

No. _____

In the
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,

Petitioner,

v.

CHERYL A. HARRIS, Co-Administratrix of the
Estate of Ryan D. Maseth, deceased; and
DOUGLAS MASETH, Co-Administrator of the
Estate of Ryan D. Maseth, deceased,

Respondents.

**On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During the Iraq War, the U.S. Army had no perfect option for housing troops and protecting them from rocket and mortar fire. The Army ultimately concluded that the “least bad” option was to billet thousands of soldiers in pre-existing, Iraqi-constructed “hardstand” buildings. The Army knew that those buildings contained hazardous, ungrounded electrical systems, but determined that the hazards from those substandard systems were outweighed by the overarching need to protect troops from enemy fire. The Army also lacked funds to upgrade the hardstand buildings, and chose not to construct new housing facilities to avoid the appearance of a prolonged occupation.

Respondents’ son was a soldier who died in a tragic accident in which he was electrocuted while showering in his assigned living quarters in a hardstand building at a forward operating base near Baghdad. Respondents brought state-law tort claims against Petitioner Kellogg Brown & Root Services, Inc., a battlefield support contractor that provided facilities maintenance and other essential combat support services to the Army in the Iraq war zone. The district court correctly concluded that Respondents’ claims were nonjusticiable under the political question doctrine and were preempted by the “combatant-activities exception” to the Federal Tort Claims Act (“FTCA”), but the Third Circuit reversed on both issues. Remarkably, the Third Circuit viewed the political question issue as turning on which state law applied to these events in Iraq. The questions presented are:

(1) Whether the political question doctrine bars state-law tort claims against a battlefield support contractor operating in an active war zone when adjudication of those claims would necessarily require examining sensitive military judgments.

(2) Whether the FTCA's "combatant-activities exception," 28 U.S.C. § 2680(j), preempts state-law tort claims against a battlefield support contractor that arise out of the U.S. military's combatant activities in a theater of combat.

PARTIES TO THE PROCEEDING

Petitioner Kellogg Brown & Root Services, Inc. was the Appellee in the proceedings before the Third Circuit and the Defendant in the proceedings before the district court. Respondents Cheryl A. Harris and Douglas Maseth were Appellants before the Third Circuit and Plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

KBR, Inc. and KBR Holdings, LLC are parent corporations to Petitioner Kellogg Brown & Root Services, Inc. KBR, Inc. and KBR Holdings, LLC each have a 10% or greater ownership interest in Kellogg Brown & Root Services, Inc. KBR, Inc. is a publicly held corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kellogg Brown & Root Services, Inc. (“KBR”) provided combat support services to the U.S. Army during the Iraq War. Respondents seek to hold KBR liable under state tort law for a tragic accident that occurred at a forward operating base in Iraq. Sensitive military judgments pervade every aspect of this case, and adjudication of Respondents’ claims would necessarily require examining the Army’s strategic battlefield decisions. Yet the Third Circuit deemed application of the political question doctrine to turn on which state’s law is applicable, and refused to find Respondents’ claims preempted under the “combatant-activities exception” to the Federal Tort Claims Act. The Third Circuit’s decision badly misconstrues those doctrines, adopts an unprecedented justiciability framework that will lead to absurd and inequitable results, and conflicts with a number of other decisions correctly recognizing that state tort law has no place in a foreign war zone.

OPINIONS BELOW

The Third Circuit’s opinion is reported at 724 F.3d 458, and reproduced at Pet.App.1-46. The district court’s opinion is reported at 878 F. Supp. 2d 543, and reproduced at Pet.App.49-164.

JURISDICTION

The Third Circuit issued its decision on August 1, 2013. KBR filed a timely petition for rehearing en banc, which the court denied on September 10, 2013. On November 8, 2013, Justice Alito extended the time for filing this petition to and including January 8, 2014. *See* No. 13A476. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II section 2 of the U.S. Constitution provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.” Article I section 8 of the Constitution provides that “[t]he Congress shall have Power ... [t]o raise and support Armies,” and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States....”

The FTCA provides in relevant part that the United States’ waiver of sovereign immunity for tort claims “shall not apply to ... (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” 28 U.S.C. § 2680.

STATEMENT OF THE CASE

A. The Army’s Reliance on Civilian Contractors To Perform Essential Battlefield Support Functions

This is one of numerous “contractor-on-the-battlefield” tort suits that have arisen out of the U.S. military’s heavy reliance upon civilian support contractors in active war zones such as Iraq and Afghanistan.

Before the advent of the modern, all-volunteer military, uniformed soldiers typically performed combat support functions such as maintaining facilities, transporting supplies, and performing countless other logistical tasks essential to the war effort. But with the transition to an all-volunteer

military—and the corresponding reduction in size of the armed forces—it is often impractical or unfeasible for such tasks to be performed by uniformed soldiers. Instead, the military has entered into a symbiotic relationship with in-theater service contractors to perform such essential combat support activities. By using contractors for those tasks, the military has “freed up” soldiers to “concentrate on the core functions of warfighting.” C.A.App.429 (Vines Decl. ¶ 6); see Army Reg. 700-137 (Logistics Civil Augmentation Program).

In December 2001, the Army awarded KBR an umbrella contract that included “combat service support.” The Army defines “combat service support” as the provision of “essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war.”¹ Under that umbrella contract, KBR performed vital functions for the war effort, such as servicing base facilities, delivering fuel, repairing equipment, preparing meals, and maintaining water supplies. In short, KBR personnel handled critical responsibilities, such as “KP duty,” traditionally performed by soldiers before the modern, all-volunteer military. General John Vines, the former Commander of the Multi-National Corps–Iraq, described KBR’s services as “essential to the success

¹ U.S. Army Field Manual 1-02, Operational Terms and Graphics at 1-36 (2004), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_02.pdf.

of the military's combat mission." C.A.App.430 (Vines Decl. ¶ 7).²

B. Army Housing During the Iraq War at the Radwaniyah Palace Complex

Military commanders deciding where to quarter troops during Operation Iraqi Freedom had no perfect options and faced difficult tradeoffs. Billeting soldiers in pre-existing, Iraqi-constructed buildings would expose them to known risks of poor construction, including electrical shocks resulting from faulty wiring. But building new secure housing would generate the appearance that the United States was a long-term occupying force, thus undermining strategic military and diplomatic goals. And housing soldiers in temporary structures would jeopardize security by leaving soldiers with insufficient protection from the near-constant stream of mortar, missile, and small arms fire that plagued the region. C.A.App.432-33 (Vines Decl. ¶ 15).

After exhaustively considering the risks and benefits of each alternative, the Army decided to house many of its Special Forces troops in pre-existing, Iraqi-constructed concrete buildings (also known as "hardstand" structures). C.A.App.283-84. The Army concluded that the overriding need to protect soldiers from incoming enemy fire outweighed the well-documented risk of electrical shocks from

² KBR's contract required the government to reimburse KBR for virtually all contract-related costs, including most third-party litigation costs and money judgments not covered by liability insurance. *See* 48 C.F.R. § 52.228-7(c).

the substandard electrical systems in many pre-existing hardstand buildings. *Id.*

The Radwaniyah Palace Complex (“Palace Complex”) is a massive facility on the outskirts of Baghdad that includes a Hussein-era palace and more than 100 other Iraqi-constructed buildings. Shortly after the invasion in 2003, the Army began using the Palace Complex to house Special Forces troops and as the headquarters for the Combined Joint Special Operations Task Force. The Army exercised, at all times, “overall responsibility for, and authority and control of, the activities and operations that took place at the [Palace Complex].” Pet.App.53; see C.A.App.2081 (Army was responsible for “real estate management and infrastructure maintenance”).

From the start, it was “generally accepted that the buildings in the [Palace Complex] did not meet Western construction standards and that there were deficiencies in the electrical systems, including a lack of proper grounding and bonding.” Pet.App.56. In 2003, the Army hired an Iraqi contractor to renovate and re-wire several buildings at the Palace Complex. It was well-known within the military that Iraqi contractors often failed to perform proper electrical bonding and grounding. The Army chose a local contractor nonetheless to improve relations with the local community. Army officials subsequently accepted the renovation work and moved soldiers into the facilities despite their awareness that the Iraqi contractor’s electrical work was “bad news,” “everything [was] jerry-rigged together,” and “everything [needed] to be fixed.” C.A.App.593.

Army commanders were well aware of the risk of shocks from such poorly installed electrical systems. *See* Pet.App.59-64. Between 2004 and 2006, there were numerous reports of injuries, and even deaths, resulting from shocks, including soldiers who were electrocuted while showering. Pet.App.59-60. Briefings to senior Army commanders and Defense Department officials emphasized the “serious threat to the life, health, and safety of our soldiers” posed by faulty wiring, and warned that troops “could be electrocuted in a shower.” C.A.App.322-24. Indeed, several senior officers openly criticized their commanders’ decision to expose soldiers to the life-threatening risks associated with ungrounded hardstand buildings. After no corrective action was taken in 2006, one Lieutenant Colonel predicted, “I guess nobody is going to care unless somebody dies.” C.A.App.412.

Although “shocking incidents of soldiers occurred regularly,” Army leadership nonetheless concluded that this risk was “minor” when compared to “other more pressing military issues such as power generation and the protection of base residents from indirect enemy fire.” Pet.App.62. As with countless other wartime decisions, Army commanders were forced to select the “least bad’ option available to fulfill the mission under the limitations [they] faced.” C.A.App.431 (Vines Decl. ¶ 11); *see id.* ¶ 10 (Army adopted and accepted a “good enough” standard for construction and base maintenance services).

C. KBR's Combat Support Services at the Palace Complex

From April 2006 until February 2007, the Army engaged KBR to perform limited maintenance at the Palace Complex. KBR was not retained to bring the electrical system up to United States standards but rather was hired to, among other things, “support *existing* electrical systems.” Pet.App.57-58. The contract itself stated that the existing electrical systems at the Palace Complex were in “poor condition.” *Id.*

After that contract expired, the Army directed KBR to perform operations and maintenance work at the Palace Complex pursuant to its broader umbrella contract. During the transition to that contract, KBR inspected the Palace Complex facilities and provided the military written technical reports identifying numerous problems with the electrical systems.

Given the poor state of the facilities at the Palace Complex, KBR initially proposed that it comprehensively upgrade the electrical systems and perform preventative maintenance to address known dangers. Pet.App.67. This “Level A” maintenance would have cost between ten and twenty million dollars. Pet.App.67 n.6. But, in light of limited funding and other spending priorities, the Army determined that “the cost associated with Level A maintenance was prohibitive.” Pet.App.67. The Army also rejected a “refurbishment” option that would have required KBR to upgrade the Palace Complex facilities “to Western construction standards.” Pet.App.71-72 & n.8.

Instead, the Army directed KBR to provide “Level B” maintenance, which included limited upkeep of *existing* systems and “required only that KBR respond to service order requests and fix the problems initially identified by military personnel.” Pet.App.122. This lower level of service cost the government considerably less than Level A maintenance, but did not permit “inspections, preventative maintenance, and upgrades.” Pet.App.67-68. KBR was allowed to perform “[l]imited maintenance” only after receiving a specific “service request” from the Army. Pet.App.68. The Army “controlled the terms and conditions of the contract,” and KBR “was not permitted to engage in any work ... outside the scope of the contract without prior approval from the military.” Pet.App.69-70.

D. Staff Sergeant Maseth’s Death

Among the troops assigned to live in the Palace Complex was Staff Sgt. Ryan Maseth, a Green Beret and Army Ranger deployed with the 5th Special Forces Group (Airborne). Like other soldiers living in the Palace Complex, Staff Sgt. Maseth was aware of the risk of electrical shocks from faulty wiring in his building, and knew that the Army provided alternative showering facilities that did not pose the same risk. Two of Staff Sgt. Maseth’s fellow soldiers testified that they “advised Maseth of the shocking risk posed by using the shower in [the building] to which he was assigned.” Pet.App.139. One of those soldiers “explained that Maseth should put his hand out to test the water before getting into the shower and even advised him that the problem would not be fixed unless the entire building was rewired.” *Id.* As

the district court explained, “it is clear that Maseth was warned of the problems” posed by the electrical system at the Palace Complex. Pet.App.138-39 n.33.³

Staff Sgt. Maseth died in a tragic accident on January 2, 2008. While showering in his assigned living quarters at the Palace Complex, an ungrounded water pump failed and energized the pipes connected to it. Pet.App.82-83. Because every component of the electrical system was similarly ungrounded, the electrical current flowed unchecked throughout the building. Staff Sgt. Maseth was electrocuted when he touched the metal showerhead. A senior commanding General subsequently noted that “the tragic and unfortunate electrocution that took SSG Maseth’s life could have happened at any other ungrounded pre-existing building in Iraq.” C.A.App.432-33 (Vines Decl. ¶ 15).

Staff Sgt. Maseth’s death spurred multiple Executive Branch and congressional investigations into the problem of soldier electrocutions in Iraq. In a July 2009 report, the Defense Department’s Inspector General concluded that “multiple systems and organizations failed, leaving [Staff Sgt.] Maseth and other US Service members exposed to unacceptable risk.” C.A.App.2122. And the Army

³ Soldiers hesitated to complain about shocks because they—like the Army officials who were responsible for housing decisions—“did not consider the shocks as a serious issue when compared to the other risks they faced as they served during in the war in Iraq.” Pet.App.80; *see also* Pet.App.80-81 (describing incident in which soldiers plugged a cell-phone-jamming device into an overloaded generator, despite KBR’s warnings not to do so, because the need to prevent the remote detonation of car bombs outweighed the risk of electrical system failure).

Criminal Investigation Command concluded in August 2009 that “[t]here was no single person or organization entirely responsible for electrical safety in the [Palace Complex] and whose act or omission caused SSG Maseth’s death.” C.A.App.2157.

The Inspector General’s report explicitly noted that the “chain of command is responsible for the safety and well-being of the soldiers under their control,” and that “[s]oldiers are responsible for their own safety as well as the safety of their fellow soldiers and equipment to the greatest extent possible under the given mission parameters.” C.A.App.2164-65. The report also concluded that the Special Forces soldiers housed at the Palace Complex were aware of the risk of shocks, but “had become accustomed to more serious threats and had lived in much worse housing” and “didn’t want to move” to alternate housing. C.A.App.2155-56. Though not exonerating KBR, both investigations highlighted military decisions that led to Staff Sgt. Maseth’s tragic death.

In February 2008, one month after Staff Sgt. Maseth’s death, the Army finally directed KBR to “rewire the building and ensure proper grounding of all electrical units, systems, and components.” Pet.App.87.

E. Proceedings Before the District Court

On March 24, 2008, Staff Sgt. Maseth’s parents filed negligence claims against KBR in state court. Because the United States is immune from suit under both the FTCA’s combatant-activities exception and *Feres v. United States*, 340 U.S. 135 (1950), KBR is the only named defendant. The crux

of Respondents' complaint is that KBR should have taken a number of affirmative steps to fix problems with the bonding and grounding of the electrical systems at the Palace Complex. *See* Pet.App.114-15 (summarizing additional bonding and grounding work that KBR allegedly "should have" performed).

KBR removed the case to federal court and then moved to dismiss, arguing that the case presents a nonjusticiable political question and is preempted by the combatant-activities exception to the FTCA. The district court denied KBR's first motion to dismiss, and the Third Circuit dismissed an interlocutory appeal from that decision. On remand, the district court instructed the parties to engage in extensive discovery on Respondents' claims and KBR's defenses. During the discovery period, the parties deposed seventeen current and former members of the military and U.S. government, including senior Army officers, senior enlisted personnel, and contracting officials.

KBR subsequently renewed its motion to dismiss, which the district court granted on July 13, 2012. The court held that Respondents' state-law negligence claims presented nonjusticiable political questions because "the military presence looms large over nearly every aspect of this case," and "further adjudication of this dispute will inextricably lead to consideration of sensitive military judgments for which no judicially manageable standards exist." Pet.App.51, 102.

The district court found that "military personnel were aware of the specific risk of electrocution in shower facilities posed by the deficient electrical

systems in hardstand buildings,” but “felt that the shocking incidents were minor when compared to other pressing matters at the base such as power distribution and protection from indirect fire.” Pet.App.117-18. The court also noted that, by expressly choosing the less-comprehensive “Level B” maintenance package, the Army acknowledged that the buildings in the Palace Complex would be maintained “as is,” and that KBR would not be expected to perform “preventative maintenance or inspections” or “upgrades.” Pet.App.122-24.

The district court thus concluded that KBR had presented “sufficient evidence” to show that “the military exposed soldiers to what its commanders determined to be an acceptable level of risk after considering all of the other hazards of war which were faced by soldiers in the Iraq war theatre and its ability to fund the electrical upgrades and safety features which are admittedly standard here in the United States.” Pet.App.52. In short, “the military’s involvement cannot be divorced from any negligent act or omission of KBR.” Pet.App.110.

The district court further held that Respondents’ claims are preempted by the combatant-activities exception to the FTCA because KBR was “fully integrated in the combatant activities of the military” and “supported ... the military’s missions in Iraq.” Pet.App.162-63.

F. The Third Circuit’s Decision

The Third Circuit reversed. On the political question issue, the court readily acknowledged that “KBR has presented sufficient evidence to support its argument that the military, rather than KBR, was

the *exclusive proximate cause* of Staff Sergeant Maseth’s death.” Pet.App.20 (emphasis added). As the court explained, “[e]lectrocution was a reasonably foreseeable result of several strategic military decisions,” such as the decision to use ungrounded hardstand buildings for troop housing and the decision not to perform comprehensive upgrades of the electrical systems in those buildings. Pet.App.22.

Despite these findings, the Third Circuit nonetheless held—in reasoning that was not advanced by either party or the district court—that application of the federal, constitutionally-based political question doctrine “depends on which state law controls,” and requires an antecedent choice-of-law analysis. Pet.App.29. Texas and Tennessee apply “proportional liability” systems for calculating damages, and the Third Circuit concluded that if one of those states’ law applies, then “damages cannot be estimated without evaluating unreviewable military decisions.” Pet.App.28. But the court concluded that the case would be justiciable if Pennsylvania law applies because, under Pennsylvania’s joint-and-several liability rule, “the plaintiffs are free to obtain the entirety of their relief from KBR.” Pet.App.28-29. The Third Circuit remanded to the district court to determine “which state’s law applies.” Pet.App.33.⁴

⁴ For similar reasons, the Third Circuit concluded that “[w]hether KBR’s contributory-negligence defense presents a nonjusticiable issue also turns on the applicable state law.” Pet.App.30-36. The court held that resolution of this issue would turn on nuances of Texas, Tennessee, and Pennsylvania law about whether fault can be assigned to nonparties for purposes of a contributory-negligence defense. *Id.*

Although such a state-law focused view of the political question doctrine would seem to strengthen the case for preemption, the Third Circuit held that Respondents' claims were not preempted by the combatant-activities exception to the FTCA, 28 U.S.C. § 2680(j). The court expressly rejected the test proposed by the United States, which would ask whether a similar tort claim against the United States would fall within the FTCA's combatant-activities exception and whether the contractor was acting within the scope of its authority at the time of the incident. Pet.App.42-43.

The court purported to endorse the D.C. Circuit's test for preemption of claims against a battlefield support contractor—*i.e.*, when the 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.” Pet.App.42 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). But the Third Circuit engaged in a searching inquiry into whether the military retains command authority, which is contrary to the D.C. Circuit's approach and its broader holding that the combatant-activities exception “reveals a policy of ‘the elimination of tort from the battlefield.’” Pet.App.41-43.

The court acknowledged that KBR was “integrat[ed] into the military's combatant activities” in an “active war zone.” Pet.App.43-44. But it nonetheless concluded that “[t]he considerable discretion KBR had in deciding how to complete the maintenance at issue here ... prevents the plaintiffs’

suit from being preempted because the military did not retain command authority over KBR's actions." Pet.App.44-45.

KBR filed a timely petition for rehearing en banc, which the Third Circuit denied on September 10, 2013. The Third Circuit has stayed the mandate pending this Court's review.

REASONS FOR GRANTING CERTIORARI

The Third Circuit refused to affirm the dismissal of Respondents' state-law tort claims for injuries arising out of U.S. military decisions in Iraq. That decision warrants review by this Court for two independent reasons.

First, the Court should grant certiorari to address whether state-law tort claims against a battlefield support contractor operating in an active war zone are barred by the political question doctrine when adjudication of those claims would necessarily require scrutinizing sensitive military decisions. Military judgments pervade every aspect of this case. The Army made a calculated decision to house troops in pre-existing, Iraqi-constructed buildings despite the well-documented risk of electrical shocks from faulty wiring. Due to funding constraints, the Army also chose to maintain those buildings on an "as-is" basis rather than comprehensively upgrading the electrical systems (as KBR had proposed). Respondents' negligence claims against KBR simply cannot be disentangled from the Army's strategic decisions regarding troop housing and resource allocation for the war effort in Iraq.

The Third Circuit's conclusion that application of the political question doctrine turns on the nuances

of state tort law and requires an antecedent choice-of-law analysis is deeply flawed on a number of levels. The political question doctrine is a constitutional principle derived from the separation of powers, and turns on the unique competencies of each branch of the *federal* government. A uniform federal rule is especially important in cases, such as this one, that are based on events that occurred in a war zone halfway around the world. On a foreign battlefield, both the military and the military's contractors are dealing with service members as U.S. service members, not as residents of particular states whose idiosyncratic tort law rules might or might not permit a suit to go forward. The events in question occurred in military housing in Iraq; it is absurd to hold that the political question doctrine bars a suit brought by a soldier from Tennessee but not one from Pennsylvania.

The Third Circuit's reasoning—which was subsequently adopted by the Fifth Circuit as well—is flatly contrary to *Taylor v. KBR*, 658 F.3d 402 (4th Cir. 2011), and *Carmichael v. KBR*, 572 F.3d 1271 (11th Cir. 2009). Both *Taylor* and *Carmichael* involved tort claims against KBR arising out of its combat support functions in Iraq. But, unlike the Third Circuit here, the Fourth and Eleventh Circuits had little difficulty concluding that the claims were nonjusticiable. As the Eleventh Circuit explained in *Carmichael*, “it would be impossible to determine that [KBR] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments.” *Id.* at 1295. Neither court remotely suggested that application of the political question

doctrine required an antecedent choice-of-law inquiry into the nuances of state tort law.

Second, the Court should grant certiorari to address whether the “combatant-activities exception” to the FTCA preempts state-law claims against a battlefield support contractor that arise out of the military’s combatant activities in a war zone. There is no question that the combatant-activities exception bars Respondents from suing the military directly for injuries incurred at a forward operating base in Iraq. It makes no sense to allow identical claims to proceed against a *contractor* based on the same underlying events. Regardless of whether the defendant is the United States or a contractor, critical federal interests will be undermined if tort claims arising out of combatant activities are allowed to proceed. The United States itself has emphasized that subjecting contractors to state-law tort suits may burden the military with intrusive discovery requests and result in unwarranted judicial probing of the military’s wartime policies—which is precisely what has happened in this case. The Third Circuit’s holding that a state-law tort claim is not preempted if the contractor exercised any “discretion” in performing its contractual duties squarely conflicts with the D.C. Circuit’s decision in *Saleh*, 580 F.3d 1, and the position of the United States.

Both of these issues independently merit this Court’s review, but together they make the need for this Court’s review particularly acute. The notion that the applicability of the distinctly-federal political question doctrine turns on the details of state law is profoundly flawed. But if the applicability of that

doctrine to actions on a foreign battlefield really did turn on the vagaries of a soldier's home-state tort law, the need for a uniform rule of federal preemption would be that much more obvious. One way or the other, it is clear that state law has no place on a foreign battlefield. That has long been obvious in suits against the U.S. military. Given the realities of the modern all-volunteer military, in which contractors perform functions traditionally discharged by soldiers, it makes no sense to have a different rule for contractors.

The wars in Iraq and Afghanistan have triggered hundreds of "contractor-on-the-battlefield" tort suits brought by soldiers and/or civilians, with no sign of abating. The decision below promises that if plaintiffs' lawyers just pick the right state tort law and theory, they can recover against contractors for battlefield injuries. This Court should make clear that this is a false promise and stem this tide of cases.

I. The Court Should Grant Certiorari To Address The Applicability Of The Political Question Doctrine To State-Law Tort Claims Against A Battlefield Support Contractor Operating In An Active War Zone.

A. Adjudication of Respondents' Claims Would Unquestionably Implicate Strategic Military Decisions.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed ... to the halls of Congress

or the confines of the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986). That is, a federal court should dismiss a case as nonjusticiable if there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” or “a lack of judicially discoverable and manageable standards for resolving it.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

It is “difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches” than military affairs and foreign policy, and it is “difficult to conceive of an area ... in which the courts have less competence.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). The Constitution provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States,” U.S. Const. art. II, § 2, and that “[t]he Congress shall have Power... [t]o raise and support Armies,” and “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States,” *id.* art. I, § 8.

As this Court has explained, “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments,” and “[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.” *Gilligan*, 413 U.S. at 10. Indeed, the very nature of warfare “requires military commanders to conduct risk assessments of

numerous risks that would be unacceptable in civilian life which they must weigh on a daily basis.” Pet.App.120.

This is a case in point. The risks from the substandard wiring of the pre-existing Iraqi hardstand building “would be unacceptable in civilian life,” *id.*, but so too would the risks of mortar fire, while diplomatic concerns about erecting permanent structures would have no analog whatsoever in ordinary civilian life. State tort law, which is all about apportioning duties and liability for the incidents of ordinary civilian life, has no role in balancing these military responsibilities. Indeed, applying ordinary civilian tort law to this situation is the kind of absurdity that the political question doctrine was designed to prevent.

Even beyond the basic trade-offs among the risks of electrical shocks, the risks from mortar fire, and various diplomatic imperatives, strategic military judgments pervade every aspect of this case. The Army controlled where troops would live and decided what levels of risk were acceptable for troop housing. The Army decided that pre-existing, Iraqi-constructed buildings were the “least bad” option because protecting troops from enemy fire was critical, even if it exposed soldiers to other hazards. The Army chose to maintain those hardstand buildings on an “as-is” basis rather than funding costly comprehensive upgrades of the electrical systems. And the Army was responsible for providing alternative housing or showers if existing facilities posed unacceptable risks. Each of those military decisions required a careful balancing of

countless considerations that are inherently military in nature, including troop safety, diplomatic considerations, cost considerations, and how the decision would advance the war effort.

Adjudication of Respondents' claims would unquestionably require courts to review the Army's strategic judgments about placing soldiers in harm's way, such as its decisions concerning the acceptable level of risk in troop housing and the allocation of scarce resources. The crux of Respondents' negligence claim is that KBR *should have taken* affirmative steps to upgrade the electrical system in the Palace Complex. *See* Pet.App.12-13 & n.5; *see also* Pet.App.114-15 (summarizing additional bonding and grounding work that KBR allegedly "should have" performed).

But the Army operated under a "good enough" standard and *expressly refused* to contract with KBR to perform precisely the type of preventative maintenance work that is central to Respondents' claims. KBR warned the military in 2007 that the Palace Complex buildings lacked proper grounding, and offered to perform "Level A" maintenance, which would have entailed "upgrades to existing facilities and the establishment of a preventative maintenance program, including checks for grounding of electrical systems." Pet.App.67; *see* Pet.App.130 (Level A maintenance "would have explicitly required KBR to conduct periodic checks for grounding of all equipment, including water pumps, every 60 days."). The Army rejected that option as too costly.

Instead, it directed KBR to perform far-more-limited "Level B" maintenance, which involved

making repairs only in response to specific service requests and “expressly excluded upgrades to existing systems and preventive maintenance.” Pet.App.67. The Army also rejected a “refurbishment” option that would have required KBR to upgrade the Palace Complex electrical systems to “Western construction standards.” Pet.App.71-72 & n.8.

In sum, as the district court correctly concluded, Respondents are effectively challenging “the scope of the duties assigned to KBR *by the military*.” Pet.App.112 (emphasis added). KBR offered ample evidence to show that “the risk of electrical shock to which Staff Sergeant Maseth was exposed was the result of high level military cost-benefit and wartime risk management decisions rather than the result of KBR’s own negligence.” Pet.App.135-36. Those strategic military risk assessments simply “cannot be evaluated under traditional state law tort standards.” Pet.App.145. Respondents’ negligence claims are thus nonjusticiable under a straightforward application of the political question doctrine because their allegations against KBR cannot be disentangled from core military judgments regarding the war effort.⁵

⁵ KBR’s contributory negligence and assumption-of-risk defenses similarly raise political questions by implicating issues such as whether military leaders provided sufficient warnings to Staff Sgt. Maseth about the risk of electrical shocks, and whether Staff Sgt. Maseth acted reasonably by failing to use alternative shower facilities.

B. The Third Circuit Badly Misconstrued the Political Question Doctrine.

The Third Circuit readily acknowledged that “KBR has adduced sufficient evidence to present its defenses that the military’s housing and maintenance decisions were at least *a proximate cause of the death*” and may have been “*the proximate cause.*” Pet.App.25. More specifically, the court recognized that “[e]lectrocution was a reasonably foreseeable result of several strategic military decisions,” including the decision to house troops in pre-existing Iraqi buildings and the decision to reject KBR’s offer to perform “Level A” maintenance at the Palace Complex. Pet.App.22-23.

Those findings should have been more than sufficient for the Third Circuit to find Respondents’ claims nonjusticiable. But the court thought a further inquiry was needed. Even though no party had raised a choice-of-law issue on appeal, the Third Circuit held that the question of whether Pennsylvania, Texas, or Tennessee law applied would be *dispositive* to whether this case raised a nonjusticiable political question. Pet.App.27-30.

That holding is deeply flawed on a number of levels. The notion that the *federal*, constitutionally based political question doctrine turns on the nuances of *state* tort law ignores first principles. The “nonjusticiability of a political question is primarily a function of the separation of powers,” and application of the doctrine involves “a delicate exercise in constitutional interpretation.” *Baker*, 369 U.S. at 210. The key considerations in determining whether the political question doctrine applies—such as

whether the issue has been textually committed to the political branches and whether there are judicially manageable standards for resolving the issue—involve the powers and competencies of each branch of the federal government. The vagaries of state tort law do not affect whether a decision has been committed by the Constitution to the Executive Branch or whether an Article III court has workable standards for evaluating events that occurred in a foreign war zone. And when a case arises in a context like this, which is manifestly unsuited for the application of state tort law designed for apportioning responsibility among civilians, focusing on the subtleties of Pennsylvania and Tennessee tort law is to miss the forest for the trees.

The fundamental problem with Respondents' claims is not some pleading deficiency that turns on a nuance of state law. It is that, *regardless* of which state's law applies, Respondents are seeking to hold KBR liable for strategic decisions about the Iraq War that were at all times the responsibility of military officials alone. On a foreign battlefield, both the military and the military's contractors are dealing with service members as U.S. service members, not as residents of particular states whose idiosyncratic tort law rules might or might not permit a suit to go forward. State tort law simply has no place in the regulation of mission-critical functions in an active war zone—which is why tort claims premised on events that occurred on a foreign battlefield are both nonjusticiable under the political question doctrine and, as explained below, preempted by the combatant-activities exception to the FTCA.

The Third Circuit's approach to the political question doctrine would also lead to illogical and inequitable results. Most obviously, tort claims against the *same* defendant arising out of the *same* series of events might give rise to radically different outcomes depending on the happenstance of where a particular soldier happened to live when not stationed abroad. Indeed, the Third Circuit noted that, under its approach, if "Pennsylvania law applies, then the defense does not introduce any nonjusticiable issues," but if "either Tennessee or Texas law applies, then the defense will introduce such an issue." Pet.App.29.⁶

This disparity would be troubling under any circumstances. But when the events in question occurred in a war zone halfway around the world, any ostensible state regulatory interests are *de minimis*, and the need for a uniform federal rule of

⁶ This absurdity would be particularly manifest in multi-plaintiff suits currently pending against Petitioner. *See, e.g., In re KBR Burn Pit Litig.*, 925 F. Supp. 2d 752, 755 (D. Md. 2013), *appeal filed* No. 13-1430 (4th Cir.) (multi-district litigation against KBR involving 58 separate complaints, including 44 purported class actions, alleging injuries from "burn pit" military waste disposal operations in Iraq); *McManaway v. KBR*, 906 F. Supp. 2d 654 (S.D. Tex. 2012), *appeal filed* No. 12-20763 (5th Cir.) (case involving dozens of plaintiffs suing KBR for alleged exposure to harmful chemicals in Iraq); *Bixby v. KBR*, No. 3:09-cv-632, 2012 WL 3776473 (D. Or. Aug. 29, 2012), *appeal filed* Nos. 13-35513, 13-35518 (9th Cir.) (same). The notion that a handful of plaintiffs exposed to the same alleged hazard on a foreign battlefield could proceed based on the peculiarities of their home-state tort law ignores that the political question problems with these cases arise from the foreign battlefield context.

nonjusticiability is imperative. The application of a fundamental constitutional principle to events that occurred on a foreign battlefield cannot possibly vary depending on whether the plaintiff was domiciled in Houston, Memphis, or Pittsburgh.

