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Tort Suits Against Federal Contractors: Selected Legal Issues

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Summary

Contractors have played a considerable role in U.S. military operations over the last decade, and some commentators anticipate they will continue to do so in the future. Due in part to their heavy involvement in military operations, contractors have faced numerous tort suits, or suits seeking remedy for civil wrongs, in recent years. Many of these tort suits have alleged that contractors' negligence, or failure to take due care, in performing contractual obligations has caused harms to third/private parties (as opposed to the contracting agency). Contractors have often responded to such suits by raising the Federal Tort Claims Act (FTCA), the political question doctrine, and derivative immunities in seeking to avoid liability. They may also, to the extent permitted by their contract, seek indemnification from the government if found liable.

The Supremacy Clause of the U.S. Constitution provides that federal law is the "supreme law of the land" and preempts, or applies instead of, inconsistent provisions of state law. The FTCA is a federal law through which the government largely waives its inherent sovereign immunity from tort liability, although it retains sovereign immunity if one of the FTCA's exceptions applies (e.g., against any claim arising in a foreign country). Although the FTCA does not apply directly to federal contractors, they have long argued that the FTCA's exceptions can preempt state tort law claims against them in addition to federal agencies, and the Supreme Court agreed in its 1988 decision in *Boyle v. United Technologies Corporation*. There, the Court held that failure to find that one such FTCA exception, the discretionary function exception, preempts state law tort claims against contractors in narrowly prescribed circumstances would frustrate the exception's underlying purpose of shielding the government from liability caused by its discretionary decisions. The Court thus fashioned a rule immunizing contractors from tort liability caused by defects in some government-selected designs. Lower courts subsequently grappled with questions regarding the *Boyle* rule's scope (e.g., does it protect against manufacturing defect claims?), as well as whether the FTCA's combatant activities exception immunity may be extended to contractors under the *Boyle* Court's rationale. Based largely on the terms and performance of particular contracts, some courts extended the combatant activities exception to contractors, whereas others did not.

Contractors have also asserted that the political question doctrine—which recognizes limitations on justiciability, or the appropriateness of a court hearing a claim—bars particular tort suits against them because determining whether they are liable would require the court to decide questions that the Constitution commits to the legislative or executive branches of government. Though the outcomes in such cases have varied, it would appear that courts may be more likely to find a political question when a case presents certain characteristics.

In addition, contractors have argued for immunities deriving from federal employees' absolute immunity under the Westfall Act, pursuant to which they cannot be liable for any harms that occur within the scope of their employment. Contractors have also argued that the judicially created *Feres* doctrine, which provides that the government cannot be liable to servicemembers for torts arising in the course of, or incidental to, military service, should apply to them. Some courts have recognized a derivative absolute immunity for contractors, but have held that it applies only to harms caused by contractors' performance of discretionary, rather than ministerial, functions. Courts have generally rejected contractors' derivative *Feres* immunity arguments.

In some cases, the government may also have agreed to indemnify a contractor, or promised to pay certain liabilities to third parties that the contractor may incur through contract performance.

Contents

Contacts

Contractors and contractor employees perform countless tasks on the government's behalf, which include playing an integral role in U.S. military operations. Though combat operations in Iraq have ceased[1] and the government plans a drawdown of U.S. forces in Afghanistan in 2014,[2] commentators have noted that contractors will continue to be vital to future military efforts.[3] Given the apparent tension between contractor accountability and ensuring that contractors' monetary liability does not get passed, directly or indirectly, to the government or otherwise undermine federal policy, the potential tort liabilities that contractors might face in the course of meeting contractual obligations are of perennial interest to Congress.

In recent years, U.S. civilian personnel, military personnel, and other parties have sued federal contractors under state tort law, alleging that contractors intentionally or accidentally injured them during the course of performing a federal contract. Contractors have responded to these tort suits by raising the Federal Tort Claims Act (FTCA), the political question doctrine, and derivative immunities in seeking to avoid liability. Some have also alleged that the government is obligated to indemnify them for any liability they may incur to third parties.

This report provides background on, and analysis of, key legal issues that such suits present. It begins by providing a broad overview of tort claims generally. Then, it discusses the primary mechanisms through which contractors have attempted to defend against tort liability. Finally, it examines indemnification agreements between the government and contractors. Such agreements do not permit contractors to escape tort liability, but can allow them to shift the monetary losses resulting from tort liability to the government. This report supersedes an earlier report on this topic, CRS Report R41755, *Tort Suits Against Federal Contractors: An Overview of the Legal Issues*, by (name redacted) and (name redacted).

Tort Claims Generally

A tort is a civil wrong for which an injured party may obtain remedy, typically in the form of damages.[4] Torts arise from breaches of duties imposed by law. In contrast, contractual remedies typically result from breaches of duties imposed by oral or written agreements between the parties to a contract. A tort suit against a contractor therefore generally results from the contractor's breach of duties imposed by law rather than its breach of contractual obligations. With some exceptions, tort duties are typically imposed by state law, and every state has its own tort laws.

Tort law encompasses a number of civil wrongs, including intentional interference with the person of another by assault, battery, and false imprisonment; various types of interference with

[1] Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Combat Mission in Iraq*, N.Y. TIMES, September 1, 2010, http://www.nytimes.com/2010/09/01/world/01military.html?pagewanted=all.

[2] Karen DeYoung, *U.S. Examines Afghanistan Option that would Leave Behind 3,000 Troops*, WASH. POST, February 23, 2014, http://www.washingtonpost.com/world/national-security/us-examines-afghanistan-option-that-would-leave-3000-troops-in-kabul/2014/02/23/a0870034-9b32-11e3-ad71-e03637a299c0_story.html.

[3] *See, e.g.,* Mark Cincian, *Contractors: The New Element of Military Force Structure*, 38 PARAMETERS: U.S. ARMY WAR C. Q. 61, 61 (2008) (noting that contractors are an "integral and permanent" part of the U.S. force structure); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-751, WARFIGHTER SUPPORT: DOD NEEDS TO IMPROVE ITS PLANNING FOR USING CONTRACTORS TO SUPPORT FUTURE MILITARY OPERATIONS 1 (2010) (noting that "DOD expects to continue to rely heavily on contractors for future operations.").

[4] *See* 74 AM. JUR. 2D *Torts* §1 (2014).

property; and negligence.[5] Negligence indicates culpable carelessness or unintentional injury.[6] To successfully establish a claim for negligence, a plaintiff must generally prove, by a preponderance of the evidence, that (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached this duty, which generally requires the plaintiff to show that the defendant failed to exercise the care that a reasonably prudent person would have exercised in a similar situation; (3) the defendant's action or failure to act actually or proximately caused the plaintiff's injuries; and (4) the plaintiff suffered harm as a result of the defendant's action or inaction.[7] Many tort claims against contractors allege negligence on the part of contractor employees in either performing their obligations under a service contract or producing goods pursuant to a contract for goods, though some also allege intentional torts.[8] Furthermore, under the theory of respondeat superior, contractors may be held liable for the wrongful acts of their employees that are committed within the scope of employment.[9]

Contractor Defenses to Tort Claims

Contractors often raise the FTCA, the political question doctrine, and/or derivative immunities when defending against tort claims, particularly claims arising from their involvement in military operations. These defenses often implicate fundamental legal issues, such as the interaction of federal and state law, separation of powers and which branches of government are best equipped to consider particular types of questions, and protection of the federal government's monetary interests.

Preemption Under the FTCA

The federal government is a sovereign, and thus enjoys sovereign immunity.[10] The Supreme Court has long held that "[i]t is elementary that the United States, as sovereign, is immune from suit" unless it unequivocally and expressly consents to suit.[11] The FTCA is one such unequivocal and express consent to suit, and it specifies that the federal government is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or punitive damages."[12] However, though the FTCA generally waives the federal government's immunity from tort liability, it contains a number of exceptions through which the government retains its sovereign immunity in specified circumstances.[13] Under these exceptions, for example, the government retains sovereign

[5] *See* W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS, §1 (5th ed. 1984).

[6] *See* 74 AM. JUR. 2D *Negligence* §5 (2014).

[7] *See id.*

[8] *See, e.g.*, *in re KBR Burn Pit Litigation*, No. 13-1430, 2014 WL 868667 (4th Cir. March 6, 2014) (wherein plaintiffs allege numerous negligence claims, but also some intentional tort claims); *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007) (wherein plaintiffs allege both negligence and intentional torts on the part of the defendant contractors).

