



5-1-2013

# Bathrooms, Burn Pits, and Battlefield Torts: The Need for a Particularized, Contextual Approach to the Combatant Activities Exception after Saleh and Al Shimari

S. Yasir Latifi

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

## Recommended Citation

S. Y. Latifi, *Bathrooms, Burn Pits, and Battlefield Torts: The Need for a Particularized, Contextual Approach to the Combatant Activities Exception after Saleh and Al Shimari*, 91 N.C. L. REV. 1357 (2013).

Available at: <http://scholarship.law.unc.edu/nclr/vol91/iss4/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

**Bathrooms, Burn Pits, and Battlefield Torts: The Need for a Particularized, Contextual Approach to the Combatant Activities Exception after *Saleh* and *Al Shimari*\***

INTRODUCTION .....1358

I. APPLYING THE FEDERAL TORT CLAIMS ACT TO PRIVATE MILITARY CONTRACTORS.....1364

    A. *The FTCA Preempts Claims Against PMCs, but Does Not Provide for Immunity* .....1364

    B. *The FTCA’s Discretionary Function and Combatant Activities Exceptions Apply to PMCs: Enter Boyle, Koohi, Saleh, and Al Shimari* .....1366

        1. Discretionary Function Exception .....1366

        2. Combatant Activities Exception .....1368

        3. Expanding the Combatant Activities Exception: *Saleh and Al Shimari*.....1370

II. APPLYING SALEH AND AL SHIMARI TO BASIC SUPPORT SERVICES: THE KBR CASES .....1373

    A. *Overview of KBR’s Role with the U.S. Military* .....1373

    B. *The Expansive Approach to the Combatant Activities Exception: Aiello, Harris, In re KBR, Inc., Taylor, and Carmichael* .....1374

    C. *The Narrow Approach to the Combatant Activities Exception: Bixby, McManaway, and Lessin*.....1378

    D. *Divergent Applications of Saleh and Al Shimari* .....1380

        1. Unique Federal Interests and Significant Conflict with State Tort Law.....1380

        2. Combatant Activity.....1380

        3. Military Command Authority .....1381

III. A PARTICULARIZED, CONTEXTUAL APPROACH TO THE COMBATANT ACTIVITIES EXCEPTION .....1382

    A. *Constructing the Framework for a Particularized, Contextual Approach* .....1383

        1. Examining the Breadth and Guidance of the Holdings: *Saleh’s* Limiting Language, Broad Military Command Authority, and Discerning What “Combatant Activity” Means.....1383

---

\* © 2013 S. Yasir Latifi.

2. Competing Interests.....	1386
B. <i>A Way Forward: Inquiring About the PMC Service and the Setting of a Claim</i> .....	1388
C. <i>Why the Particularized, Contextual Approach Makes Sense</i> .....	1390
IV. UTILIZING THIS NEW APPROACH: REASSESSING THE KBR CASES.....	1396
A. <i>Cases Where the Combatant Activities Exception Would Apply: Taylor, Carmichael, and Lessin</i> .....	1396
B. <i>Cases Where the Combatant Activities Exception Would Not Apply: Bixby and McManaway</i> .....	1398
C. <i>Rejecting the Aiello Line of Cases's Broad Reading of the Combatant Activities Exception</i> .....	1399
CONCLUSION .....	1402

#### INTRODUCTION

The facts begin like a common torts exam question: individual *A*, finishing his daily workout, walks into a gym bathroom designed, operated, and maintained by corporation *B*. Individual *A* attempts to use the urinal. It is surrounded by loose floor tiles, which have been, unbeknownst to *A*, recently washed and are therefore slippery. As *A* approaches the urinal, he slips on the loose tiles and falls onto the floor, injuring his back. Shaken, *A* retreats to the showers and turns on the hot water. But due to *B*'s faulty electrical wiring in the bathroom, *A* is severely electrocuted as soon as the hot water touches his skin and suffers extreme burns. Once at the doctor, *A* also discovers that he has been inhaling harmful amounts of dust and toxic particulates into his lungs because of corporation *B*'s careless waste disposal near the gym. After reading these facts, you might wonder whether corporation *B* employs a good defense lawyer.<sup>1</sup>

But add a few more details to this scenario.<sup>2</sup> For one, *A*'s injuries occur on a U.S. military base in Iraq during the recent Iraq War.

---

1. The hypothetical facts are inspired by three cases involving latrine maintenance, electrical wiring services, and waste disposal during the Iraq War. See generally *In re KBR, Inc., Burn Pit Litig. (KBR II)*, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013) (dealing with injuries arising from waste disposal facilities); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 546–47 (W.D. Pa. 2012) (dealing with injuries arising from electrical wiring maintenance); *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 700–01 (S.D.N.Y. 2011) (dealing with injuries arising from latrine services).

2. These additional facts describe the context of the *Aiello*, *Harris*, and *In re KBR, Inc.*, cases, among others. See *KBR II*, 2013 WL 709826, at \*2; *Harris*, 878 F. Supp. 2d at 549; *Aiello*, 751 F. Supp. 2d at 700–01.

Also, corporation *B* is a U.S. contractor in Iraq that provides basic support services, including latrine, electrical, and waste management, to thousands of soldiers and contractors alike across the country. And *B*'s services are executed under military contract and supervision. Before hiring a good personal injury lawyer, *B* could instead argue that any tortious claims against it are preempted under the combatant activities exception<sup>3</sup> found in the Federal Tort Claims Act ("FTCA"),<sup>4</sup> barring the claim because it arises out of "the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>5</sup> Indeed, some courts will agree with *B*.<sup>6</sup>

The potentially favorable outcome for corporation *B* stems from the D.C. Circuit's 2009 decision in *Saleh v. Titan Corp.*,<sup>7</sup> which "dramatically extended"<sup>8</sup> the scope of the FTCA's combatant activities exception. In 2011, under accusations similar to those found in *Saleh*, a Fourth Circuit panel in *Al Shimari v. CACI International, Inc.*<sup>9</sup> followed the D.C. Circuit's reasoning, holding that the combatant activities exception to the FTCA preempted tort claims arising out of the alleged torturing of Iraqi citizens by private military contractors ("PMCs")<sup>10</sup> serving as interrogators for the U.S. military.<sup>11</sup> At bottom, both courts reasoned that the FTCA's combatant activities exception preempted a plaintiff's claims against a contractor during wartime if "a private service contractor [was] integrated into *combatant activities* over which the military retain[ed]

---

3. See 28 U.S.C. § 2680(j) (2006) (stating that no tort claims may proceed against the United States government "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").

4. Federal Tort Claims Act, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified as amended in scattered sections of 28 U.S.C.).

5. 28 U.S.C. § 2680(j).

6. See *infra* Part II.B. (discussing *Aiello, Harris, In re KBR, Inc.*, and other cases that have recently applied the combatant activities exception).

7. 580 F.3d 1 (D.C. Cir. 2009).

8. *Taylor v. Kellogg Brown & Root Servs., Inc.*, Civil No. 2:09cv341, 2010 WL 1707530, at \*8 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010), *aff'd in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011).

9. 658 F.3d 413 (4th Cir. 2011), *vacated on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012).

10. This Comment refers to all military contractors as PMCs. For a more specific breakdown of the various kinds of PMCs, see Huma T. Yasin, *Playing Catch-up: Proposing the Creation of Status-Based Regulations to Bring Private Military Contractor Firms Within the Purview of International and Domestic Law*, 25 EMORY INT'L L. REV. 411, 445-64 (2011) (grouping PMCs into six different categories: military provider firms, military security or defense firms, military intelligence firms, military consultant firms, military logistic firms, and military support firms).

11. *Al Shimari*, 658 F.3d at 420.

*command authority*.”<sup>12</sup> To be sure, courts had previously used some of the exceptions found in the FTCA to bar individuals’ claims against PMCs.<sup>13</sup> But courts had only rewarded to PMCs the FTCA’s combatant activities exception in the realm of products liability;<sup>14</sup> *Saleh* and *Al Shimari* changed that record. In their aftermath, both cases leave many open questions for future PMC cases with different facts, including our aforementioned hypothetical.<sup>15</sup>

Of immediate concern is the dearth of guidance that both cases supply for a vast swathe of PMCs who have assisted the military during America’s recent wars—namely, PMCs providing basic support services, which include functions such as dining and laundry services, transportation, and general military base maintenance.<sup>16</sup> Neither the D.C. Circuit nor the Fourth Circuit clarifies if these kinds of basic support services embody “combatant activities.”<sup>17</sup> Nor do the courts address what kind of relationship would need to exist between military commanders and basic support PMCs that would indicate a sufficient level of military “command authority” over the PMCs.<sup>18</sup>

---

12. *Saleh*, 580 F.3d at 9 (emphasis added); see also *Al-Shimari*, 658 F.3d at 420 (“We hold that . . . where a civilian contractor is integrated into wartime combatant activities over which the military broadly retains command authority, tort claims arising out of the contractors’ engagement activities are preempted.” (citation omitted)).

13. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–13 (1988) (preempting state tort law claim against PMC due to the “discretionary function” exemption to the FTCA, found in 28 U.S.C. § 2680(a)); see also *infra* Part I.B.1 (outlining how the “discretionary function” and “combatant activities” exceptions have been applied to contractors before *Saleh* and *Al Shimari*).

14. See *Koohi v. United States*, 976 F.2d 1328, 1336–37 (9th Cir. 1992) (holding that negligence and design defect claims brought against the United States and an airline manufacturer were preempted due to the combatant activities exception); *Flanigan ex. rel. Flanigan v. Westwing Techs., Inc.*, 648 F. Supp. 2d 994, 1007 (W.D. Tenn. 2008) (finding that plaintiff’s decedent was barred from asserting tort claims against designer and manufacturer of military helicopter and helmet under combatant activities exception); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1492 (C.D. Cal. 1993) (finding that plaintiffs’ decedents’ product liability claims against missile manufacturer were preempted by FTCA’s discretionary function and combatant activities exceptions).

15. See *supra* notes 1–4 and accompanying text.

16. See MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN AFGHANISTAN AND IRAQ 15 (2011) (noting that, as of March 2011, sixty-one percent of all Defense Department contractors offered “base support” services such as “maintaining the grounds, running dining facilities, and performing laundry services”).

17. See *infra* Part II.D.2.

18. See *infra* Part II.D.3.

A series of recent cases involving the U.S. military's largest contractor in Afghanistan and Iraq,<sup>19</sup> Kellogg, Brown & Root Services, Inc. ("KBR"),<sup>20</sup> has already brought these ambiguities to the fore. Issues have included (1) whether basic support services should ever be considered as supporting "combatant activities";<sup>21</sup> (2) whether attacks on a military base should weigh in favor of viewing PMCs as supporting "combatant activities";<sup>22</sup> (3) whether "command authority" exists when PMCs operate under an open-ended services contract<sup>23</sup> or with military personnel oversight,<sup>24</sup> and (4) whether

---

19. See Brief of Kellogg, Brown & Root Servs., Inc. as Amicus Curiae in Support of Appellants and Reversal at 1, *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011) (No. 09-1335).

20. KBR is the wholly owned subsidiary of its parent corporation, KBR, Inc. See Amended Complaint at 5, *KBR, Inc. v. KBR Equity Partners, LLC*, Civil Action No. 1:11-cv-21257 (S.D. Fla. dismissed Nov. 28, 2011), 2011 WL 4592964, ¶ 18. Prior to 2007, KBR itself was a subsidiary of Halliburton, see Yasin, *supra* note 10, at 461, and has frequently been known in the past by its full name of "Kellogg, Brown & Root," which is why earlier cases name the defendant in this way. To avoid confusion, this Comment will use "KBR" when discussing past, present, and future cases involving the contractor.

21. *Compare Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713–14 (S.D.N.Y. 2011) (categorizing latrine services as supporting combatant activities), with *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 434 (W.D. Pa. 2009) (finding electrical wiring maintenance outside the scope of the combatant activities exception), *appeal dismissed*, 618 F.3d 398 (3d Cir. 2010).

22. *Compare Aiello*, 751 F. Supp. 2d at 713 (supporting its finding that PMC was part of combatant activities in part because of military base's location in war zone and three mortar and rocket attacks on the base at time of plaintiff's injury), and *Taylor v. Kellogg Brown & Root Servs., Inc.*, Civil No. 2:09cv341, 2010 WL 1707530, at \*10 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010) (noting that monthly mortar fire on military base supports a PMC's claims of conducting maintenance activities in connection with hostilities), *aff'd in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011), with *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1246 (D. Or. 2010) (finding that, although an Iraqi water plant was "[u]ndoubtedly a dangerous place to work," PMC's services at the plant were still not considered supporting combatant activities since its services were used to support the restoration of Iraq's oil-production capacity, not actual hostilities).

23. KBR itself provided services under the Logistics Civil Augmentation Program ("LOGCAP"), which costs the military billions of dollars. See Sharon Weinberger, Ctr. for Pub. Integrity, *Windfalls of War: KBR, the Government's Concierge*, iWATCH NEWS (Aug. 30, 2011, 6:00 AM), <http://www.publicintegrity.org/2011/08/30/5990/windfalls-war-kbr-governments-concierge> (noting that KBR's work with the U.S. Army under the LOGCAP has totaled over thirty-seven billion dollars spent in the past decade).

24. This kind of oversight is led by a group of military base personnel called the "Mayor's Cell." *Compare Aiello*, 751 F. Supp. 2d at 714–15 (indicating that PMCs were integrated into military's command authority by way of their relationship with the "Mayor's Cell" who oversaw the military base), with *In re KBR, Inc., Burn Pit Litig. (KBR I)*, 736 F. Supp. 2d 954, 978 (D. Md. 2010) (finding that PMC's purported breach of the LOGCAP contract makes it "unlikely that Defendants were so integrated into the military chain of command" at the military base), *modified*, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

military “command authority” dissolves if a PMC acts negligently on the battlefield.<sup>25</sup>

With PMCs cast more prominently in present-day American combat and operational roles,<sup>26</sup> and given the need to curtail many tort claims that would otherwise interfere with the important goals of the United States during wartime,<sup>27</sup> *Saleh* and *Al Shimari* may have justifiably expanded the types of PMC actions covered by the combatant activities exception beyond the products liability context.<sup>28</sup> But amplifying this exception raises concerns about how broadly preemption will affect a host of otherwise viable tort claims, particularly claims involving injuries to American military personnel.<sup>29</sup>

This Comment argues that courts should analyze a PMC’s basic support services during wartime with a *particularized, contextual approach* in defining what comprises supporting “combatant activities” under the FTCA that is “both necessary to and in direct connection with actual hostilities.”<sup>30</sup> This approach flows from *Saleh’s* and *Al Shimari’s* reasoning, particularly *Saleh’s* limiting language<sup>31</sup> and the competing interests of expanding or narrowing the scope of the combatant activities exception.<sup>32</sup> In PMC-related tort claims during wartime, this approach implores courts to focus on two dimensions, either of which could allow a PMC to qualify for the

---

25. *Compare Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1283–84 (11th Cir. 2009) (holding that the military exercised “complete control” over military convoys by way of the military orders and regulations imposed on PMCs driving the vehicles), *with Lessin v. Kellogg, Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at \*4 (S.D. Tex. June 12, 2006) (observing that military decision-making is not implicated where the PMC itself provided a convoy service).