C. The Third Circuit’s Approach Squarely Conflicts with Decisions of the Fourth and Eleventh Circuits, and Has Been Adopted by the Fifth Circuit.

The Third Circuit’s approach to the political question doctrine—which was recently endorsed by the Fifth Circuit as well—squarely conflicts with the Fourth Circuit’s decision in *Taylor* and the Eleventh Circuit’s decision in *Carmichael*.

1. In *Taylor*, the plaintiff was a U.S. Navy Hospital Corpsman who was injured by an electrical shock while helping Marines install an unauthorized backup generator at a tank ramp maintenance area on a military base in Iraq. 658 F.3d at 404. He brought common-law negligence claims against KBR, alleging that KBR employees negligently switched on the area’s main generator even though they knew that Marines were working on a backup generator at the time. *Id.*

The Fourth Circuit held that the plaintiff’s claims were barred by the political question doctrine. The court acknowledged that “KBR was nearly insulated from direct military control and was itself solely responsible for the safety of all ‘camp residents during all contractor operations.’” *Id.* at 411. It nonetheless held that the case was nonjusticiable because “a decision on the merits of [the plaintiff’s] negligence claim would require the judiciary to

question ‘actual, sensitive judgments made by the military.’” *Id.* For example, adjudication of KBR’s contributory negligence defense would have required the court to re-examine military decisions about how to supply power to the tank maintenance facility. *Id.* at 412. The Fourth Circuit concluded that such issues are “beyond the scope of judicial review,” and that there are “no discoverable and manageable standards for evaluating how electric power is supplied to a military base in a combat theatre or who should be authorized to work on the generators supplying that power.” *Id.* at 412 & n.13.

Taylor arose in a nearly identical posture to this case: the plaintiff brought state-law negligence claims against KBR based on injuries resulting from an electrical shock in Iraq, and KBR’s principal defenses included contributory negligence and lack of proximate causation. The Fourth Circuit did not remotely suggest that it needed a full-blown choice-of-law analysis to determine whether the political question doctrine applied, nor did it suggest that its holding might turn on the intricacies of state tort law. Instead, the court concluded, correctly, that tort claims against a battlefield support contractor are nonjusticiable as long as they would inevitably require the court to assess the reasonableness of strategic military decisions in order to adjudicate the plaintiff’s claims.

2. In *Carmichael*, an Army sergeant was severely injured in an accident involving a fuel convoy in Iraq. The plaintiff had been serving as the “military escort” on a fuel truck driven by a KBR employee, and was injured when the vehicle rolled

over while taking a narrow turn. 572 F.3d at 1275-78. He subsequently brought state-law negligence claims against KBR.

The Eleventh Circuit held that those claims were barred by the political question doctrine. The court emphasized that “military judgments governed the planning and execution of virtually every aspect of the convoy,” including the date and time of departure, the number of trucks, the route, and the security measures to be taken. *Id.* at 1281. Like the military housing decisions at issue here, the key decisions were made by the military based on a careful weighing of the costs and benefits of each alternative. For example, “[a] balance had to be struck so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly-maintained road.” *Id.* at 1282. The Eleventh Circuit concluded that it was “impossible to make any determination regarding ... KBR’s negligence without bringing those essential military judgments and decisions under searching judicial scrutiny.” *Id.* at 1283.

Unlike the Third Circuit’s decision here, choice of law played no role in the Eleventh Circuit’s political question analysis. Even though the district court had not made “any specific determination concerning the substantive law applicable to the dispute,” the Eleventh Circuit found it “unnecessary to address the issue here.” *Id.* at 1288 n.13. As the court explained, “given the uniformity of negligence law among the states, *our analysis would remain the same*

regardless of which state's law applied." *Id.* (emphasis added).

The plaintiff in *Carmichael* also sought to avoid application of the political question doctrine by arguing that the court need not second-guess military judgments because his claims merely alleged that KBR—not the military—had acted negligently. But the Eleventh Circuit rejected that attempted distinction, emphasizing that even if KBR's driver "bore some blame for the accident," it was "perfectly plausible" that military judgments "contributed to the rollover." *Id.* at 1286. That is, "it would be impossible to determine that [KBR] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments." *Id.* at 1295.⁷

Here, the Third Circuit refused to dismiss Respondents' claims even though it made the exact same finding as the Eleventh Circuit in *Carmichael*—namely, that there was "sufficient evidence" to show that the military was at least "*a proximate cause*" of the injury and may have been "*the proximate cause.*" Pet.App.25. There is no question that Respondents' claims would have been dismissed as nonjusticiable if this case had arisen in the Eleventh Circuit.

3. In addition to conflicting with *Taylor* and *Carmichael*, the Third Circuit's deeply flawed

⁷ The Eleventh Circuit further held that there were no "manageable standards" for adjudicating the plaintiff's negligence claims because "the dangerousness of the circumstances ... renders problematic any attempt to answer basic questions about duty and breach." 572 F.3d at 1289.

approach to the political question doctrine has now spread to the Fifth Circuit. In *McManaway v. KBR*, No. 4:10-cv-1044 (S.D. Tex.), the plaintiffs allege that KBR negligently exposed them to hazardous chemicals while restoring water-treatment operations at an Iraqi oil facility, at the instruction of the military. The district court denied KBR's motion to dismiss and certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b). But, after granting permission to appeal and accepting full merits briefing and argument, the Fifth Circuit dismissed the appeal. Citing the Third Circuit's decision in this case, which also figured prominently in the oral argument, the Fifth Circuit concluded that it was "premature" to consider KBR's political question arguments because "the district court has not performed, and we have not received the briefing necessary for us to perform, a choice-of-law analysis." Order at 2, *McManaway v. KBR*, No. 12-20763 (5th Cir. Nov. 7, 2013).

II. The Court Should Grant Certiorari To Address Whether The "Combatant-Activities" Exception Preempts State-Law Claims Against A Battlefield Support Contractor That Arise Out Of The Military's Combatant Activities In A War Zone.

A. Tort Claims Against a Battlefield Support Contractor Arising out of the Military's Combatant Activities in a War Zone Are Preempted by the FTCA.

The FTCA generally waives the United States' sovereign immunity in tort suits against the government for the wrongful acts of employees of the

United States. But recognizing the absurdity of importing ordinary state tort principles onto the battlefield, the statute expressly preserves the government's sovereign immunity for any "claim arising out of the combatant activities of the military or naval forces ... during time of war." 28 U.S.C. § 2680(j).

The rationale for the combatant-activities exception is straightforward. As the D.C. Circuit explained in an opinion by Judge Silberman, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule." *Saleh*, 580 F.3d at 7. The policy underlying the combatant-activities exception "is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.*⁸

Those critical federal interests "are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Id.* Indeed, tort claims against a battlefield

⁸ Judge Wilkinson has similarly emphasized that "consideration of the costs and consequences of protracted tort litigation introduces a wholly novel element into military decisionmaking" and may lead to "excessive risk-aversiveness on the part of potential defendants." *Al Shimari v. CACI Int'l*, 679 F.3d 205, 226 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).

support contractor are often “really indirect challenges to the actions of the U.S. military.” *Id.* Litigation of such claims “will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government’s wartime policies.” *Id.* at 8. Allowing such suits to proceed “will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations.” *Id.* And, based on standard contractual terms, “the costs of imposing tort liability on government contractors” will ultimately be “passed through to the American taxpayer.” *Id.* In short, it makes little sense to insulate the government from liability when it performs a task itself, but to allow tort claims to proceed when the government chooses to hire a contractor for that work.

Courts have thus concluded that state-law tort claims against a battlefield support contractor are preempted by the combatant-activities exception if such claims would undermine the uniquely federal interests that the exception was designed to protect. In *Saleh*, the D.C. Circuit held that, “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.” 580 F.3d at 9.

The United States has endorsed an even broader test, arguing that a claim against a contractor should be found preempted if: (1) a similar claim against the United States would be within the combatant-

activities exception of the FTCA; and (2) the contractor was acting within the scope of its contractual relationship with the government at the time of the incident. *See* Br. of United States as Amicus Curiae at 17-20, *Al Shimari v. CACI Intl*, No. 09-1335, 2012 WL 123570 (4th Cir. Jan. 14, 2012). Under that approach, “federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the scope of the contractual relationship.” *Id.* at 20.

Respondents’ claims are squarely preempted under either formulation of the test. As the district court explained, “[t]he military engaged KBR to provide discrete operations and maintenance services to the facilities used by [] Special Forces soldiers ... and the military controlled the terms and conditions of the contract and initiated all work that was performed by KBR on the base.” Pet.App.162. The services provided by KBR supported the military’s mission in Iraq, including “the attacks led by Special Forces soldiers off the base, their gathering of intelligence in furtherance of the military’s missions, and the defensive mechanisms used by the military to protect base inhabitants from enemy attacks.” Pet.App.162-63; *see also Aiello v. KBR*, 751 F. Supp. 2d 698, 714 (S.D.N.Y. 2011) (KBR was fully integrated into combatant activities where it “provide[d] operation and maintenance services at various designated Army base camps across Iraq ... at the direction of and in coordination with military personnel”).

Moreover, KBR's electrical maintenance work was "directly connected to force protection, as the military actually plugged its war-time defensive instruments used to ward off enemy attacks into the electrical facilities that KBR was paid to maintain." Pet.App.159-60. There is thus no question that KBR was "fully integrated in the combatant activities of the military at the base," Pet.App.163, and that claims against the United States alleging similar conduct would have been barred by the combatant-activities exception.⁹

B. The Third Circuit's Erroneous Refusal To Find Respondents' Claims Preempted Conflicts With the D.C. Circuit's *Saleh* Decision and the United States' Proposed Test for Preemption.

The Third Circuit nonetheless refused to find Respondents' claims preempted, in reasoning that expressly rejects the United States' proposed test and is irreconcilable with the D.C. Circuit test it purports to adopt. The court held that Respondents' claims were not preempted because "the relevant contracts and work orders did not prescribe how KBR was to perform the work required of it." Pet.App.44. Instead, those contracts supposedly "provided for

⁹ Because the combatant-activities exception applies to all conduct "arising out of" combatant activities, it encompasses "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948); *see also Aiello*, 751 F. Supp. 2d at 714 (maintenance of latrines was directly related to the health of soldiers on the base and was thus "integral to sustaining combat operations").

general requirements or objectives and then gave KBR considerable discretion in deciding how to satisfy them.” Pet.App.44-45. The modest degree of discretion perceived by the Third Circuit does not remotely take KBR beyond the scope of the contract or outside the military’s command authority. Nonetheless, the Third Circuit rejected preemption where the D.C. Circuit and United States would clearly find the state tort suit preempted.

Although the Third Circuit claimed to be following *Saleh*, its reasoning is fundamentally incompatible with the D.C. Circuit’s decision in that case. Indeed, the Third Circuit’s holding—that claims against a contractor operating in an active war zone are not preempted if the contractor exercised “discretion” in performing its functions—is nearly identical to the district court decision that the D.C. Circuit *reversed* in *Saleh*. In *Saleh*, the district court had held that combatant-activities preemption “attaches only where contract employees are ‘under the direct command and *exclusive* operational control of the military chain of command.” 580 F.3d at 4. The district court rejected the contractor’s preemption defense because there was a “dual chain of command” in which the contractor “retained the power to give ‘advice and feedback’ to its employees,” and had authority to prohibit practices that were “inconsistent with the company ethics policy.” *Id.*

The D.C. Circuit unequivocally rejected that approach to combatant-activities preemption, emphasizing that an “exclusive operational control” requirement “does not protect the full measure of the federal interest embodied in the combatant activities

exception.” *Id.* at 8. As the court explained, the fact that a contractor “has exerted *some* limited influence over an operation does not undermine the federal interest in immunizing the operation from suit.” *Id.* at 8-9. Indeed, the alternative rule would create a “perverse incentive” by discouraging contractors from exercising their expert judgment to help advance the military’s mission. *Id.*; *see also Boyle v. United Tech. Corp.*, 487 U.S. 500, 513 (1988) (emphasizing that “it does not seem to us sound policy to penalize” a defense contractor for exercising discretion).¹⁰

The Third Circuit also expressly rejected the United States’ proposed test, which the court described as “overinclusive” because it would purportedly “insulate contractors from liability” even if they were alleged to have violated the contract in question. Pet.App.42-43. But that reasoning defeats the whole purpose of the combatant-activities exception. The exception is designed to ensure adequate leeway for the government—and, in turn, its contractors—to engage in combatant activities without fear of subsequent judicial scrutiny through tort suits. Congress and the courts have repeatedly recognized the importance of immunities that sweep broadly, in order to avoid chilling critical government functions. *See, e.g.*, 28 U.S.C. § 2679 (Westfall Act granting immunity to federal employees for torts committing “within the scope of [their] office or

¹⁰ Moreover, two of the three judges on the Fourth Circuit panel in *Taylor* would have held that the plaintiff’s claims were preempted by the combatant-activities exception, as construed in *Saleh*. *See* 658 F.3d at 413 (Niemeyer, J., concurring); *id.* at 413 (Shedd, J., concurring in the judgment).

employment,” even if that conduct was wrongful or negligent); *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012).

* * *

Both issues presented here are independently worthy of this Court’s plenary review. However, the Third Circuit’s erroneous focus on the details of state law in addressing the political question doctrine highlights the importance of a federal preemption defense. Both the military and battlefield contractors must be able to interact with soldiers as soldiers, not as residents of 50 states with varying tort laws. If the applicability of the political question doctrine really did turn on state-law details, then the need for a uniform federal rule of preemption would be that much more obvious. One way or the other, the liability of a battlefield support contractor operating pursuant to military control and a military contract cannot turn on the details of a soldier’s home-state tort law.

The suit at issue here is one of numerous actions brought against battlefield support contractors for injuries incurred in the Iraq and Afghan conflicts. The decision below sends exactly the wrong signal to litigants and lower courts about such cases, which will inevitably arise out of future conflicts. It promises that if creative attorneys can only identify the right state-law liability theory, they can recover for injuries suffered on battlefields half the world away. This Court should grant review and send a different message—namely, that war remains as tragic as ever, and civilian tort law continues to have no place on the battlefield.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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January 8, 2014

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 12-3204

CHERYL HARRIS, Co-Administratrix of the
Estate of Ryan D. Maseth, deceased;
DOUGLAS MASETH, Co-Administrator of the
Estate of Ryan D. Maseth, deceased,

Appellants,

v.

KELLOGG BROWN & ROOT SERVICES, INC.,

Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania
District Court No. 2-08-cv-00563
District Judge: The Honorable Nora B. Fisher

Argued May 14, 2013

Before: SMITH, FISHER, and CHAGARES,

Circuit Judges

(Filed August 1, 2013)

OPINION

SMITH, *Circuit Judge.*

This case returns to us for resolution of the “important questions about the scope of the political question doctrine and the Federal Tort Claims Act’s

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‘combatant activities’ exception” in suits against defense contractors. We did not have the opportunity to reach these issues when this case was before us previously. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F.3d 398, 399 (3d Cir. 2010). Having jurisdiction now to reach these questions, we will provide a framework that establishes the contours of each of these doctrines. And while explaining the two frameworks can be simple, applying them is complicated by a number of case-by-case factors. Illustrating this is our conclusion that one such crucial factor still needs to be decided before the political-question doctrine aspect of this case can be resolved: which state’s law controls the claims and defenses presented. This, in addition to our conclusion that the combatant-activities exception does not preempt the plaintiffs’ claims, requires that we reverse and remand to the District Court for further proceedings.

I

During the Iraq War, the United States military established the Radwanayah Palace Complex as a base of operations. Staff Sergeant Ryan Maseth was stationed there and assigned to live in the barracks called Legion Security Forces Building 1, a building that predated the war and was known to have significant electrical problems. On January 2, 2008, Staff Sergeant Maseth died by electrocution while taking a shower in his barracks. The shower was electrified by an ungrounded and unbonded water pump.

Staff Sergeant Maseth’s estate and his parents sued Kellogg, Brown & Root Services (“KBR”), a

military contractor hired to perform certain maintenance services at the barracks. They allege that KBR caused Staff Sergeant Maseth's death by negligently performing its maintenance duties under two contracts with the United States. According to the plaintiffs, these contracts set standards of care for work performed under them, which KBR did not meet because it failed to ground and bond the water pump either when KBR installed it or responded to work orders complaining of electrified water in Staff Sergeant Maseth's barracks.

The merits of the plaintiffs' claims have not yet been resolved. Instead, KBR raises two antecedent challenges through a Rule 12(b)(1) motion to dismiss. First, KBR argues that the District Court should not exercise its proper 28 U.S.C. § 1332 diversity jurisdiction because this case presents a nonjusticiable political question. Second, KBR argues that the plaintiffs' claims are preempted by the federal policy underlying the combatant-activities exception in 28 U.S.C. § 2860(j) to the United States' waiver of sovereign immunity for torts.

The District Court first denied the motion before extensive discovery took place. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 403 (W.D. Pa. 2009). KBR sought review of this denial through an interlocutory appeal under the collateral-order doctrine, which we dismissed for lack of appellate jurisdiction. *Harris*, 618 F.3d at 400, 404. On remand, the District Court ordered discovery on the plaintiffs' claims and KBR's defenses. After discovery was mostly complete, KBR renewed its Rule 12(b)(1) motion to dismiss. This time, the

District Court granted the motion, holding that the case was nonjusticiable and—alternatively—that the plaintiffs’ claims were preempted by the federal policy embodied in § 2680(j). *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 547–58 (W.D. Pa. 2012). The plaintiffs appeal the dismissal, and this Court has jurisdiction under 28 U.S.C. § 1291.

II

Jurisdictional and justiciability questions must be resolved before a court reaches the merits of a case. *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 245–46 (3d Cir. 1998); *see also Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (“Jurisdiction is vital only if the court proposes to issue a judgment on the merits.”). Whether a case contains a political question is a matter of justiciability. *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 376 (3d Cir. 2006). Absent complete preemption, whether a plaintiff’s claims are preempted relates to the merits. *See In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999) (explaining that “ordinary preemption” arises only “as a federal defense to a state-law claim”). Neither party argues, and no court has held, that § 2860(j) combatant-activities preemption constitutes complete preemption. Accordingly, we must review the District Court’s political-question holding before addressing its preemption holding.¹

¹ The parties do not discuss whether Rule 12(b)(1) was the appropriate vehicle for KBR to assert its § 2680(j) preemption argument. The District Court, however, noted that Rule 56 may have been the appropriate vehicle.

Nevertheless, it analyzed KBR's arguments under Rule 12(b)(1) because the plaintiffs did not dispute its applicability and because the District Court believed that "it can be reasonably inferred from [our prior decision in this case] that Rule 12(b)(1) is the appropriate standard." *Harris*, 878 F. Supp. 2d at 568 & n.17. Although the parties do not dispute the appropriate standard, we must clarify that our prior decision did not imply, as the District Court believed, that Rule 12(b)(1) is the right vehicle for ordinary preemption arguments.

As the District Court acknowledged, our first decision in this case did not address whether Rule 12(b)(1) was the appropriate vehicle in which to advance any of the arguments KBR has made. *Id.* at 568 n.17. Nevertheless, the District Court inferred from our statement that "because the presence or absence of a political question is such a fact-intensive inquiry, a better-developed record could give rise to another colorable motion to dismiss," *Harris*, 618 F.3d at 403, one could reasonably conclude that Rule 12(b)(1) is the appropriate mechanism for making KBR's arguments. Our prior decision's statement is arguably dicta. At all events, it is nothing more than a statement about the appropriate procedural posture for analyzing political-question arguments rather than a statement about the method to review § 2680 preemption arguments.

This narrow reading is necessary because § 2680 questions like the one in this case are about *preemption* rather than *sovereign immunity*. To be sure, § 2680 is often invoked under Rule 12(b)(1) because it is an assertion of sovereign immunity by the federal government, which is jurisdictional. See *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 306 n.8 (3d Cir. 1986) ("The discretionary function exception [found in 28 U.S.C. § 2680(a)] operates as a bar to jurisdiction."). KBR, however, does not assert sovereign immunity. Instead, it argues that § 2680(j) represents a federal policy that preempts the plaintiffs' claims. See *Boyle*, 487 U.S. at 508–10. Preemption arguments, other than complete preemption, relate to the merits of the case. *In re U.S. Healthcare, Inc.*, 193 F.3d at 160. Therefore, the appropriate procedural device for reviewing the § 2680(j) preemption argument is not a motion pursuant to Rule 12(b)(1), but rather a motion under either Rule 12(b)(6) or for summary

A. The Political-Question Doctrine

KBR asserts its political-question argument as a factual challenge to the District Court’s jurisdiction. *See Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (“A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court’s subject matter jurisdiction.”). In such a challenge, the burden of proving that jurisdiction exists lies with the plaintiff, and “the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). Furthermore, “no presumptive truthfulness attaches to plaintiff’s allegations,” and when jurisdiction is intertwined with the merits, “the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Id.*

We exercise plenary review over the District Court’s legal conclusions but review its factual findings for clear error. *CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008). Here, the plaintiffs challenge both factual findings and legal conclusions. The plaintiffs’ factual arguments, however, are without merit because the Court did not make the factual findings they argue that it did.² We will thus

judgment, *Fisher v. Halliburton*, 667 F.3d 602, 608–09 (5th Cir. 2012)—as the District Court seemed to intuit.

The plaintiffs have waived any argument related to this error, however, so it is beyond the scope of our review. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

² The plaintiffs argue that the District Court erroneously found that KBR did not install or work on the pump that caused

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exercise plenary review over the District Court's legal conclusion that this case presents a nonjusticiable political question.

A case presents a nonjusticiable political question when one of the following characteristics is "inextricable from the case":

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

Baker v. Carr, 369 U.S. 186, 217 (1962). KBR argues that resolving the plaintiffs' claims will require judicial intrusion into issues textually committed to the executive, present issues that lack judicially manageable standards, and express a lack of respect due to coordinate branches of government. Assessing

Staff Sergeant Maseth's death. The District Court made no such findings. Instead, it explained that whether KBR did install or work on the pump could be reasonably disputed by the parties.

this argument requires a “discriminating inquiry into the precise facts and posture of the particular case,” *id.*, in a level of detail and complexity that is rare even in the political-question context.

Often, when the political-question doctrine is asserted, nonjusticiability arises from the possibility that one branch of government has exceeded its powers and the court must decide whether it has the authority and competence to regulate the alleged abuse. *See, e.g., Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430–31 (2012) (holding that determining whether a statute allowing Americans born in Jerusalem to indicate Israel as their place of birth, which was argued to represent a congressional infringement on executive prerogatives, was not a political question). As such, when deciding whether a case presents a political question, we rarely need to look beyond the complaint and any of its obvious implications.

This is not so with complaints against defense contractors. Defense contractors do not have independent constitutional authority and are not coordinate branches of government to which we owe deference. *See Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 409 (4th Cir. 2011) (recognizing that “KBR is not a part of the military”). Consequently, complaints against them for conduct that occurs while they are providing services to the military in a theater of war rarely, if ever, directly implicate a political question. Nonetheless, these suits may present nonjusticiable issues because military decisions that are textually committed to the executive sometimes lie just beneath the surface of the case. For example, a contractor’s apparently

wrongful conduct may be a direct result of an order from the military, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281–83 (11th Cir. 2009) (holding that a nonjusticiable issue is introduced when contractor-caused harm was a result of following orders from a convoy commander), or a plaintiff’s contributory negligence may be directly tied to the wisdom of an earlier military decision, *Taylor*, 658 F.3d at 411–12 (holding that a nonjusticiable issue is introduced when contributory negligence is based on the plaintiff’s disregard of an earlier military decision). In these situations, the political question appears not from the plaintiff’s claims but from the broader context made relevant by a contractor’s defenses. As such, to avoid infringing on other branches’ prerogatives in war-time defense-contractor cases, courts must apply a particularly discriminating inquiry into the facts and legal theories making up the plaintiff’s claims as well as the defendant’s defenses. *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (“We must look beyond the complaint, considering how the Plaintiffs might prove their claims and how KBR would defend.”).

1. Textual Commitment

The Fifth and Eleventh Circuits have provided a helpful framework for deciding whether a suit against a defense contractor contains issues textually committed to another branch. Because defense contractors are not coordinate branches of government, a determination must first be made whether the case actually requires evaluation of military decisions. If so, those military decisions must be of the type that are unreviewable because

they are textually committed to the executive. *See id.* at 560; *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359–60 (11th Cir. 2007).³ According to KBR, this case would require judicial review of the military’s decisions about where to house soldiers on a battlefield—decisions that are unreviewable because they involve strategic calculi about how best

³ Although the Fourth and Ninth Circuits—the only two circuits to have previously addressed this issue—do not use this framework, their analyses are consistent with it. In *Taylor v. Kellogg, Brown & Root Servs., Inc.*, the Fourth Circuit decided that a marine’s negligence claim against KBR was nonjusticiable. 658 F.3d at 404. The marine was electrocuted while installing a second generator to a tank ramp that the military had not authorized. *Id.* Relying heavily on the Fifth and Eleventh Circuits’ decisions, the Fourth Circuit held that the case presented a political question because resolving KBR’s contributory-negligence defense would require evaluating whether the military was correct to not authorize the second generator installed by the marine—a question “beyond the scope of judicial review.” *Id.* at 411–12 & n.13.

Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), involved a suit against the United States and a defense contractor for shooting down a civilian airliner off the Iranian coast. *Id.* at 1330–31. The Ninth Circuit decided that although the suit involved “conduct [that] took place as part of an authorized military operation,” the suit was not barred by the political-question doctrine because the claims were for “judicially cognizable injury” that resulted from “military intrusion into the civilian sector.” *Id.* at 1331–31 (quoting *Laird v. Tatum*, 408 U.S. 1, 15–16 (1972)); *see also The Paquete Habana*, 175 U.S. 677 (1900) (reviewing military’s seizure of two Spanish fishing vessels during the Spanish-American war). Viewed under the Fifth and Eleventh Circuits’ framework, the case was justiciable because the second condition was not met—although the case required evaluation of military decisions, they were the type that is reviewable.

to defend against threats. *See McMahon*, 502 F.3d at 1359 (“The strategy and tactics employed on the battlefield are clearly not subject to judicial review.” (quoting *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991))). Consequently, the parties have focused on the first element of the framework: whether the plaintiffs’ claims can be resolved without evaluating these military decisions.

Military control over a contractor’s actions is one common way that evaluation of strategic military decisions becomes necessary. Military control requires evaluation of military decisions because if the contractor is simply doing what the military ordered it to do, then review of the contractor’s actions necessarily includes review of the military order directing the action. *See Carmichael*, 572 F.3d at 1281–83 (holding that a suit for damages arising from a convoy crash included a nonjusticiable issue because of the degree of control the military had over the convoy, such as selection of path, speed, and distance between vehicles). However, where the military does not exercise control but merely provides the contractor with general guidelines that can be satisfied at the contractor’s discretion, contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions. *See McMahon*, 502 F.3d at 1360–61 (holding that a defense contract for aviation transportation in Afghanistan did not include sufficient military control to introduce a political question because the contractor retained authority over the type of plane, flight path, and safety of the flight).

In this case, the contracts between the military and KBR fit within the latter category. They provide KBR with significant discretion over how to complete authorized work orders. This discretion is best evidenced by the lack of detailed instructions in the work orders⁴ and the lack of military involvement in completing authorized work orders. *See id.* Military control over KBR's relevant activities therefore does not introduce an unreviewable military decision into the case.

Our analysis does not end here however. Plaintiffs' claims might still present unreviewable military decisions if proving those claims or KBR's defenses necessarily requires evaluating such decisions. *See Taylor*, 658 F.3d at 410–12. Accordingly, we must review every claim and defense in the case. Ultimately, whether the claims or defenses introduce a political question depends on which state's law applies. We will thus remand so the District Court may undergo a choice-of-law analysis.

a) The Plaintiffs' Claims

The plaintiffs' claims center on KBR's failure to ground or bond the water pump when KBR allegedly installed or maintained the pump. As to installation,

⁴ For example, one work order contained the problem complained of—"pipes (shower & sink) have voltage[,] get shocked in shower & sink"—but did not instruct KBR how to solve this problem. J.A. at 2013. KBR marked the project complete but did not explain what it did. J.A. at 2014. And when the military gave directions, those directions were quite minimal. *See* J.A. at 2015 (work order to solve "[w]ater pump leaking on top of bldg thru roof" that directs KBR to fix by "replac[ing] pressure switch").

the plaintiffs allege that if KBR installed the pump, then it was negligent for not grounding or bonding the pump as required by the standard of care set by KBR's contract with the military. As to maintenance of the pump, the plaintiffs allege that (1) KBR had a contractual duty to respond to work orders with safe work, (2) soldiers in Staff Sergeant Maseth's barracks complained of shocks that were reported to KBR in authorized work orders, (3) KBR could have eliminated the risk of electrocution under these work orders, but (4) it was negligent in failing to eliminate or recognize that risk.⁵ Although determining the validity of these claims will require acknowledgement of some strategic military decisions, neither theory requires second-guessing the wisdom of those decisions.

The installation theory is based on KBR's alleged installation of the pump between March 2006 and February 2007. At that time, KBR was operating under a CENTCOM⁶ contract with the U.S. Army Corps of Engineers. This contract acknowledged that "[e]xisting . . . electrical systems are in poor condition" and required KBR only to maintain the systems in their "existing" state. J.A. at 1645.

⁵ The plaintiffs did include several other claims in their complaint, which the District Court dismissed because they directly called into question strategic military decisions. *Harris*, 878 F. Supp. 2d at 574. These liability theories were the failure to warn, remedy the risk, rewire the building, provide safe alternatives, and properly maintain the facility. *Id.* We do not understand the plaintiffs to appeal this ruling because their briefs focus solely on the theories explained above.

⁶ CENTCOM stands for United States Central Command—the United States' military command in the Middle East.

Nonetheless, any completed electrical work was required to “operate as originally intended and designed, and in a safe manner.” J.A. at 1644. The parties dispute what “safe manner” means. KBR argues that it is not associated with any particular standard, while the plaintiffs argue that it refers to American and British electrical safety standards. So if the plaintiffs can show that KBR actually installed the pump—a disputed factual question—then whether KBR was negligent depends entirely on the standard of care established by the contract.

To be sure, determining that standard will require a court to interpret the contract, which may require testimony from military officials. But such testimony would do no more than provide information about how to interpret the term “safe manner”; their testimony would not require the fact finder to determine whether the military was negligent in setting the “safe manner” standard in the contract. And once the meaning of “safe manner” is determined, evaluating whether KBR’s work complied with that standard is a factual question for the fact finder—a question that, again, does not require evaluating any military decision. The plaintiff’s installation theory therefore does not require evaluating any unreviewable military decisions.

The same is true for the plaintiffs’ maintenance theory. KBR allegedly performed, or should have performed, maintenance to the pump under a different contract, the LOGCAP⁷ III, Statement of

⁷ LOGCAP—the Logistics Civil Augmentation Program—is a program to “preplan for the use of civilian contractors to

Work and Task Order 139. This contract divided buildings located on the base into three categories—Level A, B, or C. KBR was tasked with refurbishing and providing preventative maintenance to Level A buildings. However, for Level B buildings like the one in which Staff Sergeant Maseth was electrocuted, KBR was not to perform preventative maintenance—it was required only to complete maintenance requested through work orders. These work orders were initiated through complaints submitted to on-base field officers, known as “camp mayors,” who would review the complaints and submit work orders to KBR if the work was to cost less than a fixed amount. J.A. at 1718. If a work order exceeded KBR’s contractual authority, then KBR was to return it to the camp mayor. J.A. at 1718.

According to the plaintiffs’ maintenance theory, KBR should have properly grounded and bonded the pump when it responded to one of several work orders. Although none of these work orders requested maintenance on the pump that caused Staff Sergeant Maseth’s death, the plaintiffs argue that KBR’s completion of other work orders complaining of shocks in the same building is circumstantial evidence that KBR must have (or, at least, should have) performed some maintenance on that water pump.⁸

perform selected [support] services in wartime to augment Army forces.” U.S. Army Regulation 700-137 § 1-1 (1985).

