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SUING THE HIRED GUNS: AN ANALYSIS OF TWO FEDERAL DEFENSES TO TORT LAWSUITS AGAINST MILITARY CONTRACTORS

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INTRODUCTION

As the U.S. military decreased in size following the Cold War, the role of government contractors in combat zones grew ever larger. The military-contractor phenomenon has mushroomed in recent years, and private contractors now play pivotal roles in U.S. military and reconstruction operations in Iraq and Afghanistan.[1] The government's use of contractors to perform military and foreign affairs-related functions raises a host of political, moral, and legal questions.[2] While the U.S. intervention in Iraq and Afghanistan continues with no apparent end in sight, these questions justifiably remain at the forefront of the national debate.

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1. Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 3 (2001) ("Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement . . . .") (citing Colonel Steven J. Zamparellii, *Competitive Sourcing and Privatization: Contractors on the Battlefield—What Have We Signed up for?*, A.F. J. LOGISTICS 9, 10 (1999)). By 2007, nearly 50,000 contractors provided security services in Iraq, with many more engaged in other facets of the U.S. effort there. JENNIFER K. ELSEA & NINA M. SERAFINO, CRS REPORT FOR CONGRESS, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS AND OTHER ISSUES 3 (2007). The number of defense contractors worldwide is far greater. *Id.* (noting that as of 2007 the Department of Defense employed 127,000 contractors).

2. The size of the contractor force has raised red flags for those who have called attention to the problems of accountability that occur when corporate employees substitute for U.S. soldiers. Some argue that such spending is not cost-efficient. *See, e.g.*, Jessica C. Morris, Note, *Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act's War-Profiteering Roots?*, 41 GA. L. REV. 623, 623–30 (2007) (discussing various examples of overcharging by contractors in Iraq). Others contend that replacing soldiers with contractors threatens fundamental democratic values. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004) (arguing that increasing privatization of the military weakens the influence of Congress and generally undermines democratic governance in the United States). The public attention is not misplaced. Private military companies have a sordid history. Military contractors have been linked to human rights violations in conflicts throughout the 1990s, and along with U.S. soldiers, were implicated in the Abu Ghraib prison-abuse scandal in 2004. Joel Brinkley, *9/11 Set Army Contractor on Path to Abu Ghraib*, N.Y. TIMES, May 19, 2004, at A13 (discussing allegations of the abuse of detainees by civilian contractors at Abu Ghraib). *See also* ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf; Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287 (2006); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005).

This Article addresses a narrow aspect of the nation's use of private contractors in Iraq and Afghanistan. While the lack of criminal accountability for contractors has received much critical commentary,[3] scholars have paid comparatively little attention to the possible civil liabilities they face. This Article attempts to shine some light on this topic by addressing the defenses and immunities that might protect private military contractors from civil liability.

To an unprecedented degree, contractors now fill roles that, in the past, U.S. soldiers performed exclusively.[4] Their rights and duties, however, are not well settled.[5] The U.S. Supreme Court has weighed in, creating what is known as the "government-contractor defense."[6] But as formulated by the Court, this defense applies only to the subset of private contractors that manufactures goods and equipment for the federal government according to precise specifications.[7] The contractors currently operating in Iraq are generally not of this sort.[8] Most are service contractors, who provide personal services, rather than manufacture goods.[9] For example, these contractors offer air and land transportation for the military, food for the troops, and help in rebuilding Iraq's damaged infrastructure. Service contractors also include "hired guns," whose deeds and misdeeds have made front-page news in recent months. They are the contractors with whom the State and Defense Departments have contracted to supply

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3. *See, e.g.*, Geoffrey S. Corn, *Bringing Discipline to the Civilization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008); Chia Lehnardt, *Individual Liability of Private Military Personnel Under International Criminal Law*, 19 EUR. J. INT'L L. 1015 (2008).

4. *See* Turner & Norton, *supra* note 1.

5. *See* Posting of Bobby Chesney to the National Security Advisors: A National Security Law Blog, Private Military Contractors Liable to Servicemembers, http://www.natseclaw.com/natseclaw/2006/11/private_militar.html (Nov. 10, 2008, 5:41 EST) ("[T]he entire discussion [of contractor liability] is quite fascinating . . . . [T]here has been quite a lot of development in this area of the law in the past few years, and not all that much scholarship.").

6. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).

7. *See id.* For a discussion of the scope and limits of the *Boyle* government-contractor defense, see *infra* Part II.B. Although the Court did not limit the government-contractor defense in *Boyle* to manufacturers of weapons technology for military use, in practice, these are the contractors most likely to invoke the defense. Christopher R. Christensen & Anthony U. Battista, *Brief, Framing the Government Contractor Defense*, 38-WTR BRIEF 12, 17 (2009).

8. Sam Perlo-Freeman & Elisabeth Sköns, *The Private Military Services Industry*, SIPRI INSIGHTS ON PEACE AND SECURITY 8 (2008), http://se2.isn.ch/serviceengine/FileContent?serviceID=EINIRAS&fileid=858553D2-95FF-465E-24A4-F24C8EB1A04A&lng=en.

9. *Id.*

vital security for diplomats and officials in Iraq and Afghanistan. These are the individuals responsible for the much-publicized shooting deaths of Iraqi civilians in Baghdad in September of 2007.[10]

The presence of service contractors on the battlefield presents new legal challenges. This is evident from the recent flurry of cases in which plaintiffs have brought tort claims against contractors for injuries suffered in the conflicts in Iraq or Afghanistan. In each case, the defendant contractors have pushed for an expansion of contractor defenses to include personal services contracts for combat support. Such an expansion would take the defense beyond where the Supreme Court has heretofore permitted it to reach. The judicial opinions responding to the invocation of various contractor defenses are not consistent and evince confusion as to the source and nature of such defenses and immunities.[11]

Part I of this Article assesses the extent of the contractor presence on foreign battlefields and the various roles contractors play in assisting (and in some cases supplanting) the U.S. military. Part II briefly explores the line of cases that gave rise to the government-contractor defense, and then provides an overview of the more recent cases in the lower courts where contractors have advocated broadening the government-contractor defense. Part III addresses one particular defense available to service contractors, the government-agency defense, and examines its potential to protect contractors from suit. It concludes that the government-agency defense should be available to private contractors acting as agents of the U.S. government and can be a powerful weapon in shielding them from suit. However, because its applicability hinges on establishing the requisite agency relationship, it is likely to be available to service contractors in very few situations.

Part IV considers the combatant-activities exception to the waiver of sovereign immunity in the Federal Tort Claims Act ("FTCA").[12] Discussion of this exemption reveals that, as articulated by the Ninth Circuit, the defense may logically be expanded to protect service contractors, but countervailing interests, including ensuring the accountability of contractors, weigh against such expansion in the vast majority of cases.[13] This

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10. Sudarsan Raghavan et al., *Blackwater Faulted in Military Reports from Shooting Scene*, WASH. POST., Oct. 4, 2007, at A1.

11. For cases evincing confusion about the government-contractor defense, see *infra* note 74 and accompanying text.

12. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2008).

13. W. PAGE KEATON, PROSSER AND KEATON ON THE LAW OF TORTS 5–6 (1984) ("There remains a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests . . . . This is the law of torts.").

Article concludes by arguing that the interests in protecting contractors from civil suit are strong where the government exercises effective control over contractors, and where the defense is necessary to protect military decision making and military discipline.

I. THE MILITARY CONTRACTOR

While mercenaries[14] date back millennia, the rise to prominence of U.S. private military contractors ("PMCs")[15] can be traced to the end of the Cold War.[16] During this period, there was a sharp reduction in the size of the U.S. military and an increase in the number of military deployments abroad.[17] With a smaller group of soldiers from which to draw, the U.S. Department of Defense relied on private contractors to fill the gap.[18]

The outsourcing of military functions increased markedly following the attacks of 9/11, with the U.S. military response in Afghanistan in the winter of 2001, and the invasion of Iraq in March of 2003.[19] Contractors

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14. The Protocol Additional to the Geneva Conventions defines a mercenary as one who is recruited to fight, fights abroad in combat hostilities for private gain, and is not a national of the parties to the conflict (or of the country in which the conflict takes place). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 1125 U.N.T.S. 3. Because the contractors discussed in this Article are generally not hired to fight for a nation of which they are not a national, they are not properly viewed as mercenaries. *Id.*

15. Although one could distinguish among them, this Article uses the terms "private military company," "military contractor," and "security contractor" interchangeably.

16. The United States has used contractors since the American Revolution. Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, A.F. L. REV, 127, 130 (2004).

17. The United States became involved in the former Yugoslavia, Somalia, and other locations during the 1990s. *See* William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 675–80 (2006) (discussing the history of mercenaries and privateers, particularly during the era of the founders of the U.S. Constitution); Turner & Norton, *supra* note 1, at 8 (addressing the causes of the "rapid and significant growth of [Department of Defense] dependence on contractor support").

18. For example, the United States has employed DynCorp contractors as mercenary-type operators to man armed helicopters in the State Department's antidrug efforts in Colombia. Nicki Boldt, *Outsourcing War—Private Military Companies and International Humanitarian Law*, 47 GERMAN Y.B. INT'L L. 502, 511–12 (2004). DynCorp helicopters participated in search and rescue missions, and were involved in combat with Colombian rebels. *Id.*

19. *See* Memorandum from the Majority Staff of Committee on Oversight and Government Reform to Members of the Committee on Oversight and Government Reform 3 (Feb. 7, 2007) ("[B]y many measures, the role of private security contractors in Iraq is unprecedented in its size and scope.").

are currently present in these combat zones in huge numbers. More than 100,000 contractors operate alongside U.S. forces in Iraq, at least half of them providing private security services.[20]

Military contractors no longer simply assist in domestic construction projects or do the soldiers' laundry.[21] Contractors have handled up to thirty percent of the military's services in Iraq.[22] The integration of contractors into the U.S effort in Iraq has been comprehensive. Contractors have served as interrogators—most notably in Abu Ghraib prison[23]—and as intelligence gatherers.[24] They have provided personal security for high-ranking U.S. officials,[25] guarded important fixed installations, in-

20. CONGRESSIONAL BUDGET OFFICE, CONTRACTOR'S SUPPORT OF U.S. OPERATIONS IN IRAQ (2008), http://www.cbo.gov/ftpdocs/96xx/doc9688/MainText.3.1.shtml. This figure is striking, particularly because it is nearly as large as the number of U.S. soldiers in Iraq. In February of 2007, the United States had over 130,000 soldiers in Iraq. Alan Cowell, *Britain to Trim Iraq Force by 1,600 in Coming Months*, N.Y. TIMES, Feb. 22, 2007, at A8 (chart showing troop levels for the various nations with soldiers in Iraq). *See* ELSEA & SERAFINO, *supra* note 1 (discussing the size of the contractor force in Iraq). The number of contractors in Iraq represents the largest deployment of contractors in wartime, and is ten times larger than the number in theater during the 1991 Gulf War. One in ten persons deployed to the war zone during the Gulf War was a private contractor. JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY, at xv (2007). Kellogg, Brown & Root alone has had over 50,000 personnel in Iraq, Afghanistan, and Kuwait. *Id.* Although violence in Iraq has at times reduced the contractor presence in the country, the number has remained high. James Glanz, *Contractors Return to Iraq, but Numbers Are Still Down*, N.Y. TIMES, May 8, 2004, at A10.

21. The Department of Defense divides contractors into three categories: systems support, external theater support, and theater support. DEP'T OF DEFENSE, CONTRACTOR SUPPORT IN THE THEATER OF OPERATIONS (Mar. 28, 2001), *available at* www.dscp.dla.mil/contract/doc/contractor.doc; U.S. AIR FORCE GEN. COUNSEL, GUIDANCE DOCUMENT, DEPLOYING WITH CONTRACTORS: CONTRACTING CONSIDERATIONS (2003), *available at* https://www.safaq.hq.af.mil/contracting/affars/appendix-cc/informational/deploying-with-contractors.doc (discussing types of contractors). Systems-support contractors manage and maintain weapons systems and various logistical systems across the military, while external theater and theater-support contractors perform a host of logistical services from transportation to security functions; the distinction between the two is their location. *See* Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 378–82 (2004) (describing the three types of service contracts, and noting that the work of systems-support contractors often involves the closest contact with the front line); Turner & Norton, *supra* note 1, at 9–11 (describing the three types of contractors and the type of work they perform).

22. Spencer E. Ante & Stan Crock, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76.

23. *See* Brinkley, *supra* note 2.

24. Steve Fainara & Alec Klein, *Private Firms Collect Intelligence for Army*, FORT WORTH STAR TELEGRAM, July 7, 2007, at A12.

25. For example, contractors replaced the teams of U.S. special forces that protected President Hamid Karzai in Afghanistan, as well as members of the Coalition Provisional

cluding the Baghdad airport and Iraq's oil-production facilities, and escorted myriad personnel and supply convoys.[26] Blackwater USA, one of the most prominent contractors operating in Iraq, enjoys a number of aviation contracts with the military to transport troops and supplies to combat zones.[27] This company is also purportedly involved in the U.S. government's secret rendition program, in which politically sensitive prisoners are transported overseas for interrogation by nations with questionable human-rights records.[28] Reports have also implicated contractors in the Central Intelligence Agency's ("CIA") formerly secret interrogation program, which included the waterboarding of terrorist suspects.[29]

Although military regulations prohibit contractors from performing inherently governmental functions,[30] including combat operations,[31] reality

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Authority, including Chief Lieutenant Paul Bremer III, in Iraq. *See* David Barstow et al., *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1; James Dao, *U.S. Company to Take over Karzai Safety*, N.Y. TIMES, Sept. 19, 2002, at A24; Letter from Donald H. Rumsfeld, Secretary of Defense, to the Honorable Ike Skelton, U.S. House of Representatives (May 4, 2004), *available at* http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf ("Some Private Security Companies (PSCs) under contract in Iraq provide personal security services for senior civilian officials as well as some visiting delegations."). Scahill describes Bremer's security force as a "sort of Praetorian Guard in the war on terror." SCAHILL, *supra* note 20, at 70.

26. James R. Coleman, Note, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1503 (2004) (discussing Vinnell Corporation's contract to guard the Baghdad airport and Erinys International's deployment of over 14,000 persons to guard oil installations); David Barstow, *The Struggle for Iraq: The Contractors; Security Firm Says Its Workers Were Lured into Iraqi Ambush*, N.Y. TIMES, Apr. 9, 2004, at A1 (noting that Blackwater security employees guarded "five regional buildings used by the occupation forces"); P.W. Singer, *Warriors for Hire*, SALON.COM, Apr. 15, 2004, http://archive.salon.com/news/feature/2004/04/15/ wariors/print.html.

27. *See* August Cole, *U.S. Expands Prince Ties*, WALL ST. J., Oct. 1, 2007, at A15 (noting that the Department of Defense awarded Blackwater's aviation affiliate Presidential Airways a $92 million contract for aviation services in Central Asia).

28. SCAHILL, *supra* note 20, at 253.

29. Siobhan Gorman, *CIA Likely Let Contractors Perform Waterboarding—Interrogation Work Outsourced Heavily; Legality Uncertain*, WALL ST. J., Feb. 8, 2008, at A3 (citing two unnamed current and former intelligence officials who stated that contractors were used because the CIA lacked experience with detention and interrogation).

30. *See* Antenor Hallo De Wolf, *Modern* Condottieri *in Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 346 (2006) (noting that under army regulations, inherently government functions are those most closely associated with the public interest).

31. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS V-1 (Apr. 6, 2000), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."); Jeffrey F. Addicott, *Con-*

has not conformed to this rule.[32] Contractors have been in the thick of combat,[33] and the distinction between military and nonmilitary functions has broken down. At one point in 2005, the number of U.S. contractor fatalities exceeded the number of troop deaths for all non-U.S. and -U.K. coalition members.[34]

The U.S. military's reliance on the private sector has hardly been inadvertent. The federal government has long emphasized the importance of privatizing functions that the private sector could perform more efficiently. Under Office of Management and Budget ("OMB") Circular A-76, for example, federal agencies are periodically required to compare the cost of performing an activity in-house and the cost of contracting it out.[35] In recent years, the Bush administration's ideological bent and fo-

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tractors on the "Battlefield": Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations, 28 HOUS. J. INT'L L. 323, 347 (2006) (discussing the restrictions on contractors, and noting that while they are discouraged from carrying firearms for self-defense and are prohibited from using them in direct support of combat operations, "the dangers of the battlefield and the limitations of the military to provide adequate force protection may subject contractors to bodily harm, necessitating the contractors' possession of fire-arms for self defense").

32. C. Douglas Goins, Jr., Gregory L. Fowler & Taavi Annus, *Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts*, BRIEFING PAPERS 8–9 (2007) ("Given the nature of the circumstances under which they must operate, Government contractors . . . may be called upon to perform functions that could be characterized as direct participation in hostilities.") (citation omitted).

33. *See* Barstow, *supra* note 25 (noting that "security companies "fought to defend coalition authority employees and buildings from major assaults in Kut and Najaf," and indicating elsewhere that private contractors are on occasion mistaken for enemy units and are fired upon) ("With thousands of private security employees now guarding supply lines, buildings and reconstruction projects—and with thousands more on the way—they are increasingly being drawn into firefights and other combat situations that traditionally have been left to the military."); Clayton Collins, *War-Zone Security Is a Job for . . . Private Contractors?*, CHRISTIAN SCI. MONITOR, May 3, 2004 ("Private firms—even ones with well credentialed staff—have already stepped well beyond the job of guarding facilities and conducting other protective services . . . ."). Scahill describes an incident in which Blackwater security guards fired on a taxicab that had crossed paths with a State Department official they were transporting, killing a passenger. SCAHILL, *supra* note 20, at 72.

34. Brief for Prof'l Servs. Council & Int'l Peace Operations Ass'n as Amici Curiae at 8, Nordan v. Blackwater Sec. Consulting, LLC (*In re* Blackwater Sec. Consulting, LLC), 460 F.3d 576 (4th Cir. 2006). By February of 2007, almost 800 private contractors had been killed in Iraq, while over 3000 had been injured. *Nearly 800 Iraq Contractors Killed*, USA TODAY.COM, Feb. 23, 2007, http://www.usatoday.com/news/world/iraq/2007-02-23-contractors_x.htm.

35. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). However, the

cus on reformulating the military placed increased emphasis on outsourcing.[36] Former Secretary of Defense Rumsfeld envisioned a slimmer, more effective fighting force with contractors playing a vital role.[37] As part of the "Total Force," contractors would replace soldiers in "nation building" and other tasks, freeing troops to focus on warfare.[38]

Outsourcing military and military-support functions to civilians places many actors beyond the chain of command and allows politicians to conceal the true costs of war.[39] Nevertheless, without the sizeable contractor corps currently in Iraq, and absent substantial troop increases, the Bush

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Circular exempts the Department of Defense from its coverage in times of war or military mobilization. *Id. See also* Richard B. Nettler, *Privatization of Military Support Services*, *in* PRIVATIZING GOVERNMENTAL FUNCTIONS 15-2–15-15 (Deborah Ballati ed., 2001).

36. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 551–54 (2005) (discussing the Bush administration's "rush to outsource"). *See* Addicott, *supra* note 31, at 328 ("Without question, civilian contractors will continue to be integral participants in the ongoing War on Terror."); Gordon L. Campbell, Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend on Them, Joint Services Conference on Professional Ethics (Jan. 27–28, 2000) (on file with Brooklyn Journal of International Law) ("The use of contractors to support military operations is no longer a 'nice to have.' Their support is no longer an adjunct, ad hoc add-on to supplement a capability. Contractor support is an essential, vital part of our force projection capability—and increasing in its importance."). It is also worth noting that longstanding government policy has focused on privatizing government activities, where possible, to increase efficiency and to avoid competing with private business. *See* SCAHILL, *supra* note 20, at xvii (noting that "[t]he often-overlooked subplot of the wars of the post-9/11 period is the outsourcing and privatization they have entailed" and that ideologues such as Paul Wolfowitz and Douglas Feith came to power with two major goals—regime change in Iraq and other countries, and carrying out "the most sweeping privatization and outsourcing operation in U.S. military history").

37. *See* Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 13–19 (2007) (describing the transformation of the military and the role of contractors in this transformation).

38. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 75 (Feb. 6, 2006), *available at* http://www.defenselink.mil/qdr/report/Report20060203.pdf ("The Department's Total Force—its active and reserve military components, its civil servants, and its contractors—constitutes its warfighting capability and capacity.").

