



Tort Suits Against Federal Contractors: An Overview of the Legal Issues

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Summary

Pending litigation and judicial decisions in recent tort suits filed by U.S. civilian and military personnel, other U.S. persons, and other parties against federal contractors have prompted congressional and public interest. Many of these suits allege that contractors were negligent or committed fraud or intentional torts (e.g., false imprisonment, infliction of emotional distress) in the course of providing services in support of combat operations in Iraq and Afghanistan.

There has been particular interest in cases that have been dismissed on jurisdictional grounds, or because a federal court does not have power over the parties or subject matter. Personal jurisdiction over the defendant appears to be a particular issue in cases where the injury occurred while the contractor and U.S. persons worked for the government abroad. For example, courts recently disagreed as to whether they could exercise specific jurisdiction over contractors who allegedly exposed members of the National Guard to toxic chemicals at the Qarmat Ali water treatment plant in Iraq. Similarly, courts recently held that they cannot, absent additional contacts between the contractor and the forum state, exercise general jurisdiction over a contractor in any state from which the government administers the contract.

The court's subject matter jurisdiction can also be challenged or defeated. Some contractors have asserted that claims against them are nonjusticiable under the political question doctrine because resolution of these claims would require the court to decide issues that the Constitution has committed to another branch of government or that there are no judicially discoverable and manageable standards for resolving. To date, courts have reached differing conclusions as to whether the political question doctrine bars suits against federal contractors, although their decisions can, in part, be explained by differences in contract terms and performance.

Other contractors have asserted that state tort law claims against them are preempted under the Federal Tort Claims Act. The Supreme Court's decision in *Boyle v. United Technologies Corporation* recognized that such claims may be preempted where, among other things, the government approved reasonably precise specifications and the equipment manufactured by the contractor conformed to those specifications. While *Boyle* only addressed contracts for goods, recent decisions by some lower courts have extended it to service contracts, although there appears to be some disagreement between the courts as to how the test established in *Boyle* should be applied. Additionally, while the *Boyle* Court specifically based its decision on the "discretionary function" exception to the FTCA, some lower courts have found that state tort law claims may also be preempted under the FTCA's "combatant activities exception." Currently, there appear to be significant disagreements among the courts as to whether the combatant activities exception applies narrowly, only in circumstances like those in the cases originally recognizing it, or whether a broader "battlefield preemption" exists in certain cases.

Contractors may also be able to claim derivative absolute immunity in certain circumstances if they are seen as performing discretionary functions, and the court finds that the contributions of immunity to "effective government" within the particular context outweigh the potential harm to individual citizens. However, contractors have been less successful in asserting derivative immunity under the *Feres* doctrine, which bars service members from bringing suit against the U.S. government for injuries that arise "out of or are in the course of activity incident to service."

In some cases, the government may have agreed to indemnify the contractor, or pay any liability that it might incur for injuries to third parties during performance of the contract.

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Introduction

Scores of contractors and contractor-employed personnel perform tasks, some of which are inherently dangerous, on the government's behalf around the globe. Many work in areas of combat operations,¹ in cooperation with or close proximity to civilian and military personnel.² Given this situation, the opportunity for events potentially giving rise to tort liability is arguably higher than it was in the past, when the government relied less heavily on contractors³ and contractors generally provided goods, not services, to the government.⁴

Numerous suits have been filed in recent years by U.S. civilian and military personnel, other U.S. persons, and other parties alleging that federal contractors intentionally or accidentally injured them in the course of performing a government contract. These cases have generated significant congressional and public interest, in part because the cases can pit civilian or military personnel against large foreign or multinational corporations.⁵ These cases may also involve the performance of services that some commentators assert should not have been contracted out.⁶ In addition, the cases can tap into broader cultural beliefs about the purpose of the justice system (i.e., that wrongdoers should “pay,” literally or figuratively) and about “good government” (i.e., that the government should not “reward” “bad actors” by doing business with them).⁷

¹ The context within which the contractor operated could be relevant in determining its liability even if none of the jurisdictional challenges discussed below bar the suit. Several courts have suggested that standards of care may be lower in combat zones than in other places. *See, e.g.,* McMahon v. Presidential Airways, Inc., 502 F.3d 1333, 1364 (11th Cir. 2007) (“[Flying over Afghanistan during wartime is different from flying over Kansas on a sunny day,” but modified standards of negligence can be applied]; Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (“The question here is not just what a reasonable driver would do—it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do.”).

² *See, e.g.,* Spencer E. Ante and Stan Crock, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76 (noting that contractors handle up to 30% of the military's services in Iraq).

³ *See, e.g.,* Peter Singer, CORPORATE WARRIORS 49-70 (2003) (discussing the downsizing of the military at the end of the Cold War). Similar reductions were made in the civilian workforce in the course of efforts to reduce the deficit and “reinvent” government. *See, e.g.,* Paul R. Verkuil, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 161 (2007) (discussing the Clinton-Gore National Performance Review).

⁴ *See, e.g.,* REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 2-3 (2007) (noting that, in the period 1990-1995, the government began spending more annually on services than goods).

⁵ *See, e.g.,* Baragona v. Kuwait Gulf Link Trans. Co., 594 F.3d 852 (11th Cir. 2010), *cert. denied*, 130 S. Ct. 3473 (2010) (wrongful death action brought by the parents of an Army officer killed when his vehicle collided with a truck driven by an employee of a Kuwaiti company).

⁶ *See, e.g.,* Abigail Clark, *Reclaiming the Moral High Ground: U.S. Accountability for Contractor Abuses as a Means to Win Back Hearts and Minds*, 38 PUB. CONT. L.J. 709, 710, 732 (2009) (suggesting that contractor employees ought not to have been used as interrogators at Abu Ghraib). Commentators frequently note that government employees are “fundamentally different” than contractor personnel because contractors have “profit objectives.” *Cf.* Chapman v. Westinghouse Electric Corp., 911 F.2d 267, 271 (9th Cir. 1990).

⁷ *See, e.g.,* Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 715 (E.D. Va. 2009) (“[A] core belief of American jurisprudence [is] that individuals must be held accountable for their wrongful acts.”); Deficient Contractor Accountability Leaves Agencies and Taxpayers at Risk, Testimony of Scott Amey, Project on Government Oversight, before the Commission on Wartime Contracting in Iraq and Afghanistan, Feb. 28, 2011, *available at* http://www.wartimecontracting.gov/docs/hearing2011-02-28_testimony-Amey.pdf (objecting to the government's continued dealings with contractors who have engaged in misconduct).

This report provides an overview of key legal issues that have been raised to date in recent tort suits against government contractors.⁸ Most of these issues pertain to jurisdiction, or the court's power over the parties or subject matter of the case.⁹ Personal jurisdiction over the defendant can be an issue in any tort suit. However, it appears to be a particular issue in cases where the injury occurred while the contractor and U.S. persons were working for the government abroad, especially when the contractor is a foreign corporation. Subject matter jurisdiction can also be an issue, with the contractor relying on the political question doctrine, preemption under the Federal Tort Claims Act, or derivative immunity to defeat jurisdiction. Such defenses are generally unavailable to defendants who are not government contractors, and often arise precisely because of the contractor's legal relationship with the government. Suits that are found to be barred on jurisdictional grounds often prompt particular interest, including congressional interest (**see sidebar**), perhaps because they conflict with an intuitive sense that "justice" requires accountability for wrongdoing.¹⁰

A number of cases are pending that could affect courts' treatment of the issues discussed here. In addition, there is a pending petition for the Supreme Court to grant certiorari in *Saleh v. Titan Corporation*, a suit involving two federal contractors whose employees served as interpreters and interrogators at Abu Ghraib.¹¹ While this petition raises issues regarding the Alien

Selected Tort Suits Prompting Congressional Responses

Jones v. Halliburton: The contractor's attempt to compel arbitration of an employee's claim that she was raped and sexually harassed prompted the 111th Congress to enact legislation prohibiting the use of funds appropriated by the Defense Appropriations Act, 2010, for contracts valued in excess of \$1 million unless the contractor agrees not to require or enforce such agreements.

Baragona v. Kuwait Gulf Link Transport Co.: Opinions by the district and appeals court finding that they lacked personal jurisdiction over a foreign corporation that allegedly caused the death of an Army officer in Iraq, prompted, in part, the 111th Congress to authorize the Secretary of Defense to reduce or deny award fees to contractors "not subject to the jurisdiction of the United States courts" if he finds they have jeopardized the health or safety of government personnel. Some Members of 112th Congresses also introduced legislation requiring federal contractors to consent to personal jurisdiction.

Bixby v. KBR, Inc.: The contractor's assertion that its indemnification agreement with the government would cover any liability it might incur for negligence and fraud in exposing members of the National Guard to toxic chemicals in Iraq prompted some Members of the 111th Congress to introduce legislation limiting the executive branch's authority to enter indemnification agreements.

⁸ Although it notes older cases where they are relevant, the report focuses primarily upon recent suits because changes in the government's use of contractors could affect the court's analysis of such cases. For example, the Department of Defense now explicitly recognizes contractor employees as part of its "total force," and many commentators note that contractors play roles that are functionally akin to combat. *See, e.g.,* Department of Defense, QUADRENNIAL DEFENSE REVIEW REPORT 75 (2006); Lisa L. Turner and Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. REV. 1, 22 (2001).

⁹ *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon the court's having jurisdiction over both the subject matter and the parties."). Other issues have also been raised, although far more rarely and with less success. *See, e.g.,* *Fisher v. Halliburton*, 696 F. Supp. 2d 710 (S.D. Tex. 2010) (rejecting defendants' argument that the suit was barred by the Defense Production Act since they could have been criminally liable for failure to perform). There is also a possibility that the government could assert the state secrets privilege, thereby effectively preventing the case from proceeding. *See, e.g.,* *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010). For more on the state secrets privilege generally, see CRS Report R41741, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation*, by Todd Garvey and Edward C. Liu.

¹⁰ *See, e.g.,* Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL'Y 691, 692 (2007) ("Even in wartime, parties must be held accountable for their actions.").

¹¹ *See* 131 S. Ct. 379 (2010) (inviting the Solicitor General to file a brief expressing the government's view).

Tort Statute that are beyond the scope of this report,¹² it also challenges the “battle-field preemption” doctrine which was recently articulated by the U.S. Court of Appeals for the District of Columbia Circuit in its decision in *Saleh*.¹³ If recognized by the Supreme Court, this doctrine could prove a significant jurisdictional bar in future tort suits against at least some government contractors.

