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## Blackwater Rising: The Legal Issues Raised by the Unprecedented Privatization of U.S. Military Functions

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# **Blackwater Rising: The Legal Issues Raised by the Unprecedented Privatization of U.S. Military Functions**

ROBERT D. PELTZ\*

*The Army has used civilian contractors to provide supplies and services to its forces in the field since the Revolutionary War. These early contractors fed the cavalry's horses and transported supplies. Over the years, the role of the civilian contractor has dramatically evolved. Following the Vietnam War and the end of the draft, there has been an ever-increasing privatization of functions previously performed by the military.*

*The wars in Iraq and Afghanistan, which began in response to the September 11 attacks and have only recently started to come to a formal end, have significantly accelerated this process. As a result, by 2010 the number of contractors in these battle zones began to exceed the number of U.S. troops.*

*This massive privatization of functions previously carried out by the military has also resulted in an actual redefinition of their roles. Private contractors now perform many jobs that were formerly the responsibility of uniformed personnel, including those in forward battlefield positions as well as in active combat. This significant change in role has been accompanied by a corresponding rise in deaths and injuries for contractor employees, so that they now surpass those sustained by military personnel.*

*The redefinition of the civilians' role in battle has raised many new legal issues, for which there was very limited prior relevant precedent. In the civil context, these issues*

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*include the applicability of the political question doctrine to tort cases arising on the battlefield; contractor immunity under the Feres doctrine, the government contractor defense and the so-called combatant activities exception; the application of the state secrets doctrine and the enforceability of arbitration clauses in employment contracts. Legal questions also arise in the criminal sphere, such as the liability of civilian employees for breaches of local laws as well as the Military Code of Justice and the extra-territorial jurisdiction of U.S. courts to hear cases arising from alleged criminal acts occurring in overseas war zones.*

*As a result, the federal courts have been left to struggle with many new and complex questions raised by these changed civilian roles, relationships and functions without any significant framework for guidance. Consequently, some cases have dragged on for over a decade, while others have reached diametrically opposite results, which are often not logically capable of reconciliation.*

*If there was ever an area of overwhelmingly unique federal interest, it is the subject of military contractors' legal liabilities and responsibilities in war zones. The present patchwork quilt of remedies is neither adequate nor fair and is totally lacking in the predictability, which the law should provide to its citizens. Too often the families of civilian men and women, who died while serving in the roles traditionally performed by soldiers in war time, have been denied any effective remedy for their loved one's sacrifices.*

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## INTRODUCTION

Since the Revolutionary War, the Army has used civilian contractors to supply and service its forces.<sup>1</sup> These early contractors fed the cavalry’s horses and transported supplies.<sup>2</sup> Over the years, the role of civilian contractors in American wars has dramatically evolved. After the Vietnam War and draft ended, there has been an ever-increasing privatization of functions that were previously performed by military personnel.<sup>3</sup>

The wars in Iraq and Afghanistan, which began in response to the September 11 attacks and continue today, have significantly

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<sup>1</sup> U.S. ARMY MATERIEL COMMAND, AMC-P 715–18, AMC CONTRACTS AND CONTRACTORS SUPPORTING MILITARY OPERATIONS, 1-1 (June 26, 2000).

<sup>2</sup> Colonel Ronda G. Urey, *Civilian Contractors on the Battlefield* 8–13 (Mar. 18, 2005) (M.A. research paper, U.S. Army War College) (on file with U.S. Army War College).

<sup>3</sup> See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 22 (2001) (“This began to change during the Vietnam war and had continued exponentially since that time.”).

accelerated this process.<sup>4</sup> Traditional military jobs from mess hall cooks, to convoy drivers, to security personnel have been increasingly taken over by private contractors.<sup>5</sup> As a result, by 2010 the number of contractors in Afghanistan and Iraq began exceeding the number of U.S. troops.<sup>6</sup>

This massive privatization of military functions has also resulted in an actual re-definition of their roles. Private contractors now perform many functions that were formerly the responsibility of uniformed personnel, including those in forward battlefield positions as well as in active combat.<sup>7</sup> This redefinition of the civilians' role in battle has raised many new legal issues, both civil and criminal, for which there has often been a lack of established precedent.<sup>8</sup>

Consequently, some of the cases arising out of the use of such contractors have bounced around from court to court and have taken over a decade to resolve.<sup>9</sup> Other cases have reached disparate and irreconcilable outcomes.<sup>10</sup> As a result, the families of civilian men and women, who died while serving in the roles traditionally performed by soldiers in war time, have too often been denied any effective remedy for their loved one's sacrifices.<sup>11</sup>

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<sup>4</sup> See *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 331 (4th Cir. 2014).

<sup>5</sup> See Urey, *supra* note 2, at 3; see also MAJORITY STAFF OF THE HOUSE OF REP. COMM. ON OVERSIGHT AND GOV. REFORM, 110TH CONG., MEMORANDUM ON ADDITIONAL INFO. FOR HEARING ON PRIV. SEC. CONTRACTORS, 1–2 (2007).

<sup>6</sup> COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING, CONTROLLING COSTS, REDUCING RISKS 18 (2011).

<sup>7</sup> See Deborah C. Kidwell, *Public War Private Fight? The United States and Private Military Companies* 3 (Combat Studies Institute Press, Paper No. 12, 2005), available at <https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/kidwell.pdf>.

<sup>8</sup> See *id.* at 3–4.

<sup>9</sup> See, e.g., *U.S. v. Slatten*, 395 F. Supp. 3d 52, 54, 73 (D.D.C. 2019) (analyzing how the case against a Blackwater employee who started a fire that injured or killed thirty-one Iraqi civilians lasted over a decade).

<sup>10</sup> *Compare Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (holding that tort claims arising from attack on military convoy against military contractor were not barred by political question doctrine), with *Whitaker v. KBR*, 444 F. Supp. 2d 1277, 1281–82 (M.D. Ga. 2006) (holding that tort claims arising from attack on military convoy were barred by political question doctrine).

<sup>11</sup> See *Blackwater Sec. Consulting, LLC v. Nordan*, No. 2:06-CV-49-F, 2011 WL 237840, at \*1, \*5, \*8 (E.D.N.C. Jan. 21, 2011) (the families of Blackwater employees, who were brutally tortured and murdered on the job in Fallujah, were

Putting aside for another day the wisdom of this level of privatization and lack of institutional control,<sup>12</sup> many legal questions remain now that we are at this point. These issues include the legal liability of contractors for injuries to their employees, third persons, and soldiers; the rules and regulations governing both contractors and their employees; and the potential criminal liability of the civilian employees for both breaches of local laws as well as the Uniform Code of Military Justice.<sup>13</sup>

As observed by the Fourth Circuit, in one case that stretched on for over ten years, “Courts—including this Court—have struggled with how to treat these contractors under the current legal framework, which protects government actors but not private contractors from lawsuits in some cases.”<sup>14</sup>

Although formal American military involvement in ongoing hostilities in Iraq is significantly less today, while U.S. troops left Afghanistan in the summer of 2021, these legal issues remain important, since the continued use of contractors to support U.S. interests in hot spots around the world only continues to grow.<sup>15</sup>

#### A. *The History of Military Contractors in the United States*

During the Revolutionary War, early contractors played the limited role of feeding the cavalry’s horses and transporting supplies.<sup>16</sup>

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denied any recovery because they could not pay the extensive arbitration fees called for in the deceased’s employment contracts).

<sup>12</sup> Many sources provide further discussion on the policy issues raised by the increased reliance upon private contractors. See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 34–38 (2001); JEREMY SCAHILL, *BLACKWATER, THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* 61–63 (2008); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 993–95 (2005); Urey, *supra* note 2, at 8–13.

<sup>13</sup> See Kidwell, *supra* note 7, at 51; Turner & Norton, *supra* note 3, at 33–34.

<sup>14</sup> *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 331 (4th Cir. 2014).

<sup>15</sup> See Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm’s Way and Requiring Soldiers to Depend upon Them*, Presentation to the Joint Services Conference on Professional Ethics (Jan. 27–28, 2000) available at <http://isme.tamu.edu/JSCOPE00/Campbell00.html>; see also *DoD Personnel, Workforce Reports & Publications*, DMDC <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports> (last visited Oct. 7, 2021).

<sup>16</sup> See Urey, *supra* note 2, at 1.

By the time of the Civil War, sutlers who accompanied the troops sold non-military merchandise to the Union soldiers.<sup>17</sup> In World War II, civilians fulfilled a variety of non-combat roles both at home and in combat theaters, including scientific, engineering, and construction duties.<sup>18</sup> The Korean War saw extensive use of civilians performing stevedoring as well as road and rail maintenance functions.<sup>19</sup> In Vietnam, civilians were involved in construction, base operations, transportation, supply, and technical support activities.<sup>20</sup> During the first Gulf War, civilian contractors provided maintenance and support for high-tech equipment as well as more mundane water, food, and construction services.<sup>21</sup>

However, the role of contractors transformed dramatically throughout both post 9/11 conflicts in Iraq and Afghanistan. The massive privatization of traditional military functions not only increased the number of civilians involved in our country's war efforts, but resulted in an actual re-definition of their roles:<sup>22</sup>

“Private contractors now perform many functions that were formerly the responsibility of uniformed personnel disciplined under the Uniform Code of Military Justice (UCMJ). Moreover, contractors currently deploy to more forward (battlefield) positions than ever before, and a large number of contractors work outside active theaters. Many [private military contractors] participate in active combat. Logistician Joe Fortner observes, “contractors are not replacing force structure, they are becoming force structure.”<sup>23</sup>

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<sup>17</sup> Campbell, *supra* note 15.

<sup>18</sup> Wm. C. Peters, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 382 (2006).

<sup>19</sup> Campbell, *supra* note 15.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*; Peters, *supra* note 18, at 382; William Spyro Speros, *Friend-of-a-Friendly Fire: A Future Tort Issue of Contractors on the Battlefield*, 35 PUB. CONT. L.J. 297, 300–01 (2006).

<sup>22</sup> *See* Campbell, *supra* note 15.

<sup>23</sup> *See* Kidwell, *supra* note, 7 at 3; *see also* Turner & Norton, *supra* note 3, at 22–23.

This change in role has also resulted in the proliferation of civilian contractors providing security functions.<sup>24</sup> As noted in one House Oversight Committee Staff Report at the height of the wars:

Under direct contracts with the government and sub-contracts with reconstruction firms, private security contractors perform a wide range of security functions, including: site security for military bases, the Green Zone, and critical infrastructure; cash transport; weapons demolition; surveillance; the guarding of key personnel, contractors, and civilian dignitaries; armed escorts for supply convoys; intelligence gathering; psychological warfare; covert operations; and the training of Iraqi security forces.<sup>25</sup>

In addition to Blackwater (subsequently renamed Xe and now Academi), companies such as KBR, Halliburton, Aegis, DynCorp, Erinys, and Triple Canopy have received a substantial portion of the hundreds of billions of dollars in government funds,<sup>26</sup> spent on waging the Iraq and Afghanistan wars.<sup>27</sup> The use of private contractors to provide security services has become pervasive and unsupervised. A Staff Report from the House Committee on Oversight and Government Reform, during the midst of the post war reconstruction period, observed that the Administration did not even know how many private security contractor employees were operating in Iraq; some estimates ranged as high as 48,000 personnel from 181 security firms, which is the equivalent of three U.S. Army divisions.<sup>28</sup>

During the first Gulf War, one in thirty-six people deployed in the war zone were private contractors.<sup>29</sup> By 2010, the number of

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<sup>24</sup> See MAJORITY STAFF OF THE HOUSE OF REP. COMM. ON OVERSIGHT AND GOV. REFORM, *supra* note 5, at 1–3.

<sup>25</sup> *Id.*

<sup>26</sup> Jason Ukman, *Ex-Blackwater Firm Gets Name Change, Again*, Wash. Post (Dec. 12, 2011), [https://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO\\_blog.html](https://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html).

<sup>27</sup> See HEIDI M. PETERS & SOFIA PLAGAKIS, CONG. RSCH. SERV., DEP'T OF DEF. CONTRACTOR AND TROOP LEVELS IN AFGHANISTAN AND IRAQ: 2007-2018, R44116 at 2 (2019).

<sup>28</sup> *Id.* at 2.

<sup>29</sup> Turner & Norton, *supra* note 3, at 7.



contractors in Afghanistan and Iraq had swelled to over 260,000, exceeding the number of U.S. troops.<sup>30</sup> Although the Obama Administration began to significantly draw down military fighting forces from both Iraq and Afghanistan,<sup>31</sup> many contractors have remained as those wars have continued under the Trump and Biden Administrations.<sup>32</sup>

According to the Department of Defense (“DOD”), at the end of 2017, the last year that U.S. troop levels were publicly reported, there were 23,659 contractors working for the U.S. military in Iraq and Afghanistan compared to just 11,100 soldiers.<sup>33</sup> The disparity in relative numbers has grown even greater as the number of troops being drawn down has continued as reflected by published news reports of further decreases in troop levels accompanied by corresponding increases in the number of contractors to replace them.<sup>34</sup>

As a result of this ongoing process, over the past two decades private contractors have become the United States’ largest war partner,<sup>35</sup> prompting *Blackwater*<sup>36</sup> author Jeremy Scahill to quip on The Daily Show, “The coalition of the willing, has now become the coalition of the billing.”<sup>37</sup>

Not surprisingly, this increase in the role played by private contractors has been accompanied by a corresponding rise in deaths and

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<sup>30</sup> COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *supra* note 3, at 18.

<sup>31</sup> PETERS & PLAGAKIS, *supra* note 27, at 2.

<sup>32</sup> See Deborah Avant, *If The U.S. Withdraws From Afghanistan, Will Its Military Contractors Stay? That’s Not Clear*, Wash. Post (Feb. 28, 2020), <https://www.washingtonpost.com/politics/2020/02/28/if-us-withdraws-afghanistan-will-its-military-contractors-stay-thats-not-clear/>.

<sup>33</sup> PETERS & PLAGAKIS, *supra* note 27, at 8.

<sup>34</sup> See *id.* at 3; Thomas Gibbons-Neff & Mujib Mashal, *U.S. to Withdraw About 7,000 Troops from Afghanistan, Officials Say*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/politics/afghanistan-troop-withdrawal.html> (estimating 14,000 U.S. troops to be stationed in Afghanistan at the time).

<sup>35</sup> Urey, *supra* note 2, at 3–4.

<sup>36</sup> See SCAHILL, *supra* note 12, at 67.

<sup>37</sup> *The Daily Show with Jon Stewart* (Comedy Cent. television broadcast Apr. 19, 2007).

injuries to their personnel.<sup>38</sup> In 2009, contractor employee deaths in Iraq surpassed those of the U.S. military for the first time.<sup>39</sup> This gap has continued to widen during the ensuing troop drawdown.<sup>40</sup>

However, the increase in injuries and deaths to contractor employees is not just a result of the drawdown of military troops. In 2011, during a “surge” of combat fighters, 418 American soldiers died in Afghanistan.<sup>41</sup> During this same time period, 430 employees of U.S. contractors were reported killed according to statistics made available by government sources.<sup>42</sup> The increase in the number of injuries and deaths to contractor employees is a direct consequence of their changing roles and their assumption of higher risk functions previously handled by military personnel.<sup>43</sup>

#### B. *The Public’s Awareness of the Role of Military Contractors*

Most Americans first became aware of the private civilian presence working with the military in Iraq as a result of the gruesome ambush of four Blackwater security personnel, who escorted a convoy of food supplies in Fallujah on March 31, 2004.<sup>44</sup> Up until this time, news on the Iraq war typically identified non-military personnel simply as civilian workers or contractors, leading most Americans to believe these individuals were unarmed engineers or truck drivers.<sup>45</sup> The Blackwater security personnel, however, consisted of two former Army Rangers, an ex-Navy Seal, and an Army Special Ops graduate.<sup>46</sup>

On that fateful day, the convoy became lost and drove through the center of Fallujah.<sup>47</sup> While stopped in traffic, two unarmored vehicles occupied by the Blackwater security contractors were

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<sup>38</sup> See generally Rod Nordland, *War’s Risks Shift to Contractors*, N.Y. TIMES (Feb. 12, 2012) <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9C0DE7D91F31F931A25751C0A9649D8B63.html>.

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See PETERS & PLAGAKIS, *supra* note 27, at 1.

<sup>44</sup> SCAHILL, *supra* note 12, at 66.

<sup>45</sup> *See id.* at 66–67.

<sup>46</sup> *Id.* at 152–54.

<sup>47</sup> *Id.* at 156–58.

ambushed by grenades and machine gun fire.<sup>48</sup> A mob of attackers quickly surrounded the vehicles and pulled the one survivor out through the window, stoning him to death.<sup>49</sup> After dismembering all their bodies and dragging them through the city, two were hung up for hours on a bridge over the Euphrates River.<sup>50</sup> The grizzly scene was then broadcast for the whole world to see.<sup>51</sup>

The families of the four Blackwater employees subsequently brought suit against their employer claiming negligence in their training, weapons supply, intelligence support, and manning as well as for fraud.<sup>52</sup> Among the specific allegations raised by the families was the claim that Blackwater failed to provide the security personnel with armored vehicles,<sup>53</sup> while only supplying two men rather than three for each vehicle so that they were missing critical tail gunners.<sup>54</sup> The complaint also alleged that Blackwater neglected to even provide the men with maps, while starting the convoys immediately upon their arrival in the country, rather than allowing them the promised twenty-one-day advance period in order to reconnoiter the area and become familiar with the convoy routes and potential threats.<sup>55</sup> A Staff Report of the Committee on Oversight and Government Reform of the House of Representatives, subsequently found evidence to support their charges.<sup>56</sup>

Nevertheless, the litigation brought by the families ended without any recovery.<sup>57</sup> The families were required to arbitrate their claims based upon a provision in their decedents' employment

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<sup>48</sup> *Id.* at 158.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 159.

<sup>51</sup> See SCAHILL, *supra* note 12, at 166; *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 805 (E.D.N.C. 2005); see also Abdulrazzaq Al-Saiedi, *The Unwilling Witness*, N.Y. TIMES (Mar. 14, 2013), <https://www.nytimes.com/2013/03/17/magazine/unwilling-witness-at-falluja.html>.

<sup>52</sup> *Nordan*, 382 F. Supp. 2d at 803.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *Iraqi Reconstruction: Reliance on Private Military Contractors: Memorandum before the Comm. On Oversight and Gov. Reform*, *supra* note 11, at 3–4.

<sup>57</sup> See *Blackwater Sec. Consulting, LLC v. Nordan*, No. 2:06-CV-49-F, 2011 WL 237840 at \*4 (E.D.N.C. Jan 21, 2011).

contracts, which called for the parties to split the costs of arbitration.<sup>58</sup> The arbitration was eventually dismissed due to the families' failure to pay for their share of the costs of the arbitration, which they contended they were unable to afford.<sup>59</sup> Subsequently, the dismissal was confirmed by a North Carolina federal district court.<sup>60</sup>

Blackwater was back in the news several years later in another highly publicized incident, which again demonstrated the shortcomings of existing U.S. law to adequately govern the changing role of military contractors in modern warfare.<sup>61</sup> This time four of its contractors were involved in a Wild West type shoot out while guarding a State Department motorcade on September 16, 2007.<sup>62</sup> The gun battle took place in a predominantly Sunni neighborhood of West Baghdad, in which fourteen Iraqi civilians were killed and another seventeen wounded.<sup>63</sup>

The incident prompted the Iraqi Interior Minister to revoke Blackwater's operating license, only to learn that his action had no effect on the company's legal ability to continue working in Iraq.<sup>64</sup> Despite repeated angry denunciations from then Iraqi Prime Minister Nouri al Maliki accusing Blackwater of numerous incidents of wrongdoing, ranging from the killing of innocent citizens to helping political figures escape from jail, Blackwater continued to operate in Iraq.<sup>65</sup>

At the time, the legal ability of the United States to handle such incidents was unclear as a result of which the criminal cases against the four dragged on for eleven years with the American courts facing numerous legal and jurisdictional hurdles.<sup>66</sup> Westlaw lists numerous

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<sup>58</sup> *Id.* at \*2; *see also infra* Section II.E.

<sup>59</sup> *Id.* at \*3-4.

<sup>60</sup> *See* Blackwater Sec. Consulting, LLC., 2011 WL 237840, at \*11-12.

<sup>61</sup> *See* United States v. Slatten, 395 F. Supp. 3d at 45, 53(D.D.C. 2019).

<sup>62</sup> *Id.*

<sup>63</sup> *Slatten*, 395 F. Supp. 3d at 53, 73.

<sup>64</sup> Sabrina Tavernise, *Iraq Ends Security Company's License After 8 Deaths*, N.Y. TIMES (Sept. 17, 2007), <https://www.nytimes.com/2007/09/17/world/middleeast/17cnd-iraq.html>.

<sup>65</sup> *See* Jim Michaels, *Iraq Seeking to Ban Contractor After Civilians Shot*, USA TODAY, Sept. 18, 2007, at 9A; Leila Fadel et al., *Iraq Wants U.S. Firm Out*, MIAMI HERALD, Sept. 18, 2007, at 9A; John Daniszewski & Tarek El-Tablawy, *Maliki Assails U.S. Security Setup*, MIAMI HERALD, Sept. 24, 2007, at 16A.

