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# Contract Torture: Will Boyle Allow Private Military Contractors to Profit from the Abuse of Prisoners?

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# Contract Torture: Will *Boyle* Allow Private Military Contractors to Profit from the Abuse of Prisoners?

Roger Doyle\*

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## I. INTRODUCTION

“Saleh”<sup>1</sup> heeded the United States’ call for capable and willing Iraqis to return to Baghdad to help rebuild Iraq in the days following the American invasion.<sup>2</sup> In the early 1990s, he had fled from Iraq and went to Sweden to escape Saddam Hussein’s regime of terror and imprisonment.<sup>3</sup> As he crossed back into Iraq in 2003, U.S. troops stopped him, arrested him, and seized his car and the \$70,000 cash he brought to help start a business.<sup>4</sup> He was taken to Abu Ghraib in

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2007; B.S. Civil Engineering, United States Coast Guard Academy, May 1998. I would like to thank my advisors and editors for their invaluable efforts on this Comment, Anne Bloom, John Sprankling, and Lara Wallman. Thanks to Mandy for making this Comment readable, and putting up with me rambling on about it. Dedicated to K.C.

1. Full name not disclosed for privacy concerns.  
2. Deborah Hastings, *U.S. Contractors Face Long-Shot Civil Suits*, THE INTELLIGENCER, Oct. 25, 2004, at 1A.  
3. *Id.*  
4. *Id.*

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Baghdad, where he remained for three months.<sup>5</sup> This was not his first time in Abu Ghraib, having been sent there by Saddam Hussein for political opposition.<sup>6</sup>

But according to Saleh, his second stay, under the “control” of American troops and civilian contractors at the prison, was his worst experience.<sup>7</sup> While in custody, government contractors and military personnel beat his genitals with a stick. Saleh had his genitals tied to those of other prisoners and they were pushed and knocked to the ground one at a time.<sup>8</sup> Saleh was beaten, shocked with electricity, dragged around the cell block by a belt around his neck, and forced to perform sexual acts in front of jailers and other prisoners.<sup>9</sup> Amazingly, Saleh was never charged with any crime or found to be a spy or Saddam supporter, and was released after three months from Abu Ghraib.<sup>10</sup>

Saleh’s is but one story that depicts torture activities occurring in Iraq, Afghanistan, and Cuba that have shocked the world.<sup>11</sup> Other prisoners at Abu Ghraib report being sodomized, urinated upon, or taunted with growling dogs.<sup>12</sup> These tortuous claims have become the focus of widespread media attention<sup>13</sup> and two official investigations conducted by the U.S. Army.<sup>14</sup> In response to the actions at Abu Ghraib, at least two civil lawsuits have been filed against Titan Corporation, Incorporated of San Diego, California and CACI Incorporated of Arlington, Virginia. In both *Ibrahim v. Titan Corporation, Inc.*<sup>15</sup> and *Saleh v.*

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5. *Id.*

6. *Id.*

7. *See id.*; *see also* Major General Antonio Taguba, Article 15-6 Investigation of the 800th Military Police Brigade (Mar. 9, 2004), *available at* <http://www.publicintegrity.org/report.aspx?aid=417&sid=100> [hereinafter Taguba Report] (documenting physical abuses to prisoner genitals and acts of sodomy and sexual perversion).

8. *See* Hastings, *supra* note 2, at 1A; *see also* Taguba Report, *supra* note 7 (documenting physical abuses to prisoner genitals and acts of sodomy and sexual perversion).

9. *See* Hastings, *supra* note 2, at 1A; *see also* Major General George Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade (Aug. 23, 2004), *available at* <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Fay Report] (describing various incidents of physical abuse on detainees at Abu Ghraib).

10. Hastings, *supra* note 2, at 1A.

11. The incidents described herein were not isolated events. *See, e.g.*, James R. Schlesinger, Final Report of the Independent Panel To Review DOD Detention Operations 12 (2004) [hereinafter Schlesinger Report], *available at* <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (noting approximately 300 separate allegations and 66 confirmed instances of detainee abuse in Iraq, Afghanistan, and Cuba). *See also* Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A1 (reporting that an FBI agent at Guantanamo Bay witnessed detainees being subjected to abuse, including being “shackled to the floor in fetal positions” for days at a time, deprived of food and water, and left “to defecate on themselves”).

12. *See* Second Amended Complaint at 38, *Ibrahim v. Titan, Corp.*, 2006 WL 3570443 (Jan 1, 2004) (listing eight specific acts of physical abuse allegedly committed while Mr. Saddam Aboud was incarcerated at Abu Ghriab).

13. *See, e.g.*, the thirty-two consecutive days of front page stories by THE NEW YORK TIMES on Abu Ghraib, starting April 29, 2004 and ending June 2, 2004.

14. *See* Fay Report, *supra* note 9, at 48; *see also* Taguba Report, *supra* note 7 (documenting physical abuses to prisoner genitals and acts of sodomy and sexual perversion).

15. 391 F. Supp. 2d 10 (D.D.C. 2005).

*Titan Corporation, Inc.*,<sup>16</sup> the plaintiffs accuse the defendant government contractors of tortuous activities including assault and battery, wrongful death, torture, crimes against humanity, sexual assault and battery, and intentional infliction of emotional harm. The defendant contractors provided translators and interrogators to the U.S. military. These contractors have been directly suspected by the U.S. Army as participating in the abuses at Abu Ghraib.<sup>17</sup>

With the universal condemnation of torture<sup>18</sup> and specific U.S. law prohibiting the acts of torture,<sup>19</sup> one would believe that Saleh and the hundreds of other detainees in Abu Ghraib, Afghanistan, and Guantanamo Bay would have a legal remedy for damages. However, assuming the U.S. government and Army may avoid liability in a civil action on the premise of sovereign immunity,<sup>20</sup> the detainees' only option to recover damages for their torture and imprisonment may be against the individual captors and the private contractors who employed them.<sup>21</sup>

Without the benefit of legal protection from U.S. contractors within the Iraqi legal system,<sup>22</sup> the parties have turned to U.S. federal courts. Despite the procedural mechanisms that allow the plaintiffs to sue U.S. corporations in federal court,<sup>23</sup> a significant substantive barrier stands in between Saleh and the other detainees who were imprisoned and abused at the hands of civilian contractors: the government contractor defense.<sup>24</sup>

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16. 361 F. Supp. 2d 1152 (S.D. Cal. 2005).

17. Fay Report, *supra* note 9, at 48.

18. United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46 of 10 December 1984, enacted into force June 26, 1987 [hereinafter UN Convention].

19. See 18 U.S.C. § 2340 (2004) (creating a federal crime for torture committed outside the United States).

20. See generally *U.S. v. Sherwood*, 312 U.S. 584 (1941) (holding that the federal government has sovereign immunity from suit unless it explicitly waives immunity by statute).

21. Torture Victim Protection Act, PL 102-256, 106 Stat. 73 (1992) (stating that "an individual who, under actual or apparent authority, or color of law, . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual").

22. In June 2003, Paul Bremer, U.S. Head of the Iraqi Provisional Authority, issued an order protecting contractors from any threat of civil or criminal suit in Iraqi courts, even for intentional torts and violent crimes. Joanne Mariner, *Private Contractors Who Torture*, CNN ONLINE, June 17, 2004, available at <http://www.cnn.com/2004/LAW/06/17/mariner.contractors>.

23. Assuming that the Alien Tort Claims Act, 28 U.S.C. § 1350, and diversity jurisdiction under 28 U.S.C. § 1332, would be sufficient to allow the district court jurisdiction in these matters. For more information on the subject, see generally Scott J. Borrowman [student author], *Sosa v. Alvarez-Machain and Abu Ghraib – Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371 (2005).

24. See Anthony J. Sebok, *What Tort Claims, If Any, Can Be Brought By the Inmates Who Were Tortured in Iraq?*, FindLaw Legal Commentary (May 17, 2004), available at <http://www.writ.news.findlaw.com/sebok/20040517.html>; see also Myriam Gilles, *Private Parties as Defendants in Civil Rights Litigation*; *Association of American Law Schools Symposium*, 26 CARDOZO L. REV. 1, 7 (2004).

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This common law defense was first recognized by the U.S. Supreme Court in *Boyle v. United Technologies Corporation*.<sup>25</sup> In *Boyle*, a 5-4 court held that exemptions found in the Federal Tort Claims Act (“FTCA”) included immunity for military contractors manufacturing military equipment in accordance with approved government specifications.<sup>26</sup> The lower courts’ expansion of the defense has been ongoing since its creation to include service contracts and contracts not involving military equipment.<sup>27</sup> Additionally, the Court has exhibited reluctance to review the defense or hold corporations accountable for the actions of its employees in constitutional tort claims such as *Correctional Services Corporation v. Malesko*.<sup>28</sup> Based on this judicial trend, the government contractor defense appears to be an available affirmative defense to defendant corporations whose agents and employees inflicted the torture on the inmates of Abu Ghraib and other detention facilities.

