

No. 12-976

IN THE
Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL,
Petitioners,

v.

DONALD H. RUMSFELD,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**BRIEF FOR *AMICI CURIAE* GOVERNMENT
TRANSPARENCY AND ACCOUNTABILITY
ORGANIZATIONS SUPPORTING GRANT OF
CERTIORARI**

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<i>Bivens v. Six Unknown Fed. Narcotics Agents</i> , 403 U.S. 388 (1971)	passim
<i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500 (1988).....	19, 20
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2nd Cir. 1980).....	11
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	9, 10, 26, 30
<i>Parker v. Levy</i> , 417 U.S. 733 (1974).....	27
<i>Vance v. Rumsfeld</i> , 653 F.3d 591 (2012)	7, 13
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Other Authorities

American Forces Press Service, <i>DOD</i> , <i>FEMA, Other Agencies Aid Storm-</i>	
---	--

<i>Related Areas</i> , Oct. 30, 2012, http://www.defense.gov/news/newsarticle.aspx?id=118387	15
American Red Cross, <i>Partnership with America's Military Members</i> , http://www.redcross.org/about-us/history/red-cross-american-history/military-partnership	18
AmeriCares, <i>Iraq: Medical Aid and Humanitarian Relief</i> , http://www.americares.org/where-we-work/africa-middle-east/iraq.html	18
Arend Lijphart, PATTERNS OF DEMOCRACY (1st ed. 1999)	30
<i>Better Buying Power in Defense Spending: Hearing Before the Comm'n on Wartime Contracting</i> (Mar. 28, 2011) (statement of Ashton B. Carter, Under Sec'y of Def. for Acquisition, Tech., & Logistics), <i>available at</i> http://www.wartimecontracting.gov/docs/hearing2011-03-28_transcript.pdf	22
Brief for Professional Journalists et al. as Amici Curiae Supporting Appellants, <i>Vance v. Rumsfeld</i> , 2010 WL 6019649 (7th Cir. 2012)	20, 28, 30
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- Bureau of Int'l Info. Programs, *NGOs, Women, Minorities Play Significant Role in Iraqi Elections*, Jan. 26, 2005, available at <http://www.america.gov/st/washfileenglish/2005/January/20050126173832maduobbA9.753054e-02.html> 18
- David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277 (2005) 23
- David J. R. Frakt, *Military Accountability (or the Lack Thereof) for Detainee Abuse: The Instructive Case of Mohammed Jawad*, 45 U.S.F. L. REV. 873 (2011) 26, 29, 30
- David W. Sar, *Helping Hands: Aid for Natural Disaster Homeless vs. Aid for "Ordinary Homeless"*, 7 STAN. L. & POL'Y REV. 129 (Winter 1995-1996) 16
- Eric Engle, *The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge*, 67 ALB. L. REV. 502 (2003) 11
- Jill M. Fraley, *The Government Contractor Defense and Superior Orders in International Human Rights Law*, 4 FLA. A&M UNIV. L. REV. 43 (Fall/Spring 2008-2009) 12

Harv. L. Rev. Ass'n, <i>Military Exemption from Tort Claims</i> , 101 HARV. L. REV. 350 (1987).....	28
Human Rights Watch, <i>The Conduct of War and Civilian Casualties in Iraq</i> , 2 OFF TARGET 17, Dec. 12, 2003, available at http://www.hrw.org/node/12207/section/1	18
John L. Watts, <i>Differences Without Distinctions: Boyle's Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement</i> , 60 OKLA. L. REV. 647 (2007).....	27
Jonathan Turley, <i>Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy</i> , 70 GEO. WASH. L. REV. 649 (2002)	29, 31
Katherine Jackson, <i>Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction</i> , 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255 (2007).....	22, 24
Larry Diamond, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION (1999).....	30

- Larry G. Locke, *Constitutional Law: Servicemen and Constitutional Tort Suits-United States v. Stanley, 107 S. Ct. 3054 (1987)*, 11 HARV. J.L. & PUB. POL'Y 575 (1988)..... 28
- Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006) 20
- Laurie R. Blank, *Complex Legal Frameworks and Complex Legal Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 EMORY INT'L L. REV. 87 (2012)..... 15
- Margaret M. Severson, *Defense Industry-1, Injured Parties-0 Rights-Limiting Ethical Problems with Boyle and the Government Contractor Defense*, 21 PUB. CONT. L.J. 572 (1992) 19
- Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000)..... 19, 23, 24
- Office of the Deputy Assistant Sec'y of Def., *Past Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan (5A Papers) 1*, Jan. 2013, available at <http://www.acq>.