39. *See* SCAHILL, *supra* note 20, at xx ("With almost no public debate, the Bush administration has outsourced to the private sector many of the functions historically handled by the military. In turn, these private companies are largely unaccountable to the U.S. taxpayers from whom they draw their profits."). One seldom hears of contractor deaths on the evening news, but over 770 civilian contractors have died in Iraq since the beginning of the war. Howard Witt, *America's Hidden War Dead*, CHICAGO TRIB., Mar. 26, 2007, at A1. The combined death toll from the conflict in Iraq rises twenty percent when contractor deaths are added to the over 4000 U.S. soldiers killed. Iraq Coalition Casualty Count, http://icasualties.org/oif/ (last visited Dec. 5, 2008).

administration's widely publicized goals for reconstruction would probably have been beyond reach. Given the likelihood that a peaceful, democratic Iraq cannot be won by force of arms, the contractor presence in Iraq has been critical to U.S. success there. To perform their duties effectively, military contractors may require legal protection against civil liability. However, the law should also protect vital American interests in holding tortfeasors accountable. Having substituted contractors for soldiers, what level of civil legal protection do contractors enjoy in their new role? In this new kind of war, in which humanitarian reconstruction goes hand in hand with combat, is protecting the nation's contractors as essential as protecting its soldiers? This Article queries what legal protections do and *should* apply to service contractors in the current conflicts in Iraq and Afghanistan. The following section briefly addresses the development of contractor defenses, providing a framework for evaluating and criticizing the current model.

II. THE GOVERNMENT-CONTRACTOR DEFENSES: A BACKGROUND

A. Sovereign Immunity, the FTCA, and Its Exceptions

Sovereign immunity in the United States derives from the English common law principle, developed during the Tudor reign and cemented by the time of Blackstone, that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."[40] While sovereign immunity bars suits against the United States,[41] it is not without exception. Individuals aggrieved by government action may circumvent sovereign immunity where the government has waived it. These statutory waivers include the FTCA, which permits suits against the government for the tortious acts of its employees.[42] "Mark[ing] the culmination of a long effort to mitigate unjust consequences of sovereign immunity,"[43] the FTCA subjects the United States

40. DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW 74 (2005) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765)). Since the earliest days of our nation, courts have upheld the view that the federal government may not be sued without its consent. *See* United States v. Lee, 106 U.S. 196, 205 (1882); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 610–11 (4th ed. 2003). Under the Eleventh Amendment of the U.S. Constitution, the states also enjoy immunity from suit. U.S. CONST. amend. 11. Because suits against government contractors implicate federal employees or federal contractors exclusively, state sovereign immunity will not be addressed here.

41. CHEMERINSKY, *supra* note 40.

42. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2008).

43. WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 1 (1957). The legislation created a damages remedy against the United States whereas previously a plaintiff would

to liability in cases where injury is caused by the "negligence or wrongful act or omission of any employee of the Government" while acting in the scope of his or her employment in circumstances under which a private person would be liable.[44]

The FTCA includes a variety of key exceptions to the general waiver of immunity. These exceptions reflect unique federal interests that justify retaining sovereign immunity in particular contexts. There are two important exceptions at the heart of the military contractor's efforts to invoke federal sovereign immunity. The first exception is the "discretionary-function" exception, which preserves federal sovereign immunity in suits arising from "the exercise or performance or the failure to exercise or perform a discretionary function" by the federal government or its employees.[45] Essentially, the discretionary-function exception prevents courts from second-guessing legislative and administrative conduct that implements policy goals.[46] The discretionary-function exception forms the basis for the government-contractor defense as developed and ratified by the Supreme Court in *Boyle v. United Technologies Corp.*, discussed below. The second exception is the "combatant-activities" exception, which excepts suits against the federal government "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[47] This exception is intended to restrict interference with decisions of federal agents regarding military affairs.[48] It forms the basis for a separate contractor defense, explored in Part IV.

B. Establishing the Contractor Defenses: Yearsley v. W.A. Ross Construction Co.*,* Feres v. United States*, and* Boyle v. United Technologies Corp.

Yearsley v. W.A. Ross Construction Co., decided in 1940, is the first important U.S. Supreme Court opinion addressing a contractor's defense from civil liability for performing a government contract.[49] The case in-

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be required to sue the employee, with no guarantee that said employee had the means to pay the resulting judgment. *See id.* at 5–6, 44–46 (discussing that the purpose of the FTCA is to waive sovereign immunity in limited circumstances and allow a private person to sue the United States for money damages).

44. 28 U.S.C. § 1346(b)(1) (2008).

45. *Id.* § 2680(a).

46. United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.").

47. 28 U.S.C. § 2680(j).

48. *See* Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948).

49. Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 19–20 (1940).

volved the construction by a contractor of a dike along the Missouri River.[50] When the construction of the dike caused a diversion of the river that washed away a portion of the plaintiff's land, the landowner sued both the government and the contractor.[51] The Court held the contractor immune from suit based on the basic principles of agency: "if . . . authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."[52] In other words, when an agency relationship exists, the contractor can avoid liability where the U.S. government itself would not be liable.[53]

The Court later decided *Feres v. United States*, which examined whether soldiers are permitted to sue the U.S. government for injuries they suffered in the course of duty.[54] The Court concluded that the FTCA does not create a cause of action for soldiers suing the military for service-related injuries,[55] stating that the "federal character of military service and the need for uniformity in the system of compensation,"[56] along with the ample compensation afforded service members through veter-

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50. *Id*. at 19.

51. *Id.*

52. *Id.* at 20–21.

53. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 524–26 (1988) (Brennan, J. dissenting) (discussing *Yearsley*); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007) (discussing *Yearsley*); Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the* Boyle *Barrier*, 62 ALB. L. REV. 403, 408–09 n.27 (1998) (discussing the "agency" principle at issue it *Yearsley*). Of course, to the extent that the contractor's immunity derives from the United States' sovereign immunity, the FTCA circumscribes it. 28 U.S.C. § 1346(b)(1). So, for example, a contractor-agent might not enjoy *Yearsley's* protection where the discretionary-function exception or other FTCA exception would not protect the government. Cantu & Young, *supra* at 407–08.

54. Feres v. United States, 340 U.S. 135 (1950). *Feres* actually involved three consolidated cases. The plaintiffs (and their decedents) contended that they had suffered injuries, not in combat, but from the malpractice of military physicians in two of the cases, and from a barracks fire in the other. *Id.* at 136–37 (describing the *Feres* case, involving a negligence action arising from a fire in barracks that "should have been known to be unsafe because of a defective heating plant," the *Jefferson* case, in which a physician allegedly left an army towel inside a patient following an operation, and the *Griggs* case, another malpractice case).

55. *Id.* at 146.

56. Jonathan Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 11 (2003) (describing the rationales for the *Feres* decision). Moreover, soldiers already received ample compensation for service-related injuries through veterans' benefits. *Feres*, 340 U.S. at 145. The Supreme Court has also suggested that military discipline presents the best rationale for the *Feres* decision. United States v. Shearer, 473 U.S. 52, 57 (1985).

ans' benefits,[57] justified its ruling. In this interpretation, couched as an interpretation of the FTCA, the Court effectively added another exception to the statute.[58] Subsequent cases supplied another rationale for what emerged as the *Feres* "doctrine"—that permitting suits by soldiers against the military would undermine military discipline and morale.[59]

Lower courts later drew upon *Feres* to craft a defense for government contractors. Courts found that where the government mandated and approved specifications for a product, and had special knowledge of the dangers of the product, a contractor manufacturing it would share in the government's *Feres* immunity.[60] Holding a contractor liable in tort for executing the will of the military, the courts reasoned, would permit the very type of interference with military decision making that *Feres* sought to prevent.[61]

In *Boyle v. United Technologies Corp.*, the Supreme Court rejected this line of cases and found that *Feres* could not be the basis for a government-contractor defense. In *Boyle*, the estate of a marine who died in a helicopter crash sued the maker of the military helicopter, alleging design defects in the escape hatch.[62] The Court reasoned that applying the *Feres* principle to protect military contractors would produce "results that are in some respects too broad and in some respects too narrow."[63] That is, the result would be to immunize contractors from all tort claims by soldiers while sanctioning virtually all civilian claims.[64]

Instead of applying *Feres*, the Court focused on the unique federal interests at stake in the military's contracts with manufacturers of military

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57. *See* Turley, *supra* note 56.

58. CHEMERINSKY, *supra* note 40, at 624–26.

59. *See* United States v. Johnson, 481 U.S. 681, 691 (1987) ("Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.").

60. *See, e.g.*, Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597–98 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983).

61. *See* Jonathan Glasser, Note, *The Government Contract Defense: Is Sovereign Immunity a Necessary Prerequisite?*, 52 BROOK. L. REV. 495, 521 (1986) ("The court focused on fairness to contractors who are unable to obtain indemnification under *Feres* and *Stencel* . . . and the necessity of preventing the judiciary from interfering with military decisions . . . .").

62. Boyle v. United Technologies Corp., 487 U.S. 500, 502–03 (1988).

63. *Id.* at 510.

64. *Id.* at 510–11. The "narrow" aspect of applying *Feres* would be compelled by the fact that *Feres* only addresses suits against the federal government by military personnel. Feres v. United States, 340 U.S. 135 (1950).

equipment,[65] identifying two such interests: the obligations and rights of the United States under its contracts, and the civil liability of federal officials for actions undertaken in the course of their duties.[66] The Court recognized that it "makes little sense to insulate the Government against financial liability . . . when the Government produces equipment itself, but not when it contracts for the production."[67] The ultimate financial burden would pass through to the government, as contractors would raise their prices "to cover, or to insure against, contingent liability for the Government-ordered designs."[68] Contracting with private entities for the production of military equipment involves discretionary decisions that balance competing military, technical, and cost considerations.[69] Accordingly, the discretionary-function exception to the FTCA authorizes a defense for contractors in these cases.

The Court set forth a three-part test to identify cases in which the "policy of the 'discretionary function' would be frustrated."[70] Contractors are not liable for design defects in military equipment where (i) the government approved "precise specifications"; (ii) "the equipment conformed to those specifications"; and (iii) the contractor "warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[71] Thus, *Boyle* bars only those suits in which the government balanced the pros and cons of a particular action (be it the design and production of a fighter jet or the design and construction of a levy), contracted with the private sector, furnished precise specifications to the contractor, and supervised the execution of his or her work.

The immunity *Yearsley* provides to contractors is derived from the immunity of the government itself.[72] However, the "government-

65. *Boyle*, 487 U.S. at 505–06.

66. *Id.* at 504–05.

67. *Id.* at 512.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The Court adopted the third prong of the test, because otherwise the prospect of immunity from liability would create incentives for the contractor to withhold knowledge of risks. *Id*.

72. Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940) (characterizing the contractor as an "agent or officer of the Government"). Of course, the *Feres* doctrine is itself a creation of judge-made federal common law. But its construction of the FTCA is that Congress did not intend to remove the protective cloak of sovereign immunity from the United States in the case of certain suits by servicemen and women. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007) (describing *Yearsley*

contractor defense" described in *Boyle* does not require a strict agency relationship between the contractor and the government.[73] The defense is rooted in federal preemption,[74] which displaces state law in cases where it would interfere with unique federal interests.[75] While a successful defense of sovereign immunity ousts the court's jurisdiction to hear the case, federal preemption of state law arises by operation of federal common law and represents an affirmative defense that the contractor must raise and prove.[76]

Boyle is the wellspring of the modern government-contractor defense. Lower courts have consistently applied the *Boyle* test in product-liability suits against weapons manufacturers.[77] At least one lower court has expanded *Boyle* to cover nonmilitary equipment,[78] while another has applied the *Boyle* test for a services contract for the maintenance of military

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and its principle that "a common law agent may sometimes share in the sovereign immunity of the United States").

73. *Boyle*, 487 U.S. at 507 (describing when preemption would require dismissal of suits against contractors).

74. This is the case despite some confusion in judicial opinions about the source of the government-contractor defense. *See, e.g.*, Burgess v. Colo. Serum Co., 772 F.2d 844, 846 (11th Cir. 1985) ("If a contractor has acted in the sovereign's stead and can prove the elements of the defense, then he should not be denied the extension of sovereign immunity that is the government contract defense."); Zinck v. ITT Corp., 690 F. Supp. 1331, 1333 (S.D.N.Y. 1988) ("The government contractor defense grew out of the historic principle of sovereign immunity. When a contractor acts under the authority and direction of the United States, it shares in the immunity enjoyed by the Government.").

75. Implied preemption may be contrasted with other types of preemption, including express preemption, in which Congress, by statute, expressly displaces state law. *See, e.g.*, Employment Retirement Income Security Act, 29 U.S.C. § 1144(a) (2006) (specifying that ERISA legislation expressly preempts state laws affecting employee benefit plans).

76. *See* Rogers v. Tyson Foods, Inc., 308 F.3d 785, 791 (7th Cir. 2002) (describing the preemption defense as an affirmative defense); Snell v. Bell Helicopter Textron, Inc., 107 F.3d 744, 747 (9th Cir. 1997) ("The military contractor defense is an affirmative defense; Bell has the burden of establishing it."); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 n.5 (D.D.C. 2005) ("Immunity involves not an affirmative defense that may ultimately be put to the jury, but a decision by the court at an early stage that the defendant is entitled to freedom from suit in the first place.").

77. *See, e.g.*, Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990) (criticizing the *Boyle* decision as a flawed application of the Court's ability to fashion federal common law).

78. *See* Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) (extending contractor liability to a manufacturer of an ambulance); *In re* Haw. Federal Asbestos Cases, 960 F.2d 806 (9th Cir. 1992) (refusing to do the same).

equipment.[79] Few contractors assisting the U.S. government in Iraq and Afghanistan, though, are likely to meet the *Boyle* criteria. Contractors providing food for an army mess tent, transporting fuel across the Iraqi desert, or supplying an armed escort for a high-profile official will in most cases lack the requisite direction and control by the military.[80] The Supreme Court has given no indication of a willingness to expand *Boyle* to cover such situations.

The courts in *Koohi v. United States* and *Bentzlin v. Hughes Aircraft Co.* took a different approach to contractor defenses. These courts created a defense for contractors grounded not in the discretionary-function exception to the FTCA, but rather, in the combatant-activities exception.[81] The next Section discusses these two cases. It then surveys the recent litigation in which courts have been asked to expand the existing frontiers of contractor defenses.

C. Preemption as a Defense Rooted in the Combatant-Activities Exception to the FTCA: Koohi v. United States*, and* Bentzlin v. Hughes Aircraft Co.

Not long after the Supreme Court's ruling in *Boyle*, the Ninth Circuit confronted a claim arising from a U.S. Navy cruiser's mistaken attack on an Iranian airliner during the "Tanker Wars" between the United States and Iran in the 1980s.[82] In *Koohi v. United States*, the family of passengers on Iran Air Flight 655 sued the United States and the private manufacturers of the Aegis air-defense system allegedly responsible for misi-

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79. Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329 (11th Cir. 2003). Note that this application of the test is significant because it comes from the Eleventh Circuit, where a court recently issued an opinion in *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

80. This is not to say that contractors would not, in those cases, be following some sort of military-prescribed protocol. However, specifications will often be insufficiently precise to conform to the *Boyle* government-contractor defense. Nor will it generally be the case, in transporting fuel, for example, that the contractor could not do it according to military protocol and in conformity with the applicable standard of care. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 509 (1988) ("The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context.").

81. Koohi v. United States, 976 F.2d 1328, 1330–31 (9th Cir. 1992); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1486 (C.D. Cal. 1993).

82. The "Tanker Wars" describe the small-scale skirmishes between the United States and Iran in the Persian Gulf during Iran's war with Iraq. *Koohi*, 976 F.2d at 1330–31. The U.S. military adopted a policy of reflagging Kuwaiti oil tankers under the American banner to further protect them. Steve Liewer, *Teamwork Saved Stricken Warship: Navy Frigate Hit Iranian Mine in Persian Gulf 20 Years Ago*, SAN DIEGO UNION-TRIB., Apr. 19, 2008.

dentifying the plane.[83] The Ninth Circuit based its ruling of contractor nonliability on the combatant-activities exception to the FTCA.[84] The court found that because the ship was engaged in combatant activities at the time of the accident, the plaintiffs could not seek relief from the United States.[85]

The court articulated three reasons for immunizing the military from tort liability. First, although a central premise of tort theory is deterrence, Congress did not intend military personnel to exercise caution in combat situations.[86] Second, while tort liability seeks "to provide a remedy for the innocent victim," it would make little sense to provide remedies for civilians injured as a result of negligence as opposed to those who suffered from the "overwhelming and pervasive violence which each side intentionally inflicts on the other."[87] Finally, even though tort theory posits that tortfeasors should be punished, Congress could not have intended this principle to apply to U.S. combat personnel.[88] According to the Ninth Circuit, one purpose of the combatant-activities exception "is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."[89] Thus, the court concluded that the plaintiffs could not proceed against the United States.[90] And on the basis of the same factors, it immunized the makers of the Aegis missile system from these claims.[91]

One year later, the Central District of California heard *Bentzlin v. Hughes Aircraft Co.*, a case in which the family members of six marines sued a weapons manufacturer.[92] The marines were killed when a misdirected missile struck their jeep near the Kuwait-Saudi border.[93] The court determined that the claims against the contractors were preempted, after reviewing *Koohi's* description of the three principles animating the combatant-activities exception.[94] Recognizing the national interest in decisive

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83. *Koohi*, 976 F.2d at 1330–31.

84. *Id.* at 1333 (citing 28 U.S.C. § 2680(j)). The combatant-activities exception encompasses federal sovereign immunity injuries that arise "out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.*

85. *Id.* at 1332–36.

86. *Id.* at 1134–35.

87. *Id.* at 1335.

88. *Id.*

89. *Id.* at 1337.

90. *Id.*

91. *Id.*

92. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1487 (C.D. Cal. 1993).

93. *Id.* at 1487. The complaint alleged that the defendant contractors had negligently manufactured, tested, inspected, and distributed the missile. *Id.*

94. *Id.* at 1492–93.

action in combat situations, the *Bentzlin* court observed that permitting suits to proceed against contractors may endanger the lives of soldiers because it would encourage contractors to act with undue caution, thereby delaying the delivery of weapons to the front.[95] Although tort law is a means to punish tortfeasors, punishment is not as important in the military-contractor context because the U.S. government is "in the best position to monitor the wrongful activity by contractors, either by terminating their contracts or through criminal prosecution."[96] In order to protect the dignity of soldiers, victims of contractor negligence should not be compensated differently from those injured or killed by enemy fire.[97]

The *Bentzlin* court took *Koohi* a step further. *Koohi* adopts the principle that no duty of care is applicable to those against whom the military was directing force.[98] *Bentzlin* supports a more expansive view of combatant-activities preemption, identifying a federal interest in protecting contractors' decisive acts even where their negligent actions cause harm to fellow soldiers. Decided in the early 1990s, *Koohi* and *Bentzlin* stand virtually alone in justifying the preemption of state law tort claims against private companies on the basis of the combatant-activities exception in the FTCA. Although private military companies have recently sought to revive combatant-activities preemption, several courts have rejected this defense by distinguishing *Koohi* and *Bentzlin* on the facts.[99]

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95. *Id.* at 1493.

96. *Id.* at 1493–94. The court notes that the government may monitor the contractors' quality of work and may terminate the business relationship. *Id.* at 1494.

97. *Id.*

98. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).

99. In *Fisher v. Halliburton*, family members of Halliburton employees sued the company on the grounds that it had used the decedents' truck convoy as a "decoy" knowing that it would be attacked by anti-American forces. Fisher v. Halliburton, 390 F. Supp. 2d 610, 612 (S.D. Tex. 2005). The court in *Fisher* rejected defendants' preemption argument by distinguishing the facts from those in *Koohi*. *Id.* at 615–16. The court held that the combatant-activities defense applies only where the defective products cause the injury, not where injury results from a contractor's negligent performance of a service contract. *Id.* at 616 ("The narrow 'combatant activity' exception to the waiver of sovereign immunity in the [FTCA] does not bar the claims in this case."). *See also* Fisher v. Halliburton, No. H-05-1731, 2005 WL 2001351, at *1 (S.D. Tex. Aug. 18, 2005) (denying a rehearing, and noting that *Koohi's* holding confined combatant-activities preemption to claims alleging defective products and refusing to expand it beyond its "current boundaries").

