NO. _____

In the
Supreme Court of the United States

KBR, INCORPORATED, ET AL.,

Petitioners,

v.

ALAN METZGAR, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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April 11, 2014

QUESTIONS PRESENTED

Like the pending petition in *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817 (filed Jan. 8, 2014), this case involves an attempt to use state tort law to regulate actions that took place at the direction of the U.S. military on foreign battlefields. Respondents allege that they were injured by smoke from open-air "burn pits" while serving in Iraq and Afghanistan. Unable to sue the military directly, Respondents have brought dozens of state-law class-actions against a battlefield services contractor that performed waste disposal and other critical combat support services pursuant to a contract with the Army.

Recognizing that this case implicated the military's strategic wartime decisions, the district court correctly held that Respondents' claims were nonjusticiable under the political question doctrine, were preempted by the "combatant-activities exception" to the Federal Tort Claims Act ("FTCA"), and were barred by the doctrine of derivative sovereign immunity. But the Fourth Circuit reversed on all three issues. The Fourth Circuit's decision deepens a circuit conflict on the combatant-activities preemption issue and well illustrates the absurdity of having the political question doctrine turn on the home-state tort law of any of the scores of plaintiffs who claim to have been exposed to burn pits on a foreign battlefield.

The questions presented—the first two of which are very similar to those presented in the pending *Harris* petition—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.

(3) Whether the doctrine of derivative sovereign immunity bars state-law tort claims against a private contractor performing delegated public functions where the government would be immune from suit if it performed the same functions.

PARTIES TO THE PROCEEDING

Petitioners KBR, Inc., Kellogg Brown & Root LLC, Kellogg Brown & Root Services, Inc., KBR Holdings, LLC, Kellogg Brown & Root International, Inc., KBR Group Holdings, LLC, KBR Technical Services, Inc., Halliburton Company, Halliburton Energy Services, Inc., DII Industries LLC, Brown & Root Services, and Kellogg, Brown & Root, Inc., were defendants in the consolidated multi-district litigation before the district court and appellees in the Fourth Circuit. ERKA Ltd. was also a defendant in the district court, but was voluntarily dismissed from the case by the plaintiffs.

Respondents, who were plaintiffs in the district court and appellants in the Fourth Circuit are: Alan Metzgar; Paul Parker; Richard Ronald Guilmette; William G. Brister, Jr.; Henry J. O'Neill; Michael Auw; Cory Casalegno; Michael Douglas Moore; David U. Lackey; Randall L. Robinson; Dean Guy Olson; Albert Paul Bittel, III; Fred Robert Atkinson, Jr.; Robyn Sachs, personal representative of Christopher Sachs, deceased; Jennifer Monyijo; Stephen Flowers; Joanne Ochs; Melissa Ochs; James Morgan; David Newton; Chris Boggiano; Earl Chavis; Benny Lyle Reynolds; Joshua Eller; Robert Cain; Craig Henry; Francis Jaeger; David McMenomy; Mark Posz; El Kevin Sar; SMSgt. Glen S. Massman; SSgt. Wendy L. McBreairty; Pablo Berchini; Brian P. Robinson; Maurice Callue; Dennis Wayne Briggs; Edward Lee Buquo; Wayne E. Fabozzi; Sharlene S. Jaggernauth; Floyed James Johnson, Sr.; Tamra C. Johnson; Richard Lee Keith; Daniel Santiago Morales; Phillip McQuillan; Ildebbrando Perez; Luigi Antonio

Povenza; Ruth Ann Reece; Eduwardo Saavedra, Sr.; Jill R. Wilkins, personal representative of Kevin E. Wilkins, deceased; Michael Donnell Williams; Jermaine Lynell Wright; Edward Adams; Kenneth Baldwin; Donna Wu; John Does 1–1000; Jane Does 1–1000; Wallace McNabb; Kevin Paul Robbins; Brian Blumline; Robert Bidinger; Unknown Parties; Benjamin Boeke; Craig Kervin; Barry Zabielinski; David Green; Nick Daniel Heisler; Derrol A. Turner; Vincent C. Moseley; Alex Harley; John A. Wester, Jr.; Bill Jack Carlisle, Jr.; Anthony Edward Roles; Marcos Barranco; Joel Lugo; Shawn Thomas Sheridan; Jayson Williams; Eunice Ramirez; Lee Warren Jellison, Jr.; George Lundy; Thomas Kelleck; Dan Bowlds; Tony Allen Gouckenour; John William Jackson; John Pete Troost; Deborah Ann Wheelock; Charles Hicks; Sean Alexander Stough; Jeffrey Morgan Cox; James Warren Garland; Danny LaPierre; Kenneth Harris; Anthony Jerome Williams; Kathy Vines; Patrick Cassidy; William Barry Dutton; Christopher Michael Kozel; Richard McAndrew; Lorenzo Perez; Jessey Joseph Philip Baca; Daniel Tijernia; Heinz Alex Disch; James McCollem; Travis Fidell Pugh; Anthony Ray Johnson; David Michael Rohmfeld; Joshua David Beavers; Matthew Joel Fields; Steven E. Gardner; Stephen R. Jones; Kevin Scott Tewes; Hans Nicolas Yu; Thomas Olson; Brian Paulus; Paul Michael Wiatr; Michael Foth; Brett Anthony Mazzara; Lisa Rounds, personal representative of Andrew Ray Rounds, deceased; David Rounds, personal representative of Andrew Ray Rounds, deceased; Peter Blumer; Scott Andrew Chamberlain; Timothy E. Dimon; William Philip Krawczyk, Sr.; Sean

Johnson; Sherry Bishop, Individually and as representative of the estate of Kirk A. Bishop; Gene Bishop; Patrick Bishop; Albert Johnson, Jr.; David Jobes; Gene Leonard Matson; Timothy J. Watson; Andrew Mason; Michelle Brown; Jonathan Lynn; Charles Kinney; Michael McClain; Basil Salem; Justin Gonzales; Matthew Guthery; Christopher Lippard; David Parr; John F. Monahan; Amanda Brannon; L. Chandler Brannon, and all others similarly situated.

CORPORATE DISCLOSURE STATEMENT

KBR, Inc., is a publicly traded corporation and has no parent company. No publicly held corporation owns 10% or more of KBR, Inc.'s stock. KBR, Inc. does not have any non-wholly-owned subsidiaries or any affiliates who are publicly traded.

Kellogg Brown & Root LLC is not publicly traded. Kellogg Brown & Root LLC is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root LLC has no non-wholly owned subsidiaries that are publicly traded. Other than Kellogg Brown & Root LLC's ultimate parent (KBR, Inc.), Kellogg Brown & Root LLC does not have any publicly traded affiliates.

Kellogg Brown & Root Services, Inc. is not publicly traded. Kellogg Brown & Root Services, Inc. is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root Services, Inc., does not have any non-wholly-owned subsidiaries. Other than Kellogg Brown & Root Services, Inc.'s ultimate parent (KBR, Inc.), Kellogg Brown & Root Services, Inc., does not have any publicly traded affiliates.

KBR Holdings, LLC is not publicly traded. KBR Holdings, LLC is wholly owned by KBR, Inc., a publicly traded corporation. KBR Holdings, LLC has no non-wholly owned subsidiaries that are publicly traded. Other than its parent, KBR, Inc., KBR Holdings, LLC does not have any publicly traded affiliates.

Kellogg Brown & Root International, Inc. is not publicly traded. Kellogg Brown & Root International, Inc. is wholly owned by Kellogg Brown & Root LLC, which in turn is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root International, Inc. has no non-wholly-owned subsidiaries that are publicly traded. Other than its ultimate parent, KBR, Inc., Kellogg Brown & Root International, Inc. does not have any publicly traded affiliates.

KBR Group Holdings, LLC is not publicly traded. KBR Group Holdings, LLC is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation.

KBR Technical Services, Inc. is not publicly traded. KBR Technical Services, Inc. is wholly owned by KBR Group Holdings, LLC, which in turn is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR., Inc., a publicly traded corporation.

Halliburton Company is a publicly traded corporation and has no parent company. No publicly held corporation owns 10% or more of Halliburton Company's stock. Halliburton Company does not have any non-wholly-owned direct subsidiaries or any publicly traded affiliates.

Halliburton Energy Services, Inc. is not publicly traded. Halliburton Energy Services, Inc. is wholly owned by Defendant Halliburton Company, a publicly traded corporation. Halliburton Energy Services, Inc. has no non-wholly-owned subsidiaries that are publicly traded. Other than its parent,

Halliburton Company, Halliburton Energy Services, Inc. does not have any publicly traded affiliates.

DII Industries LLC is not publicly traded. DII Industries LLC is wholly owned by Defendant Halliburton Energy Services, Inc., which in turn is wholly owned by Defendant Halliburton Company, a publicly traded corporation. DII Industries LLC has no non-wholly-owned subsidiaries that are publicly traded. Other than its ultimate parent, Halliburton Company, DII Industries LLC does not have any publicly traded affiliates.

Named Defendants **Brown & Root Services** and **Kellogg, Brown & Root, Inc.** are no longer active entities.

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PETITION FOR WRIT OF CERTIORARI

This is the most recent in a long line of cases in which plaintiffs—many of whom are U.S. service members—seek damages under state tort law for alleged injuries suffered in foreign war zones.

During the wars in Iraq and Afghanistan, the U.S. Army had no perfect option for disposing of solid waste on forward operating bases. Incinerators were typically too costly and landfills could lead to infestation and disease. After carefully weighing the risks and benefits of each alternative, as well as its own resource constraints, the Army concluded that open-air "burn pits" were often the only feasible and cost-effective option for solid waste disposal. While in past wars the Army tasked uniformed soldiers with this waste-disposal responsibility, in the modern all-volunteer Army, this task is often performed by contractors such as Petitioner KBR.[1] Respondents disagree with the Army's chosen disposal method, and they have brought dozens of state-law class actions challenging the manner in which KBR handled waste-disposal functions pursuant to its contract with the Army.

Sensitive military judgments pervade every aspect of this case, and adjudication of Respondents' claims would necessarily require examining the Army's strategic battlefield decisions. Although Respondents have named only a battlefield support contractor as a defendant, there is no question that

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[1] Petitioners include a number of current and former subsidiaries and affiliate companies of KBR, Inc., and are collectively referred to herein as "KBR."

they seek to challenge inherently *military* judgments, such as the decision to use burn pits rather than incenerators for waste disposal on U.S. military bases. Yet the Fourth Circuit refused to find Respondents' claims barred by the political question doctrine, the combatant-activities exception to the Federal Tort Claims Act, or the doctrine of derivative sovereign immunity.

A petition raising very similar issues is currently pending before this Court in *Kellogg Brown & Root Services v. Harris*, No. 13-817 (filed Jan. 8, 2014) ("*Harris* Pet."). The Fourth Circuit's decision in this case deepens the circuit split described in the *Harris* petition and further underscores the need for this Court's review. Indeed, the Fourth Circuit readily acknowledged the existence of a three-way split among the Third, Ninth, and D.C. Circuits regarding the scope of combatant-activities preemption, and expressly rejected the United States' proposed test for preemption. This case also presents the additional issue of derivative sovereign immunity, yet another ground on which Respondents' claims should have been dismissed. The Court should consolidate this petition with the *Harris* petition and grant certiorari to resolve well-documented conflicts over the proper framework for adjudicating "contractor-on-the-battlefield" claims.

OPINIONS BELOW

The Fourth Circuit's opinion is reproduced at Pet.App.1-49. The district court's opinion is reported at 925 F. Supp. 2d 752, and reproduced at Pet.App.50-98.

JURISDICTION

The Fourth Circuit issued its decision on March 6, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The FTCA provides in relevant part that the United States' waiver of sovereign immunity "shall not apply to … (j) Any claim arising out of the combatant activities of the military or naval forces … 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 war zones such as Iraq and Afghanistan.

Uniformed soldiers historically performed combat support functions such as maintaining facilities, transporting supplies, disposing of waste, and performing countless other logistical tasks essential to the war effort. But with the transition to a modern, all-volunteer military—and the corresponding reduction in size of the armed forces—it is often impractical for soldiers to perform such tasks. Instead, the military has entered into a symbiotic relationship with in-theater service contractors to perform many essential combat support activities. *See* C.A.App.220 (deployed forces

must often be "augment[ed]" with "contractor support").

In December 2001, the Army awarded KBR an umbrella contract that included "combat service support," which is defined 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." U.S. Army Field Manual at 1-36 (2004), http://tinyurl.com/nd9672w. Under that contract, KBR performed vital battlefield support functions, such as servicing base facilities, delivering fuel, repairing equipment, preparing meals, and maintaining water supplies. This delegation of combat support functions to KBR served as a "force-multiplier" by giving battlefield commanders "the flexibility of increasing [] combat power by substituting combat units for military support units." C.A.App.220.

B. Army Waste Management in Iraq and Afghanistan

In everyday civilian society, waste disposal is often a mundane task. But at military bases inside an active war zone, waste disposal is a complicated undertaking that is critical to the success of the mission. Poorly managed waste can "spread [] infectious disease," and "proper sanitation has been historically and remains today the most important issue driving military waste management practices." C.A.App.2146.

During the wars in Iraq and Afghanistan, military commanders were, at all times, responsible for making the key decisions regarding waste disposal. *See* C.A.App.2316-17 (waste-management

decisions were made "at operational command level"). To determine waste management procedures at a forward operating base, commanders must balance inherently military considerations, such as "the feasibility as well as risks and benefits associated with each option," the "particular circumstances at a given base camp," and the Army's resource constraints and other spending priorities. C.A.App.233. Army policy also elevated "operational requirements and force protection" over "environmental considerations." C.A.App.307.

The Army considered several options for waste management at its bases in Iraq and Afghanistan, including recycling, landfills, incinerators, and open-air burn pits. Recycling was a non-starter because it was typically not feasible to implement recycling programs in active war zones. Landfills were also impractical and raised their own risks. Creating a landfill within the perimeter of a base would exacerbate space limitations and "could attract disease-spreading vermin and insects that would threaten the health of everyone on the base." C.A.App.228. And taking waste to a landfill outside controlled camp perimeters posed unacceptable risks "due to the hostile environment and security considerations." C.A.App.222. The military also considered using incinerators for waste disposal, but largely rejected that option because of the "lengthy lead time and great expense associated with getting incinerators up and running." C.A.App.222-23.

The Army ultimately decided to use open-air burn pits for waste disposal at forward operating bases, even though it described burn pits as "the

least preferred method of disposal." C.A.App.313. Decisions like this—trading one set of risks for another—are unfortunately common during times of war. Military commanders "are often asked to assume some risk to prevent a greater risk, and the continued use of burn pits reflects a policy determination by military commanders, after weighing the available options and considering the conditions on the ground, that exposure to burn pit smoke is less risky than alternatives." C.A.App.235. In a 2010 Report to Congress, the Army reaffirmed that "during military operations, open-air burning will be the safest (*from a total threat standpoint*), most effective, and expedient manner of solid waste reduction." C.A.App.2315 (emphasis added).

Military personnel made similar risk calculations regarding where to locate burn pits and what substances to burn. Burn pits ideally are located downwind of living and working facilities, but "conditions on the ground," *i.e.*, battlefield considerations, sometimes dictated otherwise. C.A.App.233. Similarly, although disposing certain substances in a burn pit "may not be ideal from a health standpoint, on an installation in a hostile environment in wartime, there may not be any other viable options for waste disposal." C.A.App.233. For example, the military directed the burning of plastic water bottles because soldiers "used a large volume of plastic water bottles each day, and there was no other way to dispose of them." C.A.App.229.

C. Army Delegation of Battlefield Waste Management Functions to KBR

Pursuant to the 2001 umbrella contract, the Army directed KBR to perform a number of critical battlefield support functions in Iraq and Afghanistan, including waste management. KBR did not perform that function at all bases; the "majority of burn pits" were "operated by troops." C.A.App.2317.

At the bases where the Army directed KBR to perform waste management functions, the Army also dictated that burn pits would be the method of waste disposal. According to Lt. Col. Jennifer Caci, who helped draft the Army's health and environmental policies in Iraq, "if the military provided funding for an incinerator, then KBR would use the incinerator, but if the military could not fund an incinerator, then burn pits were the only viable option for waste disposal." C.A.App.300. Similarly, Major Tara Hall, who developed force health protection plans, emphasized that "the Army decided which method of waste disposal to use," and "KBR did not decide which methods of waste disposal were appropriate in the contingency environment of Iraq." C.A.App.222.

The military, not KBR, also determined the location of burn pits. If there was an existing Iraqi burn pit, "the military would usually just continue to use the existing burn pit, regardless of where [it] was sited within a base." C.A.App.228-29. The "Garrison Commander" or "Mayor" of a base was ultimately responsible for "siting burn pits" in relation to living quarters and dining facilities. C.A.App.229. And, once sited, only the military could re-locate a burn

pit. *Id.* The military also decided which substances could be placed in a burn pit by preparing lists of prohibited items. C.A.App.229, 233.

Moreover, the military actively monitored potential health and safety impacts from waste management operations, regardless of whether those functions were performed by the military or a contractor. In Iraq and Afghanistan, the military conducted health monitoring of burn pit emissions and concluded "there were no health risks associated with burn pit exposure." C.A.App.223. The Army's burn pit monitoring included a 2008 "comprehensive health risk assessment regarding the burn pit at Joint Base Balad, the largest burn pit in [Iraq]." C.A.App.234. The Army concluded that "there is no expectation of long-term health risks associated with exposures to burn pit smoke at Balad." *Id.*

D. Proceedings Before the District Court

Respondents are hundreds of plaintiffs who filed 57 suits in 42 states, most of which purport to be class actions on behalf of at least 100,000 soldiers and contractors who served in Iraq and Afghanistan from 2003 to the present. C.A.App.171. KBR is the only named defendant. Although the military operated the majority of burn pits in Iraq and Afghanistan, none of the suits names the United States as a defendant; any such claims would be barred by the FTCA's combatant-activities exception and *Feres v. United States*, 340 U.S. 135 (1950).

Respondents allege that KBR acted negligently in operating burn pits and providing non-drinking

water.[2] For example, they claim that KBR failed to use "safer, alternative means" of waste disposal, such as incinerators, and improperly burned "hundreds of thousands of plastic water bottles." C.A.App.162-64. Respondents allege that KBR's actions violated "contractual obligations" with the United States and "interfered with the military mission." C.A.App.162-63.

The Panel on Multidistrict Litigation consolidated all 57 cases in the District of Maryland for pretrial proceedings. The district court denied KBR's first motion to dismiss, but subsequently directed KBR to file a renewed motion, which the court granted on February 27, 2013.

The district court closely examined the substantial record, which includes declarations of high-level military personnel and several official government reports. Pet.App.68-75 & nn.14-15. Based on that evidence, the court concluded that Respondents' claims raised non-justiciable political questions because "the most important waste disposal decision … *i.e.*, the decision to use open burn pits, was made by the military, not [KBR]."

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[2] This petition focuses on Respondents' allegations regarding KBR's operation of burn pits. But KBR's legal arguments are equally applicable to Respondents' claims based on KBR's provision of non-drinking water. The "water support mission" was a "key component of sustaining forces on the battlefield," Pet.App.71, and the Army "provided detailed specifications for military and contractor personnel who were authorized to provide water services in Iraq." C.A.App.349. Respondents' claims based on KBR's water supply services should be dismissed for largely the same reasons as the challenges to KBR's burn-pit operations.

Pet.App.69-70. That critical decision "came from the very top of the military command" and was "dictated by the exigencies associated with a war zone." Pet.App.70. Because Respondents' claims "result[ed] from essential military decisions about the methodology to be used in providing water and waste disposal services in fields of battle in two countries over an extended period of time," adjudication of these claims "would necessarily require review of the reasonableness of military decisions, a role that is simply not appropriate for, or within the competence of, the judiciary." Pet.App.74-75, 78.

The district court further held KBR was entitled to derivative sovereign immunity based on this Court's decisions in *Yearsley v. W.A. Ross Construction*, 309 U.S. 18 (1940), and *Filarsky v. Delia*, 132 S. Ct. 1657 (2012). The court concluded that all of the allegedly negligent conduct was well within the scope of KBR's contractual authority, and that KBR should not be left "holding the bag" after performing essential support functions for the U.S. military in a war zone. Pet.App.82-83.

Finally, the district court also held that Respondents' claims were preempted by the combatant-activities exception to the FTCA under the test proposed by the United States. The United States has argued that a claim against a contractor should be preempted if a similar claim against the United States would be within the combatant-activities exception and the actions in question were within the scope of the contract. *See* Br. for United States 17-20, *Al Shimari v. CACI*, No. 09-1335, 2012 WL 123570 (4th Cir. Jan. 14, 2012) ("U.S. *Al Shimari*

Br."). Applying that test, the district court concluded that Respondents' state-law tort claims are preempted because uniformed soldiers were, in fact, performing similar functions and the function was within the heartland of KBR's contractual responsibility; indeed, Respondents' claims would undermine "the interests of the United States Military and its ability to function in time of war." Pet.App.90.

