to military direction, even if not subject to normal military discipline." *Saleh,* 580 F.3d at 7. In other words, "the Government's broad authority . . . in managing its operations does not turn on" whether "contract employees" or "civil servants" are involved. *NASA v. Nelson,* —— U.S. ——, 131 S.Ct. 746, 758–59, 178 L.Ed.2d 667 (2011) (citation omitted).

Tort law, however, conflicts with rather than complements these contractual mechanisms of control by "interfer[ing] with the federal government's authority to punish and deter misconduct by its own contractors." *See Saleh,* 580 F.3d at 8. The majority's allocation of common law remedies is paradoxically not just a matter of common law. It is a decision concerning

which branch of government will control the contractors that assist our soldiers on the battlefield. Whereas contract and criminal law places contractor accountability where Article II places it—in the hands of the executive—tort law places it in the hands of the judiciary. But the executive branch—and not the judicial—is responsible for overseeing a war effort under the Constitution. Whereas the President is required as Commander in Chief "to take responsible and continuing action to superintend the military," *Loving v. United States,* 517 U.S. 748, 772, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996), we as judges are "not given the task of running the Army." *Orloff v. Willoughby,* 345 U.S. 83, 93, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

It is disquieting to say the least that the majority now believes it can displace, or to use a euphemism, "supplement" executive control of military contractors with judicial oversight. The costs of that decision will be severe. For one thing, it bleeds together two areas of law—tort and contract— that are conceptually distinct. No one disputes that those contractors who actually engage in torture breach those provisions of their contracts that require them to act in accordance with federal law. But a "[b]reach of contract is not a tort," *XCO Int'l Inc. v. Pac. Scientific Co.,* 369 F.3d 998, 1002 (7th Cir.2004), and it only muddies the law to permit private litigants to bring tort suits against contractors just because the latter allegedly violated an agreement with the executive. "[T]he main currents of tort law run in different directions from those of contract," *E. River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 873 n. 8, 106 S.Ct. 2295, 90

L.Ed.2d 865 (1986), and it does little good to attempt to channel them together.

C.

At bottom, the majority's facilitation of tort remedies chills the willingness of both military contractors and the government to contract. I have previously discussed the chilling effect today's decision will have on private contractors, *see supra* Part I, but I fear that the majority's efforts will discourage the government from partnering with private industry as well. Congress might well think the defense budget large enough without courts adding the prospect of uncertain tort liabilities. By increasing through prospective tort suits the costs of employing contractors on the battlefield, the majority interferes with the executive branch's capacity to carry out its constitutional duties. To the Defense Department in an era of cost consciousness, the threat of tort liability can chill both the government's ability and willingness to contract by raising the price of partnering with private industry, and that is particularly true here. *Boyle* noted, in fact, that burdens of "tort suits" against military contractors "would ultimately be passed through . . . to the United States itself, since defense contractors will predictably raise their prices to cover . . . contingent liability." 487 U.S. at 511–12, 108 S.Ct. 2510. So long as the executive branch could control contractual performance through contract law, it had little reason to eschew valuable partnerships with private enterprise. But now that third parties can pull contractors and their military supervisors into protracted legal battles, we can expect a distortion of contractor and military decisionmaking to account for that contingency. As the *Saleh* court explained, "Allowance of such suits

will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." 580 F.3d at 8. It will no longer be enough that military contractors meet their contractual commitments to a T, for there exists no assurance that the standard of care embraced in subsequent tort suits will incorporate by reference or otherwise the criterion of meeting one's contractual obligations.

"[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving,* 517 U.S. at 757, 116 S.Ct. 1737. Today's decision does precisely that. "[T]he Government's practical capacity to make contracts" is "the essence of sovereignty itself." *United States v. Winstar,* 518 U.S. 839, 884, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) (internal quotation mark and citation omitted). By making the contract the essence of the government-contractor partnership, we diminish the capacity of our adversaries to erode this critical aspect of our national sovereignty through litigation. Conversely, by elevating tort as a mechanism of weakening this essential partnership, we give those who do not wish us well a means of putting their ill will to use. I can understand that our enemies would seek to use our own laws as a weapon against us, but I cannot understand why we should sanction suits, the unintended effect of which is to equip them.

III.

Rather than engage in a frank discussion of the consequences that will ensue from its ruling, the majority seeks a cubby hole in the collateral order doctrine. This argument misses the mark—for many of

the same reasons that tort law does not belong on the battlefield, this case does not belong back before the district court. We are engaged in a lot of semantic word games here, losing completely the forest for the trees. The collateral order doctrine is not a matter of legalistic banter, but of letting an appellate court confront in a timely manner issues presenting grave, far-reaching consequences. Before us is a deeply unfortunate instance of litigation creep where doctrines that postpone appeals in a domestic context are transposed to an international setting without recognition of the gravity of such a shift of gears.

The collateral order doctrine is premised on the eminently reasonable conclusion that immunities from suit should be recognized sooner rather than later, because the "rigors of trial" can often be every bit as damaging as an adverse judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 870, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). Indeed, the "crucial distinction between a right not to be tried and a right whose remedy requires . . . dismissal" is whether the immunity in question would be eviscerated by the very process of litigation. *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 269, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982).

Here, the asserted immunity can take on different labels—"law-of-war immunity," "*Boyle* preemption," or an inherently political question—but the underlying premise is the same: that suits for damages against private defendants arising out of military contracts performed in a theatre of war are not cognizable by the federal courts under state tort law. The point of this immunity is not to determine after all the vicissitudes of litigation who should win and who should

lose. Rather, it is a recognition that sensitive military matters should be insulated at the outset from judicial scrutiny, and the cases to this effect are legion.

The majority's contrary holding is animated by a single mistaken belief: that "the denial of a preemption claim stemming from the combatant activities exception would not . . . entail significant scrutiny of sensitive military issues." *Ante* at 218–19. The majority expresses this confidence despite its observation that "the questions that will require proper answers . . . have yet to be fully ascertained." *Id.* at 223. At a minimum, it seems clear that the majority's pursuit of "the luxury of a complete record developed through discovery," *id.* at 222, "careful analysis of intrinsically fact-bound issues," *id.* at 223, and "exploration of the appellants' duties under their contracts with the government," *id.* at 223, contemplates full-fledged litigation that will inevitably require the substantial scrutiny of military affairs.

But this is not just another day at the ranch. This is an extraordinary case presenting issues that touch on the most sensitive aspects of military operations and intelligence. The majority's proposed inquiry, "focuse[d] on whether the contractor complied with the government's specifications and instructions," *id.* at 219, must perforce entail bringing the military personnel who gave those instructions before a court halfway around the world. The Supreme Court has long cautioned against "compelled depositions . . . by military officers concerning the details of their military commands," which will only "disrupt the military regime." *Stanley,* 483 U.S. at 682–83, 107 S.Ct. 3054.

Domestically, this sort of "broad ranging discovery and the deposing of numerous persons . . . can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald,* 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). It carries the risks of "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 816, 102 S.Ct. 2727. In the context of the battlefield, the consequences are geometrically more dire, since the plaintiffs seek information about the interrogation methods and intelligence gathering techniques critical to our nation's success in combat. "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering. . . ." *CIA v. Sims,* 471 U.S. 159, 175, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985). I wonder how the majority expects an "inquiry focuse[d] on whether the contractor complied with the government's specifications and instructions," *ante* at 219, to be resolved without hauling before the district court the military officers who gave those instructions, exposing our national security apparatus in direct contravention of the Supreme Court's clear instructions to the contrary.

Because military contractors work at such close quarters with the military, judicial "inquiry into the civilian activities [will] have the same effect on military discipline as a direct inquiry into military judgments." *Johnson,* 481 U.S. at 691 n. 11, 107 S.Ct. 2063. This is hardly a fanciful concern. Al–Quraishi, for instance, will likely seek discovery to validate the allegation in his complaint that "L–3 employees[ ] and CACI employees conspired with certain military personnel to torture prisoners." And the defendants are

no better. CACI acknowledged at oral argument that, in order to produce sensitive military documents that would vindicate itself, it would push the discovery process against the military "as broadly as [it] possibly could."

This quite plainly is the stuff of immunity, not just some affirmative defense. Despite the Supreme Court's explicit admonition to the contrary, both parties frankly seek to "require members of the Armed Services" and their contractors "to testify in court as to each other's decisions and actions" in an attempt to sort out "the degree of fault," thereby undermining the private-public cooperation and discipline necessary for the execution of military operations. *See Stencel Aero Eng'g Corp. v. United States,* 431 U.S. 666, 673, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). Both parties to this suit propose to go rummaging through the most sensitive military files and documents, seeking to prove or disprove a broad-reaching conspiracy to conduct the alleged illegal interrogations. I have no doubt that these proceedings will quickly "devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies." *Saleh,* 580 F.3d at 8.

By pitting uniformed soldiers and military contractors against one another, we will only "hamper the war effort and bring aid and comfort to the enemy," which will relish the opportunity to drag American soldiers into our "own civil courts" and thereby divert their "efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager,* 339 U.S. 763, 779, 70 S.Ct. 936, 94 L.Ed.

1255 (1950). "[T]hese cases are really indirect challenges to the actions of the U.S. military," *Saleh,* 580 F.3d at 7, and it "would be difficult to devise more effective fettering of a field commander than to allow" the suits the majority encourages today. *See Eisentrager,* 339 U.S. at 779, 70 S.Ct. 936.

Rather than allow this court to address the merits of the immunity question and decide once and for all whether the demands of national security preclude this suit, the majority prefers sending this litigation back to a lone district judge with no more guidance than to say that he should keep his finger in the dike and avoid discovery that imperils national security. The ringing klaxons that the Supreme Court has sounded in this area do not permit this casual approach. By the time this case gets back to this court for consideration of the selfsame immunity questions that we could perfectly well address right now, the litigation process may well have done its damage.

These were precisely the sort of concerns that animated the Supreme Court's extension of the collateral order doctrine to appeals pertaining to qualified immunity in *Mitchell v. Forsyth,* 472 U.S. 511, 524–30, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). That case makes clear that the touchstone of the collateral order doctrine is whether delayed review would impose "consequences . . . not limited to liability for money damages." *Id.* at 526, 105 S.Ct. 2806. Yet the majority refuses to even acknowledge that this case presents the same distinct dangers—and worse—that merited immediate appeal in *Forsyth,* preferring instead to act as if this were a typical personal injury case.

To justify this conclusion, the majority relies on semantics, ignoring the Supreme Court's instruction that the collateral order doctrine is to be given a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

First, the majority relies on a literal reading of the dictum that collateral appeals are reserved for "explicit statutory or constitutional guarantee[s] that trial will not occur." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989). The majority cites this lonely line for the sweeping and staggering conclusion that the interests protected by *Boyle* and *Saleh* are "*ipso facto,* not immunity." *Ante* at 217. But the Supreme Court has recognized that "explicit statutory or constitutional guarantee[s]" do not describe the whole of the collateral order doctrine. *Mitchell v. Forsyth* stands as an example of how "explicitness may not be needed for jurisdiction" to hear a collateral appeal. *Digital Equip.,* 511 U.S. at 876, 114 S.Ct. 1992. What differentiates both qualified immunity and law-of-war immunity from the mass of claims that do not merit immediate review is their "good pedigree in public law." *Id.* In other words, these immunities are distinct because although the interests they protect are not specifically enshrined in legislative text, they are nonetheless vital to the protection of the common good, and serve more than the mere interest of a single individual in a favorable judgment.

Second, the majority examines *Boyle* with a microscopic eye, honing in on the fact that the case uses the word "liability" rather than "immunity." *See ante* at 217–18. First, this observation is not even correct—

both the majority and the dissent in *Boyle* also describe the result as "immunity." *See, e.g., Boyle,* 487 U.S. at 510, 108 S.Ct. 2510 ("contractor immunity"); *id.* at 523 (Brennan, J., dissenting) ("contractor immunity"). Second, and more important, however, the Supreme Court has instructed that the courts of appeals should not "play word games with the concept of a 'right not to be tried.'" *Midland Asphalt,* 489 U.S. at 801, 109 S.Ct. 1494. The majority recognizes this principle when convenient, *see ante* at 214 (quoting *Midland Asphalt,* 489 U.S. at 801, 109 S.Ct. 1494), but chooses to ignore it when parsing *Boyle* with exegetic precision, *see ante* at 217–18. All that is relevant to the inquiry before us is that the rationale for *Boyle* was the same desire to avoid the "inhibition of discretionary action" that made immediate appeals necessary in *Mitchell v. Forsyth. Compare Boyle,* 487 U.S. at 511–13, 108 S.Ct. 2510, *with Forsyth,* 472 U.S. at 525–26, 105 S.Ct. 2806.

Given the fact that these cases simply bristle with novel, unprecedented questions, their duration is likely to be measured in years. It will in all likelihood be a long time indeed before they ever again reach the court of appeals, especially in view of the fact that the vote here will operate as a disincentive for any future certified appeals under 28 U.S.C. § 1292(b). District courts have been given a signal from this court that we do not want to be bothered by these appeals no matter how significant the issues might be. Today's opinion gives the district courts a green light to plunge without a scintilla of direction into the intractable difficulties and significant pitfalls of this litigation. The danger is precisely that which the collateral order doctrine is meant to forestall, namely the expenditure of

years of litigation involving a succession of national security concerns in cases that plainly should be dismissed at the very outset. *See Will,* 546 U.S. at 353, 126 S.Ct. 952; *Gough v. Perkowski,* 694 F.2d 1140, 1145 (9th Cir.1982). If the collateral order doctrine has no role in saving resources and sparing wasted efforts in a context such as this, then I fear it has been largely eviscerated in those situations where it would be of most use.

I recognize that people on both sides of these questions have the noblest intentions in mind, but we should not be oblivious to the profound changes that are occurring. It was once the case that judges of all persuasions went to great lengths to restrain themselves from entering theatres of armed conflict with prescriptions of their own, and this was true whether the conflict was regional or worldwide in its dimensions. *See, e.g., Holtzman v. Schlesinger,* 414 U.S. 1304, 1309–10, 1315, 94 S.Ct. 1, 38 L.Ed.2d 18 (1973) (Marshall, Circuit Justice) (refusing to review air operations over Cambodia because, in part, "Justices of this Court have little or no information or expertise" with regard to sensitive military decisions and "are on treacherous ground indeed when [they] attempt judgments as to [the] wisdom or necessity" of executive military action); *Eisentrager,* 339 U.S. 763, 70 S.Ct. 936 (World War II); *Ex parte Quirin,* 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942) (World War II); *The Prize Cases,* 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1863) (The Civil War). But that era is ending. Perhaps it shall end, but how it ends is all important and I hate to see it pass not through law but through judicial ukase. As

a matter of policy, one may prefer these suits go forward, but as a matter of law, they should be forthwith dismissed.

Under the majority's view of pertinent precedent, an officer denied qualified immunity for a wrongful arrest would be entitled to an immediate appeal of that decision, but the weighty questions of war and wartime policy at issue here must take their turn at the back of the line. What stands to be "irretrievably lost in the absence of an immediate appeal," *Richardson–Merrell Inc. v. Koller,* 472 U.S. 424, 431, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985), is whether decisions as to how America protects herself can be scrutinized through novel applications of extraterritorial causes of action unauthorized by anybody charged by our charter with protection of this country's most vital security concerns. In allowing these suits to proceed, the majority has asserted for itself the responsibility of all others in our system: the right of Congress to authorize private tort actions challenging combatant activity overseas; the right of the executive to control wartime operations through its contractual and criminal law prerogatives; the right of the states not to assent to the extraterritorial application of their law; and the right (though not of constitutional dimension) of litigants and district courts to some notion of where this brave new world will lead. Perhaps this litigation is simply one of those small and tiny steps that weaken America only by increments and erode our constitutional structure only by degree. But I think this understates the matter. The touchstone of the collateral order doctrine is whether a trial "would imperil a substantial public interest" or "some particular value of a high order." *Will,* 546 U.S. at 352, 126 S.Ct.

952. To some questions the answers should be so apparent as not to require iteration, and so it is here.

Judge Niemeyer and Judge Shedd have indicated that they join this opinion.

NIEMEYER, Circuit Judge, dissenting:

The majority today disregards controlling Supreme Court precedents and belittles the gravity of the issues presented in these cases, purporting to find comfort in its narrow application of the collateral order doctrine. Its effort is regrettably threadbare.

Military contractors performing work in the Iraqi war zone under the command and control of the United States military have invoked our jurisdiction, claiming immunity from tort suits brought by foreign nationals detained as part of the war effort. As a matter of convenience, the majority ducks making a decision on this issue of greatest importance to the public interest because it feels that discovery and further district court proceedings would assist it in making a decision. But in giving that as a reason, the majority fails to follow the Supreme Court's *command* in *Behrens v. Pelletier,* 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), that we hear such claims of immunity *now,* simply on the basis of the complaint.

It is simply too easy to claim, as does the majority, that unresolved facts bar consideration now of the defendants' immunity claims. There are always unresolved facts. Without any explanation, the majority fails to recognize that the *undisputed facts of the plaintiffs' claims* alone allow a court to rule on the defendants' immunity claims *as a matter of law*.

It would appear that only the Supreme Court can now fix our wayward course.

* * *

The plaintiffs in these cases are Iraqi citizens, who were seized in Iraq and detained by the U.S. military in Abu Ghraib prison and other military prisons in Iraq. They commenced these actions under state tort law and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for alleged injuries sustained from their mistreatment in prison at the hands of the defendants, who were U.S. military contractors, and of the military personnel themselves. As contractors hired by the U.S. military and under its control during the course of the war effort, the defendants in these two cases have asserted various immunities from liability and suit. They claim that the plaintiffs' claims are barred by (1) derivative sovereign immunity or derivative absolute immunity, as set forth in *Mangold v. Analytic Services, Inc.,* 77 F.3d 1442 (4th Cir.1996); (2) immunity from tort liability in a war zone, as recognized under *Saleh v. Titan Corp.,* 580 F.3d 1 (D.C.Cir.2009), *cert. denied,* —— U.S. ——, 131 S.Ct. 3055, 180 L.Ed.2d 886 (2011); and (3) law-of-war immunity, as recognized by the Supreme Court in *Dow v. Johnson,* 100 U.S. 158, 25 L.Ed. 632 (1880). On the district courts' rejection of these claims of immunity or their refusal to grant immunity on motions filed under Rules 12(b)(1) and 12(b)(6), the defendants filed these interlocutory appeals.

The majority refuses to address whether the defendants enjoy any of the immunities asserted, holding that the district courts' decisions made on Rule

12(b)(1) and Rule 12(b)(6) motions are not final appealable orders and that we do not have appellate jurisdiction. With that decision, the majority subjects the defendants to litigation procedures, to discovery, and perhaps even to trial, contrary to the deep-rooted policies inherent in these immunities. I would reject each of the reasons given by the majority for not deciding the immunity issues at this stage of the case and conclude that we undoubtedly have appellate jurisdiction *now* to consider them under the well-established principles of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), *Behrens v. Pelletier,* 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and their progeny. *Cohen* authorizes the immediate appeal under 28 U.S.C. § 1291 of important and collateral interlocutory orders that "have a final and irreparable effect on the rights of the parties." 337 U.S. at 545, 69 S.Ct. 1221. And *Behrens* and *Iqbal* clearly establish that these appeals fit comfortably with the *Cohen* collateral order doctrine because the denial of immunity "at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of § 1291." *Iqbal,* 556 U.S. at 672, 129 S.Ct. 1937 (citing *Behrens,* 516 U.S. at 307, 116 S.Ct. 834).

Each of the majority's reasons for denying review now is demonstrably flawed. In rejecting the right to appeal the district courts' denials of the derivative absolute immunity described in *Mangold,* the majority ignores well-established precedent that a district court's denial of an immunity from suit based on the facts as alleged in the complaint is a final, conclusive order that is immediately appealable as a collateral order. And in rejecting the right to appeal rulings on

Saleh and law-of-war immunities, the majority rests heavily on a distinction between an immunity that provides "an insulation from liability" and "an immunity from suit," concluding that the immunities in this case only protect defendants from civil liability. This analysis misses the point, however. The Supreme Court has found orders denying immunity *in its common law sense* to be appealable by examining the function performed by parties claiming immunity, the interference with that function a denial of immunity would occasion, and the public interest. In reaching its conclusion, the majority fails to undertake this analysis or recognize the substantial government interest underlying these immunities, an interest with deep roots in the common law.

If there ever were important, collateral decisions that would qualify under *Cohen* as reviewable final decisions, the district courts' denials of immunity in these cases are such decisions. The defendants in these cases were engaged by the U.S. military to assist in conducting interrogations under the command and control of U.S. military personnel, and the decisions about the scope and nature of these interrogations were an integral part of the military's interests. Moreover, the military desperately needed to receive contractor assistance in its interrogations because of a substantial shortage of personnel. Thus, the interrogations were a major component of the war effort, designed to gather military intelligence. These strong public interests merit our consideration of the federal common law immunities claimed by the defendants as protection from any civil suit and from any potential civil liability under state tort law.

Because we have appellate jurisdiction to address one or all of the forms of immunity claimed by the defendants, we would, at the outset, be required to decide our subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). When considering our jurisdiction, it is apparent that we, as well as the district courts, lack authority under Article III to entertain the actions because they present a nonjusticiable political question.

Accordingly, I would dismiss these appeals and remand them with orders to dismiss the cases as nonjusticiable attempts to engage the judiciary in questions reserved by the Constitution for Congress and the Commander–in–Chief to resolve.

I.

In 2003, a multi-national force, led by the United States and Great Britain, invaded Iraq. During the course of the war, the U.S. military seized and detained Iraqi citizens suspected of being enemy combatants or thought to have value in possessing useful intelligence regarding the insurgency or other terrorist activities. These detainees were imprisoned in Abu Ghraib prison and other prisons throughout Iraq. Although these prisons were operated by the U.S. Army in an active war zone, "a severe shortage" of military intelligence personnel "prompt[ed] the U.S. government to contract with private corporations to provide civilian interrogators and interpreters." J.A. 408. These contractors included CACI Premier Technology, Inc., a subsidiary of CACI International, Inc. (collectively herein, "CACI") and Titan Corporation, now

L–3 Services, Inc. ("L–3"). CACI and L–3 were required to comply with Department of Defense interrogation policies and procedures when conducting "[i]ntelligence interrogations, detainee debriefings, and tactical questioning" of persons in the custody of the U.S. military. J.A. 270–71. Secretary of Defense Donald Rumsfeld testified before Congress that the linguists and interrogators provided by contractors at Abu Ghraib were "responsible to [the military intelligence] personnel who hire[d] them and ha[d] responsibility for supervising them." Hearing of the U.S. Senate Committee on Armed Services 44 (May 7, 2004). Acting Secretary of the Army Les Brownlee also testified that civilian linguists and interrogators "work[ed] under the supervision of officers or noncommissioned officers in charge of whatever team or unit they are on." *Id.*

The plaintiffs in these two actions are individuals who were seized and detained by the military at Abu Ghraib prison and other military-controlled prisons "during a period of armed conflict" and "in connection with hostilities." Second Amended Compl. ("Complaint") ¶ 497 (*Al–Quraishi)*; Second Amended Compl. ("Complaint") ¶ 142 (*Al Shimari)*. In their complaints, they allege various acts of assault, sexual assault, humiliation, and inhumane treatment at the hands of the defendants, their employees, and their co-conspirators in the military. They allege that during the course of providing interrogation and translation services for the U.S. military, employees of the defendant corporations conspired with each other and with members of the military to commit torture, assault, battery, and war crimes and that their conduct violated the terms of the contracts that CACI and L–3

had with the U.S. military, the provisions of the U.S. Army field manual, as well as United States law, state law, and the Geneva Convention. Complaint ¶¶ 418, 430, 450, 454, 463, 470 (*Al–Quraishi)*; Complaint ¶¶ 67, 88, 94, 98, 107, 108 (*Al Shimari)*. In addition, they allege that the defendants conspired with each other and with members of the U.S. military to cover-up the misconduct and hide it from the authorities.

The complaints purport to state causes of action under various state-defined torts and under the Alien Tort Statute, naming as defendants CACI, L–3, and Adel Nakhla, an individual employee of L–3, and they demand compensatory damages for physical, economic, and mental injuries; punitive damages to punish defendants for engaging in human rights abuses and to deter similar behavior in the future; and attorney's fees. Complaint ¶¶ 2, 468–559, 560 (*Al–Quraishi)*; Complaint ¶¶ 2, 113– 204, 205; *see also Al Shimari v. CACI Premier Tech., Inc.,* 657 F.Supp.2d 700 (E.D.Va.2009); *Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702 (D.Md.2010).

The defendants filed motions to dismiss all of the claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), alleging that the claims were (1) nonjusticiable because they presented a political question, relying on *Tiffany v. United States,* 931 F.2d 271 (4th Cir.1991); (2) barred by derivative sovereign or absolute official immunity, as set forth in *Mangold v. Analytic Services, Inc.,* 77 F.3d 1442 (4th Cir.1996); (3) preempted and displaced by the federal common law government contractor defense, as set forth in *Saleh v. Titan Corp.,* 580 F.3d 1 (D.C.Cir. 2009), *cert. denied,* —— U.S. ——, 131 S.Ct. 3055, 180 L.Ed.2d 886 (2011); and (4) barred by the law-of-war immunity recognized

by the Supreme Court in *Dow v. Johnson,* 100 U.S. 158, 25 L.Ed. 632 (1880). With respect to the state law tort claims, both district courts below rejected all of these defenses and denied the motions to dismiss. And with respect to the ATS claims, the *Al Shimari* court dismissed, concluding that it lacked jurisdiction, 657 F.Supp.2d at 725–728, while the *Al–Quraishi* court denied the motion to dismiss, 728 F.Supp.2d at 741–60.

A panel of this court reversed the district courts' orders in two opinions released on the same day, concluding that the district courts should have dismissed the claims on the basis of the government contractor defense recognized in *Saleh. Al–Quraishi v. L–3 Servs., Inc.,* 657 F.3d 201 (4th Cir.2011); *Al Shimari v. CACI Int'l, Inc.,* 658 F.3d 413 (4th Cir.2011). On the plaintiffs' motions, we granted a rehearing en banc and consolidated the appeals. At our invitation, the United States also participated as an amicus curiae, filing a brief and participating in oral argument on January 27, 2012. The majority now dismisses the appeals for a lack of final appealable orders under 28 U.S.C. § 1291 and thus allows the litigation to proceed in the district courts.

II.

Section 1291 of Title 28, authorizing "appeals from all final decisions of the district courts of the United States," codifies the "final judgment rule," representing "Congress' determination since the Judiciary Act of 1789 that as a general rule 'appellate review should be postponed . . . until after final judgment has been rendered by the trial court.'" *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.,* 426 U.S. 394, 403, 96 S.Ct.

2119, 48 L.Ed.2d 725 (1976) (quoting *Will v. United States,* 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967)). Thus, the Supreme Court has emphasized "the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Mohawk Indus. v. Carpenter,* —— U.S. —— –, 130 S.Ct. 599, 605, 175 L.Ed.2d 458 (2009) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)).

Falling within the category of appealable final decisions under § 1291 are certain collateral orders that are "other than final judgments" but "have a final and irreparable effect on the rights of the parties." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 545, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Under this "practical construction" given to the statutory language "final decisions," "[t]he authority of the Courts of Appeals to review all final decisions of the district courts" is construed to confer appellate jurisdiction over " 'a narrow class of decisions that do not terminate the litigation' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.'" *Will v. Hallock,* 546 U.S. 345, 347, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (quoting *Digital Equip.,* 511 U.S. at 867, 114 S.Ct. 1992) (internal citation omitted). Thus, to be a final, appealable order, a collateral order must satisfy three requirements: (1) it must "conclusively determine the disputed question"; (2) it must "resolve an important issue completely separate from the merits of the action"; and (3) it must be "effectively unreviewable on appeal from a final judgment." *Johnson v. Jones,* 515 U.S. 304, 310, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (internal quotation marks omitted).

The Supreme Court has noted that the "collateral order doctrine" is of "modest scope," *Hallock,* 546 U.S. at 350, 126 S.Ct. 952, and should not be applied "to swallow the general rule that a party is entitled to a single appeal," *Mohawk Indus.,* 130 S.Ct. at 605 (quoting *Digital Equip.,* 511 U.S. at 868, 114 S.Ct. 1992). But, equally important, the Court has noted that the doctrine is necessary and appropriate for cases involving a "particular value of high order" including "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, [or] respecting a State's dignitary interests." *Hallock,* 546 U.S. at 352–53, 126 S.Ct. 952. In this vein, the Supreme Court and our court have applied the collateral order doctrine to review interlocutory orders denying defendants' motions to dismiss on the basis of numerous asserted immunities. *See, e.g., Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (double jeopardy claim); *Helstoski v. Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979) (Speech and Debate Clause immunity); *Nixon v. Fitzgerald,* 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (absolute official immunity); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (qualified immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (Eleventh Amendment immunity); *Osborn v. Haley,* 549 U.S. 225, 127 S.Ct. 881, 166 L.Ed.2d 819 (2007) (Westfall Act immunity certification); *Republic of Iraq v. Beaty,* 556 U.S. 848, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009) (foreign sovereign immunity); *Permanent Mission of India to the United Nations v. City of New York,* 551 U.S. 193, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007) (same);

Roberson v. Mullins, 29 F.3d 132 (4th Cir.1994) (absolute legislative immunity); *Mangold,* 77 F.3d 1442 (derivative immunity for a contractor).

Some or all of the defendants' claims of immunity in these cases are thus entitled to our review under the collateral order doctrine, and I address them seriatim.

A. Derivative Absolute Immunity

Immunity generally protects government officials from liability based on their office, their function, and the public interest. And when litigation is commenced to enforce *liability* against them, the officials are, if the public interest is sufficiently strong, also protected from defending the *suit* itself, even when the official is accused of misconduct. *See Nixon,* 457 U.S. at 752, 102 S.Ct. 2690 (noting that immunity is afforded when it is in the public interest to provide an official "the maximum ability to deal fearlessly and impartially with duties of his office" (internal quotation marks omitted)). Of course, each particular immunity is defined by the official claiming it, by his function, and by the particular public interest sought to be protected.

In this case, the defendants claim, among other immunities, derivative absolute immunity based on their role in carrying out the U.S. military's mission in the Iraq war zone under the ultimate direction and control of the military. As alleged in the complaints, the defendants were retained by the U.S. military to perform interrogation and translation services in the interrogation of military detainees in military prisons throughout the Iraqi war zone. Complaint ¶¶ 8, 435, 436, 442 (*Al–Quraishi)*; Complaint ¶¶ 1, 10, 64 (*Al*

Shimari). Indeed, the complaints assert that the defendants were functioning on behalf of the U.S. military and in conspiracy with military personnel "during a period of armed conflict, in connection with hostilities." Complaint ¶ 497 (*Al–Quraishi);* Complaint ¶ 142 (*Al Shimari)*.

Regardless of whether these facts are ultimately proved, they were alleged by the plaintiffs in their complaints and admitted by the defendants in asserting immunity. And on the basis of these facts, both district courts below conclusively determined that the defendants were not entitled to the derivative immunity recognized in *Mangold*. In one decision, the district court stated that it "*reject[ed]* both arguments" made by the defendant that it was immune under the "doctrine of derivative absolute official immunity" because it could not "determine the scope of Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place." *Al Shimari v. CA CI Premier Tech., Inc.,* 657 F.Supp.2d 700, 714 (E.D.Va.2009) (emphasis added).

In the other decision below, the district court concluded that "*relying on the information in the Complaint,* it is *clearly too early* to dismiss Defendants on the basis of derivative sovereign immunity," explaining that "the contract between [the contractor] and the military is not before the Court at this time," making it impossible to "determin[e] both the scope of the contract and whether that scope was exceeded." *Al–Quraishi v. Nakhla,* 728 F.Supp.2d 702, 735 (D.Md.2010).

Thus, both of these opinions take the facts as alleged by the plaintiffs in their complaints as true and conclude that the defendants were not entitled to derivative immunity.

As both the Supreme Court's precedents and our precedents clearly establish, when a district court refuses to grant an immunity from suit on the basis of the facts alleged in a complaint, the refusals are immediately appealable. Whether they are rightly or wrongly decided, we have jurisdiction to review such rulings to protect the defendants from the costs and distraction of litigation, which undermine the public interest in protecting the governmental function of war zone interrogations. The district courts' refusals to recognize this immunity can undoubtedly be *immediately* appealed under the collateral order doctrine. *See Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Behrens v. Pelletier,* 516 U.S. 299, 303, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *Jenkins v. Medford,* 119 F.3d 1156, 1159 (4th Cir.1997) (en banc); *McVey v. Stacy,* 157 F.3d 271, 275 (4th Cir.1998).

The majority does not take issue with the defendants' claim of immunity under the doctrine of derivative absolute immunity, nor does it take issue with the principle that this immunity protects defendants from suit. *Ante,* at 223 ("*Mangold* immunity confers upon those within its aegis the right not to stand trial"). Rather, the majority defers any ruling on the immunity because the "record [was not] sufficiently developed through discovery proceedings to accurately assess any claim, including one of immunity." As the majority explains:

> The Maryland and Virginia district courts each perceived that the validity of such invocations [of immunity] depended in significant part on whether the contractor involved was acting within the scope of its agreement with the United States. One could hardly begin to answer that question without resort to any and all contracts between the appellants and the government pertinent to the claims, defenses, and related matters below.

Ante, at 220. Thus, the majority concludes that because the district courts deferred ruling on derivative immunity until the record was more developed, their decisions lack finality and fail the requirements of *Hallock,* 546 U.S. at 349–50, 126 S.Ct. 952, that collateral orders be conclusively determined.

The majority fails to recognize, however, that its conclusions are contrary to well-established Supreme Court and Fourth Circuit precedents and that the district courts' decisions in refusing to grant immunity on motions to dismiss based on Rules 12(b)(1) and 12(b)(6) are appealable final determinations under the collateral order doctrine.

In *Behrens,* 516 U.S. at 303, 116 S.Ct. 834, the district court had entered an order denying, without prejudice, a motion to dismiss based on a defense of qualified immunity, giving as its reason the fact that *it was premature because of the lack of discovery.* Both the Ninth Circuit in the first appeal taken and, eventually the Supreme Court, recognized that the district court's order deferring consideration pending discovery was a final determination of the immunity de-

fense, subject to immediate appeal under the collateral order doctrine. *See Pelletier v. Fed. Home Loan Bank of San Francisco,* 968 F.2d 865, 871 (9th Cir.1992); *Behrens,* 516 U.S. at 308, 116 S.Ct. 834 ("Whether or not a later summary judgment motion [on the basis of immunity] is granted, *denial of a motion to dismiss is conclusive as to this right"* (emphasis added)). As the *Behrens* Court noted, at the motion-to-dismiss stage of a proceeding, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized." *Behrens,* 516 U.S. at 309, 116 S.Ct. 834 (emphasis added); *see also Mitchell v. Forsyth,* 472 U.S. 511, 529 n. 9, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) ("[W]e emphasize at this point that the appealable issue is a purely legal one: *whether the facts alleged . . .* support a claim of violation of clearly established law" (emphasis added)).

More recently, in *Iqbal,* the Supreme Court reaffirmed *Behrens* and its principle that "a district court's order rejecting qualified immunity *at the motion-to-dismiss stage* of a proceeding is a 'final decision' within the meaning of § 1291." *Iqbal,* 556 U.S. at 672, 129 S.Ct. 1937 (emphasis added).

Until this decision by the majority, we have applied the reasoning of *Mitchell* and *Behrens* faithfully and consistently, holding that the denial of *a motion to dismiss* based on an immunity that is properly characterized as an immunity from suit, even if on the basis that more discovery is necessary, is a collateral order over which we have jurisdiction under 28 U.S.C. § 1291. In *Jenkins v. Medford,* 119 F.3d 1156, 1159 (4th Cir.1997) (en banc), we declared that we had jurisdiction to review a district court's denial of a motion to dismiss based on qualified immunity even though

the district court had refused to rule on immunity at that stage because an answer had not yet been filed. Without qualification, we stated that "[w]hen a district court denies a motion to dismiss that is based on qualified immunity . . . the action is a final order reviewable by this court." *Id.; see also Winfield v. Bass,* 106 F.3d 525, 530 (4th Cir.1997) (en banc) (finding jurisdiction to review an immunity claim "accepting the facts as the district court viewed them," even though factual issues remained).

Again, in *McVey,* 157 F.3d at 275, we applied *Behrens* and concluded that we had jurisdiction over the denial of qualified immunity even though we "recognized that the district court's order essentially deferring a ruling on qualified immunity would appear, at first blush, to amount to a routine procedural order that is generally not appealable." As we reasoned:

> [I]n rejecting the immunity defense "at this early stage," the district court necessarily subjected the commissioners to the burden of further trial procedures and discovery, perhaps unnecessarily. [The district court's] order implicitly ruled against the commissioners on . . . legal questions. . . . These questions do not raise factual questions concerning the defendants' involvement, which would not be appealable. . . . On the contrary, *they are answered with the facts of the complaint assumed to be true as a matter of law.* They are therefore the very questions that *Mitchell* held were appealable.

