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## COMMENT

### **Military Burn Pits in Iraq and Afghanistan: Considerations and Obstacles for Emerging Litigation**

KATE DONOVAN KURERA

#### SUMMARY

This comment analyzes and discusses aspects of the ongoing KBR Burn Pit Litigation,<sup>1</sup> an emerging toxic tort in the United States. The litigation is in response to alleged toxic smoke exposures from burn pits operated by government contractors at military bases in Iraq and Afghanistan. The comment first discusses the alleged exposures and health concerns related to the inhalation of burn pit smoke. Next, the comment explains the regulatory framework surrounding the use of burn pits abroad and the incorporation of this framework into military logistics contracts. The comment next discusses the various legal challenges and obstacles Plaintiffs face in pursuing this not so garden-variety toxic tort case. There are many legal defenses uniquely present that overshadow the typical toxic tort hurdles, such as causation, because Defendants are government contractors. In the context of exploring the defenses, the type and scope of military contracts become relevant to establishing potential governmental contractor immunity because these are the contracts that Plaintiffs contend were breached with the negligent operation of burn pits. The comment concludes by suggesting that the tests available for evaluating liability under military logistics contracts are inadequate, resulting in unclear standards for a reviewing court to apply to Burn Pit Litigation claims.

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1. The litigation was renamed “*In re* KBR, Inc., Burn Pit Litigation” by the Multidistrict Litigation Panel (“MDL”) upon request of plaintiffs. See J.P.M.L. Transfer Order, No. 2083 (Oct. 16, 2009).

## I. INTRODUCTION

Burn pits have been relied on heavily as a waste disposal method at military installations in Iraq and Afghanistan since the beginning of United States military presence in these countries in 2001 and 2003, respectively.<sup>2</sup> Department of Defense (“DoD”) contracting companies, KBR, Inc., Kellogg, Brown & Root LLC, and Halliburton Co. (“KBR” or “Defendants”), through high-profit logistics defense contracts,<sup>3</sup> provide the majority of contingency base operational services in Iraq and Afghanistan (e.g., potable drinking water and food services, waste disposal services, medical services, recreational facilities, and other services related to base operation and maintenance.)<sup>4</sup> Until recently, little attention had been paid to the waste disposal methods utilized in the military war theaters in Iraq and Afghanistan. This dramatically changed when Joshua Eller, a computer technician deployed in Iraq, filed suit in 2008 against KBR for negligently exposing thousands of soldiers, former KBR employees, and civilians to unsafe conditions due to “faulty waste disposal systems.”<sup>5</sup> Eller and a group of more than two hundred plaintiffs (“Plaintiffs”) returning from their tours of duty, attribute chronic illnesses, disease, and even death to exposure to thick black and green toxic burn pit smoke that descended into their living quarters and interfered with military operations.<sup>6</sup>

2. U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), NO. GAO-11-63, AFGHANISTAN AND IRAQ: DoD SHOULD IMPROVE ADHERENCE TO ITS GUIDANCE ON OPEN PIT BURNING AND SOLID WASTE MANAGEMENT 8 (OCT. 2010).

3. Complaint ¶ 16, *Eller v. KBR, Inc.*, No. 4:08-cv-03495 (S.D. Tex. Nov. 26, 2008) (alleging that KBR revenue from the logistics contracts for Iraq operations was 4.7 billion for 2006). The profits KBR received from government contracts has been subject to much media attention. See David Rose, *The People vs. the Profiteers*, *Vanity Fair*, Nov. 2007.

4. Complaint ¶¶ 16-17, *Eller v. KBR, Inc.*, No. 4:08-cv-03495 (S.D. Tex. Nov. 26, 2008).

5. Complaint ¶ 1 *Eller v. KBR, Inc.*, No. 4:08-cv-03495 (S.D. Tex. Nov. 26, 2008).

6. Complaint ¶¶ 22-23, *Bittel v. KBR, Inc.*, No. 3:09-cv-05041 (W.D. Mo. May 29, 2009); see also Complaint, *Oches v. KBR, Inc.*, No. 5:09-cv-00237 (E.D.N.C. Apr. 2009). Plaintiffs, Staff Sgt. Steven Oches and Staff Sgt. Matt Bumpus, now deceased, were both stationed at Joint Base Balad in 2004 and regularly inhaled fumes from the burn pit. In 2006, both service men developed a rare, aggressive form of leukemia, and both died in 2008 within less than a

Plaintiffs assert that they witnessed batteries, plastics, biohazard materials, solvents, asbestos, chemical and medical wastes, items doused with diesel fuel, and even human remains being dumped into open burn pits.<sup>7</sup> DoD officials say this waste stream contained items now prohibited pursuant to revised guidelines.<sup>8</sup> Plaintiffs contend that KBR breached these contracts by negligently operating burn pits.

The Burn Pit Litigation certainly raises larger issues concerning the import of environmental and safety standards utilized during wartime settings. However it is the litigation that seeks to answer a more fundamental question of who should be held responsible for the alleged injuries. While U.S. law expressly prohibits using burn pits for waste disposal,<sup>9</sup> the use of burn pits in Iraq and Afghanistan highlights the disparity in the application of environmental laws, regulations, and standards at overseas military contingency operational bases. One paramedic in Iraq noted this contrast, stating, “there is no such thing as the EPA here,”<sup>10</sup> while another soldier blogged, “[t]here is no way on Earth [the operation of burn pits] would ever be allowed back home . . . but hey, we’re not at home, so it must be OK, right?”<sup>11</sup>

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month of each other. Leo Shane III, Families, DOD Spar Over Dangers of Burn Pit Smoke, Stars and Stripes, Nov. 6, 2009, <http://www.stripes.com/article.asp?section=104&article=65885>.

7. Complaint ¶ 12, Bittel v. KBR, Inc., No. 3:09-cv-05041 (W.D. Mo. May 29, 2009).

8. U.S. GOV’T ACCOUNTABILITY OFFICE, No. GAO-11-63, HIGHLIGHTS, AFGHANISTAN AND IRAQ: DoD SHOULD IMPROVE ADHERENCE TO ITS GUIDANCE ON OPEN PIT BURNING AND SOLID WASTE MANAGEMENT (OCT. 2010).

9. Resource Conservation and Recovery Act (RCRA) prohibits open dumping and open burning of solid waste. See 42 U.S.C. § 6945 (2006); 40 C.F.R. § 257.3-7(a); 40 C.F.R. § 258.24(b).

10. Dina Fine Maron, *Air Pollution: ‘There’s no such thing as the EPA here’*, GREENWIRE (Nov. 11, 2009), <http://www.eenews.net/public/Greenwire/2009/11/11/1>.

11. Kelly Kennedy, *Burn Pit at Balad Raises Health Concerns*, ARMY TIMES (Oct. 29, 2008), [http://www.armytimes.com/news/2008/10/military\\_burnpit\\_102708w/](http://www.armytimes.com/news/2008/10/military_burnpit_102708w/).

