The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield

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Lieutenant Milo Minderbinder, a fictional war profiteer during World War II, expressed the following capitalist sentiment in Joseph Heller's novel Catch-22: "Frankly, I'd like to see the government get out of war altogether and leave the whole field to private individuals." While not to the extent advocated by Lieutenant Minderbinder, the 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.[1]

I. Introduction

The Federal Tort Claims Act (FTCA) is an exception to the general rule that the government is sovereign and immune from suit.[2] However, the FTCA contains a combatant activities immunity exception (FTCA combatant exception) for "any claim arising out of the combatant activities of the military . . . during time of war."[3] Post-9/11 military operations in Iraq and Afghanistan were waged by a military that, in a partial adoption of the recommendation of Lt Minderbinder, outsourced to contractors many activities that historically were performed by military personnel.[4] In recent years, federal courts have begun to apply the FTCA combatant exception to contractors, albeit differently in each case and even then only after lengthy litigation. In 2015, the Supreme Court denied a petition for certiorari for a consolidated group of cases involving the contractor Kellogg, Brown & Root (KBR)[5] for activities in Iraq and Afghanistan encompassing barracks maintenance, the operation of a waste disposal burn pit, and water treatment in oil wells during the restoration of Iraqi oil operations[6] under the Logistics Civil Augmentation Program (LOGCAP).[7] This article will address the origin and historical application of the FTCA's combatant exception as well as the current circuit split and highly fact-dependent manner in which the exception is applied. It will then analyze how current judicial treatment of the combat exception is both impractical and counterproductive and places the judiciary in a role where it does not belong—second-guessing military planning and decision-making. Finally, the article will take the position that, in light of the Supreme Court's failure to grant certiorari in the KBR cases, Congress must take action to ensure the FTCA's combatant exception adapts to serve the national policy of utilizing a military force heavily dependent upon contractor support by allowing the President and the Department of Defense the flexibility to extend the exception to contractors engaged in, and acting in support of, combat activities..

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[1] In re: KBR, Inc., Burn Pit Litig., 736 F. Supp. 2d 954, 955-56 (D. Md. 2010), quoting JOSEPH HELLER, CATCH-22, 259 (1961).

[2] 28 U.S.C.A. § 2680 (2016).

[3] 28 U.S.C.A. § 2680(j).

[4] OFFICE OF THE SEC'Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON IMPROVEMENTS TO SERVICES CONTRACTING 31 (2011), http://www.acq.osd.mil/dsb/reports/ADA550491.pdf.

[5] The conduct at issue in the cases discussed in this paper occurred when the firm was a Halliburton Co. subsidiary named Kellogg, Brown & Root Services, Inc. In 2007, the company was sold by Halliburton and became independent, renaming itself KBR, Inc. For simplification, throughout the text of this paper the acronym KBR will be used to refer both to Kellogg, Brown & Root Services, Inc. and KBR, Inc.

[6] In re KBR, Inc., Burn Pit Litig., 744 F.3d 326 (4th Cir. 2014) cert. denied sub nom. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) *cert. denied*, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[7] The Logistics Civil Augmentation Program (LOGCAP) contract at issue in the suits discussed in this paper was a ten year multi-billion dollar contract awarded to KBR in 2001 for global support. In re KBR, Inc., 744 F.3d 326 (4th Cir. 2014). The contract was executed through task orders and statements of work that set out the work KBR was to perform in supporting military missions. *Id.* The current LOGCAP contract is held by KBR, DynCorp International, Inc., and Fluor International, Inc. and, as with the prior LOGCAP, covers a vast expanse of duties such as

> supply operations, such as the delivery of food, water, fuel, spare parts, and other items, field operations, such as dining and laundry facilities, housing, sanitation, waste management, postal services, and Morale, Welfare and Recreation activities, and other operations, including engineering and construction, support to communications networks, transportation and cargo services, and facilities management and repair.

U.S. Army Sustainment Command Public Affairs, *ASC Selects LOGCAP IV Contractors* (Jun. 28, 2007), http://www.army.mil/article/3836/ASC_selects_ logcap_iv_contractors/.

II. The History of the Federal Tort Claims Act's Combatant Exception

The FTCA is a statutory waiver of the federal government's sovereign immunity and allows individuals to file suit against the federal government, with certain exceptions.[8] One exception is the combatant activities exception, which applies to "any claim arising out of the combatant activities of the military . . . during time of war."[9] What "arising out of combatant activities" means is not defined in the statute and left to the judiciary. Recently, courts have very creatively interpreted the statute to extend it to contractors, a result that is in direct contravention of the statutory bar on the FTCA applying to contractors.[10] Despite this, the current application of the FTCA combatant exception remains inadequately tailored for the modern military due to many contractors that perform combat support tasks being denied the same immunity that has been afforded military members who have traditionally performed these tasks.

A. The Origins and Historical Application of the Federal Tort Claims Act's Combatant Exception

The issue of what constitutes a combatant activity was first addressed in a case involving allegations that military operations damaged a clam farm. In that case, the Ninth Circuit reversed a trial court's grant of a motion to dismiss for lack of jurisdiction on grounds that the damages alleged were not caused during a time of war or by an act arising out of a combat activity.[11] However, in doing so the court found that the FTCA term "combatant activities" was to be read broadly and was not limited strictly to acts of violence but encompassed all those activities that were "both necessary to and in direct connection with" hostilities.[12] The court stated that "the [FTCA] is couched in unambiguous language which leaves no doubt in our minds of the meaning the legislators intended to attach."[13] This reference to statutory unambiguous language would ironically later give way to ambiguity as courts began to struggle with the issue of whether the exception should apply to contractors, particularly when the military force structure changed to include contractors performing functions that historically had been performed by military personnel.[14]

While contractors are specifically excluded from the waiver provisions of the FTCA,[15] the Supreme Court opened the door to its application to contractors providing services to the military in a case involving a separate FTCA exception, the discretionary function exception.[16] However, the application of the FTCA's combatant exception remained limited to governmental actors until 1992 when it was extended by the Ninth Circuit to suits against contractors within the context of products liability claims.[17] In 2009 and 2011, in two cases involving contractors engaged in performing duties at Abu Ghraib prison in Iraq, the D.C. and Fourth Circuits, respectively, ruled that the FTCA's combatant exception was to be applied to private contractors if the actions of the contractor were within the control of military command authority.[18] In these two cases, the courts used a variation of the discretionary function exception's *Boyle*[19] test by looking to whether there were uniquely federal interests involved in applying the exception, whether there were significant conflicts between those unique federal interests and the application of state tort law, and by examining to what level the contractor activity was both integrated with military combat activity and under the command authority of the military.[20] This analysis had ample opportunity for further judicial application given the increased operational footprint of the U.S. military post-9/11 and the military's reliance on contract support in those operations.