Id. at 276 (emphasis added) (internal citations omitted).

Although the majority acknowledges these precedents, it attempts to distinguish them by noting that *Behrens* "confers jurisdiction of these appeals only if the record at the dismissal stage can be construed to present a pure issue of law." *Ante,* at 222. It finds that in these cases "those facts that may have been tentatively designated as outcome-determinative are yet subject to genuine dispute, that is, a reasonable factfinder could conclude in favor of either the plaintiffs or the defendants," and thus we lack jurisdiction because the "courts' immunity rulings below turn[ed] on genuineness." *Ante,* at 223. The majority's new "genuineness" addition to the collateral order doctrine, however, finds no support in the Supreme Court's discussion of collateral order immunity appeals. To the extent the majority is simply stating the well-established rule that a collateral order immunity appeal must present a purely legal question, there can be no debate that the appeals in the cases before us present just such a question. *Mitchell, Behrens*, and *Iqbal* establish without question that these appeals present a purely legal question because we are asked to decide whether the defendants are entitled to derivative immunity *on the basis of the facts as alleged by the plaintiffs* in their complaints. The possibility that a factfinder might construe these facts in favor of the *defendants* at a later time does not, by some heretofore unknown legal device, create a factual dispute that deprives us of jurisdiction at the motion-to-dismiss stage. As a matter of logical necessity, there can be no genuine issue of material fact when we are reviewing only the facts as alleged by the plaintiff in the complaint. The majority simply ignores *Mitchell* 's statement that "the appealable issue is a *purely legal one:*

whether the facts alleged" support a claim of immunity. 472 U.S. at 528 n. 9, 105 S.Ct. 2806.

The majority's claim that it could only discern a "pure issue of law" if it "were of the opinion, as the dissenters evidently are, that persons similarly situated to the appellants are inevitably and invariably immune from suit," *ante,* at 222, demonstrates the fundamental error of its approach. If the majority believes that the defendants cannot establish their claims to immunity from suit, accepting as true the facts in the complaint, then *it should deny the derivative immunity defense on the merits* and allow the district courts to proceed and develop a fuller factual record. Indeed, *Behrens* considers this very possibility, allowing the defendants to pursue a second immunity appeal after the denial of summary judgment even if they have already unsuccessfully appealed the district court's denial of their motion to dismiss. 516 U.S. at 305–08, 116 S.Ct. 834. Surprisingly, the majority *admits* that we have jurisdiction to review whether "facts that are undisputed or viewed in a particular light are material to the immunity calculus," *ante,* at 222, but then mysteriously concludes that we cannot determine whether these same facts *establish* immunity. Thus, under the majority's novel approach to the collateral order doctrine, we have jurisdiction to review whether undisputed facts are "material" to a question of immunity, but we have no jurisdiction to review the immunity determination itself. Such a rule finds absolutely no legal support.

Whether it is to avoid the difficulty presented by the political question doctrine or to evade the other difficult questions the merits of these important cases

present, the majority chooses to decimate existing collateral order jurisprudence by finding a "genuine" dispute of material fact in a case in which we are asked to review district court decisions denying derivative immunity based only on *undisputed* facts, those alleged in the complaint. *See McVey,* 157 F.3d at 276 ("These questions do not raise factual questions concerning the defendants' involvement. . . . On the contrary, they are answered with the facts of the complaint assumed to be true as a matter of law. They are therefore the very questions that *Mitchell* held were appealable"). The majority's approach is manifestly contrary to the Supreme Court's collateral order immunity jurisprudence.

Rather than following these binding precedents of the Supreme Court and our court, the majority chooses to rely on a distinguishable Fifth Circuit decision that refused to consider a claim of immunity because it was neither "substantial" nor "colorable." *See Martin v. Halliburton,* 618 F.3d 476, 484 (5th Cir.2010). The *Martin* court, however, did not decide the issue before us today. In that case, regulations governing the contractor explicitly stated that "[c]ontractors will not be used to perform inherently governmental functions" and "expressly preclude[d] Defendant [contractors] from engaging in discretionary conduct," which was a prerequisite for finding derivative immunity. *See id.* at 484. Thus, the language of the regulations themselves made the defendants' contentions that they had engaged in the performance of governmental functions frivolous and unsubstantial.

Under our decision in *Mangold* and its progeny, there can be no serious argument that, based on the

complaint, the defendants in these cases failed to present a substantial basis for the immunity. *See Mangold,* 77 F.3d at 1442 (holding that government *functions* performed by private contractors are protected by immunity both for the government and the contractor); *see also Murray v. Northrop Grumman Info. Tech., Inc.,* 444 F.3d 169, 175 (2d Cir.2006) (government contractor absolutely immune from tort liability for performing contracted-for governmental function, citing *Mangold)*; *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 71–73 (2d Cir.1998) (same); *Midland Psychiatric Assocs., Inc. v. United States,* 145 F.3d 1000, 1005 (8th Cir.1998) (common law official immunity barred tort suit against Medicare insurer). This immunity protects contractors from suit where such an immunity is necessary to protect a discretionary government function and the benefits of immunity outweigh its costs. For example, in *Mangold,* we held that "the interest in efficient government" justified granting a private contractor immunity for statements made during an official investigation of government procurement practices. 77 F.3d at 1447–48.

And recently, the Supreme Court has reaffirmed the need to protect those who perform government *functions* with immunity regardless of whether they are public employees, such as military officers, or private individuals retained to perform the same function. *See Filarsky v. Delia,* —— U.S. ——, 132 S.Ct. 1657, 1663, 182 L.Ed.2d 662 (2012) ("[T]he common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities").

But the majority never disputes this, nor even discusses why the allegations in the complaint present only a frivolous and unsubstantial claim to derivative immunity. Instead, it frames the dispositive question as one of finality. In so doing, the majority ignores the fundamental and well-established principle that a district court's denial of a motion to dismiss based on an immunity from suit is a final, immediately appealable collateral order. Whether discovery could help make the issue more clear or whether the district courts wanted a fuller record before ruling on the merits of immunity is irrelevant. The defendants claim entitlement to be protected *from the litigation process,* and the court's refusal to grant the immunity denied them that protection and was therefore an appealable decision under *Mitchell, Behrens, Iqbal, Jenkins, Winfield,* and *McVey*. It is most regrettable that the majority so readily tramples on these precedents, which clearly provide us with appellate jurisdiction *at this stage of the proceedings* to consider the substantial claims of immunity asserted by the defendants on the basis of the facts alleged in the complaint.[1]

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[1] The majority also inexplicably dismisses L–3's arguments relating to the Alien Tort Statute in a footnote, claiming that they deserve no different analysis than do the state law claims. *Ante*, at 223–24 n. 19. But in so concluding, the majority fails to recognize that plaintiffs' Alien Tort Statute claims, of jurisdictional necessity, include allegations that the defendants' allegedly abusive conduct was the conduct *of the United States* and therefore any claim of derivative immunity would have to be substantial as a matter of law.

Although the district court in *Al Shimari* dismissed the plaintiffs' claims under the ATS, the district court in *Al–Quraishi* failed to dismiss the ATS claims against L–3 and its employee. L–3 contends on appeal that the denial of its motion to dismiss the ATS claims on account of derivative immunity, among other defenses, was an error. L–3's claim to derivative absolute immunity in the ATS context is thus undeniably "substantial." In *Sanchez–Espinoza v. Reagan*, 770 F.2d 202 (D.C.Cir.1985), plaintiffs alleged that defendants had violated the law of nations by engaging in "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities," as part of a conspiracy arising out of the U.S. government's actions in Nicaragua. *Id*. at 205. In a unanimous opinion authored by then-Judge Scalia and joined by then-Judge Ginsburg, the D.C. Circuit found that "[i]t would make a mockery of the doctrine of sovereign immunity" to permit the ATS claims to proceed based on "actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States." *Id*. at 207. Like the allegations in *Sanchez–Espinoza*, plaintiffs must, to maintain their ATS claims, allege that the actions of the defendants were actions of the United States as a jurisdictional necessity. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[T]orture and summary execution . . . are proscribed by international law only when committed by state officials or under color of law"). To establish jurisdiction for their ATS claims alleging "war crimes," the plaintiffs must at the very least allege that the defendants in this case were "parties" to the hostilities in Iraq, *id*., and may have to demonstrate state action as well if the court considered war crimes to violate international norms only to the extent they were committed by combatants or state actors, *see Sosa v. Alvarez–Machain*, 542 U.S. 692, 731– 38, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C.Cir.1984) (Edwards, J., concurring).

B. Combatant Activities Immunity under *Saleh*

The defendants also asserted an immunity from suit based on the combatant activities exception to the Federal Tort Claims Act and the D.C. Circuit's application of that immunity in *Saleh v. Titan Corp.,* 580 F.3d 1 (D.C.Cir.2009), *cert. denied,* —— U.S. ——, 131 S.Ct. 3055, 180 L.Ed.2d 886 (2011). This immunity, applied to military contractors, is based on the United States' sovereign immunity for claims arising out of combatant activities of the military during time of war. *See* 28 U.S.C. § 2680(j).

Again, in response to the allegations of the plaintiffs' complaints, the defendants claimed that their immunity is based on the United States' interests, as embodied in the combatant activities exception and as applied in *Saleh*. Under this immunity, when claims arise out of federal combatant activities, the federal interests *preempt* the application of state tort law to its contractors and then *replace* state tort law with federal common law, which recognizes an immunity for claims against contractors arising out of combatant activities. The United States' interest in its con-

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Thus, the defendants' claims to derivative immunity as to the ATS claims in *Al–Quraishi* are obviously substantial because plaintiffs must allege as a jurisdictional necessity either state action or that the defendants were "parties" to the armed conflict in Iraq. Both allegations add further weight to the contention that the defendants were performing a state function and thus entitled to the same immunities afforded public officials performing that function. *See Filarsky*, 132 S.Ct. at 1663. I therefore fail to understand how these defenses can be dismissed as so insubstantial and frivolous that we lack jurisdiction even to entertain them.

tractors' performance in the course of combatant activities grows out of the uniquely federal interest in the unencumbered operation of military personnel and in the "*elimination of tort from the battlefield,* both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in *potential* subjection to civil suit." *Saleh,* 580 F.3d at 7 (emphasis added). "[T]he policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Id.* The policy to protect these interests can only be furthered and preserved if the defense protects against *potential lawsuits* brought under any civilian tort law, not simply against ultimate liability.

The district courts denied the claimed immunities. The court in *Al–Quraishi* refused to recognize the unique federal interests embodied in the combatant activities exception. *Al–Quraishi,* 728 F.Supp.2d at 738–39. And the court in *Al Shimari* simply rejected the defense as to these defendants in a conclusory manner. *Al Shimari,* 657 F.Supp.2d at 725. Both courts thus held that the defendants were entitled to neither the displacement of state tort law nor the application of federal common law immunizing them from suit.

The majority now refuses also to review these district court orders, thus denying the defendants the combatant activities immunity. It does so mainly by relying on an unexplored labeling problem. It states conclusorily, "*Boyle* preemption (and, thus, *Saleh* preemption) is, *ipso facto,* not immunity." *Ante,* at

217. And again, repeating its labeling reliance, it declares, "*Saleh* preemption falls squarely on the side of being a defense to liability and not an immunity from suit." *Ante,* at 217. The only analysis the majority accords the issue is an observation that immunity "derives from an explicit statutory or constructive guarantee that trial will not occur" (internal quotation marks omitted), and that *Boyle,* "from which *Saleh* preemption is derived, [did not rely] on any such explicit guarantee." *Ante,* at 217. The majority's opinion, however, neither considers what *Saleh* actually held in order to prove its assertion, nor analyzes the text of the combatant activities exception and the unique federal interests it embodies. Moreover, it assumes, without analysis, that *Boyle* and *Saleh* are identical for purposes of its collateral order analysis.

Surely our jurisdiction to consider the district courts' orders cannot depend wholly on labels such as "preemption" and "immunity." Nonetheless, if a vote on labels were critical, the majority would have little support, as virtually every court that has considered the government contractor defense set forth in *Boyle* takes it as a two-step defense leading to immunity. Under the first step, the court preempts state tort law, and under the second, it recognizes the federal common law providing immunity to such contractors. *See In re Katrina Canal Breaches,* 620 F.3d 455, 457 (5th Cir.2010) (characterizing the defense recognized in *Boyle* as "government contractor immunity"); *In re World Trade Ctr. Disaster Site Litig.,* 521 F.3d 169, 196 (2d Cir.2008) ("In *Boyle,* the Court refined the requirements for a *type of derivative immunity* for government military contractors" (emphasis added)); *United States v. Swiss Am. Bank, Ltd.,* 191 F.3d 30,

44 n. 6 (1st Cir.1999) ("[T]he [*Boyle*] Court used the terminology of 'displacement of state law' and 'preemption' in determining whether federal law should provide government contractors with *immunity* from certain state-law product liability actions" (emphasis added)); *Winters v. Diamond Shamrock Chem. Co.,* 149 F.3d 387, 400 (5th Cir. 1998) ("The Supreme Court set out the test for *immunity* under the government contractor defense in *Boyle* " (emphasis added)); *Oliver v. Oshkosh Truck Corp.,* 96 F.3d 992, 997 (7th Cir.1996) ("The government contractor defense is derived from the *government's immunity* from suit when the performance of a discretionary function is at issue" (emphasis added)); *Mangold,* 77 F.3d at 1448 ("Extending *immunity* to private contractors to protect an important government interest is not novel. *See, e.g., Boyle*[ ]" (emphasis added)); *Tate v. Boeing Helicopters,* 55 F.3d 1150, 1153 (6th Cir.1995) ("The *Boyle* Court held that, under certain circumstances, government contractors are *immune* from state tort liability" (emphasis added)); *Carley v. Wheeled Coach,* 991 F.2d 1117, 1120 (3d Cir.1993) (noting that the rationale that "underlies the modern government contractor defense" is that "[a] private contractor . . . should, in some circumstances, share *the sovereign immunity* of the United States" (emphasis added)); *Harduvel v. Gen. Dynamics Corp.,* 878 F.2d 1311, 1316 (11th Cir.1989) ("In the military context, this [government contractor] *immunity* serves the further important purpose of shielding sensitive military decisions from scrutiny by the judiciary, the branch of government least competent to review them" (emphasis added)).

Rather than counting labeling votes, however, we must, in determining our appellate jurisdiction over the defendants' claim of *Saleh* immunity, inquire whether the assertion of *Saleh* immunity falls within the category of collateral orders that the Supreme Court has held appealable under the collateral order doctrine.

We begin by looking to the methodology in *Boyle,* which was employed by *Saleh* to identify the unique federal interests in these cases. In *Boyle,* the Supreme Court referred to the "displacement" of state law with federal common law, 487 U.S. at 505, 507, 512, 108 S.Ct. 2510 (emphasis added), and specifically held that "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and *replaced,* where necessary, by federal law of a *content* prescribed (absent explicit statutory directive) by the *courts*—so called 'federal common law.'" *Id.* at 504, 108 S.Ct. 2510 (emphasis added) (internal citation omitted). Thus, it is the *content* of this federal common law that defines the rights and defenses of the government contractor defendant, not the preemption leading to application of the federal common law.

In *Boyle,* the father of a deceased helicopter pilot sued the helicopter's manufacturer, a private government contractor, under Virginia tort law, alleging that the helicopter's escape hatch had been defectively designed because it opened out rather than in. *Id.* at 502–03, 108 S.Ct. 2510. While the pilot survived the impact of the helicopter's crash off the coast of Virginia, he was unable to escape because the water pressure prevented the escape hatch from opening. The

Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and *must be displaced.*" *Id.* at 512, 108 S.Ct. 2510 (emphasis added).

The *Boyle* Court reached its conclusion through a two-step process. First, it recognized that the subject matter of the suit implicated "uniquely federal interests," because it involved the "performance of federal procurement contracts," which "border[ed] upon two areas that [the Court] ha[d] found to involve such 'uniquely federal interests'": (1) the rights and obligations of the United States under its contracts, and (2) the "civil liability of federal officials for actions taken in the course of their duty." *Id.* at 504–06, 108 S.Ct. 2510. In the second step, after recognizing these interests, the Court asked whether a "significant conflict exist[ed] between an identifiable federal policy or interest and the operation of state law," and whether "the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507, 108 S.Ct. 2510 (internal quotation marks and citation omitted). The Court explained that "[t]he conflict with federal policy need not be as sharp to justify preemption" when a suit involves an area of "unique federal concern," but nonetheless "conflict there must be." *Id.* at 507–08, 108 S.Ct. 2510. The Court then found this conflict in the discretionary function exception to the Federal Tort Claims Act ("FTCA"), noting that it "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement." *Id.* at 511, 108 S.Ct. 2510.

The *Boyle* case thus works the displacement of state law, through preemption, with *federal common law* and then describes the *content* of the federal common law government contractor defense, looking for that purpose to the discretionary function exception in the FTCA.

This case, however, does not involve the government contractor defense recognized in *Boyle,* but rather a defense based on the combatant activities exception, a common law immunity recognized in the FTCA. *See* 28 U.S.C. § 2680(j) (retaining sovereign immunity for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war"); *see also Filarsky,* 132 S.Ct. at 1665 ("[W]e 'proceed[ ] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so'" (first alteration in original) (quoting *Pulliam v. Allen,* 466 U.S. 522, 529, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984))). The defendants in this case asked the district courts to apply the *methodology* of *Boyle,* as the court did in *Saleh,* in order to recognize the federal common law defense based on the *combatant activities exception,* which is animated by different interests than were at issue in *Boyle. See Saleh,* 580 F.3d at 6 ("The *crucial* point is that the [*Boyle*] court looked to the FTCA exceptions to the waiver of sovereign im-

munity in order to determine that the conflict was significant and to measure the boundaries of the conflict" (emphasis added)).[2]

Saleh indeed did apply the *Boyle* methodology to circumstances *identical to those before us.* Thus the *Saleh* court concluded that Congress intended the combatant activities exception to "eliminat[e] . . . tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in *potential* subjection to civil suit." *Saleh,* 580 F.3d at 7 (emphasis added). The D.C. Circuit in *Saleh* explained:

> In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the State or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in con-

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[2] The majority's assertion that we are "repackaging for the sake of convenience the preemption defense derived from Boyle as 'combatant activities immunity,'" *ante*, at 218, ignores the fact that *Boyle* and *Saleh*, though they both apply preemption, then proceed to apply different principles of federal common law to the issue at hand. Thus, *not* only are we not applying the common law applied in *Boyle*, we are also not repackaging anything from *Boyle*. Rather, we are analyzing the content of the federal common law that the *Boyle* methodology instructs us to apply. *Saleh* analyzed the content of this law as well, and the majority simply ignores that there is any such content in its singular focus on the "preemption" label.

> flict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battlefield preemption": the federal government occupies the field when it comes to warfare, and its interest in combat is always "precisely contrary" to the imposition of a non-federal tort duty.

Saleh, 580 F.3d at 7. After displacing state tort law in favor of the unique federal interests at stake, the *Saleh* court dismissed the complaints based on sovereign immunity.

Thus, to reject the defendants' claim of sovereign immunity under *Saleh* amounts to subjecting government contractors engaged in the war effort of the military to suits, thereby interfering with the very combatant activities intended to be protected from suit by federal statutory and common law. The government's unique interest can only be protected and preserved if the *Saleh* defense to a potential suit is preserved by our review at the outset of litigation. This is because the *Saleh* immunity serves the interests of freeing officers engaged in combatant activities from "the doubts and uncertainty inherent in *potential* subjection to civil suit." *Saleh,* 580 F.3d at 7 (emphasis added).

Although the legislative history of the combatant activities exception is "singularly barren," courts have long recognized that the exception serves to exempt activities that "by their very nature should be free from the hindrance of a *possible* damage suit." *Johnson v. United States,* 170 F.2d 767, 769 (9th Cir.1948) (emphasis added). In recognizing the interests that

made qualified immunity a protection against standing trial, the Supreme Court has similarly emphasized that "the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Mitchell,* 472 U.S. at 525, 105 S.Ct. 2806 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). These "consequences" were "not limited to liability for money damages" but also included " 'the general costs of subjecting officials to the risks of trial-distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Id.* at 526, 105 S.Ct. 2806 (quoting *Harlow,* 457 U.S. at 816, 102 S.Ct. 2727).

Moreover, in *Filarsky,* the Supreme Court relied on the same public interest in holding that common law immunity protects not only government employees but also private contractors when performing the government's work:

> The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties. Not only will such individuals' performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation.

Filarsky, 132 S.Ct. at 1666 (citation omitted).

The same concerns recognized in *Mitchell* and *Filarsky* animate the combatant activities exception here, ensuring that entities engaged in actions arising out of combatant activities do not suffer "distraction," are not slowed by "inhibition," and are willing to serve our country. As *Saleh* noted, "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty." 580 F.3d at 7; *see also Koohi v. United States,* 976 F.2d 1328, 1337 (9th Cir.1992) ("[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action").

In short, the unique federal interest embodied in the combatant activities exception to the FTCA is an interest in freeing military actors from the distraction, inhibition, and fear that the imposition of state tort law by means of a *potential* civil suit entails. It makes no difference whether the military actors are low-level soldiers, commanders, or military contractors. The Supreme Court has made clear that immunity attaches to the *function* being performed, and private actors who are hired by the government to perform public functions are entitled to the same immunities to which public officials performing those duties would be entitled. *See Filarsky,* 132 S.Ct. at 1661–66. The unanimous Supreme Court in *Filarsky* emphasized that imposing liability on private individuals performing public functions will result in "unwarranted timidity" on the part of "those engaged in the public's business," calling this concern "the most im-

portant special government immunity-producing concern." *Id.* at 1665 (internal quotation marks omitted). It recognized the need to "afford[ ] immunity not only to public employees but also to others acting on behalf of the government" because "often when there is a particular need for specialized knowledge or expertise . . . the government must look outside its permanent work force to secure the services of private individuals." *Id.* at 1665–66.

This case presents just such an example. The military had a need for specialized language and interrogation skills and hired private individuals to work with the military in performing its public function. Because potential suit and liability would result in "unwarranted timidity" on the part of these government contractors, they must share the common law immunity enjoyed by the military and retained by the FTCA combatant activities exception. These interests underlying this immunity are only protected if the immunity is not only an immunity from liability, but also an immunity from suit.

Thus, the denial of a combatant activities defense will be effectively unreviewable at final judgment because the defendants will no longer be able to vindicate their right to avoid the burdens and distractions of trial. Military contractors will have to undertake future actions "arising out of combatant activities" with the understanding that they are presumptively subject to civil tort law and must abide by state law duties of care in the middle of a foreign war zone. The result will be exactly what the Supreme Court cautioned against in *Filarsky:* "those working alongside [government employees] could be left holding the

bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." 132 S.Ct. at 1666. The governmental interests in uninhibited military action and in the attraction of talented candidates, both public and private, animate the combatant activities exception, and these interests are far broader than the limited interests recognized by the majority, which focuses only on "sensitive military issues." *Ante,* at 219. Such a narrow mischaracterization of the federal interest ignores the broad language of the exception (protecting actions "*arising out of* combatant activities") and finds no support in federal common law.

At bottom, it is readily apparent that the district courts' orders denying *Saleh* immunity fall comfortably within the collateral order doctrine. As the Supreme Court has said in summarizing its collateral order precedents:

> In each case, some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring *the separation of powers, preserving the efficiency of government and the initiative of its officials,* respecting a State's dignitary interest, and mitigating the government's advantage over the individual. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is "effectively" unreviewable if review is to be left until later.

Will v. Hallock, 546 U.S. 345, 352–53, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (emphasis added). So it is in these cases.

C. Law–of–War Immunity

Finally, CACI and L–3 claimed protection from suit and from the application of Iraqi law under law-of-war immunity, as recognized in the Supreme Court's decision in *Dow v. Johnson,* 100 U.S. 158, 25 L.Ed. 632 (1879), because they were part of the occupying force in the middle of an ongoing war.[3]

The plaintiffs agree that the district courts conclusively decided that defendants were not entitled to law-of-war immunity and that the issue is collateral to the merits. They contend, however, that this immunity is not an immunity from suit but a doctrine of jurisdiction, depriving courts in an occupied territory of jurisdiction over the occupying forces.

In its amicus brief, the United States noted, without explanation, that "*Dow* and the policies it reflects may well inform the ultimate disposition of these claims," but the United States was "not prepared . . . to conclude that the contractor defendants have demonstrated a right to immediate review of their contentions based on *Dow* alone."

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[3] In *Al–Quraishi*, the district court determined that Iraqi law would apply to the action under Maryland's adherence to the *lex loci delicti* rule in analyzing choice of law in tort actions. 728 F.Supp.2d at 761–62. In *Al Shimari*, the district court noted that it would "present the parties with the opportunity to address the choice of law issue at a later date," and did not determine what law would apply. 657 F.Supp.2d at 725 n. 7. Virginia law, however, also applies the *lex loci delicti* rule and, thus, Iraqi law would appear to apply in that action as well. *See Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir.2007) (per curiam). As Judge Wilkinson notes, however, the plaintiffs in *Al Shimari* contend that Virginia law should apply.

The majority again resorts to labels to resolve this immunity issue, noting that *Dow* does not use the word "immunity." The fact that *Dow* does not use the specific term "immunity," however, has little relevance to the question of whether a ruling denying application of its holding is immediately appealable. *Dow* characterized the defense at issue as an "*exemption* from . . . civil proceedings," [4] 100 U.S. at 165 (emphasis added), which, as was customary to find at the time, led to a lack of "jurisdiction" of the court over the defendant, *id.* at 170. In *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), which was relied on by *Dow,* the Court similarly used the language of "jurisdiction," and this phrase was later interpreted by the Supreme Court to stand for what we call, in today's parlance, foreign sovereign immunity. *See Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Further, subsequent cases, including Supreme Court decisions, recognize that the *Dow* protection is a type of immunity. *See Underhill v. Hernandez,* 168 U.S. 250, 252–53, 18 S.Ct. 83, 42 L.Ed. 456

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[4] Compare this language with the Supreme Court's more recent characterization that qualified immunity "*shields* government agents from liability for civil damages," *Behrens*, 516 U.S. at 305, 116 S.Ct. 834 (internal quotation marks and alterations omitted) (emphasis added), or that it serves as a "protection to shield [defendants] from undue interference with their duties and from potentially disabling threats of liability," *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (emphasis added), and again that government officials are "*shielded* from liability for civil damages," *id*. at 818, 102 S.Ct. 2727 (emphasis added). *See also Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (noting that qualified immunity "*shield[s]*" government officials "from civil damages liability").

(1897); *Moyer v. Peabody,* 212 U.S. 78, 85–86, 29 S.Ct. 235, 53 L.Ed. 410 (1909); *"Act of State" Immunity,* 57 Yale L.J. 108, 112 (1947).

Rather than fuss with a label, however, we must determine the nature of the defense recognized in *Dow* so as to be able to determine whether its rejection is immediately appealable.

The majority finds it "curious to imagine the nineteenth century [Supreme] Court regarding its decisions in the Civil War cases as having durable precedential effect," citing no authority to reach that conclusion, and implies they may not "possess continued relevance beyond their immediate context." *Ante,* at 217. By contrast, at oral argument, the United States postulated that the "principles of *Dow* may have further life in other doctrines," and specifically argued that these principles may be "given effect" by courts in their recognition of the federal common law defense identified in *Saleh* based on the combatant activities exception. *Dow* and other cases of its era were decided as a matter of federal and international common law at a time when the Supreme Court recognized the validity of such common law. *See Ford v. Surget,* 97 U.S. 594, 613, 24 L.Ed. 1018 (1878) (finding a Mississippi *civilian* immune from civil suit for destroying another citizen's cotton in support of the occupying Confederate army based on the "common laws of war—those maxims of humanity, moderation, and justice" and the "law of nations").

Although the invocation of federal common law was restricted severely with the Supreme Court's decision in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64,

58 S.Ct. 817, 82 L.Ed. 1188 (1938), the Court's decision in *Boyle* nonetheless explicitly instructs courts to displace state tort law with federal common law when the imposition of state tort law would conflict with uniquely federal interests. The immunity recognized in *Dow* falls within the same body of federal common law that displaces state law under the methodology employed by *Boyle.* And "common-law principles of . . . immunity were incorporated into our judicial system and . . . should not be abrogated absent clear legislative intent to do so." *Filarsky,* 132 S.Ct. at 1665 (internal quotation marks omitted). For this reason, the immunity claimed by the defendants under *Dow* and the immunity claimed under the common law defense based on the combatant activities exception are simply two variations of the same principle; they are both a common law immunity from suit. And *Boyle* provides the methodology for preempting state law and applying the federal common law immunity, as pointed out in *Saleh*.

The majority relies heavily on the Supreme Court's statement that an immunity from suit must typically be derived from "an *explicit* statutory or constitutional guarantee that trial will not occur." Ante, at 217. Thus, the majority would conclude that *Saleh* preemption cannot be an immunity from suit, because there is "no contention that the Supreme Court in *Boyle* [ ], from which *Saleh* preemption is derived, relied on any such explicit guarantee embodied in statute or in the Constitution." *Ante,* at 217. Retreating almost immediately from this categorical statement, however, the majority then admits in a footnote that the Supreme Court has recognized an implicit immun-

ity from suit when such immunity has a " 'good pedigree in public law,' which more than makes up for its implicitness." *Ante,* at 217 n. 9 (quoting *Digital Equip.,* 511 U.S. at 875, 114 S.Ct. 1992). Yet, it continues to overlook the fact that the recognized need in *Dow* and other cases to free military operations from the duties and standards of state tort law represent the same kind of public law pedigree that led the Supreme Court to recognize qualified immunity, which is a common law defense and is concededly an immediately appealable issue. As the Supreme Court recently instructed, "We consult the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed with independence and without fear of consequences." *Rehberg v. Paulk,* ——U.S. ——, 132 S.Ct. 1497, 1503, 182 L.Ed.2d 593 (2012) (internal quotations marks omitted).

Therefore, for the same reasons that the denial of the federal common law defense recognized in *Saleh* is immediately appealable, inasmuch as the exemption from suit will effectively be unreviewable on appeal, the denial of the law-of-war immunity is immediately appealable, either independently or as part and parcel of the *Saleh* defense. The similarity in language is striking. *Dow* asks, "[w]hat is the law which governs an army invading an enemy's country," and concludes that "[i]t is not the civil law of the invaded country; *it is not the civil law of the conquering country:* it is military law,—the law of war." 100 U.S. at 170. *Dow* continued to reason that "for the protection of the officers and soldiers of the army" the supremacy

of the common law of war over the civil law "is as essential to the *efficiency* of the army as the supremacy of the civil law at home." *Id.* (emphasis added). Similarly, *Saleh* emphasizes the necessary "elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in *potential* subjection to civil suit." 580 F.3d at 7 (emphasis added). The freedom from "potential subjection" to civil suits and the ability of military personnel and contractors performing military functions to act efficiently, without the distraction and inhibition inherent in the potential imposition of state tort standards of duty onto an active, foreign war zone cannot be vindicated by reviewing the liability of officers or entities after a final judgment.

* * *

The denial of any one of the three immunities claimed by CACI and L–3 is undoubtedly immediately appealable under the collateral order doctrine. Not only has the denial of such immunities, even on 12(b)(6) motions, traditionally been found to be immediately appealable, *see, e.g., Behrens,* 516 U.S. at 305–06, 116 S.Ct. 834, but the substance of each immunity claim is a paradigm example of the type of collateral order that was held immediately appealable in *Cohen.* The immunities claimed protect the defendants from judicial intervention into battlefield operations, a protection which would necessarily be breached by subjecting battlefield operatives to suit. As noted above, these immunities can only be vindicated and protected by allowing interlocutory appellate review.

III.

Upon the necessary recognition of our appellate jurisdiction to consider the immunities on an interlocutory basis, we must, at once and as the next immediate step, consider our subject matter jurisdiction, as well as the subject matter jurisdiction of the district courts. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself. . . ." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Article III provides that the judicial power only extends to "Cases" or "Controversies," *U.S. Const.* art. III, § 2, and the "requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception,'" *id.* at 94–95, 118 S.Ct. 1003 (quoting *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884)).

Even when faced with a collateral order immunity appeal, we are not relieved of the duty to ask first whether the district courts and then whether our court have Article III jurisdiction to hear these cases. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 488 F.3d 112, 121–22 (2d Cir.2007) ("We conclude that review of [a removal] question is required pursuant to our independent obligation to satisfy ourselves of the jurisdiction of this court and the court below. . . . This obligation is not extinguished because an appeal [from the denial of sovereign immunity] is taken on an interlocutory basis and not from a final judgment"); *Kwai Fun Wong v. United States,* 373

F.3d 952, 960–61 (9th Cir.2004) ("Resolution of subject matter jurisdiction is . . . necessary to ensure meaningful review of the district court's interlocutory rulings because if the appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings" (internal quotation marks omitted) (alterations in original)); *Hospitality House, Inc. v. Gilbert,* 298 F.3d 424, 429 (5th Cir.2002) ("[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case"); *Timpanogos Tribe v. Conway,* 286 F.3d 1195, 1201 (10th Cir.2002) ("[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it. . . . [B]ecause we have appellate jurisdiction over the interlocutory appeal of defendants' assertion of Eleventh Amendment immunity, we also have appellate jurisdiction to determine whether the district court had subject matter jurisdiction over the Tribe's underlying claim against defendants in the first instance").[5]

In the cases presently before us, the plaintiffs have asked civilian courts to entertain state tort law

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[5] Some of these courts have considered jurisdictional questions by exercising pendent appellate jurisdiction over the question, reasoning that determining subject matter jurisdiction is "necessary to ensure meaningful review" of the immunity question. *See Kwai Fun Wong*, 373 F.3d at 960–61; *Timpanogos Tribe*, 286 F.3d at 1201. Other courts have considered it because of their inherent power and obligation under *Steel Co.* to consider jurisdiction. *See Hospitality House*, 298 F.3d at 429–30. The result is the same under either approach.

causes of action based on conduct taken in connection with an active and ongoing war against another sovereign. To entertain the plaintiffs' claims would impose, for the first time, state tort duties onto an active war zone, raising a broad array of interferences by the judiciary into the military functions textually committed by our Constitution to Congress, the President, and the Executive Branch. *See U.S. Const.* art. I, § 8, cls. 11–14 (authorizing Congress to declare war, to raise armies and create a navy, and to make rules for the military); *id.* art. II, § 2 (providing that the President "shall be Commander–in–Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual Service of the United States"). Because these cases implicate several "textually demonstrable constitutional commitment[s]" of authority to the "political department[s]," they have no place in federal courts and must be dismissed for lack of jurisdiction. *Baker v. Carr,* 369 U.S. 186, 216, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

The plaintiffs in these cases were seized in a war zone by the military, having been suspected of hostile activity or of possessing useful intelligence. The function of detaining and interrogating such persons to obtain intelligence was undoubtedly critical to the success of military strategies and campaigns. The judgment of whom to interrogate, what to inquire about, and the techniques to use fell comfortably within the powers of the Commander–in–Chief and his subordinates in the chain of command. And CACI and L–3, as civilian contractors of the military, worked side by side with the military to carry out these military op-

erations under the ultimate supervision and command of the military "during a period of armed conflict and in connection with hostilities." They were engaged by the military to pursue interrogations under the command and control of military personnel with respect to persons detained by the military. And, consistent with the close connection between the military and the military contractors, the complaints allege that the military and the civilian contractors conspired in their abuse of the military detainees.

For the reasons I gave in my panel concurrence in *Al Shimari,* 658 F.3d at 420–25 (Niemeyer, J., concurring), and the reasons given by Judge King in his majority opinion in *Taylor v. Kellogg Brown & Root Services,* 658 F.3d 402, 412 (4th Cir. 2011), I would conclude that the political question doctrine deprives both this court and the district courts of subject matter jurisdiction to hear these cases. *See also Massachusetts v. EPA,* 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("It is . . . familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question"); *Tiffany v. United States,* 931 F.2d 271, 277 (4th Cir.1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense. . . . The strategy and tactics employed on the battlefield are clearly not subject to judicial review"); *Carmichael v. Kellogg Brown & Root Servs., Inc.,* 572 F.3d 1271, 1283 (11th Cir.2009).

Accordingly, while we undoubtedly have appellate jurisdiction under *Cohen* to consider these appeals at this stage in the proceedings, we lack subject matter jurisdiction over these cases, as did the district courts. I would therefore dismiss these appeals for lack of

subject matter jurisdiction and remand the cases to the district courts with orders that they likewise dismiss the cases for lack of subject matter jurisdiction.

Judge Wilkinson and Judge Shedd have indicated that they join this opinion.