## II. ALLEDGED EXPOSURES AND HEALTH CONCERNS

The exposure to burn pits has generated complaints from service members since 2003,<sup>12</sup> but the health impacts from exposure are largely unknown.<sup>13</sup> While complaints identify exposure to burn pits throughout Iraq and Afghanistan (as of August 2010 there were an estimated two hundred and fifty one burns pits operating in Afghanistan and twenty two in Iraq),<sup>14</sup> media attention has primarily focused on the burn pit operating at Joint Base Balad in Iraq, which was suspected of burning two hundred and forty tons of waste a day at peak operation.<sup>15</sup> In a 2006 memorandum, Air Force Lt. Col. Darrin Curtis, a former bioenvironmental flight commander at Joint Base Balad, identified the burn pit as an “acute health hazard for individuals,” and noted “it is amazing that the burn pit has been able to operate without restrictions over the past few years without significant engineering controls. . .”<sup>16</sup> Curtis detailed the health hazards associated with inhalation of smoke from unsorted refuse and commented that the threats from open incineration of mixed wastes today pose more serious risks.<sup>17</sup> Air Force Lt. Col. James Elliott co-signed the Curtis memorandum, adding, “the known carcinogens and respiratory sensitizer released into the atmosphere by the burn pit present both an acute and a chronic health hazard to our troops and the local population.”<sup>18</sup> Even publications from the Air Force Institute for Operational Health state that open burning of refuse mixtures

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12. U.S. ARMY CTR. FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE (USACHPPM), No. 47-002-1208, *JUST THE FACTS: BALAD BURN PIT* (2008).

13. U.S. GOV'T ACCOUNTABILITY OFFICE, No. GAO-11-63, *HIGHLIGHTS, AFGHANISTAN AND IRAQ: DoD SHOULD IMPROVE ADHERENCE TO ITS GUIDANCE ON OPEN PIT BURNING AND SOLID WASTE MANAGEMENT* (OCT. 2010).

14. *Id.*

15. Kelly Kennedy, *War-zone Burn Pits Violate Laws, GAO says*, ARMY TIMES, Oct. 17, 2010, <http://www.armytimes.com/news/2010/10/military-gao-says-burn-pits-violate-laws-101410w/>.

16. Memorandum from Darrin L. Curtis, Lt. Col., Dep't of Air Force, to Dep't of Air Force, 332d. Air Expeditionary Wing, Balad Air Base Iraq, 1-2 (Dec. 20, 2006).

17. *Id.*

18. *Id.*

containing trash, medical wastes, and plastics can “yield a hazardous operation with potential impacts to human health and environment.”<sup>19</sup>

According to the U.S. Army Center for Health Promotion and Preventive Medicine (“USACHPPM”), sampling was conducted at Joint Base Balad at different times from 2003 through 2007; however, it was not until 2007 that a formalized sampling protocol was employed.<sup>20</sup> USACHPPM’s sampling events indicated the presence of harmful pollutants such as “dioxins, polyaromatic hydrocarbons, [and] volatile organic compounds,” but all reportedly within acceptable ranges, based on Military Exposure Guidelines (“MEG”).<sup>21</sup> USACHPPM maintains in its reports that exposure to the burn pit smoke does not pose long-term health effects.<sup>22</sup> USACHPPM’s assessments were particularly concerned with testing for dioxins, which is the pollutant most commonly associated with Agent Orange used during the Vietnam War.<sup>23</sup>

During a November 2009 Senate Democratic Policy Committee Hearing on military burn pits abroad, USACHPPM’s studies were called into question by Dr. Anthony Szema, Chief of the Allergy Section of Veterans Affairs Medical Center.<sup>24</sup> Dr. Szema, testified that the USACHPPM’s assessments were fatally flawed since they did not include data about particulate matter.<sup>25</sup> Dr. Szema noted that “the size of particulate matter is important to consider because the particles act as a carrier of various harmful chemicals in the air; . . . [t]he smaller the particulate matter, the deeper the particles are able to travel into the lungs,” posing a number of health risks.<sup>26</sup> Dr. Szema testified that the health risks from exposure to particulate matter include not only

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19. AIR FORCE INST. FOR OPERATIONAL HEALTH, OPEN PIT BURNING GENERAL FACTS AND INFORMATION 2 (2004).

20. USACHPPM, *supra* note 12, at 1.

21. *Id.*

22. *Id.*

23. AIR FORCE INST. FOR OPERATIONAL HEALTH, *supra* note 19, at 2.

24. *Are Burn Pits Making Our Soldiers Sick?: Hearing Before the S. Democratic Policy Comm.*, 111th Cong. 2-3 (2009) (statement of Dr. Anthony Szema, Chief of the Allergy Section, Veterans Affairs Medical Center).

25. *Id.* at 2.

26. *Id.*

“risk of asthma, bronchitis, and emphysema,. . .but there is also an association with respiratory and cardiovascular mortality—death—from inhalation of ultra fine particulate matter. . .”<sup>27</sup> Dr. Szema warned that the toxicity of particulate matter depends on the compounds it is carrying, and therefore, it is necessary to always include in air quality analysis.<sup>28</sup> Lt. Col. Curtis also criticized the sampling methodologies, claiming the wind patterns make accurate data collection nearly “impossible.”<sup>29</sup>

For months after the initial filing of the complaints, DoD did not officially comment on the situation, except to restate its position that “only minor, temporary effects have been identified with the burn pit smoke.”<sup>30</sup> DoD has since “acknowledge[d] that burn pit smoke causes acute health effects in some people,” but “it is less clear what other longer-term health effects may be associated with burn pit smoke inhalation.”<sup>31</sup>

### III. REGULATION OF BURN PITS IN MILITARY WARTIME OPERATIONS

A complex web of international treaties, Status of Forces Agreements (“SOFAs”), U.S. domestic laws and regulations, and DoD instructions, directives, and technical manuals govern DoD actions overseas. Although international treaties create standards for protocol at the highest level, the United States does not participate in many relevant treaties and often does not

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27. *Id.*

28. *Id.*

29. Kelly Kennedy, *Balad Burn Pit Harmed Troops Living 1 Mile Away*, ARMY TIMES (Jan. 23, 2010), [http://www.armytimes.com/news/2010/01/military\\_burn\\_pit\\_011810w/](http://www.armytimes.com/news/2010/01/military_burn_pit_011810w/).

30. Leo Shane III, *Families, DOD Spar Over Dangers of Burn Pit Smoke*, STARS AND STRIPES, Nov. 6, 2009, <http://www.stripes.com/article.asp?section=104&article=65885> (quoting Dr. R. Craig Postlewaite, Acting Dir., DoD Force Health Prot. and Readiness Programs).

31. Kelly Kennedy, DoD shows first signs of acknowledging burn-pit woes, Navy Times, Jan. 18, 2010 (quoting E-mail from Dr. R. Craig Postlewaite, Acting Dir., DoD Force Health Prot. and Readiness Programs, to Military Times (Dec. 21, 2009)), [http://www.navytimes.com/news/2010/01/military\\_burn\\_pit\\_pentagon\\_011810w/](http://www.navytimes.com/news/2010/01/military_burn_pit_pentagon_011810w/).)

recognize international law at all.<sup>32</sup> This practice complicates matters and creates ambiguity regarding applicable standards.<sup>33</sup> DoD regularly enters into SOFAs, which seek to establish a legal framework for applying foreign laws to U.S. military personnel operating in a foreign country.<sup>34</sup> SOFAs, however, are generally only peacetime agreements that allow the U.S. military forces to operate within the host country and are rarely applied in wartime scenarios.<sup>35</sup>

Additionally, there are few obligations for DoD to protect human health and the environment through U.S. environmental laws and regulations, since most U.S. environmental laws and regulations do not have extraterritorial application. For example, while the Resource Conservation and Recovery Act ("RCRA")<sup>36</sup> (a U.S. domestic law that regulates solid and hazardous waste disposal and open burning operations) does not have an express extraterritorial provision, the extraterritorial applicability of RCRA has been the subject of some litigation. Generally, parties have not been successful in overcoming the extraterritorial standard established in *Foley Brothers v. Filardo*.<sup>37</sup> In *Foley Brothers*, the court held "unless a contrary intent appears" there maintains a strong presumption that domestic law applies within the territorial limits of the United States.<sup>38</sup> Because RCRA's language and legislative history do not suggest that Congress intended to allow extraterritorial application of the citizen suit provision, courts have barred such application.<sup>39</sup>

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32. See e.g. Sharron J. Philo, Office of General Counsel, Defense Logistics Agency, Presentation at the Overseas Hazardous Waste Disposal and Readiness Workshop: Basics of the Basel Convention (July 13, 2000) (noting that the U.S. is signatory, but a non-party, to the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*).

