An Ongoing Jurisprudential War

Defending Battlefield Contractors

By Lawrence S. Ebner

The initial clashes in contractor-on-the-battlefield tort suits have taken place in the federal district courts, but have rapidly escalated to the federal courts of appeals.

Our nation's military operations in Iraq and Afghanistan after 9/11 were unprecedented in many ways. It may not seem surprising that by December 2008 the United States had 148,000 U.S. combat troops in Iraq and Afghanistan. But the presence in those war zones of an *equal number* of civilian contractor personnel who were integrated into U.S. military operations to provide many types of day-to-day logistical support was truly remarkable.

The importance of the U.S. military's ability to rely upon private sector, in-theater support contractors cannot be overstated. A recent Congressional Research Service report explained that "[o]ver the last two decades, contractors have played a critical role in U.S. military operations, making up more than half of the Department of Defense's [DOD] total workforce in Iraq, Afghanistan, and the Balkans." Moshe Schwartz & Wendy Ginsberg, Cong. Research Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 1 (2013). These "battlefield contractors" provide a wide range of support services. For example, they transport fuel, materiél, food, and personnel; they provide base life support such as electrical power generation, operations & maintenance services, and waste disposal at forward-operating bases; they perform engineering and construction services; and they offer specialized expertise such as weapons system maintenance, information technology, intelligence analysis, and linguistics.

By performing a multiplicity of functions that service members themselves formerly performed, contractors afford the U.S. military "significant operational benefits… including freeing up uniformed personnel to conduct combat operations" and "providing a surge capability, quickly delivering critical support capabilities tailored to specific military needs." *Id.* at 3. Without question, today's all-volunteer military "finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Hal-*

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liburton, 529 F.3d 548, 554 (5th Cir. 2008). That was especially true in Iraq, where President Bush's controversial "mission accomplished" speech, delivered only six weeks after the U.S.-led invasion, reflected how unprepared the U.S. military was for the more than eight years of asymmetrical warfare that followed. Indeed, Secretary of Defense Rumsfeld lamented in a speech to U.S. troops in Kuwait in December 2004 that "[a]s you know, you go to war with the Army you have. They're not the Army you might want or wish to have at a later time."

Unfortunately, the private sector's dramatically increased role in helping the U.S. military execute long-term, overseas contingency operations in Iraq and Afghanistan has generated a wave of "contractor-on-the-battlefield" tort litigation in U.S. courts. These state-law damages suits have been filed by or on behalf of soldiers or civilians allegedly injured or killed due to contractor negligence in inherently dangerous foreign war zones. Sovereign immunity bars combat-related personal injury or wrongful death suits against the United States. *See* 28 U.S.C. §§2680(a), (j), (k) (specifying exceptions to the Federal Tort Claims Act waiver of sovereign immunity). *See also U.S. v. Johnson*, 481 U.S. 681 (1987) (discussing the "*Feres* doctrine," which bars damages suits against the United States for injuries that arise from or someone suffers in the course of activity that is incident to military service). But the contractors that the U.S. military hires to perform essential support functions that military personnel otherwise would perform in foreign theaters of operation—functions for which military personnel enjoy immunity from suit—have become a seemingly irresistible target for "victims' rights" lawyers.

This litigation raises many fundamental legal questions. For example, can federal courts apply state tort law standards to corporate conduct that occurs in Middle Eastern or other combat zones thousands of miles away? One well-respected jurist answered that question this way: "Simply put… state tort claims have no passport that allows their travel in foreign battlefields," and courts "have no authority to issue one." *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 227 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting). Can individuals sue battlefield contractors, much less hold them liable under state tort law, for personal injury or death arising from the essential support services that they provide at the direction of and often as a surrogate for U.S. military personnel? Another well-known circuit judge, Laurence Silberman, who also co-chaired an Iraq war-related presidential commission, explained that "it is clear that all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—is singularly out of place in combat situations, where risk-taking is the rule." *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009).