⁸ Underlying their argument that KBR *must have* performed this maintenance is a factual dispute over whether KBR *could have* performed such maintenance within the scope of the contract. Resolving this issue depends on whether the

This theory, like the installation theory, is based solely on whether KBR satisfied its contract duties. The plaintiffs do not, for example, argue that the military should have categorized Staff Sergeant Maseth's barracks as Level A or should have submitted a work order for the pump. They argue only that KBR failed to satisfy the contractual standards for maintaining Level B buildings. The LOGCAP contract's standard of care is currently unresolved—this time because the contract is silent on the question. Interpreting the contract's standard of care will again require applying principles of contract interpretation, and may require some military officers to testify. But just like the installation theory, this interpretive question can be resolved without second-guessing military decisions.

As a result, neither of the plaintiffs' liability theories requires evaluating the wisdom of the military's decisions. Accordingly, neither justifies dismissing this case on political-question grounds.

b) KBR's Assumption-of-the-Risk Defense

While the plaintiffs' liability theories do not implicate strategic military decisions, KBR asserts three defenses that may: assumption of the risk, proximate cause, and contributory negligence. When analyzing whether a proposed defense implicates a nonjusticiable issue in a Rule 12(b)(1) factual challenge, courts must first decide whether the

maintenance would have required KBR to rewire the entire building or just to ground and bond the water pumps—the former is presumably beyond the cost constraints of the contract while the latter is not. This is a question for the fact finder to resolve through evaluation of the competing experts' testimony.

defendant has “present[ed] sufficient evidence to permit a jury to conclude that he established the [elements of the] defense by a preponderance of the evidence.” *United States v. Stewart*, 185 F.3d 112, 125 (3d Cir. 1999). If there is sufficient evidence to support the defense, then the District Court must determine whether the defense actually presents a nonjusticiable issue. If it does introduce such an issue, then the case is dismissed.⁹ But if there is insufficient evidence to support the defense, or if the defense does not present a nonjusticiable issue, then the case goes forward. Applying this framework, we conclude that KBR’s assumption-of-the-risk defense is justiciable because that defense does not require evaluating unreviewable military decisions. Yet KBR’s contributory negligence and proximate cause defenses may present nonjusticiable issues, depending on which state’s law applies.

The District Court analyzed KBR’s assumption-of-the-risk defense under Pennsylvania law.¹⁰ This

⁹ The parties do not dispute that the introduction of a nonjusticiable issue by a defense requires the dismissal of the entire case rather than elimination of the defense. This assumption is also made by several of our sister courts of appeals. *See, e.g., Taylor*, 658 F.3d at 409; *Carmichael*, 572 F.3d at 1292; *Lane*, 529 F.3d at 565. We follow suit and, at least for now, adopt this assumption. But we acknowledge that dismissing the entire case is not the only possible conclusion, as evidenced by the remedy for the introduction of nonjusticiable issues by damages estimates discussed in Part II.A.1.c *infra*.

¹⁰ The District Court has not yet determined if Pennsylvania, Tennessee, or Texas law applies. *Harris*, 878 F. Supp. 2d at 567. It sensibly restricted its analysis of KBR’s assumption-of-the-risk defense to Pennsylvania law because the parties relied on it alone and because this defense is not available under Tennessee

defense bars any recovery if a defendant can show that the injured party knew of the dangerous condition, which was both obvious and avoidable, yet still voluntarily encountered it. *Kaplan v. Exxon Corp.*, 126 F.3d 221, 226 (3d Cir. 1997) (quoting *Carrender v. Fitterer*, 469 A.2d 120, 125 (Pa. 1983)). Voluntariness requires that the injured party “had a real ‘choice.’” *Id.* (citing *Howell v. Clyde*, 620 A.2d 1107, 1112 (Pa. 1993)). KBR argues that Staff Sergeant Maseth assumed the risk of electrocution because when he took the fatal shower, he was aware of the risks of taking a shower in his barracks but chose to do so despite the military’s provision of safe alternative showering facilities. KBR is entitled to present this defense to a jury because it has presented evidence supporting Staff Sergeant Maseth’s awareness of and voluntary exposure to the risk of electrocution. Importantly, the voluntariness of his choice to use the shower is evidenced by the availability of alternative showering facilities provided by the military.

and Texas law. *Id.* at 567 & n.32; see also *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 772 n.34 (Tex. 2010) (explaining that in *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1978), the Texas Supreme Court “abolish[ed] implied assumption of the risk but retain[ed] [the] affirmative defense of express assumption of the risk”—the latter of which is when a plaintiff “explicitly consents to take personal responsibility for potential injury-causing risks”); *Baggett v. Bedford Cnty.*, 270 S.W.3d 550, 554 (Tenn. Ct. App. 2008) (explaining that “[t]he Tennessee Supreme Court abolished the defense of implied assumption of risk in [*Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994)]”).

The District Court found that analyzing voluntariness would draw strategic military decisions into the case because it would require the plaintiffs “either [to] admit that Maseth voluntarily encountered the risk in the shower, an admission which would undermine their case, or [to] take the position that his actions were involuntary such that he was acting in response to military orders and directly challenge the military’s decision concerning the shower facilities which were made available to him at the base.” *Harris*, 878 F. Supp. 2d at 587. But those are not the only possibilities. The plaintiffs may argue, for instance, that the alternative facilities were not available to Staff Sergeant Maseth or, if they were, that he was not aware of them. If either of these propositions is true, then he could not have avoided the risk under Pennsylvania law. Neither of these arguments implicates strategic military decisions. Whether the military should have provided Staff Sergeant Maseth with alternative showering facilities, as KBR intends to argue, is entirely irrelevant to whether such facilities were available to him and, if they were, whether he was aware of them. Furthermore, although the evidence appears to weigh against them, the plaintiffs may still dispute whether Staff Sergeant Maseth was aware of the risk, which has nothing to do with unreviewable military decisions. KBR’s assumption-of-the-risk defense thus does not introduce a nonjusticiable question because the merits of this defense depend solely on facts that do not implicate strategic military decisions.

c) KBR's Proximate-Cause Defense

KBR also argues that its proximate-cause defense makes this case nonjusticiable. KBR emphasizes its intent to argue that the military's actions were *the* sole cause of Staff Sergeant Maseth's death. A variation of this defense, which the District Court referred to, is the ability of KBR to argue that the military was *a* proximate cause of the death. The District Court found that both versions of KBR's proximate-cause defense would require evaluating military judgments.

KBR has presented sufficient evidence to support both of these defenses. Under relevant state law, a defendant can avoid liability by demonstrating that a third party is the true proximate cause of the harm. *Harris*, 796 F. Supp. 2d at 658–60 (collecting cases). KBR has presented sufficient evidence to support its argument that the military, rather than KBR, was the exclusive proximate cause of Staff Sergeant Maseth's death. Under both contracts between KBR and the military, the parties shared responsibility for maintaining buildings in the Radwaniyah Palace Complex. The military retained authority to perform its own maintenance. *See, e.g.*, J.A. at 701 (recording Specialist Michael Skaggs' testimony regarding maintenance work he completed while serving in the complex). Furthermore, the military was ultimately responsible for life support functions at the base—which is exemplified by the military's retention of authority to approve projects before KBR could perform any work and by occasional decisions to ignore KBR's maintenance advice. *See, e.g.*, J.A. at 649 (explaining that Level B facilities were to be

maintained only on request); J.A. at 500 (recounting KBR's initial desire to estimate a Level A maintenance cost for the barracks that the military rejected).

This shared responsibility leaves open the possibility that the military alone caused Staff Sergeant Maseth's death. As the District Court explained, KBR could prove that the military is the sole cause if the military (1) installed the pump improperly and never subsequently grounded or bonded it, (2) performed maintenance on the pump that caused it to be ungrounded and unbonded, (3) never provided KBR the authority to fix it because it was outside of the contract's scope, or (4) never submitted a work order to fix the pump. Any of these possibilities would mean that KBR had no contractual duty to repair the pump. Because KBR has provided sufficient evidence of these possibilities, this defense may go forward.

The plaintiffs argue that the defense that the military was *a* proximate cause is unavailable because the relevant evidence shows only military actions that are outside of the scope of their claims, and whose connection to this case is too attenuated to be a proximate cause. Deciding whether a party is a proximate cause varies slightly between the relevant states. The District Court has determined that Iraqi law does not apply but has not decided if Pennsylvania, Tennessee, or Texas law applies. *Harris*, 878 F. Supp. 2d at 567. Starting with Texas law, defendants are the proximate cause of an injury if their conduct was the cause in fact of the harm suffered and if the harm is the foreseeable result of

that conduct. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Harm is foreseeable when “the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others.” *Id.*

Electrocution was a reasonably foreseeable result of several strategic military decisions. The military was aware that the buildings in the Radwaniyah Palace Complex had substandard electrical systems that posed the specific risk of electrocution in shower facilities. J.A. at 324 (discussing the military’s warning to troops about the risks of electrocution from showers in existing buildings); J.A. 431–32 (recording the statement of an Army general explaining that the military was aware of the risks of placing troops in existing buildings); J.A. at 1645 (recognizing in the contract that the electrical systems were in poor condition). Nevertheless, the military chose to assign personnel to live in these barracks because the risk of electrocution was minor compared to the risks from external threats, such as missile and mortar attacks. J.A. at 432. From KBR’s perspective, the military foresaw the exact harm suffered by Staff Sergeant Maseth. Indeed, KBR’s argument is bolstered by the military’s decision to contract with KBR to repair the electrical problems in buildings like Staff Sergeant Maseth’s only in response to a work order, even though (1) KBR initially recommended that Staff Sergeant Maseth’s barracks be categorized as Level A, (2) KBR informed the military of the barracks’ significant electrical problems, J.A. at 500, and (3) the military was aware of shocking in the building from service-member complaints.

KBR argues that the military therefore must have anticipated that electrocutions were a risk of its decision not to categorize the building Level A and not to have KBR repair the building's electrical system. *See* J.A. at 433 (recounting a general's testimony that an event like Staff Sergeant Maseth's death could have occurred in any number of facilities throughout Iraq because of military decisions). Additionally, these decisions establish cause in fact: but for the military's decisions to house troops in dangerous buildings that were not to be repaired, the staff sergeant's death would not have occurred. KBR has therefore presented sufficient evidence to invoke its proximate-cause defense under Texas law.

The same is true under Pennsylvania and Tennessee law. Although the tests are not identical, both states essentially ask whether "(1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm." *Hale v. Ostrow*, 166 S.W.3d 713, 719 (Tenn. 2005) (evaluating proximate cause based on these two factors and whether the harm could have been reasonably foreseen are considered in evaluating proximate cause); *see also Lux v. Gerald E. Ort Trucking, Inc.*, 887 A.2d 1281, 1287 (Pa. Super. Ct. 2005) (evaluating proximate cause based only on these two factors). The second of these elements is essentially the same as the foreseeability analysis under Texas law, *see Wisniewski v. Great Atl. & Pac. Tea Co.*, 323 A.2d 744, 748 (Pa. Super. Ct. 1974) (citing *Majors v. Brodhead Hotel*, 205 A.2d 873 (Pa.

1965)), so KBR has adduced sufficient evidence to satisfy this element for the same reasons it can show foreseeability under Texas law.

As to the first element, whether the military's decisions were a "substantial factor" depends on three factors:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; [and]
- (c) lapse of time.

Lux, 887 A.2d at 1287. KBR's evidence supports a finding that these factors show that the military was a substantial factor in Staff Sergeant Maseth's death. The first factor, which is based on the Second Restatement of Torts, asks whether there is one event that had such a "predominant effect" that it should foreclose liability for other events that contributed to the harm. Restatement (Second) of Torts § 433 cmt. d. The evidence demonstrates that there are at least two events that contributed to the staff sergeant's death: the military's maintenance decisions despite the known electrical problems and KBR's alleged negligent response to the work orders. Yet even if KBR's negligence caused the harm, it is difficult to see why the negligence is so predominant that it should foreclose any fault that is plausibly

attributable to the military for knowingly placing service members in buildings with dangerous electrical systems.

KBR has also presented sufficient evidence on the second and third factors. As to the second factor, the military's decisions were a "continuous and active" force "up to the time of the harm," *Lux*, 887 A.2d at 1287, because they created the environment for the harm to occur and made electrocution likely to occur by using the barracks with substandard electrical wiring. As to the third factor, KBR has shown no "lapse of time," *Lux*, 887 A.2d at 1287, because these military decisions were essentially ongoing, as evidenced by the military's continual inaction regarding a technical inspection report from KBR two months before Staff Sergeant Maseth died. *See J.A.* at 525–27.

All of this is to say that KBR has adduced sufficient evidence to present its defenses that the military's housing and maintenance decisions were at least *a* proximate cause of the death and that they were *the* proximate cause. Left unanswered, however, is whether either of these defenses present a nonjusticiable issue because they require evaluating unreviewable military decisions.

KBR's defense that the military was the sole cause of Staff Sergeant Maseth's death does not require such an evaluation. As discussed above, KBR can successfully use this defense if it proves any of the following: that the military (rather than KBR) installed or performed faulty maintenance on the pump, that fixing the electrified showers was beyond the scope of KBR's contract, or that no work order

was ever submitted that would have required grounding or bonding of the pump or given KBR reason to notice that it should be. Unsurprisingly, several of these possibilities are related to existing factual disputes between the parties. They disagree over whether KBR installed the pump, could have fixed the problem within the scope of the second contract, or responded to work orders that would have required work on the specific pump that caused Staff Sergeant Maseth's death. Resolving these disputes—and thus whether the cause of the death was the sole fault of the military—does not require evaluating military decisions. All of these disputes are simply about who did what, and whether KBR could have performed the work it failed to do under the contract.

To be sure, resolving these disputes will require submission of evidence that the military could have installed or maintained the pump. Such evidence might include the military's shared responsibility for maintaining life-support systems on the base and its occasional performance of maintenance that contradicted KBR's recommendations. But the submission of evidence related to strategic military decisions that are necessary background facts for resolving a case involving a defense contractor is not sufficient to conclude that a case involves an issue textually committed to the executive. Instead, the case must require *evaluation* of those decisions such that the fact finder is asked to reexamine their wisdom. *See McMahon*, 502 F.3d at 1359–61 (explaining that a claim must require “reexamination” of a military decision before holding that the claim at issue did not implicate the political-

question doctrine even though military decisions were relevant to the case). KBR's defense that the military was the sole cause of Staff Sergeant Maseth's death does not require such an evaluation because the disputes are entirely factual: KBR did or did not install or maintain the pump, did or did not have authority under the contract to fix the showers, and did or did not receive a work order that would have required it to fix the pump. The District Court thus erred when it concluded that resolving this defense would require determining whether the military was negligent.

The other variation of KBR's proximate-cause defense—that the military was a proximate cause of Staff Sergeant Maseth's death—is another matter. It may require evaluation of strategic military decisions, and those questions turn on state law. If a jurisdiction uses a proportional-liability system which assigns liability by the degree of fault, then a proximate-cause defense introduces a nonjusticiable issue. In such a system, there is simply no way to determine damages without evaluating military decisions. The fact finder cannot decide the respective degrees of fault as between a military contractor like KBR and the military without evaluating the decisions made by each—particularly, the military's decisions to house troops in unsafe barracks that would not be repaired. *See Fisher v. Halliburton*, 667 F.3d 602, 621–22 (5th Cir. 2012) (explaining that Texas's proportional-liability system could introduce a political question but resolving the case on other grounds).

Tennessee and Texas use proportional-liability systems. *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992); Tex Civ. Prac. & Rem. Code § 33.004. So if Tennessee or Texas law applies, then damages cannot be estimated without evaluating unreviewable military decisions.¹¹ Under Pennsylvania law, however, joint-and-several liability would apply. *See* 42 Pa. C.S.A. § 7102(b) (West 2004); Act No. 2011-17, 195th Pa. Gen. Assemb. (2011) (eliminating joint-and-several liability for actions that accrue after the law's enactment).¹² So if Pennsylvania law controls, then calculation of damages does not require evaluating strategic military decisions because the plaintiffs are free to obtain the entirety of their relief from KBR.

¹¹ This conclusion depends on the ability of fact finders to assign fault to immune parties, such as the government. Both states permit this. The Tennessee Supreme Court appears to have never dealt with the assignment of fault to the government but has stated frequently that “a jury may generally apportion fault to immune nonparties.” *Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000). The Texas Supreme Court does not appear to have dealt with this question, but one intermediate appellate court has stated that the relevant Texas statute allows assignment of fault to immune nonparties. *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 56 n.5 (Tex. App. 2005).

¹² The liability rule could differ for other cases governed by Pennsylvania law because the state only recently eliminated joint-and-several liability for many torts. Act No. 2011-17, 195th Pa. Gen. Assemb. § 1 (2011). But this change only “appl[ies] to causes of action which accrue on or after the effective date of this section [June 28, 2011].” *Id.* at § 3. Staff Sergeant Maseth was killed on January 2, 2008. So the causes of action in this case accrued before, rather than “on or after,” June 28, 2011. Pennsylvania’s old rule of joint-and-several liability would apply.

See Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478, 488–89 (Pa. 2009).

Whether KBR’s proximate-cause defense implicates a nonjusticiable issue thus depends on which state law controls. If the District Court decides that Pennsylvania law applies, then the defense does not introduce any nonjusticiable issues. But if the Court decides that either Tennessee or Texas law applies, then the defense will introduce such an issue. Even if Tennessee or Texas law applies, though, only the fact finder’s calculation of damages would be nonjusticiable. This means that we can extract the nonjusticiable issue in a manner that possibly preserves some of the plaintiffs’ claims by dismissing only the damages claims that rely on proportional liability. *See Baker*, 369 U.S. at 217; *Powell v. McCormack*, 395 U.S. 486, 517–18 (1969). Accordingly, if the District Court determines that Tennessee or Texas law applies, then it should not dismiss the case. Instead, it should foreclose the plaintiffs from obtaining the types of damages that are assigned using proportional liability but allow the plaintiffs to proceed on any damages claim that does not implicate proportional liability (such as nominal damages, if available).

Eliminating the plaintiffs’ claims for these damages is the appropriate solution to the introduction of a political question by KBR’s defense because remedies, unlike breaches of a duty owed, can be extricated from a case. We are mindful that the test from *Baker* is that one of the listed factors must be “inextricable from the case.” 369 U.S. at 217. This suggests that if an issue can be extracted from

the case, then the case should be permitted to proceed with that issue removed—which is exactly what the District Court is directed to do if Tennessee or Texas law applies.

Powell v. McCormack also suggests that this is the correct approach. There, the Supreme Court analyzed federal courts' ability to "mold effective relief" separately from "whether the duty asserted can be judicially identified and its breach judicially determined." 395 U.S. at 517–18 (quoting *Baker*, 369 U.S. at 198). Importantly, when discussing the ability to provide relief, the Court avoided deciding whether the request for injunctive relief introduced a nonjusticiable issue. Instead, it determined that the plaintiff's request for declaratory relief was justiciable. *Id.* This suggests that when the request for one type of remedy is foreclosed by the political-question doctrine, plaintiffs may proceed if they are seeking other damages that do not implicate the doctrine. Accordingly, because KBR's argument that the military was a proximate cause implicates unreviewable strategic military decisions only because of the necessity of apportioning fault, the plaintiffs may still proceed if they seek any relief that does not implicate the proportional-liability system.

d) KBR's Contributory-Negligence Defenses

Whether KBR's contributory-negligence defense presents a nonjusticiable issue also turns on the applicable state law. KBR argues that it is not liable because Staff Sergeant Maseth acted negligently when he decided to take a shower in his barracks despite allegedly knowing of the risk. Contributory negligence allows defendants to avoid liability if they

can show that the injured party's own negligence caused more than 50 percent of the harm.¹³ 42 Pa. Cons. Stat. § 7102 (providing that a plaintiff's negligence is not a bar to recovery if "such negligence was not greater than the causal negligence of the defendant"); *McIntyre*, 833 S.W.2d at 57 (holding that a plaintiff's negligence bars recovery only if it is not "less than . . . the defendant's negligence"); Tex. Civ. Prac. & Rem. § 33.001 (providing that "a claimant may not recover damages if his percentage of responsibility is greater than 50 percent"). KBR has presented sufficient evidence from which a reasonable jury could find that Staff Sergeant Maseth was aware of the electrocution risk and that safe alternative showering facilities were available. Such evidence could lead a fact finder to conclude that the staff sergeant was negligent in using the barracks shower.

This defense might require evaluation of strategic military decisions. To determine whether Staff Sergeant Maseth's alleged negligence caused more than 50 percent of the harm, the degree of causation that can be assigned as between the military's alleged negligence and KBR's alleged

¹³ The denomination of this defense is confusing because of state variations. While several states refer to it as "contributory negligence," *see, e.g., Boyle v. Indep. Lift Truck, Inc.*, 6 A.3d 492, 496 (Pa. 2010), others refer to it as "modified-comparative negligence," *see, e.g., McIntyre v. Balentine*, 833 S.W2d 52, 57 (Tenn. 1992). We use the term "contributory negligence" primarily because that is how the parties refer to it.

Although KBR does not currently make a comparative-negligence argument, our analysis of its contributory-negligence defense would apply to it with equal force.

negligence must also be determined. That is, the proportion of the injured party's fault cannot be decided without also effectively deciding the extent to which the negligence of other parties caused the harm. For example, the relevant Pennsylvania Suggested Standard Civil Jury Instruction requires that the jury determine if the plaintiff's negligence is greater than 50 percent by assigning fault to each defendant and then to the plaintiff. Pa. Bar Inst. Bd. of Dirs., *Pennsylvania Suggested Standard Civil Jury Instructions* § 13.230 (4th ed. 2008). That means that for the fact finder to find that Staff Sergeant Maseth was, say, 60 percent at fault, the fact finder would have to assign fault to KBR and the military individually that summed to 40 percent. This assignment of fault to the military inevitably would require evaluating the wisdom of the strategic military decisions that caused the death.¹⁴ This defense therefore might require evaluation of strategic military decisions and make this case nonjusticiable.

Whether it does, however, depends on whether state law allows the fact finder to assign fault to nonparties and whether Staff Sergeant Maseth was

¹⁴ Because this defense introduces a nonjusticiable issue through the assignment of fault to the military, for KBR to rely on this as a basis for dismissing this case on political-question grounds, it must first present sufficient evidence from which a reasonable jury could assign some fault to the military for Staff Sergeant Maseth's death. For the reasons explained in the analysis of KBR's proximate-cause defense, KBR has met that standard by presenting evidence that the military's strategic decisions were negligent and a proximate cause of the death. *See supra* Part II.A.1.c.

negligent. The military is not a party to this suit and, as explained, the source of the nonjusticiable issue in KBR's contributory-negligence defense is the need to assign fault to the military to determine whether Staff Sergeant Maseth was more than 50 percent responsible for the harm suffered. So if state law does not permit the assignment of fault to nonparties, then KBR's defense does not require assigning fault to the military or evaluating strategic military decisions. As mentioned above, it is yet to be determined if Pennsylvania, Tennessee, or Texas law applies in this case. *Harris*, 878 F. Supp. 2d at 567. These states differ on whether a nonparty can be assigned fault by a fact finder deciding if a plaintiff's fault is greater than other tortfeasors'. As a result, the District Court must determine which state's law applies before it can resolve whether KBR's defense introduces a nonjusticiable issue.

Pennsylvania does not permit assigning fault to nonparties for the purpose of contributory-negligence defenses. *See* 42 Pa. Cons. Stat. § 7102 (providing that a plaintiff's negligence bars recovery if it is "greater than the causal negligence of the defendant or defendants against whom recovery is sought" (emphasis added)); *Kelly v. Carborundum Co.*, 453 A.2d 624, 627 (Pa. Super. Ct. 1982) (rejecting the defendant's argument that § 7102 permits "apportionment among all tortfeasors causally responsible for an injury" and explaining that the statute "merely provides for apportionment among those defendants against whom recovery is

allowed”).¹⁵ So if Pennsylvania law applies, then KBR’s contributory-negligence defense—like its proximate-cause defense—does not introduce a nonjusticiable issue.

Tennessee and Texas, however, are another matter. These states permit fault to be assigned to nonparties for the purposes of contributory negligence. See *Mullins v. State*, 294 S.W.3d 529, 536 (Tenn. 2009) (explaining two principles of Tennessee tort law, which “are that all tortfeasors must be joined in the suit unless joinder is specifically prohibited by law . . . and that parties may assert, as an affirmative defense, that another party or even a non-party is responsible for the plaintiff’s injuries”); Tex. Civ. Prac. & Rem. § 33.001 (providing that “a claimant may not recover damages if his percentage of responsibility is greater than 50 percent”); *id.* § 33.003 (providing that fact finders must assign responsibility to “each claimant; each defendant; each settling person; and each responsible third party who has been designated under § 33.004 [which contains several procedural requirements]”); *Martin*

¹⁵ See also *Thornton v. Philadelphia Hous. Auth.*, 4 A.3d 1143, 1153 (Pa. Commw. Ct. 2010) (“A plaintiff’s recovery is barred only if his contributory negligence is greater than the causal negligence of the defendants against whom recovery is sought.”); *Heckendorn v. Consol. Rail Corp.*, 465 A.2d 609, 612 (Pa. 1983) (“[I]t is clear that in the Comparative Negligence Act the legislature did not contemplate an apportionment of liability between one or more third party tortfeasors (against whom recovery may be had) and the plaintiff’s employer (against whom recovery may neither be sought nor allowed.)”); *Morris v. Lenihan*, 192 F.R.D. 484, 492 (E.D. Pa. 2000) (“[A]ppportionment may only take place among parties that are properly in the case.”).

K. Eby Const. Co. v. LAN/STV, 350 S.W.3d 675, 680 (Tex. App. 2011) (“Section 33.003 requires the trier of fact to determine the percentage of responsibility for each claimant, defendant, settling person, and responsible third party who “caus[ed] or contribut[ed] to cause in any way the harm for which recovery of damages is sought . . .”). So if Tennessee or Texas law applies, then KBR’s contributory-negligence defense introduces a nonjusticiable issue as long as KBR can show that Staff Sergeant Maseth acted negligently.

KBR must be able to show that Staff Sergeant Maseth acted negligently for its contributory-negligence defense to introduce a nonjusticiable issue into this case under Tennessee or Texas law. If he was not negligent, then there is no need to determine the degree of fault for which the military is responsible. As explained, only the comparison of Staff Sergeant Maseth’s negligence to that of KBR’s and the military’s implicates nonjusticiable issues. Deciding whether the staff sergeant was negligent does not. This, like the assumption-of-risk defense, depends entirely on factual questions regarding his knowledge of the risk and the availability of alternative showers. Unlike in *Taylor*, where the injured party’s alleged negligence was that party’s decision to ignore a strategic military decision about the number of generators a tank ramp needed, 658 F.3d at 410–11, there is no evidence that Staff Sergeant Maseth was second-guessing a military decision about showering by using the shower in his barracks. So if the District Court concludes that Tennessee or Texas law applies, then the fact finder must first determine whether Staff Sergeant Maseth

was negligent. If he was, then the case must be dismissed as nonjusticiable. If he was not, then the case will proceed to the merits.

2. The Remaining Political-Question Factors

Resolution of the remaining political-question factors—whether this case presents issues that lack judicially manageable standards or that cannot be resolved without affording respect to the coordinate branches of government—turns on the same analysis. Both of these bases for nonjusticiability are inextricable from this case if the fact finder must evaluate the wisdom of the military’s housing and maintenance decisions. And regarding the lack of a judicially manageable standard, “it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Housing and maintenance decisions on a battlefield are exactly this type of decision—complex, subtle, and professional decisions within the military’s professional judgment and beyond courts’ competence. For this same reason, resolving a case requiring evaluation of these decisions would also fail to express the respect due to the coordinate branches of government. *See Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (explaining that such respect is not shown when courts “subject[] [the political branches’] discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding

the judiciary's relative lack of expertise in these areas").

Whether this case includes an issue whose resolution would express a lack of respect or that lacks a manageable standard thus turns on whether a strategic military decision must be reviewed. This is the same question that controlled our earlier analysis of whether this case contains an issue textually committed to another branch. Consequently, the remaining political-question factors will be inextricable from this case only if the case presents an issue textually committed to another branch. As a result, if Pennsylvania law controls, then this case lacks any nonjusticiable issues. But if either Tennessee or Texas law controls, then the case contains nonjusticiable issues that require eliminating any damages based on proportional liability. In such instance, if Staff Sergeant Maseth is found contributorily negligent, the case should be dismissed.

B. Section 2860(j) Combatant-Activities Preemption

The District Court alternatively held that the plaintiffs' claims are preempted by the combatant-activities exception to the Federal Tort Claims Act. The Federal Tort Claims Act waives the United States' sovereign immunity for many tort claims against it. 28 U.S.C. § 2674. But that waiver contains numerous exceptions, one of which—the combatant-activities exception—is raised here. Under the combatant-activities exception, the United States remains immune from “[a]ny claim arising out of the combatant activities of the military or naval forces,

or the Coast Guard, during time of war.” 28 U.S.C. § 2680(j). Of course, defense contractors are not part of the government, so concepts like sovereign immunity, waiver of sovereign immunity, and exceptions to waiver do not apply *directly* to defense contractors. In fact, the Federal Tort Claims Act says as much. 28 U.S.C. § 2671 (stating that “Federal agency” “does not include any contractor with the United States”).

But the Supreme Court has held that the Act’s exceptions sometimes express federal policies that impliedly preempt state claims against defense contractors providing services to the military. In *Boyle v. United Technologies*, the Court held that another exception—§ 2860(a)’s discretionary-function exception—provides a federal policy that preempts state tort law interfering with it. 487 U.S. at 511–12. The question before the Court was whether a claim for defective design against a helicopter manufacturer was preempted. *Id.* at 503. The Court first recognized that there is a federal interest in federal-government contracts with private parties that is implicated in suits by private parties against a government contractor for conduct resulting from the government contract. *Id.* at 504–07.

To determine whether the plaintiff’s state claim conflicted with this federal interest, the Court relied on the discretionary-function exception to establish the scope of the preempting policy. *Id.* at 510–11. This exception prevents suits against the United States for “[a]ny claim . . . 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). From this exception, the Court derived a federal policy for avoiding second-guessing government decisions that “often involve[] not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations.” *Boyle*, 487 U.S. at 511. And because state design-defect claims against “contractors would produce the same effect sought to be avoided by the FTCA exception,” *id.*, these claims must also be preempted.

Importantly, the Court did not determine whether the state laws in question were preempted by simply applying the statute as if the contractor were the federal government. Instead, it created a three-part test designed to protect the federal policy underlying § 2680(a). *Id.* at 512 (holding that state claims against procurement contractors are preempted if “(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”).

To decide how *Boyle* applies to § 2680(j), we must undertake the same analytic process. *Boyle*’s analysis involved three steps: (1) identify a unique federal interest that is associated with a FTCA exception, (2) determine the scope of the policy that underlies the exception, and (3) derive a test that ensures preemption of state laws that frustrate this policy. The two circuits that have confronted this agree that

§ 2680(j) represents a unique federal interest in the management of wars. *Saleh v. Titan Corp.*, 580 F.3d 1, 5–7 (D.C. Cir. 2009); *Koohi*, 976 F.2d at 1336–37. But they disagree over the scope of the federal policy underlying the exception and, as a consequence, what test should follow.

The Ninth Circuit, in *Koohi*, held that “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.” 976 F.2d at 1337. By contrast, in *Saleh*, the D.C. Circuit held that “the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.” 580 F.3d at 7. This latter, more expansive, policy is partially based on § 2680(j)’s use of “arising out of,” which we know from “workmen’s compensation statutes to denote any causal connection,” *id.* at 6.

There is very little authority for us to rely on to resolve this disagreement. The Federal Tort Claims Act does not explicitly state the purpose of the exception, nor does legislative history exist to shed light on it. *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948) (“An examination of the record fails to produce clear evidence of Congressional intent or policy which might guide us toward a proper interpretation of [§ 2680(j)].”). We agree with the D.C. Circuit that the phrase “arising out of”

suggests that this immunity is quite broad. As a result, the Ninth Circuit’s statement of purpose, limiting the policy to foreclosing any “duty of reasonable care . . . to those against whom force is directed,” is too narrow¹⁶—which is well demonstrated by the fact that the plain language would prevent suits against the military for harm it causes through friendly fire.

