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IS TORTURE ALL IN A DAY'S WORK? SCOPE OF EMPLOYMENT, THE ABSOLUTE IMMUNITY DOCTRINE, AND HUMAN RIGHTS LITIGATION AGAINST U.S. FEDERAL OFFICIALS

Elizabeth A. Wilson[1]

"Can it be assumed . . . that an absolute privilege so broadly enjoyed will not be subject to severe abuse?"

Justice Brennan, dissenting in Barr v. Matteo.[2]

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[1] The author is Assistant Professor of Human Rights Law at the John C. Whitehead School of Diplomacy and International Relations of Seton Hall University. In summer 2008, she was Visiting Associate Professor of Law at George Washington University Law School and consultant at the Detainee Abuse and Accountability Project, Center for Human Rights and Global Justice at New York University School of Law. This Article is based in part on research and writing the author performed in the course of appellate briefing in *Rasul v. Rumsfeld* while an associate at a law firm in Washington, D.C. The views presented in this Article are her own exclusively and do not represent the views of her law firm or of her clients. The author would like to thank William Aceves, Steven Watt, Martha Minow, and Michael Meltsner for helpful suggestions. It has also benefited from discussion at a faculty colloquium at Northeastern University, especially from the remarks by commentator Dan Givelber. A special thanks goes to Jennifer Harbury for her courage in trying to bring U.S. officials responsible for torture to account and for prompting the author to reexamine the history of the official immunity doctrine. *See* Brief of Appellant Jennifer K. Harbury at 9-13, Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2006) (C.A. No. 06-5282).

[2] Barr v. Matteo, 360 U.S. 564, 590 (1959) (Brennan, J., dissenting).

ABSTRACT

U.S. federal courts have held as a matter of law that torture is within the "scope of employment" of federal officials. Under the current absolute immunity doctrine, such a determination results in the automatic substitution of the United States as defendant. Since the United States is immune from torture liability because of sovereign immunity and various exceptions to the Federal Tort Claims Act (FTCA), victims of torture by U.S. officials are left without a remedy. The law currently used to make the scope of employment determination is state *respondeat superior* law. This Article argues that federal common law should be used when the torts at issue are violations of international law, especially *jus cogens* norms, because state law should not be used to decide matters involving international law and because, where possible, U.S. statutes should always be interpreted to be consistent with international law.

Though U.S. courts have led the world in human rights enforcement through civil litigation, such litigation against U.S. officials has been frustrated because of an amendment to the FTCA limiting civil claims that can be brought against U.S. officials in their individual capacities. "The Westfall Act" or "the Westfall Amendment" (so named after a Supreme Court decision it was intended to overturn legislatively) codified, and significantly broadened, the common law doctrine of absolute immunity, a doctrine giving federal officials immunity from common law torts committed when acting within the scope of their employment. As policy, absolute immunity is sometimes justified to enable federal officials to perform their duties fearlessly, without being inhibited by the threat of "vexatious" litigation. But since the Westfall Act thwarts even meritorious claims under international law against U.S. officials, irrespective of whether those claims are based on customary international law or on treaties, the Westfall Act is inconsistent with international law and results in a double standard whereby foreign officials may be held individually liable for torture and other human rights violations, but U.S. officials will not.

Under the pre-Westfall common law doctrine of absolute immunity, courts used federal common law to determine scope of employment. A major problem with the current Westfall doctrine is that courts have interpreted the Westfall Act as

making state *respondeat superior* law the standard for deciding "scope of employment," instead of federal common law. The use of such state law in the Westfall Act context derives from its incorporation of the FTCA. Use of state *respondeat superior* law to decide scope of employment of individual officials results in holdings that include within the scope of employment *any* wrong that grows out of a job-related activity – even if the act is forbidden by statute or patently illegal, even if it amounts to torture – because *respondeat superior* law generally interprets scope of employment liberally, in order to increase the victim's chances of recovery. Under the common law used before the Westfall Act was enacted, the illegality of the acts alleged was highly relevant to the immunity determination. In contrast, under the Westfall Act, the illegality of the acts alleged is almost irrelevant, so long as they are carried out with intent to serve the master. This Article makes the case that the common law approach is preferable in general, but especially when the torts at issue are violations of international human rights norms.

Section I of the Article describes the mechanics of Westfall immunity and shows how it frustrates human rights claims against U.S. officials by nullifying the Alien Tort Claims Act (ATCA) and excluding rights guaranteed under international treaties. Section II presents an overview of the specific facts and holdings in recent cases raising torture claims against U.S. officials. Section III draws a roadmap of the evolution of the current immunity doctrine by looking at the interplay between the FTCA – a statute that enables plaintiffs to sue the United States directly when federal officials have committed torts while acting within the scope of employment, as determined by state *respondeat superior* law – and the common law immunity doctrine used to decide scope of employment when individual federal officials are sued in their *individual* capacity. The statutory immunity doctrine codified in the Westfall Act, as currently interpreted, is much broader than the common law absolute immunity doctrine for two reasons: first, because by incorporating the FTCA, the Westfall Act makes a suit against the United States the exclusive remedy when the tort has been committed within the scope of employment, and second, because courts have interpreted this exclusive remedy provision as incorporating state *respondeat superior* law along with the FTCA, even when the suit is initially filed against the individual official. Section IV examines civil human rights litigation

against *foreign* officials, and shows that an ugly hypocrisy in jurisprudence now exists, as foreign officials who violate human rights norms are not infrequently held liable for their acts in U.S. courts, but U.S. officials are not. Section V makes the case that in the absence of congressional action, courts should return to using federal common law as a standard for determining scope of employment in cases involving suits filed initially against individual officials. This is necessary to protect individuals who have been injured by intentional torts generally, but it is also necessary to bring the immunity doctrine into compliance with international law and to provide a means of compensating victims of torture. Legislative amendments to the Westfall Act are also considered. Finally, Section VI examines the policy justifications for holding U.S. officials individually liable for torture.

The absolute immunity doctrine, as currently interpreted, makes it virtually impossible to hold U.S. officials individually liable for acts that they undertake in the course of duties found to be in some way to be "official," even if those acts are war crimes or gross violations of international human rights laws. Under the broad *respondeat superior* doctrine used to interpret the Westfall Act, official acts will almost always be immunized. Of course, under international law torture is *by definition* an official act – under the Convention Against Torture (CAT), state action is an element of the offense of torture. The current Westfall regime, then, is inconsistent with international law, because the very element that is required to make an act "torture" is what under the current Westfall regime triggers absolute immunity.

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INTRODUCTION

Can U.S. officials be held civilly liable for designing and implementing a system of torture and cruel, inhuman and degrading treatment in the offshore detention facilities created after September 11th? If so, should they be? This question is no longer hypothetical, as former detainees tortured and abused in the so-called war on terrorism have begun to sue for civil damages to compensate them for their physical and emotional injuries. Because the United States has not waived its immunity to suits for torts occurring in foreign countries, detainees who have allegedly been tortured have instead sued U.S. officials.[3] Using the shield of a formerly obscure provision of the FTCA, the U.S. officials named in these suits have argued that they should be absolutely immune from such liability because they were acting within the scope of employment, and because torture of aliens outside of U.S. sovereign territory does not fall within the constitutional and statutory exceptions to official immunity.[4] So far, courts have largely agreed. Civil litigation by alien plaintiffs raising torture claims has produced the unsavory holdings that torture and cruel, inhuman and degrading treatment are within the scope of employment of U.S. officials.[5]

The federal statute that has thwarted this litigation thus far is an amendment to the FTCA giving absolute immunity to federal officials for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ."[6] The FTCA is the statute by

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[3] *See, e.g.*, *In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007); Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

[4] For limitations on the statutory exception to the Westfall Act, see *infra* notes 45-48 and accompanying text.

[5] *See, e.g.*, *In re* Iraq, 479 F. Supp. 2d at 114 ("As military officials commanding Armed Forces serving our country during a war, there can be no credible dispute that detaining and interrogating enemy aliens would be incidental to [defendants'] overall military obligations."); *Rasul v. Rumsfeld*, 414 F. Supp. 2d at 34 ("[T]orture is a foreseeable consequence of the military's detention of suspected enemy combatants" and thus "incidental to [defendants'] roles as military officials.").

[6] 28 U.S.C. § 1346(b)(1) (2000).

which the United States waives the general immunity that it enjoys as a sovereign nation;[7] the FTCA is limited by 28 U.S.C. §2680, a provision outlining exceptions to the general waiver of immunity. The amendment at issue in torture litigation was passed as the Federal Employees Liability Reform and Tort Compensation Act.[8] It is better known as the "Westfall Act" or the "Westfall Amendment" and its legal effect is the creation of "absolute immunity" or "Westfall immunity."[9] To the frustration of human rights' attorneys, since its passage in 1988 the Westfall Act has stymied civil suits against U.S. officials based on claims under international law (such as genocide and forced displacement) by neutralizing the central jurisdictional vehicle for international human rights claims on behalf of aliens with respect to U.S. officials and transforming such claims into largely symbolic gestures.[10] The Westfall Act thus shields

[7] *Id.* From the perspective of torture litigation, the key provision is § (b)(1):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, *for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

Id. (emphasis added).

[8] Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in 28 U.S.C. § 2679 (2000)).

[9] Absolute immunity defeats any claim for which it is available. Unlike qualified immunity, it does not depend on notice, good faith, or knowledge. Despite these differences, qualified and absolute immunity have certain rationales in common.

[10] The *Rasul* court noted that "[t]he plain language of the ATCA . . . does not confer rights nor does it impose obligations or duties that, if violated, would trigger the Westfall Act's statutory exception. For the Westfall Act's statutory exception to apply, the ATCA would have to create substantive rights or duties that can be violated for purposes of the Westfall Act." *Rasul v. Rumsfeld*, 414 F. Supp. 2d at 38. *See infra* notes 43-53 and accompanying text.

egregious violations of international law and acts as an impediment to governmental accountability. This Article argues for a new approach to Westfall Act immunity issues in cases involving international law, an approach based on federal common law.

Under the doctrine created by the Second Circuit's celebrated decision Filartiga v. Pena-Irala,[11] U.S. courts have enforced human rights norms through civil litigation and held foreign officials liable for torture even before Congress provided for a statutory right of action in the Torture Victim's Protection Act (TVPA).[12] The *Filartiga* decision put U.S. courts on the cutting-edge of human rights enforcement by utilizing an ancient, rarely-invoked jurisdictional statute, the ATCA, to give foreign plaintiffs a domestic legal forum to bring claims based on violations of international law.[13] By enacting the TVPA in 1991, Congress expressly ratified the *Filartiga* doctrine and created a statutory private right of action against foreign officials alleged to have committed torture. However, no such action is available against U.S. officials because the TVPA only allows claims against foreign officials and because the Westfall Act neutralizes the ATCA with respect to U.S. officials. Yet, through its accession to the Convention Against Torture ("CAT"), the United States is obligated to ensure that in its legal system the victim of torture "has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[14] Other international treaties to

[11] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[12] 28 U.S.C. § 1350 (2000).

[13] For an argument that domestic enforcement of international law is the wave of the future, *see* Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, the European Way of Law),* 47 HARV. INT'L L.J. 327 (2006) (arguing that international law can affect domestic legal systems by building capacity and enhancing effectiveness, by "backstopping" domestic legal systems trying to comply with international legal obligations, and by compelling or mandating legal action at the national level in response to global threats).

[14] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. In the U.S. reservations, declarations, and understandings, to the CAT, passed during Senate ratification, 136 Cong. Rec. S17,486-01 (daily ed.

which the United States is a party involve similar obligations, even against government officials,[15] and the duty to compensate victims of torture has arguably become part of customary international law, though the obligation to compensate victims of torture differs in wartime.[16]

The current absolute immunity doctrine, as codified in the

Oct. 27, 1990), the United States limited this obligation. *See id.* at II(3) ("That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."). Whether this limitation still obligates the U.S. to provide for a private damages action for detainees held in Guantanamo Bay, which the Supreme Court has held to be under the "territorial jurisdiction" of the United States, is a question yet to be definitively answered. *See* Rasul v. Bush, 542 U.S. 466 (2004) (holding that Guantanamo Bay is within the "territorial jurisdiction" of the United States).

[15] The International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171, prohibits torture, and imposes the obligation to provide an effective remedy, even where official state action is involved, *id.* at art. 2(3)(a) (state parties are obligated "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"). The ICCPR created the Human Rights Committee, and Optional Protocol I (not ratified by the United States) empowered this Committee to hear claims brought by individuals. The Human Rights Committee has recommended compensation to victims of torture. *See, e.g.*, George Osbourne v. Jamaica, U.N. Doc. CCPR/C/68D/759/1997 (Apr. 13, 2000). In ratifying the ICCPR, the Senate declared that the treaty was not self-executing and has never passed implementing legislation. Thus, most U.S. courts have held that the ICCPR does not create individual rights enforceable in U.S. courts. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005), *cert. denied*, 126 S.Ct. 1569 (2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005).

[16] Katharine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT'L LEGAL PERSP. 30 (2004). Article 3 of the 1907 Hague Convention makes a belligerent party liable to pay compensation for any violation of the conventions regulations, which are now accepted as customary international law. *Id.* at 34. Article 91 of Protocol I to the 1949 Geneva Conventions provides that states in violation of grave breaches of the Geneva Conventions are liable to pay compensation and the state is responsible for all acts committed by members of its armed forces. Though states are in principle liable for each violation of international humanitarian law, "this basic principle of the law of war has never been enforced. More often the victor demands compensatory payment from the defeated (reparation) without extracting compensation for each individual violation." THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 543 (Dieter Fleck ed., 1995).

Westfall Act, impedes the enforcement of U.S. obligations under international human rights law, as human rights advocates know too well. The Westfall Act works by converting suits against individual officials into suits against the United States,[17] many of which will be automatically dismissed because of other provisions of the FTCA limiting the actions that can be brought against the United States.[18] The Westfall Act thus immunizes all federal employees from tort suits that name them as defendants in their personal capacity, if they are acting within the scope of their employment and if they are not alleged to have violated any statutory or constitutional norms.[19] The Westfall doctrine significantly broadened the common law absolute immunity doctrine and, as currently applied, produces a hypocritical jurisprudence of torture, whereby foreign officials may be held liable, but U.S. officials may not.

Nothing in the legislative history of the Westfall Act suggests that the 100th Congress adopted it with torture, or any other human rights violations in mind.[20] Rather, it was designed to relieve rank-and-file federal officials of the burden and expense of defending themselves against lawsuits for "garden-variety" torts, such as car accidents, trespass and minor assaults.[21] Yet

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

28 U.S.C. § 2679(d)(1) (2000).

[18] 28 U.S.C. § 2680 (2000) (enumerating exceptions to the waiver of sovereign immunity in the FTCA).

[19] Like the FTCA, the Westfall Act also has exceptions. Under these exceptions, the individual official remains personally liable, but the interplay between the exceptions to the FTCA and the exceptions to the Westfall Act can deprive a plaintiff of any remedy whatsoever.

[20] *See* Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715 (2006).

[21] Its passage was prompted by the Supreme Court decision in Westfall v.

because it appears to unambiguously express Congress's intent to immunize officials from liability for *all* torts, whether negligent or intentional, whether mild or severe, except if those torts violate statutory or constitutional norms that provide for private rights of action, the Westfall Act, almost accidentally, has had the effect of presenting an almost absolute bar to torture and abuse claims against U.S. officials, since neither the Constitution nor any federal statute creates a private right of action for torture claims against U.S. officials. Any claims under international law face the same problem.[22]

International human rights claims are frustrated by an odd interplay of state law with federal policy that Westfall jurisprudence has created. Under the FTCA, state tort *respondeat superior* law is used to determine scope of employment. Because employers typically have deeper pockets than most employees, state tort law tries to define the "scope of employment" as broadly as possible. Yet in the context of torture allegations by U.S. officials in foreign countries or in military prisons, this expansive reading of "scope of employment" means that many of the claims will be converted into claims against the United States and dismissed because of exceptions to the liability of the U.S. government enumerated in the FTCA.[23] For purposes of torture litigation, the two most significant exceptions are the foreign country exception[24] and the combatant activities exception.[25] Use of state *respondeat*

Ervin, 484 U.S. 292 (1988), which Congress intended to overturn legislatively.

[22] *See also* Bancoult v. McNamara, 445 F.3d 427, 438 n.6 (D.C. Cir. 2006) (genocide, torture, forced relocation, and cruel, inhuman and degrading treatment within the scope of employment); Schneider v. Kissinger, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005). A related, though somewhat different suit was filed in the 1990s by Jennifer Harbury for injuries related to the death of her husband, a leader in the Guatemalan resistance who was tortured to death by agents of the Guatemalan government, allegedly with the training, support, and financial assistance of the United States. Since Harbury was a U.S. citizen and alleged her own injuries, her suit was different from that of an alien, but she still confronted the difficult hurdle of the Westfall Act.

[23] 28 U.S.C. § 2680 (2000).

[24] *Id.* § 2680(k) ("[a]ny claim arising in a foreign country").

[25] *Id.* § 2680(j) ("[a]ny claim arising out of the combatant activities of the

superior law with respect to such claims has thus resulted in a two-tiered jurisprudence in which foreign officials will generally be found individually liable for human rights violations, especially torture, but U.S. officials will not. Under the common law, scope of employment was interpreted more narrowly.