<sup>66</sup> *See Slatten*, 395 F. Supp. 3d at 79.

opinions in these cases from the U.S. Supreme Court, D.C. Circuit Court of Appeals, and U.S. District Court for the District of Columbia,<sup>67</sup> prior to their final resolution in the summer of 2020 with the sentencing of the four defendants and the denial of their last motions for new trial.<sup>68</sup> Even then the cases were not finally closed until December of 2020, when the four contractors were pardoned by President Trump as part of a highly controversial batch of pre-Christmas pardons on his way out of office.<sup>69</sup>

There are several important reasons for the difficulties U.S. courts have faced in resolving these issues. At the top of the list is the lack of a workable comprehensive statutory framework for the resolution of the multitude of civil claims, which have arisen from the increased exposure of the employees of military contractors to the hazards of wartime hostilities.<sup>70</sup> As discussed in the next section, much of the existing law was developed during World War II and the Vietnam War, significantly different conflicts fought under markedly different circumstances in which civilians played a dramatically smaller and more isolated role.<sup>71</sup> As a result, certain principles have developed in a historical context, which seem to make little logical sense today.

Due to this lack of established relevant common law precedent, coupled with the absence of any comprehensive Congressional treatment of these issues, the district courts have been left to struggle with many new and complex questions raised by these changed civilian roles, relationships, and functions without much of a framework for guidance.<sup>72</sup> As a result, many cases have reached

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<sup>67</sup> See, e.g., *Blackwater Sec. Consulting, LLC v. Nordan*, 549 U.S. 1260 (2007); *U.S. v. Slough*, 641 F.3d 544 (D.C. Cir. 2011); *Est. of Abtan v. Blackwater Lodge and Training Center*, 611 F. Supp. 2d 1 (D.D.C. 2009).

<sup>68</sup> See *U.S. v. Slatten*, No. 1:14-cr-107-RCL, 2020 WL 4530729 (D.D.C. Aug. 6, 2020).

<sup>69</sup> See Maggie Haberman & Michael Schmidt, *Trump Pardons Two Russia Inquiry Figures and Blackwater Guards*, N.Y. TIMES (Dec. 22, 2020), <https://www.nytimes.com/2020/12/22/us/politics/trump-pardons.html>.

<sup>70</sup> Greta S. Milligan, *The Defense Base Act: An Outdated Law and its Current Implications*, 86 U. DET. MERCY L. REV. 407, 434 (2009).

<sup>71</sup> Turner & Norton, *supra* note 3, at 3–4.

<sup>72</sup> *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 331 (4th Cir. 2014).

diametrically opposite results, which are oftentimes not logically capable of reconciliation.<sup>73</sup>

Although formal American military involvement in the ongoing hostilities in Iraq and Afghanistan has wound down significantly from its highwater point, the legal issues from the extensive use of military contractors in these wars still exists today. U.S. military personnel are presently deployed in over 150 countries throughout the world, some of which involve active hostilities.<sup>74</sup>

The patchwork quilt of existing remedies, which were often created in a much earlier time to address significantly different circumstances, has produced results that are too often neither adequate nor fair and lacking in the predictability the law should provide to its citizens.<sup>75</sup> Accordingly, as discussed in more detail in the Conclusion to this article, this is an area which clearly calls out for a comprehensive Congressional solution.<sup>76</sup>

## I. STATUTORY COMPENSATION SCHEMES

### A. *Defense Base Act*

Strange as it may seem, the main statutory source for determining the claims of contractors against their employers arising out of the wars in Afghanistan, a landlocked mountainous country, and Iraq, a virtually landlocked country with vast deserts, is the Longshoremen and Harbor Workers Compensation Act (“LHWCA”).<sup>77</sup> It is hard to imagine better evidence of the inadequacies of existing law to properly govern such claims.

In 1927, Congress promulgated the LHWCA to provide a system of uniform federal compensation for injuries to non-seamen

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<sup>73</sup> See, e.g., *Fisher v. Halliburton*, 667 F.3d 602, 610 (5th Cir. 2012); *Potts v. Dyncorp Int’l*, 465 F. Supp. 2d 1245, 1252 (M.D. Ala. 2006); *Lessin v. Kellogg Brown & Root*, No. CIV A H-05-01853, 2006 WL 3940556, at \*4 (S.D. Tex. June 12, 2006).

<sup>74</sup> See DEP’T OF DEF., DEF. MANPOWER DATA CTR., NO. OF MIL. AND DoD APPROPRIATED FUND (APF) CIVILIAN PERS. PERMANENTLY ASSIGNED DEC. 2020 (Feb. 5, 2021), <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>.

<sup>75</sup> See *Fisher*, 667 F.3d at 610.

<sup>76</sup> See discussion *infra* Conclusion.

<sup>77</sup> 33 U.S.C. § 901 et seq.

maritime workers, who at the time were not entitled to recover under state workers' compensation systems.<sup>78</sup> As with land-based workers' compensation systems, the LHWCA provides a limited schedule of benefits for covered injuries that do not require a showing of fault in exchange for providing the employer with tort immunity:<sup>79</sup>

[T]he statutory scheme represents a “legislated compromise between the interests of employees and the concerns of employers.” In other words, “there is a quid pro quo.” . . . “In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries,” while the employers gain “immunity from employee tort suits.”<sup>80</sup>

Prior to the United States formal entry into World War II, President Franklin Roosevelt supported Great Britain's war effort by the adoption of his Lend-Lease Program,<sup>81</sup> in which American arms were traded to England in exchange for leases on various military bases throughout the world.<sup>82</sup> In order to provide a compensation system for American civilian employees working on these bases acquired from England, Congress enacted the Defense Base Act (“DBA”),<sup>83</sup> which extended the provisions of the LHWCA to these employees.<sup>84</sup>

Following the United States formal entry into World War II, American defense bases greatly proliferated throughout the world.<sup>85</sup> Initial makeshift arrangements with contractors to provide workers compensation coverage on a voluntary basis proved to be unsuccessful.<sup>86</sup> Accordingly, in response to the resulting “uneconomic and

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<sup>78</sup> See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917).

<sup>79</sup> 33 U.S.C. § 901 et seq.

<sup>80</sup> *Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1124 (D.C. Cir. 2015) (citations omitted).

<sup>81</sup> WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972*, 278–83 (Little, Brown & Co. 1974).

<sup>82</sup> *Id.*

<sup>83</sup> 42 U.S.C. §§ 1651–1654.

<sup>84</sup> *Republic Aviation Corp. v. Lowe*, 69 F. Supp. 473, 474–75 (S.D.N.Y. 1946).

<sup>85</sup> See S. Rep. No. 85-1886, at 3 (1958).

<sup>86</sup> *Id.* at 4.

discriminatory” treatment of overseas workers in World War II due to the limited coverage of the DBA as originally enacted, Congress expanded its application through the 1942 War Hazards Act to, “provide statutory coverage for all employees of contractors engaged in work outside the United States wherever located . . . .”<sup>87</sup>

The DBA was then amended again in 1958, expanding the definition of “public work” to include “service contracts” to remove the limitation imposed by several earlier cases restricting its application to construction projects of a fixed or permanent nature.<sup>88</sup> The amendment also broadened coverage to include persons employed overseas by “welfare and morale organizations”, such as the Red Cross and USO, while also applying it to non-citizen employees.<sup>89</sup>

Following additional amendments over the years, by the time of the conflicts in Iraq and Afghanistan, the Defense Base Act<sup>90</sup> had extended coverage to claims arising from injury or death to employees engaged in any employment:

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States . . . or

(3) upon any public work in any Territory or possession outside the continental United States . . . under the contract of a contractor . . . with the United States . . . or

(4) under a contract entered into with the United States or any executive department . . . or agency thereof . . . or subcontract or subordinate contract

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<sup>87</sup> *Ross v. DynCorp*, 362 F. Supp. 2d 344, 355 (D.D.C. 2005) (quoting S. Rep. No. 85-1886, at 4 (1958)).

<sup>88</sup> *See Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 48, 48–49 (9th Cir. 1966) (applying DBA to a contract between the Air Force and a private contractor to transport military personnel from California to Vietnam).

<sup>89</sup> *Ross*, 362 F. Supp. 2d at 355.

<sup>90</sup> *See* 42 U.S.C. §1651(a).



with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work<sup>91</sup> . . . or

(5) under a contract approved and financed by the United States or any executive department . . . or agency thereof . . . or any subcontract or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954 . . . [or] any successor Act . . . .<sup>92</sup>

In reliance upon its legislative history, courts have liberally construed the types of activities coming within the reach of the DBA, and have thus continuously expanded its coverage in the years following its adoption.<sup>93</sup> As a result, cases have held it applicable to injuries and deaths occurring on military bases in Puerto Rico due to defective equipment,<sup>94</sup> aircrew providing aviation support services for the Colombian army's drug eradication services under U.S. contract,<sup>95</sup> test pilots crashing on take offs from Pacific Islands,<sup>96</sup> contractors killed by other drunken contractors in Iraq,<sup>97</sup> and even a Pan Am employee killed in a motor scooter accident in the West Indies.<sup>98</sup>

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<sup>91</sup> The term "public work" under this statute, includes "operations under service contracts and projects in connection with the national defense or with war activities . . ." 42 U.S.C. § 1651(b)(1).

<sup>92</sup> 42 U.S.C. § 1651(a). The Mutual Security Act of 1954, was repealed and superseded by the Foreign Assistance Act of 1961. *Ross*, 362 F. Supp. 2d at 353 (citing Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 642, 75 Stat. 424 (codified at U.S.C. § 2151 (1961))).

<sup>93</sup> *See, e.g., Ross*, 362 F. Supp. 2d at 355.

<sup>94</sup> *See, e.g., Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 465, 469 (1st Cir. 2000).

<sup>95</sup> *See, e.g., Ross*, 362 F. Supp. 2d at 347, 357.

<sup>96</sup> *See, e.g., Republic Aviation Corp. v. Lowe*, 69 F. Supp. 472, 473, 480 (S.D.N.Y. 1946).

<sup>97</sup> *See, e.g., Pope v. Palmer*, No. 10-13285, 2011 WL 4502859, at \*1, \*8 (E.D. Mich. Sept. 28, 2011).

<sup>98</sup> *See O'Keeffe v. Pan Am. World Airways, Inc.*, 338 F.2d 319, 320-21 (5th Cir. 1964).

Courts have not been so liberal, however, in extending the definition of an “employer” entitled to tort immunity under the Act.<sup>99</sup> While in a few instances the DBA has been applied to closely related entities, such as a “divisional unit” of the plaintiff’s employer<sup>100</sup> or a joint venture,<sup>101</sup> the mere affiliation between companies with separate corporate structures is not sufficient to confer tort immunity.<sup>102</sup>

Where the DBA is silent, courts look to the LHWCA to fill in the blanks.<sup>103</sup> Therefore, since the DBA fails to define the scope of “injury or death to any employee engaged in employment,” courts have relied upon the definition of “injury” under the LHWCA, which it defines as “accidental injury or death arising out of and in the course of employment, and such occupational disease . . . and includes an injury caused by the willful act of a third person directed against an employee because of his employment.”<sup>104</sup>

The benefits provided to injured military contractors and their families, in the event of death by the LHWCA, are relatively modest and a mere fraction of what they would be expected to receive in a civil tort suit. Under the statutory schedule a covered individual will receive 66 2/3% of their average weekly wage (“AWW”) for a specified number of weeks depending upon the nature of their injury.<sup>105</sup> For example, the loss of an arm equals 312 weeks of benefits, the loss of a leg 288 weeks, and the loss of an eye 160 weeks.<sup>106</sup> Disfigurement, no matter how severe, is compensated by a total of \$7,500, but only if it is likely to handicap the employee in obtaining or maintaining employment.<sup>107</sup>

Regardless of the employee’s actual wage, however, the AWW for purposes of these calculation cannot exceed 200% of the

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<sup>99</sup> See, e.g., *Brokaw v. Boeing Co.*, 137 F. Supp. 3d 1082, 1101 (N.D. Ill. 2015).

<sup>100</sup> See *Ross*, 362 F. Supp. 2d at 347 n.1.

<sup>101</sup> See *Haas v. 653 Leasing Co.*, 425 F. Supp. 1305, 1316 (E.D. Pa. 1977) (finding that a joint venture and its participants were the plaintiff’s employer for purposes of the LHWCA).

<sup>102</sup> See, e.g., *Brokaw*, 137 F. Supp. 3d at 1100–01.

<sup>103</sup> See, e.g., *Fisher v. Halliburton*, 667 F.3d 602, 610–11 (5th Cir. 2012); *Pope v. Palmer*, No. 10-13285, 2011 WL 4502859, at \*4–5 (E.D. Mich. Sept. 28, 2011).

<sup>104</sup> *Fisher*, 667 F.3d at 610–11.

<sup>105</sup> See 33 U.S.C. § 908(a)–(c).

<sup>106</sup> *Id.* § 908(c)(1), (c)(2), (c)(5).

<sup>107</sup> See *id.* § 908(c)(20).

“national average weekly wage” as determined by the Secretary of Labor.<sup>108</sup> The most recent average announced by the Department of Labor for the 12-month period beginning October 1, 2021 is \$863.49, thereby making the maximum AWW under the Act \$1,726.98.<sup>109</sup>

Clearly, the risks and types of injuries to which the typical longshoreman is exposed while working at a U.S. port are hardly similar or analogous to those faced by contractors working on a battlefield. The extreme nature of such risks also factors into the significantly higher compensation military contractors are paid than the typical longshoreman unloading cargo at a domestic port.<sup>110</sup> According to testimony provided during various House oversight hearings, the average daily pay for a Blackwater employee in the war zone was \$600 per day at the high point of the Iraqi War.<sup>111</sup> Other sources have given estimates of between \$500 to \$1500 per day.<sup>112</sup>

Therefore, utilizing the scheme established by the LHWCA to compensate the injured military contractor, or his family in case of death, not only fails to take into account the literal life-threatening risks faced on a daily basis and the severe nature of many resulting battlefield injuries, but also shortchanges them by utilizing an artificially low average weekly wage that often bears little resemblance to their actual pay.

### B. *Exclusivity of Remedy*

The broad immunity provided by the DBA to military contractors is a product of both the Act itself and its adoption of the

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<sup>108</sup> 33 U.S.C. § 906(b).

<sup>109</sup> *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, U.S. DEP'T LAB., <http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm> (last visited Oct. 16, 2021).

<sup>110</sup> See Janet Farley, *The Benefits of Working Overseas as a Contractor*, CLEARANCE JOBS (Apr. 3, 2011), <https://news.clearancejobs.com/2011/04/03/the-benefits-of-working-overseas-as-a-contractor/>.

<sup>111</sup> See Walter Pincus, *U.S. Pays Steep Price for Private Security in Iraq*, WASH. POST Oct. 1, 2007, at A17.

<sup>112</sup> See, e.g., JENNIFER K. ELSEA & KENNON H. NAKAMURA, CONG. RSCH. SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 4 (2008); See also Farley, *supra* note 111. (“It is not uncommon to find opportunities paying well over \$100,000 in base pay alone.”).

provisions of the LHWCA.<sup>113</sup> The DBA expressly provides that the liability of any covered employer or contractor “under this chapter shall be exclusive and in place of all other liability of such employer . . . to his employees (and their dependents) . . . under the workmen’s compensation laws of any State, Territory, or other jurisdiction . . . .”<sup>114</sup> Cases construing the DBA have given this provision its clear and obvious meaning and rejected arguments that the injured employee or his survivors can opt out of the Act in favor of more generous state workers compensation schemes.<sup>115</sup>

Significantly more extensive immunity is provided by the DBA’s express adoption of “the provisions of the [LHWCA] . . . in respect to the injury or death of any employee engaged in any employment . . . .”<sup>116</sup> as defined by the Act.<sup>117</sup> In this regard, the LHWCA provides that:

[t]he liability of an employer prescribed in section 904 of this title shall be *exclusive and in place of all other liability of such employer to the employee*, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .<sup>118</sup>

This broad immunity provided under the LHWCA, which has been construed to “destroy any tort liability of the employer,”<sup>119</sup> has similarly been interpreted in cases under the DBA as pre-empting

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<sup>113</sup> See *Brink v. Cont’l Ins. Co.*, 787 F.3d 1120, 1124–25 (D.C. Cir. 2015).

<sup>114</sup> 42 U.S.C. § 1651(c) (emphasis added).

<sup>115</sup> See, e.g., *Ross v. DynCorp.*, 362 F. Supp. 2d 344, 352–53, 365 (D.D.C. 2005); *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46, 52 (9th Cir. 1966) (holding that the language of § 1651(c) “clearly reveals a Congressional preference for the federal remedy[,]” and that allowing for election of remedies “would only interfere with the apparent policy of the Defense Base Act by affording a choice of remedies which was not intended.”).

<sup>116</sup> 42 U.S.C. § 1651(a).

<sup>117</sup> See *Pope v. Palmer*, No. 10-13285, 2011 WL 4502859, at \*4 (E.D. Mich. Sept. 28, 2011) (citing 42 U.S.C. § 1651(a)).

<sup>118</sup> 33 U.S.C. § 905(a) (emphasis added). This section goes on to limit such immunity to employers which fail to secure compensation for the benefits set forth in the Act. *Id.*

<sup>119</sup> *Robin v. Sun Oil Co.*, 548 F.2d 554, 556 (5th Cir. 1977).

all common law causes of action against the *employer* based upon negligence, regardless of how they are framed.<sup>120</sup> This includes claims based upon negligent supervision, negligence per se or the performance of an ultrahazardous activity as well as causes of action under both wrongful death and survivorship statutes.<sup>121</sup>

In *Nordan v. Blackwater Security Consulting, LLC*, however, which arose out of the brutal torture and killing of four Blackwater security personnel by a mob in Fallujah early in the Iraq War, the district court concluded that the DBA did not “completely” preempt all state law claims.<sup>122</sup> As a result, it remanded the plaintiffs’ state law claims for wrongful death and fraud back to the state court where they had been originally filed for further handling.<sup>123</sup>

Nevertheless, the plaintiffs’ victory was short lived as Blackwater subsequently successfully removed the case under the Federal Arbitration Act; thereafter, obtaining an order compelling arbitration pursuant to the terms of the contractors’ employment

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<sup>120</sup> See, e.g., *Ross v. DynCorp.*, 362 F. Supp. 2d Supp. 344, 352 (D.D.C. 2005) (“[the LHWCA] necessarily displaces all derivative common-law causes of action based on the injury or death of a covered employee caused by employer negligence, including wrongful death and survivorship actions.”); *Flying Tiger v. Landy*, 370 F.2d 46, 52 (9th Cir. 1966) (“[42 U.S.C. § 1651(c)] clearly reveals Congressional preference for the federal remedy”); *Sparks v. Wyeth Lab’ys, Inc.*, 431 F. Supp. 411, 417 (W.D. Okla. 1977) (“The Defense Bases Act . . . makes the exclusive remedy of an employee of a covered government contractor against that contractor a compensation remedy under the Longshoremen’s and Harbor Workers’ Compensation Act . . .”).

<sup>121</sup> See *Ross*, 362 F. Supp. 2d at 351–52, 357–58; *Brink v. Cont’l Ins. Co.*, 787 F.3d 1120, 1123, 1126–27 (D.C. Cir. 2015); *Jones v. Halliburton Co.*, 791 F. Supp. 2d 567, 579, 602 (S.D. Tex. 2011) (and cases cited therein).

<sup>122</sup> *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 805, 809 (E.D.N.C. 2005).

<sup>123</sup> *Id.* at 803, 813–14. The plaintiffs’ complaint, which had been filed in state court and then removed to federal court, had been carefully drafted in a manner to avoid reference to federal law, so on its face it did not show the existence of a federal question. See *id.* at 803, 806–07. Under the “well-pleaded complaint” rule, the district court therefore concluded that it was without subject matter jurisdiction, unless the claims were “completely” preempted by federal law. *Id.* at 806. Determining that such complete preemption did not exist, it remanded the case back to state court. See *id.* at 809, 814. In *In re Blackwater Security Consulting, LLC.*, 460 F.3d 580, 580, 582 (4th Cir. 2006), the Fourth Circuit subsequently dismissed the appeal filed by Blackwater on the basis of 28 U.S.C. §1447(d)’s prohibition against the review of remand orders. See 28 U.S.C. § 1447(d).

agreement.<sup>124</sup> The arbitration was subsequently dismissed for the nonpayment of arbitration costs, resulting in an award in Blackwater's favor.<sup>125</sup>

A recognized exception to the DBA's exclusive application exists, however, for those claims which fall outside of the penumbra of the LHWCA.<sup>126</sup> Courts have generally applied this exception where *either* (1) the claimed injuries did not meet the statutory definition of an injury or (2) the employee's injuries did not arise out of his or her employment.<sup>127</sup>

Although the DBA applies to claims for the "injury or death of any employee,"<sup>128</sup> the Act itself does not define "injury."<sup>129</sup> As a result, the courts have looked to the LHWCA for such a definition.<sup>130</sup>

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.<sup>131</sup>

Accordingly, the LHWCA (and by extension the DBA) does not apply where the employer acted with the specific intent to injure the employee.<sup>132</sup> This loophole is extremely narrow, however, because

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<sup>124</sup> Blackwater Sec. Consulting, LLC v. Nordan, No. 2:06-CV-49-F, 2011 WL237840, at \*1–2 (E.D.N.C. Jan. 21, 2011).

<sup>125</sup> Blackwater Sec. Consulting, LLC., 2011 WL 237840, at \*5, \*8; *see* discussion *supra* Introduction.

<sup>126</sup> *See, e.g., Jones*, 791 F. Supp. 2d at 587–88 (and cases cited therein).

<sup>127</sup> *Id.* at 588 (holding where the plaintiff's claim was determined to have not arisen out of her employment, it did not matter whether her injuries came within the statutory definition, because it was not necessary for the plaintiff's claim to meet both exceptions).

<sup>128</sup> 42 U.S.C. § 1651(a).

<sup>129</sup> *E.g., Martin v. Halliburton*, 808 F. Supp. 2d 986, 989 (S.D. Tex. 2011) (citing 42 U.S.C. § 1651(a)).

