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I. INTRODUCTION

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.

—Justice Brandeis[1]

In recent history, private contractors working for the U.S. government have assumed an ever-increasing amount of responsibility for overseas operations previously conducted by the U.S. military, especially in conjunction with the War on Terror and the war in Iraq.[2] Today, widely accepted estimates place the total number of American contractors in Iraq at somewhere over 100,000[3] (and growing), and it has been projected that in the coming months, that figure will surpass the total number of American troops in the war-torn country.[4] Moreo-

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1. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

2. *See* Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 61 (2001). Some contractors, such as Lockheed Martin, have integrated themselves deeply into the fabric of U.S. governmental operations. *See, e.g.*, Tim Weiner, *Lockheed and the Future of Warfare*, N.Y. TIMES, Nov. 28, 2004, § 3, at 1 (describing the numerous services Lockheed provides and its role in the modernization of warfare). Lockheed performs a variety of services for numerous governmental agencies, including the IRS, the FAA, and the U.S. Census Bureau. *Id.*; *see also infra* Part III.

3. Throughout this note, there will be many references to the approximate number of contractors operating in Iraq. As a point of clarification, "100,000" refers to the total number of contractors working in the country performing military and civilian functions. Sources indicate that the number of private contractors performing military duties is approximately 20,000. *See infra* note 41.

4. Deborah Avant, *What Are Those Contractors Doing in Iraq?*, WASH. POST, May 9, 2004, at B01 (observing that in 1991, the military employed one private contractor in Iraq for every sixty active-duty military personnel, whereas in 2003, the ratio jumped to approximately one in ten); *see also* Audio recording: Peter Raven-Hansen, Remarks at the Association for American Law Schools Annual Meeting, Section on National Security Law, Outsourcing the War on Terrorism: Extraordinary Rendition, Shadow Warriors, Dirty Assets, and Battlefield Contractors (Jan. 5, 2006), *available at* http://www.aals.org/am2006/program/thursday.html.

ver, these contractors have assumed a role increasingly resembling that of the troops—the Vice President of Blackwater USA, one of the largest employers of Iraq-based contractors, went so far as to assert that his own company is a "party to the conflict."[5]

With the proliferation of the U.S. military's reliance on contractors as a means of supplementing—and not just supplying—the troops on the ground, serious questions have arisen with respect to the legal regime governing the contractors' conduct. Take the case of David Passaro.[6] Passaro, a CIA contractor working in Afghanistan, was recently convicted in North Carolina on criminal charges of assault and battery for beating Abdul Wali, an Afghan detainee, during interrogations.[7] Prosecutors allege that "Passaro created a 'chamber of horrors' for Wali, ordering soldiers not to allow him to sleep, limiting his access to food and water, and subjecting him to two consecutive nights of interrogations and beatings."[8] Wali later died of his injuries.[9] After Passaro was sentenced, U.S. Attorney George Holding said, "Passaro's conduct was truly a heinous crime. . . . It was an affront to every man and woman serving overseas trying to bring freedom and the rule of law to those who are oppressed."[10]

In sentencing, however, Passaro's attorney depicted him as a hero who had "answered the call" to work for the CIA as a private contractor.[11] Aside from the unprecedented criminal charges, Passaro's case raises a vitally important question of civil liability: Specifically, does Wali's estate have a civil remedy against Passaro and ultimately against the U.S. government under whose authority Passaro interrogated Wali? This question may seem like an isolated issue in an isolated case, but the reality in Iraq tells a far different story. Indeed, as pressure increases to

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5. Vice President, Blackwater, USA, *Our Children's Children's War* (Discovery Channel television broadcast Mar. 11, 2007). Blackwater's

> largest obtainable government contract is with the State Department, for providing security to US diplomats and facilities in Iraq. That contract began in 2003 with the company's $21 million no-bid deal to protect Iraq proconsul Paul Bremer. Blackwater has guarded the two subsequent US ambassadors, John Negroponte and Zalmay Khalilzad, as well as other diplomats and occupation offices. Its forces have protected more than ninety Congressional delegations in Iraq, including that of House Speaker Nancy Pelosi.

Jeremy Scahill, *Bush's Shadow Army*, NATION, Apr. 2, 2007, at 11, *available at* http://www.thenation.com/doc/20070402/scahill.

6. *See* Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, NEWS & OBSERVER, Feb. 14, 2007, *available at* http://www.newsobserver.com/497/story/543038.html.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (internal quotation marks omitted).

11. *Id.*; *see also* Estes Thompson, *Ex-CIA Contractor Found Guilty of Assaulting Afghan Detainee*, ASSOCIATED PRESS, Aug. 17, 2006, WL 8/17/06 APALERTNC 13:49:56.

reduce the size of the American military presence, the military's reliance on independent contractors will only increase. Ultimately, the responsibilities that the contractors are assuming will also increase.

And yet, the legal regime that governs those contractors is at best unclear, given the contractors generally fall outside the auspices of the Uniform Code of Military Justice.[12] The inevitable question that arises then is whether the contractors are legally responsible for their conduct anywhere near to the same extent that U.S. soldiers would be under the same circumstances. And if not, does the increasing reliance on these contractors actually decrease the United States' accountability for its actions in Iraq? Put differently, does the ill-defined legal status of these contractors ultimately create a legal black hole because traditional military law does not apply? Or might civil remedies, which are generally unavailable against soldiers, provide the necessary deterrent to ensure that American contractors are abiding by even the most basic dictates of American law in their conduct in Iraq? These questions have been dangerously understudied. Needless to say, the time for a thorough exposition of the landscape of civil remedies against overseas contractors is long overdue.

This note concerns the question of accountability. My focus is on the accountability of the U.S. government for the actions of their private contractors.[13] In Part II, I discuss the necessity and importance of a civil right of action in these cases. Part III will examine the era of privatization and rise of the private contractor in the War on Terror. Part IV demonstrates the lack of accountability for U.S.-directed contractor abuse under current law. Finally, in Part V, I examine mechanisms for minding the liability gap between the rights of the abused and the liability of those ultimately responsible.