APPENDIX E

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI; TAHA YASEEN AR-RAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E; SALAH HASAN NUSAIF JASIM AL-EJAILI, *Plaintiffs-Appellees,* v. CACI INTERNATIONAL, INCORPORATED; CACI PREMIER TECHNOLOGY, INCORPORATED, *Defendants-Appellants* KELLOGG BROWN & ROOT SERVICES, INCORPORATED, *Amicus Supporting Appellants.*	No. 09-1335

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(1:08-cv-00827-GBL-JFA)

Argued: October 26, 2010

Decided: September 21, 2011

Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Shedd joined. Judge Niemeyer wrote a separate opinion giving additional reasons for reversing and remanding. Judge King wrote a dissenting opinion.

COUNSEL

ARGUED: Joseph William Koegel, Jr., STEPTOE & JOHNSON, LLP, Washington, D.C., for Appellants. Susan L. Burke, BURKE PLLC, Washington, D.C., for Appellees. **ON BRIEF**: John F. O'Connor, STEPTOE & JOHNSON, LLP, Washington, D.C., for Appellants. Susan M. Sajadi, Katherine R. Hawkins, BURKE PLLC, Washington, D.C., for Appellees. Raymond B. Biagini, Lawrence S. Ebner, Robert A. Matthews, Daniel L. Russell, Jr., MCKENNA LONG & ALDRIDGE LLP, Washington, D.C., for Amicus Supporting Appellants.

OPINION

NIEMEYER, Circuit Judge:

Four Iraqi citizens, who were seized by the U.S. military in the Iraq war zone and detained by the military in Abu Ghraib prison, near Baghdad, commenced this tort action against a civilian contractor, retained by the military to assist it at the prison in conducting interrogations for the purpose of obtaining intelligence. The plaintiffs allege that while they were detained, the contractor's employees and military personnel conspired among themselves and with

others to torture and abuse them and to cover up that conduct.

The contractor filed a motion to dismiss on numerous grounds, including the political question doctrine; federal preemption under *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), *and Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); and derivative sovereign immunity. The district court denied the contractor's motion, concluding that the "[p]laintiffs' claims are justiciable because civil tort claims against private actors for damages do not interfere with the separation of powers"; that defendant's claim of immunity must be developed through discovery, and dismissal now would be premature; and that plaintiffs' claims "are not preempted by the combatant activities exception at this stage because discovery is required to determine whether the interrogations here constitute 'combatant activities' within the meaning of the exception." *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700, 731 (E.D. Va. 2009).

On the contractor's appeal, we reverse and remand with instructions to dismiss this case. We conclude that the plaintiffs' state law claims are preempted by federal law and displaced by it, as articulated in *Saleh v. Titan Corp.,* 580 F.3d 1, 8-12 (D.C. Cir. 2009).

I.

In response to the unprovoked attacks on the United States on September 11, 2001, during which some 3,000 people were killed, a multinational force, led by the United States and Great Britain, invaded Iraq in March 2003 to depose Saddam Hussein and rid Iraq of weapons of mass destruction. While Hussein

was quickly deposed and no weapons of mass destruction were found, the war in Iraq continued at least for the period relevant to the claims asserted in this action. Indeed, according to various published data, a substantial number of deaths and casualties of both Iraqi civilians and members of the U.S. military continued even up to the time of oral argument, although at a reduced level from the peak in 2006 and 2007. *See, e.g.*, Hannah Fischer, Cong. Research Serv., R40824, *Iraq Casualties* (Oct. 7, 2010), available at www.state.gov/documents/organization/150201.pdf; *U.S. Casualties in Iraq*, www.globalsecurity.org/military/ops/ iraq_casualties.htm (last visited Jan. 10, 2011).

During the course of the war, the U.S. military seized and detained Iraqi citizens suspected of being enemy combatants or thought to have value in possessing useful intelligence. Some of these detainees were imprisoned at Abu Ghraib prison, near Baghdad. Although the prison was operated in the war zone by the United States Army, "a severe shortage" of military intelligence personnel "prompt[ed] the U.S. government to contract with private corporations to provide civilian interrogators and interpreters." J.A. 408. These contractors included CACI Premier Technology, Inc., a subsidiary of CACI International, Inc. (collectively herein, "CACI"). The contractors were required to comply with Department of Defense interrogation policies and procedures when conducting "[i]ntelligence interrogations, detainee debriefings, and tactical questioning" of persons in the custody of the U.S. military. J.A. 270-71.

In the Executive Summary of the Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, the Committee detailed the history of the standards and practices applied in interrogations at Guantanamo Bay, Iraq, and Afghanistan. J.A. 360-65. The Executive Summary noted that the President signed an order on February 7, 2002, stating that the Third Geneva Convention did not apply to the conflict with al-Qaeda and the Taliban and that detainees were not entitled to the protections afforded prisoners of war by the Third Geneva Convention. But the order stated that, as "a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of the Geneva Conventions." J.A. 354 (emphasis added). Later, in December 2002, following requests from the field to employ aggressive interrogation techniques to obtain intelligence, the Secretary of Defense approved a list of techniques for interrogation, such as stress positions, removal of clothing, use of phobias (such as fear of dogs), and deprivation of light and auditory stimuli. J.A. 360. While the approval was directed at interrogations being conducted at Guantanamo Bay, it was also circulated to military personnel in Iraq and Afghanistan. J.A. 363. But even as aggressive techniques were being employed for interrogation conducted in those theatres, the Secretary rescinded his memorandum approving the specific techniques. J.A. 363. It was unclear, however, what techniques there-after remained authorized by the Secretary. J.A. 363-64. During the following year, high-level military personnel directed that interrogators in Iraq be more aggres-

sive—telling field personnel that "the gloves are coming off" and "we want these detainees broken." J.A. 365.

While the record reflects an ongoing policy not to engage in torture, the definition of torture was the subject of continuing debate in the Executive Branch and the military. *See* J.A. 356-60. Nonetheless, the military believed it to be in the national interest to pursue intelligence through aggressive interrogation techniques, inasmuch as intelligence, especially in the context of the wars in Iraq and Afghanistan, was an especially significant tool of war. Even so, the Senate Armed Services Committee concluded that the approval and use of aggressive techniques were a direct cause of detainee abuse inasmuch as they conveyed a message that it was acceptable to mistreat and degrade detainees in U.S. custody.

While some of the abuses that the plaintiffs detailed in the allegations of their complaint appear to have been approved by the military at one point or another, others were clearly not.

The four Iraqi citizens who commenced this action—Suhail Najim Abdullah Al Shimari, Taha Yaseen Arraq Rashid, Sa'ad Hamza Hantoosh Al-Zuba'e, and Salah Hasan Nusaif Jasim Al-Ejaili—were detained by the U.S. military in Abu Ghraib prison during various periods between 2003 and 2008. They alleged that during their detention, they were interrogated in dangerous and unauthorized stress positions; that they were subjected to sexual assault, repeated beatings, deprivations of food, water and sleep, forced witnessing of the rape of another prisoner, and imprisonment under conditions of sensory

deprivation; and that the facts of abuse were covered up. They allege that the abuse and cover-up were carried out by CACI employees in conspiracy with U.S. military personnel.

After the district court granted CACI's motion to stay discovery, CACI filed a motion under Rules 12(b)(1) and 12(b)(6) to dismiss, based on numerous grounds, including the political question doctrine, federal preemption, and derivative sovereign immunity. The district court denied the motion, and CACI filed this interlocutory appeal, challenging the district court's rulings on immunity and on the defenses involving the political question doctrine and federal preemption. *See Nixon v. Fitzgerald,* 457 U.S. 731 (1982) (recognizing that a ruling on the President's absolute immunity based on the separation of powers was immediately appealable); *see also Al-Quraishi v. L-3 Servs., Inc*., __ F.3d __, Nos. 10-1891 & 10-1921 (4th Cir. Sept. 21, 2011) (holding that an appeal raising the same issues presented here is immediately appealable).

II.

Considering CACI's preemption challenge, we conclude, based on the uniquely federal interests involved in this case, that the plaintiffs' tort claims are preempted and displaced under the reasoning articulated in *Boyle v. United Technologies* Corp., 487 U.S. 500 (1988), as applied to circumstances virtually identical to those before us in *Saleh v. Titan Corp*., 580 F.3d 1 (D.C. Cir. 2009), *cert. denied,* __ U.S. __, No. 091313, 2011 WL 2518834 (June 27, 2011). In *Saleh*, the D.C. Circuit held that where a civilian contractor is integrated into combat activities over which the

military retains command authority, a tort claim arising out of the contractor's engagement in such activities is preempted. *Saleh*, 580 F.3d at 9. In reaching its holding, the court applied the rationale of *Boyle* to circumstances practically identical to those before us.

In *Boyle*, a marine pilot's estate filed suit under Virginia tort law against United Technologies Corporation, a civilian contractor of the Department of Defense, alleging the negligent design of a helicopter. *Boyle*, 487 U.S. at 503. When the helicopter crashed into the water, the pilot was unable to open the escape hatch, which opened outward rather than inward, causing the pilot to drown. *Id*. United Technologies contended that the door's design was specified by the Department of Defense and that the uniquely federal interests implicated by its procurement from civilian contractors preempted Virginia tort law, and the Supreme Court agreed. The Court determined that the contractor should not be held liable for implementing the government's design and that entertaining the pilot's tort case would undermine the unique federal interests in the procurement of equipment for the national defense. If state tort liability were permitted, the federal interests would be adversely affected because "either the contractor [would] decline to manufacture the design specified by the Government, or it [would] raise its price." *Id*. at 507.

The *Boyle* Court held that protecting these uniquely federal interests conflicted with the purposes and operation of state tort law and therefore the state law was preempted. It looked to the discretionary function exception of the Federal Tort Claims Act to demonstrate that the federal government must have the flexibility to select the appropriate design for

military equipment and that allowing state tort liability for a defective design, where the government had participated in that design, would significantly conflict with the policy embodied in and defined by the Federal Tort Claims Act's discretionary function exception. *Id*. at 511-12. Thus, *Boyle* recognized a government contractor preemption defense and applied it so that contractors would be protected from state law liability where such protection was necessary to safeguard uniquely federal interests.

While *Boyle*'s preemption holding thus functions to displace state law to protect "uniquely federal interests," it did not rely on any act of Congress to animate the preemption. Rather, the *Boyle* preemption, which leaves no federal law addressing the claim, operates more in effect like sovereign immunity that is extended to protect civilian government contractors' functioning on behalf of the sovereign. Thus, the shape of *Boyle* preemption, rather than being defined by the presence of federal law, is defined by the priority of uniquely federal interests over countervailing state interests as manifested in state law.

As did the courts in *Boyle* and *Saleh*, we too conclude that this case implicates important and uniquely federal interests. The potential liability under state law of military contractors for actions taken in connection with U.S. military operations overseas would similarly affect the availability and costs of using contract workers in conjunction with military operations. In this case, that uniquely federal interest was especially important in view of the recognized shortage of military personnel and the need for assistance in interrogating detainees at Abu Ghraib prison. Not only would potential tort liability against

such contractors affect military costs and efficiencies and contractors' availability, it would also present the possibility that military commanders could be hauled into civilian courts for the purpose of evaluating and differentiating between military and contractor decisions. That effort could become extensive if contractor employees and the military worked side by side in questioning detainees under military control, as the complaint alleges in this case. Moreover, such interference with uniquely federal interests would be aggravated by the prison's location in the war zone. Finally, potential liability under state tort law would undermine the flexibility that military necessity requires in determining the methods for gathering intelligence.

The dissenting opinion takes the position that CACI should not enjoy any immunity from liability based on its repeated (and wrong) assertions that CACI acted independently, apart from the military, and "contrary to military directives." Post, at 41; *see also post*, at 30 (noting that "no federal interest encompasses the torture and abuses that plaintiffs allege"); *post*, at 32-33 ("Ultimately, the government rather than the contractor must be in charge of decision making in order for the contractor to be shielded from liability"); *post*, at 33 ("the government's precise control over its contractor, which is so integral to *Boyle*'s reasoning, is absent"); *post*, at 34 (noting that government authority for alleged conduct can only be determined by looking at CACI's contract with the military); *post*, at 35 ("there is no evidence to support the majority's supposition of 'integration' . . . other than what can be gleaned from the bare allegations of the

Complaint"); *post*, at 36 (arguing that absence of government role precludes application of *Boyle*). But the dissent's position is belied by the allegations of the complaint, which assert that all the misconduct charged was *the product of a conspiracy* between CACI personnel and military personnel. *See, e.g.*, Amended Complaint ¶ 1 (alleging a conspiracy between CACI employees and military personnel, who are "now serving time in military prison" for their participation); ¶ 70 (alleging that "CACI employees repeatedly conspired with military personnel to give Plaintiffs the 'special treatment' which was code for torture of the type endured by Plaintiffs in this hard site"); ¶ 71 (alleging that "CACI employees repeatedly conspired with military personnel to harm Plaintiffs in various manners and methods referred to above"); ¶ 118 (alleging that CACI employees "agreed with each other and others to participate in a series of unlawful acts"); ¶ 124 (alleging that CACI employees "aided and abetted others who were torturing Plaintiffs"); and ¶ 135 (alleging that CACI's "knowing participation in the conspiracy caused grave and foreseeable damages to Plaintiffs"). In view of these allegations of the complaint, which, at this stage, we accept as true, we can only assume for purposes of our decision that CACI employees were integrated into the military activities at Abu Ghraib prison in Baghdad, over which the military retained command authority.

In addition to the specific adverse impacts on the uniquely federal interests of interrogating detainees in foreign battlefields, a broader and perhaps more significant conflict with federal interests would arise from allowing tort law generally to apply to foreign battlefields. "[T]he traditional rationales for tort

law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations." *Saleh*, 580 F.3d at 7 (emphasis omitted). In *Boyle*, the Supreme Court looked to the Federal Tort Claims Act exceptions for the purpose of determining whether a significant conflict between state tort law and federal interests existed. Although the relevant Federal Tort Claims Act provision in *Boyle* was the discretionary function exception, when we employ the same approach to determine the nature and extent of any conflict here, the relevant provision is the combatant activities exception. *See* 28 U.S.C. § 2680(j). This exception retains the United States' sovereign immunity for claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id*. As the D.C. Circuit observed in *Saleh*, Congress intended the exception to "eliminat[e] . . . tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Saleh*, 580 F.3d at 7. And we agree with the D.C. Circuit's conclusion that this interest is implicated even when the suit is brought indirectly—against a civilian contractor—rather than directly against the United States itself. The acuteness of a need to preempt state tort law in the context of battlefield activities is well articulated in *Saleh*:

> The nature of the conflict in this case is somewhat different from that in *Boyle*—a sharp example of discrete conflict in which satisfying both state and federal duties (i.e., by designing a helicopter hatch that opens both inward

> and outward) was impossible. In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. *Rather, it is the imposition per se of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare*. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battlefield preemption": the federal government occupies the field when it comes to warfare, and its interest in combat is always "precisely contrary" to the imposition of a non-federal tort duty.

Saleh, 580 F.3d at 7 (emphasis added) (citing *Boyle*, 487 U.S. at 500).[1]

The uniquely federal interest in conducting and controlling the conduct of war, including intelligence-gathering activities within military prisons, thus is simply incompatible with state tort liability in that context.

This case involves allegations of misconduct in connection with the essentially military task of interrogation in a war zone military prison by contractors working in close collaboration with the military. We hold that under these circumstances, where a civilian

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[1] Refusing to accept *Saleh* as the only other case squarely on point, the dissent chooses to rely heavily on the dissenting opinion in that case and would have us create a circuit split. *Post*, at 31, 32, 35 n.5, 37, 38 & n.8, 39, 40 & n.10.

contractor is integrated into wartime combatant activities over which the military broadly retains command authority, tort claims arising out of the contractors' engagement in such activities are preempted. *See Saleh*, 580 F.3d at 9.

III.

The nation rightly reacted with moral indignation to the pictures circulated from Abu Ghraib prison. And if these four Iraqi citizens did in fact suffer in a similar manner from the unauthorized conduct of military and civilian guards and interrogators, the nation, including its judges, would react similarly. Nothing we say in this opinion is intended to condone the torture, abuse, and cover-up alleged in the complaint.

Of course, nothing we say should be taken as passing judgment on the substance of these allegations. For our purposes, they remain allegations that we have accepted as true, but only for purposes of deciding this appeal.

What we hold is that conduct carried out during war and the effects of that conduct are, for the most part, not properly the subject of judicial evaluation. The Commander in Chief and the military under him have adopted policies, regulations, and manuals and have issued orders and directives for military conduct, and they have established facilities and procedures for addressing violations and disobedience. On this structural ground alone, and not on any judgment about the conduct itself, we are requiring that the claims of these four Iraqi detainees alleging abuse in a military prison in Iraq be dismissed by the district court.

Therefore, we reverse the district court's order denying CACI's motion to dismiss and remand with instructions to dismiss.

REVERSED AND REMANDED WITH INSTRUCTIONS

NIEMEYER, Circuit Judge, writing separately to reverse and remand to dismiss:

I would conclude that in addition to preemption, the political question doctrine under *Baker v. Carr,* 369 U.S. 186 (1962), and derivative absolute immunity under *Mangold v. Analytic Services, Inc.,* 77 F.3d 1442 (4th Cir. 1996), require dismissal of this case. I note that Judge King would apparently agree with application of the political question doctrine were he to have addressed the issue. *See Taylor v. Kellogg*, __ F.3d __, No. 10-1543 (4th Cir. Sept. 21, 2011) (King, J.). But, in his dissenting opinion, he has chosen to address only federal preemption and not the political question doctrine. Nor has he addressed derivative absolute immunity, even though all three issues were raised by CACI on appeal.

I.

On the political question issue, CACI contends that plaintiffs' claims are non-justiciable because the conduct of its employees, on which the claims are based, was part of the military effort undertaken in a war zone and resolution of those claims would inextricably be tied to an evaluation of the exercise of war powers, committed under Articles I and II of the Constitution to coordinate political branches. *See Baker*, 369 U.S. at 208-17. More specifically, CACI argues that the interrogation techniques, which lie at the core of plaintiffs' claims, were an inseparable component of war, and that "many if not most of the alleged forms of abuse here were interrogation techniques approved at the highest levels of the Executive Branch." CACI adds that it is not relevant whether the "chosen techniques were in fact appropriate—that is precisely

the political question that the courts may not ask or answer," citing *Lin v. United States*, 561 F.3d 502, 507 (D.C. Cir. 2009).

The plaintiffs argue that resolution of their claims is not textually committed by the Constitution to coordinate political branches but, because their claims are tort claims, to the Judicial Branch. The plaintiffs note that their "tort claims do not even arise out of actions by a coordinate political branch." Rather, the tort claims arise from conduct by CACI, which is not, nor is it like, a coordinate branch of government. They also argue that the torture allegedly committed by CACI employees was never authorized by the military.

The political question doctrine, at its core, recognizes as non-justiciable any question whose resolution is committed to a coordinate branch of government and whose evaluation by a court would require the application of standards judicially undiscoverable or judicially unmanageable. As the *Baker* Court summarized, "The non-justiciability of a political question is primarily a function of the separation of powers." 369 U.S. at 210. Even so, the "delicate exercise" of determining whether questions are indeed political remains the responsibility of the Judicial Branch as the "ultimate interpreter of the Constitution." *Id*. at 211.

In *Baker*, the Court analyzed prior representative decisions of the Court "to infer from them the analytical threads that make up the political question doctrine." *Id*. It observed, for example, that earlier foreign relations cases presented political questions where they turned on "standards that defy judicial ap-

plication," thus demanding the "single-voiced statement" of the government's views. *Id*. In another example, it observed, in connection with the war powers, that "isolable reasons for the presence of political questions" arise in determining "when or whether a war has ended," *id*. at 213, and it pointed out that the war power "includes the power to remedy the evils which have arisen from its rise and progress and continues during that emergency," *id*. at 213 (internal quotation marks omitted). Distilling the core nature of political questions, the Court explained that a "lack of judicially discoverable standards and the drive for evenhanded application" requires referring such questions to the political departments. *Id*. at 214. The Court summarized the circumstances that present a political question:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need

> for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non justiciability on the ground of a political question's presence.

Baker, 369 U.S. at 217. In short, the substantial presence of any one of the articulated formulations would indicate a political question.

The *Baker* formulations led Justice Powell to distill the inquiry into three questions:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government?
>
> (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?
>
> (iii) Do prudential considerations counsel against judicial intervention?

Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment).

To answer the first question, I begin by noting that the claims made in this case arose in the context of the war in Iraq. And seizing, in the war zone, foreigners suspected of hostile activity or of possessing useful intelligence and then interrogating them in the field were integral parts of the war effort. Indeed, the function of detaining and interrogating to obtain intelligence was undoubtedly critical to the success of

military strategies and campaigns. In such circumstances, the judgment of whom to interrogate, what to inquire about, and the techniques to use falls comfortably within the powers of the Commander in Chief and his subordinates in the chain of command.

It is not disputed that this power to conduct war and determine its objectives and means is explicitly committed by the Constitution to Congress and the President. *See* U.S. Const. art. I, § 8, cl. 11-14 (authorizing Congress to declare war, to raise armies and create a navy, and to make rules for the military); *id*. art. II, § 2 (providing that the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"). This assignment to the President was deliberate and considered. As the Federalist papers explain, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority." *The Federalist No. 74,* at 383 (Alexander Hamilton, March 25, 1788) (George W. Carey & James McClellan eds., 1990).

We must thus ask whether plaintiffs' claims, arising in the context of a war, challenge the exercise of war powers so committed to coordinate political branches. While it would certainly be so if their challenges were directed to military actions and personnel, when directed at a conspiracy of U.S. military personnel and employees of civilian contractors engaged

to conduct military functions, the issue is more nuanced. Making the question more complex is the allegation that the members of the conspiracy are alleged to have disobeyed orders and violated limits established by persons higher in the chain of military command.

In a case brought against the military directly, rather than a contractor, the allegation that a soldier disobeyed orders surely would not make the claim justiciable if it otherwise was non-justiciable. Thus, if interrogation was designed to uncover the location and names of enemy personnel and their plans, the fact that a military interrogator applied techniques more aggressive than those approved by his commander for aggressive interrogation would not remove the activity from the military effort, any more than would a soldier's shooting an enemy soldier even after he had been seized and disarmed. Such conduct, albeit disobedient, is undertaken grossly in the course of prosecuting war and advancing the strategy of the military adopted by upper level commanders for carrying out the war. Just as the President and his designees are given the authority to conduct the war and interrogate battlefield prisoners free from judicial oversight, they are given the authority to address disobedience and impose discipline.

To be sure, this analysis, when applied to conduct engaged in by civilian contractors, becomes more attenuated because civilian contractors do not enjoy every protection from suit that the military might enjoy. As our dissenting colleague recognizes in another opinion today dismissing a claim against a military contractor based on the political question doctrine,

"we are obliged to carefully assess the relationship between the military and [the contractor], and to 'look beyond the complaint, [and] consider[ ] how [the plaintiff] might prove [his] claim[ ] *and* how [defendant] would defend.'" *Taylor v. Kellogg*, __ F.3d at __, No. 10-1543 (4th Cir. Sept. 21, 2011), slip op. at 13 (quoting *Lane v. Halliburton,* 529 F.3d 548, 565 (5th Cir. 2008) (some alterations in original)). When, as here, this assessment demonstrates that the civilian contractors were working side by side with military personnel to carry out military operations under the ultimate supervision and command of the military in a war zone, evaluation of their conduct raises the same political question that would be raised by a direct challenge to the military.

CACI's function here (interrogating persons seized by the military for interrogation) was ultimately a military function under the control of the military, and therefore the decision to dismiss the plaintiff's claims is not affected by the fact that CACI was a civilian contractor. The U.S. military had picked up the detainees in the war zone and believed that they should be interrogated. The detainees remained in the custody of the military throughout interrogations, and the military both operated and guarded the prison. Because of personnel shortages, however, the interrogation activities were carried out not only by military personnel but also by civilian employees engaged to perform the same function. They were instructed on approved interrogation techniques and ordered not to violate the limitations. In addition, the intelligence being sought through interrogation was defined by the military's goals such that the substance of the questions posed to detainees was of U.S.

military origin. Moreover, the actions complained of are alleged to have been committed jointly by CACI employees and military personnel, and all activities are alleged to have fallen within the scope of a conspiracy that included CACI employees and military personnel.

Accordingly, in response to the first question in considering the political question doctrine—whether resolution of the questions in this case is committed by the text of the Constitution to a coordinate branch of government—I conclude that the answer is undoubtedly yes, even though the allegations may involve imperfect or disobedient conduct by contractors.

The answer to the second question is more complicated and requires a determination of whether resolution of the plaintiffs' claims challenging aggressive interrogation techniques would take the courts into areas beyond their judicial expertise or competence. *See Taylor*, __ F.3d at ___, No. 10-1543, slip op. at 14 ("[W]e must, to resolve this appeal, gauge the degree to which national defense interests may be implicated in a judicial assessment of [the tort claim]").

As a central component of conducting war, the President, the Executive Branch, and the military determined that aggressive interrogation techniques were a military necessity inasmuch as the war in Iraq involved an enemy that was spread out among numerous factions and cells within the population, without a distinguishing organization, uniforms, or bases of operation. Thus, as a matter of policy, the President found it inconsistent with military necessity to afford seized enemy combatants the protections of the Third

Geneva Convention. And in carrying out that determination, the Secretary of Defense and high-level military officers directed that aggressive interrogation be employed. There was, to be sure, a debate within the Executive Branch about what were morally appropriate techniques and what could be justified by military necessity. But these questions were not addressed by applying standards that were judicially cognizable; they were difficult judgments that involved a delicate weighing of public policy, the public sense of morality, public decency, the customs of war, international treaties, and military necessity. One could hardly find a question more unsuited for the judiciary.

Indeed, in any given war, the President might choose to impose no limits on specific military actions ordered. For example, we know that in connection with the response to the 9/11 attacks launched against the United States, the President considered, and perhaps even approved, an order to shoot down a U.S. civilian airplane carrying innocent American citizens, determining that the order was in the greater public interest. In that case, the President had information that the airplane was headed for the White House or the Capitol in Washington, D.C. That type of question could hardly have been addressed or reviewed by a court, which would have had few if any standards to apply.

That is not to say that the evaluation of battlefield interrogations calls for the same intensity of response as does the response to an enemy-captured civilian airplane en route to the nation's capital. Nonetheless, interrogation was a military tool for use in prosecuting the war effort. To engage a court in the question of which techniques were militarily necessary but yet

morally acceptable and consistent with American policy, at least as defined by the President and Congress, would require a court to exercise the very powers committed to those branches. The military necessity of actions in the war zone, including battlefield interrogations of detainees, cannot be explored by a court without requiring it to evaluate judgments about which the judiciary lacks expertise and competence. For a court to evaluate military policy that interrogation had to be more aggressive, that "the gloves are coming off," and that "these detainees must be broken," it would have to evaluate the entire basis for the military decisions or be at a loss as to where to begin. Such questions go to the heart of the political question doctrine.

On this question, as noted above with respect to military personnel who disobey orders, the fact that CACI employees may have disobeyed orders does not remove their activities from the military function and would not change the analysis. A court's attempt to evaluate the disobedient activities of CACI employees would inappropriately enmesh the court into military strategies, decisions, and activities to the same extent as if they were undertaken entirely by military personnel. The political question doctrine recognizes that the Constitution assigns such matters to Congress, the Commander in Chief, and the Executive Branch generally. *See Tiffany v. United* States, 931 F.2d 271, 277 (4th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense. . . . The strategy and tactics employed on the battlefield are clearly not subject to judicial review").

Finally, addressing Justice Powell's third question, I conclude that it would be imprudent for civilian courts to attempt to adjudge military acts under common law tort principles. To entertain the plaintiffs' claims under those principles would introduce, for the first time, tort principles in a field of battle, raising a yet broader array of interferences by the judiciary into the military functions committed to Congress, the President, and the Executive Branch. When deciding whether this claim raises a political question, we must assess "first, the extent to which [the contractor] was under the military's control, and second, whether national defense interests were closely intertwined with the military's decisions governing [the contractor's] conduct." *Taylor*, __ F.3d at __, No. 101543, slip op. at 17. Here, the CACI was engaged by the military to pursue interrogations under the command and control of military personnel, and decisions about the scope and nature of these interrogations, even more so than decisions about "whether backup power should have been supplied" to a particular area, *id*. at 18, were intricately intertwined with national defense interests.

For these reasons, I would defer to the political branches for how best to manage military prisons, to interrogate detainees for military intelligence, and to punish those within the prison who disobey military directives. *See Carmichael v. Kellogg, Brown & Root Servs., Inc*., 572 F.3d 1271 (11th Cir. 2009).

II.

I would also conclude that this suit is barred by the doctrine of derivate absolute immunity, as articulated in *Mangold v. Analytic Services, Inc*., 77 F.3d 1442 (4th Cir. 1996). *See also Murray v. Northrop*

Grumman Info. Tech., Inc., 444 F.3d 169, 175 (2d Cir. 2006) (government contractor absolutely immune from tort liability for performing contracted for governmental function, citing *Mangold*, 77 F.3d at 1447); *Pani v. Empire Blue Cross/Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998) (same); *Midland Psychiatric Assocs., Inc. v. United States,* 145 F.3d 1000, 1005 (8th Cir. 1998) (common law official immunity barred tort suit against Medicare insurer). Derivative absolute immunity protects contractors from suit where such immunity is necessary to protect a discretionary government function and the benefits of immunity outweigh its costs.

In *Mangold*, we held that a government contractor was absolutely immune from a state tort suit for defamation based on statements that the contractor made in response to an official government investigation about its dealings with the government. There, the Air Force had conducted an investigation into the activities of an Air Force colonel who allegedly exerted his influence to pressure a government contractor to hire a family friend. *Mangold*, 77 F.3d at 1444-45. In response to questions posed by the Air Force, the contractor provided information to the Air Force confirming that the colonel did indeed press the contractor to hire the friend, despite the friend's lack of credentials for the position. *Id*. Following the contractor's response to the Air Force, the colonel sued the contractor for defamation under Virginia law. *Id*. We concluded that the discretionary governmental action of investigating suspected fraud was protected by absolute immunity and that the immunity extended "to persons in the private sector who are government con-

tractors participating in official investigations of government contracts" "to the extent that the public benefits obtained by granting immunity outweigh[ed] its costs." *Id*. at 1447. Such immunity could be extended to a private contractor because the "immunity [was] defined by the nature of the *function* being performed and not by the office or the position of the particular employee involved." *Id*. Thus,

> [i]f absolute immunity protect[ed] a particular government *function*, no matter how many times or to what level *that function* [was] delegated, it [was] a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions. The government cannot perform all necessary and proper services itself and must therefore contract out some services for performance by the private sector. When the government delegates discretionary governmental functions through contracting with private contractors, therefore, the same public interest identified in *Barr [v. Matteo*, 360 U.S. 564 (1959)] and *Westfall [v. Erwin*, 484 U.S. 292 (1988)]—the interest in efficient government—demands that the government possess the ability meaningfully to investigate these contracts to ensure that they are performed without fraud, waste, or mismanagement.

Id. at 1447-48 (emphasis added).

As in *Mangold*, the military made the discretionary determination to interrogate detainees and re-

quired the assistance of civilian contractors to perform the interrogations. Here, as in *Mangold*, extending immunity to the contractors is necessary to protect the underlying discretionary governmental activity, in this case, performing wartime interrogations.

Nonetheless, for derivative absolute immunity to apply, its benefits must outweigh its costs. The costs of immunity obviously arise from denying injured parties access to courts to assert otherwise legitimate claims. Its benefit is that it prevents vexatious litigation from impairing the efficient functioning of government. In *Mangold*, we concluded that the government had a strong interest in receiving contractor assistance during investigations of contracting improprieties, and that such assistance would be less forthcoming if contractors could be subject to suit for their participation. *Mangold*, 77 F.3d at 1447. The court held that this interest outweighed that of potentially defamed individuals in seeking compensation. *Id*. Here, the military had a strong need to receive contractor assistance in its interrogations because of a substantial shortage of personnel. And interrogations were a major component of the war effort designed to gather military intelligence. Like in *Mangold*, subjecting contractors to tort actions would risk interference with interrogations, as well as the availability of civilian assistance. Because of the important public interest in the effective prosecution of war and the alternative mechanisms already in place to ensure against, and compensate for, the abuse for which the plaintiffs seek compensation in this case, I would conclude, as in *Mangold*, that the benefits of immunity outweigh its costs.

At bottom, I would rely on these additional grounds—the political question doctrine and derivative absolute immunity —to reverse the district court's order and remand this case to the district court for dismissal.

KING, Circuit Judge, dissenting:

I write to dissent from my distinguished colleagues in the majority. For the same reasons I discuss at length in my dissenting opinion in our companion case of *Al-Quraishi v. L-3 Services, Inc.*, ___ F.3d ___, No. 10-1891(L) (4th Cir. Sept. 21, 2011), we lack jurisdiction over this interlocutory appeal to decide, as the majority does, that the plaintiffs' claims are preempted by federal law. Were we authorized to adjudicate the merits of the preemption defense, however, we should rule it unavailing here.

I.

A.

The plaintiffs' claims arise from their maltreatment while detained at the Abu Ghraib prison during our nation's military campaign in Iraq. According to the operative Amended Complaint (the "Complaint"), the allegations of which we are bound to take as true at this stage of the proceedings, civilian employees of CACI International, Inc., and CACI Premier Technology, Inc. (collectively "CACI"), while interrogating the plaintiffs or assisting in their interrogation, conspired with military personnel to "instigate[ ], direct[ ], participate[ ] in, [and] aid[ ] and abet[ ] conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the

United States." Complaint ¶ 67.[1] One plaintiff alleges that he was "forcibly subjected to sexual acts by a female as he was cuffed and shackled to cell bars," was "dragged by a rope where part of it was tied tightly to his penis," and was "subjected to [a] mock execution." *Id*. ¶¶ 32, 37, 39. Other asserted abuses include beatings, food and sleep deprivation, humiliation, and being forced to witness the rape of a female detainee. *See generally id*. ¶¶ 11-63.

The Complaint relates that CACI has "admitted . . . that it had the ability to control, direct and influence the actions performed by employees," and it insists that CACI was able "to prevent employees from torturing plaintiffs." Complaint ¶¶ 76-77. The plaintiffs further maintain that "CACI at all times [was] obliged by the terms of its contract to supervise [its] employees." *Id*. ¶ 78. CACI was aware, according to the plain-tiffs, "that the United States intended and required that any person acting under the contract [with] the United States would conduct themselves in accordance with the relevant domestic and international laws." *Id*. ¶ 98. Nonetheless, by engaging in and directing the torture of the plaintiffs, CACI "directly contradicted the contract terms, domestic law and the United States' express policy against torture." *Id*. ¶ 115. CACI, the plaintiffs say, is consequently liable to them under Virginia law for the torts of assault and battery, sexual assault, intentional and negligent infliction of emotional distress, and negligent hiring and supervision.

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[1] The Complaint is found at J.A. 16-41. (Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties to this appeal.)

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, CACI moved to dismiss the Complaint, asserting, among other things: (1) that the suit raised a non-justiciable political question; (2) that CACI was entitled to immunity derived from its association with the sovereign; and (3) that, as a logical extension of the Supreme Court's decision in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988), the plaintiffs' state law claims were preempted, having arisen in the context of combatant activities conducted in the federal interest. The district court denied CACI's motion, rejecting its argument that the plaintiffs' claims were nonjusticiable. *See Al Shimari v. CACI Premier Tech., Inc.,* 657 F. Supp. 2d 700, 708-14 (E.D. Va. 2009). The court declined to decide the immunity issue at the dismissal stage, concluding that it could not "determine the scope of Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place." *Id*. at 714. The limited record, according to the district court, also cast doubt that CACI's interrogation practices amounted to "combatant activities." *Id*. at 725. The court ruled that the plaintiffs' claims were in any event "not preempted under *Boyle*," because they "do not present a significant conflict with a uniquely federal interest."

Id.[2] Five days following the district court's ruling, before discovery could commence, CACI noted this appeal.

B.

I need not reiterate in extravagant detail why jurisdiction over this appeal is lacking, having devoted considerable space to the subject in my dissenting opinion in today's companion case of *Al-Quraishi v. L-3 Services, Inc.*, ___ F.3d ___, No. 10-1891(L) (4th Cir. Sept. 21, 2011). Suffice it to say that the only basis that could arguably support the exercise of collateral order jurisdiction, *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the denial of dismissal on the ground of derivative sovereign immunity, was not "conclusively determined" by the district court as required by *Will v. Hallock*, 546 U.S. 345, 349 (2006). The denials of dismissal based on the political question doctrine and on *Boyle* preemption, as applied by the District of Columbia Circuit in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), though conclusively determined, abridged no immunity. As a result, neither ground meets the additional prerequisite of being "effectively unreviewable" on appeal from a final judgment. *See Will*, 546 U.S. at 349.

