NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 08-7008, 08-7009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAIDAR MUHSIN SALEH, et al.,
Plaintiffs-Appellees,
v.
TITAN CORPORATION, et al.,
Defendants-Appellants.

ILHAM NASSIR IBRAHIM, et al.,
Plaintiffs-Appellees,
v.
TITAN CORPORATION, et al.,
Defendants-Appellants.

On Appeal From The United States District Court
For the District of Columbia
Case Nos. 1:04-cv-1248, 1:05-cv-1165
The Honorable James Robertson, United States District Judge

FINAL BRIEF OF INTERVENORS CACI INTERNATIONAL INC AND CACI PREMIER TECHNOLOGY, INC.

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenors CACI International Inc and CACI Premier Technology, Inc., make the following certification:

(A) **Parties and Amici.** All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Joint Brief of Appellants.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Joint Brief of Appellants.

(C) **Related Cases.** The Court has consolidated the following cases which involve the November 6, 2007 Memorandum Order that is also at issue in the present appeals:

Ibrahim v. CACI Premier Technology, Inc., Nos. 08-7030, 08-7044 (D.C. Cir.).

Saleh v. CACI International Inc, Nos. 08-7001, 08-7045 (D.C. Cir.).

J. William Koegel, Jr.

CORPORATE DISCLOSURE STATEMENT

Intervenor CACI Premier Technology, Inc. is a privately-held company. Intervenor CACI International Inc is a publicly-traded company and is CACI Premier Technology, Inc.'s ultimate parent company. No publicly-traded company has a 10% or greater ownership interest in CACI International Inc.

J. William Koegel, Jr.

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GLOSSARY OF ABBREVIATIONS

CACI	Collectively CACI International Inc and CACI Premier Technology, Inc.
CACI Br.	Final Brief of Appellants CACI International Inc and CACI Premier Technology, Inc., *Saleh v. CACI Int'l Inc*, No. 08-7001 (D.C. Cir.) (filed Oct. 12, 2008)
TAC	Third Amended Complaint in *Saleh*

I. STATUTES, REGULATIONS AND GUIDELINES

All applicable statutes, regulations and guidelines are contained in the Joint Brief of Appellants.

II. INTEREST OF INTERVENORS

Intervenors CACI International Inc and CACI Premier Technology, Inc. (collectively "CACI") were co-defendants with Appellee The Titan Corporation ("Titan") in the *Ibrahim* and *Saleh* actions. CACI Premier Technology, Inc., provided civilian interrogators in support of the military's mission pursuant to a contract with the United States.

In *Ibrahim* and *Saleh*, the district court issued motion to dismiss orders that dismissed all of the claims asserted against CACI and Titan other than some of Plaintiffs' common-law tort claims. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 19 (D.D.C. 2005); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 59 (D.D.C. 2006). The district court subsequently granted summary judgment to Titan and denied it to CACI, on combatant activities preemption grounds, with respect to Plaintiffs' remaining tort claims. *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 11 (D.D.C. 2007).

CACI has appealed the district court's summary judgment order in a series of consolidated appeals that, by order of this Court, are to be assigned to the same

panel and argued the same day as the present appeals. *See Saleh v. CACI International Inc*, Nos. 08-7001, 08-7030, 08-7044, 08-7045 (D.C. Cir.)

CACI has an interest in the resolution of the present appeals for at least two reasons. First, both CACI's appeals and the present appeals involve the very same first-impression test created and applied by the district court for combatant activities preemption. CACI has argued, in its own appeals, that the test conceived by the district court is erroneous because it requires a party seeking preemption to show more than that it was performing combatant activities as part of a military operation. Titan, having received summary judgment under the district court's first-impression preemption test, lacks the same incentive to identify the flaws in that test.

Second, there are alternative grounds to affirm the judgment entered in favor of Titan, and any decision by this Court on those grounds may well have precedential value with respect to the claims against CACI. In particular, the district court erred in refusing to dismiss the *Ibrahim* and *Saleh* actions based on the political question doctrine. Because the scope of CACI's interlocutory appeals is limited to the district court's summary judgment order, the political question doctrine can be raised only in the present appeals.

III. SUMMARY OF ARGUMENT

The combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), provides a compelling basis for preemption of tort claims against a contractor when the contractor's employees are performing combatant activities of the United States military. The district court adopted this requirement for preemption, but then erroneously embroidered a second requirement onto that test – that the defendant's employees must be "acting under the direct command and exclusive operational control of the military chain of command." *Ibrahim*, 556 F. Supp. 2d at 4. The district court granted summary judgment to Titan on preemption grounds based on its conclusion that Titan satisfied both of the district court's requirements for preemption. Titan, however, should have been required to meet only the first of these elements – that its employees were performing combatant activities. That unitary test vindicates the Congressional interest in, and fundamental purpose of, the combatant activities exception: eliminating tort duties of care from the battlefield.