This comment takes the position that the unprecedented extension of private military contractors into roles traditionally held by military personnel, specifically paramilitary operations such as interrogation and prisoner of war detention, is an anomaly outside the Court’s reasoning in *Boyle*. Specifically, the government contractor defense in these cases is outside the scope of *Boyle*, inappropriate in light of the rationale underlying *Boyle* and *Malesko*, and would have damaging consequences for the American reputation in the world community. Allowing the military to “outsource” these specialized roles is beyond the limited scope of the military contractor providing equipment for which *Boyle* found immunity under the FTCA. Therefore, the extension of the government contractor defense is unwarranted in the specific context of contractors acting in the traditionally military roles of interrogators and translators in prisoner of war facilities.

Furthermore, the use of the government contractor defense as an affirmative defense to constitutional tort claims<sup>29</sup> is inappropriate for private military contractors who act in the roles of interrogators and other paramilitary operations traditionally held by the military. The reasoning found in *Malesko* does not apply where the agent’s employer is not a government entity, or where the parent corporation actually publishes operating procedures or encourages the actions that result in the tortuous activity.<sup>30</sup>

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25. *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988).

26. *Id.*

27. *See* *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003) (announcing elements for government contractor defense as applied to service contracts); *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993) (holding that government contractor defense applies to *all* government contractors).

28. *See* *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001) (holding that private cause of action against government contractor was not available to injured prisoner because deterrence of the tortuous conduct was not likely by the imposition of liability).

29. *See, e.g., Malesko v. Correctional Serv. Corp.*, 299 F.3d 374 (2d Cir. 2000).

30. *See* *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61 (2001); OF-347, Contract Order for Supplies and Services entered into between CACI, International and the U.S. Dept. of the Interior, March 1, 2004, at 1,

Finally, there are clear statements by Congress and the world community condemning torture and tortuous oppression by occupying armies.<sup>31</sup> The policy rationale underlying *Boyle*, its progeny, and *Malesko* are particularly flawed in the situation where the use of the government contractor defense would leave the plaintiffs with no alternative method of recovery.<sup>32</sup>

Section II of this comment will briefly address the facts that have led up to the present lawsuits against Titan Corporation and CACI Incorporated. Specifically, this section of the comment highlights the differences between traditional private military contractor roles involving non-paramilitary operations, such as infrastructure rebuilding, and tort claims resulting from the use of civilian contractors in paramilitary roles such as interrogators. Additionally, this section will note the clear statements by Congress and the world community condemning torture and tortuous oppression by occupying armies.<sup>33</sup>

Section III provides the legal background of *Boyle*, *Malesko*, and recent Supreme Court analysis of state law tort claims against contractors and government entities. Section IV provides an analysis of the government contractor defense as applied to the facts of *Ibrahim v. Titan Corporation*<sup>34</sup> and *Saleh v. Titan Corporation*.<sup>35</sup> This section examines the policy concerns behind the government contractor defense. Section V concludes with the belief that the government contractor defense as laid forth in *Boyle* should not apply to the facts presented in the torture cases stemming from Abu Ghraib.

## II. FACTUAL AND LEGAL BACKGROUND

### A. Private Military Contractors

Government sponsored private military services have a long and distinguished history. Thought of as mercenaries today, Alexander the Great, Caesar, and the British Empire each employed foreign military units to fight in combat.<sup>36</sup> In 1969, the U.S. Army implemented procedures for outsourcing

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available at [http://www.publicintegrity.org/docs/wow/CACI\\_ordersAll.pdf](http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf) (holding that private cause of action against government contract was not available to injured prisoner because deterrence of the tortuous conduct was not likely by the imposition of liability).

31. See, e.g., Associated Press, *House Vote Boosts McCain's Ban on Torture*, WASH. TIMES, Dec. 15, 2005, available at <http://www.washtimes.com/national/20051214-115713-5460r.htm>; UN Convention, *supra* note 18.

32. This comment assumes the U.S. government would be immune from suit under sovereign immunity, and that the private contractors would be immune from suit in Iraq. See *supra* text accompanying note 23.

33. See *supra* text accompanying note 31.

34. 391 F. Supp. 2d 10 (D.D.C. 2005).

35. 361 F. Supp. 2d 1152 (S.D. CA. 2005).

36. See Todd S. Millard, *Overcoming Post Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 6-9 (2003) (noting that the use of hired armies is common through history).

logistical support.<sup>37</sup> Since then, the United States has spent millions of dollars in private military contracts for training, logistics, intelligence, and communications.<sup>38</sup> Outsourcing to private contracts for military flight training,<sup>39</sup> fuel supplies,<sup>40</sup> and telecommunications have become commonplace during the past twenty years.<sup>41</sup> Some modern campaigns, such as the “War on Drugs”, were waged with private military contractors when formal military combat activities were not authorized by Congress.<sup>42</sup> A recent U.S. Government Accounting Office report noted that since the early 1990s, the Department of Defense has used private military contractors to “meet many of its logistical and operational support needs during combat operations, peacekeeping missions, and humanitarian assistance missions, ranging from Somalia and Haiti to Bosnia, Kosovo, and Afghanistan.”<sup>43</sup> It appears that, in light of current defense priorities and man-power shortages, private military contractors are invaluable to national defense.<sup>44</sup>

During the current conflict in Iraq, the U.S. government employed one private contractor for every ten active-duty military service members deployed in the region—nearly ten times the number used in the 1991 Persian Gulf War.<sup>45</sup> With current U.S. Army troop number estimates at nearly 140,000,<sup>46</sup> approximately 20,000 civilians are acting in support, logistics, and paramilitary roles in Iraq alone.<sup>47</sup>

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37. Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 235 (2000).

38. See Barry Yeoman, *Soldiers of Good Fortune*, Mother Jones, May/June 2003, available at [http://www.motherjones.com/news/feature/2003/05/ma\\_365\\_01.html](http://www.motherjones.com/news/feature/2003/05/ma_365_01.html) (reporting that private military contractors enjoy an estimated \$100 billion annually).

39. CSC News Release, *CSC Wins \$1.1 Billion Army Flight School XXI Simulation Contract*, Sept. 29, 2003, available at <http://www.csc.com/newsandevents/news/2289.shtml>.

40. See, e.g., Arctic Slope World Services Current Contracts Webpage, <http://asws.asrcfederal.com/current/current.asp?page=army> (claiming Army refueling contracts at three bases in Alabama) (on file with the *Pacific McGeorge Global Business & Development Law Journal*).

41. See, e.g., Roseanne Gerin, *MTC Tapped by Air Force for Communication Support*, Oct. 20, 2005, available at [http://www.washingtontechnology.com/news/1\\_1/telecom-it-infrastructure/27234-1.html](http://www.washingtontechnology.com/news/1_1/telecom-it-infrastructure/27234-1.html) (noting the Air Force and other Defense Department’s \$2.5 billion worth of annual communications projects).

42. See Nelson D. Schwartz & Noshua Watson, *The Pentagon’s Private Army*, FORTUNE, Mar. 17, 2003 at 100, 103, available at 2003 WL 13891324 (“At least a half-dozen companies . . . receive up to \$1.2 billion a year from the Pentagon and the State Department to fly the planes that spray suspected coca fields and to monitor smugglers from remote radar sites.”).

43. GAO Report to the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, June 2003 at 4, available at: <http://www.gao.gov/new.items/d03695.pdf> [hereinafter GAO Report].

44. *Id.* at 18.

45. Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2003, at E01.

46. Transcript of radio interview with Sec. of the Army, Francis J. Harvey, Jan. 27, 2006, available at <http://www.defenselink.mil/transcripts/2006/tr20060127-12392.html>.

47. Deborah Avant, *What Are Those Contractors Doing in Iraq?*, WASH. POST, May 9, 2004 at B1; P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004 at B3.

After the events of September 11th, the U.S. military is almost entirely dependant on translation services for operations in Arabic-speaking countries.<sup>48</sup> The shortage of Arabic-speaking military personnel resulted in a number of private military contractors vying for contracts to provide translators and linguists to the Army.<sup>49</sup> Contacts were made to provide translators and intelligence specialists at Abu Ghraib prison for translation services and interrogation of Iraqi prisoners after the U.S. invasion of Baghdad.<sup>50</sup> Testimonies from both prisoners and military personnel in Abu Ghraib at the time indicate that contractors from at least two U.S. companies directly participated in the abuses.<sup>51</sup>

In response, at least two lawsuits have been filed against Titan Corporation of San Diego, California, and CACI Incorporated of Arlington, Virginia.<sup>52</sup> *Ibrahim* was brought by seven Iraqi nationals on behalf of themselves or their deceased husbands.<sup>53</sup> *Saleh* has been filed as a class action with ten named individuals or estates and over 1000 unnamed plaintiffs who were imprisoned or tortured by the contractors.<sup>54</sup> These suits target two corporations that provided translators and interrogators to the U.S. military for use in Abu Ghraib prison between 2003 and 2004.<sup>55</sup> In particular, the suits allege that while acting under color of U.S. law, specific individuals employed by the contractors committed crimes such as rape, assault, battery, false imprisonment, torture, and wrongful death, among other tortuous activities upon the plaintiffs.<sup>56</sup> Alleging negligence and the theory of respondent superior, among other charges under RICO, the plaintiffs filed suit against the private military contractors that employed the individual interrogators and translators.<sup>57</sup> The plaintiffs are seeking compensatory and punitive damages in the millions of dollars.<sup>58</sup>

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

49. See James Bernstein, *Speaking Their Language: \$3.1B in Contracts*, NEWSDAY, Sept. 30, 2005, available at <http://www.globalsecurity.org/org/news/2005/050930-language-contracts.htm> (reporting the Army's request for bids on nearly \$3.1 billion in translation contracts).