Are these suits viable even though the relationship between the U.S. military and in-theater contractors is so close that it only can be described as symbiotic? *See generally Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1222 (5th Cir. 1982) (a "symbiotic relationship" exists when the government has 'so far insinuated itself into a position of interdependence [with a private entity] that it must be recognized as a joint participant in the challenged activity'") (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 717, 725 (1961)). *Cf. Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (discussing the delegation of governmental functions to private parties). In other words, should civilian contractors "be left holding the bag—facing full liability for actions taken in conjunction with [and almost always at the direction of] government employees who enjoy immunity for the same activity"? *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012).

The initial clashes in contractor-on-the-battlefield tort suits have taken place in the federal district courts. But this ongoing jurisprudential war—which focuses on the separation of powers, the role of the federal judiciary, the function of state tort law, and critical, uniquely federal interests in the areas of national security and foreign policy—has rapidly escalated to the federal courts of appeals. Appellate proceedings in this expanding area of federal law not only present challenging legal issues, but also have afforded my partners and me opportunities to engage in cutting-edge appellate advocacy and to participate in the development of significant case law precedent.

Key Legal Defenses

These are not garden-variety tort suits. They involve causes of action arising from the U.S. military's combatant activities in twenty-first century combat theaters, which often are described as "asymmetrical" because they do not have traditional front lines, and enemy forces, who often are locally embedded insurgents, can suddenly appear and attack from anywhere. Moreover, private contractor employees are ubiquitous, typically working in close proximity to, and at the day-to-day direction of, uniformed personnel. U.S. military wartime decision making underlies every case. Given these unique circumstances, we have developed and pursued a number of highly specialized, case-dispositive, pretrial legal defenses that adapt well-established justiciability, preemption, and immunity doctrines to contractor-on-the-battlefield litigation.

Political Question Doctrine

The political question doctrine is a threshold justiciability defense that deprives a district court of subject-matter jurisdiction. Under Article III of the U.S. Constitution "no justiciable 'controversy' exists when parties seek adjudication of a political question." *Mass. v. EPA*, 549 U.S. 498, 516 (2007). A "political question" is an issue that is "constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch"; in other words, one of the two elected branches of the federal government must resolve it. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In the seminal political question opinion, *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court "set forth six independent tests for the existence of a political question." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004). While finding that any of the *Baker* political question factors exists would render a suit nonjusticiable, the first two are the most important and readily discernible: The first test asks whether a textually demonstrable constitutional commitment of the issue to the executive branch or Congress exists, and the second asks whether judicially discoverable and manageable standards exist for resolving the issue. *See Baker*, 369 U.S. at 217. *See also Zivotofsky v. Clinton*, 132 S. Ct. 1421,

1431–33 (2012) (Sotomayor, J., concurring in part) (discussing *Baker* factors).

The Supreme Court has explained that "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches" or "an area of governmental activity in which the courts have less competence" than the "complex subtle, and professional decisions as to the composition, training, equipping and control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Indeed, the nonjusticiability of military policies, judgments, and decisions is "an arena in which the political question doctrine has served one of its most important and traditional functions—precluding judicial review of decisions made by the Executive during wartime." *Lane*, 529 F.3d at 558.

The political question doctrine bars adjudication of a state tort suit against a war-zone contractor if the district court would have to examine U.S. military judgments.

We have successfully invoked the political question doctrine to achieve dismissal of a number of contractor-on-the-battlefield tort suits on the ground that courts cannot adjudicate them without examining sensitive military judgments—wartime decisions that the Constitution has committed to the Executive Branch and for which no judicial standards exist to assess their reasonableness. *See, e.g.*, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011) (Navy corpsman suffered accidental electric shock injury at U.S. forward operating base in Iraq while installing unauthorized back-up generator at same time that contractor was repairing main generator); *Carmichael v. Kellogg Brown & Root Servs, Inc.*, 572 F.3d 1271 (11th Cir. 2009) (U.S. soldier injured when contractor-driven fuel tanker that he was protecting in an Army-led supply convoy rolled over on a hazardous Iraqi road); *In re KBR, Inc., Burn Pit Litigation*, 925 F. Supp. 2d 752 (D. Md. 2013), *appeal docketed*, No. 13-1430 (4th Cir. Apr. 2, 2013) (multidistrict litigation filed against a contractor by current and former U.S. military and contractor personnel who claimed that they have suffered ailments as a result of alleged exposure to emissions from open burn pits and contaminated water at numerous military bases in Iraq). *But see Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3rd Cir. 2013) (U.S. soldier accidentally electrocuted while showering on U.S. military base in ungrounded, preexisting, Iraqi-constructed hardstand building where the Army billeted him and a contractor performed limited electrical maintenance). *See also Lane* (holding that the pretrial factual record was inadequate to determine whether the political question doctrine barred a suit by contractor employees who suffered insurgent-inflicted injuries while driving trucks in an Army-led convoy); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007) (holding that the pretrial factual record was inadequate to determine whether the political question doctrine barred the suit brought on behalf of soldiers killed in crash of contractor-piloted airplane in Afghanistan).