This leaves the D.C. Circuit’s articulation of the purpose, which we find persuasive in some respects. We agree that the statute represents a federal policy to prevent state regulation of the military’s battlefield conduct and decisions. *See Saleh*, 580 F.3d at 7 (explaining that § 2680(j) reveals Congress’ intent to “preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit”). But we do not go as far as the D.C. Circuit’s holding that § 2680(j) reveals a policy of “the elimination of tort from the battlefield.” *Id.* at 7; *see also id.* (“The very purposes of tort law are in conflict with the pursuit of warfare.”). This broader statement loses sight of the fact that § 2680(j), as a part of the Federal Tort Claims Act, does not provide immunity to nongovernmental actors. So to say that Congress intended to eliminate all tort law is too much, which the D.C. Circuit itself implicitly recognizes by crafting a test that does not preempt state tort claims

¹⁶ In fairness, the Ninth Circuit describes its articulated purpose as “one purpose,” *Koohi*, 976 F.2d at 1337, which means that the court may recognize that there are other, broader purposes as well.

challenging contractors' performance of certain kinds of contracts. *Id.* at 9–10.

The purpose underlying § 2680(j) therefore is to foreclose state regulation of the military's battlefield conduct and decisions. With this policy in mind, we turn to the last step of the *Boyle* framework: deriving a test to decide which state claims are preempted. The D.C. Circuit articulates one 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." *Id.* at 9. KBR urges us to adopt the Solicitor General's two-part test: (1) "whether a claim against the United States alleging similar conduct would be within the FTCA's exception for combatant activities," and (2) "whether the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose." Br. for the United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc.*, Nos. 09-1335, 10-1891, 10-1921, at 17–19 (4th Cir. Jan. 14, 2012)).

We adopt the D.C. Circuit's combatant-activities, command-authority test because it best suits the purpose of § 2680(j). The Solicitor General's test is overinclusive. The latter test, by preempting combatant-activity-related contractor conduct so long as the conduct is within the "scope of [the contractor's] contractual relationship," would insulate contractors from liability even when their conduct does not result from military decisions or orders. The Solicitor General makes this clear by

explaining that under his approach, “federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract . . . as long as the alleged conduct at issue was within the scope of the contractual relationship.” *Id.* at 20 (defining scope by analogy to the Westfall Act and *Barr v. Matteo*, 360 U.S. 564 (1959) (plurality opinion)). A scope of preemption that includes contractors’ contractual violations is too broad to fit § 2680(j)’s purpose because the conduct underlying these violations is necessarily made independently of the military’s battlefield conduct and decisions. After all, if the contractors’ conduct did follow from the military’s decisions or orders, then the conduct would presumably not be in violation of the contract. State regulation of these violations thus does not constitute the regulation of the military’s battlefield conduct or decisions that § 2680(j) is meant to prevent.

The combatant-activities, command-authority test, in contrast, is well-tailored to the purpose underlying § 2680(j): The first prong—whether the contractor is integrated into the military’s combatant activities—ensures that preemption occurs only when battlefield decisions are at issue. And the second prong—whether the contractor’s actions were the result of the military’s retention of command authority—properly differentiates between the need to insulate the military’s battlefield decisions from state regulation and the permissible regulation of harm resulting solely from contractors’ actions.

Under the combatant-activities, command-authority test we adopt, the plaintiffs’ claims are not

preempted. As to the combatant-activities prong, KBR's maintenance of electrical systems at a barracks in an active war zone qualifies as integration into the military's combatant activities. The plaintiffs contend otherwise, arguing that this maintenance is not a combatant activity because it does not include actual combat such that it "arises from combatant activities of the military or naval forces." This takes too narrow a view of the phrase "combatant activities." As the Ninth Circuit explained, combatant activities "include not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson*, 170 F.2d at 770. As an example, the Court explained that "[t]he act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a 'combatant activity.'" *Id.* Maintaining the electrical systems for a barracks in an active war zone is analogous to supplying ammunition to fighting vessels in a combat area and is certainly "necessary to and in direct connection" to the hostilities engaged in by the troops living in those barracks. The plaintiffs' argument is thus unpersuasive and the first prong of the test is satisfied.

This case is ultimately not preempted, however, because the second prong is not satisfied. The military did not retain command authority over KBR's installation and maintenance of the pump because, as explained above, the relevant contracts and work orders did not prescribe how KBR was to perform the work required of it. Instead, the contracts and the work orders provided for general requirements or objectives and then gave KBR considerable discretion in deciding how to satisfy

them. *See supra* text accompanying note 4. As the D.C. Circuit explained, these types of contracts are “performance-based” contracts that “describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided.” *Saleh*, 580 F.3d at 10 (quoting 48 C.F.R. § 37.602(b)(1)). “[B]y definition, the military [cannot] retain command authority nor operational control over contractors working on [this] basis and thus tort suits against such contractors [are] not [] preempted” under the combatant-activities, command-authority test. *Id.* The considerable discretion KBR had in deciding how to complete the maintenance at issue here thus prevents the plaintiffs’ suit from being preempted because the military did not retain command authority over KBR’s actions.

III

We will remand to the District Court for proceedings consistent with this opinion. The plaintiffs’ claims are not preempted by the combatant-activities exception, and it is possible that those claims are not foreclosed by the political-question doctrine. To decide the latter issue, the District Court will first need to decide which state’s law applies. If Pennsylvania law applies, then this case lacks any nonjusticiable issues and may proceed. But if either Tennessee or Texas law applies, then the case contains nonjusticiable issues. At the least, in that situation, the District Court will need to eliminate any damages that are based on proportional liability but allow the case to move forward to provide such other remedies as may exist.

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At most, the case will be dismissed if Staff Sergeant Maseth is first found contributorily negligent.

App-47

Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 12-3204

CHERYL HARRIS, Co-Administratrix of the
Estate of Ryan D. Maseth, deceased;
DOUGLAS MASETH, Co-Administrator of the
Estate of Ryan D. Maseth, deceased,

Appellants,

v.

KELLOGG BROWN & ROOT SERVICES, INC.,

Appellee.

Filed September 10, 2013

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, RENDELL, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, JR.,
VANASKIE, and SHWARTZ, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the

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petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith

Circuit Judge

Dated: September 10, 2013

tmm/cc: Raymond B. Biagini, Esq.

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Appendix C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 08-563

CHERYL HARRIS, Co-Administratrix of the
Estate of RYAN D. MASETH, deceased;
DOUGLAS MASETH, Co-Administrator of the
Estate of RYAN D. MASETH, deceased,

Plaintiffs,

v.

KELLOGG BROWN & ROOT SERVICES, INC.,

Defendant.

Filed July 13, 2012
Judge Nora Barry Fischer

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs, the parents and administrators of the Estate of Staff Sergeant Ryan Maseth, seek damages against government contractor Kellogg, Brown and Root Services, Inc. (“KBR”), claiming that KBR’s alleged negligence in the performance or non-performance of electrical services at a military base during the Iraq War was the proximate cause of his electrocution and death while showering at the Radwaniyah Palace Complex (“RPC”). (Docket No. 209). The crux of Plaintiffs’ case is that KBR failed to

employ certain safety procedures in conjunction with electrical maintenance services it provided at the RPC. (*Id.*). The use of grounding and bonding techniques as suggested by Plaintiffs is standard practice by electricians in the United States and other Western countries. (*Id.*). According to Plaintiffs, the use of these safety precautions may have prevented their son's death, which they maintain resulted from the failure of a water pump installed without it being grounded or bonded. (*Id.*). KBR does not challenge the merits of Plaintiffs' claims at this time. Instead, KBR has filed a renewed motion to dismiss, arguing that this case is barred by the political question doctrine under *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962), and, alternatively, that Plaintiffs' claims are preempted by the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j). (Docket No. 260).

This Court previously denied a motion to dismiss brought by KBR raising these same defenses, holding that, as pled, Plaintiffs' claims did not raise non-justiciable political questions and were not preempted by the combatant activities exception. See *Harris v. Kellogg, Brown & Root Services, Inc.*, 618 F. Supp. 2d 400 (W.D. Pa. 2009). The United States Court of Appeals for the Third Circuit dismissed KBR's appeal of this decision without addressing the merits and the case was remanded to this Court. *Harris v. Kellogg, Brown & Root Services, Inc.*, 618 F.3d 398 (3d Cir. 2010). Upon remand, the parties were ordered to conduct discovery regarding Plaintiffs' claims and KBR's defenses, which they did. Extensive discovery has been undertaken by the

parties. KBR's renewed motion to dismiss has been fully briefed and argued by the parties. (*See* Docket Nos. 260-279, 282-285, 294).

The Court has carefully considered all of the parties' arguments and the detailed factual record in this case. (*See id.*). After conducting a "discriminating inquiry into the precise facts" of this case as established through a lengthy period of discovery and having heard the parties' arguments outlining the claims and defenses that they intend to present at trial, the Court finds that further adjudication of this dispute will inextricably lead to consideration of sensitive military judgments for which no judicially manageable standards exist. *Baker*, 369 U.S. at 217. Specifically, further adjudication of this case will require evaluation of the military's decision to continue to house soldiers in hardstand buildings with hazardous electrical systems even though the military was aware that the buildings lacked grounding and bonding and the military possessed specific knowledge that such electrical deficiencies had resulted in electrocutions to military personnel, causing injuries and even deaths, prior to the events of this case.

The Court finds that the issues which Plaintiffs seek to try—whether KBR was negligent in failing to install grounding and bonding features on the malfunctioning water pump, failing to install grounding and bonding features on the electrical system, or failing to properly bond the pipes at Legion Security Forces Building 1 ("LSFB1")—cannot be answered without first considering the wisdom of military judgments, thus taking this case beyond

judicial review. In this Court's view, KBR has also presented sufficient evidence from which it may legitimately argue that the military exposed soldiers to what its commanders determined to be an acceptable level of risk after considering all of the other hazards of war which were faced by soldiers in the Iraq war theatre and its ability to fund the electrical upgrades and safety features which are admittedly standard here in the United States. (*See* Def Ex. 2, Docket No. 263-2:11; Def Ex. 6, Docket No. 263-15; Def Ex. 7, Docket No. 263-16; Def Ex. 22, Docket No. 263-33; Def Ex. 24, Docket No. 263-35). This evidence supports its position that despite the known risk presented by electrical deficiencies at the RPC, the military did not contractually require KBR or prior contractors to complete upgrades to the electrical facilities there. (Def Ex. 26, Docket No. 263-37:48; Def Ex. 43, Docket No. 263-69; Pl Ex. A, Docket No. 266). The military also declined KBR's offer to upgrade the electrical facilities for cost reasons. (Docket Nos. 262 at ¶ 135; 265 at § I, ¶ 135).

The level of safety provided to soldiers at a military base is a decision which is constitutionally committed to members of the Executive Branch while the funding of the military is constitutionally committed to the Legislative Branch. *See Lane v. Halliburton*, 529 F.3d 563, 559 (5th Cir. 2008) (“[T]he Constitution commits to Congress the power to raise and support an army and navy, and to the Executive the responsibilities of commanding those armed forces.”). In this Court's estimation, following the Supreme Court's dictates in *Baker*, the judgments of these officials on such sensitive military and legislative policy issues cannot be evaluated in a

court of law without violating the doctrine of separation of powers.

For these reasons, and as is further detailed below, the Court now concludes that this case is barred by the political question doctrine and preempted by the combatant activities exception to the FTCA and must be dismissed.

II. FACTUAL BACKGROUND

The factual record in this case is extensive. As much of the evidence was previously considered by the Court in the decision denying KBR's initial motion to dismiss, *see Harris*, 618 F. Supp. 2d at 403-15, the Court recounts here only those facts necessary to resolve the pending motion.

A. The RPC and LSFBI

KBR's provision of operations and maintenance services to the United States Army during the Iraq War pursuant to the Logistics Civil Augmentation Program ("LOGCAP") is central to this case. (Docket Nos. 262 at ¶¶ 1-10; 265 at § I, ¶¶ 1-10). As noted, the relevant events occurred at the RPC. (Docket Nos. 262 at ¶¶ 28-30; 265 at § I, ¶¶ 28-30). The RPC was the headquarters for Special Operations Forces operating in Iraq. (Docket Nos. 262 at ¶ 29; 265 at § I, ¶ 29). The military had overall responsibility for, and authority and control of, the activities and operations that took place at the RPC, including the decisions as to which buildings were used as housing. (Def. Ex. 7, Docket No. 263-16, *Satterfield Depo* at 102 ("Commanders authorize soldiers, and when I say commanders I'm talking now all services, told the troops where they were allowed to live or not live."); Docket Nos. 262 at ¶¶ 51-52; 265 at § I, ¶¶ 51-52).

The RPC consists of approximately 144 separate buildings. (Docket Nos. 262 at ¶ 125; 265 at § I, ¶ 125). Due to its size, the RPC was divided into compounds or areas. (Docket Nos. 262 at ¶ 46; 265 at § I, ¶ 46). One such area was known as the Legion Security Forces Compound (“LSF”). *Id.* Staff Sergeant Maseth was housed in one of the buildings within the LSF, known as LSFb1. *Id.* Other inhabitants of the LSF buildings were Special Forces troops who conducted midnight raids on enemy forces or provided security at the heavily-guarded entry control point which was located near LSFb1. (Docket Nos. 262 at ¶¶ 35-39, 47; 265 at § I, ¶¶ 35-39, 47). The soldiers housed in the LSF buildings also provided intelligence for the war effort in Iraq. (Docket Nos. 262 at ¶ 38; 265 at § I, ¶ 38).

The RPC buildings were initially constructed by Iraqis prior to the U.S. led invasion of Iraq. (Docket Nos. 262 at ¶ 45; 265 at § I, ¶ 45). The military referred to these buildings as “hardstands.” (*Id.*). Some of the buildings had internal restroom and shower facilities which were likewise constructed by Iraqis. (See Docket Nos. 262 at ¶¶ 70, 172, 178, 187; 265 at § I, ¶¶ 70, 172, 178, 187). Soldiers living in these buildings often showered in these facilities. (*Id.*). LSFb1 had two such internal restroom facilities which were used by the inhabitants. (See Def. Ex. 31, Docket No. 263-54 at 14, Figure 2, Floor Plan of LSFb1). However, there were containerized showering facilities known as ablution units, which were made available to soldiers at the RPC. (Docket Nos. 262 at ¶ 49; 265 at ¶ 49). Military commanders were responsible for directing soldiers to use ablution units, if they deemed it appropriate. (Def. Ex. 7,

Docket No. 263-16, *Satterfield Depo* at 102-104). As a contractor, KBR had no authority to order military personnel to do anything, including to direct soldiers where to live or shower. (Docket Nos. 262 at ¶¶ 54-55; 265 at § I, ¶¶ 54-55).

B. Renovations to LSF Buildings by Iraqi Subcontractor

Shortly after the occupation, in 2003, the Army made a decision to renovate and refurbish the hardstand LSF buildings, including LSFB1. (Docket Nos. 262 at ¶ 99; 265 at § I, ¶ 99). Prior to the renovations, LSFB1 was completely looted and it had no electrical power, electrical components, internal plumbing, doors or windows. (Docket Nos. 262 at ¶ 100; 265 at § I, ¶ 100). Lieutenant Colonel Richard Cote was the project manager for the renovation project and he was directed to engage a local Iraqi contractor, rather than an American contractor, to perform the renovations. (Docket Nos. 262 at ¶ 101; 265 at § I, ¶ 101). Local contractors were used in order to improve U.S.-Iraqi relations and to support the local economy which had been devastated by the war. (Docket Nos. 262 at ¶¶ 103-04; 265 at § I, ¶¶ 103-04). The original intent of the project was for LSFB1 to be used as office space and a command post rather than living quarters. (Docket Nos. 262 at ¶¶ 105-06; 265 at § I, ¶¶ 105-06). Hence, making the building safe for living quarters was not considered a priority during the renovations. (*Id.*).

The contractual agreement with the Iraqi contractor provided that it was to rewire the building using supplies and materials from the local economy and to include grounding and bonding for all

electrical work. (Docket Nos. 262 at ¶¶ 107-09; 265 at § I, ¶¶ 107-09). The contract further directed that acceptance of the contractor's work would be conditioned on a successfully completed test of the grounding system. (Docket Nos. 262 at ¶ 110; 265 at § I, ¶ 110). However, no such test was ever completed, (*id.*), even though it was well known within the military chain of command that Iraqi contractors did not ground and bond their electrical work. (Docket Nos. 262 at ¶¶ 102, 113; 265 at § I, ¶¶ 102, 113). In fact, military personnel testified that the work was "bad news" and "jerry-rigged." (Docket Nos. 262 at ¶ 113; 265 at § I, ¶ 113). Thus, the work performed at LSFBI was no exception.

Subsequent to the renovations, it was generally accepted that the buildings in the RPC did not meet Western construction standards and that there were deficiencies in the electrical systems, including a lack of proper grounding and bonding. *See Harris*, 618 F. Supp. 2d at 405. Despite the known presence of deficient electrical systems, the military made a decision to house soldiers in these buildings as they were considered safer than manufactured housing, given the risk of mortar attacks and shelling. *Id.*; (*see also* Docket Nos. 262 at ¶ 91; 265 at § I, ¶ 91 ("As General Vines acknowledged: 'We chose to assign personnel to live in these pre-existing structures, notwithstanding their electrical deficiencies. All of us, including myself, lived in buildings with similar deficiencies.'")). Indeed, despite the initial mandate that LSFBI would not be used to house soldiers, the building was continuously occupied by soldiers from its acceptance by the military in May of 2004 through 2008. (Docket Nos. 262 at ¶¶ 112, 114; 265 at § I,

¶¶ 112, 114). The evidence also shows that the military never remedied the faulty electrical work in LSFBI completed by the Iraqi subcontractor nor did it engage another contractor to fix the problems. (Docket Nos. 262 at ¶¶ 117, 188, 190; 265 at § I, ¶¶ 117, 188, 190).

C. CENTCOM Contracts with Washington Group and KBR

The United States Army Corps of Engineers (“USACE”) engaged Washington Group International¹ (“WGI”) to provide operations and maintenance services at the RPC from April 2003 through April 2006 under a series of contractual agreements. (Docket Nos. 262 at ¶ 117; 265 at ¶ 117). These contracts provided that the buildings be maintained “as is” and noted that “[e]xisting interior and exterior electrical systems are in poor condition. The Contractor shall support *existing* electrical systems.” (*Id.* (emphasis added)). During its term as service provider at the base, WGI never upgraded the deficient electrical work which was completed by the Iraqi subcontractor. (Docket Nos. 262 at ¶¶ 188, 190; 265 at § I, ¶¶ 188, 190).

The USACE next contracted with KBR to provide operations and maintenance services at the RPC under the CENTCOM contract for the period of April 2006 through February 2007. (Docket Nos. 265 at § II, ¶ 1; 283 at ¶ 1). Like the contracts with WGI,

¹ The Court notes that Plaintiffs also brought suit against URS Corporation, the successor to WGI in this District. See *Harris v. URS, Civ. A. No. 09-1673*. That matter was amicably resolved by the parties.

this agreement with KBR also provides that “[e]xisting interior and exterior electrical systems are in poor condition. The Contractor shall support **existing** electrical systems.” (Docket Nos. 262 at ¶ 118; 265 at § I, ¶ 118 (emphasis added)). Services were provided under the USACE contract as directed by the military in order to “restore a facility or component thereof, to a condition substantially equivalent to its original intended and designed capacity ... or is restored to its ‘as built’ condition.” (Docket Nos. 262 at ¶ 119; 265 at § I, ¶ 119).

The parties dispute which provisions of the CENTCOM contract were applicable to the present circumstances. KBR contends that § 34, Requirements for Electrical, which contained no explicit standard for electrical work, applied while Plaintiffs take the position that § 44, Requirements for Low Voltage Electric System Maintenance and Repair, which specified that the National Electrical Code (“NEC”) standards govern KBR’s work, applied. (Docket No. 262 at ¶¶ 118, 119; 265 at § I, ¶¶ 118, 119). The parties have not presented any evidence outside of this contract to support their positions with respect to which provision of the CENTCOM contract controlled KBR’s relationship with the Army Corps of Engineers, i.e., if § 34 rather than § 44 applied.² (See Docket No. 294 at 94, 106).

² The Court questioned counsel regarding the CENTCOM contract at the motion hearing. (See Docket No. 294 at 94). Plaintiffs’ counsel admitted that he had no such evidence, while KBR’s counsel stated that the dispute was not relevant to the Court’s analysis of the pending motion. (*Id.* at 94, 104). As is discussed below, the Court agrees that the dispute is immaterial to the disposition of the pending motion because

D. Warnings Concerning the Risks to Soldiers of Potential Electrical Hazards at Military Bases in Iraq

During the period of 2004-2006, there were several reports of injuries and deaths of United States soldiers after sustaining electrical shocks in the Iraq war theatre. (See Def. Exs. 2, pts 2-10, 22, 24, Docket Nos. 262-2:262-11, 262-33, 262-35). Many of these shocks were attributed to improper grounding of electrical systems. (*Id.*). As is detailed below, this information pertaining to the specific risk of electrical shocks to soldiers was then publicized within the military, including distribution to many high-ranking officials in the chain of command. These warnings emanated from the Army Safety Center, the Defense Contract Management Agency (“DCMA”) and other military personnel.

To this end, the United States Army Safety Center publishes a monthly magazine, “Countermeasures,” which focuses on Army ground risk-management advice.³ (Def. Ex. 22, Docket No. 263-33 at 2). An article titled “*Electrocution: The Unexpected Killer*” appeared in the October 2004

Plaintiffs have been unable to present any direct evidence that KBR installed the water pump during the prior contract. See § V.A.1, *infra*. Therefore, KBR may legitimately argue that the CENTCOM contract has no bearing on this case. *Id.*

³ The Court notes that the publication contains a disclaimer which provides that “[i]nformation is for accident prevention purposes only and is specifically prohibited for use for punitive purposes or matters of liability, litigation, or competition.” (Def. Ex. 22, Docket No. 263-33 at 2). Despite same, Plaintiffs have not asserted any objections to the Court’s consideration of this publication.

issue of this publication. (*Id.* at 20). This article states that five soldiers had died in Iraq in fiscal year 2004 from electrocutions, including one soldier who was killed while showering in May or June of 2004. (*Id.*). The author cited “improper grounding of electrical systems” as the cause of that electrocution, and a senior military engineer confirmed that the military had seen “several shocks in showers and near misses here in Baghdad, as well as in other parts of the country.” (Docket Nos. 262 at ¶ 64; 265 at § I, ¶ 64). Although this is an Army publication and is directed to troop safety, it is unclear from the record how widespread was this publication’s reach.

Later, in 2006, Lieutenant Colonel Brent Carey, a LOGCAP support officer who reported directly to Jana Weston within the DCMA, observed electrical hazards at hardstand buildings on the bases within Iraq where soldiers were housed and prepared a presentation describing same. (Def Ex. 2, pts 2-10, Docket No. 263). The purpose of LTC Carey’s presentation titled “Sub-Standard Electric Wiring Conditions” was to bring attention to a “serious threat to the life, health and safety of our soldiers.” (Docket Nos. 262 at ¶ 69; 265 at § I, ¶ 69). His briefing provided a warning that soldiers could be electrocuted in the shower and pointed out that a soldier had died in a shower in a hardstand building in the summer of 2005. (Docket Nos. 262 at ¶ 70; 265 at § I, ¶ 70). LTC Carey intended his presentation “to make a case for having soldiers leave the hardstand buildings or releasing the funding so that KBR or another contractor could fix the wiring.” (Docket Nos. 262 at ¶ 71; 265 at § I, ¶ 71). LTC Carey testified that he discussed his concerns with various

individuals throughout the military chain of command. (Docket Nos. 262 at ¶ 72; 265 at § I, ¶ 72).

Major James Harvey also served in the LOGCAP support unit and received LTC Carey's presentation. (Docket Nos. 262 at ¶ 73). In 2006, Major Harvey forwarded the briefing up the chain of command to a number of other high-ranking individuals, including "Brigadier General Satterfield, Colonel Jack O'Connor, General Kathleen Gainey, General Joseph Anderson, Major John Stewart, Colonel Jacques Azmar, possibly Colonel Jake Hanson, Colonel Thad Hartman, Jana Weston, Headquarters of Army Sustainment Command in Rock Island, someone within Fort Belvoir, Don Anderson, the LOGCAP office, Colonel Christianson, Colonel Smith, and Congressman Wayne Gilchrest."⁴ (Docket Nos. 262 at ¶ 74; 265 at § I, ¶ 74). Major Harvey testified that he submitted this information to these individuals (and possibly others) because they had the authority and ability to take action and make changes regarding the electrical deficiencies. (Docket Nos. 262 at ¶¶ 73-76; 265 at § I, ¶¶ 73-76).

Subsequently, Major Harvey identified the electrical hazards as critical issues in situational weekly reports that he prepared for an additional four to six weeks. (Docket Nos. 262 at ¶ 78; 265 at § I, ¶ 78). These reports were also provided to military commanders. (*Id.*). In addition to the briefings, LTC Carey gave photographs of widespread electrical hazards to base camp Mayors at meetings which

⁴ Congressman Wayne Thomas Gilchrest is a Republican who formerly represented the 1st District of Maryland in the U.S. House of Representatives.

were held for the purpose of identifying additional services needed at the base camps. Neither Harvey nor Carey received any significant response to their concerns. (Docket Nos. 262 at ¶¶ 82-83; 265 at § I, ¶¶ 82-83). Indeed, LTC Carey testified that the base camp Mayors who received his report seemed “annoyed” by it. (Docket Nos. 262 at ¶ 84; 265 at § I, ¶ 84).

Brigadier General Douglas Satterfield was one of the senior commanding officers who received LTC Carey’s briefing on potential electrical hazards at the bases. (Docket Nos. 262 at ¶ 85; 265 at § I, ¶ 85). General Satterfield testified that it was well known throughout the military that the electrical systems presented hazards. (Docket Nos. 262 at ¶¶ 86-87; 265 at § I, ¶¶ 86-87). He also explained that he was likewise housed in one of the hardstand buildings and was exposed to these risks. (Docket Nos. 262 at ¶¶ 88-89; 265 at § I, ¶¶ 88-89). He further confirmed that shocking incidents of soldiers occurred regularly and admitted that he was shocked “many times.” (Docket Nos. 262 at ¶ 89; 265 at § I, ¶ 89). However, General Satterfield considered the shocking incidents to be “minor” as compared to other more pressing military issues such as power generation and the protection of base residents from indirect enemy fire. (Docket Nos. 262 at ¶ 90; 265 at § I, ¶ 90). Lieutenant General John Vines, former Commander of the Multi-National Force–Iraq, declared that the military chose to house soldiers in the hardstand buildings despite the known electrical risks and that all of the soldiers who were housed there—including him—were exposed to such risks. (Def. Ex. 6, Docket No. 263-15, Docket Nos. 262 at ¶ 91; 265 at § I, ¶ 91).

General Vines further opined that the tragic incident involving Staff Sergeant Maseth could have occurred at any of the bases in Iraq where existing hardstand structures were used to house soldiers, because they all suffered from the same electrical deficiencies and subjected soldiers to similar risks. (*Id.*).

Additional internal military documents demonstrate further awareness of the electrical problems at U.S. bases in Iraq. For example, on February 1, 2007, Paul W. Dickinson of the DCMA issued a Memorandum for the Commander of DCMA Iraq, in conjunction with an audit he was conducting for the purpose of establishing contractual standards for a future contract with KBR under LOGCAP IV.⁵ (Def. Ex. 24, Docket No. 263-35; Docket Nos. 262 at ¶ 92; 265 at § I, ¶ 92). The purpose of the Memorandum was “[t]o set a baseline on the safety status and culture, state the way forward to improve status, and develop the measures and timeline to ensure the process is properly aligned to achieve the mission goals.” (Def. Ex. 24, Docket No. 263-35; Docket Nos. 262 at ¶ 93; 265 at § I, ¶ 93). Dickinson wrote that:

KBR has a large professional safety staff and institutionalized safety program. However, the program is based upon US OSHA Safety Standards as required by contract, and is substantially non-achievable due to the war environment. Many products and facilities available in Iraq do not meet basic US

⁵ The Court notes that the LOGCAP IV program was instituted after the events of this case and is otherwise not pertinent here.

standards nor a military risk analysis based on a generally acceptable “good enough” standard. The LOGCAP contract process influences KBR to inherit many facilities which are not intended for long term usage.

(Def. Ex. 24, Docket No. 263-35; Docket Nos. 262 at ¶ 94; 265 at § I, ¶ 94). Dickinson also noted that the “[p]rimary safety threat, theater wide, is fire due to the inferior 220 electrical fixtures found throughout Iraq. Improper installation, substandard equipment purchases (such as light fixtures), and heavy usage appear to be the three primary causes of these fires.” (Def. Ex. 24, Docket No. 263-35; Docket Nos. 262 at ¶ 95; 265 at § I, ¶ 95).

E. Transition from CENTCOM Contract to LOGCAP–Technical Inspections

In February of 2007, the military desired to shift KBR’s limited maintenance responsibilities under the CENTCOM contract to the LOGCAP program. (Docket Nos. 262 at ¶¶ 127, 128; 265 at § I, ¶¶ 127, 128). There were several reasons identified for the transition, including an effort to reduce the overall cost of maintaining the RPC and the fact that the CENTCOM contract was near expiration. (Docket Nos. 262 at ¶ 227; 265 at § I, ¶ 227). Negotiations ensued between the parties regarding the details of the transition, including the timing of same and the scope of the services KBR was to provide under the LOGCAP program.

The transition from CENTCOM to LOGCAP was accomplished in a few short weeks as documents provided to the Court show that the formal request for a project planning estimate was made by the

military on February 8, 2007 and KBR responded to same on February 19, 2007, with subsequent revisions submitted on February 20 and 23, 2007. (Def. Ex. 3, Docket No. 263-12 at 26-48). One of the initial requirements that the military imposed on KBR prior to the transition was the completion of technical inspections of the RPC buildings. (Docket Nos. 262 at ¶ 129; 265 at § I, ¶ 129). The documents suggest that KBR was expected to accomplish the inspections within the short time frame allotted by the military. (Docket Nos. 262 at ¶ 130; 265 at § I, ¶ 130). For practical purposes, the completion of full technical inspections of all of the 126 buildings was not possible during the two-week time frame. In this regard, the military officer in charge of the transition, LTC Donna Williams, testified that the time frame permitted to complete the technical inspections was “unrealistic” given the number of buildings at the RPC. (*Id.*). KBR made a request for additional time to complete the inspections but military commanders rebuffed this request, and LTC Williams testified that she believed that the transition was “rushed.” (Docket Nos. 262 at ¶¶ 130, 132; 265 at § I, ¶¶ 130, 132). She also felt that the transition was expedited because of exigent battlefield needs of the military and in order to avoid a break in KBR’s services. (Docket Nos. 262 at ¶¶ 129, 131; 265 at § I, ¶¶ 129).

The hurried nature of the transition is also demonstrated by KBR’s project planning estimate, wherein KBR states that:

14. *The short suspense for the PPE does not allow for a complete TI [technical*

inspection] of each building. KBR assumes the buildings are up to the quality standards of LOGCAP and has based the estimate on assuming O&M [operations and maintenance services] on buildings and peripheral equipment that are in acceptable condition.

...

16. *KBR assumes the building systems to be in good condition and upon discovery of defective systems (Electrical, Mechanical, or Structural) repairs will be made only at the direction of an ACL [administrative change letter].* KBR has included the cost of known repairs required at the time of the estimate.

(*Project Planning Estimate "PPE"*, attached to Def Ex. 3, *Weston Depo*, Docket No. 263-12 at 30-31 (emphasis added)). Despite this language, KBR did complete a "limited" technical inspection of some of the RPC buildings and prepared a February 10, 2007 technical inspection report which identified several electrical deficiencies at "Radwaniyah Palace D9" and "LSF Office." (Pl. Ex. W, Docket No. 277 at 2-3). The problems identified in the report included, *inter alia*: a lack of grounding of a main distribution panel; incorrectly sized and not properly grounded wires on secondary feeder wire circuits; and, an improperly grounded water heater tank. *Id.* at 2. As set forth on the report, despite the noted deficiencies, the main distribution panel for the "Radwaniyah Palace D9" was identified by KBR with an equipment condition code ("CC") of "B5 Serviceable—used, fair

(w/ qualifications).” *Id.* Other options on the form included “Unserviceable”—a code which testimony demonstrates if selected may have resulted in condemnation of a building. *Id.* at 3. This technical inspection was provided to the military a second time in November of 2007, after military personnel requested KBR to provide it with another copy of the report. (Docket Nos. 262 at ¶¶ 169-170; 265 at § I, ¶¶ 169-170).

