

COMMENTS

YOU'RE IN THE ARMY NOW: BORROWED SERVANTS, DUAL SERVANTS, AND TORTS COMMITTED BY CONTRACTORS' EMPLOYEES IN THE THEATERS OF U.S. MILITARY OPERATIONS

ABSTRACT

Tortious conduct by the employees of private contractors working for the United States federal government in theaters of overseas contingency operations represents a great source of vicarious liability for contractors. However, the employment relationship that gives rise to vicarious liability can be disrupted in a contingency operation because contractors' employees might work not under the exclusive supervision of the companies that pay them but, due to the exigencies of military operations, under the partial or exclusive supervision of the U.S. military.

This Comment observes that a contractor may be able to escape liability under the borrowed servant doctrine. As interpreted by most courts, the doctrine states that when one borrows the employee of another by assuming control of the employee's acts, only the borrowing employer is liable for torts committed by that employee. For a tort arising in the theater of an overseas contingency operation, a contractor defendant's successful invocation of the borrowed servant doctrine would negate any possibility of recovery, since the borrowing employer—the military—can claim sovereign immunity.

This Comment urges courts to avoid this negative outcome by applying the dual servant doctrine, which states that two employers are jointly liable for an employee's torts when they share control of the employee. The majority approach to this doctrine renders it incompatible with the borrowed servant doctrine and therefore obsolete. This Comment endorses a minority approach, the "shared spot control approach," the adoption of which would allow courts to apply the dual servant doctrine when required by the facts of a case without contradicting the borrowed servant doctrine. The shared spot control approach would allow plaintiffs to recover damages from contractors despite

the government's sovereign immunity. It would also enhance courts' ability to offer outcomes appropriate to the facts of cases and consistent with the policy principles underlying tort law.

INTRODUCTION

An employee of a hypothetical private security contractor drives an armored sport-utility vehicle through a crowded neighborhood in Kabul, Afghanistan. In the truck's passenger seat sits a U.S. soldier serving as a monitor. Under a new (and hypothetical) Department of Defense program, the soldier is responsible for observing contractors' compliance with Pentagon rules and reporting violations to her superiors by radio. A senior employee of the contractor sits in the back seat.

The driver is speeding through the narrow streets and running red lights, a tactic he was taught by his employer to protect himself and the occupants of his vehicle from insurgent attack.¹ The monitor, concerned that the driver may cause an accident, tells him to slow down. The senior employee sitting in the back seat of the truck says nothing, and the driver reduces his speed by a few miles per hour. Moments later, the driver drives the truck into an intersection, running a stop sign, and collides with a civilian vehicle driven by an Afghan businessman. The Afghani dies in the collision, leaving a widow and four children.

A military officer visits the home of the man's widow and offers her a condolence payment of \$2,500, a fraction of her husband's lost earning power.² The widow declines the payment and sends the officer away. At the invitation of an American nonprofit organization, the widow enlists the services of a plaintiffs' lawyer and files a wrongful death suit against the contractor in a state court in the United States.³

After discovery, the contractor files for summary judgment on several alternative theories, one of which is that it cannot be vicariously liable for the driver's actions because the driver was the borrowed servant of the U.S. Army at the time of the accident. Under the borrowed servant doctrine, a general employer (in this case the private security contractor) who loans an employee (the driver) to a borrowing or "special" employer (the U.S. Army) is not

¹ Cf. John F. Burns, *The Deadly Game of Private Security*, N.Y. TIMES, Sept. 23, 2007, at A1 (reporting the practice of employees of the private security firm Blackwater Worldwide working in Iraq to drive at excessive speed to avoid attack by insurgents).

² See *infra* note 99 and accompanying text.

³ For another instance of a foreign national suing a contractor for its employees' actions during an overseas contingency operation, see Complaint at 11–13, *Abtan v. Blackwater USA*, No. 1:07-cv-01831 (D.D.C. Oct. 11, 2007) (stating complaint against the contractor Blackwater arising from its employee killing seventeen Iraqi citizens in Baghdad's Nisoor Square in September 2007).

vicariously liable for the employee's tortious acts.⁴ The contractor supports the defense with a Fifth Circuit case, *Trevino v. General Dynamics Corp.*, where the court held that contractors' employees working on a naval base in the United States were not borrowed servants of the Navy because the Navy did not sufficiently control them.⁵ The contractor argues that the military controlled its employees in this case because the injury, unlike that in *Trevino*, occurred in the theater of an overseas contingency operation, where military personnel wield such control over the actions of contractors' employees that, for the purposes of tort liability, the military stands in the role of special employer and not merely of client.⁶ The contractor argues that the Army's control of the employee negates any liability.

If the defendant contractor succeeds in its invocation of the borrowed servant doctrine, the victim's widow will be prevented from recovering damages. She cannot sue the Army for the driver's negligence because the doctrine of sovereign immunity renders it effectively judgment-proof.⁷

This hypothetical scenario highlights the deficiencies of the borrowed servant doctrine in tort cases in which a contractor is working under military control during an overseas contingency operation. This Comment argues that courts should apply the lesser known dual servant doctrine as an alternative. Part I argues that the borrowed servant doctrine too easily prevents recovery because the model courts use to interpret it—the “spot control” test—focuses on assertions of control by an alleged special employer without acknowledging the extent to which a general employer retains some measure of oversight.

Part II argues that courts should adopt the dual servant doctrine, which holds two employers jointly liable when they jointly control an employee.⁸ To do so, courts need not abandon the borrowed servant doctrine or the spot

⁴ 27 AM. JUR. 2D *Employment* § 377 (2008).

⁵ 865 F.2d 1474, 1488 (5th Cir. 1989).

⁶ See *infra* text accompanying notes 56–88. Previous scholarship on the civil liability of military contractors has not addressed this issue. See generally Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001) (summarizing issues confronting civilian contractors in contingency operations but not addressing the borrowed servant or dual servant doctrines).

⁷ See *infra* text accompanying notes 96–99.

⁸ RESTATEMENT (SECOND) OF AGENCY § 226 (1958). Existing commentary on the dual servant doctrine has not suggested that courts may apply it instead of the borrowed servant doctrine as the facts demand. See, e.g., John E. Skogland, Jr., *Borrowed Servants*, 76 COM. L.J. 307, 320–21 (1971) (arguing that courts should adopt the dual servant doctrine and discard the borrowed servant doctrine). *But see* Kelley v. So. Pac. Co., 419 U.S. 318, 324 (1974) (stating that under the Federal Employees Liability Act §§ 1–10 (as amended 45 U.S.C.A. §§ 51–60), an employer may be liable under the borrowed servant or dual servant doctrines).

control test, both of which are settled law in most jurisdictions in the United States.⁹ Instead, by embracing a minority interpretation of the dual servant doctrine, which this Comment calls the “shared spot control” test, courts may apply either doctrine as the facts of a case demand. This Comment uses the hypothetical involving the automotive accident in Kabul to show that the dual servant doctrine enables courts to produce outcomes tailored to the facts of individual cases and consistent with the public policy principles that underlie tort law.

I. THE BORROWED SERVANT DOCTRINE AND WHY IT INVITES ABUSE IN A CONTRACTOR TORT CASE

A contractor could invoke the borrowed servant doctrine by claiming that its employee was under not its own control but that of military personnel at the time the employee allegedly injured the plaintiff. Section A explains the borrowed servant doctrine and establishes that courts generally interpret it through what is called the “spot control” model. Section B explores a case arising from the Abu Ghraib prisoner abuse scandal to show how the doctrine would apply to a contractor tort. Section C returns to the Kabul hypothetical discussed in the Introduction to show how the doctrine could be misapplied in a contractor tort case and how such a misapplication would defy the public policy principles of tort law.

A. *The Borrowed Servant Doctrine and the Spot Control Model*

The borrowed servant doctrine states that when a general employer loans an employee to another, only the special employer is vicariously liable for the employee’s torts.¹⁰ As a rule, courts presume that a general employer retains control of the employee unless the alleged special employer has assumed control.¹¹ The borrowed servant doctrine applies not to a sharing of employment but to a complete displacement of it,¹² consistent with the maxim

⁹ See *infra* notes 21–32.

¹⁰ RESTATEMENT (SECOND) OF AGENCY § 227 cmt. a (1958) (stating that the borrowed servant doctrine imposes liability on either the general or the special employer but not both). The doctrine has also been considered to allow joint liability in some cases; this Comment treats the joint liability variation as a separate doctrine. See *infra* note 113.

¹¹ RESTATEMENT (SECOND) OF AGENCY § 227 cmt. b (1958).

¹² See, e.g., *Afonso v. Boston*, 587 F. Supp. 1342, 1346 (D. Mass. 1984) (stating that a lending employer can use the doctrine as a “shield” to avoid vicarious liability).

that no one can serve two masters.¹³ Conceptually, a borrowed servant trades one master for another.

The borrowed servant doctrine has drawn criticism from courts and commentators for decades.¹⁴ This Comment does not engage with those critiques but simply observes that the majority of courts have settled on the doctrine and the spot control test used to apply it.¹⁵ Under the spot control test, one becomes the special employer of another by assuming “the right to control the particular act [performed by that employee] giving rise to the injury.”¹⁶ Courts applying this test distinguish spot control from “broad control,” which is indicated by an employer’s power to hire, train, pay, and fire an employee.¹⁷

¹³ J. Dennis Hynes, *Chaos and the Law of the Borrowed Servant: An Argument for Consistency*, 14 J.L. & COM. 1, 28 n.90 (1994) (“The maxim ‘no man can serve two masters . . .’ necessarily underlies the borrowed servant rule in the overwhelming majority of jurisdictions that search for a single master.”); see also *Matthew* 6:24 (King James) (“No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”).

¹⁴ See, e.g., Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 121 (1921) (“The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence.”); see also *Wilson v. Nooter Corp.*, 475 F.2d 497, 502 (1st Cir. 1973) (claiming that the doctrine produces such unpredictable results that it is “amorphous”); *DePratt v. Sergio*, 306 N.W.2d 62, 65 (Wis. 1981) (criticizing the doctrine’s tendency to deny a plaintiff recovery if the special employer cannot pay, regardless of the financial state of the general employer); Hynes, *supra* note 13, at 18 (stating that the doctrine forces strict liability on employers that have not necessarily chosen the tortfeasor employee); Richard W. Power, *It’s Time to Bury the Borrowed Servant Doctrine*, 17 ST. LOUIS U. L.J. 464, 465 (1973) (asserting that courts should abandon the doctrine entirely); Skogland, *supra* note 8, at 319 (claiming that the doctrine “assumes the very fact which has yet to be proven, i.e., that one relation ends when the other begins”); Talbot Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1231 (1940) (“There is no true meaning [of control,] nor is there any one ‘correct’ meaning.”); *id.* at 1222, 1232–33 (arguing that the doctrine’s focus on control is inconsistent with the disregard for control seen in the frolic and detour doctrines of agency law); Henry L. Woodward, *Borrowed Servants and the Theory of Enterprise Liability*, 76 YALE L.J. 807, 821 (1967) (arguing that the doctrine assigns liability to a special employer when it is usually the general employer that is best able to predict and insure against the risks of injury); Note, *Liability for Torts of Borrowed Servants*, 28 OHIO ST. L.J. 550, 552 (1967) (stating that the courts have failed to define control).

