UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI,
ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
and HASAN NSAIF JASIM AL-EJAILI,

Plaintiffs,

v.

CACI PREMIER TECHNOLOGY, INC.,

Defendant,

CACI PREMIER TECHNOLOGY, INC.,

Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA, and
JOHN DOES 1-60,

Third-Party Defendants.

No. 1:08-cv-0827 LMB-JFA

DEFENDANT/THIRD-PARTY PLAINTIFF CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS SUGGESTION OF LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

Jesner v. Arab Bank, plc, 138 S. Ct. 1386 (2018), is a watershed decision that significantly amplifies and refines the analysis courts are required to conduct to determine whether there is subject-matter jurisdiction over a claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *Jesner* addressed the specific question whether courts could properly exercise discretion to recognize claims against foreign corporations under ATS, or whether "caution requires the political branches to grant specific authority before corporate liability can be

imposed." *Jesner*, 138 S. Ct. at 1389. By this suggestion, CACI PT is not asking the Court to address the question of domestic corporate liability left unresolved in *Jesner*, but is asking the Court to apply *Jesner* to the particular circumstances in which Plaintiffs' claims arose. Under the analysis mandated by *Jesner*, claims may not be brought under ATS that arise from U.S. military operations in a war. Accordingly, *Jesner* precludes the exercise of subject-matter jurisdiction over Plaintiffs' claims and requires that they be dismissed.

In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), the Supreme Court held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [of international law violations] we have recognized." The Court further stated that there were reasons, such as Congress's supreme role in creating and defining private rights of action, "for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Id.* Ultimately, the *Sosa* Court rejected the plaintiff's arbitrary detention claim on the grounds that it was not a sufficiently well-defined and universally-accepted violation of international law. *Id.* at 738.

Courts applying *Sosa* often treated the "judicial caution" language in that decision as being tied to its consideration whether the alleged tort was a specifically-defined and universally-accepted violation of international law – that judicial caution required that the court be firmly convinced that the alleged tort was a violation of international law.[1] Indeed, that was this

[1] *See, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1019 (9th Cir. 2014) ("*Sosa* described this restraint through a historically focused standard for determining when an ATS claim may be based on contemporary international law. Under this test, 'federal courts should not recognize private claims under federal common law for violations of any international law

Court's approach on remand. The Court directed the parties to file memoranda regarding the law applicable to Plaintiffs' claims, but rejected CACI PT's argument that Congress had not created a private right of action applicable to Plaintiffs' claims as "a confusing line of reasoning" that "is beside the point because courts have recognized that torture is a common law cause of action under the ATS." Dkt. #615 at 7. *Jesner* makes clear that CACI PT's argument is no longer "beside the point." Under *Jesner*, it *is* the point.

Indeed, *Jesner* changes the way a court must analyze claims asserted under ATS for purposes of subject-matter jurisdiction. *Jesner* reiterates that federal courts must "exercise 'great caution' before recognizing new forms of liability under ATS," and that this "vigilant doorkeeping" must take into account that the "separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS." *Id.* at 1398, 1403 (quoting in part *Sosa*, 542 U.S. at 728). *Jesner*, however, makes clear that these considerations do not just raise the bar for determining whether a particular tort is sufficiently well defined and universally accepted, but constitute an ***independent inquiry*** akin to a *Bivens* "special-factor analysis" that applies even if the tort claims asserted are well-defined and universally-accepted violations of international law. A plaintiff's failure to establish this independent factor – to show Congressional intent to permit the ATS claim – is itself sufficient to require dismissal. Accordingly, the Supreme Court held in *Jesner* that the plaintiffs' claims had to be dismissed based solely on separation-of-powers concerns and the absence of any indicia of Congressional intent to hold foreign corporations liable under ATS. The Court did this without any consideration of whether the claims alleged violations of internationally-accepted

norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.'" (quoting *Sosa*, 692 U.S. at 732)).

norms. Nor did the Court consider whether the plaintiffs' claims were barred by the presumption against extraterritoriality.