osd.mil/log/PS/docs/5A_paper/5A_Jan2013.doc.....	21
Office of the Under Sec’y of Def. for Acquisition, Tech., & Logistics, <i>Fiscal Year 2011 Annual Joint Report on Contracting in Iraq and Afghanistan</i> 11, Apr. 18, 2012, available at http://www.acq.osd.mil/log/PS/p_vault/Annual_Joint_Report_on_Contracting_in_Iraq_and_Afghanistan_18Apr2012.pdf	21
Office of Workers' Compensation Programs (OWCP), Division of Longshore and Harbor Workers' Compensation, <i>Defense Base Act Case Summary by Nation (DLHWC)</i> , http://www.dol.gov/owcp/dlhwc/dbaallnation.htm	24
Paul Blustein & Renae Merle, <i>U.S. Set to Award 7 Contracts for Rebuilding of Iraq</i> , WASH. POST, Mar. 21, 2003.....	17
R.W. Apple, <i>A Nation at War: News Analysis: Lowering Expectations</i> , N. Y. TIMES, Mar. 24, 2003, available at http://www.nytimes.com/2003/03/24/world/a-nation-at-war-news-analysis-lowering-expectations.html	17
Richard Leiby, <i>'Unilaterals,' Crossing the Lines</i> , WASH. POST, Mar. 23, 2003	17

- Rod Norland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE7D91F31F931A25751C0A9649D8B63>..... 24
- Salvation Army, *The Salvation Army In Iraq*, <http://www1.salvationarmy.org/ihq/documents/July07-back.pdf>..... 18
- Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907 (2006)..... 26, 28, 29
- Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. NAT'L SECURITY L. & POL'Y 11 (2012) 21, 22
- T. Christian Miller, *Contract Workers Invisible Casualties in Iraq, Afghanistan*, STAR-LEDGER (Newark, NJ), Sep. 24, 2010 17
- T. Christian Miller, *Private Contractors Outnumber U.S. Troops in Iraq*, L.A. TIMES, Jul. 3, 2007 17
- U.S. Companies Resolute On Iraq Mission*, BOSTON GLOBE, Apr. 3, 2004 17

U.S. Office of Personnel Mgmt., *Profile of Federal Civilian Non-Seasonal Full-Time Employees*, Sept. 30, 2012, <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/> 16, 19

United States Agency for International Development, *Iraq*, <http://iraq.usaid.gov/> 17

USAID Pakistan Contractor Made Satisfactory Progress, IG Says, 54 No. 32 GOV'T CONTRACTOR (Aug. 29, 2012) 22

vlogger, *Blackwater Sniper Engages Insurgents*, Military.com Video Center, Aug. 4, 2011, <http://www.military.com/video/operations-and-strategy/iraqi-war/blackwater-sniper-engages-insurgents/1094203251001/> 23

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INTERESTS OF THE *AMICI CURIAE*¹

Amicus curiae Government Accountability Project (“GAP”) promotes accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for whistleblower protections, including throughout the Federal government and for issues involving homeland security.

GAP defends whistleblowers and offers legal assistance where disclosures affect the public interest. GAP is at the forefront of advocating for whistleblower rights and protections.

Amicus curiae Project on Government Oversight (“POGO”) investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical Federal government.

POGO both relies upon and promotes the protection of whistleblowers. POGO has seen first hand

¹ Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, the Respondents and the Petitioners received at least 10-days notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

that whistleblowers play a vital role in exposing corruption and other misconduct committed by the Federal government and its contractors. The public relies on them. POGO has been vigilant to protect the rights of whistleblowers both in litigation and by working with elected officials.

Amicus curiae Liberty Coalition works to help organize, support, and coordinate transpartisan public policy activities related to civil liberties and basic human rights. It works in conjunction with groups of partner organizations interested in preserving the Bill of Rights, personal autonomy and individual privacy.

Amicus curiae Citizens for Responsibility and Ethics in Washington (“CREW”) seeks, through research, advocacy, public education, and litigation, to protect the rights of citizens to be informed and to ensure the integrity of government officials. Among its principal activities, CREW monitors the conduct of members of Congress and the Executive Branch and, where appropriate, files complaints. CREW seeks to preserve for those harmed by government actors the right to file suit to seek redress in the federal courts.

Amicus curiae Fund for Constitutional Government (“FCG”) believes that this country’s elected leaders, government agencies and corporations should uphold the principles set forth in the Constitution and the Bill of Rights. FCG protects the Constitution through research, public education, and litigation. It strives to awaken the public’s

concern about the Constitution and to stimulate interest in monitoring government conduct. FCG chooses its activities and projects for their ability to provide oversight, protect whistleblowers and publicize constitutional violations.

Amicus curiae International Association of Whistleblowers (“IAW”) promotes and encourages laws seeking to protect all persons of conscience, and to oppose waste, fraud and abuse of authority in government and government funded entities. It also advocates the fundamental premise that laws should effectively protect all valid truth tellers globally. It believes that strong accountability is essential to a strong and effective military.

The IAW opposes torture in general, and more specifically the torture of American citizens either at home or abroad. American citizens have a moral duty to speak out and report abuses of the U.S. military. Mr. Rumsfeld deserves full prosecution for his many violations of law, both in this case and in a range of related cases that has left the U.S. homeland vulnerable.

