What the Fourth Circuit Will Address in the Abu Ghraib Case

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Sept. 24, 2015 (published as "Expert Analysis" in Law360)

The Iraq war is still being fought in U.S. courtrooms. Federal courts of appeals and district courts continue to struggle with the fundamental question of whether, or to what extent, government contractors can be held liable under state tort law for injuries and deaths allegedly arising out of the broad range of war-zone support services they performed at the U.S. military's request (e.g., logistical support such as transportation of fuel, ammunition, food, and other supplies; operations & maintenance services at forward operating bases; professional and technology services).

For more than a decade, defense lawyers have vigorously pursued a suite of threshold, pretrial defenses in such "battlefield contractor" cases. Those defenses include federal preemption, derivative sovereign immunity and

the political question doctrine. The U.S. government, which is the real party in interest in these private party suits against military contractors, thus far has successfully dissuaded the U.S. Supreme Court from hearing any of the cases, which continue to percolate in the lower courts.

One long-running suit, involving the notorious Abu Ghraib prison, is now back in the Fourth Circuit for the third time. The plaintiffs are Iraqi citizens who claim that they were abused by government contractor employees who helped the U.S. military interrogate detainees at Abu Ghraib soon after the U.S. invasion in 2003. They are appealing a federal district court's recent dismissal of their damages suit. On June 24, 2015, after eight years of litigation—including two prior appeals to the U.S. Court of Appeals for the Fourth Circuit (the first of which involved the court's en banc review)—Judge Gerald Bruce Lee of the U.S. District Court for the Eastern District of Virginia entered judgment dismissing the suit on the ground that it is nonjusticiable under the political question doctrine. *Al Shimari v. CACI Premier Tech. Inc.*, No. 1:08-cv-00827-GBL-JFA, 2015 WL 4740217 (E.D. Va. June 18, 2015). The Fourth Circuit docketed the current appeal, No. 15-1831, on July 28, 2015.

"The political question doctrine is a 'function of the separation of powers,' and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-equipped to address." *Al Shimari v. CACI Premier Tech. Inc.*, 758 F.3d 516, 531 (4th Cir. 2014) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The political question doctrine is a threshold, jurisdictional defense, which government contractors that provided combat-zone services to the U.S.

military in Iraq and Afghanistan have raised with mixed success when seeking pretrial dismissal of wrongful death, personal injury, and other types of private-party tort suits that sovereign immunity precludes if brought directly against the United States.

Early in 2015, the Supreme Court declined to review three appeals that squarely raised the political question issue in the context of battlefield contractor litigation. *See In re KBR Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014); cert. denied sub nom. *Metzgar v. Kellogg Brown & Root Servs., Inc.*, 135 S. Ct. 1153 (2015); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3rd Cir. 2013), cert. denied, 135 S. Ct. 1152 (2015); *McManaway v. Kellogg Brown & Root Servs., Inc.*, 554 F. App'x 347 (5th Cir. 2014), cert. denied, 135 S. Ct. 1153 (2015).

In *Al Shimari*, the district court, before any discovery was conducted, initially declined to dismiss the suit on political question grounds. A three-judge Fourth Circuit panel reversed, but on rehearing, a divided en banc Fourth Circuit refused, for lack of appellate jurisdiction, to hear CACI's interlocutory appeal of the district court's ruling. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc). The district court then dismissed the suit, holding that it had no jurisdiction to consider the plaintiffs' Alien Tort Statute claims, and that provisional Iraqi law precluded the plaintiffs' common-law tort claims. On appeal, the Fourth Circuit held that Alien Tort Statute jurisdiction was not precluded, but that depending on further factual development, the political question doctrine might bar the litigation. *See Al Shimari v. CACI Premier Tech. Inc.*, 758 F.3d at 530-31, 536.

Referring to its own political question precedent in the battlefield contractor context, the court of appeals explained that the political question doctrine would apply if either of two tests apply: (1) "whether the government contractor was under the 'plenary' or 'direct' control of the military," or, (2) "whether national defense interests were 'closely intertwined' with military decisions governing the contractor's conduct, such that a decision on the merits of the claim 'would require the judiciary to question actual, sensitive judgments made by the military.'" *Id.* at 533-34 (quoting *Taylor v. Kellogg Brown & Root Servs. Inc.*, 658 F.3d 402, 411 (4th Cir. 2011)). The court further indicated that "the critical issue with respect to the question of 'plenary' or 'direct' control is not whether the military 'exercised some level of oversight' over a contractor's activities [but] whether the military clearly 'chose how to carry out these tasks,' rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed." *Id.* at 534 (quoting Burn Pit Litig., 744 F.3d at 339).

On remand, the district court, based on military depositions and contractual documents, found that "the military maintained control over all relevant aspects of Abu Ghraib, including the manner in which interrogations were carried out ... . The military clearly chose how to carry out tasks related to the interrogation mission, while CACI had no discretion in any operational matters." *Al Shimari v. CACI Premier Tech. Inc.*, 2015 WL 4740217, at *9. Thus, the district court held that under the first test described above, the political question doctrine bars the litigation in its entirety. In addition, the district court held that the second test applies because adjudicating the suit "would involve questioning sensitive

military judgments"—specifically, the "debate within the Executive Branch about what were morally appropriate [interrogation] techniques and what could be justified by military necessity." *Id*. at *10.

Now the Fourth Circuit will have the opportunity to review the district court's application of the political question doctrine. As indicated above, that doctrine is one of several pretrial defenses available to government contractors that are subjected to tort suits arising out of the services that they provide to the U.S. military both abroad and domestically.

In *amicus curiae* briefs requested by the Supreme Court in the *Burn Pit* and *Harris* cases cited above, the Solicitor General successfully recommended against the granting of certiorari because of the way that those particular appeals were postured. In those same briefs, however, the solicitor general agreed that the political question doctrine bars suits that would require a court to second-guess military judgments. Further, the solicitor general argued that state tort claims arising out of contractual services performed by war-zone contractors are preempted if a similar claim, filed directly against the United States, would be barred by sovereign immunity under the "combatant activities" exception to the Federal Tort Claims Act's general waiver of sovereign immunity. *See* 28 U.S.C. § 2680(j). The Solicitor General's briefs contended that a broad federal preemption doctrine in battlefield contractor suits would best serve the government's interests of ensuring that the commencement, or even threat, of tort litigation does not interfere with the U.S. military's increasing reliance on government contractors for combat support services.

Combatant activities preemption, the political question doctrine and other battlefield contractor defenses are all compatible. They all help to ensure that contractors which the U.S. military depends upon for vital support services, and which provide those services under military direction, will not be deterred by the threat of private party tort suits. *Al Shimari* affords the Fourth Circuit an additional opportunity to reinforce the viability of the political question defense in tort suits that, if adjudicated, would violate the separation of powers by compelling courts to question the wisdom of military decisions—decisions that the Constitution unequivocally and exclusively assigns to the executive branch.