26. *See infra* notes 217–22 and accompanying text.

27. *See Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 419–20 (4th Cir. 2011) (“The uniquely federal interest in conducting and controlling the conduct of war . . . is simply incompatible with state tort liability in that context.”), *vacated on reh’g en banc*, 679 F.3d 205 (4th Cir. 2012); *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) (“Allowance of suits [against contractors] will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.”).

28. For the earlier cases invoking the combatant activities exception only in the products liability context, see *supra* note 14 and accompanying text.

29. This is not to say, of course, that other lives lost on the battlefield are less important, but that injuries to those fighting on the same side of a war effort may give Americans greater pause. *See Getz v. Boeing Co.*, No. C 07-06396 CW, 2009 WL 636039, at \*5 (N.D. Cal. Mar. 10, 2009) (criticizing the expansion of the combatant activities exception to injuries suffered by American servicemen and women).

30. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

31. *See infra* Part III.A.1.

32. *See infra* Part III.A.2.

combatant activities exception: (1) by analyzing how the PMC *service* itself was used during the time of the claim and its connection to combatant activities; and (2) by analyzing where the specific *setting* of a particular claim arose on the battlefield and its connection to combatant activities.

It is not enough under this approach to simply resolve that a PMC service originated at a large military base, for instance, to fall under the combatant activities exception. This approach does not take the dangers at military bases lightly. So the contractor-defendant, if unsuccessful under both this approach's "setting" and "service" prongs, has the heavy burden of demonstrating either (1) that attacks on a base occurred at the very location involved in the claim with some frequency or intensity, or (2) that the base itself was so directly connected to hostilities that it would be unreasonable not to apply the combatant activities exception.

This Comment proceeds in four Parts. Part I gives an overview of the FTCA and how it has applied to PMCs over the years, most recently with *Saleh* and *Al Shimari*. Part II discusses current cases involving KBR that have applied the combatant activities exception in conflicting ways. Part II then assesses where the KBR cases leave the various components of the *Saleh* and *Al Shimari* holdings. Part III suggests a way forward in analyzing these and future basic support PMC cases, and ultimately recommends a particularized, contextual approach that re-examines *Saleh's* and *Al Shimari's* holdings. Part IV applies these new understandings of the combatant activities exception to the recent KBR cases discussed in Part II and evaluates whether the courts correctly decided outcomes of recent and ongoing litigation. Under this Comment's approach, Part IV finds that in three KBR cases since *Saleh*—involving the latrine, electrical, and waste services mentioned in the above hypothetical<sup>33</sup>—courts wrongly invoked the combatant activities exception. The remaining cases properly extended or excluded the combatant activities exception to KBR under the particularized, contextual approach.

---

33. See *supra* notes 1–6 and accompanying text.



## I. APPLYING THE FEDERAL TORT CLAIMS ACT TO PRIVATE MILITARY CONTRACTORS<sup>34</sup>

### A. *The FTCA Preempts Claims Against PMCs, but Does Not Provide for Immunity*

Enacted in 1948,<sup>35</sup> the FTCA waives the United States's sovereign immunity in certain tort claims.<sup>36</sup> The Act allows private citizens, including foreign nationals,<sup>37</sup> to bring claims against the

---

34. At the outset, it should be noted that the FTCA is only one of several ways that PMCs can attempt to avoid liability for certain tort claims. A more extended discussion that addresses the merits of each of these alternatives separately is beyond the scope of this Comment, but other potential defenses include: (1) the political question doctrine, *see, e.g., Baker v. Carr*, 369 U.S. 186, 211–37 (1962) (discussing justiciability and the six-factor test used today to determine if a political question bars courts from hearing certain claims); *see also Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring in judgment) (citing *Baker*, 369 U.S. at 217) (synthesizing *Baker's* six-factor analysis into three major questions); (2) derivative sovereign immunity, *see infra* notes 41, 47; (3) law of war immunity, *see Saleh v. Titan Corp.*, 580 F.3d 1, 10–11 (D.C. Cir. 2009); and, if the tort claims involve a civilian contractor suing his employer, (4) immunity afforded by the Defense Base Act, *see* 42 U.S.C. §§ 1651–1654 (2006) (precluding individual contractor employees from asserting negligence claims against their employer for injuries arising out of performance of a government contract outside of the United States); *see also KBR I*, 736 F. Supp. 2d 954, 956 n.2 (D. Md. 2010) (discussing the Defense Base Act), *modified*, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

For more analysis about the merits of using the political question doctrine in cases involving PMCs, *see generally* 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 (2010) (discussing the varying application of political question doctrine in PMC cases and recommending a three-pronged inquiry where courts may better assess if a PMC should be afforded protection under the doctrine); Kristen L. Richer, Note, *The Functional Political Question Doctrine and the Justiciability of Employee Tort Suits Against Military Service Contractors*, 85 N.Y.U. L. REV. 1694 (2010) (discussing the two primary ways that courts have applied the doctrine to PMCs, what the author refers to as the “justiciable-as-is” and “absolutist” approaches).

For more information on the merits of using law of war immunity with PMCs, *see generally* John F. O'Connor, *Contractor Tort Immunity Under the Law of Military Occupation*, 14 UCLA J. INT'L L. & FOREIGN AFF. 367 (2009) (arguing for the use of a law of war immunity for PMCs involving in wartime activities).

35. The Federal Tort Claims Act was originally the short title of Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812. Title IV of the Legislative Reorganization Act of 1946 was repealed and reenacted in scattered sections of Title 28. Pub. L. No. 80-773, 62 Stat. 869 (1948) (current version at 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2671–2680 (2006)).

36. *See KBR I*, 736 F. Supp. 2d at 963 (“[T]he United States as a sovereign is immune from suit except under those limited circumstances in which it has waived that immunity. . . . [T]he United States waived its immunity to tort suits under certain conditions and subject to the exceptions set forth in the FTCA.” (citations omitted)).

37. Foreign nationals may be able to bring FTCA actions in U.S. federal courts based on federal question jurisdiction, diversity jurisdiction, or the Alien Tort Statute. *See* 28 U.S.C. § 1331 (2006) (federal question); *id.* § 1332(a)(2), (3) (2006 & Supp. 2011) (diversity); *id.* § 1350 (2006) (Alien Tort Statute).

government in federal courts.<sup>38</sup> There are exceptions found in the FTCA, however, that reserve the United States's sovereign immunity in certain tort claims and effectively bar individuals from bringing suit in those instances.<sup>39</sup>

Importantly, the statute does *not* extend immunity to contractors.<sup>40</sup> Thus, contractors cannot make claims of derivative sovereign immunity<sup>41</sup> under the FTCA's exceptions.<sup>42</sup> Yet courts have extended some of the FTCA's exceptions to PMCs in such a way that, depending on the facts, *preempts* certain state tort law claims<sup>43</sup> against a PMC if the state tort law<sup>44</sup> is found to "disturb, interfere with, or seriously compromise the purposes of the [FTCA's exceptions]."<sup>45</sup>

Practically, the difference between a contractor's successful use of derivative sovereign immunity or federal preemption leads to the

38. See 28 U.S.C. § 1346(b)(1) (2006 & Supp. 2011) ("[D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . 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.").

39. See *id.* § 2680(a)-(n) (2006) (precluding liability in a range of areas, including claims relating to the transmission of postal matter, certain collections of taxes, and the fiscal operations of the Department of the Treasury).

40. See *id.* § 2671 ("[T]he term 'Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but *does not include any contractor with the United States.*" (emphasis added)).

41. "Derivative sovereign immunity protects agents of the sovereign from liability for carrying out the sovereign's will." *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 736 (D. Md. 2010), *rev'd sub nom.* *Al-Quraishi v. L-3 Servs.*, 657 F.3d 201 (4th Cir. 2011), *vacated on reh'g en banc sub nom.* *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012).

42. See *KBR I*, 736 F. Supp. 2d 954, 964 (D. Md. 2010), *modified*, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

43. The Constitution's Supremacy Clause permits federal laws to preempt state laws in certain circumstances. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

44. Note that there still remains a threshold question about which country or state's choice-of-law principles apply in the context of alleged injuries occurring in foreign countries, but this discussion falls beyond the scope of this Comment. For an idea of how complicated choice-of-law principles can become in wartime suits, see generally *Harris v. Kellogg, Brown & Root Servs., Inc.*, 796 F. Supp. 2d 642 (W.D. Pa. 2011) (denying PMC's motion to apply Iraqi law in proceedings relating to injuries sustained by plaintiff's decedent while stationed in Iraq).

45. *City of Morgan City v. S. La. Elec. Co-op. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994). *Morgan City* also gives a good overview of the ways the federal government may preempt state law. See *id.* at 321-22.

same result for an individual plaintiff—the plaintiff’s claim is dismissed. The difference is more important for contractors, however. They could still find themselves subject to criminal liability or other punitive harm, provided that only private citizens’ tort claims are preempted,<sup>46</sup> and courts do not grant immunity to the contractors on other grounds.<sup>47</sup>

*B. The FTCA’s Discretionary Function and Combatant Activities Exceptions Apply to PMCs: Enter Boyle, Koochi, Saleh, and Al Shimari*

1. Discretionary Function Exception

Two specific FTCA exceptions have been extended to PMCs. The first is the discretionary function exception to the FTCA.<sup>48</sup> The exception, in part, states that private citizens cannot bring a tort suit for any claim “based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty . . . whether or not the discretion involved be abused.”<sup>49</sup> The Supreme Court’s seminal decision in *Boyle v. United Technologies Corp.*<sup>50</sup> first brought contractors under the guise of the FTCA by using the discretionary function exception.<sup>51</sup> This approach, which preempts state tort law

---

46. See Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10) (2006 & Supp. 2009) (imposing liability under the UCMJ for those “persons serving with or accompanying an armed force in the field” during a “declared war or a contingency operation”); 18 U.S.C. § 7(9)(A) (2006) (extending the United States’s special maritime and territorial jurisdiction to “the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States” such that civilian contractors in these areas could be held liable); 18 U.S.C. §§ 2340–2340A (2006) (imposing liability for Americans who commit or attempt to commit torture); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006) (imposing liability for armed forces personnel and U.S. nationals who commit war crimes, including grave breaches of Common Article 3 of the Geneva Convention); Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261(a)(1) (2006) (imposing liability for those “employed by or accompanying the Armed Forces outside the United States” for conduct that “would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States”).

47. For a useful discussion of the ways a contractor could assert derivative sovereign immunity, see *KBR I*, 736 F. Supp. 2d at 963–74.

48. See 28 U.S.C. § 2680(a) (2006).

49. *Id.* (emphasis added).

50. 487 U.S. 500 (1988).

51. This does not mean that contractors now have the full protection of all of the FTCA’s exceptions. Rather, courts have determined that only the discretionary function exception (and, in some jurisdictions, the combatant activities exceptions) apply to contractors under the appropriate circumstances. See *supra* notes 13–14 and accompanying text. As the *Boyle* Court first indicated, “It makes little sense to insulate the Government

claims, is now widely known as the “government contractor defense.”<sup>52</sup>

In *Boyle*, the Court held that the FTCA’s discretionary function exception preempted a wrongful death claim against a contractor<sup>53</sup> who the U.S. government hired to manufacture helicopter escape hatches—one of which was alleged to have been defectively designed and repaired, ultimately leading to a pilot’s drowning.<sup>54</sup> To reach this result, the Court first noted that contractors could be immunized from suit even in lieu of any contractor-specific legislation.<sup>55</sup> The Court then proffered a two-step preemption analysis to determine if the case against the contractor would be barred.

First, the Court asked if an area involving “uniquely federal interests”<sup>56</sup> was implicated with the issue at bar;<sup>57</sup> it found such interests were present in *Boyle*.<sup>58</sup> In its second step, the Court asked whether there was a “significant conflict” between the state law and the related federal policy or interest.<sup>59</sup> Justice Scalia, writing for the majority, placed this potential conflict as between state tort law and the discretionary function exception of the FTCA.<sup>60</sup> The Court ultimately held that this exception applied to the contractor in *Boyle* and that the state tort laws involved would significantly conflict with

---

against financial liability” when it conducts an activity by itself, “but not when it contracts” for those same services. *See Boyle*, 487 U.S. at 512.

52. *See, e.g., KBR I*, 736 F. Supp. 2d at 965.

53. *See Boyle*, 487 U.S. at 512–13.

54. *Id.* at 502 (describing how the pilot crashed his helicopter into the ocean, alive at that point, but was then unable to remove himself from the escape hatch and ultimately drowned).

55. *See id.* at 504.

56. *Id.*

57. *See id.* (asking whether these uniquely federal interests are “so committed . . . to federal control that state law is preempted and replaced . . . by the courts—so-called ‘federal common law’”).

58. *See id.* at 507 (noting that U.S. contract obligations and pricing concerns would be implicated if contractors were subject to greater liability).