Basics of Tort Liability

Generally, a tort is a private or civil wrong, other than breach of contract, for which a civil court will provide a remedy in the form of an action for damages. In other words, the tort system acts as a mechanism through which an individual who has suffered an injury or incurred damages caused by an act or omission of another (i.e., a tort-feasor) can seek compensation in court from that tort-feasor. Tort law has its roots in the common or judge-made law.¹⁴ However, states have passed statutes that codify and sometimes change tort law. These changes can affect the availability and amount of remedies for a particular injury, for example. Therefore, when a plaintiff brings an action against a tort-feasor, the laws or court decisions of a state will govern the action. There are many civil wrongs included under the umbrella of torts, “ranging from simple, direct interferences with the person such as assault, battery and false imprisonment, or with property, as is the case of trespass or conversion, up through various forms of negligence.”¹⁵

Although tort law “exists on a spectrum of culpability,”¹⁶ most plaintiffs seeking recovery bring their tort suits based on a theory of negligence, which has subsets of its own, such as negligent misrepresentation and the doctrine of “informed consent” in medical malpractice. Broadly speaking, in a tort action for negligence, a plaintiff needs to prove by the preponderance of the evidence that the defendant had a legal duty to the plaintiff, that the defendant breached this duty, and that such action or omission to act was the actual and/or proximate cause of the plaintiff’s injuries.

A plaintiff must show negligent conduct, or the breach of duty, by establishing that the tort-feasor failed to use such care as a reasonably prudent and careful person would use under similar circumstances.¹⁷ This standard is generally considered ordinary negligence, in contrast to gross negligence, which is defined as “the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.”¹⁸ The prevailing view is that there are no “degrees” of care in negligence, only different amounts of care as a matter of

¹² The Alien Tort Statute grants the federal courts jurisdiction over civil actions brought by aliens for torts “committed in violation of the law of nations or a treaty of the United States,” and could potentially grant foreign plaintiffs standing to bring suit against government contractors in federal court in certain circumstances. 28 U.S.C. § 1350.

¹³ 580 F.3d 1 (D.C. Cir. 2009).

¹⁴ “New ... torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. ... When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not itself operate as a bar to the remedy.” W. Page Keeton, Prosser & Keeton on the Law of Torts, § 1 (5th ed. 1984) [hereinafter Prosser & Keeton, Torts].

¹⁵ Prosser & Keeton, Torts, § 1.

¹⁶ Michael Shapo, Principles of Tort Law, § 1.03(A) (2d ed. 2003).

¹⁷ Black’s Law Dictionary 716 (6th ed. 1991).

¹⁸ Black’s Law Dictionary 717 (6th ed. 1991).

fact; for purposes of this discussion, however, we point out that “ordinary” negligence is “based on the fact that one ought to have known the results of his act.”¹⁹ In contrast, gross negligence “rests on the assumption that one knew the results of his act, but was recklessly or wantonly indifferent to the results.”²⁰ Furthermore, an action based on negligence is different than an action based on strict liability, in which the defendant is held liable without a finding of fault, so long as the plaintiff can establish that the tort occurred and that the defendant was responsible.

Tort suits are not necessarily the only means of holding persons accountable for damages caused by their actions or inaction, or compensating persons for damages done to them.²¹ Depending upon the circumstances, other legal or non-legal recourse may be available, including criminal prosecution, suits based in contract, and workers’ compensation. However, tort suits are particularly appealing because injured parties can bring legal actions on their own behalf and recover monetary damages, unlike with criminal prosecutions. Also, tort suits may be brought in circumstances where criminal prosecutions are not possible, either because the standard of proof is higher in criminal cases than in tort suits²² or for other reasons.²³ Similarly, persons generally need to be in “privity of contract,” or be a party to the contract, in order to have standing to recover on a suit in contract.²⁴ Persons who are not parties to the contract can sometimes be classified as “third party beneficiaries” to it, but third party beneficiary status is an “exceptional privilege,”²⁵ which courts generally will not grant unless the plaintiff can demonstrate that the contract “not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.”²⁶ In addition, the amount of damages potentially recoverable in contract is generally smaller than that which can be recovered in tort.²⁷

¹⁹ Black’s Law Dictionary 717-18 (6th ed. 1991).

²⁰ Black’s Law Dictionary 717 (6th ed. 1991).

²¹ Tort law can be seen as having various purposes, which are not always compatible, including “provid[ing] a remedy for the innocent victim of wrongful conduct” and ensuring that “tortfeasors ... suffer for their sins.” *Koohi v. Varian Assocs., Inc.*, 976 F.2d 1328, 1335 (9th Cir. 1992), *cert. denied* 508 U.S. 960 (1993).

²² *Compare Harris v. Kellogg Brown & Root Servs.*, 618 F. Supp. 2d 400 (W.D. Pa. 2009) (wrongful death and survival claims brought by the family of Staff Sergeant Ryan D. Maseth, who was electrocuted in Iraq) *with* Army Finds Insufficient Evidence to Pursue Criminal Case Involving Electrocution Death in Iraq, 92 FED. CONT. REP. 101 (Aug. 11, 2009) (reporting that no person or entity will be prosecuted for Maseth’s death).

²³ For example, contractors working in Iraq could not be prosecuted under Iraqi law prior to January 1, 2009, and they generally cannot be prosecuted under U.S. law unless they are covered by the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), the Uniform Code of Military Justice (UCMJ), or similar statutes. *See, e.g.*, Coalition Provisional Authority Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, § 2, *available at* http://www.usace.army.mil/CEHR/Documents/COALITION_PROVISIONAL.pdf; CRS Report R40991, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, by Jennifer K. Elsea. Some commentators suggest that “[t]he deterrent and corrective power of tort liability assumes greater importance when other sources of deterrence and corrective justice—in particular, the criminal justice system—fail.” John P. Figura, *You’re in the Army Now: Borrowed Servants, Dual Servants, and Torts Committed by Contractors’ Employees in the Theaters of U.S. Military Operations*, 58 EMORY L.J. 513, 533 (2008).

²⁴ *Compare Nattah v. Bush*, 605 F.3d 1052 (D.C. Cir. 2010) (reversing a district court decision granting a contractor’s motion to dismiss an employee’s claim alleging, among other things, that the contractor breached an oral contract by requiring the employee to live and work in a war zone) *with Heroth v. Kingdom of Saudi Arabia*, 265 F. Supp. 2d (D.D.C. 2008) (dismissing claims brought by employees killed or injured when Al-Qaeda bombed a residential compound in Saudi Arabia that were based on their employer’s contract with Saudi Arabia and Saudi Arabia’s contract with the United States).

²⁵ *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912).

²⁶ *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001). While would-be third party beneficiaries need not be specifically or individually identified in the contract, they must “fall within a class clearly intended to benefit thereby.” *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). This test is generally met if the would-be beneficiary (continued...)

In some circumstances, however, injured persons may be barred from filing tort suits. For example, employees (but not independent contractors) are generally barred by the Defense Base Act (DBA) and other workers' compensation laws from suing their employers in tort for injuries incurred "in the course of" or "because of" their employment.²⁸ Members of the military are similarly barred, under the *Feres* doctrine, from bringing suit against the U.S. government for "injuries [that] arise out of or are in the course of activity incident to service."²⁹ The *Feres* doctrine currently does not bar suits against government contractors working for the military,³⁰ although some contractors have argued that it should be extended to preclude such suits,³¹ and some commentators have asserted that the *Feres* doctrine leads service members to seek damages from contractors that they could not recover from the government.³²

Personal Jurisdiction

The requirement that the court have personal jurisdiction over the defendant flows from the Due Process Clause of the U.S. Constitution and represents a restriction on judicial power as a matter of individual liberty.³³ The analysis of whether a federal court would have personal jurisdiction over a defendant can be a complicated matter that is generally outside the scope of this report. However, personal jurisdiction issues have arisen in several contractor tort suits of particular interest to some Members of Congress and so are briefly noted here.

For a federal court to exercise personal jurisdiction, its doing so must be both authorized by statute and consistent with constitutional requirements.³⁴ However, because courts' authority to assert personal jurisdiction under the federal "long arm" statute is generally coextensive with the

(...continued)

would be "reasonable in relying on the promise as manifesting an intention to confer a right on him." *Montana*, 124 F.3d at 1273.

²⁷ In particular, punitive damages may be recovered in tort, while they generally may not be recovered in contract. *See, e.g.,* *Metroplex Corp. v. Thompson Indus.*, 25 Fed. App'x 802 (10th Cir. 2002). The statute of limitations for filing a contract action is, however, generally longer than that for filing an action in tort.

²⁸ *See, e.g.,* *Nauert v. Ace Prop. & Cas. Ins. Co.*, Civil Action No. 04-CV-02547-WYD-BNB, 2005 U.S. Dist. LEXIS 34497 (D. Colo. Aug. 27, 2005) (finding that the DBA and the Longshore and Harbor Workers' Compensation Act preempted an employee's state-law claim alleging that an insurance company acted in bad faith when it denied his claim seeking payment of medical bills and disability compensation for an injury he sustained while working at an American military base in Kosovo). *But see* *Nordan v. Blackwater Security Consulting, LLC*, 382 F. Supp. 2d 801 (E.D. N.C. 2005), *aff'd* 460 F.3d 576, 582 (4th Cir. 2006) (holding that the DBA does not represent the contractor's exclusive liability and does not preempt state tort law claims); *Fisher v. Halliburton, Inc.*, 390 F. Supp. 2d 610, 613 (S.D. Tex. 2005) (holding that intentional torts are not covered by the DBA).

²⁹ *Feres v. United States*, 340 U.S. 135, 146 (1950).

³⁰ *See, e.g.,* *Chapman*, 911 F.2d at 271; *Durant v. Neneman*, 884 F.2d 1350, 1351 (10th Cir. 1989).

³¹ *See, e.g.,* *McMahon*, 502 F.3d at 1343-51.

³² *See, e.g.,* Trevor Wilson, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Warfare Realities*, 83 TUL. R. REV. 255, 271 (2008).

³³ *Insurance Corp.*, 456 U.S. at 701. Personal jurisdiction consists of two distinct components, amenability to jurisdiction and service of process. Amenability to jurisdiction means that the defendant is within the substantive reach of the forum's jurisdiction under applicable law. Service of process is simply the physical means by which jurisdiction is asserted. While both components may be at issue in some cases, in most cases, discussions of personal jurisdiction focus upon amenability to jurisdiction, as does the discussion here.