During the initial negotiations, KBR proposed that it be engaged to provide Level A maintenance at the RPC under Task Order 139.⁶ (Docket Nos. 262 at ¶ 134; 265 at § I, ¶ 134). Level A maintenance included upgrades to existing facilities and the establishment of a preventative maintenance program, including checks for grounding of electrical systems. (Docket Nos. 262 at ¶¶ 136, 137; 265 at § I, ¶¶ 136, 137). Level B constituted a lower level of maintenance services and expressly excluded upgrades to existing systems and preventative maintenance. (Docket Nos. 262 at ¶¶ 138-139; 265 at § I, ¶¶ 138-139). After some discussions, the Army determined that the cost associated with Level A maintenance was prohibitive and requested an estimate as to Level B maintenance, only. (Docket Nos. 262 at ¶ 135; 265 at § I, ¶ 135). In its project planning estimate, KBR relied on a series of

⁶ The parties have not pointed the Court to a specific value of this proposed contract, but there are suggestions in the record that the value was \$10 million or \$20 million dollars. (*See* Def. Ex. 3, Docket No. 263-12 at 8; *see also* Def. Ex. 29, Docket No. 263-52 at 60).

assumptions which are consistent with the Level of maintenance to be provided, including that:

27. KBR assumes FACILITY MAINTENANCE will be level B. Limited maintenance does not include inspections, preventative maintenance and upgrades. Any repairs that need to be done on the facility will be initiated with a service request by the customer. Upon receipt of service request, the contractor shall conduct an assessment to determine feasibility of repair or replacement of existing items. The assessment shall be provided by the Mayoral Cell. If the assessment determines repair or replacement is warranted, the contractor shall repair or replace. However, if the assessment exceeds the scope of repair or replacement; the contractor shall return the service request to the Mayoral Cell for disposition. *Repairs on emergency items* (i.e. No power or no AC in the summer) will be initiated within two hours of the request. Normal repairs initiated within 24 hours of the request.

(*PPE*, Def. Ex. 3, Docket No. 263-12 at 31). On February 23, 2007, the military approved funding for KBR's project planning estimate and issued an administrative change letter authorizing KBR to commence work under the LOGCAP III program in exchange for compensation in excess of three million

dollars. (2/23/07 ACO Change Letter, attached to Def. Ex. 3, Docket No. 263-12 at 26-27).

Prior to January 2, 2008, the military never directed KBR to repair the electrical deficiencies identified in the technical inspection for LSFBI or to issue an administrative change letter authorizing KBR to upgrade or rewire LSFBI. (Docket No. 262 at ¶ 166). In addition, after its initial offer to complete Level A maintenance was rejected by the military, KBR never requested that it be permitted to upgrade the electrical facilities of LSFBI and never explicitly sought the military's approval to upgrade or rewire the buildings. (Docket No. 265 at § I, ¶ 161). Nor did the military ask KBR to do so.

F. LOGCAP Contract/Statement of Work/Task Order 139

The Court previously detailed the relevant terms and conditions of the LOGCAP III Contract between KBR and the military, which consists of the LOGCAP base contract, Statement of Work and Task Order 139.⁷ (See *Task Order 139*, Def. Ex. 43, Docket No. 263-69; Pl. Ex. B, Docket No. 266-1). Thus, the Court focuses its analysis on the provisions which are necessary to the disposition of the present motion, rather than recounting the terms and conditions of the agreement in explicit detail a second time.

The relationship between the military and KBR is established in the contract. To this end, the military controlled the terms and conditions of the

⁷ See *Harris*, 618 F. Supp. 2d at 405-412. The contract is filed in multiple locations on the Court's docket. For convenience, the Court will cite to same as "*Task Order 139*."

contract and mandated strict compliance. *See Task Order 139* at §§ 1.1, 7.1. As such, KBR was obligated to perform in line with the terms of the Statement of Work and Task Order 139. *Id.* at § 7.1. KBR was not permitted to engage in any work which was outside the scope of the contract without prior approval from the military contracting authorities. *Id.* at § 7.1. However, KBR was responsible for the quality of its work and the coordination of all aspects of its performance, including supervision of its employees. *Id.* at §§ 1.11, 1.14, 7.1. The agreement makes clear that the military was not required to supervise KBR's work, other than to monitor performance under the contract to ensure that KBR did not submit any false claims for compensation to the government.

Task Order 139 “governs the base life support functions” to be performed by KBR at military bases in Iraq and specifies the services to be provided thereto including Facilities and Operations & Maintenance Services. *Task Order 139* at § 1.0. Applicable to the instant matter, section 8 of Task Order 139 details Operations and Maintenance Services, which consists of maintenance and repair of facilities and repair or replacement of equipment and major electrical appliances in the RPC. *Id.* at § 8. The Task Order sets forth three separate levels of maintenance services: Level A–Full Service; Level B–Limited Maintenance; and Level C–No Maintenance. *Id.* at § F.2. According to the contract, it was the responsibility of the Mayor's Cell to prioritize the level of maintenance for each facility. *Id.* at § F.1.2. However, the evidence presented by the parties shows that the decision to engage KBR to provide

only Level B maintenance was made by higher commanders within the military and the contracting authorities at the DCMA and may have been made without consulting the base mayors. In any event, the operative portions of Task Order 139 which applied to Level B maintenance did not explicitly set forth any electrical standards governing KBR's performance. *See Id.* at §§ F.2.2, F.4.2. In addition, the contract did not include any specific standards for the completion of technical inspections of the facilities. *See Id.* at § 8.1.2. Instead, the terms and conditions of the contract are silent regarding the standard of KBR's electrical performance under Level B maintenance. *See Task Order 139* at § F.2.2.

While Level A maintenance was not selected, it is important to note that this level of maintenance would have required the contractor to provide preventative maintenance services at the base every 60 days, including a requirement to conduct grounding checks on equipment and major electrical appliances. *See Id.* at § F.4.1.1. Indeed, the provision governing preventative electrical maintenance required the contractor to “[c]heck for damage or tampering with switches, outlets, junction boxes, control panels, circuit breakers, fuses, grounding rods, and overloading.” *Id.* Another option which was not selected, “Refurbishment,” would have required that upgrades to the facilities be performed to Western construction standards. *See id.* at § 8.2.1.⁸

⁸ Section 8.2.1. “Refurbishment” states that “[t]he contractor ... shall evaluate, upgrade or refurbish hardstand buildings to a safe and livable condition. This new work may include refurbishment, construction, alternations and upgrades. All new

However, no refurbishment of the RPC or LSFBI was ever ordered by the military.

G. Processing Service Order Requests

The Court detailed the procedures for the processing of service order requests at the RPC in its prior decision. *Harris*, 618 F. Supp. 2d at 412. Relevant here, all service order requests were initiated by soldiers on the ground, funneled through the Mayor's Cell⁹, where the requests were prioritized and then forwarded to KBR for completion. *Task Order 139* at § F.2.2.3; (Docket Nos. 265 at § II, ¶¶ 64-65; 283 at ¶¶ 64-65). Although a working relationship existed between the base camp Mayors and KBR personnel, KBR staff responded to work orders without oversight or inspection by the military. (Docket Nos. 265 at § II, ¶¶ 64, 68; 283 at ¶¶ 64, 68). If KBR believed that the scope of the work order was outside the parameters of its contract for Level B maintenance, its representatives were not permitted to complete the work but would return the work order to the Mayor's Cell for further direction and approval. *See Task Order 139* at § F.2.2.2.3; (Docket Nos. 265 at § II, ¶¶ 64-65, 69; 283 at ¶¶ 64-65, 69).

H. Evidence of Interpretation of LOGCAP Contract

Colonel Kirk Vollmecke provided a sworn statement to the Department of Defense Inspector

work shall be in accordance with International Building Code and British Standard 7671." *Task Order 139* at § 8.2.1.

⁹ The Mayor's Cell was responsible for base infrastructure, logistics and base life services.

General (“DODIG”) in conjunction with its investigation of the circumstances of this case. (Def. Ex. 29, Docket No. 263-52 at 12-85).¹⁰ Colonel Vollmecke testified that in his position as Commander of the DCMA, he reviewed all of the relevant contractual provisions. (*Id.*). His interpretation of the contract was that it contained no explicit standards for KBR’s performance, including no requirements that electrical work be completed in accordance with NEC or British standards. (*Id.* at 52). Colonel Vollmecke further explained that by signing the administrative change letter authorizing KBR to commence Level B maintenance at the RPC, the military accepted KBR’s assumptions and thereby waived the requirement that KBR complete full technical inspections of all of the buildings prior to assuming responsibility for same. (Docket No. 263-52 at 32, 36). From his perspective, DCMA personnel should not have waived the requirement that KBR complete full technical inspections of the facilities prior to initiating Level B maintenance services. (*Id.*).

Colonel Vollmecke also stated that the contracts did not include any provisions specifying that KBR only hire employees who were certified to perform electrical work. (*Id.* at 41-42). He said that the lack of such requirements was possibly the result of an assumption that the individuals KBR hired would be qualified to perform electrical work. (*Id.*). But, he did not believe that such an assumption was realistic

¹⁰ The Court notes that the interview of Colonel Vollmecke is attached to the deposition of Plaintiffs’ expert Jim Childs. (Def. Ex. 29, Docket No. 263-52 at 12-85).

because the contractor staff of approximately 68,000 individuals was over 60 percent foreign national-based and generally unfamiliar with Western electrical standards. (*Id.* at 41). He faulted several individuals within DCMA for failing to include explicit electrical performance standards and requirements for certifications in the contract. (*Id.*). But, he explained that the DCMA was under tremendous pressure during the events in question which coincided with the “Surge”,¹¹ a military

¹¹ The Court notes that President George W. Bush addressed the increase in troops which became commonly known as the “Surge” during his 2007 State of the Union Address. During his speech, President Bush declared that:

We’re carrying out a new strategy in Iraq—a plan that demands more from Iraq’s elected government, and gives our forces in Iraq the reinforcements they need to complete their mission. Our goal is a democratic Iraq that upholds the rule of law, respects the rights of its people, provides them security, and is an ally in the war on terror.

In order to make progress toward this goal, the Iraqi government must stop the sectarian violence in its capital. But the Iraqis are not yet ready to do this on their own. So we’re deploying reinforcements of more than 20,000 additional soldiers and Marines to Iraq. The vast majority will go to Baghdad, where they will help Iraqi forces to clear and secure neighborhoods, and serve as advisers embedded in Iraqi Army units. With Iraqis in the lead, our forces will help secure the city by chasing down the terrorists, insurgents, and the roaming death squads.

President Bush Delivers State of the Union Address, January 23, 2007, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070123-2.html> (last visited July 12, 2012).

maneuver wherein 5 brigades of troops (approximately 20,000 soldiers) were added to complete the military's mission in Iraq, resulting in a corresponding increase in the number of hardstand buildings being occupied by soldiers, the number of contractors engaged in the war theatre and, likewise, the number of contractual changes required of the DCMA in its oversight of the military contractors. (*Id.* at 42).

Colonel Vollmecke stated that the contracts were not initially developed for a semi-occupation environment and worked well at the beginning of the war when only a limited number of bases were involved. However, he testified that "holistic" changes were not made to the contract as the war shifted toward semi-permanent occupation of Iraq by the joint forces with the assignment of soldiers to live in thousands of Iraqi hardstand buildings. (*Id.* at 43). As is set forth in the DODIG's Report, Colonel Vollmecke instituted several changes to the contracts after the accident to Staff Sergeant Maseth. (*Id.* at 26-27). The later adopted terms included explicit standards for electrical work and technical inspections and required that all contractor personnel be qualified to perform electrical work. (*Id.*).

The evidence demonstrates that certain military personnel expected that KBR would perform its electrical work safely and in accordance with Western electrical standards. These individuals, however, had limited knowledge of the actual requirements that the military set forth in the contract with KBR.

Among them, Brigadier General Satterfield testified that he had limited knowledge of Task Order 139, indicating that he had “read” the task order but was not directly involved in contracting. (*Satterfield Depo* at 141, Pl. Ex. E, Docket No. 268 at 7). Despite same, he provided testimony concerning his understanding of KBR’s agreement with the military. (*Id.*). General Satterfield believed that the electrical standard required under the contract was the British standard. (*Id.* at 146-147). He further explained that the military’s “good enough” standard did not apply to electrical safety issues and that the military’s election of Level A or Level B maintenance should not have lowered the contractual performance requirements imposed on KBR under the contract. (*Id.*). General Satterfield also testified that he did not believe that rewiring the RPC buildings or upgrading the electrical facilities would be new work outside of Level B maintenance permitted without further direction by the military under the LOGCAP contract. (*Id.* at 158-160, 162-163).

The base camp mayors at the RPC, SSG Skaggs and CW2 David Carrier, both testified that their expectations were that KBR would have performed grounding and bonding on its work at the RPC in response to service order requests as a part of KBR’s general performance duties. (Docket No. 265 at § II, ¶¶ 79-82). They also confirmed that KBR neither requested that it be authorized to rewire LSFBI nor sought authorization to perform grounding and bonding at the base because such duties were outside the scope of KBR’s contract. (Docket No. 265 at § II, ¶¶ 74, 77). For his part, SSG Skaggs testified that he was unaware of the scope of the electrical deficiencies

at LSF B1 and claimed that if he would have been made aware of such deficiencies, he would have initiated the process to have the building rewired or repaired. (Docket No. 265 at § II, ¶¶ 54, 74, 77, 78).

I. Service Order Requests / Shocking Incidents

The evidence shows that KBR was never specifically directed to repair the deficiencies in LSF B1 which were identified in the technical inspection report, (Docket No. 262 at ¶ 166), despite the fact that KBR presented the technical inspection report to the military in February 2007 and again, on November 5, 2007. (Docket Nos. 262 at ¶¶ 168-170; 265 at ¶¶ 168-170). In addition, like the prior subcontractor, WGI, the military never directed KBR to upgrade the substandard electrical systems in the RPC buildings. (Def. Ex. 26, Docket No. 263-37:48). KBR did, however, respond to several work orders and complete maintenance work at LSF B1 and in the surrounding area.

With respect to service order requests, Plaintiffs have identified nine work orders which they argue have some relevance to the instant case, including:

- Work Order D-1682 (June 14, 2006) stating “Please ground our hot water heater, people are getting shocked while showering”;
- Work Order D-1940 (July 4, 2006) stating “install grounding wire for the water heater and motor pump”;
- Work Order D-5204 (February 13, 2007) noting a problem at “Pump for LSF Headquarters Inop”;

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- Work Order 1208997 (June 23, 2007) “pipes (shower and sink) have voltage-got shocked in shower and sink”;
- Work Order 120811 (July 8, 2007) (no description);
- Work Order 1109481 (June 23, 2007) stating “install grounding on panel”;
- Work Order 1109702 (June 26, 2007) describing installation of wire on grounding panel;
- Work Order 1205258 (July 8, 2007) “water pump leaking on top of building thru roof”;
- Work Order 2193735 (November 2, 2007) “WP pulsating badly.”¹²

(See Docket No. 265 at § II, ¶ 87; Pl. Ex. U, Docket No. 276). The work order documents do not explicitly state that work was to be performed by KBR in accordance with any electrical standards. (*Id.*). KBR responded to the identified service order requests and the documents are marked as if the work was completed. (*Id.*). KBR disputes the relevance of these work orders because none of them refer to a complaint that the water pump on the roof at LSF1 caused an electrical shock and also argues that certain of them did not even pertain to LSF1.

¹² The Court notes that the November 2, 2007 Work Order initiated by Staff Sergeant Maseth was raised by counsel at the motion hearing, (see Docket No. 294 at 104), although it is not referenced in Plaintiffs’ concise statement of material facts, (see Docket No. 295, §§ I, II). Defense counsel didn’t object. Hence, as is discussed in further detail in note 31, *infra*, the Court has considered same.

(Docket No. 283 at ¶ 87). To this end, Juan Castellanos testified that the work orders from June of 2007 describing the installation of grounding and wires on the “panel” did not pertain to LSFBI but to an exterior main distribution panel for which KBR had full maintenance responsibilities. (See Docket No. 283 at ¶ 87.f., 87.g; *Castellano Depo* at 142, Def. Reply Ex. 8, Docket No. 284-8). Castellanos’ account is the only witness testimony in the record to which the parties have directed the Court to substantiate these work orders. In fact, the only competing evidence that Plaintiffs have cited is their experts’ interpretations of the work orders, but these individuals have no actual knowledge of what area or building of the RPC the work orders described.¹³ (See Docket No. 265 at § II, ¶ 87). Thus, because Castellanos’ testimony is uncontroverted, work orders 1109481 (June 23, 2007) and 1109702 (June 26, 2007) may have no bearing on this case.

Several soldiers testified that they were shocked in the shower and bathroom facilities in LSFBI, including Sergeant First Class Justin Hummer, and MSG Mark Layman. (Docket No. 265 at § II, ¶¶ 88, 90, 91, 94). There is also evidence that another soldier, Faris Shamoan,¹⁴ was shocked at LSFBI. (Docket No. 265 at § II, ¶ 92). The last of these shocking incidents was reported in the summer of

¹³ The Court recognizes that Plaintiffs’ expert, Childs, had significant experience at the RPC and LSFBI and was familiar with the locale. (See Pl. Ex. AA).

¹⁴ The Court notes that Shamoan was not deposed, but all parties agreed that his deposition testimony was not necessary for resolution of the present motion. See n.16, *infra*.

2007. However, there is no evidence that links the source of their shocks to the subject water pump. (Docket Nos. 262 at ¶ 191; 265 at § I, ¶ 191; Def. Ex. 36, Docket No. 263-61 at ¶ 22). The soldiers each testified that the shocks subsided for some time after KBR responded to the work orders they submitted. (Docket No. 262 at ¶ 181, n.2; Pl. Ex. U, Work Orders D-1682; D-1940; D-5204; 208997). But, the soldiers also explained that they did not consider the shocks as a serious issue when compared to the other risks they faced as they served during in the war in Iraq. (Docket Nos. 262 at ¶ 182; 265 at § I, ¶ 182).

In November of 2007, the military, through base camp Mayor SFC Skaggs, requested that KBR install a generator near LSFBI to power an ECCM jamming device¹⁵ for protecting against vehicle-borne improvised explosive devices. (Docket No. 262 at ¶ 183; 265 at § I, ¶ 183). KBR representatives toured the area with military officials and advised them that “the electrical power system in the area of LSFBI should not be used to provide power for the generator because the wiring was in ‘very poor condition’ and ‘everything was maxed out.’ KBR and military personnel observed the substandard wiring for LSFBI, including wiring into the building that bypassed the breaker, wiring that had splices that needed to be replaced, and tar on the panel inside

¹⁵ SSG Daniel C. Wilson testified that a “jamming device” is “a device used to jam” or disrupt signals from cell phones and other instruments which were used by enemy forces to detonate car bombs remotely. (Docket No. 263-20, Def. Ex. 11, *Wilson Depo* at 45-46). The jamming devices were set up by the military near the entry gates to the base in order to protect the base residents from such an attack. (*Id.*).

LSFB1.” (Docket No. 262 at ¶ 184). KBR provided the military with an “Electrical Summary” of the area which reflected that the electrical system was operating at 100% capacity, and included pictures of the deficient wiring in the electrical boxes. (Pl. Ex. X, Docket No. 277-1 at 2). The parties dispute whether KBR requested that it be permitted to rewire the entire area at that time. (Docket Nos. 262 at ¶¶ 184, 185; 265 at § I, 184, 185). In any event, despite the information provided by KBR, on December 4, 2007, SFC Skaggs specifically requested that KBR immediately “install a generator ***with full O&M support*** at ECP 66 (LSF Gate).” (Docket No. 263-51 at 23) (emphasis added). He added that “[t]he generator is necessary to provide power to a new ECCM device that is integral to force protection” and “[t]his installation is required due to the inadequate electrical system currently in place.” (*Id.*). SFC Skaggs’ request was approved and the military directed KBR to perform such work on December 6, 2007. (*Id.* at 24). Later that month, the military directed KBR to remove the generator. (Docket No. 262 at ¶ 185). Then, SFC Skaggs and another soldier installed the ECCM jamming device into the existing electrical system, ignoring KBR’s warnings that the system was at full capacity. (*Id.*).

J. Warnings to Staff Sergeant Maseth

Prior to the accident, Staff Sergeant Maseth was warned by two of his fellow soldiers of the electrical hazards present at LSFB1 during October of 2007. SFC Hummer testified that he told Maseth that electrical shocks “had been an ongoing problem.” (Docket Nos. 262 at ¶ 178; 265 at § I, ¶ 178).

Hummer specifically referenced shocks in the shower to Maseth. (*Id.*). Hummer also warned Maseth to “watch himself” and to “make sure that he checked the water with his hand before he got in” the shower. (*Id.*). Similarly, Staff Sergeant Matthew Newsom testified that he recalled warning Maseth of the electrical problems in the shower around the time that Maseth arrived at the base. (Docket Nos. 262 at ¶ 179; 265 at § I, ¶ 179). Beyond warning of the risk of electrical shock, SSG Hummer testified that he also told Maseth that the entire building needed rewired in order to fix the electrical shock problem. (Docket Nos. 262 at ¶ 180; 265 at § I, ¶ 180).

The evidence presented to the Court also demonstrates that Staff Sergeant Maseth received and acknowledged a fire inspection report of LSFBI dated November 19, 2007. (Def. Ex. 34-B, Docket No. 263-59 at 5-9). The report was prepared by KBR employee, Inspector Captain James Cook, and identifies certain electrical deficiencies at LSFBI. (*Id.* at 8). A chart titled “BUILDING-FIRE RISK MANAGEMENT SURVEY” identifies electrical deficiencies including frayed and improper wiring. (*Id.* at 5). A report titled “HAZARD/DEFICIENCY INSPECTION RECORD” states that Kitchen Room B has “spliced wires near stove/ oven” and that Room H had a “Hot Water Heater hard wired into outlet” and “Dryer unit hard wired into outlet.” (*Id.* at 7). Both of these documents were signed by Staff Sergeant Maseth as Fire Marshall. (*Id.* at 7, 9).

K. January 2, 2008 Accident

The parties do not dispute that, on January 2, 2008, Staff Sergeant Maseth was tragically

electrocuted while showering in his living quarters in building LSFB1 at the RPC. (Docket Nos. 262 at ¶ 187; 265 at § I, ¶ 187). Staff Sergeant Maseth's exposure to electric current caused him to suffer cardiac arrest, which resulted in his death. *See Harris*, 618 F. Supp. 2d at 414. The source of the electric current was determined to be a water pump located on the roof of LSFB1. (Docket Nos. 262 at ¶ 189; 265 at § I, ¶ 189). "The insulation on wires inside the pump had melted and the conductors came into contact with the metal casing of the pump, which energized the metal casing of the motor pump and attached water pipes." (*Id.*).

L. LSFB1 and the Subject Water Pump

The parties agree that LSFB1 lacked a grounding and bonding system and that *every* electrical component of LSFB1 was not grounded at the time of the accident. (Docket Nos. 262 at ¶¶ 188, 190; 265 at § I, ¶¶ 188, 190) (emphasis added). Further, the subject water pump which malfunctioned was likewise ungrounded and the pipes connecting the water pump to the shower facilities in LSFB1 were not bonded. (Docket Nos. 262 at ¶ 190; 265 at § I, ¶ 190). There is no direct evidence in the record proving that KBR installed the subject water pump. Instead, Plaintiffs argue that testimony of SSG Jarvis and MSG Mark Laymon "suggests that KBR installed water tanks and a water pump on the roof of LSFB1 after April 2006 but before January 2008." (Def. Ex. 36, Docket No. 263-61 at ¶ 20; Docket No. 295 at § I, ¶ 197). However, the testimony of Jarvis and Laymon demonstrates only that water pumps were positioned

differently in a photograph taken in 2006 and a later photograph taken in 2008. (*Id.*). Plaintiffs have been unable to identify any witness to testify that KBR actually installed the water pump under any work orders issued to KBR. (Docket Nos. 262 at ¶ 197; 265 at § I, ¶ 197). And, KBR's internal investigation was likewise unable to determine if KBR completed such installation. (Docket No. 265 at § I, ¶ 197; Pl. Ex. G, Docket No. 269).

In any event, the parties agree that “[t]he completed discovery has not uncovered any evidence that, prior to January 2, 2008, the pump was the source of any electrical shock.” (Docket Nos. 262 at ¶ 191; 265 at § I, ¶ 191). Indeed, Plaintiffs admit that they “are not aware of whether the specific pump that caused the shock on January 2, 2008 ... had ever previously been the source of a shocking incident at LSFBI.” (*Id.*; Def. Ex. 36, Docket No. 263-61 at ¶ 22). KBR admits that it replaced a pressure switch on the subject water pump in July of 2007. (Docket No. 262 at ¶ 198). However, Plaintiffs and their expert witnesses concede that the pressure switch was not a casual factor in the failure of the water pump and the subsequent electrocution. (Docket No. 265 at § I, ¶ 198). Instead, Plaintiffs take the position that when installing the pressure switch on the water pump, “KBR employees should have seen that the water pump was not grounded” and installed such grounding materials to make the water pump safe. (*Id.*).

M. Parallel Investigations and Results

On July 24, 2009, the DODIG issued a comprehensive report discussing the circumstances of

the January 2, 2008 accident, titled “Review of Electrocution Deaths in Iraq: Part I-Electrocution of Staff Sergeant Ryan D. Maseth, U.S. Army.” (Def. Ex 31, Docket No. 263-54; Docket Nos. 262 at ¶ 201; 265 at § I, ¶ 201). This report concluded that “[w]ith respect to the death of SSG Maseth, multiple systems and organizations failed, leaving him and other U.S. Service members exposed to unacceptable risk of injury or death.” (*Id.*). The DODIG identified problems with all entities involved at the base, including the military chain of command, the contracting community and the defense contractors such as KBR. (*Id.*). The DODIG commented that: the military chain of command did not properly ensure that the initial renovations of the base facilities were free of electrical hazards and did not identify the potential risks posed by the remaining electrical hazards; the civilian contracting agencies failed to include explicit electrical standards in their contracts with KBR and did not establish minimum requirements for the contractor’s electrical work force and training; and KBR perpetuated electrical hazards by failing to ground equipment it installed at the base, did not bring grounding issues at other facilities to the attention of the military command, did not maintain sufficient operating procedures for conducting technical inspections and did not properly train its personnel on electrical safety issues. (*Id.* at ¶¶ 201-03).

The Department of the Army also issued its Final 15-6 Report in July of 2009. (Def. Ex. 39, Docket No. 263-64, Docket No. 265 at ¶ 205). The Army concluded that “there was no single person or organization entirely responsible for electrical safety

in RPC, and whose act or omission caused SSG Maseth's death. His death resulted from a series of causal factors that are not attributable to a single person or organization." (*Id.*). This report highlights problems caused by failures of the DCMA, KBR and the U.S. Army. (Def. Ex. 39, Docket No. 263-64 at 4-5). Regarding its own role, the Army pointed out that "[t]here were systemic failures in US Army training and electrical safety awareness that prevented soldiers from understanding the dangers and potential risk associated with the electrical issues they encountered." (*Id.* at 5).

On August 7, 2009, the Department of the Army Criminal Investigative Command issued a press release outlining the findings of its criminal investigation into the circumstances of Staff Sergeant Maseth's death. (Docket No. 262 at ¶ 206; Def. Ex. 40, Docket No. 263-65). This publicly available document states that "[t]he investigation revealed that there were numerous entities and individuals, both contractors and government employees, who breached their respective duties of care. However, none of those breaches, in and of themselves, were the proximate cause of [SSG Maseth's] death. The investigation was closed with a finding that there is insufficient evidence to prove or disprove any criminal negligence in [SSG Maseth's] death." (*Id.*).

KBR was issued a Level III Corrective Action Request ("CAR") by the DCMA on September 11, 2008. DCMA initially claimed that KBR's contract required that it perform its electrical maintenance services according to National Electrical Code ("NEC") standards. (*Id.* Docket Nos. 262 at ¶ 209; 265

at § I, ¶ 209). However, as is noted above, the former Commander of DCMA Iraq-Afghanistan during 2006 and 2007, Colonel Kirk Vollmecke, disagreed with this assessment, testifying that the NEC did not apply to KBR's work. (Docket Nos. 262 at ¶ 210; 265 at § I, ¶ 210). Moreover, the DODIG reviewed the CAR and concluded that there were no explicit electrical standards set forth in KBR's contracts with the military. (*Id.*).

N. Post-Accident Contractual Changes and Facility Upgrades

The record reflects that the military commissioned KBR to upgrade the electrical facilities at LSFBI approximately one month after the accidental death of Staff Sergeant Maseth pursuant to an administrative change letter issued on February 1, 2008. (Docket Nos. 262 at ¶ 199; 265 at § I, ¶ 199). Specifically, KBR was directed to “rewire the building and ensure proper grounding of all electrical units, systems and components.” (*Id.*). The contractual provisions at issue in this case were also revised. To this end, the DODIG report explains that after the accident the following changes were made to the LOGCAP III Statement of Work:

- Added explicit electrical standards for performance of operations and maintenance work. Prior to the electrocution, the Government relied on the general requirement to meet “Army regulatory standards” and the presumption that a contractor is obligated to provide quality and professional workmanship.

- Added minimum requirements for contractor electrical workforce training and certification. Again, prior to the electrocution, the Government in good faith relied on the contractor to provide a workforce that was qualified to perform electrical tasks assigned.

(Def. Ex 31, Docket No. 263-54 at 58).

O. Plaintiffs' Claims and Expert Evidence

Plaintiffs bring wrongful death and survival claims against KBR seeking both compensatory and punitive damages. (Docket No. 209). Plaintiffs have repeatedly argued that their claims are "narrow," focusing on KBR's alleged negligence. (See Docket No. 264 at 5, 21, 23, 36, 39, 43, 57). However, Plaintiffs' challenges to KBR's conduct are numerous and broad. To this end, they claim that KBR was negligent:

- a. In failing to remedy the electrical grounding conditions at the RPC;
- b. In failing to remedy the defective and hazardous condition caused by the electrical service to the water pump at LSF1;
- c. In failing to ground and bond the breaker panel box in LSF1;
- d. In failing to recognize that the breaker panel box in LSF1 was ungrounded;
- e. In failing to institute and follow proper paperwork procedures to ensure that problems, complaints, and work were adequately documented;

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- f. In hiring workers that it knew or should have known were unskilled and unqualified to perform the tasks they were assigned;
- g. In failing to properly supervise its workers;
- h. In failing to order supplies for which it was paid under its contracts with the U.S. government;
- i. In failing repeatedly to diagnose the electrical hazards in LSFb1;
- j. In failing to recognize a pattern of electrical hazards in LSFb1 and the RPC in general;
- k. In failing to recognize the fatal consequences that could result from metal water pipes becoming electrified;
- l. In failing to recognize that the electrical hazards in LSFb1 could be fixed without rewiring the building;
- m. In failing to recognize that the electrical hazards in LSGb1 could be fixed at a cost of less than \$2,500;
- n. In purchasing and using at the RPC electrical equipment it knew or should have known was counterfeit;
- o. In failing to rewire the RPC;
- p. In failing to connect the water pump to a circuit breaker;
- q. In permitting the use of an unsafe water pump that fell below accepted U.S. safety standards;
- r. In failing to employ a lock-out / tag-out procedure on the unsafe electrical systems;

- s. In failing to warn the residents of the RPC of the known hazards posed by the faulty electrical systems;
- t. In failing to otherwise provide a safe alternative for the use of the soldiers stationed at the complex;
- u. In intentionally, willfully, and outrageously ignoring known and preventable hazards with blatant disregard for the safety of SSG Maseth and other members of the United States military; and
- v. In otherwise failing to maintain the RPC in a reasonable and prudent manner so as to prevent injury to U.S. troops there stationed.

(*Id.* at ¶ 33). From Plaintiffs' perspective, "the core issue of this case [is] why KBR failed to properly ground and bond LSFB1 when it had both ample opportunity and contractual authority to do so." (Docket No. 285 at 1).