Much is wrong with this area of law, but this article addresses one of the biggest problems and the only one that courts can correct in the absence of congressional action – use of state *respondeat superior* law to decide the immunity of federal officials alleged to have violated *jus cogens* norms.[26] A *jus cogens* norm (also known as a peremptory norm) is defined in the Vienna Convention on the Law of Treaties as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[27] Use of state *respondeat superior* law to decide scope of employment tends to include, as a matter of law, authorized acts in the scope of employment, as well as any acts *intended*, at least in part, to benefit the master. By this standard, torture would *always* be within the scope of employment, and thus always immunized because it is by its nature inherently official, as is clear from the definition in the CAT:

> [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for

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military or naval forces, or the Coast Guard, during time of war").

[26] Some suggestions for congressional action are also made.

[27] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, Reporter's Note 6 (1987). *Jus cogens* norms have a special status in international law. Unlike most customary international law which depends on the consent of sovereign nation states, *jus cogens* norms are binding whether or not states consent to them. They are "obligations *erga omnes,*" in the words of the International Court of Justice. Barcelona Traction Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5). Most customary international law is *jus dispositivum* and binds only "those states consenting to be governed by it." David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L LAW 332, 351 (1988).

> such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.[28]

Individuals can commit assault and battery, but only officials, acting in their official capacity, can torture. To remedy this perverse outcome, federal common law, rather than state *respondeat superior* law, should be used to determine scope of employment when claims under international law are at issue.

U.S. law has manifested a deep ambivalence toward torture. The political branches have made grand pronouncements about the United States' commitment to its prohibition and the U.S. took a leadership role in advocating for the CAT.[29] But at the same time Congress has not elected to provide aliens outside of the United States with any means of individually enforcing international law, either through the Committee Against Torture or a private right of action against U.S. officials. Despite the U.S.'s accession to the CAT and the passage of the TVPA, the CIA has maintained a long-running covert program designed to train torturer-surrogates from allied but undemocratic countries.[30] To be sure, an element of deniability was built into

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[28] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. (emphasis added).

[29] *See, e.g.*, U.N. Comm. Against Torture, *Consideration of Reports Submitted by the States Parties Under Article 19 of the Convention: United States of America*, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999) ("The United States has long been a vigorous supporter of the international fight against torture . . . . Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority."); Michael A. Fletcher, *Bush Defends CIA's Clandestine Prisons*, WASH. POST, Nov. 8, 2005, at A15 (quoting George W. Bush: "We do not torture.").

[30] For a detailed history of this program, see ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR

that program – as trainers, the U.S. personnel involved were one-step removed from torture, perhaps in the room but not administering the electric shocks. With the war on terrorism, this shadow program has gone mainstream, with the use of formerly illegal interrogation techniques at a wide-variety of U.S. military detention centers and CIA "black holes." U.S. courts and legislators have to squarely face that the U.S. executive and its agents have apparently designed and are implementing a broad-based program of torture and cruel, inhuman, and degrading treatment in contravention of U.S. criminal laws and universal international human rights norms.[31]

Section I describes the mechanics of Westfall immunity and shows how it frustrates human rights claims against U.S. officials by nullifying the ATCA and excluding rights guaranteed under international treaties. Section II presents an overview of the specific facts and holdings in recent cases raising torture claims against U.S. officials. Section III draws a roadmap of the evolution of the current immunity doctrine by looking at the interplay between the FTCA – a statute that enables plaintiffs to sue the United States directly when federal officials have committed torts while acting within the scope of employment as determined by state *respondeat superior* law – and the common law immunity doctrine used to decide scope of employment when individual federal officials are sued in their *individual* capacity. Section IV examines civil human rights litigation against *foreign* officials and shows that an unseemly hypocrisy in jurisprudence now exists, as foreign officials who violate human rights norms are not infrequently held liable for their acts in U.S. courts, but U.S. officials are not. Section V makes the case that in the absence of congressional action, courts should return to using federal common law as a standard for determining scope of employment in cases involving suits filed initially against individual officials. This is necessary to protect

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ON TERROR (2006); *see also* JENNIFER K. HARBURY, TRUTH, TORTURE, AND THE AMERICAN WAY: THE HISTORY AND CONSEQUENCES OF U.S. INVOLVEMENT IN TORTURE (2005).

[31] For the purposes of the analysis in this Article, it is assumed that the acts alleged in civil torture litigation meet the international and U.S. definitions of torture. Indeed, the defendants in these actions have not asserted the defense that the acts alleged do not meet the definition of torture.

individuals who have been injured by intentional torts generally but it is also necessary to bring the immunity doctrine into compliance with international law and to provide a means of compensating victims of torture. Legislative amendments to the Westfall Act are also considered. Finally, Section VI examines the policy justifications for holding U.S. officials individually liable for torture.

I. THE MECHANICS OF WESTFALL IMMUNITY

Because the Westfall Act is doctrinally extremely complicated, it will be useful to begin by summarizing the analysis that a court must conduct when presented with a case raising Westfall immunity issues. This summary will emphasize the aspects of the doctrine that are especially difficult for human rights litigants to overcome.

A. Attorney General's Certification.

The first determination to be made under the Westfall Act is whether the employee is in fact acting within the scope of employment. When a suit is brought against a federal employer, the Attorney General has the option of issuing a certification that the employee was acting within the scope of his employment, upon which certification the case is automatically removed to federal court in the event that the case was not brought there in the first case. Under *Gutierrez de Martinez v. Lamagno*, the Attorney General's certification is judicially reviewable, but the standard has been left for the lower courts to determine.[32] In the D.C. Circuit, judicial review of the Attorney General's certification requires the court to find that plaintiffs have alleged "sufficient facts that, if true, would rebut the certification."[33]

B. Scope of Employment.

The next step in the analysis uses state *respondeat superior* law to make the determination that federal employees have

[32] Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995).

[33] Stokes v. Cross, 327 F.3d 1210, 1216 (D.C. Cir. 2003).

acted within their scope of employment. The Restatement of Agency provides some guidelines for *respondeat superior* determinations but of course each state may decide the particular mix of principles it elects to apply in given instances. In the case of the torture litigation that has been initiated, the state law that the parties agreed would be used to determine scope of employment is the law of the District of Columbia because the majority of the defendants are located in the District. In principle, the District of Columbia state courts follow the Restatement (Second) of Agency, but they have not always given the relevant sections equal emphasis. D.C. courts have focused primarily on section 228, which outlines four general factors relevant to determining the scope of a defendant's employment: a) whether the conduct is "of the kind" the defendant is generally employed to perform; b) whether the conduct occurred within the authorized time and space of defendant's employment; c) whether the defendant's intent was, at least in part, to serve the purposes of his employer; and d) in the case of force, whether the use of force was "not unexpectable" by the employer.[34] Where defendant's conduct was not authorized, the Restatement lists additional factors to be considered, such as "(a) whether or not the act is one commonly done by such servants; . . . (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal."[35] However, the D.C. courts have not relied on section 229 as frequently as section 228.

Of the section 228 factors, (a) and (c) have weighed most heavily in torture cases. Courts have reasoned that torture is "precisely the kind" of activity defendants were employed to perform, because it involves detention and interrogation; and that defendants undertook the alleged acts, whether torture or not, in order to serve the master, rather than for their own personal gratification or pique.

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[34] RESTATEMENT (SECOND) OF AGENCY § 228(1)(a)-(d); Haddon v. United States, 68 F.3d 1420, 1423-24 (D.C. Cir. 1995).

[35] RESTATEMENT (SECOND) OF AGENCY § 229(a), (i), (j) (1958). It is explained in Comment b that "[a]lthough an act is a means of accomplishing an authorized result, it may be done in so outrageous . . . a manner that it is not within the scope of employment." *Id.* at cmt. b.

Two scope of employment cases in particular have proved particularly troublesome for civil torture litigants. In *Weinberg v. Johnson*, the D.C. Court of Appeals upheld a jury finding that a laundromat employee had acted within the scope of his employment when he shot a customer in the course of an argument about shirts.[36] In *Lyon v. Carey*, the D.C. Circuit upheld a jury verdict holding that a mattress deliveryman who got into an argument with a customer and then subsequently beat and raped her had acted within the scope of employment.[37] In *Council on American Islamic Relations v. Ballenger,* the D.C. Circuit quoted from *Weinberg* in concluding that "[t]he proper inquiry in this case 'focuses on the underlying dispute or controversy, *not on the nature of the tort*, and is broad enough to embrace *any intentional tort* arising out of a dispute that was originally undertaken on the employer's behalf.'"[38] Under the D.C. Circuit's interpretation of state law, the illegality of the acts committed is virtually immaterial to the scope of employment analysis.

Here it should be noted that in civil torture litigation, D.C. state *respondeat superior* law is arguably being *borrowed* by the federal courts in cases that involve alleged violations of international norms. In such cases, state law is not strictly speaking being applied, and the use of local D.C. *respondeat superior* law is being adopted by the federal courts in lieu of a clear common law standard. That local law in such cases is being used heuristically is clear because federal courts feel free to ignore aspects of local law that it regards as inconvenient. For example, D.C. local *respondeat superior* law leaves up to a jury the determination of whether a particular act (especially

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[36] Weinberg v. Johnson, 518 A.2d 985 (D.C. 1986).

[37] Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976). A later D.C. court cast doubt on *Weinberg* by calling it in effect an "outlier" and pointedly quoted from § 245 cmt. f, of the Restatement: "[T]he fact that the servant acts in an outrageous manner or inflicts a punishment out of all proportion to the necessities of his master's business is evidence indicating that the servant has departed from the scope of employment . . . ." Boykin v. District of Columbia, 484 A.2d 560, 563 (D.C. 1984) (quoting RESTATEMENT (SECOND) OF AGENCY § 245 cmt. f (1958)).

[38] Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting Weinberg, 518 A.2d at 992) (emphasis added).

involving a physical tort) is *within* the scope of employment. The D.C. Circuit recently acknowledged that D.C. state law leaves such determinations to the jury but noted that Circuit precedent made the court the trier of fact on Westfall issues.[39]

C. Statutory and Constitutional Exceptions to Westfall Immunity

If a court determines that an employee has been acting within the scope of his employment, the employee still will not be immunized if his action falls within either the statutory or constitutional exceptions to the Westfall Act.[40] The two exceptions to Westfall immunity must be strictly construed because of the Supreme Court's decision in *Smith v. United States*,[41] which overturned a Ninth Circuit decision stating that the Westfall Act did not immunize individual employees if the result would mean that plaintiffs were entirely deprived of a cause of action by virtue of other FTCA exceptions. The Supreme Court rejected this reasoning as impermissibly

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[39] Rasul v. Myers, 512 F.3d 644, 660 (D.C. Cir. 2008) ("Unlike the determination of scope of employment in a respondeat superior case in the District of Columbia, where under local law the issue *is* a jury question . . . our precedent holds that the court determines whether conduct falls within the scope of employment under the Westfall Act . . . .") (citations omitted).

[40] "Paragraph (1) does not extend or apply to a civil action against an employee of the Government—(A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."

28 U.S.C. §2679(b)(2) (2000).

[41] United States v. Smith, 499 U.S. 160, 167 (1991). In *Smith*, the family of a U.S. military serviceman stationed overseas sought to sue the attending physician who delivered a baby at a U.S. Army hospital in Italy after the baby was born with massive brain damage. At issue in *Smith* was the so-called Gonzales Act, a statute that provided that an action against the United States was the exclusive remedy for medical malpractice by military physicians. The *Smith* plaintiffs fell into the "abyss" between the FTCA and the Westfall Act, because their cause of action arose in a foreign country and thus was excluded by the foreign country exception to the FTCA. Since this differential effect seemed to have no rational basis, the Ninth Circuit abrogated the exception because it would have entirely deprived plaintiffs of a remedy.

creating a third exception to the Westfall Act. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[42] Whether customary or treaty-based, international law is not among the enumerated exceptions.

1. The Statutory Exception.

Courts have generally limited the statutory exception to statutes that create substantive rights. International norms have found no conduit through the statutory exception, except as they are reflected in U.S. statutes. Though no federal court has addressed the question of whether the statutory exception must be limited to statutes that provide for a private right of action, the question does not appear open. The statutory exception is limited to statutes "under which such action is otherwise authorized," which appears to limit it to statutes that expressly create a private right of action.[43] The private right of action requirement eliminates relevant criminal statutes embodying international norms such as the Anti-Torture Statute and the War Crimes Act. That the exception is limited to "statutes of the United States" has led some courts to conclude that international treaties are excluded from its working.

a. The Alien Tort Statute.

Civil litigants for torture have attempted to pull international human rights norms into the statutory exception to Westfall through the vehicle of the ATCA.[44] But arguments that the

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[42] *Id.* at 167 (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980)) (footnote omitted).

[43] "Not otherwise authorized" is language used by courts in inferring a private right of action; *see* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 457-58 (1974) ("It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent . . . .").

[44] The ATCA authorizes federal courts to hear "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." 28 U.S.C. § 1350 (2000).

ATCA falls within the statutory exception of the Westfall Act have uniformly been rejected by lower courts on the basis of the Supreme Court's 2004 holding in *Sosa v. Alverez-Machain* that the ATCA is jurisdictional in nature, and merely authorizes a small number of international law claims that have attained recognition as peremptory norms.[45] Since the rights of action authorized under the ATCA emerge under international law, courts have largely concluded that the ATCA does not create rights that can be *violated*.

To be sure, jurisdictional statutes may create substantive rights,[46] but to the extent that the ATCA creates a substantive right, that right is arguably *federal common law* and thus not based upon a statute. The ATCA might usefully be compared to §1983 because it has a similar structure, creating a duty on an underlying substantive right provided elsewhere. The Supreme Court has frequently held that §1983 creates a "duty" and "a species of tort liability."[47] Duties may be breached but they are not, properly speaking, violated. Even though courts, including the Supreme Court, routinely refer to "violations" of §1983,[48] in *Chapman v. Houston Welfare Rights Organization* the Court stated quite clearly, "one cannot go into court and claim a 'violation of §1983'" itself.[49] It thus has appeared to courts that,

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[45] Sosa v. Alverez-Machain, 542 U.S. 692 (2004).

[46] *See, e.g.*, Austria v. Altmann, 541 U.S. 677, 695 (2004) (statutes that "*creat[e]* jurisdiction" where none otherwise exists "spea[k] not just to the power of a particular court but to the substantive rights of the parties as well") (quoting Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 951 (1997) (emphasis in original)).

[47] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999) ("'[W]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability . . . .'") (quoting Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986)).

[48] Richardson v. McKnight, 521 U.S. 399, 401 (1997) ("The issue before us is whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983."); see also City of Monterey, 526 U.S. at 711 (noting the Court has declined to classify § 1983 actions based on underlying rights and that the usual analysis treats the claim "as a § 1983 action *simpliciter*").

[49] Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

on a technical reading, the ATCA is precluded from the Westfall statutory exception because it does not itself create substantive rights, though it does create a statutory claim on an underlying right.

b. International Treaties.

Because the statutory exception is limited to a "statute of the United States,"[50] courts have held that it does not embrace treaties, even if those treaties are self-executing and thus have the same force as a statute.[51] Though the Supreme Court has held that self-executing treaties are "placed on the same footing, and made of like obligation, with an act of legislation,"[52] a district court has noted that "the Supreme Court went only so far as to say that treaties essentially are 'like' a statute, not that they are a statute. Without some indication that Congress intended the term statute to apply to treaties, the court felt it was "not at liberty to craft a new exception to the Westfall Act for claims raised under Geneva Convention IV."[53] So it appears that courts are resistant to making an exception to Westfall immunity for violations of international treaties.

2. Constitutional Exception.

The constitutional exception has been read to apply to the same extent as the Constitution itself applies. Civil litigants in torture cases have thus faced exactly the same constitutional

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[50] The plaintiffs in *In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007), cited to Stevens v. Griffith, 111 U.S. 48 (1884) and A.F.L. v. Watson, 327 U.S. 582 (1946), but Judge Hogan said those cases were inapposite because they were about legislation authorizing the federal courts to act with regard to statutes of states.

[51] Because of the dualistic nature of the U.S. legal system, international legal norms are not directly applicable unless they are self-executing.