<sup>130</sup> *See id.*

<sup>131</sup> 33 U.S.C. § 902(2).

<sup>132</sup> *See, e.g., Martin*, 808 F. Supp. 2d at 992.

to qualify, the employer must have had a specific intent to injure the employee as claims based upon reckless misconduct are not sufficient.<sup>133</sup>

Although several courts have concluded that claims based upon the intentional infliction of emotional distress suffered by the employee are likewise barred in the absence of a specific intent to injure the worker,<sup>134</sup> such claims have been permitted where the injury was suffered by the survivor of a deceased employee.<sup>135</sup> Accordingly, in *Martin v. Halliburton*,<sup>136</sup> the court upheld a daughter's right to pursue such a claim based upon the employer's alleged fraudulent misrepresentation to her of the circumstances surrounding her father's death, concluding "[p]laintiff's claim of intentional infliction of emotional distress flows from injury against her and not the 'accidental' injury [her father] sustained."<sup>137</sup>

The second group of exceptions applies to claims that do not arise out of the plaintiff's employment. For example, in *Jones v. Halliburton Co.*, the court concluded that the plaintiff was entitled to sue her employer for negligence, false imprisonment, and intentional infliction of emotional distress as a result of a rape by other co-employees.<sup>138</sup> Even though her injuries did not arise out of her employment, the attack occurred at housing provided by the employer on the base where she worked in Iraq.<sup>139</sup>

Similarly, in *Brink v. Continental Insurance Company*, the D.C. Circuit upheld the district court's dismissal of various negligence claims brought in a class action, but held that individual plaintiffs

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<sup>133</sup> See, e.g., *Fisher v. Halliburton*, 667 F.3d 602, 617–18 (5th Cir. 2012); *Vance v. CHF Int'l*, 914 F. Supp. 2d 669, 678 n.1 (D. Md. 2012); *Martin*, 808 F. Supp. 2d at 992; *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313, 316 (D. Me. 1981) (holding that claims based upon reckless exposure to asbestos were pre-empted by the LHWCA).

<sup>134</sup> See, e.g., *Vance*, 914 F. Supp. 2d at 682.

<sup>135</sup> See *Martin*, 808 F. Supp. 2d at 993.

<sup>136</sup> *Id.* at 993.

<sup>137</sup> *Id.*

<sup>138</sup> *Jones v. Halliburton Co.*, 791 F. Supp. 2d 567, 584–88 (S.D. Tex. 2011).

<sup>139</sup> *Id.*

could assert claims based upon both common law assault and sexual assault, since they would not arise under the LHWCA.<sup>140</sup>

In a subsequent decision, *Sickle v. Torres Advanced Enterprise Solutions, LLC.*, the D.C. Circuit addressed this exception in more detail.<sup>141</sup> In this case, an employee (Elliott) of a military defense contractor providing base security services in Baghdad injured his back while lifting sandbags.<sup>142</sup> He was treated by the base medic (Sickle), another employee of the same contractor, who subsequently recommended that he return home for more comprehensive medical diagnosis and treatment.<sup>143</sup> Both Elliott and Sickle had signed employment contracts with their employer specifying a term of employment and procedures for terminating the contracts.<sup>144</sup>

After returning stateside, Elliott filed a compensation claim under the DBA, in response to which his employer denied the claim and terminated him, notwithstanding the terms of his contract.<sup>145</sup> Thereafter, Elliott received a copy of the medical report prepared by Sickle documenting his injuries from work, which he used to obtain benefits under the DBA.<sup>146</sup> According to Sickle, the employer began to “‘threaten and intimidate’ him, insisting that he recant his support for Elliott’s workers’ compensation claim.”<sup>147</sup> When he refused, he was likewise fired.<sup>148</sup>

Elliott and Sickle subsequently jointly filed suit against their employer, asserting claims based upon retaliatory discharge, breach of contract, and conspiracy to commit tortious conduct with its insurer against them.<sup>149</sup> After going through a lengthy preemption analysis, the circuit court concluded that Elliott’s claims all arose out of his employment, because they stemmed from his claim for benefits

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<sup>140</sup> *Brink v. Cont’l Ins. Co.*, 787 F.3d 1120, 1126 (D.C. Cir. 2015). The D.C. Circuit, however, upheld the district court’s dismissal of the claims based upon violation of RICO statutes. *Id.* at 1122.

<sup>141</sup> *Sickle v. Torres Advanced Enter. Sols.*, 884 F.3d 338, 348–50 (D.C. Cir. 2018).

<sup>142</sup> *Id.* at 342.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 342–43.

<sup>146</sup> *Id.* at 343.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*



under the DBA.<sup>150</sup> As a result, it held that Elliott's tort claims were barred.<sup>151</sup> Conversely, it held that Sickle's claims were not barred, since they did not arise out of his employment, but instead from Elliott's claim for benefits.<sup>152</sup>

In an even more recent case involving highly unusual claims, the district court in *U.S. ex rel. Fadlalla v. DynCorp International, LLC*, held that neither *Brink* nor *Sickle* barred civil claims brought by a group of translators hired to assist U.S. military forces in the Middle East by a contractor, who was alleged to have engaged in a fraudulent scheme to employ them in violation of Kuwaiti criminal law.<sup>153</sup> When the contractor subsequently attempted to fire its Kuwaiti partner, the local company blew the whistle on the scheme to the authorities, who imprisoned the unwitting plaintiffs in inhumane conditions.<sup>154</sup> The court distinguished *Brink* on the grounds that the RICO conspiracy claims therein were based upon an attempt to evade liability under the DBA, while the claims before it were based upon a scheme to circumvent Kuwaiti law.<sup>155</sup>

The DBA only applies to claims asserted by an employee against the contractor which hired it.<sup>156</sup> Therefore, lawsuits by service members against contractors,<sup>157</sup> or by the employee of one contractor against another, are not affected by the Act.<sup>158</sup>

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<sup>150</sup> *Id.* at 348.

<sup>151</sup> *Id.* at 350.

<sup>152</sup> *Id.* at 349–50.

<sup>153</sup> *See United States ex rel. Fadlalla v. DynCorp Int'l, LLC*, 402 F. Supp. 3d 162, 186 (D. Md. 2019).

<sup>154</sup> *Id.* at 174–75.

<sup>155</sup> *See id.* at 174, 200.

<sup>156</sup> *See Brink v. Cont'l Ins. Co.*, 787 F.3d 1120, 1122 (D.C. Cir. 2015).

<sup>157</sup> *See, e.g., Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at \*1 (S.D. Tex. June 12, 2006) (analyzing a case in which a soldier brought a negligence claim against private contractor rather than under the DBA).

<sup>158</sup> *See, e.g., Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245, 1246–48 (M.D. Ala. 2006) (analyzing a case in which an employee of one contractor sued another contractor under several theories, including negligence, but not under the DBA).

## II. CIVIL SUITS

### A. *Political Question Doctrine*

Much of the litigation stemming from the Iraq and Afghanistan wars has focused on the applicability of the political question doctrine, which arises from the separation of powers between the three branches of government established by the U. S. Constitution.<sup>159</sup> Under this doctrine, courts will refrain from deciding controversies, which “revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>160</sup> Or more simply stated, where the “responsibility for resolving [a particular claim] belongs to the legislative or executive branches rather than to the judiciary.”<sup>161</sup>

Because the Constitution delegates authority over military affairs to Congress and the President as Commander in Chief, while expressing no role for the judiciary, cases involving foreign policy and military determinations are particularly susceptible to such claims.<sup>162</sup> As a result, the prevailing attitude of the courts has been that “[m]ost military decisions lie solely within the purview of the executive branch.”<sup>163</sup>

Nevertheless, in *Baker v. Carr*, the Supreme Court held that determination of whether a case is nonjusticiable by virtue of presenting a political question cannot be resolved by simply a “semantical cataloguing” of the nature of the controversy, but instead requires a “discriminating inquiry into the precise facts and posture of [each] particular case . . . .”<sup>164</sup>

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<sup>159</sup> See *Baker v. Carr*, 369 U.S. 186, 210 (1962); see also *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

<sup>160</sup> *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at \*2 (S.D. Tex. Aug. 30, 2006) (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

<sup>161</sup> *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 334 (4th Cir. 2014).

<sup>162</sup> See, e.g., *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111–12 (D.D.C. 2005) (dismissing claims brought by Palestinian residents of the West Bank against Israel).

<sup>163</sup> *In re KBR*, 744 F.3d at 334 (quoting *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 407 n.9 (4th Cir. 2011)).

<sup>164</sup> 369 U.S. at 217.

Accordingly, courts hearing cases involving the activities of military contractors have recognized that “[t]he Constitution’s allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to ‘combat’” just as “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>165</sup>

As a result, “[c]ontroversies stemming from war are not automatically deemed political questions merely because militaristic activities are within the province of the Executive.”<sup>166</sup> Accordingly, “the claim of military necessity will not, without more, shield government operations from judicial review,” even when part of an authorized military operation.<sup>167</sup>

To assist courts in performing the discriminating inquiry called for in *Baker*, the Supreme Court has set forth six indicia of a political question:

- (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- (2) a lack of judicially discoverable and manageable standards for resolving it; or
- (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or

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<sup>165</sup> *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15–16 (D.D.C. 2005) (internal citations omitted). *See also In re KBR*, 744 F.3d at 334 (“[A]lthough cases involving military decision making often fall in the political question box, we cannot categorize such a case as nonjusticiable without delving into the circumstances at issue.”).

<sup>166</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1320 (M.D. Fla. 2006) *aff’d*, 502 F.3d 1331 (11th Cir. 2007).

<sup>167</sup> *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992).

(5) an unusual need for unquestioning adherence to a political decision already made; or

(6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>168</sup>

The Court in *Baker* went on to hold that “[u]nless one of these formulations is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”<sup>169</sup>

As explained by the Third Circuit in *Harris v. Kellogg Brown & Root Services, Inc.*, the application of the political question doctrine is often more complex in litigation against military contractors than in suits against the government itself.<sup>170</sup>

Defense contractors do not have independent constitutional authority and are not coordinate branches of government to which we owe deference. Consequently, complaints against them for conduct that occurs while they are providing services to the military in a theater of war rarely, if ever, directly implicate a political question. Nonetheless, these suits may present nonjusticiable issues because military decisions that are textually committed to the executive sometimes lie just beneath the surface of the case. For example, a contractor’s apparently wrongful conduct may be a direct result of an order from the military, or a plaintiff’s contributory negligence may be directly tied to the wisdom of an earlier military decision.<sup>171</sup>

In considering the applicability of the doctrine to cases against military contractors, courts tend to focus on the first, second, and

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<sup>168</sup> *McMahon*, 502 F.3d at 1357–58 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); see *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (“[t]hese tests are probably listed in descending order of both importance and certainty.”).

<sup>169</sup> *Baker*, 369 U.S. at 217 (emphasis added).

<sup>170</sup> *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 465 (3d Cir. 2013).

<sup>171</sup> *Id.* (internal citation omitted).

fourth *Baker* factors.<sup>172</sup> Due to the inherent ambiguity of these factors, the application of the political question doctrine has been very uneven, and at times extremely inconsistent, prompting one circuit court to observe that “[n]o branch of the law of justiciability is in such disarray as the doctrine of ‘political question.’”<sup>173</sup> Accordingly, it is not surprising that courts have often applied it in seemingly contradictory fashion in contractor cases.

For example, in *McMahon v. Presidential Airways, Inc.*, which involved the death of three servicemen in the crash of a small plane operated by a subsidiary of Blackwater in Afghanistan, the district court observed that the political question doctrine has been “applied in very limited circumstances, but it has almost never been applied to suits involving private defendants.”<sup>174</sup> Conversely, other courts hearing suits against private contractors have concluded: “[g]iven the unprecedented levels at which today’s military relies on contractors to support its mission, [] this Court has recognized that a military contractor acting under military orders can also invoke the political question doctrine as a shield under certain circumstances.”<sup>175</sup>

Even in cases against the government, the application of the political question doctrine has at times been inconsistent. In *Koohi v. United States*, the Ninth Circuit rejected its application to a lawsuit arising out of the erroneous downing of a civilian Iranian aircraft by a U.S. battleship, which had mistaken it for a F-14 fighter jet during a period of heightened hostilities adjunct to the Iran-Iraq War.<sup>176</sup> Yet in *Aktepe v. United States*, the Eleventh Circuit applied the political question doctrine to bar a suit by members of the Turkish Navy, whose ship was accidentally hit by live Sparrow missiles fired by the U.S.S. Saratoga during NATO simulated war games.<sup>177</sup>

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<sup>172</sup> See *In re KBR, Inc., Burn Pit Litig.*, 893 F.3d 241, 259 (4th Cir. 2018); see also *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 408–09 (4th Cir. 2011).

<sup>173</sup> *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 933 (D.C. Cir. 1988) (quoting CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 14, at 74 (4th ed. 1983)).

<sup>174</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1318–19 (M.D. Fla. 2006), *aff’d on other grounds*, 502 F.3d 1331 (11th Cir. 2007).

<sup>175</sup> *In re KBR*, 893 F.3d at 259.

<sup>176</sup> *Koohi v. United States*, 976 F.2d 1328, 1330–32 (9th Cir. 1992).

<sup>177</sup> *Aktepe v. United States*, 105 F.3d 1401, 1401–03 (11th Cir. 1997).

Much of the difficulty in applying the doctrine arises from the lack of definitive parameters and guidance afforded by the *Baker* factors, particularly in the military context.<sup>178</sup> As a result, some courts have taken an expansive view, concluding that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”<sup>179</sup> Other courts, however, have expressed the more restrictive posture that just because an action is “taken in the ordinary exercise of discretion in the conduct of war” does not by itself remove the action from judicial review.<sup>180</sup>

The wide discretion afforded by the *Baker* factors has, thus, allowed courts to utilize varying philosophical approaches in analyzing the applicability of the doctrine in specific cases.<sup>181</sup> For example, in *McMahon*, the district court adopted a very restrictive view of its parameters in this context by noting that “[m]ilitary-related cases that constitute political questions have been limited to ‘direct challenges to the institutional functioning of the military in such areas as the relationship between personnel, discipline, and training . . . [or challenges] impact[ing] upon the internal functioning and operation of the military.’”<sup>182</sup>

This rationale was largely followed by the Eleventh Circuit in affirming the district court’s opinion.<sup>183</sup> After noting that decisions such as “whether and under what circumstances to employ military force” and “[t]he strategy and tactics employed on the battlefield” are typically political questions, the court concluded that claims against contractors are “at least one step removed” from such cases filed against the government.<sup>184</sup> Accordingly, the contractor will “carry a double burden,” first being required to establish that “the claims against it will require reexamination of a decision by the

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<sup>178</sup> WRIGHT, *supra* note 173, at 80.

<sup>179</sup> *Aktepe*, 105 F.3d at 1403 (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

<sup>180</sup> *Koohi*, 976 F.2d at 1332 (quoting *The Paquete Habana*, 175 U.S. 677, 715 (1900)).

<sup>181</sup> WRIGHT, *supra* note 173, at 77.

<sup>182</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1321 (quoting *Nation Mag. v. United States Dep’t of Defense*, 762 F. Supp. 1558, 1567 (S.D.N.Y. 1991)), *aff’d*, 502 F.3d 1331 (11th Cir. 2007).

<sup>183</sup> *See McMahon*, 502 F.3d at 1366.

<sup>184</sup> *Id.* at 1359.

military” and then “it must demonstrate that the military decision at issue . . . is insulated from judicial review.”<sup>185</sup>

Courts adopting this more restrictive view of the political question doctrine have limited its application to the types of cases that require the court to “second-guess military strategic, tactical, or policy decisions.”<sup>186</sup> These courts have also been reluctant to apply the doctrine to the types of cases involving more traditional tort liability, even if they relate to the military actions occurring inside a war zone.<sup>187</sup>

As pointed out by one court in a suit brought by a soldier injured by a manufacturing defect in an artillery gun, “[w]hether the manufacturing process was faulty is not a political question; it is a routine issue of civil, and civilian, tort law.”<sup>188</sup> As further expressed by another court in a similar artillery defect case,

Plaintiffs claim that [defendant] failed to manufacture the mortar cartridge in the way the government directed. In considering whether the mortar cartridge was defectively manufactured, this court need not examine the wisdom of the government’s design of the mortar shell or its decision to use a contractor. [The defendant’s] liability turns on whether the mortar cartridge was or was not defectively manufactured, a matter unrelated to the appropriateness [of] any Army policy or “the wisdom of military operations

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<sup>185</sup> *Id.* at 1359–60.

<sup>186</sup> *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 705 (S.D.N.Y. 2011) (case brought by contractor’s employee, who fell in a latrine located within a forward operating base in Iraq due to its claimed negligent construction was not barred).

<sup>187</sup> *Id.* (“When faced with an ‘ordinary tort suit,’ the textual commitment factor actually weighs in favor of resolution by the judiciary.”); *see also McMahon*, 460 F. Supp. 2d at 1321 (“Tort suits are within the province of the judiciary, and that conclusion is not automatically negated simply because the claim arises in a military context, or because it bears tangentially on the powers of the executive and legislative branches.”) (and cases cited therein).

<sup>188</sup> *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 695 (D.N.J. 2013).

and decision-making.” Instead, this court will merely examine the manufacturer’s performance.<sup>189</sup>

On the other hand, the more expansive view is illustrated by the following statement from *Bentzlin v. Hughes Aircraft Co.*,<sup>190</sup>

the objectives of tort law—deterrence, punishment, and providing a remedy to innocent victims—are inconsistent with the government’s interests in combat, and thus tort law cannot be applied to government actions in combat. Similarly, the application of tort law to contractors for suits arising from combat would frustrate government combat interests.<sup>191</sup>

Typically, in those cases in which the district courts have applied the doctrine to bar suits against private defendants, the government has exercised significant control over either the conduct at issue or the private defendant.<sup>192</sup> Therefore, in applying the *Baker* factors, cases often turn on the question of who was controlling the activity in question at the time of the injury or death and the nature of such control.<sup>193</sup>

As pointed out in a number of circuit court opinions, the issue of control is generally one of fact and accordingly, where the military “merely provides the contractor with general guidelines that can be satisfied at the contractor’s discretion,” sufficient control is often found to be lacking.<sup>194</sup> For example, in *Potts v. Dyncorp International, LLC.*, an employee of one contractor was seriously injured while riding in a truck operated by an employee of another contractor being used to transport nonmilitary food supplies under contract

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<sup>189</sup> *Rodriguez v. Gen. Dynamics Armament and Tech. Prods., Inc.*, 696 F. Supp. 2d 1163, 1185 (D. Haw. 2010) (internal citations omitted). *See also McMahon*, 460 F. Supp. 2d at 1321.

<sup>190</sup> *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993).

<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g., Potts v. Dyncorp Int’l LLC*, 465 F. Supp. 2d 1245, 1251 (M.D. Ala. 2006) (noting that the government did not control the private contractor).

<sup>193</sup> *See id.* at 1250–51 (reasoning that because defendant’s own policies controlled its conduct, the court would not need to assess U.S. military procedures, thus, there were no separation of powers concerns).

<sup>194</sup> *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 331, 338 (4th Cir. 2014) (quoting *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 462, 467 (3d Cir. 2013)).



with the Coalition Provisional Authority (“CPA”).<sup>195</sup> While racing at speeds over ninety-nine miles per hour on the highways between Trebil, Jordan and Baghdad, Iraq, the truck swerved to avoid an unknown black object, later identified as a dog, causing it to flip over several times and explode into flames.<sup>196</sup>

In support of the contention that the case involved the adjudication of a political question, the contractor argued that the determination of the plaintiff’s claims would require the court to evaluate the propriety of the security procedures contained in Dyncorp’s contract with the CPA, thereby meeting the first *Baker* factor.<sup>197</sup> The contractor also argued that the second *Baker* factor was met because the case revolved around the question of what a reasonable driver would do when faced with the possibility of hostile fire in a war zone, for which there were no “judicially discoverable or manageable standards.”<sup>198</sup>

In rejecting the first contention, the court noted that Dyncorp’s contract called for it to be responsible for the day-to-day execution of its security services, the professional and technical competence of its employees, and oversight for all its operations.<sup>199</sup> The court went on to further observe that Dyncorp’s contract “was a civilian contract to provide non-military security services to non-military personnel for the purpose of delivering non-military supplies.”<sup>200</sup> Accordingly, it concluded that the key inquiry was not the wisdom of military operations, but merely the sufficiency of Dyncorp’s internal policies and whether it had complied with them under the terms of its contract.<sup>201</sup>

The court likewise rejected the applicability of the second *Baker* factor on the grounds that because “Dyncorp was not acting ‘subject to military regulations and orders,’” the court could utilize normal tort principles (i.e. whether the driver acted reasonably under the

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<sup>195</sup> 465 F. Supp. 2d 1246, 1247–48 (M.D. Ala. 2006).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1248.

<sup>198</sup> *Id.* at 1252.

<sup>199</sup> *Id.* at 1250.

<sup>200</sup> *Id.* at 1250–51.

<sup>201</sup> *Id.* at 1253–54.

circumstances) to determine whether liability existed for the plaintiff's injuries.<sup>202</sup>

A similar ruling was reached in *Lessin v. Kellogg Brown & Root*, which involved a serious injury to a soldier who was providing a military escort to a supply truck convoy.<sup>203</sup> When one of the trucks in the convoy broke down, the escort was required to stop on the side of the road in a military zone.<sup>204</sup> While the other soldiers secured the area from potential insurgent attack, the plaintiff assisted the driver in fixing the truck.<sup>205</sup> During the repairs, the plaintiff was struck in the head by the truck's ramp assist arm and sustained serious brain injuries.<sup>206</sup>

Although accepting the contractor's argument that the political question doctrine could be raised by private entities,<sup>207</sup> the court rejected its application in the case before it. The court concluded that it did not involve an analysis of military decision-making or the way government operations were conducted.<sup>208</sup> Instead, the court noted that the case was "essentially, a traffic accident, involving a commercial truck alleged to have been negligently maintained, as well as a civilian truck driver who was allegedly negligent in operating the truck and insufficiently trained."<sup>209</sup>

In *Carmichael v. Kellogg Brown & Root Services, Inc.*, however, the Eleventh Circuit affirmed the dismissal of another convoy case in which the driver of a tanker rolled over while negotiating a curve in the road, resulting in severe brain damage to the soldier serving

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<sup>202</sup> *Id.* at 1253.