¹⁵ See *infra* notes 20–32 and accompanying text.

¹⁶ Hynes, *supra* note 13, at 10 (quoting *Nepstad v. Lambert*, 50 N.W.2d 614, 621–22 (Minn. 1951)). For criticism of the spot control approach, see *id.* at 12–18 (asserting that the test errs by omitting the issue of whether an employee is acting on an employer’s behalf); Woodward, *supra* note 14, at 810 (arguing that the spot control model relies on a fault-based theory, when “[t]oday hardly anyone believes that the *fault* of the employee can be imputed to his corporate master”).

¹⁷ JOHN SLAIN ET AL., AGENCY, PARTNERSHIP, AND EMPLOYMENT: A TRANSACTIONAL APPROACH § 1, at 2-70, ¶ 3 (1980). As Professor Slain and his co-authors observe, *id.*, some courts have emphasized broad control over spot control, most notably in *Charles v. Barrett*, 135 N.E. 199, 199 (N.Y. App. 1922) (Cardozo, J.) (stating that the doctrine would not apply unless an employee renounced his or her allegiance to the general employer). Other courts and commentators have followed or proposed a variety of alternatives to the spot control approach. See, e.g., *Standard Oil v. Anderson*, 212 U.S. 215, 227 (1909) (instituting the “whose business” approach, which states that liability should accrue to the employer whose work is being done at the

This Comment uses the phrase “spot control approach” to refer to decisions in which courts decide the issue of borrowed employment entirely or primarily on the basis of spot control.

Because the spot control test assigns liability to the party with direct oversight, it offers considerable deterrent power.¹⁸ As expressed by the *Third Restatement of Agency*: “Liability should be allocated to the employer in the better position to take measures to prevent the injury suffered by the third party. An employer is in that position if the employer has the right to control an employee’s conduct.”¹⁹

Most federal courts use the spot control test when they apply common law agency doctrine to federal statutes dealing with employment. Appellate courts in the Third, Fourth, Fifth, Seventh, and Ninth Circuits have followed the Supreme Court’s lead²⁰ in treating spot control as either the dispositive issue or the most important of several factors in establishing employment,²¹ as have

time of injury); *Inmon v. Crane Rental Servs., Inc.*, 67 P.3d 726, 731–33 (Ariz. Ct. App. 2003) (treating the “whose business” question as a mere factor in a multifactor analysis whose other factors included contract terms and the right to control an employee); *Smith*, *supra* note 14, at 1251–52 (arguing for a “scope of the business” test, which would apply the rule only when an employee working with an alleged special employer performs a task that is outside the scope of the general employer’s business); *Woodward*, *supra* note 14, at 821 (arguing for an approach that would assign liability to the employer that was best able to predict and insure against the risk of accident).

¹⁸ Power, *supra* note 14, at 465–66 (“It has been widely recognized that only [spot] control has significant accident prevention potential . . .”); Note, *supra* note 14, at 552 (arguing that the employer with spot control of an employee at the time of an injury is in the best position to prevent the injury).

¹⁹ RESTATEMENT (THIRD) OF AGENCY § 7.03(d)(2) (2006). The *Third Restatement of Agency* allows confusion about what indicates control, particularly by providing a list of factors that includes elements of both broad control (e.g., “method of payment”) and spot control (e.g., “the extent of control that an employer may exercise over the details of an employee’s work”). *Id.* at cmt. d(2).

²⁰ See *Kelley v. So. Pac. Co.*, 410 U.S. 318, 330 (1974) (finding that a business lacked sufficient “day-to-day supervision” to be a special employer).

²¹ *Hojnacki v. Klein-Acosta*, 285 F.3d 544, 552 (7th Cir. 2002) (“[B]ecause the [alleged employer] did not control [the alleged employee] in the performance of her duties, she was not [a] . . . loaned employee.”); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000) (“Ultimately, any particular factor only informs the primary inquiry—whether the borrowing employer has authoritative direction and control over a worker.”); *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1350 (3d Cir. 1991) (“The primary factor to be considered . . . is whether [the alleged special employer] had the power to direct, control and supervise the plaintiff in the performance of his work . . .”); *Melancon v. Amoco Prod. Co.*, 834 F.2d 1238, 1244–45 (5th Cir. 1988) (“[T]he question of who has control of the employee and the work he is performing, has been considered the central issue of ‘borrowed employee’ status. . . . [The special employer] clearly had control of [the employee] and his work: [the employee] took orders only from [the special employer’s] personnel who told him what work to do, and when and where to do it.”); *United States v. Bissett-Berman Corp.*, 481 F.2d 764, 772 (9th Cir. 1973) (“Here, the [employee] was under the direct and exclusive command of [the special employer] and acting at the time under [the employer’s] supervision and control. . . . [T]he crew . . . was ‘loaned to’ or were the ‘borrowed servants’ of [the employer].”).

district courts in the First, Sixth, and Eleventh Circuits.²² The Second Circuit Court of Appeals has expressly declined to interpret the doctrine,²³ but a district court in the circuit has embraced the spot control test.²⁴ The Eighth Circuit Court of Appeals has addressed the issue only in state law diversity cases.²⁵ The Tenth Circuit Court of Appeals has not squarely addressed the borrowed servant doctrine in a federal question since using an alternative test in 1937.²⁶

The spot control test predominates in state courts as well. Twenty-two states have embraced the test by treating spot control as either the determinative factor or the most important factor in a borrowed servant case.²⁷

²² *Wai v. Rainbow Holdings*, 350 F. Supp. 2d 1019, 1025–26 (S.D. Fla. 2004) (“In this case, [the employee] fails to submit evidence showing that [the alleged special employer] controlled his work to such an extent that it should be considered his borrowing employer”); *In re Complaint of Wepfer Marine, Inc.*, 344 F. Supp. 2d 1130, 1134–35 (W.D. Tenn. 2004) (“In deciding whether an employee is a ‘borrowed servant,’ the Court is to inquire into whose work is being performed by determining which employer possesses the power and control over the servant’s work. . . . When the borrowing employer possesses this authoritative direction and control over a particular act, it in effect becomes the employer.”); *Costa v. U.S. Dep’t of Veterans Affairs*, 845 F. Supp. 64, 69 (D.R.I. 1994) (“At all times [the medical residents acting as borrowed servants] were subject to direct supervision and control by attending Veterans Affairs physicians. [The residents never] used independent judgment in the treatment of a patient.”).

²³ *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001) (“We have heretofore neither adopted nor rejected [the control] test and find it unnecessary to do so today.”).

²⁴ *Jurgens v. Poling Transp. Corp.*, 113 F. Supp. 2d 388, 403 (E.D.N.Y. 2000) (holding that a special employer must have “the power to control, manage, and direct the servant in the performance of [the servant’s] work” (citing *Addison v. Gulf Coast Contracting Servs.*, 744 F.2d 494, 499 (5th Cir. 1984))). *But see Smoot v. N.Y. Susquehanna & W. Ry. Corp.*, 707 F. Supp. 629, 632 (N.D.N.Y. 1989) (applying the whose-business test).

²⁵ *E.g., Mo. Pac. R.R. Co. v. Champlin & Wells, Inc.*, 775 F.2d 255, 257 (8th Cir. 1985) (applying Arkansas law).

²⁶ *Jones v. George F. Getty Oil Co.*, 92 F.2d 255, 259 (10th Cir. 1937) (citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909)) (embracing the “whose business” test).

²⁷ *See, e.g., Inmon v. Crane Rental Servs., Inc.*, 67 P.3d 726, 731 (Ariz. Ct. App. 2003) (“[T]o avoid vicarious liability for an employee’s acts, a general employer must show that the special employer had the exclusive right to control the employee’s specific job functions”); *St. Joseph’s Reg’l Health Ctr. v. Munos*, 934 S.W.2d 192, 195 (Ark. 1996) (“The test is whether . . . [the employee] continues [to be] liable to the direction and control of his master or . . . the party to whom he is lent or hired.”); *Indus. Exch. v. Indus. Accident Comm’n*, 156 P.2d 926, 928 (Cal. 1945) (“The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship.”); *Mather v. Griffin Hosp.*, 540 A.2d 666, 672 (Conn. 1988) (stating that the application of the borrowed servant doctrine depends on whether an alleged special employer “actually exercises supervision and control over the servant”); *Kepa v. Haw. Welding Co., Ltd.*, 545 P.2d 687, 691 (Haw. 1976) (“The paramount consideration . . . is whether the alleged special employer exercised control over the details of the work of the loaned employee”); *Pinson v. Minidoka Highway Dist.*, 106 P.2d 1020, 1022 (Idaho 1940) (“The general test is the *right* to control and direct the activities of the employee, or the power to control the details of the work to be performed”); *Farr v. Laidig Concrete, Inc.*, 810 N.E.2d 1104, 1107, 1108 (Ind. Ct. App. 2004) (stating that the most important factor is “control” and evaluating that