This Court, however, need not reach the propriety of the district court's test for combatant activities preemption or its application of that test to Titan, as the Court can resolve these appeals based on the political question doctrine. Plaintiffs' claims implicate the political question doctrine because they necessarily require judicial review of the manner in which the United States has prosecuted the war in

Iraq, and in particular the policies adopted and implemented by the United States in detaining and interrogating persons captured on the battlefield. The strategy and tactics employed on the battlefield are constitutionally committed to the executive and legislative branches of government. Judicial review of the government's interrogation rules, policies and practices would inject tort law into the realm of national security and second-guess the judgments of military commanders with respect to the detention and questioning of enemy forces. This the political question doctrine does not permit.

Application of the political question doctrine to bar these actions is particularly appropriate. The *Saleh* action alleges that CACI and Titan were part of a far-flung conspiracy, the members of which included a sitting Secretary of Defense, two Undersecretaries of Defense, a half-dozen general officers, and military officers and soldiers of virtually every rank. Indeed, the *Saleh* action alleges that torture was official United States policy, conceived by the Department of Defense and implemented by military and civilian contractor personnel. The *Saleh* Plaintiffs seek to hold CACI and Titan liable for acts of detainee abuse allegedly engaged in by military personnel, and for injuries allegedly caused as a result of the implementation of Defense Department policies adopted by allegedly co-conspiring government officials. The allegations of extensive government

complicity in a vast conspiracy to torture detainees is a textbook example of claims the political question doctrine is designed to prohibit.

Plaintiffs' claims, at bottom, are requests for a judicial award of compensation for wartime injuries. Yet it is not the province of the judiciary to provide compensation for wartime injuries; that decision is constitutionally committed to the political branches. The district court erred in concluding otherwise. That error emanated from a fundamental misunderstanding of the law governing reparations and the facts regarding the availability of an administrative remedy to the Plaintiffs. In denying CACI's and Titan's motions to dismiss on political question grounds, the district court made a "working assumption" that there was no administrative remedy available for bona fide claims of detainee abuse. *Ibrahim*, 391 F. Supp. 2d at 16 n.4. As a result, the lower court concluded that the Plaintiffs' claims were not for reparations. Both that assumption and the district court's corresponding legal conclusion were wrong.

This Court's precedent holds that an available administrative remedy is *not* required for dismissal on political question grounds. Moreover, the United States *will* provide an administrative remedy for bona fide claims of detainee abuse. Thus, the political branches *have* exercised their constitutional prerogative to decide when and how such a remedy should be available.

Finally, there are no judicially manageable standards for evaluating Plaintiffs' attempts to export tort concepts to the battlefield. Plaintiffs' claims arise out of actions that occurred in detention facilities in the Iraq war zone. The documents relevant to detention and interrogation are classified, and there is no reasonable prospect for discovery to occur in Iraq, which remains a war zone without a functioning legal system. This factor, too, requires dismissal under the political question doctrine.

IV. ARGUMENT

A. The District Court Correctly Held That Plaintiffs' Claims Against Titan Are Preempted Under The Combatant Activities Exception

The district court correctly held that Titan's provision of interpreters to the United States military, during combat operations in Iraq, implicated unique federal interests requiring preemption under the combatant activities exception. *Ibrahim*, 556 F. Supp. 2d at 11. In its own appeal from the district court's preemption decision, CACI has argued that the sole focus for combatant activities preemption should be whether the contractor's employees were performing combatant activities of the military. CACI Br. at 35-43. The district court correctly found that both CACI's and Titan's employees were engaged in a combatant activities. *Ibrahim*, 556 F. Supp. 2d at 11.

A finding that a contractor's employees were performing combatant activities as part of a military operation should be, without more, sufficient for

combatant activities preemption. That standard alone vindicates the fundamental purpose of the combatant activities exception – to eliminate tort duties of care from the battlefield. *See* CACI Br. at 26-33. That standard alone furthers the federal government's interest in not having the United States' prosecution of war – a quintessentially federal prerogative – constrained in the guise of tort regulation by either a state government or, worse, a foreign government.