Although these cases differ in facts and outcomes, and one, *Harris*, was wrongly decided, they collectively establish three overarching principles that govern how the political question doctrine applies to damages suits against military support contractors. The three principles follow:

- The political question doctrine bars adjudication of a state tort suit against a war-zone contractor if the district court would have to examine U.S. military judgments.
- To determine whether a district court would have to examine military judgments, a contractor's liability defenses (*e.g.*, that the U.S. military was the proximate cause of a plaintiff's injuries) must be considered.
- The political question doctrine can bar a tort suit even if the U.S. military did not exercise plenary control over a contractor, but instead, delegated responsibility for performing the particular function that allegedly caused a plaintiff's injury.

Federal appellate courts will continue to refine and to apply these principles, which incorporate and adapt the *Baker* political question tests.

Federal Preemption and the Combatant Activities Exception

Under the Constitution's Supremacy Clause, Art. VI, cl. 2, federal law preempts conflicting state law, including state tort law. Contractor-on-the-battlefield tort suits present the question of whether federal statutes preempt a plaintiff's state tort claims.

For example, the Federal Tort Claims Act "combatant activities exception" preserves the federal government's sovereign immunity in connection with "[a]ny claims arising out of the combatant activities of the military… during time of war." 28 U.S.C. §2680(j). In *Saleh*, a suit against contractors who allegedly abused Iraqi nationals detained at Abu Grhaib prison, the D.C. Circuit explained that "the policy embedded by the combatant activities exception is simply the elimination of tort from the battlefield." 580 F.3d at 7. *See also Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 236 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) ("Multiple textual clues in [the combatant activities exception] indicate that Congress wanted to keep tort law out of the battlefield regardless of a defendant's status as a soldier or a contractor."). *Id.* at 263 (Niemeyer, J., dissenting) ("[T]he unique federal interest embodied in the combatant activities exception to the FTCA [Federal Tort Claims Act] is an interest in freeing military actors from the distraction, inhibition, and fear that the imposition of state tort law by means of a *potential* civil suit entails.").

Saleh articulated a "battle-field preemption" principle based on the clash between state tort claims against war-zone contractors and the significant, exclusively federal interests underlying the combatant activities exception: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." 580 F.3d. at 9.

In *Aiello v. Kellogg Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 710 (S.D.N.Y. 2011),

the district court adopted and applied the *Saleh* preemption principle. The court held that a seemingly simple slip-and-fall suit alleging that a military support contractor negligently maintained a latrine on a forward-operating base in Iraq was preempted. The court adopted and applied the widely accepted definition of "combatant activities," which defined combatant activities as "include[ing] not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). The court explained in *Aiello* that the plaintiff's claim against the contractor arose from a combatant activity of the military, namely indoor latrine maintenance of latrines on forward-operating bases in war zones. *See* 751 F. Supp. 2d at 713. Similarly, the district court in *Burn Pit* held that combatant activities preemption, as well as the political question doctrine, barred the suit. *See* 925 F. Supp. 2d at 767. And in *Taylor*, which affirmed dismissal based on the political question doctrine, two members of the three-judge panel also would have affirmed on the ground of combatant activities preemption. *See Taylor*, 658 F.3d at 402. *But see Harris*, 724 F.3d at 481.