Courts in thirteen states treat spot control as one of several factors²⁸ but give it

factor on the basis of an alleged special employer's power of direct supervision); *Carnes v. Dep't of Econ. Sec.*, 435 S.W.2d 758, 763–64 (Ky. 1968) (collecting cases applying the spot control approach); *Boyce's Case*, 81 A.2d 670, 673 (Me. 1951) (“It is the general rule that when one lends a servant to another for a particular employment, and the servant is under exclusive direction and control of that other in the particular employment, he must be dealt with as the servant of the one to whom he is loaned.”); *Butler-Tulio v. Scroggins*, 774 A.2d 1209, 1228 (Md. Ct. Spec. App. 2001) (stating that the most important issue is whether a special employer “had or exercised the right to control the details” of an employee’s work (citing *Franklin v. Gupta*, 567 A.2d 524, 539 (Md. Ct. Spec. App. 1990))); *Hohenleitner v. Quorum Health Res., Inc.*, 758 N.E.2d 616, 625 (Mass. 2001) (stating the “guiding principle” as “the right to control the physical conduct of the other in the performance of the service”); *Janik v. Ford Motor Co.*, 147 N.W. 510, 512 (Mich. 1914) (“The test is whether in the particular service which [the employee] is engaged or requested to perform, he continues liable to the direction and control of his original master or becomes subject to [the alleged special employer].”); *Nepstad v. Lambert*, 50 N.W.2d 614, 622 (Minn. 1951) (expressly adopting “control test” and stating that it requires “authority to exercise detailed authoritative control over the manner in which the work is to be done”); *Galvao v. G.R. Robert Const. Co.*, 846 A.2d 1215, 1222 (N.J. 2004) (expressly adopting the test); *Wolfe v. Wilmington Shipyard, Inc.*, 522 S.E.2d 306, 311 (N.C. Ct. App. 1999) (“A servant furnished by its employer to another party becomes the borrowed servant of that party when it has the right to control the servant regarding not only the work to be done but also . . . the manner of performing it.” (internal quotations and citation omitted)); *Pechtl v. Conoco, Inc.*, 567 N.W.2d 813, 819 (N.D. 1997) (stating that the borrowed servant determination “depends on whether there is authoritative control over the manner and details” of the work of the alleged borrowed employee); *Ferguson v. Dyer*, 777 N.E.2d 850, 853 (Ohio Ct. App. 2002) (expressly adopting the test); *Reflex Sys., Inc. v. W.C.A.B. (Ferrucci)*, 784 A.2d 217, 222 (Pa. Commw. Ct. 2001) (“[T]he most important factor is evidence of actual control or the right to control the work to be done and the manner of its performance”); *Agostini v. W.J. Halloran Co.*, 111 A.2d 537, 540 (R.I. 1955) (stating that the doctrine depends on the right of control over an employee); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002) (stating that the borrowed servant inquiry “hinges on whether the [special] employer or its agents have the right to direct and control the employee with respect to the details of the particular work at issue”); *Weaver v. Brush*, 689 A.2d 439, 443 (Vt. 1996) (“The issue is whether [the alleged special employer] had a right to control the details of [the employee’s] work”); *Campbell v. State*, 118 P.3d 888, 893 (Wash. Ct. App. 2005) (“The key factor is that the servant be in the exclusive control of the special employer”); *Franks v. Indep. Prod. Co., Inc.*, 96 P.3d 484, 490, 494 (Wyo. 2004) (stating that “the primary test to establish the existence of employment is the right of control of the alleged employer” and interpreting control as “the right to control the details of the work”).

²⁸ See, e.g., *Defoor v. Evesque*, 694 So.2d 1302, 1304 (Ala. 1997) (treating the general employer’s retention of spot control as the third of three factors); *Evans v. Webster*, 832 P.2d 951, 955 (Colo. Ct. App. 1991) (treating spot control as the first of nine factors, then stating that it was one of the three key factors); *Paoli v. Dave Hall, Inc.*, 462 A.2d 1094, 1096–97 (Del. Super. Ct. 1983) (treating spot control as the first of two factors); *Chavez v. Transload Serv., L.L.C.*, 884 N.E.2d 1258, 1261 (Ill. App. Ct. 2008) (stating that spot control is the first of two factors); *Sanchez v. Harbor Const. Co., Inc.*, 968 So.2d 783, 786 (La. Ct. App. 2007) (treating spot control as the first of nine factors); *Patton-Tully Transp. Co. v. Douglas*, 761 So.2d 835, 840 (Miss. 2000) (treating spot control as the second of three factors); *Kish v. Mont. State Prison*, 505 P.2d 891, 895 (Mont. 1973) (treating spot control as the second of two factors); *LaVallie v. Simplex Wire & Cable Co.*, 609 A.2d 1216, 1218 (N.H. 1992) (treating spot control as the first of nine factors); *Graziano v. 110 Sand Co.*, 855 N.Y.S.2d 203, 205 (N.Y. App. Div. 2008) (stating that spot control is the first of two factors); *Arrow Elecs. v. Adecco Employment Servs., Inc.*, 195 S.W.3d 646, 654, 656 (Tenn. Ct. App. 2005) (treating spot control as the second of two factors); *Kunz v. Beneficial Temps.*, 921 P.2d 456, 461 (Utah 1996) (treating “right of control” as the first of two factors and discussing that right in terms of detailed supervision); *Metro Mach. Corp. v. Mizenko*, 419 S.E.2d 632, 635 (Va. 1992) (treating spot control as the first of nine factors);

so much weight that it is effectively dispositive.²⁹ Seven states and the District of Columbia have adopted approaches in which spot control is not a factor but a required element.³⁰ Four states weigh spot control only when a general employer has “relinquished” or “abandoned” its control of the employee.³¹ The remaining four states have fashioned other approaches that show little indication of spreading to other jurisdictions.³²

Phelps v. Physicians Ins. Co. of Wis., Inc., 744 N.W.2d 880, 886 (Wis. Ct. App. 2007) (treating spot control as the third of four factors).

²⁹ E.g., *Arrow Elecs.*, 195 S.W.3d at 654, 656 (stating that spot control is only one of two factors, then devoting the bulk of the analysis to a discussion of it and deciding the question put before the court case based on it).

³⁰ The majority of these cases treat cite spot control as the third of three elements, following ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKMEN’S COMPENSATION LAW § 67.01 (2008) (stating that a special employer is liable when “(1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work”). See, e.g., *Union Light & Power Co. v. D.C. Dep’t of Employment Servs.*, 796 A.2d 665, 667 n.3 (D.C. 2002); *St. Lucie Falls Prop. Owners Ass’n v. Morelli*, 956 So.2d 1283, 1286 (Fla. Dist. Ct. App. 2007) (apparently following but not citing Professor Larson’s treatise); *Kaiser v. Millard Lumber, Inc.*, 587 N.W.2d 875, 880 (Neb. 1999) (same); *Rivera v. Sagebrush Sales, Inc.*, 884 P.2d 832, 835 (N.M. Ct. App. 1994) (citing Professor Larson’s treatise); *Matter of Comp. of Hunter*, 635 P.2d 1371, 1373 (Or. Ct. App. 1981) (same); *Cooke v. Palmetto Health Alliance*, 624 S.E.2d 439, 443 (S.C. Ct. App. 2005) (apparently following but not citing Professor Larson’s treatise); *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563, 564 (S.D. 1991); see also *Ballard v. Leonard Bros. Transp. Co., Inc.*, 506 S.W.2d 346, 350 (Mo. 1974) (identifying three elements: (1) employee consents to work for special employer; (2) employee works for special employer under express or implicit contract; and (3) special employer has spot control of employee).

³¹ See, e.g., *U.S. Fid. & Guar. Co. v. Forrester*, 196 S.E.2d 133, 134 (Ga. 1973) (“[I]t must be shown that (1) the special master had complete control and direction of the servant for the occasion; (2) the general master had no such control, and (3) the special master had the exclusive right to discharge the servant.”); *McDowell Const. Supply Corp. v. Williams*, 518 P.2d 604, 605 (Nev. 1974) (citing *Landis v. McGowan*, 165 P.2d 180, 184 (Colo. 1946)) (quoting with approval the rule that a general employer remains liable unless it surrenders the right of control to a special employer), *overruled on other grounds by* *Tucker v. Action Equip. & Scaffold Co., Inc.*, 951 P.2d 1027 (Nev. 1997); *Smith v. Hall*, 418 P.2d 665, 669 (Okla. 1966) (citing *Hodges v. Holding*, 229 P.2d 555, 556 (Okla. 1951), which stated that the controlling factor is whether the general employer has “released . . . all authority to control or direct the manner and method of the work to be done and surrendered such direction and control to the special employer”); *Burdette v. Maust Coal & Coke Corp.*, 222 S.E.2d 293, 299 (W. Va. 1976) (stating that the general employer remains liable unless it completely relinquishes control of the employee in question).

³² *Kastner v. Toombs*, 611 P.2d 62, 65 (Alaska 1980) (criticizing the doctrine’s “unnecessary complexity” and adopting a dual servant model in its place); *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 542 (Iowa 1997) (stating that the most important factor is the intent of the parties); *Galvao v. G.R. Robert Const. Co.*, 846 A.2d 1215, 1220–21 (N.J. 2004) (stating that an entity may be a special employer if two conditions are satisfied: (1) it controls the employee, either through spot control or broad control; and (2) the employee’s acts further the alleged special employer’s business); see also *Bright v. Cargill, Inc.*, 837 P.2d 348, 364 (Kan. 1992) (stating that under an enterprise liability model, a general employer is liable unless it relinquishes sufficient control over the employee to constitute abandonment).

Even in a state jurisdiction that has not embraced the spot control test, a litigant might be able to successfully invoke it on the basis of federal common law, which bars the application of state law in suits concerning “uniquely federal interests”³³ where federal law and state law show a “significant conflict.”³⁴ The issue of compensating those injured while working on behalf of the federal government in a military theater of operations is arguably an area of uniquely federal interest because of the federal concerns it implicates: diplomatic relations, the international reputation of the United States, and the safety and effectiveness of military forces abroad.³⁵ As federal common law, the spot control test arguably trumps conflicting state law in a contractor tort case.³⁶

B. The Borrowed Servant Defense and the Contractor Tort

This section applies the borrowed servant doctrine, interpreted through the spot control test, to contractor torts. First, this section explores an unsuccessful invocation of the doctrine by a military contractor in *Trevino*. It then explains how the authority that military personnel exercise over contractors’ employees in a military theater of operations may constitute control for borrowed servant purposes, particularly as the military exercises closer oversight of contractors in the wake of Blackwater’s involvement in the Nisoor Square shootings of September 2007. Next, it explains how a defendant in a suit arising from the Abu Ghraib prisoner abuse scandal could have successfully raised a borrowed servant defense. Finally, this section revisits the hypothetical raised in the Introduction by exploring the weaknesses of the borrowed servant doctrine in a contractor tort case.

³³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). Uniquely federal interests are implicated by cases involving ambassadors, admiralty and maritime disputes, suits between states, and cases implicating the rights and obligations of the United States. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1311, 1322, 1332, 1361 (1996).

³⁴ *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). Exceptions may lie when a state has an interest in having its own rule govern, when there is little need for a uniform national law, or when the creation of a judicial rule is unfeasible. George J. Romanik, *Federal Common Law Alive and Well Fifty Years After Erie*: *Boyle v. United Tech. Corp. and the Government Contractor’s Defense*, 22 CONN. L. REV. 239, 252 (1989).

³⁵ *Cf. Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) (stating that a matter might invoke federal common law when it indirectly affects foreign relations and faces a substantial conflict between state and federal law); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (holding that the contractual obligations of the federal government represented an area of uniquely federal interest).

³⁶ *Boyle*, 487 U.S. at 505.