The district court's adoption of a second requirement for preemption – that a contractor must demonstrate that its employees were "acting under the direct command and exclusive operational control of the military chain of command" – is unnecessary and overly burdensome. It bears no connection to Congress's acknowledged interest in eliminating tort duties on the battlefield. That interest is just as frustrated when a contractor performs *some* degree of supervision or control as when the contractor provides none. Worse yet, it fetters the discretion of battlefield commanders by creating tort law consequences if the military determines to vest some degree of control or responsibility in the hands of a contractor. That is precisely, however, what the combatant activities exception is intended to prevent. As the Supreme Court has explained, "[i]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad

to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). Under any of these scenarios, allowing battlefield tort claims frustrates Congress's determination that such claims should not constrain combatant activities in time of war.

Moreover, even if the district court's stated test were the correct standard for preemption, the record is clear that Titan is entitled to summary judgment even under a proper application of *that* standard. *Ibrahim*, 556 F. Supp. 2d at 4. The term "operational control" connotes final command authority over matters of mission accomplishment. Indeed, citation to any evidence of final command authority exercised by Titan personnel is conspicuously absent from Appellants' brief. There is no evidence in the record to suggest that Titan personnel had final decisionmaking authority on issues of mission accomplishment.

B. Plaintiffs' Claims Present Nonjusticiable Political Questions

Federal courts, as a threshold matter, "must consider whether [a] plaintiff's claims present a political question lest the court invade the province of the political branches." *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998)); *Wilson v. Libby*, 535 F.3d 697, 703 (D.C. Cir. 2008) (citations omitted); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (holding that the Court must

always "address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits").

Cases that present nonjusticiable political questions generally have one or more of the following characteristics:

> (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; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). While this Court places greater weight on the first and second *Baker* factors, *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008), if any one of these factors is inextricable from the case then a plaintiff's claims must be dismissed. *Baker*, 369 U.S. at 217; *Bancoult*, 445 F.3d at 432.

In ruling on the motions to dismiss in *Ibrahim*, the district court conceded that Plaintiffs' claims had "some relationship to foreign relations" and that "[m]anageability problems may well emerge as the litigation . . . proceeds, especially if discovery collides with government claims to state secrecy," but ultimately concluded that it had jurisdiction. *Ibrahim*, 391 F. Supp. 2d at 16. When confronted with the same issues in *Saleh*, the district court again held that it had jurisdiction over Plaintiffs' claims, expressing the sole reservation that "the

more Plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the political question doctrine." *Saleh*, 436 F. Supp. 2d at 58. The district court erred in twice concluding, albeit with reservations, that Plaintiffs' claims do not present political questions.

1. Plaintiffs' Claims Raise Policy Questions That Are Textually Committed To The Political Branches

Article I of the United States Constitution grants Congress the power to regulate the land and naval forces. U.S. Const. art. I, § 8. Similarly, Article II of the United States Constitution allocates the United States' foreign relations and national security powers to the Executive Branch, providing that the "President shall be Commander in Chief of the Army and Navy of the United States" and that he "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . [and to] appoint Ambassadors, other public Ministers and Consuls." U.S. Const. art. II, § 2. These provisions give the President "plenary and exclusive power" in the international arena and make him "the sole organ of the federal government in the field of international relations . . . ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (noting that the President has "unique responsibility" for the conduct of "foreign and military affairs"); *Oetgen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of

our government is committed by the Constitution to the executive and legislative . . . .").

This Court has observed that the conduct of the Nation's foreign policy, including the prosecution of war, is constitutionally vested in the political branches and is not an area for judicial intervention:

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.

Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967).

In contrast, Article III contains no references to foreign relations other than to establish the courts jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls," U.S. Const. art. III, § 1, and the judiciary has no traditional role in overseeing the conduct of war. Thus, as this Court has noted, it is clear that "decision-making in the areas of foreign policy and national security is textually committed to the political branches." *Schneider*, 412 F.3d at 194. Therefore, when the President exercises his war and national security powers "the propriety of what may be done . . . is not subject to judicial inquiry or decision." *Id.*

2. Plaintiffs Allege Conduct Involving Official Government Complicity, Thereby Implicating Responsibilities Constitutionally Committed to the Political Branches

Litigation of these actions would necessarily entail judicial review of the interrogation policies and rules promulgated by the United States Department of Defense and implemented by military and civilian contractor personnel. These issues present nonjusticiable political questions. Decisions regarding the detention of persons found in a combat theater are an inseparable component of the prosecution of war, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war'" (*quoting Ex parte Quirin*, 317 U.S. 1, 28 (1942)). The prosecution of war, including the war on terror, and decisions whether and under what circumstances to employ military force, are constitutionally reserved for the executive and legislative branches. The strategy and tactics employed on the battlefield with respect to detention and interrogation of enemy forces are, as a result, not subject to judicial review.