E. The Fourth Circuit's Decision

The Fourth Circuit reversed. On the political question issue, the court acknowledged that KBR had presented ample evidence showing that "the military allowed the use of burn pits and decided whether, when, and how to utilize them." Pet.App.17. The court cited the declaration of a top military health official, who explained that the military "decides which method of waste disposal, *e.g.*, burn pits or incinerators, to use at military camps," decides "where to locate burn pits," and controls "what items or substances may be disposed of in burn pits." *Id.*

The Fourth Circuit nonetheless held that this evidence of military control was insufficient to trigger the political question doctrine. Based on contrary declarations submitted by Respondents, the court reasoned that it could not yet *definitively* conclude "whether KBR or the military chose how to carry out these tasks." Pet.App.21-22. That is, the court essentially required a full-blown merits determination as a precondition for determining whether the case raised *nonjusticiable* political questions.

The Fourth Circuit also adopted the Third Circuit's state-law-centric view of the political question doctrine as articulated in the *Harris* decision, holding that the federal justiciability question—a determination rooted in federal constitutional law and the separation of powers—depends on which state's tort law applies. Relying on *Harris*, the court held that to trigger application of the political question doctrine, KBR must first establish that "the military caused the Servicemembers' injuries, at least in part." Pet.App.25. And even if causation is established, the court held the claims are nonjusticiable *only* if "the Servicemembers invoke a proportional-liability system that allocates liability based on fault" rather than a joint-and-several-liability approach to damages. *Id.*

Regarding derivative sovereign immunity, the Fourth Circuit purported to apply the "*Yearsley* rule, which asks … whether the government authorized KBR's actions in this case." Pet.App.33. But the court defined "authorization" under *Yearsley* and its progeny as the equivalent of complete contractual *compliance*, and held that KBR was entitled to derivative immunity "only if it adhered to the terms of its contract with the government." Pet.App.35-36. Rather than focusing on the delegated governmental *functions* performed by the contractor, the court framed the legal question as hinging on a fact-intensive inquiry of "compliance" and the level of contractor "discretion." *Id.*

Finally, as to the preemption issue, the Fourth Circuit recognized that this case implicates "broad"

and "unique" federal interests. The court, nonetheless, expressly rejected the United States' proposed preemption framework as "far too broad" and "flawed in several respects." Pet.App.46-47. The court surveyed recent appellate decisions regarding preemption and recognized a three-way circuit split among the D.C., Third, and Ninth Circuits. The Fourth Circuit concluded that the Ninth Circuit's preemption approach was too narrow and the D.C. Circuit's approach was too broad, and ultimately chose to follow the Third Circuit's *Harris* decision. Pet.App.40-42.

The Fourth Circuit acknowledged that Respondents' claims "undoubtedly" arose out of "combatant activities" carried out inside a foreign war zone, a conclusion that would trigger preemption under either the United States' test or the D.C. Circuit's test. Pet.App.48. But the court inexplicably held that Respondents' claims were not preempted because more discovery was needed regarding "the extent to which KBR was integrated into the military chain of command." Pet.App.49.

REASONS FOR GRANTING CERTIORARI

The Fourth Circuit reversed the dismissal of Respondents' state-law tort claims for alleged injuries arising out of the wars in Iraq and Afghanistan. That decision is wrong as a matter of law, deepens multiple circuit splits, and warrants certiorari both in its own right and as a complement to the pending *Harris* petition.

I. The Court should grant certiorari to address 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 scrutinizing sensitive military decisions.

Military judgments pervade every aspect of this case. There is no curbside garbage pickup on a remote forward operating base in a hostile country. Military commanders comprehensively weighed the substantial risks of each method of waste disposal, and concluded that open-air burn pits were often the least-bad option among feasible alternatives. Respondents' negligence claims against KBR cannot be disentangled from the Army's strategic decisions regarding the war effort in Iraq and Afghanistan. These state-law claims arising out of military decisionmaking on a foreign battlefield simply do not belong in the courts.

While the district court was persuaded that these suits were barred by multiple doctrines, the Fourth Circuit found the reasoning of the Third Circuit's *Harris* decision "persuasive and applicable here," such that it could not find Respondents' claims barred by the political question doctrine. Pet.App.25. That holding—under which application of the political question doctrine will turn on the nuances of state tort law—is as deeply flawed as it was in *Harris*. But this case—involving over 50 suits brought under the laws of 42 different states—is the *reductio ad absurdum* of *Harris*' state-law-centric approach to the political question doctrine. When the events in question occurred on a forward operating base in Iraq or Afghanistan, it makes no sense to suggest that application of the federal, constitutionally-based political question doctrine

depends on the vagaries of the tort law of each plaintiff's home state. And the Fourth Circuit further erred by effectively requiring KBR to prevail on the *merits* of its causation defense in order to win a motion to dismiss for lack of *jurisdiction* under the political question doctrine.

The Fourth Circuit's decision is consistent with the Third Circuit's *Harris* decision as well as a subsequent Fifth Circuit decision that also adopts that approach. But it is flatly contrary to *Carmichael v. KBR*, 572 F.3d 1271, 1286 (11th Cir. 2009), which correctly holds that state-law claims must be dismissed under the political question doctrine if the defendant has offered "plausible" evidence showing that military decisions "contributed" to the plaintiff's alleged injury. The Eleventh Circuit made clear that the nuances of state law play no role in that inquiry. *Id.* at 1288 n.13.

II. The Court should also grant certiorari to address whether the FTCA's "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. Regardless of whether the defendant is the United States or a contractor, allowing these tort suits to proceed will undermine critical federal interests by diverting military officials from their missions and deterring contractors from accepting assignments in foreign war zones.

The Fourth Circuit acknowledged—and deepened—a circuit split over the scope of the combatant-activities preemption doctrine. The D.C. Circuit has held in no uncertain terms that the

combatant-activities exception reflects a congressional goal of "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." *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009). The Fourth Circuit rejected that approach and instead followed the Third Circuit's *Harris* decision, which refused to find tort claims preempted if the contractor exercised "discretion" in performing its contractual duties. *See Harris v. KBR*, 724 F.3d 458, 481-82 (3d Cir. 2013). And, further underscoring the need for this Court's review, the Fourth Circuit—like the Third Circuit—also expressly rejected the preemption test advanced by the United States.

III. Finally, this case is an ideal complement to the *Harris* petition because it also raises a third basis for dismissing "contractor-on-the-battlefield" suits: the doctrine of derivative sovereign immunity. If Respondents had sued the military directly for alleged injuries arising out of the wars in Iraq and Afghanistan, there is no question that those claims would have been barred by sovereign immunity. It makes no sense whatsoever to allow identical claims to proceed against a *contractor* based on the same underlying events, especially when the United States will end up picking up the tab. As this Court recognized just two years ago, a contractor should not be left "holding the bag" when it performs an important public function pursuant to a valid government contract. *Filarsky*, 132 S. Ct. at 1666. There is value in having all available defenses,

including derivative sovereign immunity, before the Court when it considers the important and recurring issues raised in this petition and the *Harris* case.

* * *

State tort law has no place on a foreign battlefield, and courts should not allow plaintiffs to use state-law claims against a contractor to evade important limits on suits against the government. If the Fourth Circuit is correct that the political question doctrine turns on the nuances of state law, then it is all the more imperative to have a uniform and workable test for combatant-activities preemption and derivative sovereign immunity. The Fourth Circuit's decision eliminates any doubt that the courts of appeals need guidance from this Court on the proper framework for adjudicating "contractor-on-the-battlefield" 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 A 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). 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 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 armed forces, 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," *id.* art. I, § 8.

The "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 accept numerous risks that would be unacceptable in civilian life.

This is a case in point. In civilian life, a court has the tools—often provided by elaborate statutory and regulatory regimes—to determine whether solid waste was disposed of properly. But military decisions to employ burn pits on a battlefield have no civilian analog. Burn pit operations were only

needed in the first place because the U.S. military was fighting two wars that required establishing forward operating bases in remote locations in hostile countries. Under those circumstances, burn pits were often the "least bad" option for waste disposal because incinerators were too costly and landfills posed unacceptable risks of infestation. And *all* concerns about optimal waste disposal were ultimately subordinate to the military's operational goals about how to advance the war effort, with troop security and operational success trumping environmental concerns. C.A.App.307. State tort law—which is about apportioning duties and liability in the context of ordinary civilian life—is categorically unsuited to balancing those inherently military responsibilities.

Strategic military judgments pervade every aspect of this case. The Army expressly directed the use of burn pits and, indeed, routinely used burn pits on bases where it handled waste disposal. Army commanders also selected the location of burn pits at each base and provided explicit instructions about what items could not be burned. The Army was not indifferent to air quality concerns. It routinely monitored air quality to ensure that burn pits did not pose an unacceptable risk to the health and safety of the troops, but it did so *under the military's standards* and concluded that "burn pit emissions were negligible compared to other particulate matter emitted in the area." C.A.App.300.

Adjudication of Respondents' state-law tort claims would require courts to review those strategic military judgments about acceptable levels of risk at

bases in Iraq and Afghanistan. One of Respondents' core contentions is that KBR should have used "safer method[s] of waste disposal," such as incinerators, rather than burn pits. C.A.App.164. But, as the district court found, it was the military—not KBR—that was responsible for such decisions. Pet.App.69-70. The military was well aware that incinerators *could* be used for waste disposal, but it determined that incinerators were too expensive, took too long to build, and posed unacceptable logistical challenges. C.A.App.222-23.

In sum, as the district court correctly concluded, "[t]he actions complained of are not ones taken by the Defendants alone, and KBR's defenses (*e.g.*, contributory negligence and causation) would necessarily require review of the reasonableness of military decisions, a role that is simply not appropriate for, or within the competence of, the judiciary." Pet.App.78. KBR offered more than sufficient evidence to show that any risks from burn pit operations resulted from high-level military decisions. Respondents' claims against KBR simply cannot be disentangled from those core military judgments regarding the war effort.

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

The Fourth Circuit spent several pages summarizing the extensive evidence showing that it was the military, not KBR, that made the key decisions regarding the use of burn pits. Pet.App.14-17. Indeed, the court candidly acknowledged that KBR's evidence "indicates that the military allowed the use of burn pits and decided whether, when, and

how to utilize them." Pet.App.17. But the Fourth Circuit nonetheless reversed the district court's dismissal of Respondents' claims. In doing so, the court committed several serious errors of law.

1. The Fourth Circuit adopted the Third Circuit's deeply flawed approach to the political question doctrine in the *Harris* case. In particular, the Fourth Circuit concluded that whether Respondents' state-law tort claims would raise a non-justiciable political question would turn on the details of state law, specifically whether the relevant state tort law "used a proportional-liability system that assigned liability based on fault." Pet.App.24-25. Only then, the court of appeals reasoned, would a political question arise. In contrast, under a "pure joint-and-several liability system," the court asserted that there would not be a need to "evaluate the military's decisions" because "the plaintiffs could obtain all of their relief from the military contractor." Pet.App.25; *see Harris*, 724 F.3d at 474-75 (same). Because this case "involves complaints filed in forty-two different states," it was "unclear which state's (or states') law will ultimately apply." Pet.App.25 n.4. The Fourth Circuit remanded to the district court to apply the *Harris* choice-of-law framework to Respondents' claims.

Harris was wrongly decided, *see Harris* Pet. 23-26, and the Fourth Circuit's decision to apply it here starkly illustrates the problems with that deeply-flawed approach. The notion that the *federal*, constitutionally-based political question doctrine turns on the nuances of *state* tort law ignores first principles. And the notion that the application of

that federal doctrine to a group of individuals downwind from a burn pit in Iraq would turn on the vagaries of their home state's tort law defies common sense.

The key considerations in determining whether the political question doctrine applies—such as whether the issue has been textually committed to the political branches or whether there are judicially manageable standards for resolving the issue, *see Baker*, 369 U.S. at 217—involve the powers and competencies of each branch of the *federal* government. The details of state tort law cannot possibly be dispositive in determining 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. *Regardless* of which state's law applies, the analysis is the same: Respondents' claims are non-justiciable because they implicate strategic decisions that were ultimately the responsibility of military officials, and political questions would inevitably arise during the adjudication of those claims.

The Fourth Circuit's approach would also lead to illogical and inequitable results, which are on stark display in multi-plaintiff suits such as this one. Respondents filed 57 suits against KBR in 42 different states. Those suits have nothing to do with the forum states; they concern events that occurred at military bases in Iraq and Afghanistan. Yet, under the Fourth Circuit's approach, choice-of-law becomes *dispositive*, and tort claims against the same defendant arising out of the same series of events

will give rise to radically different outcomes depending on the happenstance of where a particular soldier lived when not stationed abroad. *Accord Harris*, 724 F.3d at 478 (case would be non-justiciable under Tennessee or Texas law, but not Pennsylvania law). The application of a fundamental constitutional principle to events that occurred on a foreign battlefield cannot possibly vary depending on the fortuities of the plaintiff's domicile.

Indeed, the Third and now Fourth Circuits' erroneous focus on the details of state law in addressing the political question doctrine highlights the importance of KBR's federal preemption and derivative sovereign immunity defenses. Both the military and battlefield contractors must be able to interact with soldiers as soldiers, not as residents of 50 states with varying tort regimes. 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 and derivative sovereign immunity would be that much more obvious.

2. Wholly apart from its misguided focus on the nuances of state tort law, the Fourth Circuit further erred by impermissibly converting the *threshold* justiciability inquiry under the political question doctrine into a full-blown *merits* inquiry into the validity of KBR's defenses.

If this case proceeded to trial, one of KBR's core defenses would be that Respondents cannot establish causation because the key decisions regarding the use of burn pits were made by the military, not KBR. The district court correctly dismissed Respondents'

claims as non-justiciable once it determined that there was sufficient evidence in the record to support that defense. As the district court explained, *adjudication* of KBR's defenses would necessarily require "the intrusion of the judiciary into military decision-making." Pet.App.96.

The Fourth Circuit acknowledged that KBR's evidence "indicates that the military allowed the use of burn pits and decided whether, when, and how to utilize them." Pet.App.17. But because Respondents filed declarations suggesting otherwise, the Fourth Circuit concluded that "we simply need more evidence to determine whether KBR or the military chose how to carry out those tasks." Pet.App.21-22. The Fourth Circuit thus invited—indeed, required—an intrusive analysis of military decision-making as a *prerequisite* for resolving the threshold justiciability question.

That holding is wrong. If a defendant offers substantial evidence showing that its defenses implicate a non-justiciable political question, the case should be over. Under the Fourth Circuit's approach, however, the only way to determine whether the political question doctrine applies is to adjudicate the merits of any defense that might implicate a political question. But the very process of *adjudication—i.e.*, haling military officials into depositions and court proceedings to explain their decision-making process—would result in "precisely the kind of unnecessary intrusion and entanglement with the military that the political question doctrine was

designed to avoid." Pet.App.65.[3] Those concerns are present regardless of whether the jury ultimately credits the military testimony. The purpose of the political question doctrine is to prevent courts from becoming entangled in inherently executive decisions. But, under the Fourth Circuit's approach, that doctrine will apply only after the damage it seeks to avoid has already been inflicted—*i.e.*, once the defendant has prevailed on the merits of its defenses.

C. The Fourth Circuit's Approach Sharpens a Circuit Split Over the Application of the Political Question Doctrine to Contractor-on-the-Battlefield Cases.

As explained in the *Harris* petition, the courts of appeals are sharply divided over how to apply the political question doctrine to state-law tort claims against battlefield contractors. *See Harris* Pet. 26-30. The Fourth Circuit's decision in this case further illustrates that split of authority and underscores the need for this Court's review.

1. In the Eleventh Circuit's *Carmichael* case, the plaintiff served as the "military escort" on a fuel truck driven by a KBR employee in Iraq, and was injured in an accident during a fuel convoy. 572 F.3d at 1275-78. He subsequently brought state-law negligence claims against KBR.

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[3] Respondents served at more than 100 military bases throughout two theaters of war over a decade. It is no exaggeration to suggest that adjudication of Respondents' claims could require hundreds of depositions of military officials.

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 time of departure, the route, and the security measures to be taken. *Id.* at 1281. Those decisions were made by the military based on a careful risk-benefit assessment. 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." *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 … under searching judicial scrutiny." *Id.* at 1283.

The Fourth Circuit's decision is irreconcilable with *Carmichael*. Unlike the 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." *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).

Moreover, *Carmichael* expressly rejected the Fourth Circuit's merits-based approach to the political question doctrine. As the Eleventh Circuit explained, 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.

In short, the Eleventh Circuit *refused* to do what the Fourth Circuit expressly *required*—namely, conduct a merits inquiry into the defendant's liability defenses in order to determine whether the political question doctrine applies. Because KBR offered "plausible" evidence showing that military decisions "contributed" to Respondents' alleged harm from burn pit operations, there is no question that this case would have been dismissed as nonjusticiable under the Eleventh Circuit's approach.

2. In stark contrast to *Carmichael*, the Third, Fifth, and now Fourth Circuits have adopted a state-law-centric approach to the political question doctrine under which the nuances of state tort law will often be dispositive. In *Harris*, the Third Circuit held that application of the political question doctrine "depends on which state law controls," and requires an antecedent choice-of-law analysis. 724 F.3d at 474. The Fifth Circuit has adopted the *Harris* approach as well, holding in another contractor-on-the-battlefield case that it would be "premature" to consider KBR's political question arguments because "the district court has not performed … a choice-of-law analysis." Order at 2, *McManaway v. KBR*, No. 12-20763 (5th Cir. Nov. 7, 2013), *petition for reh'g pending*.

Indeed, further underscoring the confusion that *Harris* has spawned, the Fourth Circuit now appears to be straddling both sides of the split. In this case, the Fourth Circuit heartily endorsed the Third Circuit's approach to the political question doctrine, stating that "[w]e find the *Harris* court's reasoning persuasive and applicable here." Pet.App.25. But that holding is in significant tension with the Fourth Circuit's earlier decision in *Taylor v. KBR*, 658 F.3d 402 (4th Cir. 2011), which held that the political question doctrine barred similar claims against KBR.

The plaintiff in *Taylor* was a Navy Corpsman who was injured by an electrical shock while installing a generator at a tank maintenance facility in Iraq. He brought negligence claims against KBR, which had performed electrical work at the tank facility. The Fourth Circuit held that those claims were barred by the political question doctrine because adjudication of KBR's contributory negligence defense would have necessarily required the court to examine military decisions about power supply on a forward operating base. *Id.* at 412. The Fourth Circuit did not remotely suggest that it needed a choice-of-law analysis to determine whether the case raised a political question doctrine, nor did it suggest that its holding might turn on the intricacies of state tort law.

* * *

The Fourth Circuit's decision makes clear that the deeply flawed *Harris* approach to the political question doctrine is spreading. Two competing positions have now emerged. The decision below, the Third Circuit, and the Fifth Circuit hold that state

law prevails above all, and that choice-of-law will often be dispositive to the political question analysis. In stark contrast, the Eleventh Circuit (like the Fourth Circuit's earlier decision in *Taylor*) correctly holds that state law should play no role in the inquiry. Even if the plaintiffs allege that the defendant acted negligently, a case should be dismissed as non-justiciable if the defendant offers plausible evidence showing that its defenses will implicate political questions. This conflict is entrenched and well-defined, and this case is an ideal vehicle in which to resolve it.

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 Contractor Arising out of the Military's Combatant Activities 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 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 policy underlying 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.*; *see Al Shimari v. CACI*, 679 F.3d 205, 226 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).

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." *Saleh*, 580 F.3d at 7. Indeed, tort claims against a battlefield 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 "the costs of imposing tort liability on government contractors" will ultimately be "passed through to the American taxpayer." *Id.*

State-law tort claims against a battlefield support contractor are preempted by the combatant-activities exception if such claims would undermine the federal interests 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." *Id.* 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; and (2) the contractor was acting within the scope of its contractual relationship with the government at the time of the incident. *See* U.S. *Al Shimari* Br. 17-20. 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; *see also* Br. for United States 11-17, *Saleh v. Titan Corp.*, No. 09-1313, 2011 WL 2134985 (U.S. May 27, 2011).