[52] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[53] *In re Iraq*, 479 F. Supp. 2d at 113. Noting that the term "statute" is undefined, the court invoked traditional canons of statutory interpretation and consulted Merriam-Webster's Collegiate Dictionary for the plain meaning of the word. There "statute" was defined as "'a law enacted by the legislative branch of a government.'" *Id*. at 112.

obstacles as the habeas petitioners in the litigation on behalf of still-imprisoned detainees.[54] The most basic of these obstacles is the burden of proving that, as alien plaintiffs, they are entitled to the protection of the Constitution – specifically that they possess some substantive right that protects them from the tortious or criminal acts of U.S. government officials. Though the scope of the Constitution is not evident from its fact – the Fifth Amendment reads, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . "[55] – constitutional jurisprudence has been founded on distinctions between citizens and aliens, as well as aliens within U.S. territory and aliens outside U.S. territory. The logic underlying this constitutional jurisprudence is that the Constitution is a social contract, and constitutional rights belong to those who formed this initial contract (and fictionally, their heirs) and those who willingly submit themselves to it (such as law-abiding aliens within U.S. territory). By this logic, aliens outside the United States who have no "voluntary contacts" with the United States have not indicated their willingness to submit to this social contract and thus have thereby accrued no constitutional rights.[56] Two Supreme Court cases have been read by the D.C. Circuit as foreclosing all claims by aliens held outside the United States in military custody. In rejecting the habeas petitions of aliens abroad in a military prison, the *Johnson v. Eisentrager* Court concluded:

> Such extraterritorial application of organic

[54] See *Boumediene v. Bush* and *Al Odah v. United States*, which were recently consolidated and decided by the Supreme Court in Boumediene v. Bush, 128 S.Ct. 2229 (2008), No. 06-1196, slip op. at 1 (U.S. June 12, 2008)(holding that the Military Commissions Act stripping federal courts of jurisdiction to hear habeas petitions from detainees held in the Guantanamo Bay detention facility violates the Suspension Clause of the U.S. Constitution. Whether Boumediene implies that Guantanamo detainees have individual rights under other provisions of the U.S. Constitution is not yet clear.)

[55] U.S. CONST. amend. V.

[56] For a more in-depth analysis of the constitutional issues with respect to the Guantanamo detainees, see Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006).

> [constitutional] law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view . . . . None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.[57]

The Supreme Court reaffirmed the harsh rule of *Eisentrager* in 1990 in *United States v. Verdugo-Urquidez*.[58]

Even if civil torture plaintiffs can show that they have some substantive right under the Constitution, they will also have to show that a *Bivens* remedy should be available and that no "special factors" militate against extending that remedy under the particular circumstances of the case. In the war zones of Iraq and Afghanistan, the "special factors" considerations can appear especially daunting to courts.

Taken together, the various provisions of the Westfall Act present alien plaintiffs with formidable obstacles to recovery, though these obstacles have been met with creative theories, especially with respect to procedural issues regarding the scope of employment determination. With this doctrinal backdrop, the next section turns now to the specific cases that have recently held that torture is within the scope of employment. Applying the District of Columbia's liberal *respondeat superior* law, courts have concluded that torture is all in a day's work.

II. TORTURE LITIGATION AND SCOPE OF EMPLOYMENT

In the Supreme Court's landmark 2004 opinion, *Rasul v. Bush*, the Court held that federal courts had jurisdiction to hear habeas petitions filed on behalf of foreign prisoners in Guantanamo Bay Naval Base (GTMO).[59] Further, a little discussed second holding in the case seemed to promise that

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[57] Johnson v. Eisentrager, 339 U.S. 763, 784-85 (1950) (citations omitted).

[58] United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).

[59] Rasul v. Bush, 542 U.S. 466 (2004).

civil claims against U.S. officials might go forward.[60] Justice Stevens, writing for the Court, held that petitioners in military custody were entitled to sue in U.S. courts, under the ATCA, for torts in violation of the law of nations or a treaty of the United States.[61] His tone was emphatic: "The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their non-habeas statutory claims."[62] What Justice Stevens meant is a puzzle. Even in the one short-lived legal victory that the detainees achieved – Judge Green's holding in the consolidated *Rasul* remand litigation that detainees in GTMO have constitutional rights – the detainees' ATCA claims were dismissed.[63] Released GTMO detainees and Abu Ghraib prisoners have also sued, using the ATCA as a jurisdictional basis, but their claims – save one – have also been dismissed. The problem is the Westfall Act.

The two civil cases already decided – both in the lower courts, and one additionally on appeal – are *Rasul v. Rumsfeld* and the consolidated litigation involving Iraqi and Afghani detainees styled *In re Iraq and Afghanistan Detainees Litigation.* [64] Both of these cases name as defendants a variety of uniformed and civilian officials going up the chain of command. The defendants involved are not alleged to have

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[60] *Id.* at 484-85.

[61] *Id.* at 485 (referencing the Alien Tort Claims Act 28 U.S.C. § 1350 (2000)).

[62] *Id.*

[63] Judge Green construed them as claims against the United States, rather than against detainees' custodians in their individual capacities, and dismissed them on sovereign immunity grounds. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005).

[64] Owing to their different facts, these lawsuits highlight different aspects of the Westfall immunity jurisprudence. *Rasul v. Rumsfeld* dealt with British residents who were tortured in Guantanamo Bay, a territory that the Supreme Court has already determined is tantamount to U.S. territory for the purposes of the habeas statute. 414 F. Supp. 2d 26 (D.D.C. 2006). *In re Iraq and Afghanistan Detainees Litigation* involved plaintiffs who were tortured in Iraq and Afghanistan in facilities located much closer to zones of active combat. 479 F. Supp. 2d 85 (D.D.C. 2007).

directly carried out the alleged torture, but to have ordered, authorized, condoned, approved, or otherwise acknowledged it. Though civil, these cases are thus patterned after the Nuremberg prosecutions in that they implicitly depend on the doctrine of command responsibility. The plaintiffs made a number of factual allegations as to the defendants' role, but significantly, the U.S. official defendants did not argue that the alleged heinous acts did not take place, or even that the alleged acts were *not torture*; rather, they argued that the individual defendants were immune because the acts were within the "scope" of the individual defendants' "federal offices."[65] To understand what is at stake in this litigation, it will be helpful to summarize the facts and holdings in these two cases. The immunity issues confronted by the plaintiffs in these cases are identical to those based on violations of other international law or human rights norms.

A. *Rasul v. Rumsfeld*

Rasul v. Rumsfeld was filed on behalf of four British men, three of whom had been plaintiffs in the original *Rasul v. Bush* habeas litigation in 2004.[66] The plaintiffs alleged that they were subjected to repeated beatings and anal probes, that they were sleep deprived, shackled for hours, held incommunicado, injected with unknown substances, and, perhaps most grievously, harassed and humiliated as they attempted to practice their religion. They brought six causes of action – three under customary international law (torture; arbitrary detention; cruel, inhuman and degrading treatment), one under the Geneva Conventions, and two under the U.S. Constitution (Fifth and Eighth Amendments).

The district court in *Rasul* rejected the plaintiffs' threshold

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[65] *See* Individual Defendants' Motion to Dismiss, at 10 n.4, *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26.

[66] *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26. Shafiq Rasul, Asif Iqbal, Jamal al-Harith, and Rhuhel Ahmed claimed that they had traveled to Pakistan for personal reasons and then entered Afghanistan after the American invasion in order to help provide humanitarian assistance. After realizing the peril they were in, they tried to return to Pakistan but were captured and ultimately transferred to Guantanamo Bay where they were held for over two years until *Rasul v. Bush*. *Id.* at 28.

argument that, as a matter of law, defendants' actions fell outside the scope of employment because they were contrary to the official anti-torture policy of the United States. As evidence that the officials named in the suit had acted outside their official capacity, the plaintiffs submitted a U.S. report to the United Nations Committee Against Torture in which the U.S. State Department stated that the United States was categorically opposed to torture and that any individual officials who engaged in torture would be individually liable.[67] The district court found that state law governed the scope of employment question, "not State Department representations"[68] and that to the extent that its legal representations were germane, the executive had spoken through the Attorney General's certification that the officials named in the suit were acting in their official capacity (or "in-scope").

Rejecting plaintiff-appellants' arguments that D.C. *respondeat superior* law required a jury to make an in-scope determination, the D.C. Circuit Court affirmed the district court's holding that scope of employment was essentially a value-free determination[69] and held that the correct test was whether the act at issue was a direct outgrowth of the employees' official duties irrespective of whether it was seriously criminal.[70]

B. *In re Iraq* and Afghanistan Detainees Litigation

[67] *Id.* at 32 n.5; U.N. Comm. Against Torture, *Consideration of Reports Submitted by the States Parties Under Article 19 of the Convention: United States of America*, paras. 5-6, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999).

[68] *Rasul v. Rumsfeld*, 414 F. Supp. 2d at 32 n.5.

[69] *Id.* (quoting Schneider v. Kissinger, 310 F. Supp. 2d 251, 265 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005) ("Defining an employer's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employer or his boss.").

[70] *Id.* at 34. Relying on *Johnson v. Weinberg* and *Lyon v. Carey*, the district court concluded, "[i]f the doctrine of *respondeat superior* is panoptic enough to link sexual assault with a furniture deliveryman's employment because of the likely friction that may arise between deliveryman and customer, it must also include torture and inhumane treatment wrought upon captives by their captors." *Id.*

The second case – currently stayed pending the outcome in *Boumediene v. Bush* – decided consolidated litigation relating to suits for torture on behalf of five Iraqi detainees and four former Afghan detainees held in detention facilities in Iraq and Afghanistan located much closer to military zones of conflict than Guantanamo.[71] The Iraqi detainees had filed suits against Rumsfeld and three other military officials; the Afghan detainees filed only against Rumsfeld. Collectively, the plaintiffs had six causes of action, two constitutional *Bivens* claims (due process, cruel and unusual punishment), three international law claims brought via the ATCA (torture, cruel, inhuman and degrading treatment and the Geneva Conventions), and a sixth claim for declaratory relief for violations of all the asserted sources of law.[72]

The allegations of the Iraqi and Afghan detainees were even more appalling than those of the *Rasul* plaintiffs: Mehboob Ahmad alleged he was hung from a chain upside-down from the ceiling while U.S. military personnel pushed and slapped him until he lost consciousness.[73] Said Siddiqi alleged he had been "forced to remain in a push-up position while doused with water and then beaten if he failed to sustain the position, stripped naked and photographed, anally probed, deprived of water for prolonged periods, and detained in a room flooded with water."[74] Arkan Ali was "beaten to unconsciousness," stabbed in the forearm, "burned or shocked," "locked for days in a phone-booth-sized wood box while stripped naked and hooded," urinated on, shackled and stomped on, sleep deprived "and then dragged face down and beaten for falling asleep," "chained to a metal container while kicked, spit on, choked, and threatened with a guard dog, threatened with death by having a gun placed to his head and a round chambered, mock executed by threat of being run down by a military vehicle, threatened with slaughter

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[71] The consolidated cases were Ali v. Pappas, Ali v. Rumsfeld, Ali v. Karpinski, and Ali v. Sanchez, nos. 06-0145 (TFH), Civ. 05-1377 (TFH) to Civ. 05-1380(TFH). *In re* Iraq, 479 F. Supp. 2d at 85.

[72] *In re Iraq*, 479 F. Supp. 2d at 91.

[73] *Id.* at 88-89.

[74] *Id.* at 89.

by sword, and denied food and water."[75]

The district court in *In re Iraq* devoted the preponderance of its analysis to the question of whether the plaintiffs possessed constitutional rights. After a lengthy discussion of the "special factors" that would preclude creating a private right of action directly under the Constitution for "enemy aliens" in military custody, the court concluded that the detainees had no constitutional rights. But it also decided the same scope of employment issue decided in *Rasul* and did not apparently find it a difficult question. The court's entire analysis takes up just a paragraph and does not seriously address plaintiffs' argument that interrogation and torture are not the same *kind* of act.[76] The court analyzed plaintiffs' related argument that the Westfall Act simply does not apply to international torts that violate *jus cogens* norms as an argument that the Westfall Act did not apply to intentional torts and rejected it on that basis.[77]

At the district court level, both sets of plaintiffs argued that the ATCA and the international law claims for which it provides jurisdiction fell within the statutory exception to the Westfall Act, but both courts held, as has every other court to consider the question,[78] that the ATCA does not have the characteristics required to bring it within the statutory exception that Westfall provides.[79] The central jurisdictional vehicle that enables alien plaintiffs to sue their torturers in U.S. courts is thus unavailable when the defendants are U.S. officials. The *Rasul* plaintiffs regarded the law as so clear-cut that they did not appeal the issue.

In these two lawsuits, only one claim initially survived the government's motion to dismiss on immunity grounds. This was the *Rasul* plaintiffs' claim under the Religious Freedom Restoration Act (RFRA) for religious abuse and humiliation.

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[75] *Id.*

[76] *Id.* at 114.

[77] *Id.* at 109-13.

[78] *See, e.g.*, Schneider v. Kissinger, 310 F. Supp. 2d 251, 265-66 (D.D.C. 2004).

[79] *See In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007); Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

This claim falls squarely within the statutory exception to the Westfall Act. As the RFRA claim encompasses acts that are arguably of greatest concern to plaintiffs – such as desecration of the Qur'an, interference with prayer, and use of religion as an instrument of discipline – it is of enormous legal and political significance. It does not, however, cover most of the acts that are traditionally understood as "torture." In the decision on appeal, the D.C. Circuit Court reversed the district court and held that *Rasul* defendants were absolutely immune from RFRA claims.[80]

What is striking about all of these decisions is that in determining the scope of employment no court has felt compelled to engage in a lengthy analysis of what federal officials who have the job of detaining and interrogating prisoners are in fact authorized to do. No court has confronted the paradox that torture is *by its very nature* both inherently official and inherently illegitimate. No court has seriously addressed an amicus curiae brief by retired military officials about the doctrine of command responsibility. Apparently, courts have not felt the question of specific authorization was necessary to consider because the law used in both cases to decide scope of employment – the local District of Columbia state law – defines the scope of employment extremely broadly, embracing acts well beyond those specifically authorized.[81] Strangest of all is that no court has reflected at all on the peculiarity of using the local D.C. state law of *respondeat superior* to decide the liability of U.S. officials for acts committed outside the United States involving alleged violations of universally-binding norms of human rights. Rather, courts have applied a local state law decision upholding a jury verdict clearly intended to give an egregiously-injured plaintiff a deep

[80] Since government officials are entitled to an immediate, interlocutory appeal on any decision denying immunity, the RFRA claim and the entire case was certified for appeal. The oral argument was held on Sept. 14, 2007. The denial of the motion to dismiss the RFRA claim was reversed on Jan. 11, 2008 in Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008).

[81] Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 33 (D.D.C. 2006). Judge Urbina, wrongly but not incomprehensibly, understood the test as merely requiring "some nexus" with authorized activities in order to be found within the scope of employment. This is incorrect, but it captures something of the potential breadth of *respondeat superior* law. *Id.*

pocket.[82] In *Lyon v. Carey*, a mattress deliveryman got into an argument with a customer that began with a dispute as to whether the payment should be in cash or check and eventually escalated into a beating and rape.[83] To understand how a case involving furniture delivery became the basis for immunizing federal officials for violations of wrongs that are in principle non-derogable, we need to look at the history and evolution of the absolute immunity doctrine.

III. ABSOLUTE IMMUNITY: BACKGROUND, POLICY, AND EVOLUTION OF THE DOCTRINE

The doctrine of absolute immunity for federal officials originally evolved out of cases dealing with defamation suits by individuals whom government officials had unfavorably referenced in disclosures to the public of matters related to governmental business. It began as a common-law doctrine that was first expanded and then contracted and then made statutory in an even more expansive form with the passage of the Westfall Act in 1988. In the process, it evolved from an entirely judge-made doctrine to one in which the courts feel they have little or no discretion.

The basic policy that justifies the doctrine of absolute immunity is that, on balance, good governance will be promoted if government officials are not hindered in the zealous execution of their duties by the threat of lawsuits.[84] As Judge Hand wrote in an opinion whose reasoning was later adopted by a plurality of the Supreme Court, it is better "to leave unredressed the wrongs done by dishonest officers than to subject those who try

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[82] *See, e.g.*, Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976). Of course, in the state court decision at issue the individual employee was not immunized by the finding that the employer was *also* liable.

[83] *Id.* at 650-52.

[84] Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 586 (1998). It has been pointed out that this "instrumental" defense of immunity would predict a legal regime embracing pure entity liability against the government and eschewing individual liability altogether. The FTCA most closely approaches that regime for common law torts committed outside the scope of employment.

to do their duty to the constant dread of retaliation."[85] But absolute immunity has always depended on the officials' act being within the scope of employment, a finding that is not always clear-cut and under the common law was generally conceived to involve an examination of the officials' actual authority. The Westfall Act takes away from the courts the responsibility of performing this analysis and replaces a flexible (though perhaps burdensome) common-law standard with a clear statutory rule. The question that torture litigation presents is whether the policy justification for absolute immunity applies when officials are alleged to have violated *jus cogens* norms.

The immunity of federal officials is bound up with the immunity of the United States, as it is, in effect, an extension of the state's sovereign immunity.[86] The absolute immunity doctrine has evolved in tandem with the consent of the United States to suit. In the context of torture litigation, the immunity of federal officials only becomes fatal to a plaintiff's claims because the United States has not consented to be sued for torture. This section reviews this intertwined history, as well as the policy behind the absolute immunity doctrine.

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[85] Barr v. Matteo, 360 U.S. 564, 572 (1959). *Barr* is considered the foundational case for the doctrine of absolute immunity as applied to executive functions.