59. *See id.*

60. *See id.* at 509–12 (rejecting the use of the *Feres* Doctrine as the limiting principle for finding a “significant conflict” here, as the Fourth Circuit had done, noting this produces results both “too broad and . . . too narrow”). The *Feres* Doctrine, as it is now known, prevents military service members from suing the government to recover damages for injuries sustained in the course of military service. *Feres v. United States*, 340 U.S. 135, 146 (1950); *see also Boyle*, 487 U.S. at 510 (describing the *Feres* Doctrine). Before the Supreme Court heard the *Boyle* case, the Fourth Circuit used *Feres* to mark a “significant conflict” between federal and state law and policy interests since the *Feres* doctrine would normally bar claims like this if military personnel were directly trying to sue the government. *See id.* at 509–10 (citing *Tozer v. LTV Corp.*, 792 F.3d 403 (4th Cir. 1986)).

this exception.<sup>61</sup> Recognizing that this two-step analysis could displace many viable claims against PMCs,<sup>62</sup> the Court limited the reach of its analysis by holding that the discretionary function exception preempted claims arising out of design defects against manufacturers only when contractors gained approval from the federal government for their design, adhered to the specifications, and properly warned about the design risks involved.<sup>63</sup> The contractor in *Boyle* met all of these elements.<sup>64</sup>

## 2. Combatant Activities Exception

Courts have also conferred a second FTCA exception on PMCs: the combatant activities exception. Flowing from *Boyle*'s two-step reasoning, but separate from the government contractor defense,<sup>65</sup> a court would need to find uniquely federal interests involved in a case and then judge if a state tort law would be in "significant conflict" with the FTCA's combatant activities exception in order for a contractor to rightly fit within this exception.<sup>66</sup> Generally, the exception bars tort claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>67</sup>

While a few courts have narrowly construed what qualifies as a combatant activity,<sup>68</sup> most others have followed the approach outlined in *Johnson v. United States*<sup>69</sup> and ruled that combatant activities include "not only physical violence, but activities both necessary to and in direct connection with actual hostilities."<sup>70</sup> In

---

61. See *Boyle*, 487 U.S. at 511 (explaining the detailed level of considerations that federal government made in its design specifications with the contractor, and that a tort suit would involve second-guessing of these actions).

62. See *id.* at 512–13 (outlining three steps to appropriately balance the "scope of displacement" between viable tort claims and "protect[ing] discretionary functions").

63. See *id.*

64. See *id.*

65. The government contractor defense only refers to the preempting of tort claims under the FTCA's discretionary function exception. See *KBR I*, 736 F. Supp. 2d 954, 965 (D. Md. 2010), modified, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

66. See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1, 6–8 (D.C. Cir. 2009).

67. 28 U.S.C. § 2680(j) (2006).

68. See, e.g., *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) (determining that an "exercise of physical force" is needed to qualify as a combatant activity).

69. 170 F.2d 767 (9th Cir. 1948).

70. *Id.* at 770; see also Brief for the United States as Amicus Curiae at 18–19, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (2012) (Nos. 09-1335, 10-1891, 10-1921) ("[D]istrict court decisions are generally consistent with the Ninth Circuit's [combatant activities] standard in *Johnson* . . .").

addition, courts have not read the exception to require a formal congressional declaration of war<sup>71</sup> for “purposes of domestic tort law.”<sup>72</sup>

Prior to *Saleh* and *Al Shimari*, a limited set of products liability cases used the exception, beginning in the Ninth Circuit with *Koohi v. United States*.<sup>73</sup> In *Koohi*, a U.S. warship using an air defense system designed by a defense manufacturer mistakenly shot down travelers aboard an Iranian passenger plane during the Iraq-Iran “tanker war.”<sup>74</sup> The Ninth Circuit held that the combatant activities exception preempted the negligence and design defect claims that the plaintiffs, who were heirs of the decedents, brought against the United States and the PMCs.<sup>75</sup> In reaching this conclusion, the Ninth Circuit painted the depth of the combatant activities exception in broad strokes:

The combatant activities exception applies whether . . . forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be “smart” or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other words, it simply does not matter for purposes of the “time of war” exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts. Thus, for purposes of liability under the FTCA, . . . the only question that need be answered is whether the challenged action constituted combatant activity during time of war.<sup>76</sup>

Given the wide reach of the combatant activities exception outlined in *Koohi*, many courts have either criticized it as an

---

71. See U.S. CONST. art. 1, § 8, cl. 11 (“[The Congress shall have Power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”); *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992) (noting that in not requiring a formal declaration of war in order for the combatant activities exception to apply, the court was “strongly influenced by the fact that in modern times hostilities have occurred without a formal declaration of war far more frequently than following a formal pronouncement”).

72. *Koohi*, 976 F.2d at 1335.

73. 976 F.2d 1328.

74. See *id.* at 1335.

75. See *id.*

76. *Id.* at 1335–36.

unfounded expansion of *Boyle's* reasoning<sup>77</sup> or refused to extend the exception in non-products liability cases.<sup>78</sup>

### 3. Expanding the Combatant Activities Exception: *Saleh* and *Al Shimari*

The D.C. Circuit's *Saleh v. Titan Corp.*<sup>79</sup> decision in 2009 and, two years later, a Fourth Circuit panel's decision in *Al Shimari v. CACI International, Inc.*,<sup>80</sup> adopted a broader reading of the combatant activities exception. Both *Saleh* and *Al Shimari* emerged from the same set of facts: Iraqi nationals alleged that PMCs abused and tortured them at Iraq's infamous Abu Ghraib prison.<sup>81</sup> Defendants were Titan Corporation ("Titan") and CACI International ("CACI"), PMCs that provided interpreters and interrogators who worked in concert with military personnel.<sup>82</sup> Accusations against the PMCs included that their personnel beat

---

77. See *Getz v. Boeing Co.*, No. C 07-06396 CW, 2009 WL 636039, at \*5-6 (N.D. Cal. Mar. 10, 2009) (criticizing two earlier district court cases, *Flanigan ex rel. Flanigan v. Westwind Techs.*, 648 F. Supp. 2d 994 (W.D. Tenn. 2008) and *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), that "expanded the doctrine" of when to use the combatant activities exception outlined in *Koochi*); *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) ("Until Congress directs otherwise, private, non-employee contractors are limited to the government contractor defense and *Boyle's* preemption analysis. Unless they qualify as employees or agents of the Government, private contractors may not bootstrap the Government's sovereign immunity."); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1379 (N.D. Ga. 2006) ("*Koochi* represents an expansion of the holding in *Boyle* that the Supreme Court may or may not have intended.").

78. See, e.g., *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005) (finding that there must be a claim relating to defective products before the combatant activities exception can possibly apply to the defendants).

79. 580 F.3d 1 (D.C. Cir. 2009).

80. 658 F.3d 413 (4th Cir. 2011), *vacated on reh'g en banc*, 679 F.3d 205, 212 (4th Cir. 2012). The very day *Al Shimari* was decided, the same Fourth Circuit panel released another decision. See *Al Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), *vacated on reh'g en banc sub nom.*, *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 212 (4th Cir. 2012). The Fourth Circuit panel fully explained its reasoning about using the combatant activities exception in *Al Shimari*, and its holding also applied to *Al Quraishi*. See *Al Quraishi*, 657 F.3d at 203. As such, this Comment will only refer to the *Al Shimari* case when assessing the Fourth Circuit's reasoning. Regardless, *Al Quraishi* is distinguished from *Al Shimari* and *Saleh* in two ways. First, Titan (now known as L-3 Services) interpreters did not contest the fact that they were present in the room when alleged abusive interrogations were taking place. See *id.* at 202. Second, Iraqi nationals brought suit from over twenty prisons in Iraq that included Titan workers, not just Abu Ghraib. See *id.*

81. See generally Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42 (discussing U.S. officials' abuse of prisoners held at Abu Ghraib).

82. See *Al Shimari*, 658 F.3d at 416; *Saleh*, 580 F.3d at 2.

prisoners continuously, released attack dogs in the prison, and caused the death of at least one detainee.<sup>83</sup>

Each court used *Boyle*'s two-step preemption analysis to reach its conclusions. Following *Boyle*'s first step, as discussed more fully in *Al Shimari*, the uniquely federal interests involved in these Abu Ghraib cases were numerous.<sup>84</sup> The Fourth Circuit panel first highlighted the probability of greater costs to the government for using contractors during combat operations without greater liability protection.<sup>85</sup> The panel next expressed disquiet at trying to conduct civil proceedings in the middle of a war, which could likely involve removing military personnel from the battlefield to resolve tort disputes in court<sup>86</sup> and stifling the government's use of intelligence gathering techniques.<sup>87</sup>

In step two of their *Boyle*-based analyses, both courts found a "significant conflict" between the combatant activities exception and local tort law.<sup>88</sup> In using the combatant activities exception instead of *Boyle*'s government contractor defense, the D.C. Circuit noted that the conflict between state law and the combatant activities exception relates to the "imposition *per se*" of tort law on the battlefield.<sup>89</sup> As first noted in *Koohi*, the D.C. Circuit underscored the point that the "very purposes of tort law . . . conflict with the pursuit of warfare"<sup>90</sup> and that "battle-field preemption"<sup>91</sup> of plaintiffs' tort claims was necessary.

Both circuit courts also espoused *Boyle*'s distress over the "scope of displacement"<sup>92</sup> of viable tort law claims against the interests

83. See *Saleh*, 580 F.3d at 18–19 (Garland, J., dissenting).

84. The *Saleh* court noted that there was no dispute between the parties that uniquely federal interests were involved, and so did not focus on this step of the analysis. See *id.* at 6 (majority opinion).

85. *Al Shimari*, 658 F.3d at 418.

86. See *id.*

87. See *id.*

88. At this point in both court proceedings, choice-of-law issues had not been resolved. The D.C. Circuit, in particular, appeared skeptical about whether local tort law would apply if the claim moved forward. See *Saleh*, 580 F.3d at 9 ("[W]e are still puzzled at what interest D.C., or any state, would have in extending its tort law onto a foreign battlefield."); see also *supra* note 44 (noting the extent of complications involving choice-of-law principles in wartime suits).

89. *Saleh*, 580 F.3d at 7; see also *Koohi v. United States*, 976 F.2d 1328, 1334–35 (9th Cir. 1992) (noting that the three main principles of tort law are contrary to wartime actions—namely, incentivizing the actor to be careful, providing remedies for innocent victims of wrongful conduct, and punishing people for their wrongdoings).

90. *Saleh*, 580 F.3d at 7.

91. *Id.*

92. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).



embedded in the combatant activities exception.<sup>93</sup> To that end, the D.C. Circuit, and later the Fourth Circuit, held that, “[d]uring 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.”<sup>94</sup> The cases ultimately held that Titan and CACI were integrated in combatant activities in such a way. The contractors from both companies worked “side by side in questioning detainees,”<sup>95</sup> and followed purported guidelines from the Secretary of Defense about “aggressive interrogation techniques.”<sup>96</sup> Alternatively, the D.C. Circuit also held the plaintiffs’ claims preempted because the Constitution exclusively allocates war powers to the federal government.<sup>97</sup>

Recently, the Fourth Circuit, sitting en banc, vacated the Fourth Circuit panel’s *Al Shimari* opinion.<sup>98</sup> It held that the Fourth Circuit appeal should not have been heard in the first place under the collateral order doctrine.<sup>99</sup> The en banc panel remanded the case to the district court for further proceedings.<sup>100</sup> KBR will presumably renew its original motions to dismiss, including dismissal based on the combatant activities exception.<sup>101</sup> Still, the Fourth Circuit panel’s

---

93. See *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 420 (4th Cir. 2011), *vacated on reh’g en banc*, 679 F.3d 205, 212 (4th Cir. 2012); *Saleh*, 580 F.3d at 8.

94. *Saleh*, 580 F.3d at 9 (emphasis added); see also *Al Shimari*, 658 F.3d at 420 (“We hold that under these circumstances, where a civilian contractor is integrated into wartime combatant activities over which the military broadly retains command authority, tort claims arising out of the contractors’ engagement in such activities are preempted.”).

95. *Al Shimari*, 658 F.3d at 418.

96. *Id.* at 416 (noting that, at one point, it became unclear which techniques remained authorized by the Secretary of Defense).

97. *Saleh*, 580 F.3d at 11. A closer examination of the constitutional preemption analysis in *Saleh* falls outside the scope of this Comment.

98. See *Al Shimari*, 679 F.3d at 212.

99. See *id.* at 213 (“[T]he only way we may be entitled to review the orders on [this] appeal is if they are among ‘that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.’” (citations omitted)); see also *id.* at 212–14 (discussing the collateral order doctrine in this case).

100. See *id.* at 224.

101. A similar scenario occurred in *Harris v. Kellogg, Brown & Root Services, Inc.*, 878 F. Supp. 2d 543 (W.D. Pa. 2012). The trial court first denied KBR’s motions to dismiss for lack of subject-matter jurisdiction. *Id.* at 566–67. The Third Circuit then rejected KBR’s appeal under the collateral order doctrine and remanded to the trial court for discovery proceedings. See *id.* at 566–67. After discovery, KBR renewed its appeals to dismiss for lack of subject-matter jurisdiction. See *id.* at 546–47. This time, the trial court granted the motion to dismiss on both political question and combatant activities exception grounds. See *id.* at 548.

reasoning is incredibly useful since it presents a potential analytical framework for Fourth Circuit district courts—or another Fourth Circuit panel—to use in future combatant activities exception cases.<sup>102</sup>

## II. APPLYING *SALEH* AND *AL SHIMARI* TO BASIC SUPPORT SERVICES: THE KBR CASES

A host of ongoing cases involving KBR (collectively, the “KBR cases”) unpack the D.C. and Fourth Circuits’ holdings in varying ways to the service-contracting giant and, by extension, to future basic support service providers. After a brief overview of KBR’s role in Iraq and Afghanistan, this Part explores two different groups of cases after *Saleh* and *Al Shimari*: (1) one group that has applied, or seemed amenable to, the combatant activities exception for KBR, and (2) another group of cases that has viewed KBR’s services as outside of the scope of the combatant activities exception. This Part concludes by identifying the outstanding issues surrounding the combatant activities exception that will be studied more fully in Part III.

### A. Overview of KBR’s Role with the U.S. Military

In 2001 and 2007, KBR was awarded contracts through the third and fourth iterations of the Logistics Civil Augmentation Program (“LOGCAP”).<sup>103</sup> LOGCAP III and IV were “limited competition wartime services contracts”<sup>104</sup> that allowed the government to buy goods and services over the course of several years from LOGCAP participants alone.<sup>105</sup> Under its LOGCAP contracts, KBR “maintained and ran services at war-zone bases [in Iraq and Afghanistan], including dining, recreation, showers, housing and laundry facilities.”<sup>106</sup> Each military base’s “Mayor’s Cell” (a team of

---

102. In fact, Judge Duncan’s concurring en banc opinion recommended that district courts “give due consideration to the appellant’s immunity and preemption arguments,” suggesting that she would have sided with the defendants had the Fourth Circuit been able to initially hear the case. See *Al Shimari*, 679 F.3d at 224 (Duncan, J., concurring).

103. See Weinberger, *supra* note 23. For more information on the development of LOGCAP, see Dennis C. Clements & Margaret A. Young, *The History of the Army’s Logistic Civilian Augmentation Program: An Analysis of Its Oversight from Past to Present 13–20* (Dec. 2005) (unpublished M.B.A. Professional Report, Naval Postgraduate School), available at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA443282>.