1. *A Failed Attempt: Contractor's Employee as Borrowed Servant in Trevino*

No court on record has held that military authority can constitute control over a contractor's employees to warrant application of the borrowed servant doctrine. A contractor defendant urging such a holding would probably contrast the facts of the plaintiff's case with those of *Trevino*, which concerned an invocation of the doctrine in a stateside, peacetime setting.³⁷ In *Trevino*, a quintet of Navy divers drowned in a Navy submarine's floodable airlock system because they were unable to operate its controls.³⁸ The system had been designed by engineers employed by General Dynamics, a contractor to the Navy, while the engineers were working on-site at a Navy facility.³⁹ When the victims' survivors sued General Dynamics, the company claimed that it was not responsible for the design decisions of the engineers because they were acting as borrowed servants of the Navy when they designed the system.⁴⁰

The defense failed.⁴¹ The court of appeals held that the Navy exercised inadequate control over the engineers, since it delegated discretion over design decisions to General Dynamics and did not directly control the engineers' work in any way.⁴² Through contract, the two parties had agreed that the employees would receive their instructions from General Dynamics' managers, not the Navy, and the behavior of the parties did not vary from that contractual arrangement.⁴³

Trevino is instructive not only for its reliance on actual patterns of supervision of contractors' employees by military personnel but also for the trial court's refusal to be swayed by the illegality of a borrowed servant employment arrangement. In contesting the defendant's invocation of the borrowed servant doctrine, the plaintiff in *Trevino* argued that civil service laws prevented military personnel from borrowing the employees of government contractors.⁴⁴ The trial court acknowledged that such an

³⁷ *Trevino v. Gen. Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986), *rev'd*, 865 F.2d 1474 (5th Cir. 1989).

³⁸ *Id.* at 1331.

³⁹ *Id.* at 1332.

⁴⁰ *Id.* at 1338–39.

⁴¹ *Trevino*, 865 F.2d at 1488.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Trevino*, 626 F. Supp. at 1339 (citing 5 U.S.C. § 1309).

arrangement was “legally impermissible” but refused to give that factor any weight,⁴⁵ instead basing its analysis on the facts of the case.⁴⁶ The court of appeals left this decision undisturbed,⁴⁷ indicating that the illegality of an alleged employment arrangement is of little importance in determining whether such an employment arrangement actually exists.

A defendant in a contractor tort suit arising in the theater of a military contingency operation might have more success invoking the borrowed servant doctrine than did the defendant in *Trevino*. *Trevino* shows that the success of such an argument would depend not on the legality of the proposed arrangement but on the existence of actual patterns of supervision of contractors’ employees by military personnel. Subsection 2 discusses the existence of such patterns in the theaters of overseas contingency operations.

2. *Military Control During a Contingency Operation as Spot Control*

On paper, military commanders have no control of contractors’ employees; military and contractor personnel exist in two parallel structures, each with its own chain of authority.⁴⁸ Civil service law prohibits government officials from entering personal service contracts—that is, contracts treating contractors’ employees as government employees—without specific statutory authorization.⁴⁹ A contract in violation of civil service law can be shown either through contract terms or through performance⁵⁰ indicating a pattern of “relatively continuous supervision and control.”⁵¹

Department of Defense (DOD) rules echo the strict separation envisioned by civil service law. They state that only contractor personnel, not commanders, are responsible for instructing and disciplining contractors’ employees.⁵² The involvement of commanders is typically limited to recommending instructions to designated contracting officers, who act as

⁴⁵ *Id.*

⁴⁶ *Id.* at 1339–40.

⁴⁷ *See Trevino*, 865 F.2d at 1474.

⁴⁸ LEXINGTON INST., CONTRACTORS ON THE BATTLEFIELD 11 (2007).

⁴⁹ 5 U.S.C. § 3109(b) (2006); 48 C.F.R. § 37.104 (2001).

⁵⁰ 48 C.F.R. § 37.104.

⁵¹ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF DEF., REP. NO. D-2004-057, ACQUISITION: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON 15 (2004).

⁵² U.S. DEP’T OF DEF., INSTRUCTION NO. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES ¶ 6.3.3 (2005) [hereinafter DOD Instruction], available at <http://www.dtic.mil/whs/directives/condes/pdf/302041p.pdf>.

liaisons and can accept or reject commanders' suggestions.⁵³ According to Major Karen Douglas, an Air Force judge advocate, "Commanders cannot order contractors to do anything, even the services they contracted for."⁵⁴ Commanders may give orders to contractor personnel only in emergencies and have no disciplinary power beyond limiting security clearances or facility access.⁵⁵

Conditions in the field do not always reflect official practice, however.⁵⁶ Military management is based on command and control, not the collaboration contemplated by DOD rules.⁵⁷ Consequently, military commanders may occasionally exert authority over contractor personnel. This tendency is partly due to administrative failures by the DOD to communicate to commanders the limits of their authority. According to Major Douglas, "Many battlefield commanders are unaware of the . . . limitations on contract change authority, or that they lack authority to direct or change contract work. Indeed, such a limitation runs counter-intuitively to the military culture of command."⁵⁸ Commanders who are uncertain about the extent of their authority over a contractor may have to rely on guesswork; they often "have no easy way to get answers to questions about contractor support."⁵⁹

In the absence of clear, practicable guidelines, principles of military command can incline toward, not against, control over contractors.⁶⁰ According to Major Lisa Turner, an Air Force judge advocate, "Commanders

⁵³ *Id.*; see also Turner, *supra* note 6, at 37.

⁵⁴ Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 135 (2004).

⁵⁵ DOD Instruction, *supra* note 52, at ¶ 6.3.3; see also U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 3-100.21, CONTRACTORS ON THE BATTLEFIELD 4-12, ¶ 4-47 (2003); Douglas, *supra* note 54, at 136.

⁵⁶ See LEXINGTON INST., *supra* note 48, at 8 ("[A]s experience has shown, the extensive use of civilian contractors in war zones is fraught with difficult management challenges.").

⁵⁷ *Id.*

⁵⁸ Douglas, *supra* note 54, at 140 (describing an incident in which a U.S. commander unintentionally directed a contract change by accelerating a camp construction project, causing a more than threefold increase in plywood costs); see also Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 201 (2001) ("All too often, there is a lack of training on, and understanding of, the appropriate relationship between the . . . military member and the contractor employee.").

⁵⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED SERVICES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 3 (2003).

⁶⁰ Econom, *supra* note 58, at 199-200 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS 19 (2005)). Not all contractors' employees will comply with a commander's order; historically, some have declined even to perform their contractual duties out of concern for their safety. See, e.g., Turner, *supra* note 6, at 40 (recounting a refusal to fulfill duties by contractors working for the U.S. military in South Korea).

accustomed to command authority, unity of command, and flexibility may find direction of civilians difficult in the fluid deployed scenario.”⁶¹ Unity of command has been recognized as a prerequisite to military success at least since the time of Napoleon Bonaparte;⁶² the desire for that unity may lead commanders to disregard the official wall of separation between contractors and service members. Historically, commanders have had the power to deploy service members filling support and supply chain roles into alternative service, even combat service, as needs dictate.⁶³ As the military assigns support and supply chain duties to contractors, commanders are likely to feel the need to move them into alternative areas of service as well.

The need for force protection may also motivate commanders to assert control of contractors’ employees. Commanders are responsible for ensuring the security not only of their own forces but of contractor personnel as well.⁶⁴ The importance of military security for contractors’ employees is not likely to diminish; casualty reports indicate that 353 employees of private contractors were killed in Iraq in 2007, a 17% increase over 2006.⁶⁵ Because force protection may involve instructions from commanders, it may lead to the assertion of military control.

The likelihood that commanders will assert control over contractors’ employees will likely continue as long as contractors’ employees work in military theaters of operations in roles traditionally reserved for military personnel.⁶⁶ While it is not unprecedented for governments to entrust military responsibilities to commercial enterprises,⁶⁷ the practice has increased dramatically since the end of the Cold War,⁶⁸ and shows little indication of

⁶¹ Turner, *supra* note 6, at 40.

⁶² Douglas, *supra* note 54, at 127 (quoting Napoleon Bonaparte as saying that “[n]othing is more important in war than unity of command”).

⁶³ U.S. DEP’T OF THE ARMY, *supra* note 55, at ¶ 6-2; P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 163 (2003); *see also* Douglas, *supra* note 54, at 137 (describing incidents during which commanders drafted support troops into combat roles in the Battle of the Bulge in World War II and in the Battle of Mogadishu, Somalia).

⁶⁴ *See* SINGER, *supra* note 63, at 136.

⁶⁵ David Ivanovich, *Contractor Deaths Up 17 Percent Across Iraq in 2007*, HOUSTON CHRON., Feb. 9, 2008, at A1 (stating that 901 service members were killed in Iraq in the same year).

⁶⁶ *See* SINGER, *supra* note 63, at 17 (describing the Pentagon’s unprecedented outsourcing of activities that the U.S. military had previously performed on its own).

⁶⁷ *See id.* at 19–31 (describing how military operations have been conducted principally by government entities only since the dawn of nationalism in the late nineteenth century).

⁶⁸ *Id.* at 58, 61–62, 67, 70 (explaining that the military outsourcing trend has been motivated by efficiency concerns, technological development, reluctance to wage large-scale war, and the diminishing need for a large standing military after the Cold War); *see also* MAJ. DEREK I. GRIMES ET AL., INT’L AND

abating.⁶⁹ Today's contractors provide not only support services such as maintenance, construction, food service, and logistics,⁷⁰ but also seemingly core military tasks such as base and convoy security,⁷¹ intelligence,⁷² prisoner detention and interrogation,⁷³ force training,⁷⁴ and even upper-level strategy.⁷⁵ Some observers have described the outsourcing trend as a permanent change in the way the United States fights its wars.⁷⁶

The tendency of military commanders to assert control over contractors' personnel is likely to increase as a result of the September 2007 Nisoor Square shootings. In that incident, guards employed by the contractor Blackwater Worldwide (then called Blackwater USA) shot and killed seventeen Iraqi civilians while working on contract to the U.S. Department of State.⁷⁷ That and other incidents of negligent or criminal behavior by contractors or their employees⁷⁸ suggested that no one was adequately monitoring security contractors.⁷⁹ In the fall of 2007, foreign and domestic critics,⁸⁰ U.S. military

OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 131 (2006) (citing statutory limits on the numbers of deployable troops as a factor contributing to the military outsourcing trend).

⁶⁹ See, e.g., CONG. BUDGET OFFICE, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ I (2008) (stating that the government has spent \$85 billion for contractors' services relating to the conduct of the war in Iraq since 2003); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1 (reporting that the United States employed about 100,000 employees of private contractors in Iraq in 2006, a number ten times larger than the equivalent total during Operation Desert Storm in 1991); James Risen, *Iraq Contractor in Shooting Case Makes Comeback*, N.Y. TIMES, May 10, 2008, at A1 (reporting that the State Department renewed its contract with the security contractor Blackwater Worldwide despite its involvement in the Nisoor Square shootings in September 2007); James Risen, *U.S. Splits Controversial Contractor's Iraq Work 3 Ways, but Costs May Soar*, N.Y. TIMES, May 24, 2008, at A11 (reporting that the DOD's division of a \$150 billion, ten-year contract among three companies could result in a threefold increase in costs).