Similarly, in *Lessin v. Kellogg, Brown & Root*, the court again found the reasoning of *Koohi* and *Bentzlin* inapplicable. In *Lessin*, a soldier suffered an injury while escorting a contractor caravan in Iraq. Lessin v. Kellogg, Brown & Root, No. H-05-01853, 2006 U.S. Dist. LEXIS. 39403, at *1–2, 13–14 (S.D. Tex. June 12, 2006) (generally distinguishing the procurement process, which "'inevitably implicates nuanced discretion and sophisticated judgments by military experts,'" from convoy duties, which do not)

Two cases are of particular interest: *McMahon v. Presidential Airways, Inc.*[100] and *Ibrahim v. Titan Corp*.[101]

McMahon involved U.S. serviceman in Afghanistan who died when pilots employed by a military contractor caused a plane to crash into a mountain.[102] The defendants sought to dismiss the claims by relying on the *Feres* doctrine, the government-agency defense, and combatant-activities preemption.[103] In *McMahon*, the district court emphatically rejected the defendant's claim that it was acting as an agent of the government and therefore could qualify for derivative *Feres* immunity.[104] Unpersuaded by the defendant's argument that the Defense Department's widespread use of contractors in lieu of soldiers now mandates expanding *Feres* to cover private parties, the court ruled that the *Feres* defense is only available where the United States is the defendant.[105] The Eleventh Circuit, on appeal, did recognize a policy justification for enlarging *Feres* immunity to cover private contractors—immunity might be necessary to protect the making and execution of "sensitive military judgments."[106] Yet, the Eleventh Circuit refrained from actually extending *Feres* immunity for the same reason the Supreme Court in *Boyle* jettisoned it as a basis for the government-contractor defense—it would prevent soldiers, but *not* civilians from bringing claims against contractors.[107]

(quoting *Fisher*, 390 F. Supp. 2d at 616). The plaintiff claimed that the defendants' negligent inspection, maintenance, and repair of the truck caused him a debilitating head injury. *Id.* at *2. A vehicle accident was also the subject of *Carmichael v. Kellogg, Brown & Root*, where the Northern District of Georgia rested its refusal to find the plaintiff's claim preempted on this same distinction—between design defects and the provision of services. Carmichael v. Kellogg, Brown & Root, 450 F. Supp. 2d 1373, 1380–81 (N.D. Ga. 2006). The Southern District of Texas also rejected a defendant's attempt to invoke the combatant-activities exception. Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 20, 2006).

100. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

101. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005).

102. *McMahon*, 460 F. Supp. 2d at 1318.

103. *Id.* at 1315.

104. *Id.* at 1327. The court also pointed out that "[s]tate law tort suits by service members against contractors for injuries incident to service have been permitted to go forward by numerous courts in other contexts." *Id.* at 1328.

105. *Id.* at 1325–27. Presidential argued that *Boyle's* rejection of *Feres* as the basis for the government-contractor defense is inapplicable in the current situation because the Department of Defense had so integrated contractors into its battle plans. *Id.* Apart from highlighting the changing face of the U.S. approach to warfare, the defendants offered little to show that this situation had so undermined Justice Scalia's analysis in *Boyle* so as to abandon it. *Id.* at 1328.

106. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1351 (11th Cir. 2007).

107. *Id.* at 1354–55.

The district court also rejected the defendant's' reliance on the combatant-activities exception.[108] It found that while the government-contractor defense is available *solely* to military procurement contracts in which the government "dictates design specifications," the combatant-activities exception is a legislative preservation of sovereign immunity applicable only to the government itself.[109] Even if the combatant-activities exception were theoretically available to private parties, the court continued, it is available only for "alleged defects in complex military machinery," not for "negligent provision of services."[110] On appeal, the Eleventh Circuit did not address the contractor's combatant-activities preemption claim.[111]

In *Ibrahim v. Titan Corp.*, Iraqi detainees and their families sued contractors, including employees of Titan Corp., for abuses the detainees allegedly suffered at Abu Ghraib prison.[112] In contrast to *McMahon*, the District Court for the District of Columbia revived combatant-activities preemption.[113] *Ibrahim* noted that the exemption seeks to protect against suits that would interfere with the effective execution of war;[114] suits against contractors would inevitably lead them to pass on the costs to the government.[115] The court recognized that *Boyle* permits preemption of suits against contractors where a suit would create a significant conflict between unique federal interests and tort liability. The court concluded that the existence of a unique federal interest in the detention and interrogation of prisoners depends on whether the contractors were "essentially acting as soldiers" or were "soldiers in all but name."[116] Satisfied that Titan had met its burden of showing that its employees were "under the direct command and exclusive operational control of the military chain of command," the court granted summary judgment in favor of the de-

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108. *Id.* at 1338.

109. *McMahon*, 460 F. Supp. 2d at 1330.

110. *Id.* at 1331. Interestingly, this statement impliedly repudiated controlling Eleventh Circuit precedent. In *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit had found that the government-contractor defense of the *Boyle* variety could apply to contracts for the performance of services, not merely to procurement contracts. Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003).

111. *McMahon*, 502 F.3d at 1366 (citing the doctrine of pendent appellate jurisdiction).

112. Ibrahim v. Titan Corp., 391 F. Supp. 2d 1, 10 (D.D.C. 2005).

113. *Id.* at 18 ("The inquiry then turns to whether allowing a suit to go forward would conflict with the purposes of the FTCA and whether defendants have shown that they were essentially soldiers in all but name.").

114. *Id.* at 18–19.

115. *Id.* at 19.

116. *Id.*

fendant.[117] The viability of a combatant-activities defense does not hinge on the type of the contract—procurement or services.[118] The purpose of the exception is to "shield *military* combat decisions from state law regulation."[119] Preemption of claims against contractors may thus be necessary to protect the efficient functioning of the military itself:

> Where contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability. It is the military chain of command that the FTCA's combatant activities exception serves to safeguard . . . .[120]

The above cases demonstrate that private military contractors, when faced with civil claims arising from their actions in support of the U.S military missions in Iraq and Afghanistan, have attempted to employ defenses generally available to the federal government itself. These defenses are by and large of two varieties. The first seeks to invoke the sovereign immunity of the government directly under a claim of agency. The government-agency defense is such an example. The second type of defense argues that interference with a unique federal interest requires preemption. Preemption under the combatant-activities exception to the FTCA falls under this category. With few exceptions, courts have not been willing to oblige these contractor defenses. The Supreme Court has provided very little guidance regarding government-contractor liability, and the scope of the government-agency defense and the combatant-activities exception remains unclear. Given the ubiquitous presence of contractors in recent U.S. military efforts, the stakes are high. The *McMahon* court appropriately acknowledged this fact, noting that "[r]amifications may flow from allowing U.S. service personnel to sue private military contractors who operate on or near the battlefield, especially considering the extent to which our military forces now use private

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117. Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 4 (D.D.C. 2007).

118. The court cited to the Eleventh Circuit's decision in *Hudgens v. Bell Helicopters/Textron*, which articulated the view that the controlling consideration is whether a contractor's liability under state law would create a "significant conflict with a unique federal interest." *Ibrahim*, 556 F. Supp. 2d at 4 n.3 (citing Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1345 (11th Cir. 2003)).

119. *Id.* at 5 (emphasis added).

120. *Id.* By contrast, the court ruled that Titan's co-defendant, CACI Corporation, had not satisfied the "soldier in all but name" test. *Id.* at 10. Accordingly, plaintiff's claims against CACI survived summary judgment. *Id.*

contractors in this manner."[121] The next Part of this Article addresses the first of these possible defenses, the government-agency defense. The discussion offers a perspective on the limitations of an agency-based defense for service providers and a baseline for comparing it with the combatant-activities defense.

III. THE GOVERNMENT-AGENCY DEFENSE

Since the Supreme Court's controversial decision, the *Feres* doctrine remains an insurmountable barrier to soldiers seeking monetary damages from the United States for injuries they have sustained incident to military service. No court has yet applied *Feres* directly to a private party.[122] But where a contractor proves the agency relationship necessary to establish the government-agency defense, the contractor, as a government agent, might then share in the government's own *Feres* immunity.[123]

The government-agency defense cloaks a contractor who performs a task under government supervision and direction with the government's own immunity from suit.[124] Despite the defense's seeming simplicity, courts have struggled with its application. Particularly troublesome has been identifying how close the relationship between the contractor and the government must be before the defense will apply.[125] Although de-

121. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1324 (M.D. Fla. 2006).

122. *Id.* at 1325 ("Defendants cite no case in which the *Feres* doctrine has been held applicable to private contractors."). *See also* Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss at 3–7, *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315 (M.D. Fla. 2006) [hereinafter *McMahon* Motion to Dismiss] (arguing for the expansion of *Feres* to cover military contractors).

123. A contractor who convinces a court to accord him or her derivative *Feres* immunity would enjoy an immunity defense. Feres v. United States, 340 U.S. 135, 146 (1950). A government contractor who can successfully plead a defense under the factors the Supreme Court laid out in *Boyle* will have successfully pleaded the affirmative defense of preemption. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). The government-agency defense is a defense of derivative sovereign immunity, and thus ousts the court of jurisdiction to hear the case. *Feres*, 340 U.S. at 138. The *Boyle* contractor defense is an affirmative defense the contractor must plead and prove. *Boyle*, 487 U.S. at 512.

124. Yearsley v. W.A. Ross. Constr. Co, 309 U.S. 18, 19–21 (1940). *See also generally* Richard Ausness, *Surrogate Immunity: The Government Contractor Defense and Products Liability*, 27 OHIO ST. L.J. 985, 993 (1986) (listing relevant cases).

125. Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 740 (11th Cir. 1985) ("This defense is rarely invoked, and its elements are nowhere clearly stated.").

fendants rarely succeed in winning dismissal of claims under the government-agency defense, the cases are not uniformly bleak.[126]

Courts have not been consistent in explaining the agency principles at issue in the government-agency defense.[127] When plaintiffs seek to hold the government liable through the acts of private parties, courts have required that the government "control the detailed physical performance of the contractor."[128] This standard presents a high bar for those contractors seeking to establish an agency relationship.[129] However, in *Butters v. Vance International, Inc.*, the Fourth Circuit found a contractor to be derivatively immune from suit.[130] Citing *Yearsley*, the court held that "*con-*

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126. *See* Cantu & Young, *supra* note 53, at 408 ("This agency version of the government contractor defense has proved difficult to apply because the defendant contractor must show that an agency relationship existed between it and the government. Manufacturers who contract with the military are not hired as employees; rather, the basis of the relationship is contractual. Thus, for many military contractors, this defense is ill-suited.") (internal citations omitted).

127. For example, an independent contractor may be an agent where the contractor is the fiduciary of the principal. *Shaw*, 778 F.2d at 740 n.5 (overruled on other grounds) ("[A]t least in manufacturing defect cases arising in a military setting, a firm must be more than simply an independent contractor to be regarded as the government's agent."); RESTATEMENT (SECOND) OF AGENCY § 14(N) (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."). In the context of the current conflict in Afghanistan, the military has imposed duties of loyalty and obedience to the United States approximating those owed by a fiduciary. Afghanistan General Order Number One, *cited* in Brief of Defendants-Appellants at 10–11, McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007) (No. 06-15303) [hereinafter *McMahon* Appellate Brief].

Several circuits have held that an independent contractor may be an agent where the government exercises "overall control" of the contractor's performance. RESTATEMENT (SECOND) OF AGENCY § 14(N) (1958). For example, the Ninth Circuit found that an independent contractor operating a boat as a charter for the Navy was an agent where the government exercised "overall" but not "day to day" control over the vessel. Dearborn v. Mar Ship Operations, Inc., 113 F.3d 995, 997–98 (9th Cir. 1997). *See also* Favorite v. Marine Pers. & Provisioning, Inc., 955 F.2d 382, 388 (5th Cir. 1992) (deeming the tanker serving the Department of Defense an agent); Petition of the United States, 367 F.2d 505, 510–11 (3d Cir. 1966) (considering the tanker serving the Department of Defense an agent).

128. Logue v. United States, 412 U.S. 521, 527–28 (1973) ("[T]he distinction between the servant or agent relationship and that of independent contractor turn[s] on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.").

129. *See* Williams v. United States, 50 F.3d 299, 307 (4th Cir. 1995) ("[H]ere, the United States neither supervised nor controlled the day-to-day operations or the custodial duties.").

130. Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000). Although the court dealt with sovereign immunity in the context of the Foreign Sovereign Immunities Act

tractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity."[131] In *Yearsley*, the contractor invoked derivative sovereign immunity in a situation in which the government was clearly immune. That the *Butters* court did not similarly analyze how the government exercised control over the "detailed physical performance of the contractor" suggests that a less rigorous analysis prevails where the government treasury is not vulnerable.[132]

Although the case law on the government-agency defense is sparse and inconsistent in places, the defense presents a viable means by which service contractors may avoid liability. *McMahon v. Presidential Airways, Inc.*, though, demonstrates how elusive the defense can be in practice. The government contracted with Presidential Airways to provide troop and ammunition transports between military installations in Afghanistan and neighboring countries.[133] The government selected the type of plane, the general routes the company was to use in Afghanistan, the timing of the flights, as well as what to carry.[134] It also asked the company to fly at lower altitudes to decrease its vulnerability to anti-aircraft fire.[135] Although the facts suggest that the government had a substantial role in dictating the terms of the flights, the contractor admitted that the government did not exercise control during the performance of its mission.[136] Had the court in *McMahon* adopted a less restrictive approach to agency, the pilot and other Presidential Airways employees might well have been

("FSIA"), 28 U.S.C. §§ 1330, 1602–1611 (2005), rather than the FTCA, the court relied on *Yearsley*. *Id.* at 466. FSIA generally prohibits courts from adjudicating the actions of foreign sovereigns, thus shielding them with immunity in U.S. courts. 28 U.S.C. § 1604. FSIA contains a number of exceptions, however. *Id.* §§ 1605–1607.

131. *Butters*, 225 F.3d at 466 (citing Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21–22 (1940)). The *Butters* court referenced the government's need to delegate functions, and added that "sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions." *Id.*

132. Citing *City of Worcester v. HCA Mgmt. Co.*,753 F. Supp. 31, 37–38 (D. Mass. 1990), the *Butters* court asserted that "[p]ursuant to sovereign immunity, a private company which contracts with the federal government to perform the duties of the government will not be held liable for its actions on behalf of the government."). *Butters*, 225 F.3d at 466.

133. *McMahon* Appellate Brief, *supra* note 127, at 10–11.

134. *Id.* at 11.

135. *Id.* at 13–14.

136. *Id.* at 32 ("Presidential was completely subject to the military's control, except as to the physical performance of the mission.").

deemed agents because the military retained "overall control" of their conduct.[137]

Defendants may also invoke a separate line of cases that has extended "official immunity" to contractors. Official immunity differs from sovereign immunity in that the former generally protects individuals from liability, while the latter protects the government and its agencies.[138] In *Mangold v. Analytic Services, Inc.*, the Fourth Circuit granted official immunity to contractors for their assistance as part of an Air Force investigation.[139] The court cited two Supreme Court opinions, *Barr v. Mateo*[140] and *Westfall v. Erwin*,[141] where the Court articulated the dimensions of official immunity for acts of federal employees. These cases held that a federal official who performs a discretionary act in the scope of his or her employment is absolutely immune from a state law tort lawsuit where the benefits of such immunity outweigh its costs.[142] Although the test for official immunity has been replaced by statute, this common-law approach remains the standard when considering whether contractors may enjoy official immunity.[143] In *Mangold*, the Fourth Circuit broadly concluded that "[i]f absolute immunity protects a particular governmental function, no matter how many times or to what level that function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."[144] The court relied on *Boyle* as a rationale for extending immunity to a contractor to whom the government delegated a discretionary function.[145] Of course, reliance on *Boyle* is inapposite, as the case cannot be read to support such a cavalier extension of immunity.[146] Numerous cases, though, have followed *Man-*

137. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1328 (11th Cir. 2005) (rejecting *Feres* as an available defense).

138. 63C Am. Jur. 2d Public Officers and Employees § 305.

139. Mangold v. Analytic Services, Inc., 77 F.3d 1442 (4th Cir. 1996).

140. Barr v. Matteo, 360 U.S. 564, 569–73 (1959).

141. Westfall v. Erwin, 484 U.S. 292, 295 (1988).

142. *Id.* at 296 n.3.

143. *See* 28 U.S.C. § 2679(d); Beebe v. Wash. Metro. Area Transit Auth., 129 F.3d 1283, 1289 (D.C. Cir. 1997) (noting that "*Westfall* remains the common law rule" for official immunity).

144. *Mangold*, 77 F.3d at 1447–48.

145. *Id.* at 1448.

146. *See* Sean L. Brohan, *Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 56 MD. L. REV. 1044, 1165, 1175 (1997). *Boyle* stands for the narrow proposition that when a contractor meets defined criteria, a federal common-law preemption defense applies. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). It does not extend immunity based on agency. *Id.* at 502–03.

gold's extension of immunity to contractors based on the delegation of a discretionary function to a private contractor.[147] These cases, applying the principle of immunity for discretionary acts enunciated in *Westfall* to private individuals and entities, have generally been confined to situations where private actors have cooperated with government investigations or have served as financial intermediaries.[148] Courts have not yet applied official immunity in the context of suits against military procurement or service contractors.[149]

Regardless of which type of immunity the service contractor operating in Iraq or Afghanistan invokes—the government-agency defense or official immunity under *Mangold*—courts have concluded that a showing of agency or the performance of a delegated, discretionary function is not alone sufficient to justify immunity.[150] In both cases, a defendant must affirmatively justify immunity by showing that the benefits of immunity outweigh its costs.[151] The private contractor must establish how and why the immunity doctrines that developed to protect the government also apply to private contractors.

For example, the court in *McMahon* considered how a service contractor could uphold its claim of derivative sovereign immunity under the *Feres* doctrine.[152] Merely establishing an agency relationship was not enough.[153] After considering the various rationales for *Feres* immunity and whether they could logically be expanded to cover private contractors, the court found the final rationale for *Feres*—the desire to prevent courts from second-guessing military decisions—to be a compelling justification for extending derivative sovereign immunity to contractors.[154]

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147. *See, e.g.*, Murray v. Northrop Grumman Info. Tech., Inc., 444 F.3d 169 (2d Cir. 2006); *In re* Series 7 Broker Qualification Exam Litig., 510 F. Supp. 2d 35, 44 (D.D.C. 2007) (citing *Mangold*, 77 F.3d 1442).

148. Research discloses no case that has so extended the principle announced in *Mangold* outside of the government investigation or financial intermediary context.

149. *See* Adams v. Alliant Techsystems, Inc., 201 F. Supp. 2d 700, 707 (W.D. Va. 2002) (denying defendants' immunity).

150. *See* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1344 (11th Cir. 2007).

151. *Mangold*, 77 F.3d at 1447.

152. The court reviewed the law of qualified immunity for government officers, concluding that while the United States is immune from suit "by default," an officer's immunity must be "affirmatively justified." *McMahon*, 502 F.3d at 1344. The court concludes that by analogy to qualified immunity, which applies as necessary to protect the government functions the private party is exercising, it must consider how extending *Feres* immunity is justifiable in the case of military contractors. *Id.* at 1345–51.

153. *Id.* at 1346 ("It is thus not enough for Presidential to point to its (alleged) status as a common law agent and the government's (alleged) *Feres* immunity.").

154. *Id.* at 1348.

According to the court, allowing a plaintiff's suit to proceed against a military contractor would threaten the separation of powers principle.[155] Immunity would necessarily apply in order to avoid the trial of "suits involving quintessential or peculiarly military judgments that courts should not hear as a matter of prudence, rather than a matter of constitutional law."[156] The court, in such cases, would lack the competence to appropriately evaluate the "proper tradeoff between military effectiveness and the risk of harm to the soldiers."[157] Although the court in *McMahon* recognized a policy justification for extending the government's immunity from suit to private contractors, it declined to do so.[158]

The *McMahon* court's concern for insulating sensitive military decisions from judicial scrutiny is sensible. For example, private contractors have been implicated in the transportation of alleged enemy combatants in the "war on terror."[159] In a suit against such a contractor, information regarding U.S. activities associated with the transportation of terrorist suspects is closely held, as nondisclosure is considered critical to U.S. national security.[160] Permitting a suit to proceed against a contractor in these circumstances would necessitate discovery into the adequacy of interrogation procedures and other internal controls.[161] Although restrictions on judicial interference with such activities pose a risk that an individual injured by unlawful government conduct will be left without a remedy, the law has nonetheless insulated such matters from judicial inquiry.

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155. *Id.* at 1350.

156. *Id.* In its allusion to constitutional law, the court refers to the constitutional principle of nonjusticiability, particularly the political question doctrine, under which courts are constitutionally prohibited from hearing a case. *Id.* at 1350–51.

157. *Id.* at 1350.

158. *Id.* at 1353.

159. *See* SCAHILL, *supra* note 20, at 253 (describing contractors' role in rendition and interrogation programs); Gorman, *supra* note 29 (describing how contractors have been involved in waterboarding terror suspects).

160. *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007). In *El-Masri*, the court affirmed the dismissal of a suit by a German citizen of Lebanese descent alleging torture at the hands of the CIA and private contractors as part of the war on terror. It concluded that the state-secrets doctrine precluded discovery in his case, and that the suit could not be maintained absent the very information placed beyond his reach by the court. *Id.* at 308–12.

161. Courts have said that in other circumstances inquiries into military decision making may impermissibly threaten military discipline. *See, e.g.*, McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007) (finding, in the *Feres* context, that a suit by a deceased soldier's family arising from his death in a recreational boating accident was barred, as military discipline would be threatened should an inquiry be made into the military's maintenance of boats and the adequacy of instructions concerning their use).