Respondents' claims are squarely preempted under either the *Saleh* test or the United States' test. Under *Saleh*, KBR's waste management services were "integral to sustaining combat operations" in the Iraq war zone. Pet.App.93-94; *see Aiello v. KBR*, 751 F. Supp. 2d 698, 714 (S.D.N.Y. 2011) (maintenance of latrines was "integral to sustaining

combat operations"). And KBR performed those essential combat support functions at the direction of, and in close coordination with, U.S. military personnel. Pet.App.69 ("KBR has provided clear evidence that establishes direct and fundamental military management and control of KBR employees in both theatres of war.").

Moreover, under the United States' proposed test, it is clear that uniformed soldiers, who actually performed the same work at most bases, would be covered by the exception, and it is equally clear that KBR's work fell within the scope of its contract. *See In re KBR Burn Pit Litig.*, 736 F. Supp. 2d 954, 970 (D. Md. 2010) ("waste disposal and water treatment were generally within the scope of [KBR's] duties" under the contract).

B. The Fourth Circuit's Decision Deepens an Acknowledged Circuit Split and Expressly Rejects the United States' Proposed Test for Preemption.

The Fourth Circuit readily acknowledged a three-way circuit split over the legal standard for combatant-activities preemption. Pet.App.40-42; *see Harris* Pet. 34-37. Indeed, whereas the Third Circuit attempted to downplay the starkness of the split, the Fourth Circuit candidly acknowledged the disparate approaches and expressly rejected the positions of the D.C. and Ninth Circuits (and the U.S. government).

As noted above, the D.C. Circuit has held that the combatant-activities exception reflects a policy of "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." *Saleh*, 530 F.3d at 7. The Fourth Circuit rejected the D.C. Circuit's approach as "too broad" because it does not limit preemption to "actors under military control." Pet.App.42.[4]

At the other end of the spectrum, the Ninth Circuit has held that the combatant-activities exception merely "recognize[s] 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 v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). The Fourth Circuit rejected that standard as "too narrow" because the plain text of the combatant-activities exception is not limited to "claims stemming directly from the use of force." Pet.App.42.

The Fourth Circuit ultimately settled on the approach taken by the Third Circuit in *Harris*. The court found *Harris* "persuasive" and "adopt[ed] its formulation of the interest at play here." Pet.App.42. Under that approach, only "'state regulation of the

[4] To be sure, after rejecting the D.C. Circuit's approach as "too broad," the Fourth Circuit purported to apply the D.C. Circuit's test for preemption. Pet.App.47-49. But, in finding that the D.C. Circuit's test was not satisfied here, it is clear that the Fourth Circuit was applying a wholly different standard. The Fourth Circuit held that more factfinding was needed regarding the degree to which the military controlled KBR's activities. Pet.App.49. The D.C. Circuit, in contrast, emphasized that even if a contractor exercised some degree of discretion, this "does not undermine the federal interest in immunizing the operation from suit." *Saleh*, 580 F.3d at 8-9.

military's battlefield conduct and decisions'" is preempted by the combatant-activities exception. Pet.App.41-42.

Turning to the facts of this case, the Fourth Circuit agreed with KBR that waste management operations in a war zone constitute "combatant activities" because these functions are "'necessary to and in direct connection with actual hostilities.'" Pet.App.48. But the court nonetheless refused to find Respondents' claims preempted. Even though it was "evident that the military controlled KBR to some degree," the Fourth Circuit reversed the district court and held that further proceedings were needed to conclusively resolve this issue. Pet.App.49. That reasoning echoes another aspect of the Third Circuit's misguided *Harris* decision, which holds that state-law claims against a battlefield contractor are not preempted if the contractor exercised "discretion" in performing its contractual duties. *Harris*, 724 F.3d at 481-82.

Like the Third Circuit, the Fourth Circuit also rejected the United States' proposed test for preemption as "far too broad." Pet.App.47. In particular, the Fourth Circuit criticized the United States' test for "recommend[ing] preemption when state tort laws touch any actions within the scope of the contractor's contractual relationship with the government, even actions that the military did not authorize." *Id.* But the *express purpose* of the United States' test was to place "appropriate limits on private tort suits based on [combatant] activities," even if the contractor "allegedly violated the terms of the contract or took steps not specifically called for in

the contract." U.S. *Al Shimari* Br. 14, 20. That is, the United States viewed the breadth of its test as necessary to avoid third parties precipitating intrusive inquiries into whether there was a contractual breach on a foreign battlefield, yet the Fourth Circuit saw that breadth as a vice. The fact that the Fourth Circuit *both* rejected the United States' test and deepened an existing circuit split makes this Court's review imperative.

III. The Court Should Grant Certiorari To Address The Scope Of The Derivative Sovereign Immunity Doctrine.

Finally, this case is an ideal complement to the *Harris* petition because it also squarely presents a third ground on which Respondents' claims can be dismissed. The doctrine of derivative sovereign immunity ensures that contractors are not left "holding the bag" when they perform delegated government functions for which the government itself would be immune from suit. The Fourth Circuit plainly erred by refusing to dismiss Respondents' claims on this ground.

A. This Court has long recognized that government contractors should be immune from tort liability for performing duties within the scope of their delegated authority. In *Yearsley*, 309 U.S. 18, a private contractor—pursuant to a contract with the Army Corps of Engineers—built dikes that caused erosion of the plaintiff's land. This Court held that, because the contractor was acting within the scope of its authority under a valid contract with the United States, its actions amounted to "act[s] of the government," and any tort claims challenging those

actions were barred by derivative sovereign immunity. *Id.* at 21-22.

The Court recently reaffirmed those same basic principles in *Filarsky*, 132 S. Ct. at 1666, which arose in the qualified immunity context. The Court recounted the history of private citizens performing government functions and noted that "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. Indeed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665.

Those immunities are needed to avoid "'unwarranted timidity'" by those doing the public's business, and to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Id.* at 1665-66. The doctrine of derivative sovereign immunity recognizes that private individuals performing government functions should not be left "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* at 1666. The doctrine makes particular sense in a case like this where the government will ultimately pick up the tab for the contractor's liability. *See* 48 C.F.R. § 52.228-7(c).

B. As the district court correctly concluded, Respondents' claims are barred by derivative sovereign immunity. Pet.App.79-83. Before the rise of the all-volunteer military, uniformed personnel

typically handled battlefield support functions such as waste disposal. And, despite the military's increasing reliance on contractors in Iraq and Afghanistan, military personnel continued to perform battlefield support functions at most forward operating bases. There is no question that state-law tort claims arising out of those mission-critical functions would be barred by sovereign immunity if they had been filed directly against the United States. *See* 28 U.S.C. § 2680(j) (combatant-activities exception to FTCA); § 2680(a) (discretionary-function exception); § 2680(k) (foreign-country exception). Respondents' state-law tort claims against KBR seek to do indirectly what sovereign immunity bars them from doing directly: challenging the manner in which government functions are discharged in a war zone.

The Fourth Circuit nonetheless refused to apply the doctrine of derivative sovereign immunity because "the record does not contain enough evidence to determine whether KBR acted *in conformity with* [the contract], its appended task orders, and any laws and regulations that the contract incorporates." Pet.App.36 (emphasis added). But that holding fundamentally misconstrues the derivative sovereign immunity inquiry.

The relevant question is not whether a contractor *complied* with every term of the contract, but whether it was acting within the scope of its contractual authority when it performed the function in question. A contractor can be acting within the *scope* of its delegated authority even where it is alleged to have acted negligently or violated the

terms of the contract. For example, the Westfall Act grants immunity to federal employees for torts committed "within the scope of [their] office or employment," even if that conduct was wrongful or negligent. 28 U.S.C. § 2679(b)(1).

The Fourth Circuit overlooked this important distinction and incorrectly focused on whether KBR's actions were taken "in conformity with" the contract. Under the proper test, Respondents' claims should have been dismissed because all of KBR's alleged misconduct—such as siting burn pits in the "wrong" locations or burning prohibited items—fell comfortably within the scope of its contractual authority to manage battlefield waste disposal and water supply.

The concept of derivative sovereign immunity is closely related to the other issues in this case. Indeed, the derivative sovereign immunity issue can be understood as part and parcel of the combatant-activities exception. Because Petitioners were performing sovereign functions, plaintiffs would need to identify a waiver of sovereign immunity in order to overcome Petitioners' derivative sovereign immunity. The FTCA could conceivably provide such a waiver, subject to its many exceptions, including the combatant-activities exception. Thus, the Court can still explore the derivative sovereign immunity issue even if it limits its grant to the first two questions presented or grants only in *Harris*.

Nonetheless, because both the district court and the Fourth Circuit separately addressed the derivative sovereign immunity question, there is value in granting on all three questions to maximize

the Court's flexibility in evaluating the critically important issues presented both here and in *Harris*.

CONCLUSION

The Court should consolidate this petition with *KBR v. Harris*, No. 13-817, and grant certiorari.

Respectfully submitted,

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April 11, 2014

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1430

IN RE: KBR, INCORPORATED, BURN PIT LITIGATION.

ALAN METZGAR; PAUL PARKER; RICHARD RONALD GUILMETTE; WILLIAM G. BRISTER, JR.; HENRY J. O'NEILL; MICHAEL AUW; CORY CASALEGNO; MICHAEL DOUGLAS MOORE; DAVID U. LACKEY; RANDALL L. ROBINSON; DEAN GUY OLSON; ALBERT PAUL BITTEL, III; FRED ROBERT ATKINSON, JR.; ROBYN SACHS, personal representative of Christopher Sachs, deceased; JENNIFER MONTIJO; STEPHEN FLOWERS; JOANNE OCHS; MELISSA OCHS; JAMES MORGAN; DAVID NEWTON; CHRIS BOGGIANO; EARL CHAVIS; BENNY LYLE REYNOLDS; JOSHUA ELLER; ROBERT CAIN; CRAIG HENRY; FRANCIS JAEGER; DAVID MCMENOMY; MARK POSZ; EL KEVIN SAR; SMSGT. GLEN S. MASSMAN; SSGT. WENDY L. MCBREAIRTY; PABLO BERCHINI; BRIAN P. ROBINSON; MAURICE CALLUE; DENNIS WAYNE BRIGGS; EDWARD LEE BUQUO; WAYNE E. FABOZZI; SHARLENE S. JAGGERNAUTH; FLOYED JAMES JOHNSON, SR.; TAMRA C. JOHNSON; RICHARD LEE KEITH; DANIEL SANTIAGO MORALES; PHILLIP MCQUILLAN; ILDEBBRANDO PEREZ; LUIGI ANTONIO PROVENZA; RUTH ANN REECE; EDUARDO SAAVEDRA, SR.; JILL R. WILKINS, personal representative of Kevin E. Wilkins, deceased; MICHAEL DONNELL WILLIAMS; JERMAINE LYNELL WRIGHT; EDWARD

ADAMS; KENNETH BALDWIN; DONNA WU; JOHN DOES 1–1000; JANE DOES 1–1000; WALLACE MCNABB; KEVIN PAUL ROBBINS; BRIAN BLUMLINE; ROBERT BIDINGER; UNKNOWN PARTIES; BENJAMIN BOEKE; CRAIG KERVIN; BARRY ZABIELINSKI; DAVID GREEN; NICK DANIEL HEISLER; DERROL A. TURNER; VINCENT C. MOSELEY; ALEX HARLEY; JOHN A. WESTER, JR.; BILL JACK CARLISLE, JR.; ANTHONY EDWARD ROLES; MARCOS BARRANCO; JOEL LUGO; SHAWN THOMAS SHERIDAN; JAYSON WILLIAMS; EUNICE RAMIREZ; LEE WARREN JELLISON, JR.; GEORGE LUNDY; THOMAS KELLECK; DAN BOWLDS; TONY ALLEN GOUCKENOUR; JOHN WILLIAM JACKSON; JOHN PETE TROOST; DEBORAH ANN WHEELOCK; CHARLES HICKS; SEAN ALEXANDER STOUGH; JEFFREY MORGAN COX; JAMES WARREN GARLAND; DANNY LAPIERRE; KENNETH HARRIS; ANTHONY JEROME WILLIAMS; KATHY VINES; PATRICK CASSIDY; WILLIAM BARRY DUTTON; CHRISTOPHER MICHAEL KOZEL; RICHARD MCANDREW; LORENZO PEREZ; JESSEY JOSEPH PHILIP BACA; DANIEL TIJERNIA; HEINZ ALEX DISCH; JAMES MCCOLLEM; TRAVIS FIDELL PUGH; ANTHONY RAY JOHNSON; DAVID MICHAEL ROHMFELD; JOSHUA DAVID BEAVERS; MATTHEW JOEL FIELDS; STEVEN E. GARDNER; STEPHEN R. JONES; KEVIN SCOTT TEWES; HANS NICOLAS YU; THOMAS OLSON; BRIAN PAULUS; PAUL MICHAEL WIATR; MICHAEL FOTH; BRETT ANTHONY MAZZARA; LISA ROUNDS, Personal representative of Andrew Ray Rounds, deceased; DAVID ROUNDS, Personal representative of Andrew Ray Rounds, deceased; PETER BLUMER; SCOTT ANDREW CHAMBERLAIN; TIMOTHY E. DIMON; WILLIAM PHILIP KRAWCZYK, SR.; SEAN JOHNSON; SHERRY BISHOP, Individually and as representative of the estate of

Kirk A. Bishop; GENE BISHOP; PATRICK BISHOP; ALBERT JOHNSON, JR.; DAVID JOBES; GENE LEONARD MATSON; TIMOTHY J. WATSON; ANDREW MASON; MICHELLE BROWN; JONATHAN LYNN; CHARLES KINNEY; MICHAEL MCCLAIN; BASIL SALEM; JUSTIN GONZALES; MATTHEW GUTHERY; CHRISTOPHER LIPPARD; DAVID PARR; JOHN F. MONAHAN; AMANDA BRANNON; L. CHANDLER BRANNON, and all others similarly situated,

Plaintiffs-Appellants,

v.

KBR, INCORPORATED; KELLOGG BROWN & ROOT, LLC, HALLIBURTON COMPANY; KELLOGG BROWN & ROOT SERVICES, INCORPORATED; BROWN AND ROOT SERVICES; DII INDUSTRIES, LLC; HALLIBURTON ENERGY SERVICES, INC.; KBR HOLDINGS, LLC; KELLOGG BROWN & ROOT, INCORPORATED; KELLOGG BROWN & ROOT INTERNATIONAL, INCORPORATED; KBR GROUP HOLDINGS INCORPORATED; KBR TECHNICAL SERVICES, INCORPORATED,

Defendants-Appellees,

and

ERKA LTD.,

Defendant.

Appeal from the United States District Court
for the District of Maryland
Argued: October 30, 2013
Decided: March 6, 2014
Amended/Corrected: March 7, 2014

Before DIAZ and FLOYD, Circuit Judges, and Joseph F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Floyd wrote the opinion, in which Judge Diaz and Judge Anderson have joined.

FLOYD, Circuit Judge:

Since the United States began its military operations in Afghanistan and Iraq in 2001 and 2003, respectively, its use of private contractors to support its mission has risen to "unprecedented levels." Comm'n on Wartime Contracting in Iraq and Afghanistan, *At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations* 1 (Feb. 24, 2011) (laying out the findings of a bipartisan congressional commission). At times, the number of contract employees has exceeded the number of military personnel alongside whom they work in these warzones. *Id.* Courts—including this Court—have struggled with how to treat these contractors under the current legal framework, which protects government actors but not private contractors from lawsuits in some cases. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009). This case requires us to make another contribution to this changing legal landscape.

Appellees are companies that contracted with the United States government to provide certain

services at military bases in Iraq and Afghanistan, including waste disposal and water treatment. Appellants contend that they suffered harm as a result of the contractors' waste disposal and water treatment practices and brought state tort and contract claims to seek redress for their alleged injuries. Prior to discovery, the district court dismissed Appellants' claims, holding that (1) the claims were nonjusticiable, (2) the contractors were immune from suit, and (3) federal law preempted the state tort laws underlying Appellants' claims. Because the district court lacked the information necessary to dismiss Appellants' claims on these bases, we vacate the district court's decision and remand this case for further proceedings consistent with this opinion.

I.

The Army contracted with Appellees KBR, Inc.; Kellogg Brown & Root LLC; Kellogg Brown & Root Services, Inc.; and Halliburton (collectively, KBR) to provide waste disposal and water treatment services on military bases in Iraq and Afghanistan. In fifty-eight separate complaints, Appellants—the majority of whom are United States military personnel—(Servicemembers) brought various state tort and contract claims, including the following causes of action: negligence; battery; nuisance; negligent and intentional infliction of emotional distress; willful and wanton conduct; negligent hiring, training, and supervision; breach of duty to warn; breach of contract; and wrongful death. Many of the pending cases are purported class actions. The Servicemembers contend that they suffered injuries

as a result of KBR's waste disposal and water treatment practices. According to the Servicemembers, these injuries occurred because KBR "violated military directives in its performance of waste disposal and water treatment services" and breached LOGCAP III—its contract with the government.

"LOGCAP" stands for "Logistics Civil Augmentation Program." Under that program, which the Army established in 1985, "civilian contractors [may] perform selected services in wartime to augment Army forces" and "release military units for other missions or fill shortfalls." Army Reg. 700-137, at 1-1 (Dec. 16, 1985). On December 14, 2001, the Army awarded the LOGCAP III contract to KBR. LOGCAP III is a ten-year contract that governs a wide array of services on military bases in Iraq, Afghanistan, Kuwait, Djibouti, Jordan, Kenya, Uzbekistan, and Georgia, including waste disposal, water treatment, and other vital services. The military executes LOGCAP III through various "task orders" that incorporate "statements of work," which define KBR's responsibilities.

In their First Amended Complaint, the Servicemembers contend that KBR violated LOGCAP III's waste management and water treatment components in two major ways. First, the Servicemembers allege that KBR failed to properly handle and incinerate waste by "burn[ing] vast quantities of unsorted waste in enormous open air burn pits with no safety controls" from 2003 to the present. They aver that the burned waste included trucks, tires, rubber, batteries, Styrofoam, metals,

petroleum, chemicals, medical waste, biohazard materials, human remains, asbestos, and hundreds of thousands of plastic water bottles. A report that the Department of Defense presented to Congress identifies many of these items as "prohibited from burning." Dep't of Defense, *Report to Congress on the Use of Open-Air Burn Pits by the United States Armed Forces* 6 (Apr. 28, 2010). According to the Servicemembers, the smoke from these burn pits contained "carcinogens and respiratory sensitizers . . ., creating a severe health hazard [and] potentially causing both acute and chronic health problems." Second, the Servicemembers contend that KBR provided contaminated water to military forces. Specifically, they argue that KBR did not perform water quality tests or ensure that water contained proper levels of chlorine residual.

On October 16, 2009, the Judicial Panel on Multidistrict Litigation transferred all of the cases to the District of Maryland for consolidated pretrial proceedings. KBR filed its first motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on January 29, 2010. KBR argued that (1) the Servicemembers' claims are nonjusticiable under the political question doctrine; (2) KBR is entitled to "derivative sovereign immunity" based on the "discretionary function" exception to the federal government's waiver of immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*; and (3) the FTCA's "combatant activities" exception preempts the state tort laws underlying the Servicemembers' claims. The district court denied the first motion to dismiss without prejudice, concluding that it did not have

enough information to decide whether to dismiss for lack of subject matter jurisdiction. *See In re KBR, Inc., Burn Pit Litig.* (*Burn Pit I*), 736 F. Supp. 2d 954, 957 (D. Md. 2010). The court found that the political question doctrine, derivative sovereign immunity, and the combatant activities exception did not compel dismissal based on the facts alleged in the complaint. However, due to its concern about unleashing "the full fury of unlimited discovery" on "government contractors operating in war zones," the court asked the parties to submit a joint discovery plan for limited jurisdictional discovery. *Id.* at 979.

On December 10, 2010, the district court stayed the proceedings in this case in light of the Fourth Circuit's pending decisions in *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201 (4th Cir. 2011), *Al Shimari v. CACI International, Inc.*, 658 F.3d 413 (4th Cir. 2011), and *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402. This Court ultimately dismissed *Al-Quraishi* and *Al Shimari* after a rehearing en banc because the cases were not subject to interlocutory appeal under the collateral order doctrine. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc). *Taylor* concerns how to treat military contractors under the political question doctrine.

Following the resolution of these appeals and before any jurisdictional discovery took place, KBR filed a renewed motion to dismiss for lack of subject matter jurisdiction. KBR appended twenty-three new exhibits to the renewed motion to dismiss, and the Servicemembers appended two new declarations from military officials to their opposition to KBR's

motion. In light of *Taylor*, briefs that the United States filed in *Al Shimari* and *Saleh v. Titan Corp.*, and the Supreme Court's decision in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), the district court granted KBR's motion to dismiss. *In re KBR, Inc., Burn Pit Litig.* (*Burn Pit II*), 925 F. Supp. 2d 752, 772-73 (D. Md. 2013). The court held that the political question doctrine, derivative sovereign immunity, and the combatant activities exception each provided a basis on which to dismiss the Servicemembers' claims.