104. See Weinberger, *supra* note 23.

105. LOGCAP III was awarded exclusively to KBR, while LOGCAP IV was awarded to KBR, DynCorp, and Fluor Corporation. See *id.*

106. Elise Castelli, *Auditor: ‘Unprecedented’ Fraud in LOGCAP III*, FED. TIMES, May 11, 2009, available at <http://www.federaltimes.com/article/20090511/DEPARTMENTS01/905110302/1034/IT04>.

military personnel who essentially run a particular military base) oversaw and prioritized many of the tasks KBR's workers completed.<sup>107</sup>

The LOGCAP has made KBR the largest American military contractor in Iraq,<sup>108</sup> and has proven very lucrative for the company. In fact, KBR's services rendered under LOGCAP III alone have cost the U.S. government over thirty-seven billion dollars.<sup>109</sup> KBR's role has generated controversy, particularly with the company's misquoting of services from LOGCAP III,<sup>110</sup> and its subpar performance of some of its tasks leading to injuries of U.S. military personnel and contractors.<sup>111</sup>

*B. The Expansive Approach to the Combatant Activities Exception: Aiello, Harris, In re KBR, Inc., Taylor, and Carmichael*

Five cases since the *Saleh* and *Al Shimari* decisions—*Aiello v. Kellogg, Brown & Root Services, Inc.*,<sup>112</sup> *Harris v. Kellogg, Brown & Root Services, Inc.*,<sup>113</sup> *In re KBR, Inc., Burn Pit Litigation*,<sup>114</sup> *Taylor v. Kellogg, Brown & Root Services, Inc.*,<sup>115</sup> and *Carmichael v. Kellogg, Brown & Root Services, Inc.*<sup>116</sup>—have either applied the combatant activities exception directly to KBR, or at least suggested that such a defense could work in lieu of the political question doctrine.<sup>117</sup> First, in *Aiello*, an American civilian contractor brought negligence claims against KBR for the injuries he suffered after falling to the ground inside of a toilet facility that KBR was in charge of building and maintaining at Camp Shield military base in Baghdad, Iraq.<sup>118</sup> As a forward operating base, Camp Shield was a re-arming point for military forces involved in combat,<sup>119</sup> and activities at the base

---

107. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 714–15 (S.D.N.Y. 2011).

108. See T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, Jul. 4, 2007, at A1 (“KBR is by far the largest employer of Americans [in Iraq], with nearly 14,000 U.S. workers.”).

109. See Weinberger, *supra* note 23.

110. See Castelli, *supra* note 106 (noting the government's recommendation to reduce KBR's proposed or billed costs by over four billion dollars).

111. See *infra* Part II.B–II.C.

112. 751 F. Supp. 2d 698.

113. 878 F. Supp. 2d 543 (W.D. Pa. 2012).

114. RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

115. 658 F.3d 402 (4th Cir. 2011).

116. 572 F.3d 1271 (11th Cir. 2009).

117. For more information on the political question doctrine, see *supra* note 34.

118. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 700–01 (S.D.N.Y. 2011).

119. See *id.* at 701–02.

included “supporting the transition of the Iraqi government, training Iraqi police officers, and providing internal security in Iraq.”<sup>120</sup> Tracking *Boyle*’s two-part analysis and *Saleh*’s reasoning, the court first found that uniquely federal interests were implicated with the combatant activities exception—specifically, the need to eliminate tort from the battlefield and preempt state or foreign regulation of federal wartime conduct<sup>121</sup>—and, next, that the FTCA exception brought significant conflict with state tort law claims.<sup>122</sup>

Following *Saleh*’s (and, later, *Al Shimari*’s) lead regarding the need to limit the “scope of displacement” of such an all-encompassing preemption,<sup>123</sup> the *Aiello* court also found that latrine services were, indeed, a combatant activity and part of the military’s broad command authority. In this case, the court rested its combatant activity analysis on the fact that KBR workers were providing “active logistical support of combat operations,”<sup>124</sup> given the dangers and the nature of operations conducted by PMCs and troops alike at Camp Shield.<sup>125</sup> The court also pointed to KBR’s services under the LOGCAP and under the watch of the base’s Mayor’s Cell to conclude that there was military command authority over KBR’s workers.<sup>126</sup>

Reflecting *Aiello*’s logic, the United States District Court for the Western District of Pennsylvania in *Harris* found that the plaintiff estate’s claims against KBR were barred by both the political question doctrine and the combatant activities exception.<sup>127</sup> The case involved an Army staff sergeant who was electrocuted in the shower at his base camp due to faulty electrical wiring emanating from a water pump operated by KBR.<sup>128</sup> The *Harris* court looked broadly at the water and electricity services KBR provided on the base to find that such activities were directly connected and integrated with the military’s combatant activities.<sup>129</sup> Specifically, the court noted KBR’s

120. *Id.* at 701.

121. *See id.* at 710.

122. *See id.* at 711.

123. *See Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009) (“Just as in *Boyle*, however, the ‘scope of displacement’ of the preempted non-federal substantive law must be carefully tailored so as to coincide with the bounds of the federal interest being protected.”).

124. *Aiello*, 751 F. Supp. 2d at 713 (citation omitted).

125. *See id.*

126. *See id.* at 714–15.

127. *Harris v. Kellogg, Brown & Root Services, Inc.*, 878 F. Supp. 2d 543, 548 (W.D. Pa. 2012).

128. *See id.* at 546–47.

129. *Id.* at 595–96.

overall “life support functions” to the base and its electrical facilities that “helped to protect soldiers from enemy attacks.”<sup>130</sup> It also found that, under *Aiello*’s reading of the combatant activities exception, the military’s control of the “terms and conditions of the contract” was enough to view KBR under military command authority.<sup>131</sup>

Even KBR’s trash services were subject to litigation. *In re KBR, Inc., Burn Pit Litigation*<sup>132</sup> was a set of consolidated pretrial hearings against KBR<sup>133</sup> where military servicemen and servicewomen alleged that they suffered injuries due to their exposure to contaminated water and to toxic emissions from burn pits<sup>134</sup>—open-air pits used to burn waste at certain military bases<sup>135</sup>—that KBR oversaw at “literally hundreds of locations throughout Iraq and Afghanistan.”<sup>136</sup> The United States District Court for the District of Maryland dismissed all claims against KBR under the political question doctrine, derivative sovereign immunity, and the combatant activities exception.<sup>137</sup> In its combatant activities analysis, the district court found that waste services and clean water maintenance did “arise out of combatant activities *of the military*.”<sup>138</sup> Like *Harris*, the district court quoted extensively from *Aiello* to back its finding that “mundane questions of waste disposal and water supply”<sup>139</sup> were indeed connected with combatant activities.<sup>140</sup> The court also believed that KBR had shown the necessary military command authority due to the military’s “direct and fundamental . . . management and control of KBR employees in both theatres of war.”<sup>141</sup>

---

130. *Id.* at 595.

131. *Id.* at 596–97.

132. RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

133. *See id.* at \*3 (“Forty-four of the pending cases purport to be nationwide class actions, while thirteen assert claims only for the named Plaintiffs. Thirty-seven of the cases were filed in federal courts, while twenty were filed in state courts and removed to federal courts. All of the cases have been transferred to this Court for consolidated pretrial proceedings by the Judicial Panel on Multidistrict Litigation . . . .” (footnote omitted)).

134. *See id.* at \*2.

135. *See* J. Malcolm Garcia, *Smoke Signals*, OXFORD AM., Aug. 24, 2011, at 136–37 (“The pits incinerate discarded human body parts, plastics, hazardous medical material, lithium batteries, tires, hydraulic fluids, and vehicles. Jet fuel keeps pits burning twenty-four hours a day, seven days a week.”).

136. *See KBR II*, 2013 WL 709826, at \*2.

137. *See id.* at \*12, \*13, \*18.

138. *Id.* at \*16.

139. *Id.* at \*2.

140. *See id.* at \*17–18.

141. *Id.* at \*8 (discussing the “military control” factor under the court’s political question analysis).

Separately, in *Taylor*, a Fourth Circuit panel held that the political question doctrine<sup>142</sup> and, alternatively, the combatant activities exception,<sup>143</sup> barred a Marine's negligence claims against KBR's technicians—in charge of providing electrical wiring maintenance and repair to a base located in Fallujah, Iraq<sup>144</sup>—who went ahead, even after the Marines' warnings, to restore power back to the main generator in an area of the base housing tanks and other assault vehicles.<sup>145</sup> Since the Marines were attempting, concurrently, to install a makeshift wiring box in the vehicle area, the main generator's restoration of power caused a surge of electricity to enter the wiring box, and, tragically, led to a Marine's electrocution and other injuries.<sup>146</sup> A majority of the Fourth Circuit panel considered KBR's services combatant activities.<sup>147</sup> As more fully explained in the lower court's opinion, KBR's electrical generation helped sustain an area made for tank and assault vehicle maintenance<sup>148</sup>—no doubt vehicles used to engage in combat operations—and their services were conducted at a base subject to regular mortar attacks.<sup>149</sup> In sum, the court believed that KBR's services were “necessary to and in direct connection with actual hostilities.”<sup>150</sup>

The issue over military command authority in *Taylor*, however, was a bit more muddled, given the splintered Fourth Circuit opinion. Two of the judges upheld the use of the combatant activities exception without discussing the military command authority exerted over KBR.<sup>151</sup> Presumably, these two judges would agree with the lower court's assertion that KBR was under military command authority, even when the physical actions of its personnel were not being controlled, since KBR was “operating at all times under orders

142. For a discussion of the political question doctrine, see *supra* note 34.

143. Two judges of the three-judge panel agreed that the political question doctrine applied, see *Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 403, 413 (4th Cir. 2011), while two judges (one overlapping justice from the political question issue holding) believed that the combatant activities exception should apply, see *id.* at 413 (Niemeyer, J., concurring); *id.* at 413 (Shedd, J., concurring). The opinion, thus, has alternative grounds for judgment.

144. See *id.* at 403 (majority opinion).

145. See *id.* at 404.

146. See *id.*

147. See *id.* at 413 (Shedd, J., concurring).

148. See *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at \*10 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010), *aff'd in part, vacated in part*, 658 F.3d 402, 403 (4th Cir. 2011).

149. See *id.*

150. See *id.* (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)).

151. See *supra* note 143 and accompanying text.

and determinations made by the military.”<sup>152</sup> The remaining judge in his political question analysis, however, explicitly stated the military did not employ “plenary control”<sup>153</sup> over KBR and that KBR was “nearly insulated from direct military control”<sup>154</sup> in its generator maintenance duties.<sup>155</sup>

Finally, the Eleventh Circuit’s *Carmichael* decision held that the political question doctrine barred a serviceman’s claims against the KBR driver of a convoy.<sup>156</sup> The driver failed to navigate a circuitous route outside a base in Balad, Iraq, causing the vehicle to roll over and nearly crush the serviceman who was in the car with the driver at the time.<sup>157</sup> Despite the use of the political question doctrine in *Carmichael*, the opinion sheds additional light on the issue of military command authority that could be used to sustain a combatant activities exception claim. Notably, the court discarded the plaintiff’s notion that the driver’s physical control of the convoy somehow alleviated the fact that the military’s “orders and determinations”<sup>158</sup> guided the driver’s actions “at all times.”<sup>159</sup>

C. *The Narrow Approach to the Combatant Activities Exception: Bixby, McManaway, and Lessin*

Just as those cases bolstered KBR’s attempts to employ the combatant activities exception, three other cases disparaged KBR’s preemption arguments. In both *Bixby v. KBR, Inc.*<sup>160</sup> and *McManaway v. KBR, Inc.*,<sup>161</sup> two different district courts<sup>162</sup> found that

---

152. See *Taylor*, 2010 WL 1707530, at \*7 (quoting *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1284 (11th Cir. 2009)).

153. See *Taylor*, 658 F.3d at 411.

154. See *id.*

155. Judge King still believed the political question doctrine applied since the “merits of Taylor’s negligence claim would require the judiciary to question ‘actual, sensitive judgments made by the military;’ ” namely, the Mayor’s Cell’s decisions about which areas of the base would have backup generators, and the Marines’ actions in deciding to install a wiring box in the first place. See *id.* at 411–12 (citation omitted).

156. See *Carmichael*, 572 F.3d at 1275.

157. See *id.* at 1277–78.

158. *Id.* at 1284.

159. *Id.* at 1284 n.10 (“[The driver’s] conduct was at all times governed by military rules and regulations (including timing, route, speed, and spacing), and any attempt to assess the reasonableness of Irvine’s conduct would entail an examination of those rules and regulations.”).

160. 748 F. Supp. 2d 1224 (D. Or. 2010).

161. CIV.A. H-10-1044, 2012 WL 6033259 (S.D. Tex. Dec. 4, 2012).

162. *Bixby* was decided by the United States District Court for the District of Oregon. *Bixby*, 748 F. Supp. 2d at 1224. *McManaway* was decided by the United States District Court for the Southern District of Texas. *McManaway*, 2012 WL 6033259, at \*1.

claims from former National Guard members against KBR were not barred by the political question doctrine, *Boyle's* government contractor defense, or the combatant activities exception.<sup>163</sup> In both cases, former servicemen alleged negligence and fraud claims against KBR's workers, who, contrary to their contract with the U.S. Army Corps of Engineers,<sup>164</sup> failed to inform officials of and take protective actions against environmental hazards at the Qarmat Ali water plant in Iraq.<sup>165</sup> KBR's workers had discovered levels of sodium dichromate, a hazardous carcinogen, and waited over three months to alert troops who were stationed there, which ultimately led to these lawsuits for injuries.<sup>166</sup>

Observing precedents under the combatant activities exception, including *Saleh*, the *Bixby* court found that KBR's actions were not combatant activities.<sup>167</sup> To reach this conclusion, the court focused on the activities occurring at the water plant, detached from the plant's role in the larger Iraq war efforts.<sup>168</sup> The court established that KBR's workers, though operating in a dangerous area,<sup>169</sup> supported "the goal of restoring Iraqi oil-production capacity, manifestly a foreign-policy-related goal rather than a combatant activity. That is, the defendants' operations were more akin to restoring the battlefield to productive use after the battle has ended than to aiding warriors to 'swing the sword.'" <sup>170</sup> The *McManaway* court adopted *Bixby's* reasoning entirely in reaching the same conclusion about the lack of a combatant activity.<sup>171</sup> In a later motion to dismiss the *Bixby* case, the trial court also found that the military did not carry broad command authority, as *Saleh* imagined, under performance-based service contracts.<sup>172</sup>

The third case that found against KBR was another convoy service case, *Lessin v. Kellogg, Brown & Root Services*,<sup>173</sup> which was resolved shortly before *Saleh*. The United States District Court for

---

163. See *McManaway*, 2012 WL 6033259, at \*9–10; *Bixby*, 748 F. Supp. 2d at 1225. The *McManaway* case did not specifically address the government contractor defense argument.

