

**TORTURE, AMERICAN STYLE:
A RECIPE FOR CIVIL TORT IMMUNITY**

A Thesis

Submitted to the Notre Dame Law School in partial

Fulfillment of the requirement for the

Degree of Masters of Laws (LL.M.)

(International Human Rights Law)

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Spring 2010

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Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.

- Eleanor Roosevelt¹

. . . one nation, indivisible, with liberty and justice for all.

- Francis Bellamy²

INTRODUCTION

If someone is tortured, surely, at a minimum, an intentional tort has been committed against that person. This thesis specifically addresses the civil tort remedy, or lack thereof, for victims of torture at the hands of employees of the United States.³ In

¹ Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 139 (2006); Patty Allread, *Making Human Rights a Global Reality*, COLLEGE AVENUE - COLORADO STATE UNIVERSITY, Spring 2006, at 1; Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 A.J.I.L. 38, 38 (2003).

² Dr. John W. Baer, *The Pledge of Allegiance, A Short History* (1992). Available at: <http://www.oldtimeislands.org/pledge/pledge.htm>. See also, generally, John Baer, *The Pledge of Allegiance, A Revised History and Analysis* (2007).

³ This thesis specifically and deliberately addresses only civil tort issues and, therefore, does not address constitutional issues. Who is, and who is not, guaranteed protections and rights under the Constitution of the United States is certainly a topic worthy of its own debate, independent study and analysis well beyond this particular thesis. Therefore, potential remedies for constitutional violations and the legal vehicle (and to whom this legal vehicle is available or not available) to bring suit for constitutional violations, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), is beyond the immediate scope of this thesis. However, generally speaking, Constitutional rights and privileges do not apply extraterritorially to nonresident aliens. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); cf. *Boumediene v. Bush*, 553 U.S. 723 (2008). Likewise, because the main focus of this thesis is civil tort remedies for victims of torture, criminal liability and issues are also beyond the scope of this thesis. But see, e.g., 18 U.S.C. §§ 2340, 2340A, 2340B (the Federal Torture Statute); 42 U.S.C. § 2000dd (Section 1003 of the Detainee Treatment Act of 2005). Moreover, this thesis concentrates on civil tort liability for actions by employees of the United States. Therefore, liability for contractors of the United States is also beyond the scope and focus of this thesis. However, as a general statement of law, the United States is not liable for the acts or inactions of its contractors. See 28 U.S.C. § 2671 (“As used in this chapter and sections 1346(b) and 2401(b) of this title, the term ‘Federal agency’ . . . does not include any contractor with the United States”).

ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in its subsequent reporting to the United Nations Committee Against Torture, the United States has consistently denounced torture and proclaimed itself to be a nation that provides for civil remedies against torturers. However, this thesis will draw attention to the hypocrisy and self-protection tactics of the United States when dealing with torturers employed by the United States, as opposed to foreign torturers. One of the key inequities addressed in this thesis is the current application of the Westfall Act codified, in part, in 28 U.S.C. § 2679.

This thesis begins with an examination of how the United States has allowed, and even promoted, the availability of civil tort remedies, in the courts of the United States, against foreign torturers. Next, a critical comparison is made in regard to the availability, or lack thereof, of civil tort remedies when the alleged torturer is an employee of the government of the United States. Particularly, this thesis will examine the Westfall Act and explain how this federal legislation, in combination with torture relevant exceptions to the Federal Tort Claims Act, can leave victims of torture, at the hands of employees of the United States, without any tort remedy at all – while victims of torture by foreign nationals are permitted to seek civil tort remedies in the courts of the United States.

This thesis then addresses two international human rights treaties ratified by the United States: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Covenant on Civil and Political Rights. By and through these two treaties, the United States has obligations under international law to condemn torture and to provide victims of torture with adequate legal remedies for compensation. An examination of the reservations, understandings and declarations

asserted by the United States when ratifying these treaties will be set forth along with an explanation of the effect these conditions have on treaty enforcement by torture victims. Next, this thesis addresses how the Westfall Act, in combination with torture relevant exclusions to the Federal Tort Claims Act, is violating the international treaty obligations of the United States. Finally, a recommendation is made to amend 28 U.S.C. § 2679 in order for the United States to comply with its obligations under international law by providing a domestic civil tort remedy to victims of torture by the United States.

I. FOREIGN TORTURERS

If a foreign national is tortured by a fellow foreign national, the United States will, indeed, allow the foreign victim of torture to sue his or her foreign torturer in the courts of the United States. The Alien Tort Statute (“ATS”), a statute that is over 220 years old and which was rarely used or cited until 1980, allows a foreign national who has been the victim of a tort, such a torture, to file suit in the courts of the United States against his or her foreign tortfeasor torturer.⁴

A. *Filartiga* and the Alien Tort Statute

In the 1980 landmark decision of *Filartiga v. Pena-Irala*⁵ the Second Circuit Court of Appeals held that “whenever an alleged torturer is found and served with process by an alien within our borders . . . [the ATS] provides federal jurisdiction” because “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”⁶

⁴ See 28 U.S.C. § 1350; Gary Clyde Hufbauer and Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004).

⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁶ *Id.* at 878.

The *Filartiga* case was filed by Dr. Joel Filartiga and his daughter, Dolly Filartiga, both citizens of Paraguay, in regard to Dr. Filartiga's seventeen-year-old son, Joelito.⁷ The Filartigas alleged that Joelito was kidnapped, tortured and murdered by Americo Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay at the time, in retaliation for Dr. Filartiga's political views and activities.⁸ Specifically, Dolly Filartiga alleged that she was escorted by the Asuncion police to Pena-Irala's home and shown the torture-marked body of her dead brother.⁹ As Dolly Filartiga fled the property in a horrified state, Pena-Irala actually ran after her in order to shout: "Here you have what you have been looking for for so long and what you deserve. Now shut up."¹⁰

After the death of her brother, Dolly Filartiga entered the United States under a visitor's visa; applied for permanent political asylum; and took-up residence in Washington, D.C.¹¹ At around the same time, in 1978, Pena-Irala also entered the United States under a visitor's visa.¹² However, Pena-Irala began residing in Brooklyn and remained in the United States beyond the terms of his visa.¹³ Dolly Filartiga learned of Pena-Irala's unlawful presence in the United States and reported same to the Immigration and Naturalization Service.¹⁴ As a result, Pena-Irala was arrested, detained and deported.¹⁵ However, before Pena-Irala was deported, and while he was still being

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 878-79.

¹² *Id.* at 878.

¹³ *Id.* at 878-79.

¹⁴ *Id.* at 879.

¹⁵ *Id.*

detained in the United States, Dolly Filartiga had Pena-Irala formally served with a civil tort lawsuit, filed under the ATS, for the kidnapping, torture and murder of her brother.¹⁶

At the trial court level, the District Court granted Pena-Irala's motion to dismiss and, accordingly, dismissed the complaint for lack of federal jurisdiction.¹⁷ In reversing the District Court's order of dismissal, the Second Circuit Court of Appeals held that torture by a state official is a violation of established norms and, therefore, a violation of international law.¹⁸ Accordingly, there was federal jurisdiction under the ATS, which reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations [international law] or a treaty of the United States."¹⁹ As the *Filartiga* court noted, "there are few, if any, issues in international law today on which opinion seems to be so united as the limitation on a state's power to torture persons held in its custody."²⁰ "Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced."²¹ In 1980, the seminal *Filartiga* case made it clear that torture will not be tolerated by the judiciary and that a foreign victim may sue a foreign torturer in the courts of the United States if personal jurisdiction can be obtained.

As demonstrated in *Filartiga*, the ATS may clearly be used by foreign nationals to sue other foreign nationals; however, it is less clear as to whether the ATS may properly be used for a foreign national to sue a citizen employee of the United States. In the case

¹⁶ *Id.*

¹⁷ *Id.* at 878, 880.

¹⁸ *Id.* at 880.

¹⁹ *Id.*; 28 U.S.C. § 1350.

²⁰ *Filartiga*, 630 F.2d at 881.

²¹ *Id.* at 884.

of *Lopez v. Richardson*,²² the District Court for the Northern District of Georgia, without elaborating on exactly what the “obvious reasons” were or exactly how “a significant change to the legal landscape” would result, held: “While there is nothing in the language of the Alien Tort Statute that precludes its use against domestic U.S. actors, there are obvious reasons why allowing domestic actors to be held liable under the Alien Tort Statute would result in a significant change to the legal landscape.”²³ However, in the case of *In re: Iraq and Afghanistan Detainees Litigation*,²⁴ a 2007 case of which the 2009 *Lopez* court certainly should have been aware, the ATS was the tort vehicle used by foreign plaintiffs against citizen employees of the United States.²⁵ However, as will be more fully discussed below, the Westfall Act renders moot the specific legal vehicle chosen when filing a tort claim against an employee of the United States. Whether a tort suit is brought by a foreign national against an employee of the United States using the legal vehicle of the ATS or the Federal Tort Claims Act (“FTCA”), or both, the absolute statutory immunity of the Westfall Act can be invoked by a defendant employee of the United States and, therefore, no matter what tort statute is invoked when suit is originally filed, the “litigation is thereafter governed by the Federal Tort Claims Act.”²⁶

B. The Torture Victim Protection Act of 1991

It took twelve years, but in 1992 the Congress of the United States bolstered the sentiment and message of *Filartiga* with the passage and implementation of the Torture Victim Protection Act of 1991 (“TVPA”), which was introduced as a bill in 1991 but was

²² *Lopez v. Richardson*, 647 F.Supp. 2d 1356 (N.D. Ga. 2009).

²³ *Id.* at 1363-64.

²⁴ *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d 85 (D.C. 2007).

²⁵ *Id.* at 109-116; *see also Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

²⁶ *Osborn v. Haley*, 549 U.S. 225, 230 (U.S. 2007).

not actually passed into law until 1992.²⁷ Specifically, the TVPA sets forth the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Torture Victim Protection Act of 1991.’