The majority nevertheless accepts appellate jurisdiction, *see ante* at 6, reversing the district court's interlocutory order and remanding with instructions to

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[2] Though it declined to dismiss the state law claims, the district court granted CACI's motion insofar as it pertained to federal claims asserted by the plaintiffs pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. *See Al Shimari*, 657 F. Supp. 2d at 726-28.

dismiss the plaintiffs' remaining claims as preempted on the same theory underlying the D.C. Circuit's decision in *Saleh*. Putting aside the jurisdictional defect for argument's sake, I take issue with the majority's embrace of *Saleh* preemption to relieve CACI of its potential liability in this matter.[3]

II.

A.

1.

The majority purports merely to apply the Supreme Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), but by adopting the reasoning of *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), a case presenting facts highly similar to this one, it affords *Boyle* an excessively robust elasticity. The *Boyle* Court recognized a form of implicit preemption of state law, based on a "significant conflict" be-

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[3] I address *Saleh* preemption on the merits because there is much in the majority's provocative analysis of the issue that should not be left unanswered. Inasmuch as CACI's derivative sovereign immunity and political question defenses are not addressed in the majority opinion, but discussed only in Judge Niemeyer's separate, nonprecedential opinion, I believe it would be unhelpful and confusing to debate them here. Left to my own devices, I would not resolve any of CACI's arguments on the merits as we lack jurisdiction to consider them. In *Taylor v. Kellogg*, ___ F.3d ___, No. 10-1543 (4th Cir. Sept. 21, 2011), also decided today, I authored the opinion of the Court in which, as Judge Niemeyer points out, *ante* at 15, we affirmed the district court's judgment on the ground that the dispute in that case presented a nonjusticiable political question. Our jurisdiction in *Taylor* was unquestioned, however, in that the appeal was taken from the district court's indisputably final decision dismissing the plaintiff's case. *See* 28 U.S.C. § 1291.

tween "uniquely federal interests" and state law duties the plaintiff sought to impose on a private contractor. *See* 487 U.S. at 504, 506, 512.

The contract in *Boyle* was one for procurement in which the government contractor was to manufacture and deliver military helicopters with an outward-opening escape hatch. This hatch could not be opened underwater, which allegedly rendered the design defective under state law. To determine whether a significant conflict was present, the Court looked to the statutory "discretionary functions" exception to the Federal Tort Claims Act (the "FTCA"), which reserves the sovereign immunity of the United States for, among other things, "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

Guided by this specific FTCA exception, the Supreme Court reasoned that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function" under the FTCA because "[i]t often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the tradeoff between greater safety and great combat effectiveness." *Boyle*, 487 U.S. at 511. Accordingly, the Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id*. at 512. The Court acknowledged that the

Boyle preemptive principle was distinct from "ordinary" preemption and was not tethered to "legislation specifically immunizing Government contractors from liability." *Id*. at 504, 507.

The Supreme Court stated in no uncertain terms, however, that the presence of a federal interest "merely establishes a necessary, not a sufficient, condition for the displacement of state law." 487 U.S. at 507. Such a "[d]isplacement will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or the application of state law would frustrate specific objectives of federal legislation." *Id*. (citations, internal quotation marks, and alterations omitted). Although "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption . . . , *conflict there must be*." *Id*. at 507-08 (emphasis added).

2.

The rather obvious problem with invoking the government's "interest in conducting and controlling the conduct of war," *ante* at 11, to preempt the plaintiffs' claims of gratuitous torture by an independent contractor, is that there is no conflict between the two. No federal interest implicates the torture and abuse of detainees. To the contrary, the repeated declarations of our executives, echoed by the Congress, expressly disavow such practices.

For example, shortly after graphic photos depicting detainee abuse at Abu Ghraib became public, President Bush vowed that "the practices that took place in that prison are abhorrent and they don't rep-

resent America." White House, Press Release, President Bush Meets with Al Arabiya Television, 2004 WLNR 2540883 (May 5, 2004). He pledged to "[t]he people of the Middle East . . . that we will investigate fully, that we will find out the truth," and further assured that "justice will be served." *Id*. Similarly, Secretary of Defense Rumsfeld testified before Congress that the Abu Ghraib prisoner abuses were "inconsistent with the values of our nation," asserting that "[p]art of [our] mission — part of what we believe in — is making sure that when wrongdoing or scandal occur, that they are not covered up, but exposed, investigated, publicly disclosed — and the guilty brought to justice." Donald H. Rumsfeld, *Testimony Before the Senate and House Armed Services Committees* 1, 6 (May 7, 2004).

For its part, the Senate "condemn[ed] in the strongest possible terms the despicable acts at Abu Ghraib prison." S. Res. 356, 108th Cong. (2004). Meanwhile, the House of Representatives declared that the practices at Abu Ghraib "offen[d] . . . the principles and values of the American people and the United States military . . . and contradict the policies, orders, and laws of the United States military and undermine the ability of the United States military to achieve its mission in Iraq." H.R. Res. 627, 108th Cong. (2004).

The point is not confined to the facile observation that no federal interest encompasses the torture and abuses that the plaintiffs allege. Indeed, it is quite plausible that the government would view private tort actions against the perpetrators of such abuses as *advancing* the federal interest in effective military activities. The government has not intervened on behalf of

the contractors in this dispute, and, in fact, the Department of Defense (the "DOD") has promulgated a final rule advising contractors that the "[i]n appropriate use of force could subject a contractor or its subcontractors or employees to prosecution or civil liability under the laws of the United States and the host nation." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,764, 16,767 (Mar. 31, 2008) (the "DOD Rule").

The DOD Rule "may reflect the government's general view that permitting contractor liability will advance, not impede, U.S. foreign policy by demonstrating that 'the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions.'" *Saleh*, 580 F.3d at 28 (Garland, J., dissenting) (quoting U.S. Dep't of State, Press Release, Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies (Sept. 17, 2008)). As the *Saleh* dissent emphasizes:

> the government's failure to defend the contractors may reflect the Executive Branch's view that the country's interests are better served by demonstrating that "people will be held to account according to our laws." And the Executive may believe that one way to show that "people will be held to account" is to permit this country's legal system to take its ordinary course and provide a remedy for those who were wrongfully injured.

Id.

At bottom, *Boyle* does not countenance the majority's approach because there simply is no conflict —

much less, a "significant conflict" — between the asserted state law duties and any uniquely federal interest. Quite the opposite: the plaintiffs allege that CACI *violated* federal policy. *Boyle* does not apply, because, as the *Saleh* dissent explained:

> *Boyle* has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both. Hence, these cases are not within the area where the policy of the "discretionary function" would be frustrated, and they present no significant conflict with federal interests. Preemption is therefore not justified under *Boyle*.

Saleh, 580 F.3d at 23 (Garland, J., dissenting) (internal quotation marks and citations omitted).

B.

1.

Another premise underlying *Boyle*'s reasoning — the rigid control that the government exerts over contractors in procuring military equipment — is absent where, as here, the government contracted for general services only. As the *Boyle* Court acknowledged, selecting military equipment "often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations." 487 U.S. at 511. Ultimately, the government rather than the contractor must be in charge of decision making in order for the contractor to be shielded from liability. Consistently with that principle, the *Boyle* test for preemption "assure[s] that the suit is within the area where the policy of the 'discretionary

function' would be frustrated" — that is, "that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id*.[4]

By contrast, the government itself has recognized that such judgments are not present in general services contracts. As the DOD explained in a recent rulemaking, "[t]he public policy rationale behind *Boyle* does not apply when a performance based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors." DOD Rule, 73 Fed. Reg. at 16,768. In other words, the government's precise control over its contractor, which was so integral to *Boyle*'s reasoning, see 487 U.S. at 509-12, is absent in a general services contract in which the government simply requires "a contractor to ensure its employees comply with host nation law and other authorities," DOD Rule, 73 Fed. Reg. at 16,768.

It follows that while military contractors might be able to assert *Boyle*-type arguments when the government's decisions result in injuries to third parties, the

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[4] More recently, the Supreme Court has reiterated the narrow scope of the *Boyle* preemption defense, as well as its grounding in a contractor's compliance with government instructions. For example, the Court has referred to *Boyle* as presenting a "special circumstance" in which "the government has directed a contractor to do the very thing that is the subject of the claim." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001). As the Fifth Circuit recently explained, "[t]he government contractor defense in *Boyle*, stripped to its essentials, is fundamentally a claim that the Government made me do it." *Katrina Canal Breaches Litig. Steering Comm. v. Wash. Group Int'l, Inc*., 620 F.3d 455, 465 (5th Cir. 2010).

DOD adamantly opposes "send[ing] a signal that would invite courts to shift the risk of loss to innocent third parties" where "contractors . . . seek[ ] to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States." DOD Rule, 73 Fed. Reg. at 16,768 (emphasis added). Accordingly, the DOD elected to "retain[ ] the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." *Id*. In obstinate opposition to the government's prescribed path, the majority would protect contractors from civil liability even when there is no indication that the government authorized the conduct underlying the asserted liability.

2.

Contrary to the majority's position, whether the government authorized CACI's conduct in this case can only be ascertained by examining the contract between the parties, which, as the district court lamented, is not in the record at the dismissal stage. The contract would shed light on:

- The contractor's delegated discretionary authority — that is, the services the contractor was to provide under the contract — and whether the contractor acted within the bounds of such authority, *see Rodriguez v. Lockheed Martin Corp*., 627 F.3d 1259, 1266 (9th Cir. 2010) (refusing to deem claim preempted under *Boyle* where "there is no proof to establish as a matter of law that the equipment [alleged

to have injured the victims] conformed to the government's precise specifications");

- Whether such authority was "validly conferred" to the contractor, *see Boyle*, 487 U.S. at 506 (quoting *Yearsley*, 309 U.S. at 20-21); and
- Whether and to what extent the government had a significant interest in the specific services to be provided, *see id*. at 509 (recognizing that "significant conflict" justifying preemption may not be present even where state duty is "precisely contrary" to contractual duty, since government may lack "significant interest in th[e] particular feature" specified in contract).

The majority's extra-contractual inquiry into whether "a civilian contractor is integrated into wartime combatant activities over which the military broadly retains command authority," *ante* at 11-12 (citing *Saleh*, 580 F.3d at 9), is of scant moment considering the lack

of agency possessed by the rank-and-file military to alter or augment the material terms of the contract.[5]

Of course, there is no evidence to support the majority's supposition of "integration" (whatever that means) in this case, other than what can be gleaned from the bare allegations of the Complaint. But the question is wholly irrelevant absent any allegation that the terms of the written agreement were materially supplemented or changed (or even could be, in the event that the contract contained a valid provision barring parol alterations), either by representatives with authority to act or through the parties' course of conduct or dealing. Here, although the plaintiffs allege a conspiracy with members of the military, they are entitled to the inference that the conspiracy did not define the contract, but instead permitted CACI to act outside its bounds. *Cf. ante* at 5 ("While some of

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[5] The Army Field Manual provides that "[c]ommanders do not have direct control over contractors or their employees . . . ; only contractors manage, supervise, and give directions to their employees." U.S. Dep't of the Army, Field Manual 3-100.21, Contractors on the Battlefield § 1-22 (2003). In turn, the contractors must adhere to their contractual obligations without regard to the chain of command. As the Field Manual emphasizes, "the terms and conditions of the contract establish the relationship between the military (U.S. Government) and the contractor . . . . Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract." *Id*. at 3100.21, § 1-25. As such, the government has "no more control than any contracting party has over its counterparty. And that — without more — is not enough to make the conduct of a contractor 'the combatant activities of the military or naval forces.'" *Saleh*, 580 F.3d at 34 (Garland, J., dissenting) (quoting 28 U.S.C. § 2680(j)).

the abuses that the plaintiffs detailed in the allegations of the complaint appear to have been approved by the military at one point or another, others were clearly not.").[6]

C.

1.

By relying on the discretionary function exception to the Federal Tort Claims Act ("FTCA") to identify the pertinent federal interest, the Supreme Court in *Boyle* required, at a minimum, that reviewing courts would examine a contractor's allegedly tortious conduct to determine whether it was truly the product of the government's exercise of discretion, or merely an ordinary, unprovoked lapse of care. The majority's approach avoids even that minimal analysis by ground-

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[6] The majority seizes upon the plaintiffs' allegation of a conspiracy between CACI and military personnel, *see ante* at 9-10, in support of its irrelevant supposition that CACI employees were integrated into the mission at Abu Ghraib. Whatever the military "mission" was at Abu Ghraib, it did not include torturing the plaintiffs. In any event, regardless of the relationship between the soldiers and civilians at the prison, the duties of the latter were defined exclusively by CACI's contract with the government. We do not know whether governmental authority to amend the contract resided at the Pentagon or elsewhere, but we may be fairly certain that such authority did not reside at Abu Ghraib. That relatively low-level military personnel may have violated their orders and encouraged their civilian counterparts to act outside the bounds of the contract — and settled legal principles — in no way translates to a conclusion that CACI should summarily escape liability on the ground that the actions imputed to it were somehow consistent with the government's interests.

ing the asserted federal interest in a different exception to the FTCA — the combatant activities exception — the umbrella of which the majority would deploy over government contractors whenever there are "actions taken in connection with U.S. military operations overseas." *Ante* at 8.[7]

The majority thereby ignores the Supreme Court's warning that the FTCA's exceptions are not equally equipped to define the contours of an implicit preemption. The *Boyle* Court made the point through its discussion of *Feres v. United States*, 340 U.S. 135 (1950), in which it was held that the FTCA does not waive sovereign immunity with respect to suits brought against the United States by service members for injuries sustained in the course of their military service.

The Supreme Court declared the *Feres* doctrine unsuitable to ascertain whether a significant conflict exists between federal interests and an asserted state duty, in that it "logically produces results that are in some respects too broad and in some respects too narrow." *Boyle*, 487 U.S. at 510. As an example of the former, the Court observed that "[s]ince *Feres* prohibits all service related tort claims against the Government, a contractor defense that rests upon it should prohibit all service related tort claims against the manufacturer," *id.*, a result that the Supreme Court deemed inadvisable. *See also Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 740 (D. Md. 2010) (declining to

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[7] By enacting the combatant activities exception to the FTCA, Congress expressly reserved the sovereign immunity of the United States with respect to "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j).

adopt rationale of *Saleh*, based in part on Supreme Court's rejection of *Feres* as basis for preemption, "because [the *Feres* defense] does not take into account whether the Government exercised any discretion or played any role in the contractor's alleged tortious acts, as required by the three part test ultimately articulated in *Boyle*").

The majority's invocation of the combatant activities exception suffers from the same defects. While the Supreme Court sought to discern an appropriate "limiting principle" to assist in identifying any significant conflict between state and federal policies under the discretionary function exception, *Boyle*, 487 U.S. at 509, the majority's version of preemption under the combatant activities exception is "extraordinarily broad, . . . result[ing] not in conflict preemption but in field preemption." *Saleh*, 580 F.3d at 23 (Garland, J., dissenting) (internal quotation marks omitted).[8]

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[8] Inasmuch as the FTCA contains other potentially applicable exceptions — for "[a]ny claim arising in a foreign country," and for "[a]ny claim arising out of assault [and] battery" regardless of where it occurs, 28 U.S.C. §§ 2680(h), (k) — it is baffling that the majority can correctly identify the combatant activities exception as the one that decrees the relevant federal policy. This is particularly so absent any meaningful discussion by the majority of what constitutes a "combatant activity," whether such activities may take place domestically, or how they may be distinguished from an ordinary assault or battery. The difficulties in identifying the relevant FTCA exception makes it almost impossible to articulate why the one for combatant activities matters at all. As Judge Garland observes, "the 'degree of integration' test . . . seems wholly beside the point" once these other exceptions are considered. *Saleh*, 580 F.3d at 23 (Garland, J., dissenting). Inevitably, "[o]nce we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line." *Id*.

2.

The majority makes no attempt to conceal the sweeping breadth of the preemption doctrine it adopts today, confidently maintaining that its approach properly implements what it characterizes as "the FTCA's policy of eliminating tort concepts from the battlefield." *Ante* at 11 (quoting *Saleh*, 580 F.3d at 7). The majority vastly overstates its case, however, because, much more narrowly,

> the FTCA's policy is to eliminate *the U.S. government's* liability for battlefield torts. That, after all, is what the FTCA says. But it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says.

Saleh, 580 F.3d at 26 (Garland, J., dissenting). Judge Garland's eye is keen: the FTCA waives, with certain specific exceptions, the sovereign immunity constitutionally afforded the United States, which operates through its various federal agencies. *See* 28 U.S.C. §§ 2674, 2675. Government contractors, however, are expressly excluded from the FTCA's reach. *See id*. § 2671 ("[T]he term 'Federal agency' . . . does not include any contractor with the United States."). The majority's description of the FTCA's policy as the wholesale elimination of wartime torts, even those committed by private parties, is therefore inaccurate.

Congress has had no difficulty exempting private parties from liability in other contexts. Consider, for example, the statute found at 22 U.S.C. § 2291-4(b), which provides that the interdiction of an aircraft over

a foreign country, conducted pursuant to a presidentially approved program, "shall not give rise to any civil action . . . against the United States or its employees *or agents*." *Id*. (emphasis added). Congress has issued no similar exemption here. If anything, its wholesale exclusion of government contractors from the limited protections of the FTCA leads to the opposite conclusion — that CACI should be held liable for its civil misdeeds.

Further, the FTCA addresses only the immunity of the United States; it does not shield members of the armed services or other government employees from tort suits. Instead, the Westfall Act provides that sort of protection, so long as the Attorney General certifies "that the defendant employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(1). Upon such certification, the employee is dismissed from the lawsuit and the United States is substituted as the party defendant, after which the dispute is governed by the FTCA (as well as its exceptions that retain sovereign immunity). *See Osborn v. Haley*, 549 U.S. 225, 230 (2007). But because the West-fall Act incorporates the FTCA's definitions, it too excludes government contractors. Yet the majority deems the plaintiffs' claims preempted in the absence of an Attorney General's certification that would have been essential were these defendants soldiers or sailors rather than contractors. The majority thereby grants the defendants unqualified protection that even our citizens in uniform do not enjoy.

The majority also gleans several specific policy conflicts that tort suits against contractors would bring about, but these concerns evaporate upon closer inspection. The majority asserts that "[n]ot only

would potential tort liability against . . . contractors affect military costs and efficiencies and contractors' availability," but "would also present the possibility that military commanders could be hauled into civilian courts for the purpose of evaluating and differentiating between military and contractor decisions." *Ante* at 8. But the possibility of cost-passing is already taken into consideration at an earlier stage of the *Boyle* inquiry, that is, in determining whether a uniquely federal interest "will be directly affected." 487 U.S. at 507.[9]

With respect to the majority's concern that military commanders may be called to provide testimony in private tort suits, wholesale preemption remains un-warranted. Ordinary mechanisms of civil proce-

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[9] In *Richardson v. McKnight*, 521 U.S. 399 (1997), the Supreme Court declined to extend qualified immunity to privately employed prison guards in an action under 42 U.S.C. § 1983. The Court reasoned that, because contractors performing service contracts are subject to "competitive market pressures," the threat of tort liability encourages them to comply with contractual obligations to screen, train, and supervise their employees, so as to promote effectiveness while preventing and deterring contractors and their employees from taking unlawful actions. *See Richardson*, 521 U.S. at 409 ("Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job."). As in the *Richardson* litigation, the potential for tort liability and competition between contractors may well facilitate the government's selection of contractors who will perform in a more effective, lawful, and inexpensive manner.

dure and other legal doctrines provide ample safeguards against such interference. Federal Rule of Civil Procedure 45, for example, compels the district courts to quash subpoenas calling for privileged matter or that would cause an undue burden. Moreover, the government remains free to invoke the state secrets doctrine. All this is to say, "[t]o deny preemption is not to grant plaintiffs free reign." *Saleh*, 580 F.3d at 29 (Garland, J., dissenting).[10]

The majority expresses its fear that lawsuits will "undermine the flexibility that military necessity requires in determining the methods for gathering intelligence." *Ante* at 8. Such a concern also proves illusory. The plaintiffs allege that the contractor personnel acted contrary to military directives and law. The asserted basis of liability, then, is not one that would hamper the flexibility the military needs in determining how to gather intelligence, but rather one that would hold contractors to account for violating the bounds already set by the military.

III.

Because the majority erroneously strains to discover a new form of preemption unjustified by Su-

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[10] Moreover, the majority's approach brings about the very problems it seeks to avert. That is, if the courts "ignore the military's own description of its chain of command" by looking to the "degree of integration that, in fact, existed between the military and [contractor] employees," then they thereby "invite the wide-ranging judicial inquiry — with affidavits, depositions, and conflicting testimony — that the court rightly abjures." *Saleh*, 580 F.3d at 34 (Garland, J., dissenting).

preme Court precedent, and, more fundamentally, because we lack jurisdiction to announce this new rule, I respectfully dissent.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUHAIL NAJIM ABDULLAH AL SHIMARI, et al.,	)	
Plaintiffs,	)	
v.	)	
CACI Premier Technology, Inc.,	)	1:08-cv-827 (LMB/JFA)
Defendant/Third-Party Plaintiff.	)	
v.	)	[Entered: March 22, 2019]
UNITED STATES OF AMERICA,	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION

Before the Court are third-party defendant the United States of America's ("United States") Motion to Dismiss [Dkt. No. 696] and Motion for Summary Judgment [Dkt. No. 1129], as well as defendant/third-party plaintiff CACI Premier Technology, Inc.'s ("CACI") Motion to Dismiss for Lack of Jurisdiction [Dkt. No. 1149]. For the reasons that follow, the United States' Motion to Dismiss will be granted as to Count 4 and denied in all other respects, CACI's Mo-

tion to Dismiss will be denied, the United States' Motion for Summary Judgment will be granted, and the Third-Party Complaint will be dismissed as to the United States.

I. BACKGROUND

This civil action arises out of the alleged torture; cruel, inhuman, or degrading treatment ("CIDT"); and war crimes inflicted on plaintiffs Suhail Najim Abdullah Al Shimari ("Al Shimari"), Asa'ad Hamza Hanfoosh Al-Zuba'e ("Al-Zuba'e"), Salah Hasan Nusaif Jasim Al-Ejaili ("Al-Ejaili"), and Taha Yaseen Arraq Rashid ("Rashid")[1] (collectively, "plaintiffs") by members of the United States military and CACI employees while plaintiffs were detained at the Abu Ghraib prison. The procedural and factual background of this civil action is described extensively in the Memorandum Opinion of February 21, 2018 [Dkt. No. 678] and will not be repeated in detail here. For the purposes of the present motions, it is sufficient to understand that plaintiffs, all of whom are Iraqi citizens who were detained at Abu Ghraib for a significant period of time, allege that they suffered severe mistreatment at the hands of military personnel and CACI employees. As summarized in the Memorandum Opinion:

> Over the course of six weeks, Al-Ejaili was subjected to repeated stress positions, including at least one that made him vomit black liquid; sexually-related humiliation; disruptive sleeping patterns and long periods of being

[1] On February 27, 2019, Rashid was dismissed from this civil action because the primary mistreatment he described occurred before CACI personnel had arrived at Abu Ghraib. Dkt. No. 1144.

> kept naked or without food or water; and multiple instances of being threatened with dogs. The approximately ten to twelve times he was interrogated involved systematic beatings, including to the head, and being doused with hot and cold liquids. Al-Zuba'e was subjected to sexual assault and threats of rape; being left in a cold shower until he was unable to stand; dog bites and repeated beatings, including with sticks and to the genitals; repeated stress positions, including at least one that lasted an entire day and resulted in his urinating and defecating on himself; and threats that his family would be brought to Abu Ghraib. Al Shimari was subjected to systematic beatings, including on his head and genitals, with a baton and rifle, and some where he was hit against the wall; multiple stress positions, including one where he was forced to kneel on sharp stones, causing lasting damage to his legs; being threatened with dogs; a cold shower similar to Al-Zuba'e's, being doused with water, and being kept in a dark cell and with loud music nearby; threats of being shot and having his wife brought to Abu Ghraib; electric shocks; being dragged around the prison by a rope tied around his neck; and having fingers inserted into his rectum.

Mem. Op. [Dkt. No. 678] 31-32. Plaintiffs allege that as a result of this treatment, they have suffered "severe and lasting physical and mental damage." Id. at 33. For example, Al Shimari, Al-Zuba'e, and Al-Ejaili each allege that they have "been diagnosed with post-

traumatic stress disorder and major depressive disorder," and each "has submitted an expert report detailing how these mental illnesses have caused significant problems in [their] personal and professional lives" through the present day. Id. Each plaintiff also alleges that he continues to suffer from physical symptoms, including pain and scarring, attributable to this mistreatment. Id.

The claims against CACI are brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and were initially for engaging in, conspiring to engage in, and aiding and abetting torture; CIDT; and war crimes, all in violation of international law. On February 21, 2018, the Court granted in part and denied in-part CACI's Motion to Dismiss and dismissed the direct liability counts against CACI. In so doing, the Court determined that plaintiffs' factual allegations describe conduct that represents "violations of international law norms that are specific, universal, and obligatory." Mem. Op. 28 (internal quotation marks and citation omitted); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

CACI has brought a Third-Party Complaint [Dkt. No. 665] against the United States of America and

John Does 1-60.[2] According to the allegations in the Third-Party Complaint, the United States military oversaw interrogation operations at Abu Ghraib, including making decisions about which detainees would be interrogated and which "Tiger Teams," consisting of an interrogator (either a CACI employee or a military person) and a linguist, would be assigned to which detainees. Third-Party Compl. ¶ 18. In addition, all Tiger Teams reported to the military chain of command, which included various military noncommissioned officers in charge, the Officer in Charge of the Interrogation Control Element, and the Commanding Officer of the intelligence battalion deployed to Abu Ghraib. Id. ¶ 19. CACI alleges that the United States military "exercised direct and plenary control over all aspects of a detainee's experience at Abu Ghraib," control which included not only assigning teams to detainees but also establishing the Interrogation Rules of Engagement, approving interrogation plans for each detainee, reviewing interrogation reports prepared after each interrogation, and approving certain techniques that required authorization.

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[2] The John Doe defendants comprise three groups of natural persons: soldiers deployed to Abu Ghraib; "civilian employees of the United States Department of Defense, or any components thereof, or civilian contractor employees supporting the U.S. military mission at Abu Ghraib"; and "employees of the United States or civilian contractor personnel working for Other Government Agencies at Abu Ghraib." Third-Party Compl. ¶ 9. None of these defendants has been served. On June 8, 2018, the United States moved to sever and stay the claims against the John Doe defendants. Dkt. No. 832. CACI opposed the United States' motion. Dkt. No. 853. On July 6, 2018, the Court granted the United States' motion, and CACI's third-party claims against the John Doe defendants were severed and stayed "pending resolution of the underlying action." Dkt. No. 869.

Id. ¶ 20. The gravamen of CACI's allegations is that the United States military personnel, and not CACI personnel, were ultimately responsible for directing the interrogations of the plaintiffs and subjecting plaintiffs to mistreatment. Accordingly, CACI seeks to hold the government liable on a variety of theories.

In Count 1, CACI seeks common law indemnification against the United States and the John Doe defendants and, in Count 2, exoneration for any judgment that might be entered against CACI for acts of mistreatment toward plaintiffs that the third-party defendants "inflicted, directed, authorized, or permitted." Id. ¶¶ 38, 45. In Count 3, CACI seeks contribution against the third-party defendants to the extent that plaintiffs seek to hold CACI liable on a respondeat superior theory based on CACI employees' entry into a conspiracy with or aiding and abetting the United States or the John Doe defendants. Lastly, in Count 4, CACI brings a breach of contract claim against the United States, in which it alleges that CACI's contract with the government to supply interrogators contained an implied duty of good faith and fair dealing that the government violated when it refused to produce discovery that could have allowed CACI to defend itself against plaintiffs' claims.

The United States has filed a Motion to Dismiss [Dkt. No. 696], in which it argues that the Court lacks subject matter jurisdiction to consider the Third-Party Complaint because all of CACI's claims against it are barred by sovereign immunity. CACI has also filed a derivative Motion to Dismiss [Dkt. No. 1149], in which it argues that any sovereign immunity granted to the United States must apply equally to it due to its status as a government contractor. Because

the Court had not ruled on the United States' Motion to Dismiss, the United States has also filed a Motion for Summary Judgment [Dkt. No. 1129], in which it argues that it is entitled to judgment as a matter of law because in 2007, CACI and the United States settled all claims arising out of the task orders pursuant to which CACI sent civilian interrogators to Abu Ghraib.

II. UNITED STATES' MOTION TO DISMISS

A. Standard of Review

Under Fed. R. Civ. P. 12(b)(1), a civil action must be dismissed whenever the court lacks subject matter jurisdiction. The plaintiff has the burden of establishing subject matter jurisdiction. Demetres v. E.W. Constr., Inc., 776 F.3d 271, 272 (4th Cir. 2015). "Because jurisdictional limits define the very foundation of judicial authority, subject matter jurisdiction must, when questioned, be decided before any other matter." United States v. Wilson, 699 F.3d 789, 793 (4th Cir. 2012).

B. Federal Tort Claims Act Waiver of Immunity

CACI first contends that the Federal Tort Claims Act ("FTCA") has waived the government's immunity for the claims at issue in this case. In response, the government argues that the foreign country exception, 28 U.S.C. § 2680(k), operates to bar CACI's tort claims. The FTCA generally waives sovereign immunity and subjects the United States to liability for tort damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Id. § 1346(b)(1). Congress has provided a variety of exceptions to this waiver, including for "[a]ny claim arising in a foreign country." Id. § 2680(k).

CACI argues that the foreign country exception does not apply to its claims because the area where plaintiffs' claims arose—Abu Ghraib—was a location "in which the sovereign government had been forcibly displaced by the United States military and its allies, occupied by United States military forces, and governed by a military occupation government." Third-Party P1. CACI Premier Tech., Inc.'s Opp'n to the U.S.' Mot. to Dismiss [Dkt. No. 713] ("CACI MTD Opp'n") 17. This position relies primarily on United States v. Spelar, 338 U.S. 217 (1949), in which the Supreme Court held that an air base in Newfoundland that was held by the United States under a long-term lease was a "foreign country" for purposes of the FTCA. Id. at 218-19. Although the Court did not clearly define the phrase "foreign country" as used in that section, it relied primarily on considerations of sovereignty, stating: "We know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation. By the exclusion of 'claims arising in a foreign country,' the coverage of the [FICA] was geared to the sovereignty of the United States." Id. at 219 (footnote omitted). Although this decision indicates that territory subject to another country's sovereignty is categorically within the limits of the foreign country exception, it does not explain how the FTCA

treats territory that is subject to no—or overlapping or ambiguous—sovereign claims.

That being said, more recent Fourth Circuit and Supreme Court decisions have made clear that land may be subject to the foreign country exception even if another country does not exercise sovereignty over it. For example, in Burna v. United States, 240 F.2d 720 (4th Cir. 1957), the Fourth Circuit applied Spelar to post-World War II Okinawa, which was subject to substantial governance by the United States pursuant to a treaty provision. Id. at 720-21. The plaintiff in that case argued that Spelar indicated that the FTCA exception only applied to territory under another country's control and that Okinawa was actually under the United States' control. See id. at 721. The Fourth Circuit disagreed, concluding that Spelar had held that foreign sovereignty over a particular territory was sufficient, but not necessary, to trigger application of the foreign country exception. Id. at 721-22. In reaching that conclusion, the Fourth Circuit cited Congress's use of the words "foreign country" to connote a "sense of 'otherness,' or to mean "a country which is not the United States or its possession or colony,—an alien country,—other than our own." Id. at 722-23 (internal quotation marks and citation omitted); see also id. at 722 (framing the inquiry in terms of whether "Okinawa has been incorporated into the United States"). Accordingly, it determined that Congress "did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on international law may have formulated" and that Okinawa—even when occupied by the United States—remained a "foreign country" for purposes of the FTCA. Id. at 722-23.

This understanding of the FTCA is in accord with more recent Supreme Court precedent. In Smith v. United States, 507 U.S. 197 (1993), the Court held that Antarctica, which is a "sovereignless region," falls within the foreign country exception. Id. at 198. Although the Court relied on a variety of pieces of evidence in evaluating the status of Antarctica (and did not produce a decision clearly adopting a definition of "foreign country"), it did observe that "the commonsense meaning of the term ['country] undermines petitioner's attempt to equate it with `sovereign state' because the first definition of "country" in the dictionary is "simply `[a] region or tract of land." Id. at 201 (second alteration in original) (quoting Webster's New International Dictionary 609 (2d ed. 1945)).

When these decisions are read together, it becomes clear that Abu Ghraib is in a "foreign country" and remained as such during the time it was occupied by coalition forces. In many ways, its status mirrored post-World War II Okinawa's, as the United States and other coalition governments displaced the previous Iraqi sovereign. Abu Ghraib, like Okinawa, was never "incorporated into the United States" and, given the concept of "foreign country" embraced in Smith, the lack of an independent Iraqi sovereign does not bar the application of the foreign country exception. Accordingly, the FTCA does not waive sovereign immunity for the tort claims asserted in this civil action.

C. Sovereign Immunity and Jus Cogens Violations

CACI further argues that the government has waived sovereign immunity for violations of jus cogens norms—that is, those peremptory international

law norms from which states may not derogate.[3] This question appears to be one of first impression, not just in this district or circuit but nationally.[4] Accordingly, before the question presented may be addressed, it is necessary to examine the history and development of sovereign immunity doctrine and jus cogens norms to contextualize the current dispute.

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[3] Although plaintiffs, and not CACI, were the victims of the alleged jus cogens violations at issue in this suit, CACI argues that its claims for indemnification, exoneration, and contribution are derivative of plaintiffs' claims against CACI. Accordingly, CACI appears to assume, and the government does not argue otherwise, that if the government does not have immunity for jus cogens violations, and thus plaintiffs would be able to bring their claims against the government, CACI may recover from the government on its derivative claims.

[4] As discussed below, various federal courts have confronted the question whether foreign states may invoke sovereign immunity in federal court with respect to alleged jus cogens violations. These cases are not helpful for two reasons. First, they are primarily concerned with interpreting the Foreign Sovereign Immunities Act ("FSIA"), which codifies a doctrine of foreign sovereign immunity in American courts. By contrast, the immunity of the American government from suit is a common law doctrine, and the question whether the United States has waived sovereign immunity for jus cogens violations does not turn on the interpretation of any one statute. Second, domestic and international law treat the questions whether a sovereign is immune from suit in its own courts and whether a sovereign is immune from suit in the courts of a different country as distinct questions. In particular, the serious concerns that would arise from any rule allowing a country to be sued in foreign courts the world over, as well as considerations of comity and respect, may incline in favor of a rule of restrictive jurisdiction over suits in courts of a foreign state but that do not apply similarly to suits in domestic courts.

1. Development of Sovereign Immunity Doctrine

a. Historical Background and Incorporation into American Law

The doctrine of sovereign immunity, which was recognized in English common law as early as the thirteenth century, appears to have its roots in England's feudal system, in which "each petty lord in England held or could hold his own court to settle the disputes of his vassals." David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1, 2 (1972). Although a lord's vassals were subject to the jurisdiction of his court, "as the court was the lord's own, it could hardly coerce him." Id. Indeed, the "trusted counsellors who constituted [a lord's] court" could "claim no power over him their lord without his consent." Id. That being said, each "petty lord . . . was vassal in his turn, and subject to coercive suit in the court of his own lord." Id. In the organization of the feudal hierarchy, "[t]he king, who stood at the apex of the feudal pyramid" and was "not subject to suit in his own court," was wholly immune from suit because "there happened to be no higher lord's court in which he could be sued." Id. at 2-3; see also United States v. Lee, 106 U.S. 196, 206 (1882) (identifying "the absurdity of the King's sending a writ to himself to command the King to appear in the King's court" as a basis of sovereign immunity in England).

With the rise of the nation-state, this "personal immunity of the king" transformed into "the immunity of the Crown." George W. Pugh, Historical Approach to the Doctrine of Sovereign Immunity, 13 La.

L. Rev. 476, 478 (1953). Given the potential harshness of such a doctrine as attached to the Crown rather than the king, legal authorities developed procedures whereby victims could obtain redress for wrongs committed by the government without directly suing the Crown. For example, when a government agent committed a tort, "English courts permitted suit against the government official or employee who had actually committed the wrong complained of." Id. at 479-80. Indeed, in such situations, the doctrine of sovereign immunity, as embodied in the famous phrase "the king could do no wrong," ensured that the tort victim could obtain a judgment against the agent: theoretically, if "the king could do no wrong, it would be impossible for him to authorize a wrongful act, and therefore any wrongful command issued by him was to be considered as non-existent, and provided no defense for the dutiful" agent. Id. at 480.