While the *McMahon* court agreed that the *Feres* doctrine, insofar as it protects military decision making from judicial inquiry, is applicable to military contractors, it refused to extend the military-discipline rationale to private contractors.[162] Unlike soldiers, contractors are not in the military chain of command.[163] Thus, the court reasoned that the deleterious effects on military discipline spawned by permitting soldiers to challenge military orders in court do not apply in the case of defendant contractors.

However, in light of Supreme Court precedent, the focus on the defendant's status in the chain of command is arguably misplaced. In *United States v. Johnson*, the Supreme Court held that the *Feres* doctrine prevented a serviceman's suit against the government where the alleged tortfeasor was a civilian employee of a government agency.[164] The plaintiff in the case argued that a civilian air traffic controller in the Federal Aviation Agency ("FAA") acted negligently when he provided a Coast Guard helicopter pilot with incorrect coordinate information, causing him to crash.[165] The Court noted that "[c]ivilian employees . . . play an integral role in military activities" and that "the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities."[166] *Johnson* illustrates two points. First, it shows that the application of the *Feres* doctrine depends more on the military status of the plaintiff (whose relationship to the government is of unique federal interest) than on the identity of the tortfeasor.[167] The Court held that since "Johnson went on the rescue mission specifically because of his military status," the case fell "within the heart of the *Feres* [doctrine]."[168] Second, *Johnson* suggests that the prospect of a lawsuit need not interfere directly with the military chain of command. As the Court stated, "[A]n inquiry into the civilian

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162. *McMahon*, 502 F.3d at 1348.

163. DEP'T OF THE ARMY, PAMPHLET 715-16, CONTRACTOR DEPLOYMENT GUIDE 1-1 (1998), *available at* http://www.army.mil/usapa/epubs/pdf/p715_16.pdf.

164. United States v. Johnson, 481 U.S. 681 (1987). In this case, the civilian was an employee of the Federal Aviation Agency. *Id.* at 683.

165. *Id.* at 682–83.

166. *Id.* at 691 n.11.

167. The Supreme Court's opinion in *Johnson* recognized that its prior opinions addressing the *Feres* doctrine had not treated the status of the tortfeasor as critical. *Id.* at 685. *See* Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 102 (1985) ("The key to the *Feres* holding was the plaintiff's identity: he was an active serviceman. The defendant's military status was not dispositive, for civilians may sue the military under the FTCA.") (citations omitted).

168. *Johnson*, 481 U.S. at 692.

activities would have the same effect on military discipline as a direct inquiry into military judgments."[169]

The principles of *Johnson* apply to military contractors. Like the civilian air-traffic controller in *Johnson*, private military companies work closely with military authorities although they operate outside of the chain of command.[170] *Johnson* demonstrates that the United States will be immune where a soldier sues the government in connection with orders or information negligently furnished that causes his or her injury. As contractors are part of the "Total Force,"[171] it is difficult to conclude that the outcome should change on the basis that a contractor provided the erroneous flight information rather than a civilian in the FAA. *Johnson* makes the tortfeasor's identity functionally irrelevant. The threat to military discipline and the goal of preventing the second-guessing of orders are of equal magnitude in both cases. In light of *Johnson*, the court in *McMahon* should not have so readily dismissed the applicability of *Feres's* military-discipline rationale in support of contractors' derivative sovereign-immunity defense. Indeed, the military-discipline and military-decision making rationales support the expansion of the *Feres* immunity defense to private contractors acting as agents of the government. That it did not do so suggests that the Eleventh Circuit's true objection was to *Feres* itself.[172]

Nevertheless, even if the principles underlying *Feres* might be extended to protect military contractors via the government-agency defense, courts should do so with caution. Courts confronting the government-agency defense should adopt a restrictive approach to agency. Otherwise, contractors would be immune from suit even in situations where the gov-

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169. *Id.* at 691 n.11.

170. U.S. Dep't of Army Regulation 715-9, Contractors Accompanying the Force § 2-3(a) (Oct. 29, 1999), *available at* http:// www.army.mil/usapa/epubs/pdf/r715_9.pdf.

171. In 1973, the Department of Defense adopted the "Total Force Policy," which recognized the contribution reservists, civilian government workers, and contractors could "add to the active forces in ensuring the national defense." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO NO. 95-5, DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS 10 (1994).

172. Reflecting the Supreme Court's rejection of *Feres* as the basis for the government-contractor defense, the Eleventh Circuit in *McMahon* declined to extend *Feres* immunity due to the inequity it would create for military plaintiffs. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1353 (11th Cir. 2007) ("Even if such an immunity is warranted, however, we do not believe that the *Feres* doctrine is an appropriate ground upon which to build it. The reason is that an immunity built on *Feres* would only prevent *soldiers*—and would not prevent civilians—from bringing suit against private military contractors making or executing sensitive military judgments."). Effectively announcing its view that *Feres* was wrongly decided, the court chose to contain the damage by refusing to expand it. Its criticism of *Feres* is indirect but unmistakable.

ernment exerts little control over contractor discretion and where critical federal interests are not implicated. However, if a contractor successfully demonstrates a *bona fide* agency relationship, courts should assess the principles underlying the *Feres* doctrine and, in appropriate cases, extend immunity to private contractors.

The narrow government-agency defense is not the only defense available to service contractors. In certain areas critical to the national interest, contractors may raise the combatant-activities exception as an affirmative defense without demonstrating agency. Judicial opinions differ on the meaning and scope of the exception, though. And courts are undecided about its potential for preempting tort suits against service contractors involved in combat operations. However, the ubiquitous presence of contractors on the battlefield in the global war on terror has thrust this defense back into the legal limelight. Substituting for soldiers, contractors have argued that their status justifies protecting them against civil claims arising from their participation in combat and combat-support activities. Whether this protection is warranted and which circumstances make it so are two questions addressed in the following section.

IV. APPLYING THE COMBATANT-ACTIVITIES EXCEPTION TO TORT CLAIMS AGAINST SERVICE CONTRACTORS: SOUND DEFENSE OR FLAWED REASONING?

As service contractors have faced civil claims arising from their conduct in Iraq and Afghanistan, many have turned to combatant-activities preemption as a defense.[173] Judges are now addressing the combatant-activities exception on virtually a blank slate.[174] The following discussion

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173. *See, e.g.*, Defendant Kellogg, Brown & Root, Inc.'s Motion to Dismiss, Lessin v. Kellogg, Brown & Root, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (No. H-05-1853); Defendants' Reply in Support of Motion to Dismiss, Smith v. Halliburton Co., 2006 WL 1342823 (S.D. Tex. May 16, 2006) (No. H-06-0462); Reply in Support of Motion to Dismiss by Defendants Kellogg, Brown & Root Services, Inc. and Halliburton Energy Services, Inc., Carmichael v. Kellogg, 450 F. Supp. 2d 1373 (N.D. Ga. Apr. 10, 2006) (No. 1:06-cv-0507); Defendants' Memorandum in Support of Motion to Reconsider and/or Clarify Order Denying Motion to Dismiss with Respect to Combatant Activities Exception, Fisher v. Halliburton, 390 F. Supp. 2d 610 (S.D. Tex. 2005) (No. H-05-1731) [hereinafter *Fisher* Motion]. For example, in *Fisher*, defendants argued that the court had confused the combat-activities exception with the government-contractor defense, which it argued it had not raised. *Id.* at 1. ("Defendants move for reconsideration of the Order with respect to the combatant activities exception because it appears that the application of that exception became confused with the government contractor defense based on the separate discretionary function exception, which Defendants did not raise or brief.").

174. *See* Laura A. Dickinson, *Accountability of Private Security Contractors Under International and Domestic Law*, 11 ASIL INSIGHTS, Dec. 26, 2007, http://www.asil.org/

critically evaluates this exception. It first defines its scope and suggests how it may apply to military contractors. After exploring why increasing criminal jurisdiction over military contractors is an insufficient substitute for tort liability, this section identifies a federal interest supporting combatant-activities preemption, namely, fostering bold, decisive action by military contractors. It then examines competing interests, focusing on contractor discretion as the critical variable, and concludes by arguing that combatant-activities preemption may be appropriate, but only where contractor discretion falls below a critical threshold.

A. The Scope of the Combatant-Activities Exception

The combatant-activities exception to the FTCA reflects the Congressional policy that the United States should not be subject to suit in cases concerning its armed forces' combatant activities during wartime.[175] The legislative history interpreting the exception is conspicuously sparse.[176] The Ninth Circuit in *Johnson v. United States*, though, concluded that the exception must have been intended to cover those combatant activities "which by their very nature should be free from the hindrance of a possible damage suit."[177]

The statute leaves the terms "war," "arising out of," and "combatant activities" undefined, so courts have been left to clarify their meanings.[178] Broadly defining "war," courts have noted that a declared state of war need not exist to trigger the combatant-activities exception.[179]

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insights/2007/12/insights071226.html (in discussing the grant of summary judgment in *Titan*, noting that "[t]he precise scope of the contractor immunity doctrine, however, remains unresolved").

175. Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2008). The FTCA waiver of liability provides that the district courts shall have jurisdiction over suits

> 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.

Id. § 1346(b)(1).

176. The Ninth Circuit in *Johnson v. United States*—an early case addressing the exception—noted that the record was "singularly barren" of evidence that would assist in interpreting the exception. Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1949). *See also* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 (D.D.C. 2005).

177. *Johnson*, 170 F.2d at 769.

178. *See* 28 U.S.C. § 2680(j).

179. *See, e.g.*, Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987) (indicating that the exception would apply to cases arising before the declared end of hostilities in the Vietnam War); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947)

"[S]ignificant armed conflict" short of war is sufficient.[180] The Ninth Circuit offered this definition of "war" when considering the combatant-activities exception in the context of the Tanker Wars.[181]

The term "arising out of" has also been construed expansively. *Johnson* involved the destruction of clam farms by a U.S. Navy vessel returning from duty in the Pacific Ocean following World War II.[182] The owner of the farms sued the government for damages.[183] The court interpreted "arising out of" broadly, finding that an activity at least incidentally related to combat could qualify.[184] Accordingly, the court held that the delivery of ammunition to combatants in a "fighting area" met the "arising out of" requirement.[185]

Courts have struggled when defining the term "combatant activities." Considering the types of activities service contractors perform demonstrates how slippery the concept of combatant activities can be. For example, in *McMahon*, the military hired the defendant contractor to transport troops and material from one military base in Afghanistan to another.[186] Since the President declared Iraq and Afghanistan, along with the skies above these countries, combat zones,[187] by analogy to *Johnson v.*

(holding that the combatant-activities exception was potentially applicable during the Second World War even though the incident occurred in the United States).

180. *See* Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992). When construing the phrase "in light of contemporary realities," the court found it significant that "in modern times hostilities have occurred without a formal declaration of war far more frequently than following a formal pronouncement." *Id*. at 1334. In arguing that congressional authorization for the use of force need not take the form of a declaration of war, Jack Goldsmith and Curtis Bradley observe this trend. Curtis A. Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2059–60 (2005) ("[T]he United States has been involved in hundreds of military conflicts that have not involved declarations of war . . . . [T]he United States has not declared war in *any* of its many post-World War II conflicts, even though some of them have been significant and prolonged."). *See also* Morrison v. United States, 316 F. Supp. 78, 79 (M.D. Ga. 1970) ("[A] war is no less a war because it is undeclared."). Note also that the district court in the *McMahon* case found that combat activities in Afghanistan in 2004 were sufficient to implicate the combatant-activities exception. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

181. *Koohi*, 976 F.2d at 1334.

182. *Johnson*, 170 F.2d at 768.

183. *Id.*

184. *Id*. at 770.

185. *Id*. (noting that the exception would encompass "activities both necessary to and in direct connection with actual hostilities").

186. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1336–38 (11th Cir. 2007) (describing the role the contractor Presidential played in shuttling troops and material).

187. Designation of Afghanistan and the Airspace Above as a Combat Zone, 66 Fed. Reg. 64,907 (Dec. 14, 2001) (designating Afghanistan and its airspace as "an area in

United States this would likely qualify as a combatant activity,[188] particularly because the flight apparently contained munitions as well as military personnel.[189]

Skeels v. United States involved a fisherman who was injured by falling debris from a plane engaging in military exercises in the United States during the Second World War.[190] Concluding that the combatant-activities exception did not bar the suit, the court in *Skeels* held that combatant activities means only those activities that are connected to engaging the enemy or engaging in physical force with the enemy.[191] The court in *Koohi* adopted *Johnson's* slightly different definition of combatant activities. It found that combatant activities are those "'activities both necessary to and in direct connection with actual hostilities.'"[192] Similarly, in *Vogelaar v. United States*, a case in which a plaintiff alleged that the military had acted negligently in failing to timely identify the remains of a deceased soldier, the court considered identifying and accounting for soldiers in a combat zone as constituting a combatant activity under the FTCA.[193] Transportation of troops in a combat zone would not qualify as a combat activity under *Skeels*, but would likely suffice under the less restrictive *Koohi* and *Vogelaar* formulations.

Even under a generous definition of combatant activities, many services performed by contractors do not qualify. In *Smith v. Halliburton*, the relatives of deceased service members sued Halliburton under a theory of premises liability for negligently permitting a suicide bomber to infiltrate a mess tent the company ran in northern Iraq.[194] Although the court dis-

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which Armed Forces of the United States are and have been engaged in combat"); Designation of Arabian Peninsula Areas, Airspace, and Adjacent Waters as a Combat Zone, 56 Fed. Reg. 2663 (Jan. 21, 1991) (designating Iraq a combat zone for purposes of combat pay under IRS regulations).

188. *See Johnson*, 170 F.2d 767.

189. *See McMahon* Appellate Brief, *supra* note 127, at 10–11 (describing munitions transportation).

190. Skeels v. United States, 72 F. Supp. 372, 373 (W.D. La. 1947).

191. *See In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242 (E.D.N.Y. 1984) (finding that combatant activities is limited to engaging an enemy in combat).

192. Koohi v. United States, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992) (quoting *Johnson*, 170 F.2d at 770).

193. Vogelaar v. United States, 665 F. Supp. 1295, 1302 (E.D. Mich. 1987). A case from the Middle District of Pennsylvania held that the exception applied when a Veterans Administration official was accused of negligently injuring a soldier who suffered a combat injury during World War II. Perucki v. United States, 80 F. Supp. 959 (M.D. Pa. 1948). Because the injury suffered during the medical examination would not have arisen but for the original injury suffered in combat, the exception applied. *Id.* at 961.

194. Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 30, 2006).

missed the plaintiffs' complaint on political-question grounds, the court described how the military itself remained in control of security arrangements, with the contractor merely in charge of food service.[195] In *Lessin v. Kellogg, Brown & Root*, the court found the combatant-activities exception inapplicable where the ramp-assist arm of a contractor's truck injured a soldier while the contractors were accompanying a supply convoy in Iraq.[196]

In defining combatant activities, one may distinguish between providing food for soldiers and transporting troops and military supplies between bases, the former simply being too remote from actual combat.[197] The latter, essential to any military operation, clearly has a direct connection to hostilities.[198] Such missions are vulnerable to ground attacks by insurgents and threats associated with flying according to riskier military flight plans.[199]

Transporting civilian reconstruction supplies, like in *Lessin*, is a closer case. In Iraq, the overtly military and civilian reconstruction tasks must

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195. *Id.* at *2–3.

196. Lessin v. Kellogg, Brown & Root, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403, at *2 (S.D. Tex. June 12, 2006).

197. *See Smith*, 2006 WL 2521326, at *3. Transportation of troops and food service are, admittedly, both important to any military effort. They are distinguishable, however. Troop transport is an activity inextricably linked to combat, whereas food service is not. The latter occurs regardless of deployment, but this is not true of the former.

198. The possibly apocryphal quip by General Omar Bradley, Field Commander in North Africa and Europe during the Second World War and later Chairman of the Joint Chief of Staff, comes to mind in this context: "[a]mateurs study tactics; professionals talk about logistics." Richard Hornstein, *Protecting Civilian Logisticians on the Battlefield*, 38 ARMY LOGISTICIAN 14 (2006). Winston Churchill also said that "in total war it is quite impossible to draw any precise line between military and non-military problems." Gregory Cantwell, *Nation Building: A Joint Enterprise*, 37 PARAMETERS 54 (2007). The court in *Bentzlin* noted, however, that the first *Koohi* principle might even apply in the case of the *transportation* of military material. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1493 (C.D. Cal. 1993) ("During wartime, manufacturers similarly should not be overly cautious in the production and transportation of weapons, since delay may lead to missed strategic opportunities and deaths of American soldiers."). Although the primary mission of Presidential's troop airlift in *McMahon* was apparently to transport troops from one part of Afghanistan to another, the fact that the plane carried ammunition suggests that it might fall within this *Bentzlin* dictum. *See McMahon* Appellate Brief, *supra* note 127, at 10–11 (describing munitions transportation). Defendants might draw support from *Johnson* in this regard. Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1949) (noting that the delivery of weapons might qualify as "combatant activities" under the FTCA).

199. *McMahon* Appellate Brief, *supra* note 127, at 13 ("One of the risks that the military and Presidential agreed to was to fly below the peaks of mountains in order to reduce risk of antiaircraft fire.").

be combined in order to defeat the vicious cycle of violence. Soldiers and contractors have cooperated to combat insurgents, quell sectarian strife, rebuild the country, and defend against suicide bombers. To derail these efforts, insurgents have targeted civilian reconstruction workers,[200] and as reconstruction contractors have been embroiled in violence, conventional activities have taken on the characteristics of combatant activities.[201]

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200. *See* Chia Lehnardt, *Private Military Companies and State Responsibility*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 139, 147–48 (Simon Chesterman & Chia Lehnardt eds., 2007) ("Contractors guarding reconstruction projects or escorting supply convoys through hostile territory are as much in the battlefield as [U.S.] troops. Even providing security for food delivery can result in being drawn into combat situations . . . . The distinction between security and military, defensive and offensive military operations appears, therefore, rather artificial.") (citations omitted). According to a 2005 report of the Special Inspector General for Iraq Reconstruction, terrorist attacks caused 117 of the 147 U.S. civilian deaths (including contractors') since March 11, 2003. SPECIAL INSPECTOR GEN. FOR IRAQ, REPORT TO CONGRESS 12 (2005). *See also* Daniel Bergner, *The Other Army*, N.Y. TIMES, Aug. 14, 2005 (quoting General Jay Garner, former head of the Office of Reconstruction and Humanitarian Assistance in Iraq (a precursor to the CPA), as saying that security contractors were "performing a military role").

201. *See* LEXINGTON INST., CONTRACTORS ON THE BATTLEFIELD 12 (2007) (noting that contractors drove virtually all supply convoys in the early years of the Iraq war, and that "nearly *every* [Kellog, Brown & Root] convoy was attacked in one way or another") (citing CHRISTIAN T. MILLER, BLOOD MONEY 137 (2006)); Robert F. Worth, *Al Jazeera Shows Kidnapped U.S. Journalist*, N.Y. TIMES, Jan. 18, 2006 ("Insurgents attack Iraqi police and army forces almost daily, and foreign contractors are also frequent targets."). Minow raises the point that regular activities may blur with combatant activities, querying when one function "move[s] from civilian support to core military activity" and observing that the Defense Department has not adopted a policy on this matter. Minow, *supra* note 2, at 1015. *See also* FRED SCHREIER & MARINA CAPARINI, PRIVATIZING SECURITY: LAW, PRACTICE AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY COMPANIES 31 (2005) ("[I]n Iraq, insurgents ignore distinctions between security guards and combat troops. What is more, they have made convoys, headquarters, and buildings housing state authorities prime targets. As a result, security contractors have increasingly found themselves in pitched battles, supplying services which are difficult to distinguish from what soldiers of regular armed forces do."). *But see* Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 19 (D.D.C. 2005). In *Ibrahim*, the District Court for the District of Columbia indicated that combatant-activities preemption might apply where the contractors were "essentially acting as soldiers." *Id.* The court thus implicitly rejected the view that their mere presence in Iraq during the height of insurgency was sufficient to implicate the exception. *See also The Federal Tort Claims Act*, 56 YALE L.J. 534, 549 (1947) (noting that in view of army and judge advocate regulations, "combatant activities" has been construed narrowly). It is worth mentioning that the distinction between soldier and contractor is not the only one being blurred. The nature of combat in Iraq and Afghanistan, in which troops in the rear are as vulnerable to attack as troops on the frontline, has prompted commentators to reassess the U.S. prohibition on women's service in certain combat

Admittedly, international law does not treat the military contractor as a "combatant" under the traditional meaning of the term.[202] The drafters of the FTCA, however, could not foresee that contractors would serve in such a broad range of combat-support roles. Given the current situations in Iraq and Afghanistan, the support that contractors provide is essential to military success. Filling in where the military lacks capability,[203] contractors have both augmented and replaced existing force capacity.[204] As

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roles. *See* ELSEA & SERAFINO, *supra* note 1, at 5 ("Like soldiers, private security contractors incur the risk of death and injury from insurgents in Iraq."); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 331 n.272 (2005).

202. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

203. DAVID ISENBERG, A FISTFUL OF CONTRACTORS: THE CASE FOR A PRAGMATIC ASSESSMENT OF PRIVATE MILITARY COMPANIES IN IRAQ 21 (2004) (noting that when the Army's "technology-heavy 4th Infantry Division deployed to Iraq in 2003, about [sixty] contractors accompanied the division to operate its digital command and control systems," which the Division did not yet know how to operate).

204. Peter Singer describes the contractor force as an "enabler," adding that the war would not be possible without it. PETER SINGER, CAN'T WIN WITH 'EM, CAN'T GO TO WAR WITHOUT 'EM: PRIVATE MILITARY CONTRACTORS AND COUNTERINSURGENCY 3 (2007). Singer's argument is that without the presence of contractors, the U.S. government could not engage the military in conflicts that garner the necessary public support, on account of the number of troops that would otherwise be required. *Id.*

For example, General Petraeus recently testified to the Senate Armed Services Committee that he considers contract security forces among the assets available to defeat the insurgency. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report Before the H. Comm. on Oversight and Government Reform* 121, 125, 110th Cong. (2007) (statement of Andrew Howell, General Counsel of Blackwater USA). In Howell's prepared remarks, he quoted U.S. Ambassador to Iraq, Zalmay Khalilzad, as saying, in response to the deaths of Blackwater security guards while protecting a U.S. diplomat, that "[t]hese five citizens were our colleagues and worked on behalf of the United States government to protect American diplomats and missions in Iraq." *Id.* at 123. Contractors have operated Predator drones and the guided missile defense system on the Navy's ships, targeting precision weapons systems. SCHREIER & CAPARINI, *supra* note 201, at 22. Although contractors ceased operating Predator drones during the war in Afghanistan once they were mounted with hellfire missiles, contractors from Northrup Grumman operate Global Hawk surveillance drones. Boldt, *supra* note 18, at 507. Boldt adds that although not armed, "the operation of those drones could be of crucial importance for the outcome of battles, for example by locating fleeing targets in Afghanistan." *Id. See also* Ian Traynor, *The Privatization of War*, GUARDIAN, Dec. 10, 2003, http://www.guardian.co.uk/world/2003/dec/10/politics.iraq/print ("When America launched its invasion in March, the battleships in the Gulf were manned by [U.S. Navy] personnel. But alongside them sat civilians from four companies operating some of the world's most sophisticated weapons systems."). Following 9/11, contractors formed part of the earliest teams deployed in the borderlands of Afghanistan and Pakistan to capture and/or kill Osama bin Laden. ROBERT YOUNG PELTON, LICENSED TO KILL 30–33, 42 (2006) (discuss-

one report by the British House of Commons concluded, "The distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much a part of the military operation as those who do the shooting."[205] Thus, the delivery of necessary supplies to the front, or the operation or maintenance of weapons systems is no less a combatant activity merely because a contractor performs it. Although the military's field manual provides that contractors are not to engage in combat operations, contractors are performing functions that courts have characterized as "combatant activities."[206] The fact that a contractor is not technically a "combatant" under applicable international legal principles does not obscure the reality: theoretical distinctions no longer mirror the conditions of insurgent warfare and the critical role that contractors have played.

B. Legislative Background and the (Non)Effect of Expanding Criminal Jurisdiction

While the vast majority of the 160,000 military contractors currently operating in Iraq[207] have performed satisfactorily, contractors have come under increasing scrutiny from the press and Congress as the U.S. military interventions in Iraq and Afghanistan have dragged on. Committees of the House of Representatives and Senate have held multiple hearings to address the challenges of regulating military contractors abroad.[208]

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ing the deployment of CIA contractor Bill Waugh and others to Afghanistan to hunt bin Laden, and contractors' presence there between 2005 and 2006).

205. Minow, *supra* note 2, at 1015–16 (citing NINTH REPORT OF THE FOREIGN AFFAIRS COMM., PRIVATE MILITARY COMPANIES, SESSION 2001–2002, RESPONSE OF THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH ACTIVITIES [Gr. Brit.] 4 (Oct. 2002)). *See also* CONTRACTORS ON THE BATTLEFIELD, *supra* note 201, at i ("[C]ontractors are now a *de facto* third force—a support force—integral to the conduct of modern warfare."); Clayton Collins, *War-Zone Security Is a Job for . . . Private Contractors?*, CHRISTIAN SCI. MONITOR, May 3, 2004, http://www.csmonitor.com/2004/0503/p02s01-usmi.html. One commentator suggests that "contractors are not replacing force structure, they are becoming force structure." DEBORAH C. KIDWELL, PUBLIC WAR, PRIVATE FIGHT? THE UNITED STATES AND PRIVATE MILITARY COMPANIES 3 (2005). Contractors have even been awarded Purple Heart medals in some cases, though the government has more recently indicated that these would be rescinded. ISENBERG, *supra* note 203, at 74.

206. *See* Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 3 (D.D.C. 2007) (finding that prisoner interrogation constituted a combatant activity).

207. SINGER, *supra* note 204, at 11 (noting the number of military contractors in Iraq in September 2007).

208. *See, e.g.*, *Enforcement of Federal Criminal Law to Protect Americans Working for U.S. Contractors in Iraq Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007); *War Profiteering and*

Congress has also taken action to expand criminal accountability over contractors in Iraq. The reach of U.S. and Iraqi criminal laws over U.S. citizens serving as contractors in Iraq was initially thwarted by Coalition Provisional Authority ("CPA") Order No. 17, which provided presumptive immunity from Iraqi law for all international private contractors operating in Iraq.[209] Order No. 17 did not preempt the law of the contractor's sending state, but jurisdictional gaps complicated extending the reach of U.S. law over American contractors in Iraq.[210] Congress has recently acted to fill those gaps.

The Military Extraterritorial Jurisdiction Act ("MEJA") broadens the scope of federal courts' jurisdiction to punish certain classes of persons for acts committed abroad that would constitute crimes had they been committed in the United States.[211] The statute in its original form permitted prosecution of civilians under contract with the Department of Defense, but not with other agencies.[212] Accordingly, the law did not cover many of the security contractors in Iraq and Afghanistan. Congress updated the law in 2004 to apply to civilians who have contracted with any federal agency to the extent that the employment "relates to supporting the mission of the Department of Defense overseas."[213] Because the service of most contractors in Iraq arguably supports the mission of the Department of Defense, the 2004 revision of the MEJA might encompass the criminal conduct of nearly every contractor in Iraq or Afghanistan—

Other Contractor Crimes Committed Overseas Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (2007).

209. Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 § 4(3) (June 17, 2004).

210. Human rights groups have also attributed the lack of prosecutions to executive indifference. *E.g.*, HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 19 (2008), *available at* http://www.humanrightsfirst.org/pubs/pubs.asp#privcon. This report points to the multitude of allegations of wrongful conduct by contractors, and the sparse prosecutions by the U.S. Department of Justice. *Id.* at 19–20.

211. Military Exterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 (2000). However, the Military Exterritorial Jurisdiction Act only applies to contractors who are deemed to be supporting the mission of the Department of Defense. *Id.* § 3267(1)(A)(i)(II) (West 2000 & Supp. 2007). Many contractors work for the State Department, not for the Department of Defense. *See* Jed Babbin, *Prosecution of Blackwater's Raven 23 Begins*, 65 HUM. EVENTS 7 (2009); Del Quentin Wilber, *Federal Judge Retains Charges Against Blackwater Guards*, WASH. POST, Feb. 17, 2009.

212. 18 U.S.C. § 3261(a).

213. *Id.* § 3267(1)(A).

but this result is not clear.[214] However, another amendment has passed the House[215] (with equivalent legislation having been introduced in the Senate) that would apply the MEJA to all persons employed under contract outside the United States, whether or not the contract supports the mission of the Department of Defense.[216] In addition, the USA Patriot Act is potentially applicable to prosecute contractor crimes abroad; it has already been used to prosecute a military contractor for acts committed in Afghanistan.[217] Certain abuses by contractors may also be prosecuted under the War Crimes Act and Torture Act.[218] Finally, Congress expanded the Uniform Code of Military Justice ("UCMJ") to cover contractors supporting the military abroad.[219]

Nonetheless, there have been few prosecutions of contractors in Iraq or Afghanistan. The Department of Justice ("DOJ") enjoys wide discretion.[220] Although it has been inactive, the stage is set for the DOJ to play a more constructive role in monitoring contractors. Given the radical changes to the criminal-law landscape, might criminal prosecutions of contractors be sufficient to create the proper balance between deterring bad acts and incentivizing appropriate, bold action? Blackwater seems to think so. The company has argued that derivative sovereign immunity and combatant-activities preemption should protect it,[221] while simulta-

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214. *See* HUMAN RIGHTS FIRST, *supra* note 210, at 26 ("Human Rights First has concluded that the *current* legal framework covers most criminal misconduct by most contractors in Iraq and Afghanistan . . . .").

215. 18 U.S.C. § 3261.

216. Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007).

217. Julian E. Barnes, *Contractor Is Found Guilty of Assault That Killed Prisoner*, L.A. TIMES, Aug. 18, 2006, at A18 (noting that "Passaro was charged under a provision of the Patriot Act that allows U.S. citizens accused of crimes at military installations to be prosecuted in U.S. federal courts").

218. War Crimes Act of 1996, 18 U.S.C. § 2441(a) (2006); 18 U.S.C. § 2340A(1) (2001).

219. The UCMJ formerly covered persons "serving with or accompanying an armed force in the field" during a time of war. 10 U.S.C. § 802(a)(10) (1970). This proved problematic, as the president did not commence military operations in Iraq and Afghanistan pursuant to a congressional declaration of war. Accordingly, Congress revised the language of the UCMJ such that it now applies during a "declared war or a contingency operation." John Warner National Defense Authorization Act for Fiscal Year 2007, §552, Pub. L. No. 109-364, 120 Stat. 2083 (2006). Both the conflicts in Iraq and Afghanistan are, pursuant to Department of Defense designation, contingency operations. Sandra I. Irwin, *Iraq Exodus: At Least Three Years*, 93 NAT'L DEFENSE 12 (2008).

220. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute.").

221. *See* McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007) (Blackwater's subsidiary, Presidential Airways, argued that it should benefit from derivative sovereign immunity and preemption rooted in the combatant-activities exception).

neously supporting increased criminal accountability. In his testimony before the House Committee on Oversight and Government Reform, Chairman and CEO Erik Prince indicated in response to the prospect of a DOJ investigation of Blackwater's actions that he would "welcome[,]. . . encourage[,] . . . [and] want that accountability . . . . We hold ourselves entirely accountable."[222]

In response to the spate of bad press, Blackwater and other private military companies have trumpeted their adherence to criminal laws and the code of conduct promulgated by the trade association of which they are members.[223] Contractors have an interest in playing by the rules: rule breaking is bad for business. It invites congressional scrutiny and jeopardizes future contracts. But the industry's self-regulation is no substitute for law. Indeed, even if the criminal prohibitions affecting contractors overseas were being enforced—and generally they are not[224]—criminal law is not an effective deterrent against a broad range of legally disfavored acts.[225] Tort law protects the public from a range of harms that are sufficiently serious to warrant the imposition of civil liability, though not deemed worthy of criminal punishment. Contractors should not be immune from the reach of civil law merely because there is a net of criminal laws ready to ensnare them. That Congress has provided a statutory mechanism to curb the worst contractor abuses does not mean that states

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222. *Preliminary Transcript of Private Security Contracting in Iraq and Afghanistan: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong., 72 (2007) (statement of Erik Prince).

223. International Peace Operations Association, Code of Conduct, http://ipoaonline.org/php/index.php?option=com_content&task=view&id=205&Itemid=172 (last visited Dec. 5, 2008). The Code of Conduct states that member entities commit to adhering to human rights norms, the law of wars, and the rules of engagement. *Id.* It also provides that members must ensure transparency and accountability in their work. *Id.*

224. *See* 18 U.S.C. § 7(9) (2006); Mila Rosenthal, Letter to the Editor, *Contractor Accountability*, N.Y. TIMES, Oct. 11, 2007 (criticizing the lack of criminal prosecutions of the contractors involved in Abu Ghraib abuse); Press Release, U.S. Dep't of Justice, C.I.A. Contractor Indicted for Assaulting Detainee Held at U.S. Base in Afghanistan (June 17, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/June/04_crm_414.htm.

225. *See* Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."); Commonwealth v. Heck, 491 A.2d 212, 224 (Pa. Super. Ct. 1985) ("In a fundamental sense the harshness of criminal punishment is fitting only for these types of consciously inflicted wrongs, and so traditionally the criminal law has concerned itself exclusively with conscious wrongdoing."); McElwain v. Georgia-Pacific Corp., 421 P.2d 957, 963 (Or. 1966) (distinguishing civil and criminal law by pointing to the fact that criminal law and the punitive damages of civil law, which service a criminal-law-type deterrent function, are not intended to deter civil negligence).

have no interest in protecting against others. Holding an individual tortfeasor accountable for the breach of a duty not only compensates victims who have suffered invasions of their legally recognized rights, but also serves as a deterrent to those who would act against them.[226]

In summary, despite the arguments of companies like Blackwater, the potential for increased criminal accountability over military contractors in Iraq and Afghanistan does not obviate the need for an effective tort regime. Accepting combatant-activities preemption or derivative sovereign immunity on the grounds that criminal law protects against the threat of greater public injury is nonsensical. Can such preemption be justified, though, in the interest of furthering a federal interest?

C. The Principles Underlying Combatant-Activities Preemption

Courts are understandably cautious in preempting tort claims against contractors because preemption displaces "large chunks" of state law.[227] Nonetheless, courts have long recognized that in areas where state and federal legislative jurisdictions overlap, federal law may preempt state law where state law interferes with a federal interest.[228] Even where a federal statute is silent as to its effect on state law, courts have found that certain areas "are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'"[229] Although there is a presumption against preemption, courts may intercede to prevent state law from interfering with the federal interest.[230] In

226. *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 794 (E.D.N.Y. 1980) ("Before any societal benefit can be derived from the deterrent effects of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable for the damages caused and thus motivated to prevent future torts."); Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003) ("The fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."); Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982) ("Tort law also serves the 'prophylactic' purpose of preventing future harm; payment of damages provides a strong incentive to prevent the occurrence of harm."). *See also* DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 212 (2005) (addressing how cost internalization will deter the commission of inefficient torts).

227. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 224 (1993); Mitchell v. Lone Star Ammunition, Inc., 913 F.2d 242, 247 (5th Cir. 1990) (noting that caution must be taken when conducting a preemption analysis).

228. Northern States Power Co. v. State, 447 F.2d 1143, 1145–46 (8th Cir. 1971).

229. Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988).

230. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Although the Court will generally find preemption in cases where it is explicitly written into a congressional

the case of civil liability for military service contractors, Congress has not passed any statute to immunize service contractors.[231] Thus, before a court may preempt a tort claim against them, it must identify a unique federal interest warranting preemption. The Ninth Circuit's opinion in *Koohi v. United States* provides a starting point for considering the principles underlying combatant-activities preemption.

Koohi is the only case that discusses the policies underlying it.[232] According to *Koohi*, there are two principles grounding the combatant-activities exception.[233] The first such principle is the federal interest in fostering bold action, such as direct attacks on the enemy.[234] At first glance, this federal interest does not seem to be applicable to service contractors, as the Department of Defense Federal Acquisitions Regulations ("DFARS") specifically prohibits private military companies from engaging in offensive combat operations.[235] However, DFARS permits con-

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statute, a statutory scheme may also impliedly preempt state law. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (asserting that Congress may preempt state law where Congress has evidenced an intent to displace a field or, even when it has not done so, there exists a conflict between state and federal law that stands as an obstacle to the accomplishment of the congressional purpose).

231. Nor had Congress provided immunity for procurement contractors—prompting the Supreme Court in *Boyle* to develop the federal common-law-based government contractor defense. *Boyle*, 487 U.S. at 500.

232. The Eleventh Circuit in *McMahon v. Presidential Airways, Inc.* deliberately avoided the issue. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1366 (11th Cir. 2007) (observing that combatant-activities preemption appears separate from *Feres* and declining to exercise discretion to entertain the appeal on this question).

233. *See* Koohi v. United States, 976 F.2d 1328, 1334–35 (9th Cir. 1992). While the court applied these principles to preempt claims against the United States, it reasoned that they could extend equally to service contractors. *Id.* at 1336. The court in *Bentzlin v. Hughes Aircraft Co.* reaffirmed these principles, even where contractor negligence injured U.S. service members, not "enemy" civilians as in *Koohi*. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1494 (C.D. Cal. 1993). The *Bentzlin* court added to the Ninth Circuit's reasoning on this last point: "nothing in the *Koohi* court's decision suggests that its reasoning was intended to be narrowly construed" so as to apply only to enemy civilians. *Id.*

234. Recall that the *Koohi* court applied combatant-activities preemption in favor of a weapons manufacturer, not a contractor performing services. *Koohi*, 976 F.2d at 1330.

235. 48 C.F.R. §§ 34.826–27 (noting that combat commanders cannot authorize contractors to participate in "preemptive attacks, or any other types of attacks" and that civilians accompanying the U.S. Armed Forces lose their protection under the laws of war "for such time as they take a direct part in hostilities"); *Id.* § 16.764 (in discussing the difference between combat operations and self-defense, stating that "the rule does not authorize preemptive measures"); AIR FORCE GEN. COUNSEL, *supra* note 21, at 1–2 (noting that commanders must ensure that contactors not be assigned or allowed to perform "military combat activities" and that they are generally forbidden from using weapons in

tractors to use deadly force in self-defense or "when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract."[236] Given security contractors' multifarious role in Iraq and Afghanistan—defending high-value targets, escorting convoys, or protecting the Baghdad airport, U.S. embassies, or CPA installations—and the conditions under which they operate, the opportunities for using deadly force in fulfillment of their missions are innumerable.[237] Indeed, contractors could be characterized as participating directly in hostilities.[238] Thus, although the choice to deploy contractors

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self-defense in case of attack). *See also* SCAHILL, *supra* note 20, at 129 (noting that a Blackwater official described his men as having been involved in "a security operation").

236. 48 C.F.R. § 252.225-7040(b)(3)(ii).

237. *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 538 (2005) ("A civilian government employee or private contractor defending military personnel or military objectives from enemy attack directly participates in hostilities. His or her actions are indistinguishable from the quintessential duties of combat personnel.").

238. Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 66–67 (2006) (citing U.S. Dep't of Defense, Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, ¶ 6.3.5.2 (Oct. 3, 2005)); Goins, *supra* note 32, at 8. As to the importance of defensive action, one need only consider the well-publicized roles of service contractors in defending two CPA installations against insurgent attack in 2005. In two separate incidents, contractors constituted the only line of defense to prevent CPA headquarters from being overrun by hundreds of Iraqi insurgents. The first took place in the Iraqi town of Najaf, where Moqtada al Sadr's militiamen staged a frontal assault of the building, forcing the Blackwater contractors into an all-day firefight along with a handful of U.S. troops. PELTON, *supra* note 204, at 149–54. During the encounter, Blackwater contractors assumed command, shouting orders even to active-duty troops present on the scene. *Id.* at 150. Similarly, Hart Security along with members of other contractor outfits defended against insurgent attack a CPA post in the town of al Kut, suffering severe casualties before eventually pulling out under a ceasefire. *Id.* at 158–60. Najaf and al Kut are both towns in southern Iraq—Najaf (the holy Shiite city) to the south, and al Kut to the southeast. Central Intelligence Agency, The World Factbook, Iraq Map, https://www.cia.gov/library/publications/the-world-factbook/print/iz.html (last visited Mar. 2, 2009).

The Ukrainian coalition troops stationed nearby did little to assist while CPA headquarters all but ignored the incident at the time. *See* PELTON, *supra* note 204, at 145–65; Jamie Wilson, *Private Security Firms Call for More Firepower in Combat Zone: Coalition Forces Do Little to Help as Bodyguards Protecting Foreign Workers Are Targeted by Deadly Insurgents*, GUARDIAN, Apr. 17, 2004, http://www.guardian.co.uk/world/2004/apr/17/iraq.jamiewilson (noting that Ukrainian troops helped to evacuate other buildings in al Kut, leaving Hart contractors to fend for themselves). Contractors have played similar defensive roles, generally to the exclusion of U.S. soldiers, in defending against attacks (real or hypothetical) on U.S. congressmen visiting Iraq, foreign politicians such as Hamid Karzai, and even Paul Bremer. Craig S. Smith, *Letters from Asia: The Intimidating Face of America*, N.Y. TIMES, Oct. 13, 2004 (describing DynCorp's

on hazardous, but essential, security missions in lieu of U.S. forces is certainly debatable,[239] once it has been made, the federal interest in ensuring that such contractors take the appropriately bold protective steps in an emergency is beyond question.