³⁴ *See, e.g.,* *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007).

jurisdiction of the courts of the state in which they sit,³⁵ and many states permit their courts to exercise jurisdiction to the extent permitted by the constitution,³⁶ analysis of personal jurisdiction questions generally turns upon the Due Process requirements. Under the Due Process Clause, the exercise of personal jurisdiction is constitutional if the defendants have “minimum contacts” with the state, such that the assertion of jurisdiction “does not offend traditional notions of fair play and substantial justice.”³⁷ The amount of contact necessary to meet the constitutional minimum requirements depends, in part, upon which type of personal jurisdiction—general or specific—is asserted. General jurisdiction, which allows a court to exercise jurisdiction over a defendant for any claim, requires “continuous and systematic general business contacts . . . that approximate physical presence in the forum state.”³⁸ These contacts do not have to be related to the cause of action. In contrast, specific jurisdiction requires that a defendant’s contacts with the forum “relate to” or “arise out of” the claims at issue in the case.³⁹ There is no “continuous and systematic” requirement, but jurisdiction is limited to the claims in the particular case. Because personal jurisdiction represents an individual’s constitutional right, it can be waived by, among other things, contracting in advance to submit to the jurisdiction of a particular court.⁴⁰

The differing outcomes in the five cases, to date, arising from contractors’ alleged negligence and fraud in exposing current and former members of the National Guard to sodium dichromate at the Qarmat Ali water treatment facility in Iraq illustrate the difficulties that plaintiffs can face in establishing personal jurisdiction. In one of these cases, *Bixby v. KBR, Inc.*, the court found that the defendants’ contacts with the State of Oregon were insufficient for general jurisdiction, given these contacts consisted of: (1) registrations to do business in Oregon; (2) designated agents for service of process; (3) an omnibus workers’ compensation policy covering 42 states, including Oregon; and (4) the employment of approximately 40 people who listed Oregon as their state of permanent residence, although none are employed in Oregon.⁴¹ However, the court found that it had specific jurisdiction over plaintiffs’ claims under the “effects test” articulated by the Supreme Court in *Calder v. Jones*.⁴² Under this test, a court may exercise jurisdiction over a defendant who allegedly committed an intentional tort, expressly aimed at the forum state, that the defendant knows is likely to cause harm within the forum state. The *Bixby* court found that this test was satisfied, in part, because the defendant intentionally misrepresented and concealed conditions at Qarmat Ali from the plaintiffs, knowing they were members of the Oregon National Guard.⁴³ The court further found that “any long-term harm suffered by the plaintiffs” would necessarily be felt in Oregon, which the defendants knew was likely to be the case given that they knowingly failed to disclose conditions to persons known to be from Oregon.⁴⁴ In contrast, in another of these cases, *McManaway v. KBR, Inc.*, the court found that it lacked both general and specific

³⁵ See FED. RULES CIV. PRO. 4(k)(1)(a).

³⁶ See, e.g., 42 PA. C.S.A. § 5322(b); INDIANA RULE OF TRIAL PROCEDURE 4.4(a).

³⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

³⁸ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984) (internal quotations omitted).

³⁹ *Id.* at 414 n.8.

⁴⁰ *Insurance Corp.*, 456 U.S. at 703-04.

⁴¹ Case CV-09-632-PK, 2010 U.S. Dist. LEXIS 36096, at *12-*17 (Apr. 9, 2010).

⁴² 465 U.S. 783, 789 (1984).

⁴³ 2010 U.S. Dist. LEXIS 36906, at *21 (“Given the allegation that the defendants knew the persons to whom they intentionally directed their misrepresentations and failures to disclose were soldiers of the Oregon National Guard, plaintiffs have . . . satisfied their burden with respect to the second prong of the effects test, that the intentional act was expressly aimed at Oregon.”).

⁴⁴ *Id.* at *22.

jurisdiction.⁴⁵ In particular, it found that the “effects test” was not satisfied because, assuming plaintiffs’ claims were true, the defendants directed their allegedly tortious conduct to all individuals visiting Qarmat Ali, not just those from Indiana.⁴⁶ The court also distinguished between the cause and effects of the alleged harm, finding that the cause occurred in Iraq, even if the effects were only felt after the plaintiffs returned to Indiana.⁴⁷ The court in *Gallaher v. KBR, Inc.*, reached the same conclusion when applying the “effects test,”⁴⁸ as did that in *Billiter v. KBR, Inc.*⁴⁹ In yet another of these cases, *Bootay v. KBR, Inc.*, the plaintiffs did not assert specific jurisdiction, and the court found that it lacked general jurisdiction over the three defendants who contested it because they lacked sufficient contacts with the forum.⁵⁰ However, while the outcomes in four of these five cases were undoubtedly frustrating for the plaintiffs, the plaintiffs could potentially seek a remedy in other jurisdictions where the defendants’ contacts are more substantial because the defendants are domestic corporations.⁵¹

Difficulties in asserting personal jurisdiction may be more intractable when the defendant is a foreign person who allegedly injured U.S. persons through actions or inaction abroad. That was the situation in *Baragona v. Kuwait Gulf Link Transport Company*.⁵² There, in an apparent case of first impression, the plaintiffs asserted that the Kuwaiti defendant should be subject to the general jurisdiction of the federal courts in Georgia because the headquarters of the procuring activity were located in Georgia and the contract was administered from there.⁵³ Although the court ultimately found that the procuring activity was not, in fact, located in Georgia at the time of contracting and did not administer the defendant’s contracts from there,⁵⁴ its holding was broader, stating that the “due process clause does not permit exercising jurisdiction over a United States ... contractor in the state where the [government] chooses to administer the contract, independent of any other contacts between the contractor and the state.”⁵⁵ The court’s holding is arguably unsurprising given that the Supreme Court has emphasized that defendant’s contacts with the forum state must be the result of the defendant’s intentional actions, not due to the unilateral activity of a third party.⁵⁶ The *Baragona* court also held, in another apparent question of first impression, that the contractor did not waive its personal jurisdiction defense by entering into a contract that contains language like that found in Section 52.228-8 of the Federal Acquisition Regulation (FAR), which obligates contractors to obtain additional insurance against the claims of third parties.⁵⁷

⁴⁵ 695 F. Supp. 2d 883 (S.D. Ind. 2010).

⁴⁶ *Id.* at 893.

⁴⁷ *Id.* at 894.

⁴⁸ Case No. 5:09CV69, 2010 U.S. Dist. LEXIS 73437 (N.D. W.V. July 21, 2010).

⁴⁹ Case No. 5:09CV119, 2010 U.S. Dist. LEXIS 73473 (N.D. W.V. July 21, 2010).

⁵⁰ Case No. 2:09-cv-1241, 2010 U.S. Dist. LEXIS 107868 (W.D. Pa. Oct. 8, 2010).

⁵¹ For example, the plaintiffs in *McManaway* appear to have re-filed their suit in Texas, where KBR is headquartered. See *Bootay*, 2010 U.S. Dist. LEXIS 107868, at *6.

⁵² 594 F.3d 852 (11th Cir. 2010), *aff’d* 691 F. Supp. 2d 1351 (N.D. Ga.). The plaintiffs in *Baragona* petitioned the Supreme Court for review of the Eleventh Circuit’s decision, but this petition was denied. 130 S. Ct. 3474 (2010).

⁵³ 691 F. Supp. at 1366.

⁵⁴ *Id.* at 1364-65.

⁵⁵ *Id.* As the court noted, the practical consequence of the plaintiffs’ argument would be to establish “universal jurisdiction” within the United States for government contractors, including foreign ones. *Id.* at 1368.

⁵⁶ See, e.g., *Helicopteros*, 466 U.S. at 417.

⁵⁷ *Baragona*, 691 F. Supp. 2d at 1368.

Subject Matter Jurisdiction

While the requirement that courts have personal jurisdiction flows from the Due Process Clause of the Constitution, the requirement that courts have subject matter jurisdiction derives from Article III, which represents a “restriction on judicial power ... as a matter of sovereignty.”⁵⁸ Among other things, Article III requires the existence of a “case or controversy” for a court to have jurisdiction.⁵⁹ Courts may find that this requirement is not satisfied when a “political question,” or a question which the Constitution has committed to another branch of government,⁶⁰ is “inextricably” involved in the resolution of the case.⁶¹ Alternatively, the court may find that it cannot exercise jurisdiction over the plaintiff’s claims because federal law preempts the state tort law claims which the plaintiff is asserting, or because the contractor has immunity from suit.⁶²

Political Question Doctrine

While commentators have noted numerous complexities pertaining to the political question doctrine, including whether it represents a formal or functional limitation upon courts’ jurisdiction,⁶³ the notion that courts should refrain from deciding questions that the Constitution has entrusted to other branches of government has a lengthy history in American jurisprudence. In his 1803 decision in *Marbury v. Madison*, Chief Justice Marshall distinguished between “decid[ing] on the rights of individuals,” which he viewed as within the Court’s power, and “inquir[ing] how the executive, or executive officers, perform duties in which they have a discretion,” which he viewed as beyond the Court’s power.⁶⁴ Marshall concluded that “[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.”⁶⁵ More recently, in its 1962 decision in *Baker v. Carr*, the Supreme Court articulated the prevailing standards for determining whether a political question is inextricably implicated in the resolution of a case. There, in reversing a lower court’s holding that a challenge by voters to a state’s system for establishing political districts was nonjusticiable on political question grounds, the Court noted that:

Prominent on the surface of any case held to involve a political question is found [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

⁵⁸ *Insurance Corp. of Ireland*, 456 U.S. at 701.

⁵⁹ U.S. CONST. art. III, § 2, cl. 1.

⁶⁰ See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

⁶¹ See, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827) (holding that the President, acting under congressional authorization, has exclusive and unreviewable power to determine when the militia should be called out); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (refusing to pass on whether a treaty had been broken).

⁶² See, e.g., 16 James Wm. Moore et al., *MOORE’S FEDERAL PRACTICE* ¶ 105.21 (3d ed. 1998) (“Sovereign immunity is not merely a defense to an action against the United States, but a jurisdictional bar.”).

⁶³ See, e.g., Kristen L. Richer, *The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits against Military Service Contractors*, 85 N.Y.U. L. REV. 1694 (2010).

⁶⁴ 5 U.S. (1 Cr.) 137, 170 (1803).

⁶⁵ *Id.*

government; or [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.⁶⁶

Based upon one or more of the factors articulated in *Baker*, courts subsequently found cases nonjusticiable on political question grounds when determining the defendant's liability, or otherwise resolving the case, would require them to determine the adequacy of the training procedures used by the National Guard, resolve territorial disputes between sovereigns, establish standards for intercepting aircraft entering U.S. airspace, or determine the necessity of simulating battle conditions, among other things.⁶⁷ As these cases illustrate, political questions arise with some frequency in cases involving military and foreign affairs. However, not every case that involves military or foreign affairs necessarily presents a political question.⁶⁸

Although the political question doctrine was apparently first asserted in tort suits against federal contractors in which the government intervened,⁶⁹ contractors have most recently asserted it in cases where the government has not intervened.⁷⁰ The outcomes in these cases have varied widely,⁷¹ prompting some commentators to suggest that "uniform treatment and predictable standards" are lacking.⁷² To illustrate the ostensible confusion among the cases, commentators sometimes point to the differing opinions issued by the U.S. Courts of Appeals for the Fifth and Eleventh Circuits, respectively, in *Lane v. Halliburton* and *Carmichael v. Kellogg, Brown & Root*

⁶⁶ 369 U.S. at 217.

⁶⁷ *Gilligan v. Morgan*, 413 U.S. 1 (1973) (National Guard training procedures); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (simulating battle conditions); *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991) (intercept standard); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1201 (5th Cir. 1978) (territorial disputes between sovereigns).

⁶⁸ See, e.g., *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Koohi*, 976 F.2d at 1331 "[T]he lawsuit [was not] rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation ... [F]ederal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.").

⁶⁹ See *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (suit against manufacturer of a missile that malfunctioned, killing U.S. troops in a "friendly fire" incident, nonjusticiable on political question grounds); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990) (suit against manufacturer of a ship's defense system that malfunctioned, resulting in the deaths of thirty-seven sailors when the ship was fired on by an Iraqi aircraft, nonjusticiable on political question grounds).