Similarly, English law developed the "petition of right," which allowed subjects to petition the king for the ability to sue the Crown in the king's courts—in effect, asking the king to waive sovereign immunity with respect to a specific legal dispute. See James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 900-08 (1997). As with tort suits against government agents, the notion that "the king could do no wrong" worked to ensure the availability of a remedy for victims of wrongdoing because the "king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects." Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3

(1963) (citation omitted); see also Engdahl, supra, at 3 (describing the "principle that the king could not rightfully refuse to grant a petition of right"). Moreover, because petitions of right and other "prerogative remedies" that allowed subjects to pursue a suit against the Crown "were invariably controlled by the King's justices rather than the King himself," the "rule of law, as opposed to royal whim, largely determined the availability of relief against the Crown." Pfander, supra, at 908. By the eighteenth century, such procedures were so ingrained in the common law that "[i]n the same paragraph in which William Blackstone proclaimed the immunity of the Crown, he also sketched the procedure on the 'petition of right.'" Id. at 901; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."). As a result of these procedures for obtaining redress, although the formal immunity of the Crown was deeply rooted in the common law, by the eighteenth century, it operated primarily as merely a matter of formalism, with a variety of procedural work-arounds to ensure

that victims could obtain redress for wrongs committed by the Crown's agents.[5]

Given that sovereign immunity in England was rooted in the common law and linked to the personal immunity of the king, it is not surprising that "[a]t the time of the Constitution's adoption, the federal government's immunity from suit was a question—not a settled constitutional fact." Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, 35 Geo. Wash. Int'l L. Rev. 521, 523 (2003). "The nature of the sovereignty created under the 1789 Constitution was something new and uncertain—it took the people and the institutions time to work out their relationships." Id. at 528. Mapping the old English doctrine of sovereign immunity onto this new system implicated many "[q]uestions of the form of government and of the nature of the sovereignties created" by the Constitution, including whether there was a sovereign in the new republic and, "[i]f so, where did that sovereignty reside under

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[5] There is some historical evidence that by the time of the Founding, the English legal system had moved responsibility for adjudicating claims against the Crown from these mechanisms formally relying on the king's consent to Parliament, as Parliament won authority over appropriations. See generally Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207 (2009). That being said, the English commentators on whom the Founders relied to understand the common law, such as Blackstone, continued to describe this petitioning process. Moreover, as discussed below, American sources at the Founding relied on these earlier English doctrines in articulating an understanding of the basis of sovereign immunity, and early American practice mimicked, in many ways, these formalist work-arounds to ensure that wrongs did not go unredressed.

a system of separated powers" and "[w]hat were the roles of the national legislature, the executive, and the federal courts" in that sovereign system. Id. at 528-29. The answers to these questions were not immediately obvious and, indeed, the courts did not quickly adopt a theory of federal sovereign immunity. In fact, "[t]he first clear reference to the sovereign immunity of the United States in an opinion for the entire [Supreme] Court" did not appear until 1821, when the concept of federal sovereign immunity was discussed in dicta, and the first time sovereign immunity was invoked by the Supreme Court "as a basis to deny relief' occurred in 1846. Id. at 523 n.5.

Indeed, early discussions of federal sovereign immunity by the Supreme Court exhibit a sense that the doctrine may be incompatible with a republican form of government. For example, in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amendment, U.S. Const. amend XI, Chief Justice Jay wrote:

> It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to

> judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

Id. at 471-72 (opinion of Jay, C.J.) (emphasis omitted). Although the question was not directly presented in Chisholm, Chief Justice Jay argued that "fair reasoning" suggests that the Constitution permits "that the United States may be sued by any citizen, between whom and them there may be a controversy" by extending judicial power to "controversies to which the United States are a party." Id. at 478; see also Jackson, supra, at 532-33 (reading Justice Wilson's opinion in Chisholm to argue "that the absence of monarch, the role of a written constitution and the process of judicial review suggested that English approaches to sovereign immunity were inapposite to the suability of governments under the United States Constitution" (citing Chisholm, 2 U.S. (2 Dall.) at 453-66 (opinion of Wilson, J.))).

Early American courts were not generally forced to confront the question whether the federal government enjoyed sovereign immunity because, as in England, "many judicial remedies for governmental wrongdoing were available" that did not involve direct suit against the government. Jackson, supra, at 523-24. For example, in the early days of the Republic, the usual remedy for torts committed by government officials was a damages suit directly against the official who committed the tort. Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 414-16 (1987); see also Ann Woolhandler, Old Property, New Property, and Sovereign Immunity, 75 Notre Dame L. Rev. 919, 922 (2000) ("Individual officers remained liable for their torts under general agency law, even if they were working for a disclosed principal—the state."). In addition, under the Judiciary Act of 1789, "all federal courts could issue writs of habeas corpus," which are inherently directed to government custodians but "have never been regarded as barred by sovereign immunity." Jackson, supra, at 524. Similarly, "the writ of mandamus and the injunction have been available in actions against individual government officials" to address ongoing legal violations. Id. at 525.

Specifically with respect to torts committed by government agents, the Supreme Court confirmed as early as 1804 that, as in England, direct suits against government officers were not barred by sovereign immunity. In Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), the Court held that a damages suit could proceed against a naval officer who directed the seizure of a ship sailing from France to St. Thomas. Id. at

176-77, 179. Although the seizure conformed to orders given by the Secretary of the Navy, it was unlawful under the relevant statute, which authorized seizures of ships sailing to, but not from, French ports. Id. at 177-78. The Court recognized the apparent unfairness of holding a military officer personally liable for following orders but nevertheless concluded that instructions from the executive "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass" and, accordingly, the naval captain "must be answerable in damages to the owner of this neutral vessel." Id. at 179.

Although such suits were nominally brought against government officials rather than the government itself, in the early Republic there was a "practice of relatively routine, but not automatic, indemnification" by Congress where an official had been held liable in tort. James E. Pfander & Jonathan L. Hunt, Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. Rev. 1862, 1868 (2010). "Following the imposition of liability on a government officer, Congress would decide whether to make good the officer's loss in the exercise of its legislative control of the appropriation process," thereby "preserv[ing] the formal doctrine of sovereign immunity while assigning the ultimate loss associated with wrongful conduct to the government." Id. For example, after the Supreme Court's decision in Little, Captain Little, the naval officer found liable for the unlawful seizure of the ship, submitted a petition for indemnity to Congress, and Congress passed a bill indemnifying him. Id. at 1902. Indeed, between 1789 and 1860, there were at least

"57 cases of officers petitioning for indemnification and 11 cases of suitors petitioning for the payment of a judgment against an officer" and, of these cases, over 60% of the petitioners received some form of relief, such as a private bill appropriating money directly to the officer or the victim. Id. at 1904-05.

This two-part officer suit and indemnification system rendered sovereign immunity a formalism that barred suits directly against the government but did not bar recovery from the government, at least with respect to torts committed by government agents. Instead, the function of sovereign immunity was to divide responsibilities between the judiciary and the legislature: the judiciary determined, in a direct suit against the officer, whether the conduct was unlawful and, if so, the amount of damages; and in the case of unlawful conduct, Congress determined whether the circumstances were such that the government rather than the officer should ultimately bear the loss. See id. at 1868.

Even after the concept of federal sovereign immunity had worked its way into our legal system to become "a familiar doctrine of the common law," The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1869), the idea that the concept should be construed, to the extent possible, as a procedural doctrine rather than a substantive bar to recovery led the Supreme Court to create work-arounds to allow recovery, as demonstrated by a pair of Reconstruction Era cases. In The Siren, the Court held that even though direct suits may not be instituted against the United States, "when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant

of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libelled." 74 U.S. (7 Wall.) at 154. In a similar vein, in The Davis, 77 U.S. (10 Wall.) 15 (1870), the Court held that sovereign immunity does not bar the enforcement of a lien against goods that are seized after the United States has contracted for their delivery but before they are in the possession of the government. Id. at 21-22. Although the seizure in question forced the United States "to the necessity of becoming claimant and actor in the court to assert [a] claim" to the goods, the Court determined that it technically did not infringe on the immunity of the federal government because the "marshal served his writ and obtained possession without interfering with that of any officer or agent of the government." Id. at 22.

In both of these cases, the Supreme Court relied on formal understandings of the nature of immunity from suit to allow injured parties to maintain claims—either as offset or in rem claims—even though doing so subjected the government's conduct or property rights to judicial review. Moreover, in both cases, the Court invoked the historical remedies available against the Crown in England as a reason for narrowly construing any claim of immunity. In The Siren, the Court observed that "[i]n England, when the damage is inflicted by a vessel belonging to the crown," the "present practice" is to file a suit in rem and have the court direct "the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown—which is generally given." 74 U.S. (7 Wall.) at 155. Similarly, in The Davis, the

Court observed that in situations where "it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage" in maritime cases, the "usual course of proceeding" in England is "for the proper office of the government to consent in court that it may take jurisdiction of the matter." 77 U.S. (10 Wall.) at 20. Although these procedures, which were developed to "prevent [the] apprehension of gross injustice in such cases in England," id could not be identically implemented in the United States given the government's structure, the Court attempted to prevent gross injustice by providing a procedural mechanism that allowed injured parties to obtain relief without directly suing the government.

This formalistic approach to sovereign immunity was reinforced a decade later in United States v. Lee, 106 U.S. 196 (1882), which involved the question whether an ejectment action between private plaintiffs and federal officer defendants should be dismissed as barred by sovereign immunity when the United States asserted ownership of the land. Id. at 196-98. To help explain the limits of sovereign immunity, the Lee Court went through the justifications given in English common law for the immunity of the Crown, explaining how each justification did not serve to support the adoption of the doctrine into the quite different context of the American republican government. According to the Lee Court, "one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court," but "[n]o such reason exists in our government." Id. at 206. Another reason advanced by

English authorities was that "the government is degraded by appearing as a defendant in the courts of its own creation," but the Lee Court rejected this reason "because [the government] is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment." Id. The Lee Court also observed that another reason given for sovereign immunity—"that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right"—did not apply to the United States because "no person in this government exercises supreme executive power, or performs the public duties of a sovereign," and it is therefore "difficult to see on what solid foundation of principle the exemption from liability to suit rests." Id. (citation omitted).

Indeed, the Lee Court explained that the differences between the English and American systems of government are such that English court decisions extending immunity in similar circumstances should be discounted in light of the uniquely American principle that no man is above the law:

> [L]ittle weight can be given to the decisions of the English courts on this branch of the subject, for two reasons: —
>
> 1. In all cases where the title to property came into controversy between the crown and a subject, whether held in right of the person who was king or as representative of the nation, the petition of right presented a judicial remedy,— a remedy which this court, on full examination in a case which required it, held to

be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the King who held possession of such property, when the issue could be made with the King himself as defendant.

2. Another reason of much greater weight is found in the vast difference in the essential character of the two governments as regards the source and the depositaries of power. Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government.

It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Under our system the <u>people</u>, who are there called <u>subjects</u>, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of monarch. The citizen here

> knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Id. at 208-09 (alterations in original); see also Langford v. United States, 101 U.S. 341, 342-43 (1879) (unanimously rejecting the "maxim of English constitutional law that the king can do no wrong" because it does not "have any place in our system of government," where "[w]e have no king" and where it is obvious that "wrong may be done by the governing power"). Accordingly, the Lee Court interpreted the doctrine of sovereign immunity formalistically, barring suit directly against the government but allowing the plaintiffs to proceed with their ejectment action against the government officers despite the federal government's claim of ownership to the land.

As these cases, together with the earlier cases allowing for direct suit against government officials, demonstrate, sovereign immunity was incorporated into American common law in the nineteenth century primarily as a procedural mechanism regulating the ways in which injured parties could obtain relief rather than as a substantive bar to recovery in the ordinary case. Indeed, well into the twentieth century, "[for tortious or otherwise wrongful action by a government official, in violation of or not authorized by

law, . . . officer suits—for mandamus, for ejectment, or other common law remedies—could serve as moderately effective vehicles for contesting claims of right as between governments and private individuals." Jackson, supra, at 554.

Although these procedural work-arounds reduced the need for federal courts to explore the contours of sovereign immunity doctrine by providing some avenues for recovery, by the late nineteenth century, the Supreme Court recognized that the "general doctrine" of federal sovereign immunity, which had first appeared in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), had "been repeatedly asserted" until it came to be "treated as an established doctrine" by the Court. Lee, 106 U.S. at 207. As the Lee Court observed, this entrenchment in the common law had happened sub silentio: to that point, the Supreme Court had never engaged in a detailed discussion of the doctrine or explained the reasons for it, but rather had implicitly incorporated it into American law. Id. Nevertheless, by the end of the Civil War, the Supreme Court, while narrowly construing the doctrine, invariably adhered to the principle that the federal government could not formally be sued without its consent.

b. Contemporary Sovereign Immunity Practice

Despite these murky beginnings, it is today well established that the United States enjoys the benefit of sovereign immunity and cannot be sued absent a waiver of this immunity. Pornomo v. United States,

814 F.3d 681, 687 (4th Cir. 2016).[6] With respect to torts committed by federal government actors, Congress has "provid[ed] a limited waiver of sovereign immunity for injury or loss caused by the negligent or wrongful act of a Government employee acting within the scope of his or her employment" through the FTCA, which "renders the United States liable for such tort claims in the same manner and to the same extent as a private individual under like circumstances." Id. (internal quotation marks and citations omitted). At the same time, Congress has placed two relevant limitations on the ability of injured parties to recover under the FTCA. First, Congress has carved out multiple exceptions to its waiver of immunity, see 28 U.S.C. § 2680, including, as previously discussed, any claim "arising in a foreign country," id. § 2680(k).[7] Second, the Westfall Act provides that the FTCA's remedies against the government itself are "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." Id. § 2679(b)(1). Under this provision, if an injured party attempts to bring a tort suit directly against the government officer who caused the harm and the officer was acting within the scope of his employment at the time, the United States is substituted as a defendant, id. § 2679(d), and enjoys all of the privileges of sovereign immunity. Accordingly, for torts committed by government employees, a direct suit against the wrongdoer is no longer available and, when the tort claim falls within an exception delineated in the FTCA, a suit directly against the government is ordinarily blocked by sovereign immunity. As a result, in the realm of torts committed by govern-

[6] The government argues that any government waiver of immunity must be "express." U.S.' Mem. of Law in Supp. of its Mot. to Dismiss [Dkt. No. 697] ("Gov't MTD Mem.") 3; see also Notice of Suppl. Authority Regarding the U.S.' Pending Mot. to Dismiss [Dkt. No. 1166]. Although the Fourth Circuit and the Supreme Court have used language suggesting that any sovereign immunity waiver must be explicit and statutory, see, e.g., Lane v. Pena, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . ."); Robinson v. U.S. Dep't of Educ., No. 18-1822, 2019 WL 1051585, at *2 (4th Cir. Mar. 6, 2019) ("Sovereign immunity, in short, can only be waived by statutory text that is unambiguous and unequivocal."); Pornomo, 814 F.3d at 687 ("As a sovereign, the United States is immune from all suits against it absent an express waiver of its immunity." (citation omitted)), both contemporary and historical practice, including many Supreme Court decisions, confirm that no such categorical rule exists. For example, the Supreme Court has held that time-bar limitations on waivers of sovereign immunity may be subject to equitable tolling even in the absence of affirmative congressional authority indicating an intent to allow such tolling. See United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1630-33 (2015). In addition, the Court has suggested that in some circumstances, the doctrine of estoppel may support suits against the government even in the absence of an explicit waiver of sovereign immunity. Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 422-23 (1990). Similarly, the Court has indicated that sovereign immunity would not always bar an independent action brought under Fed. R. Civ. P. 60(b) in the same court in which the government had previously subjected itself to suit, which is an interpretation of immunity relying on the government's ability to waive its immunity through litigation conduct. United States v. Beggerly, 524 U.S. 38, 42-48 (1998). This decision accords with the settled rule in a variety of other contexts that governments may impliedly waive sovereign immunity. See, e.g., 28 U.S.C. § 1605(a)(1) (stating that a foreign state may waive its immunity "by implication"); Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 616 (2002) (holding that the act of removing a lawsuit against a

ment agents, sovereign immunity has in many situations evolved into a substantive bar to relief, rather than merely a procedural device regulating how the injured party may recover.

It was not inevitable that sovereign immunity would develop in this way. Indeed, in many other

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state to federal court operates as a waiver of state sovereign immunity); United States v. Eckford, 73 U.S. (6 Wall.) 484, 491 (1868) (holding that when the government brings suit against a defendant, the defendant may permissibly plead a counterclaim that acts as an offset against the government's claim even absent a statutory waiver of sovereign immunity as to the counterclaim); Intl Indus. Park, Inc. v. United States, 102 Fed. Cl. 111, 113-14 (2011) (holding that the Army Corps of Engineers waived sovereign immunity with respect to a fee award by entering into a contract that included a fee-shifting provision). There is also a long history in American jurisprudence of "U.S. courts rel[ying] on the doctrine of implied waiver to find jurisdiction over trading corporations owned or controlled by a foreign government." Adam C. Belsky et al., Comment, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 Calif. L. Rev. 365, 395-96 (1989); see also Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907-08 (1824) (recognizing that a state can waive immunity by conduct, such as becoming a corporator in a corporation, because "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen"). Accordingly, although sovereign immunity waivers are often effected through statute, history and caselaw confirm that the government may also waive its immunity impliedly through its conduct.

[7] Because federal sovereign immunity is a creature of federal common law rather than any statute or the Constitution, the FTCA does not affirmatively assert sovereign immunity with respect to any of the exceptions in § 2680. Instead, the FTCA provides that the "provisions of this chapter" that waive sovereign immunity "shall not apply" to such claims. 28 U.S.C. § 2680.

countries whose legal systems evolved from English common law, sovereign immunity is no longer a bar to suing the government in tort. For example, in the United Kingdom, the Crown Proceedings Act establishes that "the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject" in respect of, among other things, "torts committed by its servants or agents." Crown Proceedings Act 1947, 10 & 11 Geo. 6 c. 44, § 2(I); see also Crown Proceedings Act 1950, s 6 (N.Z.) (establishing the same rule for New Zealand). Similarly, in Canada, the "Crown is liable for the damages for which, if it were a person, it would be liable" for "a tort committed by a servant of the Crown" or "a breach of duty attaching to the ownership, occupation, possession or control of property." Crown Liability and Proceedings Act, R.S.C. 1985 c. c-50, s. 3. In Australia, government liability is even broader, as the Australian Constitution gives Parliament the power to "make laws conferring rights to proceed against the Commonwealth," Australian Constitution s 78, and the Judiciary Act of 1903 provides that any "person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth" in the High Court or various state or territorial courts, Judiciary Act 1903 (Cth) s 56. Perhaps most relevant to the United States given the debates described above about the application of common law sovereign immunity to a republican government, the Irish Supreme Court has held that sovereign immunity did not survive the creation of the Irish Free State because "it is the People who are paramount and not the State" and this system is "inconsistent with any suggestion that the State is sovereign internally."

Byrne v. Ireland [1972] IR 241, 295 (opinion of Budd, J.); see also id. at 266 (opinion of Walsh, J.) ("The fact that this English theory of sovereign immunity, originally personal to the King and with its roots deep in feudalism, came to be applied in the United States where feudalism had never been known has been described as one of the mysteries of legal evolution. It appears to have been taken for granted by the American courts in the early years of the United States—though not without some question . . . .").[8]

Given the experiences of other countries, as well as the way in which the doctrine of sovereign immunity was adopted into federal common law, it is not surprising that there is a long history of criticism of the notion that the federal government should be immune from suit. As early as 1953, academics were attacking "the very bases of this unwanted and unjust concept," Pugh, supra, at 476, and a decade later, professor Louis Jaffe succinctly described the basis of academic and judicial unease with the way in which sovereign immunity had developed into a bar to recovery:

> The King cannot be sued without his consent. But at least in England this has not meant that the subject was without remedy. . . .
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> By a magnificent irony, this body of doctrine and practice, at least in form so favorable to the subject, lost one-half of its efficacy when

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[8] As Justice Walsh observed in Byrne, this move away from sovereign immunity with respect to tort claims is not limited to countries whose legal systems are rooted in English common law. For example, the law in both France and Germany had developed by 1972 to the point where the state was liable for the tortious acts of its employees. [1972] IR at 267-68 (opinion of Walsh, J.).

> translated into our state and federal systems. Because the King had been abolished, the courts concluded that where in the past the procedure had been by petition of right there was now no one authorized to consent to suit!

Jaffe, supra, at 1-2; see generally Edwin M. Borchard, Government Liability in Tort, 34 Yale L.J. 1, 4-5 (1924) (arguing that the basis of sovereign immunity is the location of absolute sovereignty in the king's person but that the doctrine makes little sense in a country where "sovereignty resides in the American electorate or the people" and that this problem is "heightened by the fact that whereas in England, to prevent the jurisdictional immunity resulting in too gross an injustice, the petition of right, whose origin has been traced back to the thirteenth century, was devised as a substitute for a formal action against the Crown, in America no substitute except an appeal to the generosity of the legislature has in most jurisdictions been afforded" (footnote omitted)); Erwin Chemerinsky, Against Sovereign Immunity, 53 Stan. L. Rev. 1201, 1201 (2001) ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law."). This criticism of the doctrine has also made its way into the judiciary. Not only do the Supreme Court and other courts have a long history of expressing discomfort with the prospect of wielding sovereign immunity as a substantive shield to recovery, as discussed above, but at least one circuit judge has recently argued in favor of reconsidering the principle of sovereign immunity altogether:

> [T]he underpinning for this outcome is an anachronistic judicially invented legal theory that has no validity or place in American

law—in this case, sovereign immunity. Two hundred and thirty-five years after we rid ourselves of King George III and his despotic ascendancy over colonial America, we cling to a doctrine that was originally based on the Medieval notion that "the King can do no wrong." This maxim was blindly accepted into American law under the assumption that it was incorporated as part of the common law in existence when our Nation separated from England. However, this assumption does not withstand historical scrutiny. Furthermore, the present case is the quintessential example of the fact that at times the government can, and does, do wrong.

More importantly, the doctrine of sovereign immunity cannot be sustained in the face of our constitutional structure. Although its language is far from specific in many parts, the Constitution nevertheless contains nothing, specific or implied, adopting the absolutist princip[le] upon which sovereign immunity rests. Furthermore, the record of the debates preceding the adoption of the Constitution are bare of any language or asseveration that might serve as a basis for support of this monarchist anachronism. In fact, the establishment in this country of a republican form of government, in which sovereignty does not repose on any single individual or institution, made it clear that neither the government nor any part thereof could be considered as being in the same infallible position as the English

> king had been, and thus immune from responsibility for harm that it caused its citizens.

Donahue v. United States, 660 F.3d 523, 526 (1st Cir. 2011) (en banc) (Torruella, J., concerning the denial of en banc review) (emphasis in original) (citations omitted).[9]

Although this Court remains mindful of the binding nature of the determinations by the Supreme Court and the Fourth Circuit that the federal government may not be sued in tort without its consent, the deeper understanding of the history and development of sovereign immunity doctrine, as well as the contemporary practice in other countries and the academic and judicial criticism of the path the United States has taken, contextualizes the question presented by the government's motion to dismiss CACI's Third-Party Complaint.

2. Jus Cogens Norms

a. Development of Jus Cogens Norms

Jus cogens norms are defined as those "peremptory norms" that "are nonderogable and enjoy the highest status within international law." Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929,

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[9] The First Circuit denied en banc review and upheld the decision that it did not have jurisdiction to hear a lawsuit for damages under the FTCA because the plaintiffs did not timely file an administrative notice of their claims. Id. at 524 (majority opinion). The plaintiffs, the estates and heirs of two men killed on the order of notorious Boston mobster Whitey Bulger, had sued the United States under the FTCA "for leaking confidential information to Bulger and enabling his reign of terror." Donahue v. United States, 634 F.3d 615, 616 (1st Cir. 2011).

940 (D.C. Cir. 1988); see also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention")[10] (defining a jus cogens norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"). Such norms come first from "customary international law," which is a body of law that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Comm. of U.S. Citizens, 859 F.2d at 940 (quoting Restatement (Third) of Foreign Relations Law § 102(2) (Am. Law Inst. 1987)). Once a necessary number of states determine that a particular rule should have the force of international law, that rule is incorporated into customary international law, which is therefore "continually evolving." Id. After a norm has been incorporated into customary international law, it may become a jus cogens, or peremptory, norm if there is "a further recognition by the international community as a whole that this is a norm from which no derogation is permitted." Id. (alterations, internal quotation marks, and citation omitted). Once a norm has achieved the status of jus cogens, it assumes a place at the top of the hierarchy of international norms, such that no state is permitted to derogate from the

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[10] Although the Vienna Convention has not been ratified by the United States, the "United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." Vienna Convention on the Law of Treaties, U.S. Dep't of State, https://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Mar. 11, 2019).

norm and any treaty or other agreement is void if it conflicts with the norm. See Vienna Convention art. 53; Comm. of U.S. Citizens, 859 F.2d at 940.

The development of the concept of jus cogens norms has proceeded as the "status of individuals under international law has undergone a fundamental change" since World War II, such that "individuals are now said to possess substantive international rights vis-à-vis states." Belsky et al., supra, at 393. This change has corresponded with a shift in the emphasis of international law from "the formal structure of the relationships between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States." Id. at 392-93 (quoting Wilfred Jenks, The Common Law of Mankind 17 (1958)). As a result, the "irreducible element" of international law has become "the sovereignty of the individual, not the sovereignty of states." Id. at 393.

Against this backdrop, jus cogens norms have developed as an expression of the international community's recognition that all states are obligated, in their capacity as states, to respect certain fundamental rights of individuals. Although the exact content of the set of jus cogens norms is debatable, it is clear that certain "fundamental human rights law[s]," such as those that "prohibit[ ] genocide, slavery, murder, torture," and similarly universally condemned practices, have achieved the status of jus cogens. Comm. of U.S. Citizens, 859 F.2d at 941. In particular, "[t]orture is widely recognized as contravening jus cogens," and [a]ll major human rights agreements and instruments

contain a prohibition against torture" that "is non-derogable." Karen Parker & Lyn Beth Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings Int'l & Comp. L. Rev. 411, 437-38 (1989).

b. Jus Cogens Norms and Foreign Sovereign Immunity Law

Although there is no American case law exploring the interplay between violations of jus cogens norms and federal sovereign immunity, the problem of reconciling the peremptory status of jus cogens norms with assertions of immunity from suit has repeatedly vexed foreign, international, and domestic courts in the context of foreign sovereign immunity—that is, the ability of one state to claim immunity from being sued in the courts of another state.

The current position of customary international law on this issue was described in a case in 2012, in which a divided International Court of Justice held that it was a violation of international law for Italian courts to refuse to extend state immunity to Germany with respect to claims brought by Italian citizens for alleged jus cogens violations during World War II. Jurisdictional Immunities of the State (Ger. v. It, Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 95 (Feb. 3). Although the court recognized that jus cogens norms preempt any contradictory substantive rules, it held that "the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status," which meant that the customary international rule that states generally enjoy immunity from being sued in the courts of an-

other state prohibited Italy from exercising jurisdiction over a nonconsenting Germany, notwithstanding the jus cogens nature of the norms at issue. Id.

This International Court of Justice decision is generally in accord with other international law decisions on the subject. For example, in 2001, the European Court of Human Rights confronted a case in which a dual British and Kuwaiti national alleged that he was tortured by Kuwaiti officials in Kuwait and attempted to sue Kuwait and various Kuwaiti officials in the British courts. Al-Adsani v. U.K., 2001-XI Eur. Ct. H.R. 79, ¶¶ 9-16. The British courts found that the State Immunity Act of 1978, which governs the exercise of jurisdiction over foreign sovereigns in British courts, did not permit such a suit, id. ¶ 18, and the European Court of Human Rights upheld that decision, ruling that the United Kingdom did not violate international law by declining to exercise jurisdiction over Kuwait to allow for the redress of the jus cogens violations, id. ¶ 66. In particular, the court did not "find it established that there is yet acceptance in international law of the proposition" that one state is not entitled to claim sovereign immunity in the courts of another state "for damages for alleged torture committed outside the forum" state. Id. ¶ 66. Similarly, a Canadian court has held that the plain language of the State Immunity Act, which governs grants of sovereign immunity to foreign states sued in Canadian courts, does not allow for a foreign state to be sued for torture that allegedly occurred in that foreign state and that international law did not compel the court to exercise jurisdiction despite the plain language of the act. Bouzari v. Iran, [2002] O.J. No. 1624, para. 69

(Can. Ont. Sup. Ct. J.). In so holding, the court interpreted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 ("Convention Against Torture"), to require states to "provide a remedy for torture committed within their jurisdiction" but not to "require a state to provide a civil remedy for acts of torture by a foreign state outside the forum." Id. paras. 51, 54. In addition, the court conducted a survey of international and foreign court decisions and determined that the majority of those decisions held that "to promote comity and good relations between states," a state should be granted immunity from civil suit in the courts of another state, even where torture or other jus cogens violations are considered. Id. para. 69. Accordingly, the court held that the plaintiff could not bring suit in Canadian courts against a foreign state for torture that occurred outside of Canada.

Similarly, American courts have generally refused to interpret the FSIA to waive sovereign immunity in American courts for all jus cogens violations committed by a foreign state. In 1992, the Ninth Circuit held that former Argentine residents could not pursue a lawsuit against Argentina to seek redress for torture and expropriation of property because the FSIA explicitly grants immunity to foreign sovereigns in all cases that do not come within one of the specifically enumerated exceptions, 28 U.S.C. § 1604, and violations of jus cogens norms are not one of the exceptions. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 704, 718-19 (9th Cir. 1992).

Following this logic, a divided panel of the D.C. Circuit held two years later that a Holocaust survivor

could not sue Germany in an American court "to recover money damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps." Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994). The court specifically examined whether the case fell into the "waiver exception" in the FSIA, which provides that there is no sovereign immunity where "the foreign state has waived its immunity either explicitly or by implication." Id. at 1173 (quoting 28 U.S.C. § 1605(a)(1)). The court rejected the argument "that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating jus cogens norms of the law of nations" because a "foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign," finding that the legislative history of the implied waiver provision indicated that any such waiver must be intentional, such as by filing a responsive pleading without raising an immunity defense or agreeing to a choice of law provision. Id. at 1174; see also Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1155-56 (7th Cir. 2001) (holding that Congress did not intend for the FSIA to create an immunity exception for all jus cogens violations); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243-44 (2d Cir. 1996) (holding that the violation of a jus cogens norm did not trigger the implied waiver provision because the examples of implied waivers in the legislative history of the FSIA all involve litigation-adjacent conduct, which the court deemed to be "persuasive evidence that Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions in relation to the conduct of litigation").

Accordingly, in both the international and domestic contexts, there is general, though not unanimous, agreement that a state may not be sued in the courts of a foreign state for conduct, including jus cogens violations, that occurred outside the forum state. Such a rule not only promotes comity and international respect among sovereigns, but it also avoids the problem of global forum-shopping that would accompany any regime of truly universal jurisdiction. That being said, at least some of the foreign cases include an implicit understanding that although sovereign immunity might defeat the exercise of jurisdiction by a state with no connection to the underlying conduct, it may not appropriately bar relief in the courts of a state with a jurisdictional nexus to the jus cogens violation.

3. Jus Cogens and Domestic Sovereign Immunity

With this background in mind, it is now appropriate to address the essential question presented by the United States' Motion to Dismiss, which is whether the federal government retains sovereign immunity that protects it from being sued in an American court for alleged jus cogens violations committed by Americans. For the reasons that follow, this Court concludes that the United States does not retain such immunity.

a. Rights and Remedies

Jus cogens norms not only carry with them an obligation on the part of states to respect the norms but also confer an unquestionable right on each individual to be free from states violating those norms. This right, which is created by international law, is binding

on the federal government and enforceable in the federal courts, and the basic axiom that where there is a right, there must be a remedy leads to the conclusion that the government has waived its sovereign immunity with respect to alleged jus cogens violations.

The basic principle that international law is incorporated into American law and is binding on the federal government and enforceable by American courts is as old as the Republic itself. In 1796, the Supreme Court "held that the United States had been bound to receive the law of nations upon declaring its independence," which meant that "the United States was required" to recognize international norms when those norms were recognized by all other nations. David F. Klein, Comment, A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts, 13 Yale J. Int'l L. 332, 338 (1988) (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)); see also Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 Va. L. Rev. 1071, 1084 (1985) ("The early American leadership believed that the attainment of independence obligated the United States to receive and to follow the law of nations."). Indeed, at the time of the Founding, American law was expected to conform to the dictates of international law. "Early federal court cases also suggested that laws or executive actions in violation of international law were void," Lobel, supra, at 1087, and at least one state court permitted the indictment of a defendant for a violation of the law of nations, finding that law to be, "in its full extent, . . . part of the law of th[e] State," Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. Ct.

Oyer & Terminer 1784). In a similar vein, the Supreme Court held in 1804 that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

In the last two centuries, the principle that "federal common law incorporates international law" has become a "settled proposition." Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995). Over that time, "Supreme Court decisions, executive statements, and scholarly commentary have . . . considered customary international law to be the law of the land." Lobel, supra, at 1072; see also The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."). Moreover, because the "Constitution does not freeze international law to its state of development [as of] 1789," as international law has evolved to incorporate jus cogens norms, so too has federal common law. Belsky et al., supra, at 398; see also Sosa, 542 U.S. at 724 (holding that the ATS is a jurisdictional statute "creating no new causes of action" but that the common law "provide[s] a cause of action for . . . certain torts in violation of the law of nations"). Accordingly, there is today a federal common law right derived from international law that entitles individuals not to be the victims of jus cogens violations.

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. Indeed, the "ancient legal maxim" ubi jus, ibi remedium—"[w]here there is a right, there should be a remedy"—is as "basic and universally embraced" today as it was two hundred years ago. Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1485-86 (1987). As Chief Justice Marshall famously stated in Marbury v. Madison, "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) at 163. In fact, not only did the early Supreme Court embrace this principle, but it was also endorsed by many state constitutions and in The Federalist Papers. See Amar, supra, at 1485-86. Since that time, the principle has been incorporated into the basic fabric of American law. Accordingly, by joining the community of nations and accepting the law of nations, the federal government has impliedly waived any right to claim sovereign immunity with respect to

jus cogens violations when sued for such violations in an American court.[11]

b. The International Enforcement Structure

In addition to this common law remedial imperative, the international enforcement structure mandated by various multilateral agreements to which the United States is a party and envisioned by foreign and international courts requires the United States to submit to suit in its own courts for certain jus cogens violations, especially those related to torture. By joining these agreements and participating in the international community, the United States has therefore impliedly waived its sovereign immunity with respect to such claims.

The Convention Against Torture, which the United States ratified in 1994, requires each state to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Convention

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[11] This does not compel the conclusion that federal sovereign immunity does not bar claims of violations of domestic law. The rights created by such laws, which are enacted by Congress against the backdrop of sovereign immunity, may be limited so as not to create a substantive right enforceable against the federal government. Cf. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (explaining that sovereign immunity derives from the "ground that there can be no legal right as against the authority that makes the law on which the right depends"). With respect to violations of jus cogens norms, the substantive right has been created by international law and incorporated into federal common law. Accordingly, the right is not so limited and is enforceable against the federal government.

Against Torture art. 14(1). Indeed, "[a]lmost all international human rights declarations and treaties, including those that are binding on the United States, impose an obligation on the State to provide compensation for violations of rights that occur." Denise Gilman, Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System, 95 Geo. L.J. 591, 624 (2007); see also Velasquez Rodriguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988) ("The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.")

In response to inquiries from the United Nations Committee Against Torture about whether the United States has taken appropriate steps to comply with its obligation "to ensure that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture," the United States has explained that "U.S. law provides various avenues for seeking redress in cases of torture" and that, "as to torture specifically, the Torture Victim Protection Act . . . created a cause of action in federal courts against" foreign officials who commit torture. United Nations Committee Against Torture, Convention Against Torture, Periodic Report of the United States of America (Third, Fourth, and Fifth Reports) (Aug. 12, 2013) ¶ 147, at 53. Although with respect to American officials and the federal government, neither of whom may be sued under the Torture Victim Protection Act,

the government has explained to the Committee Against Torture that claims may be resolved through the military, id., it has not provided any information about how this resolution structure complies with its obligations under the Convention Against Torture. Moreover, in response to a request asking "whether the United States would consider authorizing jurisdiction by the Committee to receive and adjudicate complaints by individuals claiming to have suffered human rights violations committed by the United States," the government refused to consent to such jurisdiction on the basis that the domestic legal system provides an adequate remedy for such individuals. See Gilman, supra, at 602. Because the Westfall Act provides that a suit against the government is the exclusive remedy for torts committed by government officers in the course of their government employment, victims who were tortured by American government or military personnel are unable to sue the torturers directly. See Ameur v. Gates, 950 F. Supp. 2d 905, 91418 (E.D. Va. 2013) (holding that the United States had properly substituted itself as a defendant under the Westfall Act where the plaintiff, who alleged various jus cogens violations including torture, had named individual government officers as defendants), aff'd, 759 F.3d 317 (4th Cir. 2014). As such, allowing the United States to assert sovereign immunity as a defense to such claims would ensure that the domestic legal system does not provide an adequate remedy to victims of torture. Cf. Gilman, supra, at 634 (explaining that the European Court of Human Rights has held that blanket immunities amount "to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim" and that

courts must examine claims "on the merits in an adversarial proceeding that would require the [government actors] to `account for their actions and omissions' rather than to dismiss those claims on immunity grounds" (quoting Osman v. United Kingdom (No. 95), 1998-VIII Eur. Ct. H.R. 3124, 317-71)). Accordingly, by ratifying the Convention Against Torture and assuring the Committee Against Torture that an adequate civil remedy exists for such victims, the United States has impliedly waived its sovereign immunity with respect to such claims.