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, *of any foreign nation*—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.—For the purposes of this Act, the term ‘extrajudicial killing’ means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or

²⁷ Pub. L. No. 102-256 (Torture Victim Protection Act of 1991).

inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.²⁸

In one sense, the TVPA took the *Filartiga* thinking one step further – but is still one critical step short of being universally fair and equitable. The *Filartiga* case involved foreign nationals, who were the relatives of a foreign torture and murder victim, who sued a torturer, who was also a foreign national, for the acts of torture and murder which took place on foreign soil. While adding a caveat of exhaustion of “adequate and available” local remedies, which one may consider as being applicable to foreigners, the TVPA does not actually limit potential plaintiffs to being only foreign nationals.²⁹ Under the TVPA, a victimized plaintiff filing suit in the United States may be either a citizen or

²⁸ *Id.* (emphasis added).

²⁹ *See id.*

non-citizen of the United States.³⁰ The TVPA's expansion of potential plaintiffs over that of the ATS, where a potential plaintiff may only be "an alien," is certainly a progressive step forward.³¹ However, a noticeably missing component is that the TVPA is not applicable to torture committed under the color of law of the United States.³² Rather, the TVPA is only applicable to torture committed under the color of law "of any foreign nation."³³ Accordingly, the TVPA contains a double-standard and a hypocritical message that torture is so universally wrong that any foreign torturer may be sued in the United States – but the TVPA will not be a source of law to use against anyone committing torture on behalf of the United States.³⁴

The interplay between the ATS and the TVPA can be somewhat confusing, especially since both are codified under the same statute number – 28 U.S.C. § 1350. The ATS is purely a jurisdictional statute which provides federal jurisdiction for actions based in tort, and committed in violation of international law, brought by foreign nationals against those subject to personal jurisdiction of the United States.³⁵ The ATS is known by its statute number – 28 U.S.C. § 1350.³⁶ The TVPA is a separately passed, but related, piece of federal legislation that provides for a substantive cause of action for victims of torture and extrajudicial killings against those acting under the color of law of

³⁰ *See id.*

³¹ *See id.*; 28 U.S.C. § 1350.

³² *See* Pub. L. No. 102-256.

³³ *Id.*

³⁴ The use or viability of any affirmative defenses, such as the Foreign Sovereign Immunities Act ("FSIA"), available to foreign torturers, sued under the ATS in a *Filartiga* type case or sued under the TVPA, is beyond the scope of this thesis. *See* 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611. The availability of an immunity defense under the FSIA for an alleged individual foreign torturer is currently the issue of debate before the Supreme Court of the United States. *See Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, 130 S.Ct. 49 (2009). Regardless of what defenses a foreign torturer may attempt to assert, *Filartiga* and the TVPA make it clear that foreign torturers have been, and can be, sued in the United States - and that this is the statutorily supported position of Congress.

³⁵ *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005).

³⁶ *See* 28 U.S.C. § 1350.

a foreign nation.³⁷ The TVPA is also codified at 28 U.S.C. § 1350 in that the substantive TVPA is appended as a statutory note to the purely jurisdictional ATS.³⁸

Filartiga, the ATS and the TVPA send a very clear message that the United States is not to be used as a safe haven by torturers from other nations. However, noticeably absent is the message that the United States will also hold its own employees civilly liable in tort for acts of torture.

II. TORTURERS WITHIN THE EMPLOY OF THE UNITED STATES

Before the Westfall Act amendment to the FTCA, and at the time of the United States Supreme Court decision in the case of *Westfall v. Erwin*,³⁹ a tort victim could sue an individual tortfeasor for tortious conduct committed within the tortfeasor's scope of employment with the United States.⁴⁰ If a government employee was sued in tort, then such employee would assert an affirmative defense of common law immunity for his or her actions while performing employment activities for the United States.⁴¹ However, those employees who were, and who were not, entitled to such common law immunity would change with the opinion of the United States Supreme Court in the 1988 *Westfall* case.

A. *Westfall v. Erwin*

On January 13, 1988, the Supreme Court of the United States issued its unanimous opinion in the case of *Westfall v. Erwin*.⁴² *Westfall* was not at all about torture.⁴³ Rather, *Westfall* was about exposure to toxic soda ash.⁴⁴ William Erwin was a

³⁷ See Pub. L. No. 102-256; 28 U.S.C. § 1350; *Aldana*, 416 F.3d at 1246-47.

³⁸ *Id.*

³⁹ *Westfall v. Erwin*, 484 U.S. 292 (1988).

⁴⁰ See, generally, *id.*

⁴¹ See, generally, *id.*

⁴² *Westfall v. Erwin*, 484 U.S. 292 (1988).

⁴³ See *id.* at 293-94.

civilian employee of the federal government working at the Anniston Army Depot in Anniston, Alabama.⁴⁵ Erwin suffered chemical burns to his eyes and throat after being exposed to soda ash dust that had spilled from a bag in a warehouse where he was working.⁴⁶ Erwin then filed a state law tort claim in Alabama state court alleging that three Executive Branch employees were responsible for his injuries due to their negligence in routing, storing and warning of the soda ash.⁴⁷ One of the defendants sued by Erwin was Rodney P. Westfall, who was in charge of receiving at the Army Depot.⁴⁸

The defendants removed the state court case to the United States District Court for the Northern District of Alabama.⁴⁹ There, the District Court granted summary judgment in favor of the defendants – holding that “any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs.”⁵⁰ Erwin then filed an appeal of the District Court’s decision with the Eleventh Circuit Court of Appeals.⁵¹ The Circuit Court of Appeals reversed the District Court’s decision holding that a federal employee enjoys absolute immunity from suit “only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor’s line of duty.”⁵² Accordingly, a federal employee would not be immune from suit for conduct that was a non-discretionary, ordinary function of the job. The defendants then sought certiorari review from the Supreme Court of the United States, which was granted.⁵³

⁴⁴ *Id.*

⁴⁵ *Id.* at 293.

⁴⁶ *Id.* at 294.

⁴⁷ *Id.* at 293-94.

⁴⁸ *Id.* at 294, fn. 1.

⁴⁹ *Id.* at 294.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (quoting *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1986)) (quoting *Johns v. Pettibone Corp.*, 769 F.2d 724, 728 (11th Cir. 1985)) (emphasis in original).

⁵³ *Id.* at 295.

The United States Supreme Court first explained the reason for common law absolute immunity for federal employees as follows:

The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the views that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits. (citations omitted). This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.⁵⁴

The Court went on to explain that “absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature.”⁵⁵ Accordingly, a federal employee simply following procedures and guidelines in his or her employment would not enjoy absolute immunity, while a federal employee involved in policymaking in his or her employment would enjoy absolute immunity so that the fear from possible suit does not interfere with that discretionary job function.⁵⁶

“[T]he scope of absolute official immunity afforded federal employees is a matter of federal law, ‘to be formulated by the courts in the absence of legislative action by Congress.’”⁵⁷ “Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context.”⁵⁸ Therefore, that is exactly what Congress did after the *Westfall* decision was

⁵⁴ *Id.*

⁵⁵ *Id.* at 297-98. (emphasis in original).

⁵⁶ *Id.*

⁵⁷ *Id.* at 295 (quoting *Barr v. Matteo*, 360 U.S. 564, 597 (1959)).

⁵⁸ *Id.* at 300.

issued by the Supreme Court of the United States – took action and provided guidance by enacting the Federal Employees Liability Reform and Tort Compensation Act, which is more commonly referred to as the Westfall Act.⁵⁹

B. The Westfall Act

The intent of the Westfall Act was to abrogate the United States Supreme Court decision in *Westfall v. Erwin* and to stop the judicial erosion of common law immunity from tort suits for rank and file government employees sued because they were acting within the course and scope of their employment with the government. Congress clearly expressed the purpose of the Westfall Act when it set forth that “the purpose of this Act [is] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.”⁶⁰ Congress was clearly concerned that the “erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.”⁶¹ Moreover, it was the finding of Congress that “[t]he prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.”⁶² Therefore, to remedy the issue of which Congress was concerned, Congress replaced judicially

⁵⁹ See Pub. L. No. 100-694 (Federal Employees Liability Reform and Tort Compensation Act of 1988), codified at 28 U.S.C. §§ 2671, 2674, 2679; see also Appendix A.

⁶⁰ Pub. L. No. 100-694.

⁶¹ *Id.*

⁶² *Id.*

eroding common law immunity with an absolute statutory immunity for government employees sued in tort for acts committed within the scope of their federal employment.

However, what Congress failed to consider was that the Westfall Act would leave tort victims, including victims of torture, with no civil tort recourse at all when: 1) the government employees are determined to be absolutely immune under the Westfall Act; 2) the United States is substituted in as the party defendant; and 3) the United States is then determined to enjoy absolute sovereign immunity due to the fact that the tort at issue, such as torture, falls under an exception to the FTCA – in which case the United States has not waived its sovereign immunity. If an employee of the United States is sued in tort, including torture, Congress, through the Westfall Act, has provided that government employee with the first part of the recipe for absolute tort immunity. In order to be declared absolutely immune from suit in tort for acts of torture; be dropped from the lawsuit; and to have the United States substituted in as the party defendant, all a federal employee has to do is have the Attorney General, or a designee, certify that the tortious conduct at issue was performed while acting within the scope of employment for the United States.⁶³ If the Attorney General refuses to do so, then the government employee need only motion the court to hold that the tortious conduct at issue was performed while the employee was acting within the scope of his or her employment for the United States.⁶⁴

If the government employee is dropped as a party defendant and the United States is substituted in as the party defendant, then one would think that a torture victim could then receive some sort of civil tort redress directly from the United States. After all, this

⁶³ See 28 U.S.C. § 2679(d)(1).

⁶⁴ See 28 U.S.C. § 2679(d)(3).

was the express intent of Congress in the public law comments to the Westfall Act.⁶⁵ However, in regard to torture claims, the United States may, soon thereafter, also be dismissed as a party due to the torture relevant exceptions to the FTCA.

C. Federal Tort Claims Act

As an independent and sovereign nation, the United States of America enjoys sovereign immunity – meaning that “the United States cannot be sued without its consent.”⁶⁶ However, “Congress alone has the power to waive or qualify that immunity.”⁶⁷ With the enactment of the Federal Tort Claims Act (“FTCA”),⁶⁸ Congress did just that.⁶⁹ While containing various exemptions and exceptions, the FTCA generally lends the United States to civil tort liability 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.⁷⁰

In regard to torture, a *prima facie* basis for liability appears to be established. Torture is certainly a “personal injury.”⁷¹ Torture is inflicted as a result of the “wrongful act . . . of . . . [an] employee of the government while acting within the scope of his [or

⁶⁵ See Pub. L. No. 100-694 (“It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, *while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States*”). (emphasis added).