II. THE NECESSITY OF A CIVIL RIGHT OF ACTION

Unless recovery is allowed in each instance where there has been a

12. 10 U.S.C. §§ 801–946 (2000). The Uniform Code of Military Justice governs the behavior of soldiers on the battlefield. The Code was also recently amended to allow coverage to a small number of contractors. The new provision changes paragraph 10 of Article 2 to read: "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." 10 U.S.C.A § 802(10) (West 2007). This change was likely enacted in order to extend code coverage to those conflicts that are not officially declared wars by Congress.

13. This note does not address the availability of civil remedies against the individual or corporate entity that may be responsible for potential tort injury in foreign jurisdictions. Further, this note does not address the availability of civil remedies against particular individuals and corporate entities in the United States. Such a discussion would be far beyond the scope of this paper, as it is limited to governmental liability. Such remedies against individual and corporate defendants would likely be available under 28 U.S.C. § 1350 in federal courts, and also potentially in state courts under common-law tort doctrine.

> *violation of a right, the violations will be repeated with impunity, and that which is wrong will come to be regarded as something right. Unless it is faced and dealt with, wrong will have the same stature as right.*
>
> —J.D. Lee & Barry Lindahl[14]

In considering human-rights violations by government-directed contractors, it is first imperative to establish that a civil action for damages is necessary and proper. Civil remedies represent a vital tool in the enforcement of human-rights standards as well as an important vehicle for victim rehabilitation.[15] Civil cases can be commenced when the government with criminal jurisdiction is either unable or unwilling to prosecute owing to evidentiary or political concerns.[16] Further, even when criminal proceedings are an option, civil cases provide an effective compliment to such proceedings as they offer the victim "a legal remedy which they control and which may satisfy needs not met by the criminal law system."[17]

Tort law seeks to achieve a number of goals. First, it serves as a method of financial indemnification of the victim.[18] Although the entry of a monetary judgment does not "heal" the victim, it often provides the funds necessary for the victim to seek the necessary psychological treatment.[19] More broadly, a monetary judgment often plays a much larger role: deterrence.[20] In other words, tort law seeks to make the risk of injury more costly than the value of the questionable conduct.[21] As a related function, tort law is concerned with the definition and defense of social norms by expressing a consensus about the way in which people should relate to and interact with each other, and by communicating that consensus to the general public.[22] A judgment ordering the payment of

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14. J.D. LEE & BARRY LINDAHL, MODERN TORT LAW § 1:1 (2d ed. 2002).

15. *See id.*

16. *See* John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 47–49 (1999) (arguing in favor of civil suits over criminal suits given, in part, the lower standards of proof and the increased availability of discovery devices).

17. Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 581 (1997).

18. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

19. *See* Stephens, *supra* note 17, at 604–05.

20. *See* George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-Profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 217 (1999) ("Vigorous tort litigation against such persons may reduce the incidence of such acts, as it does in more conventional arenas.").

21. *See id.*

22. *See* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 185 (1987). In this way, a civil judgment "awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence." *Id.*

money damages necessarily includes an assessment that a legal right of the plaintiff was violated, and each individual expression of liability "adds its voice to others in the international community collectively condemning [such acts] as an illegitimate means of promoting individual and sovereign ends."[23] In comparison to a criminal suit, a civil suit may better preserve a collective memory and "permit a more thorough airing of victims' stories . . . along with an expression of judicial solicitude."[24] In this regard, a criminal proceeding may be focused on the culpability of the perpetrator at the expense of the harm suffered by the victim.[25]

Over the course of American legal history, civil litigation has often been used to impact social reform.[26] This may explain in part why American lawyers gravitate toward lawsuits aimed at addressing human-rights violations, since such litigation is an important part of the legal culture.[27] In the United States, it is generally accepted that lawsuits seek remedies designed with an eye to the future.[28] The goal of prospective relief often supersedes the remedies for past wrongs. The growth of public-interest litigation led to an increase of attorneys tasked with litigating such cases.[29]

U.S. scholars have long explained the benefits that civil litigation affords the victims, the human-rights movement as a whole, and society overall.[30] Civil litigation may lead to a full investigation of the facts of an incident, identify the persons or entities responsible, and perhaps most importantly, pronounce a public judgment against those responsi-

23. *Id.*; *see also* Stephens, *supra* note 17, at 604–05 ("[A] judicial finding of liability puts a formal, official stamp upon a judgment, which may at least partially satisfy the need for acknowledgement of the wrong inflicted on the victims.").

24. Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2101 (1998) (noting the psychological benefits of civil suits to victims).

25. *Id.* at 2102–03.

26. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 8–9 (1989); *see also* Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1439–42 (1984) (describing the roots of the public-interest law); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 224–41 (1976) (describing the "second wave" of public-interest litigation, beginning in the 1960s and 1970s and focusing on issues such as consumer and environmental protection).

27. *See* ARON, *supra* note 26, at 96–97 ("[M]any kinds of professionals in different types of organizations can effectively educate, advocate, and lobby for a good cause, but it take lawyers to harness the power of the judiciary in the struggle for social change. In many situations, litigation is the only hope of achieving success.").

28. *See* Houck, *supra* note 26, at 1442–43.

29. *See id.*

30. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 234 (1996) ("[T]he plaintiffs in these cases are concerned about much more than money. They take tremendous personal satisfaction from filing a lawsuit, forcing the defendant to answer in court or to abandon the United States, and creating an official record of the human rights abuses inflicted on them or their families.") (footnote omitted).

ble.[31] Even absent the entry of judgment, the defendant may be "punished" by public exposure.[32] Although not a substitute for criminal prosecution as a means of accountability, civil remedies complement such prosecutions where they are possible, and serve an important role where criminal prosecution is not an option.[33] Public-interest litigation has led the U.S. public, judiciary, and legal advocates to view civil litigation as a potential means to realize large-scale policy goals, and to hold accountable perpetrators of egregious human-rights abuses.[34]

The U.S. government has sanctioned provisions for civil remedies against those responsible for egregious human-rights abuses.[35] In the topic at bar, it is critical that a victim of abuse suffered at the hands of a government-directed contractor have a civil remedy against the U.S. government. But will the United States be as accommodating when it is held responsible? Without such a remedy, the United States is arguably establishing a "right" by condoning the "wrong" of government-directed contractor abuse.