This conclusion is further reinforced by the international prosecution structure envisioned by these agreements and effected by international and foreign courts. Article 5 of the Convention Against Torture provides that each state party "shall take such measures as may be necessary to establish its [criminal] jurisdiction over" torture-related offenses where the offenses occur within the territory of the state, where the offender is a state national, or "where the alleged offender is present in any territory under its jurisdiction and it does not extradite him." Convention Against Torture art. 5(1)-(2). This provision establishes a structure whereby each state party to the Convention is required to assume criminal jurisdiction over all cases with a strong jurisdictional nexus to the state—where the offender is a national or the offense occurred within the state—and is also required either to extradite or prosecute offenders who are not nationals and who did not engage in the criminal conduct within the state but who are found in the state's territory. Read together, these rules establish a logical structure for criminal prosecution of those engaged in torture: when possible, prosecution should

take place in a state with a strong jurisdictional interest in the case, but when that is not possible, prosecution may take place in any state where the offender is found or to which the offender can be extradited.

Although not specifically required by the Convention Against Torture, courts have effected a similar remedial structure for civil torture claims against states. By refusing to exercise jurisdiction over foreign states where the conduct in question occurred outside the forum, courts have determined that civil suits should, like criminal prosecutions, proceed in the courts that have the strongest jurisdictional nexus to the conduct. Typically, those courts would be in the state that allegedly carried out the torture or where the torture allegedly occurred. Unlike in the case of criminal prosecutions, there is no universal jurisdiction safety valve where such a court is unable or unwilling to exercise jurisdiction. Accordingly, to effectuate the global remedial structure apparently envisioned by the Convention Against Torture, it is necessary for those courts with a nexus to alleged torture to exercise jurisdiction over victims' civil claims. In this case, the United States has decreed that it and its personnel are not subject to the jurisdiction of Iraqi courts for conduct arising out of the occupation of Iraq, see Memorandum Opinion [Dkt. No. 678] 51 (explaining that Coalition Provisional Authority Order 17 directs that injured parties, such as plaintiffs, may not bring claims arising from coalition activities in Iraqi courts because "occupying powers . . . are not subject to the laws or jurisdiction of the occupied territory" (citation omitted)), which leaves American courts as the only courts with a jurisdictional nexus to such

claims. Therefore, to effectuate the international enforcement structure envisioned by the Convention Against Torture and affirmed by international and foreign courts, it is necessary for American courts to exercise jurisdiction over civil claims arising out of alleged torture by American personnel in Iraq.[12] Accordingly, by becoming a party to the Convention Against Torture, the government has impliedly waived any sovereign immunity defense that would prevent such enforcement.

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[12] This structure for civil enforcement, including waiver of sovereign immunity in a state's own courts, also dovetails with Congress's original intent in passing the ATS. This statute was passed after "substantial foreign-relations problems" were caused by the "inability of the central government to ensure adequate remedies for foreign citizens" under the Articles of Confederation. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1396 (2018). For example, "[i]n 1784, the French Minister lodged a protest with the Continental Congress after a French adventurer, the Chevalier de Longchamps, assaulted the Secretary of the French Legation in Philadelphia." Id. Similarly, "[a] few years later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants." Id. The Articles of Confederation did not provide a national forum to resolve these disputes, which caused tension with foreign governments and led to a fear that the failure to provide such a forum "might cause another nation to hold the United States responsible for an injury to a foreign citizen." Id. at 1397. In the case before this Court, the government has already disclaimed Iraqi jurisdiction over the American personnel who allegedly committed the jus cogens violations, despite their occurrence in Iraq against Iraqi citizens. Barring any civil suit in American federal court against the government officials involved or the government itself may result in Iraq or another government asserting jurisdiction with respect to the claims, thereby frustrating the original purpose of the ATS.

c. Hierarchy of Norms

The place of jus cogens norms at the top of the hierarchy of international law norms and their status as obligatory and overriding principles that invalidate any contradictory state acts, as well as their development from the ashes of World War II, provide an additional reason that the United States does not have sovereign immunity here.

Jus cogens norms "enjoy the highest status within international law," and their supremacy "extends over all rules of international law." Siderman de Blake, 965 F.2d at 715-16 (internal quotation marks and citation omitted). Accordingly, these norms "prevail over and invalidate international agreements and other rules of international law in conflict with them." Id. (internal quotation marks and citation omitted). As one specific example, it is unquestionable that jus cogens norms "limit the scope of treaties, such that a treaty concluded in violation of a jus cogens norm [i]s null and void." Belsky et al., supra, at 390. Because the concept that a sovereign may claim immunity from suit "itself is a principle of international law," Siderman de Blake, 965 F.2d at 718, the peremptory status of jus cogens norms means that when sovereign immunity and jus cogens norms conflict, the sovereign immunity principle must give way. See id. (concluding that as "a matter of international law, [this] argument carries much force"). In this case, the two norms conflict because the jus cogens norms in question inherently include not only a rule prohibiting states from torturing individuals but also necessarily a rule requiring an effective means to redress that violation. Without such a remedial principle, the prohibitory

norm itself would be toothless and, given the recognized importance of ensuring adherence to jus cogens norms, any interpretation defanging the norm would impermissibly "undo what [the international community] has done" in implementing the norm. King v. Burwell, 135 S. Ct. 2480, 2496 (2015). So interpreted, any jus cogens norm must prevail over and invalidate any principle allowing the assertion of sovereign immunity in response to claims of jus cogens violations.[13]

Moreover, the circumstances surrounding the development of the concept of peremptory norms—ones that can bind all states even without their explicit consent and even with regard to domestic conduct—provide additional force to the conclusion that sovereign immunity must give way in the face of violations of such norms. The concept of such binding norms arose in the wake of World War II and the Nuremberg trials. Before the atrocities committed by Nazi Germany, "a state's treatment of its own citizens was considered immune from the dictates of international law." Princz, 26 F.3d at 1182 (Wald, J., dissenting). The Nuremberg trials, in which German officials were prosecuted for crimes against humanity, including crimes against German citizens, "permanently eroded any notion that the mantle of sovereign immunity

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[13] Indeed, the "very existence of jus cogens limits state sovereignty in the sense that the general will of the international community of states takes precedence over the individual wills of states to order their relation." Belsky et al., supra, at 390 (internal quotation marks and footnote omitted). Accordingly, "the concept that a sovereign is subject to no restraints except those imposed by its own will is inconsistent with the definition of jus cogens as peremptory law," id. at 390-91, and because the United States accepts the existence of jus cogens norms, it must also accept the conclusion that its immunity from suit is not categorical.

could serve to cloak an act that constitutes a 'crime against humanity,' even if that act is confined within the borders of a single sovereign state." Id. These prosecutions "forced the world to acknowledge that, even absent formal expressions of certain international principles in the past, the rule of reason required the conviction of Nazi war criminals" and, more generally, represented an acceptance by the global community of the idea that rules "appealing to normative values, such as human rights principles, do not depend on the will of the governing executive or legislative authority for their legality; they are part of the common law." Klein, supra, at 348, 352. As the International Military Tribunal at Nuremberg explained:

> The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. . . . [T]he very essence of the Charter [of the International Military Tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law. . . .
>
> The provisions of [the Charter of the International Military Tribunal providing that acting pursuant to a superior's order is not a defense

> to criminal liability] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the International Law of war has never been recognized as a defense to such acts of brutality.

International Military Tribunal (Nuremberg), Judgment and Sentences (1946), reprinted in 41 Am. J. Int'l L. 172, 221 (1947). The principle at the heart of the Nuremberg trials, and the concomitant acceptance of the existence of certain peremptory norms, is simple and persuasive: there are some acts that are, as a matter of morality and reason, fundamentally wrong such that no state may authorize their commission nor immunize those involved in such acts from liability. This principle compels the conclusion that just as a government official is unable to cloak himself in the mantle of sovereign immunity to avoid prosecution when he commits a jus cogens violation, so too is a government unable to immunize itself from civil liability for such violations. And indeed, not only has the United States accepted the principles advanced at Nuremberg, it actually

> led the way in these developments and must therefore accept domestically these legal limitations on national sovereignty. As Justice Jackson, the United States prosecutor at Nuremberg, stated, "[i]f certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." A complete deference by United States courts to executive orders or

> congressional acts irrespective of international law implications would be simply inconsistent with the spirit and rationale of Nuremberg.

Lobel, supra, at 1074 (alteration in original) (footnotes omitted). Accordingly, both by participating in the Nuremberg trials and the parallel development of peremptory norms of international law and by continuing to recognize the existence of such peremptory norms, the United States has waived its sovereign immunity for any claims arising from the violations of such norms.

d. Consent Through Membership in the Community of Nations

The United States has also consented to suit with respect to jus cogens violations by holding itself out as a member of the international community because the respect and enforcement of jus cogens norms are fundamental to the existence of a functioning community of nations. Jus cogens norms have been developed not only to safeguard the rights of individuals but also to provide an obligatory framework for ordering the relations of states because, as in any community, the "absolute protection" of "certain norms and values" is necessary for the "public order of the international community." Belsky et al., supra, at 387. Indeed, at least one "influential modern definition of jus cogens," which was given by a delegate to the United Nations Conference on the Law of Treaties, frames jus cogens norms in precisely these terms: "The rules of jus cogens [are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence in the international

community." Parker & Neylon, supra, at 415 (alterations in original) (citation omitted). A similar "emphasis on the importance of jus cogens in maintaining the existence of international law" has been echoed by a variety of other authorities, including foreign court decisions. Id. at 415-16; see also Princz, 26 F.3d at 1181 (Wald, J., dissenting) (explaining that the "principle of nonderogable peremptory norms evolved due to the perception that conformance to certain fundamental principles by all states is absolutely essential to the survival of the international community" and that if "the conscience of the international community [were] to permit derogation from these norms, ordered society as we know it would cease"); Stefan A. Riesenfeld, Editorial Comment, Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court, 60 Am. J. Int'l L. 511, 513 (1966) ("Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community." (quoting the German Supreme Court)).

This function of jus cogens norms as the building blocks of an international legal order comes into considerable tension with the notion of sovereign immunity. In recognition of this inherent discord between the rule of law and unrestrained sovereignty, at least some commentators have described the introduction

of jus cogens norms as "part of an ongoing struggle to move beyond unrestricted state sovereignty (that is, to establish an international rule of law)." Mary Ellen Turpel & Philippe Sands, Peremptory International Law and Sovereignty: Some Questions, 3 Conn. J. Int'l L. 364, 365 (1988). By continuing to engage with the international community, the United States has expressed a wish "to preserve the international order," which inherently involves "abdicat[ing] any 'right' to ignore or violate [jus cogens] norms." Princz, 26 F.3d at 1181 (Wald, J., dissenting); see also id. at 1184 ("Adhering to such principles, now termed jus cogens norms, is an obligation erga omnes—an obligation of the state toward the international community as a whole—and by abdicating its responsibility to act in accordance with such norms, Germany consciously waived its right to any and all sovereign immunity." (footnote and citation omitted)). Accordingly, by holding itself out as a member of the international community, the United States has impliedly waived its sovereign immunity for jus cogens violations because the continued deployment of such immunity would be fundamentally inconsistent with any desire to maintain an international legal order. Cf. Libyan Arab Jamahiriya, 101 F.3d at 242 & n.1 (concluding that the argument that "a state impliedly waives its immunity for jus cogens violations by holding itself out as a state within the community of nations," which is "premised on the idea that because observance of jus cogens is so universally recognized as vital to the functioning of a community of nations, every nation impliedly waives its traditional sovereign immunity for violations of such fundamental standards by the very act of holding itself out as a state," is "appealing" and has been "persuasively developed").

e. The Character of Sovereign Acts

The United States also may not claim immunity for jus cogens violations because when government agents commit such violations, their actions are not sovereign in nature. Under international law, jus cogens norms are "by definition nonderogable," which means that the "rise of jus cogens norms limits state sovereignty in the sense that the general will of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations." Princz, 26 F.3d at 1182 (Wald, J., dissenting) (internal quotation marks and citation omitted). As such, when "a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity" because such an act is fundamentally inconsistent with the obligations of every state. Id. In effect, "[i]nternational human rights law as a whole abrogates traditional notions of state sovereignty: states do not have the sovereign right to violate human rights." Parker & Neylon, supra, at 446; see also Belsky et al., supra, at 401 ("Nonrecognition is based on the principle that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer. . . . Because a state act in violation of a rule of jus cogens is not recognized as a sovereign act, the violating state has no legal right to claim immunity." (internal quotation marks and footnotes omitted)). Any other conclusion would be "senseless," as it would be illogical to argue that "on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio," but a

state may take "national measures authorising or condoning torture or absolving its perpetrators." Prosecutor v. Furundzija, No. IT-95-17/1-T (Dec. 10, 1998), ¶ 155, reprinted in 38 I.L.M. 317, 349; see also id. (concluding that the jus cogens prohibition on torture "serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture"). Therefore, when the United States violates jus cogens norms, it is not acting as a state must, and the violative acts do not have the sovereign character necessary to confer immunity.

This principle has been persuasively applied by at least two district courts in the FSIA context. In Liu v. Republic of China, 642 F. Supp. 297 (N.D. Cal. 1986), the court denied a motion to dismiss under the FSIA's discretionary function exception in a lawsuit where the plaintiffs representative alleged that the plaintiff was killed in California at the direction of Chinese officials. Id. at 305. The court held that "planning and conducting the murder of Henry Liu could not have been a discretionary function as defined by the FSIA" because the "killing of Americans residing in the United States is not a policy option available to foreign countries." Id. In short, China "and its agents simply did not have the discretion to commit the acts alleged." Id. Similarly, in Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980), the court found that the discretionary function exception did not bar a suit against Chile stemming from its alleged participation in the assassination of a Chilean official in Washington, D.C. because "there is no discretion to commit, or to have one's officers or agents commit, an illegal act." Id. at 673. In the words of the court:

"Whatever policy options may exist for a foreign country, it has no `discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law." Id. Although both Liu and Letelier involved the question whether certain violations of international law could constitute discretionary acts that allowed the foreign government to retain sovereign immunity under the statutory scheme of the FSIA, which is a slightly different concern from the question presented in this civil action, the "fundamental premise" underlying both decisions "is that, although political assassination can be viewed as a public act by a state, there is a strong international consensus that such acts are not sovereign acts." Belsky et al., supra, at 400. Accordingly, "the acts, although performed by the government, were not recognized as state acts under national and international law." Id. Similarly, when the United States government commits acts that violate jus cogens norms, it is not acting in a sovereign capacity, which means that it is not entitled to immunity for such acts.

This conclusion is reinforced by the nature of sovereignty in the American system. Since the Founding, Americans have recognized that "indivisible, final, and unlimited authority," i.e., sovereignty, rests in the People, not the government. See Amar, supra, at 1435-37. Accordingly, when speaking of the "government as sovereign," the Founders "mean[t] sovereign in a necessarily limited sense" because "[b]y definition, government's sovereignty was bounded" to "its

sphere of delegated power." See id. at 1437.[14] Therefore, the federal government may only exercise power that has been legitimately delegated to it by the People.

Moreover, at the Founding, even those with expansive views of sovereign immunity recognized that the ability to claim sovereign immunity was bounded by substantive lawmaking power. As Justice Iredell argued in dissent in Chisholm, Georgia's sovereign immunity was "exactly coextensive with her derivative 'sovereign' lawmaking capacity: A state could use its lawmaking power to adopt rules immunizing itself from liability, as long as such immunity frustrated no higher-law restrictions on the state's limited sovereignty." See id. at 1472. Accordingly, by the very nature of limited sovereignty, governments may "choose to exercise their sovereign power by immunizing themselves from rules that apply to private citizens" only when acting "within the scope of their delegated

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[14] Cf. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838-39 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. . . . A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it. . . . As James Madison explained, the House of Representatives derives its powers from the people of America, and the operation of the government on the people in their individual capacities makes it 'a national government,' not merely a federal one." (quoting The Federalist No. 39 (James Madison), at 244, 245 (C. Rossiter ed. 1961))).

authority." Id. at 1490. On the other hand, when republican "governments act ultra vires and transgress the boundaries of their charter," they have no sovereign power to immunize themselves. Id.

Putting these two conclusions together: the federal government may immunize itself from liability for jus cogens violations only if the acts of authorizing or engaging in such violations fall within the sphere of authority that has been legitimately delegated by the People. Under the principles of international law discussed in this section, the People as sovereign are bound by the nonderogability of jus cogens norms, which means that the People may not legitimately delegate to the government the power to engage in jus cogens violations. Accordingly, the federal government, bounded by its status as a limited government of delegated powers, has no sovereign power to immunize itself from liability for such violations.

For these reasons, the United States does not retain sovereign immunity for violations of jus cogens norms of international law. Because Counts 1-3 in the Third-Party Complaint are derivative of plaintiffs' claims that CACI employees conspired with and aided and abetted the federal government in violation of jus cogens norms, CACI's assertion of these counts against the United States is not barred by sovereign immunity, and the government's Motion to Dismiss will be denied as to Counts 1-3.

D. Sovereign Immunity and CACI's Contract Claim

Unlike the claims in Counts 1-3, CACI's contract claim in Count 4 is not derivative of plaintiffs' claims for violations of jus cogens norms. Instead, in Count

4, CACI alleges that the government has breached an implied duty of good faith and fair dealing by refusing to provide discovery in this litigation that CACI believes would have been helpful in defending itself against plaintiffs' claims. Accordingly, sovereign immunity with respect to this claim is not waived by the nature of plaintiffs' allegations because no jus cogens issues are involved in this claim. Instead, CACI argues that the Little Tucker Act functions as a waiver of sovereign immunity for its contract claim. CACI MTD Opp'n 29 (citing 28 U.S.C. § 1346(a)(2)). That Act provides district courts with jurisdiction (concurrent with the United States Court of Federal Claims) over any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. § 1346(a)(2), but it exempts "any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to" the Contracts Dispute Act ("CDA"), id. The CDA covers, among other contracts, "any express or implied contract . . . made by an executive agency for . . . the procurement of services." 41 U.S.C. § 7102(a). The CDA includes certain statutory review procedures, id. §§ 7103-7107, that are "exclusive of jurisdiction in any other forum." United States v. J & E Salvage Co., 55 F.3d 985, 986 (4th Cir. 1995). "Thus, federal district courts lack jurisdiction over government claims against contractors which are subject to the CDA." Id.

CACI argues that its claim is "not necessarily rendered contractual in nature for CDA purposes simply because" its relationship with the United States is "contractual in nature" and that the "essence" of its claim is not a contractual claim that would be subject to the provisions of the CDA, but rather a claim for "recovery of any tort judgment against it." CACI MTD Opp'n 27-29. CACI's argument fails. The Little Tucker Act and the CDA read together put CACI in a double bind. On one hand, if CACI's claim is "founded upon" its contract for services with the federal government, then it is subject to the exclusion in the Little Tucker Act because the underlying contract is "subject to" the CDA. On the other hand, if CACI's claim is not "founded upon" its contract with the federal government, then it never falls within the Little Tucker Act in the first place because § 1346(a)(2) only reaches claims "founded . . . upon any express or implied contract with the United States." Either way, the Little Tucker Act does not provide for jurisdiction.[15]

Although the CDA does not define the type of "claims" it governs, the Federal Acquisition Regulations ("FARs") define a "claim" as "a written demand

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[15] The government also argues that three FTCA exceptions would apply to the breach of contract claim if it were reconceptualized as a tort, rather than a contract, claim, as CACI argues it should be: the exceptions for "[a]ny claim arising out of . . . interference with contract rights," for "[a]ny claim arising out of . . . misrepresentation," and for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government." Gov't MTD Mem. 23-25 (citing 28 U.S.C. § 2680(a), (h)). CACI does not attempt to explain how its breach of contract claim, even if it were classified as a tort claim, would avoid any of these three exclusions.

or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract," 48 C.F.R. § 2.101(b), and courts have generally adopted this definition for purposes of the CDA, see Todd Constr., L.P. v. United States, 656 F.3d 1306, 1311 (Fed. Cir. 2011). This definition, which reaches assertions for any "relief arising under or relating to the contract," is extremely broad, and CACI's claim, which seeks damages for a breach of the implied duty of good faith and fair dealing contained in its contract with the government, easily qualifies as such a claim.

CACI cites a variety of cases in which courts looked at factors such as the type of relief sought by the plaintiff, the basis for the plaintiff's claims, and whether the Court of Federal Claims had any special expertise in the matter to determine whether the plaintiff's claims were "in essence" contract claims subject to the CDA; however, none of the cases cited by CACI involved a breach of contract cause of action. Instead, these cases involved situations where a plaintiff that had a contractual relationship with the federal government attempted to plead around the CDA by recasting its claims as sounding in tort or other areas of law. Accordingly, the courts undertook an examination of the claims to ensure compliance with the principle that "a plaintiff may not avoid the jurisdictional bar of the CDA merely by alleging violations of regulatory or statutory provisions rather than breach of contract." Ingersoll-Rand Co. v. United States, 780 F.2d 74, 77 (D.C. Cir. 1985). In this case, CACI has explicitly pleaded Count 4 as a breach of

contract claim, which means that there is no need for the Court to engage in this analysis of the essence of the claims: the claim arises from and is related to CACI's contract for services with the federal government because the foundation of the claim is a breach of that contract.

Moreover, even if the Court were to consider these other factors, the result would be the same. CACI seeks up to $10,000 in reimbursement for any future tort judgment against it as breach of contract damages and cites no law establishing any duty it contends the government has breached or otherwise establishing the government's liability to CACI. In addition, although CACI's breach of contract claim does not call for a price adjustment or other FAR-dependent analysis that might involve the core competency of the Court of Federal Claims, there is a governmental interest in having a uniform national rule about whether government contracts include an implied duty regulating the government's handling of discovery requests in litigation related to the contractor's activity. This governmental interest is best advanced by the procedures of the CDA and subsequent review by the Court of Federal Claims, not district courts.

Accordingly, CACI's breach of contract claim is undeniably subject to the provisions of the CDA, which means that this Court does not have jurisdiction over it. Accordingly, the United States' Motion to Dismiss will be granted as to Count 4.

III. CACI'S MOTION TO DISMISS

Piggybacking on the United States' motion to dismiss based on sovereign immunity, CACI has moved to dismiss plaintiffs' Third Amended Complaint based

on a claim of "derivative sovereign immunity." Dkt. No. 1149. CACI argues that if sovereign immunity protects the United States from its third-party claims, then it should be protected from plaintiffs' claims because the conduct at issue occurred when it was a government contractor.

Derivative sovereign immunity shields a government contractor from suit when (1) the United States would be immune from suit if the claims had been brought against it, (2) the contractor performed services for the sovereign under a validly awarded contract, and (3) the contractor adhered to the terms of the contract. See Cunningham v. Gen. Dynamics Info. Tech., Inc., 888 F.3d 640, 646-47 (4th Cir.) (citing Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 20-21 (1940)), cert. denied, 139 S. Ct. 417 (2018). Because this Court has ruled that sovereign immunity does not protect the United States from claims for violations of jus cogens norms, the first prong of the derivative sovereign immunity test is not met, and CACI's Motion to Dismiss based on a theory of derivative immunity will be denied.[16]

Even if the Court had concluded that sovereign immunity protected the United States from suit, it is not at all clear that CACI would be extended the same immunity. As plaintiffs argue in their Opposition [Dkt. No. 1172], the Supreme Court has held that derivative immunity is not guaranteed to government contractors and is not awarded to government con-

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[16] Although CACI noticed its Motion for argument on April 5, 2019 [Dkt. No. 1173], no further discussion would change the outcome for the reasons stated above.

tractors who violate the law or the contract. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672-74 (2016). The task orders under which CACI provided interrogators to the United States Army required that CACI employees conduct themselves "[in accordance with] Department of Defense, U.S. Code, and International Regulations." CACI Decl. [Dkt. No. 1154] Ex. 3. To the extent that plaintiffs have alleged that CACI conspired with and aided and abetted military personnel in committing acts of torture, CIDT, and war crimes, CACI would not have acted in accordance with the U.S. Code and international regulations. When a contractor breaches the terms of its contract with the government or violates the law, sovereign immunity will not protect it.

Yearsley, the Supreme Court case from which this doctrine of limited derivative immunity originates, "suggests that the contractor must adhere to the government's instructions to enjoy derivative sovereign immunity; staying within the thematic umbrella of the work that the government authorized is not enough to render the contractor's activities 'the act[s] of the government.'" See In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 345 (4th Cir. 2014) (alteration in original) (quoting Yearsley, 309 U.S. at 22); see also Myers v. United States, 323 F.2d 580, 583 (9th Cir. 1963) (stating that a government contractor is not liable under Yearsley if the work was done under the contract and in conformity with the contract terms but may be liable for damages from acts "over and beyond acts required to be performed by it under the contract" or "acts not in conformity with the terms of the con-

tract"). Regardless, CACI's Motion to Dismiss fails because the United States does not enjoy sovereign immunity for these kinds of claims.

IV. UNITED STATES' MOTION FOR SUMMARY JUDGMENT

In its Motion for Summary Judgment, the United States primarily argues that all claims between CACI and the federal government "arising out of or related to" the two task orders under which CACI placed civilian interrogators at Abu Ghraib were settled in 2007.

The following facts are not disputed. CACI provided interrogators to the United States Army pursuant to Task Orders 35 and 71. U.S.' Mem. of Law in Supp. of its Mot. for Summ. J. [Dkt. No. 1130] ("Gov't SJ Mem.") ¶ 1. These task orders were issued and administered by the United States Department of the Interior ("DOI"). Id. ¶ 2. Some of the interrogators provided by CACI pursuant to these task orders were sent to Abu Ghraib. Id. ¶ 5. In June 2004, several individuals who alleged they were subjected to torture while detained at Abu Ghraib filed a putative class action complaint against CACI's parent company. Id. ¶ 8.[17] In December 2006, while that class action was proceeding in the United States District Court for the District of Columbia, CACI noticed an appeal in a dispute over several task orders, including Task Orders

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[17] See Al Rawi v. Titan Corp., No. 3:04-cv-1143-R-NLS (S.D. Cal. June 9, 2003). This action was transferred to the United States District Court for the District of Columbia and amended in 2006 to name CACI as a defendant. Gov't SJ Mem. ¶ 8 (citing Saleh v. Titan Corp., No. 1:05-cv-01165-JR (D.D.C. Mar. 22, 2006)).

35 and 71. Id. ¶ 10. This appeal was docketed as CBCA No. 546 in the Civilian Board of Contract Appeals ("CBCA"). Id. (citing Exs. 2, 7). In February 2007, CACI agreed to a "full and final settlement of all claims and disputes arising out of" the terminated task orders in exchange for the government's payment of $200,000, which CACI agreed "shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders, including those in CBCA No. 546, including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders." Id. ¶¶ 11-12 (emphasis added) (citing Ex. 2).

A. Standard of Review

Summary judgment is appropriate where the record demonstrates that "there is no genuine dispute as to any material fact and movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the Court must view the record "in the light most favorable to the non-moving party," Dulaney v. Packaging Corp. of Am., 673 F.3d 323, 324 (4th Cir. 2012), "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient" to overcome summary judgment, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); see also Am. Arms Int'l v. Herbert, 563 F.3d 78, 82 (4th Cir. 2009). Rather, a genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. Moreover, "[t]he mere existence of some alleged factual dispute" cannot defeat a

motion for summary judgment. Hooven-Lewis v. Caldera, 249 F.3d 259, 265 (4th Cir. 2001). Instead, the dispute must be both "material" and "genuine," meaning that it must have the potential to "affect the outcome of the suit under the governing law." Id.

B. Settlement Agreement

The United States argues that all of CACI's third-party claims "aris[e] out of and are "related to" Task Orders 35 and 71, Gov't SJ Mem. Ex. 2 ¶ 3, and because CACI and the United States settled all claims and disputes arising out of or related to these task orders, the United States is entitled to judgment as a matter of law. Settlement agreements with the federal government, such as the one at issue here, are governed by federal common law, see Moore v. U.S. Dep't of State, 351 F. Supp. 3d 76, 88 (D.D.C. 2019), of which the Court of Federal Claims and the Federal Circuit are "a rich source," Trout v. Comm'r, 131 T.C. 239, 251 (2008). Where the provisions of a settlement agreement are "clear and unambiguous, they must be given their plain meaning." Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1375 (Fed. Cir. 2004). Broadly worded releases evince "an intent to make an ending of every matter arising under or by virtue of the contract." United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U.S. 118, 128 (1907). The language employed in the 2007 settlement agreement is indeed broad and speaks for itself: the agreement constitutes "full and final" settlement of "all claims and disputes" "arising out of or related to" the task orders. Gov't SJ Mem. Ex. 2 ¶ 3. In addition to stressing the plain meaning of the words in the settlement agreement, the United States further supports its argument by pointing to CACI's description of

plaintiffs' claims as "arising out of CACI PT's performance of its contract," Compl. 57.

CACI responds to this argument by citing Fourth Circuit case law holding that the phrase "arising out of or related to" reaches only "dispute[s] between the parties having a significant relationship to the contract." See Wachovia Bank, Nat'l Ass'n v. Schmidt, 445 F.3d 762, 769 (4th Cir. 2006) (citation omitted). This line of Fourth Circuit case law does not help CACI because it is limited to interpreting the scope of arbitration agreements. See U.S.' Reply Mem. of Law in Further Supp. of its Mot. for Summ. J. [Dkt. No. 1168] 4-5 ("It is no coincidence that CACI refers the Court only to arbitration agreement cases that apply Fourth Circuit precedent. The Fourth Circuit has an unusual line of arbitration cases in which the court injected a significant-relationship test into arbitration agreements that use the 'arising out of or relating to' formulation." (emphasis omitted)). Furthermore, in Wachovia Bank, the Fourth Circuit's most recent case on this issue, the panel acknowledged that it was "constrained to adhere to [its] precedent" but observed that the significant relationship test "appears to be at odds" with the language of the arbitration clause itself and may "be in tension with the Supreme Court's mandate that [courts] apply the ordinary tools of contract interpretation in construing an arbitration agreement." 445 F.3d at 767 n.5.

Even if a significant relationship were required, one clearly exists in this case. The phrase "significant relationship" itself is to be interpreted broadly. See Am. Recovery Corm v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93-94 (4th Cir. 1996) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388

U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement.")). For example, an agreement to arbitrate "any dispute that arose out of or related to" a consulting agreement "did not limit arbitration to the literal interpretation or performance of the contract, but embraced every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." Id. (alterations, emphasis, internal quotation marks, and citation omitted). As the United States argues, but for the task orders, CACI would not have provided interrogation services at Abu Ghraib. The task orders did not simply place CACI on the scene; they placed CACI personnel alongside United States military personnel with the job of interrogating detainees, and it was from that relationship that plaintiffs' allegations of abuse arose.

To avoid having its claims for indemnification, exoneration, and contribution barred by the settlement agreement, CACI argues that allegations of jus cogens violations exceed the bounds of that settlement agreement, citing the familiar adage that one cannot contract for unlawful acts. It argues that its claims are equitable in nature and "assertable without an allegation of contractual relationship," see Williams v. United States, 469 F. Supp. 2d 339, 342 (E.D. Va. 2007) (citation omitted); however, "a claim may arise outside of an agreement and yet still be related to that agreement," Am. Recovery Corp., 96 F.3d at 95. As the United States appropriately argues, CACI's equitable claims still relate to the task orders and are therefore encompassed by the settlement agreement.

CACI had been on clear notice for several years that it was exposed to lawsuits directed at its conduct at Abu Ghraib when it entered into the settlement agreement in 2007. As discussed above, as early as 2004, several Abu Ghraib detainees had filed a putative class action complaint against CACI's parent company and two of its subsidiaries, alleging torture. If CACI wished to preserve its right to assert an equitable claim based on jus cogens violations, it should have, and could have, done so in the settlement agreement. See Dairyland Power Coop. v. United States, 27 Fed. Cl. 805, 811 (1993) ("If a contractor wishes to preserve a right to assert a claim under that contract later, it bears the burden to modify the release, before signing it."). CACI did not do so, and the Court will not read such a reservation into the settlement agreement.

CACI points to the language in the settlement agreement that refers to the CBCA proceeding in an effort to limit the scope of the settlement to "those [claims and disputes] in CBCA No. 546, including but not limited to claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders." Gov't SJ Mem. Ex. 2 ¶ 3. This argument fails because it is the words "including but not limited to" that support the conclusion that the settlement agreement as a whole was "not limited" to just those claims.

In short, the unambiguous wording of the settlement agreement as concerning "all claims and disputes . . . arising out of or related to the terminated Task Orders" bars CACI's claims against the United States, and for this reason the government is entitled

to judgment as a matter of law. Therefore, its Motion for Summary Judgment will be granted.

V. CONCLUSION

For the reasons stated above, the United States' Motion to Dismiss will be granted as to Count 4 and denied in all other respects, CACI's Motion to Dismiss will be denied, the United States' Motion for Summary Judgment will be granted, and the Third-Party Complaint will be dismissed as to the United States by an appropriate Order to be issued with this Memorandum Opinion.

Entered this 22nd day of March, 2019.

Alexandria, Virginia

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

APPENDIX G

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

Suhail Najim Abdullah Al Shimari, et al., Plaintiffs, v. CACI Premier Technology, Inc. and CACI International, Inc., Defendants.	)	Case No. 1:08cv827 (GBL) [Entered: March 18, 2009]

Memorandum Order

THIS MATTER is before the Court on Defendants CACI Premier Technology, Inc. and CACI International, Inc.'s ("CACI") Motion to Dismiss Plaintiffs' Amended Complaint. This case concerns the civil tort claims of four Iraqi citizens alleging that United States government contractor interrogators tortured them during their detention at Abu Ghraib prison in Iraq. There are seven issues before the Court. The first issue is whether alien civil tort claims against government contractor interrogators present a non-justiciable political question. The second issue is whether government contractor interrogators are entitled to derivative absolute immunity where the lack of discovery prevents the Court from reviewing the government contract. The third issue is whether war-

time interrogation claims involve "combatant activities" within the meaning of the combatant activities exception to the Federal Tort Claims Act ("FTCA") and are therefore preempted. The fourth issue is whether the Alien Tort Statute ("ATS") provides a basis for this Court to exercise original jurisdiction over tort claims against government contractor civilian interrogators. The fifth issue is whether Plaintiffs' allege sufficient facts to support their claims against Defendants under the theory of respondeat superior. The sixth issue is whether Plaintiffs' sufficiently allege conspiratorial liability where they fail to specifically identify the individuals involved in the conspiracy. The seventh issue is whether Plaintiffs' have alleged sufficient facts to show that Defendants' employees caused Plaintiffs' injuries.

The Court denies Defendant's Motion to Dismiss on all grounds except the Court grants the Motion to the extent that Plaintiffs' claims rely upon ATS jurisdiction. The Court holds that Plaintiffs' claims are justiciable because Defendants are private corporations and civil tort claims against private actors for damages do not interfere with the separation of powers between the executive branch and the judiciary. Second, the Court finds that Defendants are not entitled to immunity at the dismissal stage because discovery is necessary to determine both the extent of Defendants' discretion in interaction with detainees and to weigh the costs and benefits of granting Defendants immunity in this case. Third, the Court holds that Plaintiffs' claims are not preempted by the combatant activities exception at this stage because the parties must conduct discovery to determine whether the interrogations here constitute "combatant activities"

within the meaning of the exception. Fourth, the Court finds that Plaintiffs' claims are dismissed to the extent that they rely upon ATS jurisdiction because tort claims against government contractor interrogators are too recent and too novel to satisfy the *Sosa* requirements for ATS jurisdiction. Fifth, the Court holds that Plaintiffs sufficiently allege facts supporting vicarious liability because the Amended Complaint states that Defendants' employees engaged in foreseeable tortious conduct when conducting the interrogations. Sixth, the Court holds that Plaintiffs sufficiently allege conspiratorial liability because facts alleging the use of code words and efforts to conceal abusive treatment plausibly suggest conspiratorial activity. Seventh, the Court holds that the Amended Complaint sufficiently alleges the direct involvement of Defendants' employees in causing Plaintiffs' injuries because Plaintiffs point to specific employees who played a direct role in supervising and participating in the alleged conduct. These issues are addressed in turn below.

I. BACKGROUND [1]

September 11, 2001, was one of the worst days in American history. At nine o'clock in the morning, as many Americans were either on their way to or arriving at their jobs, the al Qaeda terrorist network hijacked commercial airliners to attack prominent targets in the United States. Approximately 3000 people

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[1] Much of the following information is pulled from Supreme Court and Fourth Circuit cases in order to provide a historical context for the present case. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (2008).

were killed in the attacks. One week later, the United States Congress passed the Authorization for Use of Military Force Joint Resolution, which authorized the president to use "all necessary and appropriate force" against those associated with the attacks.