[9] *See* BLACK'S LAW DICTIONARY *Respondeat Superior* (9th ed. 2009).

[10] *See United States v. Sherwood*, 312 U.S. 584, 586 (1941).

[11] *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. King*, 395 U.S. 1, 4 (1969)); *United States v. Thompson,* 98 U.S. 486, 489 (1878).

[12] 28 U.S.C. §2674.

[13] 28 U.S.C. §2680.

immunity from suit for any claim arising in a foreign country[14] and any damages claim caused by regulation of the monetary system.[15] Contractors have argued that the protections of some of the FTCA's exceptions should be extended to them under the doctrine of preemption.

Under the Supremacy Clause of the U.S. Constitution, federal law is "the supreme Law of the Land"[16] and applies instead of, or preempts, state law to the degree that the two are incompatible.[17] The FTCA is not directly applicable to contractors, but courts have occasionally used its exceptions to craft rules that protect contractors from tort suit. Where courts have done so, they have rationalized that the FTCA and its underlying policies, as federal law, preempt tort claims, which are frequently rooted in state law. The two FTCA-based preemption defenses that contractors appear to invoke most frequently when defending against tort liability are the government contractor defense and the combatant activities exception.

Government Contractor Defense

One FTCA exception permits the government to retain its sovereign immunity against any claim based on its or its employees' "exercise or performance or the failure to exercise or perform a discretionary function or duty … whether or not the discretion involved be abused."[18] It is the tension between this FTCA exception, known as the discretionary function exception, and imposing tort liability on government contractors for harms caused by defects in some government-approved designs that spurred the Supreme Court to create the government contractor defense in its 1988 decision in *Boyle v. United Technologies Corporation*.[19] After the Boyle decision, lower courts were left to determine whether the Supreme Court's rationale applies only to design defect claims, or whether it also supports immunizing contractors from manufacturing defect claims and claims originating in the performance of service contracts.

Boyle and the Origins of the Government Contractor Defense

In *Boyle*, a Marine pilot died when his helicopter crashed off the coast of Virginia Beach, VA. The Marine survived the initial crash, but subsequently drowned when water pressure apparently prevented him from opening the submerged helicopter's outward-opening escape hatch.[20] His estate sued the contractor that built the helicopter to government specifications, arguing, among other things, that the escape hatch's design was defective because it opened outward rather than inward and equipment obscured the hatch handle. In response, the defendant contractor argued that the Court should recognize contractor immunity from liability for harms caused by defects in government-selected designs through a judicially created tort immunity based on the FTCA's discretionary exception.[21]

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[14] 28 U.S.C. §2680(k).

[15] 28 U.S.C. §2680(i).

[16] U.S. CONST. Art. VI, cl. 2.

[17] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

[18] 28 U.S.C. §2680(a). A discretionary function is a discretionary act. *See* BLACK'S LAW DICTIONARY *Discretionary Function* (9th ed. 2009).

[19] 487 U.S. 500 (1988).

[20] *Id.* at 503.

[21] *See id.*

The plaintiff countered that courts could not create rules preempting state law by immunizing contractors from tort suit in the absence of express legislative authorization.[22] However, the Court disagreed, holding that judicially created rules can preempt and replace state law in a few areas implicating "uniquely federal interests," meaning committed to federal control by the Constitution and U.S. laws.[23] Having thus found that preemption by a judicially created rule is possible, the Court then fashioned and applied a two-part test for determining when preemption of state law by a judicially created rule is appropriate. This test focuses upon (1) whether the claim involves "uniquely federal interests," and (2) whether the state law "significantly conflicts" with an identifiable federal policy or interest, or impedes specific objectives of federal legislation.[24]

Based on this test, the Court found state law preemption by judicially created rule appropriate in this instance. The Court did so by first noting that contractors' civil liabilities arising under equipment contracts involve "uniquely federal interests" because imposing tort liability on contractors would directly affect government contracts by causing contractors to either decline to make equipment for the government or raise prices.[25] The Court then concluded that a significant conflict exists between the discretionary function exception to the FTCA and holding contractors liable under state tort law for design defects in military equipment when the government selected the equipment's design.[26] The discretionary function exception removes the government's own tort liability arising from its discretionary acts, and the Court determined that selecting the appropriate design for military equipment is plainly a discretionary act within the meaning of the discretionary function exception.[27] The Court further concluded that contractors would "substantially if not totally" pass through to the government the costs of any tort liability derived from the government's discretionary selection of equipment design by increasing prices to "cover," or insure against, potential liability.[28] In effect, this would make the government bear liability costs resulting from its discretionary acts, which the discretionary function exception sought to prevent. Thus, the Court found a conflict between the discretionary function exception and holding contractors liable under state tort law for defects in government-selected designs and preempted state tort law with a judicially created rule.[29]

After applying its two-part test and determining state law preempted by the discretionary function exception, the *Boyle* Court then created a rule for contractor immunity from tort liability. In doing so, the Court considered the extent to which state law should be displaced, and thereby the degree to which contractors should be immune from tort liability, necessary to protect the federal interest

[22] *Id.* at 504.

[23] *Id.* at 504. In reaching this conclusion, the Court cited numerous cases wherein it previously created rules that preempt state law upon finding that a claim implicates uniquely federal interests, including *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 726-29 (1979) (creating a rule to displace state law in determining the government's priority in defaulted loans made under a federal loan program); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (holding that a federal officer's absolute privilege defense is of "peculiarly federal concern" and must be judged by federal standards, including judicially created rule in the absence of applicable legislation); and *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (finding that where federal interests are sufficiently implicated and there is no applicable act of Congress, "it is for the federal courts to fashion the governing rule of law according to their own standards.").

[24] *Boyle*, 487 U.S. at 507.

[25] *Id.*

[26] *Id.* at 512.

[27] *Id.* at 511.

[28] *Id.*

[29] *Id.* at 512.

underlying the discretionary function exception.[30] Specifically, in determining the scope of preemption, the Court sought to avoid frustration of the discretionary function exception's underlying policy of preventing the government from bearing the costs of liability caused by its discretionary acts, while simultaneously preventing contractors from perversely altering their behavior because of overly broad immunity from tort liability.[31] The Court was particularly concerned that contractors might withhold from the government knowledge of risks relevant to the government's discretionary design decisions because disclosing such risks might disrupt the contract, and withholding would produce no liability on the part of the contractor if it were entirely immune from tort liability. With these considerations in mind, the Court created a rule that immunizes contractors from state tort liability when

1. the United States approved reasonably precise specifications;
2. the equipment conformed to those specifications; and
3. the [supplying contractor] warned the United States about the dangers in the use of the equipment that were known to the [contractor] but not to the United States.[32]

Manufacturing Defect Claims and the Government Contractor Defense

The government contractor defense that the Supreme Court created in *Boyle* immunizes contractors from tort liability stemming from defects in government-approved product designs. However, *Boyle* does not address whether contractors enjoy similar immunity from tortious acts arising not from a defect in the product's design, but rather from a defect in the product's manufacturing. Lower courts have differed regarding when, if ever, judicially created rules should preempt state tort claims against contractors for manufacturing defects.

Initially, the U.S. District Court for the Central District of California relied, in part, on the Supreme Court's holding in *Boyle* to immunize contractors from tort liability for manufacturing defects under narrowly prescribed circumstances in its 1993 decision in *Bentzlin v. Hughes Aircraft Company*.[33] There, six Marines had been killed in Kuwait when a missile fired from a U.S. aircraft struck their vehicle. Their estates sued the missile maker, claiming that the manufacturer should be held liable because a manufacturing defect caused the missile to miss its intended target and hit the Marines' vehicle.[34] The court disagreed. Resting its decision on the FTCA's discretionary function exception, as the Supreme Court did in *Boyle*, the district court held that contractors enjoy immunity from tort liability when "sophisticated weaponry designed exclusively for combat use" leads to a manufacturing defect claim that is rooted in state tort law against a contractor.[35] The court did so because it determined that tort suits against contractors would interfere with the government's discretionary manufacturing decisions, given the

[30] *Id.*

[31] *See id.* at 512-13.

[32] *Id.*

[33] 833 F. Supp. 1486 (C.D. Cal. 1993). *Bentzlin* was the first notable case after *Boyle* to extend *Boyle*'s rationale to manufacturing defect claims.