III. ERA OF PRIVATIZATION[36]

We are a party to the conflict.

—Vice President, Blackwater USA[37]

Privatization has played a prevalent role in the domestic landscape in recent history. Everything from prisons, educational programs, and other welfare programs have been handed over to private agencies.[38] Far less attention, however, has been paid to privatization in the foreign-affairs arena. The United States now relies regularly on private parties to provide all forms of foreign aid and diplomatic services, and even to participate in military endeavors.[39] These military functions include not

31. *See id.*

32. *See id.*; Alvarez, *supra* note 24, at 2101.

33. *See* STEPHENS & RATNER, *supra* note 30, at 234 & n.8.

34. *See id.*

35. See STEPHENS & RATNER, *supra* note 30, at 2–5, for a description of how human-rights activists and litigators around the world seek to hold accountable those responsible for egregious human-rights abuses. Because international mechanisms of accountability often prove both inefficient and ineffective, enforcement is often left at the domestic level.

36. A recent symposium issue of the *Harvard Law Review* even goes so far as to declare that we are in "an era of privatization." *See* Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003).

37. *Our Children's Children's War*, *supra* note 5.

38. *See, e.g.*, Simon Domberger & Paul Jensen, *Contracting Out by the Public Sector: Theory, Evidence, Prospects*, OXFORD REV. ECON. POL'Y, Winter 1997, at 67, 72–75 (arguing that privatization is efficient in a variety of contexts); F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL'Y REV. 271, 271–72 (2000) (discussing private management of public schools).

39. *See generally* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and*

only support services such as constructing weapons and building barracks, but also core activities such as intelligence gathering, security services, and conducting combat-related services.[40] One only needs to look at recent events to view the sharp increase in the use of private governmental contractors. For example, not only are there approximately 20,000 private military contractors in Iraq, but the Abu Ghraib prison scandal revealed that even such sensitive tasks as military interrogations have been privatized.[41]

When the work of the national-defense industry went into high gear after the terrorist attacks on September 11, Pentagon reliance on private military companies skyrocketed.[42] Private contractors played a major role in the Afghan war, served in paramilitary CIA units that hit the ground before other combat troops, and were used in surveillance and targeting plans.[43] Major Gary Tallman, an Army spokesman, acknowledged the unprecedented level of outsourcings since September 11 and commented that "[t]he Army is much smaller than in the past . . . . When you run out of soldiers and they don't have an expertise, one way to get that capability on the battlefield is to contract it."[44]

The U.S. government's use of private contractors to transport terrorism suspects to countries known to practice torture has also raised many questions. On December 18, 2001, for example, American operatives reportedly participated "in what amounted to a kidnapping of two

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the Problem of Accountability Under International Law, 47 WM. & MARY L. REV. 135 (2005) (discussing the privatization of emergency foreign aid and the staggering growth of private military contractors).

40. *See id.* at 148. "[T]hese military services include not only support services, such as food, accommodations, and sanitation for troops on the battlefield, but also core functions such as translating, intelligence gathering, and even troop training—functions that, for at least the past fifty years, uniformed members of the armed services have performed virtually exclusively." *Id.* (footnote omitted).

41. Jonathan Turley, Commentary, *Soldiers of Fortune—At What Price?*, L.A. TIMES, Sept. 16, 2004, at B11; *see also* Joshua Chaffin, *Private Workers Found Central to Jail Abuse*, FIN. TIMES (London), Aug. 27, 2004, at 7 (discussing an investigation into the conduct of CACI International, a Virginia-based defense contractor, in interrogating detainees at Abu Ghraib).

42. *See* P.W. Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr.15, 2004, http://dir.salon.com/story/news/feature/2004/04/15/warriors/index.html?source=search&aim=/news/feature.

43. *See id.* ("[Private contractors] deployed with U.S. military forces on the ground (including serving in the CIA paramilitary units that were the first to hit the ground), maintained combat equipment, provided logistical support, and routinely flew on joint surveillance and targeting aircraft. Even the noted Global Hawk unmanned surveillance plans were operated by private employees."); *see also* David Washburn & Bruce V. Bigelow, *Debate on Military Contractors Heats Up*, SAN DIEGO UNION-TRIB., May 7, 2004, at A1; Dan Guttman, Commentary, *The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work—Mostly out of Public View*, CENTER FOR PUBLIC INTEGRITY, Sept. 29, 2004, http://www.publicintegrity.org/pns/report.aspx?aid=386.

44. Washburn & Bigelow, *supra* note 43, at A1 (internal quotation marks omitted).

Egyptians . . . who had sought asylum in Sweden."[45] Believed to be linked to Islamic militant groups, the Egyptians were "abruptly seized in the late afternoon and flown out of Sweden a few hours later on a U.S. government-leased Gulfstream 5 private jet to Cairo, where they underwent extensive, and brutal, interrogation" at the hands of private contractors.[46]

The United States became a party to the United Nations' Convention Against Torture in 1988, which forbids signatories from engaging in torture or other inhuman treatment or punishment.[47] The Convention Against Torture prohibits actual governments like the United States from engaging in torture or other inhuman treatment of prisoners, but the Convention's applicability to private actors, even those hired by signatories, is unclear. In addition to military personnel at the prison, sources note that the U.S. Army has hired private contractors to augment its interrogation and intelligence workforce.[48] Many contractors have been inadequately trained, with more than a third of these contractors not receiving "formal training in military interrogation techniques, policy, or doctrine."[49] The Abu Ghraib scandal raises a critical question: whether the contractors are legally responsible for their conduct anywhere near to the same extent as U.S. soldiers would be in the same circumstances. Further, is the United States able to escape liability as a sovereign state by simply outsourcing activities questionable under international law to independent contractors?

IV. No Available Relief Under Current Law

A government is the most dangerous threat to man's rights: it holds a legal monopoly on the use of physical force against legally disarmed victims.