⁷⁰ See SINGER, *supra* note 63, at 144.

⁷¹ Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH. POST, June 16, 2007, at A1.

⁷² ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 293-95 (2007).

⁷³ GEN. ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 26, 36 (2004).

⁷⁴ SINGER, *supra* note 63, at 124.

⁷⁵ *Id.*

⁷⁶ See, e.g., LEXINGTON INST., *supra* note 48, at 2.

⁷⁷ E.g. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1; Sudarsan Raghavan & Josh White, *Blackwater Guards Fired at Fleeing Cars, Soldiers Say*, WASH. POST, Oct. 12, 2007, at A1.

⁷⁸ See, e.g., Steve Fainaru, *Iraqis Detail Shooting by Guard Firm*, WASH. POST, Nov. 26, 2007, at A1 (reporting on shootings in 2007 by employees of the security firm Unity Resources Group); Andrew E. Kramer, *Security Contractors Shoot at Taxi, Wounding 3 Iraqis*, N.Y. TIMES, Oct. 19, 2007, at A12 (reporting a shooting outside Kirkuk involving employees of the security firm Erinys International).

⁷⁹ See, e.g., Steve Fainaru, *Where Military Rules Don't Apply*, WASH. POST, Sept. 20, 2007, at A1 (reporting that Blackwater received no coordination from the military, was not required to report its movements to the military, and was not subject to military procedures for reporting shooting incidents);

commanders,⁸¹ Secretary of State Condoleezza Rice,⁸² and Secretary of Defense Robert Gates⁸³ all agreed that more oversight was needed over American security contractors in Iraq. A DOD spokesperson announced that the military would exert greater control over contractors' training, use-of-force rules, employment standards, and movements around Iraq.⁸⁴ Secretary Rice announced that the State Department's security contractors would no longer operate convoys alone but would be accompanied by State Department security monitors.⁸⁵ Secretary Gates announced that the military would assume oversight of all security contractors in Iraq, even those working with other agencies.⁸⁶ In December 2007, the Departments of State and Defense agreed to coordinate security contractor operations and movements closely and to empower military commanders to order security contractors to change convoy routes and abort missions.⁸⁷

How the Departments of Defense and State will implement their plans for increased oversight and control of security contractors remains to be seen. The December 2007 agreement did not prescribe a policy of detailed military supervision of contractors' employees; absent enabling legislation, such a policy would likely violate civil service law.⁸⁸ However, political and military concerns about the actions of contractors' personnel make it more likely that

Johanna Neuman, *Rice Testifies about Iraq to House Panel*, L.A. TIMES, Oct. 26, 2007, at A16 (reporting admission by Secretary of State Condoleezza Rice during congressional testimony that oversight of contractors was inadequate); Ann Scott Tyson, *Pentagon Team To Study Oversight of Security Firms*, WASH. POST, Sept. 27, 2007, at A16 (reporting statement to same effect by U.S. Secretary of Defense Robert Gates during congressional testimony).

⁸⁰ Peter Spiegel, *U.S. Supervision Is Ordered for Convoys*, L.A. TIMES, Oct. 6, 2007, at A8 (explaining that the move toward contractor oversight "was a reaction to growing international outrage that was further eroding U.S. standing in Europe and the Middle East").

⁸¹ Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority over Guards*, N.Y. TIMES, Oct. 17, 2007, at A1.

⁸² Neuman, *supra* note 79, at A16.

⁸³ Tyson, *supra* note 79, at A16.

⁸⁴ John M. Broder & David Johnston, *U.S. Military Will Supervise Security Firms*, N.Y. TIMES, Oct. 31, 2007, at A1.

⁸⁵ Spiegel, *supra* note 80, at A1.

⁸⁶ Broder & Johnston, *supra* note 84, at A1.

⁸⁷ Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors, Annex A, at 2, 6 (Dec. 5, 2007), <http://www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>.

⁸⁸ See *supra* text and accompanying notes 49–51. Such a policy would also likely violate the Anti-Pinkerton Act, which prevents the federal government from contracting the services of a "quasi-military" force. U.S. *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 462–63 (5th Cir. 1977); see also Amended Complaint at 13, *Abtan v. Blackwater USA*, No. 1:07-cv-01831 (D.D.C. Nov. 26, 2007) (asserting that Blackwater Worldwide's contract with the Department of State violates the Act).

commanders will assert control over contractors' employees in the field, either as a matter of policy or on an informal basis. Any such assertion of control increases the likelihood that a defendant in a contractor tort case could prevail with a borrowed servant defense, succeeding where the defendant in *Trevino* failed.

3. *Where the Borrowed Servant Defense Would Have Worked: A Contractor's Employees at Abu Ghraib*

Had the employees in *Trevino* been working under the direct supervision of military personnel—especially the sort of control that exists in the fluid, often under-resourced atmosphere of a contingency operation—the Fifth Circuit Court of Appeals would probably have applied the borrowed servant doctrine. *Ibrahim v. Titan Corp.*, a case arising from the Abu Ghraib prisoner abuse scandal, involved a scenario to which the borrowed servant doctrine could have been applied.⁸⁹ The plaintiffs in *Ibrahim*, Iraqis formerly detained by the Army at Baghdad's Abu Ghraib Prison, alleged that they were tortured by interrogators employed by CACI International Inc., a company working on contract to the Army in late 2003.⁹⁰

CACI did not invoke the borrowed servant defense,⁹¹ but the facts indicate that its control over its employees was sufficiently displaced to warrant application of the doctrine. While Army work orders stated that contractors were “responsible for providing supervision for all contract personnel,” they also required contractor personnel to be “integrated” into Army intelligence and interrogation teams and to perform “under the direction and control of the unit's . . . chain of command.”⁹² An Army officer commanded the interrogation unit and had the power of “ultimate approval” over interrogation plans presented by CACI personnel.⁹³ A CACI site manager at Abu Ghraib spoke daily with the interrogation unit commander and “advised CACI

⁸⁹ *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007).

⁹⁰ *Id.* at 5, 8. Plaintiffs alleged that employees of CACI and another contractor subjected inmates to beatings, deprivation of food and water, forced nudity, sleep deprivation, simulated shootings, and threatened dog attacks. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005). Plaintiffs brought tort claims under common law and the Alien Torts Statute. Third Amended Complaint at 45–65, *Saleh v. Titan Corp.*, No. 1:05-cv-1165 (D.D.C. filed Mar. 22, 2006).

⁹¹ See *Ibrahim*, 556 F. Supp. 2d 1; *Ibrahim*, 391 F. Supp. 2d 10.

⁹² *Ibrahim*, 556 F. Supp. 2d at 8.

⁹³ *Id.*

interrogators on different approaches that they might try,”⁹⁴ but he was not present for most interrogations conducted by CACI personnel.⁹⁵

The facts suggest that CACI could have successfully raised a borrowed servant defense. The Army assumed spot control of CACI employees when it integrated them into Army interrogation teams in an Army chain of command. CACI yielded spot control when its site manager assumed a passive, secondary role and did not personally supervise interrogations. The plausibility of a borrowed servant defense in this particular case may smack of injustice considering the offensive nature of the Abu Ghraib abuses, but it squares with the military’s exclusive control over CACI’s employees.

4. *Misapplying the Borrowed Servant Doctrine: A Simple Hypothetical*

Return to the hypothetical raised in the Introduction, where a contractor’s employee negligently kills an Afghan businessman while driving with a military monitor and a senior employee of the contractor. The contractor invokes the borrowed servant doctrine as a defense, contrasting the case with *Trevino*. It argues that, unlike in *Trevino*, the military exercised sufficient spot control over a contractor’s employee to form a borrowed servant relationship: (1) the monitor told the driver to slow down; and (2) the driver did as he was told; (3) neither the driver nor the team leader voiced any objection to the monitor’s instruction or the driver’s response; (4) the monitor was wearing a military uniform, and the driver was not; (5) the driver’s employer was on contract to the military; (6) the driver was operating in a military theater of operations; (7) the driver was expected to follow work rules established by the military; (8) the monitor’s command to slow down served her overall purpose in being assigned to the convoy, which was to minimize unsafe behavior; and (9) the monitor was able to contact her commanding officer by radio any time she wished.

The court would likely grant the defense. The defendant demonstrated a clear pattern of instruction and obedience between the military and the contractor’s employee. Considering the unusual authority that the instruction of an armed service member would have in an interaction with military contractors in a contingency operation, the formation of a new employment relationship seems difficult to dispute.

⁹⁴ *Id.*

⁹⁵ *Id.* at 9.

The effect of such a judgment would be to remove any chance of meaningful recovery, defying the principle of compensation for injuries that underlies tort law.⁹⁶ In theory, a borrowed servant relationship in a contractor tort case would impose vicarious liability on the military, but any award of damages for injuries suffered overseas during a contingency operation would be blocked by sovereign immunity.⁹⁷ The most common route for suits against the government, the Federal Tort Claims Act, does not apply to torts arising in foreign countries.⁹⁸ In most cases, foreign victims of accidents by contractors associated with U.S. occupying forces receive only condolence payments, or *solatia*, which are given by the military or State Department out of courtesy, indicate no admission of fault, and rarely amount to more than a few thousand dollars.⁹⁹ The law allows the U.S. government to do little to compensate a plaintiff injured by a contractor in a contingency operation.

Applying the borrowed servant doctrine in a case such as the hypothetical would flout the other core principles of tort law: corrective justice, deterrence,

⁹⁶ 1 DAN B. DOBBS, *THE LAW OF TORTS* § 10, at 17–18 (2001). Theoretically, a plaintiff could bring suit against a contractor's employee as well, but such actions are relatively rare because of the limited resources of most employees in a vicarious liability suit. 5 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 26.1, at 6 (3d ed. 2008); see, e.g., Amended Complaint, *supra* note 88, at 1–2 (bringing suit against Blackwater, its chief executive officer, Erik Prince, and various affiliated companies in response to the Nisoor Square shootings but not against any individual guards).

⁹⁷ ALFRED C. AMAN JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 14.1.1 (2d ed. 2001) (explaining that the government enjoys sovereign immunity unless it is waived by statute).

⁹⁸ 28 U.S.C. 2680(k) (2006). A number of nonjudicial, administrative claims allow a victim of injury in a military operation to bring against the government under statute, but these claims are capped at limits far below what a plaintiff could collect in a viable civil suit. See 10 U.S.C. §§ 2733(a), 2734(a) (imposing caps of \$100,000 on claim settlements paid to U.S. citizens under the Military Claims Act and to foreign nationals under the Foreign Claims Act and International Agreement Claims Act). See generally Captain Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227 (1997) (discussing the Foreign Claims Act, the International Agreement Claims Act, the Military Claims Act, and the military's *solatia* practices). Foreign nationals may also be prevented from bringing a suit against a contractor affiliated with an occupying country in the courts of the occupied country because of immunity arrangements devised at the behest of the occupying power. E.g., Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq § 4(3) (2004) (stating that companies providing services on contract to the U.S. occupying forces in Iraq were immune from suit in Iraq), available at http://privatesecuritylaw.com/ia_ic17.pdf. But see Karen DeYoung, *U.S., Iraq Remain Unresolved on Dates for U.S. Troop Pullout*, WASH. POST, Aug. 10, 2008, at A17 (reporting that U.S. and Iraqi negotiators reached an agreement that U.S. contractors would be subject to Iraqi law).