B. Clear as Mud: The Current State of the Federal Tort Claims Act's Combatant Exception

With the newly expanded role that contractors play on the

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[8] 28 U.S.C.A. § 2680. Prior to 1948, the immunity waiver provisions were codified at 28 U.S.C.A. § 943(j) (1948).

[9] 28 U.S.C.A. § 2680(j).

[10] The statute "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." 28 U.S.C.A. § 2671 (2016) (emphasis added). However, military contractors have long been afforded immunity under a separate exception, the discretionary function exception, better known as the government contractor defense. 28 U.S.C.A. § 2680(a), *see also* Boyle v. United Tech. Corp., 487 U.S. 500 (1988).

[11] Johnson v. U.S., 170 F.2d 767, 770 (9th Cir. 1948).

[12] *Id*.

[13] *Id*. at 769.

[14] In fact, as courts started to examine the Federal Tort Claims Act's (FTCA) combatant exception in light of the role that contractors began to play in wartime operations, one court even went so far as to say that the earlier lack of ambiguity was dead. "The FTCA does not explicitly state the purpose of the exception, nor does legislative history exist to shed light on it." Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 479 (3rd Cir. 2013).

[15] 28 U.S.C.A. § 2671.

[16] Boyle v. United Tech. Corp., 487 U.S. 500, 511-12 (1988).

[17] Koohi v. U.S., 976 F.2d 1328, 1334 (9th Cir. 1992).

[18] Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009); Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *vacated on rehearing en banc*, 679 F.3d 205 (4th Cir. 2012).

[19] *Boyle*, 487 U.S. at 503-13.

[20] *See Saleh*, 580 F.3d at 6-9; *Al Shimari*, 658 F.3d at 418-20. Although *Al Shimari* was later vacated and remanded due to the immunity issue not being subject to an interlocutory appeal, the reasoning utilized by the court in extending the FTCA's combatant exception in both cases was attuned to the growing need to adjust the law to address the historically unprecedented involvement of government contractors on the battlefield in the wars of Iraq and Afghanistan. *See Al Shimari*, 679 F.3d 205.

battlefield, "hundreds, perhaps thousands, of lawsuits have been filed in the wake of the wars in Iraq and Afghanistan and are wending a tortuous way through courts" and yet the current application of the FTCA's combatant exception is so muddled that it results in years of litigation and still produces inconsistent and counterproductive results.[21] There are, however, common grounds that can be used to map out the current state of the law. For instance, *Koohi* established that federal interests can conflict with and preempt tort suits against contractors in the field of products liability.[22] As mentioned previously, the D.C. Circuit adapted the *Boyle* test in *Saleh* and amended it to analyze contractor actions by adding considerations of whether those actions were integrated with combat activities.[23]

In using that test, *Saleh* held that the first prong, the identification of a uniquely federal interest, was the elimination of tort law from the battlefield.[24] However, courts have also developed a narrower federal interest for this prong as being only the prevention of a state from regulating military decisions and conduct.[25] On the second prong, courts have settled on the *Saleh* position as to the significance of the state-federal conflict by looking to whether the conflict touches on military decision-making, in which case the federal government occupies the entire field.[26] In analyzing the third prong, courts are divided on whether the exception applies only if the military was so integrated with the contractor as to overcome its authority or whether the imposition of tort liability constitutes state regulation of the military.[27] Therefore, it appears to be within the first and third prongs of the analysis that a circuit split has developed and resulted in courts creating an unworkable standard for applying the FTCA's combatant exception.[28]

While courts have extended the FTCA's combatant exception to the actions of contractors, the uneven application is best illustrated by examining three separate cases involving suits against KBR for damages alleged to have been caused by their performance under the LOGCAP in Iraq and Afghanistan. The three cases below were consolidated in a petition for certiorari to the Supreme Court that was denied in January 2015.[29]

1. Harris v. KBR: The Electrocution Case

In July 2012, the Western District of Pennsylvania granted a KBR motion to dismiss[30] in a suit by the administrators of a servicemember's estate for the electrocution death of the servicemember in Iraq.[31] The court made extensive findings of fact into the complex relationship between KBR and the military for the renovation of a housing complex where the member was electrocuted.[32] The only issue decided by the court in granting the motion was whether KBR's acts met the "direct connection with hostilities" threshold.[33] The court found there was sufficient evidence that KBR's acts were "integral to force protection" and that servicemembers used the facilities maintained by KBR to obtain power for their "war-time defensive instruments."[34] Finally, the court found that the acts constituted combatant activities because combat took place within the base where KBR performed their work.[35]

On appeal, the Third Circuit reversed and found the FTCA combatant exception did not apply and explained that, while the exception itself is quite simple, applying it is complicated by "a number of case-by-case factors."[36] The court quickly dispatched the first two *Boyle* prongs and on the third prong adopted the *Saleh* position that the application of the combatant activities exception turned on whether the contractor acts were integrated into the combatant activity for which the military retained authority.[37] The court held that

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[21] McManaway v. Kellogg, Brown & Root Services, Inc., 554 F. App'x 347, 353 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[22] *See Koohi*, 976 F.2d at 1334.

[23] *See Saleh*, 580 F.3d at 9. However, one court has gone so far as to prohibit the application of the FTCA's combatant exception to cases not involving complex military equipment obtained in the procurement process or involving injuries sustained as part of the application of military force. Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp. 2d 1373, 1377-78 (N.D. Ga. 2006). That case was later dismissed pursuant to the political question doctrine, a doctrine that is also at issue in the cases discussed in this paper but is outside the scope of this paper. Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F3d 1271 (11th Cir. 2009).

[24] *Saleh*, 580 F.3d at 7.

[25] Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 480 (3rd Cir. 2013); In re KBR, Inc. Burn Pit Litig., 744 F.3d 326, 348 (4th Cir. 2014).

[26] *Saleh*, 580 F.3d at 7.

[27] *See In re: KBR, Inc.*, 744 F.3d at 350.