164. See *Bixby*, 748 F. Supp. 2d at 1229, 1231.

165. See *McManaway*, 2012 WL 6033259, at \*2; *Bixby*, 748 F. Supp. 2d at 1231–32.

166. See *McManaway*, 2012 WL 6033259, at \*2; *Bixby*, 748 F. Supp. 2d at 1232.

167. See *Bixby*, 748 F. Supp. 2d at 1242–43.

168. *Id.*

169. *Id.*

170. *Id.*

171. See *McManaway*, 2012 WL 6033259, at \*9.

172. See *Bixby v. KBR, Inc.*, No. 3:09-CV-632-PK, 2012 WL 3776473, at \*5 (D. Or. Aug. 29, 2012).

173. No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006).



the Southern District of Texas found, under facts similar to those in *Carmichael*,<sup>174</sup> that neither the political question doctrine nor the combatant activities exception applied.<sup>175</sup> The *Lessin* court noted that the service member's injuries essentially resulted from a traffic accident,<sup>176</sup> and that military decision-making would not be implicated since KBR was only providing a convoy service on the battlefield.<sup>177</sup>

#### D. Divergent Applications of *Saleh* and *Al Shimari*

The KBR cases show how vague *Saleh's* and *Al Shimari's* holdings are to basic support service contractors. Before offering a more structured way to parse these respective issues, this Comment briefly catalogs how the KBR cases applied the key aspects of the D.C. and Fourth Circuits' holdings.

##### 1. Unique Federal Interests and Significant Conflict with State Tort Law

No case raises major issues—regardless of whether the combatant activities exception applies—in finding “uniquely federal interests” and a “direct conflict” between the state tort law and the combatant activities exception.<sup>178</sup> As outlined in *Al Shimari*, issues over increased costs, litigation involving military personnel, and the larger goal of eliminating tort from the battlefield all confirm that the federal interests here are unique and that viable tort suits could conflict with the goals of the combatant activities exception.<sup>179</sup> Hence, a significant conflict will plainly arise between these unique federal interests and state tort law.

##### 2. Combatant Activity

A more marked disagreement appears among courts over whether KBR's services constitute a “combatant activity.” As stated earlier, most courts define combatant activities as including not only “physical violence, but activities both necessary to and in direct

---

174. The notable distinction between *Lessin* and *Carmichael* was the fact that the service member in *Lessin* was assisting the driver in repairing the malfunctioning truck in the midst of their service route when the ramp assist arm of the truck injured him. *See id.* at \*1.

175. *See id.* at \*3–5.

176. *See id.* at \*3.

177. *See id.* at \*4.

178. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

179. *See Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 418–19 (4th Cir. 2011), *vacated on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012).

connection with actual hostilities.”<sup>180</sup> These activities could include “active logistical support of combat operations.”<sup>181</sup>

Cases like *Aiello*, *Harris*, *In re KBR, Inc.*, and *Taylor* exemplify the view that combatant activities include KBR’s support services like latrine maintenance, water pump flow, waste disposal, and electrical wiring.<sup>182</sup> To reach this conclusion, these courts looked at the actual services KBR provided but were ultimately swayed by the context in which these services were executed. In particular, these courts examined the types of operations that were widely executed at the respective military bases, their role in larger combat operations, and the dangers faced at each of the bases by attacks from outside forces.<sup>183</sup>

In contrast, cases like *Bixby*, *McManaway*, and *Lessin* doubted that KBR’s services were covered under the exception. *Bixby* and *McManaway* divorced the water plant’s role from the larger battlefield in Iraq<sup>184</sup> and looked at the goals of Iraqi oil production within the plant itself.<sup>185</sup> This separation allowed the courts to sidestep any likely combatant activities exception analysis.<sup>186</sup> The trial court in *Lessin*, too, rebuffed the argument that driver services were related to physical force or actual hostilities.<sup>187</sup>

### 3. Military Command Authority

The KBR cases also raise questions about whether the military exerted enough command authority over KBR’s conduct to qualify KBR for the combatant activities exception. *Aiello*, *In re KBR, Inc.*,

180. See, e.g., *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948); see also Brief for the United States, *supra* note 70, at 18–19 (“[D]istrict court decisions are generally consistent with the Ninth Circuit’s [combatant activities] standard in *Johnson* . . .”).

181. *Johnson*, 170 F.2d at 768, 770.

182. See *KBR II*, 2013 WL 709826, at \*18 (D. Md. Feb. 27, 2013); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 595 (W.D. Pa. 2012); *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713 (S.D.N.Y. 2011); *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at \*10 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010), *aff’d in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011).

183. See *KBR II*, 2013 WL 709826, at \*17–18; *Harris*, 878 F. Supp. 2d at 595–97; *Aiello*, 751 F. Supp. 2d at 713; *Taylor*, 2010 WL 1707530, at \*10.

184. See Reply in Support of Defendants Haliburton Co. and Haliburton Energy Servs., Inc.’s Motion to Dismiss at 7, *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224 (D. Or. 2010) (No. 09-cv-632-PK), 2011 WL 1791574 (quoting a general who stated that KBR’s conduct occurred in a “combat environment”).

185. See *McManaway v. KBR, Inc.*, CIV.A. H-10-1044, 2012 WL 6033259, at \*9 (S.D. Tex. Dec. 4, 2012); *Bixby*, 748 F. Supp. 2d at 1246.

186. See *McManaway*, 2012 WL 6033259, at \*10; *Bixby*, 748 F. Supp. 2d at 1246.

187. See *Lessin v. Kellogg, Brown & Root*, No. CIV.A. H-05-01853, 2006 WL 3940556, at \*3–4 (S.D. Tex. June 12, 2006).

*Taylor*, and *Carmichael* held that an appreciable amount of military control existed over the PMCs generally, particularly under the guise of the LOGCAP, the Mayor's Cell, and other extensive rules and regulations for PMC services at military bases through Iraq and Afghanistan.<sup>188</sup>

*Bixby* and the earlier-decided *Lessin* case, however, held otherwise. The trial court in *Bixby* believed that the performance-based statement of work used in the KBR service contract, on its own, did not mark the military's "specific control over the actions and decisions of the contractor"<sup>189</sup> since such contracts relate to results and not " 'how' the work is to be accomplished."<sup>190</sup> *Lessin* also gave little credence to the command authority exerted by the rules and regulations governing a PMC's services and instead centered on the service provided.<sup>191</sup>

### III. A PARTICULARIZED, CONTEXTUAL APPROACH TO THE COMBATANT ACTIVITIES EXCEPTION

*Saleh* and *Al Shimari*'s growth of the combatant activities exception fails to provide an adequate framework for courts to analyze tort claims against PMCs providing basic support services.<sup>192</sup> A particularized, contextual approach to the combatant activities exception best serves the holdings in *Saleh* and *Al Shimari* and the competing interests involved in constructing a viable combatant activities exception for PMCs. The approach urges courts to focus on the PMC *service* and the *setting* involved in tort claims to settle whether a PMC's actions are "combatant activities" under the FTCA and applicable case law. After outlining the construction of this approach in light of the *Saleh* and *Al Shimari* holdings and the opposing interests involved when applying the combatant activities exception to PMCs, Part III takes a closer look into the wisdom of the proposed analytical framework.

---

188. See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1284, 1298 (11th Cir. 2009); *KBR II*, 2013 WL 709826, at \*8; *Aiello*, 751 F. Supp. 2d at 714; *Taylor*, 2010 WL 1707530, at \*7.

189. See *Bixby v. KBR, Inc.*, No. 3:09-CV-632-PK, 2012 WL 3776473, at \*5 (D. Or. Aug. 29, 2012) (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009)).

190. *Id.* (quoting *Saleh*, 580 F.3d at 10). The *McManaway* court did not directly address the issue of military command authority in its decision.

191. See *Lessin*, 2006 WL 3940556, at \*4.

192. See SCHWARTZ & SWAIN, *supra* note 16, at 15–16 (noting an increase in the number of contractors providing security); *supra* notes 16–25 and accompanying text.

A. *Constructing the Framework for a Particularized, Contextual Approach*

1. Examining the Breadth and Guidance of the Holdings: *Saleh's* Limiting Language, Broad Military Command Authority, and Discerning What "Combatant Activity" Means

Though *Saleh* and *Al Shimari* expanded the reach of the combatant activities exception to PMCs, additional limiting language in *Saleh* makes clear that not every PMC activity on the battlefield will always fall under the scope of 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. *We recognize that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military.*<sup>193</sup>

But *Saleh's* limiting language contains ambiguities as demonstrated by the differing results in the KBR cases. Under one reading, these words may imply that certain contractor services are *inherently* "discrete" and that they will never meet the combatant activities exception. This reasoning is underscored in *Bixby* and *McManaway*,<sup>194</sup> and, before *Saleh*, in *Lessin*.<sup>195</sup> Then again, the words may only imply that in certain *contexts* contractor services could be discrete, while in others those same services could meet the combatant activities exception. This thinking is underlined in cases like *Aiello*,<sup>196</sup> *Harris*,<sup>197</sup> *In re KBR, Inc.*,<sup>198</sup> and *Taylor*.<sup>199</sup>

If the contextual approach from *Aiello*, *Harris*, *In re KBR, Inc.*, and *Taylor* is followed, then another question to ask is what factors make a PMC activity so "discrete" as to remain distinct from the

193. *Saleh*, 580 F.3d at 9 (emphasis added).

194. See *McManaway v. KBR, Inc.*, CIV.A. H-10-1044, 2012 WL 6033259, at \*9 (S.D. Tex. Dec. 4, 2012); *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1246 (D. Or. 2010).

195. See *Lessin*, 2006 WL 3940556, at \*4.

196. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713 (S.D.N.Y. 2011).

197. See *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 594–96 (W.D. Pa. 2012).

198. See *KRB II*, RWT 09MD2083, 2013 WL 709826, at \*17–18 (D. Md. Feb. 27, 2013).

199. See *Taylor v. Kellogg Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at \*10 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010), *aff'd in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011).

combatant activities exception. Using the *Saleh* and *Al Shimari* holdings as a guide, is it because the PMC service is not integrated with “combatant activities” under the FTCA? Or alternatively, because of a lack of military “command authority” over PMCs in certain settings? Perhaps the answer is some combination of the two? As discussed previously, there was never any doubt in *Saleh* and *Al Shimari* that interrogations of potential Iraqi insurgents at the Abu Ghraib prison were combatant activities, and so this issue was never fully raised in those cases.<sup>200</sup>

There is little chance, however, that KBR’s services, or those of any other similarly positioned PMC, would be too “discrete” to fall outside the combatant activities exception because of a lack of military integration. While both *Saleh* and *Al Shimari* dealt with a highly integrated setting between contractor and military personnel working “side by side in questioning detainees,”<sup>201</sup> the *Saleh* court expressly rejected the need for *exclusive* military control over PMCs to fit the combatant activities exception.<sup>202</sup> Instead, the courts asked if the military broadly retained “command authority.”<sup>203</sup> In both cases, CACI employees’ “dual chain of command,” reporting both to military commanders and their civilian supervisors, fell comfortably within this broader command characterization.<sup>204</sup>

In short, *Saleh* and *Al Shimari* suggest that if a PMC is: (1) providing basic support services under military contract, (2) with extensive military regulations and guidelines, and (3) under the guise of the Mayor’s Cell at each military base,<sup>205</sup> then the PMC is under military command authority. Even purported PMC breaches of service contracts would not break the broad military authority<sup>206</sup>

---

200. See *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009); see also *supra* notes 81–83 and accompanying text (discussing the facts surrounding the Abu Ghraib prison interrogations).

201. *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 418 (4th Cir. 2011), *vacated on reh’g en banc*, 679 F.3d 205 (4th Cir. 2012).

202. See *Saleh*, 580 F.3d at 8 (rejecting the “exclusive operational control” test outlined in *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007)).

203. See *Al Shimari*, 658 F.3d at 420; *Saleh*, 580 F.3d at 9.

204. See *Saleh*, 580 F.3d at 4–5.

205. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 714–15 (S.D.N.Y. 2011).

206. See *Al Shimari*, 658 F.3d at 423 (Niemeyer, J., concurring) (“[T]he fact that a military interrogator applied techniques more aggressive than those approved by his commander for aggressive interrogation would not remove the activity from the military effort, any more than would a soldier’s shooting an enemy soldier even after he had been seized and disarmed.”).

*Saleh* and *Al Shimari* envision.<sup>207</sup> As the court in *Koohi* bluntly stated, “[I]t simply does not matter for purposes of the [combatant activities] exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts.”<sup>208</sup>

The only imaginable situation where a PMC could fall outside of military command authority, it seems, would be for actions unrelated to its government contract. To illustrate, take a PMC who is under a service contract to manage latrines at a military base. Negligent execution of latrine services would not portend a lack of military command authority. But an assault and battery against another contractor after working hours more strongly intimates that the PMC was not under the broad command authority of the military during this incident.<sup>209</sup>

This Comment’s particularized, contextual construction accounts for these understandings and obscurities. As *Saleh*’s limiting language makes evident, not all PMC activities in wartime may fall under the combatant activities exception.<sup>210</sup> And a much more durable understanding of military command authority is recognized in both *Saleh* and *Al Shimari*.<sup>211</sup> There remains some tractability, however, on the “combatant activity” portion of *Saleh* and *Al Shimari*. A contextual approach to which PMC services are deemed “combatant activities,” then, could differentiate between PMC actions that should be shielded from liability and those actions that should be left unprotected from suit.

---

207. Pre-*Saleh* commentary envisioned a more rigid understanding of military command authority before PMCs could qualify for tort preemption or immunity. See Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 822 (2008); Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365, 396 (2006).

208. *Koohi v. United States*, 976 F.2d 1328, 1335 (9th Cir. 1992).

209. The United States appeared to support this thinking in the en banc *Al Shimari* hearing. See Brief for the United States, *supra* note 70, at 20 (“[P]reemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract . . . as long as the alleged conduct at issue was within the scope of the contractual relationship . . . . But preemption would not apply to conduct of a contractor employee that is unrelated to the contractor’s duties under the government contract.”). Further exploration of this hypothetical falls outside the scope of this Comment, however, since none of the KBR cases discussed such unrelated contract incidents.