⁷⁰ See, e.g., *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (upholding district court decision to dismiss, on political question grounds, a suit against the manufacturer of bulldozers that the Israeli Defense Forces used to demolish homes in Palestinian Territories). As the Supreme Court has noted, "the identity of the litigant is immaterial to the presence of [political question] concerns in a particular case." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

⁷¹ Compare *McMahon*, 502 F.3d at 1331 (political question doctrine does not bar suit against the owner and operator of an airplane that crashed in Afghanistan), *Bixby v. KBR, Inc.*, Case No. CV 09-632-PK, 2010 U.S. Dist. LEXIS 89717 (D. Or. Aug. 30, 2010) (political question doctrine does not bar suit against company that allegedly exposed members of the Oregon National Guard to toxic chemicals in Iraq); *Harris*, 618 F. Sup. 2d 400 (political question doctrine does not bar suit against contractor for allegedly failing to repair or warn of defective wiring); *Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245 (M.D. Ala. 2006) (political question doctrine does not bar suit against company whose driver allegedly was responsible for a traffic accident); with *Taylor v. Kellogg Brown & Root Servs., Inc.*, Case No. 2:09cv341, 2010 U.S. Dist. LEXIS 50610 (E.D. Va. Apr. 16, 2010) (political question doctrine bars suit against company that was allegedly negligent in failing to repair a generator); *Whitaker v. Kellogg, Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (political question doctrine bars suit against company whose drivers allegedly caused accidents resulting in soldier's drowning); *Smith v. Halliburton Co.*, Case No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006) (political question doctrine bars suit against operator of a dining facility targeted by suicide bombers in Iraq).

⁷² Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL'Y 691, 693 (2007).

*Services, Inc.*⁷³ Both cases arose from accidents that occurred on contractor-operated fuel convoys in Iraq during the Gulf War. However, in *Lane*, the Fifth Circuit reversed a district court decision dismissing the case on political question grounds, in part, because “we cannot find that all plausible sets of facts that could be proven would implicate particular authority committed by the Constitution to Congress or the Executive.”⁷⁴ The *Lane* court also noted that, while at least some of the plaintiffs’ allegations could draw the court into consideration of what constituted adequate force protection for the convoys, some could potentially be proven without considering the “Army’s role” in events.⁷⁵ In contrast, in *Carmichael*, the Eleventh Circuit affirmed a district court decision dismissing the case on political question grounds.⁷⁶ The *Carmichael* court reached this conclusion, in part, because determining whether the convoy driver was responsible for the injuries of a soldier riding along in his vehicle “would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war,”⁷⁷ given that “military judgments governed the planning and execution of virtually every aspect of the convoy,” including the date and time of its departure, the speed and route of travel, the distance between vehicles, and the security measures taken.⁷⁸ The court also found that there were no judicially discoverable and manageable standards for resolving whether the driver was negligent because “the convoy was subject to military regulation and control,” and the standards used in “ordinary tort cases” would not apply.⁷⁹

Despite the factual similarities between the cases, the differing outcomes in *Carmichael* and *Lane* can arguably be reconciled given the courts’ differing conclusions about the degree of control that the contractor retained over its operations under applicable regulations, the terms of the contract, and the course of performance under the contract. In *Lane*, where the court viewed KBR’s “policies and actions” as potentially separable from those of the military, the court found dismissal on political question grounds to be improper, at least prior to the completion of discovery.⁸⁰ In *Carmichael*, on the other hand, the court viewed the contractor’s policies and actions as inseparable from those of the military because, among other things, regulations granted the military “plenary control” over the convoy; the contract demanded the drivers be trained to military standards; and all parties to the contract viewed the military as having “complete control” of the convoy.⁸¹ In fact, the court expressly rejected the plaintiffs’ attempt to distinguish between

⁷³ See, e.g., Richer, *supra* note 63, at 1696 (suggesting that the appellate courts are “divided” over the application of the political question doctrine in such cases); Aaron J. Fickes, *Private Warriors and Political Questions: A Critical Analysis of the Political Question Doctrine’s Application to Suits against Private Military Contractors*, 82 *TEMPLE L. REV.* 525, 526 (2009) (characterizing the outcomes of these cases as “disparate and confusing”).

⁷⁴ *Lane v. Halliburton*, 529 F.3d 548, 559-60 (5th Cir. 2008). *Lane* consolidated three cases: *Fisher*, 454 F. Supp. 2d 637; *Smith-Idol v. Halliburton*, No. 4:06-cv-01168, 2006 U.S. Dist. LEXIS 75574 (S.D. Tex. Oct. 11, 2006); *Lane v. Halliburton*, No. 4:06-cv-01971, 2006 U.S. Dist. LEXIS 63948 (S.D. Tex. Sept. 26, 2006).

⁷⁵ 529 F.3d at 560-61. The *Lane* court viewed causation as the “central issue.” *Id.* at 561. However, it addressed the implications of this primarily in terms of the plaintiffs’ allegations of intentional torts, not their claims of negligence. The court also opined, as to the third *Baker* factor, that the political question doctrine would bar plaintiffs’ claims if they were challenging “the wisdom of the military’s use of civilian contractors in a war zone.” *Id.* at 563. However, it noted that the plaintiffs could potentially recover without “need[ing] a court to evaluate the Executive’s longstanding policy of employing civilian contractors in combat support roles.” *Id.*

⁷⁶ 572 F.3d 1271, 1275 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010).

⁷⁷ *Id.* at 1275.

⁷⁸ *Id.* at 1281.

⁷⁹ *Id.* at 1288.

⁸⁰ *Lane*, 529 F.3d at 563.

⁸¹ *Carmichael*, 572 F.3d at 1276, 1283-85, 1294.

the military's control of the convoy and the driver's control of the vehicle because "[t]he fact that [the driver] had physical control over his tanker does not change the fact that he was operating at all times under orders and determinations made by the military."⁸²

Other factors also help account for the differing outcomes in *Lane*, *Carmichael*, and similar cases. Whether the plaintiff alleges negligence or an intentional tort (e.g., false imprisonment, intentional infliction of emotional distress) is one such factor. Courts appear more likely to find that cases are barred on political question grounds when the plaintiff alleges negligence than when the plaintiff alleges an intentional tort,⁸³ perhaps because commission of an intentional tort is more clearly within the contractor's "control." The tort law of the jurisdiction can also play a role, with the political question doctrine apparently more likely to bar suits in jurisdictions which recognize contributory negligence.⁸⁴ Contributory negligence is a tort doctrine which precludes plaintiffs whose own negligence is a proximate cause of their injuries from recovery, and the possibility of contributory negligence could be significant if the plaintiffs are military or civilian government personnel whose actions or inaction potentially resulted from executive branch policies.⁸⁵ Yet another factor is the nature of the remedy sought. Courts have long recognized that political questions are more likely to arise in negligence cases when plaintiffs seek to enjoin particular conduct than when plaintiffs seek monetary damages.⁸⁶ Finally, the timing of the defendant's motion to dismiss on political question grounds can also be significant. While many early district court cases based on injuries incurred during military operations in Afghanistan and Iraq were dismissed prior to the completion of discovery,⁸⁷ more recent appeals court decisions suggest that dismissal is generally only appropriate after the completion of discovery,⁸⁸ when it can be said with more certainty that plaintiff could not prove any plausible set of facts allowing the plaintiff to recover without compelling the defendant to answer a political question.⁸⁹

While *Carmichael* and similar cases suggest that federal contractors may be able to successfully assert the political question doctrine in at least some tort suits, several potentially significant questions remain unanswered. It is unclear how other jurisdictions and, particularly, the Supreme Court would view the factors that were seen as determinative by the courts that have decided these cases to date. Many tort suits against federal contractors have been heard in the Fifth and Eleventh Circuit because that is where the contractors who were most heavily involved in

⁸² *Id.* at 1284.

⁸³ *See, e.g., Lane*, 529 F.3d at 567 ("The Plaintiffs' negligence allegations move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred.").

⁸⁴ *See, e.g., Taylor*, 2010 U.S. Dist. LEXIS 50610, at *146.

⁸⁵ *See, e.g., id.* (noting that defendant's planned assertion of contributory negligence would have required the court to determine whether the Marines made a reasonable decision in attempting to repair an electrical generator themselves). *See also Carmichael*, 572 F.3d at 1288 (discussing concurrent negligence under Georgia law).

⁸⁶ *Compare Gilligan*, 413 U.S. at 10-11 (plaintiffs seeking an injunction, suit barred) *with Scheuer v. Rhodes*, 416 U.S. 232 (1974) (plaintiffs seeking damages, suit not barred). *See also Koochi*, 976 F.2d at 1332 ("A key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries. Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.").

⁸⁷ *See, e.g.,* the three cases consolidated in the Fifth Circuit's decision in *Lane*. *Supra* note 74.

⁸⁸ *See, e.g., Lane*, 529 F.3d at 554 (finding that the district court erred "to the extent that the case needs further factual development before it can be known whether the political question doctrine is an impediment"); *Carmichael*, 572 F.3d at 1291, *aff'g* 564 F. Supp. 2d 1363 (granting motion to dismiss on political question grounds that was renewed after the completion of discovery).

⁸⁹ *Lane*, 529 F.3d at 559-60.

operations in Iraq, in particular, are located.⁹⁰ It is thus less certain how courts in other circuits would approach these cases. Additionally, some commentators have suggested that the Supreme Court is not favorably inclined toward the political question doctrine at present.⁹¹ Relatedly, there appears to be disagreement among the federal courts of appeals as to what significance, if any, attaches to the government's failure to intervene in a suit against a contractor. Some circuits seemingly view the government's failure to intervene as insignificant,⁹² while others view it as weighing against dismissal of the case on political question grounds.⁹³

Preemption Under the Federal Tort Claims Act

Even if plaintiffs' claims against a government contractor are not barred by the operation of the political question doctrine, the court could still find that it cannot exercise jurisdiction over these claims because the claims are preempted under the Federal Tort Claims Act (FTCA). As a sovereign, the federal government is immune from suit without its consent.⁹⁴ The FTCA waives the government's sovereign immunity,⁹⁵ but this waiver is subject to many exceptions. Although the FTCA is not directly applicable to contractors, courts have crafted several "federal common law" defenses that shield government contractors from liability under the FTCA's exceptions. The most prominent of these are the government contractor defense and the combatant activities exception. However, some contractors have also asserted "derivative sovereign immunity" generally under the FTCA.

Government Contractor Defense

The government contractor defense is a judicially created doctrine that bars courts from hearing certain cases because the state tort law claims raised in the case are preempted. The defense derives from the Supreme Court's decision in *Boyle v. United Technologies Corporation*, which both articulated the reasons for recognizing a government contractor defense and created a test to

⁹⁰ Halliburton is headquartered in Houston and has an office in Louisiana, both of which are within the territory of the U.S. Court of Appeals for the Fifth Circuit. Compare Halliburton, Locations, available at <http://www.halliburton.com/locations/> with United States Courts, Court Locator, available at http://www.uscourts.gov/court_locator.aspx. Kellogg, Brown and Root, which was a Halliburton subsidiary until 2007, is also headquartered in Houston, but has offices in Alabama, which is within the territory of the U.S. Court of Appeals for the Eleventh Circuit. KBR holds the military's major logistics contract (LOGCAP) in Iraq, where it at one time had over 50,000 employees and subcontractors supporting over 200,000 persons at 70 sites. Joseph, *supra* note 10, at 694.