Jesner also makes clear that the exercise of "judicial caution" and "vigilant doorkeeping" requires dismissal where the claim does not further the principal objective of the ATS – to "avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States accountable for an injury to a foreign citizen." *Id.* at 1397; *see also Sosa*, 542 U.S. at 715 (ATS designed to provide a forum for claims which, "if not adequately redressed could rise to an issue of war"); *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 123-24 (2013) (same). Again, *Jesner* makes clear that this is an inquiry independent of, and in addition to, the question whether a plaintiff's claim is a sufficiently well-defined and universally-accepted violation of international law. The fact that the plaintiffs' claims did not prevent foreign entanglements and international friction was sufficient to require dismissal without considering the separate question whether the plaintiffs' claim – material support of terrorism – was a violation of an internationally-accepted norm.

Plaintiffs' claims are incompatible with *Jesner*. Plaintiffs seek to hold CACI PT[2] vicariously liable under ATS for abuse allegedly inflicted on them by U.S. military personnel in a wartime detention facility. *Jesner* dictates that federal courts reject claims brought under ATS that implicate serious separation-of-powers concerns, including that it is for *Congress*, and not the courts, to create private rights of action. Congress has legislated repeatedly in the space where Plaintiffs' claims lie, and each time conspicuously elected not to create a private right of action that would apply to Plaintiffs' claims. Moreover, prosecution of war and foreign policy is Constitutionally committed to the political branches, and federal legislation has evinced an

[2] "CACI PT" refers to Defendant/Third-Party Plaintiff CACI Premier Technology, Inc.

intention that U.S. military operations – claims arising on the battlefield – not be regulated or second-guessed through tort litigation. Thus, Congress's preeminent role in creating and defining private causes of action, and its election not to do so in a context that is Constitutionally committed to the political branches, requires dismissal of Plaintiffs' claims without regard to the Court's conclusion that they assert violations of universally-accepted international law.

In addition, Plaintiffs seek to apply ATS in a new context that is inconsistent with the purpose of ATS as stated in *Jesner* and which has not been endorsed by any court. None of the ATS cases that have been permitted to proceed to trial involves claims arising out of the United States' conduct of war. Plaintiffs' claims arise in the context of an invasion of Iraq that was specifically authorized by Congress, in which the United States military and its allies forcibly displaced the existing Iraqi government and military, replacing them with a Coalition Provisional Authority ("CPA") designated by the invading forces. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (Oct. 16, 2002); CPA Order 17.

Jesner explains that the purpose of ATS is to provide a federal forum in situations where the failure to do so could create international frictions leading to war. That was impossible here, as Plaintiffs' claims arose in the context of a war that was already underway. There is nothing in the history or purpose of ATS that supports using ATS to provide a forum for litigating civil claims arising out of the United States' *conduct* of a war. Moreover, providing such a forum is inconsistent with the long history of resolving claims arising out of wartime injuries in other ways. Indeed, *none* of the paradigmatic violations of international law to which ATS was thought to apply upon its enactment involved litigating conduct once a war had begun; they all involved offenses that, if not checked, theoretically could lead to hostilities. *Jesner*, 138 S. Ct. at

1397. For these reasons, *Jesner* precludes recognition of claims under ATS arising out of U.S. military operations in a war.[3]

II. ANALYSIS

A. Legal Standard

Federal courts have an obligation to give effect to Supreme Court decisions issued during the pendency of the case. *United States v. White*, 836 F.3d 437, 443-44 (4th Cir. 2016); *Brzonkala v. Va. Poly. Inst. & State Univ.*, 169 F.3d 820, 853 (4th Cir. 1999). This is particularly true when intervening changes in the law implicate the Court's subject-matter jurisdiction because questions of subject-matter jurisdiction "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994).