33. *Id.*

34. R. CHUCK MASON, CONG. RESEARCH SERV., STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009).

35. *Id.*; see also Status-of-Forces Agreement [SOFA], GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/facility/sofa.htm> (last visited Dec. 1, 2009).

36. 42 U.S.C. §§ 6901-92 (2006).

37. See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

38. *Id.* at 285.

39. See *Amlon Metals Inc. v. FMC Corp.*, 775 F. Supp. 668, 674-75 (S.D.N.Y. 1991).



The difficulty of applying U.S. environmental laws abroad results in DoD governing its actions abroad with its own policies, directives, instructions, and program and field manuals, which may or may not have legally binding effects.<sup>40</sup> DoD Instruction 4715.05, *Management of Environmental Compliance at Overseas Installations* (“DODI 4715.05”), implements policy, assigns responsibilities, and prescribes procedures for establishing environmental compliance standards at DoD installations in foreign countries.<sup>41</sup> The instruction directs DoD to establish Final Governing Standards (“FGS”) as the governing environmental criteria for overseas installations.<sup>42</sup> FGS are a comprehensive set of country-specific substantive provisions, typically articulated as technical limitations on effluent discharges or emissions, or a specific management practice specified by the host nation.<sup>43</sup> FGS are developed based on host country laws and requirements, as long as the applicable host-nation’s environmental standards are at least as protective of human health and the environment as the standards outlined in the *Overseas Environmental Baseline Guidance Document* (“OEBGD”).<sup>44</sup> The OEBGD, developed pursuant to DODI 4715.05, creates baseline environmental standards applicable to DoD installations, facilities, and actions in the U.S. and incorporates the requirements of U.S. law that have extraterritorial application.<sup>45</sup> Since many U.S. environmental

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40. “Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a binding norm.” *Nat’l Mining Ass’n v. Sec’y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)).

41. U.S. Dep’t of Defense, Instruction 4715.5, *Management of Environmental Compliance at Overseas Installations* ¶ 1.2 (1996) [hereinafter DoDI 4715.5].

42. *Id.* ¶ 4.1.

43. *Id.* ¶ E2.1.1.

44. U.S. DEPT OF DEFENSE, GUIDANCE 4715.05-G, *OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT*, ¶ C.1.1. (2007) [hereinafter DoD 4715.05-G].

45. *Id.*

laws do not have extraterritorial application, the OEBGD outlines minimum environmental standards and criteria based on domestic standards. The OEBGD is used to develop FGS within a host country and, in and of itself, can serve as the governing document when host country environmental standards and requirements are not present or less stringent.<sup>46</sup>

It is at the level of the OEBGD that basic guidance regarding the use of burn pits is provided. The OEBGD calls for installations to develop and implement a solid waste management strategy focused on recycling and waste minimization, and states, “open burning will not be the regular method of solid waste disposal.”<sup>47</sup> Additionally, the OEBGD explicitly prohibits the use of open burning when installations operate a Municipal Solid Waste Landfill Unit.<sup>48</sup> The *Defense Material Disposition Manual* (1997) further articulates that since installations overseas do not possess RCRA permits for hazardous waste storage and disposal, overseas installations must “comply with the OEBGD or DoD Executive Agent’s FGS for the particular host nation in which the installation is located.”<sup>49</sup> Similarly, Army guidelines on field waste management state that open burning can lead to significant environmental exposures to troops and “open burning. . . should only be used in emergency situations . . . [and] should be conducted as far downwind as possible . . . from troop locations and living areas.”<sup>50</sup> The guidelines further explain that no hazardous wastes should be incinerated, since such burning can release toxic gases.<sup>51</sup> In 2006, DoD further discouraged the use of burn pits by issuing a fragmentary order (“FRAGO”) incorporated into a document

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46. U.S. Dep’t of Defense, Manual 4160.21-M, Defense Materiel Disposition Manual 10-1 (1997) [hereinafter DoD 4160.21-M].

47. DoD 4715.05-G, *supra* note 44, ¶ C7.3.13.

48. DoD 4715.05-G, *supra* note 44, ¶ C7.3.12.5. (providing limited exceptions to the prohibition of open burning for infrequent burning of agricultural wastes, silvicultural wastes, land-clearing debris, diseased trees, or debris from emergency clean-up operations.)

49. DoD 4160.21-M, *supra* note 46, § 10-1.

50. U.S. DEP’T OF THE ARMY, TECHNICAL BULLETIN MED 593, GUIDELINES FOR FIELD WASTE MANAGEMENT, 7 (2006) [hereinafter TB MED 593].

51. *Id.*

entitled the *MNC-I Environmental Standard Operating Procedure 2006*.<sup>52</sup>

All of the abovementioned DoD documents provide minimal discussion and guidance on when and how burn pits should be utilized. In fact, it was not until April 2009 (after the Burn Pit Litigation commenced) that DoD revised the FRAGO, which now offers specific guidance on waste disposal methods in contingency operations and explicitly states that open burning is prohibited unless otherwise authorized in writing.<sup>53</sup> Implementation of these standards requires effective communication through the military chains of command and civilian contractors who provide the logistical support activities at installations abroad.

In the mid-1980s, DoD made a policy decision to use civilian contractors to provide the military with logistical and operational services through the Logistics Civil Augmentation Program ("LOGCAP").<sup>54</sup> LOGCAP contracts allow military units to focus on combat and mission related activities rather than expending military personnel and expertise on logistical and operational support services.<sup>55</sup> In addition, LOGCAP contracts allow the military to identify needs and issue task orders to contractors as required by exigent circumstances.<sup>56</sup> The majority of the military base operations in Iraq and Afghanistan utilize LOGCAP contracts.<sup>57</sup>

LOGCAP III, first awarded in 2001 to KBR, is the contract that supports the burn pit services in Iraq and Afghanistan.<sup>58</sup> KBR's requirements and obligations are outlined in contract

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52. GAO, *supra* note 2, at 10.

53. GAO, *supra* note 2, at 11.

54. Def's Mot. to Dismiss for Lack of Subject Matter Jurisdiction at 4, *In re KBR, Inc., Burn Pit Litig.*, No. 8:09-MD-02083-RWT, 2010 WL 1944178 (D. Md. Jan. 29, 2010).

55. Jay M. Zitter, Annotation, Liability of Civilian Contractors Engaged in Providing Security or Operational Support Services Under Contract to Department of Defense, Department of State, or Coalition Provisional Authority for Injuries to Their Employees, Members of Armed Forces, Foreign Nationals, and Their Survivors, 24 A.L.R. Fed. 2d 529 (2007); see also U.S. Dep't of Army, Reg. 700-137, Logistics Civil Augmentation Program 1 (1985) [hereinafter AR 700-137].

