Performing imperious legal style: *Saleh v. Titan Corp et al.* and private military contractor accountability

Tim Barouch

Introduction

In March 2003, the Iraq War began with an assault on Baghdad. The United States-led coalition assembled quickly on the heels of the 9/11 attacks, made possible in part by the broad military authority Congress delegated to President George W. Bush. The composite case for the invasion in the United States included claims that Iraq was actively developing weapons of mass destruction, that Iraq was cooperating with al-Qaeda, and that Iraq was a dictatorship that should be overthrown. The war produced worldwide opposition based on the speed with which the United States built the case, the seeming cavalier attitude that the coalition had toward human life (embodied in the Shock and Awe campaign and the conversion of 'most wanted Iraqis' into a deck of playing cards), and the suspicion of ulterior motives such as the establishment of Western power projection and easier access to oil. In short, it appeared that the United States was (charitably) taking indiscriminate vengeance or (uncharitably) exercising its imperial ambitions.

One socially significant dimension of the war was the conspicuous presence of military contractors. These corporations took on a large role in the fighting, providing security services for troops, government officials, and prisoners. Their presence amplified ongoing concerns about democratic transparency and accountability in the war effort itself. As P.W. Singer observed, these entities "operate as global businesses … in institutionally weak areas … unwilling or unable to enforce [their] own laws…. [They] have the ability to move across borders or transform themselves, whenever and wherever they choose."[1] All of these factors contribute to a "general vacuum in law".[2] The question was particularly important for the Iraq War, whose violence began with traditional legislative deliberative mechanisms perverted by the trauma of 9/11 and exploited by ideological opportunists.

Critics saw the Iraq War as a war of empire. Michael Klare wrote at the time of the invasion of the "pursuit of oil and the preservation of America's status as the paramount world power".[3] Prominent conservative pundits made the case for American empire at the time,[4] and much academic reflection on the war described it in imperial terms.[5] The role of private military contractors in an imperial project

[1] P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca and London: Cornell University Press, 2008), p. 239.

[2] *Ibid*.

[3] Michael T. Klare, "For Oil and Empire? Rethinking War with Iraq", *Current History*, March 2003, pp. 129-135 at p. 132.

[4] See, for example, Max Boot, "The Case for American Empire", *The Weekly Standard*, 15 October 2001 (arguing for war to rid Iraq of weapons of mass destruction). Retrieved from: https://www.weeklystandard.com/max-boot/the-case-for-american-empire [Accessed 15 October 2019].

[5] For arguments concerning the Iraq war and American power projection through military bases, see Tom Engelhardt, "Iraq as a Pentagon Construction Site", in Catherine Lutz and Cynthia Enloe (eds.), *The Bases of Empire: The Global Struggle against U. S. Military Posts*, (New York: NYU Press, 2009), pp.

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created a powerful new wrinkle: "a combination of American economic and political-military unilateralism … that twins practices of empire with those of neoliberalism."[6] Private military contractors "operat[ing] outside national and international law … can unleash global instability or global crisis."[7]

Imperial Excess: Torture at Abu Ghraib

Baghdad fell in April 2003 and then-President George W. Bush (in)famously declared the end of major combat operations in May 2003. That declaration proved hollow, and instead marked the start of a decade of intense sectarian violence and instability. Immediately after the fall of Baghdad, the United States converted Abu Ghraib – a brutal prison operated by the Hussein regime – into a military detention facility, which housed a mix of civilians suspected of crimes and supposedly "'high value' leaders of the insurgency".[8] The Army appointed General Janis Karpinski to lead Abu Ghraib operations. Although she had no previous experience governing a prison system, General Karpinski was "in charge of three large jails, eight battalions, and thirty-four hundred Army reservists, most of whom … had no training in handling prisoners."[9]