Amicus curiae No Fear Coalition is dedicated to eliminating racial discrimination and worker abuse in Federal agencies. No Fear Coalition members are committed to winning discrimination battles in all federal agencies. The No Fear Coalition empowers individuals with the knowledge that they not alone when they report abusive and discriminatory behavior.

Amicus curiae the Fertel Foundation supports projects related to the arts and education. The Fertel Foundation has a special interest in initiatives — such as the Ridenhour Prizes for Courageous Truth Telling — from which new communities and new insights may emerge and those that challenge entrenched communities of power.

Amici respectfully submit the following brief to protect civilian whistleblowers working both in the U.S. and abroad. They believe that whistleblowers are our last line of defense against waste, fraud and abuse of power. The Seventh Circuit's decision in *Vance v. Rumsfeld* offends *amici's* long-cherished belief that the U.S. military must act constitutionally, and that the military benefits from conscience and truth-telling.

Amici urge the Court to grant the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

The Seventh Circuit below refused to recognize *Bivens* actions as a means of redress for U.S. citizens tortured by military personnel. Its decision's broad terms could even apply to domestic contractors and citizens working on U.S. soil. The decision below leaves U.S. citizens with fewer rights than non-citizens, who can access judicial remedies for torture under federal statutes. Such a discrepancy in rights is unacceptable.

This discrepancy makes it less desirable for U.S. civilians to work in a way that they could have contact with military personnel. The decision below is a signal to hundreds of thousands of contractors and other civilians that their faith in American law is misplaced. They now face the possibility of torture without redress.

Overturing the decision below will strengthen military adherence to the U.S. Constitution without harming discipline, civilian control over the military, and the rights of civilians supporting the Federal government's activities.

ARGUMENT

I. THE LOWER COURT’S RULING CREATES A DANGEROUSLY OVERBROAD SPHERE OF IMMUNITY FOR MILITARY PERSONNEL WHO ABUSE UNITED STATES CITIZENS.

The Seventh Circuit’s ruling articulates an unnecessarily broad rule that there can be no “extra-statutory right of action for damages against military personnel who mistreat detainees.” *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2011). Instead of relying on qualified immunity for high-ranking officials, the Seventh Circuit immunizes all military personnel from *Bivens* actions, including actions brought for torture. *Id.* at 210 (Wood, J., concurring) (noting that “[the Court] could have adopted a rule of absolute immunity for government actors, in place of the qualified immunity it chose.”). The implication is that any U.S. citizen may be abused by military personnel anywhere at any time and have no recourse under *Bivens*.

A. The Seventh Circuit’s Decision Is A Dangerously Overbroad Precedent.

The Seventh Circuit’s decision sets a dangerous precedent in three ways.

First, because the Seventh Circuit declined to allow a *Bivens* action on the grounds of the nature of the military chain of command and not the peculiar position of the petitioners as contractors, the decision potentially applies to all U.S. citizens — not just U.S. citizens working for contractors. The ruling places any action by military personnel against U.S. citi-

zens beyond the scope of judicial review. No matter how inhumane or degrading the injury, a U.S. citizen cannot have his day in court.

Second, although the Seventh Circuit discusses the case in the context of the petitioners' service as security personnel in Iraq, the concurring opinion makes clear that the petitioners were held in solitary confinement and tortured far away from the war zone. *Vance*, 701 F.3d at 207 (Wood, J., concurring). Indeed, prior decisions of this Court have noted that the War on Terror's national security underpinnings are "broad and malleable," so much so that they may result in an "unravel[ing]" of our understanding of law-of-war principles. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). The decision below potentially applies to allegations of misconduct against military personnel anywhere, including inside the United States, so long as the petitioner's contact with the military was somehow related to "war."

Third, rather than restrict its holding to a finding that there was qualified immunity, which would have been an adequate basis for the decision, the Seventh Circuit found that there was no possibility of liability at all. The lower court coupled a broad grant of absolute immunity with the removal of any geographic or circumstantial restrictions that could limit the ruling.

In finding military officials immune from suit, the lower court assumes that the judiciary lacks competence to question military acts. The court reasoned that "judges make mistakes: They may lack vital

knowledge, may accept claims that should be rejected on facts or the law, or may award excessive claims.” *Vance*, 701 F.3d at 200. Judges are human, but this reasoning would preclude the judiciary from hearing any civil or criminal claim.

The lower court’s ruling precludes judicial review as a constitutional “check” where individual rights are involved. *See* U.S. Const. art. 3, § 2; *Hamdi*, 542 U.S. at 536-37 (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to . . . his detention by his Government, simply because the Executive opposes making available such a challenge.”).

B. The Seventh Circuit’s Decision Is So Overly Broad, It Leaves Citizens With Less Recourse Against The Military Than Non-Citizens.

The Seventh Circuit’s ruling gives citizens less access to courts than non-citizens. Citizens lose access to judicial remedies for torture; non-citizens retain access through federal statutes. Alien Tort Claims Act, 62 Stat. 934 (1948) (current version at 28 U.S.C. § 1350 (2006)) (“ATCA”); Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)) (“TVPA”). Together, ATCA and TVPA grant non-citizens “a cause of action in tort in the United States for torts that violate international law— such as torture.” Eric Engle, *The Torture Victim’s Protection Act, The Alien Tort Claims Act, and Foucault’s*

Archaeology of Knowledge, 67 ALB. L. REV. 502 (2003).