⁹¹ See, e.g., Richer, *supra* note 63, at 1704-05 (noting that the Supreme Court did not find either *Bush v. Gore* or *Boumediene v. Bush* nonjusticiable on political question grounds).

⁹² See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005).

⁹³ See, e.g., *Gross v. German Found. Indus. Initiative*, 549 F.3d 605 (3d Cir. 2008); *McMahon*, 502 F.3d at 1365. Some commentators have suggested that the government ought to be required to make its views known in cases where a contractor asserts the political question doctrine, much like "Bernstein letters" are used by the Department of State to inform courts if the executive branch believes the act of state doctrine applies to pending litigation. See Chris Jenks, *Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine*, 28 BERKELEY J. INT'L L. 178, 209-10 (2010).

⁹⁴ See, e.g., Donald L. Doernberg, SOVEREIGN IMMUNITY OR THE RULE OF LAW 74 (2005) (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765) ("[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.")).

⁹⁵ Specifically, the FTCA makes the United States liable "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

determine when state law should be “displaced” or preempted.⁹⁶ According to the Court, the “uniquely federal interest” in “civil liabilities arising out of the performance of federal procurement contracts” is such as to warrant preemption of state law and its replacement with “federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called ‘federal common law.’”⁹⁷ In place of the preempted state tort laws, under which the petitioners had sued a contractor who manufactured a helicopter that allegedly malfunctioned, causing the death of a Marine pilot, the Court substituted a two-prong test to determine when state law should be displaced and a three-part test to determine the scope of displacement. *Boyle*’s two-prong test asks whether (1) the claim involves an area of “uniquely federal interest” and (2) there is “a ‘significant conflict’ ... 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.’”⁹⁸ Assuming this test is satisfied, *Boyle*’s three-part test, resulting in claims being preempted where:

1. the United States approved reasonably precise specifications;
2. the equipment conformed to those specifications; and
3. the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.⁹⁹

While *Boyle* is often cited for this three-part test, several other aspects of the decision should be noted because of their relevance to ongoing litigation. First, the Court explicitly recognized that procurement of equipment by the United States is an area of “uniquely federal interest.” Second, the Court expressly held that the state-prescribed duty of care may be preempted when a contractor cannot comply with both this duty and its contractual obligations to the federal government.¹⁰⁰ Third, and perhaps most importantly, the Court grounded, or rooted, the government contractor defense in the “discretionary function” exception to the Federal Tort Claims Act.¹⁰¹ This exception bars any claim against the United States that is “based upon the

⁹⁶ 487 U.S. 500 (1988).

⁹⁷ *Id.* at 504-05. In so concluding, the Court rejected the petitioners’ broad contention that, absent legislation specifically immunizing government contractors from liability for design defects, there is no basis for judicial recognition of a military contractor defense. It noted that there have, in fact, been a few areas involving “uniquely federal interests” where it has found state law preempted and replaced, where appropriate, with “federal common law.” *Id.* at 504. Noting that it has found the civil liability of federal officials for actions taken in the course of their duty to be an area of “peculiarly federal concern,” the Court also cited *Yearsley v. W.A. Ross Construction Co.*, as support for the principle that it has found “civil liabilities arising out of the performance of federal procurement contracts” to be an area of “uniquely federal interest.” *Id.* at 505-06. In *Yearsley*, the Court held that there was no liability on the part of a government contractor for executing the will of the government if the authority for its actions was “validly conferred.” See 309 U.S. 18 (1940).

⁹⁸ *Boyle*, 487 U.S. at 507.

⁹⁹ *Id.* at 512. According to the Court, the first two conditions ensure “the suit is within the area where the policy of the ‘discretionary function’ would be frustrated—i.e., ... the design feature in question was considered by a Government officer, and not merely by the contractor itself.” *Id.* The third condition, in contrast, provides an incentive for manufacturers to provide information about risks to the government.

¹⁰⁰ *Id.* at 509. According to the Court, “[d]isplacement [of state law] will occur only 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.’” *Id.* at 507. However, the Court further stated: “The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the States have traditionally occupied ... But conflict there must be.” *Id.* at 509. In other words, state law would not be displaced “where a duty sought to be imposed on the contractor is not identical to one under the contract, but also not contrary to any assumed [under the contract].” *Id.*

¹⁰¹ *Boyle*, 487 U.S. at 511-512. The Court also considered but dismissed the *Feres* doctrine as the limiting principle to (continued...)

exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”¹⁰² In particular, the *Boyle* Court found a discretionary function is implicated whenever the government chooses the appropriate designs for military equipment.¹⁰³

Because *Boyle* involved a contract for the procurement of goods, some plaintiffs have asserted that the government contractor defense does not apply to contracts for services. The exclusion of service contracts from the government contractor defense could have significant implications for recent tort suits against government contractors, given that most government contracts are now for services, not goods.¹⁰⁴ While two recent decisions from the U.S. Courts of Appeals for the Fifth and Eleventh Circuits suggest that service contractors may be able to successfully assert the government contractor defense in certain circumstances, there appear to be some questions about its application.

In the earlier of these two decisions, *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit expressly rejected the defendant’s argument that the government contractor defense should not be extended to service contracts because “immunity from tort liability is the exception to the general rule.”¹⁰⁵ According to the court:

Although *Boyle* referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or nothing rules regarding different classes of contract. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest.¹⁰⁶

Then, having found that the government contractor defense extended to service contracts, the court applied the three-part test from *Boyle* to find that the plaintiffs’ claims against the contractor were preempted because the Army approved reasonably precise maintenance procedures; the defendant’s performance of maintenance conformed to those procedures; and the defendants had informed the Army of the dangers associated with not adopting certain precautions recommended by the Federal Aviation Administration and Bell Helicopters.¹⁰⁷

(...continued)

identify those situations in which a significant conflict arises between federal interests and state law. It found that application of the *Feres* doctrine as a limiting principle would produce results that were both too broad and too narrow. Because the *Feres* doctrine “prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should [likewise] prohibit all service-related tort claims against the manufacturer.” *Id.* at 510. On the other hand, because the doctrine only covers service-related injuries, and not injuries caused by the military to civilians, “it could not be invoked to prevent, for example, a civilian’s suit against the manufacturer.” *Id.* at 510-511.

¹⁰² 28 U.S.C. § 2680(a).

¹⁰³ *Boyle*, 487 U.S. at 512. (“It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.” *Id.*).

¹⁰⁴ See *supra* note 4 and accompanying text. Moreover, many of today’s contracts for goods are for “commercial items,” which, by definition, are not goods made to the government’s specifications. See 48 C.F.R. § 2.101 (defining “commercial item”).

¹⁰⁵ 328 F.3d 1329, 1334 (11th Cir. 2003).

¹⁰⁶ *Id.* The *Hudgens* court extended *Boyle* to service contracts, in part, because it found the articulation of maintenance protocols to involve the exercise of the same discretion that would be required to choose design specifications.

¹⁰⁷ *Id.* at 1335-37.

The Fifth Circuit also applied the government contractor defense to a service contract in *In re: Katrina Canal Breaches v. Washington Group International*.¹⁰⁸ However, the Fifth Circuit construed *Boyle* as requiring only the application of the three-part test pertaining to the specifications, not the application of the two-prong and three-part test. According to the Fifth Circuit, the first step of the three-part test (i.e., asking “whether the Government approved reasonably precise specifications for the design feature in question”) “necessarily answers the question whether the federal contract conflicts with state law.”¹⁰⁹ Further, in determining whether there was such a conflict, the court looked not to the specifications for the entire project, but rather the specifications for the specific feature at issue in the claim. It found that because the specifications were not reasonably precise in this case, the defendant contractors were not entitled to the government contractor defense, and the state law applicable to the defendants was not preempted.¹¹⁰

Both *Hudgens* and *In re: Katrina Canal Breaches* demonstrate a direct application of the government contractor defense as iterated in *Boyle* to the claims at issue. Although the courts apparently differed as to the necessity of applying the two-prong preemption test,¹¹¹ each court extended the application of the three-part test to cover actions pursuant to contracts for services. In addition, both cases acknowledged that the discretionary function was the limiting principle chosen by the Supreme Court to determine if a significant policy or federal interest is threatened by the operation of state law. However, as more tort suits against contractors have been brought, it seems as if the government contractor defense laid out in *Boyle* has been expanded by the courts, specifically with respect to the combatant activities exception, as is discussed below. Whether this was the intention of the Supreme Court in *Boyle* has also been the subject of commentary by some courts.¹¹²

Combatant Activities Exception to the FTCA

As noted above, the Supreme Court in *Boyle* grounded the government contractor defense in the discretionary function exception to the FTCA. Since then, defendant-contractors have also asserted that claims against them are preempted under the combatant activities exception to the FTCA. This exception precludes tort liability in “[a]ny claim arising out of the combatant activities of the military forces, or the Coast Guard, during a time of war.”¹¹³ The courts that have

¹⁰⁸ 620 F.3d 455 (5th Cir. 2010).

¹⁰⁹ *Id.* at 460 (citing *Lewis v. Babcock Indus. Inc.*, 985 F.2d 83, 86 (2d Cir. 1993)). The court dismissed plaintiffs’ argument that the first inquiry should be whether a significant conflict exists between federal policy and state law, stating that this threshold inquiry, as articulated by *Boyle*, “has never been required by any court, nor should it be.” *Id.* at 461.

¹¹⁰ *Id.* at 465.

¹¹¹ Although the Eleventh Circuit apparently did not apply the two-prong test within the context of the specific facts and circumstances of the case, its discussion of *Boyle* included the two-prong test, and its decision can be read as construing *Boyle* to mean that procurement contracts entail uniquely federal interests, and there are significant conflicts when contract specifications cannot be fulfilled consistently with duties imposed by state law. In any case, the court did not state that only the three-part test of *Boyle* should be applied, unlike the Fifth Circuit.

¹¹² See *McMahon*, 460 F. Supp. 2d 1315 (M.D. Fla. 2006), *aff’d on other grounds by McMahon*, 502 F.3d 1331; *Al-Quraishi v. Nakla*, 728 F. Supp. 2d 702 (D. Md. 2010); *In re: KBR, Inc., Burn Pit Litigation*, 736 F. Supp. 2d 954 (D. Md. 2010), *stay granted by In re: KBR, Inc., Burn Pitt Litigation*, 2010 U.S. Dist. LEXIS 130770 (D. Md., Dec. 10, 2010).

¹¹³ 28 U.S.C. § 2680(j).

recognized contractors' assertion of this defense have generally done so by, knowingly or unknowingly, linking it to the government contractor defense recognized in *Boyle*.