Plaintiffs have submitted two expert reports in support of their claims. James Childs is proffered as an expert in electrical codes and electrical safety. (Pl Ex. AA, Docket No. 279-1). He is a licensed Master Electrician, certified electrical inspector, and has extensive experience in both the private and public sectors, including serving as the Senior Master Electrician on Task Force Safe, a group tasked with investigating electrical issues in Iraq in 2008 by General David Petraeus. (*Id.* at 2-3). With respect to the water pump and electrical work at LSFB1, Childs opines that:

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- The pressure switch was not properly installed. The grounds were cut. The wires shorted out inside the pump to the metal pump case, energizing the metal pump and associated piping. This caused the metal water piping of the building to become energized with 200 volts whenever the pressure switch closed energizing the pump.
- My inspection of the LSF-1 building and the photographs provides the evidence to establish what caused the electrocution of SSG Ryan Maseth. KBR did not properly bond the metal water piping of the building as required by code, either NEC or British Code. KBR also did not assure the installation of an equipment grounding conductor in the branch circuit to the pump. Even apart from the codes, these practices are a violation of safe electrical practices and placed inhabitants of LSF-1 at risk for shock or electrocution.

(Id. at 5-6).

Dr. John Tobias is an electrical engineer and scientist proffered as an expert in electrical safety. (Pl. Ex. BB, Docket No. 279-2). Plaintiffs state that Dr. Tobias was engaged “to provide an opinion, from an electrical engineering perspective, about the quality of KBR’s electrical work at LSF1 and whether anything could have been done, short of rewiring the entire facility, to make the facility safe and avoid the death of SSG Maseth.” (Docket No. 299 at 7). Among his conclusions, Dr. Tobias found that:

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- Incorrect grounding was a primary factor in SSG Maseth's death. KBR electricians did not ground and bond the pump and piping system correctly, despite having several opportunities to do so under the auspices of work orders submitted.
- KBR did not live up to the electrical standards of either the LOGCAP or CENTCOM contracts, nor did KBR perform its work to a minimal degree of electrical safety.
- KBR could have grounded the pump and water pipes within the context of work orders that it received with the same, or substantially less, material and effort than it actually expended in improperly attempting electrical work; and
- KBR's electricians did not exercise a minimally safe level of skill and KBR had no oversight of their work.

(Pl. Ex. BB, Docket No. 279-2 at 8). Ultimately, Dr. Tobias concludes that:

While complete rewiring, done correctly, would [remediate the shock hazard], it was certainly not the only method available. Earlier in this report I pointed out five techniques for remediating the shock hazard [Tobias Report 4-5]. One of these methods, bonding the water piping and electrical ground, would singly have prevented SSG Maseth's death and could have easily been done with far less effort and materials than

was expended on other work orders listed. Review of the work order history ... shows that significant materials and effort was expended to incorrectly earth (system) ground the pump. If these same materials and efforts were correctly applied to provide an equipment grounding conductor for the pump, and/or bond the water piping to the electrical ground, the shock hazard would have been averted.

(*Id.* at 7).

P. KBR's Liability Defenses and Expert Evidence

KBR has denied liability in this case and raised numerous affirmative defenses to Plaintiffs' claims. (Docket No. 217). Among them, KBR has set forth traditional defenses to negligence, i.e., lack of proximate causation, assumption of the risk, contributory negligence and comparative negligence. (*Id.*). KBR intends to vigorously defend liability in this case if it were to go to trial. (Docket No. 261 at 32, n.14).

Most recently, KBR has challenged the expert testimony of both of Plaintiffs' experts, Childs and Tobias via a *Daubert* motion, which is presently pending before the Court. (Docket No. 290). In its motion, KBR argues that the proffered expert opinions "lack foundation and fail to meet the standards of reliability and fit established by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and incorporated into Federal Rule of Evidence 702." (*Id.* at 2). In part, KBR relies on the testimony of its own expert witness on electrical safety, John Loud.

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(Def. Ex. 32, Docket No. 263-55). Loud is an electrician who is currently employed by Exponent, Inc. as a Principal Engineer. (*Id.*). He has extensive practical experience and has lectured on electrical injuries and electrocutions and testified in numerous court proceedings. (*Id.*). Loud rejects the opinions of Childs and Tobias to the extent that they believe that the electrical shock risk at LSF1 could have been eliminated without rewiring the entire building. (*Id.*). In brief summary, Loud suggests that:

Upgrading the system by installing an ad hoc grounding system while performing other repairs was not possible and it was in violation of the KBR contract. Grounding and bonding LSF1 in accordance with recent electrical codes required a complete system upgrade. Indeed, such a project was directed in the Military Administrative Contracting Officer's Change Letter (ACL) issued after this incident at an estimated cost of \$50,000. It was not possible to just add a single wire to bond the pipes because there was no grounding system in the main electrical panel to which to attach it. Simply driving a ground rod would not have been effective or code compliant. Bonding the pipes alone is also not adequate or code compliant because resistive or insulated joints cannot be relied upon to trip protective devices. Without knowing exactly what caused this incident prior to its occurrence, the only way to eliminate electric shock hazards in LSF1 was to upgrade and rewire the entire building to comply with the

recent electrical codes, which was prohibited by the KBR contract.

(*Id.* at 11).

III. PROCEDURAL HISTORY

After the parties completed a period of limited discovery, this Court denied KBR's initial motion to dismiss Plaintiffs' claims relying on the political question doctrine and combatant activities exception to the Federal Tort Claims Act, without prejudice, in a Memorandum Opinion and Order issued on March 31, 2009. *Harris*, 618 F. Supp. 2d at 434. This Court later denied KBR's motion requesting that the Court certify the legal questions presented by these defenses and to authorize the filing of an interlocutory appeal. *Harris v. Kellogg, Brown & Root Services, Inc.*, 2009 WL 1248060 (W.D. Pa. Apr. 30, 2009). Despite the denial of an interlocutory appeal, KBR appealed the Court's March 31, 2009 ruling to the United States Court of Appeals for the Third Circuit on April 30, 2009. (Docket No. 166). The Court of Appeals dismissed KBR's appeal and remanded the case for further proceedings, without addressing the merits of KBR's arguments as to the political question doctrine and/or the combatant activities exception to the FTCA. *Harris*, 618 F.3d 398.

Shortly after the matter was remanded from the Court of Appeals, KBR attempted to limit discovery to the defenses it raised in its earlier motion to dismiss. *Harris v. Kellogg, Brown & Root Services, Inc.*, 2010 WL 4614694 (W.D. Pa. Nov. 5, 2010). The Court denied KBR's motion and ordered the parties to complete discovery as to Plaintiffs' claims and

KBR's defenses but again stated that KBR was free to bring the present motion at the conclusion of discovery. *Id.*

Plaintiffs were granted leave to submit an Amended Complaint, which was filed on January 26, 2011. (Docket No. 209). KBR then filed an Answer to same on February 15, 2011. (Docket No. 217). While discovery was ongoing, KBR brought a motion seeking the application of substantive Iraqi law to the legal issues in this case, rather than the state laws under which Plaintiffs' claims are based. The Court denied KBR's motion after considering all of the parties' evidence and arguments on whether Iraqi law should be applied to this matter but declined to further rule on whether the laws of Pennsylvania, Texas or Tennessee should apply to particular legal issues in this case going forward. *See Harris v. Kellogg, Brown & Root Services, Inc.*, 796 F. Supp. 2d 642 (W.D. Pa. 2011). KBR sought reconsideration of this ruling, which was again denied by the Court. (Docket No. 248).

The Court has held periodic telephone status conferences to address the status of discovery in this case. At the conference on November 28, 2011, the parties advised that fact discovery was completed regarding KBR's defenses under the political question doctrine and the combatant activities exception to the FTCA.¹⁶ (Docket No. 252). As a

¹⁶ Counsel for the parties advised at the motion hearing that three depositions remained outstanding (i.e., Colonel Leon Parrott, Faris Shamoon, and Timothy Shea) but confirmed that the testimony of these three potential witnesses was not

consequence, the Court set deadlines for the briefing of KBR's renewed motion and also ordered the parties to submit their evidence and arguments pursuant to the procedural requirements of Local Rule 56. (Docket No. 253). Accordingly, KBR submitted its renewed motion to dismiss, brief in support, concise statement of material facts and appendix on January 20, 2012. (Docket Nos. 260-63). Plaintiffs responded with their brief in opposition, responsive concise statement of material facts and appendix on February 22, 2012. (Docket Nos. 264-79). KBR brought its reply brief, response to Plaintiffs' additional facts and supplemental appendix on March 6, 2012. (Docket Nos. 282-84). Plaintiffs, in turn, filed a sur-reply on March 20, 2012. (Docket No. 285). The Court then heard oral argument from the parties during a motion hearing on March 30, 2012. (Docket No. 286). Subsequently, the Court has received and reviewed the transcript of those proceedings. (Docket No. 294).

After receiving leave of court to do so, KBR filed its supplemental brief on May 30, 2012. (Docket No. 298). The Court provided Plaintiffs the opportunity to file a supplemental brief by June 6, 2012, but Plaintiffs declined such invitation. Hence, all briefing on the pending motion has now concluded.

Because the Court has heard oral argument and reviewed all of the parties' submissions, KBR's renewed motion is ripe for disposition.

necessary for the disposition of the present motion. (*See* Docket No. 286).

IV. LEGAL STANDARD

KBR has again moved to dismiss Plaintiffs' Amended Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. (Docket No. 260). Plaintiffs do not dispute that the Rule 12(b)(1) standard should govern the disposition of the instant motion.¹⁷ (Docket Nos. 264, 285). Therefore, the Court

¹⁷ The Court had suggested in prior decisions that KBR's renewed motion should be evaluated under Rule 56 and the summary judgment standard. See *Harris v. Kellogg, Brown & Root Services, Inc.*, Civ. A. No. 08-563, 2010 WL 4614694, at *2 (W. D. Pa. Nov. 5, 2010). Plaintiffs have not objected to the Court's evaluation of the present motion under Rule 12(b)(1). Therefore, the Court considers any challenge to the appropriate standard of review to have been waived by Plaintiffs. See *Belitskus v. Pizzingrilli*, 343 F.3d 632, 645 (3d Cir. 2003) (citation and quotation omitted) (“[i]t is well established that failure to raise an issue in the district court constitutes a waiver of the argument.”); see also FED. R. CIV. P. 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.”). The Court of Appeals did not address this issue in conjunction with KBR's appeal, but it can be reasonably inferred from that decision that Rule 12(b)(1) is the appropriate standard. *Harris v. Kellogg Brown & Root Services, Inc.*, 618 F.3d 398, 403 (3d Cir. 2010) (“[B]ecause the presence or absence of a political question is such a fact-intensive inquiry, see *Baker*, 369 U.S. at 217, 82 S. Ct. 691, a better-developed record could give rise to another colorable motion to dismiss.”). In any event, the Court does not believe that Plaintiffs have raised any “genuine disputes as to any material fact” which would preclude the entry of summary judgment in favor of KBR on the political question defense. Indeed, KBR has now convinced this Court through competent evidence that this case is barred by the political question doctrine and that a jury cannot resolve the disputed facts in this record. Alternatively, the Court also holds that this case is preempted by the combatant activities exception to the FTCA.

will analyze the present motion under Rule 12(b)(1). A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the lack of subject matter jurisdiction over a plaintiff's claims. *See* Fed. R. Civ. P. 12(b)(1). "At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case.'" *Petruska v. Gannon University*, 462 F.3d 294, 302 (quoting *Mortenson v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977)). As it is the party asserting jurisdiction, a plaintiff "bears the burden of showing that its claims are properly before the district court." *Development Fin. Corp. v. Alpha Housing & Health Care*, 54 F.3d 156, 158 (3d Cir.1995); *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)("[w]hen subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion"). In reviewing a motion to dismiss pursuant to Rule 12(b)(1), the court must distinguish between facial attacks and factual attacks. *Petruska*, 462 F.3d at 302.

Like its initial motion, KBR's renewed motion asserts a factual attack on the pleadings. When a defendant launches a factual attack on subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Petruska*, 462 F.3d at 302 (quoting *Mortenson*, 549 F.2d at 891). In a factual attack, the court must weigh the evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings.

Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 514 (3d Cir. 2007).

V. DISCUSSION

The Court now turns to KBR's renewed motion to dismiss, which marks the second occasion that the Court has been tasked with analyzing KBR's defenses under the political question doctrine and the combatant activities exception to the FTCA. (Docket Nos. 260, 261). This Court rejected KBR's initial motion to dismiss advocating these defenses in a Memorandum Opinion issued on March 31, 2009. *See Harris*, 618 F. Supp. 2d at 415-17, 434; *see also Harris*, 2010 WL 4614694. However, the Court emphasized this decision was not final, permitting reconsideration of these rulings if fact discovery illuminated political questions that were not readily apparent in the limited record which was previously presented or if KBR discovered additional facts necessary to establish its preemption defense under the combatant activities exception to the FTCA. *See id.*

At this juncture, the record before the Court is much more robust as fact discovery on KBR's present defenses has been completed.¹⁸ (Docket Nos. 262, 263, 265-279, 283-284). The parties have likewise completed expert discovery and submitted their expert reports for the Court's consideration on both the motion to dismiss and KBR's *Daubert* challenge brought to exclude the testimony of Plaintiffs' experts

¹⁸ The military has cooperated with the parties throughout the discovery process, and this Court has not been called upon to resolve any disputes between the parties and the military.

at trial. (See *e.g.*, *Childs Report*, Pl Ex. AA, Docket No. 279-1; *Tobias Report*, Pl Ex. BB, Docket No. 279-2; *Loud Report*, Def. Ex. 32, Docket No. 263-55). Several Executive agencies have also concluded their investigations into the facts and circumstances of Staff Sergeant Maseth's death, and many reports produced by these investigations have been publicly released and made a part of this Court's record. (Def. Exs. 31, 39, 40).

This Court has presided over this matter since its initial removal from the Court of Common Pleas in 2008 and has reviewed all of the parties' pleadings, briefing and evidence throughout this case and provided counsel with every opportunity to present their arguments, including the most recent oral argument on the motion to dismiss. (See Docket No. 286, 294). Given same, the Court is well versed in the parties' positions vis-à-vis liability in this case and, as framed, it appears that if it would go to trial, the case would largely be tried as a battle of electrical experts—with Plaintiffs' experts offering their opinions that KBR could have made the shower in LSFBI safe from electrical shocking hazards when it responded to certain work orders in 2006 and 2007 and KBR's expert opining that the entire building needed rewired in order to eliminate the risk of electrical shocks in the showers. (See *e.g.*, *Childs Report*, Pl Ex. AA, Docket No. 279-1; *Tobias Report*, Pl Ex. BB, Docket No. 279-2; *Loud Report*, Def. Ex. 32, Docket No. 263-55). Plaintiffs have alleged that KBR negligently responded to these work orders, in violation of its contracts with the military. (Docket Nos. 209, 264, 285). KBR has countered that its negligence, if any, was not the proximate cause of

Staff Sergeant Maseth's accident and that the Plaintiffs' negligence claims are barred by assumption of the risk and contributory negligence or limited by comparative negligence principles. (Docket Nos. 261, 282). KBR's liability position is further buttressed by evidence that the military was aware of the specific risk of electrical shocks in the showers in Iraqi hardstand buildings throughout the Iraq war theatre yet did not direct KBR or prior contractors to bring the electrical systems in the buildings up to Western construction standards nor contractually require KBR to perform its electrical services in accordance with the NEC or British standards. (*See* Def. Exs. 2, 22, 24; Docket Nos. 262 at ¶¶ 86-91; 265 at § I, ¶¶ 86-91).

In this Court's estimation, the military presence looms large over nearly every aspect of this case. Specifically, the military exerted control over all aspects of the RPC, including: base security; base life activities; the designation of buildings as living quarters; assignment of soldiers to certain living quarters; the availability of alternative housing and showering facilities; and the terms and conditions of the engagement of government contractors, like KBR, to perform discrete support functions at the base. (Docket Nos. 262 at ¶¶ 51-52, 54-55; 265 at § I, ¶¶ 51-52, 54-55; Def. Ex. 7, Docket No. 263-16; *Task Order 139* at §§ 1.1, 7.1).

There is still no binding precedent from the Supreme Court of the United States or the United States Court of Appeals for the Third Circuit analyzing the political question doctrine or the combatant activities exception to the FTCA as

applied to a government contractor providing logistical support services to the military in an active war zone. *See Harris*, 618 F.3d 398 (appeal dismissed for lack of jurisdiction); *see also Bootay v. Kellogg, Brown & Root Services, Inc.*, 437 F. App'x 140 (3d Cir. 2011) (affirming dismissal on other grounds).¹⁹ However, the legal landscape has shifted considerably since this Court last analyzed KBR's defenses in this case. In the prior decision, this Court surveyed the three known decisions of Courts of Appeals which considered the political question defense in this context, *see e.g., Koochi v. United States*, 976 F.2d 1328, 1330-31 (9th Cir. 1992), *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007), and *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008), and recognized that no Court of Appeals had dismissed a tort action against a government contractor providing wartime support to the military under the political question doctrine. *See Harris*, 618 F. Supp. 2d at 419 ("The Courts of Appeals that have analyzed the political question doctrine in this context have rejected the theory, at least at the motion to dismiss stage."). That statement no longer rings true as the United States Courts of Appeals in the Eleventh and Fourth Circuits have held that cases brought against KBR for alleged negligence toward soldiers in the Iraq war theatre were properly dismissed under the political

¹⁹ In *Bootay v. Kellogg, Brown & Root Services, Inc.*, the Court of Appeals affirmed the decision of the Honorable Terrence McVerry dismissing that case on grounds that KBR did not owe a duty to the soldier who alleged he was injured by his exposure to harmful chemicals released by KBR in Iraq.

question doctrine. *See Carmichael v. Kellogg Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009) (affirming district court decision that political question doctrine applied to bar claims against government contractor); *see also Taylor v. Kellogg Brown & Root Servs. Inc.*, 658 F.3d 402 (4th Cir. 2011) (affirming district court decision dismissing case under the political question doctrine).

With respect to the preemption defense under the combatant activities exception to the FTCA, the United States Court of Appeals for the D.C. Circuit has given much broader application than did this Court in its prior analysis of this defense, which was based largely on the *Koohi* decision. *See Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009) (finding that claims by detainees alleging mistreatment by contractors were preempted), *cert denied*, 131 S. Ct. 2055 (2011). *Saleh* remains the leading case in this area because two other Courts of Appeals have followed our Circuit and dismissed appeals challenging denials of the combatant activities defense as premature. *See Martin v. Haliburton*, 618 F.3d 476 (5th Cir. 2010); *see also Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205 (4th Cir. 2012). The *Saleh* decision has been followed by other district courts, including the Southern District of New York in *Aiello v. Kellogg Brown & Root Services, Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011), which found that a negligence suit arising out of KBR's provision of operations and maintenance services under Task Order 139 was preempted under the combatant activities exception to the FTCA.

With this background, the Court will now address the parties' arguments and the evidence presented related to KBR's defenses under the political question doctrine and combatant activities exception, in turn.

A. Political Question Doctrine

In *Marbury v. Madison*, the United States Supreme Court held that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 170, 2 L. Ed. 60 (1803). “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986). To determine if a case or controversy constitutes a non-justiciable political question, the Court must ascertain “whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Baker*, 369 U.S. at 198. In *Baker*, the Supreme Court set forth the following factors to be analyzed in this determination:

Prominent on the surface of any case held to involve a political question is found

(1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;”

- (2) “a lack of judicially discoverable and manageable standards for resolving it;”
- (3) ‘the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;”
- (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;”
- (5) “an unusual need for unquestioning adherence to a political decision already made;”
- (6) “or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

369 U.S. at 217. “A finding of any one of the six factors indicates the presence of a political question.” *Gross v. German Foundation Indus. Initiative*, 456 F.3d 363, 377 (3rd Cir. 2006) (citing *INS v. Chadha*, 462 U.S. 919, 941, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983)). However, “[u]nless one of these formulations is *inextricable* from the case at bar, there should be no non-justiciability on the ground that a political question is present.” *Baker*, 369 U.S. at 217 (emphasis added). In evaluating whether a case presents a political question, a court must “undertake a ‘discriminating inquiry into the precise facts and posture of the particular case.” *Gross*, 456 F.3d at 378 (quoting *Baker*, 369 U.S. at 217); *see also Lane*, 529 F.3d at 568 (“different cases involving different claims require their own discriminating inquiry under *Baker*”). Further, the case must be evaluated as it would be tried, and both the claims

and defenses must be examined to determine if a political question precludes review of the case. *See Carmichael*, 572 F.3d at 1292; *Taylor*, 658 F.3d at 409. In its motion, KBR relies primarily on the first, second and fourth factors under *Baker*. (Docket No. 261). Hence, the Court's analysis of this case will focus on these factors.

1. Textually Demonstrable Commitment to Coordinate Political Branches

“[T]he first *Baker* formulation is primarily concerned with direct challenges to actions taken by a coordinate branch of the federal government.” *Lane*, 529 F.3d at 560 (citing *McMahon*, 502 F.3d at 1359). KBR, a private corporation, is not a coordinate branch of the federal government. Therefore, in order for KBR to invoke the “textual commitment” factor, it faces a “double burden.” *Id.* KBR must first “demonstrate that the claims against it will require reexamination of a decision *by the military*. Then, it must demonstrate that the military decision at issue is ... insulated from judicial review.” *Id.* (quoting *McMahon* 502 F.3d at 1359-60 (emphasis in original; citation omitted)).

When evaluating claims against a private military contractor in a war zone, the key question is “whether a court will have to consider the wisdom of military operations and decision-making, or whether it need only consider the private contractor's performance.” *Getz v. Boeing*, Civ. A. No. 07-6396, 2008 WL 2705099, at *6 (N.D. Cal. July 8, 2008). With respect to the types of military decisions that cannot be considered in a court of law, the Supreme Court has recognized that:

[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.

Gilligan, 413 U.S. at 10. In cases arising out of the recent war in Iraq, courts have found that the political question doctrine precluded tort suits against private contractors in situations involving: the operation of a military convoy, *see Carmichael*, 572 F.3d 1271, *see also Whitaker v. Kellogg, Brown & Root Services, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006); the provision of power generation services used in the maintenance of war tanks, *see Taylor*, 658 F.3d 402; and the provision of security services at a military base to protect the occupants from hostile actions, *see Smith v. Halliburton Co. et al.*, Civ. A. No. 06-462, 2006 WL 2521326 (S.D. Tex Aug. 30, 2006).

In our first decision, this Court reviewed the limited factual record, analyzed the contractual provisions at issue as well as the facts bearing on KBR's performance under those provisions, and determined that the high level military decisions involved in housing soldiers at a military base in Iraq

were not textually committed to the Executive Branch. *Harris*, 618 F. Supp. 2d at 422-27. We found that certain contractual provisions granted KBR control over its performance of the work on the base and discretion to decide how and when work was to be performed, permitting judicial evaluation of Plaintiffs' claims. *Id.* Our analysis then focused on a technical inspection conducted by KBR and its performance of many service order requests instituted by military personnel. *Id.* Ultimately, this Court concluded that KBR's performance could possibly be evaluated without questioning the military decisions which were apparent in the case. *Id.*

At this stage, KBR contends that the formulations of the political question doctrine set forth in *Carmichael* and *Taylor* undermine this Court's earlier analysis and conclusion that it is possible to consider KBR's alleged negligence in isolation from the high level military decisions which precipitated KBR's engagement. (Docket No. 261). KBR further argues that its defenses to Plaintiffs' claims must be considered – in the context of the policies, judgments and decisions of the military – all of which KBR maintains contributed to the death of Staff Sergeant Maseth. (*Id.*). In reply, Plaintiffs continue to contend that this is a simple tort suit which does not challenge any military judgments and the Court's earlier decision should stand. (Docket No. 264). For the following reasons, the Court now agrees with KBR that given the current record, the Court cannot overlook sensitive military judgments and decisions which are implicated in this case thereby

barring this action from further judicial consideration.

Returning to our earlier decision, the underlying theme was that KBR was potentially liable in this case because its contractual agreements with the military provided it with discretion in the manner in which it performed its operations and maintenance functions at the RPC and the control it exerted over its own employees' actions. *See Harris*, 618 F. Supp. 2d at 422. Based on the then limited factual record, the Court hypothesized that KBR's alleged negligence could possibly be considered in isolation from the high level military decisions that KBR had identified. *Id.* But, *Carmichael* and *Taylor* persuade this Court that a broader consideration of Plaintiffs' claims and KBR's defenses is necessary in order to determine if any military decision-making will be implicated at a trial of this case. *See Carmichael*, 572 F.3d at 1292; *see also Taylor*, 658 F.3d at 409. Moreover, the facts established through discovery and the opinions of the parties' electrical experts, now demonstrate to this Court that the military's involvement cannot be divorced from any negligent act or omission of KBR.

The Court turns initially to Plaintiffs' arguments and supporting evidence. Plaintiffs' opposition to the present motion is essentially twofold: first, that their claims are narrowly tailored to challenge only KBR's alleged negligent conduct; and second, that KBR's negligence based defenses do not "legitimately implicate" military judgments in this case. (Docket Nos. 264, 285). As set forth below, the Court disagrees that all of Plaintiffs' claims are narrowly

tailored but also finds that KBR's defenses to Plaintiffs' remaining claims are properly supported and do legitimately implicate military decision-making.

First, Plaintiffs' claims are not as narrowly tailored as they contend but are very broad in scope. (Docket No. 209). In this regard, their Amended Complaint identifies at least 22 separate duties which were allegedly breached by KBR in this case.²⁰ (*Id.* at ¶ 33(a)-(v)). Further, their supporting arguments are very general in nature. They have not pointed to evidence in the record which supports each of KBR's 22 alleged breaches nor have they analyzed how each of these claims can proceed without an impermissible analysis of sensitive military judgments.²¹

In the Court's view, many of the claims, as pled, directly implicate the sensitive military judgments cited by KBR and are not supported. For example,

²⁰ Plaintiffs have not sought the Court's leave to narrow their claims to date to coincide with their legal arguments.

²¹ As is discussed in § IV, *supra*, Plaintiffs have the burden to present evidence supporting their claims in order to oppose KBR's renewed motion to dismiss. They have been on notice that KBR would be given an opportunity to renew its motion to dismiss since the Court denied KBR's initial motion to dismiss in March of 2009, without prejudice, and have been repeatedly advised on numerous occasions that such a motion was forthcoming at the conclusion of discovery. (*See* Docket Nos. 153, 165, 195, 199, 253). In this Court's opinion, Plaintiffs should have been prepared to fully support all of the claims in their Amended Complaint at this time or should have selectively withdrawn or dismissed those claims that they cannot fully support.

Plaintiffs allege that KBR was negligent, among other things, “in failing to remedy the electrical grounding conditions at the RPC”; “in failing to rewire the RPC”; “in failing to warn the residents of the RPC of the known hazards posed by the faulty electrical systems”; “in failing to otherwise provide a safe alternative for the use of the soldiers stationed at the complex”; and, “in otherwise failing to maintain the RPC in a reasonable and prudent manner so as to prevent injury to U.S. troops there stationed.” (Docket No. 209 at ¶ 33(a), (o), (s), (t), (v)). Despite Plaintiffs’ position that these claims relate only to work KBR actually performed at LSFBI, none of the above-cited breaches pertain to any service order request²² that the military submitted to KBR for the performance of electrical services at LSFBI. Instead, these claims appear to challenge the scope of the duties assigned to KBR by the military in the LOGCAP and CENTCOM contracts. As such, it is apparent to the Court that the claims which are pled in paragraphs 33(a), (o), (s), (t) and (v) of the Amended Complaint are barred under the political question doctrine because such claims are not supported by any service orders.

²² As is discussed later in this section, Plaintiffs rely on the following work orders in support of their claims: (1) Work Order D-1682 (June 14, 2006); (2) Work Order D-1940 (July 4, 2006); (3) Work Order D-5204 (February 13, 2007); (4) Work Order 1208997 (June 23, 2007); (5) Work Order 120811 (July 8, 2007); (6) Work Order 1109481 (June 23, 2007); (7) Work Order 1109702 (June 26, 2007); (8) Work Order 1205258 (July 8, 2007); (9) Work Order 2193735 (November 2, 2007). (Pl. Ex. U, Docket No. 276).

While the Court finds that these specific claims are not “narrowly tailored” as the Plaintiffs suggest, the Court believes that Plaintiffs have made a strong case that KBR negligently performed its electrical work at the RPC. Taken at face value, their evidence may be sufficient to establish a prima facie case of negligence,²³ as they have presented evidence which supports findings that:

- KBR had a duty to respond to work orders at the base from 2006 through the date of the accident, January 2, 2008, and to perform its work safely under the CENTCOM and LOGCAP III contracts, (*see* Docket Nos. 262 at ¶ 117; 265 at § I, ¶ 117; *see also Task Order 139*);
- the soldiers who were exposed to electrical shocks in LSFB1 submitted work orders to KBR wherein they reported the shocks and requested that repairs be completed, (*see* Pl. Ex. U, Docket No. 276; Docket No. 265 at § II, ¶¶ 88, 90, 91, 92, 94);
- Plaintiffs’ well-qualified electrical experts, Childs and Tobias, opine that KBR could have eliminated the risk of electrical shock in the shower in Room 2 of LSFB1 in the context of the work orders which were submitted, (*see Childs Report*, Pl. Ex. AA,

²³ The Court notes that it has not resolved the choice of law issues in this case, among the potentially interested jurisdictions of Pennsylvania, Texas and Tennessee. *See Harris*, 796 F. Supp. 2d 642. The basic elements of negligence are the same in each jurisdiction and need not be discussed further here.

Docket No. 279-1; *see also Tobias Report*, Pl. Ex. BB, Docket No. 279-2); and,

- KBR's failure to recognize the risk in the shower and eliminate it in the context of the work orders to which they responded proximately caused the harm to Staff Sergeant Maseth, (*see id.*).

But, Plaintiffs' case is not infallible. Plaintiffs do not have any "smoking gun" evidence which conclusively determines the liability issues in this case in their favor. For example, they have no evidence that the military submitted any work order to KBR which explicitly states that a soldier was shocked in the shower in Room 2 of LSF1 and also requests that KBR repair the subject water pump on the roof which malfunctioned on January 2, 2008. (*See* Pl. Ex. U, Docket No. 276). In fact, they admit that the subject water pump was never the source of any prior report of an electrical shock before that date. (Docket Nos. 262 at ¶ 191; 265 at § I, ¶ 191; Def. Ex. 36).

Without this type of direct evidence of KBR's liability, Plaintiffs seek to prove their case circumstantially and through the opinions of their expert witnesses that KBR's responses to the submitted work orders should have caused its workers to ground and bond the water pump, the piping within LSF1, or the building's entire electrical system, even though none of the submitted work orders expressly requested that this type of work be performed. (*See Childs Report*, Pl. Ex. AA, Docket No. 279-1; *see also Tobias Report*, Pl. Ex. BB, Docket No. 279-2). Their experts meticulously detail the steps KBR could have taken in response to these

work orders which would have potentially eliminated the risk of electrical shock in the shower. *See e.g. Childs* at 7 (“KBR could have bonded the water lines with just a few feet of wire and a couple of hours of labor. ... [T]his would not have been a separate job, but, rather, a necessary safety component of the work orders that KBR responded to.”); *Childs* at 8 (“the bonding of LSF-1 would have only taken an experienced electrician a couple of hours and less than one hundred dollars of material. This should have been a necessary safety component of KBR’s work under the existing work orders.”); *Tobias* at 9 (“While complete rewiring, if done correctly, would [remediate the shock hazard], it was certainly not the only method available. [...] One of these methods, bonding the water piping and electrical ground, would singly have prevented SSG Maseth’s death and could have easily been done with far less effort and materials than was expended on other work orders listed.”). Plaintiffs argue that KBR should have acted in the manner described by their experts because the military granted KBR discretion to perform its work in the manner it saw fit and did not inspect KBR’s work after it was completed. (Docket No. 264 at 48-49). They also point out that KBR was contractually obligated to notify the military if the requested repairs could not be performed, exceeded certain specified cost thresholds, or reached beyond the scope of the contracts. (*Id.* at 18). The Court acknowledges that *Childs* and *Tobias* make a compelling case of how KBR could have performed its maintenance services to eliminate the risk of electrical shock in the shower, however, as we discuss below, their opinions rely on a disputed factual

predicate and contractual provisions which are ambiguous, at best. As such, Plaintiffs' case is particularly susceptible to KBR's defenses.