56. GAO, *supra* note 2, at 6.

57. *Id.*

58. *Id.*

documents and the Statement of Work (“SOW”). The LOGCAP SOW states, in relevant part, “the contractor will ensure the safety and health of personnel, equipment and supplies. . .”<sup>59</sup> while providing field services including “[f]ood [s]ervice, [m]ortuary [a]ffairs, [s]anitation to include [h]azardous [w]aste, [b]illiting, [f]acilities [m]anagement, [m]orale [w]elfare and [r]ecreation. . .”<sup>60</sup> The SOW states that the contractor will “adhere to sound environmental practices and all applicable Environmental Protection and Enhancement laws and regulations”<sup>61</sup> and implement a hazardous materials/waste services plan and an integrated safety and health program that comply with “Army Regulations, NATO Status of Forces Agreements, and federal, state and/or host country/region laws and statutes.”<sup>62</sup> A former KBR logistics contract manager testified before Congress that KBR “management would brag that they could get away with doing anything they wanted because the Army could not function without them. . .KBR figured that even if they did get caught, they had already made more than enough money to pay any fines and still make a profit.”<sup>63</sup>

#### IV. LEGAL CHALLENGES FOR RECOVERY TO BURN PIT EXPOSURE

Plaintiffs have a number of legal hurdles ahead in order to successfully prevail in this litigation. The claims Eller *et al.* have asserted include typical elements of toxic torts, such as issues of causation. However, Defendants, government contractors, assert various liability shields based on the theory that government immunity should be extended to them.<sup>64</sup> These immunity

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59. U.S. DEP’T OF THE ARMY, LOGISTICS CIVIL AUGMENTATION PROGRAM SUPPORT CONTRACT, No. DAAA09-02-D-0007, STATEMENT OF WORK § 2.5.1.3 (2001) [hereinafter LOGCAP SOW].

60. *Id.* § 1.5.3.

61. *Id.* § 1.16.1.

62. *Id.* § 2.5.7.

63. Are Burn Pits Making Our Soldiers Sick?: Hearing Before the S. Democratic Policy Comm., 111th Cong. 4 (2009) (statement of Rick Lamberth, former KBR Employee).

64. Suzanne Yohannan, *Defense Contractor Seeks Shield from Tort Suits Over Burn Pit Exposures*, 18 DEF. ENVTL. ALERT, No. 4, Feb. 16, 2010.

defenses play a central role in KBR's defense strategy because the operation of burn pits occurs in the context of wartime operations and is a military-authorized activity.

### A. Causation

Although causation is typically a large hurdle for toxic tort cases, it may be a non-issue in this case due to the wartime setting, which provides Defendants alternative theories for seeking dismissal of the case. However, for purposes of completeness, general issues of causation that could potentially bar the litigation are discussed.

In a plaintiff's effort to "prove the causal connection between exposure and harm," the plaintiff must show the following three elements by a preponderance of the evidence: (1) exposure to the substance(s) of concern; (2) general causation (the substance *can* cause the harm suffered); and (3) specific causation (the substance *did* cause the harm suffered).<sup>65</sup> Meeting the burdens of proof for causation can be a significant obstacle in toxic tort cases and requires heavy reliance on scientific disciplines and experts.

In applying the causation analysis, Plaintiffs can prove the exposure to toxic smoke by first establishing, through direct testimony, that Plaintiffs inhaled burn pit smoke. Plaintiffs allege that their sleeping quarters would often fill with noxious smoke, ground-level plumes would impair military operations, and Plaintiffs would have difficulty breathing on days the pits were in full operation.<sup>66</sup> Next, scientific evidence demonstrates that the refuse stream of the burn pits (including tires, lithium batteries, Styrofoam, paints, solvents, asbestos insulation, items containing pesticides, polyvinyl chloride pipes, animal carcasses, and plastic water bottles)<sup>67</sup> releases toxic constituents into the air such as dioxins, particulate matter, polycyclic aromatic hydrocarbons, volatile, organic compounds, carbon monoxide, and

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65. Andrew R. Klein, *Causation and Uncertainty: Making Connections in a Time of Change*, 49 JURIMETICS J. 5, 25 (2008).

66. Complaint at ¶ 15, 16, 23, 24, Robbins v. KBR, Inc., No. 109-cv-00643. (W.D. Mich. July 14, 2009).

67. *Id.* at ¶ 14.

hexachlorobenzene.<sup>68</sup> Moreover, DoD's own sampling within the vicinity of the pit burns shows toxic constituents in the air from a number of sampling events conducted from 2004 through 2009.<sup>69</sup> This evidence provides the basis for Plaintiffs to show exposure to toxic substances released from the burn pits. The general causation prong is not a significant hurdle in this case either. It is well documented in scientific studies that exposure to the toxic constituents identified around the burn pits *can* cause the illnesses and injuries suffered.<sup>70</sup>

In contrast to general causation, proving specific causation is a more complicated proposition, requiring Plaintiffs to demonstrate that "but for" Defendants' acts, Plaintiffs would not have suffered the alleged harm. The soldiers in Iraq work in harsh environments and are exposed to many elements throughout the course of their tours that could have negative health impacts. Many of the injuries alleged by Plaintiffs, such as tightness in the chest, persistent cough, asthma and bronchitis, can result from exposure to frequent sand and dust storms and commonly impact soldiers stationed in the Middle East.<sup>71</sup> These facts cut against the preponderance of evidence threshold, under which Plaintiffs must prove that the burn pit smoke is more likely than not the cause of their injuries.<sup>72</sup> In many toxic tort cases, medical science cannot provide conclusive evidence on the casual connection between actual injuries and the specific exposures.<sup>73</sup> Another causal indeterminacy is the development of latent illnesses by the soldiers. Latent illnesses can cause further causation problems since latency periods allow for more time for intervening events to occur that can further

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68. Air Force Inst. for Operational Health, *supra* note 19. In fact, the Air Force fact sheet states, "highly toxic dioxins, produced in small amounts in almost all burning processes, can be produced in elevated levels with increased combustion of plastic waste (such as discarded drinking water bottles)." *Id.* at 19.

69. USACHPPM, *supra* note 12.

70. See *Are Burn Pits Making Our Soldiers Sick? Before the S. Democratic Policy Comm.*, 111th Cong. 2 (Nov. 6, 2009) (statement of Dr. Anthony Szema, Chief of the Allergy Section, Veterans Affairs Medical Center).

71. GAO, *supra* note 2, at 7.

72. Klein, *supra* note 65, at 18.

73. Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383, 447 (2007).

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weaken the causal relationship.<sup>74</sup> Latent illness could be a factor in this litigation because many Plaintiffs were exposed as early as 2004.

## **B. Government / Military Contractor Defenses**

Another potential hurdle for Plaintiffs, in overcoming a dismissal of their claims (and likely addressed prior to issues of causation), is application of the government contractor defense and other theories of derivative sovereign immunity, which could immunize defendant KBR contractors for alleged negligent actions. The framework for the government contractor defense is primarily based in the Supreme Court case *Boyle v. United Technologies Corp.*<sup>75</sup> However, to understand the government contractor defense, one must examine the framework for the defense, as it is based in the Federal Tort Claims Act ("FTCA") and related case law.

### **1. FTCA and the Feres Doctrine**

The FTCA, passed in 1946, allows government employees to sue the government in situations where a private individual would be liable under state tort law.<sup>76</sup> This is contrary to the historic principles of sovereign immunity traditionally enjoyed by the government. Sovereign immunity, carried over from English common law, was premised on the notion that the King could do no harm, and should be immunized from lawsuits.<sup>77</sup> As a limit to sovereign immunity, the FTCA provides that the government can be liable for:

[I]njury 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*

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74. *Id.*

75. *See generally* Boyle v. United Tech. Corp., 487 U.S. 500 (1988).