⁹⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN* 34, 51 (2007) (stating that the usual *solatia* payment is \$2,500); Jon Tracy, Op-Ed, *Sometimes in War, You Can Put a Price on Life*, N.Y. TIMES, May 16, 2007, at A19 (describing the experience of the author, a former Army judge advocate working with civilian claims in Iraq from 2003 to 2004). But see Sudarsan Raghavan, *U.S. Offers Cash to Victims in Blackwater Incident*, WASH. POST, Oct. 25, 2007, at A19 (reporting that the State Department offered survivors of the Nisoor Square shootings awards as high as \$12,500).

and internalization of costs. It would defy corrective justice by allowing a contractor to escape liability when it had the power to prevent its employee from causing an injury.¹⁰⁰ It would fail to deter similar bad acts because it would give neither that contractor nor a similarly situated contractor any incentive to change its practices in the future.¹⁰¹ And it would fail to internalize costs because the cost of the accident would be borne not by the contractor but by the victim's family, the victim's community, and indirectly, the United States, which would suffer (even if in a small way) the loss of goodwill arising from an uncompensated injury inflicted by its agents.¹⁰²

The deterrent and corrective power of tort liability assumes greater importance when other sources of deterrence and corrective justice—in particular, the criminal justice system—fail. After the Nisoor Square shootings, critics expressed concern that no one at Blackwater would be held accountable for the actions of the guards, either in Iraqi courts, military tribunals, or criminal proceedings.¹⁰³ Partly to compensate for the perceived weaknesses of the criminal justice system, advocacy organizations and plaintiffs' attorneys have pursued civil liability against contractors for injuries suffered by foreign nationals in the theaters of contingency operations.¹⁰⁴ Due

¹⁰⁰ 1 DOBBS, *supra* note 96, § 9, at 13–16 (describing corrective justice as the old but enduring idea that liability should be assigned to a party at fault in order to right a wrong); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 604 (2005) (arguing that a doctrine of redress provides a more effective, less punitive model to reach ends similar to those of corrective justice).

¹⁰¹ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 174–78 (1970) (describing deterrence as the idea that parties should be held liable for avoidable injuries they cause to others in order to prevent them and other similarly situated parties from causing injuries in the future); 1 DOBBS, *supra* note 96, § 11, at 19–20 (expressing deterrence economically and stating that the principle leads parties whose behavior may cause injury to modify or abandon that behavior if the costs of compensating injuries outweigh the activity's benefits).

¹⁰² See CALABRESI, *supra* note 101, at 144 (defining internalization of costs as the idea that deterrent effects should be limited to those parties able to prevent accidents and not distributed among society in general); 1 DOBBS, *supra* note 96, § 11, at 19–20 (stating that internalization means that liability is a cost of doing business and that the cost should be borne by the firm).

¹⁰³ James Risen & David Johnston, *Justice Department Briefed Congress on Legal Obstacles in Blackwater Case*, N.Y. TIMES, Jan. 16, 2008, at A12 (reporting uncertainty that Blackwater guards could be prosecuted under federal law); Posting of Laura Dickinson to Balkinization, *Prosecuting Military Contractors: More a Problem of Law in Action than Law on the Books*, <http://balkin.blogspot.com/2007/10/prosecuting-military-contractors-more.html> (Oct. 10, 2007, 9:34 EST) [hereinafter Dickinson] (explaining the obstacles to prosecution). *But see* Del Quentin Wilber & Karen DeYoung, *Justice Dept. Moves Toward Charges Against Contractors in Iraq Shooting*, WASH. POST, Aug. 17, 2008, at A1 (reporting that the U.S. Department of Justice sent target letters to six Blackwater guards involved in the Nisoor Square shootings, indicating the likelihood that the guards would be indicted).

¹⁰⁴ For example, the Center for Constitutional Rights, a nonprofit organization representing victims of the Nisoor Square shootings, states that it uses litigation “to hold domestic companies accountable for injustices

to doctrinal and institutional advantages that civil plaintiffs have over criminal prosecutors, particularly their freedom from political pressures,¹⁰⁵ civil suits may be the most potent source of accountability for injuries inflicted by contractors. When a legal doctrine threatens to undermine this accountability, as the borrowed servant doctrine does in a contractor tort case, it should be applied only with great care.

In a case like the hypothetical, the spot control test to the borrowed servant doctrine allows courts to shift liability too readily onto an alleged special employer based only on its behavior of that special employer, despite the control that the general employer still retains. The spot control test enables a litigant to overcome the presumption that an employment relationship with a general employer remains intact merely by showing that a special employer has assumed some control.¹⁰⁶ When a special employer is judgment-proof, the effect of the borrowed servant doctrine is to deny the plaintiff's recovery entirely.¹⁰⁷

The solution is not to eliminate the spot control test for the borrowed servant doctrine;¹⁰⁸ it is appropriately applied when a general employer truly has no control over a borrowed employee and thus no meaningful ability to prevent an accident.¹⁰⁹ Where it fails is in a fluid scenario such as the hypothetical, where multiple employers share control. Such a situation calls for another tool to be added to the agency law toolbox. This tool is the dual servant doctrine.¹¹⁰

committed against those who can least afford them" *Ctr. for Constitutional Rights, Corporate Human Rights Abuse*, <http://ccrjustice.org/corporate-human-rights-abuse> (last visited Sept. 8, 2008).

¹⁰⁵ See Dickinson, *supra* note 103 ("Lack of enforcement is, of course, partly a question of political will.").

¹⁰⁶ See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) ("Any presumption that a general employer has the right to control an employee may be rebutted by proving factual indicia that the right has been assumed by a special employer.").

¹⁰⁷ *DePratt v. Sergio*, 306 N.W.2d 62, 65 (Wis. 1981) (criticizing the doctrine for denying plaintiffs recovery if a special employer cannot pay, regardless of general employer's resources). It could be argued that the real problem is not the borrowed servant doctrine but rather the tendency of the sovereign immunity doctrine to make the U.S. government a judgment-proof defendant in a contractor tort case. Attacking sovereign immunity to resolve this narrow problem is not only beyond the scope of this Comment, but it would fail to resolve the fact that the judgment-proof defendant problem is not limited to cases where the U.S. government is the defendant. *Id.* A more efficacious response is to recommend the modest adaptation in the law of agency discussed in Part II of this Comment.

¹⁰⁸ *But see* Skogland, *supra* note 8, at 319 (arguing for the abolition of the doctrine).

¹⁰⁹ See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (addressing the importance of control for assigning liability).

¹¹⁰ In theory, a plaintiff could also invoke the subservant doctrine to rebut a contractor's borrowed servant defense. The subservant doctrine represents a three-tiered structure, where a master employs a servant and the

II. DUAL SERVANT: SHARED SPOT CONTROL OF PRIVATE MILITARY FIRM EMPLOYEES

Part I explained how a court would likely apply the borrowed servant doctrine to a contractor tort case and explored its possible negative consequences. Part II asserts that courts may avoid these consequences by applying the dual servant doctrine, which states that both employers are jointly liable when they jointly control an employee.¹¹¹ Whereas the borrowed servant doctrine prevents recovery when a special employer is judgment-proof, the joint liability provision of the dual servant doctrine would hold either the general or the special employer fully liable if one of them is unable to pay.¹¹²

This Comment does not suggest that the dual servant doctrine should supplant the borrowed servant doctrine. Rather, section A asserts that the two doctrines are logically consistent when the dual servant doctrine is applied with the “shared spot control” test. Section B applies the doctrine to the hypothetical scenario discussed in the Introduction and Part I. It explains that because the dual servant doctrine holds two employers jointly liable, it does not eliminate the potential for recovery when one of them—in a contractor tort case, the military—is judgment-proof. This characteristic of the doctrine makes the dual servant doctrine a valuable item in the toolboxes of courts and plaintiffs’ attorneys.

servant (which may be a corporate entity) employs another servant. *See* Kelley v. S. Pac. Co., 419 U.S. 318, 324 (1974); Warrington v. Elgin, Joliet & E. Ry. Co., 901 F.2d 88, 90–91 (7th Cir. 1990); Kemether v. Pa. Interscholastic Athletic Ass’n, 15 F. Supp. 2d 740, 752 (E.D. Pa. 1998); Harper *ex rel.* Daley v. Toler, 884 So.2d 1124, 1135 (Fla. Dist. Ct. App. 2004); White v. Morris, 152 S.E.2d 417, 419 (Ga. Ct. App. 1966); Larson v. CSX Transp., Inc., 835 N.E.2d 138, 144 (Ill. App. Ct. 2005); Watts v. Mont. Rail Link, 975 P.2d 283, 291–94 (Mont. 1999); RESTATEMENT (SECOND) OF AGENCY § 5(2) (1958). The subservant doctrine would present the difficulty of proving that the military controlled not only an employee but an entire firm.

¹¹¹ RESTATEMENT (SECOND) OF AGENCY § 227 cmt. a (1958) (stating that the dual servant doctrine imposes liability on either the general or special employer).

¹¹² Skogland, *supra* note 8, at 320.

A. *Defining the Dual Servant Doctrine: The Shared Spot Control Test and Why It Does Not Doom the Doctrine to Obsolescence*

Courts applying the dual servant doctrine¹¹³ usually hold two employers liable for the torts of a single employee when the employee's tasks serve the interests of both employers.¹¹⁴ This Comment calls this reading of the doctrine the abandonment model, following the *Second Restatement of Agency*: "A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other."¹¹⁵ The Ninth Circuit Court of Appeals applied this variation of the doctrine in 1993 in *Ward v. Gordon*, where it held that both the Army and a hospital were jointly liable under Washington law for the malpractice of a medical resident employed by the Army.¹¹⁶ The hospital controlled the resident's specific conduct, but the court ruled that the Army would remain liable unless the resident "abandoned" his services for the government.¹¹⁷

¹¹³ The dual servant doctrine is beset by taxonomic and semantic obscurity. Courts and commentators treat it sometimes as a distinct doctrine, e.g., RESTATEMENT (SECOND) OF AGENCY § 226 (1958) (treating dual servant in its own section, apart from the borrowed servant section), and sometimes as a version of the borrowed servant doctrine, e.g., RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (discussing dual servant in its treatment of the borrowed servant doctrine). It also appears under several different names: "dual servant," e.g., *Larson*, 835 N.E.2d at 142; "servant acting for two masters," e.g., RESTATEMENT (SECOND) OF AGENCY § 226 (1958); "dual liability," e.g., *DePratt v. Sergio*, 306 N.W.2d 62, 63 (Wis. 1981); and "co-employment," e.g., *Hoffman v. Trinity Indus.*, 979 S.W.2d 88, 90 (Tex. App. 1998). The taxonomic question affects applicability. If dual servant is only a variation of the borrowed servant doctrine, then courts adopting the spot control test that has become the majority approach, see *supra* notes 21–32 and accompanying text, can ignore it as an anomalous minority view. Because this Comment argues that courts can apply either the borrowed servant or dual servant doctrine as the facts of a case dictate, it treats dual servant as an independent doctrine. The semantic question is less important; this Comment adopts the term "dual servant" simply to emphasize that the doctrine is a peer of the borrowed servant doctrine.