The district court first addressed the political question issue in the context of motions to dismiss the *Ibrahim* action. The *Ibrahim* action was brought in the nature of a garden-variety personal injury action, albeit one involving injuries allegedly occurring in a combat-zone detention facility. *Ibrahim*, 391 F. Supp. 2d at 18. The *Ibrahim* Plaintiffs did not assert a conspiracy between the contractors

and United States government and military personnel, or otherwise seek to hold CACI and Titan liable for the conduct of military personnel in Iraq. In the context of those personal injury claims, the district court denied the CACI and Titan motions to dismiss based on the political question doctrine. *Id.* at 15-16.

In its *Saleh* motion to dismiss, CACI argued that the decision on the political question doctrine in *Ibrahim* should not control the result in *Saleh.* In contrast to *Ibrahim*, the *Saleh* action alleged extensive government complicity in a vast conspiracy. The *Saleh* action alleged that torture was official United States policy, conceived by the Department of Defense and implemented by military and civilian contractor personnel. The *Saleh* Plaintiffs seek to hold CACI and Titan liable for acts of detainee abuse allegedly engaged in by military personnel, and for injuries allegedly caused as a result of the implementation of Defense Department policies adopted by allegedly co-conspiring government officials. *Id.*

The *Saleh* Plaintiffs allege that they were injured during their detentions by what they call the "Torture Conspirators," a group never defined with precision but unmistakenly including CACI and Titan, their employees, and "other military and government officials" who were allegedly either indifferent to the legality of interrogations in Iraq, or were part of a conspiracy to flout domestic and international laws governing the conduct of interrogations. JA.266-67 at ¶ 28. Indeed, at the outset of the case, the *Saleh* Plaintiffs provided a laundry list of

supposed members of this alleged conspiracy, ranging from former Secretary of Defense Rumsfeld, to two Undersecretaries of Defense, and to dozens of soldiers ranging in rank from generals to privates. Plaintiffs identified 36 individuals as definite co-conspirators and another 91 military personnel as possible co-conspirators. JA.112-13 at ¶ 3.

The *Saleh* Plaintiffs also allege that CACI and Titan are liable for all of the wrongful acts of any other member of this so-called Torture Conspiracy. JA. 267 at ¶ 29. Thus, the *Saleh* Plaintiffs seek to hold CACI and Titan liable for the acts of the United States in arresting, detaining and interrogating Plaintiffs. In fact, the *Saleh* Plaintiffs allege that CACI's and Titan's actions were "under the color of the United States authority." JA. 260-61 at ¶ 1; JA.274 at ¶ 65; JA.282 at ¶ 91. In other words, the *Saleh* Plaintiffs allege that CACI and Titan operated as agents of the United States, cloaked with the authority of law. The *Saleh* Plaintiffs go so far as to allege that CACI's and Titan's employees were subject to the "direction and supervision" of the "government team leader." JA.277 at ¶ 74. The Third Amended Complaint ("TAC") makes clear that all the injuries for which it seeks redress, and all of the misconduct that it alleges, occurred while the *Saleh* Plaintiffs were detained in U.S. military custody in the war zone of Iraq and "imprisoned in prisons or facilities in or around Iraq *under the control of the United States forces*." JA.263-64 at ¶¶ 12, 13, 14; JA.268-69 at ¶ 38 (emphasis added); *see also* JA.266-

67 at ¶ 28; JA.274 at ¶ 63; JA.274 at ¶ 65; JA.292 at ¶ 128; JA.293 at ¶ 132 (all alleging wrongful acts in prisons under the United States' control); JA.287 at ¶ 114; JA.294 at ¶ 136; JA.295 at ¶ 141; JA.297 at ¶ 145 (all alleging that Plaintiffs were wrongfully detained).

The TAC further avers, and thereby admits, that all of "Defendants' acts took place during a period of armed conflict." JA.310 at ¶ 226. Indeed, the TAC alleges that CACI's and Titan's conduct constituted war crimes. JA.310-12 at ¶¶ 225, 227-28, 233, 237. Thus, it is plain that the actions for which CACI and Titan are being sued were taken in a war zone pursuant to a United States war effort, and that the *Saleh* Plaintiffs seek to have this Court pass judgment on the way in which the United States, particularly with the support of civilian contractors, has waged war in Iraq. That the political question doctrine does not permit.