76. HENRY COHEN ET AL., CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, FEDERAL TORT CLAIMS ACT 1 (2007).

77. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed. 1969).

*private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*<sup>78</sup>

However, the FTCA carves out a number of exceptions to the rule where the government can still remain protected under the traditional notions of sovereign immunity.<sup>79</sup> The relevant exceptions include the “discretionary function” exception<sup>80</sup> and the “combatant activities” exception.<sup>81</sup>

In *Feres v. United States*, the Supreme Court addressed whether or not the government was liable under the FTCA for injuries to servicemen arising out activities related to military service, since the FTCA contained no specific exception related to military service.<sup>82</sup> *Feres* consolidated three causes of action brought by military serviceman against the U.S. government for negligent acts of military personnel.<sup>83</sup> The Court held that “the Government *is not* liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”<sup>84</sup> The Supreme Court’s reasoning, known as the *Feres Doctrine*, essentially carved out another

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78. 28 U.S.C. § 1346(b) (2006) (emphasis added).

79. *See* 28 U.S.C. § 2680(a)-(n) (2006).

80. 28 U.S.C. § 2680(a) (“Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”).

81. 28 U.S.C. § 2680(a) (“Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”).

82. COHEN, *supra* note 76, at 4.

83. Plaintiff executrix of *Feres* brought an action to recover for the death of her husband, an active duty serviceman, who died in a fire in the quartering barracks. Plaintiff claimed her husband’s death was a result of the military’s negligence in housing servicemen in quarters they knew or should have known to be unsafe. *Feres v. United States*, 340 U.S. 135, 137 (1950). Plaintiff Jefferson underwent an abdominal operation by Army doctors. Eight months later, Jefferson had another unrelated operation during which the doctors removed a towel marked “Medical Department U.S. Army” from his abdomen. *Id.* Plaintiff executrix of Griggs sued for negligent medical treatment by army surgeons. The Court found the underlying common fact to be active duty servicemen sustaining injuries due to the alleged negligence of other military personal. *Id.* at 138.

84. *Feres*, 340 U.S. at 146 (emphasis added).



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exception to the FTCA.<sup>85</sup> The Court's decision was based primarily on the delicate relationship between military personnel and the Government, as well as the fact that federal law governs the relationship.<sup>86</sup> The Court looked at the language of the FTCA that waives government immunity in cases where a private person would be liable under state law. The Court found that:

[P]laintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.<sup>87</sup>

*Feres* is relevant in the government contractor immunity framework because this was the standard first reviewed by the Supreme Court in *Boyle v. United Technologies Corp.*, where government contractors sought immunity from liability in the performance of certain military contracts. The Supreme Court failed to extend the *Feres* doctrine to the military government contractors in *Boyle*<sup>88</sup> and instead developed its own test, which allowed liability protections to apply to government contractors.<sup>89</sup>

## 2. FTCA and the Discretionary Function Exception

As government contractor services became more pervasive in government operations, including LOGCAP contracts, courts faced the question of whether to apply similar governmental immunity to contractors who followed the specifications and direction of the government. The FTCA explicitly excludes "any contractor with the United States" from its definition of Federal

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85. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1341 (11th Cir. 2007).

86. *Feres*, 340 U.S. at 143-44, 146.

87. *Id.* at 141-42.

88. *Boyle*, 487 U.S. at 513.

89. *Id.* at 512.

Agency,<sup>90</sup> which plainly suggests that contractors are not eligible to utilize the FTCA liability exceptions. This fact, however, did not preclude the Supreme Court in *Boyle* from holding that a government contractor could be provided the same liability protection as the government in certain circumstances.<sup>91</sup> To establish the basis of the government contractor defense,<sup>92</sup> the Supreme Court looked to the “discretionary function” exception of the FTCA,<sup>93</sup> which “immunizes the United States for acts or omissions of its employees that involve policy decisions.”<sup>94</sup>

In *Boyle*, a military copilot drowned when his helicopter crashed into the ocean and he could not escape due to the defective design of the escape hatch.<sup>95</sup> The plaintiff recovered in district court under state tort law, while the Fourth Circuit reversed, applying a military contractor defense. The Supreme Court granted certiorari where they articulated the rationale for the government contractor defense and annunciated a three-prong test to determine its applicability.<sup>96</sup>

In its simplest form, the government contractor defense provides a liability shield from state law product liability claims when a military contractor provides military equipment pursuant

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90. See 28 U.S.C. § 2671 (2006).

91. See *Boyle*, 487 U.S. at 513.

92. The Court choose not to extend the *Feres* doctrine to include government contractors, finding that the *Feres* doctrine was both too board and too narrow to be applied to the government contractor context. *Id.* at 510. The Court opined that the results are too board because immunity could be applied to contractors even when a helicopter was purchased from stock, and would be or if by chance, the “design of the stock item contained an injury-causing attribute which conflicted with state tort law.” Zitter, *supra* note 54, at 535. Additionally, the *Feres* doctrine would be too narrow in that *Feres* applied only to injured military personnel. See *Boyle*, 487 U.S. at 510.

93. Specifically the FTCA exception states “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” 28 U.S.C. § 2680(a).

94. COHEN, *supra* note 76, at i.

95. *Boyle*, 487 U.S. at 502.

96. See *id.*

to government contracts.<sup>97</sup> *Boyle* holds that state tort liability should be displaced only where a “significant conflict exists between an identifiable federal policy or interest and the [operation] of state law.”<sup>98</sup> The basis for the displacement of state tort law, according to the Court, is within the FTCA’s discretionary function exception.<sup>99</sup> This exception protects governmental decision-making based on public policy considerations where the decisions made involve “an element of judgment or choice.”<sup>100</sup> The exception does not apply when the government has no choice in applying a prescribed “federal statute, regulation, or policy.”<sup>101</sup> The Court in *Berkovitz* stated, “if the employee’s conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.”<sup>102</sup> This explains why the Court in *Boyle* held that “the selection of the appropriate design for military equipment to be used by [our] Armed Forces is assuredly a discretionary function” within the meaning of the FTCA.<sup>103</sup> Government contractor liability under state law for military equipment design defects could create a “significant conflict” with federal policy.<sup>104</sup> The Court found that declining to extend the immunity to military government contractors and “second guessing” the military’s procurement decisions would “produce the same effect sought to be avoided by the FTCA exemption.”<sup>105</sup>

After the Court delivered its rationale for extending immunity to government contractors, it outlined a test to ensure the government contractor defense is applied in situations “where

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97. Christopher R. Christensen & Anthony U. Battista, Brief: Framing the Government Contractor Defense, 38 Wtr Brief 12, 13 (2009).

98. *Boyle*, 487 U.S. at 507 (internal quotations omitted).

99. *Id.* at 511.

100. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

101. *Id.*

102. *Id.*

103. *Boyle*, 487 U.S. at 511.

104. *Id.*

105. *Id.* The Supreme Court was concerned that holding government contractors liable would “directly affect the terms of Government contracts” and contractors would either refuse to manufacture based on the government specified design or would raise their contracting prices. *Id.* at 507; see also Christensen & Battista, *supra* note 97, at 13.

the policy of the ‘discretionary function’ would be frustrated.”<sup>106</sup> The test states that:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier 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.<sup>107</sup>

The test has been applied in many factual scenarios and has been subject to extensive litigation. One of the main issues addressed by the circuit courts is how broadly *Boyle* should apply (e.g., outside military contexts, to other product liability causes of action, etc.). The *Boyle* test has been discussed in cases of government contracts outside the military context, but courts generally defer to the derivative sovereign immunity analysis under *Yearsley v. W. A. Ross Construction Co.* for non-military contracting situations.<sup>108</sup> The Supreme Court in *Yearsley* held government contractors are not liable when carrying out a “validly conferred” government contract under common law agency theory.<sup>109</sup> However, in the military context, the *Boyle* test has been applied to a wider range of product liability causes of action, including failure to warn,<sup>110</sup> manufacturing defects,<sup>111</sup>

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106. COHEN, *supra* note 76, at 28.