[86] Scheuer v. Rhodes, 416 U.S. 232, 239 (1974) ("The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity"). In the post-Westphalian nation-based system of international relations, sovereign immunity has been viewed as a characteristic inherent in the nature of nation states. An alternate explanation is that sovereign immunity is a prudential doctrine that derives from a conflict between two logically prior doctrines – sovereign equality and territorial jurisdiction. Sovereign immunity is less a "fundamental right" of the current international legal regime than an exception or waiver (granted by the *forum* state) to the right to exclusive territorial jurisdiction – a right that *is* fundamental to the international legal regime. The U.S. case establishing the sovereign immunity doctrine, *The Schooner Exchange v. McFaddon*, illustrates this, as Justice Marshall noted that all states consent in practice to a "relaxation" of the principle of exclusive territorial jurisdiction, out of reasons of comity. *See* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 751 (2003) (citing The Schooner Exchange, 11 U.S. (7 Cranch) 116, 136 (U.S. 1812)).

A. Early History: *Spaulding v. Vilas*

The doctrine of absolute immunity first developed with respect to the legislative function.[87] Judges of courts of superior or general authority and other officers with duties related to the judicial process were held to be absolutely immune from civil suits for alleged damages resulting from the exercise of their judicial duties.[88] Early cases make clear that the doctrine in its early articulations was designed to protect the actions of officials, acting within the scope of their authority, from any injuries that might result from the malicious or personal exercise of their power.[89] A late nineteenth century case extended the absolute immunity doctrine to cabinet-level executive officers and heads of executive departments under certain conditions. *Spalding v. Vilas* held that the head of an executive department was not liable in damages on account of official communications made by him, when he acted "pursuant to an act of congress," and "within his authority," even when a personal or malicious motive might have prompted his action.[90] After Spalding, the lower federal courts extended its holding to federal officials generally.

In these early years, the United States as a sovereign entity was immune from suit and the only action available to injured plaintiffs was against the government's employees in their individual capacity. During this period of time, suits against lower level officials often ended up being dealt with through the mechanism of private bills designed to compensate victims who could not be compensated by defendants, either for reasons of

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[87] *Barr*, 360 U.S. at 579 (Warren, J., dissenting) ("Absolute legislative privilege dates back to at least 1399." (citing Van Vechten Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 9 COLUM. L. REV. 468 (1909) and Tenney v. Brandhove, 341 U.S. 367, 372 (1951))).

[88] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

[89] Spaulding v. Vilas, 161 U.S. 483, 499 (1896) ("But if . . . [an official] acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals").

[90] *Id.* at 498.

immunity or inability to fulfill a judgment. This was a cumbersome process that led to calls for a more uniform solution. The result was the passage of the FTCA.[91]

B. Federal Tort Claims Act.

The FTCA is the statute by which the United States consents to be sued in lieu of its employees and waives the general sovereign immunity that it enjoys as a sovereign nation.[92] However, the FTCA did not make a suit against the United States the *exclusive* remedy for victims injured by federal employees. After the passage of the FTCA and before the passage of the Westfall Act, plaintiffs had the option of suing the United States or the individual employee. In the first years after the FTCA's passage, the doctrine of absolute immunity had not been extended to lower level officials and suits against individual officials remained viable. After the doctrine of official immunity was extended to lower level officials in 1959, those officials were often found to be immune, but the substitution of the United States was not automatic and individual suits continued.

Though broad, the FTCA's waiver of sovereign immunity was far from total. As noted earlier, the FTCA contains within it exceptions to the consent to suit, enumerated in 28 U.S.C. §2680 (2000). When the Westfall Act converts suits against individual officials into suits against the United States, many of

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[91] Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §29, 60 Stat. 812 (1946).

[92] 28 U.S.C. § 1346(b)(1) (2000):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

them will be dismissed on the basis of exceptions in §2680. Significantly, when the United States consented to suit, it did not consent to be sued for certain, specifically-enumerated intentional torts committed by its employees.[93] The United States thus did not offer its deep pockets to victims of torts involving physical harm committed by its employees. The clear implication of the United States' refusal to take on liability for certain intentional torts is that such physically harmful acts could not be legitimate official duties. With respect to suits involving such torts, suits against individual officials remained the only viable option.[94]

The FTCA is the source of the use of state *respondeat superior* law in deciding the scope of employment in cases where the United States is named as the defendant rather than the individual official, though it is not immediately self-evident from the face of the statute why this should be so. The FTCA says only that federal courts will have:

> exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

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[93] 28 U.S.C. § 2680(h) (2000) (excepting from the FTCA "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights).

[94] In 1974, Congress amended § 2680 to provide for a "law enforcement" exception to the other exceptions in section 2680. A law enforcement exception to the intentional tort exception to the waiver of sovereign immunity meant that the United States consented to suit for certain intentional torts when committed by law enforcement personnel. Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895, 932-33 (2003);§ 2680(h)(2000) (providing that "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law).

> while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[95]

There is no general definition of "scope of employment" in the FTCA. The only definition related to "scope of employment" is with respect to the military and defines it as meaning "in [the] line of duty."[96] Though the FTCA references local state law, that reference does not clearly state that the determination of scope of employment must derive from state law. The FTCA could be read, alternatively, as involving a two-step process: first use uniform federal standards to determine the scope of employment and then, if it is found that the official acted within his authority, determine whether the elements for the *state* tort law violation have been met.

At the same time, the language of the statute is not totally inconsistent with the contrary reading. The relevant language, "injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where [the U.S.] would be liable . . . in accordance with the law of the place . . . ," could be, and has generally been, read to include the entirety of state tort law, including state *respondeat superior* law to determine scope of employment. However, this reading violates several canons of statutory interpretation, primarily the rule against surplussage.[97] If the "law of the place" included

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[95] 28 U.S.C. § 1346(b)(1) (2000).

[96] 28 U.S.C. § 2671 (2000) ("'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.").

[97] *See* Garcia v. United States, 799 F. Supp. 674, 678 (W.D. Tex. 1992), *rev'd* 88 F.3d 318 (5th Cir. 1996) (Scope of employment clause "would be unnecessary if the state law of respondeat superior is interpreted to apply . . . . By expressly including the scope of employment language in this provision, Congress has indicated that this element should be determined separately and distinctly from the law of the place. Such a distinction gives effect to all of the words used in the statute."). Garcia was eventually overturned by the Fifth Circuit on the basis of *Williams*, but it states a reasonable reading of the

state *respondeat superior* law, there would be no need to mention "scope of employment" separately. Use of state law is also inconsistent with the rule that determination of federal employee status is a federal question.[98] Given the alternative possible readings, it is not surprising that, immediately after the passage of the FTCA, a circuit split arose, with courts disagreeing about whether to use state law in making the scope of employment determination or to develop federal common law.[99]

C. Williams v. United States: State *Respondeat Superior* Law Becomes the Standard Under the FTCA

State law became the applicable norm in deciding FTCA cases with a curious Supreme Court decision in 1955, *Williams v. United States*. *Williams* involved a motor vehicle accident where a U.S. army corporal stationed on the island of Guam acquired a permit made out to another soldier for a military vehicle and, after ingesting considerable quantities of beer and champagne, negligently drove into a car parked at the end of a street, injuring the driver.[100] The district court and the Ninth Circuit Court of Appeals both determined scope of employment using federal common law, but the Supreme Court reversed, stating that state *respondeat superior* law should be used to make the determination.[101]

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language of the Westfall Act. *See also* Rosky, *supra* note 94, at 933 (arguing that reading the law of the place to include the scope of employment determination violates the rule against surplussage, as well as the rules of the last antecedent and *inclusio unius est exclusio alterius*).

[98] *Cf.* Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

[99] *See, e.g.*, United States v. Eleazer, 177 F.2d 914 (4th Cir. 1949), *cert. denied*, 339 U.S. 903 (1950) (using federal common law); Hubsch v. United States, 174 F.2d 7 (5th Cir. 1949) (using federal common law), *cert. granted*, 338 U.S. 814 (1949), *opinion on compromise*, 338 U.S. 440 (1949), *cert. dismissed by petitioner*, 340 U.S. 804 (1950); Christian v. United States, 184 F.2d 523 (6th Cir. 1950) (using state law).

[100] Williams v. U.S., 105 F. Supp. 208, 208-09 (D.C. Cal. 1952).

[101] Williams v. U.S., 350 U.S. 857 (1955).

The Supreme Court's decision in *Williams v. United States* is two lines long in its entirety and contains no reasoning. The Court held simply that "[t]his case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle."[102] This case effectively barred any future courts from finding that the "scope of employment" for military personnel should be decided differently (using a common law standard) than "scope of employment" for civilian government officials.[103] Since *Williams*, courts have interpreted the phrase in the FTCA "under the circumstances where the United States, if a private person, would be liable to a claimant," as if it read, "under circumstances where the United States, *if the private employer of a private person*, would be liable."

Use of state *respondeat superior* law when the United States is being sued, instead of the individual official, makes some sense, because the aim of *respondeat superior* is to offer a deeper pocket to victims injured by employees. The FTCA has a similar rationale and was intended to compensate victims, as well as promote efficiency by relieving Congress of the burden of private bills designed to compensate victims.[104] The Supreme Court has held that the FTCA should be liberally interpreted, and the decision in *Williams* reflects that liberality.[105] In a case

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[102] *Id.* At least one district court judge believed the Supreme Court misspoke. *See* Sievers v. United States, 194 F. Supp. 608, 610 (D. Or. 1961) ("The one sentence opinion in Williams was in error in stating that the California law applied. No doubt, the court intended to say that such law should be used in deciding the law of Guam.").

[103] The petitioner's successful argument that the FTCA included the state law of *respondeat superior* was based on the Supreme Court's interpretation of "the law of the place" clause in the FTCA as meaning that federal law assimilates state substantive law, Feres v. United States, 340 U.S. 135, 142 (1950), and a rough gloss on the explanation of liability found in a Senate report discussed in Capital Transit Co. v. United States, 183 F.2d 825, 827-29 (D.C. Cir. 1950), *overruled by* United States v. Yellow Cab Co., 340 U.S. 543 (1951).

[104] Capital Transit Co. v. United States, 183 F.2d at 827 (summarizing S. REP. NO. 79-1400, at 29-31 (1946).

[105] United States v. Yellow Cab Co., 340 U.S. 543 (1951) (holding that it is inconsistent with Congress's breadth of purpose in passing the FTCA and the trend of increasing scope of waiver from sovereign immunity to "whittle it down by refinements").

like *Hatahley v. United States*, where the Court noted the existence of "an area, albeit of a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment," it was to ensure a remedy for plaintiffs injured by the actions of federal agents who had failed to comply with the notice provisions of a federal statute.[106] However, even after the Supreme Court's decision in *Williams*, courts continued to develop federal common law in deciding the immunity of federal officials sued in their *individual* capacity. Since the passage of the Westfall Act, this part of the history has become obscured.

D. Barr v. Matteo: A Federal Common Law Standard for Individual Capacity Suits

The official immunity doctrine, codified in the Westfall Act, was first expressed in the common law shortly after the decision in *Williams*. With the FTCA in place, immunity for lower level officials became a natural extension of the *Spaulding v. Vilas* holding. This took place in 1959 with the decisions in *Barr v. Matteo* and its companion case, *Howard v. Lyons*.[107] Decided four years after *Williams*, these cases indicate that the Supreme Court did not draw from the FTCA the conclusion that state *respondeat superior* law should thenceforth be used to determine the scope of employment of federal officers in individual capacity suits. Though only a plurality opinion, reflecting a badly fractured court, *Barr v. Matteo* is considered the foundational case for the doctrine of absolute immunity as applied to executive functions. *Barr* states the doctrine

[106] Hatahley v. United States, 351 U.S. 173, 181 (1956). *See also* Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Haw. 1977) (interpreting *Hatahley* to mean federal officials have no discretion to break the law).

[107] Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). *Barr* uses the terms "privilege" and "immunity" interchangeably, while *Howard* refers only to "privilege," but they are often cited for the same principle. Wheeldin v. Wheeler, 373 U.S. 647, 650-51 (1963) (referring to "the immunity doctrine of [*Barr*] and [*Howard v. Lyons*]"); Boyle v. United Technologies, 487 U.S. 500, 505 (1988) (citing *Barr* and *Howard* for the proposition that the "scope of [federal officials'] liability is controlled by federal law"); Nestor v. O'Donohue, 429 F. Supp. 25, 26 (D. Haw. 1977) ("the question presented . . . is whether . . . plaintiff's claim is foreclosed by two Supreme Court decisions, [*Barr* and *Howard*]").

supposedly codified in the Westfall Act.[108]

In *Barr*, the act in question involved alleged defamation by an acting director of an executive agency who had announced in a press release his intention to suspend two employees who had cooked up a dubious but not actually illegal accounting scheme that had generated heated criticism on Capitol Hill. Before becoming acting director, the official had worked in another capacity for the same agency and had vehemently opposed the accounting scheme. It was therefore alleged that he had personal motives in his public criticism of the other employees. The plurality found that although the acting director's press release was discretionary (he was "not required by law or by direction of his superiors to speak out"), he was nonetheless protected, because "the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty, apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority."[109]

Barr v. Matteo approaches the question of absolute immunity as a balancing test. The plurality – four justices (Harlan, joined by Frankfurter, Clark and Whittaker) – adopted the reasoning of Judge Learned Hand in *Gregoire v. Biddle*,[110] in which Judge Hand weighed the opposing interests and concluded that it was better "to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." The plurality quoted his reasoning at some length:

> The decisions have, indeed, always imposed upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to

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[108] H.R. Rep. No. 100-700, (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5947.

[109] *Barr*, 360 U.S. at 575.

[110] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)

> overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.[111]

Hand uses "dishonest" twice, but in context it becomes clear that it is not a synonym for *illegal* acts but refers to bad or personal motive. Though the dissenting justices noted that the ultimate disposition of the plurality was "not the result of a balance," because the interest of the injured individual was obliterated,[112] *Barr v. Matteo* clearly articulated the absolute immunity doctrine as involving the weighing of two interests, and courts went on to develop the doctrine on that basis.

A companion case to *Barr* makes clear that the scope of employment of federal officials should be determined by federal standards. In *Howard v. Lyons*, [113] the Court squarely addressed the question of whether federal courts were bound to follow state courts in determining the extent of absolute privilege from civil liability for acts that allegedly violate state tort law. The Court stated:

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[111] *Barr*, 360 U.S. at 572 (quoting *Gregoire*, 177 F.2d at 581).

[112] *Id.* at 578. Justice Warren, joined by Justice Douglas, dissented. Justice Brennan wrote a separate dissent, 360 U.S. at 587. The Warren dissent found problems on both sides of the scales and argued that a qualified immunity would suffice:

> On the one hand, the principal opinion sets up a vague standard under which no government employee can tell with any certainty whether he will receive absolute immunity for his acts. On the other hand, it has not given even the slightest consideration to the interest of the individual who is defamed.

Id. at 578.

[113] Howard v. Lyons, 360 U.S. 593, 597 (1959) ("Our decision in *Barr v. Matteo* . . . governs this case.").

> We think that the very statement of the question dictates a negative answer. *The authority of a federal officer to act derives from federal sources*, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government. *No subject could be one of more peculiarly federal concern*, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several states. *We hold that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress*.[114]

In *Howard*, the court reviewed a lower court decision granting only qualified privilege to a federal official who was sued by two employees of the Federal Employees Veterans Association after he criticized them in an official agency report that was also released to various newspapers and wire services and to the state's congressional delegation.[115] In deciding the issue, the court looked at uncontradicted affidavits by the petitioner and in particular by his commanding officer that the action was in the scope of his official duties. In addition to affidavits by the petitioners and his commanding officer, the Court also consulted a "Memorandum of Instructions issued by the Secretary of the Navy" that instructed Navy agencies to keep "Members of Congress" "advised, if possible in advance, of any new actions or curtailment of actions which may affect them."[116]

Under the common law, state *respondeat superior* law was not used to determine the scope of employment of federal officials in individual capacity suits because the determination

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[114] *Id.* (citation omitted) (emphasis added).

[115] *Id.* at 594-96. The claims, based on release to newspapers and wire services, were dropped in light of petitioner's sworn statement that he was not responsible. *Id.* at 597-98.

[116] *Id.*

did not fall under the FTCA. The scope of employment determination did not fall under the FTCA, because prior to the Westfall Act the remedy against the United States was not "exclusive." The federal courts considered the job description of the federal official as reflected, *inter alia*, in statutes and regulations and asked whether the particular act was within the scope of the official's *authority*. If the act was within the official's authorized duties, the official was immune, notwithstanding the fact that his action might have injured someone. If he had acted outside of his official duties, or *ultra vires*, he remained potentially liable as an individual.

The *Barr* doctrine immunized federal officials from state common law torts committed within the "outer perimeter" of their official duties, so long as the official acted within his statutory authority.[117] The Court's extended discussion of the *Barr* doctrine in *Butz v. Economou* makes clear that statutory prohibitions largely defined the perimeters of scope of authority:

> *[Barr]* did not address the liability of the acting director had his conduct not been within the outer limits of his duties, but . . . it may be inferred that had the release been unauthorized, and *surely if the issuance of press releases had been expressly forbidden by statute*, the claim of absolute immunity would not have been upheld.[118]

In dictum, *Butz* limited the *Barr* doctrine to common law torts when the official was acting within the scope of his authority, as defined by the limits in the statute: "if [federal officials] are

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[117] Lower courts subsequently interpreted *Barr* broadly. *See* Expeditions Unlimited Aquatic Enter. v. Smithsonian Inst., 566 F.2d 289, 307 (D.C. Cir. 1977) (extending *Barr* doctrine to "executive officials at all levels"). Similarly, to the extent that *Barr* was limited to defamation, lower courts extended its reasoning to encompass "any common law tort." Expeditions Unlimited, 566 F.2d at 300 (Robinson, J., concurring); *accord* Miller v. DeLaune, 602 F.2d 198, 200 (9th Cir. 1979) (*per curiam*); Plourde v. Ferguson, 519 F. Supp. 14, 17 (D. Md. 1980). Of course, immunity depended on an in-scope determination.