The Servicemembers now appeal, contending that the district court erred in granting the motion to dismiss. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

On appeal from a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), "[w]e review the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo." *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004). "[W]hen a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.*; *see also Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (noting that "the court may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning jurisdiction"). However, "when the jurisdictional facts are inextricably intertwined

with those central to the merits, the [district] court should resolve the relevant factual disputes only after appropriate discovery." *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009).

III.

A. Political Question Doctrine Background

We turn first to KBR's argument that the political question doctrine renders the Servicemembers' claims nonjusticiable. A claim presents a political question when the responsibility for resolving it belongs to the legislative or executive branches rather than to the judiciary. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). The political question doctrine prevents the courts from encroaching on issues that the Constitution assigns to these other branches or that the judiciary is ill-equipped to decide. *See id.* at 217. However, in determining whether the questions that this case presents belong to another branch of government, we remain mindful of the fact that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"[M]ost military decisions lie solely within the purview of the executive branch." *Taylor*, 658 F.3d at 407 n.9. As this Court explained in *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), "the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. . . . [J]udicial review of military decisions

would stray from the traditional subjects of judicial competence." *Id.* at 548. However, "acting under orders of the military does not, in and of itself, insulate the claim from judicial review." *Taylor*, 658 F.3d at 411. Therefore, although cases involving military decision making often fall in the political question box, we cannot categorize such a case as nonjusticiable without delving into the circumstances at issue.

The Supreme Court announced a six-factor test for assessing whether a claim poses a political question in *Baker v. Carr*. Pursuant to *Baker*, cases involving political questions evince (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" the issue, (3) "the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion," (4) "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government," (5) an "unusual need for unquestioning adherence to a political decision already made," *or* (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

This Court considered whether examining a government contractor's actions can invoke a political question in *Taylor*. In doing so, the Court adapted *Baker* to the government contractor context through a new two-factor test. Under the *Taylor* test, we first consider "the extent to which [the government

contractor] was under the military's control." 658 F.3d at 411. Second, we evaluate "whether national defense interests were closely intertwined with the military's decisions governing [the government contractor's] conduct." *Id.* Pursuant to the second factor, the political question doctrine renders a claim nonjusticiable if deciding the issue "would require the judiciary to question 'actual, sensitive judgments made by the military,'" which can occur even if the government contractor is "nearly insulated from direct military control." *Id.* (quoting *Taylor v. Kellogg Brown & Root Servs., Inc.*, No. 2:09cv341, 2010 WL 1707530, at *5 (E.D. Va. Apr. 19, 2010)). In evaluating the *Taylor* factors, we "look beyond the complaint, [and] consider [] how [the Servicemembers] might prove [their] claim[s] *and* how KBR would defend." *Id.* at 409 (first and second alterations in original) (quoting *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008)) (internal quotation marks omitted).

In *Taylor*, this Court determined whether the political question doctrine barred a Marine's negligence suit against a government contractor. The Marine—Peter Taylor—was electrocuted and suffered severe injuries when the government contractor's employee turned on a generator at a military base in Iraq despite Marine Corps' instructions not to do so. *Id.* at 404. When considering the first factor, the Court held that the government contractor was not under the military's control because its contract specified that "the contractor shall have exclusive supervisory authority and responsibility over employees." *Id.* at 411 (internal quotation marks omitted). However, when

considering the second *Taylor* factor, the Court explained that assessing the government contractor's contributory negligence defense would require it to evaluate Taylor's conduct and certain military decisions, such as the military's choice to employ a generator. *Id.* at 411-12. The Court therefore determined that "an analysis of [the contractor's] contributory negligence defense would 'invariably require the Court to decide whether . . . the Marines made a reasonable decision.'" *Id.* at 411 (second alteration in original) (quoting *Taylor*, 2010 WL 1707530, at *6). Accordingly, based on the second factor alone, this Court opted to affirm the district court's decision to dismiss the case. *Id.* at 412. The Court's analysis suggests that, if a case satisfies either factor, it is nonjusticiable under the political question doctrine.

Although the Court evaluated Taylor's claim under the new two-factor test, it did not ignore the traditional *Baker* analysis. In a footnote, the Court noted that considering whether the Marines' actions contributed to Taylor's injuries "would run afoul of the second and fourth *Baker* factors":

> 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. Furthermore, any such judicial assessment thereof would show a lack of respect for the executive branch.

Id. n.13. The Court added this analysis so it could compare the factual scenario at issue in *Taylor* to the

circumstances underlying this Court's earlier decision in *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991)—a case that utilized the *Baker* factors. This comparison simply bolstered the decision that the Court had already reached using the new two-factor test; the Court did not rely on a *Baker*-style analysis to arrive at its conclusion. We therefore proceed with our analysis in this case using only the *Taylor* test.

B. "Military Control" Factor

The district court concluded that both *Taylor* factors counseled in favor of finding that the political question doctrine rendered the Servicemembers' claims nonjusticiable. With respect to the first *Taylor* factor, the district court found that the military made the decision to use burn pits and chose where to locate them. *Burn Pit II*, 925 F. Supp. 2d at 761-62 & n.14. The court based this determination on the declarations of various military officers and civilians and a letter from General David Petraeus, which states, "There is and will continue to be a need for burn pits during contingency operations." *Id.* at 762 (internal quotation marks omitted). The court also found that the military controlled water supply operations in Iraq and Afghanistan, a determination it made based on the declarations of two military officers and two Army publications. *Id.* at 762-63. Finally, the court concluded that, contrary to the contract at issue in *Taylor*, LOGCAP III and certain task orders related to burn pits and water treatment "demonstrate[d] pervasive and plenary military control" over the functions at issue in this case. *Id.* at 764. The district court therefore held that the first

Taylor factor "weigh[ed] heavily in favor of dismissing the[] cases." *Id.*

The Servicemembers object to the district court's conclusion that the military controlled KBR and, therefore, contend that this case does not satisfy the first *Taylor* factor. With regard to the burn pit component of their claims, the Servicemembers aver that the record contains evidence indicating that the military decided to use a burn pit at only a single military base: Camp Taji in Iraq. Accordingly, the Servicemembers argue that any other surface burning occurred without military authorization. The Servicemembers further contend that the *Overseas Environmental Baseline Guidance Document* supports their argument because it specifies that "[o]pen burning will not be the regular method of solid waste disposal." Dep't of Defense, DoD 4715.5-G, *Overseas Environmental Baseline Guidance Document* ¶ C7.3.14 (March 2000).

According to a report that the Department of Defense presented to Congress, open-air burn pits are an acceptable method of waste disposal on military bases. Dep't of Defense, *Report to Congress on the Use of Open-Air Burn Pits by the United States Armed Forces* 4 (Apr. 28, 2010). However, the report makes clear that burn pits are not the preferred method of waste disposal, and the military should utilize them only after exhausting other options, such as landfills and incinerators. *Id.* In any event, "the decision to use burn pits in deployed operations is retained at operational command level, based on local conditions and in accordance with higher level guidance." *Id.* at 4-5 (footnotes omitted). The report

notes that "[t]he operational commander shall develop and approve a solid waste management plan for the contingency operation," and "[t]he use of open-air burn pits shall not be allowed unless included within this plan." *Id.* at 5 n.5 (internal quotation marks omitted). An "operational commander" is the senior commander of a Joint Task Force or deployed force. *Id.*

Various task orders associated with LOGCAP III mesh with the report's description of surface burning as a waste disposal method that the military authorized but discouraged. Iraq Task Orders 139 and 159 specifically mention "surface burning" as a permitted method of waste disposal, although these task orders allow KBR to engage in surface burning only "[u]pon formal notification" and indicate that surface burning is not the preferred method of waste disposal. Afghanistan Task Order 13 places certain limitations on "[t]rash burning," and Afghanistan Task Orders 14 and 98 specify that KBR "shall provide trash pick up and disposal service," including "the operation of a burn pit." Pursuant to Afghanistan Task Order 113, KBR "shall operate and maintain the burn pit . . . until provision of a[n] . . . incinerator." Iraq Task Orders 116, 118, and 145 and Afghanistan Task Order 97 direct KBR to perform general waste management tasks but do not specifically mention surface burning or burn pits.

Declarations from various military officials and civilians indicate that the military decided what method of waste disposal to use on bases in Iraq and Afghanistan. Major Tara Hall, who served as the Army's Chief of Preventive Medicine and Force

Health Protection Officer for the Multi-National Corps-Iraq, stated that "the Army decided which method of waste disposal to use at military bases in Iraq. KBR did not decide which methods of waste disposal were appropriate in the contingency environment of Iraq." According to Gerald E. Vincent, a civilian who served as Environmental Program Manager for the Multi-National Corps-Iraq, "the U.S. military made the decisions about which method of waste disposal to use at each base camp in Iraq . . . . When appropriate, . . . KBR personnel would provide input in the decision[-]making process leading to the decisions about which method of waste disposal would be used." Dr. R. Craig Postlewaite, Acting Director of Force Health Protection and Readiness Programs and Director of Force Readiness and Health Assurance, explained that "the U.S. military, as a matter of policy and doctrine, decides which methods of waste disposal, e.g., burn pits or incinerators, to use at military camps in such war theaters, including Iraq and Afghanistan." He went on to state that "the U.S. military decides where to locate burn pits at such camps" and "[t]he U.S. military also controls what items or substances may be disposed of in burn pits at military camps in these theaters of war." In sum, this evidence indicates that the military allowed the use of burn pits and decided whether, when, and how to utilize them.

Although some evidence demonstrates that the military exercised control over KBR's burn pit activities, the Servicemembers presented evidence—which the district court did not discuss—contradicting this picture. A military guidance document regarding LOGCAP, which the

Servicemembers appended to their memorandum in opposition to KBR's first motion to dismiss, explains that a statement of work "is a description of the work that is to be performed. It details who, what, when and where but not 'how'." U.S. Army, *LOGCAP 101 Working with LOGCAP in SWA* (Draft) 13. The same document goes on to explain that the military "do[esn't] tell the LOGCAP Contractor[s] how to perform the Mission; [it] just tell[s] them what the end result has to be." *Id.* at 14. The Servicemembers provided declarations that support this account. Patrick Perkinson, a former Hazardous Materials and Safety Supervisor for KBR, explained in his declaration that "KBR, not the military, was responsible for choosing the location of the burn pits" at Camp Diamondback in Iraq. In his declaration, KBR's former Corporate Environmental Manager, Lee Lasiter, stated that KBR "was exclusively responsible for operating burn pits in Iraq and Afghanistan [and] for management of wastes generated in the performance of the LOGCAP contract." Declarants Rick Lambeth, Sylvester L. Aleong, David Jobes, Claude Jordy, and Ronald Smith each made similar statements regarding KBR's operational control over the burn pits at various military bases.

The evidence that KBR submitted also speaks to the military's control over water treatment at bases in Iraq and Afghanistan. Pursuant to Iraq Task Orders 59, 89, 139, and 159 and Afghanistan Task Orders 116 and 118, KBR "install[ed], operate[d] and maintain[ed] potable and non-potable water systems." Afghanistan Task Orders 13 and 97 direct KBR to "produce, distribute, and store potable/non-

potable water," and Afghanistan Task Orders 14 and 98 require KBR to "produce, distribute, and dispose of potable and non-potable water." According to Major Sueann O. Ramsey, who served as the Chief of Preventive Medicine for the Multi-National Corps-Iraq,

> The military had oversight over the provision of water services at base camps within Iraq. Technical medical bulletins provided the basic standards and testing methodologies that governed the provision of potable and non-potable water services. [Multi-National Corps-Iraq] policies provided detailed specifications for military and contractor personnel who were authorized to provide water services in Iraq.

Colonel Steven W. Swann, who served as Commander of the 30th Medical Brigade and Corps Surgeon for the Multi-National Corps-Iraq, similarly explained that, "[i]n Iraq, the Army had oversight regarding the testing, production, and distribution of potable and nonpotable water at base camps. Preventive Medicine detachments regularly tested the water to ensure that the water was safe for soldiers and other personnel at the base camps." Accordingly, this evidence suggests that, although the military delegated many water treatment functions to KBR, the military oversaw water treatment in Iraq and Afghanistan to some degree.

To gauge whether the military's control over KBR rose to the level necessary to implicate the political question doctrine in this case, we—like the *Taylor* Court—look to the Eleventh Circuit's decision

in *Carmichael v. Kellogg, Brown & Root Services, Inc.* In *Carmichael*, the Eleventh Circuit considered whether the political question doctrine barred a negligence suit against a government contractor and its employee. 572 F.3d at 1275. The employee was driving a truck in a military convoy transporting fuel in Iraq. *Id.* at 1278. When the truck rolled over, the plaintiff was seriously injured, leaving him in a permanent vegetative state. *Id.* The Eleventh Circuit agreed with the district court's conclusion that the plaintiff's suit would "require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Id.* at 1281. Specifically, pursuant to the Army Field Manual and various task orders, the military decided the date and time of the convoy's departure, the speed of travel, the route, how much fuel to transport, the number of trucks in the convoy, the distance between vehicles, and what security measures were necessary. *Id.* The court characterized this level of military involvement as "plenary control" warranting application of the political question doctrine. *Id.* at 1276; *see id.* at 1281-83.

At this point in the litigation, it does not appear that the military's control over KBR's burn pit and water treatment tasks rose to the level of the military's control over the convoy in *Carmichael*. In fact, based on the current record, the case at hand more closely resembles the situation in *Harris v. Kellogg Brown & Root Services, Inc.* In *Harris*, which we discuss in more detail below, the Third Circuit applied a test very similar to the *Taylor* test to determine whether the political question doctrine barred a plaintiff's claims against a military

contractor. The court explained that "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." 724 F.3d at 467. The court concluded that the military did not exercise control over the contractor because the military did not provide detailed instructions regarding how to complete work orders or get involved in the contractor's assignments. *Id.*

Similarly, in this case, the military guidance document that the Servicemembers provided suggests that the military told KBR what goals to achieve but not how to achieve them. The task orders demonstrate that the military delegated trash disposal and water treatment functions to KBR, but they do not establish whether the military directed these tasks. Only one declarant indicated that the military decided where to locate burn pits and determined what substances to dispose of via surface burning. Several other declarations—including some that KBR provided—demonstrate that the military chose which method of waste disposal to use, but they do not indicate whether the military told KBR how to implement that method. Furthermore, although two declarants stated that the military controlled water testing in Iraq, neither declarant spoke regarding water treatment in Afghanistan, which is also at issue in this litigation. In short, although the evidence shows that the military exercised some level of oversight over KBR's burn pit and water treatment activities, we simply need more

evidence to determine whether KBR or the military chose how to carry out these tasks. We therefore cannot determine whether the military control factor renders this case nonjusticiable at this time.

C. "National Defense Interests" Factor

We now turn to the second *Taylor* factor: "whether national defense interests were closely intertwined with the military's decisions governing KBR's conduct." 658 F.3d at 411. As part of this analysis, we consider whether the Servicemembers' claims or KBR's defenses require us to question the military's judgments. *See id.* When considering the second *Taylor* factor, the district court noted that KBR "assert[ed] that [its] conduct was reasonable because the United States Military determined the method of waste disposal, determined burn pit logistics, and determined water control operations." *Burn Pit II*, 925 F. Supp 2d at 765. The district court also explained that KBR planned to raise a causation defense alleging that the military—not KBR—caused the Servicemembers' injuries.[1] *Id.* According to KBR, this defense would "require the [c]ourt to scrutinize the military's environmental testing efforts and its contemporaneous conclusions that burn pits posed no long-term health problems." *Id.* Because these considerations suggested that "[t]he actions complained of [were] not ones taken by [KBR] alone" and "KBR's defense[] . . . would necessarily require review of the reasonableness of military decisions,"

[1] The district court also stated that KBR planned to raise a contributory negligence defense. *See Burn Pit II*, 925 F. Supp. 2d at 765. However, as we explain below, it is more appropriate to characterize KBR's argument as a causation defense.

the district court concluded that the second *Taylor* factor indicated that this case was nonjusticiable. *Id.* at 765-66. The court therefore held that the political question doctrine prevented it from reaching the merits of the case. *Id.*

Regarding the second *Taylor* factor, the case at hand is somewhat similar to the circumstances at issue in *Taylor* itself. As it did in *Taylor*, KBR counters the Servicemembers' claims by arguing that the military's decisions—not KBR's actions—led to the Servicemembers' injuries. *See Taylor*, 658 F.3d at 405, 407. As KBR explained in its memorandum in support of its renewed motion to dismiss in this case, "[t]he substantial record before this [c]ourt is replete with evidence, including military declarations and government documents, that supports KBR's liability defense that [the Servicemembers'] alleged injuries were caused by military decisions and conduct, not by KBR." However, unlike the contributory negligence defense at issue in *Taylor*, analyzing KBR's defense in this case would not "invariably require the Court to decide whether . . . the [military] made a *reasonable* decision." *Id.* at 411 (first alteration in original) (emphasis added) (internal quotation marks omitted). Rather than characterizing its argument as a contributory negligence defense, KBR's memorandum in support of its renewed motion to dismiss labels its theory a "proximate causation" defense.[2] This causation defense simply requires the

[2] Even if KBR were to re-plead contributory negligence, thereby possibly requiring the district court to question the military's decision making when it evaluates the Servicemembers' negligence claims, this defense would not

district court to decide if the military made decisions regarding (1) whether to use, how to use, and where to locate burn pits and (2) how to conduct water treatment. KBR's defense therefore does not necessarily require the district court to evaluate the propriety of these judgments.[3]

This case more closely resembles the Third Circuit's recent decision in *Harris*. In that case, the court considered whether the political question doctrine barred a suit against a military contractor accused of negligently performing maintenance duties and causing a soldier's death. 724 F.3d at 463. The contractor raised a causation defense similar to KBR's defense in this case, contending that the military proximately caused the soldier's death through its maintenance actions. *Id.* at 474. The Third Circuit concluded that the defense required the evaluation of strategic military decisions only if the governing law used a proportional-liability system that assigned liability based on fault. The court therefore held the case was justiciable as long as the

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affect the Servicemembers' breach of contract claims. The political question doctrine would therefore not render the entire suit nonjusticiable.

[3] In its brief, KBR argues that the Servicemembers indirectly question military judgments by contending that KBR acted negligently because, according to KBR, the military actually made the decisions at issue in this case. However, at this point in the litigation, it is unclear whether KBR or the military made the allegedly negligent decisions. Furthermore, as we explain below, because KBR raises a causation defense rather than a contributory negligence defense, the military's negligence becomes an issue only under a proportional-liability system that assigns liability based on fault.

plaintiffs did not seek any relief that implicated the proportional-liability system. *Id.* at 475. For example, under a pure joint-and-several liability system, the plaintiffs could obtain all of their relief from the military contractor, preventing the need to evaluate the military's decisions.[4] *Id.* at 474.

We find the *Harris* court's reasoning persuasive and applicable here. KBR's causation defense does not require evaluation of the military's decision making unless (1) the military caused the Servicemembers' injuries, at least in part, and (2) the Servicemembers invoke a proportional-liability system that allocates liability based on fault. The second *Taylor* factor therefore does not necessarily counsel in favor of nonjusticiability in this case. Because neither the first nor the second *Taylor* factor currently indicates that the Servicemembers' claims are nonjusticiable, we hold that the political question doctrine does not render this case nonjusticiable at this time and vacate the district court's decision to dismiss the Servicemembers' claims on that basis.

IV.

We turn next to the Servicemembers' contention that the district court erred in finding that KBR was entitled to immunity under the FTCA's discretionary

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[4] This case involves complaints filed in forty-two different states, so it is unclear which state's (or states') law will ultimately apply. Many states have limited joint-and-several liability in tort actions. *See* Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 Ark. L. Rev. 437, 440 & n.14 (2007).

function exception.[5] As a general matter, the United States is immune from suit unless it waives that immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). The United States waived its immunity from tort suits under certain circumstances in the FTCA, see 28 U.S.C. § 2674, but that waiver is subject to certain exceptions, *see id.* § 2680. One of these exceptions is the "discretionary function" exception, which renders the government immune from "[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

[5] The district court did not explicitly rely on the discretionary function exception in concluding that KBR was immune from suit. Instead, the district court quoted a lengthy passage from its *Burn Pit I* decision, in which "[t]his ground for dismissal [derivative sovereign immunity] was described." 925 F. Supp. 2d at 766. The passage discusses the discretionary function exception. *Id.* at 766-67. In its appellate brief, KBR does not rely on only the discretionary function exception to support its immunity argument. Instead, it contends that "[t]here is no question that the U.S. military would be immune from suits arising from the performance of these services under a variety of exceptions to the FTCA, e.g., the discretionary function, combatant activities, and foreign country exceptions." Although we focus on the discretionary function exception below, the conclusion we reach regarding *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), applies regardless of which FTCA provision underpins KBR's immunity argument. Specifically, as we discuss in detail below, *Yearsley* allows government contractors to enjoy immunity from suit only if they adhere to the terms of their contracts with the government, and the record is not developed enough at this stage in the litigation to allow us—or the district court—to determine whether KBR satisfied this requirement.