The second principle informing combatant-activities preemption is based in tort policy. According to *Koohi*, the punitive aspect of tort law makes it an inappropriate remedy against service members who negligently injure others in combat[240]: the imperative to force U.S. soldiers to compensate persons injured by their negligence is reduced if one considers that scores of others are similarly injured by the inherently violent nature of war.[241] The court's second justification for preemption is ill-conceived. Although tort law provides for punishment of the tortfeasor in certain cases, its primary function is to compensate the victim.[242] In addition, the fact that some victims who suffer injuries in war are left without a remedy does not mean that others should be denied recourse.[243]

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protection of Afghan President Hamid Karzai). Karzai has been attacked several times. *Id.*

239. Among other objections, the challenge of integrating the military and civilian contractors creates a greater likelihood of friendly fire and other accidents. *See* William Spyro Speros, Note, *Friend-of-a-Friendly Fire: A Future Tort Issue of Contractors on the Battlefield*, 35 PUB. CONT. L.J. 297, 299–300 (2006). Speros discusses the likelihood of a friendly-fire incident involving military contractors, and notes that in military confrontations friendly fire is inevitable. *Id.* (citing Charles R. Shrader, *Friendly Fire: The Inevitable Price*, PARAMETERS, Autumn 1992, at 43). *See also* Michaels, *supra* note 2 (discussing the constitutional objections to substituting contractors for soldiers).

240. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).

241. *Id.* The Ninth Circuit indicated that no duty of care existed in respect of "enemy civilians," but is ambiguous as to whether a different result might obtain in cases of equipment malfunctions causing collateral damage among U.S. soldiers. *Id.* The *Bentzlin* court answered that question, finding that the exception foreclosed suit against the manufacturers of military equipment that malfunctioned and killed several Marines. Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1494 (C.D. Cal. 1993).

242. *See, e.g.*, Folz v. State, 797 P.2d 246, 261 (N.M. 1990) ("The whole theory of our tort law is to compensate the victim for his or her losses, not (unless punitive damages are awarded) to punish the tortfeasor."). Punitive damages are generally not available for negligence. *E.g.*, Grynberg v. Citation Oil & Gas Corp., 573 N.W.2d 493, 506 n.10 (S.D. 1997).

243. Would the court's statement imply that in the case of the National Security Agency wiretapping scandal, the fact that thousands of potential plaintiffs will not get their day in court for lack of standing also mean that those who can show standing should not be heard? *See* Tony Mauro, *High Court Declines Review of NSA Wiretapping Program*, LEGAL INTELLINGENCER, Feb. 21, 2008, at 4.

While it is unclear whether *Koohi's* second rationale for preemption should apply to service contractors,[244] the federal interest in encouraging bold, decisive action in the national defense should apply. Nevertheless, other federal interests may cut against preemption. The next Section discusses these countervailing interests. It highlights contractor discretion as the key element on which a court's analysis should turn. Depending on the value a court sees in protecting a private military contractor's acts of discretion, the combatant-activities defense might take on radically different proportions.

D. Combatant-Activities Preemption: The Problem of Contractor Discretion

A soldier is entitled to immunity for actions taken in good faith in the scope of employment.[245] Having substituted private employees for soldiers in key roles,[246] it might be argued that the law should similarly protect contractors, especially since the prospect of civil liability for con-

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244. To the extent that the second principle justifies preemption of tort claims against procurement contractors (those who manufacture weapons in the safety of the home front), it applies *a fortiori* in the case of service contractors. Unlike procurement contractors, service contractors in a combat setting will act under conditions of exigency. Arguably, were the Blackwater contractors who were involved in the defense of the government post in Najaf to have injured their U.S. Army or Marine counterparts by friendly fire, a reasonable person would find such conduct less deserving of punishment than the procurement contractor who produces a fatally defective missile. *Koohi's* reasoning would presumably apply in cases where contractors participate in combat activities but are not vulnerable to live fire. For example, contractors operated a guided missile system for the U.S. Navy in Iraq, while sixty contract employees were deployed with the Army's 4th Infantry Division to operate its digital command and control systems. David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, *supra* note 200, at 82, 85–88.

245. *See In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 108–09 (D.D.C. 2007) (finding that officials accused of torture were potentially entitled to qualified immunity if the rights alleged to have been violated were not clearly established at the time of suit). Federal officials are also protected under the Westfall Act, 28 U.S.C. § 2679(b)(1), which "affords federal employees absolute immunity from tort liability for negligent or wrongful acts or omissions they commit while acting within the scope of their employment." *Id.* at 110.

246. *McMahon* Motion to Dismiss, *supra* note 122, at 2–3 (arguing that identity as part of Total Force makes them akin to soldiers, requiring dismissal of claims). Service contractors providing security services for key U.S. officials in Iraq may thus be distinguished from manufacturers of military equipment on the home front. The Supreme Court in *Boyle v. United Technologies Corp.* indicated that the government-contractor defense would protect contractors only where they followed government orders. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).

tractors may thwart effective decision making in risky circumstances.[247] Although proponents of such a defense might concede that the discretion of private, independent contractors is not worthy of protection at the expense of tort plaintiffs, they would maintain that their role in providing vital combat-support services changes the calculus.

Nevertheless, a variety of factors weigh against protecting contractor discretion. First, the text of the FTCA suggests that the exception was intended to protect military decision making. Second, contractor discretion does not deserve protection because unlike government employees, contractors are economic actors and will optimize their conduct even if immunity is unavailable. Third, under the principles of tort law, the contractor is in the best position to avoid tortious behavior and thus immunity from negligence liability is inappropriate. Finally, the unique federal interest in combat situations is not applicable where the government lacks oversight and control. The incidents at Najaf and al Kut present cases in which private military contractors defended CPA positions with negligible outside aid.[248] In certain cases, objective commentators have even characterized them as more reliable than the U.S. military or its coalition partners.[249] It might seem unfair in such cases to refuse to pro-

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247. In his analysis of sovereign immunity, Peter Schuck has argued that because the law forces plaintiffs aggrieved by government action to seek redress against an individual federal employee rather than against the United States, it creates perverse and risk-adverse effects. PETER H. SCHUCK, SUING THE GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 75 (1983). For fear of liability, government officials substitute relatively riskless action for appropriate action in order to minimize risk. *Id.* at 68–72. Schuck discusses these effects for "street-level officials," not higher ranking individuals whose interactions with the public are more limited. *Id.* A "defect[] of official liability" is its "propensity to chill vigorous decisionmaking." *Id.* at 100. Although Schuck's attack is directed elsewhere, it is applicable in the case of service contractors.

248. In al Kut, Hart Security battled insurgents for fourteen hours before a cease-fire permitted them to evacuate. MILLER, *supra* note 201, at 165. *See also supra* note 238.

249. Having substituted contractors to protect top U.S. officials, the contractors are essentially acting as soldiers but do not benefit from similar legal protections. It is not for the courts to second-guess the inclusion of contractors in the mix. In combat conditions where critical U.S. interests are at stake, should the law recognize that contractors often function as soldiers?

Robert Young Pelton, who imbedded himself with Blackwater contractors for a month in Iraq in early 2004, describes the siege of al Kut. He reports that when word reached Paul Bremer that one of his CPA offices was on high alert he cautioned that whoever was sending the communications should "tone down" the wording. PELTON, *supra* note 204, at 156. Reviewing the inaction of the sizeable contingent of Ukrainian soldiers stationed near the office in response to the attack by Shiite militiamen, Pelton concludes that "[a]lthough the incidents in [a]n Najaf and [a]l Kut were downplayed by Bremer and never fully reported in the media, it was clear that Blackwater and other private teams were a far better and more willing partner than many in the war in Iraq." *Id.* at

tect contractors where the task they performed with pluck was manifestly one for the military. Yet, having considered the argument for protecting a contractor's discretion in such circumstances, a variety of factors cut against such a result. These factors compel the conclusion that when a contractor is subject to civil liability for actions taken in a combat context, even if the contractor retains significant discretion, combatant-activities preemption is unwarranted.

1. The Text of the FTCA

The first objection to shielding security contractors for their discretionary actions via combatant-activities preemption is the lack of a critical government nexus. The combatant-activities exception waives the government's immunity except for claims "arising out of the combatant activities of the military or naval forces."[250] Arguably, Congress intended the exception to apply only to the U.S. military. That the U.S. military uses contractors as an instrumentality of war in lieu of soldiers does not undermine the essential requirement that combatant-activities preemption serve to protect military decision making.[251] Under the textual view, preemption is inappropriate because it does not protect a military decision *per se*; it would have no prophylactic effect on military decision making.[252]

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165. Similarly, Richard Dunn could not find an example of a combat support contractor abandoning its post in Iraq. RICHARD L. DUNN, CONTRACTORS IN THE 21ST CENTURY "COMBAT ZONE" 34 (2005), *available at* http://www.acquisitionresearch.org/_files/FY2005/UMD-CM-05-020.pdf. He contrasts this record with a platoon of the Army Reserve Quartermaster Company, which refused to take its trucks on an assigned supply mission. *Id.* at 60 (citing John Lumpkin, *Unit Refused Iraq Mission, Military Says*, ASSOCIATED PRESS, Oct. 16, 2004). Gerald Schumacher also recounts an example in which Hart Security was responsible for protecting a construction project, with the United Nations in charge of security for the area. GERALD SCHUMACHER, A BLOODY BUSINESS 167 (2006). As the security situation deteriorated, the United Nations departed, and Hart was left protecting the project. It ended up leaving one of its own dead behind when finally forced to evacuate. *Id. See also* ISENBERG, *supra* note 203, at 49 (noting that contractors have "largely stayed the course" rather than "walk[ed] away from the job . . . in the midst of combat").

250. 28 U.S.C. § 2680(j) (2006).

251. Accounts from the battles suggest that Blackwater in Najaf and Hart Security in al Kut operated with virtually no military or CPA oversight. PELTON, *supra* note 204, at 149–65. In fact, the CPA's responses to Hart's calls for aid largely consisted of admonishments to "tone down" the wording of its communications. PELTON, *supra* note 204, at 156.

252. *See* Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 3–5 (D.D.C. 2007) ("It is the military chain of command that the FTCA's combatant activities exception serves to safeguard . . . . [C]ommon law claims against private contractors will be preempted only to

2. Incentivizing Contractor Conduct

Congress and the courts have sheltered the discretion of federal employees from state tort liability by creating statutory and common-law immunity defenses.[253] In determining the value of a contractor's discretionary act, it is useful to compare the government contractor to the government employee. In their analysis of the Supreme Court's *Boyle* decision, Michael Green and Richard Matasar identify two salient differences between the two.[254] Unlike the government officer, they argue, the government contractor is in a position to earn profits from its association with the government, and in a position to withdraw from the market for provision of security services.[255] Because the contractor "stands to enjoy the benefits" of the contract, Green and Matasar suggest that a form of immunity is improper: "one would expect the contractor to engage in cost-benefit optimizing behavior without the benefit of immunity."[256] In contrast to public officers, who in theory act in the public interest and seek to maximize social welfare, private contractors "are assumed to maximize personal welfare, or profits, rather than public welfare, and to be staffed by self-interested individuals."[257]

There is evidence that this argument is applicable to military contractors because they stand to benefit personally from the contract and, as rational actors, have weighed the costs and benefits of assuming liability. The salary for private military contractors is much higher than the salary

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the extent necessary to insulate *military* decisions from state law regulation."); Green & Matasar, *supra* note 77, at 652. To the extent that the law carves out an exception from the general waiver of sovereign immunity, it is only to protect *military* decisions, not those of nongovernmental actors. *Id.*

253. *See, e.g.*, 28 U.S.C. § 2679 (1988) (providing that whenever an individual U.S. employee is sued in common law tort for acts committed within the scope of employment, the exclusive remedy is against the United States); Westfall v. Erwin, 484 U.S. 292, 297–98 (1988) (holding that federal officials are absolutely immune from state tort-law actions where conduct falls within the scope of official duties and is discretionary in nature).

254. Green & Matasar, *supra* note 77, at 652–53. Green and Matasar distinguish the two on a variety of grounds, only two of which are discussed above.

255. *Id.* at 652–53, 717.

256. *Id.* at 652–53.

257. *See* SCHREIER & CAPARINI, *supra* note 201, at 51 ("[P]olitical and military exigencies do not naturally combine with the economic motivations of PMCs . . . ."); Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 273 (1991); Schooner, *supra* note 36, at 565 ("[T]he pursuit of fees distorts the moral compass that we would otherwise hope to animate federal government procurement officials.").

for regular members of the U.S. military.[258] Moreover, applicable provisions of DFARS specifically state that a contractor must accept all risks associated with supporting the military abroad, and that all liability in connection with a contractor's use of a weapon rests solely with the contractor.[259] Indeed, in response to a comment to its proposed rule that *Boyle* does not apply to service contractors and that contractors may be liable for their torts, the Department of Defense stated in a recent revision of DFARS that

> [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 or its employees or subcontractors. . . . [T]o the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions.[260]

Faced with such an explicit contractual and regulatory *ex ante* allocation of risk, the contractor has logically built the cost of potential tort liability into its rates. Even if this is not the case for all contractors, the law should presume it.[261] Therefore, immunity for contractors would be redundant.

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258. T. Christian Miller, *Arrested Contractors Allege Abuse by Marines*, S. FLA. SUN-SENTINEL, June 12, 2005, at 15A ("Private contractors routinely make three or four times the salary that U.S. soldiers do, upward of $100,000 a year.").

259. 48 C.F.R. § 252.225-7040(b)(2), (j)(4) (2008).

260. *Id.* § 252.225-7040(b)(2). Although military regulations may provide that the military does not exercise control over contractors, the facts on the ground, as courts have justifiably found, may dictate a different answer. *See supra* Part III.

261. For example, when considering defenses of commercial impracticability, frustration, and *force majeure* in contract law, courts will generally interpret the contract to allocate risk to the party that could have most efficiently foreseen the cause of the impracticability or frustration and have taken measures to guard against it. *See, e.g.*, Spartech Corp. v. Opper, 890 F.2d 949, 955 (7th Cir. 1989) ("A principle purpose of contracts . . . is to allocate the risk of the unexpected[,] . . . not to place it always on the promisee."); N. Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 275–79 (7th Cir. 1986) (describing doctrines of frustration as "doctrines for shifting risk to the party better able to bear it, either because he is in a better position to prevent the risk from materializing or because he can better reduce the disutility of the risk (as by insuring) if the risk does occur"). In that case, a court uses default norms to assign liability, deciding the issue of risk allocation in a manner akin to how the parties would have decided it had they considered the question.

It may be argued that failing to provide service contractors with an affirmative defense will increase the cost of liability so much that contractors will withdraw from the market of providing military services. However, given the critical role contractors have played in Iraq and Afghanistan, their withdrawal from combat-support services is unlikely. First, contractors entered the market to provide military services with no clearly established affirmative defense on which to rely. Therefore, a court's refusal to create an affirmative defense should not measurably affect the behavior of contractors in this market. Second, if a contractor receives an adverse jury award for tort liability, it can raise the rates it charges the federal government for its military services. Admittedly, the Supreme Court in *Boyle* recognized a federal interest in avoiding such a result,[262] but courts should not treat the impact on the federal treasury as a justification for preempting tort claims against contractors.[263] Green and Matasar point out that "[p]rotection of the federal fisc is a virtually unmanageable justification" for the government-contractor defense, noting that almost every case touching on federal law has a potential impact on the "monetary interests of the United States."[264] They identify a number of cases in which courts have refused to employ federal common law to assuage the impact of a tort judgment on the federal treasury.[265] As Justice Brennan's dissent in *Boyle* observes, the Supreme Court has declined to create a federal common law rule displacing state law where litigation between private parties would have the effect of raising contract prices for the government.[266] The *Boyle* majority recognized that pass-through costs are not alone sufficient to justify preemption.[267]

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262. Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988).

263. *See, e.g.*, Brief of Amici Curiae, Professional Services Council and International Peace Operations Ass'n at *14, Nordan v. Blackwater Security Consulting, LLC (*In re* Blackwater Sec. Consulting, LLC), 460 F.3d 576 (4th Cir. 2005) (arguing that permitting a remedy, in addition to that of the Defense Base Act, against a contractor in a suit brought by employees threatens to burden the federal government by imposing higher costs on the government).

264. Green & Matasar, *supra* note 77, at 663.

265. *Id.* (citing United States v. Gilman, 347 U.S. 507 (1954); United States v. Standard Oil Co., 332 U.S. 301 (1947)).

266. *See Boyle*, 487 U.S. at 519–22 (Brenan, J., dissenting) (citing Miree v. DeKalb County, 433 U.S. 25, 27 (1977); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966)). *See also* South Carolina v. Baker, 485 U.S. 505, 521 (1988); James v. Dravo Contracting Co., 302 U.S. 134, 160 (1937) (The fact that a tax on a government contractor "may increase the cost to the government . . . would not invalidate the tax.").

267. Green & Matasar, *supra* note 77, at 664 (citing *Boyle*, 487 U.S. at 510–11). The Supreme Court identified protecting the discretionary judgments of the government about military designs and specifications as the primary justification for the government-contractor defense. *Boyle*, 487 U.S. at 512.

The factual circumstances the Supreme Court addressed in *Boyle* differ fundamentally from those confronting the provider of security services in Iraq or Afghanistan. The Court in *Boyle* stated that fashioning a federal common law affirmative defense would be appropriate in situations where the contractor could not comply with its contractual obligations *and* the applicable duty of care under state law.[268] *Boyle* concerned a contractor that breached its duty of care in crafting the manufacturing specifications for a product.[269] Because *Boyle* speaks to the case in which the government effectively allows the contractor to violate the duty of care, a tort suit is a virtual guarantee. Accordingly, the threat of tort liability, including the threat to the federal fisc, for contracts meeting the *Boyle* test is much greater than for service contracts.

The relevant service contracts contain no hint that a military contractor in Iraq or Afghanistan cannot simultaneously discharge its contractual responsibilities and act with the appropriate duty of care.[270] Section 252.225 of DFARS permits contractors to use deadly force in "self-defense" and when "necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract."[271] The regulatory language does not oblige a contractor to breach applicable duties. By sanctioning the use of such force in a broader context, the regulations allow contractors to accomplish their contractual missions even in difficult circumstances. These regulations will not *per se* absolve a contractor of liability for breaching the standard of care. They help define that duty. And in any event, they empower the contrac-

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268. *Boyle*, 487 U.S. at 509 ("If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context."). *See also* Adams v. Alliant Techsystems, Inc., 201 F. Supp. 2d 700, 707 (W.D. Va. 2002) (distinguishing the facts of the case from *Boyle* and finding that the contractor was not entitled to governmental immunity on grounds that the duty of care owed under state law did not "conflict[] with or even burden[]" contractual or regulatory duties).

269. *Boyle*, 487 U.S. at 509 ("Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).").

270. *See, e.g.*, Contract Between Department of Defense and CACI Premier Technology, Inc., *available at* http://www.publicintegrity.org/wow/resources.aspx?act=resources (governing the provision of interrogation services from 2003 to 2004).

271. 48 C.F.R. § 252.225(b)(3)(iii) (2008).

tor to act decisively without fear of losing its current or future contracts, and provide some incentive to act aggressively without fear of tort liability. In cases of exigency, where self-defense is appropriate, the contractor is held to a comparatively lower standard of care,[272] giving the reasonable person wider latitude for error. For example, a contractor will not be liable in tort to a bystander whom he or she accidentally injures while exercising his or her right to self-defense.[273] In summary, the threat to the federal treasury is not as acute in the case of service contractors because, in contrast to contractors who might qualify for protection under the *Boyle* factors, they will more often be able to comply with the applicable standard of care.

A court should step in to override state law only when there is a threat of "major damage" to "clear and substantial" federal interests.[274] The previous discussion of the principles animating the *Koohi* decision demonstrates that the federal government has an interest in motivating contractors to act boldly and decisively to protect U.S. interests.[275] However, on further reflection, it is unclear that combatant-activities preemption is necessary to effectuate these interests. Unlike government employees, who act in the public interest, military service contractors personally benefit from their contract and have weighed the costs and benefits of assuming liability. Moreover, mass contractor withdrawal from the military services market is unlikely, and the threat of injury to the federal treasury associated with higher rates is an insufficient reason to protect the discretion of service contractors. Because they may fulfill their contractual obligations without breaching the applicable standard of care,

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272. Although the standard of care, that of a "reasonable person," does not change, society's expectation about how a reasonable person would act in a given set of circumstances does. DAN B. DOBBS, THE LAW OF TORTS 302 (2000). *See also* RESTATEMENT (SECOND) OF TORTS § 75 cmt. b, illus. 1 (2006) ("In determining whether the actor as a reasonable man should be aware that his act creates an unreasonable risk of causing an invasion of any of the third person's interests of personality . . . [t]he exigency in which the actor is placed, though not due to the third person's conduct, with its attendant necessity of an almost instantaneous choice of a means of self-defense, is here a factor of great importance."). The concept of the reasonable actor necessarily changes in a combat situation. *See* Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War*, 86 CAL. L. REV. 939, 959 (1998) ("The capacity of the human mind to process complex information in situations of extreme adversity, such as those on the battlefield, is quite limited.").