A challenge to the Court's subject matter jurisdiction may be brought at any time, and "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); *United States v. Beasley*, 495 F.3d 142, 147 (4th Cir. 2007); *Green v. Sessions*, No. 1:17-cv-1365-LMB-TCB, 2018 WL 2025299, at *7 (E.D. Va. May 1, 2018). While a challenge to the Court's subject-matter jurisdiction often is brought under Federal Rule of Civil Procedure 12(b)(1), the proper vehicle for such a challenge once the defendant has answered the complaint is a suggestion of lack of subject-matter jurisdiction. 5B Wright & Miller, *Federal Practice &*

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[3] As CACI PT has argued previously, there are a number of reasons why the Court lacks subject-matter jurisdiction in this case. Some of these reasons require discovery and will be renewed, if the case is not dismissed beforehand, at the time CACI PT files its motion for summary judgment. Other jurisdictional arguments previously rejected by the Court likely will be renewed at that time as well. This motion solely addresses the impact of the majority opinion in *Jesner* on Plaintiffs' claims.

Procedure § 1350, at 138 (3d ed. 2004); *see also S.J. v. Hamilton County, Ohio*, 374 F.3d 416, 418 n.1 (6th Cir. 2004).

To determine subject-matter jurisdiction, the Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) ("*Burn Pit*"). A court must act as finder of fact for purposes of the motion and resolve any evidentiary disputes. *Id.* (citing *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). The plaintiff has the burden of proving subject-matter jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

B. The Supreme Court's Decision in *Jesner*

The starting point for *Jesner* is the Supreme Court's decision in *Sosa*, which established a framework for determining whether claims may proceed under ATS. *Sosa* held that claims asserted under ATS must "rest on a norm of international character accepted by the civilized world and defined with [sufficient] specificity." *Sosa*, 692 U.S. at 725. *Sosa* went on to add, however that there were reasons "for judicial caution when considering *the kinds of individual claims* that might implement the jurisdiction conferred" by ATS. *Id.* (emphasis added). These concerns included:

- changes in the conception of the common law since ATS's enactment in 1789;
- a "significant rethinking of the role of the federal courts in making" common law;
- the notion that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases";
- "the potential implications for the foreign relations of the United States of recognizing [ATS] causes of action should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and
- the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations."

Id. at 725-28.

Given the language is *Sosa*, courts often treated the reasons stated by the Court for judicial caution as explaining why a strict standard was required in terms of specificity and universal acceptance before a particular tort claim would be recognized under ATS. This dynamic played out in this case. In its court-ordered memoranda addressing applicable law, CACI PT argued that "United States legislation, and the congressional policies underlying such legislation, inform the Court's analysis of the availability of causes of action under ATS and in fact take precedence over customary international law." Dkt. #576 at 10 (citing Anti-Torture Statute, War Crimes Act, Torture Victims Protection Act, Military Commissions Act of 2006, and combatant activities exception to FTCA). The Court characterized CACI PT's argument as "a confusing line of reasoning" and held that its points were irrelevant "because courts have recognized that torture is a common law cause of action under the ATS." Dkt. #615 at 7. Thus, the Court treated the reasons for judicial caution identified in *Sosa* as inapplicable based on the Court's view that the torts asserted by Plaintiffs met *Sosa*'s requirement of specificity and universal acceptance.

Jesner clarifies that the requirements of specificity and universal acceptance stated in *Sosa* are necessary *but not sufficient* for an ATS claim to proceed. Rather, the "judicial caution" and "vigilant doorkeeping" required by *Sosa* is an inquiry that is separate from, and independent of, the question whether a particular tort is specifically defined and universally accepted as a violation of international law. As *Jesner* makes clear, a holding that a particular tort meets the specificity and universal acceptance requirement does not overcome, nullify or otherwise trump the reasons for "judicial caution" and "vigilant doorkeeping" specified by *Sosa*. As explained below, *Jesner* holds that when separation-of-powers and foreign-policy concerns requiring

"judicial caution" and "vigilant doorkeeping" counsel against allowing a particular plaintiff's claim under ATS, dismissal is required *even if those claims would be actionable under ATS in other contexts*.