[28] The circuit split issue is covered further *infra* Part IV.A. of this paper.

[29] In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326 (4th Cir. 2014) *cert. denied sub nom*. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) cert. denied, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[30] The motions to dismiss in all of the KBR cases covered also include either the political question doctrine or derivative sovereign immunity under the FTCA's discretionary exception.

[31] Harris v. Kellogg, Brown & Root Services, Inc., 878 F. Supp. 2d 543, 548 (W.D. Pa. 2012). The court previously dismissed the motion and, after remand from the Third Circuit, conducted discovery prior to granting the renewed motion to dismiss. *Id*. at 547.

[32] *Id*. at 548-66. Specifically, the suit alleged that KBR failed to adequately install a water pump or respond to work orders that complained of "electrified water[.]" *Harris*, 724 F.3d at 463.

[33] *Harris*, 878 F. Supp. 2d at 595.

[34] *Id*.

[35] *Id*.

[36] *Harris*, 724 F.3d at 462.

[37] *See id*. at 480.

this analysis ensured "preemption occurs only when battlefield decisions are at issue" and the acts were "the result of the military's retention of command authority."[38] The court reversed the lower court's decision by finding that, while KBR's actions were integrated into the military's combat activities, the military's work orders to KBR "did not prescribe how KBR was to perform the work required of it."[39] Thus, because KBR had discretion in how to perform the work required by the military, the Fourth Circuit found that the FTCA combatant exception did not apply.

2. *In re: KBR: The Burn Pit Case*

In February 2013, the District of Maryland granted a KBR motion to dismiss in a consolidated case involving forty-four class action suits and thirteen individual plaintiffs filed by servicemembers alleging injuries sustained due to KBR's negligent operation of waste disposal burn pits and provisions of contaminated water.[40] In granting the motion, the court adopted the position of *Saleh* that the "focus should not be on the activity of the contractor, but rather that of the military and whether the claims asserted arise out of combatant activities of the military."[41] The court determined it was "the exigency of combat conditions that drove the decision of the military to use open burn pits in the first place."[42] On appeal, the Fourth Circuit acknowledged that the application of the FTCA's combatant exception to the modern military force structure was a "changing legal landscape,"[43] and reversed and remanded for further discovery on the issue.[44]

The Fourth Circuit rejected the broad *Saleh* "elimination of tort from the battlefield" goal of the FTCA's combatant exception as well as the limited holding from *Koohi* that there was "no duty of reasonable care" owed to those against whom force is directed[45] and instead adopted the *Harris* standard that the unique federal interest at issue was the prevention of state interference with military conduct and decisions[46] and that the federal government occupies the field as to military conduct and decision-making.[47] The Fourth Circuit also adopted the *Johnson* standard that combatant activities included those acts "necessary to and in direct connection with actual hostilities"[48] and that the operation of burn pits and water treatment in a combat area were combat activities.[49] In the end, however, the court found that there was insufficient evidence to determine whether KBR's combat activities were sufficiently integrated into the chain of command to trigger the application of the FTCA's combatant exception and the case was remanded for further discovery.[50]

3. *McManaway v. KBR: The Water Treatment Case*

In December 2012, the Southern District of Texas denied a KBR motion to dismiss in an action brought by servicemembers alleging injuries caused by KBR's operation of oil wells in Iraq.[51] The court used the *Johnson* standard for what constituted a combatant activity and found that there was no need to determine whether the FTCA combatant exception applied because KBR's restoration of oil production was not a combatant activity and did not occur during combat but instead occurred while the United States was "restoring the combat area of Iraq to productive use after hostilities ended."[52] The Fifth Circuit then denied a petition for an en banc rehearing but the denial contained a blistering dissent by four of the circuit judges based on the point that, "from the contractor's standpoint, its mission was fully intertwined with that of the military, as the facility's restoration depended on coordination and collaboration" between the Army and KBR.[53] The dissent noted that the current judicial status of the exception was unworkable and nonsensical by noting that "it makes no sense to render formulations of the exception that preserve contractor tort liability in ways that would be inconceivable had the same battlefield-related activities been conducted by the military itself."[54] The opinion accurately summed up the state of the judiciary's treatment of the FTCA's combatant activities exception by stating "[t]he panel's dismissal order stands federal procedure on its head by implying that this case must nearly be tried before we can assess federal court jurisdiction and competence to hear it."[55] The *McManaway* dissent serves as the judicial magnum opus of the logical and legal absurdity, not to mention impractical

[38] *Id*. at 481.

[39] *Id*.

[40] In re KBR, Inc., Burn Pit Litig., 925 F. Supp. 2d 752 (D. Md. 2013). The motion was originally denied pending development of a joint discovery plan and then the case was stayed pending the outcome of several FTCA combatant exception cases in the Fourth Circuit. *See id*. at 757-58.

[41] *Id*. at 770 (italics omitted).

[42] *Id*.

[43] In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326, 331 (4th Cir. 2014).

[44] *See id*. at 351-52.

[45] Koohi v. U.S., 976 F.2d 1328, 1337 (9th Cir. 1992).

[46] *In re: KBR, Inc*., 744 F.3d at 347-48.

[47] *Id*. at 348-49.

[48] Johnson v. U.S., 170 F.2d 767, 770 (9th Cir. 1948).

[49] *See In re: KBR, Inc*., 744 F.3d at 351.

[50] *Id*.

[51] McManaway v. KBR, Inc., 906 F. Supp. 2d 654 (S.D. Tx. 2012).

[52] *Id*. at 666 (omitting internal citations). The restoration of the oil wells took place starting in 2003 shortly after the U.S invasion of Iraq. *Id*. at 658.

[53] McManaway v. KBR, Inc., 554 F. App'x 347, 355 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[54] *Id*. at 353.

[55] *Id*. at 348. "To any reasonable observer, however, an incredible amount of private, military, and judicial resources will have been expended solely to determine if the suit can be heard in federal court." *Id*. at 349.

and counterproductive from a policy standpoint, that is the current status of the application of the FTCA's combatant exception.

III. The Need for True Combatant Contractor Immunity

Since 9/11, the United States has made the twin policy decisions to engage in wars while also utilizing a smaller active duty military that is dependent upon contractor support.[56] The modern military's reliance on contractors is now placed at some risk by the application of the FTCA's combatant exception because these tort actions, while seeking compensation for real and tragic losses, are "really indirect challenges to actions of the U.S. military."[57] The reality is that "contractors are part of the total military forces"[58] and the current judicial application of the FTCA's combatant exception does not adequately serve the needs of that force.