107. *Boyle*, 487 U.S. at 512.

108. See *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (discussing how the doctrine of derivative sovereign immunity had its origin in *Yearsley*).

109. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *see also* *Carley v. Wheeled Coach*, 991 F.2d 1117, 1123 (3d Cir. 1993) (holding government contractor defense is available to nonmilitary contractors under federal common law); *Ackerson v. Bean Dredging*, 589 F.3d 196, 204 (5th Cir. 2009) (applying government contractor immunity under *Yearsley*).

110. See *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 629 (2d Cir. 1990) (applying *Boyle* to failure to warn claims).

111. The circuit courts are split on whether the defense can be applied to manufacturing defects. *See Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir. 1989) (not extending government contractor defense to a manufacturing defect cause of action), *compare with* *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997) (stating that the defense can apply to manufacturing defects).

and service and performance contracts (as opposed to procurement contracts).<sup>112</sup>

The wide application and varying outcomes across the Federal circuit and district courts make it difficult to predict how the government contractor defense under *Boyle* can be applied to the KBR LOGCAP contracts.<sup>113</sup> Looking at the cases that have broadly interpreted the *Boyle* test to include performance or service contracts provides a basis for understanding how the defense could be applied to the Burn Pit Litigation.

*Boyle* was a product liability (design defect) cause of action under a supply contract. The applicability of the *Boyle* test to performance or logistics contracts is still largely unresolved, since a majority of the decisions addressing the issue have been at the district court level, with little guidance from the circuit courts.<sup>114</sup> In *Hudgens v. Bell Helicopters*, the Eleventh Circuit applied the *Boyle* test to a helicopter maintenance contract finding that the specifications provided by the government were specific enough to protect the contractor.<sup>115</sup> The court stated that even though *Boyle* referred to a procurement contract, the proper analysis “is not designed to promote all-or-nothing rules regarding different classes of contracts. Rather, the question is whether subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest.”<sup>116</sup> In

112. See *Hudgens v. Bell Helicopter*, 328 F.3d 1329, 1334-35 (11th Cir. 2003) (applying *Boyle* to an Army maintenance contract); *Richland-Lexington Airport v. Atlas Prop.*, 854 F. Supp. 400, 421-23 (D.S.C. 1994) (holding that the government-contractor defense applies to service contracts as well as procurement contracts, also held that the defense applies equally in nonmilitary as well as military settings); *Lamb v. Martin Marietta Energy Sys. Inc.*, 835 F. Supp. 959, 966 (W.D. Ky. 1993) (finding that the government contractor defense could be applied to an action by neighboring landowners seeking recovery for contamination of environment against a contractor of an operations and maintenance contract).

113. See generally Sean Watts, *Boyle v. United Technologies Corp. and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 Wm. & Mary L. Rev. 687 (1999).

114. Interestingly, the Supreme Court in *Boyle*, while discussing its prior decision in *Yearsley*, suggested that the distinction between the type of contract, procurement or performance, is not determinative. *Boyle*, 487 U.S. at 506.

115. *Hudgens*, 328 F.3d at 1334.

116. *Id.* (citing *Glassco v. Miller Equip. Co.*, 966 F.2d 641, 642 (11th Cir.1992)).

*Hudgens*, the court found that the direction provided by the maintenance protocols “involve[d] the exercise of the very same discretion” that would be provided in a procurement contract.<sup>117</sup> The court’s test for preemption, paralleling *Boyle*, states that as long as “prescribed maintenance procedures [are] reasonably precise . . . to ensure that a close relationship exists between the contract duty imposed by the federal government and the state law duty. . . the government contractor defense will preempt.”<sup>118</sup>

The application of the government contractor defense applied to the Burn Pit Litigation would be highly variable depending on the jurisdiction’s interpretation of the *Boyle* test. However, if a court were to apply the analysis of *Hudgens* to the Burn Pit Litigation, the court could look to *Hudgens*’ modified test: did the United States approve “reasonably precise maintenance procedures” in the contract (*Boyle* speaks specifically of specifications, while *Hudgens* asks about maintenance procedures); did the contractor conform to those procedures; and was the United States warned about the dangers in relying on the procedures.<sup>119</sup> However, *Hudgens* still poses a limitation to the Burn Pit Litigation, since the *Hudgens* court addressed the facts of a maintenance contract, arguably different to LOGCAP logistics contracts.

However, *Boyle* is still the only Supreme Court test for the government contractor defense under the FTCA. If a court were to apply *Boyle* and/or *Hudgens*, a court would look to the extent the government was exercising its discretionary function in directing, approving, or controlling KBR in the waste disposal process, thereby causing a significant conflict with federal policy.<sup>120</sup>

Since the litigation is currently unfolding, it is difficult to say how much control and the level of detail the military had over disposal of wastes during contingency operations in Iraq and Afghanistan. KBR argues in its Motion to Dismiss, along with supporting affidavits, that there was a “pervasive ‘military footprint’ and control over the key discretionary policies and

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117. *Id.*

118. *Id.* at 1335.

119. *Id.*

120. *See Boyle*, 487 U.S. at 511.

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tactical decisions as to whether, where, when, and by what means waste would be managed and disposed.”<sup>121</sup> However, review of publicly available contract documents, statements of work, DoD instructions, field manuals, and policy, indicates there was very little specific technical direction from the government.<sup>122</sup> For example, the statement of work calls for broad declarations for KBR to maintain the health and safety of “personnel, equipment and supplies”<sup>123</sup> and to “adhere to sound environmental practices and all applicable. . . laws and regulations.”<sup>124</sup> Additionally, the field waste management technical manual only provides that open burning should not be a regular method of solid waste disposal and allows for interim means prior to the construction on incineration facilities.<sup>125</sup> Application of the government contractor defense under *Boyle* to the Burn Pit Litigation is difficult to predict, given little precedent with LOGCAP contracts and unfolding facts.

### 3. FTCA and Combatant Activities Exception

As discussed above, the Supreme Court in *Boyle* found the government contractor defense was born out of the “discretionary function exception” of the FTCA.<sup>126</sup> However, the FTCA provides other exceptions to the waiver of sovereign immunity. One relevant exception is the “combatant activities exception,” which protects the government from tort claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>127</sup> The extension of this exception to government contractors has been successfully applied in a few

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121. Memorandum in Support of Def.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 8, *In re KBR, Inc., Burn Pit Litig.*, No. 8:09-MD-02083-RWT, 2010 WL 1944178 (D. Md. Jan. 29, 2010).

122. *See, e.g.*, LOGCAP SOW, *supra* note 59, at 23.

123. *Id.*

124. *Id.* at 9.

125. TB MED 593, *supra* note 50, at 7.

126. *See Boyle*, 487 U.S. at 511-12.