—Ayn Rand[50]

A. *The Federal Tort Claims Act*

The main avenue by which individuals can seek monetary relief

45. Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib 53 (2004).

46. *Id.*

47. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

48. *See* Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, Wash. Post, May 13, 2004, at A1.

49. James R. Schlesinger et al., Final Report of the Independent Panel to Review DoD Detention Operations 69 (2004).

50. Ayn Rand, *Check Your Premises: Man's Rights*, Objectivist Newsl., Apr. 1963, at 14.

from the U.S. government in the form of damages is the Federal Tort Claims Act ("FTCA"). The FTCA generally abrogates the sovereign immunity of the United States for certain torts.[51] To have a claim under the FTCA, injuries must be caused by the negligence or the wrongful acts "of any government employee of the agency 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."[52] When enacting this comprehensive legislation, Congress intended the U.S. government to be liable for "garden-variety torts" by its employees, such as negligence while driving governmental vehicles.[53] Although the scope of the FTCA appears at first to be far reaching, Congress has created numerous requirements and exceptions that, if not met, will bar relief under the act. In the following paragraphs, I will discuss only those exceptions that are applicable to the scenario of potential civil relief against the United States for government-directed contractor abuse abroad.

1. Government Employees Acting Within the Scope of Their Office or Employment

The FTCA potentially creates liability for direct employees of the U.S. government because the FTCA defines the term "employee of the government" to cover nearly all federal employees in both civilian and military sectors.[54] The question of governmental employment becomes unclear when a contractor is involved. The FTCA defines employees of the government to include not only officers or employees of a federal agency, but also "persons acting on behalf of a federal agency."[55] The term "federal agency" includes "the executive departments, the judicial

51. 28 U.S.C. §§ 2671–2680 (2000).

52. *Id.* § 2672.

53. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 706 n.4 (2004) (discussing the foreign-country exception to the Federal Tort Claims Act where a Mexican national was abducted from Mexico and brought to the United States for trial)

54. 28 U.S.C. § 2671 provides in pertinent part:

> "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

Id.

55. *Id.*

and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States."[56] The "instrumentalities and agencies" clause is misleading as it specifically excludes governmental contractors.[57]

The underpinnings of the independent-contractor exception are highlighted in the Supreme Court's decision in *United States v. Orleans*:

> Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. . . . Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the act of entrepreneurs . . . into federal governmental acts.[58]

The critical factor in determining if a contractor is an employee or an independent contractor is whether the government has the power to "control the detailed physical performance of the contractor."[59] The inquiry is not whether the contractor receives federal funds and must comply with federal standards and regulations, but whether the federal government supervises the contractor's day-to-day operations.[60] As such, whether a contractor is truly independent may present a close factual case.[61]

The "right of control" standard is an incredibly hard standard to meet. How could contractors prove that the government had physical day-to-day control over their activities? Additionally, if the United States uses contractors to promote efficiency,[62] why then would it make sense for the United States to control every aspect of the day-to-day operations? This is a virtually impossible standard to meet. As discussed in the next section, even governmental employees are aware that certain actions and behaviors are implicit in their job duties.[63] Why

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56. *Id.*

57. *Id.* ("[T]he term 'federal agency' includes . . . and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.*") (emphasis added).

58. 425 U.S. 807, 815–16 (1976).

59. Logue v. United States, 412 U.S. 521, 527–28 (1973).

60. *See Orleans*, 425 U.S. at 817–18.

61. *See* McKay v. United States, 703 F.2d 464, 472 (10th Cir. 1983) (reversing a grant of summary judgment arguing that whether plaintiff could recover on a tort claim for damages due to weapons manufacturing was a question of fact and appropriate for the district court).

62. *See* Washburn & Bigelow, *supra* note 43, at A1.

63. *See* discussion *infra* Part IV.A.2.

should a contractor, with express directions by the government to accomplish a task, be treated any differently? If the government should have to exert such day-to-day control to satisfy such a high standard so as to defeat the efficiency argument for using contractors in the first place, there must be some other reason contractors are being used. Could that reason be that outsourcing liability for actions like torture or other abuses makes it virtually impossible for the government to be held liable for those acts, and furthermore saves the government from bad publicity? Does this ill-defined legal status of governmental contractors ultimately create a legal black hole?

2. THE WESTFALL ACT AND ACTING WITHIN THE SCOPE OF EMPLOYMENT

The Westfall Act confers immunity on federal employees by "making an FTCA action against the Government the exclusive remedy for torts committed by Government employees in the scope of their employment."[64] The Attorney General may certify that an employee of the federal government was acting within the scope of their employment.[65] As such, a suit that may have been brought previously against a specific governmental employee on certification may in turn be converted into a suit against the U.S. government under the FTCA.[66] The process for determining whether a federal employee was acting within the scope of his employment is often complicated and at times convoluted. When a court decides the issue, judges traditionally apply the law of the state in which the alleged tort occurred, or if no state law is in point, judges will apply the principles of agency law.[67]

Recently, the question of an employee acting within the scope of

64. United States v. Smith, 499 U.S. 160, 163 (1991); *see also* 28 U.S.C. § 2679 (2000).

65. 28 U.S.C. § 2679(d)(1) provides as follows:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

Id.

66. *See id.*

67. The Restatement (Second) of Agency provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958); *see also* Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 33 (D.D.C. 2006) (applying the principles of agency to determine whether the defendants were

his governmental employment was addressed by the D.C. Circuit in *Rasul v. Rumsfeld*.[68] In *Rasul*, the court discussed the scope of employment requirement of the Westfall Act in substituting the individual named defendants with the U.S. government.[69] There, the court found that virtually any type of conduct can be considered "incidental" and thus within the scope of the employment of the governmental employee, "so long as the action has some nexus to the action authorized."[70]

More interesting, however, is the court's willingness to consider torture or other intentional torts as both foreseeable and within the potential scope of employment for the governmental employees at Guantánamo Bay.[71] The court stated that "[t]he plaintiffs' allegations of torture, though reprehensible, do not offset the presumption that these individuals were acting on behalf of their employer during 'the course of performing job duties.'"[72] Further, the court held that in fact, the torture of the detainees in question was even *foreseeable*.[73] The court reasoned that the inquiry was "necessarily whether the intentional tort was foreseeable, or whether it was unexpectable in view of the duties of the servant."[74] The court further reasoned that "the heightened climate of anxiety" after September 11, which created pressure to capture the terrorists, "would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogation."[75] As such, the court concluded that individual employees' situations "did not present a mere opportunity for tortious activity to occur but provided the kindling for such activity to grow without the appropriate supervision."[76]

This argument has powerful repercussions. After all, how is it possible for torture or other intentional torts not only to be within the scope of an employee's employment but also foreseeable? If it is foreseeable that an official governmental employee will torture a detainee, and that torture is within the scope of their employment, it should also follow that it is foreseeable that a U.S. contractor would torture or intentionally

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acting within the scope of their employment in a suit by former Guantánamo Bay detainees alleging that they were tortured).