A. The Expanded Role of Contractors on the Battlefield

Contractors are now performing many combat support operations that were once performed by active duty military and routinely make up the majority of the total force in an area of combat operations.[59] Contractors perform a wide array of tasks that the average civilian would likely consider combat-related,[60] in addition to the combat support services at issue in the KBR cases.[61] National policy has created a "symbiotic relationship with in-theater service contractors to perform such essential combat support activities" in order to free up Soldiers for the "core functions of warfighting"[62] and it is necessary to ensure that the legal framework regarding the FTCA's combatant exception furthers that policy.

The move to a smaller military force dependent on contractors was made in large part to provide a more flexible military and save costs.[63] However, the Department of Defense has more than doubled their expenditure on contracting since 9/11, with total contracting obligations consisting of roughly ten percent of the entire federal budget.[64] For For instance, Iraq-related contract obligations of $25 billion in fiscal year 2008, reflecting costs during the U.S. troop surge, and Afghanistan-related contract obligations totaled $21 billion in fiscal year 2012 during the peak of the U.S. presence in Afghan operations.[65] Regardless of one's opinion of the wisdom of choosing the current force structure[66] or the effectiveness of KBR in the cases analyzed in this article, the Rubicon has been crossed. The military force has been cut and is now dependent on contract support and it is necessary that public policy, to include the application of the FTCA's combatant exception, work to serve national security needs with, to paraphrase former Secretary of Defense Donald Rumsfeld, the force we have rather than the force we once had.[67]

B. Impractical and Counterproductive: The March of the Judiciary

Courts and Congress have facilitated a legal absurdity by allowing military contractors engaged in combat operations to be subject to fifty different state tort schemes that creates operational uncertainty for both the government and contractors.[68] The new military force structure requires a

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[56] MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEP'T OF DEF.'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS AND ISSUES FOR CONG. 1 (2013) [hereinafter USE OF CONTRACTORS].

[57] Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009). For instance, in *Harris*, a case in which formal discovery has not yet even taken place, there were seventeen military officials who were deposed by the time KBR sought a writ of certiorari from the U.S Supreme Court. Brief of the Chamber of Commerce of the United States of America, et al. at 24, Kellogg, Brown & Root Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015) No. 13-817, 2014 WL 547051.

[58] Karen Parish, *Dempsey: Military Costs Must Shrink*, AM. FOREIGN PRESS SERVS. (Mar. 6, 2012), http://archive.defense.gov/news/newsarticle.aspx?id=67440.

[59] *See* DEP'T OF DEF. CONTRACTOR AND TROOP LEVELA IN IRAQ AND AFGHANISTAN: 2007-2014, R44116, 1 (Heidi Peters, et al. eds., 2015) [hereinafter CONTRACTOR AND TROOP LEVELS]..

[60] USE OF CONTRACTORS, *supra* note 56, at 3. Contractors perform "such critical tasks as providing armed security to convoys and installations, providing life support to forward deployed warfighters, conducting intelligence analysis, and training local security forces." *Id.*

[61] In addition to the KBR tasks of performing building maintenance in *Harris*, burning waste in pits in *In re KBR*, and treating water in *McManaway*, contractors also "wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells, and support many other important activities." COMMISSION ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN SECOND INTERIM REPORT TO CONG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 7 (2011).

[62] Brief for Petitioner at 3, Kellogg, Brown & Root Services, Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015.); No. 13-817, 2014 WL 108365 (omitting internal citations).

[63] *See* USE OF CONTRACTORS, *supra* note 56, at 3-4.

[64] *See Id*. at 1-3, fig.1-2 (stating that in inflation-adjusted dollars the expenditures have increased from $170 billion in 1999 to $360 billion in 2012).

[65] *See* CONTRACTOR AND TROOP LEVELS, *supra* note 59, tbl.5.

[66] This article focuses primarily on the legal basis for ensuring the most effective operation of the national security policy choice of a military force structure heavily dependent on contractor support. Although outside the scope of this article, much has been written on the potential for contractor support, particularly in the field of private security contractors, to lessen the political risk for the use of force. *See* Robert Bejesky, *The Economics of the Will to Fight: Public Choice in the Use of Private Contractors in Iraq*, 45 Cumb. L. Rev. 1 (2014-2015).

[67] The actual quote of Secretary Rumsfeld was, "As you know, you go to war with the army you have, not the army you might want or wish to have at a later time." *Troops Put Rumsfeld in the Hot Seat*, CNN (Dec. 8, 2004), http://www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html.

[68] *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1064 (2009). The inability to know which law will govern a contract "lead[s] to inconsistent standards

high level of trust and cooperation between commanders and contractors that is undermined by litigation that "will often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies."[69] The seemingly obvious reason for the adoption of the FTCA's combatant exception was to free military activities from the hesitancy associated with the risk of tort liability. With the changed military force structure and the increasing dependence on battlefield support by contractors, that rationale logically now extends to contractors because tort suits "will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations."[70] Contractors are rational actors and will seek to minimize their losses. The imposition of tort liability in a combat environment raises the potential for liability so it is only natural that contractors will tailor their behavior to minimize their risk by more closely questioning military decision-making and the limits of what they are willing to do to perform their combat support functions.

Allowing contractor liability under an unpredictable legal framework will, to a large extent, have the same effect as it would if the suits are brought against the military because it will serve as a factor weighing on military decision-making on how to use contractors and for contractors in how to offer their expertise to support military missions. In addition, the current state of the law is counterproductive because contractors are unable to calculate the costs of performance prior to engaging in business with the military because they cannot factor in potential liability under the laws of all fifty states.[71] This inability to assess the costs of doing business with the military may very well lead to a degree of hesitancy or unwillingness to contract with the government[72] or higher costs of contracting.[73] In what truly seems to be a Twilight Zone twist, the standard contractual relationship between the government and battlefield contractor contains provisions that ensure "the costs of imposing tort liability on government contractors is passed through to the American taxpayer."[74] In fact, the LOGCAP contract under which KBR performed support services is a cost-reimbursement contract requiring reimbursement for all but those harms occurring as a result of willful misconduct.[75] In fact, in August 2015, in a task order under the LOGCAP that extended the passing through of liability to the government even further, the Armed Services Board of Contract Appeals addressed a case where the indemnification clause involved in a KBR Iraqi oil services restoration contract covered even willful misconduct and indemnified "third party claims . . . and related legal costs."[76] The eventual passing through of damage and litigation costs to the government under an unpredictable legal framework with no federal control negates in part the cost-savings benefit of using contractors to support a smaller military.