[118] Butz v. Economou, 438 U.S. 478, 489 (1978). In *Butz*, the Court rejected the argument that Cabinet members are always absolutely immune from civil liability for constitutional violations, while recognizing that the "special functions" of certain officials might require absolute immunity *ex officio*.

accountable *when they stray beyond the plain limits of their statutory authority*, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability" (emphasis added).[119]

Thus under the common law, the absolute immunity doctrine with respect to common law torts was narrower than it currently is under the Westfall Act, and statutory prohibitions were relevant – highly relevant – to the scope of employment determination.[120]

E. Cutting Back on Absolute Immunity: *Westfall v. Ervin*.

The Supreme Court cut back the doctrine of absolute immunity in 1988 with its decision in *Westfall v. Ervin*.[121] In *Westfall*, the Supreme Court restricted official immunity only to acts that are within the scope of employment *and* are discretionary in nature.[122] Picking up on the concerns of the dissent in *Barr v. Matteo* by noting that "official immunity comes at a great cost,"[123] the Court described its traditional

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[119] *Id.* at 495. *See also* Gravel v. United States, 408 U.S. 606, 624-25 (1972) (stating that the speech or debate clause only immunizes actions within "the legislative sphere" which are not "all-encompassing"); Doe v. McMillan, 412 U.S. 306, 314-15 (1973) (speech or debate clause does not protect officials of the government printing press from liability to private persons when publishing congressional materials to public).

[120] In McKinney v. Whitfield, 736 F.2d 766, 769-70 (D.C. Cir. 1984), the D.C. Circuit noted that while "physical contact batteries may qualify for absolute immunity when administered by federal security or law enforcement officers whose job it is to maintain order and the public peace," federal regulations did not "sanction the use of physical force by desk supervisors; on the contrary, they provide that 'every management action affecting employees [should be] free from coercion.'" (citing Federal Personnel Manual). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (noting that the investigator for the House Un-American Activities Committee was not acting within the scope of his authority when he filled in his name on a signed blank subpoena without congressional delegation of subpoena power).

[121] Westfall v. Ervin, 484 U.S. 292 (1988).

[122] *Id.* at 295.

[123] *Id.*

approach to the doctrine as a "functional" inquiry, driven mostly by policy considerations: "Because the benefits of official immunity lie principally in avoiding disruption of governmental functions, the inquiry into whether absolute immunity is warranted in a particular context depends on the degree to which the official function would suffer under the threat of prospective litigation."[124] Under the holding of *Westfall v. Ervin*, the individual official would thus remain individually liable for non-discretionary acts.

At first glance, this approach seems wrongheaded – shielding higher level officials with more discretion while exposing lower level employees who have little flexibility in their job descriptions. But the Court noted that the policy behind official immunity is not furthered by protecting non-discretionary acts: "When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'"[125] The Court concluded its decision in *Westfall* by admonishing courts not to "lose sight of the purposes of the official immunity doctrine when resolving individual claims of immunity or formulating general guidelines" and by inviting Congress to "provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context."[126]

F. The Passage of the Westfall Act: Codifying the Absolute Immunity Doctrine.

Congress took up the Supreme Court's invitation to legislate on the issue, acting almost immediately to overturn *Westfall v. Ervin* by passing the Westfall Act.[127] Congress's stated intention

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[124] *Id.* at 296 n.3. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 810-11 (1982) ("[I]n general our cases have followed a 'functional' approach to immunity law.").

[125] *Westfall*, 484 U.S. at 296-97 (quoting Barr v. Matteo, 360 U.S. 564, 571).

[126] *Westfall*, 484 U.S. at 299-300.

[127] 28 U.S.C. § 2679 (2000).

was merely to return the law to what it had been prior to the decision in *Westfall*.[128] However, to the extent that the earlier law involved a balancing test and reflected the *Barr* doctrine, Congress did not return the law to its previous state. The Westfall Act does not involve a balancing test. It has few nuances. If the act is committed within the scope of employment, the official is absolutely immune unless the official acts fall within certain, narrowly-delineated exceptions.

This lack of nuance had a certain rationale with respect to discretionary acts. The House Report on the Westfall Act noted that *Westfall v. Ervin's* requirement that the act be discretionary in nature would almost always require a "fact-based determination." "Thus, the transaction costs (i.e., litigation costs) and length of time needed to resolve the issue of discretion in these cases will be substantially increased, as will the uncertainty for the individual employee who is sued."[129] The House also noted that the effect of altering the immunity doctrine in this fashion would fall disproportionately on lower level officials because such officials would generally have less discretion in their jobs. But the *Barr* doctrine always required some degree of fact-based determinations.

The Westfall Act also went beyond *Barr* in making the FTCA the exclusive remedy for situations when federal officials were found to be acting within their scope of employment. In doing so, the Westfall Act, perhaps inadvertently, displaced federal common law by state *respondeat superior* law. This displacement was perhaps inadvertent because the legislative history is not entirely clear as to Congress's intent. The sponsor of the Westfall Act, Rep. Barney Frank of Massachusetts, has stated in an amicus brief supporting the plaintiff in *Harbury v. Hayden* that Congress never intended the Westfall Act to immunize officials against torture.[130] The House Report on the

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[128] *See* H.R. REP. NO. 100-700, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947 ("The functional effect of H.R. 4612 ["Federal Employees Liability Reform and Tort Compensation Act of 1988"] is to return Federal employees to the status they held prior to the *Westfall* decision. That is, Federal employees will be immune for personal liability for actions taken in the course and scope of their employment.").

[129] *Id.* at 5946.

[130] *See* Brief for U.S. Rep. Barney Frank as Amici Curiae Supporting Appellant at 2, Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) (No. 06-5282)

Westfall Act does not expressly exclude torture from the scope of employment, but it does say that "egregious misconduct" will not be immunized.[131] In fact, the House Report is unclear about the scope of employment determination. It approaches the issue in three ways without definitively resolving it: 1) noting the usual FTCA state law approach (citing *Williams*);[132] 2) suggesting in effect that courts take state *respondeat superior* law as a general but not binding guide;[133] and 3) delegating the designation to the Attorney General or his agents (with no requirement that the Attorney General utilize state law to make the determination). Whatever the merits of Rep. Frank's representations are about the Westfall Act's legislative history, since courts have not regarded the language of the Westfall Act as ambiguous, they have not looked to the legislative history for guidance.

The Westfall Act changed the absolute immunity doctrine by making the scope of employment as broad as possible and the exceptions to immunity as narrow as possible. In essence, the Westfall Act represents Congress's attempt to find a middle ground between protecting the functions of government and

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("The U.S. government can never be substituted into cases involving the use of torture by federal officials.").

[131] *See* H.R. REP. NO. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 ("If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."). It is not entirely clear what Congress intended by "egregious misconduct." The *In re Iraq* plaintiffs argued that torture could not be immunized because torture is such egregious misconduct, but the counter to this argument is that Congress did not intend to refer to something other than the statutory and constitutional exceptions explicitly created in the Westfall Act.

[132] *Id.* at 5 ("Under the FTCA, the issue of whether an employee was acting within the scope of his employment is governed by the law of the state in which the negligent or wrongful conduct occurred"; "the test for [whether an act was committed within an employee's scope of employment] is generally whether the employee's act[s] are an incident or, a part of, or in furtherance of, the employee's employment." (citing Kemerer v. United States, 330 F. Supp. 731, 733 (W.D. Pa. 1971), *aff'd*, 474 F.2d 1338 (3d Cir. 1973)).

[133] H.R. Rep. No. 100-700, (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945 (enumerating factors from the leading treatise on the FTCA, as if state law were only to serve as a general heuristic).

compensating victims injured by the acts of federal officials. The compromise underlying the Westfall Act's immunity is not wholly unreasonable, but it has two problems. It makes no exception for violations of international law (and narrowly provides for statutory exceptions) and it entangles the scope of employment with the liability determination, significantly broadening the scope of immunized activity. In the case of foreign plaintiffs suing U.S. officials, the Westfall Act's rather arcane workings combine, in a negative synergy, to create a formidable obstacle to liability.

G. Sea-Change in the Immunity Doctrine.

The Westfall Act quietly wrought a dramatic change in the absolute immunity doctrine. Had courts been presented with civil torture litigation prior to the passage of the Westfall Act, they would have had to confront the numerous explicit *prohibitions* against torture in the official job descriptions of the officials sued. The *Barr* doctrine, as interpreted by *Butz*, only shielded officials with immunity for acts that were not explicitly prohibited by statute. In an amicus brief filed in both *Rasul* and *In re Iraq*, retired military officers and military and history scholars detailed the numerous prohibitions on torture that constrain the actions of military officials and soldiers. The brief discussed the long history of humane treatment of prisoners, a practice to which the U.S. military has been committed since the Battle of Trenton in the Revolutionary War.[134] The U.S. military is prohibited from torturing detainees in its custody by military regulations,[135] the Uniform Code of Military Justice,[136] the

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[134] *See* Brief for Retired Military Officers and Military and History Scholars et al. as Amici Curiae Supporting Plaintiffs-Appellants at 4-5, Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008) (No. 06-5209) (noting that after winning the Battle of Trenton, General Washington ordered his men to take the Hessian soldiers captive and "[l]et them have no reason to complain of our copying the brutal example of the British Army" and that the Lieber Code, adopted during the Civil War, has served as "the basis of every convention and revision" of international law concerning prisoners of war).

[135] U.S. DEP'T OF THE ARMY, FM 2-22.3 (FM 34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS viii (2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

[136] Although the Uniform Code of Military Justice does not contain

Geneva Conventions,[137] U.S. criminal law[138] and the CAT.[139] Officers are also held responsible for violations through the obligations of "command responsibility."

With Congress's passage of the Westfall Act, however, and the subsequent interpretation by lower courts to apply local law to the question of scope of employment, such evidence of the lack of authorization became almost inconsequential. The relevant questions changed and became the following: Are the alleged acts *incidental* to authorized conduct? Are they foreseeable or expectable? Did the servant undertaking them intend to serve the master? For example, in 2005, a *Filartiga*-style action was brought against Kissinger for his role in bringing about the death of a Chilean general opposed to the military coup in Chile against Dr. Salvadore Allende.[140] In the district court, defendant Kissinger argued that he had been acting at the behest of President Nixon and was therefore acting within the scope of his employment. Citing the expansive *respondeat superior* standard found in district state law,[141] the court agreed:

> The Court finds that Dr. Kissinger was acting within the scope of his employment as National Security Advisor to President Nixon when he allegedly conspired to kidnap General Schneider.

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language specifically relating to torture, it does prohibit cruelty and maltreatment as well as assault. *See* 10 U.S.C. §§ 893, 928 (2006).

[137] *See, e.g.*, Convention (Third) Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[138] 18 U.S.C. § 2340A (2006).

[139] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[140] *See* Schneider v. Kissinger, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005). No allegation was made that Kissinger had actually ordered the death of General Schneider, which occurred during a botched kidnapping attempt.

[141] *Id.* at 265 n.15 ("*Weinberg* is a prime example of the breadth of the term 'scope of employment.'").

> The establishment of a Socialist Government in Chile would have had a substantive impact on U.S. foreign policy and would naturally implicate national security concerns for which Dr. Kissinger had some responsibility. Moreover, there is no allegation by the plaintiffs that Dr. Kissinger undertook these activities solely, if at all, for his own personal benefit. ("The tort must be actuated, at least in part, by a purpose to further the master's business and not be unexpected in view of the servant's duties.").[142]

The Westfall holding was not appealed.

In creating an almost insuperable bar for foreign plaintiffs alleging violations of universally-binding human rights norms of international law, the Westfall Act helped to create a two-tiered, some would say ugly and hypocritical, jurisprudence when it comes to torture. The next section examines how U.S. courts have handled civil torture lawsuits when the defendants are *foreign* officials. The approach to immunity differs dramatically.

IV. FOREIGN OFFICIALS AND THE CIVIL LIABILITY FOR TORTURE UNDER U.S. LAW.

With the Second Circuit's landmark decision in *Filartiga v. Pena-Irala*, in which the court held that the ATCA gives federal courts jurisdiction to hear violations of international law, the U.S. courts took the lead in human rights enforcement through the mechanism of private law.[143] In the *Filartiga* line cases, and later in TVPA litigation, U.S. courts have proved generally unforgiving with regard to officials who have allegedly committed torture, quite in contrast to their conclusions when the defendants are U.S. officials.

Citing to *Filartiga* line cases, plaintiffs in civil torture litigation have argued that ATCA cases involving foreign officials are relevant to the determination of the scope of employment

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[142] *Id.* at 265-66 (citation omitted).

[143] *SEE* CRAIG SCOTT, TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (2001).

with respect to U.S. officials,[144] using them to support the argument that torture is *per se* outside the scope of employment. Courts have not been receptive to this argument, but they have not seriously addressed the issues raised by the *Filartiga* jurisprudence, in which U.S. courts have proved to be hostile venues for foreign officials accused of torture. This line of cases involves facts that are, in substance, similar to those alleged in civil torture litigation against U.S. officials and therefore are an instructive point of comparison.

Since this jurisprudence involves different statutory and common law causes of action and defenses, a brief review of the major doctrines will be helpful. Though the doctrines through which immunity is articulated differ in the foreign context, all official immunity is derived in a sense from the sovereign immunity of the state, and so the foundation is the same in both the U.S. and foreign law contexts. Before proceeding with this section, it should be noted that while the Clinton administration supported the *Filartiga* doctrine and the Bush Sr. administration signed the TVPA despite expressing reservations about the potential implications of the *Filartiga* doctrine, the George W. Bush administration has intervened in more than a dozen cases to oppose *Filartiga*-style litigation in U.S. courts.[145] The position that the United States government has taken in these cases regarding judicial review of human rights violations is unconstitutional because it interferes with the foreign affairs power of the executive.[146]

A. Causes of Action: ATCA and TVPA

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[144] *See* Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss at 65, *In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007) (Misc. No. 06-0145) (TFH) (The *In re Iraq* plaintiffs cited the Filartiga line cases in support of the argument that U.S. courts "repeatedly have declined to extend immunity to individuals in the analogous context of ATS cases in which foreign defendants assert the 'act of state doctrine' as a defense to tort liability.").

[145] *See* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 169 (2004). These numbers are presumably now much higher.

[146] *Id.*

The use of United States courts as a forum for litigating civil damages claims against foreign officials accused of torture on behalf of foreign citizens began in 1980 with *Filartiga v. Pena-Irala*.[147] The Second Circuit concluded that torture was universally prohibited and that "international law confers fundamental rights upon all people vis-a-vis their own governments."[148] As the court memorably declared, "[a]mong the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[149]

Filartiga was a breakthrough in human rights enforcement and a judicial model for other countries to emulate.[150] It is ironic, given the *official* nature of torture, that it was precisely through the mechanism of tort law, by conceiving torture-as-tort, that foreign torturers began to be brought to account in some measure.

Between 1980 and 1991, the ATCA was the only recourse available to foreign plaintiffs seeking to recover for torture claims. Then, in 1991, Congress provided for a statutory right of action when it passed the TVPA, specifically ratifying and codifying the ATCA jurisprudence that had begun to develop post-*Filartiga*.[151] The TVPA provides that any individual who "under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture "shall, in a civil action, be liable for damages to that individual."[152]

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[147] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[148] *Id.* at 885.

[149] *Id.* at 890 (emphasis added).

[150] *See* SCOTT, *supra* note 143.

[151] Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 78 (1992). *See* H.R. REP. NO. 102-367(I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.'").

[152] *Id.* at 84.

Acknowledging in its terms the "official" nature of torture, the TVPA cannot be used as a basis for liability unless the individual alleged to have committed the torture was acting "under actual or apparent authority, or color of law, of any foreign nation . . . ."[153] Lower federal courts have reached similar conclusions for claims brought directly under the ATCA, though the Supreme Court has not yet settled the question of whether the law of nations reaches private action.[154] With respect to U.S. plaintiffs, the passage of the TVPA closed a jurisdictional gap. Under the *Filartiga* doctrine, the ATCA provided jurisdiction to foreign persons, but U.S. citizens still lacked a similar remedy against foreign torturers.[155]

The TVPA and the ATCA thus provide asymmetrical rights. Under the ATCA, U.S. citizens do not have a right of action, but aliens do. The TVPA provides both aliens and citizens with a right of action, but only against foreign officials, not officials of the U.S. government. In addition, as shown above, the ATCA does not meet the requirements of the statutory exception to the Westfall Act, while the TVPA would if it provided for a right of action against U.S. officials.

B. Sovereign Immunity and the Foreign Sovereign Immunities Act Defense.

Foreign officials accused of torture under the ATCA and the TVPA have certain defenses that they can make.[156] Before the

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[153] *Id.* *See also* 28 U.S.C. § 1350 (2000).