Clearly, the alleged actions complained of implicate determinations made in furtherance of the United States' war effort, the precise type of official involvement in foreign affairs decisions that triggers the political question doctrine. *Gonzalez-Vera*, 449 F.3d at 1263-64; *Bancoult*, 445 F.3d at 432; *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005).

3. Whether Recovery For Wartime Injuries Should Be Available To Plaintiffs Is A Political Question Constitutionally Committed To The Political Branches

Plaintiffs seek compensation for the injuries that they allegedly suffered as a consequence of the actions of the United States in invading and occupying Iraq. Those actions included the provision of interrogation and interpreter services by, respectively, CACI and Titan pursuant to contracts with the United States.

American courts have long recognized that they have no role in assessing the propriety of compensation for wartime injuries. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1871). These cases establish that, from the earliest days of the Republic, the federal courts have had no role in compensating individuals, whether the defendant is the United States or a private party, for injuries suffered as a result of the manner in which the United States wages war, even if the United States violated the law of nations through its war-fighting tactics. Rather, the advisability of such compensation appropriately is determined through the diplomatic efforts of the political branches of government.

Consistent with the Constitution's textual allocation of the Nation's foreign policy and war powers, the political branches historically have made the policy decision as to whether, and which, claimants alleging wartime injuries should be entitled to compensation. As the Supreme Court recently observed:

> Since claims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations' between the countries involved, there is a 'longstanding practice' of the national executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries.

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942), and *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). In *Garamendi*, the Court even noted that resolution of wartime claims against private parties is a function historically undertaken by the political branches and not by the courts:

> Historically, wartime claims against even nominally private entities have become issues in international diplomacy . . . . As shown by the history of insurance confiscation mentioned earlier, untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.

Id. at 416. Here, Plaintiffs' claims do not have merely a tenuous connection to the conduct of war. Rather, that connection is as direct, focused and unadulterated as is possible. Plaintiffs seek to hold CACI and Titan liable for the alleged conduct of military personnel and contractor employees, employees working hand-in-hand with the United States military in a combat zone detention facility. Thus, Plaintiffs' claims against CACI and Titan are inseparable from the United States' conduct of the war in Iraq.

Other recent cases have echoed this principle. For example, in *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 666-67 (N.D. Cal. 2002), the court held that claims against a bank for financial losses suffered by the plaintiff during World War II were wartime compensation claims constitutionally committed to the political branches: "As an issue affecting United States relations with the international community, war reparations fall within the domain of the political branches and are not subject to judicial review." *Id.* at 666 (citation omitted). The *Zivkovich* court also rejected plaintiff's argument that this principle did not apply because his claim was asserted against a private bank. *Id.* at 666-67; *see also Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1117 (C.D. Cal. 2003).

That said, a wartime compensation or reparations agreement is not required for dismissal based on the political question doctrine. This Court recently rejected, on political question grounds, a wartime compensation claim asserted by former "comfort women" who alleged that they had been abducted and forced into sexual slavery by the Japanese Army before and during World War II. *Hwang Geum Joo v. Japan*, 413 F.3d 45, 51 (D.C. Cir. 2005). The Court reached this conclusion even though the relevant peace agreements *made no provision for compensation*. *Id.* As the Court observed, an agreement making no provision for compensation

for wartime injuries just as conclusively bars war claims as an agreement providing for such recoveries:

> [T]he restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and *if there had been no provision, respecting these subjects, in the treaty,* they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice.

Hwang Geum Joo, 413 F.3d at 51 (emphasis added) (quoting *Ware*, 3 U.S. (3 Dal.) at 230), *cert. denied,* 126 S. Ct. 1418 (2006). Other courts have relied upon the political question doctrine to reject wartime compensation claims even though the claimants had no administrative means of recovery available to them. *See, e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 769 (2003), *aff'd,* 378 F.3d 134 (Fed. Cir. 2004); *Anderman*, 256 F. Supp. 2d at 1117; *Zivkovich*, 242 F. Supp. 2d at 666-67.

Ignoring these precedents, the district court concluded that Plaintiffs' claims were not "a standard matter of 'war reparations,'" because "there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings." *Ibrahim*, 391 F. Supp. 2d at 16. The district court's decision was based in part on its "working assumption" that there was no administrative remedy available to Plaintiffs for their alleged wartime injuries. *Id.* at 17 n.4.

