Legal Backgrounder

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Judge's Dismissal of Toxic-Tort Multidistrict Litigation Against War-Zone Contractor Respects US Military Prerogatives

by Lawrence S. Ebner

After almost eight years of consolidated, multidistrict, pretrial proceedings—including massive jurisdictional discovery and a succession of dispositive motions and appeals—Judge Roger W. Titus of the US District Court of the District of Maryland on July 19, 2017 dismissed in its entirety the "*Burn Pit*" toxic-tort multidistrict litigation (MDL).[1] The primary defendant, Kellogg Brown & Root Services, Inc. (KBR), was the US military's principal logistical-services contractor during combat operations in Iraq and Afghanistan between 2003 and 2010.

As the court's 81-page Memorandum Opinion explains, "one of the first decisions made by the military was that, due to the extremely dangerous conditions in these two war zones, the management of waste would have to be accomplished through the use of open burn pits, some operated by the military, and others operated by contactors."[2] The military understood the attendant health risks, but chose to balance those risks "against the greater risk of harm to military and other personnel should other methods of waste management be utilized."[3] Military and civilian personnel serving in proximity to the burn pits, however, suffered illnesses they claimed were caused by smoke coming from open burn pits and/or from drinking water allegedly contaminated by the burn pits.[4] This resulted in an "avalanche of litigation in the federal courts asserting the common question of harm caused by the use of open burn pits."[5]

Aside from the enormous number of potential plaintiffs involved (the MDL encompassed 63 separate complaints, 44 of which were putative nationwide class actions),[6] the *Burn Pit* decision is significant because: (i) the district court recognized and respected the judiciary's constitutionally limited role in cases, including private party damages suits, that implicate the wisdom of combat-related military decisions; and (ii) the decision illustrates the need for highly detailed jurisdictional discovery to support political question and federal-preemption defenses in "battlefield contractor" suits, at least in litigation involving sweeping, generalized, personal-injury claims asserted by a multitude of diverse plaintiffs.

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[1] *In re: KBR, Inc., Burn Pit Litig.*, MDL Case No. 8:09-md-2083-RWT, 2017 WL 3066200; *notice of appeal filed* Aug. 4, 2017.
[2] Mem. Op. at 1.
[3] *Id.* at 1-2.
[4] *Id.* at 2.
[5] *Ibid.*
[6] *Ibid.*

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Jurisdictional Evidence Demonstrated the Plenary Military Control Required for Dismissal

The Memorandum Opinion demonstrates that the legal grounds for dismissal—the political question doctrine and implied preemption under the Federal Tort Claims Act's (FTCA) combatant-activities exception[7]—not only were compelled by, but also predicated upon, the jurisdictional evidence that KBR developed and presented to demonstrate the US military's pervasive control of burn-pit and water-services operations at forward-operating bases (FOBs) in Iraq and Afghanistan. The court indicated that the "scope of discovery was massive ... over 5.8 million pages of documents, including more than 3 million pages of emails and other electronic data, 102,000 pages of award-fee-evaluation documents, and 640,000 pages of contract directives."[8] More than 34 depositions of military personnel and other witnesses also were conducted on jurisdictional questions.[9]

After the completion of the jurisdictional discovery, KBR filed renewed Motions to Dismiss and for Summary Judgment under Federal Rules of Civil Procedure 12(b)(1) and 56.[10] Those motions, and the plaintiffs' opposition, were accompanied by thousands of pages of declarations, contracts, and other exhibits concerning the military's control over KBR's burn-pit and water-services activities.[11] In addition, before ruling on KBR's dispositive motion, the district court conducted "an extensive evidentiary hearing," including live witness testimony from former high-ranking Defense Department officials and military officers.[12]

In its Memorandum Opinion, the court's jurisdictional fact-finding could not have been more emphatic. The court found:

- "*[A]ll of the decisions Plaintiffs challenge were in fact made by the military—not KBR.*"[13]
- "KBR established by overwhelming evidence ... that the military, after balancing all the risks and alternative methods of waste disposal, made the sensitive decision to use burn pits, and only burn pits, at all FOBs in Iraq and Afghanistan" and "*decided where to locate the burn pits on all FOBs.*"[14]
- "[T]he use of open burn pits was a quintessential military decision made by the military, not KBR, and was a decision driven by the exigencies of war."[15]
- "[T]he military *made all of the key decisions* at issue in this case and exercised *direct and plenary control* over KBR's use and operation of burn pits and provision of water services."[16]
- "[D]espite the inability of military personnel in the operational command to give direct orders to KBR ... the military nevertheless retained authority and control over KBR's provision of waste and water services, and KBR was integrated into the military mission and chain of command."[17]

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[7] 28 U.S.C. § 2680(j).
[8] Mem. Op. at 14.
[9] *Ibid.*
[10] After an initial denial, *In re KBR, Inc., Burn Pit Litig.*, 736 F. Supp. 2d 954 (D. Md. 2010), the district court had granted KBR's earlier, pre-discovery motion to dismiss, *In re KBR, Inc., Burn Pit Litig.*, 925 F. Supp. 2d 752 (D. Md. 2013), but on appeal, the Fourth Circuit reversed and remanded, *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014), on the ground that the then-existing factual record was inadequate to support dismissal on political-question or federal-preemption grounds. *See* Mem. Op. at 3-4, 8-12.
[11] Mem. Op. at 35-41.
[12] *Id.* at 20; *see id.* at 21-35 (summarizing evidentiary hearing).
[13] *Id.* at 67 (emphasis in original).
[14] *Id.* at 42, 45 (emphasis in original).
[15] *Id.* at 80.
[16] *Id.* at 41 (emphasis in original).
[17] *Id.* at 53.

These findings, and similar jurisdictional facts, compelled the court to conclude that the *Burn Pit* litigation must be dismissed on political-question and federal-preemption grounds. In reaching that conclusion, the court was bound and guided by the Fourth Circuit's prior opinion in the *Burn Pit* litigation itself,[18] and to some extent by two other Fourth Circuit battlefield-contractor decisions.[19]

Political Question Doctrine

The modern political question doctrine, first articulated by the US Supreme Court in *Baker v. Carr*,[20] deprives federal courts of subject-matter jurisdiction over issues which, *inter alia*, are constitutionally committed to the politically elected branches of the federal government or for which judicially discoverable and manageable standards do not exist. Although the Supreme Court has not yet reviewed the application of the political question doctrine to state-law tort suits against US military battlefield contractors, several US courts of appeals have issued opinions addressing that subject in connection with post-9/11 military operations in Iraq and Afghanistan.[21] In one of the first such cases, *Lane v. Halliburton*, the Fifth Circuit explained that military decision making 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."[22]

In *Burn Pit*, the district court concluded that because "the mission-critical, risk-based decisions surrounding the use and operation of open burn pits ... were *made by the military* as a matter of *military wartime judgment*," and that "[i]n operating burn pits ... KBR was acting at all times under the direct and actual control of the operational and contracting arms of the military," the Plaintiffs' "claims ... must be dismissed as nonjusticiable political questions."[23] The court emphasized that "military judgments governed the planning and execution of virtually every aspect of KBR's waste and water treatment activities," and that "military control over KBR in Iraq and Afghanistan was comprehensive and complete."[24]

The court found that the overwhelming jurisdictional evidence presented by KBR satisfied not only the "military control" factor identified by the US Court of Appeals for the Fourth Circuit for political question purposes, but also the "national defense interests" factor. The court indicated that "national defense interests were not just 'closely intertwined' with the military's decisions governing KBR's conduct—they were at the very heart of every decision made by the military with regard to KBR's waste and water treatment activities."[25] "There is a mountain of evidence in this case showing that the claims here would require the Court to question actual, sensitive judgments made by the military that were being carried out by KBR."[26]

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[18] *See* 744 F.3d 326 (4th Cir. 2014); *supra* n.11.