¹¹⁴ E.g., *Ward v. Gordon*, 999 F.2d 1399, 1404 (9th Cir. 1993); see also *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974) (stating that under the Federal Employees Liability Act §§ 1–10 (as amended 45 U.S.C.A. §§ 51–60), an employee may be "deemed to be acting for two masters simultaneously").

¹¹⁵ RESTATEMENT (SECOND) OF AGENCY § 226 (1958). For discussions of this model, see 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 26.11, at 1398 n.14 (1956); 2 FLEMING JAMES, JR., THE LAW OF TORTS, § 26.11, at 164 n.14 (Supp. 1968); FLOYD R. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 453–468, at 309–20 (Philip Mechem ed., 4th ed. 1952); Power, *supra* note 14, at 465; Skogland, *supra* note 8, at 319–21.

¹¹⁶ *Ward*, 999 F.2d at 1404.

¹¹⁷ *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 226 (1958)); see also *Minnkota Power Coop., Inc. v. Manitowoc Co.*, 669 F.2d 525, 532 n.10 (8th Cir. 1982) (stating that an employee's acts as a "borrowed servant" would not absolve the general liability but instead result in joint liability when the acts were within the scope of employment of both employers); *Kastner v. Toombs*, 611 P.2d 62, 65 (Alaska 1980) (adopting joint liability when "a servant acting within the scope of his employment for two masters negligently causes injury to another").

The logic employed in *Ward* shows that the abandonment approach is incompatible with the spot control test to the borrowed servant doctrine.¹¹⁸ Under that test, applied by a majority of state and federal courts, an employee becomes a borrowed servant when a special employer supervises the manner of an employee's exercise of his or her duties.¹¹⁹ Under the spot control test, the hospital in *Ward* would have been found to be the special employer because it controlled the resident's specific conduct; whether the resident abandoned his service to the Army would have been of little importance.¹²⁰

Because the abandonment approach to the dual servant doctrine is incompatible with the spot control approach to the borrowed servant doctrine, it cannot be embraced widely by courts, most of which have embraced the spot control test and do not apply the dual servant doctrine at all. The only jurisdiction to have embraced the abandonment approach, Alaska, did so by way of overruling the borrowed servant doctrine entirely.¹²¹ A plaintiff invoking the dual servant doctrine under the abandonment test would be, in effect, asking the court not only to view the facts in a particular way but to defy a settled common law doctrine in favor of an unusual one. A borrowed servant rebuttal based on the abandonment approach to the dual servant doctrine, then, seems almost certain to fail in most courts.

This Comment defends an alternate reading of the dual servant doctrine: the shared spot control test. In this model, general and special employers are jointly liable when they share spot control over an employee. Unlike the abandonment approach, the shared spot control model is consistent with the spot control model to the borrowed servant doctrine, allowing courts to apply the dual servant doctrine without contradicting the borrowed servant doctrine.

¹¹⁸ *Ward*, 999 F.2d at 1403.

¹¹⁹ See *supra* notes 21–32 and accompanying text.

¹²⁰ Abandonment of the general employer's service was, however, the dispositive factor in the "transfer of allegiance" model introduced by Judge Cardozo in *Charles v. Barrett*, 135 N.E. 199, 199–200 (N.Y. 1922) ("[T]here will be no inference of a new relation unless command has been surrendered . . ."). See also Hynes, *supra* note 13, at 22 (referring to the model as the "transfer of allegiance rule"). Because employers are not inclined to "surrender" control of people they wish to retain as employees, fidelity to this model would allow the borrowed servant doctrine to be applied extremely infrequently. *Id.* at 25–26. Abandonment also relates to the whose-business test; today, however, courts rarely address the whose-business question as the most important question, instead treating it as of no more importance than the spot control question. *E.g.*, *Inmon v. Crane Rental Serv., Inc.* 67 P.3d 726, 731–33 (Ariz. Ct. App. 2003) (stating that the borrowed servant inquiry depended on the whose-business factor, as well as contract terms and the right to control an employee); see also *supra* note 17.

¹²¹ See *Kastner*, 611 P.2d at 65 (adopting the dual servant doctrine in place of the borrowed servant doctrine).

It therefore offers a plaintiff in a contractor tort case a potent rebuttal to a contractor defendant's invocation of the borrowed servant doctrine.

The *Second Restatement of Agency* indicates that the shared spot control model applies when employers agree to share control of an employee:

Where two masters share services: Two persons may agree to employ a servant together or to share the services of a servant. If there is one agreement with both of them, *the actor is the servant of both at such times as the servant is subject to joint control.* If, however, it is agreed that control shall alternate, the actor is the servant only of the one for whom he is acting at the moment.¹²²

The agreement between the two employers that the *Second Restatement* refers to need not be formal or written; a general employer may implicitly agree with a special employer to share control of an employee.¹²³

The shared spot control model recently appeared in *Chang v. United States*.¹²⁴ In *Chang*, the Sheriff's Department of Fairfax County, Virginia, was sued for claims arising from its arrests of protesters at an event in Washington, D.C., where it was working alongside the U.S. Park Police under a contract with them.¹²⁵ Fairfax County moved for summary judgment on the basis that its officers acted as the borrowed servants of the Park Police, not as employees of Fairfax County.¹²⁶ The court rejected the motion, citing the dual servant doctrine.¹²⁷ The contract between the two departments stated that the Park Police Chief would have "[r]esponsibility for the overall law enforcement

¹²² RESTATEMENT (SECOND) OF AGENCY § 226 cmt. b (1958) (second emphasis added). The *Second Restatement* provides the illustration of two roommates who employ a chauffeur whom they understand to be subject to obey the orders of each of the two at all times. *Id.* at illus. 4. In an uncharacteristic instance of ambiguity, the *Second Restatement* also supports the abandonment model, which is inconsistent with the shared spot control model. See *supra* text accompanying note 115. The *Third Restatement* does not support either model. See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (stating only that "[s]ome cases allocate liability to both general and special employer on the basis that both exercised control over the employee and both benefited to some degree from the employee's work").

¹²³ RESTATEMENT (SECOND) OF AGENCY § 226 cmt. b, illus. 4 (1958) (stating that a contract for dual employment may be formed when the terms of employment are "understood" among the parties). The final sentence of the *Restatement* quotation (*supra* text accompanying note 122) indicates that liability is exclusive, not joint, when two employers agree that control of an employee is to alternate between them. In effect, this sentence indicates not the dual servant doctrine but the borrowed servant doctrine, which assigns liability exclusively to a special employer when that employer assumes control of the employee at a particular moment. See *supra* Part I.A.

¹²⁴ 2007 WL 2007335, at *12–13 (D.D.C. July 10, 2007).

¹²⁵ *Id.* at *1.

¹²⁶ *Id.* at *12.

¹²⁷ *Id.* at *12–13 (citing RESTATEMENT (SECOND) OF AGENCY § 226 (1958)).

operations,” but it also stated that the Fairfax officer in charge would play “an integral part of any decision making process.”¹²⁸ Because the facts did not indicate that the parties deviated from this contractual arrangement of joint control,¹²⁹ the court held that the facts were in dispute “as to whether the Park Police, [Fairfax police], *or both*, were in control of [Fairfax] officers.”¹³⁰ Because the court indicated that the dual servant doctrine requires shared direct supervision,¹³¹ *Chang* demonstrates an application of the shared spot control test, not the abandonment model.¹³²

Because the shared spot control test is based on spot control, it is consistent with the spot control test most courts use to interpret the borrowed servant doctrine.¹³³ Therefore, unlike the abandonment approach, the shared spot control approach allows plaintiffs to invoke the dual servant doctrine without asking courts to jettison the borrowed servant doctrine.

The function of the dual servant doctrine, applied with the shared spot control test, is to carve out a middle area between full spot control by one employer or another. When a special employer exclusively holds spot control, it alone is liable under the borrowed servant doctrine. When a general employer exclusively holds spot control, it alone is liable under the respondeat superior doctrine as customarily applied.¹³⁴ Under the shared spot control approach, the dual servant’s joint liability provision articulates a sensible middle ground between these two opposites. Asserting this middle ground is a much more intuitive and less risky argument than trying to convince a judge to discard a settled doctrine, as an argument based on the abandonment model would require a plaintiff to do.

¹²⁸ *Id.* at *2.

¹²⁹ The *Chang* court’s attention to contract language indicates not deference to the contract but rather a presumption that contractual relations control unless facts indicate otherwise. In general, labels assigned to an agency relationship by the parties involved do not necessarily determine the form of that relationship. RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006).

¹³⁰ *Chang*, 2007 WL 2007335, at *13 (emphasis added).

¹³¹ *See id.* at *12–13 (citing RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006)).

¹³² *See also, e.g.*, *Columbia Helicopters, Inc. v. Transp. Indem. Co.*, 428 F.2d 1385, 1388 (9th Cir. 1970) (declining to apply the doctrine when there was no indication that two alleged employers were engaged in a joint enterprise or shared joint control of the pilot); *Inmon v. Crane Rental Servs.*, 67 P.3d 726, 731 (Ariz. Ct. App. 2003) (collecting cases); *Larson v. CSX Transp., Inc.*, 835 N.E.2d 138, 142 (Ill. App. Ct. 2005) (stating that the doctrine applies when “two employers share equally in the direct supervision and control of one servant.” (citing *Pellicioni v. Schuyler Packing Co.*, 356 A.2d 4, 8 (N.J. Super. Ct. App. Div. 1976))).

¹³³ *See supra* Part I.A.

¹³⁴ 5 HARPER ET AL., *supra* note 96, at § 26.6 (stating that employers are vicariously liable for torts committed by their employees working within the scope of their employment).