In addition, courts have simply shown themselves unable to make the military-specific determinations required to apply the FTCA's combatant exception. The judiciary has too often taken an ivory tower approach to analyzing the environments in which battlefield contractors operate. For instance, in *Harris*, the court downplayed the risk to KBR contractors and their activities when KBR was acting in an environment where attacks had occurred and affected life on the base.[77] Regardless of whether a contractor is actually engaged in combat, if they are in the theater of operations or within a base in which combat is occurring they must take the operational

being applied and uncertainty on the part of actors who wish to conform their conduct to the law." *Id.*

[69] Saleh v. Titan Corp., 580 F.3d 1, 8 (D.C. Cir. 2009).

[70] *Id.*

[71] For instance, in *Harris*, on December 26, 2015, after years of litigation and the denial of certiorari by the Supreme Court, the court finally determined that Pennsylvania's tort law would apply to the case. Harris v. Kellogg, Brown & Root Services, Inc., No. 08-563, 2015 WL 8990812 (W.D. Pa. 2015).

[72] In fact, one ironic twist of the current application of the FTCA's combatant exception is that large corporate conglomerates that are heavily invested in receiving wartime contracts, such as KBR, who were so criticized for their conduct during the wars in Iraq and Afghanistan and derided in the media as the modern day scourge of what President Eisenhower termed the Military-Industrial Complex, are likely the only type of firms that are able to take on such legal and financial uncertainty. The current legal framework acts to lock into place the major wartime contractors and acts to stifle competition.

[73] *See* Boyle v. United Tech. Corp., 487 U.S. 500, 517 (1988).

[74] *Saleh*, 580 F.3d at 8. "The financial burden of judgments against the contractors [will] ultimately be passed through, substantially if not totally, to the United States itself." *Boyle*, 487 U.S. at 511-12.

[75] 48 C.F.R § 52.228-7(c)(2), (e)(3) (2016).

> (c) The Contractor shall be reimbursed . . . (2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, *whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees*, and must be represented by final judgments or settlements approved in writing by the Government. . . . (e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities) . . . (3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction[.]

Id. (emphasis added).

[76] *In re* Kellogg Brown & Root Services, Inc., ASBCA No. 59357, 2015 WL 5076058, at *7 (August 13, 2015). This case involved a consolidation of various claims against KBR, including those at issue in *McManaway*. *Id.* at *4-5.

[77] *See* Harris v. Kellogg, Brown & Root Services, Inc., 878 F. Supp. 2d 543, 595 (W.D. Pa. 2012) (minimizing the state of readiness required on the base). "[T]here was a risk of mortar and shelling at the base but limited reports of such activities affecting base life" and "soldiers generally felt that the RPC was a safer location to be housed than other areas of Iraq where intense fighting was more common." *Id.*

precautions as if they could be under attack at any time.[78] Practice has shown that courts are ill-equipped to make the determination of "how much combat is enough combat" .[79] In fact, in addition to *Saleh's* "elimination of tort from the battlefield"[80] and *Koohi's* "reasonable care"[81] theories, one commentator also found that courts have used a legal purist theory which refuses to extend the FTCA's combatant exception to contractors and a textualist theory that extends the exception only to those contractor activities that actually constitute combat operations.[82] This commentator wrote prior to the circuit court opinions in the KBR cases used in this article to illustrate the federal circuit split as to the application of the FTCA's combatant activities exception, and advocated an adoption of the *Koohi* standard, "which holds that a reasonable care standard for private military contractors is appropriate in some circumstances."[83] In addition, in articles also written prior to the denial of certiorari in the KBR cases used in this article, commentators have posited even more complicated judicial solutions to the issue of the FTCA's combatant activity exception's extension to contractors, such as a multi-pronged "particularized, contextual approach"[84] or an approach that analyzes whether an activity constitutes combat and then applying the rules of engagement.[85] However, in light of the differing analyses and inconsistent results that has only been made more confusing by the KBR cases, it remains evident that courts are simply unable to fashion a workable standard for extending the FTCA's combatant exception to contractors and that the answer to the problem is not for the judiciary to adopt an even more complicated and subjective test.

Finally, the federal circuit split on the issue of how to apply the FTCA's combatant exception has negative practical effects. The current state of the law requires years of litigation of motions to dismiss and, in effect, results in a threshold combatant immunity trial before the merits trial to determine if the exception is applicable.[86] For instance, although the Third Circuit in *Harris* purported to be following the D.C. Circuit's application of the FTCA's combatant activities exception in *Saleh*, the Third Circuit refused to dismiss due in part to the discretion retained by KBR in performing maintenance.[87] However, the court did not offert a clear delineation as to what measure of control is required by the military to overcome the threshold that would outweigh a contractor's discretion. In addition, even if a legal threshold could be determined, it would produce a counterproductive and "perverse incentive" for contractors to avoid exercising their expertise in furtherance of the military mission and seek complete oversight and direction from the military to avoid potential liability.[88]

Even if a contractor did not deliberately seek to have the military exercise a higher degree of control in order to avoid potential liability, under the framework set up in the KBR cases, the FTCA's combatant exception is more likely to be applied as the degree and control exercised by the military

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[78] As anyone who has served in the wars in Iraq and Afghanistan can attest, the security and operational posture of each of these support tasks requires a war footing and a constant readiness for combat. This is something that seems completely lost in the judicial analysis of the cases involving the FTCA's combatant exception.

[79] In fact, one court found that oil restoration activities in Iraq, while dangerous, were not related to combat activities but were instead related to a foreign policy goal that was more akin to providing "base maintenance services, or to conducting truck convoys through hostile territory with military escorts than to repairing a generator necessary for the performance of maintenance on the engines of war." Bixby, et al. v. KBR, Inc., et al., 748 F. Supp. 2d 1224, 1246 (D. Or. 2010).

[80] Saleh v Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009).

[81] Koohi v U.S., 976 F.2d 1328, 1337 (9th Cir. 1992).