[34] *Id.* at 1487.

[35] *Id.* at 1491. The court defined "sophisticated weaponry designed exclusively for combat use" as "combat equipment with no civilian counterpart." *See id*.

government's inextricable intertwining with the manufacturing process as a result of the governmental security clearances and quality controls that it imposes throughout the process.[36]

More recently, however, in its 2013 decision in *McMahon v. General Dynamics Corporation*,[37] the U.S. District Court for the District of New Jersey determined that the discretionary function exception does not apply to a mistake or defect in manufacturing and therefore held *Boyle* inapplicable.[38] In this case, the plaintiff alleged injury caused by a machine gun manufacturing defect and sued the contractor that supplied the machine gun to the government. The contractor attempted to argue that *Boyle* immunized it from the plaintiff's manufacturing defect claim.[39] However, the court disagreed. It distinguished *Boyle* from the case at hand by noting that *Boyle* immunized contractors from liability arising out of the government's exercise of its discretion, while manufacturing defect claims are caused by errors in process, not errors in the government's discretionary decisions.[40] The court thus concluded that "the discretionary function exception to the FTCA does not apply here," and without applicability of the discretionary function exception, there can be no *Boyle* defense.[41]

Given the differing outcomes in *McMahon* and *Bentzlin*, the viability of the government contractor defense to manufacturing defect claims is unsettled. It is unclear whether other courts might apply *Bentzlin*'s approach, apply *McMahon*'s approach, or try to reconcile the two by, for example, finding that the government contractor defense generally does not extend to manufacturing claims unless *Bentzlin*'s rule applies (i.e. the contract is for sophisticated weaponry designed exclusively for combat use).

Service Contracts and the Government Contractor Defense

Boyle was also silent as to whether the government contractor defense extends to contractors performing service contracts,[42] and how it might extend to such contractors. Based on the Supreme Court's rationale in *Boyle*, lower courts have disagreed on the scope of *Boyle*'s extension to contractors performing service contracts.

For example, in its 2003 decision in *Hudgens v. Bell Helicopters/Textron*,[43] the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) expanded the government contractor defense so that it immunizes some contractors whose tort liability stems from performance of service contracts. In this case, a contractor entered an agreement with the U.S. Army to maintain aircraft pursuant to Army publications and directives, and Army personnel closely monitored the contractor's performance to ensure compliance with Army protocols. The plaintiffs were injured when piloting a helicopter whose tail fin separated from the aircraft.[44] The helicopter's faulty tail

[36] The court also noted that a distinction between design defect suits and manufacturing defect suits is improper when the government intervenes and takes the position that a case would undermine federal interests. *Id*. at n.8.

[37] 933 F. Supp. 2d 682 (D.N.J. 2013).

[38] *Id.* at 689.

[39] *Id.* at 688.

[40] *Id.*

[41] *See id.*

[42] A service contract is "a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." 48 C.F.R. §37.101.

[43] 328 F.3d 1329 (11th Cir. 2003).

[44] *Id.* at 1330.

fin would likely have been discovered if the contractor had followed industry-recommended inspection protocols, but Army guidelines that the contractor was obligated to follow did not incorporate such protocols.[45] The plaintiffs alleged that the contractor had negligently failed to properly maintain the helicopter at issue and repair the faulty tail fin. In response, the defendant asserted that is was entitled to *Boyle*'s government contractor defense, apparently because government procedures governed its contract performance.[46]

Over the plaintiffs' argument to the contrary, the Eleventh Circuit held that the government contractor defense can extend to service contracts because articulating maintenance performance protocols requires the government to use its discretion, just as it must when creating design specifications.[47] Therefore, in the Eleventh Circuit's view, the government contractor defense's underlying rationale (i.e., preventing circumvention of the purpose of the discretionary function exception by permitting contractors to pass on the costs of the government's exercise of its discretion to the government) can point toward government contractor immunity applying in the context of service contracts.[48] As for when the government contractor defense applies to service contracts, the Eleventh Circuit modified the traditional government contractor defense, holding contractors immune from tort liability when

1. the United States approved reasonably precise maintenance procedures;
2. [the contractor's] performance of maintenance conformed to those procedures; and
3. [the contractor] warned the United States about the dangers in reliance on the procedures that were known to [the contractor] but not to the United States.[49]

The Eleventh Circuit then appeared to consider the totality of the maintenance procedures governing the contract between the government and the defendant contractor, as opposed to the procedures that specifically govern tail fin inspection. The court found the government contractor defense applicable and affirmed the district court's entry of summary judgment in favor of the contractor.[50]

Similarly, in its 2010 decision in *Katrina Canal Breaches v. Washington Group International*,[51] the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) recognized that the government contractor defense can extend to service contracts. However, the Fifth Circuit reached this conclusion by modifying slightly the scope of *Boyle*'s three-part test as used by the Eleventh Circuit in *Hudgens*. There, the Eleventh Circuit appeared to consider the specifications for the entire contracted project in determining whether the government provided the contractor with reasonably precise specifications, one of the three factors considered in determining the applicability of the government contractor defense to the defendant contractor.[52] The Fifth Circuit, in contrast, considered only the specifications pertaining to the particular design feature giving

[45] *Id.* at 1331-32.

[46] *See id.* at 1333.

[47] *Id.* at 1334.

[48] *See id.*

[49] *Id.* at 1335.

[50] *Id.* at 1335-36.

[51] 620 F.3d 455 (5th Cir. 2010).

[52] *See Hudgens*, 328 F.3d at 1335-36.

rise to the plaintiffs' claims, reasoning that "precise specifications for one aspect of a large project do not create an umbrella of protection for an entire project."[53]

Combatant Activities Exception

Other courts have similarly relied on the Supreme Court's rationale in *Boyle* to extend immunity to contractors stemming from the combatant activities exception of the FTCA. The combatant activities exception, like the discretionary function that the Supreme Court relied upon in *Boyle*, is an example of the U.S. government retaining its sovereign immunity under certain circumstances. Pursuant to the combatant activities exception, the government is not liable for torts that arise from the combatant activities of the Army, Navy, Air Force, or Coast Guard during time of war.[54] Relying on *Boyle*'s rationale, contractors facing tort liability frequently argue that the federal policies embodied in the combatant activities exception point toward the exception's preemption of state law tort suits against contractors in at least some instances. There has not been uniformity in court decisions that have dealt with such arguments. Some courts have declined to extend the exception to immunize contractors from tort liability. Other courts have extended the exception to contractors, but have done so differently based on the courts' accepted definitions of combatant activities and the federal policy the courts find embodied within the exception.

Refusal to Extend the Combatant Activities Exception to Contractors

Some courts have expressly declined to extend the combatant activities exception to contractors.[55] For example, in *McMahon v. Presidential Airways, Incorporated*,[56] the U.S. District Court for the Middle District of Florida rejected a contractor's argument of entitlement to immunity under the FTCA's combatant activities exception. The plaintiffs were survivors of three servicemembers who had perished in a plane crash in Afghanistan. The survivors brought state tort negligence claims against the contractor that was responsible for air transportation and operational support under a contract with the Department of Defense.[57] In response, the contractor argued that *Boyle*'s rationale supports extending the combatant activities exception to contractors. However, the court found otherwise, determining that the only immunity that contractors enjoy against tort suit is the government contractor defense created by the Supreme Court in *Boyle*, and any extension of the

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[53] *Katrina Canal Breaches*, 620 F.3d at 461. It is unclear exactly how significant the distinction between *Hudgens* and *Katrina Canal Breaches* was to *Katrina Canal Breaches*' outcome because the Fifth Circuit never explicitly commented on the precision of the specifications governing other aspects of the project or the project more generally. However, the Fifth Circuit appeared to suggest that the specifications governing the design feature giving rise to the plaintiffs' claims were particularly imprecise and general, *see id.* at 462, and thus that the court's consideration of only the specifications governing the design feature at issue may have affected *Katrina Canal Breaches*' outcome.

[54] 28 U.S.C. §2680. The combatant activities of the U.S. Marine Corps fall within this definition as the Marine Corp is part of the Navy.