The legal effect on a defendant of a court's embracing the shared spot control model would be to increase the difficulty of mounting an effective borrowed servant defense. The defendant would be required not only to support its borrowed servant defense but to refute a dual servant rebuttal. That is, instead of merely showing that a special employer assumed control of an employee, the defendant would have to show that it was not under an agreement—implicit or explicit—with another employer to share direct supervision of the employee.¹³⁵

Through its joint liability provision, the dual servant doctrine would also effect results consistent with the principles of corrective justice, deterrence, and internalization of costs. In a case with two well-resourced defendants, each of whom directly supervised an employee tortfeasor, the effect of the doctrine would be to divide the damages between both of them instead of forcing one or the other to carry the full burden. In a case with one well-resourced defendant and one judgment-proof defendant, the effect would be to assign the full liability burden to the former instead of eliminating the plaintiff's hopes of recovery.¹³⁶

B. The Dual Servant Doctrine and the Contractor Tort

The Kabul hypothetical discussed in the Introduction and Part I shows the benefit of applying the shared spot control approach to a contractor tort case.¹³⁷ The defendant contractor raises a borrowed servant defense, arguing that the pattern of instruction and obedience between the military monitor and the contractor-employed driver made the driver a borrowed servant of the military. It supports the argument by portraying the facts as discussed in Part I.B.4: a pattern of instruction and obedience between driver and monitor, unfolding in a context of military authority. The defendant argues that the driver and the military, through the monitor, formed a new employment relationship that

¹³⁵ The interpretation of the borrowed servant doctrine in a handful of states would achieve a similar effect by requiring not only a showing of spot control by an alleged special employer but also a showing that a general employer relinquished or surrendered control of its employee. *See supra* note 31 and accompanying text. This Comment does not discuss such treatments in depth because of its observation that the jurisdictions embracing the spot control test as settled law do not require that element. *See supra* notes 21–32 and accompanying text.

¹³⁶ Skogland, *supra* note 8, at 320.

¹³⁷ The shared spot control model appears not to have been applied to a contractor tort before. *See, e.g.*, *Ziegler v. Dalton*, 110 F.3d 72 (9th Cir. 1997) (unpublished table decision) (holding, without expressly applying either the abandonment model or the shared spot control model, that an employee was not a dual servant of a contractor and the U.S. Navy because the Navy simply “had no authority to interfere in the supervision of [the contractor’s] employees”).

overcomes the presumption of control by the defendant contractor—the general employer—and thereby negates its liability.

The plaintiff invokes the dual servant doctrine as a rebuttal.¹³⁸ She does not argue for applying the abandonment approach, since to do so would ask the court to defy the spot control approach to the borrowed servant doctrine.¹³⁹ Instead, she frames the argument in terms of shared spot control. If, as the defendant contends in its motion for summary judgment, the military formed a relation of spot control with the driver, that relationship did not supplant the spot control relationship existing between the driver and his general employer, the contractor. Rather, the facts show that the contractor and the military entered a tacit agreement to share control of the driver; thus, the driver was a dual servant, not a borrowed servant.

The plaintiff's argument depends on the role of the team leader. She points to the following facts: (1) the team leader was assigned by the contractor to supervise the driver; (2) the team leader was present during the interactions between the Army monitor and the driver; (3) the team leader remained silent while the monitor instructed the driver to slow down, communicating no disapproval of either the substance of her instruction or her decision to give it; (4) neither the monitor nor the team leader indicated that the team leader was not in charge; and (5) both the team leader and the monitor shared an interest in preventing an accident.

On the basis of these facts, the plaintiff makes two key assertions. First, the contractor, through the oversight exercised by the team leader, retained control of the driver at all times. Second, the team leader's silence during the exchange between the monitor and the driver indicated not a shift of control from one employer to another but rather consent to the military's simultaneous exercise of control over the driver.

She argues that this pattern of assertion and consent formed an agreement between the contractor and the military to share spot control of the driver. Under the dual servant doctrine, the Army and the contractor are therefore

¹³⁸ The plaintiff could also raise the theory in the complaint if the facts establishing military control were sufficiently clear.

¹³⁹ The abandonment approach would also be unsupported by the facts, since the driver made no act inconsistent with his general employment and therefore indicative of abandonment. This underscores a weakness of the notion of abandonment; true abandonment of one's relationship to a general employer is so rare that any doctrine relying upon it would be effectively dead. *Cf. Hynes, supra* note 13, at 25–26 (discussing the concept of abandonment in regard to the borrowed servant doctrine).

jointly liable for the driver's negligence.¹⁴⁰ The court is convinced; the contractor's motion for summary judgment is denied.

This argument shows the value of the dual servant doctrine both for its factual applicability and its fidelity to the policy principles of tort law. Factually, the finding of a dual servant relationship in the hypothetical jibes with the reality that neither the military nor the contractor exclusively controlled the driver—he was under the supervision of both. A court should find nothing unnatural about the existence of parallel lines of authority. In the hypothetical, it was only natural for the driver to obey the instruction of his team leader. It was likewise natural for the monitor to give the instruction on behalf of the military, considering that the driver was providing military-related services during a contingency operation. Without the dual servant doctrine, the court would have been required to ignore the actual—and rational—cooperation of two employers and find only one to be the employer.

The most dramatic impact of the application of the dual servant doctrine in the hypothetical is to enable a full recovery for the plaintiff. The court is not forced to consign the plaintiff's suit to failure simply because the military formed an employment relationship with the tortfeasor. Of course, this means that the contractor is forced to pay the full award of damages when its proper share would be less if not for the government's inability to pay damages.¹⁴¹ This Comment asserts that this consequence is a lesser offense to justice than the complete prevention of recovery the plaintiff would have suffered had the contractor improperly prevailed under a borrowed servant theory.

The dual servant doctrine honors the policy principles of corrective justice, deterrence, and internalization of costs that underlie tort law. Because the contractor has been made to pay damages, it has been penalized for a fault—namely, its failure to adequately instruct its employees to drive safely. The award of damages deters this and other contractors from continuing in this omission, showing them that it is in their interest to avoid putting bystanders and other motorists at risk. Finally, the contractor has been forced to assume the cost of its behavior as a cost of doing business instead of allowing it to be externalized and distributed among the victim's family and community and, indirectly, to the United States itself.

¹⁴⁰ RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006); RESTATEMENT (SECOND) OF AGENCY § 226 (1958).

¹⁴¹ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 (2000).

Applying the dual servant doctrine in a contractor tort case invites criticisms of overdeterrence and cost increase. The overdeterrence argument would charge that holding contractors liable in tort for the actions of their employees could make their employees overly slow to use force in the face of perceived risks, thus increasing the danger of injury or death to themselves, their clients, and the military personnel who might be called upon to come to their aid.¹⁴² It is hardly worth disputing that those entrusted by the state with the power to use deadly force should decide when to use it based on necessity, not the effect of litigation costs on their bottom line.

But if it is a bad idea for contractors' employees to be preoccupied with profitability concerns when they decide whether to use force, the problem is not the threat of liability. The profitability distraction is built into their business model; contractors' employees, unlike service members, work under the institutional pressure of a profit-based model.¹⁴³ If the bottom line is an undesirable distraction in use-of-force decisions, the solution is not to shield security contractors from liability but to prohibit private contractors from assuming positions requiring the use of force.¹⁴⁴ Such a reform would return the conduct of war to service members who have received military training and are entrusted with the authority to make life-or-death decisions without the pressures of profitability or liability. A prohibition not only on contractors' use of deadly force but on their operation within unsecured areas would also solve the overdeterrence problem in protective, nonlethal activities, such as the practice of the driver in the hypothetical to speed through city streets in order to avoid insurgent attack.

Holding contractors liable through the dual servant doctrine could also cause an increase in the government's contracting costs, since contractors would almost certainly pass the bulk of their liability costs on to their government clients. Liability costs could potentially motivate contractors to

¹⁴² Cf. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–78 (1998) (defining overdeterrence as the tendency of tort liability to prevent socially desirable conduct and arguing that it inclines public officials toward inaction).

¹⁴³ See Complaint, *supra* note 3, at 5–7 (alleging that Blackwater encourages its guards to use force aggressively to maintain its well-advertised record of never losing a client to an attack).

¹⁴⁴ This could be done through a statute barring commercial contractors from being hired to wield deadly force in a military theater of operations. *An Uneasy Relationship: U.S. Reliance on Private Security Firm in Overseas Operations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 3 (2008) (statement of Laura A. Dickinson, Professor, University of Connecticut School of Law). It could also be done with a judicial decision that the government's use of security contractors violated the Anti-Pinkerton Act. See *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 462 (5th Cir. 1977) (interpreting the Act to bar the government from contracting the services of quasi-military companies).

withdraw from the marketplace, making their services unavailable to the government.¹⁴⁵

But such a result may be the natural outcome of outsourcing military functions. The military has outsourced certain services under the assumption that profit-driven enterprises functioning in a competitive marketplace perform more efficiently than government entities.¹⁴⁶ Public policy dictates that this be done without externalizing costs, so that liability for injuries becomes a cost of doing business.¹⁴⁷ Allowing for-profit entities to avoid this cost would grant them an undue advantage in the marketplace, a government thumb on the free-market scale. Such a protection of industry, whether imposed by courts or Congress, would undermine the rationale for outsourcing in the first place. If contractors cannot provide government services without enjoying protections not generally given to profit-driven enterprises, perhaps the functions they perform should be returned to the public sector. Public policy demands that corporations that profit from their contracts with the government assume the liability costs of those contracts. The dual servant doctrine, applied with the shared spot control model, is an essential means of engendering that result.

CONCLUSION

This Comment has argued that courts should apply the shared spot control approach to the dual servant doctrine to offer a more complete set of judicial tools for the multiple-employer scenario than is currently offered by the borrowed servant doctrine alone. Because most jurisdictions in this country treat the spot control approach to the borrowed servant doctrine as settled law, they are likely to deny recovery to plaintiffs whose injuries are inflicted by employees working under the shared control of contractors and military personnel.

Courts could avoid this unjust outcome by applying the shared spot control test to the dual servant doctrine. This approach would prevent the obsolescence of the dual servant doctrine and make it compatible with the borrowed servant doctrine. By adopting this approach, courts could hold a

¹⁴⁵ Cf. Arwa Damon & Joe Sterling, *Contractor: Losing Immunity Would Hurt Iraq Mission*, CNN.com, July 31, 2008, <http://www.cnn.com/2008/WORLD/meast/07/31/iraq.contractors/> (reporting a contractor's prediction that a repeal of the Iraqi law granting contractors immunity in Iraqi courts would cause an "exodus" of contractors from the country).

¹⁴⁶ SINGER, *supra* note 63, at 68–70.

¹⁴⁷ See *supra* note 102.

special employer fully liable under the borrowed servant doctrine or hold two employers jointly liable under the dual servant doctrine, depending on the facts of the case. By adding this doctrine to the judicial toolbox, courts would enhance their ability to make plaintiffs whole and engender outcomes in accord with public policy principles, both in contractor tort cases and in tort cases in general.

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