68. 414 F. Supp. 2d 26 (D.D.C. 2006).

69. *See id.* at 31–36.

70. *Id.* at 33.

71. *Id.* at 36.

72. *Id.* at 35 (quoting Weinberg v. Johnson, 518 A.2d 985, 989 (D.C. 1986)); *see also Weinberg*, 518 A.2d at 989 ("[W]here an employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests.").

73. *Rasul*, 414 F. Supp. 2d at 36.

74. *Id.* (quoting Majano v. Kim, No. CIV.A.04-201, 2005 WL 839546, at *8 (D.D.C. Apr. 11, 2005)) (internal quotation marks omitted).

75. *Id.*

76. *Id.* (citing Boykin v. District of Columbia, 484 A.2d 560, 563 (D.C. Cir. 1984)).

harm a detainee.[77] Additionally, that conduct should likely be deemed within the scope of expected behavior of a similarly situated governmental employee. To find otherwise would create a virtually unworkable scheme. By drawing a line in the sand between contractors and government employees based simply on who signs their paychecks allows for zero transparency and accountability for those entities responsible for defining the job descriptions of a contractor or governmental employee who later abuses a detainee. If this conduct is truly foreseeable, the government should not outsource it to a private contractor to shirk liability. Rather, the government should be even more vigilant when assigning duties that could raise questions of abuse to contractors who may or may not be actually accountable to the government.

3. FOREIGN-COUNTRY EXCEPTION

The FTCA does not apply to any claim arising in a foreign country.[78] The foreign-country exception was interpreted broadly by the Supreme Court's watershed decision in *Sosa v. Alvarez-Machain*.[79] In *Sosa*, a Mexican national sued the United States for having him kidnapped from Mexico in order to prosecute him in the United States.[80] The Court held that the foreign-country exception barred his FTCA claims against the United States because the injury that formed the basis of his claim actually arose out of the kidnapping event that occurred on Mexican soil.[81] For purposes of the foreign-country exception, the Court held that an action arises where the injury occurs, even if the tortious conduct, such as the order to kidnap someone, occurred elsewhere.[82] The court rejected the "headquarters exception" to the foreign-country exception that had developed in some lower courts.[83] That exception allowed for FTCA liability for tortious conduct that occurred overseas if officials at some "headquarters" within the United States

77. This argument would defeat the Justice Department's contention that David Passaro's actions when he beat Abdul Wali were the actions of a rogue officer. If abuse of prisoners and detainees is foreseeable, then Passaro's actions should also have been expected.

78. 28 U.S.C. § 2680(k) (2000).

79. Sosa v. Alvarez-Machain, 542 U.S. 692, 707–12 (2004).

80. *Id.* at 698–99.

81. *Id.* at 712.

82. *See id.* ("[T]he FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."). Further, this essentially gives the United States a proverbial blank check to commit injuries overseas without fear of liability. A far better solution would be to adhere to a standard that reflects not the physical location of any incident, but rather an approach that favored accountability for those individuals or countries that actually instigated whatever conduct created the injury.

83. *Id.* at 701–12.

approved it.[84]

As applied in the case of abuse suffered at the hands of a government-directed contractor, the foreign-country exception would foreclose any claim against an independent contractor for an injury that occurred outside the territory of the United States.[85] This is troubling considering the United States' increased activities overseas. Should the government not be held accountable to the same standard overseas as it would be on its own soil? Why should the United States be allowed to abdicate responsibility simply because its actions took place abroad?

4. Intentional-Tort Exception

The intentional-tort exception generally provides that the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, [or] false arrest."[86] This provision is qualified by certain restrictions that apply to law-enforcement officers acting within the scope of their employment.[87] Accordingly, the intentional-tort exception does not bar FTCA claims for intentional torts that fall within the law-enforcement proviso. For example, the provision allows abuse victims at the hands of federal law-enforcement officers to sue the United States under the FTCA for money damages without having the claim barred by the intentional-torts exception.[88] The FTCA defines investigative or law-enforcement officers to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[89] Accordingly, the United States may potentially use the intentional-tort exception to escape liability for torture by those who lack law-enforcement powers. The question remains: Is there any time in which the U.S. government would empower private contractors with law-enforcement powers? Although the answer from U.S. officials would likely be a resounding "no," incidents like David Passaro's interrogation of an Afghan detainee suggest that contractors are often employed to act like law-enforcement personnel.[90] Is applying the specific labels of "contractor" or "law-

84. *Id.* at 701.

85. *But cf.* Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."). *Contra* Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that Guantánamo is not a U.S. territory for purposes of statutes relied on in that case by Cuban and Haitian immigrants temporarily detained there). With the expansion of the U.S. military's bases abroad, perhaps the time has come to reevaluate the idea of what constitutes a U.S. territory.

86. 28 U.S.C. § 2680(h) (2000).

87. *Id.*

88. *Id.* at (h), (i).

89. *Id.* at (h).

90. *See supra* Part I (discussing David Passaro's interrogation of Abdul Wali).

enforcement officer" merely semantics, or is there something far more dubious occurring? Under the current legal regime, it is possible for the United States to use this exception as a means of shirking liability for injuries resulting from abuse suffered at the hands of a contractor, even though he ostensibly is fulfilling the role of a law-enforcement officer.