The Court also believes that KBR has presented substantial evidence supporting its defenses in this case, thereby undermining Plaintiffs' position that these defenses are not legitimate. Moreover, the evidence that KBR has presented to defend against Plaintiffs' claims directly implicates sensitive judgments of the military which are shielded from judicial review. The Court will address the parties' evidence with respect to each of the proffered defenses.

Most prominent among KBR's defenses is its defense to causation whereby it argues that the military's actions were the sole or superseding cause of the accident. *See Lane*, 529 F.3d at 561 ("The central issue will be causation. If we must examine the Army's contribution to causation, 'political question' will loom large."). Hence, at trial KBR will challenge the military decision making. Admittedly, the Court has not yet resolved the disputed issue of whether the laws of Pennsylvania, Texas, or Tennessee will apply to the substantive issues in this case, including causation. *See Harris*, 796 F. Supp. 2d at 658-660 (citing PA.SSJI (CIV), § 3.17; *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir. 2010), which quoted *Coleman v. Equitable Real Estate Investment Management, Inc.*, 971 S.W.2d 611 (Tex. Ct. App. 1998); *Russell v. Anderson County*, 2011 WL 486900, at *11-12 (Tenn. Ct. App. Feb. 11, 2011), which quoted *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)). Although there are some differences in

the law of causation among these jurisdictions, the laws of each provide that proximate causation sets the boundaries of a defendant's liability in negligence. *Id.* In each state, a defendant can establish a legitimate defense to a negligence claim by proving that its own conduct was not the proximate cause of the harm to the plaintiff and may do so by pointing to evidence that a third party's actions were the true proximate cause of the harm. *Id.* Therefore, the Court's analysis "would remain the same regardless of which state's law applied." *See Carmichael*, 572 F.3d at 1288 n.13. Here, KBR argues that "[i]f this case goes to trial, [it] will be forced to use military witnesses and documents to prove that SSG Maseth's tragic death was caused by discretionary decisions made by personnel at all levels of the military, from Commanding Generals to SSG Maseth himself. A trial would inevitably pit military personnel against each other and force them to explain or defend their discretionary wartime decisions." (Docket No. 261 at 44).

This is not a hollow position. Indeed, KBR has now presented substantial evidence which demonstrates that the military was aware not only of the fact that the hardstand buildings in the RPC were ungrounded with substandard electrical systems, as the Court recognized in our prior decision, *see Harris*, 618 F. Supp. 2d at 404-05, but also that military personnel were aware of the specific risk of electrocution in shower facilities posed by the deficient electrical systems in hardstand buildings throughout the Iraq war theatre. For example, KBR has submitted the declaration of General Vines, who recounts that "[w]e chose to

assign personnel to live in these pre-existing structures, notwithstanding their electrical deficiencies. All of us, including myself, lived in buildings with similar deficiencies.” (Docket Nos. 262 at ¶ 91; 265 at § I, ¶ 91). Soldiers and commanders alike were subject to shocking incidents caused by deficient electrical work at the base. But, military commanders felt that the shocking incidents were minor when compared to other pressing matters at the base such as power distribution and protection from indirect fire. (Docket No. 262 at ¶¶ 90, 91). Considering the circumstances, General Vines opined that the tragic incident involving Staff Sergeant Maseth could have occurred at any of the bases in Iraq where existing hardstand structures were used to house soldiers, because they all suffered from the same electrical deficiencies and subjected soldiers to similar risks. (*Id.*).

KBR’s evidence also shows that a number of soldiers were electrocuted in the Iraq war theatre in 2004 and 2005 due to accidental exposure to ungrounded electrical systems, causing injuries and deaths to soldiers, including two electrocution deaths which occurred in shower facilities. (*See* Def. Exs. 2, 22, 24). It is important that these incidents all occurred *before* KBR was engaged to perform operations and maintenance services under either the CENTCOM (2006) or LOGCAP III contracts (February 2007). (*See* Docket Nos. 262 at ¶ 117; 265 at § I, ¶ 117; *see also Task Order 139*). The information regarding the specific risk of electrocution from ungrounded electrical systems was then circulated within the military chain of command via all of the following: an Army Safety Publication

which warned soldiers of potential electrical hazards; a presentation by LTC Carey outlining the electrical hazards which he provided to base camp mayors and military commanders; and an internal DCMA memo which acknowledged the safety issues presented by the electrical facilities and recommended changes to tighten up ambiguous contractual provisions. (Def. Exs. 2, 22, 24). The dissemination of these warnings all *predate* the military's engagement of KBR pursuant to the LOGCAP III contract in February of 2007. Hence, the duties that the military did and did not assign to KBR under that contract cannot be analyzed without considering the facts which precipitated the military's decisions. *See Task Order 139*. Because there is evidence that the military was aware of the potential risk posed by deficient electrical systems *before* KBR was engaged as a contractor at the base, the Court believes that KBR has presented a sufficient factual foundation from which it can reasonably argue that the military's actions in knowingly exposing soldiers to the risk of electrical shock in the showers of Iraqi hardstand buildings were the proximate cause of harm to Staff Sergeant Maseth in this case, rather than KBR's own actions.

The parties dispute whether the military's decision to house soldiers in hardstand buildings was based on a stated military policy, i.e., whether as KBR advocates that this decision involved a calculated war time trade-off between hardstand buildings which provided greater protection to soldiers from attacks than the alternative prefabricated containerized housing units used by the military at other bases or whether, as Plaintiffs

advocate, the choice was a result of the failure of the military to appreciate the gravity of the risk posed by the ungrounded electrical systems which, in turn, was compounded by KBR's deficient electrical work. (Docket Nos. 262 at ¶¶ 61, 114; 265 at § I, ¶¶ 61, 114). However, a federal district court is not constitutionally permitted to resolve this type of dispute when, as here, KBR's position is supported by competent evidence such as General Vines' declaration²⁴ and the other evidence cited in the preceding pages of this Opinion. During wartime, the military bears the responsibility for the safety of our soldiers. Yet, the nature of war requires military commanders to conduct risk assessments of numerous risks that would be unacceptable in civilian life which they must weigh on a daily basis. As is discussed below, in the court system, we lack any judicially manageable standards under which the military's wartime decision-making can be evaluated. *See Saleh*, 580 F.3d at 7 ("it is clear that all of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule.").

²⁴ Indeed, General Vines declared that "[s]pecial operations personnel are a unique breed of soldier, trained to operate and fulfill their missions under difficult and dangerous conditions. Because of the nature of their assignments, they often must endure austere living arrangements, using available facilities. They frequently live apart from other military personnel and must place security over comfort, given the special nature of their operations." (Docket No. 263-15 at ¶ 13).

There are several other aspects of KBR's defense to causation which show that further adjudication of this case will implicate sensitive military judgments. Principally, as this Court interprets the LOGCAP III contract,²⁵ its terms do not completely shift responsibility for the potential risks associated with soldiers living and showering in hardstand buildings with known ungrounded electrical systems to KBR. *See Task Order 139*. At most, this agreement demonstrates that the military and KBR *shared* such responsibility, leaving open KBR's argument that the military's actions—and not its own—were the proximate cause of the harm.

On this point, the military command structure at the base cannot be understated. At the RPC, the Mayor's Cell was tasked with the responsibility for all life support functions at the base, including operations and maintenance of electrical and plumbing systems. (Docket Nos. 262 at ¶ 57; 265 at § I, ¶ 57). As a consequence, if a contractor such as KBR was not engaged to perform operations and maintenance services at the base, these tasks would be solely the responsibility of the military through the Mayor's Cell. Further, a government contractor is

²⁵ The Court notes that a similar analysis of the CENTCOM contract is not necessary because there is insufficient evidence to demonstrate that KBR installed the water pump during the pendency of this contract and Plaintiffs admit that they have no evidence that the water pump caused any electrical shocks requiring service at any time prior to January 2, 2008. (Docket Nos. 262 at ¶ 191; 265 at § I, ¶ 191; Def. Ex. 36 (Plaintiffs "are not aware of whether the specific pump that caused the shock on January 2, 2007 . . . had ever previously been the source of a shocking incident at LSF1.")).

only able to act when authorized to do so by the military and in the manner set out in the parties' contractual arrangement. See *LOGCAP III contract, SOW 7.1* ("The Contractor is obligated to follow and adhere to the Governing directives and applicable documents as listed in the contract and the SOW."). Under Task Order 139, the Mayor's Cell—which oversaw all life support functions at the base—was granted the authority to determine whether Level A or Level B maintenance was appropriate for the buildings. See *Task Order 139, Appx F.1.2* ("Prioritization of facility levels (A, B and C) is the responsibility of the Mayor[s] Cell."). Level A maintenance required preventative maintenance of the facilities and periodic inspections for defects in electrical systems, including checks for grounding. *Id.* at *Appx F.2.1 "Level A, Full Maintenance", F.4, "Preventative Maintenance"*. The Task Order further provides that "[t]he purpose of these inspections is for safety and to save the government money by identifying deficiencies while they are still small and easy to fix." *Id.* at *Appx F.4.1*. On the other hand, Level B maintenance required only that KBR respond to service order requests and fix the problems initially identified by military personnel. *Id.* at *Appx F.2.2.3* ("Any repairs or replacement that need to be done on the facility will be initiated with a service order request by the customer."). The service order requests were funneled from the soldier on the ground, through the Mayor's Cell and then to KBR for performance. After receiving the service order request from the Mayor's Cell, a KBR employee would respond to the order, identify/diagnose the problem and fix it, as appropriate. *Id.* at *Appx*

F.2.2.2. (“Upon receipt of service request, the contractor shall conduct an assessment to determine feasibility of repair or replacement of existing items. The assessment shall be provided to the Mayoral Cell.”). KBR was also not authorized to unilaterally perform “new work” without first obtaining approval from the Mayor’s Cell and repairs which exceeded certain cost thresholds required approval by the Mayor’s Cell. *Id.* at *Appx F.2.2.2.3.* (“If the assessment exceeds the scope of repair or replacement; the contractor shall return the service request to the Mayoral Cell for disposition.”). Finally, the contract provides that KBR perform its services safely for the benefit of all those at the base, including military personnel but the term “safety” is undefined. *See Task Order 139* at § 1.1.2 (“Worksite Safety. The contractor shall be responsible for safety of employees and base camp residents during all contractor operations ...”).

Given these contractual provisions, the military retained considerable control over operations and maintenance services at the base even though it delegated certain work to KBR which, in turn, supervised its own employees’ performance without military involvement or inspection of same. Indeed, as the Mayor’s Cell was ultimately responsible for base life support functions at the base and through the LOGCAP III contract and Task Order 139 delegated only certain limited maintenance responsibilities to KBR, both the military and KBR effectively *shared* maintenance and operations responsibilities for the electrical facilities at the base. (Def. Ex. 7, Docket No. 263-16 at 32, ¶ 10 (“In the military, unit commanders have full responsibility

for the health, safety and welfare of their unit members.”)). It was the military that declined to engage KBR to refurbish the existing buildings by updating the electrical systems, as well as to conduct preventative maintenance services and periodic inspections of the electrical facilities and also decided not to perform these functions using its own personnel. (Docket Nos. 262 at ¶ 135; 265 at § I, ¶ 135). Under this contractual arrangement, the military retained the responsibility for troop safety stemming from its decisions to limit maintenance at the base by maintaining the buildings “as is” without preventative maintenance or inspections while KBR was only responsible to “safely” perform its work on the base—a standard which is undefined in the agreements. *See Task Order 139*. Thus, this Court cannot find that the military completely shifted to KBR the risk of loss potentially caused by electrical shocks to base camp residents that may have been prevented by the election of a higher level of operations and maintenance services or the direction to refurbish the buildings and upgrade the systems.

A convincing example of the military’s retention of control over the level of operations and maintenance services KBR provided at the RPC occurred in late 2007. At that time, base camp Mayor SFC Skaggs directed KBR to install a generator near LSFBI and also requested that KBR provide “full O&M” services to the generator, meaning that service was to be provided as Level A maintenance under Task Order 139. (Docket No. 262 at ¶ 183; 265 at § I, ¶ 183; *Task Order 139, Appx. F., § F.2.1*. (“Level A, Full Maintenance”)). The purpose of the generator was to power an ECCM jamming device

which protected the base and its residents from vehicle-borne improvised explosive devices. (Docket No. 263-51 at 23). Thus, the military retained the ability to assign Level A maintenance to certain equipment and facilities and apparently did so in instances, such as this one, where the military believed that Level A maintenance was necessary to protect base camp residents from potential hostilities.

The evidence surrounding the generator installation also demonstrates that the military ignored warnings from KBR concerning the state of the electrical facilities in the LSFBI area. In this regard, KBR representatives advised military personnel in person and through written correspondence that the electrical systems in that area were “maxed out” and recommended that the ECCM device be operated through the generator rather than the electrical system. (Docket No. 262 at ¶ 184; Pl. Ex. X, Docket No. 277-1 at 2). The military initially followed KBR’s recommendation and ordered KBR to install the generator. (Docket No. 263-51 at 23). However, within a month, military personnel directed KBR to remove the generator and SFC Skaggs and other military personnel installed the ECCM directly into the electrical system, contrary to KBR’s recommendation. (Docket No. 262 at ¶ 185). Again, this evidence shows that the military conducted its own risk assessment and would act contrary to KBR’s recommendations on electrical safety, if the military believed that it was necessary to do so.

In addition, the evidence of work KBR actually performed at the base does not foreclose KBR's argument that the military's actions alone were the proximate cause of Staff Sergeant Maseth's death because Plaintiffs' case largely relies on circumstantial evidence which is particularly susceptible to KBR's empty chair defense that challenges the military's decisions. For example, the parties dispute whether it was KBR that installed the ungrounded water pump in 2006 at LSFBI that ultimately failed in this case. Plaintiffs maintain that it did, relying on photographs of LSFBI from 2006 and 2008 and the corroborating testimony of two soldiers to show that the water pumps and tanks were moved on the roof of the building during that time period. (Def. Ex. 36, Docket No. 263-61 at ¶ 20; Docket No. 295 at § I, ¶ 197). Plaintiffs' evidence supporting their contention that KBR installed the water pump is speculative and weak, at best. Yet, Plaintiffs ask that the Court and a jury infer from the movement of the water pumps and equipment and the fact that KBR had an operations and maintenance contract at the base during this time period, that KBR must have installed the water pump. (Docket No. 265 at § I, ¶ 197). The DODIG investigators apparently found this information²⁶

²⁶ The report also mentions that the installation of new water tanks on the roof of LSFBI was completed by a KBR subcontractor from Card Industries and, from this, the DODIG surmises that the water pumps would have been installed concurrently. (Def. Ex. 31 at 3-4). Yet, this Court has not been presented with the underlying evidence (such as the statement from the KBR subcontractor) to substantiate this assertion in the DODIG Report.

sufficient to reach the conclusion that KBR installed the water pump in its findings. (See Def. Ex. 31 at 3-4). But, the DODIG was not restricted by the Rules of Evidence, and its conclusion is possibly inadmissible at trial.²⁷ (*Id.*). KBR denies that it installed the water pump, stating that its internal investigation has not unearthed any work order which shows that its representatives actually performed the installation.²⁸ (Docket No. 265 at § I, ¶ 197, Pl Ex. G, Docket No. 269). Because the evidence is disputed as to whether KBR, rather than the military or another subcontractor, installed the water pump, the Court

²⁷ The Court notes that when ruling on a motion for summary judgment, a district court may consider inadmissible evidence only if the court first determines that such evidence could be presented in an admissible form at trial. See *Palfrey v. Jefferson-Morgan Sch. Dist.*, 355 F. App'x 590 (3d Cir. 2009) (citing *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990); *Williams v. Borough of West Chester*, 891 F.2d 458, 466 n.12 (3d Cir. 1989)). As the Court noted in a prior decision, see *Harris*, 2010 WL 4614694, at *4, the DODIG Report is likely inadmissible to prove the fact that KBR installed the water pump. See e.g. FED. R. EVID. 803(8) (“The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness ... [a] record or statement of a public office if ... it sets out ... in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation”); *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 n.4 (3d Cir. 2002) (setting forth factors to consider to determine if agency reports are admissible under Rule 803(8)); *Hallett v. United States*, 877 F. Supp. 1423, 1428 (D. Nev. 1995) (holding that a Department of Defense report was inadmissible).

²⁸ The Court notes that Plaintiffs did not bring a motion to compel or any other challenges to KBR’s production during discovery.

believes that KBR can legitimately defend its position that it did not cause the water pump to be installed without proper grounding and bonding. KBR is likewise able to support its position by relying on the facts that: none of the 144 buildings in the RPC were properly bonded or grounded; none of the electrical elements of LSFB1, including the equipment and appliances, were bonded or grounded; and the military never explicitly directed it to ground and bond its work on the base through the contracts. (See Docket Nos. 262 at ¶¶ 125, 188, 190; 265 at § I, ¶¶ 188, 190).

Plaintiffs' remaining claims rely on KBR's failure to properly respond to work orders on the following dates: June 14, 2006; July 4, 2006; February 13, 2007; June 23, 2007; June 26, 2007; and July 8, 2007. (Docket No. 265 at § II, ¶ 87). This evidence is likewise hotly contested between the parties. (Docket Nos. 265 at § II, ¶ 87(a)-(g); 283 at ¶ 87(a)-(g)). While several of these work orders contained complaints of electrical shocks by service members,²⁹ Plaintiffs admit that they have no evidence that the subject water pump was the source of any of the electrical

²⁹ The Court understands from the layout of LSFB1 included in the DODIG Report that LSFB1 had two separate restroom facilities. (See Def. Ex. 31, Docket No. 263-54 at 14, Figure 2, Floor Plan of LSFB1). As KBR points out, the shocks that were reported by soldiers did not all occur in the restroom adjacent to Room 2, where the Maseth accident took place but many occurred in the restroom adjacent to Room 6. (Docket No. 283 at ¶ 87). In addition, the reported shocks required service to the water heaters which were located in three separate locations surrounding the building, rather than to the water pump and tanks located on the roof of the building. (*Id.*).

shocks which were suffered by the soldiers.³⁰ (Docket Nos. 262 at ¶ 191; 265 at § I, ¶ 191; Def. Ex. 36 (Plaintiffs “are not aware of whether the specific pump that caused the shock on January 2, 2007 ... had ever previously been the source of a shocking incident at LSF1.”)). However, Plaintiffs have identified work orders requesting service to the subject water pump. To this end, the July 8, 2007 work order pertained to a complaint from SSG Hummer that a water tank was leaking. (Docket No. 265 at § II, ¶ 87(h)). KBR responded to this request and replaced a pressure switch attached to the subject water pump. (*Id.*). However, Plaintiffs and their experts admit that the pressure switch did not cause the water pump to malfunction. (Docket No. 265 at § I, ¶ 198).

In all, Plaintiffs do not have direct evidence creating a causal link between the subject water pump and a prior electrical shock incident. Yet, Plaintiffs and their experts suggest that KBR’s workers who responded to the subject work orders should have: bonded the water pipes that became electrified in addition to fixing (or attempting to fix) the reported electrical problems with the lack of grounding on the water heater and electric panels; or, recognized that the water pump was ungrounded when they replaced the pressure switch and, then, either grounded the water pump or sought approval to do so from the Mayor’s Cell. (Docket No. 265 at § I,

³⁰ The Court notes that the work that KBR actually performed in response to these service order requests caused the shocking incidents to subside for some time. (*See* Docket Nos. 262 at ¶ 181; 265 at § I, ¶ 181).

¶ 198). The former base camp mayors both testified that they would have authorized such work if KBR had presented such a request to them. (Docket No. 265 at § II, ¶¶ 54, 74, 77-82). But, without direct evidence of KBR's performance of faulty work on the subject water pump, KBR's liability position can be fairly defended by pointing to the ambiguities in the contract and the fact that the contract contained provisions which were not elected, like Level A maintenance, which would have explicitly required KBR to conduct periodic checks for grounding of all equipment, including water pumps, every 60 days. *See Task Order 139 at Appx F.4.1.* ("A Category. Inspection should be conducted every 60 days, but can be modified by the base camp mayor for more or less frequent inspections on an individual basis. The purpose of these inspections is for safety and to save the government money..."). The subject water pump was last serviced on July 8, 2007, and Staff Sergeant Maseth's death did not occur until January 2, 2008.³¹

³¹ At the motion hearing, Plaintiffs' counsel suggested that a work order initiated by Staff Sergeant Maseth on November 2, 2007 also involved the subject water pump. (*See* Docket No. 294 at 104). This work order is not referenced in Plaintiffs' response to KBR's concise statement of material facts or their own counterstatement of material facts. (Docket No. 295, §§ I, II). Thus, under Local Rule 56, which the parties were ordered to follow in the instant motion practice, this Court may disregard such evidence as it is the Plaintiffs' burden to present facts using the concise statement procedure. Despite same, the Court has independently located the referenced work order in the record. (Pl. Ex. U, Docket No. 276 at 12). Counsel is correct that Staff Sergeant Maseth reported: "wp pulsating badly" in the work order dated November 2, 2007. (*Id.*). The remainder of the work order, including the sections filled out by KBR staff, is almost illegible but it appears to state that KBR repaired the

(See Docket Nos. 265 at § II, ¶ 87(h); 262 at ¶ 187; 265 at § I, ¶ 187). If Level A maintenance was ordered by the military, KBR would have been contractually required to have conducted grounding checks on the water pump multiple times from the start of the contract in February of 2007 and two or three times between the last service call and the accident. See *Task Order 139* at *Appx F.4.1*. As one of the stated purposes of inspections and grounding checks was for “safety”, the ambiguous nature of the pertinent provisions in the contract lends support to the argument that the military’s decision to exclude preventative maintenance was a causal factor in the accident. See *id.* Therefore, the military’s decision to exclude language requiring preventative maintenance and periodic inspections every 60 days from the contract—the purpose of which was to ensure “safety” of the facilities—is directly implicated by the parties’ respective positions on proximate causation.

Another point of contention between the parties is whether the risk of electrical shock in the shower at LSFBI could have been eliminated without direction from the military to rewire the entire building. (Docket Nos. 262 at ¶¶ 166-167; 265 at § I,

pressure switch. (*Id.*). From this work order alone, the Court is unable to determine whether it involves the subject water pump or what relevance, if any, this document has to the case. In any event, the November work order would not undermine the Court’s position that Level A maintenance would have required KBR to conduct bi-monthly inspections and grounding checks while the operative portions of the contract under which KBR worked were ambiguous and lacked explicit performance standards. (See *Task Order 139*).

¶¶ 166-167). This dispute is the center of the battle of electrical experts in this case. (See Docket Nos. 289-293, 299, 302-303). KBR's expert, John Loud, contends that a complete rewire of the building was necessary to eliminate the risk of electrical shock. (Def. Ex. 32). Plaintiffs' experts, Jim Childs and Dr. John Tobias, concede that a complete rewire would eliminate the risk, but they also conclude that the electrical shock risk could have been addressed by KBR within the context of the aforementioned work orders. (Pl. Exs. AA, BB). The facts underlying these competing opinions are disputed although both parties agree that the military never issued an order directing KBR to upgrade the electrical facilities until after the accident. While KBR has moved to exclude the opinions of Plaintiffs' experts under *Daubert*, (see Docket No. 289), Plaintiffs have not sought to exclude the opinions of Loud, the defense expert, by filing a *Daubert* challenge, (see Docket No. 255); instead, Plaintiffs will rely on cross examination at trial. Plaintiffs' tactics, while understandable, undermine their position that KBR's defenses do not legitimately implicate military judgments. Without seeking to exclude Loud's testimony, Plaintiffs have, in effect, conceded that his opinions will be placed before the jury. Of note, only the military had the authority to direct KBR to rewire LSF1, and Loud's opinion that the risk of electrical shock could not have been eliminated absent such an order challenges the sensitive military judgment of whether the military should have commissioned KBR or another contractor to upgrade the electrical systems by rewiring the building. (See Def. Ex. 32 at 11).

The presence of such nonjustiable issues is even more apparent if the Court delves deeper into the disputed facts on the issue of the safety of LSFBI, contractual negotiations with KBR and the limited technical inspection which was completed by KBR before it assumed operations and maintenance responsibility at the RPC. Plaintiffs suggest that KBR should have recognized that the electrical systems posed significant risks to soldiers and that KBR should have marked the building as “unserviceable”—effectively condemning it. (Docket No. 265 at § II, ¶¶ 51-54). KBR cites the same technical inspection report as further evidence of its warnings to the military of the poor condition of the electrical systems and, again, faults the military for not ordering that LSFBI be rewired. (Docket No. 262 at ¶¶ 152-156). KBR representatives presented the technical inspection report to military officials on two separate occasions, once in February of 2007 and a second time in November of 2007. (*Id.* at ¶¶ 168-170).

In this Court’s estimation, the evidence KBR has submitted with respect to the contractual aspects of the technical inspection process is compelling, particularly the sworn statements of Colonel Kirk Vollmecke, Commander of DCMA. (Def. Ex. 29 at 12-85). He offered wide-ranging statements regarding the LOGCAP III contract before the DODIG investigators and the role of DCMA staff in contractual negotiations. (*Id.*). During his interview, he explained that the military had waived the requirement that KBR conduct technical inspections of the buildings at the RPC and authorized KBR to commence work under the LOGCAP III contract without fixing the electrical problems identified in

the February 2007 technical inspection, including the problems at LSFBI. (*Id.* at 32, 36). He also confirmed his belief that the LOGCAP III contract did not contain any explicit electrical standards requiring KBR to complete electrical work under the NEC or British Codes and it lacked any requirements regarding the certification of contractors performing electrical work on the base. (*Id.* at 41-42, 52-55). Colonel Vollmecke faulted DCMA staff for waiving the requirement of the technical inspections, accepting the many assumptions that KBR made in its PPE (including that the buildings were in good condition) and for directing KBR to commence work at the RPC without fixing the problems which KBR identified in the “limited” technical inspection report. (*Id.* at 41-42). He also expressed his dissatisfaction with the ambiguities in the contract, which in his mind left it without any explicit standards for the performance of electrical work or any requirements for the certifications of contractors performing electrical work. (*Id.* at 52-55).

Colonel Vollmecke provided significant context for his testimony as well. He explained that the contracts were not developed to account for the semi-permanent occupation environment that was present at that stage of the war in Iraq and believed that these agreements worked well at the beginning of the war when only a limited number of bases were involved. (*Id.* at 41-43). But, as the war progressed toward semi-permanent occupation of Iraq by the joint forces and the assignment of soldiers to live in thousands of Iraqi hardstand buildings, “holistic” changes were not made to the contract to keep up with the changing dynamics of the war. (*Id.* at 43).

Moreover, the contractual negotiations with KBR took place in February of 2007, at a time when the United States—at the command of the President—had commenced execution of the “Surge” wherein the troop levels on the ground in Iraq were significantly increased (in excess of 20,000) in order to stabilize the country. (*Id.* at 42). The “Surge” added tremendous pressure to DCMA as the troop increases resulted in corresponding increases in the number of contractors, which required a significant amount of work from DCMA staff at the time. (*Id.*)

Much of Colonel Vollmecke’s testimony concerning the state of the agreements with contractors at the relevant time is corroborated by the February 1, 2007 Dickinson Memorandum—an audit report wherein Dickinson reports that the safety programs then-present in the war theatre were “substantially non-achievable due to the war environment.” (Def. Ex. 24). He added that “[m]any products and facilities available in Iraq do not meet basic US standards nor a military risk analysis based on a generally acceptable ‘good enough’ standard. The LOGCAP contract process influences KBR to inherit many facilities which are not intended for long term usage.” (*Id.*). Dickinson also identified poor electrical conditions as a major safety threat on U.S. bases in his report. (*Id.*)

This evidence, acquired from internal military sources, lends further credence to KBR’s theory that the risk of electrical shock to which Staff Sergeant Maseth was exposed was the result of high level military cost-benefit and wartime risk management decisions rather than the result of KBR’s own

negligence. In all, the Court finds that KBR's causation defense cannot be addressed without questioning multiple policy-based decisions made by military commanders. *See Taylor*, 658 F.3d at 411-412 (analysis of KBR's contributory negligence defense could not be completed without reviewing reasonableness of military judgments).

KBR further argues that its defense of assumption of the risk bars consideration of this action by this Court. (Docket No. 261). The parties have not briefed the choice of law issue on assumption of the risk, although both have referenced Pennsylvania law during their arguments.³² (*See* Docket Nos. 261, 264, 282, 285). As

³² The Court notes that it appears that the states of Texas and Tennessee have abandoned the doctrine of assumption of the risk in favor of comparative fault statutory schemes. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 772 (Tex. 2010) (citing TEX. CIV. PRAC. & REM. CODE § 33.001; *Farley v. M M Cattle Co.*, 529 S.W.3d 751, 758 (Tex. 1975)); *see also Baggett v. Bedford County*, 270 S.W.3d 550, 554 (quoting *Perez v. McConkey*, 872 S.W.3d 897, 901 (Tenn. 1994) (“[w]e agree with those states that have abandoned all categories of implied assumption of the risk, as well as the traditional assumption of risk terminology, in the wake of judicial or statutory adoption of a scheme of comparative fault. The types of issues raised by implied assumption of risk are readily susceptible to analysis in terms of the common-law concept of duty and the principles of comparative negligence law.”)). But, as we recognized previously, *see Harris*, 796 F. Supp. 2d at 659, both Texas and Tennessee have similar statutes whereby plaintiffs may not recover if the jury finds that they were more than fifty percent responsible for their own injuries. *See McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992); *see also* TEX. CIV. PRAC. & REM. CODE §§ 33.001, 33.003. Further, as we discuss below, the same evidence of the military's decision of whether to provide ablation units on the

such, the Court will look to Pennsylvania law to determine if KBR's defense of assumption of the risk is supported by evidence and legitimately implicates military judgments. *See Travelers Cas. And Sur. Co. v. Ins. Co. of N. Amer.*, 609 F.3d 143, 170 (3d Cir. 2010) (quoting *Assicurazioni Generali, S.P.A. v. Clover*, 195 F.3d 161, 164 (3d Cir. 1999)) ("the first question to be answered [under Pennsylvania law] is whether the parties explicitly or implicitly have chosen the relevant law."); *see also Allegrino v. Conway E & S, Inc.*, Civ. A. No. 09-1507, 2010 WL 4052923, at *6 n.16 (W.D. Pa. Oct. 14, 2010) (holding that Pennsylvania law applied as the parties did not argue choice of law issue and implied that Pennsylvania law applied by focusing their arguments on same). Although a system of comparative negligence has been enacted by the Pennsylvania legislature, courts have recognized that the doctrine of assumption of the risk remains as a complete defense to negligence claims under Pennsylvania law. *See Matharu v. Muir*, 29 A.3d 375, 388 n.4 (Pa. Super. Ct. 2011); *see also Zeidman v. Fisher*, 980 A.2d 637 (Pa. Super. Ct. 2009). To prove assumption of the risk under Pennsylvania law, a defendant must show that a plaintiff fully understood and appreciated the specific obvious and avoidable danger which caused his injury and "nevertheless proceeded voluntarily to encounter [it]." *Kaplan v. Exxon Corp.*, 126 F.3d 221, 226 (3d Cir. 1997) (quotation omitted). In determining voluntariness, the court looks to whether the plaintiff had a

base or not would be relevant under a comparative fault analysis.

reasonable alternative to encountering the risk. *Id.* (citation omitted). The defense may show the plaintiff's knowledge and understanding of the risk through circumstantial, rather than direct, evidence. PA. SSJI (CIV.) § 13.150 (2011). Whether assumption of the risk bars a claim is an issue typically reserved for the jury. *See Matharu v. Muir*, 29 A.3d at 388; *see also Zeidman*, 980 A.2d at 643.