Two early cases—*Koohi v. Varian Associates, Inc.*¹¹⁴ and *Bentzlin v. Hughes Aircraft Co.*¹¹⁵—first extended the application of the combatant activities exception to government contractors in certain limited circumstances. Both cases involved product liability claims. In *Koohi*, the U.S. Court of Appeals for the Ninth Circuit extended the combatant activities exception to preempt claims against a weapons manufacturer on the grounds that:

[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action. ... The imposition of such liability on the manufacturers of the Aegis would create a duty of care where the combatant activities exception is intended to ensure that none exists.¹¹⁶

However, the Ninth Circuit's arguably brief discussion left it unclear whether the court *intended* to utilize the government contractor defense to explain the extension of the combatant activities exception to contractor. However, subsequent courts have done so, or concluded that this was the Ninth Circuit's intent.¹¹⁷

Bentzlin is like *Koohi* in that the U.S. District Court for the Central District of California seemed to base the combatant activities exception, in part, on the government contractor defense.¹¹⁸ The *Bentzlin* court explicitly addressed whether the government contractor defense could be extended to suits arising from wartime activity (i.e., combatant activities) and found that it could because (1) there is a unique federal interest in the procurement of highly sophisticated weapons; and (2) there would be a significant conflict between federal policy (rooted in the discretionary function exception) and the operation of state tort law.¹¹⁹ *Bentzlin* also expanded upon *Koohi*'s use of the combatant activities exception by noting that while *Koohi* limited its application of the combatant activities exception to suits involving "enemies" of the United States, nothing in *Koohi* suggested that it was intended to be so narrowly construed. The court reasoned that "[i]n a wartime context, state law cannot establish a duty of care owed to American soldiers who necessarily assume the risk of death."¹²⁰

¹¹⁴ *Koohi*, 976 F.2d 1328.

¹¹⁵ *Bentzlin*, 833 F. Supp. 1486.

¹¹⁶ *Koohi*, 976 F.2d at 1337.

¹¹⁷ The court did not explore the *Boyle* two-prong test to discuss if the government contractor defense would be applicable by examining if a unique federal interest is at stake and if the federal interest would be threatened by operation of state law. It also did not explicitly discuss utilizing the combatant activity exception as the limiting principle as the Supreme Court had done with the discretionary function exception in *Boyle*.

¹¹⁸ 833 F. Supp. at 1489.

¹¹⁹ *Id.* at 1492. The *Bentzlin* court specifically held that the government contractor defense supports preemption of manufacturing defect suits arising in the context of war because the application of tort law principles—deterrence, punishment, and providing a remedy to innocent victims—to suits arising from combat "would frustrate government combat interests." *Id.* at 1493.

¹²⁰ *Id.* at 1494-95. See also *McMahon*, 460 F. Supp. 2d at 1330 (opining that *Bentzlin* expanded the *Koohi* decision when it stated that "the 'government contractor defense' necessarily extends to suits ... which arise from wartime activity ('combatant preemption').").

More recent decisions on the combatant activities exception have diverged as to its scope,¹²¹ with some parties and courts viewing the combatant activities exception primarily through the framework of *Koohi* and *Bentzlin* and others considering the exception more broadly in light of the government contractor defense recognized in *Boyle*. The courts in *Flanigan v. Westwind Technologies* and *Lessin v. Kellogg Brown & Root, Inc.*, for example, approached the combatant activities exception primarily through the framework of *Koohi* and *Bentzlin*. They concluded, respectively, that the plaintiffs' claims fell within those preempted under *Koohi/Bentzlin* because they involved the procurement of "complex equipment" by the government,¹²² or were distinguishable from those in *Koohi/Bentzlin* because they did not arise from the "United States' use of weapons during combat," and contractors have a duty of care to U.S. persons (as opposed to perceived enemies) during combat.¹²³

In contrast, in *Saleh v. Titan Corporation*, the U.S. Court of Appeals for the District of Columbia Circuit looked to *Boyle* in expanding the reach of the combatant activities exception. *Saleh* arose from contractor employees' work as interrogators and interpreters at the Abu Ghraib prison complex,¹²⁴ and the case also raises issues regarding the Alien Tort Statute that are outside the scope of this report. As to the combatant activities exception, the *Saleh* court first used the two-prong analysis set forth in *Boyle* to find a unique federal interest in the detention and interrogation of individuals during war and a potentially significant conflict between this federal interest and the operation of state tort law.¹²⁵ The court then broadened the "scope of displacement" test that had been used by the district court to find that claims are preempted "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains *command authority*." The district court, in contrast, had found plaintiffs' claims preempted only when the contractor is "under the direct command and exclusive operational control of the military chain of command,"¹²⁶ a test that the D.C. Circuit found to be too narrow given that the "breadth of displacement must be inversely proportional to the states' interests, just as it is directly proportional to the strength of the federal interest."¹²⁷

¹²¹ Thus far, it seems like a minority of courts have found in favor of the defendant-contractor. See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (affirming that claims against defendants should be dismissed); *Taylor*, 2010 U.S. Dist. LEXIS 50610 (granting defendant's motion to dismiss under the combatant activities exception). But see *Bixby*, 2010 LEXIS 89717 (denying defendant's motion to dismiss under the combatant activities exception); *Harris*, 618 F. Supp. 2d 400 (denying defendant's motions to dismiss under the combatant activities exception); *Lessin v. Kellogg Brown & Root, Inc.*, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 12, 2006) (same).

¹²² 648 F. Supp. 2d 994, 1006 (W.D. Tenn. 2008). It should be noted that the defendants in *Flanigan* did not explicitly assert the government contractor defense. However, the court stated that their argument for preemption was based on the analysis articulated in *Boyle*. *Id.* at 1004. The court then distinguished between the *Koohi/Bentzlin* cases, which extended the *Boyle* defense to combatant activities because they concerned "complex equipment acquired by the Government," and other cases that did not extend the exception because no manufacturing or design defects were alleged. *Id.* at 1006. The *Flanigan* court concluded that "the type of action at bar falls into the *Koohi/Bentzlin* category of cases, as the systems and components alleged by the Plaintiff ... constitute 'complex equipment acquired by the Government.'" *Id.* at 1007.

¹²³ *Lessin*, 2006 U.S. Dist. LEXIS 39403, *13-14. See also *Fisher*, 390 F. Supp. 2d 610.

¹²⁴ *Saleh*, 580 F.3d 1, in part *aff'd* and in part *rev'd*, *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D. D.C. 2007), *petition for cert. applied* 78 USLW 2652 (U.S. Apr. 26, 2010) (No. 09-1313).

¹²⁵ *Id.* at 7. With respect to the federal interest, the court specifically noted that "the policy [of the combatant activities exception] ... is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.*

¹²⁶ *Id.* at 9 (emphasis added).

¹²⁷ *Id.* at 12. The D.C. Circuit disagreed with the district court's "exclusive operational" control test because it found (continued...)

Saleh and other recent decisions addressing the combatant activities exception highlight other apparent differences between the courts in their application of the exception, although it is unclear to what degree such differences influence the outcomes in particular cases given the widely different facts of the cases and other differences in courts' approaches. Key among these differences are:

- ***what constitutes a “combatant activity”***: Some courts have adopted a broad definition of “combatant activity,” including “not only physical violence, but activities both necessary to and in direct connection with actual hostility.”¹²⁸ Others have adopted narrower definitions. In *Al Shimari v. CACI Inc.*, for example,¹²⁹ the court defined “combatant activities” as “the actual engaging in the exercise of physical force.”¹³⁰ Additionally, there is the related question of whether the court should focus solely upon whether the defendant’s actions fall within its definition of “combatant activities,” or whether it should first analyze whether the military actually retained control over the defendant’s actions, as the *Saleh* court did.¹³¹
- ***whether the decisions in *Koohi* and *Bentzlin* are, in fact, based in *Boyle* and the combatant activities exception to the FTCA***: Although several courts have addressed the application or non-application of the combatant activities exception through the *Boyle* government contractor defense analysis, a few courts have rejected this connection. For example, in *McMahon v. Presidential Airways Inc.*, a federal district court declared that it was “skeptical that the combatant activities exception to the FTCA ... has any application to suits against private defense contractors.”¹³² The *McMahon* court not only pointed out the apparent conflation

(...continued)

that the test “d[id] not protect the full measure of the federal interest embodied in the combatant activities exception.” *Id.* at 8.

¹²⁸ See, e.g., *Taylor*, 2010 U.S. Dist. LEXIS 50610, at *28-20 (citing *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948)). In *Taylor*, the defendants argued that activities should be deemed combatant activities “whenever ‘contract employees [are] integrated into the military’s operational activities ... and perform[] a common mission with the military under ultimate military command.’” *Id.* The plaintiffs argued that “the exception is limited to actual combat activities.” *Id.* See also *Harris*, 618 F. Supp. 2d 400 (denying the defendant-contractor’s motion to dismiss as it concluded, without much analysis, that the conduct giving rise to the claims in the case did not arise from active military combat operations).

¹²⁹ 657 F. Supp. 2d 700.

¹³⁰ *Id.* (citing *Skeen v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947)). The court found that this more limited definition “comports with the common sense notion that a government contractor does not necessarily conduct combatant activities merely because it provides services in support of a war effort.” *Id.* While the court found that it could not conclude whether the defendant-contractor’s interrogation and interpretation services constituted “combat activities” prior to discovery, it analyzed the claims before it under the *Boyle* two-prong test and, unlike the court in *Saleh*, was not persuaded by the defendants’ argument that the plaintiffs’ claims implicated uniquely federal interests because the prosecution of war is a power constitutionally vested in the federal government. *Id.* at 721. The court specifically wanted to review the contract because, under its definition of “combat activities,” interrogation “should not properly be understood to constitute actual physical force ... because the amount of physical contact available to an interrogator is largely limited by law and by contract.”

¹³¹ Compare *Taylor*, 2010 U.S. Dist. LEXIS 50610, at *27-28 with *Saleh*, 580 F.3d at 9-10.

¹³² *McMahon*, 460 F. Supp. 2d at 1331, *aff’d* by *McMahon*, 502 F.3d 1331. The court was particularly critical of the Ninth Circuit’s *Koohi* decision that extended the exception to contractors to preempt tort law claims where the plaintiffs were survivors of “enemy” combatants. The court in *McMahon* declared, “[w]hether 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 (continued...)”

of the government contractor defense and the combatant activities exception in *Koohi* and *Bentzlin*,¹³³ but also noted that “[t]here is no express authority for judicially intermixing the government contractor defense and the combatant activities exception. ... [U]nless [private contractors] qualify as employees or agents of the Government, [they] may not bootstrap the Government’s sovereign immunity.”¹³⁴ Other courts have noted similar problems in grounding the combatant activities exception in the government contractor defense.¹³⁵

- ***whether the government contractor defense bestows derivative sovereign immunity upon contractors***: Not only have some courts taken the combatant activities exception and rooted it in the *Boyle* government contractor analysis, but at least one federal district court has suggested that the defense bestows derivative sovereign immunity upon contractors. In *Bixby v. KBR, Inc.*, the court declared that “[u]nder the so-called ‘government contractor defense,’ where certain conditions are met, a government contractor enjoys derivative sovereign immunity against tort actions arising out of the contractor’s provisions of services to the government.”¹³⁶ No other court appears to have adopted this analysis, although other defendants have asserted that they have derivative sovereign immunity, either because they are agents of the government or on other grounds.¹³⁷

As defendant-contractors assert with more frequency the government contractor defense and the combatant activities exception as grounds to preempt state tort law claims against them, it is possible that the distinction between the two defenses will become less, rather than more, clear.¹³⁸

(...continued)

to endorse such a defense for private contractors based solely on the fact that Defendants were operating in a combat zone.” *Id.* at 1330.