<sup>203</sup> *Lessin v. Kellogg Brown & Root*, No. CIV A H-05-01853, 2006 WL 3940556, at \*1 (S.D. Tex. June 12, 2006).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *See id.* at \*3 n.1 (quoting *United States v. Munoz-Flores*, 495 U.S. 385, (1990))("[T]he identity of the litigant is immaterial to the presence of [political question] concerns in a particular case.").

<sup>208</sup> *Id.* at 3. ("While the actions taken by Lessin, a military officer, in assisting the truck will likely be relevant to causation, it is by no means clear that the policies or decisions of the military or of the executive branch itself will be implicated in this case. It does not follow, therefore, that the case will require initial policy decisions committed to the discretion of the political branches, or that adjudication of the case will evince a lack of respect for the political branches.").

<sup>209</sup> *Id.*

as a guard.<sup>210</sup> The court reasoned that since the military picked the time and route of the convoy, set the speed and distance to be maintained between the vehicles, established the security measures to be taken, and that the “circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions,” it would not be possible to determine whether the contractor had been negligent without judicial scrutiny of these military judgments.<sup>211</sup>

Such conflicting results also occur outside of the convoy context as seen in several cases arising out of attacks on military bases by suicide bombers. In *Smith v. Halliburton Company*, the family of a civilian contractor, who was killed in a suicide bomb attack on a mess hall in Mosul, Iraq, sued Halliburton, the parent company of the contractor which operated the dining facility.<sup>212</sup> The suit claimed that its subsidiary Kellogg Brown & Root, failed to exercise proper security, thereby allowing the suicide bomber, who was dressed in an Iraqi military uniform, to walk in and detonate his bomb.<sup>213</sup>

The court focused on the contract between the contractor and the government, which did not place responsibility upon the contractor to provide security for the base, and found that “[i]n the absence of any contractual directive to provide security, the Army assigns responsibility for force protection, including security, to the military, not to civilian contractors . . . . Although contractors may be armed, they may only be armed for the purpose of individual self-defense.”<sup>214</sup>

As a result, the court rejected the plaintiff’s contention that the case was a simple premises liability suit, but instead raised a political question, since it would require the court

to second-guess the decisions of the United States military, even though the suit is ostensibly against only military contractors . . . [since] [b]y alleging that defendants were negligent in providing security

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<sup>210</sup> *Carmichael v. Kellogg Brown & Root Servs.*, 572 F.3d 1271, 1277–78, 1296 (11th Cir. 2009).

<sup>211</sup> *Id.* at 1281–83.

<sup>212</sup> *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at \*1 (S.D. Tex. Aug. 30, 2006).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at \*3.

[at the facility] . . . plaintiffs are, in effect alleging that the military was negligent in providing security . . . .<sup>215</sup>

In *Hencely v. Fluor Corp., Inc.*, another district court judge held that a political question was not presented in a suicide bombing occurring on a base operated by a private contractor.<sup>216</sup> In this case, the perpetrator, who had been a former member of the Taliban, was an employee of a sub-contractor of the defendant.<sup>217</sup> Although the bomber had been vetted and placed at the base by the government, the complaint focused solely upon the claims of the contractor's subsequent negligent supervision and retention of him.<sup>218</sup> The court rejected the defendant's attempts to point the finger at the government for its role in approving the bomber for employment at the base as part of its defense.<sup>219</sup>

A different district judge, however, reached the opposite conclusion in another case arising out of the *very same incident* in *Loquasto v. Fluor Corp., Inc.*<sup>220</sup> Here, the court refused to follow the reasoning utilized in *Hencely* just seven months earlier.<sup>221</sup>

In *Al Shimari v. CACI Premier Tech., Inc.*, the Fourth Circuit, which has been the forum for many of these lawsuits as the home to several military contractors, sought to simplify and clarify the political question analysis by distilling *Baker's* six factors into two questions:

[F]irst . . . “whether the government contractor was under the ‘plenary’ or ‘direct’ control of the military” (direct control). Second, . . . whether “national defense interests were ‘closely intertwined’ with military decisions governing the contractor’s conduct, such that a decision on the merits of the claim ‘would

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<sup>215</sup> *Id.* at \*5.

<sup>216</sup> *Hencely v. Fluor Corp., Inc.*, No. 6:19-cv-00489-BHH, 2020 WL 2838687, at \*1 (D.S.C. June 1, 2020).

<sup>217</sup> *Id.* at \*8, \*9.

<sup>218</sup> *Id.* at \*8–12.

<sup>219</sup> *Id.* at \*11–12.

<sup>220</sup> *See Loquasto v. Fluor Corp., Inc.*, 512 F. Supp. 3d 728, 741 (N.D. Tex. 2021).

<sup>221</sup> *Id.*

require the judiciary to question actual, sensitive judgments made by the military.” An affirmative response to either of the two . . . factors . . . generally triggers application of the political question doctrine.<sup>222</sup>

Nevertheless, even this simple two factor test has proved difficult to consistently administer as witnessed by the seemingly conflicting conclusions reached in *Taylor v. Kellogg Brown & Root Services, Inc.*<sup>223</sup> and the two *KBR, Inc., Burn Pit Litigation* opinions.<sup>224</sup> In *Taylor*, a Marine suffered severe injuries when he was electrocuted while installing a back-up generator in a military base in Iraq after an employee of the contractor turned on the main generator, despite the Marine Corps’ instructions not to do so.<sup>225</sup> Although concluding that the contractor was not under the control of the military, the court reasoned that assessing the contractor’s contributory negligence defense would require it to evaluate military decisions made by the Marine leadership, such as whether a back-up generator should have been installed, thereby requiring dismissal of the suit.<sup>226</sup>

In the first of the court’s subsequent *In re KBR, Inc. Burn Pit Litigation* opinions, it utilized a much narrower analysis to reject a similar argument made by the contractor.<sup>227</sup> In this case, servicemen and civilian employees sued KBR claiming injuries because of exposure to toxic chemicals caused by the burning of various wastes prohibited by Department of Defense regulations and by improper water purification procedures.<sup>228</sup> The court rejected the argument that a political question was involved simply because the military had decided to use burn pits, which it considered an “acceptable”

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<sup>222</sup> *Al-Shimari v. CACI Premier Tech, Inc.*, 840 F.3d 147, 155 (4th Cir. 2016) (internal citations omitted) (quoting *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011)).

<sup>223</sup> See *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 403 (4th Cir. 2011).

<sup>224</sup> See *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 331–32 (4th Cir. 2014); see also *In re KBR, Inc.*, 893 F.3d 241, 253 (4th Cir. 2018).

<sup>225</sup> *Taylor*, 658 F.3d at 404.

<sup>226</sup> *Id.* at 411–12.

<sup>227</sup> *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d at 335.

<sup>228</sup> *Id.* at 332.

but last option for disposing of waste.<sup>229</sup> Although recognizing that the contractor had produced “some evidence demonstrat[ing] that the military exercised control over [its] burn pit activities,” conflicting evidence established that the contractor controlled the *manner* of the work.<sup>230</sup>

The court went on to adopt the analysis utilized by the Third Circuit in *Harris v. Kellogg Brown & Root Services, Inc.*, which involved a wrongful death action brought by the family of a soldier, who was electrocuted while taking a shower in his barracks.<sup>231</sup> The family alleged that the contractor, who was charged with maintenance of the facility, failed to properly ground a water pump resulting in the electrocution of their son.<sup>232</sup> The court focused on the element of control over the manner that the particular work in question was to be performed:

where the military does not exercise control but merely provides the contractor with general guidelines that can be satisfied at the contractor’s discretion, contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions.<sup>233</sup>

In reliance upon *Harris*, the Fourth Circuit similarly concluded that where the evidence establishes that the military merely provides the “goals to achieve[,] but not how to achieve them[,]” a political question is not involved.<sup>234</sup>

When the case came back to the court four years later, however, the Fourth Circuit concluded that additional discovery taken in the interim established that the military’s control over the waste disposal procedures was “plenary and actual,” requiring dismissal of the case as presenting a political question.<sup>235</sup>

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<sup>229</sup> *Id.* at 336–39.

<sup>230</sup> *Id.* at 337.

<sup>231</sup> *Id.* at 338–39; *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 462, 462–63 (3d Cir. 2013).

<sup>232</sup> *Harris*, 724 F.3d at 463.

<sup>233</sup> *Id.* at 467.

<sup>234</sup> *In re KBR, Inc. Burn Pit*, 744 F.3d at 339.

<sup>235</sup> *In re KBR, Inc.*, 893 F.3d at 241, 261 (4th Cir. 2018).

Another issue which has created inconsistencies in the application of the political question doctrine is the willingness of some courts to look beyond the claims raised by the plaintiff's complaint and to analyze the issues that may be implicated by the contractor's potential defenses.<sup>236</sup>

For example, in *Amedi v. BAE Systems, Inc.*, after a contractor was killed when a mine resistant ambush protected ("MRAP") vehicle broke apart upon striking an improvised explosive device ("IED"), his family sued the manufacturer claiming that it failed to meet the government's specifications during construction.<sup>237</sup> Although acknowledging that the plaintiff's claims of manufacturing defects would likely not raise political questions, the court nevertheless held that the defendant's likely defenses, which pointed the finger at the military for negligence in the convoy formation, the route selected, and the sufficiency of safeguards to avoid IEDs, would raise such issues—requiring a dismissal of the case.<sup>238</sup>

Other courts, however, have refused to allow the defendant to define the political question analysis in such a manner. A good example is *McMahon v. General Dynamics Corp.*, which involved another battlefield products liability claim, this time by a soldier who was seriously injured when a machine gun misfired.<sup>239</sup> Although the plaintiff only challenged the contractor's manufacture of the weapon, the defendant "state[ed] that it [would] defend itself in a manner that [would] drag the Court into exacting evaluations of the Army's policies and the actions of its soldiers."<sup>240</sup>

The court rejected the product manufacturer's argument, observing that it

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<sup>236</sup> See *Amedi v. BAE Systems, Inc.*, 782 F. Supp. 2d 1350, 1357 (N.D. Ga. 2011).

<sup>237</sup> *Id.* at 1351–52; see also *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 409 (in evaluating these factors, the court "look[s] beyond the complaint, [and] considers how [the service members] might prove [their] claim[s] and how KBR would defend"); *Carmichael v. Kellogg Brown & Root Servs.*, 572 F.3d 1271, 1288, 1292 (11th Cir. 2009) (dismissing case which arose out of alleged negligent operation of a vehicle in a military convoy, because of the contractor's defense that military decisions caused the accident).

<sup>238</sup> *Amedi*, 782 F. Supp. 2d at 1357–58.

<sup>239</sup> *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 685–686 (D.N.J. 2013).

<sup>240</sup> *Id.* at 695.

is too broad; it would give the defendants too much power to define the issues. Indeed, it would bar virtually any claim in which the contractor posited that the military, not itself, was at fault. In the great majority of cases dismissing claims on political question grounds, the allegedly faulty exercise of military judgment was the basis of the complaint, not of a hypothetical defense. McMahon does not challenge any order he was given, or indeed anything that occurred in Afghanistan. His allegation of a manufacturing defect could stand alone without implicating any decision committed to the discretion of the military.<sup>241</sup>

The difficulties which the political question analysis have caused the courts is demonstrated by the legal journey of four negligent convoy cases originally decided by the same district court judge: *Fisher v. Halliburton, Inc.*,<sup>242</sup> *Smith-Idol v. Halliburton*,<sup>243</sup> *Lane v. Halliburton*,<sup>244</sup> and *Woodson v. Halliburton*.<sup>245</sup> The judge originally dismissed each of the cases on the grounds that they presented political questions, concluding that under the defendant's contract with the government, and regulations issued by the Army to define the respective roles of the military forces and the contractor, that "the Army was, at the very least, significantly involved in transportation and force protection decisions."<sup>246</sup>

Following the dismissals, the Fifth Circuit Court of Appeals reversed and remanded the cases<sup>247</sup> back to the district court to determine whether they could be resolved "without needing to make a constitutionally impermissible review of war time decision

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<sup>241</sup> *Id.*

<sup>242</sup> *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 645 (S.D. Tex. 2006).

<sup>243</sup> *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685, at \*1, \*2 (S.D. Tex. Oct. 11, 2006).

<sup>244</sup> *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2796249, at \*1, \*2 (S.D. Tex. Sept. 26, 2006).

<sup>245</sup> *Woodson v. Halliburton*, No. H-06-2107, 2006 WL 2796228, at \*1, \*2 (S.D. Tex. Sept. 28, 2006).

<sup>246</sup> *See Fisher*, 454 F. Supp. 2d at 643.

<sup>247</sup> Three of the four dismissals were appealed: *See e.g., Lane*, 2006 WL 2796249, at \*1; *Smith-Idol*, 2006 WL 2927685, at \*1; and *Fisher*, 454 F. Supp. 2d at 645.



making.”<sup>248</sup> After allowing the parties extensive discovery and utilizing the analytical standards established by the Fifth Circuit, the district judge concluded the second time around that the cases did not in fact involve political questions, since their focus was not on the military’s gathering of information, but instead on Halliburton’s use of it after it was communicated.<sup>249</sup>

While therefore denying the motion to dismiss based upon the political question doctrine, the district judge nevertheless granted the contractor’s motion for summary judgment on the grounds that the plaintiffs’ actions were barred by the exclusive remedy provisions of the Defense Base Act.<sup>250</sup> When the cases reached the Fifth Circuit for the second time,<sup>251</sup> the court upheld the summary judgments under the DBA, but decided that it did not need to revisit the political question issue.<sup>252</sup>

The ultimate takeaway from these cases is that the complex and interdependent nature of the contractor-military relationship, which characterized the wars in Iraq and Afghanistan, makes it necessary to focus on the specific allegations of negligence in each case. Where the case challenges actions by the contractor which have the potential to implicate military decisions or actions, it is more likely that a political question will be found.<sup>253</sup> Where, however, the case is directed to the contractor’s failure to comply with government regulations as adopted, its misuse of information provided by the military or its own failure to exercise reasonable care, the case is more likely to be subject to normal civil tort principles.<sup>254</sup>

A good example of the application of such analysis is seen in *McMahon v. Presidential Airways, Inc.*, where both the government

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<sup>248</sup> Lane v. Halliburton, 529 F.3d 548, 568 (5th Cir. 2008).

<sup>249</sup> See Fisher v. Halliburton, 696 F. Supp. 2d 710, 722–23 (S.D. Tex. 2010).

<sup>250</sup> See Smith-Idol v. Halliburton, No. H-06-1168, 2010 WL 2196268, at \*1 (S.D. Tex. May 27, 2010).

<sup>251</sup> See Fisher v. Halliburton, 667 F.3d 602, 603 (5th Cir. 2012). The Lane case was settled prior to the appeal, leaving only Fisher and Smith-Idol for the second appeal.

<sup>252</sup> Fisher, 667 F.3d at 606.

<sup>253</sup> Smith-Idol, 2010 WL 2927685, at \*1–2.

<sup>254</sup> Fisher, 696 F. Supp. 2d at 722–23.

and the contractor shared responsibilities for the flights in question.<sup>255</sup> The court first delineated each party's obligations:<sup>256</sup>

On the most general level, the SOW [statement of work]<sup>257</sup> required Presidential to “[p]rovide all fixed-wing aircraft, personnel, equipment, tools, material, maintenance, *and supervision* necessary . . . for the missions DoD requested . . . . The SOW further gave Presidential the ultimate responsibility for ensuring the safety of the flights it was operating . . . . [T]he military's duties (according to the SOW) were relatively discrete. The military chose the start and end points of the flights, and chose when the flights would be flown (qualified by Presidential's power to decline a mission for safety reasons). The military also imposed certain constraints on Presidential's exercise of its supervisory responsibilities. It limited the working hours of Presidential's pilots; specified minimum requirements for the aircraft; set out minimum and maximum amounts of passengers and cargo; and contained a provision requiring Presidential employees to comply with General Order One (which contained general rules of conduct for all service members in Afghanistan).<sup>258</sup>

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<sup>255</sup> *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331,1361 (11th Cir. 2007).

<sup>256</sup> *Id.* at 1360–61.

<sup>257</sup> *Id.* at 1360, 1336 (statements of work are issued by the military to define the contractor's specific responsibilities under its umbrella contract with the government); *Carmichael v. Kellogg Brown & Root Servs.*, 572 F.3d 1271, 1276 n. 2 (11th Cir. 2009) (noting the umbrella contract between the contractor and the military is made under the Logistics Civil Augmentation Program (“LOGAP”), which “define[s] the general contours of the military's relationship with civilian contractors.” The specific nature of the relationship is “further governed by a patchwork of other agreements and instruments,” including the Army Field Manual, Department of Defense directives and “Statements of Work (SOW) and Task Orders (TO) by which the contract is implemented”); *see also In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 332, 337 (4th Cir. 2014).

<sup>258</sup> *McMahon*, 502 F.3d at 1360–61 (emphasis added).

The court then looked to the plaintiff's specific claims of negligence:<sup>259</sup>

McMahon's allegations [do not] relate to any of these discrete areas of military responsibility. She does not challenge the military's scheduling of the flights; the force protection the military provided on the base; or the military's generalized restrictions on Presidential employees while they were on the base pursuant to General Order One. Rather, her allegations relate principally to the operation of the flight, for which Presidential retained residual responsibility under the terms of the SOW. McMahon alleges "[n]egligent . . . entrusting an aircraft to a flight crew inexperienced in flying the mountainous terrain of Afghanistan"; ". . . failure to conduct a formal route study"; ". . . failure to properly plan and execute the . . . flight"; and other challenges to the operational details of the flight.<sup>260</sup>

As a result, the court concluded that the prosecution of the case would not require a reexamination of any decision made by the military thereby rendering the political question doctrine inapplicable.<sup>261</sup>

The type of analysis undertaken in *McMahon* recognizes the important underlying principle emphasized in *Klinghoffer v. S.N.C. Achille Lauro ed Altri-Gestione*, that "the doctrine 'is one of "political questions," not one of "political cases.'" The fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."<sup>262</sup>

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<sup>259</sup> *Id.* at 1361.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1360, 1365.

<sup>262</sup> *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (internal citations omitted)(suit by family of passenger against the PLO arising from the hijacking of a cruise ship was not subject to dismissal as raising a political question).

### B. *Sovereign Immunity and the Feres Doctrine*

Some contractors have claimed a direct entitlement to sovereign immunity under the so-called *Feres* doctrine, which bars a soldier from recovery against the government under the Federal Tort Claims Act (“FTCA”) for injuries which “arise out of or are in the course of activity incident to service.”<sup>263</sup> For example, in *McMahon v. Presidential Airways, Inc.*, the contractor argued that “‘as military contractors operating in a combat zone,’ they should share in the Government’s sovereign immunity because ‘the reality of modern warfare’ is that contractors perform traditional military functions . . . characterizing their role as part of the ‘Total Force.’”<sup>264</sup>

The contractor based its argument on the contention that the plaintiffs’ status as servicemen was the critical element of the *Feres* doctrine and not the government’s role as the defendant.<sup>265</sup> The district court rejected this argument, holding that “*Feres* has never been applied to protect private parties from tort liability.”<sup>266</sup>

The rejection of the *Feres* doctrine to a private contractor is clearly required by both the wording of the FTCA and the *Feres* opinion itself.<sup>267</sup> The FTCA expressly excludes contractors from the scope of the Act.<sup>268</sup>

As used in this chapter . . . the term “Federal agency” includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.*<sup>269</sup>

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<sup>263</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950) (Feres was a serviceman who died in a barrack’s fire as an alleged result of the Army’s negligence in using an unsafe facility and in failing to maintain an adequate fire watch. Two other cases based upon claimed medical malpractice of Army surgeons were consolidated with it in the Supreme Court).

<sup>264</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1325 (M.D. Fla. 2006).

<sup>265</sup> *Id.* at 1325–26.

<sup>266</sup> *Id.* at 1328.

<sup>267</sup> *Feres*, 340 U.S. at 141–42; *see also* 28 U.S.C. § 2671.

<sup>268</sup> 28 U.S.C. § 2671.

<sup>269</sup> *Id.* (emphasis added).

Such a contention is also inconsistent with the Court's holding in *Feres*, which allows recovery against the government for "tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." <sup>270</sup> In analyzing this issue, the Court looked to the role of the FTCA and the history of sovereign immunity in the United States, concluding that the Act did not create new remedies against the government, but merely waived sovereign immunity for existing causes of action applicable to private parties under the same circumstances. <sup>271</sup> Finding a lack of equivalent remedies in the private sphere, the Court held, "[w]e know of no American law which ever has permitted a soldier to recover for negligence, *against either his superior officers or the Government he is serving.*" <sup>272</sup>

The indispensable role of the federal government as the defendant to the application of the *Feres* doctrine was further emphasized by the Court's subsequent decision in *United States v. Johnson*. <sup>273</sup> In this case, the Eleventh Circuit previously held that the claims asserted by the families of Coast Guard rescuers, whose helicopter crashed during a mission, were not barred by *Feres*, since the claimed negligence was that of civilian FAA employees. <sup>274</sup> The Supreme Court rejected this conclusion, explaining that the critical factor was the role of the federal government as the defendant, not the job description of the employees whose negligence gave rise to the claim. <sup>275</sup>

As a result, those courts which have considered the attempted extension of the *Feres* doctrine to military contractors, have rejected the argument on the grounds that since sovereign immunity is only applicable to the government, the *Feres* exception to the statutory waiver of sovereign immunity can only apply to suits by servicemen against the government. <sup>276</sup>

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<sup>270</sup> *Feres*, 340 U.S. at 141 (quoting 28 U.S.C. § 2674).