50. See Taguba Report, *supra* note 7; Tara McKelvey, *Torture Inc.*, LEGAL AFFAIRS 13 (Oct. 2005), available at [http://www.legalaffairs.org/issues/September-October-2005/scene\\_mckelvey\\_sepoct05.msp](http://www.legalaffairs.org/issues/September-October-2005/scene_mckelvey_sepoct05.msp) (noting that nearly CACI PT, Inc sent nearly 30 interrogators to work at Abu Ghraib in August 2003, and Titan has sent roughly 4000 translators to Iraq).

51. See generally, Taguba Report, *supra* note 7; Third Amended Complaint, *Saleh v. Titan Corp.*, Case No. 1:05-cv-1165, Sept. 12, 2005 (noting that the Army had hired CACI employees as interrogators, and Titan employees as translators) [hereinafter *Saleh Complaint*].

52. See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152 (S.D. Cal. 2005).

53. *Ibrahim*, 391 F. Supp. 2d at 12.

54. Complaint, *Saleh v. Titan Corporation*, WL 2091778 (D.D.C. 2006).

55. *Ibrahim*, 391 F. Supp. 2d at 12.

56. *Saleh Complaint*, *supra* note 51.

57. *Id.*

58. *Id.*

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### B. Applicable U.S. Law

In 1989 and again in 1991, U.S. Congress passed legislation in response to the fact that nearly 100 countries still practiced torture in routine police and military operations.<sup>59</sup> Currently, the United States provides aliens access to its court system to redress injuries suffered from official torture inflicted by a foreigner outside of its territorial limits.<sup>60</sup> Additionally, a foreign victim of torture has been able to seek redress in U.S. federal courts and obtain civil remedies under the Alien Tort Claims Act<sup>61</sup> (ATCA) and 28 U.S.C. § 1331.<sup>62</sup> In 1991, Congress codified the remedial and jurisdictional basis upon which federal courts are permitted to adjudicate claims brought by torture victims, both alien and domestic, by enacting the Torture Victim Protection Act (“TVPA”). The TVPA provides that “an individual who, under actual or apparent authority, or color of law . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”<sup>63</sup>

Unfortunately, all too often, military contracts are the product of political pressure and poor oversight.<sup>64</sup> This combination creates a host of interesting contractual issues best left for another forum, including: sole source contracting,<sup>65</sup> contract specifications written by contractors in violation of military protocol,<sup>66</sup> and differing contracting procedures for differing agencies or departments within an agency.<sup>67</sup>

The complaints allege common law torts in addition to violations of statutory law.<sup>68</sup>

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59. See, e.g., MARTIN ROBERTSON & AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 28 (1984); see also Torture Victims Relief Act of 1998, Pub. L. No. 105-320 Sec. 2, 112 Stat. 3016 (1999) (“The American people abhor torture by any government or person. The existence of torture creates a climate of fear and international insecurity that affects all people.”).

60. *Torture Victim Protection Act of 1989: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 19 (1990).

61. 28 U.S.C. § 1350 (2005) (providing that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

62. *Id.* § 1331 (providing that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”).

63. *Id.* § 2340.

64. See Tony Perry, *Rep. Cunningham Pleads Guilty to Bribery, Resigns*, L.A. TIMES, Nov. 29, 2005, available at <http://www.latimes.com/business/la-me-duke29nov29,0,7903329.story?coll=la-home-business> (noting that Cunningham used his committee position to “influence the appropriations of funds and the execution of government contracts”); GAO Report, *supra* note 43, at 28.

65. Sheryl Elam Tappan, *An Oversight Hearing on Contracting Abuses in Iraq*, Comments before the Senate Democratic Policy Committee, Sept. 10, 2004, available at: <http://democrats.senate.gov/dpc/hearings/hearing17/tappan.pdf>.

66. David Phinney, *Prison Interrogation for Profit*, CORPWATCH, Sept. 15, 2004, available at <http://www.warprofiteers.com/article.php?id=11524>.

67. General Accounting Office, *Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans* 26 (June 2003), available at: <http://www.gao.gov/new.items/d03695.pdf>.

68. See Saleh Complaint, *supra* note 51.

### III. GOVERNMENT CONTRACTOR DEFENSE BACKGROUND

#### A. Early Contractor Immunity

When Congress passed the FTCA,<sup>69</sup> it created a limited waiver of sovereign immunity. The Legislature specifically limited this waiver to government employees acting within the scope of their employment.<sup>70</sup> In defining the parameters of the FTCA, Congress explicitly excluded “any contractor with the United States,”<sup>71</sup> meaning that the U.S. government was not liable in tort under the FTCA for acts caused by the negligence of a government contractor. The years after the passage of the FTCA resulted in a number of federal cases where plaintiffs attempted to hold the United States and/or their government contractors liable in tort for damages.<sup>72</sup> Many of these cases were brought under the FTCA against the U.S. government for injuries resulting from interactions with military equipment.<sup>73</sup>

In *Feres v. United States*, however, the Supreme Court held that the U.S. government was immune from personal injury actions by active duty military service members for injuries sustained while in military service.<sup>74</sup> The Court emphasized the unique relationship between military service members and the government, the lack of precedent allowing military personnel to recover damages from their superiors, and other available statutory compensation precluding military members from suing the U.S. government.<sup>75</sup>

To circumvent *Feres*, the plaintiffs attempted to sue the corporations working under contract to the U.S. military for injuries sustained from malfunctioning or unsafe equipment.<sup>76</sup> In many of such cases, the corporate defendant attempted to

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69. Federal Tort Claims Act, 28 U.S.C.A. § 1346 (1997) (authorizing recovery of damages against the United States for harm caused by the negligent or wrongful conduct of a Government employee, to the extent that a private person would be liable under the law of the place where the conduct occurred).

70. See 28 U.S.C.A. § 2671 (2000) (defining “government employee” and “within the scope of their employment” as applied to 28 U.S.C.A. § 1346); *U.S. v. Orleans*, 425 U.S. 807, 813-14 (1976) (court’s interpretation of the language found in § 2671).

71. 28 U.S.C.A. § 2671 (2000).

72. See, e.g., *Brooks v. United States*, 337 U.S. 49 (1949) (claim against the United States for injuries resulting from automobile accident with army vehicle); *Santana v. United States*, 175 F.2d 320 (1<sup>st</sup> Cir. 1949) (negligence claim against United States for injuries sustained while under care of Veterans’ Administration); *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940) (negligence claim against government contractor for damage to land while building dikes under government contract).

73. See, e.g., *Brooks*, 337 U.S. at 49 (1949) (private citizen claim against the United States for injuries sustained in an automobile accident with an army vehicle); *Whittaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5<sup>th</sup> Cir. 1969) (holding military contract grenade manufacturer liable for injuries to plaintiff).

74. 340 U.S. 135, 146 (1950).

75. *Id.* at 141-44.

76. See, e.g., *Adams v. General Dynamics Corp.*, 535 F.2d 489, 491 (9<sup>th</sup> Cir. 1976) (claim against aircraft manufacturer for injuries resulting from crash); *Barr v. Brezina Construction Co.*, 464 F.2d 1141 (10<sup>th</sup> Cir. 1972) (claim against government contractor for negligent construction).

cross-claim against the U.S. for indemnity under the contract.<sup>77</sup> In response, the Supreme Court in *Stencel Aero Eng'g. Corp. v. United States* precluded third-party indemnity claims against the United States where the original claim would be precluded by the *Feres* rule.<sup>78</sup>

By the late 1970s and early 1980s, defendant contractors argued that the combined holdings of *Stencel* and *Feres* created a state of immunity for military defense contractors.<sup>79</sup> The judicial support for this theory was strongest where the military was involved in the action.<sup>80</sup> Courts reasoned that absent congressional action, the courts should not impose liability upon the U.S. government in military matters.<sup>81</sup> Matters such as contract execution should be left to the executive and legislative branches.