ATCA provides non-citizens with access to courts, stating, “[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2006). But ATCA only provides non-citizens with a private right of action for harms suffered in foreign nations. *Id.*; *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). The citizenship distinction is important in light of the decision below. Under ATCA, Vance and Ertel are denied access to courts *because of* their citizenship.

TVPA creates liability for an “individual who, under actual or apparent authority, or color of law, of any foreign nation” commits acts of torture. 28 U.S.C. § 1350 § 2(a) (2006). U.S. citizens are not guaranteed access to the courts under TVPA when the U.S. commits the torture. The use of the term “foreign nation” could “by its plain meaning . . . suggest that the definition of torture is limited to individuals acting under the actual or apparent authority of a government other than the United States.” Jill M. Fraley, *The Government Contractor Defense and Superior Orders in International Human Rights Law*, 4 FLA. A&M UNIV. L. REV. 43, 56 (Fall/Spring 2008-2009). The Second Circuit’s ruling in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), gives credence to this interpretation. There, U.S. officials were not liable under TVPA for a citizen’s detention

and removal from the U.S. to Syria for torture because their power arose under American law. *Id.* at 568.

Since ATCA and TVPA apparently preclude citizens from filing claims when the U.S. government commits the rights violation, the Seventh Circuit decision denies the last possible avenue of redress: *Bivens* actions — thereby creating a bizarre dichotomy where foreign nationals have more protections than do citizens. As the original panel in the Seventh Circuit observed:

Under the Torture Victim Protection Act, if an alien has been tortured by her own government, and if that foreign government has denied her a civil remedy, then a U.S. court could hear the case against a defendant found in the U.S. It would be extraordinary — one might even say hypocritical — for the United States to refuse to hear similar claims by a U.S. citizen against officials of his own government. And *Bivens* provides the only available remedy.

Vance v. Rumsfeld, 653 F.3d 591, 623 (2012). Given the availability of legal remedies for non-citizens, and the fact that Congress has taken no steps to foreclose *Bivens* claims generally, citizens must also have legal remedies. The Court should reverse the Seventh Circuit decision to guarantee U.S. citizens the same access to the courts as non-citizens for rights violations.

Otherwise, non-citizens will have more robust avenues for redress than citizens. Only non-citizens interacting with U.S. military or governmental personnel in foreign countries could seek remedies under ATCA and the TVPA, and citizens would be denied redress under *Bivens*.

II. THE SEVENTH CIRCUIT'S RULING WILL INCREASE THE COSTS INCURRED BY AMERICAN CIVILIANS WORKING WITH AMERICAN MILITARY PERSONNEL, UNDERMINING THE INTERESTS OF THE UNITED STATES.

Were this Court to refuse to correct the Seventh Circuit decision, it disincentivize civilians to work in any capacity involving contact with military personnel. Contractors, civil servants, reporters, non-governmental organization (“NGO”) workers, and others would all be denied protection.

American civilian workers come into contact with U.S. military personnel in a myriad of contexts, and they would be put at risk for abuse. They rely on the protections of the law when they agree to perform vital work; this Court should assure them that their faith is justified.

A. American Civilians Are Heavily Involved In The Work Of The United States Domestically And Abroad.

1. American civilians at home

The Seventh Circuit's ruling affects civilians supporting the Federal government domestically. Under this ruling, civilians working alongside military personnel even within the U.S. cannot seek civil remedies if wrongfully detained or tortured.

Disaster response operations, in which military and civilian personnel cooperate, are one environment in which civilians face a risk of detention and abuse. Following 2012's Hurricane Sandy, National Guard troops were placed on duty to assist police and emergency services. American Forces Press Service, *DOD, FEMA, Other Agencies Aid Storm-Related Areas*, Oct. 30, 2012, <http://www.defense.gov/news/newsarticle.aspx?id=118387>. The Army Corps of Engineers was also deployed. *Id.* These military personnel worked alongside local civilians from the Federal Emergency Management Administration, the Red Cross, and other volunteer efforts, in addition to civilian residents. *Id.*

Like overseas environments, disaster areas present situations where abuse can take place. In most disaster relief operations, "the military's primary mission will be to establish a safe and secure environment" allowing NGOs and other civilian agencies to carry out their own relief activities. Laurie R. Blank, *Complex Legal Frameworks and Complex Legal Challenges: Navigating the Applicable Law Across the Continuum of Military Operations*, 26 EMORY INT'L L. REV. 87, 130 (2012). These security operations take place in an environment where normal infrastructure is disrupted and a portion of

the population is displaced or “de-homed.” *See* David W. Sar, *Helping Hands: Aid for Natural Disaster Homeless vs. Aid for “Ordinary Homeless”*, 7 STAN. L. & POL’Y REV. 129, 129, 135-36 (Winter 1995-1996). There have been several cases of violence in these environments. *Id.* at 135. Domestic natural disasters therefore present situations where there is a heightened need for civilian assistance, as well as a heightened risk of abuse.