[154] *See, e.g.*, Ibrahim v. Titan Corp. 391 F. Supp. 2d 10, 14 (D.D.C. 2005) (stating that the law of nations does not reach private actors); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir, 1984), *cert. denied*, 470 U.S. 1003 (1985) (finding no consensus that the law of nations applies to private actors).

[155] A claim under the TVPA is subject to certain constraints that an ATCA claim is not, so plaintiffs have sometimes brought both and courts have confronted the question of whether the TVPA occupies the field when it comes to torture litigation.

[156] Other defenses include the Act of State, Head of State, and the political question doctrines. The Act of State doctrine precludes courts from inquiring into the validity of the "public" or "official" acts of a recognized foreign sovereign power. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). *See also* LaFontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994)

passage of the TVPA, the most important of these defenses was the Foreign Sovereign Immunities Act (FSIA). Under international law, immunity from suit is one of the prerogatives of the nation-state.[157] If the FSIA applies, "a federal court lacks subject-matter jurisdiction over a claim against a foreign state," unless certain exceptions apply.[158] Since the FSIA only deprives a court of jurisdiction if the party involved is a foreign state or an "agency and instrumentality" of that state, a threshold question is therefore whether the FSIA applies to natural persons and thus extends immunity to individual officials.[159] Courts can answer either "yes" or "no" since both answers have been given (at least until the passage of the TVPA).[160] What is interesting for the current analysis is that, with respect to torture, it did not really matter how courts answered that question. Officials who engaged in torture were almost invariably found individually liable. After 1992, in light of

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(heads-of-state are likewise immune, as embodiments of the state); Baker v. Carr, 369 U.S. 186, 211 (1962) (the political question doctrine prevents the judiciary from deciding issues textually committed to the legislative or political branches).

[157] *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

[158] Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993). *See also* 28 U.S.C. §§ 1330, 1602-1611 (2000 & Supp. 2005).

[159] The FSIA defines "agency or instrumentality" to include "any entity -- (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603 (2000). The D.C. Circuit has held that the "agency or instrumentality" determination should be made by the court as a matter of law. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 152-53 (D.C. Cir. 1994) (applying the "categorical" test to the "agency or instrumentality" determination); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003) (applying *Transaero* test and deciding as matter of law that the Iranian Ministry of Foreign Affairs is not an "agency or instrumentality").

[160] *See also* Xuncax v. Gramajo, 886 F. Supp. 162, 175 (D. Mass. 1995) (holding that FSIA immunity would not be available for acts by an official that were "beyond the scope of the official's authority," without deciding whether the FSIA applies to individuals).

Congress's creation of a specific cause of against foreign officials in the TVPA, it became harder to argue that such officials fall within the ambit of the FSIA, at least with respect to torture. Where courts have held that the FSIA applies to natural persons, it has nevertheless been held that acts of torture cannot be legitimate executive acts. For example, in *Chuidian v. Philippine National Bank*, the Ninth Circuit held that the FSIA applies to natural persons but only insofar as they act in an official capacity.[161] As in the federal common law jurisprudence on absolute immunity before the Westfall Act, the court found relevant the limitations on official power provided by statute: "[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do."[162]

C. Legality and Legitimate Executive Acts.

Unlike current Westfall jurisprudence, *Filartiga* line cases consider the legality of the actions alleged. A particularly elaborate discussion of the nature of legitimate executive acts is found in the Ninth Circuit line of ATCA cases involving the estate of Ferdinand Marcos.[163] Consolidated as *In re Human Rights Litigation*, the Estate of Marcos litigation involved allegations that are not dissimilar to those alleged in the recent civil torture litigation against U.S. officials. In that class action litigation against the former dictator, the complaint included allegations that "at the direction or with the approval" of Marcos, plaintiffs were arrested without cause, held incommunicado, subjected to "tactical interrogation" (a

[161] Chiudian v. Phil. Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990) (finding that defendant would not be entitled to sovereign immunity for acts not committed in his official capacity).

[162] *Id.* at 1106.

[163] *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1471 (9th Cir. 1994) [hereinafter *In re* Human Rights Litig.]. In complex class action litigation against the former dictator, his general, and his daughter, the Ninth Circuit addressed various aspects of the liability of foreign officials for torture. The litigation began in the late 1980s.

euphemism for torture), and arbitrarily detained.[164] The court held that because the allegations had to be taken as true for the purpose of a motion to dismiss, Marcos' actions "should be treated as taken without official mandate pursuant to his own authority."[165] In this pre-TVPA litigation, the court drew this inference in plaintiffs' favor even though the complaint stated specifically that Marcos "*under color of law* ordered, orchestrated, directed, sanctioned, and tolerated the continuous and systematic violation of human rights of plaintiffs and the class through the military, para-military, and intelligence forces he controlled."[166] Even though Marcos had "extraordinary powers," the court found that he did not "appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him."[167] The court went on to adduce multiple reasons why Marcos' acts should not be considered legitimate acts of a sovereign.

> Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape.[168]

Part of the Ninth Circuit's reasoning here turns torture into the sovereign equivalent of a frolic rather than a detour and is not inconsistent with the "intent to serve the master" test of state

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[164] *Id.*

[165] *Id.*

[166] *Id.* The complaint also alleged that Marcos' actions were violations of international law and the constitution and law of the Philippines.

[167] *Id.*

[168] *Id.* (citing Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988) and Jimenez v. Aristeguieta, 311 F.2d 547, 557 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963) (finding the former dictator "chief executive, a public officer, of the sovereign nation of Venezuela," but not the state itself)).

respondeat superior law.[169] But the distinction between legal acts and acts that "lack a basis in law" places the emphasis on the legal authority (or lack of it), as reflected in the laws of the Philippines under which Marcos acted when he instigated torture, an emphasis lacking in civil torture litigation against U.S. officials.[170] The Ninth Circuit reasoned that such a holding was consistent with the FSIA's restrictive principle which limits sovereign immunity to governmental or public acts, not commercial or private acts. "Immunity is extended to an individual only when acting *on behalf of* the state, because actions against those individuals are 'the practical equivalent of a suit against the sovereign directly.'"[171]

Other ATCA cases have similarly found the issue over-determined, but always address the legality of the acts in question.[172] In *Xuncax v. Gramajo*, the U.S. District Court decided that alleged torture and summary execution by the former Guatemalan Minister of Defense exceeded his official

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[169] The distinction between "public" official acts and "private" official acts is also found in international legal opinions, such as, in dictum, in the International Court of Justice's *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. LEXIS 5, at *53 (Feb. 14) ("[A] court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"). Some commentators, as well as the dissenting judge in the case, have interpreted the majority opinion as implying that violations of *jus cogens* norms can never be among the "official" acts of a state or a state's agents. *See* Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877 (2002). But others have noted that characterizing such acts as "private" renders the state itself not responsible for the action and thus divests other states of their right to demand cessation of the acts in question. *See* Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?* 13 EUR. J. INT'L L. 895 (2002).

[170] *See In re Human Rights Litig.*, 25 F.3d at 1471 (equating the questions of sovereign immunity, act of state, and political question).

[171] *Id.* at 1472 (quoting Chiudian v. Phil. Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990)).

[172] *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (holding that alleged violations of fundamental human rights were "not the public official acts of a head of government," nor were they ratified by the de facto military government, nor were they legal under Argentine law).

authority.[173] The court noted that neither the past nor the present government had characterized the acts as officially authorized,[174] thus implicitly suggesting that unauthorized acts could become authorized if they are adopted by the legitimate government.[175] At the same time, the court cited *De Letelier v. Republic of Chile* for the much stronger proposition that assassination is "clearly contrary to the precepts of humanity as recognized in both national and international law" and cannot be part of an official's "discretionary authority."[176] The implication of *Filartiga* and its progeny is that torture and related violations of domestic law and international human rights norms cannot be legitimate executive acts – exactly the *per se* rule rejected in civil torture litigation, though the reasons for this conclusion have differed and the weight of different factors have not always been clearly parsed or explicated.[177]

Ambivalence remains about torture and state responsibility. In *Siderman de Blake v. Republic of Argentina*,[178] the Ninth

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[173] Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

[174] *Id.* at 176.

[175] Picking up on this hint, several district courts have concluded that express state ratification of an official's acts brings them within the scope of official duty, regardless of whether the acts in question constitute violations of international human rights norms. *See* Yusef v. Samantar, 2007 WL 2220579 (E.D. Va. 2007) (holding that based on letter from the Somali Transitional Federal Government, the former Minister of Defense and Prime Minister in Somalia was acting in official capacity when allegedly committing human rights abuses); Belhas v. Ya'Alon, 466 F. Supp. 2d 127 (D.D.C. 2006) (holding that based on a letter from Israeli government, the head of the Israeli Army Intelligence was acting in official capacity in bombing Qana); Matar v. Dichter, 500 F. Supp. 2d 284, 291 (S.D.N.Y. 2007) (indicating that "[c]ourts assign 'great weight' to the opinion of a sovereign state regarding whether one of its officials was acting within his official scope").

[176] De Letelier v. Chile, 488 F. Supp. 665, 673 (D.D.C. 1998).

[177] *See, e.g.*, Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1197-98 (S.D.N.Y. 1996) (holding that alleged acts of torture fall beyond the scope of authority).

[178] Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied,* 507 U.S. 1017 (1993) (holding that Argentina's official acts of torture, though clear violations of *jus cogens* norms, were immunized from suit by the doctrine of sovereign immunity).

Circuit held that torture *is* an act of state if a state commits it, because the Foreign Sovereign Immunities Act did not provide for a specific exception for torture (or any other violation of *jus cogens* norms).[179] This ambivalence is reflected in the TVPA, which is "subject to the restrictions in the Foreign Sovereign Immunities Act of 1976."[180] The FSIA now contains an exception for torture, waiving foreign state sovereign immunity in damages actions, but the torture exception only applies if the state is specifically designated a foreign terrorist organization (FTO).[181] The greatest practical import of this residual ambivalence surrounding state responsibility and torture is that plaintiffs' recovery may be limited by the individual defendants' assets.

D. Command Responsibility

Both the TVPA and the ATCA jurisprudence have recognized the doctrine of command responsibility. Under the command responsibility doctrine, a soldier who exercises command authority in the U.S. military is "responsible for everything [his or her] command does or fails to do."[182] As noted above, courts in civil torture litigation against U.S. officials have not seriously considered that doctrine as outlined in the amicus brief by former military officials filed in civil torture litigation in support of plaintiffs. However, the Senate committee report on the TVPA endorsed the principle of command responsibility with respect to foreign officials, describing the scope of the TVPA as follows:

> The legislation is limited to lawsuits against

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[179] Just as United States v. Smith requires courts to read exceptions to the Westfall Act narrowly, Argentine Republic v. Amarada Hess Shipping Corp., 488 U.S. 428, 434 (1989), imposes a similar constraint on the reading of the FSIA.

[180] *See* H.R. REP. NO. 102-367(I), at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 88.

[181] 28 U.S.C. § 1605A.

[182] U.S. DEP'T OF ARMY, ARMY REGULATION 600-20, ARMY COMMAND POLICY, § 2-1(b) (June 2006).

> persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.[183]

Under the TVPA, then, command responsibility can be a basis for civil liability. [184] In *Xuncax v. Gramajo*, the First Circuit Court of Appeals found that the foreign official defendant, as former Vice Chief of Staff and director of the Army General Staff, was responsible under the command responsibility doctrine for the atrocities committed by the military under his command. Even before the TVPA, the "command responsibility" doctrine was recognized in U.S. law.[185] In the Second World War case, *In re Yamashita*, the commander of a Japanese force was held responsible for atrocities committed by his troops in the Philippines, even though he had not committed them himself or specifically ordered his men to do so.[186]

The U.S.'s failure to provide the equivalent of *Filartiga* against U.S. officials may itself be a violation of international law, as some scholars have argued that the duty to compensate torture victims, even in wartime, has achieved the status of customary international law.[187] Whether the duty to

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[183] S. Rep. No. 102-49, at 9 (1991).

[184] *See also* Ford v. Garcia, 289 F.3d 1283, 1286 (11th Cir. 2002) (finding that TVPA doctrine permits a civil cause of action based on international law doctrine of command responsibility).

[185] Xuncax v. Gramajo, 886 F. Supp 162 (D. Mass. 1995).

[186] *In re* Yamashita, 327 U.S. 1, 14-16 (1946).

[187] Katharine Shirey, The Duty to Compensate Victims of Torture Under Customary International Law, 14 INT'L LEGAL PERSP. 30, 30 (2004).

compensate is owed to individuals or to the state to which the individual belongs is still a matter of some debate, though the Supreme Court recently assumed, without deciding, in *Hamdan v. Rumsfeld* that at least certain provisions of the Geneva Conventions are individually enforceable.[188] The United States has stated reservations to international treaties that purport to limit its obligation to provide individuals with compensation for acts committed abroad.[189] But if even compensation is not a legal duty, U.S. law on absolute immunity now reflects an ugly double-standard, as there is no domestic equivalent to the *Filartiga* jurisprudence. Because courts have mechanically applied the Westfall Act in cases involving alleged torture committed by U.S. officials, cases involving foreign officials have been found inapplicable.[190] U.S. law relating to absolute immunity for officials accused of torture thus needs to be changed to reflect the prohibition against official torture and to more adequately internalize human rights norms. A way for courts to do this is to return to using federal common law to determine scope of employment.

V. THE CASE FOR A COMMON LAW STANDARD TO DETERMINE SCOPE OF EMPLOYMENT UNDER THE WESTFALL ACT.

As shown in Section III, prior to the Westfall Act, courts used two different standards for determining scope of employment –

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[188] Hamdan v. Rumsfeld, 548 U.S. 557, 562 (2006).

[189] The international community has accepted these reservations, though as interpreted by the United States they arguably defeat the purpose and object of the treaty. The United States has claimed that the CAT does not obtain during war and that its reservation to the CAT (interpreting "cruel and inhuman" treatment as meaning "cruel and inhuman" in the sense of the Eight Amendment to the U.S. Constitution) means that the CAT only applies insofar as the U.S. Constitution itself applies and therefore is not applicable to U.S. personnel abroad.

[190] Rasul v. Rumsfeld, 414 F. Supp. 2d at 34 (D.D.C. 2006) ("By enacting the FTCA, Congress directed that state law governs the scope of employment for claims brought against federal employees. For this reason, case law interpreting legislation governing foreign officials is inapplicable to the present circumstance.) *aff'd sub nom*. Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008).

general federal common law for individual capacity suits and state *respondeat superior* law for FTCA suits. On the whole, this seems a preferable approach. The common law standard was narrower and hewed more closely to explicitly defined grants of authority. The policy of enabling federal officials to fearlessly do their job was balanced against concern for injured citizens, and the balance was struck near the edge of authorized activity. The FTCA utilized state *respondeat superior* law, but the United States did not waive sovereign immunity for intentional torts, except for torts committed by law enforcement officials in the course of their duties. Thus, although *respondeat superior* would have provided a more expansive basis for liability against the federal "employer" in a suit where the United States was the named defendant, such a suit if based on intentional torts would have been nullified by the §2680 exceptions. Individual capacity suits were necessary to provide the victim with some possibility of recovery, since the United States refused to legitimate intentional torts as within the scope of employment.

The Westfall Act, as currently interpreted by courts, interfered with this scheme by bringing the scope of employment determination under the FTCA. This created special problems for claims made under the ATCA, but it created problems for generic FTCA plaintiffs as well, in that victims of intentional torts by government officials may also be left without a remedy.

The case for why courts should use a federal common law standard for determining scope of employment when international law claims are at issue thus begins with the more general problem that the Westfall Act has created. Though in passing the Westfall Act, Congress declared its intention to return the law to the status quo ante, in reality it did much more, eliminating the use of federal common law to determine scope of employment when federal officials are sued in their individual capacity and replacing it with state *respondeat superior* law. Use of state *respondeat superior* law sweeps into the scope of employment a much broader swath of illegal and marginally legal acts, thus significantly broadening the scope of immunized activity. The argument in this section does not exclude the related argument that the United States should consent to suit for claims based on torture; in an ideal world, both the United States and the individual official would be liable

for torture, and possible changes to the law are discussed in brief below.[191]

A. How the Westfall Act Affects Plaintiffs Injured by Intentional Torts Generally

As a result of the Westfall Act, the same logic that leaves alien plaintiffs without a recovery after Westfall substitution (nullification by the §2680 exceptions) also affects domestic plaintiffs who have been physically injured by federal officials. Under Westfall, plaintiffs injured by one of the enumerated intentional torts (unless by a law enforcement official) may be left without the possibility of recovery. Presumably this explains why the D.C. Circuit Court of Appeals in *Majano v. United States* suddenly embraced an aspect of Washington, D.C. *respondeat superior* law that it had previously never emphasized, namely, that scope of employment is primarily a jury question, and that in the rare case where D.C. courts have decided it as a matter of law, they have done so only when the acts at issue are so egregious that no reasonable jury could find them within the scope of employment.[192]

At issue in *Majano* was a minor assault by a federal employee on another employee that resulted in a neck injury.[193] The plaintiff sued the employee in her individual capacity and the Attorney General certified that the employee was acting within the scope of employment, thus resulting in the automatic substitution of the United States as defendant under the Westfall Act and dismissal of the action under the intentional

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[191] It should be noted that many of the difficulties discussed in this paper would be obviated if it were clear that alien plaintiffs held abroad in U.S. custody possessed substantive fundamental rights protected by the U.S. Constitution. Apart from holding that the Suspension Clause applies in full in Guantanamo Bay, the Supreme Court did not decide this issue in *Boumediene v. Bush*. What fundamental rights *are* has never been precisely adjudicated but it is generally understood that they provide the minimum standards necessary for a rule-of-law system. Recognizing *jus cogens* norms as constitutional "fundamental rights" would reflect the natural law underpinnings to the U.S. Constitution, limit the rights to universally recognized and judicially manageable norms, and provide parity for individuals injured by U.S. officials.