⁶⁶ *Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940).

⁶⁷ *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20 (1926).

⁶⁸ The Federal Tort Claims Act (“FTCA”) is comprised of 28 U.S.C. §§ 1346(b), 2671-2680. See Appendix B.

⁶⁹ See 62 Stat. 933, c. 646.

⁷⁰ 28 U.S.C. § 1346(b)(1).

⁷¹ *Id.*

her] office or employment.”⁷² And, torture is a *jus cogens* violation under international law and is, therefore, prohibited by law in “the place where the act . . . occurred.”⁷³

However, while the Westfall Act provides absolute statutory immunity to the individual government employee and then substitutes the United States as the party defendant, the Westfall Act also permits the United States to assert each and every affirmative defense it may have under the FTCA in order to completely dismantle the claim.⁷⁴ If an exception to the FTCA applies, then the United States has not waived its sovereign immunity and is still absolutely immune from liability in tort.⁷⁵ This is especially true in torture claims which lend themselves to FTCA exceptions to torts: 1) involving discretionary duties or functions – even if such discretion is abused;⁷⁶ 2) arising from assault, battery, false imprisonment, false arrest, malicious prosecution or abuse of process – unless committed by an investigative or law enforcement officer of the United States, which is defined as “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”;⁷⁷ 3) arising out of combatant activities of the military, naval forces or the Coast Guard during times of war;⁷⁸ or 4) committed in a foreign country.⁷⁹ This is not an exhaustive list of the exceptions to the FTCA. Rather, this is a list of the FTCA exclusions most applicable to torture claims, and to having torture claims dismissed when the United States is the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See 28 U.S.C. §§ 2674, 2679(d)(4).

⁷⁵ See 28 U.S.C. § 2680.

⁷⁶ 28 U.S.C. § 2680(a).

⁷⁷ 28 U.S.C. § 2680(h).

⁷⁸ 28 U.S.C. § 2680(j).

⁷⁹ 28 U.S.C. § 2680(k). In the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court of the United States demonstrated the strength of this exclusion when it held that “the FTCA’s foreign country exception bars *all claims* based on *any injury* suffered *in* a foreign country, *regardless* of where the tortious act or omission [such as where the orders came from] occurred.” *Id.* at 712. (emphasis added).

party defendant. Therefore, these exceptions to the FTCA provide the second part of the recipe for tort immunity for torture – as concocted by Congress.

So as not to be civilly liable in tort for torture, the United States may simply torture whomever it deems to be an enemy combatant in the war on terror while administering such torture on foreign soil by a government employee who is not technically an investigative or law enforcement officer while that employee performs a discretionary function of his or her government employment. A torture victim who was tortured under these circumstances cannot successfully sue the United States under the FTCA – or the federal employees involved due to the Westfall Act. This scenario is not just a hypothetical possibility conjured-up for the purpose of an academic thesis. This absolute miscarriage of justice is painfully illustrated in the real life cases of *In re: Iraq and Afghanistan Detainees Litigation*; *Rasul v. Myers*; and *Harbury v. Hayden*. While the United States has actually reported to the Committee Against Torture that the FTCA provides torture victims with an adequate avenue for redress, these cases certainly demonstrate otherwise.⁸⁰

D. In re: Iraq and Afghanistan Detainees Litigation

In the case of *In re: Iraq and Afghanistan Detainees Litigation*,⁸¹ the plaintiffs, who were detained by the United States during military operations in Iraq and Afghanistan, alleged that they were severely tortured during their detainment and, therefore, sought compensation in tort from Colonel Janis Karpinski, Commander of the 800th Military Police Brigade; Lieutenant General Ricardo Sanchez, Commander of the Coalition Joint Task Force-7; Colonel Thomas Pappas, Commander of the 105th Military

⁸⁰ See U.N. Doc. CAT/C/28/Add.5 at pp. 14, 58 ¶¶ 51, 269-70.

⁸¹ *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d 85 (D.C. 2007).

Intelligence Brigade; Donald Rumsfeld, former Secretary of Defense; and the United States.⁸² The nine plaintiffs claimed they were innocent civilians who were detained and tortured by the United States military in both Iraq and Afghanistan.⁸³ The plaintiffs further alleged that after being detained and tortured, they were all eventually released without being charged with any crime.⁸⁴ Specifically, some of the alleged torture included being: 1) hung upside-down from the ceiling by chains until being rendered unconscious; 2) elevated by chains and then dropped to the ground; 3) electrocuted; 4) anally probed; 5) beaten; 6) deprived of water; 7) deprived of sleep; 8) stabbed; 9) urinated on; and 10) subject to mock executions.⁸⁵ Clearly, such acts, as alleged, can be categorized as common law torts in addition to being categorized as torture.

The plaintiffs claimed that the defendants were responsible in tort because “the defendants were directly and personally involved in establishing the interrogation procedures” that were used on the plaintiffs.⁸⁶ The defendants filed motions to dismiss asserting lack of subject matter jurisdiction and failure to state a valid cause of action.⁸⁷ In specific relevance to this thesis, one of the defense assertions was that the defendants enjoyed absolute statutory immunity pursuant to the Westfall Act.⁸⁸

The foreign plaintiffs did not sue the defendants under the FTCA.⁸⁹ Rather, the plaintiffs sued the defendants in tort under the ATS.⁹⁰ However, the court noted that whether a tort suit is brought by a foreign national against an employee of the United

⁸² *Id.* at 88, 90-91.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 89.

⁸⁶ *Id.* at 91, fn. 5.

⁸⁷ *Id.* at 91.

⁸⁸ *Id.* at 92.

⁸⁹ *Id.* at 109-116.

⁹⁰ *Id.*

States using either the ATS or the FTCA, “the Westfall Act provides that, if the Attorney General or his designee certifies that a federal employee was acting within the scope of his [or her] employment when an alleged act or omission occurred, then the lawsuit automatically is converted to one against the United States under the Federal Tort Claims Act, the federal employee is dismissed as a party, and the United States is substituted as the defendant.”⁹¹

The plaintiffs argued that their torture-based tort claims should not be barred by the absolute immunity provided by the Westfall Act for three reasons.⁹² First, the plaintiffs argued that the absolute immunity of the Westfall Act should not be allowed to apply to intentional torts that violate *jus cogens* norms, such as torture, because the term “negligent or wrongful act or omission,” as contained within the Westfall Act, is ambiguous and was not congressionally intended to apply to *jus cogens* violations.⁹³ Next, the plaintiffs argued that the defendants were acting outside the scope of their employment and, therefore, the Westfall Act should not apply as a bar.⁹⁴ Finally, the plaintiffs asserted that violations of international law fall within the Westfall Act’s express exception for statutory violations that provide for a cause of action against federal employees.⁹⁵

In response to the first argument of the plaintiffs, that the term “negligent or wrongful act or omission,” as contained within the Westfall Act, is ambiguous and was not congressionally intended to apply to *jus cogens* violations, the court refused to even examine the congressional intent of the Westfall Act because such an examination of

⁹¹ *Id.* at 110.

⁹² *Id.*

⁹³ *Id.*; 28 U.S.C. § 2679(b)(1).

⁹⁴ *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 110.

⁹⁵ *Id.*

intent was not appropriate when the intent could be derived from the plain and ordinary meaning of the words Congress chose to use.⁹⁶ Using an ordinary meaning analysis, the court held that an intentional tort, including torture, was clearly included within the meaning of a “wrongful act.”⁹⁷ Accordingly, the court concluded that the Westfall Act does apply to intentional torts – including torture.⁹⁸

In response to the second argument of the plaintiffs, that the defendants were acting outside the scope of their employment and, therefore, the Westfall Act did not apply, the court did not accept the plaintiffs’ reasoning that *jus cogens* violations could never be considered as being within the scope of employment simply because the United States deplors such conduct and is bound to honor international law.⁹⁹ Rather, the court held that the Attorney General’s certification that the tortious conduct at issue was performed by the individual defendants while in the course and scope of their employment for the United States was appropriate because, even if torture was used, “there can be no credible dispute that detaining and interrogating enemy aliens would be incidental to their overall military obligations.”¹⁰⁰

In response to the third argument of the plaintiffs, that violations of international law fall within the Westfall Act’s express exception for statutory violations that provide for a cause of action against federal employees, the court noted that there are only two express exceptions in the Westfall Act that preclude its application: 1) Constitutional violations; and 2) An action substantively based upon a federal statute that authorizes

⁹⁶ *Id.* at 110-11; 28 U.S.C. § 2679(b)(1).

⁹⁷ *Id.*

⁹⁸ *See In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 111.

⁹⁹ *Id.* at 114.

¹⁰⁰ *Id.*

recovery against a federal employee.¹⁰¹ The court found that no exception to the applicability of the Westfall Act could be satisfied because the ATS is merely a jurisdictional statute and that the ATS does not provide any substantive right of recovery against a federal employee.¹⁰² While the court only addressed the ATS, and not the FTCA, clearly the same would be true of the FTCA because the FTCA is merely a limited statutory waiver of sovereign immunity for some common law torts and, like the ATS, the FTCA does not provide any substantive cause of action or right of recovery against a federal employee.¹⁰³ Again using an ordinary meaning approach to the word “statute,” the court concluded that international law, including international treaties, did not constitute federal statutes in order to fit under the self-contained exception to the Westfall Act.¹⁰⁴ Accordingly, all of the tort claims against all of the individual defendants were dismissed as a direct result of the Westfall Act.¹⁰⁵

E. Rasul v. Myers

In the case of *Rasul v. Myers*,¹⁰⁶ four British nationals brought tort claims against former Secretary of Defense Donald Rumsfeld, and ten other senior military officials employed by the United States, alleging physical mistreatment while illegally detained at the United States Naval Base at Guantanamo Bay, Cuba.¹⁰⁷ Much like *In re: Iraq and Afghanistan Detainees Litigation*, the plaintiffs asserted their common law tort claims

¹⁰¹ *Id.* at 110; *see also* 28 U.S.C. § 2679(b)(2).

