

**CORPORATE INVOLVEMENT IN THE ABU GHRAIB HUMAN
RIGHTS ABUSES: A CASE STUDY IN CORPORATE EFFORT
TO USE DERIVATIVE SOVEREIGN IMMUNITIES**

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The exponential growth in the private military contractor industry in recent years has transformed the modern battlefield. Thousands of private contractors are currently in Iraq and Afghanistan providing services that most Americans would assume are being performed by soldiers—interrogations, security, transportation, intelligence-gathering, language translation. According to the Center for Public Integrity, by July 2004 over 150 American corporations had received contracts worth up to \$48.7 billion for work in Afghanistan and Iraq. See <http://www.publicintegrity.org/wow/report.aspx?aid=338>.

This increased use of civilian contractors to perform “inherently governmental functions” raises a host of issues, some of which came to the fore in the Abu Ghraib scandal. Two companies – Titan Corporation and CACI – were named by General Taguba as participating in the torture and abuse of Iraqi prisoners.

The Center for Constitutional Rights and others (including our firm) brought a civil suit captioned *Saleh et al. v. Titan et al.* on behalf of the torture victims. This suit is currently pending before Judge Robertson in the District Court in the District of Columbia. Although it was filed almost two years ago, it remains in the early procedural stages due to a lengthy fight over venue.

The government contractors are seeking to dismiss the suit by arguing that, because they were acting pursuant to a contract with the federal government, they stand in the shoes of the federal government, and enjoy whatever immunities would otherwise apply. This defense is known as the “government contractor defense.”

Titan and CACI had major contracts with the military to provide interrogation, translation, and related services. The contracts required CACI and Titan to abide by all relevant laws, including the Geneva Conventions. See, e.g., *Titan Statement of Work at section C.P.I.*

Titan and CACI have argued that the judicially-created “government contractor defense” applies to protect them from lawsuits seeking to redress human rights violations. This article briefly describes the development of that doctrine, and then walks through the reasons why it should not be expanded to reach the intentional acts that violate the human rights law.

The “government contractor defense” doctrine draws on long-standing ideas about sovereign immunity, but was developed by the judiciary relatively recently in the context of products liability actions. The first explication of the defense was in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

There, the family of a marine who had been killed in a helicopter crash brought suit against the helicopter manufacturer, seeking money damages from manufacturer based on product liability. The Supreme Court barred the claims, holding that the manufacturer was immune from state tort liability on a product manufactured and supplied to the military.

The Court found that such claims for design defects are preempted “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.” *Id.* at 512.

The *Boyle* Court was very clear that the government contractor defense does confer sovereign immunity on contractors. *Boyle*, 487 U.S. at 505 n.1. Rather, their immunity is based on policy considerations and separation of powers, namely that the courts should not be in the business of reviewing decisions and design specifications made by the Executive Branch and the military and carried out by private contractors.

The *Boyle* Court was primarily concerned about preempting the federal contracts or federal law with state tort law: Displacement [of state law] will occur only where, as we have variously described, a “significant conflict” exists between an identifiable “federal policy or interest and the [operation] of state law,” or the application of state law would “frustrate specific objectives” of federal legislation.

The *Boyle* Court went on to hold that the government contractor defense does not apply if “the contractor could comply with *both* its contractual obligations and the state-prescribed duty of care.” *Id.* at 509 (emphasis added). One of the prime reasons that *Boyle* Court applied the government contractor defense is that the military, part of the Executive Branch, must be able to select military equipment designs without court interference. This logic does not extend to situations where the contractors are making decisions on the battlefield.

Subsequent to *Boyle*, the Ninth Circuit Court of Appeals has basically limited the government contractor defense to the area of design defects. See *United States ex. rel. Ali v. Danie, Man, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004) (stating that the government contractor defense only “protects a government contractor from liability for acts done by him while complying with government specification during execution of performance of a contract with United States.”)(quoting *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983)).

Other courts have limited the applicability of the defense to those instances when the state and federal requirements are in conflict. See, .e.g., *Neilson v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454-55 (9th Cir. 1990); *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83, 86 (2d Cir. 1993); *Barron v. Martin-Marietta Corp.*, 868 F. Supp. 1203 (N.D. Cal. 1994) (finding that the “requisite conflict exists only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract”).

In *Malesko v. Correctional Services Corporation*, 229 F.3d 374 (2d Cir. 2000), *rev’d. on other grounds*, 534 U.S. 61 (2001), the Second Circuit declined to extend *Boyle* to a *Bivens* action. The Court of Appeals emphasized the

distinction between state law claims and those that arise under federal law and found that the Boyle Court had intended the government contractor defense to prevent the “application of *state law* [claims]” that “would frustrate specific objectives of federal legislation.” *Malesko*, 229 F.3d at 382, n.4, quoting *Boyle*, 487 U.S. at 507. Like the *Bivens* action at issue in *Malesko*, the ATS was intended to advance federal interests, the incorporation of the law of nations, into U.S. law. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 103-04 (2d Cir. 2000).

Because the government contractor defense is based on giving contractors the benefits of sovereign immunity when the contractor is simply fulfilling specifications of its government contract, it should not be expanded to immunize actions that were taken outside of these specifications or in violation of federal law. In these situations, the contractor is taking action independent of government directives and there is no justification for clothing the contractor with the government’s immunity.

Similarly, the aims of the government contractor defense are not served by immunizing private contractors who engage in unlawful acts. There is no public policy or interest in enabling the government to engage in an unlawful act. In *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21, 60 S. Ct. 413 (1940), the Supreme Court considered the liability of a contractor for work performed on a government contract to be related to the issue of whether “what was done was within the constitutional power of Congress.” The starting point for the *Yearsley* analysis remains valid. The government lacks authority to contract for an unlawful act. The federal interests set forth in Acts of Congress, Congressional pronouncements, Executive statements, judicial decisions, binding treaties, military regulations, and long recognized military practice all clearly establish that the federal interest (in both times of war and peace) is served by not torturing or mistreating persons, including persons who are detained as a result of a war.

To date, one district court – the Eastern District of New York – squarely held that the government contractor defense does not apply to claims that a defendant has violated human rights, the law of nations, or related theories. *In re Agent Orange Litigation*, 373 F. Supp. 2d 7, 85-96 (E.D.N.Y. 2005). Authorization or commands from a sovereign do “not justify a person’s commission of, or knowing participation in, and international crime.” *Id.* at 94-95.

The District Court for the District of Columbia will have to decide this issue in the relatively near future in both the Saleh action and a related case known as *Ibrahim v. Titan*.