General Karpinski was suspended a month after her appointment amidst an Army investigation into her governance of the prison. The ensuing report found significant evidence of "sadistic, blatant, and wanton criminal abuse" of inmates.[10] The incidents included: breaking chemical lights and pouring phosphoric liquid on detainees, pouring cold water on them, beating them with broom handles, and sodomising at least one, among other instances of abuse. The Taguba report referenced "detailed witness statements" and "extremely graphic photographic evidence" documenting the charges.[11] Although the report was intended to be secret, both the report and the photos were placed into wide circulation. The photos were aired by *60 Minutes 2* on 28 April 2004 and *The New Yorker* published Seymour Hersh's "Torture at Abu Ghraib" a few days later. The photos depicted "leering G.I.s taunting naked Iraqi prisoners who are forced to assume humiliating poses"[12] and Hersh's piece quoted liberally from the Taguba Report, which *The New Yorker* had obtained.[13]

The resulting outcry set off a series of institutional responses, including public condemnation, testimony and reform. Many of the perpetrators of the abuse and torture were held criminally responsible as individuals and were dishonourably

131-144. Saba Mahmood examined neocolonial justifications for intervention (in Iraq and elsewhere) to liberate indigenous women from patriarchal cultures in "Feminism, Democracy, and Empire: Islam and the War on Terror", in Hanna Herzog and Anne Braude (eds.), *Gendering Religion and Politics: Untangling Modernities*, (New York: Palgrave MacMillan, 2009), pp. 193-215. See also Benjamin Barber, *Fear's Empire: War, Terrorism, and Democracy*, (New York: W. W. Norton, 2004).

[6] Jan Nederveen Pieterse, "Neoliberal Empire", *Theory, Culture & Society*, 21(3), 2004, pp. 119-140, p. 123.

[7] *Ibid*. 137.

[8] Seymour Hersh, "Torture at Abu Ghraib", *The New Yorker*, 10 May 2004. Retrieved from: https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib [Accessed 15 October 2019].

[9] *Ibid*.

[10] Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Report"), p. 16. Retrieved from: https://fas.org/irp/agency/dod/taguba.pdf [Accessed 15 October 2019].

[11] Taguba Report, p. 16.

[12] Hersh, "Torture at Abu Ghraib".

[13] *Ibid* (quoting the Taguba Report).

discharged. But there was still the matter of the victims of the abuse and torture. Much of the activity of the prison involved functions fulfilled by private contractors. In what ways were they accountable? Were they subject to the same legal liabilities that typically attached to private companies? Or should they have been classed as soldiers in military combat? If there were different legal authorities that pointed to different answers, which should prevail, and why?

The Privatisation of War and Public Wrongs: *Saleh v. Titan Corp et al.*

The atrocities that occurred at Abu Ghraib during the Iraq War drew attention to the horrible effects of Western intervention. The use of private companies to support the coalition forces raised significant problems of public accountability and transparency for these organisations that nevertheless executed state-led functions. The legal controversy surrounding contractor liability for detainee abuses at Abu Ghraib highlights crucial elements of Western legal style in the era of twenty-first century empire.

This controversy came to a head in *Saleh, et al. v. Titan Corp*. Some of the victims of Abu Ghraib sued CACI, Inc., and Titan Corporation, two of the private military contractors that had served the US military prison at Abu Ghraib. CACI, Inc. had provided interrogation services while Titan Corporation provided translation.[14] Two groups of plaintiffs representing detainees and their family members brought a lawsuit alleging that they (or their family members) were abused by employees of CACI or Titan at Abu Ghraib. Their complaints alleged that they were "beaten, electrocuted, raped, subjected to attacks by dogs".[15] The majority DC Court of Appeals opinion noted that these claims, which amounted to torture and war crimes, were "used sporadically" at oral argument, the plaintiffs' briefs were "in virtually all instances limited to claims of 'abuse' or 'harm'", and that the Court was "entitled … to take the plaintiffs' cases as they present them to us".[16] At the outset of the litigation, the plaintiffs had made many claims under various United States and international laws. By the time the litigation reached the DC Circuit Court of Appeals, the claims that were left were state tort claims (assault and battery, wrongful death/survival, the intentional infliction of emotional distress, and negligence) and a claim under the Alien Tort Statute, which grants to federal district courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[17]