In addition to reaching civilians encountering military personnel in the context of natural disasters, the lower court’s ruling affects civilian federal employees who happen to set foot on military property. Overall, the Federal government employed 2,110,221 civilians as of September 2012. *See* U.S. Office of Personnel Mgmt., *Profile of Federal Civilian Non-Seasonal Full-Time Employees*, Sept. 30, 2012, <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees/>. The Department of Defense employed over a third of these. *Id.* Only fifty thousand work outside the United States. *Id.* These employees fill vital roles, and their willingness to work in these positions may be adversely affected if their rights are not adequately protected by the law.

2. American civilians overseas

American civilians have long assisted and otherwise accompanied the Federal government overseas, as frontline journalists, contractors rebuilding infrastructure, and non-governmental organization repre-

sentatives aiding impoverished areas while building goodwill for the United States. *See, e.g.*, R.W. Apple, *A Nation at War: News Analysis: Lowering Expectations*, N. Y. TIMES, Mar. 24, 2003, available at <http://www.nytimes.com/2003/03/24/world/a-nation-at-war-news-analysis-lowering-expectations.html>; Paul Blustein & Renae Merle, *U.S. Set to Award 7 Contracts for Rebuilding of Iraq*, WASH. POST, Mar. 21, 2003, at A30; United States Agency for International Development, *Iraq*, <http://iraq.usaid.gov/>. For example, at the onset of the U.S. invasion of Iraq, two thousand reporters were in the country—five hundred of whom were embedded in combat units. Richard Leiby, *'Unilaterals,' Crossing the Lines*, WASH. POST, Mar. 23, 2003, at F01. The Iraq War has also featured record numbers of private contractors who feed troops, drive convoys, build shelters for military families, and provide security for American officials. *See, e.g.*, T. Christian Miller, *Contract Workers Invisible Casualties in Iraq, Afghanistan*, STAR-LEDGER at 1 (Newark, NJ), Sep. 24, 2010; T. Christian Miller, *Private Contractors Outnumber U.S. Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1; *U.S. Companies Resolute On Iraq Mission*, BOSTON GLOBE, Apr. 3, 2004, at A1.

NGOs currently assist the Federal government in war zones throughout the world, helping to promote fairness, support liberalization, and provide aid to impoverished people. In Iraq, the National Democratic Institute helped politicians, civic leaders, minority communities, women, and young people participate in the 2005 parliamentary elections. *See*

Bureau of Int'l Info. Programs, *NGOs, Women, Minorities Play Significant Role in Iraqi Elections*, Jan. 26, 2005, available at <http://www.america.gov/st/washfileenglish/2005/January/20050126173832maduobbA9.753054e-02.html>. The AmeriCares Foundation provides medical supplies and aid in building clinics throughout Iraq. AmeriCares, *Iraq: Medical Aid and Humanitarian Relief*, <http://www.americares.org/where-we-work/africa-middle-east/iraq.html>. The Salvation Army, Human Rights Watch, and the American Red Cross all have sent American personnel to Iraq, too. Salvation Army, *The Salvation Army In Iraq*, <http://www1.salvationarmy.org/ihq/documents/July07-back.pdf>; Human Rights Watch, *The Conduct of War and Civilian Casualties in Iraq*, 2 OFF TARGET 17, Dec. 12, 2003, available at <http://www.hrw.org/node/12207/section/1>; American Red Cross, *Partnership with America's Military Members*, <http://www.redcross.org/about-us/history/red-cross-american-history/military-partnership>.

Given the different capacities in which U.S. citizens serve overseas, the lower court's ruling threatens the proper functioning of aid and development programs that further U.S. foreign policy interests. Civilian workers operating overseas for NGOs do so trusting that they will be safe from harm from their own country's military personnel, and that if they are harmed they have a way to be made whole. The lower court's ruling undermines that fundamental trust. In doing so, fewer U.S. citizens will be willing to place themselves at risk, and fewer organizations

will be willing to place their employees in dangerous environments.

B. The Seventh Circuit's Ruling Will Increase
The Cost Of Contracted Workers Who Provide
Vital Services To The Federal government.

Out of the over two million federal contractors, only fifty thousand are employed outside the U.S. *See* U.S. Office of Personnel Management, *supra*. If the Seventh Circuit's broad decision, which is not limited to civilians overseas, is allowed to stand, then businesses contracting with the government will face potential difficulties in hiring and retaining personnel. *See* Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 265 (2000).

The Court and legal scholars have found that the legal rights and liabilities of contractors have a direct effect on the price of government contracts. Margaret M. Severson, *Defense Industry-1, Injured Parties-0 Rights-Limiting Ethical Problems with Boyle and the Government Contractor Defense*, 21 PUB. CONT. L.J. 572, 589 (1992). This Court has determined in the past that costs incurred by contractors, such as judgments, ultimately pass to the United States itself, since contractors raise their prices to cover, or to insure against, contingent liability. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-12 (1988). Contractors who care about their vulnerability to the costs of litigation will also

be concerned about their ability to recover damages from U.S. government entities and personnel.