<sup>271</sup> *Id.* at 142.

<sup>272</sup> *Id.* at 141 (emphasis added).

<sup>273</sup> *United States v. Johnson*, 481 U.S. 681, 691–92 (1987).

<sup>274</sup> *See Johnson v. United States*, 749 F.2d 1530, 1540 (11th Cir. 1985).

<sup>275</sup> *Johnson*, 481 U.S. at 689–90.

<sup>276</sup> *See, e.g., Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 272 (9th Cir. 1990); *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989); *McMahon v. v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315 *aff'd* 502 F.3d 1331, 1352–53; *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848, 879 (W.D. Mich 2004); *see*

In reaching this conclusion, the courts have focused on the identity of the defendant, rather than the nature of the work being performed.<sup>277</sup>

The [Supreme] Court emphasized that “[t]he congruence of professional interests between contractors and the Federal Government is not complete” because “the contractors remained distinct entities pursuing private ends, and their actions remained commercial activities carried on for profit.

This reasoning is helpful. Westinghouse’s private profit objectives in operating under the contract establish it as an entity distinct from the government.<sup>278</sup>

Perhaps in recognition of the foregoing, on appeal the contractor in *McMahon* refined its argument to contend that “it was a common law agent of the federal government at the time of the accident, and is therefore entitled to the sovereign immunity the government might have under the *Feres* doctrine. [This] argument relies on the doctrine of derivative sovereign immunity.”<sup>279</sup>

The doctrine of derivative sovereign immunity originated in the case of *Yearsley v. W.A. Ross Const. Co.*, which involved a claim by a landowner against a contractor building dikes in the Missouri River under contract with the federal government in exercising its eminent domain power.<sup>280</sup> The specific work was being performed under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States.<sup>281</sup> The Court concluded that where the agent was acting within the express authority validly granted by the government “[t]he action of the agent is ‘the act of the government.’”<sup>282</sup>

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*also Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 874–75 (8th Cir. 1974) (refusing to extend sovereign immunity to grenade manufacturer for a Vietnam training accident).

<sup>277</sup> *Chapman*, 911 F.2d at 271.

<sup>278</sup> *Id.* (citation omitted).

<sup>279</sup> *McMahon*, 502 F.3d at 1341.

<sup>280</sup> *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 19 (1940).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 22.

As observed by the Sixth Circuit in *Adkisson v. Jacobs Engineering Group, Inc.*,<sup>283</sup> a non-military contractor case, “*Yearsley’s* spare reasoning, however, creates uncertainty as to the scope of the decision.”<sup>284</sup> Nevertheless, several circuit court decisions have relied upon the doctrine in different contexts to shield contractors from liability where they were performing actions for which the government itself would be immune from suit.<sup>285</sup>

The doctrine has not fared very well, however, when raised by military contractors in cases arising out of combat hostilities. In *Bynum v. FMC Corporation*,<sup>286</sup> which involved a claim by a National Guardsman for injuries due to the alleged negligent manufacture of a military vehicle, the Fifth Circuit noted that “[t]he difficulty of establishing a traditional agency relationship with the government makes the derivative sovereign immunity defense ill-suited to many manufacturers of military equipment.”<sup>287</sup>

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<sup>283</sup> See *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641, 646–647 (6th Cir. 2015) (noting that the doctrine can only be applicable where the contractor is performing acts for which the government would be immune. In this case the underlying legal question was whether the government would have been liable under the FTCA if it had been the negligent actor).

<sup>284</sup> *Id.* The doctrine was revisited by the Court in several more recent cases, but without fully filling in its scope. See, e.g., *Filarsky v. Delia*, 566 U.S. 377, 393–94 (U.S. 2012) (holding that an attorney hired by a city to assist it in conducting an investigation into an employee’s potential wrongdoing was entitled to the same qualified immunity for his actions as city employees in performing the same activities); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166, 168–69 (U.S. 2016) (holding that an advertising company hired by the Navy to text recruiting messages to young adults was not entitled to immunity for failing to follow the terms of the Telephone Consumer Protection Act).

<sup>285</sup> See, e.g., *Butters v. Vance Int’l, Inc.*, 225 F.3d 462 (4th Cir. 2000) (holding a private contractor was entitled to derivative sovereign immunity under the Foreign Sovereign Immunity Act for following the commands of a foreign sovereign in refusing to promote female employee); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009) (holding dredging companies were entitled to immunity for environmental damages caused by their activities performed pursuant to contracts with federal government); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963) (holding a contractor could not be held liable for trespass in constructing a highway in conformance with the terms of a contract with the federal government by landowners claiming that the construction exceeded government right-of-way).

<sup>286</sup> 770 F.2d 556, 564 (5th Cir. 1985).

<sup>287</sup> *Id.*

Noting that it had previously “never upheld a claim of derivative sovereign immunity,” the Eleventh Circuit in *McMahon* concluded that “if it in fact exists,” which it declined to decide, it would require that the entity seeking immunity “must at a bare minimum have been a common law agent of the government.”<sup>288</sup> Even where such a relationship existed, however, the court warned that would not be enough by itself to invest a private entity with sovereign immunity.<sup>289</sup>

Since the contractor sought entitlement to sovereign immunity solely by virtue of its claimed status as a common law agent, the Eleventh Circuit rejected the application of the *Feres* doctrine to it.<sup>290</sup> Nevertheless, after a detailed analysis of the policies underlying the *Feres* doctrine, the court concluded that while it was not applicable, there still *might* be some limited form of immunity due to contractors in “their making or executing sensitive military judgments.”<sup>291</sup> However, the Eleventh Circuit did not find that the *Feres* “incident to service” standard provided the proper test for determining when such immunity was appropriate.<sup>292</sup> Accordingly, the court went on to hold that even *if* such immunity could hypothetically exist that it would not be appropriate in this case.<sup>293</sup>

The only other circuit courts to consider this question in the military contractor context are the Fourth and Ninth circuits.<sup>294</sup> In *Chapman v. Westinghouse Electric Corp.*,<sup>295</sup> which involved a personal injury claim by a Navy enlisted man who was injured as a result of the collapse of a deck at a government owned reactor, the Ninth Circuit likewise rejected the application of the defense, focusing on the difference between the government’s objectives and the contractors profit motive.<sup>296</sup> Accordingly, the court concluded that

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<sup>288</sup> 502 F.3d at 1343.

<sup>289</sup> *Id.* at 1344.

<sup>290</sup> *Id.* at 1346.

<sup>291</sup> *Id.* at 1350–51.

<sup>292</sup> *Id.* at 1351.

<sup>293</sup> *Id.* at 1355–56.

<sup>294</sup> See generally *Chapman v. Westinghouse Electric Corp.*, 911 F.2d 267 (9th Cir. 1990); *In re KBR, Inc. Burn Pit Litig.*, 925 F. Supp. 2d 752 (D. Md. 2013).

<sup>295</sup> 911 F.2d 267, 268 (9th Cir. 1990).

<sup>296</sup> *Id.* at 271 (quoting *U.S. v. New Mexico*, 455 U.S. 720, 738–40 (1982)) (holding that private companies operating atomic research facilities under contract



the contractor could not be considered a government employee, thereby precluding the application of sovereign immunity.<sup>297</sup>

In *In re KBR, Inc. Burn Pit Litigation*, however, the Fourth Circuit held that the defense could be applicable in the contractor setting but concluded that the district court had improperly applied it to dismiss the claims of both soldiers and employees seeking to recover for injuries claimed to have occurred from exposure to toxic chemicals caused by burning waste in huge pits.<sup>298</sup> The court held that for the defense to be applicable, it was not enough for the government to merely set the general scope or parameters of a project.<sup>299</sup> Instead, it must establish specific instructions, which the contractor was strictly following at the time.<sup>300</sup> Accordingly, where the contractor has discretion in performing its activities, derivative sovereign immunity cannot apply.<sup>301</sup>

### C. *Government Contractor Defense and Combat Activities Exception*

As a result of the refusal of most courts to allow the direct application of sovereign immunity to non-governmental entities, military contractors have subsequently raised several new defenses seeking to obtain their own analogous version of immunity by relying upon exclusions applicable to the government under the FTCA. The first successful foray into this area gave rise to the “government contractor defense.”<sup>302</sup> This defense, in turn, led to the recognition by some courts of what is now commonly called the “combat

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with the Department of Energy were not government employees entitled to immunity from state taxation).

<sup>297</sup> *Id.*

<sup>298</sup> 744 F.3d 331, 331 (4th Cir. 2014), *rev'g*, 925 F. Supp. 2d 752, 753 (D. Md. 2013).

<sup>299</sup> *Id.* at 345–46.

<sup>300</sup> *Id.* at 338–39.

<sup>301</sup> See *Harris v. Kellogg, Brown & Root Servs., Inc.*, No. 08-563, 2016 WL 4720058, at \*2 (W.D. Pa. Sept. 9, 2016); *Vangjeli v. Banks*, No. 19-1635, 2020 WL 5880131, at \*5 (E.D. Pa. Oct. 1, 2020) (discussing difference between derivative sovereign immunity and official immunity doctrines).

<sup>302</sup> See, e.g., *Tozer v. LTV Corp.*, 792 F.2d 403, 405–06 (4th Cir. 1986); *Bynum v. FMC Corp.*, 770 F.2d 556, 560 (5th Cir. 1985); *Tillett v. J.J. Case Co.*, 756 F.2d 591, 596–97 (7th Cir. 1985); *McKay v. Rockwell Int'l*, 704 F.2d 444, 448 (9th Cir. 1983).

activities exception.”<sup>303</sup> As with the application of the political question doctrine, there has been disparate treatment by the courts in determining the applicability and scope of these defenses.

Several Circuit Court decisions initially adopted the government contractor defense<sup>304</sup> as an adjunct to the *Feres* doctrine.<sup>305</sup> These courts concluded that to allow claims against contractors for injuries to Armed Service personnel sustained in the course of military service would defeat the purpose behind the *Feres* doctrine since the increased cost of the contractor’s tort liability would be added to contracts, which “pass-through costs . . . would . . . defeat the purpose of the immunity for military accidents conferred upon the government itself.”<sup>306</sup>

In *Boyle v. United Technologies Corp.* which involved a suit against a helicopter manufacturer by the family of a Marine pilot, who drowned following a crash because he could not get the emergency hatch to open, the Supreme Court recognized the defense, but rejected the underlying analysis utilized by these lower courts.<sup>307</sup> Noting that sovereign immunity does not apply to private entities, the Court instead turned to a preemption analysis:

Petitioner’s broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree. In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law. But we have held that a few areas, involving “uniquely federal interests,” are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a

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<sup>303</sup> See, e.g., *Koohi v. United States*, 976 F.2d 1328, 1333–34 (9th Cir. 1992); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1492 (C.D. Cal. 1993).

<sup>304</sup> See, e.g., *Tozer*, 792 F.2d at 403; *Bynum*, 770 F.2d at 556; *Tillett*, 756 F.2d at 591; *McKay*, 704 F.2d at 444.

<sup>305</sup> *Feres v. United States*, 340 U.S. 135 (1950).

<sup>306</sup> See, e.g., *Tozer*, 792 F.2d at 408.

<sup>307</sup> 487 U.S. 500, 502–03, 510 (1988).

content prescribed (absent explicit statutory directive) by the courts — so-called “federal common law.”

The dispute in the present case borders upon two areas that we have found to involve such “uniquely federal interests.” We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law.

Another area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty. We have held in many contexts that the scope of that liability is controlled by federal law. The present case involves an independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government’s work done.<sup>308</sup>

Although finding that the procurement of military equipment by the United States was an area of “uniquely federal interest,” the Court held that this alone was not enough to preempt state law allowing tort recovery.<sup>309</sup> Instead, it concluded that preemption would only occur where: “a ‘significant conflict’ exists between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”<sup>310</sup>

The Court then looked to the discretionary function exception to the Federal Tort Claims Act<sup>311</sup> as the basis for determining whether such a “significant conflict” existed:

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<sup>308</sup> *Id.* at 504–05 (citations omitted).

<sup>309</sup> *Id.* at 507–08.

<sup>310</sup> *Id.* at 507 (citations omitted).

<sup>311</sup> 28 U.S.C. §2680(a) (excepting “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty” from the waiver of sovereign immunity).

We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting “second-guessing” of these judgments through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.<sup>312</sup>

As a result, the Court went on to hold that this test would only be met in claims against manufacturers based upon alleged *design* defects in military equipment when: (1) the government approved the precise specifications, (2) the equipment complied with the specifications, *and* (3) the supplier warned the government purchaser of the dangers in the use of the equipment.<sup>313</sup>

As noted by some lower court decisions, “[s]tripped to its essentials, the military contractor’s defense under *Boyle* is to claim, ‘The Government made me do it.’”<sup>314</sup>

Subsequent lower court decisions have reached divergent conclusions over the reach of *Boyle*. Some cases have refused to extend the defense beyond its origins, limiting it to those product liability

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<sup>312</sup> 487 U.S. at 511 (citations omitted).

<sup>313</sup> *Id.* at 512. Multiple circuit court decisions have weighed whether military contractors have carried their burden of establishing these elements. *See Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011) (upholding summary judgment for contractor which designed helicopter pursuant to government approved specifications that did not call for safety device that may have prevented crash); *Brinson v. Raytheon Co.*, 571 F.3d 1348, 1349 (11th Cir. 2009) (affirming summary judgment for the designer of the military aircraft).

<sup>314</sup> *Copeland v. 3M Co.*, No. 20-1490 (JRT/KMM), 2020 WL 5748114, at \*2 (D. Minn. Sept. 25, 2020) (finding the government contractor defense inapplicable to claims of hearing damage against a manufacturer of combat arms earplugs) (quoting *In re Joint E. & S. Dist. New York Asbestos Litig. v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 632 (2d Cir. 1990)).

design cases where the three express conditions are met.<sup>315</sup> Other courts have extended the defense beyond merely negligent design to other products liability type claims involving the negligent manufacture of military products,<sup>316</sup> failure to warn of product dangers,<sup>317</sup> and even to the provision of maintenance services.<sup>318</sup>

Still, others have stretched *Boyle* beyond the provision of products and maintenance services to immunize other activities by contractors for which the military would be protected by sovereign immunity, such as in the cases arising out of the abuses of prisoners of war at the notorious Abu Ghraib prison in Iraq.<sup>319</sup> These latter decisions have created a new hybrid type defense based upon the “combat activities exception” to the FTCA, which provides that the government does not waive its sovereign immunity from suits regarding “[a]ny claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*.”<sup>320</sup>

One of the leading cases to adopt this new hybrid defense is *Koochi v. United States*, in which the Ninth Circuit construed *Boyle* to bar wrongful death claims arising from the shooting down of an Iranian civilian plane carrying 290 passengers by the *USS Vincennes*.<sup>321</sup> Using the Aegis Air Defense System, manufactured by

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<sup>315</sup> See, e.g., *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 272 (9th Cir. 1990) (analyzing the case of a Navy enlisted man injured in the collapse of a nuclear reactor facility); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615–16 (S.D. Tex. 2005) (refusing to apply defense to claims by civilians injured and killed in convoy operated by contractors, which were attacked by insurgents in Iraq).

<sup>316</sup> See, e.g., *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 995–96, 1001–02 (9th Cir. 2008) (applying defense to cases based upon negligent manufacture).

<sup>317</sup> See, e.g., *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1151–52, 1156–58 (6th Cir. 1995); *Getz*, 654 F.3d at 867. The Ninth Circuit limited its prior opinion in *Butler v. Ingalls Shipbuilding, Inc.*, 89 F.3d 582 (9th Cir. 1996), which had refused to apply the defense to a failure to warn case.

<sup>318</sup> *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1334 (11th Cir. 2003) (holding defense available to service contractor for the alleged negligent failure to discover a stress crack in fin spar that led to crash of Army helicopter, where it followed government’s maintenance procedures); *LaCourse v. PAE Worldwide, Inc.*, 980 F.3d 1350, 1362 (11th Cir. 2020) (affirming summary judgment for contractor which allegedly failed to properly service and maintain F-16 that crashed, killing pilot).

<sup>319</sup> See *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009).

<sup>320</sup> 28 U.S.C. §2680(j) (emphasis added).

<sup>321</sup> 976 F.2d 1328, 1337 (9th Cir. 1992).

several government contractors, the battleship mistook the civilian airbus for an Iranian F-14 during a time of heightened hostilities between the United States and Iran arising out of the decade-long Iran-Iraq war.<sup>322</sup>

Although acknowledging that sovereign immunity would not directly shield the private contractors that had manufactured the Aegis system from liability, the Ninth Circuit reasoned that the application of the FTCA's combatant activities exception nevertheless removed any duty of care owed by either the government or the contractors "to those against whom force is directed as a result of authorized military action."<sup>323</sup> Reading *Boyle* as holding "preemption [to be] appropriate when imposition of liability on [a] defense contractor 'will produce [the] same effect sought to be avoided by the FTCA exception,'"<sup>324</sup> the Ninth Circuit went on to conclude that liability therefore could not be asserted against the contractors for the same reason as against the government.<sup>325</sup>

In *Bentzlin v. Hughes Aircraft Co.*, a California district court judge relied upon *Koohi* to expand *Boyle's* reach even further in a case arising from the death of six Marines during the first Gulf War due to an errant missile strike by a U.S. Air Force jet.<sup>326</sup> In suing the manufacturer for a claimed defect in the missile's guidance system, the plaintiffs tried to circumvent *Boyle* by claiming that the missile was defectively *manufactured*, rather than improperly *designed*.<sup>327</sup> The government took the unusual step of intervening in the lawsuit to assert that the continued progression of the case would damage national security, since it would result in the disclosure of highly classified information concerning the design of its Maverick missile system.<sup>328</sup>

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<sup>322</sup> *Id.* at 1329–30.

<sup>323</sup> *Id.* at 1337.

<sup>324</sup> *Id.* Interestingly, the court did not reference the earlier decision of a different panel from the circuit in *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267 (9th Cir. 1990), which utilized a straight analysis of the three *Boyle* factors to hold that the government contractor defense was inapplicable to a suit by a Navy enlisted man in the collapse of a nuclear reactor facility.

<sup>325</sup> *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992).

<sup>326</sup> 833 F. Supp. 1486, 1487, 1494 (C.D. Cal. 1993).

<sup>327</sup> *Id.* at 1489.

<sup>328</sup> *Id.* at 1496–97.

Although the court could have easily remained on the path of existing precedent by dismissing the case on the limited grounds that *Boyle* applied to claims of both design and manufacturing defects or by simply relying upon the state secrets doctrine,<sup>329</sup> it instead embarked upon a broad tirade against allowing recovery for any war time injuries as an affront to “military dignity,” regardless of cause or responsibility.<sup>330</sup>

“War produces innumerable innocent victims of harmful conduct—on all sides. It would make little sense to single out for special compensation a few of these persons . . . on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.” This principle applies even when the suit is against a government contractor, rather than the government itself. There can be no difference in compensation for those that die in war, even when the cause is a manufacturing defect.

Indeed, *the federal interest* in maintaining the military dignity of casualties suffered by soldiers fighting a war on behalf of the United States *would be harmed* by allowing soldiers killed or injured in war to bring suits against military contractors. Unfortunately, soldiers die and are injured in combat. Casualties are contemplated prior to war and judged to be a necessary consequence of the decision to go to war.<sup>331</sup>

Implicit in the court’s reasoning is the view that soldiers are war time expendables that do not deserve the same protections of the law for their safety as afforded to everyday consumers, because of the perceived need for military weapons manufacturers to avoid delays necessary to make their products safe.<sup>332</sup>

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<sup>329</sup> See *id.* at 1492. The court found both defenses applicable to the case. For a more detailed discussion of the state secrets doctrine, see *infra* Section II. D.

<sup>330</sup> *Bentzlin*, 833 F. Supp at 1494.

<sup>331</sup> *Id.* (citations omitted) (emphasis added).

<sup>332</sup> *Id.* at 1493–94.

[T]ort law is based in large part on deterrence; tort liability is meant to make tortfeasors more careful . . . . During wartime, manufacturers similarly should not be made overly cautious in the production and transportation of weapons . . . . Exposing government contractors to tort liability, even for manufacturing defects, would place undue pressure on manufacturers to act too cautiously, even when the national interest would be better served by expedient production than defect-free weapons.<sup>333</sup>

This same rationale also formed the basis for the dismissal of a products liability suit against the manufacturer of a pilot's safety equipment, which was claimed to have caused his death when his Apache helicopter crashed in Afghanistan, in *Flanigan v. Westwind Technologies, Inc.*<sup>334</sup> Building upon *Bentzlin's* argument that manufacturers of military weapons should not be bogged down by the tort system's concern for making safe products, the court went on to urge blanket immunity for such manufacturers by perversely twisting *Koohi's* statement that the FTCA's combatant activities exception removed any duty of care owed to enemy combatants to apply with equal vigor to "actions arising from the deaths of American soldiers in combat based upon product liability."<sup>335</sup>

The radical extension of *Boyle* by these cases has been rejected by many courts utilizing a variety of different rationales. Some courts have refused to apply the combatant activities exception to cases arising outside of the product liability field, reasoning that tort judgments in such cases will not subvert "any sophisticated design judgments or nuanced exercises of [military] discretion" inherent in the procurement process, which constituted a critical aspect of *Boyle's* analysis.<sup>336</sup> Other courts have rejected the application of the

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<sup>333</sup> *Id.* at 1493.