CACI and Titan had argued that federal law pre-empted the state tort claims, and that the plaintiffs' allegations under the Alien Tort Statute did not meet the "violation of the law of nations" language in the statute. The federal pre-emption doctrine provides that the federal government can displace a state law in favour of a federal law or regulation when there is a conflict between the state and federal law. Derived from the Supremacy Clause of the Constitution, it has been implicated in a variety of contexts, including immigration,[18] trade secret regulation, oil and gas

[14] The US military could not provide sufficient numbers of skilled interrogators and translators for these tasks.
[15] *Saleh, et al. v. Titan Corp*. 580 F.3d 1, 17 (D. C. Cir. 2009) (Garland, J. dissenting).
[16] *Saleh*, 580 F.3d, p. 3.
[17] 28 U.S.C. Section 1350.
[18] Karl Manheim, "State Immigration Laws and Federal Supremacy", *Hastings Constitutional Law Quarterly*, 22(4), 1994, pp. 939-1018.

pipelines,[19] and the medical use of marijuana.[20] In *Saleh*, CACI and Titan argued that their actions at Abu Ghraib were legal under superior federal law, because they were undertaken in conjunction with the military operations in Iraq (and subject to the military's chain of command).

The district (trial) court decided that the pre-emption defence applied "only where contract employees are 'under the direct command and *exclusive* operational control of the military chain of command'".[21] It granted summary judgment[22] for Titan Corporation because Titan's employees were "'fully integrated into [their] military units … essentially functioning 'as soldiers in all but name'".[23] But it allowed the plaintiffs to proceed against CACI, reasoning that CACI had "retained the power to give 'advice and feedback' to its employees and because interrogators were instructed to report abuses up both the company and military chains of command" (hence, not "exclusive").[24]

The DC Circuit Court of Appeals affirmed this result concerning Titan and reversed it concerning CACI, concluding that the plaintiffs' claims against both contractors were pre-empted by federal law. It decided that CACI's "advice and feedback" to its employees did not "detract meaningfully from the military's operational control". It argued that a prior Supreme Court decision, *Boyle v. United Technologies Corp.*,[25] required this result, as well as "other … precedents in the national security and foreign policy field".[26] The Court also dismissed the plaintiffs' claims against Titan under the Alien Tort Statute on grounds that judges should be extremely cautious in recognising claims for recovery based on violations of international norms, and the allegations here did not suffice.

Saleh v. Titan Corp., which decided that these contractors were protected from legal liability because such laws conflicted with contrary federal mandates, represents a significant expression of legal style that paved the way for imperial expansion in its current form. Its legal result justified Western constitutional forms and practices when confronted with alternative legal obligations. Close analysis of its techniques reveals that legal style emerges from a constitutive tension in American legal structure: judicial decision-making is presumptively illegitimate in a democracy, and so must therefore authorise itself with recourse to democratic appeals.

The majority opinion in *Saleh* accomplished this with three moves. First, it marginalised dissenting views as out of step with consensus. Second, it grounded its analysis in democratic policy making in order to reframe the legal question in a light favourable to Western legal practices and norms. Third, it highlighted its own institutional limitations to legitimate judicial inaction. Taken together, these tactics produced an imperious result. It sided with Western legal form in the face of

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[19] *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947).
[20] Robert A. Mikos, "On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime", *Vanderbilt Law Review*, 62(5), 2009, pp. 1419-1482.
[21] *Saleh*, 580 F.3d, p. 4 (emphasis added) *quoting Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007).
[22] Summary judgment is a procedural technique used to dispose of cases prior to trial. The rationale is to spare the burden on courts and the parties of time-intensive information discovery, issue-briefing, and eventual trial. The general standard that a party must satisfy is that the opposing party's alleged facts, even if proved true, would not entitle that party to legal recovery.
[23] *Saleh*, 580 F.3d, p. 4, quoting *Ibrahim v. Titan Corp*, 556 F. Supp. 2d 1, pp. 10 and 3 (D.D.C 2007).
[24] *Ibid.,* quoting *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d, p. 3.
[25] 487 U.S. 500 (1988).
[26] *Saleh*, 580 F.3d, p. 6.

potentially resistant traditions. Its attitude created (legal) threats and conquered them with a mode of reasoning that posed its resolution as the only viable option.