Here, KBR has submitted evidence supporting each of the elements of its assumption of the risk defense. There is certainly circumstantial evidence in the record which shows that Staff Sergeant Maseth had knowledge of the risk posed by the shower. As the Court discussed above, KBR has presented evidence that the military had knowledge that the electrical systems in Iraqi hardstand buildings did not meet Western construction standards as well as the fact that certain individuals within the military chain of command were made aware of the specific risk of electrocution in the shower facilities in Iraqi hardstand buildings. (Def. Exs. 2, 22, 24; Docket Nos. 262 at ¶¶ 86-91; 265 at § I, ¶¶ 86-91). KBR has also submitted evidence that warnings of the risk in the shower were provided to Staff Sergeant Maseth himself.³³ (Docket Nos. 262 at ¶¶ 178-180; 265 at § I,

³³ The Court notes that Plaintiffs' counsel asserted at oral argument that perhaps Staff Sergeant Maseth believed that KBR had corrected the electrical shock issues in the shower. (See Docket No. 294 at 51). However, there is no evidence in the record which supports this position. In fact, as the work orders described above were submitted to KBR and responded to prior to Maseth's arrival on the base in the fall of 2007, and the warnings were given to him by Hummer and Newsome after his arrival, it is clear that Maseth was warned of the problems,

¶¶ 178-180). Two of his fellow soldiers testified that they advised Maseth of the shocking risk posed by using the shower in LSF1 to which he was assigned. (*Id.*). They told him to “watch out” while he was showering. (Docket Nos. 262 at ¶ 178; 265 at § I, ¶ 178). Staff Sergeant Hummer further explained that Maseth should put his hand out to test the water before getting into the shower and even advised him that the problem would not be fixed unless the entire building was rewired. (*Id.*). Additional evidence shows that in November of 2007, KBR completed a fire inspection of the building which identified multiple electrical hazards throughout the building. (Def. Ex. 34-B). Staff Sergeant Maseth signed the report as fire marshal for the building, and it can be reasonably inferred from this evidence that he was aware that the entire building had yet to be rewired when he entered the shower on January 2, 2008. (*Id.*).

The issue of whether Staff Sergeant Maseth voluntarily encountered the risk of potential electrocution in the shower involves the consideration of any reasonable alternatives which were available to him at the time of the accident. *See Kaplan*, 126 F.3d at 226. In this Court’s opinion, this issue cannot be decided without implicating sensitive military judgments concerning the facilities made available to soldiers at the RPC for housing and showering. In fact, the Court believes that both parties’ positions on voluntariness cannot be resolved without taking into account the military’s decision-

despite the fact that KBR had responded to work orders and attempted to fix the issues.

making which precipitated Staff Sergeant Maseth's own choice to take a shower on January 2, 2008.

From their view, Plaintiffs submit that the act of taking a shower does not involve sensitive military decisions. (Docket Nos. 264, 285). However, the parties do not dispute that the military controlled all aspects of the facilities planning relevant to the RPC, including where soldiers were housed and the showering facilities made available to them. (Docket Nos. 262 at ¶¶ 51-52; 265 at § I, ¶¶ 51-52). There is also no evidence in the record which suggests that KBR was delegated any duty to evaluate all of the shower facilities and determine if ablution units—prefabricated countainerized shower units—should be used rather than the showers which were present in the Iraqi hardstand buildings. *See Task Order 139*. In addition, as a soldier, Staff Sergeant Maseth was required to follow orders from his commanding officers, and KBR had no authority to direct him where to live or shower. (Docket Nos. 262 at ¶¶ 54-55; 265 at § I, ¶¶ 54-55). The military assigned Staff Sergeant Maseth to his living quarters in LSF1 and made the shower facility available to him. Consequently, his estate contends that it was reasonable for him to use the shower which the military provided him. (Docket Nos. 264, 285). KBR's position relies on the fact that ablution units were available to soldiers at the RPC and provided a safer option than the showers in the hardstand buildings. (Docket Nos. 261, 282). Although KBR does not have any specific evidence that Staff Sergeant Maseth was aware of the ablution units or expressly declined to use such facilities on January 2, 2008, it was not KBR's duty—contractual or otherwise—to make this

alternative type of facility available to him. That option remained with the military.

From the Court's perspective, neither party can prove its case on the voluntariness issue without implicating the sensitive military judgment of whether reasonable alternatives were available to Staff Sergeant Maseth for showering in LSFBI. Plaintiffs must either admit that Maseth voluntarily encountered the risk in the shower, an admission which would undermine their case, or take the position that his actions were involuntary such that he was acting in response to military orders and directly challenge the military's decisions concerning the shower facilities which were made available to him at the base. On its behalf, KBR argues that the ablution units should have been more widely available at the base and that the military should not have permitted Staff Sergeant Maseth and other soldiers to use the shower facilities within the Iraqi hardstands, but, instead, should have required the soldiers to use the ablution units. To support this argument, KBR would have to put on evidence about the number and placement of the ablution units, as well as evidence concerning the apparent military decision to permit showers in the hardstand buildings. Any decision by this Court resolving these factual and legal disputes would necessarily pass judgment on the military's choices regarding what type of shower facilities it made available to soldiers at the base, something this Court is ill-equipped to evaluate.

Although KBR has specifically argued in its papers that its assumption of the risk defense cannot

be further adjudicated given the above-cited evidence, it is apparent to the Court that its other defenses of contributory negligence and comparative negligence present non-justiciable political questions for the same reasons. We simply cannot determine if Staff Sergeant Maseth himself acted negligently with respect to his own safety without evaluating whether the military made alternative showering facilities available to him. And, that decision was solely within the purview of the military. *See Taylor*, 658 F.3d at 411-412 (analysis of KBR's contributory negligence defense could not be accomplished without reviewing reasonableness of military judgments). We also fail to see any way in which a jury could apportion liability among these parties under a comparative negligence analysis without evaluating the military's role in this case. Indeed, under Texas law, which may ultimately apply here given that it is the state of KBR's headquarters and the location of many of its activities, a jury may be tasked with apportioning the percentage of responsibility for a plaintiff's harm among parties and non-parties, including defendants which are immune from suit like the United States in this case. *See Fisher v. Haliburton*, 667 F.3d 602, 621 (5th Cir. 2012) (citing TEX. CIV. PRAC. & REM. CODE § 33.004(l)) (noting that § 33.004(l) potentially implicates political questions because it permits a jury to assess fault against parties "who are not subject to the court's jurisdiction or who are immune from liability to the claimant" even though that party has no liability in the case). As the Court of Appeals for the Fifth Circuit suggests, permitting a jury to conduct such an assessment would clearly run afoul

of the principles of separation of powers which we are counseled to avoid in *Baker. Id.*

Considering these facts, the Court holds that this case involves sensitive military judgments which are not subject to judicial review. The funding of the military is committed to the sound discretion of the legislature while the decisions concerning what type of operations and maintenance services to be provided at a military base in a war zone are committed to the executive branch. *See Gilligan*, 413 U.S. at 10. The potential trade-offs between the safety of troops from hostile actions and other hazards on a military base in an active war zone versus the condition of electrical facilities on the base and the military's allocation of scarce battlefield resources to enhance the safety of electrical facilities versus using such funds for other wartime activities cannot be determined in a court of law thousands of miles away. (*See e.g.*, Docket Nos. 262 at ¶ 90 (General Satterfield testifying that shocking incidents were minor when compared to other pressing matters such as power distribution and protection from indirect fire); ¶ 91 (General Vines declaring that "[w]e chose to assign personnel to live in these pre-existing structures, notwithstanding their electrical deficiencies. All of us, including myself, lived in buildings with similar deficiencies."); ¶ 204 ("Speaking of safe, from your perspective as a 1SG or CSM, would you rather have your soldiers live in a hardstand building or a CHU when mortars are going off nearby? Where do the soldiers want to live?")). Weighing these factors requires professional military judgment which this Court is not authorized to review without violating the separation of powers

of the three branches of our federal government. *See Baker*, 369 U.S. at 217.

For these reasons, the Court finds that the first factor under *Baker* has been established and this case must be dismissed.

2. Judicially Discoverable and Manageable Standards

With respect to the second *Baker* factor, “[a] political question looms menacingly when a claim suffers from ‘a lack of judicially discoverable and manageable standards for resolving it.’” *Lane*, 529 F.3d at 560 (quoting *Baker*, 369 U.S. at 217). “One of the most obvious limitations imposed by [Article III, § 1, of the Constitution] is that judicial action must be governed by *standard*, by *rule*.” *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (plurality opinion)) (emphases in original). “Courts have frequently held that certain military judgments are outside the competence of courts” as courts are not equipped with appropriate standards to resolve the questioning of these judgments. *McMahon*, 502 F.3d at 1363 (discussing *Gilligan*, 413 U.S. 1). The type of judgments that are insulated from judicial review involve inherently military activities including combat operations, training exercises, and the equipping and control of military forces. *See Id.*

In light of this precedent, the Court’s analysis of the second factor under *Baker* flows from the examination of the first factor. By their nature, sensitive military judgments are without judicially manageable standards as “courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing

injury and loss of life.” *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997). Although we previously found that the flexible standards of negligence law would likely permit the Court to discover and adopt a manageable legal standard in this case, *see Harris*, 618 F. Supp. 2d at 427-30, after consideration of the fully developed factual record, we believe that the military’s risk assessment concerning the continued use of the shower facilities in the Iraqi hardstand buildings which posed a known electrocution risk to soldiers cannot be evaluated under traditional state law tort standards. The military’s decisions furthered its objective of force protection from hostilities (whether the base was subject to actual attacks or not) and responded to the allocation of scarce defense resources among the many war hazards to which soldiers were possibly subject in Iraq. A federal court lacks the competence to evaluate these policy decisions. *See Taylor*, 658 F.3d at 412, n.13 (“Here, we have no discoverable and manageable standards for evaluating how electric power is supplied to a military base in a combat theatre or who should be authorized to work on the generators supplying that power.”).

We likewise cannot determine whether KBR acted (or failed to act) with due care toward Staff Sergeant Maseth because the contracts at issue in this case did not shift the risk of loss associated with the soldiers’ exposure to known electrical hazards from the military to KBR. Instead, the contracts delegated only certain discrete duties to KBR, and the military necessarily retained the duties which were not assigned under the contracts. *See Task*

Order 139; see also Pl. Ex. A. As such, KBR's activities at the RPC are inextricably intertwined with the policy-based decisions made by the military and the issue of proximate causation cannot be evaluated without questioning these military decisions. See *Carmichael*, 572 F.3d at 1295 (explaining "it would be impossible to determine that [KBR's conduct] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments"). In addition, KBR's defenses of assumption of the risk, contributory negligence and comparative negligence raise further questions which are not suited for judicial review. See *Taylor*, 658 F.3d at 411-12 (holding that defense of contributory negligence would implicate sensitive military judgment regarding power generation).

This case is even more problematic in that Plaintiffs' liability theory relies primarily on their assertion that KBR was required to perform its electrical work to NEC or British electrical standards but they have been unable to produce evidence which convinces this Court that either of these standards applied to the work that KBR actually performed at LSFBI. (Pl. Exs. AA, BB). The Court previously suggested that Plaintiffs could prove the duty owed by KBR and the standard of care with reference to the terms of its contracts with the military, internal operating procedures, or possibly by undertaking a duty through its performance of service order requests at the base. *Harris*, 618 F. Supp. 2d at 428-29 ("The applicable duty owed by KBR to Staff Sergeant Maseth, if any, can be defined with reference to common law negligence principles as

well as the LOGCAP III Contract, Task Order 139, service order requests at LSF-B1, and KBR's internal operating procedures.""). But, the evidence in the present record is insufficient to demonstrate that any specific performance requirements were set by the military. Plaintiffs have provided the Court with testimony from General Satterfield that the applicable standard was the British standard and the base camp mayors, Skaggs and Carrier, testified that they expected that KBR would complete grounding and bonding as a part of any electrical work they performed on the base. (*Satterfield Depo* at 141, 146-47, 158-60, 162-63, Pl. Ex. E, Docket No. 268; (Docket No. 265 at § II, ¶¶ 54, 74, 77, 78). However, these individuals had limited knowledge, if any, of the actual contractual agreements. (*Satterfield Depo* at 141, Pl. Ex. E, Docket No. 268 at 7). And, as is discussed in the prior section of this Opinion, and as confirmed by Colonel Vollmecke, the contractual provisions which were applicable to the work orders in this case did not explicitly require performance to either electrical standard and the contractual condition that KBR complete technical inspections of the buildings was waived. (Def Ex. 29 at 52). Plaintiffs have likewise failed to persuade the Court that KBR admitted that the NEC applied to the circumstances of this case through the deposition testimony of Rule 30(b)(6) witness Paul Hardin.³⁴ (Pl.

³⁴ Plaintiffs rely on a very brief exchange during Mr. Hardin's deposition to establish his purported judicial admission on behalf of KBR. That passage is as follows:

Q. Okay. Is -- was KBR, when they would make repairs based on a work order, did they do their

Ex. L). At most, he testified equivocally that KBR would have performed to NEC standards in certain situations but could not at the RPC because all of the buildings there needed to be rewired. (*Id.*). In this Court's opinion, this isolated testimony by Hardin is insufficient to create a binding judicial admission by KBR that the NEC applied to all of its work at the base. See *In re Teleglobe Comm. Corp.*, 493 F.3d 345, 377 (3d Cir. 2007) (citing *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972)) (“[t]o be binding, admissions must be unequivocal” and admissions “must be statements of fact that require evidentiary proof, not statements of legal theories.”). Plaintiffs have not argued that KBR's standard operating procedures required it to perform to these Western electrical standards but, having reviewed the procedures provided in the record, they appear to set forth performance standards consistent with Hardin's testimony rather than require performance under the Western electrical standards.³⁵ (*See* Pl. Ex.

repairs, electrical repairs in accordance with NEC standards?

A. Yes, when capable of, depending on the conditions as what they come across. A lot of these buildings needed to be rewired, sir.

(Pl. Ex. L, Docket No. 271-1).

³⁵ Although neither party has explicitly relied on KBR's Standard Operating Procedures in their respective arguments, section 4.1. titled “Ground Resistance Maintenance” appears consistent with Hardin's explanation of KBR's practices. (Pl. Ex. U, Docket No. 276 at 33-35). To this end, section 4.1.1 provides that the “Ground Resistance reading shall be in compliance with the USNEC, British Standard (BS), or the Authority Having Jurisdiction (AHJ). ***Depending on the location of the installation.***” (*Id.* at 35) (emphasis added). Here, the location

U, Docket No. 276 at 33-35). Further, Plaintiffs have not established that a course of conduct was in place whereby KBR routinely performed its electrical work to these Western electrical standards; indeed, the evidence shows the opposite—that no electrical elements of LSFBI were grounded or bonded as were the electrical systems in all of the other 143 buildings in the RPC. (Docket Nos. 262 at ¶¶ 188, 190; 265 at § I, ¶¶ 188, 190). Instead, KBR maintained the electrical systems “as is” under the CENTCOM contract and performed only reactive Level B maintenance under Task Order 139. *See* Pl. Ex. A; *see also Task Order 139*.

Without any explicit contractual language supporting their position, or an alternative means of proof to establish the electrical standards used at the base, Plaintiffs and their experts contend that this Court and ultimately, a jury, should evaluate KBR’s performance in relation to American and/or British electrical standards, based only on KBR’s general duty in the agreements to perform its work in a “safe” manner. (Pl. Exs. AA, BB). This Court cannot hold KBR to a standard of care that was not

of installation was the RPC in Baghdad, Iraq, a location without any established electrical standards.

Colonel Vollmecke offered further explanation of this distinction during his statements to the DOD investigators. (Docket No. 263-52). To this end, he explained that “anybody knows NEC or British standard really should be host nation driven to the environment, because ultimately you’re going to turn the facilities over. And so if they’re a quasi-British standard, why wouldn’t we want to do that? Why would we want to give the Iraqis NEC when, in fact, their grids aren’t even set to that. That’s stupid.” (Docket No. 263-52 at 54-55).

explicitly present in its contracts with the military. It was the military's responsibility to implement contractor performance requirements by including such electrical standards in the contracts. *See Army Reg. 715-9* at 3-2(f) (stating that contractor employees are "not under the direct supervision of military personnel in the chain of command," but that the "contracting officer ... or [his] designated liaison ... is responsible for monitoring and implementing contractor performance requirements"); *see also Carmichael*, 572 F.3d at 1283 (quoting same). The military (through DCMA) failed to do so. (Docket No. 263-52 at 52). If this Court were to equate the use of the term "safety" in the agreement as a means to import the Western electrical standards into the relationship, it would undermine the military command structure and question the military's decisions in failing to include such explicit language in the agreement. While negligence claims involve inherently flexible standards, without explicit contractual duties requiring KBR to perform its electrical maintenance activities to American or British standards, the standard of care cannot be based on general considerations of "safety," an undefined and ambiguous term. As is demonstrated by the testimony of many military witnesses, and other evidence of record, our civilian society's general understanding of the term "safety" cannot be introduced into combat areas where sensitive military policy-based judgments must be made to shield our troops from all of the hazards that a war presents. (*See* Docket No. 262 at ¶ 125 (questioning of Skaggs, RPC Mayor at the time of SSG Maseth's

accident, “Q: From an electrical standpoint, was [LSFB-1] a safe building? A: I – *you would have to define “safe,”* sir. I – I personally have lived in worse buildings than this ... Q: When you said define “safe,” from an electrical standpoint, would this building – LSF-B1, would it conform to the National Electrical Code? . . . A: No, sir. No, sir. But no building there would. And that’s the whole 144 buildings. *None of them would conform.*”). Hence, the term “safety” as it relates to electrical maintenance on the base cannot be interpreted without questioning the military’s discretionary decision to house troops in these facilities with known electrical problems and its awareness of the electrocution risk posed by the electrical system and shower facilities. These types of decisions are committed to the Executive branch and cannot be reviewed by this Court.

As a result, the Court finds that this case lacks judicially discoverable and manageable standards and must be dismissed based on the application of the second *Baker* factor to the factual record in this case.

3. Lack of Respect Due to Coordinate Branches

For many of the reasons we have already expressed, the Court believes that the fourth *Baker* factor, which considers “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” also bars consideration of this case. *Baker*, 369 U.S. at 217. To this end, we share the views of the Court in *Aktepe v. United States*, that:

adjudicating this case would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the judiciary's relative lack of expertise in these areas. The interjection of tort law into the realms of foreign policy and military affairs would effectively permit judicial reappraisal of judgments the Constitution has committed to the other branches.

105 F.3d at 1404 (citing *Tiffany v. United States*, 931 F.2d 271, 278 (4th Cir. 1991)). Although the United States is not a party to this case and is immune from any lawsuit brought against it by Staff Sergeant Maseth's estate and any contribution action brought against it by KBR, given the facts established by KBR regarding the military's decision-making at the base, the Court cannot preclude KBR from presenting its evidence which attempts to place responsibility on the military for the accident involving Staff Sergeant Maseth. *See Feres v. United States*, 340 U.S. 135 (1950) (United States immune from soldier's claim against United States military for injuries incident to service); *see also Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977) (*Feres* doctrine extended to bar third party's claim for contribution or indemnity against United States arising from soldier's injuries incident to service). Simply put, to permit this case to go forward would place the military and its wartime practices on trial. As a consequence, this case must be dismissed.

This holding finds further support in the government agency reports issued by the Department of Defense Inspector General, Department of the Army and Department of the Army Criminal Investigative Division. (Def. Exs. 31, 39, 40, 41). When this Court issued its initial decision in March of 2009, the Executive Branch reports on the death of Staff Sergeant Maseth had not yet been completed and released. *See Harris*, 618 F. Supp. 2d at 431. This Court found that adjudication of this case while those investigations were pending would not express a lack of respect to the coordinate branches of the federal government because those investigations were not evaluating the case under the same legal standards as the negligence principles that would be applied in this forum. *Id.* While we again acknowledge the different legal standards pertaining to a civil tort action and the findings of these agencies, all of the completed reports point to systemic failures by many entities involved in the operation and maintenance of the RPC, making each significant contributors to Staff Sergeant Maseth's electrocution and death. (Def. Exs. 31, 39, 40, 41; Docket Nos. 262 at ¶¶ 201-206; 265 at § I, ¶¶ 201-206). Indeed, the Executive branch reports find fault not only with KBR's performance of its operations and maintenance services and its failure to identify potential risks of harm at the base, but also with the DCMA and the military chain of command for their respective roles in the accident. (*Id.*).

In addition, the Executive reports contain factual findings and legal conclusions which Plaintiffs directly challenge in this case. For example, the DODIG report concludes that the LOGCAP III

contract did not contain explicit electrical standards and this report and the Department of the Army 15-6 Report both state that KBR's contracts did not set forth baseline standards for its employees' electrical certifications and/or training. (Def. Exs. 31, 39). Moreover, all of the Executive reports indicate that the military's decisions were causal factors contributing to the accident. (Docket No. 262 at ¶¶ 201-206). To this point, the Army CID report concludes that it could not determine that any single individual or entity's actions were the proximate cause of the accident in this case. (*Id.* at ¶ 206).

As such, Plaintiffs' claims will test the propriety of the Executive branch's pronouncements regarding the circumstances surrounding Staff Sergeant Maseth's death. It would be incompatible with those Executive findings for this Court to hold KBR to the electrical standards advocated by Plaintiffs—which are not explicitly stated in the contractual agreements and for which the Executive agencies have determined their own personnel shared some fault. Further, whether KBR should have done more to make the base “safe” and prevent Staff Sergeant Maseth's death simply cannot be evaluated in the context of this case without considering the military's initial risk assessment to permit soldiers to live and shower in the Iraqi hardstand buildings which presented a known risk to his safety. With the benefit of hindsight, it is apparent that if greater emphasis had been placed on the potential risk posed by the hardstand buildings, this accident may have been avoided and Staff Sergeant Maseth would likely be alive and well. “But the political question doctrine does not permit us to mimic the constitutional role of

the political branches by guessing how they would have conducted the nation's foreign policy had they been better informed." *El-Shifa Pharmaceutical Industries, Co. v. U.S.*, 607 F.3d 836, 845 (D.C. Cir. 2010). Given the persuasive precedent we have discussed above, we cannot permit a jury to make such a determination. Accordingly, the Court finds that the fourth *Baker* factor has also been established precluding further litigation of this case in this Court.

4. Conclusion as to Political Question Doctrine

After conducting a "discriminating inquiry" into the detailed factual record in this case, the Court concludes that further consideration of this case would violate the doctrine of separation of powers between the co-equal branches of our federal government. From this Court's perspective, it would be impossible to evaluate this case without questioning sensitive military policy-based decisions over which no judicially manageable standards can be crafted, and requiring military personnel to appear at trial and defend these wartime policies would offend the constitutional principles we have discussed. *See Baker*, 369 U.S. at 217. As a consequence, this case must be dismissed.

B. Combatant Activities Exception

Given that the Court has determined that this case presents non-justiciable political questions, we may decline to consider KBR's alternative basis for dismissal under the combatant activities exception to the FTCA. *See Taylor*, 658 F.3d at 412 ("Because the political question doctrine deprives the federal courts

of jurisdiction to resolve Taylor's negligence claim, a ruling on the FTCA issue would be little more than an advisory opinion on a constitutional question."). However, for completeness, and because the Court believes that this defense independently supports dismissal of the case at this stage, a brief discussion is included.

As this Court previously recognized, the FTCA authorizes "damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988) (citing 28 U.S.C. § 1346(b)). The combatant activities exception to the FTCA, section 2680(j), provides an exception which precludes tort liability for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Although not directly applicable to government contractors, several courts have extended the principles underlying this exception to preempt claims against government contractors. *See e.g. Koohi*, 976 F.2d 1328; *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993); *Saleh*, 580 F.3d 1; *Aiello*, 751 F. Supp. 2d 698.

In *Koohi*, the United States Court of Appeals for the Ninth Circuit held that "the combatant activities exception was designed '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.'" *Koohi*, 976 F.2d

at 1337. More recently, in *Saleh*, the Court of Appeals for the D.C. Circuit viewed the defense more broadly and recognized that “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.” *Saleh*, 580 F.3d at 9. Modern courts³⁶ have looked to *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948), for its definition of “combatant activities,”

‘Combat’ connotes physical violence; ‘combatant,’ its derivative, as used here, connotes pertaining to actual hostilities; the phrase ‘combatant activities,’ of somewhat wider scope, and superimposed upon the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection with actual hostilities.

Id. The *Johnson* court further explained that:

The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a ‘combatant activity,’ but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be cataloged as a ‘combatant activity.’

³⁶ See e.g., *Koohi*, 976 F.2d at 1333 n.5; *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1245-46 (D. Or. 2010); *Taylor*, 2010 WL 1707530, at *10, *aff’d in part, rev’d in part*, 658 F.3d 402; *Aiello*, 751 F. Supp. 2d at 711-714.

Id. The Court also noted that “[t]he act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a ‘combatant activity.’” *Id.* at 768, 770.

The parties debate the proper formulation of the test to be applied to evaluate this defense as each have offered slightly different interpretations of arguments presented by the Solicitor General in amicus briefs before the Supreme Court in conjunction with the *Saleh* case and before the Fourth Circuit in the *Al-Shimari* litigation.³⁷ (*See* Docket Nos. 261, 264, 282, 285). The parties both suggest, however, that application of the *Johnson* test is appropriate. (*Id.*). The crux of the dispute here can therefore be simplified to an analysis of the evidence in this case in light of the *Johnson* definition of combatant activities, i.e., whether KBR was involved in “activities both necessary to and in direct connection with actual hostilities.” *Johnson*, 170 F.2d at 769. Plaintiffs have largely conceded that the “necessary to” prong of this test has been met in this case but maintain that KBR’s activities were not “in direct connection” with actual hostilities. (*See*

³⁷ The Court notes that the petition for writ of certiorari was denied in *Saleh*, 131 S. Ct. 2055 (2011), and the appeal in *Al-Shimari* was dismissed by the Court of Appeals for the Fourth Circuit, 679 F.3d 205. As such, neither Court directly addressed the position advocated by the Solicitor General in those briefs. The Solicitor General has not appeared in this case and has therefore not expressed any position regarding the applicability of the combatant activities exception to the FTCA directly to this Court. Accordingly, the Court declines to rule on whether the test formulated in its briefs in the *Saleh* and *Al-Shimari* matters should be adopted here.

Docket No. 285 at 10 (“KBR’s faulty performance of routine electrical maintenance at the LSFBI were in no way ‘in direct connection with actual hostilities.’”). Thus, the Court can concentrate its analysis on the disputed second prong and, for the following reasons, we believe that KBR’s activities at the base are sufficient to establish a direct connection with actual hostilities.

First, KBR’s duties included maintenance of the electrical systems in the 126 buildings at the RPC. *See Task Order 139*. The evidence also shows that KBR was engaged by the military to ensure the flow of electricity within the base. *Id.* at §§ 8.1.1 (Operations & Maintenance), 8.3 (Power Generation); 8.1.3.1 (Power Distribution). Electricity was used on the base not only for life support functions like running the water pumps, water heaters and air conditioning equipment, but also to power devices which helped to protect soldiers from enemy attacks. *Id.* In fact, KBR received orders from the military in November of 2007 to install a generator for the purpose of powering an ECCM jamming device used to protect against vehicle borne improvised explosive devices. (Pl. Ex. X, Docket No. 277). In this order, SFC Skaggs states that “[t]he generator is necessary to provide power to a new ECCM device **that is integral to force protection.**” (Pl. Ex. X., Docket No. 277-1 at 6 (emphasis added)). The generator was removed upon the military’s request after some time, and military officers then plugged the ECCM device directly into the electrical system that KBR maintained. (Docket No. 262 at ¶ 185). Therefore, KBR’s electrical maintenance was not only necessary to support life activities on the base, as Plaintiffs

concede, but also was directly connected to force protection as the military actually plugged its war-time defensive instruments used to ward off enemy attacks into the electrical facilities that KBR was paid to maintain. Certainly, aiding the military in its efforts to thwart enemy attacks on the base by supplying power to the jamming device provides a “direct connection” between KBR’s discrete functions on the base and the military’s combatant activities such that KBR was fully integrated into force protection activities. *See Saleh*, 580 F.3d at 9. In this Court’s opinion, the engagement of a contractor in support of such preemptive defense mechanisms qualifies as combatant activities under the *Johnson* definition. *See Johnson*, 170 F.2d at 769; *see also Taylor*, 658 F.3d at 413 (J. Shedd, concurring) (finding that Taylor’s claim was preempted under the *Johnson* test for combatant activities).

Second, the broader definition of the combatant activities exception as formulated by the *Aiello* Court likewise supports preemption in this case. The District Court in *Aiello* recognized that there was no evidence that the inhabitants of the base were either receiving or returning enemy fire in active battle, which distinguished that case from the *Taylor* matter. *See Aiello*, 751 F. Supp. 2d at 713 (citing *Taylor*, 2010 WL 1707530 at *10 (“[i]f shelling and receiving shelling is not combat, then combat has no meaning.”)). Despite the absence of actual fighting on the base, the Court held that:

[u]nlike the camp in *Taylor*, artillery was not fired from Camp Shield. That makes it a somewhat closer question, but the design,

operation and maintenance of basic life-support facilities at a forward operating base, which served as a refit and re-arming point for soldiers involved in combat and which came under hostile fire, is necessary to and in direct connection with actual hostilities. It is therefore combatant activity.

Id. at 713. The *Aiello* Court further recognized that maintenance of latrine facilities was directly related to the health of the soldiers inhabiting the base and, thus, “integral to sustaining combat operations.” *Id.* at 714. Here, the parties dispute how much actual combat took place within the walls of the RPC. The evidence shows that, among other things:

- the facilities at the LSF Compound within the RPC housed Special Forces units and soldiers, including Staff Sergeant Maseth;
- the Special Forces soldiers who lived in the LSF buildings would leave the base to conduct midnight raids on enemy forces and then return to refit and re-arm before engaging in further attacks;
- the Special Forces soldiers also provided military intelligence for the war effort in Iraq;
- Special Forces personnel were trained to operate and fulfill their missions under difficult and dangerous conditions and were expected to “endure austere living arrangements, using available facilities”;

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- there was a risk of mortar and shelling at the base but limited reports of such activities affecting base life;
- security for the base included the use of defensive instruments such as ECCM jamming devices and armed soldiers maintained a controlled entry point to the base which was located near LSF B1;
- warning shots were occasionally fired from the main entry point of the base to redirect unknown vehicles from the base and the ECCM jamming devices set up near the entry point prevented insurgents from remotely triggering IEDs;
- body armor was worn by some soldiers and contractors but not others in and around the LSF buildings; and,
- soldiers generally felt that the RPC was a safer location to be housed than other areas of Iraq where intense fighting was more common.

(Docket Nos. 262 at ¶¶ 35-39, 47; 265 at § I, ¶¶ 35-39, 47; 265 at § II, ¶¶ 106-114; 283 at ¶¶ 106-114; 263-15 at ¶ 13; 277). The military engaged KBR to provide discrete operations and maintenance services to the facilities used by these Special Forces soldiers in the LSF buildings, and the military controlled the terms and conditions of the contract and initiated all work that was performed by KBR on the base. *See Task Order 139*. The services performed by KBR at the base supported both the military's missions in Iraq, including the attacks led by Special Forces soldiers

off the base, their gathering of intelligence in furtherance of the military's missions and the defensive mechanisms used by the military to protect base inhabitants from enemy attacks. Given these facts, under the broad *Aiello* formulation of the combatant activities exception, we hold that KBR was fully integrated in the combatant activities of the military at the base. *See Aiello*, 751 F. Supp. 2d at 711-714.

For these reasons, the Court alternatively holds that KBR's motion to dismiss under the combatant activities exception is granted.

VI. CONCLUSION

After carefully considering all of the parties' arguments and the extensive factual record in this case, this Court believes that dismissal is appropriate given the impact of the many military judgments which we have fully described above. While we believe that Plaintiffs and their experts have made a compelling case challenging the safety of KBR's electrical work in LSFBI, we do not believe that this case can be further adjudicated without questioning the military's wartime decisions which directly affected the safety of the electrical facilities in the building. It is not the role of the judiciary to pass judgment on the military's decisions which affect the safety of a military base located in an active war zone and we conclude that an evaluation of KBR's defenses cannot be divorced from these military decisions. The Court points out that KBR's performance has been critically evaluated by the political branches of our government. For example, the DODIG Report found, among other things, that:

KBR perpetuated electrical hazards by completing electrical work without proper grounding and bonding; employed personnel with inadequate electrical training and expertise; had deficient standard operating procedures; and failed to bring inconsistent contract specifications to the attention of government officials. Based on the evidence of record before this Court, it appears that the DODIG conclusions are correct.

The Court does not reach its decision lightly. We are certainly mindful of the loss of the Plaintiffs and the ultimate sacrifice made by Staff Sergeant Maseth. Yet, based on the present record before this Court and the foregoing analysis, KBR's Motion to Dismiss [260] must be GRANTED, and this case is DISMISSED, with prejudice. An appropriate Order follows.

s/Nora Barry Fischer
Nora Barry Fischer
U.S. District Judge

Date: July 13, 2012

cc/ecf: All counsel of record.