¹⁰² *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 112; *see also* *Sosa*, 542 U.S. at 724 (“the ATS is a jurisdictional statute creating no new causes of action”).

¹⁰³ *See In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 112.

¹⁰⁴ *Id.* at 112-13; 28 U.S.C. § 2679(b)(2)(B).

¹⁰⁵ *In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 114-15, 119.

¹⁰⁶ *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

¹⁰⁷ *Id.* at 527-28.

using the ATS to obtain federal jurisdiction.¹⁰⁸ The Circuit Court of Appeals affirmed the District Court's dismissal of the tort claims, pursuant to the Westfall Act, and stated:

We explained that the Westfall Act makes the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2679 *et seq.*, the exclusive remedy for any damages action for torts committed by a federal official 'while acting within the scope of his office or employment.' 28 U.S.C. § 2679(b)(1). The Alien Tort Statute and Geneva Convention claims in Counts 1 to 4 were premised on alleged tortious conduct within the scope of defendants' employment. (citation omitted). Since plaintiffs failed to exhaust their administrative remedies as required by the FTCA (citation omitted), the district court lacked jurisdiction over Counts 1 to 4.¹⁰⁹

F. Harbury v. Hayden

In the case of *Harbury v. Hayden*,¹¹⁰ a Guatemalan rebel fighter, named Efrain Bamaca-Velasquez, was tortured and killed by members of the Guatemalan army.¹¹¹ The slain rebel fighter's widow, Jennifer Harbury, a United States citizen, sued various CIA officials, employed by the United States, and claimed that these individual employees of the United States were legally responsible for the death of her Guatemalan husband.¹¹² The District Court dismissed the plaintiff's tort claims against the individual defendants and substituted the United States as the party defendant, pursuant to the Westfall Act, and then proceeded to also dismiss the tort claims against the United States because of the FTCA exception for injuries that occur in a foreign country.¹¹³ In affirming the dismissal of the plaintiff's common law tort claims, the Circuit Court of Appeals explained, as follows:

The Federal Tort Claims Act is a limited waiver of the Government's sovereign immunity. Under the FTCA, plaintiffs may sue the United

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 528, fn. 1.

¹¹⁰ *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), *cert. den.*, 129 S.Ct. 195 (2008).

¹¹¹ *Id.* at 415.

¹¹² *Id.*

¹¹³ *Id.*; *see also* 28 U.S.C. § 2680(k).

States in federal court for state-law torts committed by government employees within the scope of their employment. 28 U.S.C. §§ 1346(b), 2671-80. But the FTCA does not create a statutory cause of action against individual government employees.¹¹⁴

If a plaintiff files a state-law tort suit against an individual government employee, a companion statute – the Westfall Act – provides that the Attorney General may certify that the employee was acting within the scope of employment ‘at the time of the incident out of which the claim arose.’ U.S.C. § 2679(d)(1). Upon the Attorney General’s certification, the tort suit automatically converts to an FTCA ‘action against the United States’ in federal court; the Government becomes the sole party defendant; and the FTCA’s requirements, exceptions, and defenses apply to the suit. *Id.*¹¹⁵

If the Attorney General does not certify that the defendant employee was acting within the scope of employment, the defendant may petition the court to make such a finding. If the court so finds, then the case becomes a federal-court FTCA case against the Government, just as if the Attorney General had filed a certification. 28 U.S.C. § 2679(d)(3)-(4). If the court finds that the government employee was not acting within the scope of employment, then the state-law tort suit may proceed against the government employee in his or her personal capacity.¹¹⁶

...

When one of the FTCA’s exceptions applies – that is, when the Government has *not* waived its sovereign immunity – the Attorney General’s scope-of-employment certification has the effect of converting the state-law tort suit into an FTCA case over which the federal courts lack subject-matter jurisdiction. In other words, the combination of the scope-of-employment determination and the FTCA’s exceptions may absolutely bar a plaintiff’s case. (citation omitted).¹¹⁷

In order to avoid the exact procedure and outcome outline by the court, the plaintiff argued that the Westfall Act did not bar her tort claims because “acts of torture can never fall within the scope of employment.”¹¹⁸ However, the court disagreed and set forth that the individual CIA employee defendants acted within the scope of their

¹¹⁴ *Harbury*, 522 F.3d at 416.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 416, fn. 1.

¹¹⁷ *Id.* at 417. (emphasis in original).

¹¹⁸ *Id.* at 418.

employment by conducting covert operations and working with individuals in Guatemala who tortured and killed the plaintiff's husband.¹¹⁹ Therefore, the alleged tortious conduct of the individual defendants was "incidental to their authorized conduct" as undertaken on behalf of the United States.¹²⁰ In affirming the complete dismissal of all of the plaintiff's tort claims against all defendants, the court held:

Because the alleged actions of the individual CIA Defendants were within the scope of their employment, Harbury's claims against the individual CIA Defendants are properly converted into claims against the Government under the FTCA. But Harbury's FTCA claims against the Government fall squarely within the FTCA's exception for claims 'arising in a foreign country.' 28 U.S.C. §2680(k).¹²¹

G. Congressional Intent

While it did not result in a favorable ruling, Barney Frank, United States House Representative for the Fourth Congressional District of Massachusetts, filed an *amicus curiae* brief in favor of the plaintiff in the *Harbury* case.¹²² Representative Frank was a member of the 100th Congress which passed the Westfall Act and, in fact, sponsored the bill; wrote the House Report; and led the House debate on the legislation.¹²³ Clearly, if anyone knows what Congress truly intended to accomplish by passing the Westfall Act, it should be Representative Frank. Representative Frank clearly indicated that the true intent of the Westfall Act was to do away with the exercise of discretion requirement for a federal employee to be absolutely immune from a tort suit, as required by the Supreme Court of the United States in *Westfall v. Erwin*; to make federal employees acting within the scope of their employment absolutely immune from suit; and to substitute the United

¹¹⁹ *Id.* at 422.

¹²⁰ *Id.*

¹²¹ *Id.* at 422-23.

¹²² See Brief of *Amicus Curiae* United States Representative Barney Frank, *Harbury v. Hayden*, Case No. 06-5282, 2007 WL 2344799 (D.C. Cir. 2007).

¹²³ *Id.* at 1.

States as a party defendant, so that federal employees would not be burdened with garden-variety tort suits and to provide plaintiffs with a deeper pocket, the United States, to pursue for damages.¹²⁴ In his brief, Representative Frank clearly set forth that it was never the intent of Congress to immunize torturers and that it was the intent of Congress that any federal employee who committed outrageous or criminal conduct, such as torture, would always remain personally liable - because such conduct could never be considered as being part of the scope of employment while working for the United States of America.¹²⁵

The position of Representative Frank, as represented in his *amicus* brief, is also well documented in the Congressional record. In a House Report, Representative Frank expressed his intent and understanding of the bill that would become the Westfall Act when he set forth: “If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted . . . and the individual employee remains liable.”¹²⁶ This was also the legal opinion and interpretation of then Deputy Assistant Attorney General Robert L. Willmore who testified before a Congressional subcommittee that, under the Westfall Act, “employees accused of egregious misconduct – as opposed to mere negligence or poor judgment – will not generally be protected from personal liability for the results of their actions.”¹²⁷

The problem with Representative Frank’s intent and understanding and with former Deputy Assistant Attorney General Willmore’s interpretation and opinion is that

¹²⁴ *Id.* at 3-4.

¹²⁵ *Id.* at 1-16.

¹²⁶ H.R. Rep. No. 100-700 at 5.

¹²⁷ *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, the Federal Employees Liability Reform and Tort Compensation Act of 1988, Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 100th Cong. 79 (1988) (“Westfall Committee Hearing”), (prepared statement of Robert L. Willmore, Deputy Assistant Att’y Gen., Civil Division, Dept. of Justice).*

neither is actually clearly represented in the actual words of the Westfall Act. If Congress did not want to provide absolute statutory immunity to torturers, then all it had to do was expressly say so. Without actually amending 28 U.S.C. § 2679, it is highly unlikely that the intent of the 100th Congress, as demonstrated by Representative Frank, will ever be judicially recognized.

In conformity with a longstanding canon of statutory interpretation, the courts read the words of a statute and apply and enforce the plain, clear, common and ordinary meaning of those words – and will only properly look to the legislative history for congressional intent when an ambiguity in the statutory language does not lend itself to a plain and ordinary meaning.¹²⁸ Without an ambiguity, it is presumed that the legislature carefully chose its words and clearly intended what it plainly expressed in the statutory language.¹²⁹ The mere fact that a statutory word or phrase is not used with a self-contained, express definition does not make the word or phrase ambiguous.¹³⁰ To the contrary, as undefined terms are simply read in accordance with their ordinary meaning.¹³¹ This would explain how the *Harbury* court applied, without passion or prejudice, the clear and plain language of the Westfall Act, and the FTCA exceptions, without even addressing the completely contrary legislative intent directly expressed by Representative Frank in his *amicus* brief to the court.

¹²⁸ See *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004) (advising against interpretation of legislation that would depart with “longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text”).

¹²⁹ See *United States v. Fisher*, 6 U.S. 358, 399 (1805) (2 Cranch) (“Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction”).

¹³⁰ *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

¹³¹ *Id.* (“In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning”).

H. The Problem Continues: *Al-Zahrani v. Rumsfeld*

The tort immunity being provided to alleged torturers within the employ of the United States is not an isolated or outdated issue. It is a recent and continuing issue worthy of immediate congressional intervention. As recently as February 16, 2010, in the case of *Al-Zahrani v. Rumsfeld*,¹³² another torture-based lawsuit was dismissed as a result of the Westfall Act in combination with an exception to the FTCA.¹³³ In *Al-Zahrani*, the plaintiffs were the survivors of two detainees that were held at the United States Naval Base at Guantanamo Bay, Cuba from sometime in 2002 until their death on June 10, 2006.¹³⁴ Among others, the plaintiffs sued twenty-four United States government employees - asserting an ATS cause of action.¹³⁵

The operable complaint alleged that the detainees, Yasser Al-Zahrani and Salah Ali Abdullah, were deemed, by the United States, to be enemy combatants and that the two men were subjected to violent acts of torture at the hands of employees of the United States.¹³⁶ The plaintiffs further alleged that the two detainees were the victims of torturous acts “including sleep deprivation, exposure to prolonged temperature extremes, invasive body searches, beatings, threats, inadequate medical treatment and withholding of necessary medication”¹³⁷ The cause of death for both men, as determined by the United States Navy, was suicide by hanging.¹³⁸ The government employee defendants moved to dismiss the complaint, while the United States moved to substitute itself as the

¹³² *Al-Zahrani v. Rumsfeld*, -- F.Supp. 2d --, 2010 WL 535136 (Feb. 16, 2010).