Pending appeals afford several federal circuits the opportunity to adopt and to apply combatant activities preemption to contractor-on-the-battlefield suits. In addition to the *Saleh* preemption formulation, we have urged appellate courts to adopt the combatant activities preemption test that the United States advocated in an amicus brief filed with the en banc Fourth Circuit in *Al Shimari*, a case similar to *Saleh* that was remanded for lack of appellate jurisdiction and subsequently dismissed. Under the government's proposed test, a state tort claim is preempted if (1) the combatant activities exception would bar a similar claim filed against the United States, and (2) the contractor acted within the scope of its contractual relationship with the military at the time of the incident from which the claim arose. This is a broad, albeit not unlimited, preemption test, which, compared with the political question doctrine, is less fact specific.

Federal Preemption: Other Statutes

Contractor defenses based on the Federal Tort Claims Act combatant activities exception fall under the doctrine of "implied preemption." But at least two other federal statutes contain express preemption provisions that can result in pretrial dismissal of state tort suits against war-zone support contractors.

The Defense Base Act, 42 U.S.C. §1651, establishes an exclusive, federally administered, contractor-funded, workers' compensation scheme for contractor personnel who are injured or killed overseas while engaged in national defense activities, including as a result of war hazards. The Defense Base Act contains an exclusivity-of-remedy provision, 42 U.S.C. §1651(c), which expressly prohibits imposing state tort liability against a contractor that participates in the Defense Base Act program. This is a strong ground for dismissing contractor-on-the-battlefield suits filed by contractor employees. For example, in *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012), the court of appeals held that the Defense Base Act preempted the plaintiffs' negligence and fraud claims, the same claims involved in *Lane*. The court held that the Defense Base Act's definition of a covered injury encompassed the claims, and thus preempted them because the contractor employee convoy drivers' injuries were caused by the "willful act of a third person, " Iraqi insurgents, and directed against them "because of [their] employment." *Id.* at 611.

A different statute, the Defense Production Act of 1950, authorizes the Department of Defense to issue high priority, "rated" orders, which "require… performance under contracts… deem[ed] necessary or appropriate to promote the national defense." 50 U.S.C. app. §2071(a). In return for such mandatory contractor performance, the Defense Production Act contains an express preemption provision stating that "[n]o person shall be held liable for damages… for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation or order issued pursuant to this Act." *Id.* 2157. This provision "plainly provides immunity" and "expressly provid[es] as defense to liability." *Hercules, Inc. v. United States*, 516 U.S. 417, 429 (1996). The key to raising Defense Production Act preemption is whether a plaintiff's claim arises from a contract that is classified as a "rated" order under the statute.

Derivative or Shared Sovereign Immunity

In addition to preemption based on the Federal Tort Claims Act combatant activities exception, military support contractors, which function symbiotically with the U.S. military in active theaters of operation—also can assert other dispositive pretrial defenses based on the federal government's sovereign immunity from suit. For example, in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940), the Supreme Court held, albeit in a domestic public works context, that "there is no liability on the part of the contractor for executing [the federal government's] will." *See also Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) ("contractors… acting within the scope of their employment for the United States have derivative sovereign immunity") (citing *Yearsley*); *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447–48 (4th Cir. 1996) ("If absolute immunity protects a particular government function… it is a small step to protect that function when delegated to private contractors… ."). The district court in *Burn Pit* dismissed that contractor-on-the-battlefield litigation based in part on derivative sovereign immunity. The court cited the recent Supreme Court opinion in *Filarsky*, which explained that private contractors might be deterred from accepting government work if they can be held liable in connection with performing functions for which government employees enjoy immunity. *See Filarsky*, 132 S. Ct. at 1665–66. The court held that "the same rationale strongly supports a conclusion that derivative sovereign immunity should apply to military contractors performing services for the government in war zones." *Burn Pit*, 925 F. Supp. 2d at 767.

Pending appeals afford several federal circuits the opportunity to adopt and to apply combatant activities preemption to contractor-on-the-battlefield suits.

Military support contractors also may be able to argue that they directly share the government's sovereign immunity. The United States occupies the "empty chair" at the defendants' table in contractor-on-the-battlefield tort suits: "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)). This rule should apply whenever the United States is contractually obligated to indemnify a war-zone contractor in connection with a liability suit. *See, e.g.*, 48 C.F.R. §52.228-7(c) ("Insurance—Liability to Third Persons" provision, incorporated in many military support contracts, requiring the United States to reimburse contractor for third-party litigation costs not covered by insurance).