[55] *See, e.g., Lessin v. Kellogg, Brown & Root Servs.*, No. CIVA H-05-01853, *5 (S.D. Tex. 2006) ("In the absence of additional authority, and in light of the distinctions between the *Koohi* and *Bentzlin* cases at bar, the Court declines to extend the combatant activities exception."); *Carmichael v. Kellogg, Brown & Root Servs.*, 450 F. Supp. 2d 1373, 1381 (N.D. Ga.), *aff'd*, 572 F.3d 1271 (11th Cir. 2009) (noting that *Koohi* and *Bentzlin*, discussed below, "represent expansions of the holding in *Boyle* that the Supreme Court may or may not have intended," and "neither case is binding in this circuit" before declining to extend the combatant activities exception to contractors).

[56] 460 F. Supp. 2d 1315 (M.D. Fla. 2006), *aff'd*, 502 F.3d 1331 (declining to review or reverse the district court's refusal to find preemption based on the combatant activities exception).

[57] *Id.* at 1318.

combatant activities exception to contractors would require legislative authorization.[58] With no such authorization to extend the combatant activities exception's protections to contractors, the court reasoned, any immunity for contractors based on the combatant activities exception must come from Congress rather than the judiciary.[59]

Definition of "Combatant Activities"

Other courts have found that the combatant activities exception does extend to contractors, but some have differed over the proper definition of combatant activities. The FTCA does not define "combatant activities," and courts attempting to define the term have often turned to the FTCA's legislative history only to find that it is silent on the issue.[60] Therefore, courts that are potentially willing to extend the combatant activities exception to federal contractors have had to construe the meaning of "combatant activities." In doing so, two different definitions have emerged: a fairly narrow definition crafted by the U.S. District Court for the Western District of Louisiana in 1947 in *Skeels v. United States*,[61] and a broader definition crafted by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in 1948 in *Johnson v. United States*.[62] Neither *Skeels* nor *Johnson* involved claims against contractors. Rather, both required the court to define combatant activities in the context of applying the combatant activities exception to the government's actions. However, as a general rule, modern cases involving contractors that invoke the combatant activities exception in defense to tort claims use either the *Skeels* or *Johnson* definition of combatant activities.[63]

In *Skeels*, a man who was fishing off the coast of Texas died when a pipe particle fell from a U.S.-owned airplane and hit him on the head, and the man's estate sued the government for negligence. The U.S. was involved in World War II at the time, and the military was using the airplane in question in combat training exercises.[64] In its defense, the government argued that sovereign immunity protected it against the plaintiff's claims pursuant to the FTCA's combatant activities exception. Evaluating this defense required the *Skeels* court to determine whether the government's activity was "combatant" within the scope Congress intended for the FTCA. It did so by looking to the plain meaning[65] of the word "combatant," as found in dictionary

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[58] *Id.* at 1330.

[59] The court seemed to suggest that other cases that extended the combatant activities exception to contractors did so in error. *See id.* However, it noted that even if the courts that extended the combatant activities exception to contractors were correct, such extension is limited to products liability claims, and does not protect against claims arising out of service contracts. *Id.* (noting that extension of the combatant activities exception to contractors has "been limited to products liability claims when applied to private actors …").

[60] *See, e.g., Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948) ("An examination of the record fails to produce clear evidence of Congressional intent or policy which might guide us toward a proper interpretation of the [combatant activities exception]."); *Al Shimari v. CACI Int'l*, 679 F.3d 205, 262 (4th Cir. 2012) (noting that "the legislative history of the combatant activities exception is 'singularly barren …'").

[61] 72 F. Supp. 372 (W.D. La. 1947).

[62] 170 F.2d 767 (9th Cir. 1948).

[63] *See In re Kellogg, Brown, & Root Servs. Burn Pit Litigation*, 925 F. Supp. 2d 752, 768-69 (noting that cases evaluating the FTCA's combatant activities exception in the context of claims against contractors have adopted either the *Johnson* or *Skeels* definition for combatant activities).

[64] *Skeels*, 72 F. Supp. at 374.

[65] Under one canon of statutory construction, the "plain meaning rule," when a statute's language is unambiguous, a court enforces it in accordance with its plain terms. *See* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted), 41 (2011). Though the court never explicitly referenced the plain (continued...)

definitions.[66] Based on these definitions, the court held that "combat activities" mean "the actual engaging in the exercise of physical force," rather than mere practice or training activities, even if those practice or training activities occur in time of war.[67] Accordingly, the court rejected the government's defense.[68]

Johnson's definition of combatant activities, in contrast, is more expansive than the definition adopted in *Skeels*. Like the court in *Skeels*, the Ninth Circuit in *Johnson* initially turned to the FTCA's legislative history to parse out a definition of "combatant activities" when evaluating the government's combatant activities exception defense to tort claims, and found it unhelpful.[69] The *Johnson* court thus turned to the FTCA's wording, which it found clear, unambiguous, and leaving no doubt as to legislators' intended meaning for "combatant activities."[70] According to the Ninth Circuit, "combat" denotes physical violence, and "combatant" means pertaining to actual hostilities.[71] Therefore, the Ninth Circuit concluded, the definition of "combatant activities" encompasses both physical violence and the activities necessary to, and in direct connection with, actual hostilities.[72]

In recent years, courts charged with defining combatant activities in the context of tort suits against government contractors have generally used the *Johnson* definition rather than the *Skeels* definition, apparently believing that it more accurately captures the definition of combatant activities.[73] However, at least one court has relied upon the *Skeels* definition in a recent decision. In 2009, the U.S. District Court for the Eastern District of Virginia applied the *Skeels* definition after recognizing that the combatant activities exception can extend to contractors in *Al Shimari v. CACI International, Incorporated*,[74] finding *Skeels* more limited definition harmonious with the "common sense notion" that a government contractor providing services in support of a war effort does not necessarily mean that the contractor is conducting combatant activities.[75] There, the defendant contractors had filed a motion to dismiss the plaintiff's claims on a number of grounds,

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(...continued)

meaning rule in its analysis, it seems apparent that it relied upon the rule to apply the combatant activities exception.

[66] After consulting dictionaries, the court found that "[t]he word 'combatant' is defined as follows (Webster's Unabridged Dictionary, 2d ed., printed in 1942): 'Combatant-adj., contending or disposed to contend; (a) Military-taking part in or prepared to take part in active fighting as a combatant officer as distinguished from one of the medical commissariat or a similar branch.' New Century Dictionary, Volume 1 (1936 Ed.): 'Combatant-La. Combating; fighting; also, disposed to combat or content; in heraldry, rampant as if in combat, as two lions, etc., facing each other; II.N. One who takes part in combat or fighting, or in any conflict.'" *Skeels*, 72 F. Supp. at 374.

[67] *Id.*

[68] *Id.* at 375.

[69] *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948).

[70] *Id*.

[71] *Id.* at 770.

[72] *Id.*

[73] *See*, *e.g., Harris v. Kellogg, Brown & Root Servs.,* 724 F.3d 458, 481 (3rd Cir. 2013); *Aiello v. Kellogg, Brown & Root, Servs., Inc.*, 751 F. Supp. 2d 698, 712 (S.D.N.Y. 2011) ("This Court declines to adopt [*Skeels'*] more narrow test, and will adopt the *Johnson* test."); *McManaway v. Kellogg, Brown, & Root Servs.*, 906 F. Supp. 2d 654, 666 (S.D. Tex. 2012) ("In determining what qualifies as "combatant activities," the Fifth Circuit has relied upon the definition of "combatant activities" in *Johnson v. United States*…") (citing *Arnold v. United States*, No. 97-50779, 1998 WL 156318, *2 (5th Cir. March 18, 1998)).

[74] 657 F. Supp. 2d 700, 721 (E.D. Va. 2009), *rev'd,* 658 F.3d 413 (4th Cir. 2011), *vacated on procedural grounds*, 679 F.3d 205 (4th Cir. 2012).

[75] *Id.* at 721.

including federal preemption under the combatant activities exception. In applying the *Skeels* definition of "combatant activities," the court concluded that it was too early in the litigation, and thus not enough evidence had yet been presented, to definitively conclude that the defendant contractors' actions constituted actual engagement in physical force.[76] The court therefore rejected the defendants' motion to dismiss.[77] The U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) later reversed, finding that the combatant activities exception did shield the defendant contractors from tort liability under the circumstances.[78] In doing so, the Fourth Circuit did not opine on which of the *Johnson* or *Skeels* definition of combatant activities it believed to be correct. However, moving forward, courts in other jurisdictions could similarly find that the narrow combatant activities definition in *Skeels* is the proper definition in evaluating a contractor's combatant activities defense.