A proper view of checks and balances requires that employees of these contractors receive the protection of access to the courts, even despite the cost. If employees report illegalities in the form of waste, fraud, abuse, physical mistreatment, or other illicit criminal activity, they must have the ability to report such behavior to proper superiors or authorities. Brief for Professional Journalists et al. as Amici Curiae Supporting Appellants, *Vance v. Rumsfeld*, 2010 WL 6019649 12 (7th Cir. 2012). In particular, “[c]ivilians working in such war zones must retain the right to speak out about criminal wrongdoing without fear of unjust retaliation. If whistleblowers can be shackled or abused, the status quo on wrongdoing or corruption, in whatever arena, becomes perpetual.” *Id.*

The entire Federal government is affected by the Seventh Circuit’s ruling, as it will face higher contracting costs due to increased contingent liability. *See Boyle*, 487 U.S. at 511-12. As U.S. government entities continue to privatize their activities, private agencies will hire increasing numbers of U.S. citizens—whose rights will hinge on the protections they are afforded as employees. Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 384 (2006).

Rising costs will also impact the many Federal governmental entities working worldwide, including the U.S. military, that depend heavily on civilian

contractors. See Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. NAT'L SECURITY L. & POL'Y 11, 14 (2012). USAID employed 1,827 contractors in Iraq and 58,598 contractors in Afghanistan at the end of fiscal year 2011. Office of the Under Sec'y of Def. for Acquisition, Tech., & Logistics, *Fiscal Year 2011 Annual Joint Report on Contracting in Iraq and Afghanistan* 11, Apr. 18, 2012, available at http://www.acq.osd.mil/log/PS/p_vault/Annual_Joint_Report_on_Contracting_in_Iraq_and_Afghanistan_18Apr2012.pdf. The Department of State employed 5,311 contractors in Iraq and 2,825 contractors in Afghanistan at the end of fiscal year 2011. *Id.* By employing a high number of contractors, the U.S. uses as few as half of the military personnel required to complete the missions. Schooner & Swan, *supra*, at 23.

The U.S. military is especially reliant on contractors to fulfill its overseas missions, and American operations in Iraq and Afghanistan are no exception. As of January 2013, the Department of Defense employed 33,444 contractors in Afghanistan and 2,356 contractors in Iraq. Office of the Deputy Assistant Sec'y of Def., *Past Contractor Support of U.S. Operations in USCENTCOM AOR, Iraq, and Afghanistan* (5A Papers) 1, Jan. 2013, available at http://www.acq.osd.mil/log/PS/docs/5A_paper/5A_Jan_2013.doc. These contractors are indispensable to the Federal government. In fact, “[m]any observers argue that the U.S. military is overly dependent on the services contractors provide.” Katherine Jack-

son, *Not Quite A Civilian, Not Quite A Soldier: How Five Words Could Subject Civilian Contractors in Iraq and Afghanistan to Military Jurisdiction*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 255, 260 (2007); *USAID Pakistan Contractor Made Satisfactory Progress, IG Says*, 54 No. 32 GOV'T CONTRACTOR ¶ 268 (Aug. 29, 2012). In recent testimony before Congress, an Under Secretary of Defense reported, “We’re simply not going to go to war without contractors. We have to build that into what we call readiness, what we call training, what we call leadership and what we call war planning.” *Better Buying Power in Defense Spending: Hearing Before the Comm’n on Wartime Contracting* 39 (Mar. 28, 2011) (statement of Ashton B. Carter, Under Sec’y of Def. for Acquisition, Tech., & Logistics), *available at* http://www.wartimecontracting.gov/docs/hearing2011-03-28_transcript.pdf.

For the Department of Defense and the U.S. armed forces, contractors provide a wide range of services, including accounting and audit services, construction, food service, flying planes and helicopters, information technology, intelligence gathering and analysis, healthcare, interpretation and translation, “mobile security (e.g., protecting high-value targets, such as Members of Congress, and escorting convoys),” and “static security (guarding enclosed bases, diplomatic facilities, depots, etc.)” Schooner & Swan, *supra*, at 28 n.72. As has been widely report-

ed,² contractors also provide services included in the military's core competencies, such as combat. David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 279-80 (2005). Contractors "interact with enemy combatants and often hostile noncombatants in stressful environments," and many military contractors are placed "in roles that require them to operate alongside uniformed members of the armed services, often under combat conditions." *Id.* at 280.