¹³³ *Id.* at 1, 13.

¹³⁴ *Id.* at 1.

¹³⁵ *Id.* at 1-2.

¹³⁶ *Id.* at 1.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2.

party defendant, in place of the government employee defendants, and to then dismiss the complaint based on the Westfall Act and an express exception to the FTCA.¹³⁹

The court in *Al-Zahrani* granted the motion for substitution and specifically referenced “the clear holding” in the prior decisions of *Rasul* and *Harbury*.¹⁴⁰ After the government employees were dismissed, and the United States was substituted in their place pursuant to the Westfall Act, the court then dismissed the United States from the lawsuit as well because of the foreign country exception to the FTCA while correspondingly rejecting the position of the plaintiffs that the United States Naval Base at Guantanamo Bay was not foreign soil.¹⁴¹

I. Proposed Amendment

If Congress is troubled by the judicial decisions holding alleged torturers to be absolutely immune from suit, then the following amendment to the Westfall Act, as only proposed in this thesis as of this point in time, could solve the problem:

28 U.S.C. § 2679(b):

(1) 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 against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

¹³⁹ *Id.* at 1-3.

¹⁴⁰ *Id.* at 1, 8-10.

¹⁴¹ *Id.* at 10-13; *see also* 28 U.S.C. § 2680(k).

(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~~;~~ or

(C) which is brought for acts of torture, violations of *jus cogens* norms, or for conduct which is otherwise egregious or criminal in nature.¹⁴²

Besides amending the Westfall Act in order to better represent and express the true intent of Congress, and to end the gross miscarriage of justice in regard to tort liability for torture, the United States also needs to amend the Westfall Act in order to be in compliance with its international treaty obligations. As discussed below, the United States has international treaty obligations that must be satisfied by and through domestic law. The current state of the law, in regard to the Westfall Act and the exceptions to the FTCA, does not satisfy the international human rights treaty obligations of the United States.

III. INTERNATIONAL HUMAN RIGHTS TREATIES

The two major international human rights treaties, in regard to the prohibition of torture, which the United States has ratified are the International Covenant on Civil and Political Rights (“CCPR”)¹⁴³ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).¹⁴⁴ By ratifying these two international human rights treaties, the United States has an obligation under international law to provide individuals with the right to be free from torture and inhuman or

¹⁴² In the author’s proposed amendment to 28 U.S.C. § 2679(b), double strikethrough (=) represents deletion while underlining (_) represents addition.

¹⁴³ International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171. Signed by the United States on Oct. 5, 1977 and ratified by the United States on June 8, 1992.

¹⁴⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. Signed by the United States on April 18, 1988 and ratified by the United States on Oct. 21, 1994.

degrading treatment;¹⁴⁵ the right to make official complaints of torture;¹⁴⁶ and the right to state compensation for torture.¹⁴⁷ Furthermore, the CCPR requires that the United States “adopt such legislative . . . measures as may be necessary to give effect to the rights recognized in the . . . Covenant.”¹⁴⁸ The CCPR also requires the United States to provide “an effective remedy” to victims and “[t]o ensure that any person claiming such a remedy shall have his [or her] right thereto determined by competent judicial, administrative or legislative authorities. . . .”¹⁴⁹ Moreover, the CAT requires the United States to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. . . .”¹⁵⁰ With the existing loopholes in the Westfall Act and the exceptions to the FTCA, clearly the United States is not complying with its international treaty obligations in regard to providing torture victims with an adequate remedy and compensation for torture at the hands of employees of the United States. However, despite what is set forth in the CCPR and the CAT, the problem for victims of torture is that nothing in the CCPR or the CAT can be directly enforced against the United States by a torture victim using the courts of the United States.

Before addressing, in detail, that the United States has adopted the CCPR and the CAT under the condition that both conventions are non-self-executing, it is first important to initially focus on exactly what a non-self-executing treaty is; why the United States would deem some treaties to be non-self-executing; and the affect this has on

¹⁴⁵ 999 U.N.T.S. 171 at Art. 7; 1465 U.N.T.S. 85 at Art. 4.1, Art. 16.

¹⁴⁶ 1465 U.N.T.S. 85 at Art. 12.

¹⁴⁷ 1465 U.N.T.S. 85 at Art. 14.1.

¹⁴⁸ 999 U.N.T.S. 85 at Art. 2.2.

¹⁴⁹ 999 U.N.T.S. 85 at Art. 2.3.

¹⁵⁰ 1465 U.N.T.S. 85 at Art. 14.1.

judicial enforcement of legal protections against torture committed by employees of the United States.

A. Non-Self-Executing

Briefly stated, what “non-self-executing” means is that one cannot go down to his or her local courthouse and file a lawsuit. But, the analysis is a bit more complex than just this simple, yet accurate, description. In the seminal case of *The Paquete Habana*,¹⁵¹ Justice Gray, in his deliverance of the opinion for the Supreme Court of the United States, set forth: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁵² Article III, Section 2, of the Constitution of the United States, in part, reads: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”¹⁵³ The Supremacy Clause, contained within Article VI of the Constitution of the United States, reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁵⁴ Therefore, it would appear, at least initially, that international human rights treaties would be treated by all courts within the United States

¹⁵¹ *The Paquete Habana*, 175 U.S. 677 (1900).

¹⁵² *Id.* at 700; see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

¹⁵³ U.S. CONST. art. III, § 2 (emphasis added).

¹⁵⁴ U.S. CONST. art. VI (emphasis added).

as “the supreme Law of the Land.”¹⁵⁵ However, a review of judicial interpretation reveals that the apparently clear words of the Constitution of the United States are not so clear.

While the Supremacy Clause of the Constitution of the United States references “*Treaties*,”¹⁵⁶ the Supreme Court of the United States makes a distinction between treaties that are the judicial equivalent of legislative acts and treaties that are merely contracts of politics between nations, with the later not being a judiciable issue for the courts until and unless the legislature enacts positive domestic legislation thereon.¹⁵⁷ In *Foster v. Neilson*,¹⁵⁸ the Supreme Court of the United States set forth:

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself without the aid of any legislative provision*. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, *the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.*¹⁵⁹

Accordingly, for the purpose of whether a treaty is judiciable, treaties have been judicially assigned two categories: 1) self-executing and 2) non-self-executing.¹⁶⁰ “[W]hile treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’”¹⁶¹ To provide further

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Foster v. Neilson*, 27 U.S. 253, 254 (1829), *overturned, in part, on other ground, United States v. Percheman*, 32 U.S. 51 (1833).

¹⁵⁸ *Foster v. Neilson*, 27 U.S. 253 (1829).

¹⁵⁹ *Id.* at 254. (emphasis added).

¹⁶⁰ See *Medellín v. Texas*, 128 S.Ct. 1346, 1356 (2008).

¹⁶¹ *Id.* (citing *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

clarity on the issue, the Supreme Court of the United States has set forth precisely what it means.

The label ‘self-executing’ has on occasion been used to convey different meanings. What we mean by ‘self-executing’ is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.¹⁶²

However, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[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.’”¹⁶³ Based on this legal presumption, several federal appellate courts have held that, absent express treaty language to the contrary, international treaties do not create privately enforceable rights and, therefore, do not create justiciable issues for individuals to litigate in domestic courts.¹⁶⁴

While treaties may be binding international law, the bottom line is that treaties ratified by the United States in non-self-executing fashion are, domestically, nothing

¹⁶² *Id.* at 1356, fn. 2.

¹⁶³ *Id.* at 1357, fn. 3 (citing 2 *Restatement (Third) of Foreign Relations Law of the United States* § 907, Comment a, p. 395 (1986)).

¹⁶⁴ *Id.*; see, e.g., *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th 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. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); see also, e.g., Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); Aya Gruber, *Sending the Self-Execution Doctrine to the Executioner*, 3 FIU L. REV. 57 (2007); Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002); David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103 (2000); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

more than unenforceable ideals.¹⁶⁵ Why would the United States not allow itself or its employees to be sued in the courts of the United States for its violations of ratified treaties – and especially treaties that prohibit torture? There are at least two possible theories: The “safety valve” theory and the “window dressing” theory.¹⁶⁶

The “safety valve” theory is simply that the domestic law of the United States is not a complete redundancy of treaty rights and that, therefore, the non-self-executing declarations are a “safety valve” to preclude the judiciary from domestically enforcing any treaty rights that are not codified in existing national law.¹⁶⁷ The United States takes the position that its domestic laws envelop its international human rights obligations.¹⁶⁸ But, just in case there is a new treaty right that is not a redundancy of national law, a non-self-executing declaration would act as a “safety valve” to prevent any separate and unique treaty-based right from being asserted in a national court.¹⁶⁹

The “window dressing” theory is that the United States makes domestic law understandings and non-self-executing declarations as a form of “window dressing” that, in theory, enables the United States to comply with its treaty obligations while, at the same time, not disturbing preexisting national law.¹⁷⁰ This “window dressing” is then used as an enticement in order to secure the Senate votes necessary to ratify the treaties in

¹⁶⁵ See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 370-76 (6th Cir. 2001) (holding that non-self-executing treaties are not binding on the courts); *White v. Paulsen*, 997 F. Supp. 1380, 1386-87 (E.D. Wash. 1998) (holding that no private cause of action can be brought under the CCPR or CAT in national courts); see also Gabrielidis, *supra* note 1, at 156; David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1120-23 (2000); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2175-88 (1999); see also, generally, Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J. L. & PUB. POL’Y 431 (2004).

¹⁶⁶ David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 189-90 (1999).

¹⁶⁷ *Id.*

¹⁶⁸ U.N. Doc. CAT/C/28/Add.5 at p. 19, ¶ 60; U.N. Doc. CCPR/C/SR.1402 at pp. 2, 7, 9, ¶¶ 3, 25, 37; U.N. Doc. CCPR/C/SR.1401 at p. 8, ¶ 34; U.N. Doc. CCPR/C/81/Add.4 at p. 4, ¶ 8.