[82] Spencer R. Nelson, *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. Civ. Rts. L.J. 109, 119-27 (Fall 2012). This article is a great summary of the varying legal theories underpinning the differing application of the FTCA's combatant exception prior to the KBR cases addressed in this article.

[83] *Id*. at 127.

[84] S. Yasir 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 (May 2013). This comment calls for courts to examine the issue of how a contractor is used "in connection to combatant activities" and then analyze whether the claim arose "on the battlefield and its connection to combat activities." *Id*. at 1362-63. Further, if a contractor fails either of the issues above, they would then have the burden of demonstrating that "attacks on a base occurred at the very location involved in the claim with some frequency or intensity" or "that the base itself was so directly connected to hostilities that it would be unreasonable not to apply" the FTCA's combatant activity exception. *Id*. at 1363.

[85] Michael Kutner, *The Battle Over Combat: A Practical Application of the Combatant Activities Exception to the Federal Tort Claims Act*, 87 St. John's L. Rev. 701, 721-23 (Spring-Summer 2013). This article calls for looking to the plain meaning of the exception's language, and asks if the activity in question constitutes combat as it is commonly understood. *Id*. at 704-05. If the activity constitutes combat, this gives a rebuttable presumption for application of the FTCA's combatant activity exception that can be overcome if the plaintiff can show the activity violated the "rules of engagement for the area in which it occurred." *Id*. at 705. However, if the activity is not found to constitute combat, then a rebuttable presumption arises that the exception will not apply unless the government can show that the "activity is similar enough to combat that imposing liability for it would give rise to the same policy concerns as would imposing liability for combat." *Id.*

[86] Although there is not complete formal discovery on the merits in the KBR cases, there has been years of litigation, depositions, evidentiary submissions, and considerations of the threshold issues of the combatant immunity exception, the political question doctrine, and sovereign immunity and yet still courts find that they "lack the information necessary" to determine these claims and continually "need more evidence" to determine the relationship between the military and contractor. In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326, 331, 339 (4th Cir. 2014).

[87] *See* Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 481 (3rd Cir. 2013).

[88] Saleh v. Titan Corp., 580 F.3d 1, 8-9 (D.C. Cir. 2009) (omitting internal citations). *Boyle* termed such a framework a perverse inventive for imposing liability as penalizing a contractor for exercising their discretion. Boyle v. United Tech. Corp., 487 U.S. 500, 513 (1988).

over the contractor increases. A contractor would actually be rewarded under such a structure for being so incompetent in performing battlefield support tasks that the military command structure would have to exercise additional oversight and control in order to ensure the needed tasks were performed adequately. Under the current military force structure, it is unsound policy to have a smaller active duty force dependent on contractors who also have an incentive to avoid exercising their expertise and instead push as much as possible to rely on government oversight and control to avoid liability. This unintended consequence of the legal status quo directly undermines the rationale for utilizing a small force dependent on contractor support, i.e. lower costs and freeing the military for combat and direct support of combat.

IV. Common Sense Expansion: Updating the Law to Fit Combat Reality

Combatant contractor performance is fundamentally different from peacetime performance and the role of contractors on the battlefield has fundamentally changed as they have become integrated into the military force structure. In addition to the uneven judicial application of the FTCA's combatant exception, the current application carries over the peacetime idea that the allocation of risk for performance-based contracts should rest with the contractor into the very different environment of battlefield contracting in which the idea of risk allocation requires a radically different approach. Although, in the wake of the experience gained in Iraq and Afghanistan, the trend is for increased military oversight of contractors, [89] the uneven application of the FTCA's combatant exception carries real risks and should allow the President and the Department of Defense to bring it into line with the operational needs of the military.

A. Missed Opportunity: The Supreme Court's Punt on the KBR Cases

The KBR cases presented the perfect opportunity for the Supreme Court to bring the FTCA's combatant exception into line with the reality of the modern military force and free contractors, and commanders, from the limiting risk of civil suit.[90] However, in January 2015, the Supreme Court denied certiorari[91] and the state of the law remains unpredictable and unevenly applied. Even if federal courts turn to *Saleh* and the D.C. Circuit to guide their analysis, the KBR cases illustrate that there is the real risk that most combat support contractors will find the exception inapplicable as performance-based contracts would likely fail the military oversight and control analysis of the third prong of the *Boyle* test [92] absent a contractual provision that shifts risk to the government.[93]

In addition to the practical economic and operational reasons already covered in this article, granting certiorari was necessary in the KBR cases because there is a circuit split as to what the test for application of the FTCA combatant exception is. The Fourth Circuit explicitly acknowledged the split in *In re KBR*.[94] In analyzing the first prong of the *Boyle* test, the "unique federal interest" at issue, the court compared the D.C. Circuit's elimination of tort from the battlefield standard in *Saleh* [95] and the Ninth Circuit's no duty of reasonable care owed against those to whom the combat activities are directed standard in *Koohi*, [96] before finally adopting the Third Circuit's *Harris* middle ground rationale of seeking only to foreclose state regulation of the military's battlefield decisions and conduct.[97] In addition, in analyzing the third prong of the *Boyle* test, balancing the conflict between state tort law and the federal interest for the FTCA's combatant exception, the Fourth Circuit also identified a split.[98] The Fourth Circuit compared the *Saleh* standard of whether the military retained command authority over the contractor to such an extent that the contractor is integrated

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[89] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-145, MILITARY OPERATIONS: HIGH-LEVEL DOD ACTION NEEDED TO ADDRESS LONG-STANDING PROBLEMS WITH MGMT. AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES 1 (2006). The type of oversight recommended in the aftermath of the Iraq and Afghanistan operations is designed in large part to ensure that the United States receives adequate performance for the money expended, i.e. bang for the buck. The oversight does not involve the type of direct management by the military that would likely result in it being more likely that the FTCA's combatant exception would apply under the current legal framework. *See id.*

[90] *See Saleh*, 580 F.3d at 7 ("[A]ll of 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, where risk-taking is the rule."). This must be so in order to carry out the "elimination of tort from the battlefield, both to preempt state or foreign regulation of wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.*

[91] In re KBR, Inc., Burn Pit Litig., 744 F.3d, 326 (4th Cir. 2014) *cert. denied sub nom*. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) *cert. denied*, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[92] "[T]he public policy rationale behind *Boyle* does not apply when a *performance-based statement of work* is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor . . . ." *Saleh*, 580 F.3d at 9-10 (italics in original) (omitting internal citations).