<sup>334</sup> 648 F. Supp. 2d 994, 995, 1007 (W.D. Tenn. 2008).

<sup>335</sup> *Id.* at 1004–05.

<sup>336</sup> *McMahon v. General Dynamics Corp.*, 933 F. Supp. 2d 682, 689, 692 (D.N.J. 2013) ("[T]he discretionary function exception does not apply to a mistake or defect in manufacturing. Such a process error is not a governmental, discretionary decision."); see *Fisher v. Halliburton*, 390 F. Supp. 2d 710, 720–21 (S.D. Tex. 2005) (refusing to apply the defense to claims arising out of the negligent operation of a convoy in Iraq); *Carmichael v. Kellogg, Brown & Root Servs.*,



defense by taking a restrictive view of the nature of the required “combatant” activities.<sup>337</sup>

Still others have taken a fact-based approach to determine whether the purposes of tort law would be met by allowing the case to go forward. For example, in *Getz v. Boeing Co.*, a different California district judge contrasted the plaintiffs in the case before him, who were the survivors of U.S. military personnel that died in a helicopter crash in Afghanistan, with the plaintiffs in *Koohi*, who were citizens of Iran, which was involved in military hostilities with the United States at the time.<sup>338</sup>

Using this analysis, she construed *Koohi* as “focus[ing] on whether the purposes of tort law would be furthered by requiring weapons manufacturers to extend a duty of care to ‘enemy forces or persons associated with those forces,’” which it answered in the negative.<sup>339</sup> *Getz*, on the other hand, “concern[ed] extending the duty of care to United States servicemen, the people the helicopter was designed to protect.”<sup>340</sup> The lack of a duty of care owed to enemies in

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Inc., 450 F. Supp. 2d 1373, 1377–81 (N.D. Ga. 2006) (refusing to apply to injuries arising from the negligent operation of a vehicle in a convoy by a contractor’s employee); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823, at \*5 (S.D. Tex. May 16, 2006) (refusing to apply to claim for injuries caused by negligent security which allowed suicide bomber entry into Army mess hall).

<sup>337</sup> See, e.g., *Brokaw v. Boeing Co.*, 137 F. Supp. 3d 1082, 1106 (N.D. Ill. 2015) (holding that the transportation of military equipment by plane into a war zone did not constitute a combatant activity, while questioning whether the defense can be applied to contractors); *McManaway v. KBR, Inc.*, 906 F. Supp. 2d 654, 666 (S.D. Tex. 2012) (holding contractor responsible for water and waste treatment at U.S. bases in Iraq did not involve combatant activity), *appeal dismissed*, No. 12–20763, 2013 WL 8359992 (5th Cir. Nov. 7, 2013); *Linfoot v. MD Helicopters, Inc.*, No. 3:09–0639, 2010 WL 4659482, at \*7–8 (M.D. Tenn. Nov. 9, 2010) (holding a helicopter crash in Iraq occurring as a result of a product defect rather than enemy fire did not constitute combatant activity); *Rodriguez v. General Dynamics Armament and Tech. Prods., Inc.*, 696 F. Supp. 2d 1163, 1186–89 (D. Hawaii 2010) (holding the combatant activities exception did not extend to injuries caused by a premature exploding motor round during training exercises in Hawaii). *But see* *Aiello v. Kellogg, Brown & Root Servs. Inc.*, 751 F. Supp. 2d 698, 711–13 (the design, operation and maintenance of toilet facilities located on a forward operating base was held to constitute combatant activity).

<sup>338</sup> *Getz v. Boeing Co.*, No. C 07–06396 CW., 2009 WL 636039, at \*4–6 (N.D. Cal. Mar. 10, 2009).

<sup>339</sup> *Id.* at \*4.

<sup>340</sup> *Id.*

war does not apply to our own military personnel.”<sup>341</sup> Accordingly, the court found the combatant activity exception inapplicable.<sup>342</sup>

Similarly, *McMahon v. General Dynamics Corp.*<sup>343</sup> criticized the express reliance in *Koochi* and *Bentzlin* upon the perceived need to free weapons manufacturers from the safety constraints of the tort system, which would require them to “exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces . . . .”<sup>344</sup>

True, the duty of care should not constrain our soldiers from taking “bold and imaginative measures” in battle. But reckless bravery is not the quality we look for in a supplier of materiel. A manufacturer like General Dynamics should not act in a spirit of bold improvisation; it should follow specifications scrupulously and exercise the highest level of care in the manufacturing process.<sup>345</sup>

*McMahon* went on to take further aim at the rationale expressed by those cases claiming that it was necessary to sacrifice the safety of soldiers in a time of war:<sup>346</sup>

I am not persuaded by all of *Bentzlin*'s reasoning. I am not convinced, for example, that fear of claims like McMahon's would induce General Dynamics to slow down its operations. Nor does anyone claim that a military exigency required that General Dynamics relax its safety standards to hasten production. I cannot meaningfully correlate the need to encourage “bold and imaginative” battle tactics to the manner or the rate at which guns come off of a U.S. assembly

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<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at \*4–6.

<sup>343</sup> *McMahon v. General Dynamics Corp.*, 933 F. Supp. 2d 682, 691 (D.N.J. 2013) (refusing to apply the combatant activity exception to shield a manufacturer from a claim by a soldier who was allegedly injured as a result of a defect in a machine gun causing it to misfire).

<sup>344</sup> *Id.* at 690 (quoting *Koochi v. United States*, 976 F.2d 1328,1334–35 (9th Cir. 1992)).

<sup>345</sup> *McMahon*, 933 F. Supp. 2d at 690.

<sup>346</sup> *Id.* at 691–92.

line. Nor do I believe that tort law loses its salutary capacity to encourage care, punish negligence and spread the cost of accidents, simply because the customer happens to be the government . . . . The tort system, here as elsewhere, can help enforce the highest standard of care in the production of the equipment upon which our servicemen and servicewomen rely. That safety and deterrence rationale, of course, has no application to the enemy, as *Koochi* implies . . . . It is a fact of life that the enemy seeks to injure us; that is no reason to forgo the best means we have of ensuring that we do not injure ourselves.<sup>347</sup>

Other cases have recognized the combatant activities exception but have rejected the *Koochi* approach to determine its applicability, instead focusing upon the extent of the government's control over the activity in question. One such case is *Saleh v. Titan Corp.*, which involved claims brought by several Iraqi detainees against military contractors based upon their torture in the infamous Abu Ghraib prison by both U.S. servicemen and the contractors' employees.<sup>348</sup> The D.C. Circuit Court of Appeals concluded that the defense would only apply to contractors, "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority . . . ."<sup>349</sup>

From a legal standpoint, the rationale for transforming the limited government contractor defense into a new broad scale combatant activities exception is conceptually unsound for a number of reasons. The essence of the government contractor defense is that the manufacturer is immune from being sued *because* it followed the military's specifications in designing a weapons system.<sup>350</sup>

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<sup>347</sup> *Id.*

<sup>348</sup> 580 F.3d 1, 1–2 (D.C. Cir. 2009).

<sup>349</sup> *Id.* at 9. In *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 481–82 (3d Cir. 2013), the Third Circuit adopted this test, finding the defense inapplicable to the claim of a soldier, who was electrocuted while taking a shower as a result of the negligent installation of an ungrounded water pump, because the Army did not retain control over the manner in which the contractor installed the pump.

<sup>350</sup> *Getz v. Boeing Co.*, 654 F.3d 852, 860–61 (9th Cir. 2011).

Nevertheless, it is well settled that such a contractual relationship with the government will not vest the private contractor with sovereign immunity.<sup>351</sup>

As explained in *Foster v. Day & Zimmerman, Inc.*,<sup>352</sup> in refusing to extend sovereign immunity to a grenade manufacturer for a Vietnam training accident,

The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government.<sup>353</sup>

. . . Therefore, the government does not become the conduit of its immunity in suits against its agents and instrumentalities merely because they do its work.<sup>354</sup>

This principle was reiterated more recently in the context of the recent wars in *McMahon v. Presidential Airways, Inc.*<sup>355</sup>

A private contractor that operates with “private profit objectives in operating under [a] contract” is “an entity distinct from the government,” though the two are contractually linked . . . .

. . . Defendants entered into the contract as a commercial endeavor. They provided a service for a price. Simply because the service was provided in the mountains of Afghanistan during armed conflict does not render Defendants, or their personnel, members of the military or employees of the Government.<sup>356</sup>

As such, *Boyle* expressly recognized that private military contractors were not entitled to sovereign immunity and accordingly,

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<sup>351</sup> *Foster v. Day & Zimmerman*, 502 F.2d 867, 874 (8th Cir. 1974).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 874 (and cases cited therein).

<sup>354</sup> *Id.* at 874 n. 6 (and cases cited therein).

<sup>355</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1326 (M.D. Fla. 2006) *aff'd* 502 F.3d 1331 (11th Cir. 2007) (and cases cited therein).

<sup>356</sup> *Id.* at 1326–27.

did not utilize the exceptions to the waiver of sovereign immunity applicable to the government set forth in the FTCA to create analogous defenses for private contractors.<sup>357</sup> Instead, it looked to the discretionary function exception of the Act (28 U.S.C. §2680(a)) solely for the purpose of determining whether the FTCA preempted state tort claims arising out of the government's exercise of its discretion in one discrete specific area, the selection of specifications for military weapons.<sup>358</sup> As a result, *Boyle* clearly does not support the attempt to utilize the FTCA to create a system of parallel sovereign immunity-like defenses for private contractors.<sup>359</sup>

The broad scope of the combatant activities exception also clearly exceeds the limited nature of the government contractor defense recognized by the Supreme Court in *Boyle*. As pointed out by the court in *Saleh*, *Boyle* requires that for the government contractor defense to apply,

one must discover a discrete discretionary governmental decision, which precludes suits based on that decision, [the combatant activities exception] is more like a field preemption . . . because it casts an immunity net over any claim that *arises* out of combatant activities.<sup>360</sup>

Accordingly, the reasoning expressed in cases like *Koohi*, *Bentzlin*, and *Flanigan* is clearly at odds with the underlying rationale of *Boyle*. As a result, the district court in *McMahon*, rejected the analytical framework underlying this hybrid defense by observing,

Whether the *Bentzlin* and *Koohi* courts unwittingly confused the government contractor defense and the combatant activities exception to the FTCA, or whether they crafted an entirely new defense based on sovereign immunity and federal preemption, this Court declines to endorse such a defense for private

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<sup>357</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 502, 510–13 (1988).

<sup>358</sup> *Id.* at 511–12.

<sup>359</sup> *Id.* at 510.

<sup>360</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009) (and cases cited therein).

contractors based solely on the fact that Defendants were operating in a combat zone. This Court can find no persuasive authority for the conclusion that the combatant exception preempts state tort law claims. The combatant activities exception to the FTCA is an explicit legislative preservation of sovereign immunity, while the government contractor defense is a judicially recognized affirmative defense grounded in federal preemption and the discretionary function exception to the FTCA. The latter defense shields contractors only in military equipment procurement contracts and only when the government dictates design specifications. Private contractors are not entitled to sovereign immunity unless they are characterized as government employees, which Defendants are not.<sup>361</sup>

The court therefore went on to hold,

There is no express authority for judicially intermixing the government contractor defense and the combatant activities exception; nor is there authority for bestowing a private actor with the shield of sovereign immunity . . . . *Unless they qualify as employees or agents of the Government*, private contractors may not bootstrap the Government's sovereign immunity.<sup>362</sup>

#### D. *The State Secrets Doctrine*

Like many other issues involving military contractors, the state secrets doctrine has resulted in differing opinions regarding both its scope and application. Some cases have treated it as an evidentiary privilege affecting only the admissibility of so-called state secrets, allowing the case to go forward minus the privileged evidence.<sup>363</sup> Other cases, however, have given it a pre-emptive effect requiring

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<sup>361</sup> *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) *aff'd* 502 F.3d 1331 (11th Cir. 2007) (and cases cited therein).

<sup>362</sup> *Id.* (emphasis added).

<sup>363</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077–80 (9th Cir. 2010).

the dismissal of the entire litigation, even where the parties can still establish their claims and defenses through nonprivileged and sometimes even public evidence.<sup>364</sup>

The state secrets doctrine has its origins in a suit brought by the estate of a southern Civil War spy, which sued the federal government for breaching a secret agreement made with President Lincoln to compensate the spy for his war time espionage services.<sup>365</sup> In *Totten v. United States*, the Supreme Court upheld Lincoln's authority "to employ secret agents" to spy on behalf of the government,<sup>366</sup> however, it affirmed the dismissal of the lawsuit. The Court reasoned that the nature of the underlying agreement was part of a class of "secret employments."<sup>367</sup> As a result, the Court went on to hold:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated . . . . Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.<sup>368</sup>

Seventy-seven years later, the Supreme Court referenced *Totten* in a footnote, but did not otherwise appear to rely upon it, in *United States v. Reynolds*.<sup>369</sup> In *Reynolds*, the families of three civilian contractors who died in the crash of an Air Force plane on a highly secret mission sought the discovery of highly classified investigative reports as part of their suit for recovery against the government under the FTCA.<sup>370</sup> The case arrived at the Court following the Third

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<sup>364</sup> *Id.*

<sup>365</sup> *Totten v. United States*, 92 U.S. 105, 105–06 (1876).

<sup>366</sup> *Id.* at 106.

<sup>367</sup> *Id.* (“[S]ecret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent.”).

<sup>368</sup> *Id.* at 107.

<sup>369</sup> 345 U.S. 1, n.11 (1953).

<sup>370</sup> *Id.* at 1.

Circuit Court of Appeals affirmance of a default judgement entered against the government as a sanction for refusing to produce the documents after the district court overruled the Air Force's objection based upon privilege.<sup>371</sup>

In reversing the lower courts' orders requiring the production of the reports, the Court formally recognized the existence of an evidentiary privilege for military and state secrets, which allows the U.S. government to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security.<sup>372</sup> The Court subsequently explained in *General Dynamics Corp. v. U.S.*, that its holding in "*Reynolds* was about the admission of evidence."<sup>373</sup> "It decided a purely evidentiary dispute by applying evidentiary rules."<sup>374</sup> The Court described that in *Reynolds* "*the privileged information [was] excluded and the trial [went] on without it.*"<sup>375</sup>

At the same time, *General Dynamics* breathed new life into the Court's earlier *Totten* decision, treating it as a corollary of the state secrets doctrine under which it was appropriate to dismiss entire actions under some circumstances.<sup>376</sup> *General Dynamics* involved a lawsuit by the manufacturer of a stealth aircraft over the consequences of the cancellation of its multi-billion dollar contract with

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<sup>371</sup> The claim of privilege was based upon an Air Force regulation exempting such reports from public disclosure that was enacted under the authority of 5 U.S.C. § 5 (now 5 U.S.C. § 22). *United States v. Reynolds*, 345 U.S. 1, 1 (1953). In *Touhy v. Ragen*, the Supreme Court upheld the authority of executive agencies to enact such regulations. 340 U.S. 462, 469–470 (1951). Initially, the government did not raise the claim in the district court that the documents constituted state secrets. *See sub nom.* *Brauner v. United States*, 10 F.R.D. 468, 472–73 (E.D. Pa. 1950) ("the Government does not here contend that this is a case involving the well-recognized common law privilege protecting state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security"). Subsequent to the district court's initial ruling sustaining the plaintiffs' motion to compel, however, the Judge Advocate General of the Air Force filed an affidavit stating that the production would "seriously hamper[] national security . . . and the development of . . . secret military equipment." *Reynolds v. United States*, 192 F.2d 987, 990 (3d Cir. 1951).

<sup>372</sup> *Reynolds*, 192 F.2d 987 at 996.

<sup>373</sup> 563 U.S. 478, 485 (2011) (emphasis added).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* (emphasis added).

<sup>376</sup> *Id.* at 486–87.



the Air Force.<sup>377</sup> In support of its claim that the military had misled it at the bidding stage, the contractor relied upon the principle recognized in such cases that the Air Force had withheld “‘superior knowledge’ of difficult-to-discover information ‘vital’ to contractual performance.”<sup>378</sup>

To establish such “superior knowledge,” it was necessary to inquire into the Air Force’s prior experiences with stealth technology in other projects.<sup>379</sup> Although disclosing some information regarding these earlier applications, the Air Force refused to provide all of the information requested on the grounds that it constituted a privileged military secret.<sup>380</sup>

In dismissing the lawsuit, despite the existence of sufficient non-privileged evidence to make a *prima facie* showing of the application of the government’s superior knowledge of the technical problems facing the building of the subject stealth aircraft, the Court distinguished *Reynolds* and returned to *Totten*,<sup>381</sup>

[the lower court’s] perception that in the present context the state-secrets issue raises something quite different from a mere evidentiary point seems to us sound. What we are called upon to exercise is not our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes. And our state-secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy.<sup>382</sup>

The “two cases”<sup>383</sup> relied upon by the Court were *Totten* and its modern-day counterpart *Tenet v. Doe*, which involved the CIA’s claimed breach of a contract with a spy during the Cold War.<sup>384</sup> In *Tenet*, the Court reversed the lower courts’ refusal to dismiss the

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<sup>377</sup> *Id.* at 481.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 481–82.

<sup>380</sup> *Id.* at 482.

<sup>381</sup> *Id.* at 485.

<sup>382</sup> *Id.* at 485–86 (internal citation omitted).

<sup>383</sup> *Id.* at 486.

<sup>384</sup> *Tenet v. Doe*, 544 U.S. 1, 1 (2005).

lawsuit and expressly rejected the argument that *Reynolds* had “re-cast [*Totten*] simply as an early expression of the evidentiary ‘state secrets’ privilege, rather than a categorical bar to [plaintiffs’] claims.”<sup>385</sup> Although the Court’s language in *Tenet* focused on the need to keep spy contracts secret, *General Dynamics* clearly expanded the applicability of the complete bar in some state secrets cases beyond just espionage lawsuits.<sup>386</sup>

Unfortunately, *General Dynamics* did not address the question of when the state secrets doctrine crosses the line from an evidentiary privilege to a complete bar, kicking that can down the road by observing,

what we promulgate today is not a statute but a common-law opinion, which, after the fashion of the common law, is subject to further refinement where relevant factors significantly different from those before us here counsel a different outcome.<sup>387</sup>

In subsequently wrestling with the issue of where to draw this line, the Ninth Circuit Court of Appeals surveyed the prior circuit court decisions in *Mohamed v. Jeppesen Dataplan, Inc.*,<sup>388</sup> which involved a suit against military contractors by Iraqi nationals who had been taken to black sites for the purposes of the CIA’s “so-called ‘extraordinary rendition program.’”<sup>389</sup>

Ordinarily, simply excluding or otherwise walling off the privileged information may suffice to protect the state secrets and “the case will proceed accordingly, with no consequences save those resulting from the loss of evidence.”

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<sup>385</sup> *Id.* at 8.

<sup>386</sup> *General Dynamics Corp. v. United States*, 563 U.S. 478, 486 (2011).

<sup>387</sup> *Id.* at 491.

<sup>388</sup> 614 F.3d 1070, 1082–83 (9th Cir. 2010) (internal citations omitted); *see also In re Sealed Case*, 494 F.3d 139, 152–54 (D.C. Cir. 2007); *El-Masri v. United States*, 479 F.3d 296, 299–300 (4th Cir. 2007); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 545 (2d Cir. 1991).

<sup>389</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073, 1075 (9th Cir. 2010).

In some instances, however, application of the privilege may require dismissal of the action. When this point is reached, the *Reynolds* privilege converges with the *Totten* bar, because both require dismissal. There are three circumstances when the *Reynolds* privilege would justify terminating a case.

First, if “the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.” Second, “if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.”

Third, and relevant here, even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets.<sup>390</sup>

Although more typically applied where the plaintiff is the party seeking so-claimed secret information, as noted in the above quotation from *Mohamed*, the privilege may also come into play where the information inures to the benefit of the defendant.<sup>391</sup> In such cases, it has been held that a dismissal (or defense summary judgment) is appropriate where the exclusion of the evidence “so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion,”<sup>392</sup> or where it deprives the

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<sup>390</sup> *Id.* at 1082–83.

<sup>391</sup> *In re Sealed Case*, 494 F.3d 139, 148 (D. C. Cir. 2007).

<sup>392</sup> *Zuckerbraun*, 935 F.2d at 547.

defendant of information that would otherwise give it a valid defense to the claim.<sup>393</sup>

Where, however, the withholding of the privileged information will not foreclose the possibility of a fair trial, the case will be allowed to proceed, but without the requested information.<sup>394</sup> In such cases, individual claims or defenses may be stricken if dependent upon the privileged information.<sup>395</sup>

The privilege has been held to apply in a variety of different contexts, including to block production of “information that would result in ‘impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments,’ or where disclosure ‘would be inimical to national security . . . .’”<sup>396</sup> It is not necessary for the United States or its agencies to be a party to the litigation, however, only the government may assert the claim.<sup>397</sup>

For the privilege to apply in the military context, the court need only be satisfied that “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>398</sup> Where the privilege is properly invoked, “even the most compelling necessity cannot

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<sup>393</sup> *In re Sealed Case*, 494 F.3d at 148–49. See also *General Dynamics Corp.*, 563 U.S. at 486–87; *White v. Raytheon Co.*, No. 07–10222–RGS, 2008 WL 5273290, at \*1, \*4 (D. Mass. Dec. 17, 2008) (suit by wife of Navy pilot shot down in friendly fire incident while on patrol in Iraq by defective Patriot missile dismissed where the application of the state secrets doctrine deprived the manufacturer of necessary information to establish its claimed defenses); *Bareford v. General Dynamic Co.*, 973 F.2d 1138, 1141–43 (5th Cir. 1992).