¹⁶⁹ David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 189-90 (1999).

¹⁷⁰ *Id.*

the first place.¹⁷¹ If the national law already complies with treaty obligations, then there is certainly more incentive for the Senate to vote in favor of ratification over a situation where ratification would require comprehensive changes to domestic law.

Under either theory or reasoning, it appears clear that the use of non-self-executing treaty declarations to international treaties relating to torture is just another way that the United States has insulated itself and its employees from domestic civil tort liability for torture in a way not provided to foreign torturers. An argument could be made that, under either theory, the United States has violated general principals of international law by not ratifying the treaties in good faith. It is, arguably, less than good faith to enter into a treaty that may grant new and unique rights when a “safety valve” is also inserted in order to ensure that any treaty rights are not judicially enforceable. It is also, arguably, less than good faith to enter into a treaty that may require some modification of existing national law by hanging a negating “window dressing” in order to garner the ratifying votes of lawmakers. Under either theory, the effect of the Westfall Act, when coupled with the exceptions to the FTCA, results in a denial of civil redress for torture at the hands of employees of the United States – which clearly violates ratified human rights treaties.

B. RUDs

Since the meaning and effect of a non-self-executing treaty have been addressed, along with potential reasons for invocation of same, the specifics of the conditional ratification of the CCPR and CAT by the United States can be discussed. While ratifying the CCPR and the CAT, the United States only did so with a number of reservations,¹⁷²

¹⁷¹ *Id.*

¹⁷² *See* Appendix C.

understandings¹⁷³ and declarations¹⁷⁴ - sometimes referred to as RUDs. While the United States references the rights it ratified under these treaties in understanding to its own Constitution,¹⁷⁵ the United States, nevertheless, made a point to declare that the rights contained within the ratified treaties are not self-executing.¹⁷⁶ The circular reasoning of adopting international human rights treaties with the basic understanding that the United States already complies with the treaties, by and through its already existing national law, while, at the same time, reducing its treaty obligations to non-justiciable issues in national courts is somewhat less than good faith with entering into and complying with the intent and purpose of the treaties. This is especially true when the treaties at issue require adequate legal redress and compensation for torture victims, while, at the same time, the Westfall Act and the FTCA deny torture victims the very redress that the United States has promised to the international community. What adds insult to injury is that, because of the non-self-executing nature of the treaties, torture victims cannot even sue the United States for its clearly apparent treaty violations.

The reservations, understandings and declarations made by the United States concerning the CCPR did not go unnoticed by the international community. Belgium,¹⁷⁷ Denmark,¹⁷⁸ Finland,¹⁷⁹ France,¹⁸⁰ Germany,¹⁸¹ Italy,¹⁸² the Netherlands,¹⁸³ Norway,¹⁸⁴

¹⁷³ See Appendix D.

¹⁷⁴ See Appendix E.

¹⁷⁵ See *supra* note 173.

¹⁷⁶ See *supra* note 174.

¹⁷⁷ See Appendix F.

¹⁷⁸ See Appendix G.

¹⁷⁹ See Appendix H.

¹⁸⁰ See Appendix I.

¹⁸¹ See Appendix J.

¹⁸² See Appendix K.

¹⁸³ See Appendix L.

¹⁸⁴ See Appendix M.

Portugal,¹⁸⁵ Spain¹⁸⁶ and Sweden¹⁸⁷ all raised comments or objections to the conditioned ratification of the CCPR by the United States. Likewise, the reservations, understandings and declarations made by the United States concerning the CAT also did not go unnoticed by the international community. Finland,¹⁸⁸ Germany,¹⁸⁹ the Netherlands¹⁹⁰ and Sweden¹⁹¹ all raised comments or objections to the conditioned ratification of the CAT by the United States of America.

In their objections, Finland, the Netherlands, Portugal and Sweden appear to have hit the nail squarely on the head. Specifically, concerning the CCPR, the objection by Finland correctly set forth that “a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.”¹⁹² The objection of Portugal set forth “that the reservation . . . in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law.”¹⁹³ Sweden, by use of its objection to the conditioned ratification of the CCPR by the United States, clearly set forth that it was completely unsatisfactory for the United States to take the position that it can comply with a treaty by and through its already existing national law. Specifically, Sweden set forth:

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities

¹⁸⁵ See Appendix N.

¹⁸⁶ See Appendix O.

¹⁸⁷ See Appendix P.

¹⁸⁸ See Appendix Q.

¹⁸⁹ See Appendix R.

¹⁹⁰ See Appendix S.

¹⁹¹ See Appendix T.

¹⁹² *Supra* note 179.

¹⁹³ *Supra* note 185.

under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.¹⁹⁴

In regard to the CAT, the Netherlands, through its objection to the reservations, understandings and declarations of the United States, set forth that “it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation.”¹⁹⁵ Sweden, through the same method, referred to its previous objections to the reservations, understandings and declarations entered by the United States concerning the CCPR, and then, concerning the reservations, understandings and declarations of the United States regarding the CAT, asserted an objection based on the same reasoning.¹⁹⁶ Likewise, concerning the CAT, while also referring to its previous objection regarding the United States and the CCPR, Finland set forth:

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also . . . subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.¹⁹⁷

¹⁹⁴ *Supra* note 187.

¹⁹⁵ *Supra* note 190.

¹⁹⁶ *Supra* note 191.

¹⁹⁷ *Supra* note 188.

Finland, the Netherlands, Portugal and Sweden appear to be uniform in their opposition to the understandings of the United States that attempt to limit its international human rights responsibilities and obligations to the scope and provisions of the Constitution of the United States and other domestic law. These countries raise a very valid point. The reservations, understandings and declarations made by the United States in ratifying the CCPR and the CAT may substantially frustrate the true intent and purpose of the treaties. The United States, by conditioning the human rights elicited from the CCPR and the CAT to the confines of existing domestic law, deprives the international community of the commitment of the United States to the full scope of the rights these treaties purport to provide. Moreover, by not making the treaty obligations self-executing, the United States also denies people, such as victims of torture, the right to domestically enforce treaty rights which are not properly codified in existing national law – as, for example, the tort immunity for torturers provided by the Westfall Act and the exceptions to the FTCA. It seems completely hypocritical for the United States to use its domestic law as a justification for making treaties non-self-executing when, as with the Westfall Act and the FTCA, the domestic law of the United States does not comply with its international treaty obligations.

Besides the initial reaction of other countries to the conditioned ratification of the CCPR and the CAT, of particular interest is the reporting requirement, found in the CCPR¹⁹⁸ and the CAT,¹⁹⁹ that requires all participating members to report to the Secretary-General of the United Nations, for consideration by a committee, as to exactly what the reporting members have done, legislatively, judicially and administratively, in

¹⁹⁸ 999 U.N.T.S. 171 at Art. 40.1.

¹⁹⁹ 1465 U.N.T.S. 85 at Art. 19.1.

order to give effect to the provisions in each ratified convention. Making suggestions and recommendations, along with comments, if any, from other members, each respective committee then reports, through the Secretary General, to the General Assembly of the United Nations.²⁰⁰

As part of this treaty reporting process, the United States continues to make itself clear that in ratifying international human rights treaties it does not intend to create any enforceable causes of action to be litigated in domestic courts.²⁰¹ The United State has purposefully done this due to a mandate by the Executive Branch and the Senate.²⁰² However, despite this fact, the United States is of the position that ratifying a treaty that cannot be domestically enforced does not affect the international treaty obligations of the United States.²⁰³ It continues to be the misguided and uninformed position of the United States that, by and through the enforcement of its already existing laws, it already does everything required of it by the international human rights treaties it has ratified.²⁰⁴ As an illustrative example, in an addendum to its initial report to the Committee on the Elimination of Racial Discrimination, in relation to the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”),²⁰⁵ another human rights convention conditionally ratified by the United States, the United States specifically references the CCPR and the CAT and set forth:

²⁰⁰ 999 U.N.T.S. 171 at Art. 40; 1465 U.N.T.S. 85 at Art. 19.

²⁰¹ U.N. Doc. CAT/C/SR.427 at p. 3, ¶ 8; U.N. Doc. CAT/C/28/Add.5 at p. 18, ¶ 56; U.N. Doc. CCPR/C/SR.1405 at p. 3, ¶ 7; U.N. Doc. CCPR/C/SR.1401 at p. 4, ¶ 12; U.N. Doc. CCPR/C/81/Add.4 at pp. 4, 36, 203, ¶¶ 8, 129, III(1).

²⁰² U.N. Doc. CCPR/C/SR.1405 at p. 4, ¶ 8; U.N. Doc. CCPR/C/SR.1401 at p. 4, ¶ 12.

²⁰³ U.N. Doc. CAT/C/SR.427 at p. 3, ¶ 8; U.N. Doc. CAT/C/28/Add.5 at pp. 18, 19, ¶¶ 57, 60; U.N. Doc. CCPR/C/SR.1405 at pp. 3, 4, ¶¶ 7, 8; U.N. Doc. CCPR/C/SR.1401 at pp. 9, 11, ¶¶ 38, 46; U.N. Doc. CCPR/C/81/Add.4 at p. 4, ¶ 8.

²⁰⁴ U.N. Doc. CAT/C/28/Add.5 at p. 19, ¶ 60; U.N. Doc. CCPR/C/SR.1402 at pp. 2, 7, 9, ¶¶ 3, 25, 37; U.N. Doc. CCPR/C/SR.1401 at p. 8, ¶ 34; U.N. Doc. CCPR/C/81/Add.4 at p. 4, ¶ 8.

²⁰⁵ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195. Signed by the United States on Sept. 28, 1966 and ratified by the United States on Oct. 21, 1994.

This [non-self-executing] declaration has no effect on the international obligations of the United States or on its relations with States parties. However, it does have the effect of precluding the assertion of rights by private parties based on the Convention in litigation in U.S. courts. In considering ratification of previous human rights treaties, in particular the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1994) and the International Covenant on Civil and Political Rights (1992), both the Executive Branch and the Senate have considered it prudent to declare that those treaties do not create new or independently enforceable private rights in U.S. courts. However, this declaration does not affect the authority of the Federal Government to enforce the obligations that the United States has assumed under the Convention through administrative or judicial action.²⁰⁶

...