Imperial Discursive Form: The Role of Legal Style

The academic importance of the question posed by *Saleh* involves the role of legal style in justifying the advance of Western empire. Scholarship on empire traditionally has been conceived as the conquest of people for the express purpose of governing them from afar. Empire as a topical organisation of Western liberal regimes in the nineteenth century had significance both at the level of political theory and in public political discussions. Arguments in the British context were made in favour of empire to civilise those subject to rule, as well as those advocating for the benefits of empire to the home polity for those exercising the power as governing authorities.[27] Scholars have recently extended the assessment of empire as the export of constitutional forms and practices. Law is a vital site as the execution of constitutional form, which James Tully has argued "has a degree of separation … from the activities of those who are subject to it and has the compliance capacity to structure or even constitute the field of recognition and interaction of the people subject to it."[28] Western constitutional form serves imperial aims with its "legitimising metanarratives" that form the horizon of expectations for subjects of constitutional democracies, supporting the *telos* of the mission to civilise inferior people as a "universal and cosmopolitan endpoint for one and all".[29]

This essay understands the study of style as "a coherent repertoire of rhetorical conventions depending on aesthetic reactions for political effect".[30] Because styles are bound by time and culture,[31] they are reinvented, extinguished and revived across time. Imperial aims rely on recurring appeals, which embody a particular character and serve specific functions. Scholars have assessed the role of style in the advance of empire, specifying the relationship between style and empire as the mutual entailment of conquest and public democratic ends.[32] In these cases, "public culture becomes distorted by [persuasive] appeals"[33] to expand domestic influence across the globe. These ambitions stifle public criticism in a variety of ways. The persuasive appeals absolve publics of moral responsibility by making choice appear as compulsion, blur the distinction between image and reality by framing imperial projects as spectacular, and seduce both perpetrators and local collaborators by draping domination in the garb of affection.[34] These discursive acts further imperial aims even when Western powers are making amends for empire's past excess and abuse. For these reasons,

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[27] Duncan Bell has directed attention to the history of empire as the historical expression of ideas in "Republican Imperialism: J.A. Froude and the Virtue of Empire", *History of Political Thought*, 30(1), 2009, pp. 166-191.

[28] James Tully, "Modern Constitutional Democracy and Imperialism", *Osgoode Hall Law Journal*, 46, 2008, pp. 461-493, p. 466.

[29] *Ibid.* 479.

[30] Robert Hariman, *Political Style: The Artistry of Power*, (Chicago: University of Chicago Press, 1995), p. 4.

[31] *Ibid.* 96.

[32] Robert Hariman, "Three Tropes of Empire: Necessity, Spectacle, Affection", *Javnost: The Public*, 12(4), 2005, pp. 11-26. Donovan Conley and William O. Sass, "*Occultatio*: The Bush Administration's Rhetorical War", *Western Journal of Communication*, 74(4), 2010, pp. 329-350.

[33] Hariman, "Three Tropes", p. 12.

[34] *Ibid*.

ritual acts still retain ambivalence about these abuses and "recycle paternalistic and hierarchical discourses" towards colonised peoples.[35] Liberal polities can "bolster … their liberal credentials" by disavowing past violence while simultaneously pointing to heroic intent.[36]

When specifying the importance of legal style, it is important to understand the level of remove at which legal discourse operates. In explicit public appeals in favour of empire, the discourse of law can obfuscate, mystifying a public by "betray[ing] the aims of democratic communication – precision, transparency, and accountability".[37] Leaders have argued to their publics by invoking the broad authority of the law in the positivist sense of what law permits (or commands) in favour of preferred imperial policies. But discursive forms internal to legal institutions operate in a more subversive manner, often enough justifying these policies without explicitly acknowledging the imperial objectives. Like apology, legal style animates discursive form by shaping a horizon of expectations, and making legal results appear consonant with a liberal constitutional tradition.