<sup>394</sup> *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334 (4th Cir. 2001) (noting that where quashing defendant’s subpoena on the U.S. for documents protected by the state secrets doctrine did not foreclose possibility of fair trial, the case would not be dismissed); *In re Sealed Case*, 494 F.3d at 141, 154 (holding Bivens action filed by DEA employee against State Department for Fourth Amendment violations would be allowed to proceed because of the existence of alternate sources of evidence).

<sup>395</sup> See *S.E.C. v. Naccio*, 614 F. Supp. 2d 1164, 1168–69 (D. Colo. 2009) (“[W]here a defendant will be deprived of the privilege, the court may dismiss the affected claims against that defendant.”).

<sup>396</sup> *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995) (internal citation omitted).

<sup>397</sup> *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991).

<sup>398</sup> *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”<sup>399</sup>

Because of its breadth and severe effect, it has been repeatedly recognized that the privilege may not be lightly applied.<sup>400</sup> “[W]hen- ever possible, sensitive information must be disentangled from non- sensitive information to allow for the release of the latter.”<sup>401</sup>

An important procedural safeguard imposed upon its application is the requirement that only the head of the relevant government agency may assert the formal claim and only after a personal review of the matter.<sup>402</sup> Other subordinate officials may, however, file declarations in support of the objection once it is asserted by the department head.<sup>403</sup>

Although the judiciary is charged with making the final determination of whether the privilege applies, the Supreme Court has admonished that courts must be careful to avoid “forcing a disclosure of the very thing the privilege is designed to protect.”<sup>404</sup> In assessing the risk of disclosure, courts traditionally show the utmost deference to executive assertions of privilege or presidential responsibilities upon grounds of military or diplomatic secret.<sup>405</sup> Furthermore, judicial review of such a claim of privilege is necessarily narrow.<sup>406</sup>

While observing that “[j]udicial control over the evidence cannot be abdicated to the caprice of executive officers,” the Court in *Reynolds* went on to caution “we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim will be accepted in any case.”<sup>407</sup> To strike this balance from a practical standpoint, the Supreme Court has stated that courts should first attempt to determine whether the application of

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<sup>399</sup> *Id.* at 11.

<sup>400</sup> *Id.* at 7. *See also* *General Dynamics Corp. v. United States*, 563 U.S. 478, 492 (2011) (“[the privilege] is the option of last resort, available in a very narrow set of circumstances.”).

<sup>401</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

<sup>402</sup> *Reynolds*, 345 U.S. at 7–8; *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995).

<sup>403</sup> *Kasza v. Browner*, 133 F.3d 1159, 1169–70 (9th Cir. 1998).

<sup>404</sup> *Reynolds*, 345 U.S. at 8.

<sup>405</sup> *See United States v. Nixon*, 418 U.S. 683, 710, 713 (1974).

<sup>406</sup> *Id.*

<sup>407</sup> *Reynolds*, 345 U.S. at 9–10.

the privilege can be established by extrinsic evidence, in which case an in camera inspection of the privileged information is not appropriate.<sup>408</sup> As explained by the Court, “When . . . the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”<sup>409</sup>

The privilege has been typically held to apply in cases involving claims of defective military armaments, such as claimed failures in friendly aircraft identification systems,<sup>410</sup> missile targeting equipment,<sup>411</sup> or missile defense systems.<sup>412</sup> As with other products liability cases involving non-military products, cases of this nature require the production of design and manufacturing specifications, product performance standards, quality control processes, training materials, records of prior system failures, and internal analysis of product capabilities and vulnerabilities.<sup>413</sup> In the military context, these materials almost always contain classified information.<sup>414</sup>

Claims of military equipment failures raise their own unique issues as well. While most product liability claims raise causation issues revolving around the question of whether the product was used properly, in the military context this issue often requires an analysis of whether the operators properly followed Rules of Engagement and/or their training procedures, which are normally classified.<sup>415</sup>

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<sup>408</sup> *Id.* at 10. See also *El-Masri v. United States*, 479 F.3d 296, 306 (4th Cir. 2007); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 548 (rejecting request for in camera inspection in suit for deaths of Navy sailors alleging that defects in missile defense system failed to repel Iraq air attack).

<sup>409</sup> *Reynolds*, 345 U.S. at 10.

<sup>410</sup> *Mounsey v. Allied-Signal, Inc.*, No. CV 95-4309 SVW (MCx), 2000 WL 34017116, at \*1 (C.D. Cal. April 10, 2000); *White v. Raytheon Co.*, No. 07-10222-RGS, 2008 WL 5273290, at \*1, \*5 (D. Mass. Dec. 17, 2008).

<sup>411</sup> *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp 1486, 1487 (C. D. Cal. 1993).

<sup>412</sup> *Zuckerbraun*, 935 F.2d at 544, 546 (analyzing the purported failure of the Phalanx Anti-Missile System); *Bareford v. General Dynamic Co.*, 973 F.2d 1138, 1140 (5th Cir. 1992) (analyzing the claimed flaws of the Phalanx military weapon system).

<sup>413</sup> See, e.g., *Bentzlin*, 833 F. Supp. at 1496–97.

<sup>414</sup> *Id.*

<sup>415</sup> See, e.g., *Zuckerbraun*, 935 F.2d at 547; *Mounsey*, 2000 WL 34017116 at \*2, \*8.

Another area where the privilege has come into play has been in suits arising out of claimed torture during alleged illegal renditions by the CIA and military contractors.<sup>416</sup> In *El-Masri v. U.S.*,<sup>417</sup> the court dismissed the suit of a German national, who had been arrested by Macedonian authorities and subsequently transferred to a CIA black site in Afghanistan, despite the plaintiff's claim that the CIA's rendition program was widely known and extensively reported in the media.<sup>418</sup> The court concluded that even though the general subject matter of such renditions was known, the specific facts necessary to prove the plaintiff's case were not.<sup>419</sup>

To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the [specific] defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.<sup>420</sup>

Although there is a legitimate need for a government secrets privilege, in the absence of strict and well-defined rules for its application, there is potential for abuse, including the denial of compensation to the families of military personnel who die needlessly as a result of the negligence of government contractors. *Bareford v. General Dynamic Co.*<sup>421</sup> presents a good example of such potential. In this case, the families of thirty-seven Navy sailors, who were killed by a missile strike on the *U.S.S. Stark* during the Iran-Iraq War, brought suit against the manufacturers of the ship's Phalanx defense system contending that its defects led to the success of the attack.<sup>422</sup>

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<sup>416</sup> *El Maris, v. United States*, 479 F.3d 296, 300–01 (4th Cir. 2007).

<sup>417</sup> *Id.* at 302.

<sup>418</sup> *Id.* at 300–02.

<sup>419</sup> *Id.* at 308–09.

<sup>420</sup> *Id.* at 309.

<sup>421</sup> *Bareford v. General Dynamic Co.*, 973 F.2d 1138, 1142 (5th Cir. 1992).

<sup>422</sup> *Id.* at 1138, 1140.

The plaintiffs produced over 2,500 pages of unclassified documents in support of their claims, including eleven Congressional reports, which the court acknowledged provided “substantial evidence from which a judge or jury might find problems, or even wrongdoing, by General Dynamics in its production and testing of the Phalanx system.”<sup>423</sup> Although the Department of Navy did not challenge any of these documents, the court accepted its contention that dismissal was still required:

[t]he government maintains that, even if the data is available from non-secret sources, acknowledgment of this information by government officers would still be damaging to the government, because the acknowledgement would lend credibility to the unofficial data. These cases stand for the proposition that disclosure of information by government officials can be prejudicial to government interests, even if the information has already been divulged from non-government sources.<sup>424</sup>

#### E. *Arbitration*

Over recent years there has been a tendency among industries, especially those which either employ foreign workers or hire U.S. citizens for jobs overseas, to incorporate arbitration provisions into their contracts.<sup>425</sup> Due to this trend, the courts have been called upon to decide an increasing number of cases involving the application of such clauses in the context of injuries to employees of military contractors.<sup>426</sup>

The Federal Arbitration Act provides that arbitration provisions in employment contracts “involving commerce” are enforceable, except “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>427</sup> The courts have given the enabling

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<sup>423</sup> *Id.* at 1142.

<sup>424</sup> *Id.* at 1144 (internal citations omitted).

<sup>425</sup> *See, e.g.,* *Bautista v. Star Cruises*, 396 F.3d 1289, 1292 (11th Cir. 2005) (upholding arbitration provision in foreign seaman’s contract with Miami cruise line).

<sup>426</sup> *See id.*

<sup>427</sup> 9 U.S.C. § 1.



“involving commerce” clause a broad application consistent with the reach of Congress’ power over interstate commerce.<sup>428</sup> The exception limits the grounds upon which arbitration agreements may be invalidated to those “‘generally applicable contract defenses, such as fraud, duress or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>429</sup>

Although Section 1 of the Federal Arbitration Act on its face exempts “contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce,”<sup>430</sup> the Supreme Court has construed this provision to limit its application to such workers only while engaged in transportation employment activities.<sup>431</sup> As a result, arbitration clauses in military contractor employment contracts are permissible, except in those circumstances where contracts in general would be voidable.<sup>432</sup>

Typically, a two-step approach has been used by the courts in analyzing whether a particular controversy is subject to arbitration.<sup>433</sup> The first step requires a determination of whether the parties have agreed to arbitrate the specific dispute.<sup>434</sup> This question in turn has two sub-parts: “(1) is there a valid agreement to arbitrate the claims and (2) does the dispute in question fall within the scope of that arbitration agreement.”<sup>435</sup> Where the answer to both of these questions is in the affirmative, the second step looks to whether there is any federal statute or public policy which would be violated by requiring arbitration of the particular claim.<sup>436</sup>

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<sup>428</sup> See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 12–13 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

<sup>429</sup> *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 339 (2011).

<sup>430</sup> 9 U.S.C. § 1.

<sup>431</sup> *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001). More recently, in *New Prime, Inc. v. Oliveira*, the Court held that the exclusion would apply regardless of whether the worker was an employee or independent contractor. 139 S.Ct. 532, 543 (2019).

<sup>432</sup> See generally *Jones v. Halliburton Co.*, 583 F.3d 228, 234–35 (5th Cir. 2009).

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at 233–34.

<sup>435</sup> *Id.* at 234.

<sup>436</sup> *Id.*

Federal courts favor arbitration as a matter of public policy, generally holding that “any doubts concerning the scope of arbitration should be resolved in favor of arbitration.”<sup>437</sup> As a result, some courts have gone so far as to conclude “a valid agreement to arbitrate applies ‘unless it can be said with positive assurance that [the] arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.’”<sup>438</sup>

Nevertheless, it has also generally been recognized that parties cannot be required to arbitrate controversies which they have not agreed to arbitrate and accordingly, “[e]ven though there is that presumption in favor of arbitration, ‘[t]he courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.’”<sup>439</sup> As a result, the question of whether claims brought by the employees of military contractors against their employers are subject to arbitration is dependent upon the specific language of their employment contracts.

In cases involving straightforward personal injury and wrongful death claims, the courts have generally upheld the enforceability of clauses containing the typical arbitration language.<sup>440</sup> For example, in *Nordan*, which arose out of the grisly 2004 murders of four security contractors in Fallujah, the district court granted Blackwater’s petition to compel arbitration where the families had sued the contractor for negligence, reckless misconduct, and fraud in failing to properly train, arm, equip, support, and otherwise prepare their decedents for the mission to which they had been assigned.<sup>441</sup> Similar results have been reached in other tort cases.<sup>442</sup>

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<sup>437</sup> *Id.* at 235.

<sup>438</sup> *Id.* (quoting *Personal Sec. & Safety Sys., Inc. v. Motorola, Inc.*, 297 F.3d 388, 392 (5th Cir. 2002)).

<sup>439</sup> *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) (quoting *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990)).

<sup>440</sup> *Blackwater Security Consulting, LLC v. Nordan*, 2011 WL 237840 at \*11 (E.D.N.C. Jan. 21, 2011).

<sup>441</sup> *Nordan*, 2011 WL 237840 at \*2. The contract required the arbitration of “any dispute regarding the interpretation or enforcement of any of the parties’ rights or obligations under this Agreement.” See *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 806 (E.D.N.C. 2005).

<sup>442</sup> See, e.g., *Coffey v. Kellogg Brown & Root*, 2009 WL 2515649, at \*3 (N.D. Cal. Aug. 13, 2009) (noting the employment contract required arbitration of “any and all claims that employee might have against the company . . . either (i) related

Where other types of claims have been involved, judicial treatment has been mixed. For example, in *Jones v. Halliburton Co.*, which involved the alleged gang rape of an employee by other co-employees while stationed in Baghdad, the Fifth Circuit concluded that some of the plaintiff's claims were subject to arbitration, while others were not.<sup>443</sup>

Following her arrival in Baghdad, the 20-year-old plaintiff was assigned to a predominately male barracks in the Green Zone and immediately began to complain about sexual harassment, claiming she was told by management to "go to the spa."<sup>444</sup> Several days later, Jones claimed that she was drugged and brutally raped by a number of Halliburton firefighters, while off duty after a social function in her barracks.<sup>445</sup>

After what the plaintiff described as further harassment and mishandling of her resulting complaints by management, she filed a claim with the EEOC, which "credited [her] claim of sexual harassment [and found] cause to believe that the Halliburton defendants violated Title VII of the Civil Rights Act of 1964."<sup>446</sup> In addition, she also successfully asserted a claim for compensation benefits under the DBA.<sup>447</sup>

Subsequently, Jones filed a multi-count complaint against Halliburton in the federal district court in Texas, seeking recovery under ten different theories: "negligence; negligent undertaking; sexual harassment and hostile work environment under Title VII; retaliation; false imprisonment; breach of contract; fraud in the inducement to enter the employment contract; fraud in the inducement to enter the arbitration agreement; assault and battery and intentional infliction of emotional distress."<sup>448</sup>

Halliburton moved to dismiss the suit and compel arbitration under a clause in the plaintiff's contract, which required the arbitration of "any and all claims that you might have against Employer related

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to their employment, including termination of employment, or (2) for personal injuries arising in the workplace . . .").

<sup>443</sup> *Jones*, 583 F.3d at 231–32, 242.

<sup>444</sup> *Jones v. Halliburton Company*, 625 F. Supp. 2d 339, 343 (S.D. Tex. 2008).

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Jones*, 583 F.3d 228, 243.

<sup>448</sup> *Jones*, 625 F. Supp. 2d at 344.

to your employment, including your termination, and any and all personal injury claims arising in the workplace . . . .”<sup>449</sup>

While upholding the validity of the arbitration agreement, the district court concluded that the specific claims based upon assault and battery; intentional infliction of emotional distress; negligent hiring, supervision, and retention; and false imprisonment did not arise out of Jones’ “scope of employment,” and were therefore not subject to arbitration.<sup>450</sup> In reaching this conclusion the court observed, “[a]lthough the arbitration provision extends to personal injury claims arising in the workplace, the Court does not believe that Plaintiff’s bedroom should be considered the workplace, even though her housing was provided by her employer.”<sup>451</sup>

The court also rejected the argument that the plaintiff’s prior application for and receipt of benefits under the DBA estopped her from contending that these claims were outside the scope of her employment, since “[t]he Court does not believe that the liberal interpretation of the term ‘scope of employment’ in the workers compensation context can be incorporated wholesale into the interpretation of an arbitration provision.”<sup>452</sup>

Although rejecting the lower court’s conclusion that the scope of the arbitration clause was to be determined by state, rather than federal law, the Fifth Circuit otherwise subsequently affirmed the district court’s rationale as well as its ultimate findings and holdings.<sup>453</sup> In doing so, the Fifth Circuit likewise rejected the conclusion of another Texas district court in *Barker v. Halliburton*,<sup>454</sup> which had held that claims arising out of a sexual assault against another female employee of the same contractor in her quarters were subject to arbitration, since the perpetrator had allegedly violated the employer’s rules during the course of the attack.<sup>455</sup> The Fifth Circuit

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<sup>449</sup> *Id.* at 343–44.

<sup>450</sup> *Id.* at 354–55.

<sup>451</sup> *Id.* at 353. *See also* *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1209 1217–18 (11th Cir. 2011), which involved a purported rape of a crewmember aboard a cruise ship that relied heavily upon *Jones* to reach a similar result under a broader arbitration provision.

<sup>452</sup> *Jones*, 625 F. Supp. 2d at 354.

<sup>453</sup> *Jones v. Halliburton Co.*, 583 F.3d 228, 242 (5th Cir. 2009).

<sup>454</sup> 541 F. Supp. 2d 879 (S.D. Tex. 2008).

<sup>455</sup> *Id.* at 887, 889–90; *Jones*, 583 F.3d at 237–38.

concluded that such allegations were not enough to bring such an attack within the scope of the plaintiff's employment.<sup>456</sup>

Outside of the sexual assault context, however, arbitration provisions have generally been upheld even in non-personal injury claims.<sup>457</sup> For example, in *McBride v. Halliburton Co.*,<sup>458</sup> an employee claimed that its employer had committed various fraudulent acts against the government under its LOGCAP contract for which the plaintiff was entitled to seek damages on behalf of the United States under the False Claims Act.<sup>459</sup> The plaintiff further alleged that she was terminated in retaliation for acting as a whistleblower and thereafter subsequently falsely imprisoned.<sup>460</sup>

The court concluded that all the claims were subject to arbitration under the terms of the plaintiff's contract which provided for arbitration of "any matters with respect to" her employment, including her termination and "any other matter related to or concerning the relationship between the Employee and the Company."<sup>461</sup>

One of the issues arising from the application of arbitration clauses is the impact of the inability of a plaintiff to be able to afford payment for the costs of such arbitration, which can be extremely high.<sup>462</sup> The American Arbitration Association's International Dispute Resolution Division, which generally hears such claims, charges a sliding scale filing fee.<sup>463</sup> For matters in which the plaintiff claims damages in the \$1 million to \$10 million range, the filing fee alone is presently \$18,975.<sup>464</sup> More significantly, however, are the fees of the arbitrators, who are typically experienced attorneys

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<sup>456</sup> Jones, 583 F.3d at 237–38.

<sup>457</sup> See, e.g., U.S. ex rel. *McBride v. Halliburton Co.*, No. 05-00828(HHK), 2007 WL 1954441, at \*1 (D.D.C. July 5, 2007).

<sup>458</sup> *Id.*

<sup>459</sup> *Id.* 31 U.S.C. §3729 et seq. permits a private individual to bring a claim on behalf of themselves and the government. The complaint is initially filed under seal and if the government decides, after investigating the claim, that it does not wish to pursue it, the private party then may proceed forward with the litigation.

<sup>460</sup> U.S. ex rel. *McBride*, 2007 WL 1954441, at \*1.

<sup>461</sup> *Id.* at \*5.

<sup>462</sup> *International Arbitration Fee Schedule*, INT'L CTR. DISP. RESOL. 1 (Oct. 1, 2017), [go.sdr.org/internationalfeeschedule](http://go.sdr.org/internationalfeeschedule).

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* The fee is paid in two installments, \$8,625 initially and \$10,350 prior to the first hearing. *Id.*

charging anywhere from \$400 to \$1000 per hour.<sup>465</sup> Since some arbitration agreements call for a panel of three arbitrators, the hourly fees can become tripled.<sup>466</sup>

In the commercial context, corporations can make their own analysis as to the affordability of such fees as part of their contract negotiations and decide whether to enter into such agreements. The normal employee of a military contractor, however, generally has no such bargaining power. Typically, the injured employee or his family, in the case of a wrongful death claim, rarely is able to bear such costs, especially after the loss of the family's major breadwinner.<sup>467</sup>

Several courts have held out the possibility that arbitration can be challenged where its costs would be prohibitively expensive for the plaintiff to be able to obtain redress for its statutory remedies.<sup>468</sup> To avoid this problem, some employers have agreed to pay for the costs of arbitration as part of their employment contract.<sup>469</sup> However, even where the contract calls for the splitting of the arbitration costs, the threshold for proving such a defense has rendered it nearly illusory as evidenced by a series of Eleventh Circuit cases dealing with the analogous arbitration of seamen's contracts.<sup>470</sup>

This defense has not fared any better in military contractor cases. In the long running *Nordan* case, the district court granted Blackwater's petition to compel arbitration in 2007.<sup>471</sup> The employment contract required that the arbitration be conducted before the American

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<sup>465</sup> See Deborah Rothman, *Trends in Arbitrator Compensation*, DISP. RESOL. MAG. 1, 1 (2017) available at [https://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/spring2017/3\\_rothman\\_trends\\_in\\_arbitrator.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf).

<sup>466</sup> *International Arbitration Fee Schedule*, *supra* note 462, at 2.

<sup>467</sup> See, e.g., *Blackwater Sec. Consulting, LLC v. Nordan*, No. 2:06-CV-49-F, 2011 WL237840, at \*2, \*3 (E.D.N.C. Jan. 21, 2011).

<sup>468</sup> See *Anders v. Hometown Mortg. Servs.*, 346 F.3d 1024, 1029 (11th Cir. 2003); *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1291–92 (11th Cir. 2015); *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 545 (11th Cir. 2016).

<sup>469</sup> See, e.g., *Anders*, 346 F.3d at 1029.

<sup>470</sup> See *Escobar*, 805 F.3d at 1283 (holding that a seaman, who filed an affidavit indicating that he was unemployed and had \$0 in the bank, and thus could not pay half of the anticipated arbitration fees of \$20,000, failed to meet his burden to establish this defense); *Suazo*, 822 F.3d at 545.