¹³³ *Id.* The court believed the government contractor defense created in *Boyle* was limited in application and only shielded contractors in the procurement of military equipment when the government dictates design specifications. Furthermore, it stated that “[p]rivate contractors are not entitled to sovereign immunity unless they are characterized as government employees.” *Id.*

¹³⁴ *Id.*

¹³⁵ *See, e.g.,* *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 715 (D. Md. 2010) (noting that doing so would result in the same problems that caused the Supreme Court to reject the *Feres* doctrine as the basis for the government contractor defense in *Boyle*). *See* note 101.

¹³⁶ *Bixby*, 2010 U.S. Dist. LEXIS 89717. It should be noted that the *Boyle* Court explicitly stated that it did not address this issue. *Boyle*, 487 U.S. at 505 n1 (“The [dissent] misreads our discussion here to “intimat[e] that the immunity [of federal officials] ... might extend ... [to] nongovernment employees” such as a Government contractor. ... But we do not address this issue, as it is not before us. We cite these cases [*Westfall v. Erwin*, *Howard v. Lyons*, and *Barr v. Matteo*] merely to demonstrate that the liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.”). Notwithstanding this discrepancy, the court in *Bixby* applied the three-part *Boyle* test to the claims at hand. *Bixby* separately addressed the combatant activities exception to the FTCA. Interestingly, although the court in *Bixby* stated that it would accept the *Saleh* rationale that the combatant activities exception precluded some claims against government contractors, it did not seem to acknowledge that the *Saleh* analysis was, in fact, grounded in the two-prong government contractor defense analysis from *Boyle*.

¹³⁷ *See, e.g.,* *Martin v. Halliburton*, 618 F.3d 476, 484-85 (5th Cir. 2010); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205-06 (4th Cir. 2009); *Fisher*, 696 F. Supp. 2d at 714-20.

¹³⁸ A prime example of this uncertainty as to what should be asserted by the parties and/or considered by the courts is the district court’s decision in *In re: KBR, Inc., Burn Pit Litigation*. Because the defendants did not assert the government contractor defense, the court stated that it would refrain from performing any analysis of *Boyle*. 736 F. Supp. 2d 954, 965-66 (D. Md. 2010). Yet, when it addressed the combatant activities exception, the court stated:

(continued...)

Though the result for the defendant-contractor might be the same regardless of the variation of the defense applied,¹³⁹ what is asserted and how it is analyzed remain significant because of the scope of immunity at stake. Generally, each version of the government contractor defense¹⁴⁰ requires the defendant to meet a test fashioned by the court to determine (1) whether the defense is applicable in the first instance, and (2) if applicable, the scope for displacing state law. Moving across the spectrum (*see* footnote 140), the scope of immunity generally seems to become broader as the specificities of the applicable test lessen. For example, one court stated that “[t]he combatant activities exception is much broader in scope than the discretionary function exception, and the *Saleh* degree of integration test may not appropriately limit the scope of the combatant activities exception as applied to government contractors.”¹⁴¹ Thus, depending on the type of defense asserted and recognized, a defendant-contractor may have a less burdensome affirmative defense to prove and a broader shield of immunity.¹⁴²

Derivative Immunity

In some cases, contractors may assert derivative immunity that is not based in the government’s sovereign immunity, although contractors’ ability to assert such immunity *does* result from their working for the government. Derivative absolute immunity, which can protect government employees against certain tort suits, is one type of immunity that may be asserted. Contractors have also attempted to assert derivative *Feres* or “intramilitary” immunity, although with little success. Where a party is immune from suit, the court cannot exercise jurisdiction over the claim against it.

(...continued)

Notwithstanding their disavowal of the government contractor defense and *Boyle* at this stage of the litigation, Defendants nevertheless rely on cases involving application of the *Boyle*-styled preemption defense ... Apparently puzzled ..., Plaintiffs interpret [the defendants’] combatant activities argument as a derivative sovereign immunity argument, not a preemption defense. ... The Court will assume for purposes of this motion the Defendants are raising a *Boyle*-styled, conflict preemption defense based on the combatant activities exception as opposed to a separate basis for the assertion of derivative sovereign immunity.

Id. at 976. Similarly, in *Lessin*, the court noted that the defendant, in its motion to dismiss, emphasized that it was asserting the combatant activities exception rather than the affirmative government contractor defense laid out in *Boyle*. 2006 U.S. Dist. LEXIS 39403, at *11 n.2.

¹³⁹ *In re: KBR Inc., Burn Pit Litigation*, 736 F. Supp. 2d at 967 (“Whether viewed as “derivative sovereign immunity” or federal preemption, the result is protection from liability for a government contractor faithfully doing the government’s bidding.”).

¹⁴⁰ The variety of defenses recognized thus far include: (1) the *Boyle* government contractor defense rooted in the discretionary function exception to the FTCA limited to military procurement contracts for goods; (2) the *Boyle* government contractor defense rooted in the discretionary function exception to the FTCA applicable to both contracts for services and goods; (3) the *Boyle* government contractor defense rooted in the combatant activities exception; and (4) the government contractor defense as a part of derivative sovereign immunity.

¹⁴¹ *In re: KBR Inc., Burn Pit Litigation*, 736 F. Supp. 2d at 977 n.12.

¹⁴² The critique by the *McMahon* and *Al-Quraishi* courts of the applicability of the combatant activities exception to defendant-contractors further raises the question of how far the government contractor defense could evolve. *See also Fisher*, 390 F. Supp. 2d at 616 (“The Court concludes that extension of the government contractor defense beyond its current boundaries (i.e., beyond the *Koohi/Bentzlin* model) is unwarranted.”). Courts, since *Boyle*, have chosen to look to the other FTCA exceptions, which prompted the dissenting judge in *Saleh* to opine that “if we go down this road and extend *Boyle* to the combatant activities exception, there is no reason to stop there.” *Saleh*, 580 F.3d at 23 (Garland, J., dissenting).

Derivative Absolute Immunity

Government employees are generally immune from suit when they perform “discretionary” (as opposed to ministerial) functions within the scope of their employment, and the court finds that the contributions of immunity to “effective government” within the particular context would outweigh the potential harm to individual citizens that might result from the employee’s being immune from suit.¹⁴³ This type of immunity is known as “absolute immunity,” and it does not flow automatically from the government’s sovereign immunity, although it also operates to defeat the court’s jurisdiction.

While the earliest decisions recognizing the doctrine of absolute immunity apparently were issued by the Supreme Court and address only government employees,¹⁴⁴ more recent decisions by the lower courts have recognized that government contractors possess derivative absolute immunity in at least certain circumstances.¹⁴⁵ These decisions can be read narrowly, as granting derivative absolute immunity to contractors only when they share information with the government or serve as a financial intermediary.¹⁴⁶ However, one such decision by the U.S. Court of Appeals for the Fourth Circuit in *Mangold v. Analytic Services, Inc.*, used particularly broad language in granting immunity to the contractor, suggesting that the “delegation” of functions to contractors is tantamount to delegation of functions to government employees:

Extending immunity to private contractors to protect an important government interest is not novel. . . . If absolute immunity protects a particular government function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government’s unquestioned need to delegate government functions.¹⁴⁷

Contractors facing tort suits in contexts where courts have not previously granted them derivative absolute immunity have attempted to rely on the broad language of *Mangold*. They have also attempted to show that granting them immunity would comport with *Westfall* because they performed discretionary functions, and granting them immunity would contribute to effective government by, for example, ensuring that the government is free to contract out functions.¹⁴⁸ While such attempts to expand the contexts in which derivative absolute immunity exists have generally not succeeded, a few courts have accepted the argument that granting immunity to contractors contributes to effective government by protecting the government’s ability to contract

¹⁴³ *Westfall v. Erwin*, 484 U.S. 292, 299-300 (1988).

¹⁴⁴ *See Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959).

¹⁴⁵ *See, e.g., Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006) (contractor has absolute immunity for sharing information with national security implications with government officials in the course of performing its duties); *Mangold v. Analytic Servs.*, 77 F.3d 1442 (4th Cir. 1996) (contractor has absolute immunity for statements made to government investigators looking into misconduct by government personnel).

¹⁴⁶ *Cf. Andrew Finkelman, Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits against Military Contractors*, 34 BROOKLYN J. INT’L L. 395, 419 (2009). A narrow reading is arguably in keeping with the Supreme Court’s unanimous decision in *Westfall*, which admonished courts to consider “whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens” in determining whether particular functions properly fall within the scope of absolute official immunity. *Westfall*, 484 U.S. at 299.

¹⁴⁷ 77 F.3d at 1447-48.

¹⁴⁸ *See, e.g., Al Shimari*, 657 F. Supp. 2d at 714-20.

out functions, which it must do because it “cannot perform all necessary and proper services itself.”¹⁴⁹

Derivative *Feres* Immunity

As noted previously, under the *Feres* doctrine, members of the military are barred from bringing suit against the U.S. government for “injuries [that] arise out of or are in the course of activity incident to service.”¹⁵⁰ Although the *Feres* doctrine originally applied only when the service member was injured by another service member, it was subsequently expanded to encompass civilian employees of the government,¹⁵¹ and some government contractors have recently asserted that it should be further extended to provide derivative *Feres* or “intramilitary” immunity to at least some contractors. For example, in *McMahon v. Presidential Airways, Inc.*, the contractors argued that they should share in the government’s *Feres* immunity because “‘the reality of modern warfare’ is such that contractors perform traditional military functions.”¹⁵² Although the contractors argued that the *Feres* doctrine should bar any claim by a plaintiff who is a member of the military,¹⁵³ the Eleventh Circuit in *McMahon* refused to extend the doctrine to provide military contractors with immunity. Given that the Supreme Court expressly declined to expand the *Feres* doctrine so as to make it the basis for the government contractor defense when it decided *Boyle*,¹⁵⁴ the Eleventh Circuit felt that it could not, consistently with *Boyle*, expand *Feres* here.

Potential Indemnification of Contractor Liability

An indemnification agreement is one in which one party to a contract agrees to hold the other party harmless, secure the other party against loss or damage, or give security for the reimbursement of the other party in the case of an anticipated loss.¹⁵⁵ When the government has agreed to indemnify the contractor, the government, not the contractor, may be obligated to pay damages awarded to third parties in tort suits. An indemnification agreement does not allow a contractor to avoid liability for its torts, unlike the jurisdictional defenses previously discussed.¹⁵⁶ However, some commentators view an indemnification agreement as tantamount to avoiding liability because the contractor does not have to pay the costs of its actions or omissions.