[192] Majano v. United States, 469 F.3d 138 (D.C. Cir. 2006).

[193] *Id.* at 139.

tort exception to waiver in §2680.[194] The plaintiff challenged the certification, but the district court ruled, applying the expansive D.C. scope of employment law that the substitution was proper. The D.C. Circuit reversed the lower court and remanded the case for further proceedings.[195]

The *Majano* case thus shows that the perverse effect of the Westfall Act also affects citizen plaintiffs injured by garden-variety intentional torts. After the Westfall Act, if the Attorney General certifies that the defendant was acting within the scope of employment, the United States will be substituted and the case will be dismissed. The victim of an intentional tort by a government official can recover neither against the United States nor the individual official. As a result, federal officials may not face the full consequences of their actions when they commit intentional common law torts. A useful disincentive is thus removed.

The Westfall Act is additionally problematic as a general matter because it negates the federal interest in defining the scope of employment for federal officials. The Supreme Court has never held, either implicitly or explicitly, that state *respondeat superior* law must be used to determine the scope of employment of federal officials sued in their individual capacity. To the contrary, it has said on numerous occasions, that "[n]o subject could be one of more peculiarly federal concern [than absolute immunity of federal officials]."[196] As recently as 1995, in *Lamagno v. Gutierrez,* the Supreme Court clearly implied that the scope of employment of federal officials is a federal question. In reversing a Fourth Circuit Court of Appeals decision that an attorney general's certification was not judicially reviewable, the Court held that because a case under the Westfall Act " raises [a] question[n] of substantive federal law at the very outset,' it clearly arises under federal law, as that term is used in Article III [of the Constitution]."[197] Indeed,

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[194] *Id.* at 140.

[195] *Id.* at 139.

[196] Howard v. Lyons, 360 U.S. 593, 597 (1959).

[197] Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 435 (1995) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983)). The Court also noted that "[w]hether the employee was acting within the scope of his

the Westfall Act itself concedes the federal interest in defining scope of employment by providing for the opportunity for the Attorney General or his designate to certify that the employee was acting within the scope of his employment and for immediate removal to federal court upon certification. In the FTCA proper, this federal interest is structurally defined by the terms of §1346 and §2680 (as a limitation on liability), so use of *respondeat superior* in that context is less problematic.

Of course, the structure of the Westfall Act makes a general return to the status quo ante difficult in cases involving state common law torts. Once the immunity doctrine incorporates the FTCA and the FTCA becomes the exclusive remedy when an official is found to have acted within the scope of employment, it is hard to justify using different standards given the holding in *Williams* that state *respondeat superior* law applies in FTCA cases. The only way to "fix" this would be to turn back the clock and reinterpret §1346 so that the FTCA is not read to require the use of state *respondeat superior* law. The analysis then would involve a two-step process. The court would first use federal common law to determine whether the employee had acted within the scope of employment and, if so, then simply substitute the United States as defendant and analyze whether all the elements of the state tort had been met. This of course would run up against numerous Supreme Court holdings, beginning with *Williams*, holding that scope of employment under the FTCA is determined by state *respondeat superior* law. Unless *Williams* is limited to its facts (as involving military personnel in an unincorporated territory), courts would in general appear not to be at liberty to revert to fashioning a general federal common law in cases involving state tort law.

However, in human rights cases, the federal courts have in reality been making federal common law with respect to scope of employment. Jurisdiction in these cases is not predicated on diversity, which would generally (though not always) instruct federal courts to follow state law. In the cases discussed here, plaintiffs have invoked the federal question statute and the alien tort statute. As a general matter, the *Erie* doctrine[198] does not

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federal employment is a significant federal question – and the Westfall Act was designed to assure that the question could be aired in a federal forum." *Id.*

[198] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

strictly govern FTCA cases, because the FTCA is a hybrid jurisdictional statute that gives a federal forum to state law claims. These state law claims may nonetheless involve federal interests, and the scope of employment of federal officials is such a federal interest.[199] Federal courts' use of state *respondeat superior* law is the kind of borrowing contemplated by the Supreme Court in *Clearfield Trust Co. v. United States*.[200] Litigants in civil torture cases, for instance, have stipulated to the use of D.C. *respondeat superior* law and chose it as more favorable than Virginia law. The D.C. Circuit Court selectively follows state *respondeat superior* law, rejecting procedural aspects that it deems inapplicable. In contrast, the Supreme Court has held in *United States v. Neustadt* that the meaning of §2680 exceptions to the FTCA waiver must be determined by examining Congress' intent, not by consulting state law.[201] Whether the scope of employment of federal officials is broad enough to include torture should likewise be determined by examining Congress' intent, not by mechanically applying state law where it results in an aberrant outcome.

The original sponsor of the Westfall Act, Rep. Barney Frank of Massachusetts, has recently argued to the court of appeals that Congress never intended the Westfall Act to immunize officials accused of torture,[202] citing a sentence from the House report that civil torture litigants have also seized on, which provides that: "If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."[203] Is such

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[199] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

[200] Clearfield Trust Co. v. United States, 318 U.S. 744, 842 (1943) (noting that in creating federal common law, federal courts "have occasionally selected state law").

[201] United States v. Neustadt, 366 U.S. 696, 705-06 (1961).

[202] Brief of Amicus Curiae United States Representative Barney Frank in Support of Appellant Jennifer K. Harbury at 2, Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) (No. 06-5282).

[203] *Id.* at 4 (citing H.R. Rep. No. 100-700, at 5 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5949).

legislative history relevant? *In re Iraq* plaintiffs made the argument that the word "wrongful," as used in the Westfall Act, was ambiguous and that the court should look to the legislative history for evidence that Congress did not intend to immunize egregious wrongs,[204] but the court rejected that argument and refused to consider legislative history.[205] This may have been error. In fact, the Supreme Court has twice looked to the legislative history for guidance in interpreting "wrongful" in §1346.[206] Even though the specific question at issue in those cases was whether "wrongful" encompassed strict liability, the cases indicate that the meaning of "wrongful" in §1346 is not self-evident and since language of the Westfall Act tracks that of §1346, *in haec verba*,[207] it would not have been unjustifiable for

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[204] Plaintiffs' Consolidated Opposition to Defendant's Motions to Dismiss at 62-63, *In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007) (Nos. 06-145). The *In re Iraq* plaintiffs asked the court to consider the legislative history of the Westfall Act based on the fact that the word "wrongful" was ambiguous. They argued that in passing the Westfall Act Congress evinced an intent that the Westfall Act would not apply to acts as egregious as torture and cruel and inhuman treatment.

[205] *In re Iraq*, 479 F. Supp. 2d at 110-11.

[206] Dalehite v. United States, 346 U.S. 15 (1953); Laird v. Nelms, 406 U.S. 797, 799 (1972) ("It is at least theoretically possible to argue that since Dalehite in discussing the legislative history of the Act said that 'wrongful' acts could include some kind of trespass, and since courts imposed liability in some of the early blasting cases on the theory that the plaintiff's action sounded in trespass, liability could be imposed on the Government in this case on a theory of trespass which would be within the Act's waiver of immunity. We believe, however, that there is more than one reason for rejecting such an alternate basis of governmental liability here").

[207] *Compare* 28 U.S.C. § 2679(b)(1) (2000) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from *the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment* is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter . . .") (emphasis added) *with* 28 U.S.C. § 1346(b)(1) (2000) ("[D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by *the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,* under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place

a court to consult the legislative history of the Westfall Act to see whether Congress evinced any intention to immunize federal officials against torture claims. Of course, no such intention may be found.

B. Common Law Standard for Scope of Employment with Respect to International Law Claims

Federal common law should especially be used to determine scope of employment when the torts at issue are violations of *jus cogens* norms of international law. Use of state *respondeat superior* law is arguably part of the "law of the place" of the FTCA, which provides redress for state common-law tort violations. But international law is the law of nations, not the law of a particular state, so it makes no sense to arbitrarily apply the state *respondeat superior* law of the place where defendants happen to reside when the law they are alleged to have violated is not that state's law. The states have no interest in enforcing their *respondeat superior* law in cases where their citizens are not the injured parties and where their substantive law has not been violated.[208] Under such circumstances, state law is being used only as a heuristic, and it is a bad heuristic because state *respondeat superior* law was not devised with torture, or any other violation of *jus cogens* norms of international law, in mind.

Furthermore, as the Supreme Court has long held, foreign relations are *different*. In *Banco National de Cuba v. Sabbatino*, the Court stated that, as an issue "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community," foreign relations "must be treated exclusively as an

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where the act or omission occurred") (emphasis added).

[208] A state standard has some rational basis if the torts involved occurred in the states whose laws are being applied and if the torts are indeed "garden-variety" torts. Federal officials living and working in a particular state, especially over an extended period of time, ought to be subject to the same laws of the state residents they are working alongside. Even so, use of state law has the unequal effect of exposing federal officials to differential risks of liability based on the arbitrary difference of where an official happens to be living.

aspect of federal law."[209] In *Sabbatino*, the Court held that the *Erie* doctrine should not apply to matters involving foreign relations and summarized approvingly the work of Professor Philip C. Jessup who "cautioned that rules of international law should not be left to divergent and parochial state interpretations."[210] The use of state *respondeat superior* law to decide the immunity of federal officials for alleged violations of international law potentially produces the same inconsistencies as the *Erie* doctrine generally when applied to international law, since a narrow state *respondeat superior* law would produce a different result from D.C.'s liberal law. The *Sabbatino* holding would thus seem to preclude the use of state law with respect to international law claims.

The creation of federal common law to decide scope of employment when violations of international law, particularly of *jus cogens* norms, are at stake is also indicated because international law is a matter of federal law. The federal design of the United States means that states are not at liberty to make their own foreign policy or to establish their own human rights norms.[211] Judge Urbina in *Rasul* quoted the Supreme Court's warning in *Sosa v. Alvarez-Machain* to consider "the potential implications for the foreign relations of the United States" before recognizing implied causes of action under international law and to be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[212] The same considerations militate against the mechanical application of state law in determining immunity decisions that will affect whether the United States is meeting its obligations under international law. Moreover, use of state law when claims arise under international law is inconsistent with

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[209] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

[210] *Id.*

[211] *See* THE FEDERALIST NO. 80, at 535-36 (Alexander Hamilton) (J. Cooke ed., 1961) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (striking down Massachusetts state law regulating trade with Burma as interfering with foreign relations power entrusted to executive).

[212] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

the doctrine that "[w]hen federal law is the source of the plaintiffs' claim, there is a federal interest in defining the defenses to that claim, including the defense of immunity."[213]

Using federal common law to determine scope of employment with respect to international law claims is in keeping with the principle of interpretation that, where possible, statutes are to be interpreted consistently with international law.[214] Since Nuremberg, international law has required states to hold perpetrators accountable for human rights violations.[215] The United States is obligated under the CAT to provide the victim of torture with "redress" and "an enforceable right to fair and adequate compensation."[216] Even if this obligation is technically limited to territory under the jurisdiction of the United States, as it is under U.S. reservations to the treaty, it arguably requires the United States to waive its immunity from suit[217] or to craft an immunity doctrine allowing suits to go forward against individual officials.

Under the common law, plaintiffs would be able to make a compelling case that torture is not within the scope of employment, even if carried out with intent to benefit the master. Under a "functional" approach, courts would be obliged to take into account the manifest illegality of the acts and the egregiousness of the harms alleged in determining whether the particular governmental function involved needed protection from the harassment of litigation. They would have been free to

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[213] Ferri v. Ackerman, 444 U.S. 193, 198, n.13 (1979).

[214] The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). *See also* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164-65 (2004); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963).

[215] Final Report to the President from Supreme Court Justice Robert H. Jackson, U.S. Dep't St. Bull. Vol. XV, Nos. 366-391, at 771, 774 (1946).

[216] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, § 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[217] Suits against federal officials alone might meet this obligation, since torture would meet the constitutional exception to the Westfall Act if a claim were brought by a U.S. citizen or alien living in the United States.

decide, for example, that cabinet-level officials like former Secretary of Defense Donald Rumsfeld should be immune from common law tort litigation but not from litigation involving *jus cogens* norms of international law.

C. "General" *Respondeat Superior* Law

Even if courts do not return to the general common law of the *Barr* era, it is arguable that in passing the Westfall Act, Congress intended courts to devise a general *respondeat superior* law based loosely on the state law but not to apply state law mechanically if it yields a perverse result. From the legislative history of the Westfall Act, Congress may have intended courts to use state *respondeat superior* law as a guideline for devising its own common law rules. Representative Frank, like the torture litigants, noted that the House report listed eight factors from a leading treatise on agency to be used in determining scope of employment, as if the federal courts were to use the common law of *respondeat superior* merely as a heuristic in guiding their own determinations and not strictly apply state law.[218] As noted earlier, it is also clear that federal courts *do* feel that they are making their own law on scope of employment because they ignore state law where inconvenient to their policy aims.

D. Legislative Solutions

The argument outlined here in favor of common law to determine scope of employment, with the associated narrowing of scope of employment, constitutes a pragmatic approach to the obstacles presented by the interplay between the Westfall Act and the §2680 exceptions to the FTCA. Litigants raising international law claims against U.S. government officials should challenge the use of state *respondeat superior* law and appeal the issue if necessary, as the current regime abdicates to state law crucial determinations about the status of federal

[218] Brief of *Amicus Curiae* United States Representative Barney Frank in Support of Appellant Jennifer K. Harbury at 10-11, Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) (No. 06-5282) (referencing H.R. REP. NO. 100-700, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949 (citing LESTER JAYSON, HANDLING FEDERAL TORT CLAIMS § 216.01 (1986))).

officials. Though not objectionable in principle when such officials are not actually the defendants, as in FTCA cases against the United States, this abdication is deeply problematic when officials are sued in their individual capacity. The pragmatic approach outlined here makes the determination of federal officials' scope of employment a matter of federal law. In the absence of Congressional action, use of federal common law gives courts a way to hold officials liable if they are found to have committed acts that amount to torture, even when they have acted outside United States territory, and this approach might produce a better outcome for litigants.

Yet this solution is in some ways not ideal, as it has the effect of "privatizing" an act (torture) that requires state action and does not align the immunity doctrine with the elements of the torture offense. What would an ideal solution look like? It would be legislative and could take a number of different forms. One solution to prevent the Westfall Act from functioning as a bar to claims based on *jus cogens* norms of international law would be to include such norms among the enumerated exceptions to the Westfall Act.[219] Being narrowly tailored only to allow suits based on universally-recognized and accepted norms, such an exception would not open the floodgates to a spate of lawsuits founded on controversial or marginal norms. Yet by not specifically enumerating which norms are referenced, such an amendment leaves the law open to change, without need for further legislative emendation, based on the *Sosa* doctrine. Such an approach to changing the Westfall Act has the benefit of bringing the immunity law relative to U.S. officials in line with ATCA jurisprudence and the torture law with respect to foreign officials. U.S. officials would be liable for torture to the same extent as foreign officials would be liable under the ATCA and the TVPA.

A second legislative fix, and perhaps the simplest, would be to amend the TVPA to provide for an action against U.S. officials as well as foreign officials. Such an amendment would provide alien plaintiffs with a clear statutory right and a clear private

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[219] Such an amendment might read: "(2) [The exclusive remedy provision of the Westfall Act] does not extend or apply to a civil action against an employee of the Government--

...which is brought for a violation of a *jus cogens* norm of international law."

right of action. A TVPA that encompassed actions against U.S. officials would clearly fall within the statutory exception to the Westfall Act and once amended would prospectively withstand the various qualified immunity tests. But it would have the limitation of not including all possible *jus cogens* norms within its ambit.

Other legislative solutions would be to add an exception for international treaties, or remove the private right of action requirement from the statutory exception.[220] Both of these might sweep too broadly, but they could be narrowed on the basis of the private rights of action that might be found under particular treaties or statutes. Other means of narrowing the applicable treaties or statutes might be appropriate for Congress to consider.