Policy Underlying the Combatant Activities Exception

Courts have found differing federal policies embodied in the combatant activities exception, and have thus created different tests for contractor immunity to preserve the purposes they believe the exception embodies. Early on, in its 1992 decision in *Koohi v. Varian Associates, Incorporated*,[79] the Ninth Circuit relied on *Boyle* and the combatant activities exception to craft a narrow immunity that applies only to claims against contractors by 'enemies' of the U.S. during time of war. In that case, the U.S. was engaged in hostilities with Iran, and a U.S. naval cruiser shot down an Iranian civilian aircraft over Iranian waters after mistaking it for a fighter jet. The plaintiffs were heirs of people who subsequently died, and they sued the contractor responsible for designing the naval cruiser's Aegis Air Defense System. The contractor argued that it was entitled to immunity against the plaintiffs' claims under the FTCA's combatant activities exception.[80]

In resolving the plaintiffs' claims, the Ninth Circuit followed the analytical framework that the Supreme Court had outlined in *Boyle* for determining the scope of federal law's displacement of state law, or the degree of contractor tort immunity necessary to protect the federal interest underlying, in this case, the combatant activities exception. First, it determined that one federal policy embodied in the combatant activities exception is that the U.S. owes no duty of reasonable care to its enemies, or those against whom U.S. military efforts are directed, during times of war.[81] Next, the Ninth Circuit found that this policy conflicts with allowing U.S. enemies to impose tort liability on contractors because such liability would "create a duty of care where the combatant activities exception is intended to ensure that none exists."[82] Thus, the Ninth Circuit narrowly extended the combatant activities exception to contractors by creating a rule immunizing federal contractors against tort suits for acts against U.S. enemies during wartime.[83]

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[76] *Id.*

[77] *Id.*

[78] *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011), *vacated on procedural grounds*, 679 F.3d 205 (4th Cir. 2012).

[79] 976 F.2d 1328 (9th Cir. 1992).

[80] *See id.*at 1337.

[81] *Id.*

[82] *Id.*

[83] *See id.*

Koohi was the earliest case to find tort claims against contractors preempted by the FTCA's combatant activities exception, and a number of courts subsequently followed *Koohi*'s lead.[84] However, these courts have generally found that the combatant activities exception embodies broader policy rationales than merely eliminating a duty of care owed to the enemies of the U.S. during wartime, and have thus crafted rules that afford contractors broader immunity than the *Koohi* rule. Two distinct rules, in particular, appear to have developed after *Koohi* that differ in their scope.

The first rule that flows from *Koohi* appeared in 1993 in *Bentzlin*,[85] a case discussed earlier in this report in connection with the government contractor defense. As previously noted, in *Bentzlin*, a missile fired from a U.S. aircraft struck a vehicle and killed six Marines, leading the Marines' estates to bring state tort claims for manufacturing defects against the contractor that made the missile. The U.S. District Court for the Central District of California considered the defendant contractor's argument that, in addition to having immunity from liability under *Boyle*'s government contractor defense, the FTCA's combatant activities exception preempted all tort claims against it.

In so doing, the court determined that the combatant activities exception embodies the premise that the three primary objectives of tort law (punishing tortfeasors, compensating innocent victims, and deterring risky behavior) are incongruent with the government's combat interests.[86] In other words, the court reasoned that the government should not be punished for mistakes made during war, those who have suffered due to the government's negligence during war should not be compensated differently from those who were victims of the violence of war, and the government should not be deterred from taking "bold and imaginative measures" when necessary during war.[87] Therefore, the government is immune from tort law stemming from its combat actions.[88] The court then concluded that the same incongruity between tort law's objectives and the government's combat interests exists when tort law is applied to contractors: tort law is not required to punish contractors as the government is in the best position to monitor any wrongful activity by contractors, those who have suffered due to a contractor's negligence during war should not be compensated differently from those who are victims of the violence of war, and making contractors overly cautious during wartime could harm the government's military efforts.[89] Accordingly, the court held that the plaintiffs' state tort claims against the defendant contractor were preempted by the combatant activities exception.[90]

The *Bentzlin* court did not, however, articulate a clear test for determining when the combatant activities exception preempts state tort claims against contractors. Rather, its decision could apparently be construed to mean that applying state tort law to a contractor for *any* harm arising out of combatant activities would frustrate the government's combat interests, which the combatant activities exception seeks to protect. Therefore, *Bentzlin* could potentially be said to have extended to contractors broad immunity against any tort claims arising out of combatant

[84] *See, e.g., Bentzlin v. Hughes Aircraft Company*, 833 F. Supp. 1486 (C.D. Cal. 1993); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Aiello v. Kellogg, Brown & Root, Servs., Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011).

[85] 833 F. Supp. 1486 (C.D. Cal. 1993).

[86] *Id.* at 1493.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1493-94.

[90] *Id.* at 1494-95.

activities much like the government's own immunity under the combatant activities exception, and some courts have subsequently construed it as doing so.[91]

The second rule that derives from *Koohi* appeared in 2009 in *Saleh v. Titan Corporation*.[92] The two defendants in *Saleh* had contracts to provide interrogation and interpretation services to the U.S. military at the Abu Ghraib prison complex in Iraq. The plaintiffs were prisoners at Abu Ghraib who alleged torture and abuse at the hands of both defendants' employees (and U.S. soldiers).[93] The plaintiffs brought a number of claims against the defendant contactors, including state tort claims,[94] which the defendants argued were preempted by the FTCA's combatant activities exception.

The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Saleh* relied on the Supreme Court's rationale in *Boyle* to fashion a test that extends the combatant activities exception to contractors. First, the D.C. Circuit ascertained the federal interest furthered by the combatant activities exception, finding that Congress sought to eliminate duties of care from the battlefield through the exception.[95] The D.C. Circuit reasoned that risk taking is necessary in wartime efforts, and thus that that the traditional rationales of tort law (deterring risky behavior, compensating victims, and punishing tortfeasors) are "singularly out of place in combat situations."[96] The D.C. Circuit then held that the combatant activities exception's underlying policy of eliminating tort liability from the battlefield is "equally implicated" whether the allegedly tortious act occurred at the hands of a soldier or a contractor that was engaged in combatant activities under military orders and command.[97]

Next, in accordance with *Boyle*, the D.C. Circuit considered the scope of federal law's displacement of state tort law that was necessary to protect the federal policy embodied in the combatant activities exception.[98] The D.C. Circuit created a rule extending the combatant activities exception's protections to contractors when, during wartime, they are integrated into combatant activities over which the military retains command authority, and the tort claim arises out of the contractor's participation in such combatant activities.[99] The D.C. Circuit then found both defendant contractors immune from tort suit because their employees were fully integrated into military units and subject to the military chain of command, noting that they were essentially functioning as soldiers.[100]

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[91] *See, e.g., McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) (observing that the *Bentzlin* court extended combat preemption to suits against contractors which arise from wartime activity); *Rodriguez v. General Dynamics Armament and Technical Prod., Inc.*, 696 F. Supp. 2d 1163, 1188 (noting that the *Bentzlin* court determined that "just as the government should not be punished for mistakes made during war, government contractors should not be punished.").

[92] 580 F.3d 1 (D.C. Cir. 2009).

[93] *Id.* at 2-3.

[94] In addition to state tort claims, plaintiffs brought claims under the Alien Tort Statute, the Racketeer Influenced and Corrupt Organizations Act, and various international laws and agreements, all of which exceed the scope of this report. *Id.* at 3.

[95] *Id.* at 7.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 8.

[99] *Id.* at 9.

[100] *Id.* at 13.