B. *Constitutional Violations*

Federal courts have long been the forums for vindicating constitutional rights.[91] The legal basis for constitutional-tort claims against federal officials was first embraced openly by the Supreme Court in *Ex Parte Young*,[92] and then later revitalized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[93] In *Bivens*, the Court recognized a federal cause of action for money damages against the federal agents who violated the plaintiff's Fourth Amendment rights.[94] In later cases, the Court recognized *Bivens* claims for violations of the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause.[95] The court in *Bivens*, however, held that a constitutional-tort claim may be defeated in two situations.[96] The first is when defendants demonstrate "special factors counseling hesitation in the absence of affirmative action by Congress."[97] The second is "when defendants show that Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."[98] The key in *Bivens* actions is that the victim must show a constitutional violation.[99] As such, the main issue in the govern-

91. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (Transaction 2007) (1928); *see* Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting FRANKFURTER & LANDIS, *supra*); Zwickler v. Koota, 389 U.S. 241, 247 (1967) (quoting FRANKFURTER & LANDIS, *supra*); *see also* Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 588–89 (1995) (stating that before 1875, state courts provided the only forum for vindication of many important federal rights).

92. 209 U.S. 123, 161–62 (1908) (holding that jurisdiction was appropriate under the federal-question statute for a constitutional challenge to a statute regulating railroad rates).

93. 403 U.S. 388, 396–97 (1971).

94. *See id.* at 391–97.

95. *See* Carlson v. Green, 446 U.S. 14, 16–24 (1980) (recognizing a cause of action against federal prison officials for their deliberate indifference to decedent's serious medical needs while in prison); Davis v. Passman, 442 U.S. 228, 248–49 (1979) (recognizing a cause of action for an alleged violation of the equal-protection component of the Fifth Amendment brought against a former member of Congress who, while in Congress, fired the plaintiff from his staff because she was a woman).

96. *See Bivens*, 403 U.S. at 396–97.

97. *Id.* at 396.

98. Jaffee v. United States, 663 F.2d 1226, 1262 (3d Cir. 1981) (citing *Bivens*, 403 U.S. at 397 and *Davis*, 442 U.S. at 245–47).

99. *Bivens*, 403 U.S. at 396–97.

ment-directed contractor-abuse case is showing that an alien has constitutional rights under the Court's jurisprudence.[100] The Court has held that the Fourth Amendment does not apply to the search and seizure of property that belongs to a nonresident alien and is located in a foreign country.[101] The Court based its holding on reasoning that could prevent aliens from relying on the Fourth Amendment to assert claims of excessive force based on official conduct that occurs outside the United States.[102] In addition to limiting the Fourth Amendment, the Court has held that the Fifth Amendment "does not confer a right of personal security" upon certain enemy aliens.[103] More broadly, the Court also added that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[104] Accordingly, it is likely that any claim from an alien regarding an incident that occurred abroad would fail to receive constitutional protection.[105]

In addition, this scenario may present "special factors counseling

100. The U.S. Court of Appeals for the D.C. Circuit addressed the question of citizenship most recently in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). In *Boumediene*, the court held the recent amendments to the habeas corpus statutes applied to foreign-enemy combatants detained at the naval base in Guantánamo Bay, Cuba thus essentially stripping detainees from any habeas review of their detention because of their alien status. *Id.* at 986–88. The court argued that because the administration explicitly disclaims any sovereignty rights over the Naval base in Cuba, constitutional protections should not be extended to detainees. *Id.* at 990–92. The court noted, however, that the detainees cited the *Insular Cases* "in which 'fundamental personal rights' extended to U.S. territories." *Id.* at 992 (citing Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) and Dorr v. United States, 195 U.S. 138, 148 (1904)).

101. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 274–76 (1990).

102. *See id.* at 271–76 (finding evidence that the term "people" in the Fourth Amendment does not include aliens without a "substantial connection" to the United States). In the government-directed contractor-abuse case, it would be incredibly difficult for a victim of abuse from an independent contractor abroad to demonstrate the requisite "substantial connection."

103. Johnson v. Eisentrager, 339 U.S. 763, 785 (1950); *see also Verdugo-Urquidez*, 494 U.S. at 269 (characterizing *Eisentrager* as rejecting the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States). But how would this doctrine apply to U.S. military bases or embassies abroad? Should this restriction be limited within the confines of the continental United States? Bases and embassies are considered sovereign territories, so why should there be a distinction in rights available to detainees?

104. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

105. *See, e.g.*, *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). In that case, Judge Joyce Hens Green addressed eleven coordinated habeas cases involving aliens being detained by the United States as "enemy combatants" at Guantánamo Bay. *Id.* at 445. These detainees were seized in Afghanistan. Denying in part the government's motion to dismiss the petitions, the district court held that "the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are 'enemy combatants' subject to indefinite detention violate the petitioners' rights to due process of law." *Id.* The district court further ruled that the Taliban, but not the al Qaeda detainees, were entitled to the protections of the Third and Fourth Geneva Conventions. *Id.* at 478–80.

hesitation," thus again rendering a *Bivens* action inoperable.[106] The Court has said that "*Bivens* action[s] might be unavailable" to aliens for constitutional violations in foreign countries.[107] The Court explained that the foreign location and the particular identity of the claimant may constitute "special factors counseling hesitation."[108] The Court is likely hesitant to recognize a *Bivens* claim when doing so would require judicial review of the executive branch's conduct of foreign affairs and military strategy, as may be true of outsourcing of governmental projects abroad to contractors that have arisen from the War on Terror.[109] In addition, *Bivens* claims were primarily designed to impose liability upon the rogue officer who violates someone's constitutional rights either deliberately or out of plain incompetence. This does not address the issue of an independent contractor carrying out direct executive orders from the government.

V. MINDING THE LIABILITY GAP

> *Our government is the potent, the omnipresent teacher. . . . [I]t teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.*
>
> —Justice Brandeis[110]

As evidenced from above, there is a striking gap in the rights of aliens to be free from U.S.-directed torture at the hands of "independent" contractors and the remedies available against the United States as a sovereign for instigating such abuse abroad. This is precisely the type of behavior that should be deterred. But the question remains: What should be done about this disparity between rights and remedies? Is this not the type of behavior that the international community wants to deter? It is incredibly dangerous to have a legal system that creates no accountability for actions of a sovereign simply outsourced to independent contractors. This problem cannot be permitted to continue where governmental contractors are being used to carry out torture and other abuses abroad.

106. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

107. *Verdugo-Urquidez*, 494 U.S. at 274.

108. *Id.*

109. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 279–83 (E.D.N.Y. 2006) (distinguishing the facts from *Rasul*, and arguing that the foreign-policy considerations barred a *Bivens* claim by a torture victim whom defendant United States rendered to Syria for torture); *see also* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208–09 (D.C. Cir. 1985) (Scalia, J.) (arguing that "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad").

110. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Congress has chosen on several occasions in the past to set standards for accountability for international human-rights abuses such as torture and extrajudicial killings. For example, Congress has enacted the Torture Victim Protection Act of 1991 ("TVPA").[111] The TVPA symbolically represents the United States' unequivocal contempt for torture, thereby setting the standard for other countries to follow. In addition, the TVPA reaffirms the United States' commitment to the protection of torture victims by ensuring that they receive adequate and just compensation and guaranteeing that the United States does not become a sanctuary for international torturers.[112] Specifically, the TVPA establishes civil liability for acts of torture and extrajudicial killings abroad.[113] The TVPA applies only to acts taken under color of official authority and recognizes as a defense the existence of remedies in the country where the violation allegedly occurred.[114]

The TVPA is not the only legislation adopted by the United States to demonstrate its adamant stance against torture and extrajudicial killings. The United States also opened its courthouse doors to aliens suing private entities in tort under the Alien Tort Claims Act ("ATCA").[115] ATCA gives federal courts jurisdiction over "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."[116]

In addition to the TVPA and ATCA, Congress has also enacted the Foreign Sovereign Immunities Act of 1976 ("FSIA").[117] The FSIA provides a mechanism by which foreign sovereigns or agents thereof can be

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111. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . .").

112. *See id.*; *see also* AMNESTY INT'L, TORTURE IN THE EIGHTIES 28 (1984) (stating that torture has been widely condemned in international law).

113. 28 U.S.C. § 1350, historical and revision notes, provides in pertinent part:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id.

114. The TVPA creates liability for an individual who acts "under actual or apparent authority, or color of law, of any foreign nation." *Id.* To prove a claim, the plaintiff is required to "establish some governmental involvement in the torture or killing." Arar v. Ashcroft, 414 F. Supp. 2d 250, 264 (E.D.N.Y. 2006) (quoting Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995)) (internal quotation marks omitted).

115. 28 U.S.C. § 1350 (2000).

116. *Id.*

117. 28 U.S.C. §§ 1602–1611 (2000).

sued in U.S. federal courts.[118] The claimant must show that the sovereign fits within one of the exceptions contained in the FSIA, usually an act that would duplicate actions that a private citizen would undertake.[119] The FSIA has been used to hold sovereign governments accountable in the past. In the notable case, *Alejandre v. Republic of Cuba*, the court issued a multimillion-dollar judgment against the Cuban government for the deaths of three Americans that resulted from the Cuban Air Force shooting down the Brothers to the Rescue humanitarian flight.[120] In that case, this legislation was used again to demonstrate the United States' zero-tolerance policy on terrorism and extrajudicial killings.

The TVPA, ATCA, and FSIA represent Congress's willingness to legislate within the field of international human-rights abuses. So what now? What is the best course of action in closing this gap of liability that has left the U.S. government "untouchable?" Further, what action could provide the necessary deterrent to ensure that American contractors are abiding by even the most basic tenets of American law in their conduct in Iraq?

One solution is to increase the level of internal accountability among the defense contractors being used in the War on Terror. In the past, the Department of Defense has been plagued with failure upon failure of its contracting scheme and mechanisms of cost and mission accountability.[121] Experiments in streamlined contracting processes have allowed the military to pay contractors for a flexible delivery order rather than specifying a detailed agreement by contract.[122] The Department of Interior's Inspector General investigating the Abu Ghraib situation reported that CACI, a private contractor, was given orders predominantly for interrogations, intelligence, and security services in

118. *Id.*

119. *Id.*

120. 996 F. Supp. 1239, 1243–46 (S.D. Fla. 1997). The personal representatives of the deceased brought action against the Republic of Cuba and the Cuban Air Force after three U.S. citizens flying civilian airplanes were shot down by Cuban fighter planes over international waters. *Id.* at 1242. The court found that the plaintiffs provided sufficient evidence that the Air Force and Cuba could be considered liable under the FSIA exception. *Id.* at 1247–48. The court found both the Cuban Air Force and the Republic of Cuba liable for damages under the theory of respondeat superior. *Id.* at 1249. The court awarded substantial compensatory and punitive damages to the plaintiffs. *Id.* at 1249–52. But the theory of respondeat superior only allowed the foreign state to be liable for compensatory damages and not for punitive damages. *Id.* at 1253–54.

121. Not only has there been failures regulating the activities of contractors abroad, but even some suggest that contractors are scamming the government out of money. "[T]he name 'Haliburton' has become synonymous with 'no-bid contract,' which in the media evokes images of gross cronyism and taxpayer rip-off." Patricia H. Wittie, *News from the Chair*, PROCUREMENT LAW., Winter 2005, at 2, 2.

122. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 569 (2005).