Government, whether or not the discretion involved be abused." *Id.* § 2680(a). A discretionary function is one that "involves an element of judgment or choice." *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

The FTCA explicitly excludes independent contractors from its scope. *See* 28 U.S.C. § 2671. Specifically, the statute does not include government contractors in its definition of "federal agency" or "employee of the government." *Id.* ("[T]he term 'Federal agency' . . . does not include any contractor with the United States. . . . 'Employee of the government' includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard . . . , and persons acting on behalf of a federal agency in an official capacity . . . and (2) any officer or employee of a Federal public defender organization . . . ."). The discretionary function exception includes both of these terms.

Despite this language, KBR contends that it is entitled to derivative sovereign immunity, which "protects agents of the sovereign from liability for carrying out the sovereign's will."[6] *Al-Quraishi v.*

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[6] KBR argues that the FTCA's discretionary function exception entitles it to immunity, not that the provision preempts the state tort laws underlying the Servicemembers' claims. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which we discuss in more detail in Part V of this opinion, the Supreme Court considered whether a military contractor was liable under state tort law for an injury that resulted from a design defect. *Id.* at 502-03. The Court held that the case involved "uniquely federal interests." *Id.* at 505-06. The Court then explained that the FTCA's discretionary function exception

Nakhla, 728 F. Supp. 2d 702, 736 (D. Md. 2010), *rev'd on other grounds, Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), *appeal dismissed, Al Shimari*, 679 F.3d 205. The concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). In that case, the Supreme Court considered whether a private contractor could be held liable for damage resulting from a construction project that Congress authorized. *Id.* at 19-20. When the project caused erosion that damaged nearby property, the injured landowners sued the contractors, claiming that they had effected a taking of their property without just compensation. *Id.* The Supreme Court explained that

> it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. Where an agent or officer of the Government purporting to act on its behalf

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"demonstrate[d] the potential for, and suggest[ed] the outlines of, 'significant conflict' between the federal interests and state law." *Id.* at 511. In light of these determinations, the Court crafted a test to ensure the preemption of state laws that clashed with the federal interest at play. *See id.* at 512. Although *Boyle*, like the case at hand, drew on the discretionary function exception, the Supreme Court specified that *Boyle* does not govern the question of whether immunity extends to "nongovernment employees." *See id.* at 505 n.1 (internal quotation marks omitted). KBR asks for derivative sovereign immunity rather than preemption under the discretionary function exception in this case, thus rendering *Boyle* inapposite.

> has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.

Id. at 20-21 (citations omitted). In other words, under *Yearsley*, a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government "validly conferred" that authorization, meaning it acted within its constitutional power. *Id.* Applying this test, the Supreme Court determined that the contractors were not liable for damaging the plaintiffs' land because they acted pursuant to Congress's valid authorization. *Id.* at 21-22.

Yearsley does not explicitly mention sovereign immunity. In fact, the Court based its holding on the fact that the government had "impliedly promised to pay [just] compensation [for any taking] and ha[d] afforded a remedy for its recovery." *Id.* at 21. *Yearsley*'s ultimate holding is therefore quite narrow:

> So, in the case of a taking by the Government of private property for public use such as petitioners allege here, it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution, and hence it excludes liability of the Government's representatives lawfully acting on its behalf in relation to the taking.

Id. at 22. Despite this narrow holding, this Court has recognized, based on *Yearsley*, "that contractors and common law agents acting within the scope of their

employment for the United States have derivative sovereign immunity." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). Our sister circuits have reached similar conclusions. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 206-07 (5th Cir. 2009) (determining that the district court correctly dismissed claims against a contractor when the plaintiff did not allege that the contractor exceeded its authority or that Congress did not validly confer such authority); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (acknowledging the existence of derivative sovereign immunity and its origin in *Yearsley*); *Myers v. United States*, 323 F.2d 580, 583 (9th Cir. 1963) (applying Yearsley and concluding that contractor was not liable for work it performed pursuant to a federal contract).

After a well-reasoned discussion in *Burn Pit I*, the district court concluded that KBR was not entitled to derivative sovereign immunity under *Yearsley* at that time because immunity depended on whether KBR acted within the scope of its authority, which the court could not determine at that point in the litigation. *See* 736 F. Supp. 2d at 968. The district court reversed course in *Burn Pit II*, finding that the Supreme Court's 2012 decision in *Filarsky v. Delia* compelled extending derivative sovereign immunity to KBR. *See* 925 F. Supp. 2d at 767. Specifically, the district court noted that Filarsky cautioned against leaving individuals who work alongside government employees "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 132 S. Ct. at 1666; *Burn Pit II*,

925 F. Supp. 2d at 767. Therefore, without applying the law to the facts at hand, the district court concluded that KBR was immune from suit because it was a military contractor "performing services for the government in war zones." *Burn Pit II*, 925 F. Supp. 2d at 767.

In *Filarsky*, the Supreme Court considered whether an attorney was entitled to qualified immunity in a 42 U.S.C. § 1983 action when he assisted government employees in investigating whether a firefighter was feigning illness to avoid work. 132 S. Ct. at 1660-61. The Court determined that the common law did not distinguish between government employees and private actors serving the government in 1871, when Congress enacted § 1983. *See id.* at 1661-65. Because Congress had not expressed "clear legislative intent" contrary to the common law treatment, the Court determined that qualified immunity was not linked to whether an individual was a full-time government employee. *Id.* at 1665 (internal quotation marks omitted). Instead, the relevant inquiry is whether a government employee performing the same action would be entitled to qualified immunity. *Id.* The Court then turned to the policy justifications underlying qualified immunity to see if they also counseled in favor of applying it to private actors assisting government employees. Those interests are "avoid[ing] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* The Court determined that all of these

interests supported extending qualified immunity to the attorney. *Id.* at 1665-66.

Contrary to the district court's conclusion, there is no indication that the Supreme Court intended *Filarsky* to overrule *Yearsley* and its progeny. *See Filarsky*, 132 S. Ct. at 1669 (Sotomayor, J., concurring) ("[I]t does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity . . . . Such individuals must satisfy our usual test for conferring immunity."). The Supreme Court framed the question presented in Filarsky as "whether an individual hired by the government to do its work is prohibited from seeking such immunity [under § 1983], solely because he works for the government on something other than a permanent or full-time basis." *Id.* at 1660. After tracing the history of common law immunity up to the point Congress enacted § 1983, the Court concluded "immunity *under § 1983* should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 1662-65 (emphasis added). The opinion never mentions *Yearsley*, sovereign immunity, or the FTCA and never purports to extend beyond § 1983 qualified immunity. We therefore believe that the district court erred in concluding that *Filarsky* compelled altering the conclusion that it reached in *Burn Pit I*.

We interpret *Filarsky* as reaffirming the principles undergirding the *Yearsley* rule, albeit in the context of § 1983 qualified immunity rather than derivative sovereign immunity. Like *Filarsky*, *Yearsley* recognizes that private employees can

perform the same functions as government employees and concludes that they should receive immunity from suit when they perform these functions. Furthermore, *Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*. By rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the "unwarranted timidity" that can arise if employees fear that their actions will result in lawsuits. *Filarsky*, 132 S. Ct. at 1665. Similarly, affording immunity to government contractors "ensur[es] that talented candidates are not deterred from public service" by minimizing the likelihood that their government work will expose their employer to litigation. *Id.* Finally, by extending sovereign immunity to government contractors, the Yearsley rule "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.*

We now turn to applying the Yearsley rule, which asks us to consider whether the government authorized KBR's actions in this case.[7] As this Court explained in *Butters v. Vance International, Inc.*, that inquiry involves determining whether KBR "exceeded [its] authority under [its] valid contract," which the Court also characterized as exceeding "the scope of

[7] The parties do not dispute that the military had the power to delegate waste management and water treatment functions to a government contractor. We therefore need not consider the component of the *Yearsley* analysis that asks whether "the project was validly conferred, that is, if what was done was within the constitutional power of Congress." *Yearsley*, 309 U.S. at 20-21.

[its] employment." 225 F.3d at 466. The parties debate whether we should construe the scope of KBR's authority narrowly or broadly. According to the Servicemembers, KBR exceeded its authority in this case because it violated the specific terms of LOGCAP III and other "government directives." By contrast, KBR takes a broader view, contending that it acted within the scope of its authority by performing general waste management and water treatment functions.[8]

Yearsley supports the Servicemembers' view. In *Yearsley*, the Supreme Court emphasized that "[t]he Court of Appeals . . . found it to be undisputed that

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[8] KBR suggests that a government contractor is entitled to derivative sovereign immunity if it qualifies as a common law agent of the government. Specifically, KBR cites an unpublished decision from this Court, which explains that, under Virginia law, "[w]hether an agent acted within the scope of his authority turns not on whether the *particular act* at issue—often a tort committed by the agent—is 'within the scope of the agent's authority, but [on] *whether the service itself in which the tortious act was done* was . . . within the scope of such authority.'" *First Tenn. Bank Nat'l Ass'n v. St. Paul Fire & Marine Ins. Co.*, 501 F. App'x 255, 260 (4th Cir. 2012) (second and third alterations in original) (quoting *Broaddus v. Standard Drug Co.*, 179 S.E.2d 497, 503 (Va. 1971)). However, common law agent status is not sufficient to establish derivative sovereign immunity. As the Eleventh Circuit reasoned in *McMahon v. Presidential Airways, Inc.*, if all common law agents of the government enjoyed derivative sovereign immunity due to their agency status, the immunity of the government and its officers would be coextensive, which is not necessarily the case. *See* 502 F.3d at 1343-45 & n.15. Furthermore, as we explain below, *Yearsley* itself supports our conclusion that simply being the government's common law agent does not entitle a contractor to derivative sovereign immunity.

the work which the contractor had done . . . *was all authorized and directed* by the Government of the United States." 309 U.S. at 20 (emphasis added) (internal quotation marks omitted). This language suggests that the contractor must adhere to the government's instructions to enjoy derivative sovereign immunity; staying within the thematic umbrella of the work that the government authorized is not enough to render the contractor's activities "the act[s] of the government." *See id.* at 22 (internal quotation marks omitted). The Ninth Circuit similarly interpreted *Yearsley* in *Myers v. United States*. In that case, the court considered whether landowners could recover from a private company that damaged their property while constructing a road pursuant to a government contract. *See* 323 F.2d at 580-82. The court held that, "[t]o the extent that the work performed by [the contractor] was done under its contract with the Bureau of Public Lands, and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the [landowners]." *Id.* at 583. The court went on to explain that, "[i]f [the landowners] suffered any damage from any act of [the contractor] over and beyond acts required to be performed by it under the contract, or acts not in conformity with the terms of the contract," the contractor was not liable because the landowners consented to its actions. *Id.* In other words, when the contractor exceeded its authority under the contract, *Yearsley* did not provide the basis for escaping liability; the landowners' acquiescence did. Accordingly, as *Yearsley* and *Myers* show, KBR is entitled to derivative sovereign immunity only if it

adhered to the terms of its contract with the government.

At this point in the litigation, the record does not contain enough evidence to determine whether KBR acted in conformity with LOGCAP III, its appended task orders, and any laws and regulations that the contract incorporates. We also lack evidence regarding whether the military permitted or required KBR to deviate from the contract's terms under certain circumstances. Accordingly, we hold that the district court erred in finding that KBR was entitled to derivative sovereign immunity at this time and vacate the court's decision to dismiss the Servicemembers' claims on that ground.

We also note that the district court did not address whether KBR's waste management and water treatment activities constituted "discretionary functions" under the FTCA. However, as we explain above, a discretionary function "involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. If the military dictated exactly how KBR should undertake its waste management and water treatment tasks, those functions were not discretionary because they did not involve an element of judgment or choice. By contrast, if KBR enjoyed some discretion in how to perform its contractually authorized responsibilities, the discretionary function exception would apply, and KBR could be liable. The district court should conduct this inquiry before determining whether KBR is entitled to derivative sovereign immunity under the discretionary function exception.

V.

Finally, the Servicemembers contend that the district court erred in finding that the FTCA's combatant activities exception preempted the state tort[9] laws undergirding their claims. Pursuant to the combatant activities exception, the United States is 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). The statute does not define the terms "arising out of" and "combatant activities."

Relying on the Supreme Court's decision in *Boyle v. United Technologies Corp.*, multiple circuit courts have held that the federal interests inherent in the combatant activities exception conflict with, and consequently can preempt, tort suits against government contractors when those suits arise out of what those courts viewed as combatant activities. *See Harris*, 724 F.3d 458; *Saleh*, 580 F.3d 1; *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992).

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[9] We note that the Servicemembers bring breach of contract claims in addition to their tort claims. In general, "[t]he FTCA does not apply to common law contract claims." *Tritz v. U.S. Postal Serv.*, 721 F.3d 1133, 1141 (9th Cir. 2013). However, it may apply when a plaintiff brings a contract claim seeking a tort remedy rather than a contract remedy such as rescission. *See id.* Because the district court did not discuss how the FTCA affects the Servicemembers' breach of contract claims, we decline to address this issue to allow the district court to do so in the first instance on remand. *See Q Int'l Courier, Inc. v. Smoak*, 441 F.3d 214, 220 n.3 (4th Cir. 2006) ("Although we are not precluded from addressing [questions the district court did not reach], we deem it more appropriate to allow the district court to consider them, if necessary, in the first instance on remand.").

The district court initially found that the combatant activities exception did not preempt state law because the record was not developed enough to assess whether preemption was appropriate. *See Burn Pit I*, 736 F. Supp. 2d at 976-78. However, the district court once again reversed course in *Burn Pit II*, holding that preemption was appropriate under a test that the United States recommended in amicus briefs that it filed in this Court's rehearing en banc of *Al Shimari* and in support of denying the petition for writ of certiorari in *Saleh*. *See Burn Pit II*, 925 F. Supp. 2d at 769-72.

Before we can reach the question of whether the combatant activities exception preempts state tort law due to the United States' proposed test, we must first decide whether to apply the United States' test at all—an analytical step that the district court skipped. The Supreme Court's *Boyle* decision governs this inquiry. *Boyle* arose when a Marine helicopter co-pilot died after his helicopter crashed into the ocean during a training exercise. 487 U.S. at 502. Although the co-pilot survived the crash, he could not open the helicopter's escape hatch, causing him to drown. *Id.* The co-pilot's father sought to hold the military contractor that built the helicopter liable under state tort law, contending that it defectively repaired part of the helicopter's flight control system and defectively designed the escape hatch. *Id.* at 502-03. The Court explained,

> In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct

> conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts-so-called "federal common law."

Id. at 504 (citations omitted).[10] The Court then analyzed whether the situation at hand in that case invoked "uniquely federal interests" in a way that warranted preemption.

The *Boyle* Court employed a three-step process to determine whether federal law preempted state law. First, it identified the "uniquely federal interests" at issue in that case. *See id.* at 504-07. Second, it determined whether there was a "significant conflict" between those interests and state law. *Id.* at 507-12. The Court identified the FTCA's discretionary function exception as "a statutory provision that demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law." *Id.* at 511. The Court then explained that "'second-guessing' [the government's selection of a helicopter design] through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption" because government contractors would raise their

[10] This excerpt from *Boyle* makes clear that Congress need not act affirmatively to cause the preemption of state law. The Servicemembers' arguments to this effect therefore lack merit.

prices to compensate for possible lawsuits, rendering the government financially liable. *Id.* at 511-12 (citation omitted). Third, the Court formulated a test that ensured preemption of state laws that clashed with the federal interests at play. *See id.* at 512-13.

A.

We now turn to the first step of the *Boyle* analysis. The D.C. Circuit, Ninth Circuit, and Third Circuit have each articulated a different "uniquely federal interest" underlying cases in which a litigant attempts to hold a government actor responsible for its combatant activities—in other words, the federal interest buttressing the combatant activities exception. In *Saleh*, the D.C. Circuit began its inquiry by noting that, although "[t]he legislative history of the combatant activities exception is 'singularly barren,' . . . it is plain enough that Congress sought to exempt combatant activities because such activities 'by their very nature should be free from the hindrance of a possible damage suit.'" 580 F.3d at 7 (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). The court went on to explain that 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." *Id.* In light of these considerations, the D.C. Circuit determined 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." *Id.* Based on similar considerations, the Ninth Circuit articulated the interest underlying the combatant activities exception as "recogniz[ing] 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.

The Third Circuit rejected both of these approaches in *Harris*. The court noted that the FTCA limits the combatant activities exception to "claim[s] *arising out of* . . . combatant activities," 28 U.S.C. § 2680(j) (emphasis added), and pointed out that, in other areas of the law, "arising out of" "denote[s] *any* causal connection." 724 F.3d at 479 (quoting *Saleh*, 580 F.3d at 6) (internal quotation marks omitted). In light of this "arising out of" language, the court concluded that the Ninth Circuit's formulation of the interest was too narrow because it rested on the premise that "no duty of reasonable care is owed to *those against whom force is directed*," *Koohi*, 976 F.2d at 1337 (emphasis added), which omits individuals who suffer harms that flow tangentially from wartime force. *See Harris*, 724 F.3d at 480. The court cited *Saleh* favorably, *see id.*, but ultimately determined that the D.C. Circuit's formulation of the interest underlying the combatant activities exception was too broad, *id.* at 480-81. Specifically, the court explained that the FTCA "does not provide immunity to nongovernmental actors. So to say that Congress intended to eliminate all tort law is too much." *Id.* at 480. The Third Circuit therefore announced a test that falls between these two extremes: "The purpose underlying § 2680(j) . . . is to

foreclose state regulation of the military's battlefield conduct and decisions." *Id.*

We find the Third Circuit's analysis persuasive and adopt its formulation of the interest at play here. In *Boyle*, the Supreme Court reasoned that no "uniquely federal interest" warrants preemption when the federal government has little or no control over a contractor's conduct. *See* 487 U.S. at 509-10 (explaining that the government would have no interest in the design of a helicopter door if it ordered stock helicopters that just happened to have a certain door design). Due to *Boyle* and the FTCA's omission of government contractors, we agree that the D.C. Circuit's test is too broad because it does not limit the interest of "eliminat[ing] . . . tort from the battlefield" to actors under military control. *See Saleh*, 580 F.3d at 7. We also agree with the Third Circuit's conclusion that the Ninth Circuit's test is too narrow because of the combatant activities exception's broad "arising out of" language. If the interest at play were "recogniz[ing] that during wartime encounters no duty of reasonable care is owed to those against whom force is directed," *Koohi*, 976 F.2d at 1337, the combatant activities exception presumably would contain language limiting its scope to claims stemming directly from the use of force.

B.

Now that we have identified the federal interest at play in this case, we move on to the second step of the *Boyle* analysis: determining whether there is a significant conflict between this federal interest and the operation of the state tort laws underlying the Servicemembers' claims. In *Boyle*, this conflict was

discrete because it was impossible to construct the helicopter according to the government's design and satisfy the state-imposed duty of care. 487 U.S. at 509. However, in the combatant activities exception realm, the conflict between federal and state interests is much broader.[11] As the D.C. Circuit explained in *Saleh*, "the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state." 580 F.3d at 7. Instead, when state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime. In other words, "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty." *Id.* (quoting *Boyle*, 487 U.S. at 500).

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[11] Although the conflict between federal interests and state tort law is broad in the combatant activities exception context, we can also identify several specific conflicts. Notably, as the Supreme Court recognized in *Boyle*, imposing tort liability on contractors that carry out the government's orders will result in the contractor charging higher prices, a cost that the taxpayers will ultimately bear. 487 U.S. at 511-12. Furthermore, haling a government contractor into a court proceeding that questions the military's decision making will distract government personnel from their tasks and allow "judicial probing of the government's wartime policies." *Saleh*, 580 F.3d at 8. Finally, "given the numerous criminal and contractual enforcement options available to the government in responding to alleged contractor misconduct[,] . . . allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors." *Id.*

C.