“Open-ended” indemnification agreements, of the type that would generally be necessary to cover damages for death or bodily injuries in tort, are arguably rare in government contracts.¹⁵⁷

¹⁴⁹ *TWI v. CACI Int’l, Inc.*, Case No. 1:07cv908, 2007 U.S. Dist. LEXIS 83342 (E.D. Va. 2007) (quoting *Mangold*, 77 F.3d at 1448).

¹⁵⁰ See *supra* note 29.

¹⁵¹ *United States v. Johnson*, 481 U.S. 681, 686, 687 n.8 (1987).

¹⁵² 460 F. Supp. 2d at 1325.

¹⁵³ *Id.*

¹⁵⁴ 502 F.3d at 1354; 360 F.2 Supp. 2d at 1327-28.

¹⁵⁵ See *Black’s Law Dictionary* 783 (8th ed. 2004).

¹⁵⁶ Andrew D. Ness & Marcia G. Madsen, *Trends in Contractor Liability for Hazardous Waste Cleanups: The Current Legal Environment*, 22 PUB. CONT. L.J. 581, 609 (1992/1993). An indemnification agreement “does not change the identity of the liable party;” rather, it represents a promise that another party “will pay or reimburse the indemnified party for the liability.” *Id.*

¹⁵⁷ There are other indemnification agreements which are not “open-ended” as to the amount of the government’s (continued...)

Agencies must have explicit statutory authority to enter such agreements because these agreements otherwise would run afoul of the Anti-Deficiency Act, which prohibits agencies from obligating funds in excess or advance of an appropriation.¹⁵⁸ Public Law (P.L.) 85-804, which was enacted in the aftermath of the Korean War to allow agencies to provide various forms of “extraordinary contractual relief” in situations involving the “national defense,” has historically been the primary statutory authority that agencies rely upon when entering indemnification agreements.¹⁵⁹ Only the military departments and specified civilian agencies, including the Atomic Energy Commission, the National Aeronautics and Space Administration, and the Federal Emergency Management Agency, may enter indemnification agreements under the authority of P.L. 85-804,¹⁶⁰ and such agreements may only indemnify risks that are “unusually hazardous or nuclear,” as those risks are defined in the contract.¹⁶¹ However, other statutory provisions authorizing particular agencies to enter indemnification agreements also exist, most notably Section 4 of the Price-Anderson Act, which authorizes the Department of Energy to indemnify its contractors for claims arising from nuclear accidents,¹⁶² and since 2003, annual appropriations riders, which authorize the Department of the Army to provide “for such indemnification as the Secretary determines to be necessary.”¹⁶³ Under an indemnification agreement, the government’s

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potential liability. Agencies do not need express statutory authority to enter such agreements, although indemnification must still constitute a “necessary expense” upon which the agency may spend appropriated funds. *See, e.g.,* Gov’t Accountability Office, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW*, Vol. II, at 6-71 (3d ed. 2006) (“Indemnification agreements may be proper if they are limited to available appropriations.”). Such agreements can be broadly divided into two types. In the first type of agreement, the maximum potential amount of indemnification is known at the time of contracting, and funds sufficient to cover this contingent obligation can be reserved or recorded. *See* *Vehicles—Charter Coach Service*, B-164646 (Nov. 26, 1968) (approving of a government agreement to indemnify damages to leased buses caused by Selective Service registrants because the potential liability “was necessarily limited to the value of the motor carrier’s equipment”); *Bailments—Liability*, B-150729 (June 19, 1963) (approving of a government agreement to indemnify the owner of a leased aircraft for damages to the aircraft because the agency had no-year appropriations available to pay for such liability, and the “maximum liability was measurable by the fair market value of the aircraft”). In the second type of agreement, in contrast, the maximum potential amount of indemnification is not known at the time of contracting, but the contract limits the indemnification to the “availability of appropriated funds at the time a contingency occurs.” 48 C.F.R. § 52.228-7(d). *See also* *Claim for Federal Reimbursement of State Disability Payments*, B-202518 (Jan. 8, 1982). However, both the Government Accountability Office (GAO) and contractors have expressed discomfort with the second type of non-open-ended agreement. The GAO’s concerns center upon the “potentially disruptive fiscal consequences” that such agreements could have for agencies, while contractors are concerned that these agreements leave contractors at risk of not being fully indemnified for liability they might face. *See* *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW*, at 6-76.

¹⁵⁸ 31 U.S.C. § 1341(a).

¹⁵⁹ An Act to Authorize the Making, Amendment and Modification of Contracts to Facilitate the National Defense, P.L. 85-804, 72 Stat. 972 (Aug. 28, 1958) (codified, as amended, at 50 U.S.C. §§ 1431-1435).

¹⁶⁰ *See* Executive Order 10789, 23 Fed. Reg. 8897 (Nov. 15, 1958) (authorizing the Departments of Agriculture, Commerce, the Interior, Transportation and the Treasury, as well as the Atomic Energy Commission, Federal Emergency Management Agency, General Services Administration, Government Printing Office, National Aeronautics and Space Administration, and Tennessee Valley Authority, to rely upon the authority of P.L. 85-804).

¹⁶¹ 50 U.S.C. § 1431; 48 C.F.R. § 52.250-1(b)-(c).

¹⁶² 42 U.S.C. § 2210. *See also* 10 U.S.C. § 2354 (indemnification under Department of Defense research and development contracts); 42 U.S.C. § 9619 (indemnification of Superfund clean-up contractors).

¹⁶³ Department of Defense Appropriations Act, 2010, P.L. 111-118, § 8072, 123 Stat. 3445 (Dec. 19, 2009) (“*Provided further*, That contracts entered into under the authority of this section may provide for such indemnification as the Secretary determines to be necessary.”); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, P.L. 110-329, § 8072, 122 Stat. 3637 (Sept. 30, 2008) (same); Department of Defense Appropriations Act, 2008, P.L. 110-116, § 8075, 121 Stat. 1332 (Nov. 13, 2007) (same); Department of Defense Appropriations Act, 2007, P.L. 109-289, § 8073, 120 Stat. 1290-91 (Sept. 29, 2006) (same); Department of Defense Appropriations Act, 2006, P.L. 109-148, § 8082, 119 Stat. 2117 (Dec. 30, 2005); Department of Defense Appropriations Act, 2005, P.L. 108-287, (continued...)

obligation to pay is often contingent upon certain conditions being satisfied, including, in the case of indemnification agreements entered into under P.L. 85-804, liability arising from those risks identified in the contract.¹⁶⁴ It is, thus, not unheard of for the government and the contractor to litigate whether the government is obligated, under the terms of the contract, to indemnify the contractor after the contractor is found to be liable.¹⁶⁵

At least one contractor facing tort suits has recently asserted that it has an indemnification agreement with the government which would cover any liability it owes in these suits.¹⁶⁶ The merits of this claim cannot presently be assessed because the text of this indemnification clause is classified, and it is unclear whether the damages that allegedly occurred resulted from the risks that were addressed in the clause.¹⁶⁷ The existence and potential terms of this agreement have generated substantial congressional interest, in part because the contractor who seeks to rely on the agreement could face suit by dozens, or even hundreds, of current and former members of the National Guard who served in Iraq for damages resulting from their exposure to sodium dichromate and subsequent hexavalent chromium poisoning.¹⁶⁸

Conclusion

It remains to be seen how the issues raised by recent tort suits against federal contractors will play out in the courts and what, if any, changes in statutes, regulations, or policies the legislative or executive branches may make in response to court decisions. To date, congressional responses have centered upon ensuring that arbitration agreements do not bar claims arising under Title VII of the Civil Rights Act of 1964 or tort claims related to sexual assault or harassment and ensuring that lack of personal jurisdiction does not bar suits against foreign defendants for harms to U.S. persons occurring overseas.¹⁶⁹ Other congressional responses to tort suits against government

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§ 8090, 118 Stat. 118 Stat. 992 (Aug. 5, 2004); Department of Defense Appropriations Act, 2004, P.L. 108-87, § 8091, 117 Stat. 1093-94 (Sept. 30, 1993).

¹⁶⁴ See, e.g., 48 C.F.R. § 52.250-1(b)-(c) (“[T]he Government shall, subject to the limitations contained in the other paragraphs of this clause, indemnify the Contractor against—(1) [c]laims (including reasonable expenses of litigation and settlement) by third persons (including employees of the Contractor) for death; personal injury; or loss of, damage to, or loss of use of property; (2) [l]oss of, damage to, or loss of use of Contractor property, excluding loss of profit; and (3) [l]oss of, damage to, or loss of use of Government property, excluding loss of profit. . . . This indemnification applies only to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise.”). Indemnification agreements entered into under the authority of P.L. 85-804 further provided that the contract must “[p]romptly notify the Contracting Officer of any claim or action against, or any loss by, the Contractor or any subcontractors that may be reasonably expected to involve indemnification under this clause” and “[c]omply with the Government’s directions . . . in connection with settlement or defense of claims or actions.” 48 C.F.R. § 52.250-1(g)(1) & (4). See also 48 C.F.R. § 52.250-1(h) (noting that the “Government may direct, control, or assist in settling or defending any claim or action that may involve indemnification under this clause.”).

¹⁶⁵ See, e.g., *E.I. Du Pont De Nemours & Co., Inc. v. United States*, 365 F.3d 1367 (Fed. Cir. 2004) (finding that the plaintiff was entitled to indemnification under the terms of the contract).

¹⁶⁶ See *Bixby*, 2010 U.S. Dist. LEXIS, at *10.

¹⁶⁷ See Principal Deputy Under Secretary of Defense, Acquisition, Technology and Logistics, Letter to Representative Earl Blumenauer, Nov. 24, 2010 (copy on file with the authors).

¹⁶⁸ See *supra* notes 41 to 51 and accompanying text.

¹⁶⁹ See Department of Defense Appropriations Act, 2010, P.L. 111-118, § 8116, 123 Stat. 3454-55 (Dec. 19, 2009); Lieutenant Colonel Dominic “Rocky” Baragona Justice for American Heroes Harmed by Contractors Act, S. 235, 112th Cong. Similar bills were introduced in the 111th Congress (H.R. 2349, S. 526, S. 2782).

contractors seek to hold contractors accountable for alleged wrongdoing by ensuring that they, not the government, pay any liability,¹⁷⁰ as well as by excluding contractors who engage in tortious conduct that harms government personnel from government contracts¹⁷¹ and authorizing agencies to deny award fees to contractors found to have harmed government personnel.¹⁷² There do not, as yet, appear to have been any attempts to address, directly or indirectly, the barriers to subject matter jurisdiction that have apparently emerged; or otherwise clarify when contractors may avoid liability for tortious conduct because of the work they perform for the federal government.

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¹⁷⁰ See Accountability for Defense Contractors Act, H.R. 6310, 111th Cong., S. 3909, 111th Cong.

¹⁷¹ See Safety in Defense Contracting Act, H.R. 2825, 111th Cong.

¹⁷² See Ike Skelton National Defense Authorization Act for FY2011, P.L. 111-383, § 834,—Stat.—(Jan. 7, 2011).