The district court was wrong on two counts. *First,* the district court erred in viewing the existence of a state-negotiated reparations agreement as the *sine qua*

non for application of the political question doctrine. This Court's decision in *Hwang Geum Joo* makes clear that reparations claims are barred even in the absence of an administrative remedy.

Second, contrary to the district court's "working assumption," the United States *will* provide an administrative remedy under the Foreign Claims Act ("FCA"), 10 U.S.C. § 2734 (2008), for persons presenting credible claims of abuse arising from their detention by the United States in Iraq. *See* JA.736-60.[1] By the time the district court issued its decision on the motions to dismiss in *Ibrahim*, the *Saleh* Plaintiffs' counsel had been advised by the United States Army Claims Service that it would not provide compensation to Plaintiff Saleh for the detainee abuse aspects of his administrative claim, although it authorized payment of compensation for other aspects of Saleh's claim. JA.751-57. The Army's basis for refusing compensation under the FCA for Saleh's claims of detainee abuse was not that no such remedy was available, but that, upon investigation, it turned out that Plaintiff Saleh was never interrogated, never housed in the "hard site" where the abuse is alleged to have occurred, and never abused. JA.743-47; JA.751-57. Indeed, by the time the district court issued its decision on the motions to dismiss

[1] The Court is permitted to consider the United States' position in this regard. As this Court observed in *Gonzalez-Vera*, 449 F.3d at 1262, the political question doctrine is one of subject-matter jurisdiction, and therefore not subject to the general requirement that Rule 12(b)(6) motions be decided without regard to material outside the complaint.

in *Saleh*, the *Saleh* Plaintiffs' counsel had been definitively advised by the United States Army that it *would* provide administrative compensation for claims of detainee abuse, despite the *Saleh* Plaintiffs' counsel's best efforts to convince the Army to take the position that it would not provide such a remedy. JA.758-60.

Plaintiffs' counsel failed to disclose this to the court, and as a result the district court was not aware of the United States' administrative remedy at the time it declined to dismiss the actions on political question grounds. The incorrect nature of the district court's "working assumption" that no administrative remedy was available for bona fide claims of detainee abuse – known to the *Saleh* Plaintiffs' counsel but none of the other litigants – was brought to the district court's attention only after CACI learned the details of Plaintiff Saleh's administrative claim shortly before filing its summary judgment reply.

While not a prerequisite to invocation of the bar of the political question doctrine, the availability of an administrative remedy underscores the need to avoid judicial interference in a matter delegated to the political branches.[2]

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[2] Moreover, because the Constitution vests the power to wage war and conduct foreign affairs in the political branches, adjudicating Plaintiffs' reparations claims would demonstrate a lack of respect for the proper constitutional role of coordinate branches of government, which, under *Baker*, supports a finding of nonjusticiability. *Zivkovich*, 242 F. Supp. 2d at 668.

4. Courts Cannot Create A Standard By Which To Judge The Reasonableness Of The Political Branch's Deployment Of Force In Wartime

"[R]ecasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments." *Schneider*, 412 F.3d at 197. This is because it is the political branches, and not the courts, that must "determine whether drastic measures should be taken in matters of foreign policy and national security" and who "must determine what degree of force [a] crisis demands." *Bancoult*, 445 F.3d at 436-37, 370 (internal quotation and citation omitted).

Plaintiffs allege that the methods used by the United States military, Titan, and CACI to interrogate foreign enemy combatants in an active war zone are unlawful. Plaintiffs have asked this Court to do the very thing that the Court has refused to do in its prior applications of the political question doctrine to similar exercises of Executive Branch power – develop a new standard by which to evaluate the national security policy of the United States.

In *Bancoult*, former residents of the Chagos Archipelago alleged that they had suffered severe injuries as a result of the United States forcibly relocated them during the construction of the Diego Garcia air base. 445 F.3d at 427. This Court described their claims as encompassing "forced relocation; torture; racial discrimination; cruel, inhuman, or degrading treatment; genocide; intentional

infliction of emotional distress; negligence; trespass; and destruction of real and personal property." *Id.* Despite the gravity of the plaintiffs' allegations, this Court held that it did not have jurisdiction because *both* the decision to establish a military base on Diego Garcia and "the specific tactical measures allegedly taken to depopulate the Chagos Archipelago" were nonjusticiable political questions. 445 F.3d at 436. Therefore, the Court could not establish a standard by which to judge the exercise of force or even conclude that the United States owed a duty of care to the plaintiffs:

> We cannot second-guess the degree to which the executive was willing to burden itself by protecting the [plaintiffs] well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been. In this respect, the specific steps taken to establish the base did not merely touch on foreign policy, but rather constituted foreign policy decisions themselves. If we were to hold that the executive owed a duty of care toward the Chagossians, or that the executive's actions in depopulating the islands and constructing the base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence. The courts may not bind the executive's hands on matters such as these, whether directly-by restricting what may be done – or indirectly – by restricting how the executive may do it.