Finally, we turn to *Boyle*'s third step: formulating a test that ensures preemption when state tort laws conflict with the interest underlying the combatant activities exception. *See Boyle*, 487 U.S. at 512-13. KBR argues in favor of both the test the D.C. Circuit announced in *Saleh* and the test the United States advocated in amicus briefs that it filed in connection with *Al Shimari* and the petition for writ of certiorari in *Saleh*. In *Saleh*, the D.C. Circuit articulated the following 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." 580 F.3d at 9. The court reasoned that the military need not maintain "exclusive operational control" over the contractor for the government to have an interest in immunizing a military operation from suit. *Id.* at 8-9. It therefore crafted a test that allowed the contractor to exert "*some* limited influence over an operation," as long as the military "retain[ed] command authority." *Id.*

Alternatively, the United States recommends preemption when (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 federal government at the time of the incident out of which the claim arose." Brief of United States as Amicus Curiae at 17-18, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (Nos. 09-1335, 10-1891, 10-1921). In

the amicus brief that it filed in *Saleh*, the United States identified three key flaws in the *Saleh* test. First, it explained that, "[u]nder domestic and international law, civilian contractors engaged in authorized activity are not 'combatants'; they are 'civilians accompanying the force' and, as such, cannot lawfully engage in 'combat functions' or 'combat operations.'" Brief for United States as Amicus Curiae at 15, *Saleh v. Titan Corp.*, 131 S. Ct. 3055 (2011) (No. 09-1313). Therefore, the United States argued that it was inappropriate for the *Saleh* test to focus on whether the contractor was engaged in combatant activities. *Id.* Second, the United States contended that the Saleh test does not account for the fact that the combatant activities exception provides immunity for activities "arising out of" the military's combatant activities. It claimed that "[a] more precise focus on claims 'arising out of' the *military's* combatant activities would allow for a more accurate assessment of the contractor's distinct role, and avoid confusing it with the role of military personnel." *Id.* at 16. Third, the United States explained that the *Saleh* court "did not address whether application of the preemption defense it recognized would be appropriate if contractor employees acted outside the scope of their employment or the contractor acted outside the scope of the contract." *Id.* The United States reiterated these arguments in the brief it filed in *Al Shimari* and formulated the above test to address these defects. *See* Brief of United States as Amicus Curiae at 16-20, *Al Shimari*, 679 F.3d 205 (Nos. 09-1335, 10-1891, 10-1921).

In *Burn Pit II*, the district court favorably cited these amicus briefs and adopted the United States' test. 925 F. Supp. 2d at 769-71. However, the United States' criticisms of the *Saleh* test are flawed in several respects. First, even if government contractors cannot qualify as "combatants" under domestic and international law, this fact is irrelevant because the *Saleh* test does not require private actors to be combatants; it simply requires them to be "integrated into combatant activities." *Saleh*, 580 F.3d at 9; *cf. Johnson*, 170 F.2d at 770 (explaining that "combatant activities" suggests a "wider scope" than "combatant"). Second, the United States inaccurately contends that the *Saleh* test does not reflect the combatant activities exception's use of the phrase "arising out of." In fact, the *Saleh* test does mirror this phrase, specifying that "a tort claim arising out of the contractor's engagement in [combatant activities over which the military retains command authority] shall be preempted." 580 F.3d at 9. Third, the United States complains that the *Saleh* test does not address how to treat contractors who act outside the scope of their employment or violate the terms of their contract. However, the purpose of the combatant activities exception is not protecting contractors who adhere to the terms of their contracts; the exception aims to "foreclose state regulation of the military's battlefield conduct and decisions." *Harris*, 724 F.3d at 480. By focusing on whether the contractor was "integrated into combatant activities over which the military retain[ed] command authority," *Saleh*, 580 F.3d at 9, the *Saleh* test ensures that the FTCA will preempt only state tort laws that touch the military's wartime

decision making. We therefore reject the rationales underlying the United States' test—the same rationales that buttressed the district court's *Burn Pit II* decision.

We agree with the Third Circuit's determination that, if the interest underpinning the combatant activities exception is foreclosing state regulation of the military's battlefield conduct and decisions, the United States' test is far too broad. *See Harris*, 724 F.3d at 480-81. The test recommends preemption when state tort laws touch any actions within the scope of the contractor's contractual relationship with the government, even actions that the military did not authorize. In this way, the United States' test preempts state tort laws even when they do not conflict with the federal purpose underlying the combatant activities exception. To the contrary, the *Saleh* test allows the preemption of state tort law only when it affects activities stemming from military commands. *See id.* (reaching the same conclusions). Due to the closer fit between the *Saleh* test and the interest at play in this case, we adopt the *Saleh* test here.

The *Saleh* test requires a contractor to be "integrated into combatant activities" for preemption to occur. We therefore must determine whether waste management and water treatment constitute "combatant activities" when these tasks occur in warzones. In *Johnson v. United States*, the Ninth Circuit held that combatant activities "include not only physical violence, but activities both necessary to and in direct connection with actual hostilities," such as "supplying ammunition to fighting vessels in

a combat area during war." 170 F.2d at 770. The Third Circuit and at least one district court have adopted the *Johnson* test. *See Harris*, 724 F.3d at 481 (maintaining electrical systems on a military base in a warzone qualified as combatant activity); *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 711-12 (S.D.N.Y. 2011) (holding that latrine maintenance constituted combatant activity because the contractor "was providing basic life support services for active military combatants on a forward operating base").

We agree with the *Johnson* court's reasoning and adopt its test here. As the Ninth Circuit explained, "'[c]ombat' connotes physical violence; 'combatant,' its derivative, as used here, connotes pertaining to actual hostilities; the phrase 'combatant activities,' [is] of somewhat wider scope." *Johnson*, 170 F.2d at 770 (footnote omitted). It therefore makes sense for combatant activities to extend beyond engagement in physical force. Furthermore, viewing "combatant activities" through a broader lens furthers the purpose of the combatant activities exception. If a government contractor remained subject to state tort suits stemming from activities other than physical force, the *Saleh* test would not successfully "foreclose state regulation of the military's battlefield conduct and decisions," *Harris*, 724 F.3d at 480, which could encompass conduct and decisions that do not involve actual combat. Performing waste management and water treatment functions to aid military personnel in a combat area is undoubtedly "necessary to and in direct connection with actual hostilities." *Johnson*, 170 F.2d at 770. We therefore hold that KBR engaged in combatant activities under the *Johnson* test.

Next, the *Saleh* test asks whether "the military retain[ed] command authority" over KBR's waste management and water treatment activities. 580 F.3d at 9. At this stage in the litigation, although it is evident that the military controlled KBR to some degree, *see supra* Part III.B, the extent to which KBR was integrated into the military chain of command is unclear. *See Saleh*, 580 F.3d at 4 (identifying the proper focus as "the chain of command and the degree of integration that, in fact, existed between the military and [the] contractors' employees rather than the contract terms"). The district court therefore erred in resolving this issue before discovery took place. Accordingly, we vacate its decision to dismiss the Servicemembers' claims on the basis of preemption.

VI.

For the foregoing reasons, we vacate the district court's decision to dismiss the Servicemembers' claims and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Master Case No. RWT 09md2083
This Document Relates to: All Member Cases

IN RE: KBR, INC., BURN PIT LITIGATION.

Filed: February 27, 2013

MEMORANDUM OPINION

On September 8, 2010, this Court entered a Memorandum Opinion and Order [ECF No. 99] denying the Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Original Motion") [ECF No. 21]. *See In re: KBR Burn Pit Litig.*, 736 F. Supp. 2d 954 (D. Md. 2010). The Defendants have now filed a Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Renewed Motion") [ECF No. 217], and the Court heard oral arguments on July 16, 2012. For the reasons that follow, the Renewed Motion will be granted and all cases in this multi-district litigation will be dismissed.

This case is about war, in fact two wars, and generalized claims made by the Plaintiffs against contractors serving the military during those wars. It has sometimes been said that "war is hell," an observation frequently attributed to General William

Tecumseh Sherman.[1] Especially during times of war, the military frequently calls upon civilians and civilian contractors to aid in the fulfillment of its missions under often hellacious combat conditions.

Tort and other claims are occasionally made against those chosen to aid the government, a circumstance that generated these observations by Chief Justice Roberts in *Filarsky v. Delia*, ___U.S. ___, 132 S. Ct. 1657 (2012):

> Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to "'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.'" *Richardson [v. McKnight,* 521 U.S 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997)], supra, at 408, 117 S.Ct. 2100 (quoting *Wyatt [v. Cole*, 504 U.S. 158112 S.Ct. 1827, 118 L.Ed.2d 504 (1992]), *supra,* at 167, 112 S.Ct. 1827). The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals. . . .
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> * * * * *

[1] Attribution of this quote to General Sherman is not without dispute or controversy. *See Denies 'War is Hell' Were Sherman's Words*, N.Y. Times, May 28, 1922.

> Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct. *See* App. 134 (Delia's lawyer: "everybody is going to get named" in threatened suit). Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

Filarsky, 132 S. Ct. at 1665-66.

The dissenting opinion of Circuit Judge J. Harvey Wilkinson in *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012), addressed this same concern in the context of contractors working for the military in time of war:

> Tort regimes involve well-known tradeoffs. They may promote the public interest by compensating innocent victims, deterring wrongful conduct, and encouraging safety and accountability. However, tort law may also lead to excessive riskaverseness on the part of potential defendants. And caution that may be well-advised in a civilian context may not translate neatly to a military setting, where the calculus is different, and stakes run high. Risks

considered unacceptable in civilian life are sometimes necessary on a battlefield. In order to secure high-value intelligence or maintain security, the military and its agents must often act quickly and on the basis of imperfect knowledge. Requiring consideration of the costs and consequences of protracted tort litigation introduces a wholly novel element into military decisionmaking, one that has never before in our country's history been deployed so pervasively in a theatre of armed combat.

* * * * * *

Given these realities, it is illusory to pretend that these suits are simply ordinary tort actions by one private party against another. Instead, because contractors regularly assist in "the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible... to the electoral process," *see Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973), a decent respect for the separation of powers compels us to consider what sort of remedy would best ensure the authority of the executive over those with whom it partners in carrying out what are core executive functions. The answer is obvious. Unlike tort, contract law gives the executive branch a mechanism of control over those who regularly assist the military in performing its mission.

Al Shimari, 679 F.3d at 226, 241. With these preliminary observations in mind, this Court will first address the background and procedural history of the cases before it.

I. Background and Procedural History

In fifty-seven separate complaints,[2] Plaintiffs, the majority of whom are United States military personnel, have brought a myriad of state law tort and contract claims against Defendants KBR, Inc., Kellogg Brown & Root Services Inc., Kellogg Brown & Root LLC and Halliburton Company (collectively, "Defendants," "KBR," or "KBR Defendants") in connection with the United States military's wartime activities in Operation Iraqi Freedom in Iraq and Operation Enduring Freedom in Afghanistan. Plaintiffs seek to recover from Defendants for injuries they claim to have suffered as a result of alleged exposure to emissions from open burn pits and to contaminated water at military bases at literally hundreds of locations throughout Iraq and Afghanistan. Notably, their claims do not relate to a specific, discrete event, but rather to conditions endured in vast theaters of war in two countries over extended periods of time. Factually, their claims do not involve sensational subjects such as torture that may test the outer limits of legal principles, but

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[2] One of the Complaints has been voluntarily dismissed. *See* ECF No. 44 in *Beth Oshiro Burton v. KBR, Inc.*, Civil Case No. RWT 10-3360 and ECF No. 199 in Case No. RWT 09md2083. Ten Plaintiffs in multi-plaintiff cases have voluntarily dismissed their claims, but other Plaintiffs remain in those cases. *See* ECF No. 76 in Case No. RWT 09md2083.

rather the more mundane questions of waste disposal and water supply.

Forty-four of the pending cases purport to be nationwide class actions,[3] while thirteen assert claims only for the named Plaintiffs. Thirty-seven of the cases were filed in federal courts, while twenty were filed in state courts and removed to federal courts. All of the cases have been transferred to this Court for consolidated pretrial proceedings by the Judicial Panel on Multidistrict Litigation on the basis that the actions "involve common questions of fact." *See* ECF No. 1. Paragraph 67 of the First Consolidated MDL Complaint seeks class certification because "common questions of law and fact predominate" in these cases. *See* ECF No. 49.

Defendants filed the Original Motion on January 29, 2010. *See* ECF No. 21. Defendants contended that: (1) Plaintiffs' claims are non-justiciable under the political question doctrine; (2) Defendants are entitled to "derivative sovereign immunity" based on the "discretionary function" exception to the federal government's waiver of immunity in the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 2680(a); and (3) Plaintiffs' claims are preempted by the "combatant activities" exception in the FTCA, *id.* § 2680(j).

In its September 8, 2010 Order denying Defendants' Original Motion without prejudice, this Court concluded that it did not then have enough information to decide whether Plaintiffs' claims were non-justiciable under the political question doctrine,

[3] None of the cases has been certified as a class action.

barred by derivative sovereign immunity or preempted under the combatant activities exception to the FTCA. *In re: KBR Burn Pit Litig.*, 736 F. Supp. 2d at 957. In denying the Defendants' Original Motion without prejudice, this Court also noted that the legal principles upon which they relied were still developing. *Id.* at 979 n.15. In that regard, this Court observed that:

> [T]he United States Court of Appeals for the Fourth Circuit has scheduled oral argument on October 26, 2010 before a single panel in three cases that address many of the arguments that have been presented by the parties in this case. * * * The Fourth Circuit may (and, of course, may not) benefit from the additional analysis provided by this Opinion, and this Court will certainly benefit from an up-to-date analysis by the Fourth Circuit of some of the principal legal issues that have been raised in this case.

Id. (citations omitted).

Because this Court denied Defendants' Original Motion without prejudice, it asked both parties to submit a joint discovery plan for limited jurisdictional discovery. *See id.* at 979. This Court also invited the participation of the United States in formulating a discovery plan and, in that regard, cautioned that "the full fury of unlimited discovery will not be unleashed at this time," stressing "the importance of not overly burdening the military and its personnel with onerous and intrusive discovery requests." *Id.*

On December 10, 2010, without having ruled on the scope of any possible discovery,[4] this Court ordered that all proceedings be stayed. *See* Stay Order, ECF No. 112. Having listened to the October 26, 2010 Fourth Circuit oral arguments in *Al Shimari*, *Al-Quraishi*, and *Taylor*, this Court was "even more convinced that the disposition of these cases will be of significant assistance in determining the appropriate duration and scope of jurisdictional discovery, if any, in these cases." *See* Memorandum Opinion at 2, ECF No. 111. This Court also noted that the Supreme Court had invited the Solicitor General to file a brief in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *writ of certiorari docketed* No. 09-1313 (2010), a case addressing preemptionbased defenses derived from the FTCA's combatant activities exception. *Id.*

Some of the anticipated legal developments did not fully materialize. On June 27, 2011, the Supreme Court denied certiorari in *Saleh* and, in doing so,

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[4] In anticipation of the possibility of future discovery, this Court's December 10, 2012 Memorandum Opinion also directed each Plaintiff asserting a claim arising out of the operation of burn pits or the furnishing of water purification facilities to submit certain information during the pendency of the stay. *See* Memorandum Opinion, ECF No. 111. Specifically, each Plaintiff was required to submit an affidavit indicating, *inter alia*, his name, capacity in which he served, start and end date, list of every base where he served. This Court concluded: "Once this basic information is on file . . . the Court can effectively match each Plaintiff with the appropriate jurisdictional discovery, if any to which he or she may be entitled, thus tailoring and limiting the discovery in a manner that will not unduly burden the operation of the United States military or any Defendant." *Id*. at 5.

declined to address the contours of a government contractor's preemption defense as derived from the FTCA's combatant activities exception.

On September 21, 2011, a three-judge panel of the Fourth Circuit issued opinions in *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201 (4th Cir. 2011) and *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413 (4th Cir. 2011). In *Al-Quraishi*, the panel found that it had appellate jurisdiction and reversed and remanded the case with directions to dismiss on preemption grounds claims asserted by Iraqi citizens who alleged that they had been tortured. 657 F.3d at 203-04. *Al-Quraishi* was relied upon for the exercise of appellate jurisdiction in the companion case, *Al Shimari*. *See* 658 F.3d at 417.

In *Al Shimari*, the same three-judge panel of the Fourth Circuit reversed a lower court decision denying a government contractor's motion to dismiss under the combatant activities-based preemption. *Id.* at 420. Relying on the Supreme Court's preemption analysis in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-05 (1988), and the District of Columbia Circuit's application of *Boyle* in *Saleh*, the panel held that the FTCA's combatant activities exception preempted Iraqi citizens' state tort claims against a contractor for claims arising out of the contractor's alleged torture of those Iraqi citizens at Abu Ghraib prison. *Al Shimari*, 658 F.3d at 417. The panel majority found plaintiffs' claims to be preempted because "this case involves allegations of misconduct in connection with the essentially military task of interrogation in a war zone military prison by contractors working in close collaboration with the

military" and imposing state tort liability "*conflicts with the FTCA's policy of eliminating tort concepts from the battlefield*." *Id.* at 419-20 (*quoting Saleh*, 580 F.3d at 7) (emphasis in original). The panel decision in *Al-Quraishi* adopted the same analysis of combatant activities-based preemption used in *Al Shimari* because the "factual context" in *Al-Quraishi* was "the same as" in *Al Shimari*. 657 F.3d at 202.

On November 8, 2011, the Fourth Circuit issued an order granting a petition for rehearing en banc in the *Al Shimari* and *Al-Quraishi* cases.[5] On May 11, 2012, the en banc court, in an 11-3 decision, held that orders denying the contractors' motions to dismiss were not subject to interlocutory appeal under the collateral order doctrine. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (2012). The en banc majority concluded that it lacked jurisdiction because combatant activities-based preemption is not an immunity but a defense, and derivative sovereign immunity is a qualified immunity that requires government contractors to provide a sufficiently developed record to accurately assess the claimed immunity.[6] *Id.* In a concurring opinion, Judge Duncan expressed the "hope that the district courts will give due consideration to the appellants' immunity and preemption arguments—especially in

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[5] A reconsideration en banc vacates the panel opinion. *See, e.g., Hooten v. Jenne*, 786 F.2d 692 (5th Cir. 1986). Accordingly, the previous panel opinions no longer have any standing except to the extent that the en banc court adopts them. *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990).

[6] In contrast to *Al Shimari*, this Court has a substantial factual record before it, as discussed below.

light of the Supreme Court's decision in *Filarsky v. Delia*, ___U.S.___, 132 S. Ct. 1657, 182 L.Ed.2d 662 (2012), as discussed in Judge Niemeyer's dissent—which are far from lacking in force." *Id.* at 224.

On September 21, 2011, the Fourth Circuit issued its panel decision in *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402 (4th Cir. 2011). There, the court held that a service member's claim against a military contractor for injuries sustained resulting from an electric shock was barred under the political question doctrine. *Id.* at 411. The Plaintiff in *Taylor* did not seek en banc review. Thus, *Taylor* creates new, binding precedent with respect to whether this Court has subject matter jurisdiction over Plaintiffs' claims under the political question doctrine.[7] In addition, while the panel decisions in the *Al Shimari* and *Al-Quraishi* cases were vacated, the analysis in those opinions is quite instructive, as is the discussion of the merits of the immunity and preemption defenses in the en banc concurring opinion by Judge Duncan and the dissenting opinions by Judges Niemeyer and Wilkinson.

On the issue of combatant activities preemption, this Court has been aided by the observations of the Solicitor General made in amicus briefs filed in *Saleh* in the Supreme Court and in *Al-Shimari* in the Fourth Circuit. Finally, on the issue of derivative

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[7] One court, in recently dismissing a complaint under the political question doctrine, described the decision in *Taylor* (and other recent cases) as shifting considerably the "legal landscape" for claims against military contractors. *Harris v. Kellogg, Brown & Root Services, Inc.*, 878 F. Supp. 2d 543, 570 (W.D. Pa. 2012).

sovereign immunity, the analysis of the Supreme Court in *Filarsky* has been very instructive.

II. The Standard Applicable to the Defendants' Renewed Motion

The standard applicable to the Renewed Motion is a familiar one, and was described in the earlier opinion in this case:

> A defendant may challenge subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) by contending "that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Once a defendant makes a facial challenge to subject matter jurisdiction, "the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A plaintiff receives the same procedural protection as would be received under a Rule 12(b)(6) consideration: "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). When deciding a Rule 12(b)(1) motion to dismiss, "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for

> summary judgment." *Velasco v. Gov't of Indon.,* 370 F.3d 392, 398 (4th Cir. 2004).

In re: KBR Burn Pit Litig., 736 F. Supp. 2d at 957.

These are not cases in which the factual questions relating to jurisdiction are inextricably intertwined with the merits of the claims such as those asserted by the Plaintiff in *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009). There, scope of employment was an issue that was determinative of both jurisdiction and the merits of the claim, and the Fourth Circuit held that under those fairly unique circumstances, dismissal under Rule 12(b)(1) should not occur without affording the plaintiff procedural safeguards such as discovery. *See Kerns*, 585 F.3d at 195.