210. See *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009).

211. See *supra* notes 201–08 and accompanying text.

## 2. Competing Interests

In the shadows of resolving these uncertainties, there are very real interests and concerns that spawn from expanding or narrowing the scope of the combatant activities exception.<sup>212</sup> Those who favor broadly applying *Saleh* and *Al Shimari* would stress that, *Saleh*'s limiting language about the combatant activities exception aside, the thrust of both opinions seeks to *eliminate* tort law generally from the battlefield,<sup>213</sup> where the “traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, because risk-taking is the rule.”<sup>214</sup> In addition, war powers are the exclusive province of the federal government,<sup>215</sup> and proceeding with lawsuits that may involve questioning military

---

212. Several recent articles have expressed concern over the expansion of the combatant activities exception to PMCs. See Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 458 (2009) (arguing for a limited combatant activities exception that does not include a PMC's discretionary actions); Michael H. LeRoy, *The New Wages of War—Devaluing Death and Injury: Conceptualizing Duty and Employment in Combat Zones*, 22 STAN. L. & POL'Y REV. 217, 243–50 (2011) (discussing the “objectionable short-term effects” of barring soldiers and civilians compensation arising out of PMC actions and the options moving forward for tort claims); Abigail Clark, Note, *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, 731–34 (2009) (noting that contractors would not qualify for the exception in most recent cases); Davidson, *supra* note 207, at 831 (arguing that the expansion of the combatant activities exception to PMCs “misreads” the Boyle case); Spencer R. Nelson, Comment, *Establishing a Practical Solution for Tort Claims Against Private Military Contractors: Analyzing the Federal Tort Claims Act's “Combatant Activities Exception” Via a Circuit Split*, 23 GEO. MASON U. C.R. L.J. 109, 135–41 (2012) (arguing that the *Koochi* standard limits the use of the combatant activities exception to instances where force is directed against the enemy “as a result of authorized military action”); Rakowsky, *supra* note 207, at 396 (underscoring the need to ensure that PMCs were following the military's order before extending various immunity defenses to them). Other commentaries, however, suggest the importance of expanding the exception to PMCs. See Aaron L. Jackson, *Civilian Soldiers: Expanding the Government Contractor Defense to Reflect the New Corporate Role in Warfare*, 63 A.F. L. REV. 211, 221–23 (2009) (discussing the policy reasons of expanding government contractor immunities to PMCs); O'Connor, *supra* note 34, at 415 (noting how the federal government has already considered the competing interests of barring tort claims during wartime, and, therefore, the combatant activities exception should be extended to both soldiers and PMCs alike); Trevor Wilson, Comment, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Warfare Realities*, 83 TUL. L. REV. 255, 280 (2008) (noting the need for courts to expand the existing government contractor defenses for PMCs in unique circumstances).

213. See *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 419 (4th Cir. 2011), *vacated on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012); *Saleh*, 580 F.3d at 7.

214. See *Saleh*, 580 F.3d at 7 (citing *Koochi v. United States*, 976 F.2d 1328 (9th Cir. 1992)).

215. See U.S. CONST. art. I, § 8, cls. 11–16; *id.* art. I, § 10, cl. 1, 3; *id.* art. II, § 2, cl. 2.

commanders' behavior, or specific war strategies and activities, could hamper war efforts.<sup>216</sup>

Moreover, *Saleh* and *Al Shimari* implicitly recognize the value that PMCs have in modern American warfare.<sup>217</sup> PMC services during wartime have existed since the Revolutionary War.<sup>218</sup> The plethora of PMC services offered now, however, far exceeds those nascent beginnings.<sup>219</sup> In fact, PMCs in Iraq and Afghanistan have outnumbered military troops, with the U.S. government hiring over 260,000 PMCs at a cost of over \$206 billion to the federal government.<sup>220</sup> These numbers are staggering and signal that the use of PMCs will continue in future American wars.<sup>221</sup> Though the rigors of training, supervision, and evaluation of military personnel justify the immunities enjoyed by the Armed Forces,<sup>222</sup> the growing importance and impact of PMCs in wartime should lodge doubt in those who think PMCs are insignificant players unworthy of legal protection in modern warfare.

But those favoring a narrower protection of PMCs under *Saleh* and *Al Shimari* would highlight several concerns, too. They would question whether the combatant activities exception should have ever applied to PMCs in the first place, an issue that several lower courts raised before *Saleh*.<sup>223</sup> These early reservations should at least caution against inflating the exception in future cases, particularly outside of the products liability or interrogation context.<sup>224</sup> Further suspicion is warranted, too, when considering the limiting language of *Saleh*

216. See *Al Shimari*, 658 F.3d at 418.

217. See *KBR I*, 736 F. Supp. 2d 956, 956 (D. Md. 2010) (“[T]he role of government contractors in combat zones has grown to an unprecedented degree in recent years with the wars waged by the United States in Iraq and Afghanistan.”), *modified*, RWT 09MD2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

218. See MOLLY DUNIGAN, VICTORY FOR HIRE 6–7 (2011) (discussing the use of privateers in 1776).

219. See ADVISORY COUNCIL ON INT’L AFFAIRS, EMPLOYING PRIVATE MILITARY COMPANIES 7 (2007) (PMCs offer “specialised services . . . [in] combat operations, strategic planning, intelligence collection, operational and logistic support, training, procurement and maintenance”).

220. Richard Fontaine, Op-Ed., *Pentagon Must Reshape Future Role of Private Contractors*, DEF. NEWS, Sept. 12, 2011, [www.cnas.org/print/6958](http://www.cnas.org/print/6958); see also David Isenberg, *Contractors in War Zones: Not Exactly “Contracting,”* TIME (Oct. 9, 2012), <http://nation.time.com/2012/10/09/contractors-in-war-zones-not-exactly-contracting> (citing a study that noted how contractors in Iraq and Afghanistan from 2008 to 2011 made up over fifty percent of the total force in both countries).

221. See Fontaine, *supra* note 220.

222. See 3 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 14A:6, at n.74 (2d ed. 2012).

223. See *supra* note 77 and accompanying text.

224. See *supra* note 78 and accompanying text.



itself.<sup>225</sup> Ignoring this limiting language makes it possible that every kind of PMC service could fit the exception as long as a PMC was located at a military installation or in some way situated on the battlefield. Covering every kind of service under the exception, in turn, would severely curb the accountability of PMCs for their tortious conduct.<sup>226</sup>

This possibility may not prove distressing in the abstract, particularly if the lawsuits arise out of PMC actions allegedly harming perceived enemies of the United States as in *Koochi*,<sup>227</sup> *Saleh*, and *Al Shimari*.<sup>228</sup> But there is no distinction for plaintiffs who are apparent allies or enemies of the United States under *Saleh* and *Al Shimari*.<sup>229</sup> Put another way, the combatant activities exception can preempt claims from Americans who suffered injuries on the battlefield in their fight and support of wartime efforts—an outcome that may give observers greater pause.<sup>230</sup> These unfavorable outcomes for injured Americans encourage the need for a more fact-specific approach to govern when a PMC may fit within the combatant activities exception.

#### B. *A Way Forward: Inquiring About the PMC Service and the Setting of a Claim*

A particularized, contextual approach to the combatant activities exception best captures the *Saleh* and *Al Shimari* holdings and duly balances competing interests about the scope of the combatant activities exception. Courts should narrow the “battlefield” context when resolving whether a particular service is supporting a “combatant activity” under the FTCA, focusing on (1) how a *service*

---

225. See *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009).

226. Criminal liability for PMCs exists under federal law, see *supra* note 46, but, given that the United States did not bring suit based on any of the torture claims arising from the *Saleh* and *Al Shimari* cases, see *Saleh*, 580 F.3d at 10, it is unclear how likely it is that the United States would prosecute a PMC for basic tort claims.

227. *Koochi* involved a passenger aircraft mistakenly believed to be an Iranian fighter plane. See *Koochi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992).

228. *Saleh* and *Al Shimari* both involved injuries sustained by Iraqi prisoners. See *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 414 (4th Cir. 2011), *vacated on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012); *Saleh*, 580 F.3d at 1–2.

229. See *Al Shimari*, 658 F.3d at 423 (“The fact that a military interrogator applied techniques more aggressive than those approved by his commander for aggressive interrogation would not remove the activity from the military effort, any more than would a soldier’s shooting an enemy soldier even after he had been seized and disarmed.”).

230. A few cases before *Saleh* and *Al Shimari* refused to extend the combatant activities exception for this reason. See *Getz v. Boeing Co.*, No. C 07-06396 CW, 2009 WL 636039, at \*5 (N.D. Cal. Mar. 10, 2009); *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006).

was used in a claim and (2) where specifically the *setting* of the claim arose on the battlefield. Under each analytical inquiry, the court would then decide if the PMC actions at issue were both, as the *Johnson* court defined, “*necessary to and in direct connection with actual hostilities*,”<sup>231</sup> and, therefore, qualify as supporting combatant activities. Satisfying either the “service” or the “setting” prong is adequate to meet the exception; both parts need not apply in every case. The only other way the contractor-defendant may fit the combatant activities exception is if the PMC can demonstrate either (1) that attacks on a military installation occurred at the very location involved in the claim with some frequency or intensity so as to show a direct connection with hostilities or (2) that the military installation itself was so directly connected to hostilities that it would be unreasonable not to apply the combatant activities exception.

Under the “service” analytical track, courts should inspect how a PMC service was used during the events at issue. After probing how a PMC’s services were used at the time the claim arose, the court would then ask whether there was a “necessary” and “direct connection” to hostilities. Take a soldier who is interrogating a prisoner. The soldier aims to intimidate the prisoner by ripping off a piece of electrical wiring that a PMC previously installed—only the soldier proceeds to electrocute himself because of the PMC’s botched wiring. The “service” prong would preempt the soldier’s claim, since this use of the wiring had the needed “necessary” and “direct connection” to hostilities because of its purpose in this interrogation. By contrast, if a soldier turned on a light switch in his room and was electrocuted, that would not manifest the kind of “necessary” and “direct connection” to hostilities required to find that a PMC was supporting combatant activities.<sup>232</sup> In the latter case, the tort followed out of a regular use of the light switch with no other unique circumstances to find a direct link to hostilities.

Under the “setting” analytical track, courts should identify the specific setting of a claim on the battlefield. Rather than concluding that an incident occurring during wartime qualifies per se under the

---

231. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (emphasis added).

232. A regular use of PMC services may show enough of a direct connection to combat activities on its own absent additional facts. The vivid displays of supporting hostilities seen in *Saleh* and *Al Shimari* are examples of such instances. These two cases would likely qualify under the “setting” prong of this Comment’s approach as well; this prong will be discussed further in the next Part. PMCs who provide basic support services, however, would find it difficult to qualify under the “service” prong if claims relate simply to a regular use of services as in the light switch example above.

combatant activities exception, courts should note exactly where a tortious action on the battlefield occurred. If an injury transpired on a military base, for instance, the court should explore not only the characteristics of the base as a whole, but also where exactly on that base the injury occurred. A claim arising out of, for example, the ammunition room of a military facility would be more likely to be preempted versus a claim arising out of a soldier's bedroom; the former houses weapons that are used for combat operations while the latter is used as a resting place for a soldier.<sup>233</sup>

Taking this two-part approach together, the combatant activities exception will not apply if neither the "service" nor the "setting" prongs show a "necessary . . . and . . . direct connection with actual hostilities."<sup>234</sup> So at the outset, the combatant activities exception could protect any PMC activity—be it cleaning toilets or providing electrical wiring. Yet it is not enough to extend the exception to PMCs who are simply providing services at a military base—a base that inevitably has some type of combat-connectedness and dangers associated with it. At the same time, a PMC's maintenance services should not be divorced from how and where those services were being used in a particular suit.

Even if courts using the "service" and "setting" prongs of the particularized, contextual approach do not find that a PMC is supporting combatant activities, the contractor-defendant still has the opportunity to satisfy the exception. Recognizing the many dangers that PMCs and military personnel alike face in the war zone and on certain military bases, the contractor-defendant may still qualify for the exception if it can show either (1) that attacks on a military installation occurred at the very location involved in the claim with some frequency or intensity, or (2) that the military installation itself was so directly connected to hostilities that it would be unreasonable not to apply the combatant activities exception.

### C. *Why the Particularized, Contextual Approach Makes Sense*

The particularized, contextual approach is a realistic framework for courts to use in deciding future combatant activity exception cases. What is more, the approach is grounded in case law and strikes a reasonable balance against the competing interests of PMC

---

233. A counterargument to this assertion is that the bedroom may house a soldier involved in combat operations. But this Comment's approach emphasizes a narrower analytical scheme, and so it is more prudent to focus on the primary purpose of such a setting.

234. *Johnson*, 170 F.2d at 770.

liabilities during wartime. First, the approach flows from the holdings and limitations of *Saleh* and *Al Shimari*. The *Saleh* decision explains that the exception does not apply to every PMC activity.<sup>235</sup> As previously discussed, however, *Saleh* and *Al Shimari*'s flexible understandings of military command authority make it rare to exclude a PMC independently from the exception on command authority grounds.<sup>236</sup> This approach, then, hinges on whether a PMC action relates to a "combatant activity" under the exception. But this Comment disfavors a reading of "combatant activity" that would foreclose the combatant activities exception per se to certain kinds of services, as seen in cases like *Bixby*, *McManaway*, and *Lessin*.<sup>237</sup> Rather, to conclude if a PMC action would be "discrete" enough to fall outside the combatant activities exception,<sup>238</sup> this approach prefers a fact-specific approach found in cases like *Aiello*, *Harris*, *In re KBR, Inc.*, and *Taylor* (albeit with a narrower focus) to discern whether a PMC service derived out of a "combatant activity."<sup>239</sup>

Second, this approach also balances the contending interests previously discussed in this Comment.<sup>240</sup> On one hand, the approach affirms the realities of PMC integration with the military and the importance of limiting tort claims during wartime.<sup>241</sup> These interests are harbored in this approach's permissive understanding of what constitutes military command authority over PMCs,<sup>242</sup> which respects that the military and PMCs work together toward one goal on the battlefield. In fact, this approach allows for any PMC activity to qualify for the combatant activities exception,<sup>243</sup> which underscores the widespread availability of this exception during wartime.