It should be noted that the *respondeat superior* test of "intent to serve the master" (so long as the act at issue bears some resemblance to the act the employee was hired to perform) would not be as problematic as it is in cases involving violations of international human rights law if the United States had waived its sovereign immunity for such violations. It is because finding that an act has been committed in an official's "official" capacity means that the victim is left entirely without a remedy that the use of the *respondeat superior* standard is problematic. Therefore, ideally, when the offense at issue is torture, both the state and the official would remain liable. Waiver of sovereign immunity would also require Congressional action, which could be accomplished through an exception to the §2680 exceptions similar to that for intentional torts committed by law enforcement personnel. Since the United States has consented

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[220] The background assumption is that international treaties, even when self-executing, do not create private rights of action. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 907 cmt. a (1987) ("[I]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts"). Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary. *See, e.g.*, United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001); United States v. Jimenez-Nava, 243 F.3d 192, 195 (5th Cir. 2001); United States v. Li, 206 F.3d 56, 60-61 (1st Cir. 2000) (*en banc*); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); Canadian Transp. Co. v. U.S., 663 F.2d 1081, 1092 (D.C. Cir. 1980); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979).

to suit for intentional torts committed by law enforcement personnel when acting in the scope of employment, there is precedent for waiver of sovereign immunity when intentional torts are committed by federal officials acting officially.

Because rendering officials immune by shifting liability to the state eliminates any deterrent effect that the threat of liability might impose, for "functional" reasons the individual official should remain liable as well. As Justice Jackson noted long ago, war crimes are not committed by abstract entities. Recognizing state responsibility would eliminate the contradiction that, though state action (or "color of law") is a required element of the torture under international law, it has the effect of triggering immunity, since a suit against an official acting in an official capacity is the equivalent of a suit against the state itself.

Like the current scope of employment standard, the *Filartiga* fiction characterizing torture as a "private" act of an official acting out of personal motives also does not acknowledge the "state action" element of the torture offense. But this element reflects an important truth about what torture really is – a crime against an individual by the state or the state's representative. Torture has been outlawed by civilized nations because of the threat it poses to the rule of law. It would be anthropomorphizing to say that the state is "complicit" in torture, but state involvement plays an important role in making torture what it is. While some officials may indeed torture out of private sadistic motives, more typically torture occurs because the state's agents are drawn into the belief that the survival of the state depends on their engaging in torture, or that the rightness or goodness of their ends justifies any means. As in the case of the Bush Administration, the state itself, as an entity, may have over time developed such sophisticated rationales for engaging in torture, and have gone to collective lengths to "legitimate" torture, that it produces a fundamental distortion to lay responsibility purely at the feet of individual officials. Though such officials should not be rendered immune, or excused on the basis of obeying superior orders, neither should the collective legitimation be denied. Allowing the state to remain immune while individual officials are held liable permits the state to shift blame onto "bad apples" and remain insulated from the shaming effect that a liability determination would have in the eyes of the world. It also masks the extent to which

rehabilitation requires legal and political change. What happened in Guantanamo Bay and Abu Ghraib occurred after internal memoranda and executive orders approving "waterboarding" and other "enhanced interrogation techniques" were issued. These memoranda written, by John Yoo and Jay Bybee *inter alia*, were facilitated by the Senate's reservations attached to the CAT and the International Covenant for Civil and Political Rights.[221] Those reservations limited the reach of the treaties to U.S. territory, while President Bush's unilateral decision that the Geneva Conventions did not apply to the "war on terrorism," except selectively and as an act of grace, limited their scope. All of these collective legal acts contributed to the over-determined causality of torture in Guantanamo Bay, Abu Ghraib, and elsewhere.

VI. IS ELIMINATING IMMUNITY FOR FEDERAL OFFICIALS ALLEGED TO HAVE VIOLATED HUMAN RIGHTS NORMS GOOD POLICY?

A final consideration is the policy effect of allowing civil human rights litigation against U.S. officials to go forward. From the preceding sections, it should be clear that from the perspective of the present argument, it is a good idea. However, it is also worth spelling out why. In considering this question, it should be noted that the common law doctrine of immunity had already evolved standards to address the policy issues. These standards are a good starting place. Under the "functional" common law, outlined in *Mitchell v. Forsyth*, the Supreme Court described its main considerations in determining when a particular governmental function should be granted

[221] *See* Memorandum from Jay S. Bybee, Ass't Attorney General to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), http://washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf (regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 183 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) ("[F]rom the texts of [s]ection 2340 and [the CAT]" . . . it is obvious that "Congress intended [s]ection 2340's definition of torture to track the definition set forth in [the CAT], as elucidated by the United States' reservations, understandings, and declarations submitted as part of its ratification.").

immunity.[222] Though not legally controlling because dealing with constitutional torts, the *Mitchell v. Forsyth* test is analytically useful, laying out three factors to consider: 1) whether there is a common law basis for the immunity in question; 2) whether not granting immunity would unacceptably raise the risk of "vexatious" litigation; and 3) whether the officials in question are subject other checks that "help to prevent abuses of authority from going unredressed."[223]

A. The *Mitchell* Test Applied to Immunity from Torture.

1. Common law Tradition for Immunity.

The *Mitchell v. Forsyth* test considers the question of whether a grant of immunity has a root in common law. That the military recognizes the doctrine of command responsibility does not speak to the question of whether military personnel – and their civilian leadership – should be liable in damages to victims injured by illegal acts, not acts of legitimate warfare. In fact, civil liability for military officers who injure civilians in obeying illegal orders has some basis in common law. In the nineteenth century, the "general rule" was that "an inferior who executes an illegal order, however regular or proper it may appear on its face, is liable in damages to any person injured or aggrieved by the execution of the order."[224] Chief Justice John Marshall held at the turn of the Nineteenth Century: "A commander of a ship of war of the *United States*, in obeying instructions from the President of the *United States*, acts at his peril. If those instructions are not strictly warranted by law he is answerable in damages to any person injured by their execution."[225] As recently as 1992, the Eleventh Circuit Court of Appeals considered and rejected the argument that acts of war cannot be the basis of individual liability, noting: "There is no

[222] Mitchell v. Forsyth, 472 U.S. 511, 521 (1985).

[223] *Id.* at 521-22.

[224] THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW (1891).

[225] Little v. Barreme, 6 U.S. (2 Cranch) 170, 170 (1804).

exception for deliberately planned and heinous acts even during an armed conflict."[226] Of course, such suits are rare, and liability under international law for war crimes committed in the course of combatant activities falls on the state itself, not on individual officials or soldiers, so this factor does not particularly weigh in favor of waiving immunity.

2. Risk of Vexatious Litigation.

The second policy consideration raised by the *Mitchell v. Forsyth* test concerns the risk of vexatious litigation. The negative policy effects of permitting damage suits against military officials engaged in an active war was decisive for Judge Hogen in deciding against the claims of Afghan and Iraqi detainees:

> There is no getting around the fact that authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests, a prospect the Supreme Court found intolerable in *Eisentrager* . . .[227]

The civil claims brought by former GTMO detainees do not raise the identical concerns about interfering with active combat, but the conditions of their confinement were also apparently carried out in the strategic interest of the war on terrorism. There are two responses to the objection that torture litigation will be vexatious and interfere with the conduct of the war on terrorism.

First, even if the war on terrorism is a war, at issue here is not the tactical and strategic conduct of war but the treatment of prisoners in U.S. custody. The Supreme Court has already noted

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[226] Linder v. Portocarrero, 963 F.2d 332, 336 (1992). In *Linder*, plaintiffs' decedents sued individuals affiliated with the Nicaraguan anti-governmental organizations ("contras") that tortured and executed a U.S. citizen working with the government of Nicaragua. *Id.* at 333.

[227] *In re* Iraq and Afg. Detainees Litig., 479 F. Supp. 2d 85, 105 (D.D.C. 2007).

in *Hamdi v. Rumsfeld* that the courts have a role to play in reviewing the treatment of detainees in U.S. custody.[228] Indeed, the Court has taken every opportunity presented since September 11th to review executive action with respect to military detention.

The executive branch seems to consider the conduct of the war versus the treatment of detainees as a false distinction in the war on terrorism. Its zealous defense of its policies can only lead to the inference that it believes that it is necessary to torture in order to gain the intelligence necessary to conduct the war on terrorism. In response to this, it can be said that in every war there is intelligence that needs to be gained. In the era before satellites, intelligence about troop movements was dependent on human intelligence much as intelligence about clandestine organizations like Al Qaeda is today. Yet the U.S. military steadfastly rejected the use of torture in interrogation throughout its history until the present conflict. Consensus does not even exist within the executive branch that such policies are in fact efficacious.[229]

Second, this concern understates the practical difficulties that confront civil torture lawsuits. Except for GTMO, and then only under certain, strict conditions, lawyers do not have access to terrorist suspects held in off-shore detention facilities. Released detainees are often afraid of being re-incarcerated or of causing their still-incarcerated countrymen to be subjected to retribution. As in the *habeas* litigation, consolidation could streamline judicial decision-making on common issues of law or fact related to torture claims. The courts will not relish this role, as it will expose them to charges of activism on the part of supporters of the officials subjected to the trials of litigation. Where, however, the United States appears to have abandoned the rule of law on a systematic basis, the courts have an

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[228] Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like [habeas corpus].").

[229] Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

obligation to intercede. No matter how urgent an individual official believes his responsibility is – to prevent terrorism, to spread democracy – his acts cannot be done in utter contravention of the rule of law.[230] As the Supreme Court noted in *Mitchell*, "National security tasks . . . are carried out in secret; open conflict [i.e., litigation] and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go un[dis]covered than that fancied abuses will give rise to unfounded and burdensome litigation."[231] The present moment is one where actual abuses are going undiscovered.

3. Insufficient Checks to Prevent Abuses

The most serious of the policy considerations raised by the *Mitchell* test concerns the potential for abuse by government officials. In principle, the military and civilian defendants in civil torture litigation should be subject to sufficient checks to prevent abuses of authority. As noted above, U.S. criminal laws prohibit torture and cruel and inhuman treatment and military regulations, such as the Army's manual on human intelligence collector operations, recognize the doctrine of command responsibility.[232] However, at the present time, evidence suggests a breakdown in the system of checks and balances. In the specific context of the war on terrorism, the executive branch appears to have made an affirmative decision not to comply with international law. The publication of the infamous torture memoranda presents circumstantial evidence that high level cabinet members, if not the President himself, authorized torture. Criminal laws are nominally on the books but they are not being enforced, as the enforcement agency (the Department of Justice) is an executive agency under the authority of the

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[230] This was among the Congressional findings leading to the TVPA. *See* H.R. 102-367, at 3 ("A state that practices torture and summary execution is not one that adheres to the rule of law.").

[231] Mitchell v. Forsyth, 472 U.S. 511, 522 (1985).

[232] U.S. DEP'T OF THE ARMY, FM 2-22.3 (FM 34-52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5-14 (2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf ("Commanders have an affirmative duty [under Geneva Conventions] to ensure their subordinates are not mistreating detainees or their property.").

same executive head as the officials alleged to be perpetrating torture. The military discipline system has prosecuted only a handful of lower level soldiers for alleged abuses.

Of course, Congress has not specifically created a statutory right of action for victims of U.S. torture. It was not mere oversight that Congress did not make the TVPA applicable to U.S. officials. When the U.S. ratified the CAT, it opted out of the individual complaint mechanism, rejecting the notion that individual victims of torture by U.S. officials could file complaints to the enforcement committee of the CAT after exhausting domestic remedies.[233] (This reservation does not relieve the U.S. of its obligation to provide individual victims with an "enforceable right to fair and adequate compensation."[234]) In 2005, Congress passed the Detainee Treatment Act (DTA), which expressly prohibits "cruel, inhuman, or degrading treatment" of prisoners in U.S. custody abroad.[235] But the DTA provides no mechanism for individual enforcement of that right. To the contrary, it explicitly strips courts of any jurisdiction to hear actions based on that prohibition.[236] The Supreme Court held in July 2006 in *Hamdan v. Rumsfeld* that this provision was not retroactive.[237] However, the Military Commissions Act passed in September 2006 makes it retroactive.

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[233] Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17,486-01 (daily ed. Oct. 27, 1990) ("[C]ommunications [with the Committee Against Torture] shall be accepted and processed only if they come from a State Party which has made a similar declaration."). *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22, § 4(b), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[234] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, § 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[235] Detainee Treatment Act, Pub. L. No. 109-148, §1003, 119 Stat. 2680, 2739 (2005).

[236] The Graham-Kyl-Levin amendment to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e),(h), 119 Stat. 2742 (2005) amends the federal habeas statute found in 28 U.S.C. § 2241 (2000).

[237] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

Yet, though Congress has not created an enforceable cause of action for civil damages, it has criminalized torture and prohibited the cruel and inhuman treatment of detainees in U.S. custody. Under *Youngstown Sheet & Tube Co. v. Sawyer*, executive power is at its greatest when it acts with Congressional authorization and at its lowest when it acts contrary to Congress's expressed intent.[238] Civil litigation should not be the primary deterrent of torture, yet it is *a* deterrent. Though not as powerful as a jail sentence, a finding of liability would provide a measure of accountability. When the system of checks and balances is so broken that official torture is not being prosecuted by the criminal courts and not being effectively punished by the military courts-martial, civil litigation has a role to play in reestablishing the rule of law. The court for the Eastern District of New York recently stated: "That the case may call for an assessment of the President's actions during wartime is no reason for a court to abstain. Presidential powers are limited even in wartime."[239] Courts have a special role to play in maintaining the separation of powers. The Supreme Court in *Boumediene v. Bush* recently rejected the claim that only the President has the power to determine what is U.S. sovereign territory (and thus where the U.S. Constitution applies), saying that permitting such a unilateral determination would lead "to a regime in which Congress and the President, not this Court, say 'what the law is.'"[240]

The policy rationale underlying the *Barr* doctrine was to protect officials doing their duty from liability to individuals, especially from vexatious litigation, so that the higher public interest would be served by having those officials carry out their duties fearlessly and boldly.[241] If officials are engaged in actions

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[238] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 597, 634 (1952) (Jackson, J., concurring).

[239] *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 64 (E.D.N.Y. 2005).

[240] Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008)(quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).).

[241] *See* Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 566 F.2d 289, 293 (1977) ("The nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest.").

that undermine the rule of law, that policy rationale is negated. Of course, the officials who are alleged to have committed torture undoubtedly would argue, if such cases ever reached the merits, that they were acting with the public interest in mind. Perhaps an "emergency" or "necessity" defense might ultimately be made in their favor if objective good faith could be proved, but when the specific actions at issue are clearly and specifically prohibited by statute, treaty, regulations, and military codes, the presumption must be that the acts at issue are not within the scope of employment. The broad "intent to serve the master" test of the *respondeat superior* standard is justified where the policy goal of compensating victims is served by making the master liable *in addition to* the servant. But it has no place where its effect is to immunize a crime that is the very mark of barbarity.

B. Violating Non-Derogable Norms.

Finally, to add to the *Mitchell v. Forsyth* criteria, it cannot be good policy to violate a norm that admits of no derogation. A *jus cogens* norm reflects the accreted wisdom of civilized nation. It is binding whether or not a state consents to it. It is binding whether or not it is reflected in municipal law. Absolute immunity should not be a shield for criminal acts that the community of nations has universally condemned.

CONCLUSION

Used to decide cases involving misconduct by government officials occurring outside the territorial United States, the Westfall Act is a mess. It takes a policy designed to maximize recovery for victims and turns it on its head, transforming *respondeat superior* into a device for denying recovery to victims of the most heinous violations of human dignity and the most grievous physical and mental injuries. Courts considering civil torture litigation have mechanically applied the Westfall Act without giving serious consideration to the problems created by using state law in cases alleging violations of international human rights norms. Because of the Westfall Act, U.S. courts hold U.S. officials to different, and lower, standards than foreign officials for violations of international *jus cogens* norms. At present, U.S. courts frequently, if not routinely, hold foreign

officials civilly liable for torture while finding U.S. officials absolutely immune for the same or similar acts, even when the U.S. officials have not denied that the alleged acts took place or if they did take place, that they constitute torture.

Because of the perverse utilization of state *respondeat superior* law to decide scope of employment even when the allegations against U.S. officials involve human rights norms, the fact that the torture is alleged to be *official* becomes the basis for the immunity, rather than a material element of the tort. Under existing law, the acts alleged would have to be the expression of the private sado-masochistic desires of U.S. officials in order to be found outside the scope of employment. But this is wrongheaded. Torture is by its nature *official*. The reason why torture is universally abhorred – why the torturer is the enemy of all mankind – is that torture threatens the principle of law itself. Official torture does not break a particular law; it breaks down the rule of law, replacing a government of laws with a government of men. As one military intelligence officer in Guantanamo Bay allegedly told his captive: "You are in a place where there is no law – we are the law."[242] That is the essence of torture's threat.

This Article has argued that, in the absence of Congressional action to amend the Westfall Act, courts should return to using federal common law to determine whether the particular act alleged to have caused injury was committed within the scope of employment. This was the standard used before the common law absolute immunity doctrine was codified in the Westfall Act, and it remains the preferable approach when the causes of action at issue are based on international law. A return to the use of federal common law to determine scope of employment, especially where international law claims are alleged, would uphold the federal interest in determining the status of federal officials, would enable federal courts to establish a consistent approach to an area of doctrine fundamentally affecting foreign relations, and would interpret the Westfall Act so that it is not inconsistent with international law. Congressional action in the area of immunity for federal officials is sorely needed, but in the

[242] CENTER FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY, CUBA 2 (2006), *available at* http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

absence of such action federal courts can avoid the gravest problems by making federal common law.