In *Jesner*, the Court reiterated that ATS is "'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action for violations of international law." *Id.* at 1397 (quoting *Sosa*, 542 U.S. at 713-14). The *Jesner* Court explained that at the time of ATS's enactment, the "relatively modest set" of international law violations governing individual conduct consisted of "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* The Court repeated its observation from *Sosa* that these three violations of international law were "probably on the minds of the men who drafted the ATS." *Id.* (quoting *Sosa*, 542 U.S. at 715).

The Court explained that ATS's objective was the *prevention* of armed conflict between the United States and foreign nations by providing a remedy for conduct that a foreign country could find chargeable to the United States itself if no tort remedy existed:

> The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.

Id. (citing *Sosa*, 542 U.S. at 715-19); *see also id.* at 1406.

Having explained the ATS's historical backdrop, the *Jesner* Court noted that *Sosa* "held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the "historical paradigms familiar when § 1350 was enacted." *Id.* (quoting *Sosa*, 542 U.S. at 732. The Court, however, noted the limitations *Sosa* imposed on this power:

> The [*Sosa*] Court was quite explicit, however, in holding that ATS litigation implicates serious separation-of-powers and foreign-relations concerns. Thus, ATS claims must be "subject to vigilant doorkeeping."

Id. (quoting *Sosa*, 542 U.S. at 729) (internal citations omitted).

The Court then turned to the separation-of-powers issues inherent in ATS litigation. In *Jesner*, which did not involve claims arising out of U.S. military operations, the principal separation-of-powers issue involved Congress's preeminent role in deciding whether to create private rights of action under federal law. As the Court explained:

> *Sosa* is consistent with this Court's general reluctance to extend judicially created private rights of action. The Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). That is because "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). Thus, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Id.* at 1858

Id. at 1402 (parallel citations and parentheticals omitted) (omission in original).

Based on these principles, the Court restated *Sosa*'s command that courts "must exercise 'great caution' before recognizing new forms of liability under the ATS." *Id.* at 1403 (quoting *Sosa*, 542 U.S. at 728). The Court further explained that "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under ATS." *Id.* The Court, however, concluded that it did not need to reach this question in order to hold that claims under ATS against foreign corporations are categorically prohibited. *Id.*

As noted above, the Court cited three non-ATS cases as demonstrating the Court's aversion to the creation of private rights of action by federal courts. In *Ziglar*, the Court held that a *Bivens* action was not available against Executive branch officials by detainees asserting that the United States' post-9/11 detention policies violated their constitutional rights. 137 S. Ct. at 1863. The Court held that the plaintiffs' claims arose in a different context from prior prisoner abuse claims, for which *Bivens* remedies had been held available, because the case involved considerations of national-security policy and "[j]udicial inquiry into the national-security realm raises 'concerns for the separation of powers in trenching on matters committed to the other branches.'" *Id.* at 1861 (quoting *Christopher v. Harbury*, 536 U.S. 403, 417 (2002)).

In *Malesko*, the Court held that a *Bivens* action was not available against a corporation operating a privately-owned prison, "[f]or if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." 534 U.S. at 71. In *Alexander*, the Court held that no private right of action was available to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964 because "private rights of action to enforce federal law must be created by Congress." 532 U.S. at 286.

In addition to the separation-of-powers concerns that by themselves were sufficient to bar the plaintiffs' claims, the *Jesner* Court held that the claims in that case were contrary to the objective underlying ATS. The Court explained that "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406. The Court observed that the assertion of claims under ATS in the case before it had created, rather than prevented,

international friction. Thus, "[l]ike the presumption against extraterritoriality, judicial caution under *Sosa* 'guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.'" *Id.* at 1407 (omission in original) (quoting *Kiobel*, 569 U.S. at 124).