<sup>471</sup> *Blackwater Sec. Consulting*, 2011 WL 237840, at \*2.

Arbitration Association (“AAA”), which as noted above has rather substantial fees for both filing in the first instance and the ongoing payment of its arbitrators.<sup>472</sup>

The attorney for the deceased contractors’ families initially filed a hardship request with the AAA requesting that it waive its filing fee on the grounds that his clients could not afford to pay it.<sup>473</sup> The AAA instead offered to defer payment of the filing fee until the end of the case, to which the families agreed.<sup>474</sup> Subsequently, the AAA issued bills for the payment of its arbitrators’ fees.<sup>475</sup> Following the indication by the families’ counsel that they could not afford these fees, Blackwater initially paid them, however, later refused to pay subsequent fee requests over the next few years.<sup>476</sup> As a result, the AAA refused to go forward with the arbitration, eventually dismissing the claims and bringing the case to a premature conclusion.<sup>477</sup>

### III. CRIMINAL LIABILITY

#### A. *Under Iraqi Law*

On May 16, 2003, Coalition Administrator Paul Bremer adopted the original Coalition Provisional Authority (“CPA”) Regulations.<sup>478</sup> Regulation number 1 vested the powers of government for the administration of Iraq in the CPA as well as “all executive,

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<sup>472</sup> The initial filing fee at the time was \$13,500. *See id.* at \*2, \*6.

<sup>473</sup> *Id.* at \*3.

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> The CPA’s authority derived from the status of the United States and Great Britain as occupying powers as acknowledged in UN Security Council Resolution 1483, adopted on May 22, 2003. *See* JAMES DOBBINS ET AL., OCCUPYING IRAQ: A HISTORY OF THE COALITION PROVISIONAL AUTHORITY 12 (2009), available at [https://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND\\_MG847.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG847.pdf). The CPA governed Iraq from May 2003 to June 28, 2004. The CPA Administrator, Paul Bremer, was appointed by President Bush and Secretary of Defense Rumsfeld. *See* U.S. ex rel. DRC, Inc. v. Custer Battles, LLC., 562 F.3d 295, 298 (4th Cir. 2009).

legislative and judicial authority necessary to achieve its objectives . . . .”<sup>479</sup>

Pursuant to this grant of authority, Administrator Bremer subsequently adopted revised CPA Order Number 17, which provided that all contractors and their employees working under contract with the CPA “shall be immune from Iraqi legal process.”<sup>480</sup> Under this order, such contractors and their employees would, however, still be subject to jurisdiction of the country which sent them.<sup>481</sup>

As a result, neither military contractors or their employees may be legally held liable for violation of Iraq’s criminal laws, nor tried in an Iraqi court.<sup>482</sup>

### B. *Under U.S. Law*

Although CPA Order Number 17 immunizes contractors and their employees from the reach of Iraqi law, it still subjects them to the jurisdiction of the country which sent them.<sup>483</sup> Therefore, to the extent that the home county has criminal jurisdiction for acts occurring in either Iraq or Afghanistan, contractors and their employees may still be subject to criminal process under such laws.<sup>484</sup>

In earlier wars, civilians that accompanied American forces overseas had been subject to military court-martial for crimes committed in their host countries.<sup>485</sup> This practice was codified by the adoption of the Uniform Code of Military Justice in 1950, which provided for the jurisdiction of military courts over:

(10) In time of *declared war* or a *contingency operation*, persons serving with or accompanying an armed force *in the field*.

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<sup>479</sup> COAL. PROVISIONAL AUTH., DEP’T OF DEF., CPA/REG/16 MAY2003/01, COALITION PROVISIONAL AUTHORITY (2003).

<sup>480</sup> COAL. PROVISIONAL AUTH., DEP’T OF DEF., CPA/ORD/27 JUNE2004/17, STATUS OF CPA, MNFI, CERTAIN MISSIONS AND PERSONNEL IN IRAQ W/AMEX \*\*REVISED\*\* (2004).

<sup>481</sup> *Id.* at Section 3(1).

<sup>482</sup> *See id.*

<sup>483</sup> *Id.*

<sup>484</sup> *Id.* at Section 2(4).

<sup>485</sup> *See, e.g., In re Varney’s Petition*, 141 F. Supp. 190, 200–01 (S.D. Cal. 1956) (and cases cited therein); *see also Hines v. Mikell*, 259 F. 28, 35 (4th Cir. 1919).



(11) . . . persons serving with, *employed by*, or *accompanying* the armed forces outside the United States . . . .

(12) . . . persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States . . . .<sup>486</sup>

In 1957, however, the Supreme Court held in *Reid v. Covert* that military court-martial for capital cases stemming from crimes occurring outside of the United States in times of peace, improperly deprived civilian dependents of servicemen of their constitutionally protected rights.<sup>487</sup> Three years later, in *Kinsella v. Singleton*, the Court expanded its holding in *Reid* to include noncapital crimes committed by civilian dependents.<sup>488</sup> In two more cases that year, the Court applied these holdings to civilian employees that were U.S. citizens.<sup>489</sup>

Following these decisions, many crimes committed thereafter fell into a “jurisdictional vacuum” as a result of the then-existing presumption against the extraterritorial application of U.S. criminal statutes, and the reluctance of many host countries to prosecute crimes that did not involve their own citizens.<sup>490</sup>

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<sup>486</sup> 10 U.S.C. § 802 (emphasis added). In 2007, subsection 10 was changed from “[i]n time of war” to “[i]n time of declared war or a contingency operation” in order to nullify the decision by the United States Court of Military Appeals in *United States v. Averette*, 19 C.M.A. 363, 365 (C.M.A. 1970), which held that a civilian employee of an Army contractor in Vietnam could not be court-martialed because the conflict was not a declared war. *See United States v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012).

<sup>487</sup> 354 U.S. 1, 4–5, 19 (1957). *Reid* involved two consolidated convictions against the wives of service members stationed overseas during peacetime that were found guilty of murdering their spouses.

<sup>488</sup> *Kinsella v. Singleton*, 361 U.S. 234, 248 (1960).

<sup>489</sup> *See Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (finding civilian employee of the Corps of Engineers guilty of capital crime reversed); *see also McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960) (finding civilian employees of Army and Air Force guilty of noncapital charges reversed).

<sup>490</sup> *U.S. v. Slatten*, 865 F.3d 767, 779 (D.C. Cir. 2017).

To address this “vacuum,” Congress adopted the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”),<sup>491</sup> which extended federal criminal jurisdiction, just in time for the Iraq and Afghanistan wars.<sup>492</sup> Initially, the MEJA only applied to extraterritorial crimes committed by civilians<sup>493</sup> employed by the Department of Defense or its contractors.<sup>494</sup> Following the Abu Ghraib torture scandal, which involved contractors working for the Department of the Interior, it was amended to reach contractors and their employees working for all agencies supporting the war effort, so long as their actions at the time of the purported crime “relate[d] to supporting a DOD mission.”<sup>495</sup>

Although there was originally some debate among commentators over whether the MEJA could extend the reach of United States criminal law to cover actions by civilian contractors in Iraq and Afghanistan,<sup>496</sup> the circuit courts that subsequently considered the issue have found such jurisdiction to exist.<sup>497</sup>

One such highly publicized criminal case involved the September 16, 2007, shootout by Blackwater security personnel, which

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<sup>491</sup> 18 U.S.C. § 3261.

<sup>492</sup> 18 U.S.C. § 3261.

<sup>493</sup> The Act applies to servicemen who commit crimes while a member of the Armed Forces but cease to be subject to military law at the time of being charged. See 18 U.S.C. § 3261(d).

<sup>494</sup> *Slatten*, 865 F.3d at 779.

<sup>495</sup> *Id.* at 779–80 (quoting 18 U.S.C. § 3267).

<sup>496</sup> See Anthony Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699 (2007); Andrew Fallon & Theresa Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F. L. REV. 271 (2001); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367 (2006).

<sup>497</sup> See *Slatten*, 865 F.3d at 767, 777 (D.C. Cir.) (upholding the convictions of Blackwater security guards for charges arising from the killing and wounding of 31 Iraq civilians in Baghdad); *United States v. Brehm*, 691 F.3d 547, 552 (4<sup>th</sup> Cir. 2012) (upholding indictment against South African national employed by DynaCorp for assault of British citizen at military airbase in Afghanistan); *United States v. Green*, 654 F.3d 637, 653 (6<sup>th</sup> Cir. 2011) (upholding a conviction of former serviceman for crimes committed in Iraq prior to his discharge under MEJA); see also *United States v. Williams*, 509 F. App'x 899, 902 (11<sup>th</sup> Cir. 2013) (upholding constitutionality of prosecution under MEJA for crimes committed by civilian spouse against his daughter while in Japan and Okinawa).

resulted in the deaths of fourteen Iraqi civilians and the wounding of twenty others, as discussed in the Introduction.<sup>498</sup> While providing security protection for a State Department official traveling from a meeting site back to the Green Zone, four of the Blackwater personnel got into a firefight at a street intersection, claiming that they were attacked first.<sup>499</sup> Two days after the incident, the security personnel provided written statements to the Department of State based upon assurances that neither the statements, nor any information derived from the statements, would be used against them.<sup>500</sup> Following various investigations by the State Department, Army, and FBI, federal prosecutors concluded that the shooting was an “unprovoked illegal attack”<sup>501</sup> and a federal grand jury in Washington D.C. subsequently handed down indictments against the security personnel for manslaughter.<sup>502</sup>

The indictments were initially dismissed by the district court on the grounds that the defendants’ Fifth Amendment rights had been violated by the impact of the compelled statements.<sup>503</sup> The dismissals were subsequently reversed by the D.C. Circuit Court of Appeals, which concluded that the district court had failed to conduct a proper independent source analysis to determine whether sufficient non-tainted evidence existed to prosecute the security personnel.<sup>504</sup>

Following the denial of certiorari by the Supreme Court,<sup>505</sup> new superseding indictments were handed down, and as a result, in an

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<sup>498</sup> United States v. Slough, 677 F. Supp. 2d 112,116 (D.D.C. 2009).

<sup>499</sup> *Id.* at 116.

<sup>500</sup> *Id.* at 118–19.

<sup>501</sup> Sari Horwitz, *New Charges Brought Against Former Blackwater Guards in Baghdad Shooting*, WASH. POST: NAT’L SEC. (Oct. 17, 2013), <http://www.washingtonpost.com/world/national-security/new-charges-brought-against-former-blackwater-guards-in-baghdad-shooting/2013/10/17>.

<sup>502</sup> *Slough*, 677 F. Supp. 2d at 115–16.

<sup>503</sup> *Id.*

<sup>504</sup> United States v. Slough, 641 F.3d 544, 551 (D.C. Cir. 2011). This opinion only applied to four of the five guards originally charged as the government moved to dismiss the indictment against Nicholas Slatten without prejudice to seek a later re-indictment. Slatten was later reindicted and convicted of murder; see also Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>.

<sup>505</sup> United States v. Slough, 566 U.S. 1043 (2012).

October 2014 trial, one of the guards was found guilty of first degree murder and three others of manslaughter and weapons charges.<sup>506</sup> Slatten, the guard convicted of murder, was sentenced to life imprisonment and each of the others to 30 years in prison.<sup>507</sup> Although Slatten's original conviction was vacated for failure to sever his case from the others,<sup>508</sup> he was subsequently convicted a second time.<sup>509</sup> The cases were finally closed over 12 years after they started, when the four guards were pardoned in December of 2020 by President Trump as part of his highly controversial deluge of pardons on his way out of office.<sup>510</sup>

Another potential avenue for exerting U.S. criminal jurisdiction is found in the War Crimes Act, which applies to both members of the Armed Forces and U.S. nationals.<sup>511</sup> Under the Act, jurisdiction exists to prosecute various "war crimes," which are defined as "grave breach[es]" of the 1949 Geneva Conventions,<sup>512</sup> as well as violations of specific portions of the 1907 Hague Convention.<sup>513</sup>

In 2006, Congress amended the Act to exclude "foreign or international" law as sources for determining prohibited conduct and

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<sup>506</sup> Matt Apuzzo, *supra* note 504.

<sup>507</sup> Matt Apuzzo, *Ex-Blackwater Guards Given Long Terms for Killing Iraqis*, N.Y. TIMES (Apr. 13, 2015), <https://www.nytimes.com/2015/04/14/us/ex-blackwater-guards-sentenced-to-prison-in-2007-killings-of-iraqi-civilians.html>. The sentences for the three guards convicted of manslaughter were subsequently reduced to between 12 and 15 years. See Ashraf Khalil, *Sentences Reduced for 3 Blackwater Guards from 2007 Iraq Massacre*, MIL. TIMES: PENTAGON & CONG. (Sept. 8, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/09/08/sentences-reduced-for-3-blackwater-guards-from-2007-iraq-massacre/>.

<sup>508</sup> *United States v. Slatten*, 865 F.3d 767, 777 (D.C. Cir. 2017).

<sup>509</sup> *United States v. Slatten*, 395 F. Supp. 3d 45, 116 (D.D.C. 2019).

<sup>510</sup> See Haberman & Schmidt, *supra* note 69.

<sup>511</sup> 18 U.S.C. § 2441.

<sup>512</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>513</sup> 1907 Hague Convention IV with Respect to the Laws and Customs of War on Land (With Annexed Regulations) art. 23, art. 25, art. 27, art. 28, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV].

then went on to identify specific acts that would form a basis for jurisdiction.<sup>514</sup> The conduct identified by Congress under these conventions giving rise to jurisdiction consists of torture, murder, mutilation and maiming, intentionally causing serious bodily injury, rape, sexual assault, taking hostages, and performing biological experiments.<sup>515</sup> The 2006 Amendment also gave the President “the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.”<sup>516</sup>

Another basis for American courts to exercise jurisdiction for extra-territorial crimes is the Anti-Torture Statute.<sup>517</sup> This statute applies to acts of torture as defined in the Act, which are performed outside of the United States by either citizens or foreign nationals who are then arrested within this country.<sup>518</sup> The Act does not provide a basis for private civil remedies, only criminal prosecution.<sup>519</sup>

#### CONCLUSION

Although the military has used civilian contractors in every major conflict from the Revolutionary War to the present, their role and duties have evolved dramatically over the years. These changes have been spurred by many factors, including advances in technology and the resulting redirection of resources away from human warriors, political decisions to reduce the military budget and standing army strength following the end of the Cold War, the elimination of the draft, and changes in the nature of war itself. Perhaps one of the most

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<sup>514</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600.

<sup>515</sup> 18 U.S.C. § 2441(d).

<sup>516</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600.

<sup>517</sup> 18 U.S.C. §§ 2340, 2340A. This statute implemented the United States’ obligations as a signatory of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/39/51 (1984). *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 161 (4th Cir. 2016).

<sup>518</sup> *Id.* at § 2340A.

<sup>519</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009); *Renkel v. United States*, 456 F.3d 640, 644–45 (6th Cir. 2006); *Brown v. Victor*, 337 F. App’x 239, 241 (3d Cir. 2009).

significant factors has been the underlying political philosophy of privatization of government functions, which has characterized both Republican and Democratic administrations over the past two decades.<sup>520</sup>

As a result, civilian contractors now fulfill many functions that were previously performed by military personnel, which has resulted in the deployment of their employees to more forward battlefield positions than ever before.<sup>521</sup> The exposure of private civilians to greater risks of harm has also been enhanced by the increasing use of contractors to provide security forces for everything from the guarding of military bases to the protection of U.S. State Department officials and even Iraqi cabinet members.<sup>522</sup>

This redefinition of the civilians' role in the U.S. military war effort has raised many new legal issues for which there is often a lack of established relevant precedent. As previously discussed, much of the existing case law was developed during World War II and the Vietnam conflict, in which civilians played dramatically smaller and more isolated roles than in recent war efforts.<sup>523</sup>

As a result, certain legal principles have developed in historical contexts, which are sometimes hard to reconcile with today's warfare environment. For example, the continued rationale for utilizing the LHWCA to govern claims arising out of the wars in Afghanistan, which is a landlocked mountainous country, and Iraq, a country with vast deserts and a mere 36 miles of coastline, are hard to justify.<sup>524</sup>

The use of the LHWCA to decide claims arising out of the wars in Iraq and Afghanistan is largely the result of a historical accident, stemming from the development of the Defense Base Act in World War II in response to the needs created by President Roosevelt's Lend-Lease Program with Great Britain. As such, the LHWCA provides a relatively modest schedule of benefits for injured workers, comparable to those provided by state workers compensation acts.<sup>525</sup>

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<sup>520</sup> See Turner & Norton, *supra* note 3, at 1–2; SCAHILL, *supra* note 12, at 61; Urey, *supra* note 2, at 4; Campbell, *supra* note 15.

<sup>521</sup> PETERS & PLAGAKIS, *supra* note 27, at 4.

<sup>522</sup> *Id.*

<sup>523</sup> Campbell, *supra* note 15.

<sup>524</sup> 33 U.S.C. §901 et seq.

<sup>525</sup> See discussion *supra* Section I.A.

Although longshoring work is hardly easy, the risks and types of injuries to which the typical longshoreman is exposed certainly do not compare to the hazards of working in a wartime environment with enemy troops and insurgents trying to kill or maim opposition workers, not to mention the perils posed by friendly fire and weapon systems' malfunctions.<sup>526</sup> As noted by one military author, due to the "asymmetric threat on [today's] nonlinear battlefield, there is no 'safe' zone within the area of operation"<sup>527</sup> for contractors.

Even in the context of the relatively safer work environment, the LHWCA also gives longshoremen a much broader ability to sue non-employer third parties for negligently inflicted injuries than are available to the employees of military contractors, who must contend with political question, government contractor, combatant activities exception and government secret defenses.<sup>528</sup>

Due to the lack of established relevant common law predicate coupled with the absence of any comprehensive Congressional treatment of these issues, the district courts have been left to struggle with many new and complex questions raised by these changed civilian roles, relationships and functions without much of a framework for guidance. Consequently, many cases have reached diametrically opposite results that are often not logically capable of reconciliation.<sup>529</sup>

Take for example the unfortunately too common convoy ambush, which has produced many of the claims arising out of these recent conflicts.<sup>530</sup> A civilian employee in the convoy operated by

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<sup>526</sup> See generally *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007); *General Dynamics Corp. v. United States*, 563 U.S. 478; *White v. Raytheon Co.*, No. 07-10222-RGS, 2008 WL 5273290, at \*1 (D. Mass. Dec. 17, 2008) (dismissing a suit by wife of Navy pilot shot down in a friendly fire incident while on patrol in Iraq by a defective Patriot missile where application of state secrets doctrine deprived the manufacturer of necessary information to establish its claimed defenses).

<sup>527</sup> Campbell, *supra* note 15.

<sup>528</sup> See 33 U.S.C. § 933(a). For a detailed discussion of such rights, see Robert D. Peltz & Andrew L. Waks, *Personal Injury and Wrongful Death of Seamen and Other Maritime Workers*, FLORIDA MARITIME LAW AND PRACTICE §3.4A (Florida Bar, 6th Ed. 2019).

<sup>529</sup> Compare *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008), with *Whitaker v. KBR*, 444 F. Supp. 2d 1277, 1281-82 (M.D. Ga. 2006).

<sup>530</sup> See *Nordan v. Blackwater Sec. Consulting, LLC*, 382 F. Supp. 2d 801, 805 (E.D.N.C. 2005).

his employer is limited to the relatively modest schedule of benefits provided by the LHWCA.<sup>531</sup> Another civilian employee of a different contractor riding in the same convoy can bring a claim for all damages allowed under the tort laws of the state where the operating contractor is headquartered.<sup>532</sup> Similarly, an army soldier injured in the same convoy would also have the right to bring a state law claim against the contractor.<sup>533</sup>

That is, of course, assuming that the plaintiff is lucky enough to avoid getting one of the judges, who have applied the political question doctrine, government contractor defense, or combatant activities exception to such claims.<sup>534</sup> Even after navigating these shoals there is always the unpredictable application of the state secrets doctrine.<sup>535</sup>

As a result, the answers to questions—such as the application of the political question doctrine, the parameters of the government contractor defense, the validity and scope of the combatant activities exception, the extension of sovereign immunity to private entities and the limitations imposed on the application of the state secrets doctrine—often seem to rely too much on the luck of the draw in getting a judge with the right political philosophy, rather than existing legal precedent.

If there was ever an area of overwhelmingly unique federal interest, it is the subject of military contractors' legal liabilities and responsibilities. As aptly described by one commentator,

Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement . . . the military is facing a fundamental change in the way it conducts

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<sup>531</sup> See generally *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012).

<sup>532</sup> See generally *Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245 (M.D. Ala. 2006).

<sup>533</sup> See generally *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006).

<sup>534</sup> See *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F.Supp.2d 1277, 1278 n. 1 (M.D.Ga. 2006).

<sup>535</sup> *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1487, 1487, 1494 (C.D. Cal. 1993).



warfare, and there is little evidence that the players have been adequately prepared for that change.<sup>536</sup>

This is clearly an area that calls out for a comprehensive Congressional solution. The present patchwork quilt of remedies is neither adequate nor fair and is lacking the predictability that the law should provide to its citizens, especially those who are called upon to risk their lives for the defense of their country.

Accordingly, the only rational solution is for Congress to step in and create a unified system of recovery, which is relevant to the modern battlefield and the risks and dangers to which the employees of today's contractors are exposed. Whether it is to permit tort damage claims to go forward to be tried before either a judge or jury or whether it is to create a *realistic* schedule of workers compensation type benefits, a single comprehensive system covering all military contractors and their employees working on the battlefield is necessary to provide both the predictability and fairness necessary under the law.

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<sup>536</sup> Turner & Norton, *supra* note 3, at 3.