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Obtaining an Early Appeal

Despite these compelling pretrial defenses, some district courts have denied war-zone contractors' motions to dismiss. The question then is how to pursue an interlocutory appeal rather than incurring the costs and risks of a trial. One approach is to file a "collateral order" appeal, contending under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and its progeny that there is a right to immediate appeal because military support contractors' threshold defenses raise important issues that are separate from the merits of a suit. Thus far, however, courts of appeals have not been receptive to this contention. *See, e.g.*, *Al Shimari*, 679 F.3d 205 (4th Cir. 2012); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010); *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398 (3d Cir. 2010).

The Fifth Circuit in *Martin* suggested that certification under 28 U.S.C. §1292(b) is a better approach. Recognizing that "the basis for many of these defenses is a respect for the interests of the government in military matters," and that such defenses should be resolved "at an early stage" to avoid "interference with military prerogatives," the court of appeals indicated that district courts should consider "freely certifying orders denying such defenses… provided of course that the record has been developed adequately so that an informed decision can be made." *Martin*, 618 F.3d at 488. Even if a district court certifies a denial of a motion to dismiss, the court of appeals still needs to decide whether to grant permission to appeal. *See* Fed. R. App. P. 5.

The reasons for certifying and allowing such an appeal are compelling. When criticizing the Fourth Circuit denial of immediate review in *Al Shimari*, Judge Wilkinson emphasized that delay "inflicts significant damage on the separation of powers, allowing civil tort suits to invade theatres of armed conflict heretofore the province of those branches of government constitutionally charged with safeguarding the nation's most vital interests." 679 F.3d at 225 (Wilkinson, J., dissenting).

Enlisting the U.S. Government's Support

The United States unquestionably has significant interests in having contractor-on-the-battlefield tort suits dismissed.

In *Carmichael*, the Solicitor General filed an amicus brief opposing Supreme Court review, explaining that the "United States has significant interests in ensuring that sensitive military judgments are not subject to judicial second-guessing," and also "in making sure contactors are available and willing to provide the military with vital combat-related services." Similarly, in his *amicus* brief opposing certiorari in *Saleh*, the Solicitor General indicated that the government's unique interests in this area of law include "avoiding unwarranted judicial second-guessing of sensitive judgments by military personnel and contractors with which they interact in combat-related activities, and ensuring that there are appropriate limits on private tort suits based on such activities."

In the amicus brief that the United States filed with the en banc Fourth Circuit in *Al Shimari*, it discussed the "primacy" of federal interests, such as the "federal interest in protecting the conduct of the military's combat operations from interference by litigation based on state tort law," including "the need to avoid second-guessing battlefield decisions [and] intruding into the military command decision-making process." And in the amicus brief that it filed with the Fifth Circuit in *Fisher*, the United States explained that

> [t]o support ongoing military operations in Iraq and Afghanistan, the United States relies heavily on civilian contractors, and the potential tort liability of contractors arising from the performance of functions in this context is thus a matter of considerable importance to the United States, particularly because increased tort litigation risk would, at a minimum, cause prospective contractors to increase the prices they charge the government and could dissuade them from offering their services altogether.

In addition, the United States has a direct financial interest in many contractor-on-the-battlefield cases. This is because the United States often is contractually obligated to indemnify war-zone contractors for litigation costs and adverse money judgments to the extent that insurance does not cover them. *See, e.g.*, 48 C.F.R. §52.228-7 (Insurance—Liability to Third Persons).

Given the significant national security-related interests and financial interests that the United States has in "private" tort litigation against military support contractors, it is quite surprising that the U.S. Department of Justice almost always refrains from taking the initiative to participate in contractor-on-the-battlefield appeals as amicus curiae. With the exception of *Fisher*, the United States has participated only when invited by an appellate court to express its views. Hopefully, the federal government does not expect war-zone contractors, on which the U.S. military so heavily relies, and which serve our nation under the most difficult and hazardous of circumstances, to get stuck "holding the bag" in liability suits that have no place in the judicial system.