Jesner is also notable for what it did not decide. The Court did not decide whether the plaintiffs' proposed tort – material support of terrorism – met the specificity and universal acceptance requirements under *Sosa*. Rather, the Court "assumed . . . that individuals who knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes" under the same "well-settled, fundamental precepts of international law." *Id.* at 1394. Similarly, the Court concluded that it did not need to decide whether the plaintiffs' "allegations are sufficient to 'touch and concern' the United States under *Kiobel*" to decide the case before it. The Court could assume a "well-settled" violation of international law, and did not need to decide extraterritoriality because the separation-of-powers and foreign-policy concerns requiring dismissal of the plaintiffs' claims applied without regard to how those issues might be resolved.

C. *Jesner* Requires Dismissal of Plaintiffs' Claims

In *Jesner*, the Court held that there was no jurisdiction under ATS in that case for two independent reasons: (1) the separation-of-powers concerns inherent in ATS precluded judicial creation of a private right of action in the new context at issue in *Jesner*; and (2) allowing an ATS claim did not further ATS's objective of preventing friction between the United States and foreign nations. The separation-of-powers and foreign-policy considerations that each compelled dismissal in *Jesner* are even stronger in the present case, and require dismissal of Plaintiffs' claims.

1. The Separation-of-Powers Concerns Identified in *Jesner* Require Dismissal of Plaintiffs' Claims

The main separation-of-powers concern that compelled dismissal in *Jesner* was the general principle that Congress, and not the courts, is charged with deciding whether to permit particular private rights of action. *Jesner*, 138 S. Ct. at 1402-03. The Court noted that Congress is better equipped than the courts to decide "if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1402 (quoting *Ziglar*, 137 S. Ct. at 1857. The Court held that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of ATS" because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403 (citing *Kiobel*, 569 U.S. at 116-17).

Moreover, the Court held that these concerns extend beyond whether to recognize particular torts as violative of international law, and also include whether to allow a damages remedy under ATS is a new context. *Id.* ("This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability on artificial entities like corporations."). Accordingly, in any context in which a claim under ATS arises, a court must not create a damages remedy "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1402 (quoting *Ziglar*, 137 S. Ct. at 1858). The separation-of-powers concerns counseling against allowing claims under ATS are significantly stronger in this case than they were in *Jesner*.

Here, there are sound reasons why Congress might doubt the efficacy of a private right of action. Congress has legislated repeatedly in the space occupied by Plaintiffs' claims, and never elected to create a private right of action that would permit Plaintiffs' claims. Congress enacted the Torture Victims Prevention Act ("TVPA"), 28 U.S.C. § 1350 note, and as the Court held in

Jesner, "[t]he key feature of the TVPA for [that] case" was that Congress created a private right of action under the TVPA but limited such claims to claims against natural persons only. *Jesner*, 138 S. Ct. at 1398, 1404; *see also Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453-56 (TVPA claims limited to claims against natural persons). The TVPA's limitation to claims against natural persons is relevant here, as Plaintiffs' claims are against a corporation, but the TVPA is even more relevant in the present case because Congress expressly limited the private right of action to claims of torture and extrajudicial killing occurring "under actual or apparent authority, or color of law, ***of any foreign nation***." TVPA § 2(a), 28 U.S.C. § 1350 note (emphasis added). Thus, Congress created a private right of action for torture, and could have included claims under color of U.S. law, but did not.