The *Saleh* rule does not appear to provide the same broad protection to contractors for all tort liabilities arising out of combatant activities that the *Bentzlin* rule arguably provides, given that it requires contractors to be fully integrated into combatant activities, and the military to retain command authority over the contractors. However, the *Saleh* rule affords contractors greater protection than the *Koohi* rule in one sense by protecting contractors against all claims under specified circumstances, regardless of the status of the person bringing the claim (i.e., whether the person bringing the claim is an "enemy" of the U.S.). Courts that have recently resolved contractor defendants' combatant activities preemption claims generally appear to have followed the *Saleh* rule rather than the *Koohi* or *Bentzlin* rules, finding that it best fits the purpose of the combatant activities exception.[101]

The Political Question Doctrine

Other arguments that contractors have advanced against tort liability are grounded in the political question doctrine. This doctrine derives from Article III of the Constitution, which provides that federal courts are courts of limited jurisdiction which can only hear "Cases" and "Controversies."[102] This means federal courts can only entertain questions raised in adversarial proceedings that are capable of judicial resolution.[103] In accordance with Supreme Court precedent, "no justiciable 'controversy' exists when parties seek adjudication of a political question,"[104] which is generally a question that courts should refrain from deciding because the Constitution has entrusted its resolution to the legislative or executive branches of government.[105] The political question doctrine traces its origins to the Supreme Court's 1803 decision in *Marbury v. Madison*, which holds that courts cannot properly entertain questions that are political in nature because they are committed to the executive branch.[106] The Supreme Court later annunciated standards for determining when a political question exists in its 1962 decision in *Baker v. Carr*.[107] There, reversing a lower court's holding that a challenge by voters to a state's system for establishing political districts posed a nonjusticiable political question, the Court noted that a political question exists when a case shows on its surface

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards;
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

[101] *See, e.g., Harris v. Kellogg, Brown & Root Servs.,* 724 F.3d 458, 480 (3rd Cir. 2013) ("We adopt the D.C. Circuit's combatant-activities, command-authority test because it best suits the purpose of [the combatant activities exception]."); *Aiello v. Kellogg, Brown & Root Servs.,* 751 F. Supp. 2d 698, 710 (S.D.N.Y. 2011) ("This Court respectfully disagrees with the Koohi Court's formulation of the United States' interest in claims against military contractors arising out of combatant operations, and adopts the Saleh Court's formulation.").

[102] U.S. CONST. Art. VI, §2.

[103] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992).

[104] *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007).

[105] *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012).

[106] *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

[107] 369 U.S. 186 (1962).

4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
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.[108]

Political questions arise with some frequency in cases involving the military and foreign affairs, including tort cases against military contractors, because the military and foreign affairs are areas that are generally committed to the executive and legislative branches of government. However, not every case that involves the military or foreign affairs necessarily presents a political question; at least one *Baker* factor must be present in a case for the political question doctrine to apply.[109] Contractors often invoke the first two *Baker* factors when they raise the political question doctrine to seek dismissal of tort claims against them. Though these cases have diverged greatly in their outcomes, it would appear that courts are more likely to find the political question doctrine applicable when (1) the military largely controls the contractor's actions; (2) the plaintiff's claims are not seen as presenting an "ordinary tort suit"; (3) the record before the court is sufficiently developed; (4) the government intervenes on the contractor's behalf; or (5) the applicable state law recognizes the tort doctrine of contributory negligence, whereby plaintiffs may not recover in a negligence claim when their own negligence is a proximate cause of their injuries,[110] and the plaintiff is a government employee.

Courts appear more likely to find that the political question doctrine forecloses justiciability of a tort claim against a contractor when the military exercises a significant degree of control over the contractor's actions and behavior.[111] For example, the differing conclusions in two factually similar cases, *Carmichael v. Kellogg, Brown & Root Services* (2009)[112] and *Lane v. Halliburton* (2008),[113] both of which arose from accidents that occurred during contractor-operated fuel convoys in Iraq during recent hostilities, illustrates this point.

In *Carmichael,* the Eleventh Circuit affirmed a district court decision dismissing the case on political question grounds. The Eleventh Circuit, in considering the first *Baker* factor, largely rested its decision on the fact that the military regulations governing the defendant's contract gave the military plenary control over convoys, including the one at issue in the case.[114] Given these regulations, the Eleventh Circuit reasoned that military decisions controlled nearly every aspect

[108] *Id.* at 217.

[109] *See id.* at 211 ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

[110] *See* 74 AM. JUR. 2D *Torts* §51 (2013).

[111] *See, e.g., McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1362 (11th Cir. 2007) (noting that the contractor had not shown that the military retained control or responsibility over those aspects of the contractor's operations that plaintiff challenged in refusing to find the political question doctrine applicable).

[112] 572 F.3d 1271 (11th Cir. 2009).

[113] 529 F.3d 548 (5th Cir. 2008).

[114] *Carmichael*, 572 F.3d at 1276. The Eleventh Circuit went on to explain that "it is the military, not civilian contractors, that decides when convoys are to be arranged, the routes to be traveled, the amount of fuel or other supplies to be transported, the speed at which the vehicles are to travel, the number of vehicles to be included in the convoy, the spacing to be maintained between the vehicles, and the security measures to be employed, and other details of the mission." *Id.* at 1276-77.

of the convoy in which the plaintiff was injured,[115] and that it would thus be impossible for the court to evaluate the defendant contractor's alleged negligence without simultaneously examining military judgments and decisions.[116]

In contrast, in *Lane*, the Fifth Circuit reversed a district court decision dismissing the case on political question grounds. According to the Fifth Circuit, the first *Baker* factor (i.e., commitment of the issue to a coordinate branch) is concerned with improper judicial challenge of actions taken by the executive and legislative branches of government.[117] The Fifth Circuit held that for a contractor to invoke *Baker*'s first factor in seeking dismissal of a tort claim, it must show two things: that the claim against it will require the Fifth Circuit to reexamine a *military* decision, and that the military decision at issue is insulated from judicial review.[118] The Fifth Circuit noted that at least some of the allegations against the defendant contractor could draw the court into consideration of the military's decision as to what constituted adequate force protection for the convoys at issue.[119] However, the Fifth Circuit determined that the plaintiffs had presented factual allegations sufficiently plausible to establish other claims against the defendant contractor that would not draw the court into questioning the Army's decisions as to force protection.[120] For these other claims, the Fifth Circuit viewed the defendant contractor's "policies and actions" as separable from those of the military.[121]

A court appears more likely to hold that *Baker*'s second factor (i.e., judicially manageable standards) warrants dismissal of a plaintiff's tort claims against a federal contractor on political question grounds when the court cannot evaluate the claims using the ordinary tort standards that it uses in the civilian context.[122] For example, in finding the political question doctrine applicable in *Carmichael*, the Eleventh Circuit noted that the question of the defendant contractor's negligence could not be resolved using readily available "ordinary" tort standards because of the large degree of military control over the convoy at issue.[123] That is, evaluating the plaintiff's claims would require the Eleventh Circuit to develop and apply new standards.[124] Conversely, in finding the political question doctrine inapplicable, the Fifth Circuit in *Lane* observed that the questions raised by the plaintiffs' claims could be answered through the use of traditional tort standards.[125]

Other factors also help account for the differing outcomes in cases wherein a contractor invoked the political question doctrine when facing civil tort liability. For instance, the timing of a defendant's motion to dismiss the claims against it can affect the motion's outcome. Before

[115] *Id.* at 1281.

[116] *Id*. at 1282-83.

[117] *Lane*, 529 F.3d at 560.

[118] *Id*.

[119] *Id.*

[120] *Id.* at 562.

[121] *Id.* at 563.

[122] *See, e.g., McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007) (noting, in evaluating an ordinary negligence claim against a contractor arising out of an airplane crash in Afghanistan, that "It is well within the competence of a federal court to apply negligence standards to a plane crash."); *Aiello v. Kellogg, Brown, & Root Servs.*, 751 F. Supp. 2d 698, 705 (S.D.N.Y. 2011).

[123] *Carmichael*, 572 F.3d at 1289.