[93] *See id.* (citing Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764 at 5 (Mar. 31, 2008)).

[94] *In re: KBR, Inc.*, 744 F.3d at 348.

[95] *See Saleh*, 580 F.3d at 7.

[96] *See* Koohi v. U.S., 976 F.2d 1328, 1337 (9th Cir. 1992). *See also* Lessin v. Kellogg, Brown & Root Services, Inc., 2006 WL 3940556, *4 (S.D. Tx. 2006) (drawing a distinction between the proposition that no duty of care is owed to enemies in a time of war by denying the FTCA's combatant exception due to a duty of care owed to U.S. servicemembers).

[97] *In re: KBR, Inc.*, 744 F.3d at 348.

[98] *Id*. at 349-51.

into the combat activity of the military[99] to the *Harris* standard of whether the application of state tort law constitutes a state regulation of military conduct and decision-making[100] before adopting *Saleh*.[101] The Fourth Circuit's opinion is even divided as to which portions of the test it is adopting for the first prong. The court rejected the D.C. Circuit's reasoning in *Saleh* in favor of the Third Circuit's in *Harris* before turning around and rejecting *Saleh* and adopting *Harris* on the third prong. These "refined disagreements among the circuits"[102] "stand federal procedure on its head" and should have served as a knock at the door of Supreme Court review.[103]

However, even if, as the plaintiffs in the KBR cases assert, there is no circuit split,[104] the United States as amicus curiae proposed a test that was designed to cover all claims arising out of combat activities of the military by proposing that the FTCA's combatant exception be applied if the United States would be immunized had the act been performed by the government and the contractor was acting within the scope of the contractual relationship.[105] To date, no court has adopted that test and the military has not acted to adopt contractual provisions shifting tort risk for combatant contractor activities onto the government. Because of this, it is time for Congress to amend the language of the FTCA to bring the purpose of the combatant activities exception, allowing for the U.S. military to effectively engage in combat when called upon without the risk of tort liability, to reflect the modern force structure. This purpose requires the FTCA combatant exception cover contractors who now perform vital combat support operations.

B. Modernizing the Federal Tort Claims Act's Combatant Exception: A Congressional Solution

The United States' amicus curiae briefs in *Harris* and *In re KBR* went so far as to admit that the current judicial treatment of the FTCA's combatant exception was "detrimental to military effectiveness."[106] This article has already shown how the failure of the judiciary to adapt the FTCA's combatant exception to fit the modern military force is counterproductive to national security needs given the modern military force's dependence on contractor support. However, depending on one's interpretation of the "arising out of"[107] language in the statute coupled with fact that the definition of "federal agency" does not include contractors,[108] it certainly is a defensible position for courts to be wary about extending the application of the FTCA's combatant exception, even if the current application does not serve the needs of the modern military force. The hesitancy of the court may well rest upon a sensible notion that Congress must amend the FTCA's combatant exception to include combatant contractors and that even the current limited application of the exception to contractors constitutes an inappropriate judicial re-writing of the FTCA. In fact, some have argued just this point by asserting that even the current limited, yet inconsistent, expansion of the FTCA's combatant activities exception to contractors is unjustified because "in the sixty years since the adoption of the FTCA, Congress has had ample opportunity to provide contractors with broad defenses to tort actions and has declined to do so"[109] and "[i]n the FTCA, Congress has only made its intent clear that it wanted to remove tort liability from the battlefield for the United States and its employees, it makes no mention of private military contractors."[110]

Although this article takes the position that the circuit split justified Supreme Court review to address the impracticality of the current application of the FTCA's combatant exception to the modern military force structure, it is also undeniable that a straight-forward reading of the statute weighs against the application of the exception to contractors. However, it is also undeniably true that the current limited expansion of the exception, circuit split, and modern military force structure that is heavily dependent on contractors is an unsustainable status quo that demands Congressional action.

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[99] *See Saleh*, 580 F.3d at 9.

[100] *See KBR Inc*., 744 F.3d at 350.

[101] Even in adopting *Saleh*, despite years of litigation on the issue, the Fourth Circuit still found that there was insufficient information in the record to determine whether the FTCA's combatant exception applied. *Id*. at 351-52.

[102] McManaway v. KBR, Inc., 554 F. App'x 347, 355 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[103] *Id*. at 348.

[104] Brief for Respondent at 17, KBR, Inc., et al., Petitioners v. Metzgar, et al., Respondents, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015) No. 13-1241, 2014 WL 1936174 (describing the circuit split as manufactured and illusory). "To the extent there have been different outcomes in these cases, it is a reflection of differences in the facts, not in the court's view of the law." *Id.*

[105] *See* Brief of the United States as Amicus Curiae at 15, Kellogg, Brown & Root Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015) No. 13-817, 2014 WL 7185602; Brief of the United States as Amicus Curiae at 15, KBR, Inc., et al., Petitioners v. Metzgar, et al., Respondents, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015) No. 13-1241, 2014 WL 7185601. The United States in both cases also took the position that there was not a circuit split.

[106] "A legal regime in which contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations would be detrimental to military effectiveness." Brief of the United States as Amicus Curiae in *Harris*, *supra* note 95, at 19; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 21.

[107] 28 U.S.C.A. § 2680(j) (2016).

[108] 28 U.S.C.A. § 2671 (2016).

[109] Margaret Z. Johns, *Should Blackwater and Halliburton Pay for the People They've Killed? Or are Government Contractors Entitled to a Common-Law, Combatant Activities Defense?*, 80 Tenn. L. Rev. 347, 357 (Winter 2013).

[110] Nelson, *supra* note 81, at 133.

While it is unknown exactly why the Supreme Court failed to grant certiorari, the United States as amicus curiae argued against granting certiorari on the basis that the application of the FTCA's combatant exception was an interlocutory matter that was not yet ripe for decision.[111] However, there should be no need to wait years and engage in voluminous discovery to find an acceptable outcome within the judicial system. If courts refuse to act, perhaps sensible from a statutory interpretation standpoint, then Congress must bring the exception into line with the modern military force structure. To do so, Congress should: 1) expand the FTCA's combatant exception to cover the performance of those contracts taking place in a combat zone by providing flexibility to the Executive in determining when and where to apply the exception, and 2) establish a predictable forum for binding arbitration for all claims alleging harms suffered due to out-of-scope acts of the contractor occurring within the when and where scope covered by Executive discretion.