Reading Imperial Law as a Genre of Liberal Constitutionalism

One particularly significant legal form is the judicial opinion, which displays the hallmarks of legal style by authorising itself through argumentative manoeuvres. The judicial opinion is a generic response to periodic irresolvable conflicts that threaten democratic social order. It responds strategically to these conflicts by provisionally resolving the tensions implicit for a democracy that delegates conflict resolution to unaccountable judges. Judges claim their authority through performance. They justify their decisions by manipulating the repertoire of familiar discursive forms, creating an imagined community subject to the decision's force. "The most important message is the one the judge performs, not the one [the judge] states."[38] The judicial opinion produces democratic legitimacy as an effect of this performance. Three structural tensions bear mention for their role in Western constitutional democracy.

First, legal style is the product of a tension between hierarchical expertise and equal decision-making power. On the one hand, judicial opinions can be productively viewed as a form of technical expertise.[39] Because lawsuits represent democratic failure in the sense that two parties were incapable of resolving a dispute (with its attendant political and economic implications), the parties litigate the dispute in a forum in which they acknowledge its legitimacy by virtue of their participation. These decisions by legal experts make reference to a host of obscure definitions, rules of evidence and appeal, doctrines, institutional precedents and statutory histories. Their competent application requires a facility with their timing, relevance and appropriateness to the legal question under consideration. They are less accessible to average citizens, and their language tends toward the opaque.

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[35] Tom Bentley, "The Sorrow of Empire: Rituals of Legitimation and the Performative Contradictions of Liberalism", *Review of International Studies*, 41, 2015, pp. 623-645, p. 625.
[36] *Ibid.* 634.
[37] Conley and Saas, "*Occultatio:* The Bush Administration's Rhetorical War", p. 331.
[38] James Boyd White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life", *Michigan Law Review*, 82, 1984, pp. 1669-1699. This essay was adapted from White's book, *Heracles' Bow: Essays in the Rhetoric and Poetics of the Law*, (Madison: University of Wisconsin Press, 1985).
[39] G. Thomas Goodnight, "The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation", *Argumentation and Advocacy*, 48, 2012, pp. 198-210.

This posture is balanced by the presence of democratic tropes in Western legal discourse. Equality is prized in the law. Its categories apply to all who fit them. Norms of legal argument ensure equal opportunities to present evidence. Interpretive arguments refer to shared traditions and histories. There is an avowed preference for democratic process, and judges make decisions by noting that they will lead to democratic outcomes.[40] When injustice occurs, judges frequently observe that it is not their place to stand in for the people, and they often invite the people to address the supposed injustice directly through more representative institutions (such as legislation).[41] Taken together, these tropes help legitimate legal decisions, which themselves are subject to debate, discussion, and reinterpretation for the future.

Second, legal style makes use of a tension between procedural certitude and judicial reluctance to intervene. Opinions perform a conviction about the singular correctness of their chosen approach. Procedure is associated with confidence in the legal result. To perform sound legal judgment properly means to follow the proper analytical steps, giving judicial opinions a quasi-logical character.[42] Missteps of procedure are a mark of inexperience. Judicial opinions deploy generic elements consonant with this procedural faith, suppressing the possibility of contingency, offering their distinctive solution to the conflict as the one-and-only possible outcome.[43] Interpretive disagreement is articulated as grievous error, which cultivates a discourse of plural opinions with little room for persuasion.

This methodological certainty is tempered by the display of "passive virtues" that creates the appearance of judicial restraint.[44] In the American case, federal judges

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[40] Canonical examples of American constitutional law illustrate the point. In *Brown v. Board of Education* 347 U.S. 483, 493 (1954), the constitutional injury of racially segregated education laws (that were enacted by legislative majorities) was framed partially in terms of the "importance of education to our democratic society … the very foundation of good citizenship". An example from the other side of the ideological ledger proves the point. When the Supreme Court ordered the end of the recount in the 2000 Presidential election, it framed its intervention as a necessity compelled from outside circumstances: "Members of this Court … [admire] … the Constitution's design to leave the selection of the President to the people … When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush v. Gore*, 531 U.S. 98, 111 (2000).