Similarly, Congress enacted the Anti-Torture Statute in 1994, which addresses both torture and "cruel or inhuman treatment," two of the three varieties of claims asserted by Plaintiffs. 18 U.S.C. § 2340A. Congress limited the reach of that statute to *criminal prosecution only*. But Congress went further and added a specific provision stating that the statute shall not be construed "as creating any substantive or procedural right enforceable by law by any party in any civil proceeding." 18 U.S.C. § 2340B. Congress enacted the War Crimes Act in 1996, but again did not include a private right of action in that statute. 18 U.S.C. § 2441. Congress created jurisdiction in federal district court for civilians accompanying the armed forces overseas,[4] and enacted legislation creating court-martial jurisdiction over contractors serving in the field with

[4] *See, e.g.*, Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 *et seq.* (creating federal court forum for crimes committed by civilians serving with the armed forces overseas).

the armed forces during a contingency operation.[5] Again, this legislation focused solely on criminal jurisdiction and did not create a private right of action.

Not only has Congress conspicuously failed to create a cause of action for persons such as Plaintiffs, it has *affirmatively prohibited* claims such as those present here. In the Federal Tort Claims Act, Congress specifically barred "[a]ny claim arising out of the combatant activities of the military or naval forces." 28 U.S.C. § 2680(j). This prohibition not only shields the United States, it also bars claims against defendants such as CACI PT "where a private service contractor is integrated into combatant activities over which the military retains command authority . . . ." *Burn Pit*, 744 F.3d at 349-51 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). In *Burn Pit,* the Fourth Circuit concluded that the purpose underlying § 2680(j) is to foreclose state regulation of the military's battlefield conduct and decisions. *Id.* at 348. It is self-evident that Congress did not intend to allow, under the guise of ATS claims, *international* regulation of the military's battlefield conduct and decisions.

As in *Jesner*, Congress's apparent satisfaction with limiting remedies for misconduct during U.S. military operations during a war to criminal prosecution, whether by court-martial or in federal court,[6] reflects the sensible conclusion that litigation of alleged wrongs under these

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[5] Uniform Code of Military Justice art. 2(a)(10), 10 U.S.C. § 802(a)(10) (designating civilians serving with the armed forces "in the field" during time of war as subject to trial by court-martial).

[6] The United States regularly prosecutes soldiers and civilian contractors, in courts-martial or in federal criminal cases, for alleged unlawful conduct toward perceived enemies in a war zone. *See, e.g.*, *United States v. Drotleff*, 497 F. App'x 357, 358-59 (4th Cir. 2012) (involuntary manslaughter charges against contractors for shooting in Afghanistan); *United States v. Passaro*, 577 F.3d 207, 211 (4th Cir. 2009) (assault charges against CIA contractor arising out of "a military operation in Afghanistan in an effort to topple the Taliban regime"); *United States v. Slatten*, 865 F.3d 767, 776-77 (D.C. Cir. 2017) (voluntary manslaughter and first-degree murder charges against contractors for shooting in Iraq); *United States v. Green*, 654 F.3d 637, 640 (6th Cir. 2011) (federal court prosecution of former soldier for murder and sexual assault of Iraqis); *United States v. Harman*, 68 M.J. 325, 326 (C.A.A.F. 2010) (court-martial for

circumstances should be controlled by the United States government through its exercise of prosecutorial discretion. *Sosa*, 542 U.S. at 727 (creating a private right of action involves the consideration whether "to permit enforcement without the check imposed by prosecutorial discretion"). Against this backdrop, it is singularly inappropriate for this Court to create rights of action where Congress has conspicuously not done so.

Unlike *Jesner*, however, the separation-of-powers concerns here extend far beyond Congress's supremacy in deciding whether and under what circumstances to permit private rights of action. This case seeks remedies for injuries allegedly incurred during military operations in a combat-zone detention facility by Plaintiffs from whom the U.S. military sought battlefield intelligence. Plaintiffs admit that "CACI interrogators [never] laid a hand on them,"[7] punctuating that they seek redress for injuries inflicted by U.S. soldiers during a military operation.

The Constitution expressly commits foreign policy and war powers to the federal government. U.S. Const. art. I, § 8, cls. 1, 11-15; art. II, § 2, cls. 1, 2. No federal power is more clearly committed to the political branches than the warmaking power. *Lebron v. Rumsfeld*, 670 F.3d 540, 548-49 (4th Cir. 2011); *United States v. Moussaoui*, 382 F.3d 453, 469-70 (4th Cir. 2004). "There is nothing timid or half-hearted about this constitutional allocation of authority."