127. 28 U.S.C. § 2680(j) (2006).

instances arising out of the Iraq and Afghanistan wars; however, the Supreme Court has yet to address it.<sup>128</sup>

District and circuit courts have addressed the issue with mixed results.<sup>129</sup> In *Koohi v. United States*, the Ninth Circuit extended immunity to government contractors through the FTCA's "combatant activities exception."<sup>130</sup> *Koohi* involved a case of where an Iranian commercial airliner, taking off from a joint military-commercial airport, was mistaken for an Iranian fighter jet and shot down by U.S. military during a "tanker war."<sup>131</sup> The plaintiffs, heirs of deceased passengers, sued both the United States and private contractors for defective design of a military defense system used to shoot down the aircraft.<sup>132</sup> The court extended the FTCA exception to government contractors under the rationale 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."<sup>133</sup> The court then reasoned that since the commercial airline was flying in a combat zone and did not communicate its "civilian status," no duty was owed by either the U.S. or its contractors who manufactured the defense system.<sup>134</sup> District courts, however, have been reluctant to follow *Koohi*.<sup>135</sup> For example, in *Fisher v. Halliburton*, the Southern District of Texas stated that the "extension of the government contractor defense beyond its current boundaries is unwarranted."<sup>136</sup> Similarly, the Eleventh Circuit in *McMahon v. Presidential Airways* declined to exercise its discretion on the

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128. See Zitter, *supra* note 55, § 7; see also *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1366 (11th Cir. 2007).

129. See Zitter, *supra* note 55, § 7.

130. *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992).

131. *Id.* at 1330.

132. *Id.*

133. *Id.* at 1337.

134. *Id.*

135. See, e.g., *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 WL 3940556, at \*5 (S.D. Tex. Jun. 12, 2006) (declining to extend the combatant activities exception under the FTCA to government contractors); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823, at \*5 (S.D. Tex. May 16, 2006) (court was not "persuaded that the reasoning of *Koohi*" of extending the combatant activities exception under the FTCA to government contractors applied to the facts of the case).

136. *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005).



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theory of preemption of government contractor liability based on the “combatant activities exception.”<sup>137</sup>

The D.C. Circuit most recently addressed the issue of whether to extend the “combatant activities exception” to government contractors in *Saleh v. Titan Corp.*<sup>138</sup> In *Saleh*, the D.C. Circuit reviewed the decision of the district court, which held that claims against government contractors involved in a service contract providing interrogation or interpretation services at Iraqi prisons were preempted under the FTCA “combatant activities exception.”<sup>139</sup> The district court “fashioned a test of first impression” for contractors in the combat context, which would allow preemption when contract employees are “under the direct command and *exclusive* operational control of the military chain of command.”<sup>140</sup> The action against defendant Titan was dismissed based on this test, and the plaintiff appealed; meanwhile, the co-defendant CACI’s motion to dismiss was denied, and defendant CACI appealed the denial.<sup>141</sup>

In addressing the plaintiff and defendant appeals, the D.C. Circuit agreed the district court properly focused the issues<sup>142</sup> but provided a lengthy rationale on how extending liability protection to government contractors under the FTCA’s “combatant activities exception” squares with *Boyle*.<sup>143</sup> The crux of the D.C. Circuit’s argument is that *Boyle* was premised on the “significant conflict between federal interests and state law,”<sup>144</sup> and the court looked at the FTCA exceptions “to determine that the conflict was significant and to measure the boundaries of the conflict.”<sup>145</sup> In *Saleh*, the D.C. Circuit applied the rationale developed in *Boyle* and found that the FTCA exception on combatant activities is the relevant exception that creates the significant conflict.<sup>146</sup> The

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137. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1366 (11th Cir. 2007).

138. *Saleh v. Titan Corp.*, 580 F.3d 1, 23, 34 (D.C. Cir. 2009).

139. *Saleh*, 580 F.3d at 4.

140. *Id.* (citing *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007)).

141. *Id.* at 4.

142. *Id.*

143. *Id.* at 5-8.

144. *Id.* at 6.

145. *Saleh*, 580 F.3d at 6.

146. *Id.*

court went on to say that the conflict arises because combatant activity is an area the federal government always occupies, creating a significant conflict with state tort law- an idea the court labels “battle-field preemption.”<sup>147</sup> Just as the *Boyle* test was devised to ensure a government discretion function was at stake,<sup>148</sup> the circuit court developed a test to outline the scope of conflict under the “combatant activities exception.” Under the *Saleh* test, “during wartime, where a private service contractor is integrated into combatant activities, over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”<sup>149</sup>

This test is clearly favorable to defense in the Burn Pit Litigation; however, the Eleventh Circuit recognizes that “a service contractor might be supplying services in such a discrete manner – perhaps even in a battlefield context – that those services could be judged separate and apart from combat activities of the U.S. military.”<sup>150</sup> This recognition by the court could be an important factor in applying the *Saleh* test to the Burn Pit Litigation if it can be shown that, although in a battle field context, waste disposal services are performed in a “discrete manner” that can be judged separately from the military combat activities. The court in *Saleh* compares this situation to *Boyle* where a government contractor contracted to supply a product, but was not subject to “reasonably precise specifications.”<sup>151</sup>

### C. Political Question

The political question doctrine is based in the constitutional constraint of separation of powers. The doctrine excludes from judicial review those controversies revolving around “policy choices and value determinations constitutionally committed for resolution to the legislative and executive branch.”<sup>152</sup> In *Baker v. Carr*, the Supreme Court identified six factors that indicate the

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147. *Id.* at 7.

148. *Id.* at 8.

149. *Id.* at 9.

150. *Id.* at 9.

151. *Boyle*, 487 U.S. at 512; *Saleh*, 580 F.3d at 9.

152. 16A Am. Jur. 2d Constitutional Law § 268 (2009).

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presence of a nonjusticiable political question.<sup>153</sup> Under *Baker*, an issue is nonjusticiable on political question grounds if it displays:

[1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>154</sup>

Often, political question cases arise in the context of foreign relations or national security, and accordingly, the doctrine has been used in dismissing claims against the U.S. government and government contractors in times of war. The military wartime cases are “an arena in which the political question doctrine has served one of its most important and traditional functions – precluding judicial review of decisions made by the Executive during wartime.”<sup>155</sup> As such, a number of cases against military contractors have been dismissed on political question grounds by the district courts.<sup>156</sup> However, *Baker* notes, “not all questions ‘touching foreign relations’ are nonjusticiable.”<sup>157</sup> Many of the

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153. *Baker v. Carr*, 369 U.S. 186, 211-18 (1962).

154. *Id.* at 217.

155. *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008).

156. *See, e.g.*, *Fisher v. Halliburton*, 454 F. Supp. 2d 637, 644-45 (S.D. Tex. 2006); *Lane v. Halliburton*, No. H-06-1971, 2006 U.S. Dist. LEXIS 63948, at \*15 (S.D. Tex. Sept. 7, 2006); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 U.S. Dist. LEXIS 75574, at \*6 (S.D. Tex., Oct. 11, 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at \*7 (S.D. Tex. Aug. 30, 2006); *Carmichael v. Kellog, Brown & Root Serv., Inc.*, 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008); *Whitaker v. Kellog Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006).