[19] *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147 (4th Cir. 2016) (suit by Iraqi nationals alleging abusive conduct by US military prison contractors); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011) (suit by Navy Hospital Corpsman alleging that KBR accidentally caused electric shock injury); *see also Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3rd Cir. 2013) (wrongful death suit alleging that KBR negligently caused soldier's accidental electrocution); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (same allegations as *Al Shimari*); *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (personal-injury suit involving overturned, contractor-driven truck in US military-led supply convoy).

[20] 369 U.S. 186, 217 (1962).

[21] *See* Mem. Op. at 55-60 (discussing cases); *see also* Lawrence S. Ebner, *Defending Battlefield Contractors*, For The Defense (Nov. 2013).

[22] 529 F.3d 548, 558 (5th Cir. 2008).

[23] Mem. Op. at 60-61 (emphasis in original).

[24] *Id.* at 61, 62 (internal quotation marks omitted).

[25] *Id.* at 65, 66.

[26] *Id.* at 67.

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Combatant-Activities Preemption

In *Saleh v. Titan Corp.*,[27] the DC Circuit articulated a "battle-field preemption" principle based on the conflict between state-law tort claims against battlefield contractors and the significant federal interests embodied by the FTCA's combatant-activities exception, which bars damages claims against the United States "arising out of the combatant activities of the military ... during time of war."[28] The *Saleh* preemption principle, which the Fourth Circuit adopted during an earlier phase of the *Burn Pit* litigation, states, "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."[29]

On remand from the Fourth Circuit, the district court held that the plaintiffs' claims are preempted under this implied preemption principle because "[t]he overwhelming weight of the evidence shows that KBR was highly integrated into the military's mission."[30] More specifically, "the military and contract documents dictated both the 'what' and the 'how' of KBR's contract performance. … [E]ven if KBR has exercised some limited influence over its operation of waste and waste-water treatment services, the claims would still be preempted because the activities stemmed from military commands and because KBR was fully integrated with the military in performing its mission." [31]

Conclusion

The district court's fact-intensive Memorandum Opinion is a testament to judicial restraint. Founded upon constitutional separation of powers, the political question doctrine, as applied in the military context, renders nonjusticiable any litigation, including private-party personal-injury suits against civilian war-zone support contractors, that cannot be adjudicated without requiring a court to second-guess wartime or combat-related military judgments. As the Fourth Circuit and other federal courts of appeals have recognized, state-law tort claims against war-zone support contractors that were integrated into US military combatant activities are similarly barred under implied-preemption principles. Preemption of such state-law claims protects the same exclusively federal interests underlying the FTCA combatant-activities exception.[32]

The district court recognized and applied these principles in dismissing the *Burn Pit* MDL prior to trial. With the guidance of the Fourth Circuit, the district court exercised restraint in ensuring that there was a robust pretrial factual record supporting and warranting dismissal. As a practical matter, this means that defendants in at least some types of battlefield-contractor suits will have to engage in detailed pretrial factual development before achieving dismissal. That can be a time-consuming and costly endeavor, and may require US military cooperation. The highly undesirable alternative, however, is not only subjecting the military's combat-related judgments to the retrospective scrutiny of civilian courts, but also potentially interfering with future military operations by imposing state-law liability, or the threat of liability, on war-zone support contractors that serve our nation and "have become an essential component of a successful war-time mission."[33]

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[27] 580 F.3d at 9.
[28] 28 U.S.C. § 2680(j).
[29] 580 F.3d at 9.
[30] Mem. Op. at 74.
[31] *Id.* at 75-76.
[32] Judicial restraint concerning US military judgments should not be limited to federal courts. For example, the Texas Supreme Court recently granted review of a battlefield contractor suit that implicates the political question doctrine, combatant-activities preemption, and other threshold legal defenses. *See American K-9 Detection Servs. LLC v. Freeman*, No. 15-0932, *pet. for rev. granted* Sept. 1, 2017.
[33] *Lane v. Halliburton*, 529 F.3d at 554.

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