Here, the standards applicable to the defenses asserted by KBR do not necessitate any examination of the merits. As discussed below, the defenses asserted require this Court to examine not whether the KBR Defendants were negligent or in breach of a contract or other tort duty, but rather, for example, whether national defense interests were closely intertwined with the military's decisions governing the contractor's conduct or whether the contractor was engaged in providing services to the military in connection with the military's combat activities. Indeed, in *Taylor* the Fourth Circuit concluded that the political question doctrine defeated federal court jurisdiction under facts that assumed the merits of the plaintiff's contention that a KBR employee had acted negligently and contrary to a Marine directive. 658 F.3d at 411-12.

Nor is this a case that can be easily characterized as either a pure "facial" challenge or a "factual" challenge to jurisdiction. *Kerns*, 585 F.3d at 192. Here, there are jurisdictional factual allegations in the complaint that are not necessarily disputed. But there are additional facts asserted by the Defendants, the establishment of which has been shown by extensive affidavits and exhibits, that demonstrate that jurisdiction is defeated by one or more of the defenses asserted. Accordingly, the more appropriate analytical framework is supplied by the decision in *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004), in which the Fourth Circuit observed that where a Rule 12(b)(1) motion is based on " 'immunity, which provides protection from suit and not merely a defense to liability, . . . the court must engage in sufficient pretrial factual and legal determinations to 'satisfy itself of its authority to hear the case before trial.' " *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1027-28 (D.C. Cir. 1997) (quoting *Foremost-McKesson v. Islamic Republic of Iran,* 905 F.2d 438, 449 (D.C. Cir. 1990) (internal quotation omitted))." 370 F.3d at 398. Notably, the finding of the District Court upheld in *Velasco* was not based on discovery, but rather upon "extensive affidavits and supporting documents" which established a *prima facie* case of immunity which was not overcome by the Plaintiff's documents. *Id* at 400-01.

This Court concludes that more than sufficient information is before it without the need for any discovery or an evidentiary hearing. Not only is discovery unnecessary in these cases, but also it would be extremely burdensome and would intrude

upon sensitive military judgments, as discussed below. The Plaintiffs' proposed discovery plan seeks extensive documentary evidence from the Defendants and non-governmental third parties that can only be described as extremely broad. The documentary evidence sought by the Plaintiffs includes contracts, statements of work ("SOWs"), task orders, Letters of Technical Direction, names of subcontractors and KBR personnel responsible for dealing with the military regarding waste management and water works systems, and internal communications pertaining, relating or referring to the performance of solid waste management and disposal programs and/or water works systems. *See* Pls.' Proposed Disc. 7-9, ECF No. 108. The Plaintiffs also seek depositions of the Defendants, non-governmental third party witnesses, and any governmental witnesses that the Defendants intend to use in support of their motion. *Id.* at 9. Because this MDL includes forty-four putative class actions, the Plaintiffs seek discovery concerning all of the Defendants' sites in Iraq and Afghanistan from 2003 to the present.[8] *Id.* at 6.

Defendants contend that the requested discovery is "breathtakingly broad in scope, and it would be prohibitively expensive and incredibly burdensome for Defendants to respond to such a broad request" given "the probative value of the requested e-mail communications and internal documents is minimal in light of the contract and military-evaluative

[8] Plaintiffs also request all e-mail communications and internal documents generated by Defendants' employees relating to burn pit or water services even if limited to five selected bases. Pls.' Proposed Disc. 7-8, ECF No. 108.

documents that Plaintiffs will already receive from Defendants and the military." Defs.' Proposed Disc. 11-12, ECF No. 109. This Court agrees and concludes that the record before it is more than sufficient to decide the Renewed Motion, and that the discovery requested would result in precisely the kind of unnecessary intrusion and entanglement with the military that the political question doctrine was designed to avoid.

III. Discussion

A. The Political Question Doctrine and Government Contractors

The Constitution limits the jurisdiction of federal courts. A federal court has jurisdiction only if the issue before the court is a "case or controversy." *See* U.S. Const. art. III, § 2, cl. 1. Justiciability is the term of art used to explain the limits placed on federal courts by the case or controversy requirement. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968). Because "political questions" do not present cases or controversies within the meaning of Article III of the Constitution, courts lack the constitutional jurisdiction or competence to decide them. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). In determining whether a court lacks subject matter jurisdiction under the political question doctrine, courts traditionally consider six factors:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. A lack of judicially discoverable and manageable standards for resolving it; or

3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. The impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of government; or
5. An unusual need for unquestioning adherence to a political decision already made; or
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). At its core, the political question doctrine stands for the proposition that courts do not have the expertise to adjudicate certain disputes because no standards exist to adjudicate them or such disputes are to be resolved by other branches of government in accordance with separation of powers principles.

Based on these principles, the opinion in *Taylor* found that the political question doctrine barred a claim by a military service member against a government contractor that was awarded a contract to "install, inspect, operate, repair, and maintain the electrical generators" at the Marine Camp in Fallujah, Iraq. 658 F.3d at 406.[9] The Camp housed a tank ramp and a related assault vehicle ramp (collectively known as the "Tank Ramp"), which were

[9] In 2007, the Camp housed military units "directly involved in combat operations" and Marines who "provided support for supply convoys." *Taylor*, 658 F.3d at 406.

used for the general maintenance of Marine tanks, amphibious assault vehicles, and Humvees. *Id.* at 404.[10] Although the Camp provided power through a connection to the main power plant or generator to some facilities, certain critical facilities had individual generators and some were authorized to obtain redundant power sources through backup generators. *Id.* at 406. To obtain a redundant power source, permission was needed from a group of Marine personnel known as the "Mayor's Cell." *Id.*[11] The Tank Ramp did not have authority for a redundant power source but instead relied solely on an individual generator, which had many outages. *Id.* at 404. On July 27, 2007, the Tank Ramp's generator malfunctioned. *Id.* A group of Marines, including Taylor, decided to install a wiring box at the Tank Ramp and hook up their own generator. *Id.* Initially, when Taylor and the other Marines began installing the wiring box, the Tank Ramp's generator was turned off. *Id.* While working, the government contractors arrived at the Tank Ramp to fix the generator and the Marines told the contractors not to begin working until the Marines confirmed that it was safe to do so. *Id.* Although the contractors stated they would not begin work until the Marines gave confirmation, one contractor, in violation of the Marine directive, turned on the generator while Taylor was working. *Id.* Taylor was injured as result of the powerful electrical current that surged through

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[10] The Tank Ramp was the only Camp facility that provided maintenance for the tanks. *Id.*

[11] The Mayor Cell's job was to oversee the day-to-day support functions of the Camp. *Id.*

the wiring box and he filed a negligence claim against the contractor. *Id*. The contractor asserted a defense of contributory negligence. *Id.* at 405.

In finding that Taylor's claims were barred under the political question doctrine, the Fourth Circuit distilled the six-factor political question analysis used in *Baker* into a two-part inquiry for use in the government contractor context. *Id.* at 411.[12] The Fourth Circuit determined the applicability of the political question doctrine by considering (1) the extent to which a contractor was under the military's control; and (2) whether national defense interests were closely intertwined with the military's decisions governing the contractor's conduct. *Id.*

1. *Taylor* requires that this Court revisit its prior decision

In *In re: KBR Burn Pit Litigation*, this Court earlier applied the *Baker* factors in these cases to hold, based on the then existing state of the law, that the political question doctrine did not bar Plaintiffs' state law tort claims arising out of KBR's water treatment and waste disposal services at military bases in Iraq and Afghanistan, at least not in the absence of limited discovery. 736 F. Supp. 2d at 959-

[12] For the *Taylor* court, only the first (textually demonstrable constitutional commitment of the issue to a coordinate political department), second (lack of judicially discoverable and manageable standards), and fourth (impossible for court to resolve claim without expressing lack of respect to other branches of government) *Baker* factors appeared to be relevant to determining the applicability of the political question doctrine in the contractor context. *Id.* at 408-09.

63. The *Taylor* court's "landscape changing"[13] application of the traditional *Baker* factors in the military contractor context and a thorough review by this Court of the existing record compel a change in the prior holding.

2. The "military control" factor

KBR has provided clear evidence that establishes direct and fundamental military management and control of KBR employees in both theatres of war. Moreover, the most important waste disposal decision affecting the Plaintiffs, i.e., the decision to use open burn pits, was made by the military,[14] not

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[13] *See Harris v. Kellogg, Brown & Root Services, Inc.*, 878 F. Supp. 2d at 570.

[14] In a Declaration provided by Major Tara Hall, who served in Iraq as the Army's Chief of Preventive Medicine and as Force Health Protection Officer for the Multi-National Corps-Iraq, she confirmed that "the Army decided which method of waste disposal to use at military bases in Iraq. KBR did not decide which methods of waste disposal were appropriate in the contingency environment of Iraq." ECF No. 21-8 ¶ 3. She went on to note that "[t]he Army selected burn pits as the primary method of waste disposal in Iraq. Although burn pits are not the Army's preferred method of waste disposal, it is often necessary to use burn pits in contingency environments such as Iraq because these places lack the infrastructure for more sophisticated methods of waste disposal. In addition, due to the hostile environment and security considerations, waste disposal outside of military bases is not feasible." *Id.* ¶ 4. Gerald E. Vincent, an Army civilian who served in Iraq as the Environmental Program Manager for the Multi-National Corps-Iraq, also confirmed that "the U.S. military made the decisions about which method of waste disposal to use at each base camp in Iraq, and these military decisions were influenced by the realities of the contingency environment and resource limitations." ECF No. 21-9 ¶ 5. To the same effect is the

the Defendants. Indeed, the decision came from the very top of the military command: "There is and will continue to be a need for burn pits during contingency operations." Letter from David H. Petreaeus, General, U.S. Army, to the Honorable Russell D. Feingold, U.S. Senator, (Dec. 4, 2008). *See* Original Motion, Exhibit 3, ECF No. 21-5. This determination, undoubtedly dictated by the exigencies associated with a war zone, exposed the Plaintiffs and others to the risks inherently associated with this method of waste disposal. Any analysis of their burn pit claims necessarily would involve questioning these military judgments[15] and

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Declaration of Dr. R. Craig Postlewaite, Acting Director of Force Health Protection and Readiness Programs and Director of Force Readiness and Health Assurance. *See* ECF 21-10. Dr. Postlewaite also confirmed that "the U.S. military, as a matter of policy and doctrine decides which method of waste disposal, e.g., burn pits or incinerators, to use at military camps in such war theaters, including Iraq and Afghanistan. Incinerators are the preferred method of waste disposal, but, depending on the situation on the ground, incinerators are not always a feasible option. The decision regarding which method of waste disposal to use is made by military commanders, after taking into account the feasibility as well as the risks and benefits associated with each option and the particular circumstances at a given base camp." *Id*. ¶ 4. Not only is the decision to use burn pits made by the military, but also he confirmed that the U.S. military "decides where to locate burn pits at such camps, including those in Iraq and Afghanistan." *Id*. ¶ 5.

[15] Indeed, the military's decision to use open burn pits has resulted in congressional inquiries and a critical report on the practice by the Government Accountability Office. *See* Dep't of Defense, *Report to Congress on the Use of Open-Air Burn Pits by the United States Armed Forces* (Apr. 18, 2010); U.S. Gov't Accountability Office, GAO-11-63, *Afghanistan and Iraq: DOD*

the actions taken by the Defendants under the military's direction.

The same can be said with respect to supply of water by the Defendants in Iraq and Afghanistan. The provision of water is an essential function of the United States military in war zones. *See* Technical Bulletin Medical 577 ("TB Med 577") § 2-2 (May 1, 2010), *available at* http://www.army.mil/usapa/med/DR_pubs/dr_a/pdf/tbmed577.pdf ("The water support mission is a key component of sustaining forces on the battlefield."). Oversight and responsibility for Iraq and Afghanistan is assumed by the military, without regard to whether the water is produced and distributed by the military or by a contractor. AR 40-5; *see also Preventive Medicine*, Army Pamphlet 40-11 (July 22, 2005) ("DA PAM 40-11"), *available at* http://www.apd.army.mil/pdffiles/p40_11.pdf.

The extent of the military's control of water supply operations is demonstrated by the declaration of Major Sueann O. Ramsey who served in Iraq as the Chief of Preventative Medicine for the Multi-National Corps—Iraq for a one-year period beginning in late 2006. *See* ECF No. 21-21. In her Declaration, she states that the "military had oversight over the provision of water services at base camps within Iraq." *Id.* ¶ 5. As she points out, the

> Preventive Medicine personnel in theater were required, and regularly conducted surveillance of the potable water at base camps to ensure the health and safety of

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Should Improve Adherence to its Guidance on Open Pit Burning and Solid Waste Management (Oct. 2010).

> deployed personnel at the base camps. This surveillance included sampling and testing water for potability. If the testing of water samples showed unacceptable levels for potability that could not be corrected through disinfection, such test results would have been brought to my attention. I do not recall any instance in which that happened.

Id. ¶ 6. To the same effect is the Declaration of Col. Steven W. Swann who currently serves as the command surgeon for the U.S. Army Warrior Transition Command. ECF No. 21-22. Like Major Ramsey, he served in Iraq, in his case between September 2005 and September 2006, and was responsible for five army Preventive Medicine Detachments. *Id.* ¶ 3. He also reported that the Army had oversight regarding the testing, production and distribution of potable and nonpotable water at base camps, and that Preventive Medicine Detachments regularly tested the water to ensure that the water was safe for soldiers and other personnel at the base camps. *Id.* ¶ 4.

In *Taylor*, the court found that the "military control" factor weighed against applying the political question doctrine. 658 F.3d at 411. In doing so, it rejected the district court's finding that the military exercised control over KBR because "the military determined how power should be supplied to the Tank Yard" and "authorized certain individuals to perform electric maintenance work." *Id.* at 407; *see also Taylor v. Kellogg Brown & Root Services, Inc.*, 2010 WL 1707530, at *7 (E.D. Va. 2010). The court observed that the military does not exercise "control"

over a contractor simply because the military orders a contractor to perform a certain service. 658 F.3d at 411 ("acting under orders of the military does not, in and of itself, insulate the claim from judicial review").

The key inquiry under the decision in *Taylor* is whether the government directly controls contractor employees. *Id.* (citing *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009)). In *Carmichael*, the Eleventh Circuit viewed the military as directly managing contractors tasked with driving a convoy because regulations granted the military "plenary control" over the convoy, the contract demanded that drivers be trained to military standards, and all parties to the contract viewed the military as having "complete control" of the convoy. 572 F.3d at 1276, 1283-85, 1294; *cf. Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008) (declining to dismiss on political question grounds, at least prior to the completion of discovery, because the contractor's "policies and actions" regarding convoy driver safety was potentially separable from those of the military).

Applying these principles, the *Taylor* court reasoned that, although the military maintained "control" over how power should be supplied and allocated to the Tank Ramp facility, the service contract required the government contractor to "be responsible for the safety of employees and base camp residents during all contractor operations" and to "have exclusive supervisory authority and responsibility over [the government contractor] employees." 658 F.3d at 411 (citations omitted). Because the service contract "nearly insulated" the

government contractor's employees from direct military management (indeed, the KBR employee in *Taylor* acted contrary to a specific military directive), the court was understandably reluctant to use the "military control" factor as a justification behind its decision to apply the political question doctrine. *Id.*

In contrast, in the present case, the first *Taylor* factor—the extent to which the contractor was under the military's control—weighs strongly in favor of applying the political question doctrine. While the *Taylor* court looked to the language of the contract to conclude that the military did not manage the contractor employees, here the LOGCAP III contract and appended Iraq task orders (59, 89, 139, and 159) and Afghanistan task orders (13, 14, 97, 98, 113, 116, 118, and 145) relating to the services at issue (burn pits and water treatment) for the time periods in question (2003-2007) demonstrate pervasive and plenary military control. *See* Renewed Motion, Exhibits I-T, ECF Nos. 217-12 through 217-23. Even if, as the Plaintiffs contend, these task orders do not apply to all of the services at issue, the method of waste removal, i.e., use of open burn pits, was dictated by the military as it has acknowledged in reports to Congress and as described in a critical Government Accountability Office Report.[16] As in *Taylor*, nothing in these SOWs gives the military direct control over KBR employees but, unlike *Taylor*, the essential decision to use open burn pits as a method of battlefield waste disposal was made by the military alone. The issue before this Court does not involve a discrete event on a specific date, but

[16] *See id.*

rather the resolution of damage claims resulting from essential military decisions about the methodology to be used in providing water and waste disposal services in fields of battle in two countries over an extended period of time.

Thus, the "military control" factor weighs heavily in favor of dismissing these cases under the political question doctrine.

3. The "national defense interest" factor

The "national defense interest" factor also weighs in favor of dismissing these cases under the political question doctrine because Plaintiffs' claims and Defendants' defenses, upon careful reflection, simply cannot be decided without entanglement with this key interest.

Although the "military control" factor weighed against application of the political question doctrine in *Taylor*, the Fourth Circuit found that the second factor—whether national defense interests were closely intertwined with the military's decisions governing the contractor's conduct—was dispositive. It concluded that plaintiff's claim warranted dismissal under the political question doctrine because the government contractor "specifically advised the court that it would be presenting a contributory negligence defense" as that defense is understood by Virginia law. 658 F.3d at 405, 411-12.

The *Taylor* Court cautioned, however, that "the military (and certainly a military contractor) is not, as a matter of course, insulated from liability when it asserts a 'national defense interest.'" *Id.* at 409-10. (construing *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991)). A factual inquiry is necessary to

determine the precise nature of the national defense interest. *Id*. As a general matter, a successful contributory negligence defense precludes recovery by plaintiffs whose own negligence has been a contributing cause of their injuries. On these facts, the Fourth Circuit concluded that a contractor's assertion of a contributory negligence defense unavoidably implicated a national interest or military policy because plaintiff was a Marine and the contractor's contributory negligence defense turned on the reasonableness of that Marine's decision to connect a back-up generator in violation of command protocol. *Id*. at 411-12. To assess the reasonableness of violating a command protocol, a fact-finder must assess the reasonableness of the Marine's command's decision not to provide redundant power to the Camp's only tank maintenance facility. *Id*. Thus on these facts, the *Taylor* court found the political question doctrine barred the contractor's claims because contributory negligence defense forced a federal court to question "actual, sensitive judgments made by the military." *Id*. at 411.

Here, the second *Taylor* factor—whether national defense interests were closely intertwined with the military's decisions governing the contractor's conduct—weighs heavily in favor of applying the political question doctrine. The KBR Defendants assert that their conduct was reasonable because the United States Military determined the method of waste disposal, determined burn pit logistics, and determined water control operations. *See* Defs.' Reply 6, ECF No. 219. KBR also intends to challenge the Plaintiffs' negligence claims by

contesting causation and asserting contributory negligence. *Id.* According to the Defendants, the causation defense will require the Court to scrutinize the military's environmental testing efforts and its contemporaneous conclusions that burn pits posed no long-term health problems. *Id.*

In *Amedi v. BAE Systems, Inc.*, 782 F. Supp. 2d. 1350 (N.D. Ga. 2011), the estate of a civilian translator employed by the United States Army in Iraq brought product defect, negligence and breach of warranty claims against a military contractor that had designed a vehicle in which the decedent was riding when it ran over a pressure wire which triggered an improvised explosive device resulting in his death. *Id.* at 1351. In dismissing the case on the basis of the political question doctrine, the court observed that

> "[i]t is not the mere fact that the incident took place in Iraq during combat operations in time of war that renders Plaintiff's claims subject to the political question doctrine. Rather, it is because in adjudicating Plaintiff's claim that the court will be required to examine decisions concerning military matters that could only have been made by the United States military personnel who controlled all aspects of the operation conducted on April 21, 2008."

Id. at 1357. The court focused, as has this Court, on the *military* decisions made that had an impact upon the claim made by the Plaintiff. *Id.* In *Amedi*, the *military* had made the decision to develop a new vehicle "designed to address improvised explosive

devices." *Id.* It was the *military* that "made the decision to fast-track the production of such a vehicle," and it was the *military* that "determined what type of vehicle it wanted for the job." *Id.* Here also, it was the *military* that made the decision to use open burn pits, and it was the *military* that made the decision where to locate them. Finally, it was the *military* that supervised all aspects of the provision of water supply services to military personnel in the two war zones.