It was not until the Fourth Circuit announced a new “common law” military contractor defense in *Tozer v. LTV* that the Supreme Court decided to reconsider the issue.<sup>82</sup> The Supreme Court formally created the government contractor defense in *Boyle v. United Technologies Corp.*<sup>83</sup>

### B. *Boyle v. United Technologies Corporation*

In 1988, the Supreme Court held in *Boyle* that state tort law, which holds government contractors liable for design defects in military equipment, presented a conflict with federal policy sufficiently significant to warrant preemption of the state tort law.<sup>84</sup> In *Boyle*, Lieutenant Boyle was killed in a helicopter crash at sea.<sup>85</sup> The aircraft, designed and built by the United Technologies Corporation under military contract, had an escape hatch that opened outward instead of inward, and was therefore ineffective in a submerged state against the water pressure.<sup>86</sup> At trial, the jury agreed with Boyle’s estate that the helicopter was negligently designed under a products liability theory and awarded damages to

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77. See, e.g., *Adams*, 535 F.2d at 491 (defendant filed third-party complaint against the United States, who owned aircraft that crashed causing injuries); *Barr*, 464 F.2d at 1141 (defendant filed third-party complaint against the United States alleging negligent design specifications).

78. *Stencel Aero Eng'g. Corp. v. United States*, 431 U.S. 666, 674 (1977) (precluding third-party claims for indemnity against the United States where those claims derived from claims that would themselves be barred by *Feres*).

79. See, e.g., *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 (7th Cir. 1985) (defendant contending that the progression from *Feres*, barring service members from state law tort suits, to *Stencel*, barring contractor indemnification claims against the government, creates an immunity only if operating in strict compliance with government contract).

80. See *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (“The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.”).

81. See *id.*

82. *Tozer v. LTV*, 792 F.2d 403 (4th Cir. 1986) (creating elements of military contractor defense).

83. 487 U.S. 500 (1988).

84. *Id.* at 512.

85. *Id.* at 502.

86. See *id.* at 503 (also noting that the escape hatch handle was obstructed by other equipment).

the plaintiff.<sup>87</sup> The Fourth Circuit reversed and held in a ruling released the same day as *Tozer* that United Tech. Corp. was not liable because of the “military contractor defense.”<sup>88</sup>

The Supreme Court granted certiorari and vacated the Fourth Circuit ruling.<sup>89</sup> In an opinion written by Justice Scalia, the Court remanded the case to determine whether the government contractor defense factually applied to the case.<sup>90</sup> Justice Scalia’s analysis can be broken into two relevant areas. First, he addressed whether preemption of state tort law would be appropriate or whether there was a “unique federal interest” at stake.<sup>91</sup> Second, he analyzed the scope of the defense within the elements announced in *Tozer*.<sup>92</sup>

Traditional preemption of state law is based in the inherent tension between federalism and central government.<sup>93</sup> The Supremacy Clause provides that laws of the federal government will be “the supreme Law of the Land.”<sup>94</sup> Historically, the courts have found preemption appropriate only in one of three cases: (1) Congress intentionally and expressly preempted a particular state statute;<sup>95</sup> (2) the implied intent of Congress to preempt state law was demonstrated by comprehensive legislation of the field;<sup>96</sup> or (3) where enforcement of state law would fundamentally conflict with the objectives of Congress.<sup>97</sup>

As of 1988, when *Boyle* was decided, there was no legislation that expressly indemnified government contractors from state tort products liability claims.<sup>98</sup> Therefore, the historical formulations of preemption are not appropriate where there is no federal statute to be considered “supreme.”<sup>99</sup> In *Boyle*, Justice Scalia

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87. *Id.*

88. *Boyle v. United Tech. Corp.*, 792 F.2d 413, 414-15 (4th Cir. 1986).

89. *See Boyle v. United Tech. Corp.*, 479 U.S. 1029 (1986) (granting cert.); *Boyle*, 487 U.S. at 514 (vacating and remanding for clarification of sufficiency of the evidence for directed verdict).

90. *Boyle*, 487 U.S. at 514.

91. *Id.* at 506-12.

92. *Id.* at 512-13.

93. KENNETH STARR, ET. AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE*, AMERICAN BAR ASSOCIATION 40-42 (American Bar Association 1991).

94. U.S. Const. art. VI, § 2.

95. *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (a often cited case involving direct conflict between the California Business and Professions Code and the Federal Meat Inspection Act (“FMIA”) in which Congress specifically prohibited the imposition of “[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made” under the FMIA).

96. STARR, ET. AL., *supra* note 93, 19-20.

97. *See Id.* at 27-30 (discussing various case law demonstrating conflict preemption); *see also Felder v. Casey*, 487 U.S. 131 (1988) (holding that state statute limiting liability of government actors in civil rights actions directly conflicted with the goals of 42 U.S.C. § 1983, therefore state statute was preempted).

98. *Compare Boyle v. United Tech. Corp.*, 487 U.S. 500, 515 n.1 (1988) (Brennan, J., dissenting) (noting the silence by Congress to pass legislation to indemnify government contractors), *with Homeland Security Act of 2002*, Public Law 107-296 (providing liability limitations, and in certain cases, complete immunity for all third-party claims brought against manufacturers of anti-terrorism technologies for damages resulting from terrorist acts).

99. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (outlining the various types of preemption, and noting that congressional intent to preempt must be demonstrated either through statute or

created federal common law that displaced state tort law in the absence of specific federal legislation.<sup>100</sup> The Court noted that some arenas are “so committed by the Constitution and laws of the United States to federal control that state law [should be] preempted and replaced . . . [by] ‘federal common law.’”<sup>101</sup> These arenas traditionally involve “uniquely federal interests,”<sup>102</sup> and fall into two categories: (1) those in which a federal rule of decision is “necessary to protect uniquely federal interests”;<sup>103</sup> or (2) those in which Congress has given the courts the power to develop substantive law.<sup>104</sup>

The *Boyle* Court recognized the judicial precedent that federal law exclusively governed the obligations and rights of the United States under contract to another party.<sup>105</sup> Additionally, the Court found a federal concern in the imposition of civil liability on federal officials for action taken within the scope of their duties.<sup>106</sup> The Court noted that such liability was controlled by federal law in many cases.<sup>107</sup> Combining the federal law precedent of contracting rights of the United States with the liability of federal officers, the Court held that a uniquely federal interest was present in the civil liabilities that arose from the performance of federal procurement contracts.<sup>108</sup> While contractor liability suits are typically between private parties where federal law would not govern,<sup>109</sup> the Court rationalized that the impact of the imposition of liability on government contractors would directly affect the interests of the United States.<sup>110</sup> The Court reasoned that allowing inconsistent lower court decisions and placing the burden of state tort liability on military contractors would ultimately result in increased costs passed back to the government.<sup>111</sup> Through this analysis, the Court found that discretion in military contracting and equipment requirements involved unique federal interests.<sup>112</sup>

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administrative regulations); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997) (discussing the need for more explicit congressional intent in preempting state law).

100. See *Boyle*, 487 U.S. at 504; see also James L. Akers, *Boyle v. United Technologies Corporation: In Search of the Definitive Interpretation of the Government Contractor Defense*, 16 N. KY. L. REV. 603 (1989).

101. See *Boyle*, 487 U.S. at 504.

102. *Tex. Indus. Inc. v. Radcliff Materials Inc.*, 451 U.S. 630, 640 (1981).

103. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

104. See *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (noting that the areas in which the court can develop federal common law are “few and restricted”).

105. See *Boyle*, 487 U.S. at 504.

106. *Id.* at 505.

107. See *id.* (citing six cases in which federal official liability was controlled by federal law).

108. *Id.* at 505-06.

109. *Id.* at 506 (quoting *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956)).

110. Compare *id.* at 507, with *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977) (finding that federal interests were too remote and outcome too speculative to impose federal law where third-party beneficiary sued municipality over agreement with the FAA).

111. See *Boyle*, 487 U.S. at 511-12.

112. *Id.* at 507.

However, simply finding a unique federal interest does not inevitably result in the displacement of state law.<sup>113</sup> Displacement will only occur where a significant conflict exists between an identifiable unique federal interest and the operation of state law.<sup>114</sup> While appearing to sound much like a traditional preemption standard, Justice Scalia specifically stated that the “conflict with federal policy need not be as sharp as that which must exist for ordinary preemption.”<sup>115</sup> In *Boyle*, the significant conflict existed between the contractual duty of the manufacturer to the federal government, and the state-imposed duty to design and manufacture products that are not unreasonably dangerous.<sup>116</sup>

In the absence of any explicit preemption by Congress, the Court reverted to an analysis of conflict preemption, whereby the federal law and state law could not co-exist. Justice Scalia first looked to *Feres* and the doctrine that abolished suits by military personnel in the course of their service.<sup>117</sup> While acknowledging the conflict, the Court found the application of the doctrine would produce inconsistent results.<sup>118</sup> However, with regards to military equipment procurement contracts, the Court found the proper parameters of the significant conflict within the statutory provisions of the FTCA.<sup>119</sup> The Court’s analysis rested heavily on the exclusion clause of the FTCA, which provides an exemption for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.”<sup>120</sup>

The selection of military equipment traditionally balances “many technical, military, and even social considerations” including safety versus combat effectiveness.<sup>121</sup> The Court decided that military equipment selection was a function best left to the military, not for the courts to “second-guess” in contradiction with the FTCA exemption.<sup>122</sup> The Court found the selection of the appropriate design for military equipment was a discretionary function.<sup>123</sup>

Therefore, the federal common law preemption analysis can be summarized as follows: in order to benefit from the governmental contractor defense, the contractor must satisfy both prongs of a two-part test. First, the contractor must establish that its activity involves a unique federal interest warranting the

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113. *Id.*

114. *See id.* (quoting *Wallis v. Pan American Petroleum*, 384 U.S. 63, 69 (1966)).

