

March 28, 2011

Neal Kumar Katyal, Acting Solicitor General
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United States Department of Justice
950 Pennsylvania Avenue, NW
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Re: The Supreme Court's invitation to file a brief expressing the views of the United States in *Haidar Muhsin Saleh, et al. v. Titan Corporation, et al.*, U.S. Supreme Court No. 09-1313.

Dear Neal,

I write to draw your attention to the D.C. Circuit Court of Appeal's decision in *Saleh v. Titan*, presently awaiting Supreme Court review. It is my understanding that the United States has been invited to submit a brief expressing its views. We urge the United States to support the grant of cert and urge reversal of the decision.

The appellate court ruled that the civilian contractors are immune from civil suit as the functional equivalent of U.S. soldiers, entitled to invoke the Federal Tort Claims Act (FTCA) bar to claims arising from the "combatant activities" of the "military or naval forces of the Coast Guard." The court equated contractors with combatants for FTCA purposes, reasoning that they were "integrated" into a "common mission" with the U.S. military, under "ultimate military command," and "subject to military direction."

We believe this decision is contrary to the interests of the United States. It undermines respect for the most fundamental principle of International Humanitarian Law (IHL): that of distinction. It likewise undermines COIN strategy by withholding measures to protect civilian populations. This, in turn, heightens the danger to Coalition troops and contractors, alike.

The laws of war and implementing U.S. military regulations distinguish civilians from combatants to protect civilians from the harms of war and to ensure that combat is conducted by combatants and their commanders who are trained in the law of war, and can be held responsible for its violation.

Under IHL, a person's status as a combatant turns on the existence of responsible command – a direct chain of accountability from officer to soldier. Contractors owe no more than a contractual duty to military supervisors and may ignore or contravene a military officer's orders and suffer only the consequence of termination, damages or other remedy for breach of contract. By contrast, members of the armed forces are subject to an elaborate system of discipline, training and punishment that requires commands by military superiors be obeyed and ensures that combatant activities are in accordance with the laws of war. At the same time, the civilian superiors of military commanders are ultimately accountable to the American people. In view of this comprehensive and distinctive system of justice and political accountability, it makes sense for Congress to have exempted the "combatant activities" of U.S. military personnel from tort liability. But since civilian contractors are not subject to the military chain of command, it makes little sense to extend immunity for their misconduct.

In order to limit hostilities to soldiers, and protect civilians, the laws of war create parallel privileges and protections of distinct combatant and civilian status. Combatants can be intentionally targeted with lethal force, but correspondingly are privileged to engage in hostilities without fear of prosecution provided they observe the laws of war. Civilians, on the other hand, cannot be targeted unless they

directly participate in hostilities. However, because engagement in hostilities by persons not subject to responsible command is disfavored, civilians are not entitled to the immunity from prosecution to which privileged belligerents are entitled.

The appellate court recognizes a privilege of immunity from tort liability for military contractors without imposing any of the corresponding burdens that accompany combatant status – discipline and punishment pursuant to a military chain of command. This not only threatens to blur the line between civilians and combatants, placing civilians at greater risk for harm, but also puts U.S. soldiers and contractors themselves at unreasonable risk.

By clearly prohibiting attacks on civilians, the principle of distinction safeguards U.S. soldiers from possible civilian reprisals. But when contractors, whom the civilian population may not distinguish from U.S. soldiers, commit unlawful acts upon the local civilian population with impunity, U.S. soldiers are placed at greater risk of retaliation. As soldiers are under increased risk of attack because of hostility caused by the actions of contractors, they are in turn, less able to operate effectively in combat zones.

It is also in the best interest of contractors to be subject to, and liable for violations of, the principle of distinction. Blurring the line only increases the risk that contractors are perceived as legitimate targets. This in turn, can lead to a vicious cycle of riskier, and potentially unlawful, behavior by contractors, with commensurate violence against them.

Additionally, while combatant immunity protects the military mission and those who implement it, extending immunity to civilian contractors has the opposite effect of undermining COIN strategy, as some high profile incidents in Iraq and Afghanistan have shown. The absence of an enforceable right to redress for serious crimes against civilians can only alienate local populations and undermine U.S. counterinsurgency efforts. As then-Senator Barack Obama stated, “We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors.”

The United States recognized that contractor accountability advances U.S. interests when it became a signatory to the *Montreux Document on the Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*. The *Montreux Document* recommends that States “provide for non-criminal accountability mechanisms for improper and unlawful conduct” of private contractors including, civil liability.

For these reasons, we hope that you will see fit to submit a brief on behalf of the United States, urging the Supreme Court to grant cert and reverse the Circuit Court decision. Please let me know if you have any questions or would like to discuss the matter.

All the best,



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cc: Jeh Johnson, General Counsel, U.S. Department of Defense

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