On March 20, 2003, a multinational coalition force led and composed almost entirely of troops from the United States and Great Britain invaded Iraq. The invasion, initially premised on the threat of and in search of weapons of mass destruction ("WMDs"), led to the rapid defeat of the Iraqi military and the capture and execution of Saddam Hussein.[2] Throughout the occupation, coalition forces met with fierce hostility. Conventional and asymmetric warfare tactics employed by insurgents, including the much-publicized Improvised Explosive Device ("IED"), led to the death of over 4000 coalition troops and counting.

In addition to the hunt for WMDs, the invasion also sought the liberation of the Iraqi people from Saddam Hussein's oppressive regime, infamous for imprisoning political dissidents. One singularly imposing locus of this legendary oppression was the Abu Ghraib prison, located near Baghdad. During Saddam Hussein's regime Abu Ghraib was one of the world's most notorious prisons. Some detainees were held without charge for decades and subjected to testing in experimental chemical and biological weapons programs. As many as 40 detainees were squeezed into cells measuring approximately 170 square feet each. In this 280-acre city within a city, torture was the rule and not the exception. Executions occurred

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[2] It was later determined that Saddam Hussein was not responsible for the September 11 attacks.

weekly, and vile living conditions made life miserable for the tens of thousands who lived and died there.

Just before the 2003 coalition invasion, the then-existing Iraqi regime, aiming to create havoc for coalition forces, released the detainees held at Abu Ghraib prison and other facilities. After the invasion the United States military took over Abu Ghraib. The military used it to detain three types of prisoners: (1) common criminals, (2) security detainees accused or suspected of committing offenses against the Coalition Provisional Authority, and (3) "high value" detainees who might possess useful intelligence (insurgency leaders, for example). As it had in the past, the post-invasion Abu Ghraib prison population included women and juveniles. 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. These contractors included L-3 Services (formerly Titan Corporation) and CACI International.

Abu Ghraib prison again received negative publicity, this time in late April 2004, when CBS aired an extended report on the modern Abu Ghraib on *60 Minutes II*. The broadcast showed sickening photographic evidence of U.S. soldiers abusing and humiliating Iraqi detainees at Abu Ghraib. It showed photographs of naked detainees stacked in a pyramid; a photograph of two naked and hooded detainees, positioned as though one was performing oral sex on the other; and a photograph of a naked male detainee with

a female U.S. soldier pointing to his genitalia and giving a thumbs-up sign. Another photograph showed a hooded detainee standing on a narrow box with electrical wires attached to his hands. A final photograph showed a dead detainee who had been badly beaten. U.S. soldiers were in several of the photographs, laughing, posing, and gesturing. The abuses stunned the U.S. military, public officials in general, and the public at large.

This case arises out of the detention, interrogation and alleged abuse of four Iraqi citizens detained as suspected enemy combatants at Abu Ghraib between September 22, 2003, and November 1, 2003, a period corresponding to the Abu Ghraib prison abuse scandal. Plaintiffs are Suhail Najim Abdullah Al Shimari, Taha Yaseen Arraq Rashid, Sa'ad Hamza Hantoosh Al-Zuba'e and Salah Hasan Usaif Jasim Al-Ejaili. Between 2004 and 2008, all four Plaintiffs were released from Abu Ghraib without ever being charged with any crime. (Am. Compl. ¶¶ 25, 44, 53, and 63.)

On June 30, 2008, Plaintiffs filed this action against Defendants CACI International, Inc., a Delaware corporation with its headquarters in Arlington, Virginia, and CACI Premier Technology, Inc., its wholly-owned subsidiary located in Arlington, Virginia. Defendants are corporations that provided interrogation services at Abu Ghraib during the period in question. Beginning in September 2003, Defendants provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison. Plaintiffs allege that Defendants committed various acts of abuse, including food deprivation, beatings, electric shocks, sensory deprivation,

extreme temperatures, death threats, oxygen deprivation, shooting prisoners in the head with taser guns, breaking bones, and mock executions. Plaintiffs assert that jurisdiction is proper under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332 (diversity), 28 U.S.C. § 1350 (Alien Tort Statute) and 28 U.S.C. § 1367 (supplemental jurisdiction). Plaintiffs allege the following twenty (20) counts:

1) Torture;
2) Civil conspiracy to commit torture;
3) Aiding and abetting torture;
4) Cruel, inhuman or degrading treatment;
5) Conspiracy to treat Plaintiffs in a cruel, inhuman or degrading manner;
6) Aiding and abetting cruel, inhuman and degrading Treatment;
7) War crimes;
8) Civil conspiracy to commit war crimes;
9) Aiding and abetting the commission of war crimes;
10) Assault and battery;
11) Civil conspiracy to assault and batter;
12) Aiding and abetting assaults and batteries;
13) Sexual assault and battery;
14) Civil conspiracy to sexually assault and batter;
15) Aiding and abetting sexual assaults and batteries;

16) Intentional infliction of emotional distress;

17) Civil conspiracy to inflict emotional distress;

18) Aiding and abetting intentional infliction of emotional distress;

19) Negligent hiring and supervision; and

20) Negligent infliction of emotional distress.

Defendants now move for dismissal of all claims.

II. DISCUSSION

A. Standard of Review

1. Nonjusticiable Questions Under Rule 12(b)(1)

A party challenging the justiciability of an issue before a court questions that court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See Republican Party of N.C. v. Martin,* 980 F.2d 943, 949 n.13 (4th Cir. 1992). Where a court determines that a nonjusticiable question is presented it must dismiss the action. Fed. R. Civ. P. 12(h)(3). A court need not accept factual allegations as true for purposes of a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1). *Thigpen v. United States,* 800 F.2d 393, 396 (4th Cir. 1986) ("In contrast to its treatment of disputed issues of fact when considering a Rule 12(b)(6) motion, a court asked to dismiss for lack of jurisdiction may resolve factual disputes to determine the proper disposition of the motion."). The plaintiff bears the burden of persuasion when a motion to dismiss challenges a court's subject matter jurisdiction. *See Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, MD,* 523 F.3d 453, 459 (4th Cir. 2008).

2. Failure to State a Claim Under Rule 12(b)(6)

A Federal Rule of Civil Procedure 12(b)(6) motion should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1969 (2007); *see* Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Lab., Inc. v. Matkari, 7* F.3d 1130, 1134 (4th Cir. 1993). In addition to the complaint, the court may also examine "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S. Ct. 2499, 2509 (2007). "Conclusory allegations regarding the legal effect of the facts alleged" need not be accepted. *Labram v. Havel,* 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendant to prepare a fair response. *Conley v. Gibson,* 355 U.S. 41, 47 (1957).

B. Analysis

1. Nonjusticiable political question

The Court denies Defendants' Motion to Dismiss Plaintiffs' Amended Complaint as presenting a nonjusticiable political question because courts are wholly competent to resolve private actions between private parties, even where the defendant is a government

contractor. Courts can identify nonjusticiable political questions by the presence of any one or more of six factors outlined by the United States Supreme Court in *Baker v. Carr,* 369 U.S. 186 (1962). In *Baker,* the Court held that nonjusticiable political questions involve at least one of the following:

1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;

2) a lack of judicially discoverable and manageable standards for resolving it;

3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;

4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

5) an unusual need for unquestioning adherence to a political decision already made; or

6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. In evaluating a case, a court must engage in a "discriminating inquiry into the precise facts and posture of the particular case," while understanding "the impossibility of resolution by any semantic cataloguing." *Id.* "[It] is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetasean Soc'y,* 478 U.S. 221, 229-30 (1986) (citing *Baker,* 369 U.S. at 211). The concern is not

with "political cases" carrying the potential to stir up controversy, but instead with "political questions" which, by their nature, create separation of powers concerns. *See Baker,* 369 U.S. at 217. The Court addresses each of these factors slightly out of turn below, focusing first on the three factors expressly raised by Defendants, then on the remaining three as outlined in *Baker*.

a. Constitutional commitment to a coordinate political branch

Defendants argue that Plaintiffs' claims are nonjusticiable because the Amended Complaint alleges conspiratorial conduct and, since the type of conspiracy alleged could not be carried out by low-level contractors and military personnel, Plaintiffs' claims must therefore challenge official policies and directives that were established by the executive branch and are consequently nonreviewable by the judiciary. CACI's argument is flawed for two reasons.

First, as an initial matter, the Court finds no basis to hastily conclude that a conspiracy of the type Plaintiffs allege could not be carried out by on-site military and contracted personnel because it is quite unlikely that these personnel were subjected to the persistent and pervasive supervision that CACI necessarily suggests. CACI would have the Court blindly accept its premise that the activities at Abu Ghraib were so heavily monitored that, but for the involvement and approval of high-level government officials, the atrocities could not have occurred. The problem with CACI's premise is that Abu Ghraib prison sits over six thousand miles from the Pentagon. As a result, it is very unlikely that the President of the United States

or his top military and government officials had the type of regular insight into the daily activities at Abu Ghraib that Defendants suggest. Likewise, the military commanders in theater were, and still are, focused on conducting military operations in both Iraq and Afghanistan. It would be unrealistic for this Court to presume that theater commanders had the time or resources to stay a vigilant eye on the day to day activities at Abu Ghraib while fighting a war on two fronts. Consequently, the Court finds it plausible that the on site personnel engaged in conduct that higher-ups were wholly unaware of. If that be the case, it is completely within the realm of possibility that a conspiracy of the type Plaintiffs complain of was carried out absent the authorization or oversight of higher officials.[3]

Second, it is clear to this Court that Plaintiffs' Amended Complaint challenges not the government itself or the adequacy of official government policies, but the conduct of government contractors carrying on a business for profit. Defendants rely on the United States Court of Appeals for the Fourth Circuit's opinion in *Tiffany v. United States,* 931 F.2d 271 (4th Cir. 1991), for the proposition that civil claims such as

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[3] Because this premise forms the foundation of CACI's constitutional commitment argument, its failure thereby destroys CACI's argument that follows because, as noted by this Court, it is entirely possible that a conspiracy of this type could be carried out by low level officials. As such, this Court could analyze this low-level conspiracy without once calling the executive's interrogation policies into question. However, for the sake of completeness, the Court will proceed to evaluate CACI's position in its entirety.

Plaintiffs' challenge the Executive's battlefield policies and are therefore nonjusticiable. CACI's reliance is misplaced because the *Tiffany* facts are wholly distinguishable from the present case.

In *Tiffany,* Mr. Tiffany and six passengers where killed when he flew unidentified into an air defense zone and collided with a United States F-4C fighter jet. *Id.* at 271. One of the fighter jets sent out to visually identify Mr. Tiffany's plane came too close to his aircraft, colliding with it as the jet banked sharply to break off the intercept. *Id.* Mr. Tiffany's widow sued the government, alleging negligence on the part of the military pilot and ground control in their execution of the intercept. *Id.* The Fourth Circuit, however, took issue with the idea of holding the United States liable in tort, finding that "[t]he negligence alleged in this case necessarily calls into question the government's most important procedures and plans for the defense of the country." *Id.* at 275. Revealing separation of powers concerns as the reason for its decision, the Fourth Circuit held that the claim was nonjusticiable because resolution of the claim would result in the court "interjecting tort law into the realm of national security and second-guessing judgments with respect to potentially hostile aircraft that are properly left to the other constituent branches of government." *Id.*

The present case is clearly distinguishable from *Tiffany* for two reasons. First, the defendant here is a private party, not the government itself, which is a key distinction when identifying separation of powers problems. As the courts in both *Baker* and *Tiffany* noted, the political question doctrine is rooted in separation of powers principles. *See Baker,* 369 U.S. at

217 ("several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of separation of powers."); *Tiffany,* 931 F.2d at 276 ("Separation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command. That doctrine requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power.") (internal citations omitted). At no time is the potential for a separation of powers problem more apparent than when the federal government is the named defendant. Here, however, Plaintiffs' action is against CACI, a private corporation engaged in interrogating prisoners merely for self profit. Certainly, separation of powers is a concern in a case like *Tiffany,* where a private party's action is against the government and its allegation is that the government improperly conducted its affairs. But the government is not a party to the present case. The Amended Complaint does not attack government policies. Instead, Plaintiffs' allege that a private corporation conducted its business in derogation of United States and international law, an allegation that is entirely justiciable.

Second, the conduct complained of in *Tiffany* triggered separation of powers problems because the conduct was inextricable from the executive branch, as fighter intercepts are non-existent outside of the governmental context. There, the plaintiff argued that the United States was negligent in the way in which it intercepted Mr. Tiffany's aircraft. *Id.* at 275. The conduct the plaintiff complained of was created,

trained and regulated only in order to serve the government's national defense function. As a result, there was no way to independently evaluate the conduct because the conduct did not exist independent of the government. As noted by the Fourth Circuit, such a claim "calls into question the government's most important procedures and plans for the defense of the country." *Id.* at 275. Here, however, torture has an existence all its own. Plaintiffs' allege that they were, among other things, beaten, stripped naked, deprived of food, water and sleep, subjected to extreme temperatures, threatened and shocked. (Am. Compl. ¶¶ 11-63.) Unlike the fighter intercept in *Tiffany,* this conduct does not depend on the government for its existence; private actors can and do commit similar acts on a regular basis. Separation of powers is not implicated where the conduct is already separate and distinct from the government.

The fact that CACI's business involves conducting interrogations on the government's behalf is incidental; courts can and do entertain civil suits against government contractors for the manner in which they carry out government business. *See Boyle v. United Tech. Corp,* 487 U.S. 500 (1988) (estate's wrongful death claim against government helicopter manufacturer justiciable); *see also Ibrahim v. Titan Corp.,* 391 F. Supp. 2d 10 (D.D.C. 2005) and *Saleh v. Titan Corp.,* 436 F. Supp. 2d 55 (D.D.C. 2006) (Iraqis' civil suits against government contractor interrogators and interpreters posed no political question where the court found "no merit in the defendants' political question defense . . ."). The judiciary is regularly entrusted with the responsibility of resolving this type of dis-

pute. Hence, the Court finds that separation of powers concerns are not triggered by the Court's evaluation of CACI's conduct in this case.

Alternatively, Defendants argue that Plaintiffs' claims are nonjusticiable because the issue of recovery for wartime injuries is constitutionally committed to the political branches. CACI insists that this Court lacks the authority to resolve the present action because reparations claims are generally barred absent an express reparations agreement or a diplomatic agreement with a provision expressly allowing such claims. CACI cites no cases that square with the facts of this case. Four of the cited cases involve plaintiffs seeking recovery directly from the offending government and the fifth involves equitable claims against the State of the Vatican City. The only case CACI cites that involves recovery from a private party is over two hundred years old, is actually a preemption case, and only tangentially addresses recovery of pre-war debt. *See Ware v. Hylton,* 3 U.S. 199, 230 (1796) (allowing a British subject to collect a pre-war debt from an American citizen despite a state law discharging debts to the British because of the supremacy of a peace treaty providing for debt recovery). CACI conveniently ignores the long line of cases where private plaintiffs were allowed to bring tort actions for wartime injuries. *See The Paquete Habana,* 175 U.S. 677 (1900) (damages imposed for seizure of fishing vessels during military operation); *Ford v. Surget,* 97 U.S. 594 (1878) (soldier not exempt from civil liability for trespass and destruction of cattle if act not done in accordance with the usages of civilized warfare); *Mitchell v. Harmony,* 54 U.S. 115 (1851) (soldier sued for trespass for wrongful seizure of citizen's goods while

in Mexico during Mexican War); Little v. *Barreme,* 6 U.S. 170 (1804) (naval officer liable to ship owner for damages for illegal seizure of his vessel during wartime). Thus, this Court finds ample support for its ability to entertain Plaintiffs' present tort claims.[4]

b. Judicially discoverable and manageable standards for resolution

CACI argues that there are no judicially discoverable and manageable standards for evaluating Plaintiffs' claims because the Court would have to conduct an extensive review of classified materials, or materials unlikely to be discoverable because of the "fog of war." (Defs.' Mem. 12.) The Court finds CACI's position very unlikely given the extensive amount of litigation that has already occurred involving the events at Abu Ghraib prison and the fact that CACI's government contract likely lays out the applicable standard of care in this case. First, and most notably, CACI itself brought a civil suit involving most of the same facts present in this case. In *CACI Premier Technology, Inc. v. Rhodes & Piquant, LLC,* CACI alleged defamation against a radio personality for statements she made blaming CACI for the atrocities at Abu Ghraib. 2006 U.S. Dist. LEXIS 96057 (E.D. Va. 2006), *aff'd,* 536 F.3d 280 (4th Cir. 2008). In that case, this Court granted summary judgment in favor of the defendant, but only after carefully examining the briefs,

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[4] CACI seems to suggest that the Court should feel comfortable dismissing Plaintiffs' claims on political question grounds because, after all, Plaintiffs may still have administrative remedies available to them. However, as the Supreme Court stressed in *Baker*, "courts cannot reject as 'no law suit' a bona fide controversy . . ." 369 U.S. at 217. Hence, this Court will refrain from doing so here.

exhibits, and affidavits submitted by both parties. *Id.* The Court finds it ironic that CACI argues that this case is clouded by the "fog of war," yet CACI saw only clear skies when it conducted discovery to develop its defamation case.

Second, this Court also finds instructive the number of other courts that have entertained similar cases and conducted some level of discovery on these or similar facts. In *Ibrahim v. Titan Corporation,* 391 F. Supp. 2d 10 (D.D.C. 2005), the court, in considering a motion to dismiss, noted the potential for manageability problems in the future but concluded that "[t]he government is not a party. . . and [the court is] not prepared to dismiss otherwise valid claims at this early stage in anticipation of obstacles that may or may not arise." *Id.* at 14. The court went on to allow discovery as to the issue of whether the defendants were "essentially soldiers in all but name" and the plaintiffs' claims consequently preempted. *See id.* at 18-19. Likewise, in *Saleh v. Titan Corporation,* a case "virtually indistinguishable" from *Ibrahim* but for added conspiracy claims, the court permitted discovery as to the evidentiary support for the plaintiffs' claims, and the exact nature of the information the plaintiffs relied upon where they asserted claims "upon information and belief." 436 F. Supp. 2d 55, 59 (D.D.C. 2006). The completion of at least some level of discovery in these cases leads the Court to reject the position that the present case implicates manageability issues severe enough to trigger the political question doctrine.

Third, the Court finds that many of the potential witnesses have already testified about their actions and the actions of others during the courts martial of

several military personnel involved in the events at Abu Ghraib. Several of the soldiers who participated in the atrocities were tried and convicted of their crimes. Plaintiffs expressly refer to "post conviction testimony and statements by military co-conspirators" suggesting that "CACI employees Steven Stefanowicz . . and Daniel Johnson . . directed and caused some of the most egregious torture and abuse at Abu Ghraib." (Am. Compl. ¶ 1.) This availability of eyewitness testimony further hurts CACI's position.

Fourth, Plaintiffs made clear to this Court that they do not intend to delve into the Central Intelligence Agency's "Ghost Detainee" program. Given that assurance, there is no reason for the Court to suspect that classified documents regarding that program will be sought or necessary to Plaintiffs' case. Due to the number of cases, both criminal and civil, that have already been brought challenging the events at Abu Ghraib and Plaintiffs' assurance that they do not plan to challenge the "Ghost Detainee" program, the Court rejects CACI's argument that this case necessarily involves the evaluation of numerous documents that are either classified or unavailable to the Court. The government has not sought to intervene in this case. The government has not asserted any state secret on behalf of CACI. If and when the time comes to consider whether classified information is necessary in this case, the government and the Court will address that issue.

The Court finds that the judicial standards governing this case are both manageable and discoverable. As mentioned above, many of the documents likely to form the basis of the present action have already been obtained and evaluated by this and other

courts. In addition, the Court finds that CACI's government contract is likely to be highly instructive in evaluating whether CACI exercised the appropriate level of care in its dealings with Abu Ghraib detainees. The Court suspects that the contract details CACI's responsibilities in conducting the interrogations, outlines the applicable laws and rules that CACI personnel are bound by, and sets further restrictions on the type of conduct permitted. The Court finds that manageable judicial standards are readily accessible through the discovery process.

c. Lack of respect due coordinate branches of government

CACI argues that the Court will demonstrate a lack of respect due to the political branches should it adjudicate Plaintiffs' claims because the Constitution vests the power to wage war and conduct foreign affairs in the political branches. It is likely that CACI recognized the futility of this argument, as CACI buried it in a footnote on the twelfth page of its supporting memorandum. As CACI is undoubtedly aware, matters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs. *See Hamdan v. Rumsfeld,* 548 U.S. 557 (2006) (hearing the habeas appeal of suspected alien terrorist detained by the Department of Defense at Guantanamo Bay); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) (examining the process owed to citizens being detained in the United States as enemy combatants); *Dames & Moore v. Regan,* 453 U.S. 654 (1981) (evaluating whether the president exceeded his constitutional and statutory authority when he suspended American citizens' claims against Iran following Iranian hostage crisis); *Youngstown Sheet & Tube Co. v. Sawyer,* 343

U.S. 579 (1952) (reversing a presidential directive ordering the seizure of steel mills to protect the production of armaments for the Korean War); *see also United States v. Lindh,* 212 F. Supp. 2d 541 (E.D. Va. 2002) (addressing the issue of whether an American citizen fighting with the Taliban in Afghanistan was entitled to lawful combatant immunity). Surely, if courts can review the actions of the President of the United States without expressing a lack of respect for the political branches, this Court can review the actions of a contracted, for-profit corporation without doing so as well.

d. Impossibility of deciding without non-judicial policy determination

Now turning to the remaining *Baker* factors, this Court finds that the present issue can be decided by this Court because the political branches already made a policy determination through the enactment of the Anti-Torture Statute, 18 U.S.C. § 2340, *et seq.* (2006). The Anti-Torture Statute provides for criminal sanctions for the commission or attempted commission of torture. *Id.* The statute extends jurisdiction to United States nationals located outside of the United States and to offenders within the United States, regardless of the offenders' and the victims' nationalities. § 2340A. As this legislation makes clear, the policy determination central to this case has already been made; this country does not condone torture, especially when committed by its citizens.

In addition, the legislative branch has already made a policy determination specifically concerning the events that took place at Abu Ghraib. In the Senate Armed Service Committee's investigation of the

events at Abu Ghraib, the committee clearly condemns the mistreatment that occurred at the prison. *See* S. ARMED. SERV. COMM., 110TH CONG., EXECUTIVE SUMMARY OF THE S. ARMED SERV. COMM.'S INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008). The summary starts out with a quote:

> What sets us apart from our enemies in this fight . . is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with the dignity and respect. While we are warriors, we are also all human beings.

Id. at xii (internal citations omitted). From there, the report outlines all of the underlying problems that ultimately paved the way for the events at Abu Ghraib. Hence, the policy is clear: what happened at Abu Ghraib was wrong.

e. Need for adherence to a political decision already made

The Court finds that adjudication of the present case in no way countermands a need for adherence to a political decision already made because, as mentioned above, the decision made is one against torture.

f. Potential for embarrassment from multifarious pronouncements

As to the final *Baker* factor, the Court finds no potential for embarrassment from multifarious pronouncements because, as mentioned above, the political branches of government have already spoken out against torture. The Anti-Torture Statute is a codified

consensus reached among the executive and legislative branches of government.

While it is true that the events at Abu Ghraib pose an embarrassment to this country, it is the misconduct alleged and not the litigation surrounding that misconduct that creates the embarrassment. This Court finds that the only potential for embarrassment would be if the Court declined to hear these claims on political question grounds. Consequently, the Court holds that Plaintiffs' claims pose no political question and are therefore justiciable.

2. Derivative absolute official immunity

Having established that the political question doctrine does not deprive this Court of jurisdiction, the Court must now address the question of whether the doctrine of derivative absolute official immunity bars Plaintiffs' claims. Defendants argue that they are immune for two reasons. First, Defendants argue they are immune because they performed a discretionary function within the scope of their government contract. Second, Defendants argue they are immune because the public benefit of immunity for contractor interrogators outweighs the cost of ignoring a potential injustice should Plaintiffs' claims go unremedied and unaddressed. The Court rejects both arguments because the Court cannot determine the scope of Defendants' government contract, the amount of discretion it afforded Defendants in dealing with detainees, or the costs and benefits of recognizing immunity in this case without examining a complete record after discovery has taken place. The Court will first address the issue of whether Defendants performed a discretionary

function within the scope of their government contract, followed by an analysis of the costs and benefits of granting immunity in this case.

The law of governmental absolute immunity has largely developed as a part of the federal common law to protect discretionary government functions from the potentially debilitating distraction of defending private lawsuits. *See, e.g.*, *Westfall v. Erwin,* 484 U.S. 292, 295 (1988), *superseded by* 28 U.S.C. § 2679 (2006); *Barr v. Matteo,* 360 U.S. 564, 569-73 (1959) (plurality opinion). There are various principles underlying the doctrine of immunity. One principle is "to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits for entering public service." *Wyatt v. Cole,* 504 U.S. 158, 167 (1992). Another is to protect the public from the timidity of public officials by "encouraging the vigorous exercise of official authority." *Butz v. Economou,* 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) (listing prevention of inhibition of discretionary action).

In *Barr* and *Westfall,* the Supreme Court recognized absolute immunity from state tort liability for federal officials exercising discretion while acting within the scope of their employment. The Supreme Court made clear that the purpose of such immunity was not to bestow a benefit upon government actors for their private gain, but instead to protect the government's interest in conducting its operations without the threatened disruption of civil litigation. *See Barr,* 360 U.S. at 572-73 ("The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government."). Thus, the question of whether to grant

immunity is closely connected to the policies that would be served by doing so.

The Fourth Circuit extended the doctrine of absolute immunity to government contractors in *Mangold v. Analytic Services,* 77 F.3d 1442 (4th Cir. 1996). In that case, the court granted derivative immunity to a government contractor for statements it made in response to the inquiries of Air Force investigators regarding improper practices by Air Force officers. *Id.* at 1450. The Court found that the *Westfall* principles discussed above, combined with the same interest that justifies protecting witnesses in government-sponsored investigations, supported the extension of immunity. *Id.* at 1448. Read broadly, *Mangold* means that in some circumstances, government contractors are immune from liability while performing their government contracts. *Id.*

But courts recognize that protecting government actors with absolute immunity is not without costs. Immunity undermines a core belief of American jurisdprudence, that individuals must be held accountable for their wrongful acts. *See Westfall,* 484 U.S. at 295. This interest in holding individuals accountable while protecting governmental functions from distracting private lawsuits led to a balancing test, affording immunity "only to the extent that the public benefits obtained by granting immunity outweigh [the] costs." *Mangold,* 77 F.3d at 1447 (citing *Westfall,* 484 U.S. at 296 n.3); *see id.* at 1446-47 ("Protecting government actors with absolute immunity, however, has its costs, since illegal and even offensive conduct may go unredressed.").

a. Discretionary function and scope of contract

Defendants first argue that they are immune because their interrogations constituted a discretionary function within the scope of their government contract. Under the first prong of the *Westfall* test, "immunity from state law tort liability [attaches] for federal officials *exercising discretion* while acting within the scope of their employment." *Mangold*, 77 F.3d at 1446 (emphasis supplied). The Court has insufficient information at this stage in the litigation to conclude that Defendants had either the authority to exercise discretion in how they conducted interrogations or that they did so within the scope of their government contract. The Court addresses each element in turn below.

i. discretionary function

Defendants argue that the Court need not even address the question of discretion because *Mangold* held a contractor immune from suit even though the function that the contractor performed—responding to a government investigation—was not discretionary. Defendants' assertion, however, misses the broader rule to which *Mangold* represents an exception. When *Mangold* extended government employee immunity to government contractors, it did so with explicit reference to the test established in *Barr* and *Westfall*. *Mangold,* 77 F.3d at 1448 (couching the issue as whether *Barr* and *Westfall* immunity should be extended). *Barr* and *Westfall* clearly looked to the presence of a discretionary function to determine the propriety of extending immunity. *Id.* at 1446. *Mangold* then addressed a narrow issue: "[W]hether *Barr* and

Westfall immunity also extends to persons in the private sector who are government contractors participating in official investigations of government contracts." *Id.* at 1447. By answering in the affirmative, *Mangold* did not generally repudiate the discretionary function requirement of *Barr* and *Westfall* in the contractor context but instead recognized a limited expansion of the rule, extending immunity "only insofar as necessary to shield statements and information . . . given by a government contractor . . . *in response to queries* by government investigators engaged in an official investigation." *Id.* at 1449.

This case does not fall within the narrow response-to-government-inquiries expansion to the discretionary function requirement as carved out in *Mangold* because here Defendants were not giving information, they were extracting it through the use of allegedly abusive means. The distinction is important because the *Mangold* court extended immunity in that case to preserve the government's interest in protecting the integrity of its investigations. This, again, goes back to the central purpose of absolute immunity that the Supreme Court addressed in *Barr:* preservation of an efficiently operating government. *Mangold,* then, did not ignore the discretionary function requirement outlined in *Barr* and *Westfall,* but instead found that similar policy interests were served by the extension of immunity to the precise and limited *Mangold* facts. The Court therefore rejects Defendants' argument that discretion is irrelevant and finds the limited *Mangold* extension inapplicable to the present

case.[5] Therefore, the fundamental inquiry remains whether Defendants acted pursuant to discretionary authority within the scope of their contract. Although the Court agrees with Defendants that the mere allegation of serious abuse does not automatically strip Defendants of any immunity to which they might otherwise be entitled, the Court is unpersuaded at this early stage of the proceedings and in light of a very limited factual record that Defendants performed a discretionary function entitling them to absolute immunity.

The Court doubts, however, that Defendants will fall within the discretionary function category even after a chance for discovery because the facts of this case are wholly distinguishable from the *Mangold* facts. The wartime interrogations in this case are different from the investigations referenced in *Mangold* because in that case, there was no question of whether the investigative techniques used by the Air Force were lawful; the only question was whether the contractor's responses were protected. *Id.* at 1448. Moreover, responses to Air Force inquiries surrounding whether an officer inappropriately pressured a private engineering and analysis firm to hire a family friend are not immediately analogous to Defendants'

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[5] Defendants argue in the alternative that the FTCA's combatant activities exception, 28 U.S.C. § 2860(j), creates an alternate basis for granting derivative absolute official immunity. The Court is unpersuaded because Defendants offer no precedent supporting this assertion. Moreover, the question of whether the combatant activities exception to the FTCA supports a finding of immunity is distinct from the question of whether it supports a finding of preemption. The Court addresses this second question in Section 3, below.

allegedly abusive interrogations of detainees at Abu Ghraib prison. Indeed, this case presents a question of whether the government actually delegated to Defendants the task of performing allegedly abusive conduct. For these reasons, based on the limited record currently before the Court, *Mangold is* entirely distinguishable from this case.

Furthermore, the Court finds that Defendants may have problems after discovery showing that their actions were discretionary in light of Plaintiffs' allegations that Defendants violated laws, regulations and Defendants' government contract. A government contractor does not automatically perform a discretionary function simply by virtue of being a government contractor. *See United States v. Gaubert,* 499 U.S. 315, 322 (1991) (observing that a federal employee's actions are not discretionary "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'")(citations omitted); *see also Perkins v. United States,* 55 F.3d 910, 914 (4th Cir. 1995) ("Obviously, failure to perform a *mandatory* function is not a *discretionary* function"); *Baum v. United States,* 986 F.2d 716, 720 (4th Cir. 1993) ("[I]f the plaintiff can show that the actor in fact failed to so adhere to a mandatory standard then the claim does not fall within the discretionary function exception."). Here Plaintiffs allege that Defendants violated laws and their government contract, which is the same as claiming that Defendants failed to adhere to a mandatory standard. The Court finds it doubtful that discovery will show that Defendants' actions were discretionary in light of

Plaintiffs' allegations of legal and contractual violations.

ii. scope of government contract

Defendants argue that Plaintiffs' claims arise out of conduct that allegedly occurred in the course of Defendants' interrogation duties at Abu Ghraib prison. The Court is completely bewildered as to how Defendants expect the Court to accept this scope of contract argument when the contract is not before the Court on this motion.

There are many ways in which discovery will answer unresolved questions that must be answered before the Court can reasonably determine whether Defendants are entitled to immunity. For example, Defendants' contract with the government will shed much light on the responsibilities, limitations and expectations that Defendants were bound to honor as government contractors. In addition, consideration of Defendants' course of dealing with the government may reveal whether deviations from the contract occurred and, if so, whether they were tolerated or ratified. The scope of Defendants' contract is thus an open issue that requires discovery.

Furthermore, if Plaintiffs' allegations are true, then Defendants are not entitled to absolute immunity if their actions were wrongful. Plaintiffs allege that Defendants violated United States and international law, military policies and procedures, and finally, the terms of their contract. (Am. Compl. at ¶¶ 67, 94, 108.) If these allegations are true, then Defendants are not entitled to dismissal on derivative absolute immunity grounds because Defendants' alleged abuse of Plaintiffs was not within the scope of

their contract. *See Mangold,* 77 F.3d at 1446 (noting that *Barr* and *Westfall* grant immunity to federal officials "acting within the scope of their employment.").

For these reasons, and on this limited record, the Court lacks a basis for finding that the conduct in the Complaint arises out of a discretionary function within the scope of Defendants' government contract. Discovery as to Defendants' contract and course of dealings with the government is necessary to determine whether Defendants meet these requirements.

b. Cost v. public benefit of immunity

Assuming, *arguendo,* that Defendants' alleged abuse of Plaintiffs constituted a discretionary government function within the scope of Defendants' contract, the Court must now determine whether the public benefits of granting immunity outweigh the costs. Defendants argue that the public has an urgent and compelling interest in enabling government contractors to perform combatant activities in a war zone free from the interference of tort law. The Court finds that the limited record currently available does not support the conclusion that the public interest outweighs the costs of granting immunity in this case.

As discussed above, the Court must balance the interest in holding individual wrongdoers accountable against the interest in protecting the government from distracting litigation. *Mangold,* 77 F.3d at 1447. From this Court's perspective, it is clear that the Supreme Court expected courts to adopt a case-by-case approach to this analysis. As the Supreme Court explained in *Westfall,* "the inquiry into whether absolute immunity is warranted *in a particular context* depends on the degree to which the official function

would suffer under the threat of prospective litigation." *Westfall,* 484 U.S. at 296 n.3 (emphasis supplied). Here Defendants ask this Court to do for government contractors what the Supreme Court was unwilling to do for government officials: adopt a *per se* rule that the benefits of immunity necessarily outweigh the costs. Defendants cite no authority for this proposition. Indeed, if the public benefits always outweighed the costs, the balancing test requirement would be meaningless. The Court finds it appropriate to weigh the public interest in granting immunity to Defendants against the costs of doing so.

Defendants urge that the public interest in recognizing absolute immunity here is the "compelling interest in enabling government contractors to perform combatant activities in a war zone free from the interference of tort law." (Defs.' Mem. 17.) As discussed in Section 3, below, the Court is unconvinced that contractor interrogations are in fact combatant activities. Further, even if Defendants' activities are combatant activities, the Court questions whether the public's interest is stronger in recognizing immunity for these types of activities or in allowing suits like this to go forward. The public outcry against the abuse of detainees at Abu Ghraib was strong and compelling. Photographs of detainee abuse scarred the national conscience, leading to the publication of numerous books, newspaper and magazine articles and at least one congressional investigation. On the limited record currently before the Court, the Court cannot say that the public has a stronger interest in recognizing immunity than it does in allowing Plaintiffs' suit to proceed. Discovery is needed to address the scope of Defendants' contract, their actual conduct, and the

applicable statutes and regulations. Absent this information, the Court cannot say that the public interest in granting immunity outweighs the costs.

Defendants also argue that immunity is available even for illegal and offensive conduct. For example, Defendants cite *Medina v. United States,* 259 F.3d 220 (4th Cir. 2001), in which a former diplomat sued Immigration and Naturalization Service agents for assault, battery and other torts arising out of his arrest. 259 F.3d at 222. The Fourth Circuit held that the agency was immune from suit under the discretionary function exception to the FTCA because the case implicated public policy. *Id.* at 229. Defendants also cite *Perkins v. United States,* 55 F.3d 910 (4th Cir. 1995), a wrongful death action in which a worker suffocated in a mine attempting to remove equipment to satisfy an Internal Revenue Service ("IRS") seizure order. 55 F.3d at 912. There, the court held that immunity protected the IRS agents because the acts they committed, even if illegal or tortious, were related to the assessment of a tax debt. *Id.* at 915. The Court does not disagree that where immunity applies, it is a powerful shield. But *Medina* and *Perkins* do not support a finding of immunity for Defendants because those cases involved FTCA suits against United States government officials, not contractors. *Medina,* 259 F.3d at 220; *Perkins,* 55 F.3d at 910. A public benefits analysis under the FTCA is inapposite here because the FTCA authorizes suit against the government; by contrast, in cases where only private parties are involved, the presumption is that public policy favors granting access to the courts and resolution of conflicts through the adversarial system.