On the other hand, certain safeguards in this approach exist so that the combatant activities exception does not preempt every possible tort claim. These safeguards not only reflect doubts from those skeptical about extending this exception to PMCs in the first place, particularly with injuries involving American military and non-military personnel,<sup>244</sup> they also reflect the very words found in *Saleh*'s

---

235. See *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009).

236. See *supra* notes 201–09 and accompanying text.

237. See *supra* notes 194–95 and accompanying text.

238. See *Saleh*, 580 F.3d at 6.

239. See *supra* notes 196–99 and accompanying text.

240. See *supra* Part III.A.2.

241. See *supra* notes 212–21 and accompanying text.

242. See *supra* notes 201–09 and accompanying text.

243. See *supra* Part III.B.

244. See *supra* notes 223–30 and accompanying text.

limiting language.<sup>245</sup> Determining whether a PMC service or setting at issue arose from supporting combatant activities is a threshold question. The answer to this question appropriately distinguishes between permissible tort claims on the battlefield and those that would surely burden wartime efforts. A particularized, contextual approach permits the court to take a discriminating look at the specific facts surrounding tort claims on the battlefield, and it sensibly avoids any blanket rule on preempting all PMC activities during wartime.

A trade-off to this approach is the “possibility that military commanders could be hauled into civilian courts”<sup>246</sup> to answer questions arising from tort suits, which undoubtedly implicates unique federal interests.<sup>247</sup> But procedural rules and “other legal doctrines”<sup>248</sup> can blunt probable intrusions into battlefield capabilities.<sup>249</sup> Presumably, this Comment’s approach could also shed the most sensitive claims involving actual combat operations and activities, which would burden military commanders more than other, non-combat activity claims. Given the worry over the breadth of the combatant activities exception to PMCs, though, this Comment’s approach accepts the compromise.

This Comment’s fact-specific approach defining a “combatant activity” also means there is no per se exception to PMC activities that arise out of a military installation located in a war zone. At first blush, this may seem counterintuitive. After all, a military base is by its very nature engaged in some kind of combatant activities during wartime. But, according to *Johnson’s* definition of combatant activities, although a PMC’s services that are taking place at a military base show its services are likely “necessary to”<sup>250</sup> the war effort, this

---

245. See *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009).

246. See *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 418 (4th Cir. 2011), *vacated on reh’g en banc*, 679 F.3d 205 (4th Cir. 2012).

247. See *id.* at 418; see also *Johnson v. Eisentrager*, 339 U.S. 763, 777–79 (1950) (noting concerns with giving enemy aliens access to U.S. courts, which would “hamper our war effort” and “diminish the prestige of our commanders”).

248. *Al Shimari*, 658 F.3d at 436 (King, J., dissenting) (“Federal Rule of Civil Procedure 45, for example, compels the district courts to quash subpoenas calling for privileged matter or that would cause an undue burden. Moreover, the government remains free to invoke the state secrets doctrine.”); see also *Saleh*, 580 F.3d at 29 (Garland, J., dissenting) (“Where discovery would hamper the military’s mission, district courts can and must delay it—until personnel return stateside, or until the end of the war if necessary. Where production of witnesses or documents would damage national security regardless of timing, the usual privileges apply. To deny preemption is not to grant plaintiffs free reign.”).

249. See *Al Shimari*, 658 F.3d at 436 (King, J., dissenting).

250. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

fact alone does not illustrate a “*direct connection* with actual hostilities”<sup>251</sup> that would evince a PMC supporting combatant activities.

There are several reasons for this assertion. As discussed earlier, this new approach takes seriously the limiting language found in *Saleh* and the competing interests on the scope of the combatant activities exception.<sup>252</sup> As a result, analyzing the “service” and “setting” prongs of this particularized, contextual approach should be a narrow inquiry.<sup>253</sup> Simply put, it would not be enough to state that a claim emanated from the Afghanistan War, or from a military installation housing over 30,000 military personnel and PMCs in Iraq.<sup>254</sup> Rather, courts should more closely scrutinize if a claim arose out of, say, a tank maintenance facility at a military base,<sup>255</sup> or inside of a toilet facility at a base camp.<sup>256</sup> This closer inspection translates into a more demanding, fact-specific analysis in finding whether a PMC’s actions will have the requisite “direct connection with actual hostilities.”<sup>257</sup>

Nor is a soldier or PMC’s daily life at a large military base always associated with an onslaught of attacks or launching of tactical operations. There are large groups of military personnel who rarely, if ever, engage in combat activities off of a military base; they instead provide logistical support from a military base to those infantry personnel who may be working from more dangerous combat operations outposts.<sup>258</sup> Pejoratively called “fobbits”<sup>259</sup> or “pogues,”<sup>260</sup>

251. *See id.* (emphasis added).

252. *See supra* Part III.A.1–2.

253. *See supra* Part III.B.

254. *See Balad Air Base*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/iraq/balad-ab.htm> (last modified Nov. 1, 2011) (describing the size and resources of the Balad Air Base).

255. *See Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 404 (4th Cir. 2011).

256. *See Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 700–01 (S.D.N.Y. 2011).

257. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

258. *See Richard Tomkins, FOBs the Closest Thing to Home in Iraq*, WASH. TIMES, Mar. 26, 2008, at A15, available at <http://www.washingtontimes.com/news/2008/mar/26/briefing-fobs-the-closest-thing-to-home-in-iraq> (“Combat operations posts . . . are located in towns and villages miles from forward operating bases. This is where the ‘door kickers’ can live for days before rotating back to a forward operating base, conducting anti-terrorist sweeps, presence patrols and other nitty-gritty duties in a counterinsurgency war—all the while risking snipers and improvised explosive devices.”).

259. *In Taji*, IRAQPARTII (SEPT. 24, 2007, 2:32 PM), [http://iraqpartii.blogspot.com/2007\\_09\\_01\\_archive.html](http://iraqpartii.blogspot.com/2007_09_01_archive.html) (describing oneself as a “fobbit” because of a logistical officer role on base). The term seemingly combines the forward operating base abbreviation, FOB, with the Hobbit characters that do not leave the safety of the Shire in J.R.R. Tolkien’s *Lord of the Rings* series. *See generally* J.R.R. TOLKIEN, *THE LORD OF THE*

these military members may “battl[e] boredom”<sup>261</sup> at their military base as they wait for a summoning of their non-combat services.<sup>262</sup>

The prevalence of PMCs at forward operating bases (“FOBs”) in the recent Iraq War buttresses this Comment’s narrow approach as well. FOBs are “large-to-huge logistics and support areas where munitions and supplies are stored, vehicles are maintained or repaired, headquarter detachments are based, mail is received, medical care is available and facilities such as showers and recreation centers help relieve the stress of deployment and missions ‘outside the wire.’”<sup>263</sup> FOBs in Iraq offered access to internet cafes, phones, post exchanges, and even quiet courtyard areas for rest and relaxation.<sup>264</sup> These FOBs also presented a variety of dining options at their facilities,<sup>265</sup> including an array of global food chains.<sup>266</sup> Such observations affirm the scrupulous manner in which the “service” and “setting” prongs of the particularized, contextual approach apply for military installations generally. Without this limited reach, the individual in our introductory hypothetical,<sup>267</sup> with injuries stemming from a corporation’s poor latrine, electrical, and waste maintenance, would be left without any recourse on a self-enclosed military base of 30,000 people—the size of a small town—though the very same

---

RINGS (Collector’s Ed. 1987) (describing the adventures of the fictional characters who eventually do leave the safety of the Shire).

260. The term Pogue, or sometimes POG, stands for “persons other than grunts.” The grunts are the ones who are physically engaging in combat activities, such as infantryman. See *The Problem of Perception, THE CALM BEFORE THE SAND* (Apr. 14, 2007, 4:12 PM), <http://calmbeforethesand.blogspot.com/2007/04/problem-of-perception.html> (“People only see either the Grunts or the Pogues. The Grunts are the Infantrymen, raiding homes, staring at death daily, and going months at a time without so much as a phone call or a letter from home. The Pogues are the rest; the support or otherwise noncombat soldiers who may or may not even go out the wire.”).

261. *Id.*

262. This is not to suggest that military personnel engaged in these support roles should not qualify for the combatant activities exception—they can. Recall that the unique training and supervision of military personnel justifies their broader immunities. See 3 NANDA & PANSIUS, *supra* note 222, § 14A:6, at n.74.

263. Tomkins, *supra* note 258.

264. See, e.g., *Mujahedin-E Khalq (MEK) Training Camp*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/iraq/mek.htm> (last modified Nov. 7, 2011) (describing the amenities offered for personnel stationed at the MEK Compound).

265. See Tomkins, *supra* note 258 (describing the size of dining facilities at FOBs); *At the DFAC, IRAQPARTII* (Oct. 14, 2007, 1:18 PM), <http://iraqpartii.blogspot.com/2007/10/at-dfac.html> (detailing the food offerings at KBR-run dining facility in Taji, Iraq).

266. See *How the Spartans Were Conquered*, CASTRA PRAETORIA (Apr. 17, 2009, 9:03 PM), <http://www.castrapraetoria1.blogspot.com/2009/04/how-spartans-were-conquered.html> (noting the prevalence of Subway, Taco Bell, Pizza Hut, Burger King, KFC, Cinnabon, and Green Bean Coffee at a military base).

267. See *supra* notes 1–6 and accompanying text.

injuries could give rise to tortious claims against a corporation in an actual small town in the United States.

None of these remarks should understate the real dangers that soldiers and contractors can face<sup>268</sup> even in the confines of a FOB, as noted in both *Aiello* and *Taylor*,<sup>269</sup> and the crucial work that both military personnel and contractors provide from a FOB or other type of large military installation. To that end, this Comment's approach gives PMCs an additional avenue to fit within the combatant activities exception by placing the burden on the contractor-defendants to illustrate either that (1) attacks on a military installation occurred at the very location involved in the claim with some frequency or intensity so as to show a direct connection with hostilities, or (2) the military installation itself was so directly connected to hostilities that it would be unreasonable not to apply the combatant activities exception.

Given this Comment's narrower approach, the contractor-defendant must do more than purely say that mortar and rocket attacks have sprung on a base. Rather, the contractor-defendant should point to *where* such attacks have erupted on the base at the time of the claim. If mortar and rocket attacks have regularly ensued on the outskirts of a base, for instance, with no major injuries to base personnel, these attacks would fail to show the "necessary" and "direct connection" to hostilities under this approach. By contrast, a base with an unusually high level of damaging mortar and rocket attacks in places near the location of the actual claim might have a better chance of falling under this exception.<sup>270</sup>

---

268. See, e.g., Bernd Debusmann, *In Outsourced U.S. Wars, Contractor Deaths Top 1,000*, REUTERS NEWS (Jul. 3, 2007), <http://www.reuters.com/article/2007/07/03/us-usa-iraq-contractors-idUSN0318650320070703?sp=true> (noting how over 1,000 contractors had been killed and over 13,000 wounded in the wars in Iraq and Afghanistan).

269. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713 (S.D.N.Y. 2011) (noting three mortar and rocket attacks on base); *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at \*10 (E.D. Va. Apr. 16, 2010, amended Apr. 19, 2010), *aff'd in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011) (noting monthly mortar fire on military base); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 404 (W.D. Pa. 2009) (noting consistent mortar attacks on base), *appeal dismissed*, 618 F.3d 398 (3d Cir. 2010)). As explained below, however, these attacks would not help KBR meet its burden under this Comment's approach. See *infra* Part IV.C.

270. Camp Anaconda may have been a model location where a PMC could have met its burden of proof in this regard. See Anita Powell, *Attacks on the Decrease at LSA Anaconda, aka 'Mortaritaville'*, STARS & STRIPES (Jul. 22, 2006), <http://www.stripes.com/news/attacks-on-the-decrease-at-lsa-anaconda-aka-mortaritaville-1.51876> (noting that Camp Anaconda was the subject of so many mortar attacks that it was known as "Mortaritaville" by personnel stationed there).



Likewise, one can imagine a situation in which the nature of the military installation itself—such as with a combat operations outpost housed in a village miles away from a FOB that conducts protective sweeps and counterintelligence work<sup>271</sup>—would almost always be evidence of a “direct connection with actual hostilities.”<sup>272</sup> In such a scenario, it would be difficult for courts to undertake a “service” and “setting” analysis that separates the regular, day-to-day functions of a combat operations outpost since the location and uses of that outpost are so heavily concentrated on, or in support of, actual combatant activities.<sup>273</sup>

#### IV. UTILIZING THIS NEW APPROACH: REASSESSING THE KBR CASES

This Part reviews the KBR cases under the particularized, contextual approach discussed in Part III and considers whether any of the decisions would change as a result. This analysis and commentary can prove useful for future PMC cases involving not only KBR but also other PMCs providing basic support services to the American military during wartime.

Under this Comment’s approach, *Taylor*, *Carmichael*, and *Lessin* would fall under the combatant activities exception, while the remaining KBR cases would not. Using this approach, the *Aiello* case and the two cases that relied on its reasoning—*Harris* and *In re KBR, Inc.*—were wrongly decided.<sup>274</sup> At the outset, it should also be noted that because the claims against KBR arise under its LOGCAP contract with the military, and under the direction and coordination of a Mayor’s Cell at all of the military bases, KBR services were under broad military command authority as understood under *Saleh* and *Al Shimari*.<sup>275</sup> Therefore, this Part targets whether KBR’s services constitute supporting “combatant activities.”

##### A. *Cases Where the Combatant Activities Exception Would Apply:* *Taylor*, *Carmichael*, and *Lessin*

First, this Comment’s approach would agree with the Fourth Circuit’s *Taylor* decision to invoke the combatant activities

---

271. See Tomkins, *supra* note 258.

272. Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948).

273. See Tomkins, *supra* note 258.

274. The *Lessin* case would also be wrongly decided under this Comment’s approach. But the case was decided before *Saleh*, and so it is imprudent to link that case with *Aiello*, *Harris*, and *In re KBR, Inc.* in the subsequent discussion.

275. See *supra* notes 186–88 and accompanying text.

exception.<sup>276</sup> Following the particularized, contextual approach, the court could first inquire about how the service was being used at the time of the claim. In *Taylor*, the claim arose from the KBR contractor providing his regular electrical service to the base. The soldier was repowering a portion of the base camp after an electrical wiring malfunction caused a power outage.<sup>277</sup> This action, on its own, would not adhere to the conditions of the combatant activities exception. But *Taylor's* facts also show that the Marines involved took steps to rectify the power outage on their own,<sup>278</sup> so it is not entirely clear if a “direct connection with actual hostilities”<sup>279</sup> existed based on this fact alone.