273. DOBBS, *supra* note 272, at 159, 169–70.

274. United States v. Yazell, 382 U.S. 341, 352 (1966).

275. Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992) ("[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.").

preemption is unwarranted in these situations Thus, it is doubtful that preemption is necessary to incentivize service contractors to take bold, decisive action in combat zones.

3. Efficiency, Equity, and Indemnification

In its preemption analysis, a court should also consider questions of economic efficiency and equity,[276] which suggest that contractors should not be protected where they act as functionally autonomous actors.[277] A core principle of modern tort law is that liability for negligence should be borne by the party that is the cheapest cost avoider.[278] In other words, liability is efficient where the burden of precaution is less than the probability of the harm times the magnitude of the harm.[279] As between a U.S. soldier and an Iraqi or Afghan civilian, the contractor is in the better position to evaluate the likelihood and magnitude of the harm. This is because a security contractor may discharge his or her contractual responsibilities in conformity with the applicable duty of care. The contractor is also able, and in many cases will be required, to purchase insurance in connection with his or her performance of a military contract.[280] Thus, in this situation, the service contractor should be the party responsible for insuring against the risk and bearing the cost of any resulting harm.[281]

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276. Elam v. Alcolac, Inc., 765 S.W.2d 42, 176 (Mo. 1988) ("Cognate principles of equity and economic efficiency also inform" the goals of compensation and deterrence in tort law.).

277. The military contractor in Iraq and Afghanistan will never be fully autonomous, of course, as he or she is subject to the terms of the contract, as well as default statutory and administrative rules.

278. Rankin v. City of Wichita Falls, 762 F.2d 444, 448 (5th Cir. 1985); *Elam*, 765 S.W.2d at 176 ("[C]osts of the pervasive injury which result from mass exposure to toxic chemicals shall be borne by those who can control the danger and make equitable distribution of the losses, rather than by those who are powerless to protect themselves.").

279. *See* Mesman v. Crane Pro Servs., 409 F.3d 846, 850 (7th Cir. 2005) ("The cheaper the precaution, the greater the risk of accident, and the greater the harm caused by the accident, the likelier it is that the failure to take the precaution was negligent."). For a description of the Hand test, developed by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 168 (2007). Posner engages in extensive criticism and reformulation of the traditional Hand test. *Id.*

280. 48 C.F.R. § 52.228-7 (2007) (requiring a contractor to carry some minimum amount of general liability insurance.)

281. Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 HARV. J. ON LEGIS. 287, 310 (2006) (citing Richard A. Posner & Andrew M. Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90–92 (1977)).

Against this backdrop, the effect of providing a federal common law affirmative defense for service contractors in this situation would shift the loss to the innocent victim. A defense intended to protect contractor discretion is unjustifiable because the contractor is in the better position to avoid the loss in the first place, and because the national security interest in incentivizing risk taking is not present.[282] If the government had considered ensuring that contractors act with fearless discretion in combat scenarios to be sufficiently important to national securities interests, it would have indemnified these contractors. When Congress has determined that such a strong interest exists, it has not been hesitant to provide legislative solutions. The same is true for the executive.

Congress has authorized indemnification in cases where it "was necessary to encourage contractors to undertake activities for the government [that] would expose them to greater risks than would ordinary commercial or industrial activities, which could be protected by private insurance."[283] Under the authority of the National Defense Contracts Act,[284] in conjunction with Executive Order 10,789,[285] the president may authorize the Department of Defense to modify a contract, which includes providing for indemnification, whenever such action would facilitate the national defense. Contractual indemnification may apply to losses not compensable by insurance, including litigation and settlement fees.[286] Subject to restrictions, contractors may also obtain indemnification under existing federal acquisition regulations for defined liabilities not covered by insurance, including loss or damage to property, and death or bodily injury.[287] The post-9/11 legal landscape demonstrates that Congress can act

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282. *See, e.g.*, Holland v. Buckley, 305 So. 2d 113, 119 (La. 1974) ("[A]s between him who created the risk of harm and the innocent victim thereby injured, the risk-creator should bear the loss.").

283. Frank P. Grad, *Contractual Indemnification of Government Contractors*, 4 ADMIN. L.J. 433, 443–44 (1991).

284. 50 U.S.C. § 1431 (2007). *See* Kevin P. Mullen, *Extraordinary Contractual Relief: Public Law 85-804 in the Homeland Security Era*, 37 PROCUREMENT LAW. (2002).

285. Exec. Order No. 10,789, 3 C.F.R 426–27 (1954–1958), *reprinted in* 50 U.S.C. § 1431 (2007).

286. *Id.*

287. 48 C.F.R. § 52.228-7 (2007). *See* AIR FORCE GEN. COUNSEL, *supra* note 21, at 9–10. Reimbursement under this section is "subject to the availability of appropriated funds at the time the liability arises," and is available for cost-reimbursement contractors, not in fixed-price contracts. Agnes P. Dover & Thomas L. McGovern III, *Risk Mitigation Approaches for Government Contractors*, BRIEFING PAPERS 4 (2007). Although the Anti-Deficiency Act places restrictions on the government's ability to commit to undefined contingent liabilities, defined indemnification efforts are permissible. 31 U.S.C. § 1341 (2007). *See also* Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361 (1983), at *9–10 (LEXIS). The National Defense

quickly when it wants to,[288] and Congress is in the best position to strike a balance between the states' interest in enforcing their tort laws and the federal interest in protecting military service contractors.[289]

Contracts Act is an exception to the prohibition on open-ended indemnification agreements. Dover & McGovern, *supra* note 284, at 2. In fact, industry groups have lobbied for third-party indemnification under FAR § 52.228-7, Insurance—Liability to Third Persons, for fixed-price contracts. *Bar Group Identifies Barriers to Contractor Support of Defense Missions*, 47 No. 39 GOV'T CONTRACTOR ¶ 439, Oct. 19, 2005 (noting that the Professional Services Council, an industry group for private contractors such as Blackwater and others, had pushed for the expansion of the regulation).

288. Congress has passed a number of bills extending various forms of immunity to industries that perform functions deemed vital to homeland security. *See, e.g.*, Support Anti-Terrorism by Fostering Effective Technologies Act of 2002, 6 U.S.C. §§ 441–444 (2006) (protecting manufacturers of qualified antiterrorism technology by creating a rebuttable presumption for the government-contractor defense); Public Readiness and Emergency Preparedness Act of 2005, 42 U.S.C. §§ 247d-6d, 247d-6e (2005) (shielding manufacturers and distributors of a "covered countermeasure" protecting the public health during times of a declared pandemic or other health emergency); Smallpox Emergency Personnel Act, 42 U.S.C. § 239 (2002) (protecting manufacturers and distributors of the smallpox vaccine in a designated time of emergency by substituting the United States as a defendant in personal injury claims).

To the extent that legislation only reaches contractors who manufacture products, consider the proposed Gulf Coast Recovery Act ("GCRA"). Gulf Coast Recovery Act, S. 1761, 109th Cong. (2005). Senator Jim Thune (South Dakota) sponsored the legislation, with senators James Inhofe (Oklahoma), Trent Lott (Mississippi), Lisa Murkowski (Arkansas), and David Vitter (Louisiana) as cosponsors. The bill seeks to clarify (and reduce) the liability of contractors participating in the reconstruction of areas affected by Hurricane Katrina. If the Army Corps of Engineers certifies the contractor, in the event of a lawsuit, the GCRA entitles the contractor to a "rebuttable presumption" that the elements of the government-contractor defense were satisfied. *Id.* §§ 5(d)(1)–(2). *See also* Schooner & Siuda-Pfeffer, *supra* note 281, at 301–03. By deploying contractors presumptively shielded by the government-contractor defense, the government would effectively place beyond a plaintiff's challenge a range of acts of contractor discretion. *Id.* at 304 (In the context of emergency contracting, "the government essentially delegates any exercise of discretion to contractors" and "[s]uch open ended arrangements fail to provide the specific direction or approval historically required for application of the government contractor defense."). *See also* Mark Gleason, Note, *In the Name of* Boyle: *Congress's Overexpansion of the Government Contractor Defense*, 36 PUB. CONT. L.J. 249 (2007) (arguing that the GRCA does not honor the limitations of the government contractor defense). The GCRA is flawed legislation. It radically overextends the government-contractor defense without the necessary safeguards to prevent abuses. Fortunately it is not yet law. The GCRA demonstrates that Congress, if it saw fit, could act to protect service contractors in narrow circumstances where commercial insurance is unavailable. Schooner & Siuda-Pfeffer, *supra* note 281, at 321 (observing that Congress has typically indemnified contractors when insurance has been unavailable). Insurance for contractors that operate in and around the battlefield may be unavailable in many cases. *See* Goins, *supra* note 32, at 17, 22 (noting that insurance may be denied where a contractor carries

4. Government Oversight and Control

The United States also has a strong federal interest in ensuring the appropriate integration of and control over private military companies. It goes without saying that a unique federal interest exists in ensuring military effectiveness. This interest bears on government accountability and should also figure into a court's determination as to whether preemption is warranted with respect to service contractors. First, current military doctrine[290] presupposes that to form an effective component of the armed forces' Total Force, contractors must be incorporated into the military's command and control structures.[291] Second, particularly in Iraq, the lack of government control over contractors has lowered foreign confidence in the United States and its mission.[292]

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weapons or is engaged in a high-risk activity, or where there is a high risk of loss from terrorist activities).

289. Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 962–63 (1996) ("[I]t is hard to escape the conclusion that the Court exercised power that the Constitution reserves to Congress.").

290. For example, the most recent Quadrennial Defense Review emphasizes the importance of integration. U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 81 (2006), *available at* http://www.defenselink.mil/qdr/report/Report20060203.pdf [hereinafter QUADRENNIAL DEFENSE REPORT]. The 2004 National Military Strategy provides that attaining the military's goals for deploying its forces in combat zones requires "a seamless mix of active forces, the Reserve component, [Department of Defense] civilians, and contracted work force." Colonel Ronda G. Urey, Civilian Contractors on the Battlefield 1 (Mar. 18, 2005) (unpublished thesis, U.S. Army War College) (on file with the Brooklyn Journal of International Law) (citing RICHARD B. MYERS, NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2004)).

291. *See* JOSEPH J. BUTKUS & MATTHEW F. HOWES, A CRITICAL ANALYSIS OF THE COORDINATION, COMMAND AND CONTROL OF CONTRACTORS IN IRAQ 18 (2006), *available at* http://stinet.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA460387 ("Conflicts between contractors and military commanders have caused disruptions in services, breaches in security and increased costs to the government."); KIDWELL, *supra* note 205, at 45 ("The integration of PMCs as a greater percentage of the force mix can directly impact military capabilities.").

292. The hostility of the U.S. intervention has produced violent terrorist backlashes and an indigenous anti-American terrorist movement. Peter Bergen & Paul Cruickshank, *The Iraq Effect: The War in Iraq and Its Impact on the War on Terrorism*, MOTHER JONES, Feb. 21, 2007, *available at* http://www.motherjones.com/print/17073. These, in turn, have required that the United State maintain unexpectedly high troop levels, sacrifice over 4000 military lives, and delay the establishment of functional and stable democracy. STEVE BOWMAN, CRS REPORT FOR CONGRESS, IRAQ: U.S. MILITARY OPERATIONS AND COSTS 2 (2004), http://fpc.state.gov/documents/organization/41127.pdf. The problems are less egregious in Afghanistan—where neglect rather than cultural insensitivity and poor planning is to blame for our lack of progress—but similar issues threaten the country. Nathaniel C. Fick & John A. Nagl, *Counterinsurgency Field Manual: Afghanis-*

Integrating contractors with the military has been a challenge for the U.S. military for over 200 years.[293] Indeed, the value of the contractor as a force multiplier assumes that there are structures in place that allow combatant commanders to augment active duty forces without sacrificing overall efficiency.[294] While full assimilation of contractors into the for-

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tan Edition, FOREIGN POL'Y, Jan. 2009, *available at* http://www.foreignpolicy.com/story/cms/php?story_id=4587.

293. John Calhoun, as Secretary of War, complained of the problem in 1818. BUTKUS, *supra* note at 291, at 18 (describing the challenge of the "integration of civilian contractors within a rigid military chain of command"). Modern military doctrine emphasizes integrating contractors into the Total Force.

294. SCHREIER & CAPARINI, *supra* note 201, at 47 ("Maintaining visibility of contractors and coordinating their movements are vital if the commander is to manage his available assets and capabilities efficiently and effectively."). *See also* Urey, *supra* note 290, at 7 (noting that according to relevant military doctrines, "[c]ontracted support must be integrated into the overall support plan"); Colonel George G. Akin, Joint Implications for Contracted Logistics (Mar. 30, 2007) (unpublished thesis, U.S. Army War College) (on file with the Brooklyn Journal of International Law) ("To fight as a joint team the combatant commander must force synchronization and standardization of contractor operations across Service components . . . to optimize contractors support."). Apart from the tactical and efficiency losses from the failure to effectively integrate contractors with active and reserve forces, such failure has caused myriad friendly-fire incidents that have taken the lives of scores of contractors and soldiers alike. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO NO. 05-737, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 27 (2005); DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS 10 (1994) (describing incidences of friendly fire between contractors and military, and noting that they occur primarily at military checkpoints, and that between January and May 2005, twenty reports of friendly fire were received). The Bush administration took steps to address coordination problems, subjecting all security firms contracting with the State Department to the supervision and control of the Department of Defense. *See* John M. Broder & David Johnston, *U.S. Military Will Supervise Security Firms*, N.Y. TIMES, Oct. 31, 2007.

U.S. emphasis on contractor integration finds a parallel in the approach of the United Kingdom, which has forcefully privatized combat-support functions. A fundamental assumption of U.K. military doctrine is that contractors can be integrated with regular military forces. *See* MATTHEW UTTLEY, CONTRACTORS ON DEPLOYED MILITARY OPERATIONS: UNITED KINGDOM POLICY AND DOCTRINE 15 (2005) (describing the United Kingdom's assumptions underlying the privatization of military operations, including that "[c]ontractors providing deployed support can be integrated into military operational planning, and command and control . . . arrangements without disruption."). The Royal Military has taken a further step towards integration through the development of the "Sponsored Reserves"; the military draws on members of a contractor's staff who qualify as reservists, and these members perform functions appropriate for contractors during peacetime but inappropriate during war. *See* Matthew R.H. Uttley, *Private Contractors on Deployed Operations: The United Kingdom Experience*, 4 DEF. STUD. 145, 160 (2004). The Sponsored Reserves are deployed to perform contractor functions, but are subject to

mal military chain of command is not likely to be achieved, the value of contractors as a force multiplier will be defeated if they are involved in combat-support roles that operate wholly independently from military command.[295] Functioning as a parallel force decreases contractors' effectiveness, undermining the value of their presence in the combat zone.[296] Coordination and communication between contractors and the military increases the overall effectiveness of the civil-military effort.[297] Since the true value of the private military contractor in a combat zone is derived from the appropriate coordination and integration of contractors with regular forces, protecting the independent discretion of contractors does little to further the critical federal interest in integrating the military.[298]

Contractor accountability also matters in the crucial battle for the "hearts and minds" of the citizens of Iraq and Afghanistan. Contractors are essential to the war effort, and most have acted honorably. But their aggressive tactics and lawless behavior have caused them to be "one of the most visible and hated aspects of the American presence in Iraq."[299] Accountability is crucial where the aim of the counterinsurgency is to create a vested interest in the success of democracy, an effort that depends on persuading Iraqis and Afghans to support the invasion.[300] Observers agree that the culture of impunity among contractors has *severely* damaged the U.S. war effort, particularly in Iraq.[301] If courts preempt tort

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the command and control of the military. *Id.* As such, their identities as contractors and soldiers are deliberately intertwined to ensure maximum effectiveness. *Id.*

295. *See* Joe A. Fortner, *Institutionalizing Contractor Support on the Battlefield*, 32 ARMY LOGISTICIAN 12 (2000) (noting that one of the basic principles of contractor support is that "[it] must be integrated into the overall support plan").

296. For example, soldiers and contractors are vulnerable to friendly fire and other accidents when the two forces function independently. *See* MILLER, *supra* note 201, at 168 (describing the prevalence and incidences of friendly fire between the military and contractors).

297. *See* SCHUMACHER, *supra* note 249, at 52.

298. As can be imagined from the *Johnson* case, a contractor may participate in a "combatant activity" while functionally integrated in a civilian agency, such as the FAA, Department of the Interior, or State Department. *See* Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948).

299. SINGER, *supra* note 204, at 5. *See also id.* at 9 ("Contractors have proven to be a drag on efforts to explain the highly unpopular U.S. effort in Iraq . . . ."). *But see* SCHUMACHER, *supra* note 249, at 170 (noting that one of the tasks of security contractors in Iraq is to intimidate).

300. *See* Evan Thomas & John Berry, *The Fight over How to Fight*, NEWSWK., Mar. 24, 2008 (explaining how theorists of war in a "world of failing states" argue that "firepower is not enough," that "it is necessary to win hearts and minds").

301. There is no serious disagreement among scholars that the United States fostered such a culture. For example, CPA Order 17 provided that Iraqi law would be inapplicable to contractors. The CPA was unable to account for ten percent of contractor staff at one

suits in cases where contractors are acting with measured discretion, it will add to the debilitating culture of impunity that has undermined U.S. military and civil efforts in Iraq from the beginning.

E. Effective Control: A Case for Limited Combatant-Activities Preemption

This Article has argued that unique federal interests are absent in civil negligence claims arising from the discretionary acts of contractors. However, it has not yet addressed whether a preemption defense might be appropriate in other circumstances. This Section answers this question in the affirmative. It first examines a threshold question—how should a court evaluate whether preemption is appropriate when the government exercises considerable control over contractors? This Section then reviews the various judicial doctrines that seek to insulate military decision making from scrutiny and concludes that combatant-activities preemption may be justified under these doctrines. Although the scope of preemption should be narrow, it may be invoked in circumstances where the contractor is under the direct supervision and control of the government.[302]

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point in the war, and the government outsourced the contractor monitoring function to a contractor. *See* Isenberg, *supra* note 244, at 85–88; Lehnardt, *supra* note 200, at 140. Describing private military contractors in Iraq, Lehnardt notes that "there appears to be little effort to maintain effective control over their activities." *Id.* Lehnard also points out that the contractors identified as being involved in the abuses at Abu Ghraib have not been charged with a crime, whereas army and marine soldiers have been. *Id.* at 141. *See also* OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., ACQUISITION: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND—WASHINGTON, Rep. No. D-2004-057, at 24 (2004) (noting that in a study of twenty-four contracts issued between February 2003 and August 2005, valued in total at $122.5 million, "[thirteen] did not have adequate surveillance of contractors").

302. Cases may, of course, arise in which the government exercises sufficient control over the day-to-day activities of a contractor so as to make the contractor an agent of the government for purposes of the government-agency defense. In such circumstances, combatant-activities preemption and the government-agency defense will both be available to the contractor. However, as the Eleventh Circuit articulated in *McMahon v. Presidential Airways, Inc*., even where a contractor is deemed to be an agent, the court may still require the contractor to justify the grant of immunity affirmatively. 502 F.3d 1331, 1345–46 (11th Cir. 2007). Given the courts' hostility to *Feres*, a contractor, whether an agent or not, might make a more compelling argument for protection under the principles animating combatant-activities preemption than under a theory of derivative sovereign immunity.

1. Evidence and the Supervision Inquiry

Assuming *arguendo* that combatant-activities preemption is a viable defense, and that control and supervision form a necessary element, how is a court to determine when preemption is applicable? To which evidentiary sources should a court look? A court's analysis might turn on the scope of the contractor's authority under the applicable regulations or the facts on the ground. These inquiries may provide different answers as to whether preemption is appropriate.

This tension is evident in *Ibrahim v. Titan Corp.*[303] In *Ibrahim*, plaintiffs rejected the defendants' attempt to rely on combatant-activities preemption.[304] They argued that the district court reached the wrong conclusion when applying its own preemption test—whether the contractors were under "exclusive operational control" of the military.[305] They also maintained that a finding of exclusive operational control was inappropriate because it was contrary to Army regulations,[306] pointing to Army Regulation 715-9, which prescribes policies for managing contractors accompanying the force.[307] This regulation specifies that the commercial firm(s) providing the battlefield support services will "perform the necessary supervisory and management functions of their employees since [c]ontractor employees are not under the direct supervision of military personnel in the chain of command."[308] The military could not have exercised exclusive control over the defendants in this situation, asserted the plaintiffs, because the contractor supervisors controlled contractor employees,[309] and therefore, preemption was not fitting.[310]

In response, defendants argued that courts assessing the application of the combatant-activities exception have "always grounded their decisions on the facts as they occurred," and that this analysis is what matters when considering interference with unique federal interests.[311] Moreover, ap-

303. Ibrahim v. Titan Corp., 556 F. Supp. 2d 1 (D.D.C. 2007).

304. *Id.* at 10.