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maltreatment of detainees at Abu Ghraib prison); *United States v. Chamblin*, No. 201500388, 2017 WL 5166627, at *1 (N-M. Ct. Crim. App. Nov. 8, 2017) (court-martial conviction for desecration of enemy corpses); *United States v. England*, No. ARMY20051170, 2009 WL 6842645, at *1 (A. Ct. Crim. App. Sept. 10, 2009) (court-martial for maltreatment of detainees at Abu Ghraib prison); *United States v. Pennington*, No. NMCCA200800106, 2008 WL 5233379, at *1 (N-M. Ct. Crim. App. Dec. 16, 2008) (court-martial for murder of suspected insurgent leader).

[7] *See* 9/22/17 Tr. at 15 ("We are not contending that the CACI interrogators laid a hand on the plaintiffs."); *see also* Dkt. #639 at 31 n.30 (the "gravamen of Plaintiffs' complaint is conspiracy and aiding and abetting"); *id.* at 1 ("Plaintiffs sued CACI under well-established theories of accessory liability.").

Thomasson v. Perry, 80 F.3d 915, 924 (4th Cir. 1996) (en banc). "The strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

Notably, two of the three cases cited in *Jesner* to establish the proper analysis for ATS claims arose in the *Bivens* context, where the Court repeatedly has rejected efforts to allow judicially-created private rights of action in contexts not already permitted by the Supreme Court. 138 S. Ct. at 1863. In *Ziglar*, where the Court rejected creation of a private right of action for claims arising out of post-9/11 detention policies, the Court explained that the national-security context of the claim was dispositive:

> National-security policy is the prerogative of the Congress and President. Judicial inquiry into the national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches. These concerns are even more pronounced when the judicial inquiry comes in the context of a claim seeking injunctive or other relief. This risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy.
>
> For these and other reasons, courts have shown deference to what the Executive Branch has determined . . . is essential to national security. Indeed, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs unless Congress specifically has provided otherwise.

Ziglar, 137 S. Ct. at 1861. Thus, if anything, the case for dismissal is stronger here than in *Jesner*. This case and *Jesner* both present the separation-of-powers concern inherent any time the issue of judicially-created private rights of action arises, but the present case also involves judicial intrusion on the political branches' Constitutionally-committed role in overseeing military operations.

2. ATS Claims Are Appropriate to Prevent Hostilities Between the United States and Foreign Countries, But Not to Regulate the Actual Conduct of Hostilities That Are Underway

The Supreme Court stated in *Jesner* that the principles counseling against judicially-created rights of action might "preclude courts from ever recognizing any new causes of action under ATS." *Jesner*, 138 S. Ct. at 1402. Regardless, the analytical framework mandated by *Jesner* limits ATS claims to private conduct that, without a judicial remedy, could *cause* international hostilities. Conversely, claims cannot be maintained under ATS that regulate U.S. military operations once hostilities have already commenced.

As *Jesner* explained, the original purpose of the ATS was to "avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States accountable for an injury to a foreign citizen." *Id.* at 1397 (citing *Sosa*, 542 U.S. at 715-19); *id.* at 1406 ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable."). In other words, Congress enacted ATS to provide a federal forum for international law violation that "if not adequately redressed could rise to an issue of war." *Sosa*, 542 U.S. at 715; *Kiobel*, 569 U.S. at 123-24.