115. *See id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

116. *See Akers, supra* note 100, at 619; Restatement 2d Torts 402(a) (2001) (defining products liability).

117. *Boyle*, 487 U.S. at 510.

118. *See id.* (noting that the results would be too broad because stock and standard equipment were covered by the *Feres* conflict, yet too narrow since *Feres* only applies to military personnel, and not civilians injured by contractor equipment).

119. *Id.* at 511.

120. 28 U.S.C. § 2680(a) (2001).

121. *See Boyle*, 487 U.S. at 511.

122. *Id.*

123. *Id.*

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displacement of state law.<sup>124</sup> Second, the contractor must show either that a significant conflict exists between the identifiable unique federal policy or interest and the operation of state law, or that the application of state law would frustrate the specific operation of federal legislation.<sup>125</sup>

The Court realized that scope of the displacement must be limited to the “discretionary function exception.”<sup>126</sup> In order to determine if actions by the government contractor fell within the preempted discretionary function, the Court adopted the elements for government contractor defense as enunciated in *Tozer*.<sup>127</sup>

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when: (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in using the equipment that were known to the supplier but not to the United States.<sup>128</sup>

The first two conditions for the defense assured that the claim fell within the discretionary function exception of the FTCA.<sup>129</sup> The last condition ensured that the contractor provided the government with all the necessary information to make an informed discretionary decision.<sup>130</sup>

The government contractor defense in its purest *Boyle* form has been successfully asserted by defendant military contractors in many recent cases.<sup>131</sup> However, at least one circuit places great weight on the discussion by Justice Scalia in *Boyle* that the government contractor defense is always a matter of fact to be determined by the fact finder.<sup>132</sup> The Ninth Circuit has held in a number of cases that dispute as to any of the elements of the defense are genuine issues of material fact, and therefore should be submitted to the jury.<sup>133</sup>

### C. Post-Boyle Expansion of the Government Contractor Defense

Much of the post-*Boyle* litigation has concerned questions not specifically addressed by the Supreme Court.<sup>134</sup> The case by case application of the test has

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124. *Id.* at 507.

125. WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §4892.98 (Sept. 2005).

126. *See Boyle*, 487 U.S. at 512-13.

127. *Id.* at 511-512.

128. *Id.* at 510.

129. *Id.*

130. *Id.*

131. *See, e.g., Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 419 (5th Cir. 2001); *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 796 (5th Cir. 1993); *Tate v. Boeing Helicopters*, 140 F.3d 654, 656 (6th Cir. 1998).

132. *See Boyle*, 487 U.S. at 514 (holding that the court of appeals had acted in error if it had undertaken to determine if the defense had been established, not whether no reasonable jury could have found for the petitioner).

133. *See generally Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1451 (9th Cir. 1990); *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582, 584 (9th Cir. 1996).

134. *See, e.g., In re Joint E. & S. Dist N.Y. Asbestos Litig.*, 897 F.2d 626 (2d Cir. 1990) (holding that

led to a substantial split in lower court case law.<sup>135</sup> Many courts find the *Boyle* elements to be too fact specific and have reverted to an expansion of the preemption reasoning to find application of the defense.<sup>136</sup>

The Eleventh Circuit extended the government contractor defense from specifically product liability claims to service contracts between the military and private contractors.<sup>137</sup> The Court of Appeals analogized that the appropriate service procedures under the government contract involved the same exercise of discretion found to be a unique federal interest in *Boyle*.<sup>138</sup> Finding the same conflict under the FTCA, the court rearticulated the limiting elements of the defense as more applicable to service contracts, specifically maintenance contracts.<sup>139</sup> Recently, the government contractor defense as applied to service contracts was successfully asserted in a wrongful death suit stemming from contractor activities in Afghanistan.<sup>140</sup> The district court held that *Boyle* did not set all-or-nothing rules regarding different classes of contract, but required the court to determine if the operation of state law presented a significant conflict with a "unique federal interest."<sup>141</sup>

Issues of contractor liability in times of war were addressed in *Koohi v. United States*, in which heirs of deceased passengers of a civilian airliner, shot down by a U.S. warship, filed claims against both the United States and the contractor that manufactured the weapons system.<sup>142</sup> The Ninth Circuit held that the claims against the United States were barred by sovereign immunity.<sup>143</sup> The appellate court had no problem finding that the deliberate decision by Congress and the Executive to engage in hostile encounters with another sovereign was a unique federal interest or policy.<sup>144</sup> Like the *Boyle* court, the Ninth Circuit looked

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government contractor defense applies to warning claims as well as design claims); *Smith v. Xerox*, 866 F.2d 135 (5th Cir. 1989) (dismissing manufacturing defect claims on the basis of government contractor defense).

135. Compare *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d. Cir. 1993) (holding that government contractor defense applies to *all* government contractors), with *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (9th Cir. 1992) (holding that government contractor defense applies only to *military* government contractors).

136. See *Dorse v. Eagle-Picher Indus.*, 898 F.2d 1487 (11th Cir. 1990) (noting that the three-prong element analysis is not strictly applicable to warning-defect claims, and resorting to preemption analysis).

137. See *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003) (holding a contractor liable under state law for conscientiously maintaining military aircraft according to specified procedures would threaten government officials' discretion in precisely the same manner as holding contractors liable for departing from design specifications).

138. *Id.* at 1334.

139. See *id.* at 1335 (announcing elements for government contractor defense as applied to service contracts: (1) the government approves reasonably precise maintenance procedures, (2) the maintenance contractor conforms to those procedures, and (3) the maintenance contractor warns the government about known dangers associated with the maintenance procedures).

140. *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189 (M.D.Fla. 2006).

141. *Id.* at 1198.

142. *Koohi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992).

143. See *id.* at 1333 (holding that the claims fell within the express exception in the FTCA barring claims arising out of combatant activities of the military or naval forces).

144. *Id.* at 1333-34.

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to the exceptions of the FTCA to find significant conflict. As to the claims against the weapon system manufacturer, the Court of Appeals for the Ninth Circuit extended the analysis of *Boyle* to preempt claims against contractors that would be barred by the combatant activities exception to the FTCA.<sup>145</sup>

With one notable exception, the Supreme Court has declined to hear any recent cases in order to refine the government contractor defense.<sup>146</sup> In *Correctional Services Corporation v. Malesko*, the Court provided, in dicta, a revised definition of the government contractor defense.<sup>147</sup> *Malesko* presented a case where a prisoner filed a civil suit against the private government contractor that ran the halfway house where the prisoner was assigned.<sup>148</sup> The Court found that the prisoner did not have a private right of action against the contractor.<sup>149</sup> Although the Second Circuit opinion spent considerable time dealing with the question of whether the defendant contractor would be eligible for the government contractor defense,<sup>150</sup> the Supreme Court generally passed on the issue once it found that no private right of action for the constitutional tort claim was appropriate. However, in one clear footnote written in dictum, the Court appears to have expanded the government contractor defense.<sup>151</sup>

The language used by Justice Scalia in *Boyle* limits the government contractor defense to a specific set of facts:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.<sup>152</sup>

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145. See *id.* at 1336-37 (noting that the imposition of liability against the contractors of the weapon system would create a duty of care where the combatant activities exception intended to ensure that no duty existed).

146. See, e.g., *id.*, cert. denied, 508 U.S. 960 (1993); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11<sup>th</sup> Cir. 1989), cert. denied, 494 U.S. 1030 (1990).

147. *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001).

148. See *id.* at 64 (noting that since 1981, the Bureau of Prisons had relied exclusively on contracts with profit corporations and non-profit organizations to operate halfway house facilities to reintegrate federal prisoners).

149. See *id.* at 74 (holding that a constitutional tort claim against an individual federal agent as announced in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), not applicable against corporations working under government contract).

150. See *Malesko v. Correctional Serv. Corp.*, 229 F.3d 374, 381-82 (2d Cir. 2001) (holding that the government contractor defense would not be appropriate where the government had not directed the contractor to institute the policies which led to the injury).