[124] *See id.*

[125] *Lane*, 529 F.3d at 563.

finding that the political question doctrine forecloses judicial disposition of a case, a court should conduct a "discriminating analysis" of the particular question posed.[126] It should consider the history of its management by the political branches, whether the specific facts and circumstances of the case make it susceptible to judicial handling, and the implications of a judicial decision.[127] A court generally will not find the political question doctrine appropriate when there is merely a chance that a political question may present itself; it must be certain that a political question will present itself.[128] Thus, when a defendant files a motion to dismiss on political question grounds before the record has been adequately developed, a court does not have much material on which to base its "discriminating analysis." In such circumstances, courts appear less likely to find the political question doctrine applicable, but may still consider the doctrine's applicability at a later stage of the litigation.[129]

Additionally, courts seem less likely to find that the political question doctrine forecloses adjudication of a tort suit against a contractor if the government fails to intervene in the suit on the contractor's behalf. As the Eleventh Circuit noted in another case, *McMahon v. Presidential Airways, Incorporated*, the government's opinion is significant in a court's decision as to whether a political question exists.[130] There, the Eleventh Circuit determined that the government's apparent lack of interest, as conveyed by its failure to intervene on behalf of the contractor, buttressed the court's conclusion that the case should not yet be dismissed under the political question doctrine.[131] The U.S. Court of Appeals for the Third Circuit similarly found the government's failure to take a formal position on a claim's justiciability by intervening suggests that the claim is not committed to another branch of government, and thus that the political question doctrine does not apply.[132]

Finally, courts seem more likely to find the political question doctrine applicable if the relevant state tort law recognizes contributory negligence and plaintiffs are military or civilian government personnel. Contributory negligence is a defense that defendants may raise, which prevents plaintiffs from recovering in a negligence claim when their own negligence is a proximate cause of their injuries.[133] When plaintiffs are military or civilian government personnel, their actions or inactions potentially result from executive branch policies. Thus, a contractor's contributory negligence defense increases the likelihood that the court may be called upon to evaluate executive policies, which it would view as beyond its purview. Accordingly, the availability of a

[126] *Baker v. Carr*, 369 U.S. 186, 211 (1961).

[127] *Id.* at 211-12.

[128] *Lane*, 529 F.3d at 565.

[129] *Compare McMahon*, 502 F.3d at 1365 (noting that a political question may present itself later in the litigation process, but at the time of plaintiff's motion to dismiss on political question grounds, "when almost no discovery has been completed, [the Eleventh Circuit could not] say that resolution of this case will require it to decide a political question"), *with Carmichael*, 572 F.3d at 1291 ("the record before us in this case has been fully developed, and based on our review of the record, it is completely evident that the suit would require us to review many basic questions traditionally entrusted to the military, and that we have no judicially manageable standards for adjudicating the issues in the case.").

[130] *McMahon*, 502 F.3d at 1365.

[131] *Id.*

[132] *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 385 (3rd Cir. 2006) (partially resting its holding that the political question doctrine did not apply to prevent the plaintiff's claims on the fact that the Executive Branch "declined to take a formal position on the justiciability of this case …").

[133] *See* 74 AM. JUR. 2D *Torts* §51 (2013).

contributory negligence defense increases the likelihood that a court would find the political question doctrine applicable.

For example, in *Taylor v. Kellogg, Brown, & Root Services*, the Fourth Circuit held that the defendant's planned assertion of contributory negligence would require it to determine the reasonableness of a military decision, and thus implicate the political question doctrine.[134] There, a group of Marines, including the plaintiff, had attempted to install a replacement generator in response to a main generator's malfunction. While the Marines were working on the replacement, technicians employed by the defendant arrived to perform repairs on the main generator. The technicians turned on the main generator, resulting in the plaintiff's electrocution and subsequent negligence suit against the defendant.[135] The defendant advised the Fourth Circuit that it planned to argue the plaintiff's contributory negligence in defense, and filed a motion to dismiss based on the political question doctrine. The Fourth Circuit held that the political question doctrine foreclosed the plaintiff's claim because the defendant's contributory negligence defense would draw it into improper consideration of the reasonableness of the military's decision to install a secondary generator.[136]

Derivative Absolute Immunity

Federal employees generally enjoy absolute immunity from tort suit under the Westfall Act,[137] which Congress passed in 1988 in response to the Supreme Court's *Westfall v. Erwin*[138] decision. In *Westfall*, the Court relied on federal employee immunity's "central purpose" of promoting effective government to hold that government employees are immune from suit when they perform discretionary (as opposed to ministerial) functions within the scope of their employment.[139] Discretionary functions are those involving the government's policy-making activities.[140] In fashioning this rule, the Court observed that Congress is best suited to decide what contexts warrant absolute immunity, and invited further congressional intervention by noting the prospective usefulness of legislated standards governing federal employees' immunity from tort suits.[141] Congress responded by enacting the Westfall Act, which removed the requirement that federal employees' acts be discretionary for absolute immunity to apply. Thus, since 1988, federal employees have absolute immunity from tort suit when their tortious conduct occurs within the scope of their employment.[142]

In the wake of *Westfall v. Erwin* and the Westfall Act, some government contractors argued that they should have derivative absolute immunity, analogous to federal employees' absolute

[134] 658 F.3d 402 (4th Cir. 2011).

[135] *Id.* at 404.

[136] *Id.* at 411-12.

[137] Federal Employees Liability Reform and Tort Compensation Act of 1988, P.L. 100-694, 102 Stat. 465 (1988) (codified as amended in various sections of 28 and 16 U.S.C.).

[138] 484 U.S. 292 (1988).

[139] *Id.* at 297-98.

[140] *Martin v. Halliburton*, 618 F.3d 476, 484 (5th Cir. 2010).

[141] *Id.* at 300.

[142] In such circumstances, the Westfall Act provides that if the Attorney General certifies that the employee acted within the scope of his office or employment when the incident giving rise to the claim occurred, the U.S. government is substituted as the defendant in the employee's place. 28 U.S.C. §2679(d)(1). Therefore, the action is "deemed action against the United States …" *Id.*

immunity, under certain circumstances. Some lower courts have recognized such derivative immunity, but have required, pursuant to *Westfall v. Erwin*, that the act giving rise to potential liability be a discretionary function that occurred within the scope of the contractor's employment or duties. For example, in *Martin v. Halliburton*, the Fifth Circuit noted that "non-governmental entities—such as [the defendant contractors]—that seek the protection afforded by the *Westfall* decision remain subject to the requirement that their acts be discretionary."[143]

Courts in the Fourth Circuit have also held that contractors have derivative absolute immunity against tort liability arising from their participation in official investigations under certain circumstances. The leading case on such immunity is *Mangold v. Analytic Services, Incorporated*, where the Fourth Circuit considered an Air Force Colonel's tort claims, including injury to reputation, against a contractor stemming from the contractor's participation in an internal Air Force investigation into the Colonel's alleged improper conduct in awarding a contract.[144] Concluding that there is a public interest in identifying and preventing waste, fraud, and mismanagement in government,[145] the Fourth Circuit held that a contractor cannot be liable for torts resulting from statements and information that it or its employees give in response to inquiries by government investigators during an official investigation.[146] The Fourth Circuit based its holding on the same rationale of promoting effective government relied upon by the Supreme Court in *Westfall*, concluding that there is a public interest in identifying and preventing waste, fraud, and mismanagement in government.[147] The Fourth Circuit also based its rule on the common law privilege to testify before courts, grand juries, and government investigators with absolute immunity.[148]

A district court in the Fourth Circuit later observed that, while *Mangold* purported to rely in part on *Westfall*'s federal official immunity, the defendant contractor in *Mangold* was not entitled to the federal official immunity recognized in *Westfall* because there was no judicial finding that the contractor acted within the scope of its employment or performed a discretionary function.[149] It thus appears as though, in *Mangold*, the Fourth Circuit created a novel avenue through which contractors can possess derivative absolute immunity. While at least one court in a different circuit has entertained the application of *Mangold*'s test,[150] no court outside of the Fourth Circuit appears to have applied it to extend derivative absolute immunity to contractors.

Derivative *Feres* Immunity

When faced with tort suits, some contractors have argued that they are entitled to an immunity that derives from the government's immunity established by the Supreme Court in *Feres v. United*

[143] 618 F.3d 476, 484 (5th Cir. 2010). The court for the District of Maryland has similarly recognized that, although its federal common law rule for a government employee's absolute immunity has been replaced by the Westfall Act, *Westfall v. Erwin*'s rule applies when courts evaluate whether contractors are entitled to derivative official immunity. *In re KBR, Inc., Burn Pit Litigation*, 736 F. Supp. 2d 954, 970 (D.M.D. 2010).

[144] 77 F.3d 1442 (4th Cir. 1996).

[145] *Id.*

[146] *Id.* at 1449.

[147] *Id.*

[148] *Id.*

[149] *See, e.g., In re KBR, Inc., Burn Pit Litigation*, 736 F. Supp. 2d 954, 973 (D.M.D. 2010).