Even if the policies in *Medina* and *Perkins* are evaluated in the context of this case, they do not help Defendants. The policy behind allowing FTCA suits against government actors is essentially accountability. *See Dalehite v. United States,* 246 U.S. 15, 27 (1953), *rev'd in part on other grounds by Indian Towing Co. v. United States,* 350 U.S. 61 (1955). On the other hand, Defendants' strongest policy arguments for granting immunity in this case are efficiency and flexibility. Here, the immense public outcry in the wake of the Abu Ghraib scandal illustrates the public's strong interest in accountability even though efficiency and flexibility are otherwise valued.

Defendants argue that allowing suits such as Plaintiffs' will require military and government officials to justify and explain their wartime decisions in court As addressed throughout this Order, however, the question whether a private actor exceeded the scope of its contractual obligations or otherwise violated the law is a question soundly committed to the judiciary. "Damage actions are particularly judicially manageable. . . The granting of monetary relief will not draw the federal courts into conflict with the executive branch." *Gordon v. Texas,* 153 F.3d 190, 195 (5th Cir. 1998) (internal citations and formatting omitted).

Finally, Defendants caution that without a finding of derivative absolute official immunity in this case, military commanders would forfeit the tort-free environment deemed essential to effective combat operations whenever they decide to augment military personnel with civilian contractors. But even if the Court were to find that the interrogation of detainees by civilians necessarily constitutes "combat opera-

tions," the decision to employ civilian contractors instead of military personnel is one that commanders must make in consideration of all the attendant costs and benefits. In any case, Defendants' concern for preventing judicial interference with military decisions is inconsistent with their request that the Court shield the military from the consequences of one of those decisions, namely, to employ civilian contractors, who normally are not immune from suit, instead of soldiers, who normally are.

In sum, taking as true Plaintiffs' allegations that Defendants exceeded the scope of their government contract and violated laws and regulations, the Court cannot say that the public benefits of granting derivative absolute official immunity here outweigh the costs of holding immune contractors who allegedly "crossed the line from official duty into illicit brutality." *Griggs v. WMATA,* 232 F.3d 917, 921 (D.C. Cir. 2000). For all these reasons, and based on the information available to the Court at this time, the Court denies Defendants' Motion to Dismiss Plaintiffs' Amended Complaint on the grounds of derivative absolute official immunity.

3. Preemption under the Combatant Activities Exception to the FTCA

Having established that Plaintiffs' claims are not barred by the doctrine of derivative absolute official immunity, the Court now addresses the question of whether Plaintiffs' tort claims are preempted by federal law. Defendants urge that the combatant activities exception of the Federal Tort Claims Act ("FTCA") preempts Plaintiffs' claims because wartime interrogations are combatant activities that present a

uniquely federal interest that significantly conflicts with state law. The Court expresses doubt as to whether Defendants' actions constituted combatant activities and holds that, even if they did, Plaintiffs' claims are not preempted because they do not present uniquely federal interests, nor do they pose a significant conflict with state law.

Under the FTCA, the United States waives its sovereign immunity for torts and authorizes suit against the federal government subject to certain exceptions. *See* 28 U.S.C. § 1346(b) (2005). One of these is the discretionary function exception, which reserves immunity for claims against the government based on the performance of a discretionary governmental function. *Id.* § 2680(a). Another exception, which is the one raised in this case, is the combatant activities exception. The combatant activities exception reserves sovereign immunity for "[a]ny claim arising out of combatant activities of the military or naval forces, or of the Coast Guard, during time of war." *Id.* § 2680(j).

a. Combatant activities

As an initial matter, because Defendants argue that Plaintiffs' claims are preempted under the combatant activities exception to the FTCA, the Court addresses the issue of whether Defendants' conduct constituted a combatant activity. Defendants argue that they indisputably performed combatant activities because they interrogated Iraqis detained at a combat zone detention facility in support of the U.S. Army. The Court finds that discovery is needed to determine whether Defendants' services qualify as combatant activities because, unlike soldiers engaging in actual

combat, the amount of physical contact available to civilian interrogators against captive detainees in a secure prison facility is largely limited by law and, allegedly, by contract.

Defendants urge the Court to adopt a "battlefield" theory and conclude that "[a]iding others to swing the sword of battle is certainly a combatant activity." (Defs.' Mem. at 32) (internal formatting and citations omitted). While the Court agrees that "arrest and detention activities are important incidents of war," (*Id.*), this broad generalization does not resolve the question of whether Defendants engaged in combatant activities within the meaning of § 2680(j) because merely being an "important incident of war" does not make something a combatant activity. For instance, the mass production of military uniforms at a private mill is an important incident of war, but it is certainly not a combatant activity.

Defendants argue that their employees indisputably performed combatant activities, but the Court cannot draw this conclusion without examining the government contract itself. This is because the Court's inquiry is a precise one and different courts reach different results. Defendants argue that the Court should adopt the Ninth Circuit's broad interpretation of combatant activities to "include not only physical violence, but activities both necessary to and in direct connection with actual hostility." *Johnson v. United States,* 170 F.2d 767, 770 (9th Cir. 1948). However, other courts find ample justification to limit the application of the exception, concluding that:

> If it had been intended that *all* activities . . . in . . . preparation for war were to be included[,] . . . the words 'war activities,' it seems, would have been more appropriate, but instead, the exception or exemption from liability for torts was restricted to `combat activities,' which as indicated means *the actual engaging in the exercise of physical force.*

Skeels v. United States, 72 F. Supp. 372, 374 (W.D. La. 1947) (emphasis supplied). This Court is inclined to adopt the more limited definition because it comports with the common sense notion that a government contractor does not necessarily conduct combatant activities merely because it provides services in support of a war effort. *See, e.g.*, *McMahon v. Presidential Airways,* Inc., 502 F.3d 1331, 1366 (11th Cir. 2007) (declining to review or reverse district court's holding that declined to extend *Boyle* preemption for private contractors); *Lessin v. Kellogg Brown & Root Servs., Inc.* 2006 WL 3940556 at *5 (S.D. Tex. Jun. 12, 2006) (declining to preempt claims against military logistics contractor in Iraq); *Fisher v. Halliburton,* 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005) (declining to preempt service contractors because *Boyle* protects against state product liability claims only). In this Court's view, interrogation should not properly be understood to constitute actual physical force under *Skeels* because the amount of physical contact available to an interrogator is largely limited by law and by contract, to the point where the amount of contact is unlikely equivalent to "combat." The Court declines Defendants' invitation to summarily conclude, without learning the relevant facts, that the combatant activities exception of § 2680(j) applies in this case. Therefore,

before even reaching a *Boyle* analysis, the Court finds it too early to conclude that the combatant activities exception to the FTCA is applicable to this case.

b. Two-part Boyle *analysis*

Assuming, *arguendo,* that Defendants' services qualify as combatant activities, and thus potentially fall under the combatant activities exception, the Court now addresses the issue of whether, when applying the *Boyle* test, the combatant activities exception preempts the claims in this case.[6] For the reasons to follow, the Court finds that Plaintiffs' claims are not preempted here under the *Boyle* analysis.

In *Boyle v. United Technologies Corporation,* 487 U.S. 500 (1988), the Supreme Court explained the framework under which exceptions to the FTCA's waiver of sovereign immunity require the preemption of tort claims against government contractors. The issue before the Court was whether the discretionary function exception of the FTCA preempted the plaintiff's tort claims. *Id.* at 511. *Boyle* involved a wrongful death claim by the father of a Navy lieutenant who drowned when he was unable to escape from his crashed helicopter. *Id.* at 500. The father alleged that the escape hatch design was defective because it opened out instead of in, allowing the water pressure

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[6] From the briefs, both parties appear to accept that the *Boyle* analysis, initially developed in the context of the discretionary function exception to the FTCA, applies equally in the context of the combatant activities exception. That being the case, the Court will assume without deciding that *Boyle* applies when evaluating whether Plaintiffs' conduct falls within the combatant activities exception.

against a submerged helicopter to prevent its operation. *Id.* at 503. The Supreme Court found that the FTCA preempted state tort claims. *Id.* at 512.

In doing so, the Court announced a two-part test, holding that state law is displaced by federal law only when (1) "uniquely federal interests" are at stake; *id.* at 504-07, and (2) the application of state tort law would produce a "significant conflict" with federal policies or interests. *Id.* at 507-13. Applying this test, the *Boyle* Court found that the discretionary function exception conflicted with, and thereby preempted, product defect claims against a government contractor supplying goods where the federal government approved and the contractor complied with reasonably precise product specifications, and where the contractor warned the government of any known defects. *Id.* at 512. Finding that the procurement of equipment by the United States was a uniquely federal interest, *id.* at 507, the Court held that the plaintiff's claims were preempted because the state-imposed duty of care (to manufacture escape-hatch mechanisms of the sort that plaintiff claimed was necessary) was exactly contrary to the government contract-imposed duty (to manufacture escape-hatch mechanisms shown by the specifications). *Id.* at 509.

Defendants argue that Plaintiffs' claims are preempted because the prosecution of war is a uniquely federal interest that would be significantly frustrated by interposing state tort causes of action against CACI. The Court finds, based on the limited record available at this stage in the litigation, that Plaintiffs' claims are not preempted because the interests in this case are shared between federal and state

governments and Plaintiffs' claims do not significantly conflict with uniquely federal interests. The Court addresses each part of the *Boyle* analysis in turn below.

i. uniquely federal interests

Defendants argue that Plaintiffs' claims implicate a uniquely federal interest because the prosecution of war is a power constitutionally vested solely in the federal government. Although it recognizes the federal government's sole authority to prosecute war, the Court disagrees that Plaintiffs' claims implicate a uniquely federal interest for three (3) reasons.

First, the Court is unpersuaded by Defendants' argument that subjecting a private, for-profit civilian corporation to a damages suit will interrupt or interfere with the prosecution of a war. Plaintiffs are not suing soldiers or any government entity; they are suing civilian corporations. Additionally, as far as the Court can discern, the military has already collected much of the evidence it may be asked to provide in this case in pursuing courts martial proceedings against CACI's alleged co-conspirators. Accordingly, the source-collecting burden on the government in this case will be minimal and will not distract it from the prosecution of a war. The Court therefore rejects Defendants' argument that allowing this suit to go forward to discovery will interfere with the government's prosecution of a war.

Second, this Court finds that permitting this litigation against CACI to go forward actually advances federal interests (and state interests, as well) because the threat of tort liability creates incentives for government contractors engaged in service contracts at

all levels of government to comply with their contractual obligations to screen, train and manage employees. *See Richardson v. McKnight,* 521 U.S. 399, 409 (1997) ("Competitive pressures mean . . . that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement.")

In *Richardson,* the Supreme Court declined to extend qualified immunity to prison guards employed by a private prison management firm in a constitutional tort action. 521 U.S. at 412. The Court reasoned that the history and purpose of qualified immunity did not support an extension in that case because declining to extend immunity would motivate the contractor to provide service in a manner compliant with government requirements and constitutional norms. *Id.* at 409.

Like in *Richardson,* permitting Plaintiffs' claims against CACI to go forward 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 a more effective job." *Id.* at 409. The claims in this suit therefore advance any federal interests that may be involved here.

Third, Defendants' federalism concerns are misplaced because both federal and state governments have a strong interest in the enforcement of laws against torture, evincing a shared policy that opposes preemption in this case. *Compare, e.g.*, Anti-Torture Act, 18 U.S.C. § 2340A (2006) (criminalizing torture); War Crimes Act, 18 U.S.C. § 2441 (2006) (criminalizing war crimes); *and* Military Commission Act, 10

U.S.C. § 948a(1)(A) (2006) (defining "unlawful enemy combatant"), *with* Constitution of Maryland, Decl. of Rights, Art. 16 (prohibiting laws permitting cruel and unusual pains); VA. CODE ANN. § 19.2-264.2 (LexisNexis 2008) (providing that the use of torture is a consideration in death penalty sentencing); and MD. CODE ANN., Health - General § 24-302 (LexisNexis 2008) (forbidding the sale of toys depicting or resembling an instrument designed for torture). Concerns regarding torture are both state and federal and are therefore not a uniquely federal concern. For all these reasons, the Court concludes that "uniquely federal interests" are not at stake in this case.

ii. significant conflict with federal policies

Assuming, *arguendo,* that Plaintiffs' claims invoke uniquely federal interests, the Court must now address whether Plaintiffs' state tort claims pose a significant conflict with federal interests. Anything less than a total conflict between state and federal interests is insufficient to cause preemption under *Boyle* because preemption only applies if the contractor cannot possibly comply with its contractual duties and the state-law imposed duties at the same time. *See Boyle,* 487 U.S. at 508-09. Preemption does not apply even in "an intermediate situation, in which the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." *Id.* at 509. As long as "[t]he contractor could comply with both its contractual obligations and the state prescribed duty of care," state law will not generally be preempted. *Id.; see also In re Joint E. & S. Dist. New York Asbestos Litig.,* 897 F.2d 626, 632 (2d Cir. 1990) ("Stripped to its essentials, the military contractor's defense under *Boyle is*

to claim, 'The Government made me do it.'"); *Barron v. Martin-Marietta Corp.,* 868 F. Supp. 1203, 1207 (N.D. Cal. 1994) ("[R]equisite conflict exits [sic] only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract.").

Defendants raise several arguments as to why the application of state tort law would create a significant conflict with the federal interests underlying the combatant activities exception. Upon careful consideration, the Court finds that Defendants' arguments do not justify finding that Plaintiffs' claims pose a significant conflict with federal interests, as discussed below.

Defendants cite *Koohi v. United States,* 976 F.2d 1328, 1333, 1337 (9th Cir. 1992), for the proposition that no tort duty should extend to those against whom combatant force is directed in times of war because it would subject commanders to judicial second-guessing. In *Koohi,* heirs of the deceased passengers and crew of an Iraqi civilian aircraft sued after a United States warship shot down the aircraft during the "tanker war" between Iraq and Iran. 976 F.2d at 1329-30. The plaintiffs sued both the United States and the civilian manufacturers of the weapons systems used by the warship. *Id.* at 1330. Citing the Supreme Court's formulation of the preemption framework in *Boyle,* the Ninth Circuit found that the combatant activities exception to the FTCA "shield[ed] from liability those who supply ammunition to fighting vessels in a combat area." *Id.* at 1336. The court based its holding partially on the rationale that "during wartime encounters no duty of reasonable care is owed to

those against whom force is directed as a result of authorized military action." *Id.* at 1337.

As an initial matter, this Court is not bound by Ninth Circuit precedent. Addressing the substance of Defendants' argument, however, Defendants fail to consider that Plaintiffs at the time of their interrogation posed no combatant threat and therefore were not properly the recipients of combatant force. Accordingly, on the limited record currently before the Court, the Court cannot say that no duty was owed. Moreover, the distinction between the *Koohi* contractor as a supplier of complex goods and Defendants as government contractor service providers suggests *Koohi* is distinguishable on a fundamental level. Supplying complex military technologies inevitably implicates nuanced discretion and sophisticated judgments by military experts. *See Boyle,* 487 U.S. at 511. It was therefore appropriate to absolve *Koohi*'s government contractor of responsibility for the government's misidentification of the civilian Airbus as an enemy target. In contrast, Plaintiffs here do not allege that Defendants supplied any equipment, defective or otherwise, to the United States military, and as discussed elsewhere, the Court must withhold judgment on the scope of Defendants' discretion until it can examine Defendants' contract. For these reasons, the Court concludes that *Koohi* does not entitle Defendants to dismissal in this case.

Again citing *Koohi,* Defendants counter that removing "battlefield tort duties" is beneficial because it ensures equal treatment of those injured in war. "It would make little sense," Defendants tell the Court, "to single out for special compensation a few [innocent victims of harmful conduct] . . . on the basis that they

have suffered from the negligence of our military forces" rather than from the intentional infliction of violence in war. *Koohi,* 976 F.2d at 1334-35. To the extent that Defendants' argument is that it is worse to compensate a few deserving innocent victims than none at all, the Court rejects it as inconsistent with the strong public policy favoring access to the courts.

More important, however, is that Plaintiffs do not allege that they suffered from the negligence of U.S. military forces. While indeed they may have, the case at bar is captioned solely against private government contractors. Defendants fail to appreciate that, generally speaking, private contractors are not entitled to sovereign immunity unless classified as government employees. *See McMahon v. Presidential Airways, Inc.,* 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) ("The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government.") (citing *Foster v. Day & Zimmerman, Inc.,* 502 F.2d 867, 874 (8th Cir. 1974)). Defendants acknowledge that they do not qualify as government employees within the meaning of the FTCA. *(See* Defs.' Mem. at 26 ("The immunity of the United States and its employees is the reason why Plaintiffs assert their claims solely against contractors with which they had little or no contact.").) Immunity is a shield, not a blanket. The Court therefore concludes that the limited record does not indicate that allowing Plaintiffs' claims to go forward would create a duty of care on the battlefield.

The Court also rejects Defendants' argument that haling private citizens into federal court to defend against alleged violations of a government contract

and other law infringes on the Executive's constitutionally committed war powers. These separation of powers concerns are not implicated here because "[d]amage actions are particularly judicially manageable . . . . The granting of monetary relief will not draw the federal courts into conflict with the executive branch." *Gordon v. Texas,* 153 F.3d 190, 195 (5th Cir. 1998) (internal citations and formatting omitted). *Compare Gilligan v. Morgan,* 413 U.S. 1, 11 (1973) (refusing to hear suit seeking judicial supervision of operation training of Ohio National Guard in wake of Kent State shootings), *with id.* at 5 & 11 (suggesting the Court might allow suit against National Guard for damages). Private actors are accountable for their actions even when employed by the executive. *Cf. Richardson v. McKnight,* 521 U.S. 399 (1997) (holding privately employed prison guards amenable to suit for prison abuse).

Defendants further argue that one purpose underlying the combatant activities exception is ensuring that the United States' conduct of war is not regulated by another sovereign in the guise of applying that sovereign's tort law. Defendants argue that this purpose would fail if this case were to proceed. The Court need not address that issue at this stage in the litigation, however, because even if the law of a foreign jurisdiction were to govern any of Plaintiffs' claims, it would not regulate the conduct of the United States, a nonparty to this suit between private parties.[7] For the

[7] If and when it should become relevant, the Court will present the parties with the opportunity to address the choice of law issue at a later date.

reasons stated above, the Court concludes that Plaintiffs' claims do not present a significant conflict with a uniquely federal interest.

In sum, the Court doubts that Defendants' activities constituted combatant activities and therefore doubts that the FTCA is relevant because the limited record does not support that conclusion where Defendants are civilian contractors assigned to interrogate incapacitated detainees. Even if it did, however, the Court holds that Plaintiffs' claims are not preempted under *Boyle* because Plaintiffs' claims do not present a significant conflict with a uniquely federal interest. The Court therefore denies Defendants' motion to dismiss on the grounds of preemption.

4. Alien Tort Statute

Having established that Plaintiffs' claims are not preempted by federal law, the Court must now address the question of whether the Alien Tort Statute ("ATS") confers original jurisdiction upon this Court over alien tort claims against government contractor civilian interrogators for injuries sustained by detainees during military prison interrogations. Plaintiffs argue that their ATS claims survive under *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004), because the Court need not recognize any new claims here and because war crimes are universally condemned on the grounds that they are so reprehensible that anyone who commits them must be held individually responsible. The Court holds that the ATS does not confer original jurisdiction over civil causes of action against government contractors under international law because such claims are fairly modern and therefore not

sufficiently definite among the community of nations, as required under *Sosa*.

The ATS, passed as part of the Judiciary Act of 1798, confers original jurisdiction upon district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). Courts need not rely on express legislation to entertain civil claims based on ATS jurisdiction. *See Sosa,* 542 U.S. at 718. It is clear, however, that under ATS jurisdiction, courts have only the ability "to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.* at 712.

In *Sosa,* the Supreme Court further defined the "law of nations" violations that trigger jurisdiction under the ATS by first generally identifying the two different types of violations. *Id.* at 714-15. The term "law of nations" is historically comprised of two distinct spheres. *Id.* at 715. The first concerns how states conduct themselves among each other, and the second involves the conduct of individuals "outside domestic boundaries and consequently carrying an international savor." *Id.*

At the intersection of these two spheres lies a class of "hybrid international norms" and the ATS confers jurisdiction only where that overlap occurs. *See id.* at 715-16, 720. This limited category expressly includes three tort causes of action: (1) violation of safe conduct; (2) infringement of the rights of ambassadors; and (3) piracy on the high seas. *Id.* at 715, 720, and 724. The underlying concern with respect to the hybrid norms is not so much vindication of the individual right as it is compensation to the sovereign affected by

the tort. *See id.* at 724 (pointing to an interest that the state, as to offenses against ambassadors, "at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister.").

Although the Supreme Court recognizes that ATS jurisdiction may extend beyond the three torts mentioned in *Sosa,* district courts must exercise caution when recognizing additional torts under the common law that enable ATS jurisdiction. *See id.* at 729 ("[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."). The Supreme Court highlighted five concerns in recognizing additional torts under the ATS, namely that:

1) the current view of common law as made or created law creates the potential that district courts will exercise too much discretion in recognizing torts;

2) it is customary to look for legislative guidance "before exercising innovative authority over substantive law";

3) the creation of private rights of action is better left to the legislative branch;

4) potential adverse foreign policy consequences from the recognition of additional causes of action; and

5) Congress has not asked the judiciary to expand the law in this area.

Id. at 725-28.

Although the Supreme Court warns caution, it does not foreclose the possibility of additional causes of action. *Id.* at 729. *Sosa* provides at least two guidelines as to what qualifies as a cause of action enabling ATS jurisdiction should a district court find it proper to recognize one after fully considering the concerns listed above. First, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732 (referring to the three torts expressly mentioned above). Second, district courts must temper "the determination [of] whether a norm is sufficiently definite to support a cause of action" with "an element of judgment about the practical consequences of making that cause available to litigants." *Id.* at 732-33.

Plaintiffs argue that their allegations fall within the scope of *Sosa* and do not require the Court to recognize any new claims because "war crimes, torture and cruel, inhuman and degrading treatment are precisely the specific, universal, and obligatory violations that are actionable under the ATS." *(See* Pls.' Opp'n at 23 (internal formatting and citations omitted).) The Court grants Defendants' Motion to Dismiss as to Plaintiffs' ATS claims because the Court is not convinced that civil causes of action against government contractors in this context qualify under *Sosa* for ATS jurisdiction for two (2) reasons.

First, the Court doubts that the content and acceptance of the present claims are sufficiently definite under *Sosa* because the use of contractor interrogators is a modern, novel practice. Plaintiffs contend

that *Sosa* brings Plaintiffs' allegations within the scope of this Court's ATS jurisdiction on the grounds that war crimes and other degrading treatment constitute specific, universal, and obligatory violations of the law of nations. Plaintiffs draw this conclusion, they explain, because *Sosa* cited with approval *Filartiga v. Pena-Irala,* 630 F.2d 876, 887 (2d Cir. 1980), and *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 781 (D.C. Cir. 1984). Plaintiffs do not explain why they discern the *Sosa* Court's citation of these cases as helpful to their position.

In fact, a nuanced reading of *Sosa* reveals that the Supreme Court cited *Filartiga* and *Tel-Oren* only for the proposition that federal courts may recognize enforceable international norms when they are specific, universal and obligatory. *See Sosa,* 542 U.S. at 732. The *Sosa* Court's citation of these cases therefore does not support Plaintiffs' argument that Plaintiffs' *particular* allegations constitute specific, universal, and obligatory violations of the law of nations. As this Court mentioned above, Plaintiffs' claims lack this universality because the use of contractor interrogators is a recent practice. *See id.* at 725 (allowing only claims resting on norms "with a specificity comparable to the features of the 18th-century paradigms."). As the use of contractor interrogators is modern, so too is the concept of suing contractor interrogators in tort for a violation of the law of nations. As such, these claims fail under *Sosa.* Second, even if Plaintiffs' claims were sufficiently accepted and universal, the Court is unconvinced that ATS jurisdiction reaches private defendants such as CACI. In *Sosa,* the Court questioned whether international law extends liabil-

ity to private defendants. *See id.* at 733 n.20 (comparing cases ten years apart, one finding no true consensus that torture by private actors violated international law, the other finding a sufficient consensus that genocide by private actors violated international law). Plaintiffs contend that international law does extend liability to private defendants but point the Court to no mandatory case law definitively establishing their position. Plaintiffs' reliance on nonbinding authority does not persuade the Court that ATS jurisdiction reaches Defendants. Plaintiffs rely heavily on *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. 1995), which held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." 70 F.3d at 239. Plaintiffs emphasize that *Kadic* was cited favorably by the Supreme Court. It is questionable, however, whether the references to *Kadic* in the *Sosa* opinion can fairly be classified as favorable. *Kadic* is mentioned once in footnote twenty of the majority opinion for the proposition that the existence of ATS jurisdiction against private defendants is an open question; it is mentioned again in Justice Scalia's concurring opinion as an example of a case that leads the judiciary "directly into confrontation with the political branches." *Sosa,* 542 U.S. at 748 (Scalia, J., concurring in part and concurring in judgment). Because the Supreme Court's treatment of *Kadic* was neutral at best, the Court is reluctant to rely on *Kadic.*

In any event, this Court need not follow a case from the Second Circuit and declines to do so in light of the five initial *Sosa* concerns mentioned above. *See Sosa,* 542 U.S. at 725-28 (ranging from caution against excessive district court discretion to giving

due deference to the legislature). Here, the Court is particularly wary of exercising too much discretion in recognizing new torts. *See id.* Although some international tribunals have held private actors criminally liable under international law, the Court questions whether this liability is similarly established in the civil context under the ATS. The Court is unpersuaded that Plaintiffs' claims fall into the "very limited category defined by the law of nations and recognized at common law," *id.* at 712, because the Court is unconvinced that a suit against private civilian interrogators falls within the class of hybrid international norms in existence when the ATS was enacted. The Court therefore grants Defendants' Motion to Dismiss Plaintiffs' Amended Complaint to the extent that its claims invoke ATS jurisdiction. However, because Plaintiffs assert diversity and federal question as alternate bases of jurisdiction, the Amended Complaint survives as to those claims that do not rely upon the ATS.[8]

5. Sufficiency of claims

The Court holds that Plaintiffs sufficiently plead facts to support the claims in their Amended Complaint. Defendants challenge the sufficiency of the pleadings in three respects. First, Defendants argue that Plaintiffs fail to sufficiently allege Defendants' vi-

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[8] The Court is operating under the assumption that diversity and/or federal question jurisdiction are sufficient bases for jurisdiction as to all of Plaintiffs' claims. If Defendants believe differently, the Court invites Defendants to brief the question of which of the counts of the Amended Complaint, if any, must be dismissed because they rely solely upon ATS for subject matter jurisdiction.

carious liability because Plaintiffs alleged no facts indicating that CACI authorized its employees to treat detainees in an unauthorized manner, or that CACI employees did so to serve CACI's interests. Second, Defendants argue Plaintiffs insufficiently plead facts as to conspiratorial liability because Plaintiffs point to no facts showing that their injuries where the result of an agreement between parties and not the product of independent actors acting in parallel. Third, CACI argues that Plaintiffs' claims fail because the Amended Complaint sets forth no facts indicating that CACI personnel were directly involved in causing injury to these particular Plaintiffs. The Court rejects these arguments for the reasons set forth in order below.

a. Vicarious liability

As an initial matter, the Court rejects Defendants' argument that Plaintiffs fail to allege facts sufficient to hold Defendants vicariously liable under a respondeat superior theory. Under the theory of respondeat superior, an employer may be held liable in tort for an employee's tortious acts committed while doing his employer's business and acting within the scope of the employment when the tortious acts were committed. *See Plummer v. Ctr. Psychiatrists, Ltd.,* 476 S.E.2d 172, 174 (Va. 1996) (internal citations omitted). An employer may be liable in tort even for an employee's unauthorized use of force if "such use was foreseeable in view of the employee's duties." *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1351 (4th Cir. 1995) (internal citations omitted); *Heckenlaible v. Va. Peninsula Reg'l Jail Auth.,* 491 F. Supp. 2d 544, 549 (E.D. Va. 1950) (finding a jury question as to

whether correctional officer's sexual assault on an inmate was within the scope of his employment).

Here, Plaintiffs sufficiently allege that Defendants are vicariously liable for the conduct of CACI employees. Plaintiffs argue that CACI employees Steven Stefanowicz, Daniel Johnson, and Timothy Dugan tortured Plaintiffs and instructed others to do so. (Am. Compl. ¶¶ 1, 64-68.) They also allege that Defendants employed all three and knowingly ratified their illegal actions. (*Id.* at ¶¶ 72, 76-80, 90-91.) The Amended Complaint further alleges that CACI took steps to cover up the activities of its employees involved in the Abu Ghraib scandal. (*Id.* at ¶¶ 79, 81-88.) The Amended Complaint also alleges that CACI failed to properly train and supervise its employees and failed to properly report the torture committed. (*Id.* at ¶¶ 101-108.) Finally, the Amended Complaint alleges that Defendants made millions of dollars as a result of their wrongful behavior. (*Id.* at ¶¶ 73, 92-93.) Consequently, the Court finds that Plaintiffs make a sufficient showing of vicarious liability to withstand the motion to dismiss.

Defendants argue that any alleged misconduct by its employees at Abu Ghraib was not within the scope of employment because Defendants never authorized CACI employees to torture detainees. Here, however, it was foreseeable that Defendants' employees might engage in wrongful tortious behavior while conducting the interrogations because interrogations are naturally adversarial activities. As such, Plaintiffs sufficiently plead vicarious liability.

b. Conspiratorial liability

The Court finds that Plaintiffs sufficiently plead facts to support a conspiratorial liability claim under *Bell Atlantic v. Twombly*. In *Twombly,* the Supreme Court held that a plaintiff must go beyond "a short and plain statement of the claim" showing entitlement to relief in order to survive a motion to dismiss. 127 S. Ct. at 1964 (internal citations omitted). The Court stressed that a successful allegation of conspiracy requires the plaintiff to cross the line between "the conclusory and the factual" as well as between "the factually neutral and the factually suggestive." *Id.* at 1966 ("Each must be crossed to enter the realm of plausible liability."). In that case, the plaintiffs attempted to allege an antitrust conspiracy based on the facts that the defendant exchange carriers engaged in parallel conduct to prevent the growth of upstart carriers and agreed not to compete with each other. *See id.* at 1962. The Court found that the plaintiffs failed to state a conspiracy claim because the complaint lacked enough "factual matter ([when] taken as true) to suggest that an agreement was made." *Id.* at 1966. The Court found the allegations of parallel conduct insufficient without more because the defendant carriers had independent incentives to act in the manner that they did that in no way obviated conspiratorial conduct. *See id.* at 1971. The Court further found the agreement not to compete did not suggest a conspiracy because of a history of monopoly in the field and the defendant carriers' likely desire to maintain the status quo. *See id.* at 1972-73. As such, the Court held that the plaintiffs' complaint should be dismissed. *Id.* at 1961.

Here, Defendants argue that the present claims also fail because Plaintiffs point only to parallel conduct which fails under *Twombly*. This Court rejects Defendants' argument for two reasons. First, the Court finds that Plaintiffs adequately allege specific facts to create the plausible suggestion of a conspiracy. Unlike the *Twombly* plaintiffs, who relied solely on parallel conduct and an agreement not to compete to state their conspiracy claim, here Plaintiffs point to at least two suggestive facts that push their claims into the realm of plausibility. First, Plaintiffs allege that CACI employees adopted the code phrase "'special treatment,' which was code for the torture of the type endured by Plaintiffs in the hard site." (Am. Compl. ¶ 70.) Taking the allegation as true, the use of code words makes a conspiracy plausible because the personnel would have to reach a common understanding of the code in order to effectively respond to it. Second, Plaintiffs also allege that Plaintiff Mr. Rashid was "removed from his cell by stretcher and hidden from the International Committee of the Red Cross . . who visited Abu Ghraib shortly after Mr. Rashid had been brutally and repeatedly beaten." (*Id.* at ¶ 43.) The act of hiding abuse from a humanitarian organization's inspection also plausibly suggests a conspiracy, as a cover-up would require the participation and cooperation of multiple personnel. As such, the Court finds that these specific allegations together with the other conduct alleged are enough to state a conspiratorial liability claim.

Second, unlike *Twombly,* the Defendants here have no independent motive to act in the alleged manner. In *Twombly,* the Supreme Court found persuasive arguments against the conspiracy claim in that

there was a history of monopoly in the rather specialized field and because the defendant carriers had an independent motive to resist upstart carriers in order to avoid subsidization burdens. *See id.* at 1971-72. These alternate, independent motives made the plaintiffs' conspiracy allegations less plausible. *See id.* Here, however, the Court cannot think of any history or independent motive Defendants might have that would move Plaintiffs' conspiracy claims outside of the realm of plausibility. As an initial matter, torture during interrogations is historically banned. As far back as 1949, the Third Geneva Convention demanded that "[p]risoners of war must at all times be treated humanely." Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. In addition, the Uniformed Code of Military Justice imposes criminal punishment for many of the offenses alleged in the Amended Complaint, including murder, rape, and cruelty and maltreatment. *See* 10 U.S.C. §§ 893, 918, 920 (2007). Consequently, the historical explanation present in *Twombly* is absent here. Likewise, the Court can think of no plausible motive Defendants might have to act independently in the egregious manner alleged by Plaintiffs. In *Twombly,* the defendant carriers faced the potential for financial gain as a result of their actions. *See Twombly,* 127 S. Ct. at 1971-72. Here, it's possible that the personnel at Abu Ghraib acted individually in pursuit of some perverse pleasure, but this possibility is insufficient to make Plaintiffs' conspiracy allegations less than plausible.

c. Direct involvement

Defendants argue that Plaintiffs' claims must fail because Plaintiffs allege no facts implicating Defendants in the conduct that caused injury to these Plaintiffs. The Court denies Defendants' motion to dismiss on these grounds because, again, the Amended Complaint identifies Mr. Dugan, Mr. Stefanowicz and Mr. Johnson, as directing and causing "some of the most egregious torture and abuse at Abu Ghraib." (Am. Compl. ¶ 1.) Plaintiffs also allege that military co-conspirators have testified that Mr. Stefanowicz and Mr. Johnson were "among the interrogators who most often directed that detainees be tortured." (*Id.* at ¶ 66.) The Amended Complaint alleges that Mr. Stefanowicz and Mr. Johnson directed and engaged in conduct in violation of the Geneva Conventions, U.S. Army guidance, as well as United States law. (*Id.* at ¶ 68.) The Court finds these factual allegations sufficient to suggest that CACI employees were directly involved in the injuries caused Plaintiffs.

III. CONCLUSION

The Court denies Defendant's Motion to Dismiss on all grounds except the Court grants the Motion to the extent that Plaintiffs' claims rely upon ATS jurisdiction. The Court holds that Plaintiffs' claims are justiciable because civil tort claims against private actors for damages do not interfere with the separation of powers. Second, derivative absolute immunity is inappropriate at this stage because discovery is necessary to determine both the extent of Defendants' allowed discretion in dealing with detainees and to determine the costs and benefits of granting immunity in this case. Third, the Plaintiffs' claims are not

preempted by the combatant activities exception at this stage because discovery is required to determine whether the interrogations here constitute "combatant activities" within the meaning of the exception. Fourth, the Court dismisses Plaintiffs' claims to the extent that they rely upon ATS jurisdiction because tort claims against government contractor interrogators do not satisfy the *Sosa* requirements for ATS jurisdiction. Fifth, Plaintiffs sufficiently allege facts supporting vicarious liability because the Amended Complaint states that Defendants' employees engaged in foreseeable tortious conduct when conducting the interrogations. Sixth, conspiratorial liability is sufficiently alleged because facts stating the use of code words and efforts to conceal abusive treatment plausibly suggest conspiratorial activity. Seventh, the Court finds that the Amended Complaint sufficiently alleges the direct involvement of Defendants' employees in causing Plaintiffs' injuries because Plaintiffs point to specific employees who played a direct role in supervising and participating in the alleged conduct. Therefore, it is hereby

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is GRANTED in part and DENIED in part. Defendants' Motion to Dismiss is GRANTED only to the extent that Plaintiffs' claims rely on ATS jurisdiction.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 18th day of March, 2009.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
3/18/09

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1328
(1:08-cv-00827-
LMB-JFA)

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs – Appellees,

and

TAHA YASEEN ARRAQ RASHID; SA'AD HAMZA HANTOOSH AL-ZUBA'E,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant and 3rd-Party Plaintiff – Appellant,

and

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

Defendants,

v.

UNITED STATES OF AMERICA; JOHN DOES 1-60,

Third-Party Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae,

THE CENTER FOR JUSTICE AND ACCOUNTABILITY; RETIRED MILITARY OFFICERS; EARTHRIGHTS INTERNATIONAL,

Amici Supporting Appellee.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Floyd, Judge Thacker, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX I

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law..[1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches,

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[1] So in original.

to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.