[41] Justice Felix Frankfurter was one of the most well-known proponents of this kind of judicial restraint. In his dissent in *West Virginia v. Barnette* 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting), (the canonical free speech case that struck down compulsory recitation of the Pledge of Allegiance in schools), he observed that "the real question is, who is to make such accommodations, the courts or the legislature? This is no dry, technical matter. It cuts deep into one's conception of the democratic process …. A court can only strike down …. It cannot modify or qualify, it cannot make exceptions to a general requirement." Recently appointed Associate Justice Neil Gorsuch channelled this stylistic tradition in *Henson v. Santander Consumer USA, Inc.* 582 U.S. 11 (2017) (which considered the meaning of the term "debt collector" for consumer protection purposes) when he wrote that "the proper role of the judiciary … is to apply, not amend the work of the people's Representatives".

[42] See, for example, Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (South Bend: Notre Dame Press, 1973). Perelman and Olbrechts-Tyteca employ the term "quasi-logical" to refer to arguments that generate persuasive force by taking on the appearance of formal validity. Here the point is that judicial opinions appear as exercises in deduction, such that only one clear answer to a legal dispute suggests itself. I am arguing that such styles also conceal interpretive choices that have political consequences.

[43] Robert Ferguson has marked this tendency in "The Judicial Opinion as Literary Genre", *Yale Journal of Law & the* Humanities, 2(1), 1990, pp. 201-220.

[44] Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence", *Yale Law Journal*, 94(7), 1985, pp. 1567-1616.

are constrained by a series of doctrines that limit the types of conflicts that can be decided. Issues are not "justiciable controversies" if they involve political questions, if parties have not suffered a legally cognisable injury, or if a party has brought an issue before the court too early to properly decide. In addition to these avoidance doctrines, judges argue from a position of institutional limits. Judges who disagree with a colleague will often express their objection in terms of a judge's lack of professional discipline, such as rendering an opinion based on personal belief rather than textual application. Such restraint is often imposed because of an express acknowledgment of the limits of legal institutions. Law cannot do policy, it is adversarial and competitive, it is costly, and it is a place of last resort. Each of these rationales is used to justify judicial non-involvement. Their presence reassures Western constitutional democratic subjects who are wary of being bound by unelected judges, whose interpretive decisions would alter presumptively representative statutes.

In *Saleh*, the District of Columbia Court of Appeals activated these tropes in the service of American empire. The following section demonstrates that the majority opinion justified its denial of justice to the Abu Ghraib victims by producing democracy as an effect of its legal reasoning. In justifying its refusal to intervene, the *Saleh* majority posed the legal alternative as a disruption to the presumptively valid status quo. This performance was doubly ironic in two senses. It applied this reasoning to private military contractors whose operations evade traditional democratic institutions. It also displayed an interpretive attitude that was itself imperious because it refused to acknowledge its own limits and raised the possibility of excess in its application.

Judicial Style: Legitimating Injustice as Democratic Choice

The *Saleh* decision provides a fitting example of legal style's effects in an age marked by interminable wars and America's desire to expand its influence. The majority opinion used strategies of marginalisation and certainty to justify its holding to deny relief for the plaintiffs. These strategies permitted the majority to reframe the core legal question – whether private military contractors would be immune from the plaintiffs' suit – as a potential threat to democratic political process. It then assumed the position of institutional humility to amplify the threat, which was extended to deny any role for transnational influence in American law.

First, the majority framed possible alternative outcomes as marginal, out of step with accepted expertise. Ideologically, the tactic reconstituted the institutional norm of respect for prior authority and hierarchy. The dissent was "not just dissenting from [the majority], he [wa]s quarreling with *Boyle* where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors."[45] The dissenting view was a marginal opinion because it misunderstood the meaning of the relevant governing Supreme Court case. It was to be treated with scepticism because it knew neither the law nor the norm of respecting precedent. This approach told a half-truth: *Boyle* decided that a private contractor could use the FTCA for a pre-emption defence. But that was not the *Saleh* dissent's point. Judge Garland had argued that according to *Boyle*, the private military contractor here faced no apparent conflict

[45] *Saleh*, 580 F.3d, p. 6.

of legal obligations. Nothing in the FTCA's text conflicted with state tort law for private military contractors.