[150] *See Morris v. Northstar Aerospace (Chicago), Inc.*, No. 11 C 2610, 2011 WL 6938455 (N.D. Ill. December 29, 2011).

States[151] in 1950. There, the Court rejected the consolidated negligence claims of former servicemembers against the government, holding that servicemembers cannot sue the U.S. government for any injuries that arise from, or occur in the course of, activity incident to service,[152] which lower courts subsequently interpreted broadly.[153] The Court rested its decision on the distinctively federal relationship between the government and members of its armed forces[154] and the existence of generous statutory compensation schemes for injured servicemembers.[155] Initially, some lower courts held that the *Feres* doctrine proscribed only suits against the government in which a servicemember caused harm to another servicemember.[156] However, the Supreme Court later broadened the doctrine to all claims by a servicemember against the government that arise out of, or are incidental to, service, regardless of whether a servicemember or civilian government employee commits the act causing harm.[157]

When servicemembers have sued contractors for negligence that occurred incidentally to service, contractors have occasionally argued that the *Feres* doctrine should be further broadened to shield them from liability under theories of derivative sovereign immunity. However, courts appear uniform in their rejection of these contractor arguments, with some expressly stating that the *Feres* doctrine applies only to the government and its employees.[158]

Indemnification

Unlike the defenses discussed previously in this report, indemnification does not allow a contractor to avoid tort liability. Instead, through an indemnity agreement, one party agrees to compensate another for a loss that the other party incurs, often to a third party.[159] In the context of tort suits against contractors, when the government has agreed to indemnify a contractor, the government may be obligated to compensate the contractor for certain damages paid to third parties. Because indemnification allows the contractor to forgo paying for the costs of harms it causes, indemnification is sometimes viewed as the practical equivalent of avoiding liability, although indemnification technically alters who pays for any liability.

The use of indemnification agreements in government contracts is limited by the Anti-Deficiency Act, which prevents any government employee from entering a contract on the government's

[151] 340 U.S. 135 (1950).

[152] *Id.* at 146.

[153] *See, e.g., Major v. United States*, 835 F. 2d 641, 644 (6th Cir. 1987) (observing that the *Feres* doctrine "encompass[es], at minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose."); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) (observing that "… courts have applied the Feres doctrine broadly …").

[154] *Id.* at 143.

[155] *Id.* at 145.

[156] *See, e.g., Johnson v. United States*, 749 F.2d 1530, 1539 (1985).

[157] *Johnson v. United States*, 418 U.S. 681 (1987).

[158] *See, e.g., McMahon v. Presidential Airways, Inc.* 502 F.3d 1331 (11th Cir. 2007) (considering the policy rationales behind the *Feres* doctrine in holding that its "incident to service" test would afford contractors too broad of immunity); *Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 271 (9th Cir. 1990) (noting that the *Feres* doctrine "applies only to suits against the government and its employees.").

[159] *See* 41 AM. JUR. 2D *Indemnity* §1 (2014).

behalf or obligating the government to make a payment in excess or advance of an appropriation unless otherwise authorized by law.[160] The act generally precludes the government from entering into any open-ended indemnification agreement, barring express statutory permission. However, three frequently cited statutes expressly permit, and thereby authorize, agencies to enter into open-ended indemnification agreements: P.L. 85-804, the Price-Anderson Act, and 10 U.S.C. §2354.[161]

First, P.L. 85-804[162] allows the President to authorize an agency that acts in connection with the national defense to enter, amend, modify, or make advance payments on contracts without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, including the Anti-Deficiency Act, whenever he believes that such agency action would facilitate the national defense.[163] This language has been interpreted to allow the President to authorize certain agencies to indemnify government contractors against risks that are "unusually hazardous or nuclear," as those risks are defined in the relevant contract.[164] P.L. 85-804's applicability to actions that facilitate the national defense has been liberally construed to encompass the actions of not only certain defense agencies, but also certain civilian agencies, including the Department of the Treasury, Department of the Interior, Department of Agriculture, Government Printing Office, Department of Commerce, General Services Administration, National Aeronautics and Space Administration, Government Printing Office, and Tennessee Valley Authority.[165] P.L. 85-804's indemnification authority only applies when the contractor will not be compensated for its loss, whether by insurance or otherwise.[166]

Second, the Price-Anderson Act[167] permits the Department of Energy (DOE) to enter into agreements with its nuclear contractors whereby DOE provides indemnification for liability arising from specified types of nuclear accidents. In part, Congress enacted the Price-Anderson Act to spur the development of the atomic energy industry.[168] Commentators have noted that the act has proven essential to ensuring that contractors participate in DOE nuclear programs, as their participation exposes them to considerable risks that are uninsurable through private insurance.[169]

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[160] 31 U.S.C. §1341(a).

[161] The three noted statutes do not constitute an exhaustive list of statutes that expressly permit agencies to enter into open-ended indemnification. For example, some recent Department of Defense appropriations bills have permitted certain Army Operation and Maintenance contracts to provide "such indemnification as the Secretary [of Defense] determines to be necessary." *See, e.g.*, Department of Defense Appropriations Act, 2008, P.L. 110-116, §8075, 121 Stat. 1295, 1332 (2007); Department of Defense Appropriates Act, 2005, P.L. 108-287, §8090, 118 Stat. 951, 992 (2004).

[162] Act of August 28, 1958, P.L. 85-804, 72 Stat. 972 (1958) (codified as amended at 50 U.S.C. §§1431-1435). As recently as March of 2014, a federal court in *Kellogg, Brown & Root Servs. v. United States*, No. 12-780 C, 2014 WL 939975 (Fed. Cl. March 7, 2014), evaluated a contractor's claim under an indemnification agreement that the Army entered into pursuant to the authority of P.L. 85-804, dismissing the plaintiff's claim on procedural grounds.

[163] *Id.* at §1.

[164] 48 C.F.R. §52.250-1(c)(1).

[165] Exec. Order No. 10,789, 23 Fed. Reg. 8897 (November 15, 1958).

[166] 48 C.F.R. §52.250-1(c)(2).

[167] Act of September 2, 1957, P.L. 85-256 (1957) (codified as amended in various sections of 42 U.S.C.).

[168] *Id.* at §1.

[169] JOHN CIBINIC, JR. & RALPH C. NASH, JR., COST-REIMBURSEMENT CONTRACTING 1090 (3d ed. 2004).

Third, 10 U.S.C. Section 2354 applies only to research and/or development contracts between a military department and a contractor.[170] In such contracts, military departments can include indemnification clauses to protect contractors against losses that arise out of direct contract performance, but only to the extent that they are not compensated by insurance or otherwise.[171] Under 10 U.S.C. Section 2354, indemnification can cover any claims by third parties against the contractor, including reasonable litigation and settlement expenses and any loss of the contractor's property.[172] However, covered claims and losses must be caused by an "unusually hazardous" risk, as defined in the relevant contract.[173] Payments made under a 10 U.S.C. Section 2354 indemnification agreement must come from funds not yet obligated that were made available for research and/or development, funds specifically obligated for the performance of the relevant contract, or funds appropriated for indemnification payments.[174]

Conclusion

The government's increased reliance on contractors in recent years, particularly in the military arena, has led to an increased number of tort suits against contractors. The government will likely continue its widespread use of contractors well into the future, which will include the use of contractors in military operations. As such, tort litigation against contractors will likely continue. To date, there do not appear to have been any congressional attempts to address the defenses that contractors have relied upon, successfully and unsuccessfully, to defend against tort liability. There further do not appear to have been any attempts by Congress to otherwise clarify when contractors may escape liability for torts that occur during government contract performance.[175]

[170] 10 U.S.C. §2354(a). Pursuant to 42 U.S.C. §241(a)(7), the Department of Health and Human Services has authority identical to that provided to the military departments by 10 U.S.C. §2354.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] 10 U.S.C. §2354(d).

[175] Congress has responded to issues tangentially related to tort suits against contractors, including seeking to ensure that contractors, rather than the government, pay for any of their liability, *see* Accountability for Defense Contractors Act, H.R. 6310, 111th Cong., S. 3909, 111th Cong., excluding from government contracts those contractors who engage in tortious conduct that causes harm to governmental personnel, *see* Safety in Defense Contracting Act, H.R. 2825, 111th Cong., and permitting agencies to deny award fees to contractors that are found to have harmed government personnel, *see* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383, §834, 124 Stat. 4137, 4278 (2011).

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