The United States is aware of the Committee's preference for the direct inclusion of the Convention into the domestic law of States parties. Some non-governmental advocacy groups in the United States would also prefer that human rights treaties be made 'self-executing' in order to serve as vehicles for litigation.²⁰⁷

...

As was the case with prior human rights treaties, existing U.S. law provides protections and remedies sufficient to satisfy the requirements of the present Convention.²⁰⁸

...

Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law. Neither does it contravene any provision of the treaty or restrict the enjoyment of any right guaranteed by U.S. obligations under the Convention.²⁰⁹

However, if this is true, then why is it necessary to be "prudent" in excluding international human rights treaties from domestic enforcement? This is especially true when there are clear gaps between the national law and the international treaties – as

²⁰⁶ U.N. Doc. CERD/C/351/Add.1 at pp. 43-44, ¶ 170.

²⁰⁷ *Id.* at p. 44, ¶ 173.

²⁰⁸ *Id.* at p. 44, ¶ 171.

²⁰⁹ *Id.* at p. 44, ¶ 172.

illustrated in this thesis. The respective treaty committees do not appear to agree with the position of the United States on this issue.²¹⁰ The respective treaty committees would prefer if the United States implemented the ratified human rights treaties by direct inclusion of the conventions into domestic law.²¹¹ In fact, the respective committees have taken the position that the stance of the United States on this issue actually contradicts the principle that international treaties should take precedence over domestic law.²¹² Furthermore, it has been relayed to the United States that it should rescind its non-self-executing declarations in order to demonstrate full support of the conventions.²¹³ This would certainly be another way to bridge the gap between the domestic law, and effect of the Westfall Act and FTCA exceptions, with the rights provided in the CCPR and the CAT.

The flaws in the position of the United States can be illustrated with the simplest of rhetorical questions. If the United States holds that the rights recognized under the covenants are already guaranteed in domestic law, then why are the domestic courts being deprived of the opportunity to rely on the conventions as the true law of the land?²¹⁴ Would it not be preferable to make ratified human rights treaties self-executing so that individuals could invoke them in domestic legal proceedings?²¹⁵ In 2000, the Chairperson of the Committee Against Torture, Peter Thomas Burns, a Canadian

²¹⁰ U.N. Doc. CAT/C/USA/CO/2 at p. 10, ¶ 40; U.N. Doc. CAT/C/SR.703 at p. 13, ¶ 72; U.N. Doc. CAT/C/USA/Q/2 at p. 2, ¶ 5; U.N. Doc. CCPR/C/SR.1405 at p. 3, ¶ 7; U.N. Doc. CCPR/C/SR.1401 at pp. 8, 11, ¶¶ 34, 46; *see also* Margaret Thomas, "Rogue States" Within American Borders: Remediating State Noncompliance with the International Covenant on Civil and Political Rights, 90 CAL. L. REV. 165, 177 (2002); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 461 (1996).

²¹¹ U.N. Doc. CCPR/C/SR.1402 at pp. 6, 7, ¶¶ 22, 27; U.N. Doc. CCPR/C/SR.1401 at p. 11, ¶ 46.

²¹² U.N. Doc. CCPR/C/SR.1402 at p. 6, ¶ 22; U.N. Doc. CCPR/C/SR.1401 at p. 8, ¶ 35.

²¹³ U.N. Doc. CAT/C/USA/CO/2 at p. 10, ¶ 40; U.N. Doc. CAT/C/SR.703 at p. 13, ¶ 72; U.N. Doc. CAT/C/USA/Q/2 at p. 2, ¶ 5; U.N. Doc. A/55/44, p. 32, ¶ 180; U.N. Doc. CCPR/C/SR.1402 at p. 6, ¶ 22; U.N. Doc. CCPR/C/SR.1401 at p. 11, ¶ 48.

²¹⁴ U.N. Doc. CCPR/C/SR.1401 at p. 8, ¶ 34.

²¹⁵ U.N. Doc. CAT/C/SR.424 at p. 6, ¶ 16.

national, believed so.²¹⁶ At the 424th meeting in which the Committee Against Torture considered the initial report of the United States regarding the CAT, Mr. Burns stated: “Articles 1 to 16 were non-self-executing and yet, according to the report, their provisions indirectly formed part of United States law. Under those circumstances, would it not be preferable to make them self-executing so that individuals could invoke them in legal proceedings?”²¹⁷ Since the conventions were intended to benefit individuals, exactly how are individuals being protected if the convention rights cannot be domestically enforced where domestic law may fall short of treaty obligations?²¹⁸ And that is exactly what the Westfall Act and the FTCA do – fall short of treaty obligations. As Omran El Shafei, an Egyptian national and a member of the Human Rights Committee, noted in 1995 at the 1401st meeting in which the Human Rights Committee considered the initial report of the United States in regard to the CCPR: “[T]he purpose of treaties . . . [is] for States to undertake new obligations, and in the case of the International Covenant on Civil and Political Rights, to conform domestic law to international standards enshrined in the Covenant. It . . . [is] regrettable that by its decision, the [United States] Government . . . [has] prevented the Covenant from being tested in the United States courts.”²¹⁹ Despite the clearly inaccurate representations by the United States that it fully complies with its treaty obligations by and through its already existing national law, it is especially regrettable that the Westfall Act and the FTCA clearly fall well short of complying with international human rights treaties – especially

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ U.N. Doc. CAT/C/USA/Q/2 at p. 2, ¶ 5; U.N. Doc. CCPR/C/SR.1405 at p. 3, ¶ 7; U.N. Doc. CCPR/C/SR.1401 at p. 8, ¶ 34.

²¹⁹ U.N. Doc. CCPR/C/SR.1401 at p. 11, ¶ 46.

since torture victims can in no way use the conventions themselves to seek a judicial remedy.

CONCLUSION

Whether fully implemented in domestic law or not, the United States is obligated to respect the international treaties it ratifies.²²⁰ The Westfall Act and the exceptions to the FTCA currently deny victims of torture, American style, from an adequate civil tort remedy. Therefore, not only do the Westfall Act and the FTCA result in violations of the international treaty obligations of the United States, they also result in a miscarriage of justice that is clearly contrary to the represented intent of Congress. The end result is a purely self-protectionist, hypocritical position of the United States when compared to its position on civil tort liability for torturers from other countries.

Accordingly, it is time for Congress to fix the problem it has created. While House Representative Barney Frank has represented that it was never the intent of Congress to shield torturers from civil tort liability, the fact remains that Congress is obviously aware of the problem and, to date, has done nothing to remedy the situation.²²¹ Therefore, Congress should amend the Westfall Act to allow civil tort suits against employees of the United States when the tortious conduct at issue is for torture and other *jus cogens* violations. Alternatively, the United States Senate and the State Department should withdraw the non-self-executing declarations in regard to the CCPR and the CAT so that torture victims could use the conventions as a legal source of rights not currently being properly provided by the national law – namely, the Westfall Act and the FTCA.

²²⁰ Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1235 (2005); see also *Sosa*, 542 U.S. at 752 (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”).

²²¹ See United States Code Classification Tables, Office of the Law Revision Counsel. Available at: <http://uscode.house.gov/classification/tables.shtml>.

An ideal situation would be for the United States to do both. A change is clearly necessary in order to finally burn the recipe for torture-related tort immunity.

APPENDIX A

Pub. L. No. 100-694 (Federal Employees Liability Reform and Tort Compensation Act of 1988), codified at 28 U.S.C. §§ 2671, 2674, 2679. This legislation is commonly referred to as the “Westfall Act” – named after the Supreme Court of the United States case of *Westfall v. Erwin*, which was legislatively abrogated by the Westfall Act. *See In re: Iraq and Afghanistan Detainees Litigation*, 479 F.Supp. 2d at 110. Specifically, the Westfall Act, in its public law form, reads:

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Federal Employees Liability Reform and Tort Compensation Act ‘28 USC 1 note’ of 1988.’

SEC. 2. ‘28 USC 2671 note’ FINDINGS AND PURPOSES.

(a) FINDINGS. -- The Congress finds and declares the following:

- (1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.
- (2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.
- (3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.
- (4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees.
- (5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal

liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in *Westfall v. Erwin*, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) PURPOSE. -- It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph by inserting after ‘executive departments,’ the following: ‘the judicial and legislative branches.’

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

‘With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.’

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

‘(b)

(1) 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 against the employee whose act or omission gave rise to

the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) 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.'

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

'(d)

(1) 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.

(2) 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 State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought 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. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought 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. A copy of the petition

shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if --

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.'

SEC. 7. '28 USC 2671 note' SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. '28 USC 2679 note' EFFECTIVE DATE.

(a) GENERAL RULE. -- This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY TO PROCEEDINGS. -- The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

(c) PENDING STATE PROCEEDINGS. -- With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the enactment of this Act during which to seek removal under such

section

2679(d).

(d) **CLAIMS ACCRUING BEFORE ENACTMENT.** -- With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act.

SEC. 9. '16 USC 831c-2' TENNESSEE VALLEY AUTHORITY.

(a) **EXCLUSIVENESS OF REMEDY.** -- (1) An action against the Tennessee Valley Authority 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 Tennessee Valley Authority while acting within the scope of this office or employment is exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages for a violation of the Constitution of the United States.

(b) **REPRESENTATION AND REMOVAL.** -- (1) Upon certification by the Tennessee Valley Authority 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 heretofore or hereafter commenced upon such a claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831C(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority 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 State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the

court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) RETENTION OF DEFENSES. -- Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

‘With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.’

Approved November 18, 1988.

APPENDIX B

The Federal Tort Claims Act (“FTCA”) is comprised of 28 U.S.C. §§ 1346(b), 2671-2680, and, as currently enacted, reads:

28 U.S.C. § 1346(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.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury. 28 U.S.C. § 1346(b).

28 U.S.C. § 2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term ‘Federal agency’ includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

‘Employee of the government’ includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

‘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. 28 U.S.C. § 2671. Underlining indicates that portion of 28 U.S.C. § 2671 which is part of the Westfall Act. *See* Pub. L. No. 100-694.