According to Judge Garland's dissenting view, *Boyle* clearly limited the use of the pre-emption defence to instances where the state legal standard obligated the contractor to a course of action that would force it to breach its military contract. The issue in *Boyle* was a state standard about helicopter escape hatches. The *Boyle* plaintiff argued that state law required a particular type of hatch, and the defendant's contract with the government specifically required a different hatch.[46] The conflict was born of the impossibility of complying with both legal obligations. But what conflict did the majority assert here between the defendants' obligations to interrogate and translate for the military and their obligation not to abuse and torture them? It resided in the more abstract extension of tort onto the battlefield.

Clarity of legal result appeals to subjects in the Western democratic tradition because it helps predict the likelihood of state force as a consequence of private action. Here, the majority invoked clarity and authority on the basis of a critique that dissenting views were unacceptable departures from institutional norms. Invoking an idiom of certainty to substantiate this conclusion, the majority in *Saleh* declared that a "conflict" could derive from conflicting ends instead of specific legal commitments. The opinion turned away from specialised legal techniques of interpretation to justify this course. It used democratic tropes of shared democratic expression to fortify the case for military deference. Where the dissent looked to the text of the statute and the Supreme Court's prior interpretation to find that defendants had no conflicting obligations, the *Saleh* majority moved to a higher level of abstraction. It speculated (but never explicitly decided) that the defendants' conduct constituted "combat activities" and then turned to the rationale for their exemption in the federal statute.

This tactic allowed the majority to shift its interpretive focus from the technical application of statutory terms to the more public act of statutory creation. The choice permitted the Court to evade the core argument of the dissent. Instead, it highlighted the publicly shared motivation for the statute's exemption for combat activities. Mediating shared traditions permitted an argument from essential nature in support of the opinion. The legislative history – deliberations and declarations of statutory intent – were "singularly barren" but it was "plain enough that Congress sought to exempt combatant activities" because Congress thought that they should be "by their very nature … free from the hindrance of a possible damage suit".[47] Because the purpose of the statute was to free military action from the risk of tort liability, the opinion here should vindicate that essential purpose.

The strategy named both the source and content of democratic unity, reconstituting American democratic traditions as a way to avoid confronting their ugly excess. This perspective protects a vision of democracy as representative social contract. According to this vision, democracy knows what it is because it is bound by agreements to legislate democratically. This posture still raises a background question: if democratic government is legitimated through consent to legislation, why would the Court not interpret statutes by overlapping sovereigns more narrowly, so as to grant each sovereign legitimacy? The *Saleh* majority's response was to pivot to a strategy of institutional (in)competence.

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[46] *Ibid.* 21.

[47] *Saleh*, 580 F.3d, p. 7, citing *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir. 1948).

Converting inaction into a virtue, the *Saleh* Court shifted the operative legal question. These were, in the majority's eyes, questions of appropriate restraint in war, and they did not suit juridical methods and vocabularies. Once again, the opinion resorted to democratic tropes in order to assuage sceptics concerned about whether it was clearing the way for an empire unhinged:

> "To be sure, to say that tort duties of reasonable care do not apply on the battlefield is not to say that soldiers are not under any legal restraint. Warmaking is subject to numerous proscriptions under federal law and the laws of war. Yet, it is clear that all of the traditional rationales for *tort* law – deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule."[48]

Legal abdication here does not mean limitless war, though the opinion does not expand on the various laws that would check the kinds of gross abuse at Abu Ghraib.