445 F.3d at 437. Importantly, this Court held that the political question doctrine divested it of jurisdiction over the plaintiffs' claims against the United States as well as the claims asserted against the individual defendants. *Id.* In so holding, the Court rejected the plaintiffs' argument that the political question doctrine did not

bar their claims against the individual defendants because those individuals had not acted in conformance with presidential orders to depopulate the island. *Id.*

Because the individual defendants were authorized to depopulate the islands and establish a military base "[a]ll the acts alleged to have harmed the [plaintiffs] directly furthered, or at least were incidental to, this authorized goal" and "the use of harsh measures in the course of completing the tasks cannot be unexpected." *Id.* at 438. Consequently, the actions of the individuals alleged to have caused the harm to plaintiffs was not, for political question purposes, outside the scope of their employment. *Id.*

The *Bancoult* decision compels the dismissal of Plaintiffs' claims. Like the individual defendants in *Bancoult*, the government contractors employed by the United States military in Iraq to support intelligence gathering were authorized by the military to use various interrogation techniques to accomplish their authorized objectives.[3] The United States military's interrogation policies and the

[3] This Court held that the alleged "authorization, implementation and supervision of torture" was within the scope of employment of military personnel who interrogated detainees at the United States Naval Base at Guantanamo Bay, Cuba. *Rasul v Myers*, 512 F.3d 644, 656-60 (D.C. Cir. 2008). In *Rasul,* the allegation that military interrogators had engaged in "serious criminality" while interrogating detainees did not change the result because "the detention and interrogation of suspected enemy combatants [was] a central part of the [soldiers'] duties as military officers charged with winning the war on terror." *Id.* at 658-60. Because "the detention and interrogation of suspected enemy combatants [was] the type of conduct the defendants were employed to engage in," *id.* at 659, "allegations of serious criminality d[id] not alter [the Court's] conclusion that the

implementation of those policies by CACI interrogators and Titan linguists are inextricably intertwined. As in *Bancoult* "the specific steps taken" by military and CACI interrogators to extract intelligence from detainees also "constituted foreign policy decisions themselves." *Id.* at 437; *see also Schneider*, 412 F.3d at 196.

Plaintiffs cannot avoid the challenge their claims present to United States foreign policy by suing private contractors charged with implementing that policy. CACI and Titan played the same role, and operated under the same procedures, as the uniformed service members they worked with and from whom they took orders. *See* JA.470 ("In my opinion, there are some differences [between soldiers and the contractor employees deployed with the Army in Iraq], primarily administrative and logistical. But from a missions standpoint, no."). As discussed *supra*, Plaintiffs actually allege that CACI and Titan acted as agents of the United States "under the color of the United States authority." JA.260-61 at ¶ 1; JA.274 at ¶ 65; JA.282 at ¶ 91. As this Court's decisions make clear, actions taken in furtherance of the executive's foreign policy goals by CACI , Titan, or any other agents of the military, are an exercise of executive power. *Gonzalez-Vera*, 449 F.3d at 1264.

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defendants' conduct was incidental to authorized conduct." *Id.* at 660.

5. There Are No Judicially Discoverable And Manageable Standards For Evaluating Plaintiffs' Claims

Much of the evidence bearing on Plaintiffs' claims likely will be impossible for the Court and the parties to discover. The district court acknowledged this problem in *Ibrahim*, 391 F. Supp. 2d at 14, yet left the resolution of it for another day. Now, more than three years later, there are still no judicially manageable standards within which to conduct discovery in Iraq.

Federal courts regularly have held that they lack judicially manageable standards for evaluating claims for wartime injuries that would require an extensive review of classified materials, or materials that are unlikely to be discoverable because of the "fog of war." *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Anderman*, 256 F. Supp. 2d at 1112-13; *Zivkovich*, 242 F. Supp. 2d at 668. As one court has observed, "[i]n wartime, it would be inappropriate to have soldiers assembling evidence, collected from the 'battlefield.'" *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1495 (C.D. Cal. 1993). All of these concerns apply with full force here.