28 U.S.C. § 2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter. 28 U.S.C. § 2672.

28 U.S.C. § 2673:

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim. 28 U.S.C. § 2673.

28 U.S.C. § 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter. 28 U.S.C. § 2674. Underlining indicates that portion of 28 U.S.C. § 2674 which is part of the Westfall Act. See Pub. L. No. 100-694.

28 U.S.C. § 2675:

(a) An action shall not be instituted upon a claim 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, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages. 28 U.S.C. § 2675.

28 U.S.C. § 2676:

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. 28 U.S.C. § 2676.

28 U.S.C. § 2677:

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon. 28 U.S.C. § 2677.

28 U.S.C. § 2678:

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both. 28 U.S.C. § 2678.

28 U.S.C. § 2679:

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) 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 against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) 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.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) 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.

(2) 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 State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought 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. This

certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought 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. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. 28 U.S.C. § 2679. Underlining indicates that portion of 28 U.S.C. § 2679 which is part of the Westfall Act. *See* Pub. L. No. 100-694.

28 U.S.C. § 2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute

or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) 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: Provided, 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.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. 28 U.S.C. § 2680.

APPENDIX C

[CCPR reservations made by the United States]

(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT reservations made by the United States]

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case. (Oct. 21, 1994). Available at:

http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtmsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX D

[CCPR understandings made by the United States]

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in articles 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to 'exceptional circumstances' in paragraph 2 (a) of article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the

Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtmsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT understandings made by the United States]

(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'

(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.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention. (Oct. 21, 1994). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX E

[CCPR declarations made by the United States]

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that the right referred to in article 47 may be exercised only in accordance with international law. (June 8, 1992). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

[CAT declarations made by the United States]

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing. (Oct. 21, 1994). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

The Government of the United States of America reserves the right to communicate, upon ratification, such reservations, interpretive understandings, or declarations as are deemed necessary. (Apr. 18, 1988). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX F

[Comments of Belgium in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

The Government of Belgium wishes to raise an objection to the reservation made by the United States of America regarding article 6, paragraph 5, of the Covenant, which prohibits the imposition of the sentence of death for crimes committed by persons below 18 years of age.

The Government of Belgium considers the reservation to be incompatible with the provisions and intent of article 6 of the Covenant which, as is made clear by article 4, paragraph 2, of the Covenant, establishes minimum measures to protect the right to life.

The expression of this objection does not constitute an obstacle to the entry into force of the Covenant between Belgium and the United States of America. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX G

[Comments of Denmark in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

Having examined the contents of the reservations made by the United States of America, Denmark would like to recall article 4, para 2 of the Covenant according to which no derogation from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.

These objections do not constitute an obstacle to the entry into force of the Covenant between Denmark and the United States. (Oct. 1, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtmsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX H

[Comments of Finland in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Understanding (1) pertaining to articles 2, 4 and 26 of the Covenant is therefore considered to constitute in substance a reservation to the Covenant, directed at some of its most essential provisions, namely those concerning the prohibition of discrimination. In the view of the Government of Finland, a reservation of this kind is contrary to the object and purpose of the Covenant, as specified in article 19(c) of the Vienna Convention on the Law of Treaties.

As regards reservation (2) concerning article 6 of the Covenant, it is recalled that according to article 4(2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

As regards reservation (3), it is in the view of the Government of Finland subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

For the above reasons the Government of Finland objects to reservations made by the United States to articles 2, 4 and 26 [*cf.* Understanding (1)], to article 6 [*cf.* Reservation (2)] and to article 7 [*cf.* Reservation (3)]. However, the Government of Finland does not consider that this objection constitutes an obstacle to the entry into force of the Covenant between Finland and the United States of America. (Sept. 28, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX I

[Comments of France in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

At the time of the ratification of [the said Covenant], the United States of America expressed a reservation relating to article 6, paragraph 5, of the Covenant, which prohibits the imposition of the death penalty for crimes committed by persons below 18 years of age.

France considers that this United States reservation is not valid, inasmuch as it is incompatible with the object and purpose of the Convention.

Such objection does not constitute an obstacle to the entry into force of the Covenant between France and the United States. (Oct. 4, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtmsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX J

[Comments of Germany in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

The Government of the Federal Republic of Germany objects to the United States' reservation referring to article 6, paragraph 5 of the Covenant, which prohibits capital punishment for crimes committed by persons below eighteen years of age. The reservation referring to this provision is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of the Federal Republic of Germany interprets the United States' `reservation' with regard to article 7 of the Covenant as a reference to article 2 of the Covenant, thus not in any way affecting the obligations of the United States of America as a state party to the Covenant. (Sept. 29, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX K

[Comments of Italy in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

The Government of Italy objects to the reservation to art. 6 paragraph 5 which the United States of America included in its instrument of ratification.

In the opinion of Italy reservations to the provisions contained in art. 6 are not permitted, as specified in art.4, para 2, of the Covenant.

Therefore this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant.

Furthermore in the interpretation of the Government of Italy, the reservation to art. 7 of the Covenant does not affect obligations assumed by States that are parties to the Covenant on the basis of article 2 of the same Covenant.

These objections do not constitute an obstacle to the entry into force of the Covenant between Italy and the United States. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtmsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX L

[Comments of the Netherlands in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States. (Sept. 28, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX M

[Comments of Norway in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

1. In the view of the Government of Norway, the reservation (2) concerning capital punishment for crimes committed by persons below eighteen years of age is according to the text and history of the Covenant, incompatible with the object and purpose of article 6 of the Covenant. According to article 4 (2), no derogations from article 6 may be made, not even in times of public emergency. For these reasons the Government of Norway objects to this reservation.

2. In the view of the Government of Norway, the reservation (3) concerning article 7 of the Covenant is according to the text and interpretation of this article incompatible with the object and purpose of the Covenant. According to article 4 (2), article 7 is a non-derogable provision, even in times of public emergency. For these reasons, the Government of Norway objects to this reservation.

The Government of Norway does not consider this objection to constitute an obstacle to the entry into force of the Covenant between Norway and the United States of America. (Oct. 4, 1993). Available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&msgid=IV-4&chapter=4&lang=en#Participants>.

APPENDIX N

[Comments of Portugal in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

The Government of Portugal considers that the reservation made by the United States of America referring to article 6, paragraph 5 of the Covenant which prohibits capital punishment for crimes committed by persons below eighteen years of age is incompatible with article 6 which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

The Government of Portugal also considers that the reservation with regard to article 7 in which a State limits its responsibilities under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of International Law.

The Government of Portugal therefore objects to the reservations made by the United States of America. These objections shall not constitute an obstacle to the entry into force of the Covenant between Portugal and the United States of America. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtmsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX O

[Comments of Spain in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

After careful consideration of the reservations made by the United States of America, Spain wishes to point out that pursuant to article 4, paragraph 2, of the Covenant, a State Party may not derogate from several basic articles, among them articles 6 and 7, including in time of public emergency which threatens the life of the nation.

The Government of Spain takes the view that reservation (2) of the United States having regard to capital punishment for crimes committed by individuals under 18 years of age, in addition to reservation (3) having regard to article 7, constitute general derogations from articles 6 and 7, whereas, according to article 4, paragraph 2, of the Covenant, such derogations are not to be permitted.

Therefore, and bearing in mind that articles 6 and 7 protect two of the most fundamental rights embodied in the Covenant, the Government of Spain considers that these reservations are incompatible with the object and purpose of the Covenant and, consequently, objects to them.

This position does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America. (Oct. 5, 1993). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX P

[Comments of Sweden in response to the reservations, understandings, and declarations of the United States in regard to the CCPR]

In this context the Government recalls that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified, does not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.

A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

Sweden therefore objects to the reservations made by the United States to:

- article 2; cf. Understanding (1);
- article 4; cf. Understanding (1);
- article 6; cf. Reservation (2);
- article 7; cf. Reservation (3);
- article 15; cf. Reservation (4);
- article 24; cf. Understanding (1).

This objection does not constitute an obstacle to the entry into force of the Covenant between Sweden and the United States of America. (June 18, 1993). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants.

APPENDIX Q

[Comments of Finland in response to the reservations, understandings, and declarations of the United States in regard to the CAT]

A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty.

The Government of Finland therefore objects to the reservation made by the United States to article 16 of the Convention [(cf. Reservation I.(1)]. In this connection the Government of Finland would also like to refer to its objection to the reservation entered by the United States with regard to article 7 of the International Covenant on Civil and Political Rights. (Feb. 27, 1996). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX R

[Comments of Germany in response to the reservations, understandings, and declarations of the United States in regard to the CAT]

[W]ith respect to the reservations under I (1) and understandings under II (2) and (3) made by the United States of America upon ratification "it is the understanding of the Government of the Federal Republic of Germany that [the said reservations and understandings] do not touch upon the obligations of the United States of America as State Party to the Convention." (Feb. 26, 1996). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtmsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX S

[Comments of the Netherlands in response to the reservations, understandings, and declarations of the United States in regard to the CAT]

The Government of the Netherlands considers the reservation made by the United States of America regarding the article 16 of [the Convention] to be incompatible with the object and purpose of the Convention, to which the obligation laid down in article 16 is essential. Moreover, it is not clear how the provisions of the Constitution of the United States of America relate to the obligations under the Convention. The Government of the Kingdom of the Netherlands therefore objects to the said reservation. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the United States of America.

The Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention:

II. 1 a This understanding appears to restrict the scope of the definition of torture under article 1 of the Convention.

1 d This understanding diminishes the continuous responsibility of public officials for behaviour of their subordinates.

The Government of the Kingdom of the Netherlands reserves its position with regard to the understandings II. 1b, 1c and 2 as the contents thereof are insufficiently clear. (Feb. 26, 1996). (emphasis in original). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#Participants.

APPENDIX T

[Comments of Sweden in response to the reservations, understandings, and declarations of the United States in regard to the CAT]

The Government of Sweden would like to refer to its objections to the reservations entered by the United States of America with regard to article 7 of the International Covenant on Civil and Political Rights. The same reasons for objection apply to the now entered reservation with regard to article 16 reservation I (1) of [the Convention]. The Government of Sweden therefore objects to that reservation.

It is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfill the obligations undertaken therein. (Feb. 27, 1996). Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtmsg_no=IV-9&chapter=4&lang=en#Participants.