151. Compare *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988), with *Correctional Serv. Corp.*, 534 U.S. at 74 (J. Rehnquist stating that government contractor defense more broadly, and without the specific limiting prongs outlined by J. Scalia in *Boyle*).

152. *Boyle*, 487 U.S. at 500.

As opposed to the fact specific test set forth by Justice Scalia in *Boyle*, in *Malesko*, Justice Rehnquist provided a more generally applicable and less factual specific interpretation of the government contractor defense:

Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense. *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988). The record here would provide no basis for such a defense.<sup>153</sup>

The Court in *Malesko* departed from the limited holding of *Boyle* by removing the second two elements of the test. However, this may be a more accurate definition of the defense in light of the expansion of its application in the lower courts.<sup>154</sup> Without clear Supreme Court guidance on the matter, the lower courts expansion of the doctrine to date appears consistent with Justice Scalia's significant conflict reasoning if the FTCA exceptions are read broadly.

#### IV. THE GOVERNMENT CONTRACTOR DEFENSE IN *SALEH* AND *IBRAHIM*

The first issue in determining the applicability of the government contractor defense to the *Saleh* and *Ibrahim* cases is whether the defendants can establish that their activities are of a unique federal interest.<sup>155</sup> This comment assumes *arguendo* that the defendant contractors can establish that the detention and interrogation of foreign national prisoners at Abu Ghraib is an area of unique federal interest.

However, this may not be readily apparent from the analysis in *Boyle*. First, it is important to note that the line of cases from which Justice Scalia produces the unique federal interest criteria specifically recognized that there is no "federal common law."<sup>156</sup> Despite this pronouncement, a handful of cases have found "few and restricted" instances where the federal common law was "necessary to protect uniquely federal interests."<sup>157</sup> The *Boyle* court found a unique federal interest in the effects of imposing liability on contractors engaged in military

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153. *Correctional Serv. Corp.*, 534 U.S. at 74 n.6.

154. *See, e.g.*, *In re Joint E. & S. Dist N.Y. Asbestos Litig.*, 897 F.2d 626 (2d Cir. 1990) (holding that the government contractor defense applies to warning claims as well as design claims); *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993) (holding that the government contractor defense applies to *all* government contractors) (emphasis added); *Johnson v. Grumman Corp.*, 806 F. Supp. 212, 216 (W.D. Wis. 1992) (holding that the government contractor defense is available to contractors who provide civilian products to civilian government entities).

155. *See generally Boyle*, 487 U.S. at 504-06 (holding that application of federal common law is only applicable in a "few areas" involving unique federal interests).

156. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Boyle*, 487 U.S. at 516-18 (Brennan, J., dissenting) (noting that the majority disregards the long standing and clear pronouncement of *Erie*).

157. *See generally Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

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procurement contracts with the U.S. government.<sup>158</sup> The tortured reasoning that a suit between private entities implicates a unique federal interest because of the increased costs the government would bear in direct relation to the imposition of liability is not applicable when the thing being contracted for is of such limited duration and specificity that any future cost burden would be too speculative.

However, the unique federal interest laid out in *Koohi* and *McMahon v. Presidential Airways, Inc.* is arguably similar by analogy to the case of Abu Ghraib.<sup>159</sup> There can be little doubt that unique federal interests are implicated when the Executive and Legislative branches, with full public disclosure, deliberately decide to engage in military hostilities with a foreign nation. However, the actions of the private military contractor must also be of unique federal interest, and as noted above, this comment will assume that their contracted services are of a unique federal interest.

### A. *Is There a Significant Conflict Between the FTCA and State Tort Law as Applied in Saleh or Ibrahim?*

The government contractor defense as stated in *Boyle* and its progeny relied on statutory exceptions to the FTCA for finding a conflict between unique federal interests and the application of state tort law.<sup>160</sup> Those exceptions provided a boundary for Justice Scalia's finding of a "significant conflict";<sup>161</sup> likewise in *Koohi*.<sup>162</sup> Preemption of state tort law, however, would not be appropriate under the theory of an express FTCA exception in the cases of *Saleh* and *Ibrahim*. The present cases illustrate factual situations that fall outside the preemption analysis set forth in *Boyle* and arguably *Koohi*.

With respect to conflict preemption, Justice Scalia clearly stated that "displacement of state law will occur only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law, or application of state law would frustrate specific objectives of federal legislations."<sup>163</sup> In *Boyle*, the defendant contractors argued that state tort liability conflicted with the grant of immunity under *Feres* for suits brought by military

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158. See *Boyle*, 487 U.S. at 505-06.

159. See *Koohi v. United States*, 976 F.2d 1328, 1333 (9<sup>th</sup> Cir. 1992); see also *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1189-90 (M.D.Fla. 2006) (holding that the deliberate decision by the executive branch and Congress of sending U.S. armed forces to engage in an organized series of hostile encounters on a significant scale with the military forces of another nation to be a unique federal interest which is covered by the FTCA exemption).

160. See, e.g., *Boyle*, 487 U.S. at 511 (finding significant conflict with 28 U.S.C. § 2680 (a)); see also *Koohi*, 976 F.2d at 1333 (finding significant conflict with 28 U.S.C. § 2680 (j)).

161. See *Boyle*, 487 U.S. at 504.

162. See *Koohi*, 976 F.2d at 1333.

163. See *Boyle*, 487 U.S. at 507-08 (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

personnel.<sup>164</sup> However, the Court declined to follow the *Feres* conflict reasoning and instead found conflict within the provisions of the FTCA.<sup>165</sup> Justice Scalia found that the federal statute expressly exempted the “discretionary nature” of certain functions performed by government employees.<sup>166</sup> The Court felt the balancing of “many technical, military, and even social considerations” including safety versus combat effectiveness was a discretionary function best left to the military, not the courts.<sup>167</sup>

A similar analysis was used by the Ninth Circuit in *Koohi*.<sup>168</sup> The appellate court found an express FTCA exemption for liability where the claim arose out of combatant activities of the military forces during wartime.<sup>169</sup> The Ninth Circuit, however, did not require a formal declaration of war for the combatant activities exception to apply.<sup>170</sup> The court found the principle purposes of tort liability were not applicable to military service members acting under orders in time of war. Specifically, the court reasoned that where the imposition of tort liability would chill military actors, Congress could not have intended for military members to be concerned with the possibility of tort liability when making life and death decisions in the midst of combat.<sup>171</sup> As to the punitive and compensatory aspects of tort liability, the court found that imposing civil tort liability on American service members for their actions was not reasonable in light of the inherently destructive nature of war.<sup>172</sup> Where the actor was a military service member using allegedly defective equipment in time of war, the appellate court concluded that tort liability would not be appropriate.<sup>173</sup>

The present torture and abuse cases by private military contractors fall outside either FTCA exemption noted above. Furthermore, state tort liability is directly in line with the stated purposes of the TVPA<sup>174</sup> because there is no significant conflict between the substantial federal interests of protecting persons from torture, and the application of state tort law to impose liability for tortuous conduct.

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164. See *id.* at 510 (refusing to apply the reasoning of *Tozer*, that military contractor liability conflicted with the *Feres* doctrine since the increased cost of the contractor’s tort liability would be added to the price of the contract, and pass-through costs to the government would defeat the purpose of the governmental immunity).

165. See *id.* at 510-11 (noting the both too broad and too narrow results of reliance on *Feres*, and finding a statutory provision that circumscribes the outlines for “significant conflict” between federal interests and state law).

166. *Id.* at 511-12.

167. *Id.*

168. See *Koohi v. United States*, 976 F.2d 1328, 1333-1334 (9<sup>th</sup> Cir. 1992).

169. See *id.* at 1333 (quoting 28 U.S.C. § 2680).

170. *Id.* at 1334.

171. *Id.* at 1334-35.

172. *Id.*

173. *Id.*

174. See *supra* note 61 and surrounding text.

First, the *Boyle* analysis is inapplicable where the government employee is not performing a discretionary function, and where the activity performed is specifically prohibited by federal law. Since torture inflicted by persons acting under color of law is outlawed by the TVPA, Congress explicitly left the military no room for discretion. Similarly, there should be no concern over increased costs where the government would pay more for contracts because the contractor is aware of the possible liability in breaking federal law when it enters the contract. Furthermore, any contract entered into with the intent of breaking federal law would be void as contrary to public policy.

Second, the *Koohi* analysis, and the FTCA in general, has a significant weakness that the contractors must overcome. The specific wording of the FTCA provides exemption for “combatant activities of the military or naval forces.”<sup>175</sup> The private military contractor is neither a member of the military nor naval forces contemplated by Congress or the courts.<sup>176</sup> Furthermore, under the FTCA, contractors are specifically not included as employees or agents of the U.S. government.<sup>177</sup>

One possible argument by the contractors is that by acting under color of U.S. law, they were acting as agents of the U.S. military, and therefore entitled to the FTCA exemption.<sup>178</sup> First, this theory would be only available to the individual contractors, and not their parent employers.<sup>179</sup> However, the Court has noted that one of the distinguishing elements between contractors and agents is the government’s “power to control the detailed physical performance of the contractor.”<sup>180</sup> As applied, the Court has found that because the government could not directly supervise the individual employees, even if working under government regulations, they were contractors and not agents of the government.<sup>181</sup> However, there is some debate as to whether the contractors in *Saleh* and *Ibrahim* were working directly for and under the supervision of military service members.<sup>182</sup> This issue only matters if the courts find that the contractors were working without sufficient direct government supervision. If they are outside government supervision, the contractors are not agents and are eligible for the government contractor defense as a preliminary matter. But if the

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175. 28 U.S.C. § 2680(j) (2000) (emphasis added).