Plaintiffs' claims arise out of activities that took place in combat-zone detention facilities. All records regarding who was detained by the United States and why, what detainees were interrogated (and by whom), what interrogation techniques were approved by military authority, the reports of interrogations, and whether a detainee made a report of abuse, are within the exclusive province of the

United States. Notwithstanding the fact that the war-zone context of these detention activities likely makes recordkeeping less than perfect, these records are in large measure, if not entirely, classified. *See, e.g., ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 552, 564-55 (S.D.N.Y. 2005). But CACI and Titan would need access to all of these records in order to test the veracity of Plaintiffs' claims of abuse.

In addition to classified records in United States custody, some of the evidence relating to Plaintiffs' claims will be located in Iraq. For example, in investigating a Plaintiff's claim of abuse, CACI and Titan would need to take discovery of persons, such as other detainees, who were detained in the vicinity of the Plaintiff. Indeed, given the *Saleh* Plaintiffs' claim that CACI and Titan were in a conspiracy with Iraqi nationals hired by the military to guard Iraqi criminals with no intelligence value, the parties would need discovery of non-party Iraqi nationals.

Iraq was, is, and will be for the foreseeable future, a war zone. There is no reasonable prospect that the parties would be able to rely on the assistance of an Iraqi judiciary or diplomatic agency in obtaining compelled testimony or production of documents.[4] Thus, there is no reasonable process by which the

[4] Indeed, violence against Iraqi judges and other government officials remains widespread. *See, e.g.*, Reuters, *Suicide bomb blast kills 13 in Baghdad*, June 5, 2008, available at

parties can expect to obtain access to any sources of proof located in Iraq relating to activities that occurred 4-5 years ago. Access to evidence in the hands of the United States is hindered not only by the inherent difficulties of recordkeeping in a war zone, but also by the classified nature of the information crucial to CACI and Titan's defense. For these reasons, Plaintiffs' claims are precisely the types of wartime claims that defy resolution through the judicial process.

V. CONCLUSION

For the foregoing reasons, the Court should hold that Plaintiffs' claims present nonjusticiable political questions, and remand this case to the district court with instructions to dismiss Plaintiffs' claims.

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http://www.chinapost.com.tw/asia/other/2008/06/05/159602/Suicide-bomb.htm (reporting on suicide bomb attack on a senior police officer in Baghdad); Associated Press, *Gunmen ambush electoral workers in southern Iraq*, Aug. 19, 2008, available at http://www.boston.com/news/world/middleeast/articles/2008/08/19/gunmen_ambush_electoral_workers_in_southern_iraq/ (reporting the targeted killings of two election workers); Richard A. Oppel Jr. and Abeer Mohammed, *Judge and U.S.-Linked Sunni Fighters Are Killed in Iraq*, N.Y. Times, Jan. 15, 2008, available at http://www.nytimes.com/2008/01/15/world/middleeast/15iraq.html?ex=1358053200&en=8d649cd4ee228979&ei=5088&partner=rssnyt&emc=rss (reporting on assassination of respected and high-ranking Iraqi appellate court judge in western Baghdad); Associated Press, *Officials: some 30 Iraqi judges have been killed in Iraq, underscoring need for tight security*, International Herald Tribune, Aug. 13, 2007, available at http://www.iht.com/articles/ap/2007/08/13/africa/ME-GEN-Iraq-Judges.php (reporting that 31 Iraqi judges have been killed in Iraq because of their profession); Associated Press, *28 militants, Iraqi official killed*, U.S.A. Today, Apr. 29, 2008, available at http://www.usatoday.com/news/world/iraq/2008-04-29-iraq-violence_N.htm?csp=34 (reporting the assassination of the director general at the Iraqi Ministry of Labor and Social Affairs).

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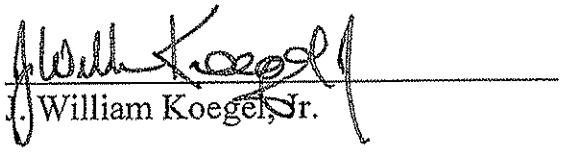
November 21, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I, J. William Koegel, Jr., hereby certify that:

1. I am an attorney representing Intervenors CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Certificate as to Parties, Table of Contents, Table of Authorities, Glossary, and Certificate of Compliance and Service) contains 6,708 words.



J. William Koegel, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2008, I caused the foregoing Final Brief of Intervenors CACI International Inc and CACI Premier Technology, Inc., to be filed with the Clerk under F.R.A.P. 25(a)(2)(B), and a true copy to be served on the following counsel, by U.S. mail, first-class postage prepaid:

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