The increasing use of contractors allows the U.S. military to focus its resources and attention on its core mission: projecting American power. Davidson, *supra*, at 263. Contractors "permit the military to preserve a favorable teeth-to-tail ratio. In the face of a greatly reduced force strength since the end of the Cold War, the military can preserve its combat strength (teeth) by outsourcing some of its logistical support functions (tail)." *Id.*

Citizens serving in these essential contractor roles face substantial risks of injury. For example, between 2001 and 2012, contractors filed 70,230 insurance claims under the Defense Base Act (DBA)

² See, e.g., vlogger, *Blackwater Sniper Engages Insurgents*, Military.com Video Center, Aug. 4, 2011, <http://www.military.com/video/operations-and-strategy/iraqi-war/blackwater-sniper-engages-insurgents/1094203251001/> (video footage of private contractors sniping insurgents from a rooftop near Baghdad, Iraq).

to recover for injuries received in Iraq and Afghanistan. Office of Workers' Compensation Programs (OWCP), Division of Longshore and Harbor Workers' Compensation, *Defense Base Act Case Summary by Nation (DLHWC)*, <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>. Out of the 70,230 insurance claims for injuries, 2,911 resulted from the death of a civilian contractor. *Id.* The risk faced by contractors is even more apparent when considering that as far back as 2009 in Iraq and 2011 in Afghanistan the number of annual contractor deaths exceeded that of military deaths. Rod Norland, *War's Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A8, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE7D91F31F931A25751C0A9649D8B63>.

The risk of wrongful detention and torture at the hands of the American military personnel only makes contracting work even more dangerous. Without an avenue for adequate recovery for any of these injuries, the prices demanded by contractors must necessarily increase. See Davidson, *supra*, at 265. The increasing number and variety of contractors used by the United States, coupled with the decreasing legal rights of U.S. citizens working for contractors, will lead to increased costs of government contracts. *Id.* If the cost of contracts rises to unsustainable levels, the supply of contractor services dries up, or the tasks performed by contractors become too dangerous, the United States loses the ability to make war and the flexibility to deploy its armed services around the world. Jackson, *supra*, at 260.

III. THE SUPREME COURT SHOULD AGREE TO HEAR THIS CASE BECAUSE LETTING THE LOWER COURT'S RULING STAND WILL HARM MILITARY DISCIPLINE.

The Seventh Circuit's ruling undermines the military's ability to maintain discipline in two ways. First, the removal of protections against abuse will have a chilling effect on reporters and whistleblowers who risk retaliation for their reporting. Second, making *Bivens* unavailable in abuse cases involving military personnel – even when torture is involved – removes a deterrent against abuse provided by *Bivens* itself.

A. The Seventh Circuit's Ruling Will Have A Chilling Effect On Third-Party Monitoring Of Misconduct.

This case involves two contractors who were detained by American officials after reporting suspicious activity within their firm to the Federal Bureau of Investigation. Brief of Petitioner-Appellant at 6. The petitioners were targeted for detention as a result of their whistle-blowing. *Id.* By preventing petitioners from pursuing a civil claim under *Bivens*, the lower court has allowed abuse of whistleblowers to go without adequate redress. If left to stand, this ruling will deter future whistleblowers and reporters who may otherwise report waste, abuse, fraud, or illegality.

B. Allowing The Seventh Circuit's Ruling To Stand Creates Problems Of Military Discipline.

By precluding courts from hearing *Bivens* claims, the lower court actually creates problems of military discipline that will lead to further constitutional violations against U.S. citizens. Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 938-39 (2006). "The very act of noninterference creates knowledge among the military that civilian capability to restrain their decisions will be limited." *Id.* see also David J. R. Frakt, *Military Accountability (or the Lack Thereof) for Detainee Abuse: The Instructive Case of Mohammed Jawad*, 45 U.S.F. L. REV. 873, 908 (2011) ("Regardless of whether the chain of command ordered or officially sanctioned abuses, when our military leaders look the other way or the perpetrators receive only a slap on the wrist, it sends a clear signal to the troops that the military will tolerate, and perhaps even implicitly encourage, detainee abuse."). This is especially true given the "broad and malleable" basis for the War on Terror, which could legitimize even seemingly "farfetched" violations of rights. *See Hamdi*, 542 U.S. at 520. "[L]ongstanding law-of-war principles" currently govern the War on Terror, including detention policy, and will continue to do so unless "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Id.* at 521. Surely, circumstances

have not changed so much that *Bivens* suits are no longer available to U.S. citizens harmed by military personnel outside of clearly-defined war zones — or that the entire globe is now a theater of combat.

If *Bivens* suits by U.S. citizens are barred, the members of the armed forces — as both a group of individuals and an institution — have less incentive to adhere to the Constitution, and the military will become increasingly divorced from American values.

C. Allowing This Case To Proceed Will Not Harm Military Discipline.

Allowing this case to proceed will not harm military discipline. Military discipline is compromised when service members are permitted to question the judgment, orders, and actions of fellow service members, military superiors, and the political branches of the government charged with equipping and running the military. John L. Watts, *Differences Without Distinctions: Boyle's Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647, 652 (2007). The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. *See id.* at 693 (citing *Parker v. Levy*, 417 U.S. 733, 758 (1974)). However, “[i]f maintenance of military discipline is the goal to be attained by exercising restraint, then the standard of reviewability should be that proposed by Justice

Brennan, denying *Bivens* actions only when essential to maintenance of military discipline.” Larry G. Locke, *Constitutional Law: Servicemen and Constitutional Tort Suits-United States v. Stanley*, 107 S. Ct. 3054 (1987), 11 HARV. J.L. & PUB. POL’Y 575, 582-83 (1988) (internal quotations omitted). *Bivens* actions should only be denied on the basis of military discipline when they are essential to maintaining military discipline.