176. See generally *Logue v. United States*, 412 U.S. 521, 526 (1973) (finding that an “employee of the government” includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, but does not include any contractor with the United States).

177. 28 U.S.C. § 2671 (2000).

178. *United States v. Orleans*, 425 U.S. 807, 813-815 (1976).

179. *Id.*; *Maryland v. United States*, 381 U.S. 41 (1965).

180. See *Orleans*, 425 U.S. at 814 (quoting *Logue v. United States*, 412 U.S. 521, 528 (1973)).

181. See *Logue*, 412 U.S. at 527-28.

182. Compare Taguba Report, *supra* note 7 (noting that civilian contractors were under the operational control of military members), with GAO Report, *supra* note 43 (stating that many military commanders believe that the civilian contractors working with the military are outside operational control).

contractor's physical performance is directly supervised by the government, then it appears the contractor would be an agent of the government under the criteria laid out in *United States v. Orleans* and would fall within the definition of government employee under the FTCA.<sup>183</sup>

The principle reasoning in *Koohi* for allowing the combat activities exemption of state tort law is not applicable when the actors are not military members. First, contractors are not currently acting as front line combatant troops. Thus, the imposition of liability would not hinder the actions of combat soldiers. Second, the contractor activities are usually limited in scale and duration. Therefore, the effects are immediate and measurable unlike the large scale operations that are undertaken by military units. Specific to *Saleh* and *Ibrahim*, the contractors are not accused of abuses outside the prison by any number of personnel the plaintiffs encountered; only specific tortuous acts committed by named individuals are alleged.<sup>184</sup>

One final argument the defendant contractors may make for significant conflict is that the FTCA provides an express exemption for claims that arise in a foreign country.<sup>185</sup> While case law on this issue is scant, two district courts have held that the test to determine the applicability of this exemption as "whether the place in which [the claim] arose was territory subject to the sovereignty of another nation, and whether the liability asserted is one depending on the laws of a foreign power."<sup>186</sup> Since the alleged activities happened during the time of the U.S.-run Coalitional Provisional Government, and in light of Paul Bremer's edict giving private military contractors' immunity in Iraqi courts, it appears that the defendant contractors would not be subject to the sovereignty of another nation or laws.

A number of other traditional policy reasons supporting the viability of the government contractor defense are inapplicable to the present fact pattern.<sup>187</sup> However, two significant policy considerations should be carefully evaluated. First, courts have traditionally given great deference to military decisionmaking based on their lack of expertise in dealing with such matters.<sup>188</sup> However, this theory is only applicable in areas where the court questions the decisions of the

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183. See 425 U.S. at 813-15; 28 U.S.C. § 2671 (2000) (defining parties covered by the FTCA).

184. See *Saleh Complaint*, *supra* note 51; *Ibrahim v. Titan Corp.*, 391 F. Supp. 10 (D.D.C. 2005).

185. 28 U.S.C. § 2680(k) (2000).

186. See *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1199 (M.D.Fla. 2006) (quoting *Pignataro v. United States*, 172 F. Supp. 151, 152 (E.D.N.Y. 1959)).

187. See generally John J. Michels, Jr., *The Government Contractor Defense: The Limits of Immunity After Boyle*, 33 A. F. L. REV. 147, 150 (1990) (outlining the following policy considerations behind the government contractor defense: "the inapplicability of normal tort law theories to the procurement of government equipment; the lack of expertise in the courts to deal with military equipment procurement; potential increased cost of government designed equipment; the doctrine of sovereign immunity; and the ability of the [f]ederal [g]overnment to get goods corresponding to government needs").

188. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.").

military personnel, and not simply in the application of the TVPA. Second, the military and the federal government's ability to accomplish its national security and foreign policy objectives is a valid argument for judicial deference to the executive branch and its methods. On the other hand, the theory that failure to hold persons and corporations accountable for the very same crimes committed by the recently overthrown leaders of both Afghanistan and Iraq presents a significant threat to viable Arab-Western relations is equally compelling.<sup>189</sup>

Finally, *Saleh* presents an interesting dilemma for the courts in a preemption analysis. Preemption generally arises where a significant federal interest conflicts with applicable state law, or where the federal government has exercised superior authority in a field by enacting a complete scheme of regulation.<sup>190</sup> Presently, the courts will face a situation where military interests, national security, and foreign policy—all significant federal interests conflicting with state tort law—abuts against federal and state law that prohibit the actions taken by the contractors. The courts should respect the expressed intentions of Congress when it passed the TVPA and find that there is no conflict where the Legislature has clearly spoken, and that state tort law can exist peaceably with that statute.

#### *B. A Boyle Analysis of Private Military Contractors Working in Paramilitary Roles*

While *Boyle* has been extended a number of times since the Court granted immunity to military contractors acting in accordance with approved specifications that relate known dangers, a district court judge in the District of Columbia recently refused to extend the government contractor defense to intentional torts committed by non-governmental contract employees.<sup>191</sup> The defendant's corporation, Titan, attempted to assert that they were immune from suit. The court distinguished immunity from preemption. The court noted that immunity is not an affirmative defense that may ultimately be put to a trier of fact, but a procedural decision questioning whether a defendant is entitled to freedom from suit.<sup>192</sup> On the other hand, preemption under the government contractor defense is an affirmative defense as outlined in *Boyle*.<sup>193</sup> With an affirmative defense, there are both procedural and factual elements that can be determined from the record.

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189. See generally Sherry Ricchiardi, *Missed Signals*, AMERICAN JOURNALISM REV. (Aug./Sept. 2004), available at <http://www.ajr.org/Article.asp?id=3716>; Jim Miklaszewski, David Gregory & Alicia Jennings, *Abuse Scandal "Terrible" for U.S., Powell Concedes*, MSNBC (May 17, 2004), available at <http://www.msnbc.msn.com/id/4855930/> (quoting former Sec. of State Colin Powell, who noted the fervor over the Abu Ghraib scandal was a pressing and recurrent issue in a recent conference in Jordan).

190. See generally *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (outlining general law of field and express preemption).

191. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 1017 (D.D.C. 2005).

192. See *id.* at 18 n.5 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

193. See *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997).

Under the *Boyle* analysis, the first step involves a judicial evaluation of whether the actions under the contract implicate uniquely federal interests.<sup>194</sup> The *Ibrahim* court found that the treatment of prisoners during wartime qualifies as a unique federal interest.<sup>195</sup> Following that finding, the second part of *Boyle* applies the conditions first outlined in *Tozer* relating to design defects in military equipment.<sup>196</sup> At this point the traditional government contractor analysis fails.

The first element of the government contractor defense requires the approval of reasonably precise specifications by the United States. It is unlikely that the United States approved the use of torture in violation of U.S. and international law in its contract specifications. Contract records with CACI show that for \$19.9 million, CACI was to provide interrogators and intelligence experts to the U.S. Army.<sup>197</sup> In the statement of work attached to the contract, although written by a CACI employee in violation of Government Services Administration (GSA) conflict of interest guidelines,<sup>198</sup> interrogators will “conduct interrogations . . . [in accordance with] local [standard operating procedures] and higher-authority regulations.”<sup>199</sup> In applying the government contractor defense, a number of cases have found that leaving too much discretion to the contractor for the design or the completion of the contracted services does not meet the first element of the *Boyle* test.<sup>200</sup> In at least one of the present contracts, the contractor wrote the statement of work or specifications.<sup>201</sup> This reasonably appears to be either “rubber stamping” the specifications of the contractor or leaving the discretion up to the contractor, and both are outside the “continuous back-and-forth review process” or the drafting and participating process found to be sufficient to meet the reasonably precise specifications element.<sup>202</sup>

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194. See *Boyle v. United Tech. Corp.*, 487 U.S. 500, 507 (1988) (holding displacement of state law will only occur where a “significant conflict” exists between an identifiable “federal policy or interest and the [operation] of state law”).

195. *Ibrahim*, 391 F. Supp. 2d at 18.

196. *Boyle*, 487 U.S. at 512.

