Legal Opinion Letter

Vol. 27 No. 10 July 13, 2018

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Fourth Circuit Holds MDL against Military-Battlefield Contractor Raises Nonjusticiable Political Questions

by Lawrence S. Ebner

More than any other federal circuit court, , the U.S. Court of Appeals for the Fourth Circuit has developed highly refined jurisprudence governing application of the political question doctrine to "battlefield contractor" litigation—personal-injury suits against government contractors that provide mission-critical support services to the U.S. military in foreign theaters of war. The Fourth Circuit's most recent battlefield-contractor opinion, *In re: KBR, Inc., Burn Pit Litigation*, No. 17-1960 (June 20, 2018), not only is an exemplar of clarity, but also underscores the essential role that jurisdictional facts can play in enabling a court to determine whether "a suit against a military contractor raises a nonjusticiable political question." Op. at 27. In general, a case "involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department [*i.e.*, to the Executive Branch and/or Congress]; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* at 26 (internal quotation marks omitted); *see Baker v. Carr*, 369 U.S. 186, 217 (1962).

Case Background. *In re: KBR, Inc.* was multidistrict litigation arising out the U.S. military's "sensitive decision to use burn pits, and only burn pits," for solid waste disposal, "at all FOBs [forward operating bases] in Iraq and Afghanistan" during post-9/11 combat operations. Op. at 16. Beginning in 2008, military personnel and civilians filed 63 separate personal-injury suits—most of which were putative class actions encompassing thousands of potential class members—against military contractor KBR. The suits generally alleged that "KBR failed to design, manage, and operate the burn pits safely and to treat and monitor water qualities," thereby causing soldiers and others to suffer "harms from being exposed to smoke from open air burn pits and drinking impure water." *Id.* at 14. The Judicial Panel on Multidistrict Litigation consolidated and transferred the suits to a Maryland federal district court (Judge Roger W. Titus) for pretrial proceedings.

After the district court initially dismissed the litigation based on both (i) the political question doctrine, and (ii) implied preemption under the Federal Tort Claims Act combatant activities exception, 28 U.S.C. § 2680(j), the Fourth Circuit "vacated and remanded on the grounds that the record was not sufficiently developed to support the district court's decision." *Id.* at 15. Under the district court's supervision, the parties then "created an extensive factual record through a herculean discovery process." *Id.* at 13. "Jurisdictional discovery yielded over 5.8 million pages of documents, including almost a million pages of contract documents, and 34 witness depositions." *Id.* at 15. Based on this voluminous body of jurisdictional evidence, the district court made the key findings that the decision to use burn pits reflected a military judgment made in a wartime environment; that the military made all of the decisions regarding the location of burn pits on FOBs in Iraq and Afghanistan; that the military exercised control over the operation of the burn pits; and that KBR at all times acted under the military's comprehensive direction and control." *Id.* at 16, 17, 18. As a result, the district court again dismissed the litigation on political question and federal preemption grounds. *See* Lawrence S. Ebner, *Judge's Dismissal of Toxic-Tort Multidistrict Litigation Against War-Zone Contractor Respects US Military Prerogatives*, WLF Legal Backgrounder (Sept. 22, 2017).

Lawrence S. Ebner is founder of Capital Appellate Advocacy PLLC, a Washington, DC-based boutique law firm that advocates for business and industry in appellate courts throughout the United States.

Fourth Circuit Opinion. The Fourth Circuit affirmed the district court's dismissal of the *Burn Pit* litigation on political question grounds. The court explained that "[f]ederal courts will not examine cases involving a political question because doing so would encroach on the constitutional prerogatives of Congress and the President and because they are ill-equipped to decide these cases." *Id.* at 26 (citing *Baker v. Carr*, 369 U.S. at 217). Relying upon its earlier battlefield contractor decision in *Taylor v. Kellogg, Brown & Root Services, Inc.*, 658 F.3d 402, 411 (4th Cir. 2011), the court indicated that "a suit against a military contractor raises a nonjusticiable political question if either (1) the military exercised direct control over the contractor, or (2) national defense interests were closely intertwined with the military's decision regarding [the contractor's] conduct." Op. at 27 (internal quotation marks omitted). Further, "[t]o qualify as direct control, the military's control over the government contractor must be *plenary* . . . and *actual*." *Id.* (emphasis added) (internal citations omitted).

Importantly, the Fourth Circuit panel explained that "[t]o determine whether the military's control is plenary, 'a court must inquire whether the military clearly chose *how* to carry out [the contractor's activities], rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed.'" *Id.* at 28 (quoting *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 534 (4th Cir. 2014)). And for military control to be actual, it needs to be more than merely "on paper." *Id.* at 29 (citing *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 156-57 (4th Cir. 2016)).

Based on these political question principles, as well as on the jurisdictional evidence, the court concluded that the military's control over KBR's services was both plenary and actual. *Id.* at 31. "[T]he military's control was plenary as it not only directed to KBR 'what' must be done but also prescribed 'how' KBR must accomplish those tasks." *Id.* at 30. "[T]he military's control was actual [because] [a]lthough KBR did not officially fall within the military chain of command, the military exercised extensive control and oversight over KBR's burn pit operations and water services," including by "interfac[ing] with KBR contractors on a regular basis." *Id.* Thus, "[t]he military's control over KBR was plenary and actual, making KBR's decisions pertaining to waste management and water services 'de facto military decisions' unreviewable by [the] Court." *Id.* at 35 (quoting *Taylor*, 658 F.3d at 410).[1]

In so holding, the Fourth Circuit rejected the plaintiffs' "numerous unpersuasive arguments." *Id.* For example, responding to plaintiffs' contention that KBR violated contractual requirements by burning hazardous material, the court indicated that "a few instances of non-specific allegations do not amount to . . . systematic failure of oversight and lack of command presence." *Id.*

Conclusion. The Fourth Circuit's *Burn Pit* decision applies and unequivocally reaffirms the separation-of-powers principle that courts cannot second-guess the wisdom of U.S. military judgments, including how U.S. military bases should be operated in foreign war zones. Our nation's military can continue to rely upon the vital services provided by combat-zone contractors without subjecting them to the threat of tort liability for carrying out military directives. To protect themselves, support contractors should take steps to ensure that military directives, and the military's plenary and actual control over contractors' activities, are well documented.

This is not to say, however, that the federal government is oblivious to service members' combat-zone injuries. The Veterans Administration, for example, has established an "Airborne Hazards and Open Burn Pit Registry" for which more than 140,000 veterans and service members have completed a questionnaire that documents and reports their exposures and health concerns. Further, the House Veterans' Affairs Committee recently held a hearing on veterans' burn pit-related health concerns. These political-branch activities, coupled with the Fourth Circuit's decision, illustrate the brilliance of the political question doctrine.

---

[1] On June 29, 2018, the Texas Supreme Court held that the political question doctrine bars a civilian's dog-bite suit against a contractor that supported the U.S. military in Afghanistan by providing explosive-detection dogs. *American K-9 Detection Services, LLC v. Freeman*, No. 15-0932. The contractor argued that one of its defenses at trial would be that the Army defectively designed and constructed the kennel and directed it to use the kennel from which the dog escaped. The state supreme court agreed, holding that "[t]he Army's design decisions would be front and center at trial [and] are unreviewable military decisions because they go to the equipping of the military, constitutionally committed to the federal political branches." Op. at 18. This appears to be the first state supreme court decision applying the political question doctrine in a battlefield contractor suit.

 ISBN 1056 3059