157. *Lane*, 529 F.3d at 559 (quoting *Baker*, 369 U.S. at 211).

district court decisions that hastily dismissed a plaintiff's claims have been reversed or are pending appeal in the circuit courts.<sup>158</sup>

*Lane v. Halliburton* and *Carmichael v. KBR*, two cases involving LOGCAP contracts during the Iraq war, came to different results with similar facts involving accidents during military convoys. Both circuits suggested that the backdrop of the Iraq war posed serious concerns for "second-guessing the acts and decisions of the Army,"<sup>159</sup> which are normally "insulated from judicial review"<sup>160</sup> under the political question doctrine. In *Lane v. Halliburton*, the Fifth Circuit reserved three district court cases in a consolidated appeal, holding that the political question doctrine does not necessarily bar tort claims against government contractors performing support services under LOGCAP contracts even when "political questions. . .loom so large in the background."<sup>161</sup> The decision was based largely on the fact that the plaintiffs' claims were for fraud and misrepresentation, and as such, the court felt there was no lack of judicially manageable standards to judge the negligence.<sup>162</sup> Even though the factual setting was in the context of military activities, the claims could be resolved with "ordinary" fraud and misrepresentation standards without making an "impermissible review of wartime decision-making."<sup>163</sup>

KBR in the Burn Pit Litigation would likely rely on the Eleventh Circuit's decision in *Carmichael v. KBR*, affirming the grant of the defendant's motion for summary judgment on nonjusticiable political question grounds.<sup>164</sup> The Eleventh Circuit found that the facts of the case would require

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158. See *id.* at 548 (consolidating and reversing district court cases *Fisher v. Halliburton*, *Lane v. Halliburton*, and *Smith-Idol v. Halliburton*, holding plaintiffs claims were not barred by the political question doctrine); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007) (affirming lower court's decision declining to dismiss plaintiff's cause of action on political questions grounds).

159. *Lane*, 529 F.3d at 567.

160. *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271, 1275, 1280 (11th Cir. 2009).

161. *Lane*, 529 F.3d at 568.

162. *Id.* at 561.

163. *Id.* at 568.

164. *Carmichael*, 572 F.3d at 1275.

“reexamination of many sensitive judgments and decisions entrusted to the military in a time of war.”<sup>165</sup> In *Carmichael*, the plaintiffs’ claims were based on negligent actions of the contractor during a military convey; however, the plaintiffs could not show that the military did not exercise complete control over the convoy.<sup>166</sup> The defense’s evidence indicated that the military, not the contractor, was in control regarding all convey decisions, such as arranging, routing, and providing the security measures to be employed.<sup>167</sup> In the Burn Pit Litigation, KBR asserts a similar evidentiary basis, attempting to show that KBR had no hand in the decision-making process for waste disposal.<sup>168</sup> If KBR can establish their actions were solely based on military directives, policies, and judgments, it will be difficult for the court to review Plaintiffs’ claims without reviewing, reexamining, and “second-guessing” critical and sensitive military policies decisions.

Even if Plaintiffs can establish that KBR had much more control over the burn pits than is suggested in the Motion to Dismiss, the *Baker* factor of “judicially manageable standards” poses limitations. In *McMahon*, the political question doctrine did not bar the plaintiff’s wrongful death action for soldiers that were killed during a plane crash operated by the defendants through a transportation services contract in Afghanistan.<sup>169</sup> *McMahon* found that the defendants did not establish the presence of the *Baker* factors to warrant dismissal based on a political question. In particular, although in a wartime context, it was asserted that the defendants negligently staffed, equipped, and operated the flight that crashed.<sup>170</sup> The court found, “as in any tort suit involving a plane crash, the court will simply have to determine whether the choices Presidential made were negligent.

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165. *Carmichael*, 572 F.3d at 1281.

166. *Id.* at 1283.

167. *Id.* at 1277.

168. See Memorandum in Support of Def.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 13-19, *In re KBR, Inc., Burn Pit Litig.*, No. 8:09-MD-02083-RWT, 2010 WL 1944178 (D. Md. Jan. 29, 2010) (discussing the military’s role in burn pit waste disposal methods); see also *Carmichael*, 572 F.3d at 1275.

169. *McMahon v. Presidential Airways Inc.*, 502 F.3d 1331, 1336 (11th Cir. 2007).

170. *Id.* at 1363-64.

It is well within the competence of a federal court to apply negligence standards to a plane crash.”<sup>171</sup> The court continued by acknowledging “that flying over Afghanistan during wartime is different from flying over Kansas on a sunny day,” but that fact did not make the “flexible standards of negligence” unmanageable for judicial review.<sup>172</sup> On the other hand, the Fifth Circuit stated that courts dealing with situations involving military combat or training are not capable of “developing judicially manageable standards.”<sup>173</sup>

In the case of KBR Burn Pit Litigation, Defendants argue there are no standards for a court to judge the actions of KBR employees when the U.S. military directed KBR. KBR contends that the reasonable person standard is not applicable here because the case is not “a garden variety toxic tort suit.”<sup>174</sup> What is compelling and problematic for Plaintiffs is that, although waste disposal, via open burning, is strictly prohibited in the U.S. and presents a clear standard for cases on domestic soil, there is no standard available to judge reasonableness of care or duty when burn pit use in wartime scenarios is permitted by the military. The *Carmichael* court comments, “in the typical negligence action, judges and juries are able to draw upon common sense and everyday experience” to determine if a defendant acted reasonably in a given situation.<sup>175</sup>

## V. CONCLUSION

Based upon a review of case law, there are many unresolved issues regarding how a reviewing court might address certain defenses in the KBR Burn Pit Litigation. Which government contractor test will a court employ – the Supreme Court’s *Boyle* test, or the *Saleh* test? Can the issues of waste disposal be separated out from governmental decision-making to

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171. *Id.* at 1364.

172. *Id.*

173. *Id.*

174. Memorandum in Support of Def.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 33, *In re KBR, Inc., Burn Pit Litig.*, No. 8:09-MD-02083-RWT, 2010 WL 1944178 (D. Md. Jan. 29, 2010).

175. *Carmichael v. Kellog, Brown & Root Serv., Inc.*, 572 F.3d 1271,1289 (11th Cir. 2009).

escape dismissal based on political question? Or could derivative sovereign immunity principles play a role in barring the claims?

What is clear, however, is none of the tests or standards discussed within this article are sufficient to address the liability of government contractors under military logistics and performance contracts in the wartime context. The FTCA, the *Feres* doctrine, and the *Boyle* decision could not imagine the scope of military contracting taking over roles that once were exclusively conducted by military personnel. The *Boyle* test is likely too narrow to address LOGCAP contracts dealing with waste disposal services, while *Hudgens* and *Saleh* have their own limitations. Although *Hudgens* addressed a maintenance services contract, the government specifications for conduct under this contract were still fairly well defined, allowing the court to effectively modify the *Boyle* test. Although the *Boyle* court suggested it should not matter what type of contract it is, the *Boyle* test is extremely difficult to apply because LOGCAP contracts by their nature lack the specificity of supply contracts.<sup>176</sup> Application of *Saleh* presents limitations to the Burn Pit Litigation as well. The *Saleh* test applies to combatant activities; although burn pit operation and use occurred during wartime in a combatant zone, the activity itself is not combative.

The lack of a clear test for holding government military contracts liable under LOGCAP contracts poses significant issues for Plaintiffs in the Burn Pit Litigation. Although Plaintiffs intend to litigate this suit as a “garden variety toxic tort” case,<sup>177</sup> the factual complexities will pose concern for a reviewing court in determining whether the negligence claims can be judged as such and not be influenced by the wartime context and setting.

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176. See Justin Jacobs, *The Boyle Test is an Insufficient Standard for Determining Whether to Allow Private Military Contractors to Assert the Government Contractor Defense*, 36 HOFSTRA L. REV. 1377, 1399 (2008); see also Rebecca Rafferty Veron, *The Future of Competitive Sourcing, Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 381 (2004).

177. Memorandum in Support of Def.’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 33, *In re KBR, Inc., Burn Pit Litig.*, No. 8:09-MD-02083-RWT, 2010 WL 1944178 (D. Md. Jan. 29, 2010).