197. OF-347, Contract Order for Supplies and Services entered into between CACI, International and the U.S. Dept. of the Interior, March 1, 2004, 1, available at [http://www.publicintegrity.org/docs/wow/CACI\\_ordersAll.pdf](http://www.publicintegrity.org/docs/wow/CACI_ordersAll.pdf) (containing 572 pages of payments, addendums, statements of work, etc.). The fact that the contract is with the U.S. Dept. of the Interior for “technology services” does not discount the possibility of the government contractor defense. See *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d. Cir. 1993) (holding that government contractor defense applies to all government contractors).

198. David Phinney, *Prison Interrogation for Profit*, CorpWatch, Sept. 15, 2004, available at <http://www.warprofiteers.com/article.php?id=11524>.

199. OF-347, *supra* note 197 (stating that contractors are non-combatants and are not authorized to be armed).

200. See, e.g., *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989) (holding that a rubber stamp approval by the government did not satisfy the reasonably precise specifications prong); *Johnson v. Grumman Corp.*, 806 F. Supp 212 (W.D. Wis. 1992) (holding the first element not met where the government delegated the design discretion to the contractor).

201. David Phinney, *Prison Interrogation for Profit*, CORPWATCH, Sept. 15, 2004, available at <http://www.warprofiteers.com/article.php?id=11524>.

202. See generally *Russek v. Unisys Corp.*, 921 F. Supp. 1277 (D.N.J. 1996); *Maguire v. Hughs Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990).

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The second element requires that the contractor conform to the reasonably precise approved specifications. This would be a question of fact for a jury. Unlike military equipment where the court can take notice that the great number of pieces worked as expected or the military ran additional tests to confirm conformity, in the case of prisoner interrogations, there is no method of determining conformity with specifications without an ad hoc analysis. In the case of the CACI contract, the statement of work explicitly calls for the contractor to “conduct interrogations . . . [in accordance with] local [standard operating procedures] and higher-authority regulations.”<sup>203</sup> After the Abu Ghraib scandal broke, the Army tasked General Taguba to conduct an investigation of the incident. In interviewing witnesses for his report, General Taguba specifically asked about the promulgation and familiarity with established standard operating procedures.<sup>204</sup> The interviews demonstrated a complete lack of understanding of the standard operating procedures, or even that they were distributed to the lower level military members and contractors.<sup>205</sup>

Even if other standard operating procedures approved the use of physical, mental, and emotional interrogation, the TVPA specifically forbids the infliction of severe physical and mental pain or suffering.<sup>206</sup> The TVPA would be considered a higher-authority regulation with which CACI was to act in compliance. It appears unlikely that the defendant contractors conformed to the specifications given that most prior cases hold that military approval of the work product or services, or inspection and testing by the government of the equipment produced satisfactory results.<sup>207</sup>

The third element under *Boyle* is that the contractor warns the United States about the dangers in using the equipment that were known to the supplier but not to the United States.<sup>208</sup> This comment will assume that the third element of the *Boyle* analysis could not have been met by the defendant contractors. It seems unreasonable to assume without further evidence that the contractors explained

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203. *Supra* note 199 and accompanying text.

204. *See* Affidavit of John Israel, Titan Employee, Feb. 12, 2004, at 6-8, Annex 91 to the Taguba Report (stating that he “may have read” the Geneva Convention, as it “might” have been part of the papers given to him during his hour long indoctrination briefing upon arrival at Abu Ghraib).

205. *See* Taguba Report, *supra* note 7, at 24, 31.

206. 18 U.S.C. § 2340 (2004) (defining (1) “torture” as an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; and (2) “severe mental pain or suffering” as the prolonged mental harm caused by or resulting from: (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality).

207. *See generally* *Fagans v. Unisys Corp.*, 945 F. Supp. 3 (D.D.C. 1996) (holding that conformity with the specifications was found where the government inspected, certified, and accepted the equipment for use).

208. *See Boyle v. United Tech Corp.*, 487 U.S. 500, 512 (1988).

the risk of breaking federal law to the military or Department of the Interior. However, in light of the Executive Branches' policies concerning torture as a viable interrogation method, the contractors may only have to show that the United States knew of the risks it was undertaking when it contracted for the services.<sup>209</sup>

C. *Does the Use of Private Military Contractors in Traditionally Paramilitary Roles Undermine the Policy Rationale behind the Government Contractor Defense?*

While *Boyle* clearly announced the rationale behind the government contractor defense as the protection of unique federal interests from significant conflict with the operation of state law, cases such as *Malesko* leave some doubt as to whether the government contractor defense would be applicable in the *Saleh* and *Ibrahim* cases. There are two clear indicators that the use of private military contractors in traditionally paramilitary roles would undermine the rationale behind the government contractor defense.

First, in *Malesko*, the Supreme Court implicitly endorsed the Second Circuit's narrow reading of the government contractor defense.<sup>210</sup> While possibly expanding the scope of the defense, Justice Rehnquist was agreeing to the fact that the Bureau of Prisons had not exercised its discretionary control over the policies and practices of Correctional Services Corporation ("CSC").<sup>211</sup> This lack of interaction fails the first element of the *Boyle* analysis calling for reasonably precise specifications. Based on this reasoning, it is unlikely that Titan and CACI can show that they were acting on very specific and nondiscretionary government instructions when they participated in torture.

Second, the Court has demonstrated in *Malesko* that where another remedy is available, suit against corporations under contract with the government is not warranted.<sup>212</sup> Furthermore, the imposition of liability on the corporation would have severe consequences on the public treasury.<sup>213</sup> The Court has found no private right of action against government contractors when those "special factors" were present in the facts.<sup>214</sup> However, in *Saleh* and *Ibrahim*, two facts distinguish those "special factors." First, in light of the sovereign immunity by the U.S. military and the pronouncement that contractors had immunity in Iraqi courts, the suit against the private military contractor may be the only remedy

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209. See generally R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees: Justice Nominee's Hearings Likely to Focus on Interrogation Policies*, WASH. POST, Jan. 5, 2005 at A1 (reporting on a White House memo outlining recommended interrogation techniques that included physical and physiological torture).

210. See *Malesko v. Correctional Service Corp.*, 534 U.S. 61, 73-74 (2001).

211. *Id.* at n.6 ("The record here would provide no basis for [the government contractor] defense.").

212. *Id.* at 69-70.

213. *Id.*

214. *Id.*

available to the plaintiffs. Second, the cost burden will not be to the public treasury, but solely to the contractor.<sup>215</sup> There are very few contracts that the government can enter into that would force the conflict between contract execution and the TVPA. For that reason, there would not be substantial future increased costs to the government.

Finally, the FTCA expressly waives immunity for agents of the government acting within scope of their employment.<sup>216</sup> If the traditional military role is outsourced to private military contractors acting within a standard military chain of command, then a reasonable argument could be made that the individual contractors are acting as agents of the U.S. government. If that is true, then the issue before the courts would be: were the agents acting within the scope of their employment while they were torturing prisoners in violation of the TVPA and the Geneva Convention? That presents a question not only of policy and legal interpretation, but one that defines us as Americans. Is it permissible for American agents to torture foreign nationals in the name of preventing harm to American citizens? Congress and the international community have spoken loud and clear. It should be equally clear to the courts that persons who have been tortured and abused by private military corporations profiting from those acts have a remedy, and furthermore, that the contractors have no defense to those actions, either legally or morally.

## V. CONCLUSION

Any common law legal standard must undergo revisions and iterations to adjust to nuances and factual circumstances it confronts. Private military corporations are attempting to intertwine two separate and distinct common law affirmative defenses. The government contractor defense and the extension of sovereign immunity are both powerful litigation tools available to the corporate defendant. As indicated in *Ibrahim*, the lower courts are already unsure exactly how to approach the unique situation where private military contractors working for the military commit tortuous acts on the civilian population abroad.<sup>217</sup>

As to the issue of the government contractor defense, it appears clear from the reasoning laid out in *Boyle*, that despite the Court's tacit approval of the defense's expansion, the government contractor defense would not be applicable in the case of an intentional tort committed by a private military contractor in paramilitary roles. First, the preemption analysis is sufficiently different from that both *Boyle* and *Koohi* that any unique federal interest would be subordinate

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215. Compare *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (finding that liability costs would be paid from the public coffers), with *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990) (holding that the government contractor defense did not apply to non-military contracts, because the increased costs of liability were not likely to be passed on to the government in a less risky context).

216. 28 U.S.C. § 1346 (a) (2001).

217. See *Ibrahim v. Titan Corp.*, 391 F. Supp. 10, 12 (D.D.C. 2005).

to the TVPA and not conflict with applicable state law. In light of the present political and national security climate, a court could find a unique federal interest that may warrant preemption. However, it would still be difficult for the contractors to assert that they meet all of the elements laid out in *Boyle*.

Finally, by extending the government contractor defense to private military contractors acting in traditionally paramilitary roles, the courts would circumvent two clear edicts. First, the deterrence value found in *Malesko* of holding the corporation liable would be lost if the corporation were not held liable for the actions of its employees' within the scope of that employment. Second, the clear intent of Congress to waive sovereign immunity for specific actions by agents of the government would be thwarted.

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