These principles have no application whatsoever once the United States is already at war and the claims arise out of military operations in the war zone. Plaintiffs' claims arise in the context of a military invasion and occupation of Iraq by the United States military and certain of its allies. This invasion and occupation was specifically authorized by an Act of Congress. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107–243, 116 Stat. 1498 (Oct. 16, 2002). Pursuant to that Act of Congress, the United States military and its allies forcibly displaced the existing Iraqi government and military, and installed the CPA to

govern Iraq, with the CPA supported by an occupation force. *See United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295, 298 (4th Cir. 2009) (detailing creation of CPA). Indeed, as this Court has acknowledged, the CPA issued an order that completely exempted U.S. military forces and supporting contractors from Iraqi law and Iraqi legal process. Dkt. #679 at 51.[8]

Allowing ATS claims in this context cannot prevent hostilities; Plaintiffs' claims arose during a war. By the time Plaintiffs' claims arose, there was no prospect of "avoid[ing] foreign entanglements." *Jesner*, 138 S. Ct. at 1397. By that time, the United States and Iraq were quite entangled already, and providing a forum for Plaintiffs' claims offered no hope of "promot[ing] harmony in international relations," so that the government of Iraq (which the United States and its allies had deposed) would not "hold the United States accountable" for conduct taking place in Iraq. *Jesner*, 138 S. Ct. at 1406. It is no coincidence that "relatively modest set" of international law violations that were "probably on the minds of the men who drafted the ATS" – "violation of safe conducts, infringement of the rights of ambassadors, and piracy" – all involve private conduct, unrelated to military operations or government action, in time of peace that, if left unchecked, could cause a foreign country to commence a war against the United States. *Id.* at 1397 (quoting *Sosa*, 542 U.S. at 715). None of these international law paradigms involves claims arising out of the United States *conduct* of a war that had already begun.

In addition, the purpose of ATS is to ensure that, by providing a federal forum for tort claims, violations of international norms by private actors would not be viewed by other countries as conduct chargeable to the United States. But when the injuries occur during U.S.

[8] As CACI PT has stated in moving to dismiss Plaintiffs' claims, CACI PT views CPA Order 17 as going much further and preempting litigation of claims of bodily injury or property damage arising out of the invasion and occupation of Iraq. The Court need not resolve this issue to conclude that Plaintiffs' ATS claims are barred under the analytical framework mandated by *Jesner*.

military operations in a war, there is no avoiding the fact that the conduct is chargeable to the United States. This is particularly true where, as here, Plaintiffs have sworn off any claim that CACI PT personnel injured them directly, and are instead seeking to hold CACI PT liable for injuries inflicted by U.S. soldiers and other government personnel.

Indeed, the United States has made clear that the interrogators interacting with detainees at Abu Ghraib prison served under the command and supervision of the U.S. military:

> In connection with the December 15, 2003 interrogation [of Al Shimari], CACI Interrogator A and Army Interrogator B were subject to the direction of the military chain of command, beginning with their military section leader, an Army non-commissioned officer, who was to be briefed both prior to and following the interrogation to ensure that the interrogators were focused on answering CJTF-7's priority intelligence requirements, human intelligence (HUMINT) requirements, and source directed requirements. Their military section leader was also responsible for strictly enforcing the interrogation rules of engagement (IROE). From their military section leader, the interrogators' chain of command flowed through the military non-commissioned officer in charge (NCOIC) and officer in charge (OIC) of the Interrogation and Control Element (ICE), to the military chain of command at the Joint Interrogation and Detention Center (JIDC).
>
> ***No CACI personnel were in this chain of command***. While the CACI site manager at Abu Ghraib, Daniel Porvaznik, managed CACI personnel issues and the ICE OIC relied on him as one source of information regarding the abilities and qualifications of CACI interrogators, ***the military chain of command controlled the interrogation facility, set the structure for interrogation operations, and was responsible for how interrogations were to occur during both the planning and execution phases***.

Ex. 1 at 8 (emphasis added).

Therefore, the wartime context of Plaintiffs' claims would bar them under *Jesner*'s reasoning even if the serious separation-of-powers concerns inherent in Plaintiffs' claims did not by themselves preclude them.

III. CONCLUSION

The Court should dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2018, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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