The ability of a court to review the conduct of members of the military in the context of a *Bivens* claim does not harm military discipline. Lichtman, *supra*, at 938-39. Courts frequently review military affairs in a variety of cases not involving service-members’ service-related claims. Harv. L. Rev. Ass’n, *Military Exemption from Tort Claims*, 101 HARV. L. REV. 350, 361 (1987). The “courts have also been equally clear that the judicial branch can, and indeed must, review the constitutionality of military actions when individual rights are at stake.” Brief of Professional Journalists et al., *supra*, at 9-10 (citing *Munaf v. Geren*, 553 U.S. 674, 686 (2008); *Trop v. Dulles*, 356 U.S. 86 (1958)). “The issues presented in this appeal are quintessential subjects for judicial protection and the case does not stray even close to those matters that are entrusted solely to other branches.” *Id.*

In fact, service members are already allowed to disobey orders that are unlawful today in the case of war crimes or constitutional violations. Jonathan Turley, *Tribunals and Tribulations: The Antithetical*

Elements of Military Governance in a Madisonian Democracy, 70 GEO. WASH. L. REV. 649, 698 (2002). However, military defendants have argued that they were confused about what was permitted because of poor or conflicting guidance about proper treatment of detainees and appropriate interrogation techniques. Frakt, *supra*, at 908.

Although the government's official position is that it takes appropriate actions to hold accountable soldiers who abuse detainees, many critics believe that most punishment for cases of proven abuse is weak and inadequate. *Id.* at 901 (citations omitted). “Overall, there has been a failure to effectively investigate or prosecute anyone beyond those who immediately carried out the abuses [of detainees] and a tendency toward lenient penalties for anyone who has been tried. This has resulted in de facto impunity . . .” *Id.* at 878; *see also*, Lichtman, *supra*, at 938-39 (“[T]he Court's work has traveled well beyond mere noninterference or even deference; at times, the Court has been an enabler of military misconduct.”). The real threat to military discipline comes when the Constitution is applied to the military unevenly or not at all.

D. The Danger Of Detention And Detainee Abuse Has Not Abated.

The danger of detention and detainee abuse has not abated since the events in this case. *Frakt, supra*, at 908. In fact, the command climate that contributed to detainee abuse has not changed dramatically since the current administration took

office. *Id.* Therefore, contractors-turned-whistleblowers still face a very real risk of becoming targets of wrongful detention and abuse, in addition to every other risk of harm detailed above. By stripping U.S. civilians of the ability to file *Bivens* claims against military personnel, the Seventh Circuit deprived contractors-turned-whistleblowers of their avenue for recourse if abuse occurs, and of a deterrent against abuse in the first place.

IV. JUDICIAL REVIEW AND CIVILIAN CONTROL OF THE MILITARY ARE ESSENTIAL.

Ultimately, the issue of whether courts can hear *Bivens* claims by U.S. citizens is important to maintain both civilian control of the military and the vibrancy of judicial review. “[W]hen the military is not accountable to civilian oversight and justice, democracy is inherently limited by a reserve domain of power. This not only diminishes regime legitimacy but undermines the security and confidence of civilian democratic authority.” Larry Diamond, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 47 (1999). The stability of our Constitution is only maintained if it is backed by judicial review. Arend Lijphart, *PATTERNS OF DEMOCRACY* 228 (1st ed. 1999). Judicial review is plainly envisioned by the Constitution when individual rights are involved. Brief of Professional Journalists, et al., *supra*, at 11 (*citing* U.S. Const. art. 3 § 2; *Hamdi*, 542 U.S. at 536-37 (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to . . . his

detention by his Government, simply because the Executive opposes making available such a challenge.”)).

At its foundation, military discipline must be rooted to the Constitution. The military is controlled by civilian leadership in the Executive Branch and is governed by laws written by Congress. *See also* U.S. Const. art. I, § 8 (Congress shall have the power to “make all Laws which shall be necessary and proper for carrying in to Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” (emphasis added)). Neither Congress nor the members of the Executive Branch, as constitutional officers, have the power to enable the military to disregard the Constitution. *See also*, Turley, *supra*, at 687 (“The reference to congressional control over the ‘government’ of the military, however, was never meant to indicate ... a special protection of the War Department from legal standards affecting other federal agencies. It was essential to opponents of a standing army that it remain dependent and subservient to Congress.”) By insulating the military from *Bivens* suits by U.S. citizens, the Court would unmoor the military from the source of its being. This disconnection would harm the power of the Court to arbitrate constitutional litigation, and it would allow the military to use unconstitutional means toward the purpose of constitutional – and essential – ends.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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