Despite the fuzziness of the “service” prong analysis, matters simplify if a court were to analyze the setting in which the claim began. Here, a soldier was electrocuted at a section of the base that maintained tanks and other assault vehicles,<sup>280</sup> vehicles that are undoubtedly involved in combat operations. This fact proves crucial in concluding that the service provided in this instance was in “direct connection with actual hostilities.”<sup>281</sup>

Although *Carmichael* was decided on political question grounds,<sup>282</sup> this Comment’s approach makes plain that the combatant activities exception should also apply to these kinds of convoy cases, thereby overturning the previous understanding in *Lessin*.<sup>283</sup> In *Carmichael*, which follows from similar facts in *Lessin*,<sup>284</sup> the contractor was providing a convoy service, driving supplies from one base to another.<sup>285</sup> Under the “service” prong of this Comment’s approach, the KBR contractor’s convoy service did not have the direct relationship to hostilities needed to trigger the combatant

276. Recall that the combatant activities exception was an alternative holding for the Fourth Circuit panel, where two of the three judges held that the political question doctrine applied, and two of the three judges (including one overlapping judge) believed that the combatant activities exception should apply. See *Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 413 (4th Cir. 2011) (Niemeyer, J., concurring).

277. See *id.* at 403–04 (majority opinion).

278. See *id.* at 404.

279. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

280. See *Taylor*, 658 F.3d at 404.

281. *Johnson*, 170 F.2d at 770. In contrast, this “service” prong analysis is what proves unsuccessful for KBR in the *Harris* case discussed below. See *infra* note 292 and accompanying text.

282. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275 (11th Cir. 2009).

283. *Lessin v. Kellogg, Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at \*3–4 (S.D. Tex. 2006).

284. See *supra* note 174 and accompanying text.

285. See *Carmichael*, 572 F.3d at 1275.

activities exception. Though the vehicle ultimately was turned over, at its core, the events stemmed from the use of a convoy service.<sup>286</sup>

As with *Taylor*, though, the “setting” prong proves dispositive. In *Carmichael*, the convoy service was not cropping up at the base, or some road outside the warzone; it was quite literally on the battlefield, traveling from one base to another outside the confines of the protections afforded at their respective base camps.<sup>287</sup> The dangers of this route were apparent because the convoy was assigned military escorts and traveled with gun trucks and Humvees along the way.<sup>288</sup> These facts illuminate the “direct connection to actual hostilities” needed to meet the combatant activities exception.

*B. Cases Where the Combatant Activities Exception Would Not Apply: Bixby and McManaway*

In *Bixby* and *McManaway*, it is impossible for any PMC activity at the Qarmat Ali water plant<sup>289</sup> to conform to the combatant activities exception since this Comment’s approach is unsuitable to a water plant that, in the district courts’ minds, focused on restoring Iraq’s oil production without any involvement in present battlefield activities.<sup>290</sup> Even ignoring the courts’ mutual understanding of the water plant—and instead viewing the plant as part of the larger military effort in Iraq—does not help KBR. The “service” prong offers KBR little assistance since all of the work in *Bixby* and *McManaway* involved health and safety inspections with no direct bond to combat activities.<sup>291</sup>

The “setting” prong would also prove fruitless since the claims accrued over a three-month period where KBR failed to disclose to its superiors the harmful carcinogen found at the water plant.<sup>292</sup> The lack of a direct connection to hostilities in this case is fairly clear under the proposed approach. Though the plant was a “dangerous place to work,”<sup>293</sup> KBR could not overcome the presumption that the water plant was not subject to an inordinate amount of dangers or

---

286. This thinking mimics the *Lessin* court’s reasoning. *Lesssin*, 2006 WL 3940556, at \*4.

287. See *Carmichael*, 572 F.3d at 1277–78.

288. See *id.* at 1276; see also *Yasin*, *supra* note 10, at 462–63 (noting the dangers that KBR convoys have faced in various warzones).

289. See *McManaway v. KBR, Inc.*, CIV.A. H-10-1044, 2012 WL 6033259, at \*9 (S.D. Tex. Dec. 4, 2012); *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1246 (D. Or. 2010).

290. See *McManaway*, 2012 WL 6033259, at \*9; *Bixby*, 748 F. Supp. 2d at 1246.

291. See *Bixby*, 748 F. Supp. 2d at 1231–32.

292. See *id.* at 1232.

293. *Id.* at 1246.

that the plant itself was not so heavily ingrained in combat operations.<sup>294</sup> In its last opportunity to fit within the combatant activities exception, then, KBR would not meet its burden in these cases.

C. *Rejecting the Aiello Line of Cases's Broad Reading of the Combatant Activities Exception*

This Comment's approach conflicts with the rulings in *Aiello*, *Harris*, and *In re KBR, Inc.* In *Aiello*, the court found that the combatant activities exception preempted a tort suit for injuries suffered by a civilian contractor after falling inside of a KBR-managed toilet facility.<sup>295</sup> Relying on *Aiello*, the *Harris* court found that a tort suit for a soldier's electrocution in a KBR-managed shower was also preempted.<sup>296</sup> *In re KBR, Inc.* leaned on *Aiello* when it explained that the combatant activities exception preempted claims against KBR for its improper and unhealthy waste disposal methods through its burn pits.<sup>297</sup> Applying this Comment's analytical approach, however, yields different results.

In *Aiello*, the "service" prong of the particularized, contextual analysis would prove unsuccessful for KBR. The claim arose out of the regular use of a toilet. With no other unique circumstances noted, the court would have been unable to find a needed "direct connection" to combat operations. The "setting" prong offers no additional help for KBR either. The injury occurred inside of a toilet facility with no other tie-in to hostilities other than the toilet being located on a forward operating base.<sup>298</sup>

In *Harris*, KBR would also face an impasse under a particularized, contextual approach. The "service" prong does not assist KBR. The soldier in *Harris* was electrocuted during a regular use of the shower because of KBR's slipshod electrical wiring.<sup>299</sup> Also, asking where the setting of the claim was located would not aid KBR since a shower lacks the "direct connection to actual hostilities" needed to find a combatant activity. Unlike in *Taylor* where the

294. See *supra* notes 268–73 and accompanying text.

295. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 700–01 (S.D.N.Y. 2011).

296. See *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 548 (W.D. Pa. 2012).

297. See *In re KBR II*, RWT 09MD2083, 2013 WL 709826, at \*18 (D. Md. Feb. 27, 2013).

298. See *Aiello*, 751 F. Supp. 2d at 700–01.

299. See *Harris*, 878 F. Supp. 2d at 561.

“setting” prong proved beneficial,<sup>300</sup> that is not the case here where the claim was merely related to someone using the shower.

KBR would also have little luck with the particularized, contextual approach under the facts of *In re KBR, Inc.* The “mundane” tasks of “waste disposal and water supply”<sup>301</sup> certainly do not comply with the “service” prong. The “setting” prong analysis is different from *Aiello* and *Harris* since “claims do not relate to a specific, discrete event, but rather to conditions endured in vast theaters of war in two countries over extended periods of time.”<sup>302</sup> But even so, KBR could not show the direct connection needed to hostilities. The burn pits were located on military installations throughout Afghanistan and Iraq,<sup>303</sup> not on some remote, exposed location in the middle of the battlefield.

KBR’s final opportunity to use the combatant activities exception in any of these cases, then, would rest on whether the frequency and intensity of attacks on a particular section of the base, or that the base itself was so directly engaged in combat operations, make it so that the exception should apply. But KBR would still fail to meet the exception. The base in *Aiello* was a FOB, which will not help KBR meet its burden under this Comment’s approach.<sup>304</sup> Nor would the mortar attacks mentioned in *Aiello*<sup>305</sup> be enough to satisfy this burden and establish an immediate connection to hostilities. Along with no additional facts about these mortar and rocket attacks’ proximity to the toilet facilities in *Aiello*,<sup>306</sup> this approach would not find an ample “direct connection to actual hostilities.”<sup>307</sup>

KBR would have an even weaker case in *Harris*. The events surfaced at the Radwanayah Palace Complex, the former main residence of Saddam Hussein.<sup>308</sup> The entire complex consisted of 144 buildings<sup>309</sup> and had “limited reports” of mortar and shelling outside

---

300. See *supra* notes 277–81 and accompanying text.

301. *KBR II*, 2013 WL 709826, at \*2.

302. *Id.*

303. See *id.*

304. See *supra* notes 263–66 and accompanying text.

305. See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713 (S.D.N.Y. 2011).

306. The court mentions that one of these attacks damaged several trucks and housing units, but it is unclear where these attacks occurred in relation to the toilet facilities. See *id.*

307. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

308. See *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 546 (W.D. Pa. 2012); *Radwanayah Presidential Site*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/iraq/radwanayah-cc.htm> (last modified Sept. 7, 2011).

309. See *Harris*, 878 F. Supp. 2d at 548.

the base ever “affecting base life.”<sup>310</sup> The strongest argument KBR could raise is that Special Forces troops were housed at the complex.<sup>311</sup> But given the complex’s size and its removal from more dangerous military outposts,<sup>312</sup> this Comment’s approach would not save KBR.

The facts from *In re KBR, Inc.*, too, would not offer the company any comfort. The burn pits were located on large military bases that housed tens of thousands of military personnel.<sup>313</sup> Absent any more facts about how some of these specific claims commenced, it should be assumed that the injuries were related to regular waste and water services with no significant instances of attacks near the burn pits.

At any rate, the *Aiello* court outlined why it believed latrine services were “necessary facilities”<sup>314</sup> related to supporting combatant activities.<sup>315</sup> The court even drew from historical examples involving the failed upkeep of latrines in supporting combat operations during the Punic, Revolutionary, and Spanish-American wars.<sup>316</sup> But if one is to accept this reasoning in *Aiello*, then it is hard to demarcate which activities would be “discrete” enough to fall outside the combatant activities exception.<sup>317</sup> For one thing, a food service worker could also fall under the exception since food also is a “necessary” part of sustaining combat operations. Under this Comment’s approach, however, these activities lack the “direct connection” also required by the definition of “combatant activity.”<sup>318</sup> *Aiello*’s approach, which *Harris* and *In re KBR, Inc.* adopt, did not fully appreciate *Saleh*’s limiting language,<sup>319</sup> and as a result, it incorrectly favored KBR. Of course, the effect of this particularized, contextual approach is that, although “necessary to” wartime efforts, the latrine, water, and trash

310. *Id.* at 596.

311. *See id.* at 548.

312. *See supra* notes 270–73 and accompanying text (discussing how a military outpost could be more likely to receive combatant activity protection).

313. *See, e.g., Garcia, supra* note 135, at 137 (discussing burn pits located at Balad Air Base that “consumed about 250 tons of waste a day, exposing 25,000 U.S. military personnel and thousands of contractors to toxic fumes.”); *Balad Air Base, supra* note 254 (describing Balad Air Base).

314. *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 714 (S.D.N.Y. 2011).

315. *See id.* at 713–14.

316. *See id.*

317. *See Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) (“We recognize that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military.”).

318. *See Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

319. *See Saleh*, 580 F.3d at 6.

services outlined in *Aiello*, *Harris*, and *In re KBR, Inc.* will rarely have the “direct connection with actual hostilities” under the combatant activities exception.<sup>320</sup> But as seen in *Taylor*, *Carmichael*, and *Lessin*, regular maintenance services can be protected under the right circumstances. Although it is hard to imagine when latrine, electrical, or waste services could fit the exception.<sup>321</sup>

### CONCLUSION

Enlarging the FTCA’s combatant activities exception<sup>322</sup> to cover the contractors in *Saleh* and *Al Shimari* is a proper response to the growing importance and assimilation of PMCs in contemporary American warfare.<sup>323</sup> But this new reality should not translate into assigning the combatant activities exception in every battlefield context where PMCs are present—a view reflected in the *Saleh* court’s limiting language.<sup>324</sup> Divisions have gushed in the aftermath of *Saleh* and *Al Shimari* over when to use the exception in lawsuits against basic support services contractors like KBR.<sup>325</sup> With that in mind, this Comment proposes a method for courts to use when resolving whether tort claims against a PMC should fall under the combatant activities exception. The approach encompasses both prior case law and foremost policy interests.

In brief, this Comment argues that courts should use a particularized, contextual approach to what constitutes a “combatant activity.” This approach calls for courts to conduct two inquiries, either of which would allow a PMC to meet the combatant activities exception. Courts should (1) analyze how the PMC *service* itself was used during the time of the claim, and (2) analyze where the specific *setting* of a particular claim arose on the battlefield, and determine if either prong details actions that were “both necessary to and in direct connection with actual hostilities.”<sup>326</sup> Along with the “service” and

---

320. *Johnson*, 170 F.2d at 770.

321. Perhaps the following three unlikely scenarios that could occur while a base was under attack would fall within the exception: (1) if a soldier used the top cover of a toilet as a shield against the enemy, but he was injured by the use of the “toilet shield;” (2) if a soldier turned on a fire hose against the enemy, but he was injured by the subsequent water stream; or (3) if a soldier was attacked on a base and proceeded to throw the enemy into a fiery burn pit, but he was injured after falling into the burn pit as well. KBR’s services in these contexts would qualify as a “combatant activity” under both the “service” and “setting” prongs of this Comment’s analytical framework.

322. See 28 U.S.C. § 2680(j) (2006).

323. See *supra* notes 217–22 and accompanying text.

324. See *Saleh*, 580 F.3d at 6.

325. See *supra* notes 16–25 and accompanying text.

326. *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

“setting” prongs, this Comment’s approach affords a contractor-defendant another chance to reach the combatant activities exception if it can meet its burden to show that (1) attacks on a base occurred at the very location involved in the claim with some frequency or intensity so as to show a direct connection with hostilities, or (2) the base itself was so directly connected to hostilities that it would be unreasonable not to apply the combatant activities exception.

Thus, the combatant activities exception would not heedlessly preempt claims against PMCs arising out of a regular use of its services and at an area of a base or battlefield that has no immediate connection to hostilities. As shown in cases like *Taylor* and *Carmichael*, basic support PMCs can successfully use the exception in the appropriate battlefield context with a real, direct association to hostilities that satisfies the combatant activities exception. Without a direct link to hostilities, however, PMCs will struggle to meet the exception.

In the end, the injured individual *A* from our earlier hypothetical on the military base<sup>327</sup> would be in luck. His claims would not be preempted. And absent more facts that reveal the toilet, shower, or trash facilities were home to several enemy attacks, it is highly unlikely that corporation *B* could meet its burden to restore the use of the combatant activities exception. Corporation *B* might need to call that defense lawyer after all.

S. YASIR LATIFI\*\*

---

327. See *supra* notes 1–6 and accompanying text.

\*\* The author would like to thank a number of individuals for their contributions to this piece, especially: Adam Parker and the *North Carolina Law Review* board and staff members for their tireless efforts and attention to detail on this piece; William Koegel at Steptoe & Johnson LLP for his invaluable insights on the *Al Shimari* case and draft versions of this piece; Judge Scott Silliman for his initial guidance about the topic of private military contractor liability; and, most of all, the author’s family for their unwavering support and kind words.