The opinion framed legal process as an unpredictable force that makes unjust decisions about cases shorn for their contexts. The opinion adorned the original question with uncertain and vague legal terms – "tort duties of reasonable care"[49] implies an expansive, subjective and perhaps limitless inquiry. It is difficult to conjure a comprehensive list of one's legal duties. The mere suggestion might evoke anxiety and apprehension. Tort duties create legal relationships that punish the mentalities and motivations that are necessary for survival in war. A series of metonymic substitutions create the appearance that these lawsuits pose a grave threat to democratic action. First, the opinion substitutes "policy" for statute in order to cultivate a sense of threat to the military:

> "The policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield …. And the policies … are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military."[50]

The culmination of this strategy was to convert the contractors and the military into potential victims and the plaintiffs' quest for justice as a destructive force. Instead of being concerned about the victims of CACI Inc. and Titan, the opinion worried that "military personnel [might be] haled into lengthy and distracting court or deposition proceedings".[51] These proceedings could "devolve into an exercise in finger-pointing between the defendant contractor and the military…. [The suits] will surely hamper military flexibility and cost-effectiveness."[52] What began as a question of potential liability for the contractors turned into a concern to limit legal conflicts between contractors and the government.

The result was a perversion of the role of democratic institutions. "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only

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[48] *Ibid*., citing *Koohi v. U.S.*, 976 F.2d at 1334-35 (9th Cir. 1992).
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*. 8.
[52] *Ibid*.

broad – it is obvious."[53] Here, the Court was imagining the consequences of a lack of clarity and unified rule: "The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making."[54] The *Saleh* majority represented institutional practices designed to seek the truth and provide public accountability as a mass of conflict and confusion that could threaten unified and democratically supported military action.

The *Saleh* majority's passivity extended to the last of the plaintiffs' claims – the abuse and torture claims against Titan Corp. under the Alien Tort Statute. Could plaintiffs recover for violation of international norms against torture? Again, the *Saleh* majority rejected this explicitly transnational claim based on strategies of restraint and institutional limitations. Continuing the strategy of converting plaintiffs' claims into a threat, it said that they were "stunningly broad" and it took the plaintiffs' most tenuous claim – that there was an international consensus against "abuse" – to comment that their legal theory was "an untenable, even absurd, articulation of a supposed consensus of international law".[55] Although the majority admitted some ambiguity concerning the torture allegations, it once again punted to more representative democratic bodies for that question. Congress, not the judiciary, possessed "superior legitimacy" on the question, it "has not … been silent" on the question, and it "never has created" the cause of action.[56]

Conclusion: Threatening Ambiguity and Interpretive Sovereignty

The cumulative effect of this approach was to justify imperious substantive legal results with a matching stylistic performance. The substantive legal outcome excused torture, thereby allowing private military contractors to evade economic damages for its conduct abroad.[57] More significantly, it dismissed contrary legal authority that could restrain US military advances, signalling that sovereign law that frustrates broad US federal policies would be accorded little respect. All these aspects are assembled in opposition to transnationalism. The theme that emerged betrayed the circular logic of a self-sealing argument: avoiding liability for private military contractors was permissible because there was no international consensus against it, and the lack of an international consensus was established by the fact that the US opposed it.

This interpretive doubling exceeds the immediate injustice that its decision potentially wrought. In giving legal (and hence, precedential) significance to an idea of conflict as a tension between incompatible policies instead of an impossibility to comply with two different legal obligations, it expressed a hostile disposition toward plural legal sovereigns. By cloaking its preference for singular unitary rule rather than multiple sources of authority, the opinion poses imperial aspiration as a democratic necessity. The contingent use of this interpretive repertoire explains how legal style

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[53] *Ibid.* 11.

[54] *Ibid*, citing U. S. Const. Article I, section 10 and a string of Supreme Court decisions that recognised the power of the federal government, and not the states, to enact foreign policy.

[55] *Ibid.* 15.

[56] *Ibid.* 16.

[57] The majority in *Saleh* took the position that the plaintiffs had more or less abandoned their torture claims in their briefing and at oral argument. The dissent had the better of it as a matter of legal argument – at the summary judgment stage, the Court must take the facts alleged by the plaintiff as true, and the plaintiffs had alleged facts that included torture.

can discursively support the quest for empire in subjects at home and marginalise resistance abroad. By framing legal ambiguities as irresolvable conflicts and victims of empire as threats, the *Saleh* majority appealed to the vanity of certitude for its judicial intervention. The antidote to this situation cannot solely be found in rhetorical practices shaped by institutions. But neither can those practices be avoided. Where certainty and domination appear under cover of democracy, may they be answered by charity and humility.

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