305. Joint Final Brief of Appellants at 19–21, Ibrahim v. Titan Corp., No. 04-1248, Saleh v. Titan Corp., No. 05-1165 (D.D.C. Oct. 16, 2007) [hereinafter Joint Final Brief].

306. *Id.* at 32.

307. U.S. Dep't of Army Regulation 715-9, Contractors Accompanying the Force (Oct. 29, 1999), *available at* http://www.aschq.army.mil/gc/files/AR715-9.pdf.

308. *Id.* § 3-2(f); DEP'T OF THE ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 4-45 (2003) ("Maintaining discipline of contractor employees is the responsibility of the contractor's management structure, not the military chain of command."); Joint Final Brief, *supra* note 305, at 32.

309. *Id.* at 32–35.

310. *Id.* at 35, 39–45.

311. Post-Hearing Memorandum of CACI International, Inc. and CACI Premier Technology, Inc., in Support of Their Motion for Summary Judgment at 5–6, Ibrahim v. Titan

proaching the question otherwise would place the court in the "untenable position" of deciding what the military "should do in a combat situation when faced with an exigent need for civilian interrogators."[312]

The plaintiffs' argument in *Ibrahim* is peculiar because it offered law—the regulations—to prove a fact. This approach is faulty. There is no dispute that the legal restrictions on contractors are not actually observed.[313] The military or another agency will demonstrate operational control or supervision through *actual* interaction with contractors. Contractual terms and regulations inform the question of control, but they themselves are not determinative. The district court in *Ibrahim* justifiably adopted the "facts on the ground" perspective[314]: if the record demonstrates that the military exercised control in fact, then contrary regulations do not alter this conclusion.[315]

However, the regulations and the contract under which the contractors operated are relevant as part of a court's legal evaluation of the federal interest(s) at issue. The fact that regulations place an activity beyond the power of the contractor provides important evidence that no federal interest is at stake in protecting the contractor.[316] With this in mind, the facts on the ground should prevail against inconsistent regulations.

2. Cases of Narrowly Defined Contractor Discretion and Effective Government Control: The Federal Interests That Preemption Serves

This Article has argued that combatant-activities preemption of claims arising from a contractor's tortious conduct undertaken in the exercise of

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Corp., 2007 WL 3319823 (D.D.C. Oct. 15, 2007); Post-Hearing Memorandum of Defendant L-3 Communications Titan Corp. in Support of its Motion for Summary Judgment at 2–3, Ibrahim v. Titan Corp., (D.D.C. Oct. 15, 2007).

312. *See supra* note 311 and accompanying text.

313. *See* KIDWELL, *supra* note 205 (noting that intelligence gathering is characterized as an inherently governmental function, but contractors are performing it anyway).

314. Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 8 (D.D.C. 2007).

315. *See* KIDWELL, *supra* note 205, at 53 (quoting Assistant Secretary of the Army Patrick T. Henry for the proposition that intelligence gathering at the tactical level is an intrinsically governmental function). Indeed, the law in other contexts imposes liability against corporations and other entities for violations by their agents even where their internal rules expressly prohibit the conduct in question. *See* N.Y. Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 491–95 (1909) (upholding the constitutionality of the Elkins Act, which made corporations liable for the acts of their officers, even where the officers were acting contrary to instructions); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (addressing criminal antitrust liability).

316. In other words, to the extent that regulations specify that contractors should not engage in a particularly activity, this at least suggests that the federal government might have little interest in protecting contracts when they injure someone while performing the contract.

his or her broad discretion is inappropriate. Furnishing a preemption defense in such cases will do little to meaningfully encourage action that serves U.S. interests, and would come at too great a cost to other stakeholders. Circumstances might arise, however, in which the military's control over a contractor is high and the contractor's discretion is minimal.

Contractors do not form a *de jure* part of the military chain of command.[317] They may form a *de facto* component, however. Consider the facts of *Titan v. Ibrahim Corp.* and *Saleh v. Titan Corp.*[318] In both of these cases, the district court concluded that Titan linguists and interrogators were subject to the control of their military unit commander at all relevant times, and Titan employees were wholly excluded from supervisory roles.[319] When translating or interrogating alongside military personnel, Titan contractors were not to second-guess or disagree with their military counterparts.[320] Although internal Army investigations suggest that a lack of supervision at Army interrogation centers contributed to the abuses, the district judge found that the military exercised strict control over Titan personnel.[321]

In cases of tight military-contractor integration, a civil suit against contractors would likely reveal highly sensitive military information such as interrogation tactics, military operational orders, and secret counterterrorism activities.[322] The primary focus of a court's inquiry would no longer be the contractor's discretion in taking certain allegedly tortious actions. Rather, the government's own conduct would be relevant. Accordingly, the military's own procedures, the adequacy and propriety of instructions, cautionary statements, and orders to contractors and to other soldiers would be scrutinized. Truly, the government can state no unique federal interest in the abuse of prisoners or derogation from international

317. McMahon v. Presidential Airways, Inc., 502 F.2d 1331, 1348 (11th Cir. 2007) ("[A] private contractor is not in the chain of command.").

318. *Ibrahim*, 556 F. Supp. 2d 1; Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006).

319. *Ibrahim*, 556 F. Supp. 2d at 5.

320. *Id.*

321. *See* GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 52 (2004), *available at* http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf (describing the prevailing conditions of lawlessness at Abu Ghraib prison).

322. The author recognizes, as courts have, that the United States has an interest in insulating military decisions from judicial scrutiny. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (detention as an "important incident[] of war") (internal quotes removed). This should not be confused, however, with the view that the United States has an interest in promoting torture or mistreatment of prisoners.

human rights norms. But beyond detainee treatment, preemption has a far more relevant role where the military has integrated contractors in intelligence gathering or surveillance activities.[323]

Courts have recognized the unique federal interest in insulating military decisions from judicial inquiry, finding that even tangential intrusions into military decision making may pose a threat to military discipline.[324] This extra-cautious approach can be appropriate because judges are not well positioned to understand and evaluate the effects of such intrusion.[325] The court in *McMahon v. Presidential Airways, Inc.* ac-

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323. One could also imagine a case in which the contractors accompanying Special Forces units along the Afghan border assist in capturing an alleged terrorist. Following instructions from the military, they subject the detainee to what he or she later alleges was rough treatment. Imagine that he or she sues the military and the contractor. Discovery would likely yield facts analogous to those in *Titan*—that the military effectively directed the contractor's conduct. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005). Recall that contractors have also maintained and operated weapons systems onboard warships during combat operations. SCHREIR & CAPARINI, *supra* note 201, at 22, 25. What would the result be where a contractor negligently calibrates a weapons system causing a missile to strike a civilian or U.S. military target? On board the vessel, the contractors are likely to be under close supervision and to be following detailed instructions.

324. Under this rationale, courts have upheld the dismissal of a plaintiff-soldier's suit against the military in connection with a recreational boating accident. McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007). The court found that dismissal was appropriate because the suit would require discovery into the military's maintenance of the boat and the adequacy of the instructions concerning its use. *Id.* In another case, fears of an adverse impact on discipline prompted the court to dismiss a claim arising from the drowning of soldiers in a military-sponsored rafting trip, even where civilian guides were the alleged tortfeasors. Costo v. United States, 248 F.3d 863 (9th Cir. 2001). Many circuits have found military discipline to be threatened in the *Feres* context in a wide variety of recreation-based accidents. *See, e.g.*, Rayner v. United States, 760 F.2d 1217 (11th Cir. 1985) (finding that *Feres* barred a malpractice suit where the soldier sought elective medical care from the military provider); Hass v. United States, 518 F.2d 1138, 1141 (4th Cir. 1975) (concerning a serviceman injured in an accident involving a horse rented from a Marine Corps-operated stable).

325. Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers . . . ."); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); Fisher v. United States, 402 F.3d 1167, 1177 (Fed. Cir. 2005); Holzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1973). Nor will courts hear cases that threaten to significantly impede combat effectiveness. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call

knowledged these concerns and identified a class of suits involving "sensitive military judgments" that courts should not hear as a matter of prudence.[326] Combatant-activities preemption also recognizes such a class of suits, vindicating the federal interest in avoiding inquiries into sensitive military decisions.[327]

The recognition of these federal interests—which are not present in cases where contractors enjoy broad discretion—does not negate the powerful arguments *against* preemption that this Article has addressed. The preferred method for protecting contractors is by congressional action or executive indemnification.[328] However, in cases where contractor discretion is minimal and the contractor is subject to extensive government control, preemption is appropriate. This should be the case so long as courts continue to recognize the interest preemption protects—the U.S. interest in avoiding interference with sensitive decision making—as sufficiently important to trump the nation's interest in permitting plaintiffs to use the courts to obtain redress for wrongs. *Boyle's* holding, that a suit against contractors may be preempted where tort liability would be inconsistent with a unique federal interest (deriving from either the discretionary-function exception or the combatant-activities exception), may be understood to sanction this outcome.[329] The scope of a preemption defense rooted in contractors' participation in the combatant activities of the United States hinges on the meaning of "control" and the amount of permissible contractor discretion.

Preemption is proper where contractor discretion is so narrow that a decision, order, or instruction of the military or other government agency becomes the true fact of interest.[330] This occurs where contractor actions

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him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.").

326. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1353 (11th Cir. 2007).

327. *See* Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 5 (D.D.C. 2007) ("It is the military chain of command that the FTCA's combatant activities exception serves to safeguard, however, and common law claims against private contractors will be preempted only to the extent necessary to insulate *military* decisions from state law regulation.").

328. *See, e.g.*, Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 806, 839–41 (2008) (proposing a congressional indemnification scheme).

329. *See* Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003) ("Although *Boyle* referred specifically to procurement contracts, the analysis it requires is not designed to promote all-or-nothing rules regarding different classes of contract. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest.") (citing Glassco v. Miller Equip. Co., 966 F.2d 641, 642 (11th Cir.1992)).

330. Titan Corporation made this argument in its brief to the D.C. Circuit. Corrected Final Brief of Defendant-Appellee Titan Corp. at 27, Ibrahim v. Titan Corp., Nos. 08-

are necessarily bound up with military action. Although this Article has primarily addressed the case of *negligent* conduct by a contractor, the end combatant-activities preemption can serve, protecting military decisions, can be achieved even where the contractor acts intentionally. The key element remains whether the conduct resulted from government direction rather than an exercise of contractor discretion.

Determining whether the discretion of a contractor has exceeded the critical threshold is a fact-sensitive analysis, and the amount of permissible discretion will vary from case to case. A court should permit a comparatively greater degree of discretion—within a range of reasonableness—where the conduct at issue is particularly sensitive. The polar star of the court's inquiry must be to protect military decision making and military discipline, not a contractor's discretionary act.[331]

3. The Breadth of Combatant-Activities Preemption and the Meaning of "Control"

A court may approach measuring and defining "control" in various ways.[332] One approach would be to adopt the *Boyle* criteria explicitly, for which there is precedent.[333] But applying the *Boyle* factors mechanically is inappropriate in cases involving contractor torts arising from participation in combatant activities. The *Boyle* government-contractor defense, as the Supreme Court described it, does not shield contractor negligence.[334] Of course, contractors should generally not be immune, from

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7008, 08-7009 (D.C. Cir. Dec. 3, 2008) ("To put it another way, where contractor employees are placed under the military's operational control on the battlefield, the employees' actions in a meaningful sense constitute the actions of *the military*.").

331. The court in *Ibrahim* articulated this view. *Ibrahim*, 556 F. Supp. 2d at 3.

332. *See* 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, 388 (2006). *See also supra* note 71 and accompanying text.

333. Rakowsky also contemplates this idea. Rakowsky, *supra* note 332. In *Hudgens v. Bell Helicopter/Textron*, for example, the Eleventh Circuit found the *Boyle* defense applicable where contractor DynCorp, which had contracted to maintain military helicopters, negligently caused the crash of an Army pilot. Hudgens v. Bell Helicopter/Textron, 328 F.3d 1329 (11th Cir. 2003). The court determined that because DynCorp followed a reasonably precise, comprehensive maintenance regime, it was not expected to supplement its own procedures. *Id.* at 1334–35.

334. "[T]ort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government." *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 793–94 (E.D.N.Y. 1980), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied* Chapman v. Dow Chemical Co., 454 U.S. 1128 (1981); Barron v. Martin-Marietta Corp., 868 F. Supp.

civil or criminal liability, for illegal or tortious acts. Yet, this is not the appropriate result in a combat situation. A contractor's good faith but negligent execution of military instructions in a combat context should not forfeit the defense. The federal interests present where contractor discretion is minimal do not disappear. Indeed, these interests require vindication in spite of the contractor's tort.[335]

Ibrahim v. Titan Corp presents another option for defining and measuring control in this context. In *Ibrahim*, the court articulated a "soldier in all but name" test, under which defendants would succeed in their preemption argument where they could show that they were under the "exclusive operational control" of the military.[336] This test is itself subject to varying interpretations, as it leaves open questions as to whether contractors must be following direct orders, or merely operating under the guidance and instruction of the military.[337] The court's formulation in *Ibrahim* appropriately sacrifices the advantages of a bright-line rule for a fact-specific inquiry. However, even the fact-specific "soldier in all but name" test may be too narrow. This test purports to confine combatant-activities preemption to cases in which the contractor works alongside the military. Although this is normally the case, preemption may also be warranted even where the contractor is not acting as a soldier.[338]

A suitable formulation of control might also be derived from the language of the International Court of Justice ("ICJ") in *Nicaragua v. Unit-*

1203, 1207 (N.D. Cal. 1994) ("[R]equisite conflict exists only where a contractor cannot at the same time comply with duties under state law and duties under a federal contract.").

335. Of course, a contractor's flagrant and/or repeated negligence will suggest that the military or another government agency really exerts little control over the contractor. The other possibility—that the military is complicit in the contractor's errors—is not inconceivable.

336. *Ibrahim*, 556 F. Supp. 2d at 3 ("In the context of preemption, the federal interest embodied by the exception is the same. Where contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability.").

337. *See* Rakowsky, *supra* note 332.

338. Consider a hypothetical case akin to *United States v. Johnson*, 481 U.S. 681 (1987). A contractor works under the supervision of civilian air controllers of a government agency and provides positioning information to military pilots in a declared combat zone. The contractor negligently misinforms the pilot, causing a crash that kills him or her and several civilians. The contractor's actions are likely to qualify as combatant activities under case law. Although the contractor was not functioning as a soldier, there was close government supervision of the contractor's operations and, thus, preemption is arguably justified.

ed States.[339] In this case, the ICJ examined whether the United States could be held liable for the acts of the paramilitary forces it sponsored in Nicaragua, and what level of control the U.S. government must exert over those forces in order to incur liability.[340] The court found that the United States was not liable because it failed to exercise "effective control" over those forces.[341] The flexibility of the court's "effective control" test is both necessary and dangerous in the context of combatant-activities preemption.

Contractors, such as those responsible for the abuses at Abu Ghraib, should not be able to avoid civil liability by demonstrating nominal supervision by the military. The Supreme Court in *Boyle* recognized that when the government dictates, monitors, and approves manufacturing specifications and the manufacturing process, the conduct in question is really the government's. Courts should view the applicability of the combatant-activities exception to private actors in a similar manner. Combatant-activities preemption can protect vital government interests, but it is only appropriate when government conduct substantially circumscribes contractor discretion.[342]

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339. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 65 (June 27).

340. *Id.*

341. *Id.* at 64.

342. For example, in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, the Northern District of Georgia concluded that the plaintiff's negligence action against the contractor was nonjusticiable on political question grounds. Carmichael v. Kellogg, Brown & Root Servs., Inc., 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008). As part of its ruling, the court found that "the army controlled the conduct of Carmichael's convoy at the most granular level" because the military determined the convoy's route, speed, and following distance to the exclusion of Kellogg, Brown & Roots' own supervisors. *Id*. at 1369. Unlike *McMahon*, where the Presidential pilots had wide discretion (and apparently used it), the army in *Carmichael* appeared to have exercised control sufficient to virtually eliminate Kellogg, Brown & Roots' discretion—at least sufficient to call into question its orders in a lawsuit. *Id.* at 1368–69. Similar to *Titan*, this case presents an example of the type of control courts should require before applying the combatant-activities exception to private actors.

One can apply the effective-control analysis to the facts of *McMahon v. Presidential Airways, Inc.*, for example. In *McMahon*, the contractor was engaged in combatant activity at the time of the accident. McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1318, 1328 (M.D. Fla. 2006) Although the contractor was subject to certain restrictions, such as what routes to fly and at what altitude, the pilots caused the plane to veer off course, crashing into a box canyon eighty miles off the designated route. NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT BRIEF, ACCIDENT NUMBER IAD05FA023, at 19, Nov. 8, 2006, *available at* http://www.ntsb.gov/ntsb/query.asp. The National Transportation Safety Board's postcrash analysis concluded that the pilot had decided to use an alternate route "for fun" and his failure to use the oxygen system contributed to his impaired judgment while flying. *Id.* at 19–20. The contractor's own negligence caused the

Having explored the disadvantages of protecting a contractor's discretionary acts, the courts' application of the preemption defense that draws on the combatant-activities exception must be flexible. Regarding this exception, the courts' determination of effective control cannot be formulaic and should not depend on whether the contractor functioned as a soldier. It must also consider the extent of the contractor's discretion, if any, within the precise context in which he or she exercised it. If the contractor's conduct involves activities, such as intelligence gathering or military maneuvers, in which the nation's interest in protecting military decision making and execution from judicial second-guessing is at its apex, the ends of preemption are served, even where the contractor exercises slightly more discretion than he or she would in a context more remote from core military interests.[343] The courts' inquiry, accordingly, should be about "effective" control, judged with regard to the role preemption plays in protecting a unique federal interest, the amount of discretion (if any) the contractor exercises, and the context in which the contractor acts.

CONCLUSION

This Article has explored the defenses and immunities that may protect private military service contractors from civil liability. It has argued that the government-agency defense, while potentially applicable to service contractors, should be narrowly drawn. In addition, the principles recognized by courts to underlie the combatant-activities exception as applied

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crash. *Id.* The NTSB blamed Presidential Airways for the accident, but also noted that the Department of Defense did not provide adequate oversight of the contractor's operations in Afghanistan in what was "clearly a military operation subject to [Department of Defense] control." *Id.* at 22–23, 25; SCAHILL, *supra* note 20, at 248. The company admitted that the military lacked supervision and control over the performance of the mission. *McMahon* Appellate Brief, *supra* note 127, at 32 ("Presidential was completely subject to the military's control, except as to the physical performance of the mission."). The scope of the contractor's discretion in this case is sufficiently broad to preclude combatant-activities preemption. Even if a court could find that the government controlled the contractor's freedom of action, permitting the suit to proceed would not jeopardize critical federal interests. Although the contractor could contend that a failure to preempt would negatively affect military discipline by questioning the military's orders, this claim should fail. The plaintiff's claim does not have anything to do with the military's practice of employing contractor pilots. Instead, the plaintiff's claim hinges on the contractor's own negligence. Thus, this case is distinguishable from cases such as *McConnell v. United States*, 478 F.3d 1092, 1098 (9th Cir. 2007), where the allegations of negligence went to maintenance of and instructions concerning the use of military recreational boats.

343. *See* Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (describing the nation's interest in forcing military officials to testify to sensitive decisions at trials in the United States).

to the federal government, namely, avoiding interference with sensitive military decision making, can similarly justify the preemption of civil claims against service contractors. However, preemption of a wronged plaintiff's claims under the combatant-activities exception can wreak a clear injustice. Therefore, courts must frame combatant-activities preemption as narrowly as possible while still protecting critical federal interests. This balance is arguably achieved by only allowing preemption in cases where the contractor was under the supervision and control of the military.

The wisdom of the military's widespread use of contractors remains a decision for the political branches. This Article's conclusion that preemption may apply to service contractors does not mean that the impunity of contractors should be tolerated. Success in Iraq and Afghanistan demands that the United States foster a culture of accountability, and it should start by enforcing criminal sanctions against its soldiers and contractors who break the law. Agencies employing contractors should integrate clear guidelines and limitations into contracts with PMCs, with particular regard to their duty to respect the rights of civilians in zones of armed conflict.[344] On a broader scale, the United States needs a coherent national policy on private military contractors. Congress should take up this policy challenge in earnest.

344. For a discussion of how the contract might be used to foster greater accountability among contractors, see Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, *supra* note 200, at 217. *See generally* Kevin O'Brien, *What Should and Should Not Be Regulated?*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, *supra* note 200, at 29.