The model for expansion of the FTCA's combatant immunity exception is the combat zone tax exclusion (CZTE) that excludes gross income received by military members while serving in a combat zone.[112] The CZTE leaves the determination of what constitutes a combat zone to the Executive[113] and implementation of the exclusion is left to the Department of Defense.[114] The FTCA's combatant exception should be amended to include contractor acts arising out of combat activity that occur within a zone of combat zone when the harm is suffered due to acts within the scope of the contractual relationship while leaving the "when" and "where" of the expanded exception to the Executive. Executive flexibility[115] is necessary to ensure adequate tailoring of the exception to only those locations where combat occurs and those acts which constitute combat and the direct support of combat. For example, the exception need not be crafted as broadly from a geographic standpoint as the CZTE. For instance, the CZTE applies in countries such as Qatar and the United Arab Emirates where there is not a state of combat, but instead merely support combat areas such as Afghanistan.[116]

The proposal for amending the FTCA's combatant exception would allow for applying the exception to contractors in combat zones such as Afghanistan while refusing to extend it to support areas such as Qatar and the United Arab Emirates. The Executive could also make the exception available only for certain combat support tasks within a geographic area. For instance, the exception could be made to apply to convoy escorts but not to laundry services in a combat zone depending on whether the Executive believed those activities "arose out of combat." Large-scale contracts, such as those under the LOGCAP, could even be tailored according to each individual task order.[117]

While the FTCA's combatant exception must be expanded to reflect the change in military force structure, that does not mean that the very real injuries suffered by contractor employees should be without restitution. Contracts covered by the expanded exception should include provisions requiring all contractor employees to have minimum health and life insurance policies paid for by the contractor,[118] to serve the same function as the military insurance and disability programs available to active duty military members engaged in combat that are prohibited from filing suit against the government. The goal of the proposal is designed to, as closely as possible, provide modern day combatant contractors the same tort protections that have in the past been afforded the government when the same combat support tasks were performed by military members. Under this proposal, the only suits against contractors covered by the expanded FTCA combatant exception would be those for harms alleged to have been caused by acts outside the scope of the contract. Contractors would thus be encouraged to provide their expertise for what they were contracted for to the fullest extent possible and only be subject to tort liability when they venture outside that scope.

The limitation of liability may seem somewhat of a harsh solution, as even in-scope willful acts of a combatant contractor would fall within the expanded exception and be covered by insurance,[119] but the national policy choice has been made to rely on combat contractors and there is no longer a logical justification why the exception applied, and continues to apply, to combat support activities performed by

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[111] Brief of the United States as Amicus Curiae in *Harris*, *supra* note 92, at 20-1; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 22-3.

[112] 26 U.S.C.A. § 112(a), (b) (2016).

[113] 26 U.S.C.A. § 112(c). The Executive Orders are found in U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 44 (as amended) [hereinafter DoD FMR].

[114] U.S. DEP'T. OF DEF., INSTR. 1340.25, COMBAT ZONE TAX EXCLUSION (CZTE) (Sept. 28, 2010).

[115] The author intends the term "executive" to include those officials within the Department of Defense to whom the "when" and "where" determinations would likely be delegated.

[116] DOD FMR, *supra* note 101, vol. 7A, ch. 440103A.1.

[117] Allowing the FTCA combatant exception to apply within individual task orders would also allow further tailoring of the application of the exception within a geographic region on a task-specific basis. While this would create some unpredictability at the time of contract award as to which task orders would be covered by the exception, it is an improvement over the current system in that it would allow the contractor and government to determine in advance of performance whether the exception applies.

[118] While this would increase the costs of the contracts covered by the exception, the government could dictate in advance what protections would be required and the contractors would have an estimate of the costs so as to be able to make predictable accounting determinations at the time of competing for the contract award.

[119] Although, the author would assert that the proposed solution is still better than forcing contractors to engage in years of litigation and end up with the costs eventually being passed through to the government. *See In re* Kellogg Brown & Root Services, Inc., ASBCA No. 59357, 2015 WL 5076058 (Aug. 13, 2015).

servicemembers but is not applied to a contractor performing that same combat support activity today and in the future. Under the United States' proposed test from the KBR cases, a combatant contractor would remain unaware at the time of bidding or performance which of the fifty states laws would apply in a tort suit.[120]

This level of unpredictability is not acceptable, even in serving as a check to keep contractors within scope, when considered it within the context that combatant contractors are now an integral part of the national security apparatus. It is not unreasonable to assume that there could be occasions when a contractor would perform outside the scope at the behest of the military or in a good faith belief that doing so helps to further a military mission. Such a contractor should not be exposed to the unpredictability of playing a game of state-tort Russian roulette. Therefore, to bring uniformity to the process, contracts covered by the expanded exception should require a form of binding arbitration for those claims arising out of an allegation that the harms were suffered due to acts outside of the scope of the contractual relationship.[121] The arbitration system could be designed by the government and borrow many features of the existing military claims system. This would allow an action for harms alleged to have been caused by acts outside the scope of the contract but avoid the unpredictability of subjecting contractors to liability under fifty separate state tort systems by creating a forum designed and tailored primarily to suit national security interests.

V. Conclusion

The military force structure has not quite evolved to that advocated by Milo Minderbinder, but it has evolved to the point where combatant contractors are now deserving of protection from claims arising out of combatant activities. The FTCA's combatant exception has not been adapted by the judiciary and is currently illogical and counterproductive. Due to the Supreme Court's failure to grant certiorari in the KBR cases, it is time for Congress to bring the exception into line with the modern military force. War often involves the choice of one of several imperfect options and the proposed proposal is a vast improvement over the current status of the FTCA's combatant activity exception. The United States has chosen the policy of engaging in wars requiring large military forces while simultaneously downsizing the military so as to make the military dependent on contractor support in order to effectively fight those wars. This policy choice requires expanding the FTCA's combatant exception to cover combatant contractors with the same combatant tort protections that have historically been afforded to the military. Lieutenant Minderbinder would surely agree.

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[120] Brief of the United States as Amicus Curiae in *Harris*, *supra* note 92, at 15; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 15.

[121] Arbitration would be necessary because there is not an avenue within the existing military claims system capable of handling such claims.