Iraq.[123] Yet, doesn't involving private entities in interrogations cross the line into the arena of centrally government work?[124] A long-standing executive policy, now expressed in the Office of Management and Budget Circular, directs that inherently governmental functions should not be outsourced.[125] Congress adopted the Federal Activities Inventory Reform Act ("FAIR") in 1998, which requires agencies to inventory civil-service work and to identify jobs as commercial or inherently governmental in order to assist the privatization effort.[126] But even with a statute on the books that separates commercial from governmental activities, disagreements over classification and the governmental capacity continue.[127] For example, officially speaking, a contractor may be entrusted with providing security as well as driving trucks to transport soldiers, equipment, and other supplies; but when does this function move from civilian to core military?[128] The Department of Defense has not created or consistently applied standards or benchmarks to identify and track what functions must remain within the government and those activities that may be outsourced.[129]

As shown, the Department of Defense is unable to regulate itself. As the War on Terror continues, it is obvious that the number of private contractors is only going to increase, and the task of classifying their duties will become virtually impossible. One would think that the gov-

123. *See id.* at 555; *see also* Joshua Chaffin, *Private Workers Found Central to Jail Abuse*, FIN. TIMES (London), Aug. 27, 2004, at 7 (discussing CACI's role in the interrogation of detainees at Abu Ghraib).

124. *See* Schooner, *supra* note 122, at 555.

125. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). This document includes a categorization of governmental activities into commercial and inherently governmental. Inherently governmental jobs would be those "so intimately related to the public interest as to mandate performance by government personnel." *Id.* Functions may be "inherently governmental" where they involve discretion and sovereign authority that could bind the U.S. and "[s]ignificantly affect[ ] the life, liberty, or property of private persons." *Id.*

126. Pub. L. No. 105-270, 112 Stat. 2382 (1998) (codified as amended at 31 U.S.C. § 501 note) (stating that in using the private sector for needed commercial services, officials are to identify savings and also identify non-inherently governmental functions to enable cost comparisons between private bids and public budgets); *see* Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48, 61–92 (1998) (describing FAIR, Circular A-76, and the competitive cost comparison process).

127. *See* U.S. GEN. ACCOUNTING OFFICE, COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE FEDERAL GOVERNMENT 1 (2002), http://www.gao.gov/new.items/d02847t.pdf.

128. *See* Schooner, *supra* note 122, at 556 n.20 (describing fights within the government over outsourcing what may be inherently governmental functions).

129. *See id.* at 553–54. "'Just as the distinction between combat arms and non-combat arms has become blurred during operations, the distinction between 'advising' and 'doing' for these contractors is similarly blurred,' writes Major Thomas Milton of the Foreign Area Officer Association." KEN SILVERSTEIN, PRIVATE WARRIORS 166 (2000).

ernment would want to keep an eye out for what their contractors are actually doing in the field. But at the end of the day, if the liability will ultimately befall the contractor, absent international or domestic pressure, the United States has no incentive to monitor its contractors.[130]

A far better idea is creating a statute that would attach liability to the federal government for abuses carried out by their contractors abroad. With the numerous exceptions to the FTCA virtually eliminating U.S. liability abroad, and with the questionable status of the constitutional rights for aliens, a new statute is the only way to ensure accountability. This new statute should impose restrictions on what exactly can be outsourced to independent contractors, create standards of oversight, and create liability for the U.S. government in tort when the statute is violated.

This proposed legislation would have numerous critics from all realms of government and business. Contractors would likely be against it for the sheer fact that it is likely to reduce the amount of business they can perform under lucrative governmental contracts. But contractors should welcome the new legislation. By clearly defining duties of the contractor and keeping such duties within the "commercial realm," contractors will likely face a sharp reduction in suits brought against them. Further, clearly defined directives allow liability to be correctly assessed to the appropriate party. At the current state of affairs, the line between the government and the contractor is blurred, leaving each entity to blame each other. Clearly delineated standards create transparency within the system.

In addition, Congress could potentially achieve a secondary objective by enacting such legislation. By regulating the conduct and activities of governmental contractors, Congress far reduces the ability of the United States to function as a military force in Iraq. Congress could essentially force a military stand-down and withdrawal by enforcing a statute that would assess liability on the government for allowing and or directing governmental contractors to participate in activities that are inherently governmental. This approach would allow Congress not only to circumvent the bad publicity that would result by pulling funds directly from the American troops, but would also would deter governmental departments from entrusting contractors with tasks that are inherently governmental.

130. Even American television is aware of the contractor crisis in Iraq. Popular television shows like *Law & Order* often take up controversial contractor issues in the War on Terror. This shows that this problem is not as hidden as some governmental departments may suggest. *See Law & Order: America, Inc.* (NBC television broadcast Mar. 22, 2006) (dealing with the use of private military firms that handle military-support functions in the Iraq war).

The executive branch of the U.S. government is also likely to oppose this proposition. Clearly, it is rare that the government would welcome a statute abrogating sovereign immunity for additional torts by contractors with open arms. As discussed previously, however, the United States has done this before. After all, it would be hypocritical for the United States to chastise foreign nations and other international entities for sanctioning terrorism and employing torture techniques in their interrogations when the U.S. government can slyly outsource liability and get away with the exact same thing.[131] That is a dark accusation, but without accountability there is no way to ensure that outsourcing otherwise illegal activity to escape liability does not occur.

VI. CONCLUSION

The objector and the rebel who raises his voice against what he believes to be the injustice of the present and the wrongs of the past is the one who hunches the world along.

—Clarence S. Darrow

In this paper, I have shown that an alien suffering abuse at the hands of government-directed contractor abroad is entitled to a civil remedy against the entity ultimately responsible as a means of ensuring that "wrongs" do not become "rights." In today's era of privatization, it is essential the U.S. government not be given unlimited freedom to outsource torture and other abuses to escape liability. As referenced above, the problem of "contractors behaving badly" has only begun its violent spiral out of control. The problem is only going to get worse as American contempt for the war in Iraq grows, and the reliance on private contractors to conduct military activities increases. This paper implores Congress to act. Whether Congress acts to plug the gap between the rights of the victims and remedies available in U.S. courts, or as a backdoor tool where Congress reigns in the President's actions in Iraq, the bottom line is something must be done—and soon. After all, it should be the duty of our government to ensure that American contractors in Iraq are abiding by the most basic tenets of American and international law. This gap between rights and remedies must be mended to ensure the accountability of the United States and its contractors abroad. Leaving that gap unattended only makes the United States a victim of its own negligence and failure to act. Minding the liability gap will undoubtedly work toward the guarantee of the elimination of outsourcing impunity. To do so would truly ensure liberty and justice for *all*.

131. *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1250–53 (S.D. Fla. 1997).

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