The Court concludes that the military declarations, government documents, and newspaper articles provided by the KBR Defendants demonstrate the applicability of the political question doctrine in this case. The actions complained of are not ones taken by the Defendants alone, and KBR's defenses (e.g., contributory negligence and causation) would necessarily require review of the reasonableness of military decisions, a role that is simply not appropriate for, or within the competence of, the judiciary.[17]

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[17] In *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), the Fourth Circuit expressed similar principles of judicial restraint and deference to separation of powers when it declined to create an implied cause of action against high level decisionmakers sued as a result of allegedly being tortured. As noted in the opinion by Judge J. Harvey Wilkinson:

> First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit

B. Derivative Sovereign Immunity

The Defendants also seek dismissal under what is described as "derivative sovereign immunity." To the extent that this Court's conclusion concerning lack of jurisdiction under the political question doctrine is incorrect, dismissal is nevertheless appropriate on this ground as well. This ground for dismissal was described in this Court's earlier opinion:

> As a general matter, the United States as a sovereign is immune from suit except under those limited circumstances in which it has waived that immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). With the passage of the Federal Torts Claims Act ("FTCA"), ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.), the United States waived its immunity to tort suits under certain conditions and subject to the exceptions set forth in the FTCA. *See* 28 U.S.C. § 2674 ("The United States shall be liable [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ."); *see id.* § 2680 (setting forth exceptions). One of the FTCA

> constitutional assignments of responsibility to the coordinate branches of our government.

Id. at 548. The court also reiterated the "wisdom of the constitutional design, which commits responsibility for military governance and the conduct of foreign affairs to the branches most capable of addressing them and most accountable to the people for their choices." *Id.* at 556.

exceptions, the "discretionary function exception," involves any 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." *Id.* § 2680(a).

The FTCA explicitly *excludes* independent contractors from its scope. The definitions of the terms "federal agency" and "employee of the Government," both of which appear in the discretionary function exception, do not include government contractors. *See id.* § 2671 ("[T]he term 'Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States*." (emphasis added)); *id.* ("'Employee of the government' includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard . . . , and persons acting on behalf of a federal agency in an official capacity . . . , and (2) any officer or employee of the Federal public defender organization . . . ."). In addition, the FTCA limits the court's exclusive jurisdiction to "civil actions on claims *against the United States*, for money

damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within the scope of his office or employment." *Id.* § 1346(b)(1) (emphases added).

Notwithstanding the exclusion of independent contractors from the FTCA's scope, Defendants argue that they are entitled to "derivative sovereign immunity" preserved by the sovereign in the discretionary function exception and retained by federal officials acting within the scope of their employment while exercising their discretion. Defs.' Mem. Supp. Dismiss 36-46. To support their entitlement to "derivative sovereign immunity" preserved by the sovereign in the discretionary function exception, they rely primarily on *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), and its progeny. In support of their entitlement to "derivative sovereign immunity" retained by federal officials acting within the scope of their employment while exercising their discretion, they cite a Supreme Court case, *Westfall v. Erwin*, 484 U.S. 292 (1988), *superseded in part by statute*, 28 U.S.C. § 2679(d) (applying only to federal employees), *as recognized in Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1152 (4th Cir. 1997); a Fourth Circuit case, *Mangold v. Analytic*

> *Servs., Inc.*, 77 F.3d 1442 (1996), and their progeny.
>
> Plaintiffs contend that a third Supreme Court case, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988), controls Defendants' assertion of derivative sovereign immunity and does not insulate them from liability. Pls.' Opp'n 35-38. In the alternative, Plaintiffs contend that *Yearsley*, *Westfall*, *Mangold*, and their progeny do not entitle Defendants to the immunity preserved by the sovereign in the FTCA's discretionary function exception or retained by federal officials acting within the scope of their employment while exercising their discretion. See *id.* at 38-50.

In re: KBR Burn Pit Litig., 736 F. Supp. 2d at 963-64.

Just as *Harris* viewed the Fourth Circuit decision in *Taylor* as changing the landscape of the law on the political question doctrine and its applicability to claims against military contractors, the same can be said of the decision of the Supreme Court in *Filarsky* on the question of derivative sovereign immunity. The decision of Chief Justice Roberts in *Filarsky* effectively eliminated any doubts as to the viability of the legal assertions made by the Defendants in seeking to benefit derivatively from the sovereign's immunity in connection with their work for the government. It is clear that the Supreme Court was quite reluctant to leave contractors "holding the bag," *Filarsky*, 132 S. Ct. at 1666, and that same rationale strongly supports a conclusion that derivative sovereign immunity should apply to

military contractors performing services for the government in war zones.

C. The "Combatant Activities" Exception in the Federal Tort Claims Act

Finally, the Defendants seek dismissal under what is described as the "combatant activities" exception in the Federal Torts Claim Act. Once again, to the extent that this Court's conclusions concerning lack of jurisdiction or derivative sovereign immunity are incorrect, dismissal is nevertheless appropriate on this ground as well. This ground for dismissal was described in this Court's earlier opinion:

> [T]he FTCA's combatant activities exception, . . . preserves the sovereign's immunity against "[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). The statute leaves the terms "arising out of" and "combatant activities" undefined, so courts have been left to clarify their meanings. Only a handful of courts have done so, and they seemingly disagree about the necessity of physical force. *Compare Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) ("[N]ot only physical violence, but activities both necessary to and in direct connection with actual hostilities."), *with Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) ("[T]he actual engaging in the exercise of physical force."); see also *Taylor v. Kellogg Brown & Root Services, Inc.*, Civil No.

> 2:09cv341, 2010 WL 1707530, at *10 (E.D.Va. Apr. 19, 2010), appeal docketed, No. 10-1543 (4th Cir. 2010) (adopting *Johnson* definition); *Al Shimari v. CACI Premier Tech., Inc.,* 657 F. Supp. 2d 700, 721 (E.D. Va. 2009), appeal docketed, No. 09-1335 (4th Cir. 2010) (adopting *Skeels* definition). Regardless of the exact definition, "[t]he rational test would seem to lie in the degree of connectivity" between the conduct at issue and the actual combat. *Johnson*, 170 F.2d at 770.

In re: KBR Burn Pit Litig., 736 F. Supp. 2d at 974.

This Court then discussed the *Saleh* decision of the District of Columbia Circuit as follows:

> The second case was *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), which reviewed the district court decision in *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007). As described in *Saleh*, Iraqi nationals brought suits alleging abuse against two private military contractors, CACI International, Inc. ("CACI") and Titan Corp. ("Titan"), which provided interrogation and interpretation services to the U.S. government at the Abu Ghraib military prison during the war in Iraq. 580 F.3d at 1. In their defense, the contractors asserted that the claims against them were preempted as claims against civilian contractors providing services to the military in a combat context. *Id.* at 4. In the face of insufficient factual support to sustain the

application of the preemption defense, the district court judge ordered limited discovery regarding the military's supervision of the contractor employees as well as the degree to which such employees were integrated into the military chain of command. *Id.* at 4. Following discovery, the contractors filed for summary judgment on the same preemption grounds. *Id.* Absent controlling authority, the court fashioned a test of first impression, finding preemption only where the contract employees are "under the direct command and *exclusive* operational control of the military chain of command." *Id.* (quotation marks omitted). Finding that the Titan employees were "fully integrated into their military units" and "essentially functioning as soldiers in all but name," but that the CACI employees were subject to a "dual chain of command," the court dismissed as preempted the tort claims against Titan, but not as to CACI. *Id.* (quotation marks omitted).

The D.C. Circuit decided that the district court judge "properly focused on the chain of command and the degree of integration that, in fact, existed between the military and both contractors' employees rather than the contract terms," but eliminated the exclusive control component of the district court's legal test. *Id.* at 6. The D.C. Circuit's test provides: "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. This "battle-field preemption" test is appropriate in the D.C. Circuit's view because the "imposition *per se*" of the state tort law conflicts with the policy behind the combatant activities exception of "eliminating tort concepts from the battlefield." *Id.* at 7. At the same time, the D.C. Circuit "recognize[d] that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military." *Id.* at 9.

In re: KBR Burn Pit Litig., 736 F. Supp. 2d at 974-75.

In amicus briefs filed in both the Supreme Court and the Fourth Circuit, the Solicitor General argued that the analysis used by the District of Columbia Circuit in *Saleh* was sound, but flawed in an important respect:

> The court of appeals' recognition of a federal preemption defense informed by the FTCA is generally consistent with the approach this Court took in *Boyle*. But the court's description of the contours of that defense is inexact, unclear, and potentially misguided in certain respects.
>
> For example, the court of appeals appears to have focused its inquiry on whether the contractor was itself "engaging in combatant activities" (Pet. App. 15) or was "integrated

into combatant activities" *(id.* at 19). In phrasing the test in this manner, the court may have misunderstood the circumscribed role private contractors play in war zones. Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants"; they are "civilians accompanying the force" and, as such, cannot lawfully engage in "combat functions" or "combat operations." *See* DoD, *Instruction 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces* ¶ 6.1.1 (Oct. 3, 2005); *id.* ¶ 6.1.5 ("Functions and duties that are inherently governmental are barred from private sector performance."); DoD, *Instruction 1100.22: Policy & Procedures for Determining Workforce Mix,* Encl. 4, ¶ 1.c(1)(b) (Apr. 12, 2010) ("Combat Operations" are inherently governmental); 73 Fed. Reg. at 16,764-16,765 ("[T]he Government is not contracting out combat functions."); Army Reg. 715-9, ¶ 3-3(d) (1999) ("In the context of the law of war, contracted support service personnel are civilians accompanying the force. * * * They may not be used in or undertake any role that could jeopardize their status as civilians accompanying the force."). International law recognizes that civilians authorized to accompany the force in order to provide support are entitled to certain status and protections. *E.g.*, Third Geneva Convention, art. 4.A(4), 6 U.S.T. at 3320 (including "[p]ersons who accompany

> the armed forces without actually being members thereof" within the definition of "[p]risoners of war").
>
> Moreover, application of the FTCA's combatant activities exception, on which the court of appeals drew, does not turn on whether a challenged act is itself a "combatant activity," or whether the tortfeasor is himself engaging in a "combatant activity." Rather, it speaks of claims "*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) (emphasis added). A more precise focus on claims "arising out of" the *military's* combatant activities would allow for a more accurate assessment of the contractor's distinct role, and avoid confusing it with the role of military personnel. (emphasis in original)

Brief for the United States as Amicus Curiae at 15-16, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011), ECF No. 217-5.

The Solicitor General reiterated the same theme in his Amicus Curiae brief filed in the Fourth Circuit in *Al Shimari:*

> Application of the FTCA's combatant activities exception, however, does not turn on whether a challenged act is itself a "combatant activity," or whether the alleged tortfeasor is himself engaging in a "combatant activity." The statute instead refers to claims "*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) (emphases added). Such claims, if brought against the United States (or if brought against a military service member or other federal officer or employee acting within the scope of his or her employment), would be dismissed because Congress expressly retained the sovereign immunity of the United States for claims arising out of combatant activities. The scope of preemption informed by that statute's expression of a uniquely federal interest should likewise turn on whether particular claims "aris[e] out of" the military's combatant activities.

* * * For the purpose of these cases, the Court should hold that claims against a contractor are generally preempted to the extent that a similar claim against the United States would be within the combatant activities exception of the FTCA, and 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, particularly in situations where the contractor was integrated with military personnel in the performance of the military's combat-related activities. *Cf. Saleh*, 580 F.3d at 4-7 (discussing integration of contractor personnel into military units).

Brief for the United States as Amicus Curiae at 17-18, *Al Shimari v. CACI Int'l, Inc.*, Nos. 09-1335, 10-1891, 10-1921 (4th Cir. Jan. 13, 2012), ECF No. 217-6.

The views of the Solicitor General on this issue are not precedential, but nevertheless are highly significant. At stake in these cases are the interests of the United States Military and its ability to function in time of war. The views of the United States, therefore, are of more than passing importance. The analysis of the Solicitor General is manifestly correct. The focus should not be on the activity of the contractor, but rather that of the military and whether the claims asserted arise out of combatant activities *of the military*. On that question there can be no doubt. At all times pertinent to the claims of the Plaintiffs, the United States Military in Iraq and Afghanistan was clearly engaged in combat activities in those two theaters of war; indeed, it is the exigency of combat conditions that drove the decision of the military to use open burn pits in the first place. Had the military been engaged in some other activity, such as building flood control projects, there would be no question that no combat activity was involved, and there is little doubt that open burning of waste would not be a military exigency.

In *Aiello v. Kellogg, Brown & Root Services, Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011), the Southern District of New York recently dismissed a soldier's claim against KBR arising out a fall in a latrine facility in a forward base in Iraq on the basis of the

combatant activities exception to the FTCA.[18] *Id.* at 700-01. In language that mirrors that of the Solicitor General, the court observed:

> The combatant activities exception preserves immunity as to any "claim *arising out of* the combatant activities of the military." 28 U.S.C. § 2680(j) (emphasis added). This familiar "arising out of" language, as recognized in *Saleh,* has long been used in workmen's compensation statutes "to denote *any* causal relationship between the term of employment and the injury." *Saleh,* 580 F.3d at 6 (citing *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 507, 71 S.Ct. 470, 95 L.Ed. 483 (1951)). The Second Circuit has held such language to be expansive in other federal statutes, as well. *See Benzman v. Whitman*, 523 F.3d 119, 125-26 (2d Cir. 2008) (suggesting that statute providing cause of action for claims "arising out of" the September 11 attacks may cover claims that government officials misrepresented air-quality risks following the attacks); *In re WTC Disaster Site*, 414 F.3d 352, 377 (2d Cir. 2005) ("As it requires no great stretch to view claims of injuries from inhalation of air

[18] The court rejected a challenge to jurisdiction on the basis of the political question doctrine after it concluded that the "allegation regarding negligence in washing the floor could stand alone and support a claim without implicating any military decisions." *Aiello*, 751 F. Supp. 2d at 706. That is not the case here because, as discussed above, the military made the decision to use open burn pits, and claims arising out of their operation inevitably would implicate those decisions.

rendered toxic by the fires, smoke, and pulverized debris caused by the terrorist-related aircraft crashes of September 11 as claims 'relating to' and 'arising out of' those crashes, we conclude that Congress intended ATSSSA's cause of action to be sufficiently expansive to cover claims of respiratory injuries by workers in sifting, removing, transporting, or disposing of that debris.").

To narrow the scope of the combatant activities exception to claims by "those against whom force is directed" could potentially mean that a duty of care would still exist as to bystanders and allies, even in actual live-fire combat events. Force not "directed" at them could still cause them harm. The combatant activities exception "reflects the need to avoid second-guessing military 'judgment as to the balancing of many technical, military, and even social considerations.'" *Taylor,* 2010 WL 1707530, at *9 (quoting *Boyle,* 487 U.S. at 511, 108 S.Ct. 2510). It also reflects the federal interest in freeing "military commanders from the doubts and uncertainty inherent in potential subjection to civil suit," and recognizes that "the costs of imposing tort liability on government contractors is passed through to the American taxpayer." *Saleh,* 580 F.3d at 7, 8. These purposes would not be served by the narrow *Koohi* formulation, which limits the interest to precluding suits brought by those against whom force is directed.

Aiello, 751 F. Supp. 2d at 709-10.

The court in *Aiello* had little difficulty concluding that latrine maintenance is related to combat activity in words that easily can be translated to the refuse disposal and water supply services at issue in this case:

> At first glance, indoor latrine maintenance may not appear related to combatant activity. But, since at least the Roman campaign against Carthage there has been an acknowledged relationship between the upkeep of latrines and the health of fighting forces. *See* Nathan Rosenstein, *Rome at War: Farms, Families and Death in the Middle Republic* (2004), at 132-33 (describing typhoid outbreaks during the Hannibalic War arising at extended encampments where there was no evidence of latrines equipped with running water, as opposed to permanent camps with latrines). In the United States, the matter has been of concern to fighting forces. General George Washington was reportedly "appalled" that latrines were dug in proximity to kitchens. Edward Countryman, *The American Revolution* (2003), at 135. After the Spanish-American War, Major Walter Reed, the U.S. Army physician, co-authored an exhaustive report focused in large part on the relationship between latrine upkeep and the spread of disease. *See* Walter Reed, Victor C. Vaughan & Edward O. Shakespeare, *Report on the Origin and Spread of Typhoid Fever*

> *in U.S. Military Camps During the Spanish War of 1898* (1904), at 329 (discussing latrine hygiene practices of the Twelfth Pennsylvania Infantry to guard against typhoid, including requirement that soldiers wash hands with soap and water "under the supervision of a sentinel posted at each latrine for this purpose"); *Id.* at 533 (citing location of latrine as contributing to spread of typhoid); *Id.* at 607 (high typhoid morbidity rate for soldiers staying in tents near latrines); *Id.* at 663 (discussing latrines as locus for spread of typhoid). Thus, it has long been recognized that the creation and maintenance of these necessary facilities is integral to sustaining combat operations.

Aiello, 751 F. Supp. 2d at 713-14. This Court agrees, and concludes that the claims of the Plaintiffs are also preempted by the combatant activities exception.

D. The Nature of this Case as Multi-District Litigation and the National Interests at Stake

One last observation is in order concerning the nature of these cases as part of a multi-district litigation. The statute authorizing multi-district litigation provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). This Court is convinced, for the reasons set forth above, that as sympathetic as the claims of the Plaintiffs may be, this Court simply does not have jurisdiction and, to

the extent that it does, the Defendants are immune from suit and the Plaintiffs' claims are preempted. One might be tempted, however, to allow these cases to proceed and not now decide the essential questions addressed above. That, however, would not be fair to either side nor would it be in the national interest.

It would not be fair to the Defendants to endure the breathtaking level of discovery that the Plaintiffs propose and to which they might arguably be entitled but for this Court's conclusions described above. It would also not be fair to the military which would be called upon to produce a veritable parade of witnesses who would be called away from military duties to testify concerning claims arising out of two theaters of war. It would also not be fair to the Plaintiffs because they would have to endure an almost endless period of discovery, a final resolution by this Court and possibly end up with all of their efforts being for naught because of the reasons described by the Court above.

No one, not the Defendants, the military or the Plaintiffs, should have to endure that if this Court does not have the authority to proceed. Proceedings in multi-district litigation are sometimes criticized for taking extended periods of time to reach resolution, and this will not be one of them. This case must come to an end now, and without prolonging the agony.

Conclusion

In the final analysis, it is the national interest that dictates dismissal of all of the cases now pending before this Court. The critical interests of the United States could be compromised if military contractors

were left "holding the bag" for claims made by military and other personnel that could not be made against the military itself. The ability of the military to recruit contractors and their willingness to assist the military in time of war could be called into serious question if they did not enjoy the same protections as does the United States for combat activities. Moreover, the intrusion of the judiciary into military decision-making would not only violate separation of powers principles, but also would be extremely unwise and imprudent.

This does not mean that the Court is unsympathetic to the claims of the Plaintiffs. The use of open burn pits in Iraq and Afghanistan allegedly has caused harm to these Plaintiffs. The inevitable by-product of open burning of waste in war zones is an escalation of risk factors for those in close proximity to smoke emanating from such burn pits. As to military personnel, there are a number of statutory remedies available to them, and with respect to civilian Plaintiffs employed by government contractors other remedies are also available.

In *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held that the FTCA bars military personnel from suing the sovereign for alleged torts that occur during the "course of activity incident to service." 340 U.S. at 146. In commenting on the *Feres* decision, the Fourth Circuit observed in *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989):

> The [Supreme] Court, while recognizing that this exception to the FTCA's broad waiver of sovereign immunity was not expressly

> required by the Act, offered two rationales for the necessity of barring tort actions by soldiers. First, the "distinctively federal" relationship between the government and its soldiers would be undermined by holding military personnel accountable under the variations in state tort law according to the situs of the alleged tort. * * * Second, the Court noted the comprehensive system of statutory benefits granted to service members and concluded that Congress must have intended them to be the sole remedy for service related injuries. * * * In later decisions, the Court offered as a third rationale the fear that frequent judicial inquiry into military decision making would have a deleterious impact on military discipline and effectiveness.

Appelhans, 877 F.2d at 311 (citations omitted). A comprehensive set of remedies is also available to provide compensation for disability or death to persons employed at military, air and naval bases outside the United States as well as compensation for injury, death or detention of employees of contractors with the United States outside the United States. *See* Defense Base Act, 42 U.S.C. §§ 1651-1655; War Hazards Compensation Act, 42 U.S.C. §§ 1701-1706.

Finally, to the extent that any special or additional remedy should be made available for those claiming to have been affected by open burn pits or impure water in these two wars, the remedy is through the military and the legislative processes, not through the judiciary. In short, Congress has

already provided defined remedies for the Plaintiffs, and it is not appropriate for this Court to fashion new ones. While the Court is reluctant to close the door on any Plaintiff, the national interests in this case dictate the result that has been reached. A separate order follows.

Date: February 27, 2013

/s/
Roger W. Titus
United States District Judge