Combat Government Contractor Defenses – Political Question Doctrine

The United States has engaged in combat activities since shortly after September 11, 2001. During this time, the use of private contractors to actively support U.S. military operations has risen to unprecedented levels. *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 331 (4th Cir. 2014). These contractors perform a wide-range of activities, many of which would meet anyone's definition of combat.

Over the last decade, many personal injury and wrongful death cases have been brought by military members and families against military contractors for injuries and death in combat zones. For the most part, the lawsuits are based on state negligence or products liability laws and the plaintiffs face an array of defenses that may close the courthouse doors depending on the circumstances giving rise to the claims.

The federal government is shielded from claims by service members and their families by an array of immunity theories and statutes, such as the *Feres* doctrine, *Feres v. United States*, 340 U.S. 135, 146 (1950), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671. Congress, however, has never enacted legislation to shield private contractors from tort liability. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 515 n.1 (1988) (Brennan, dissenting). Nevertheless, contractors have, often successfully, defended against claims of tort liability based on a variety of defenses, including the political question doctrine. This article will present a brief overview of how this doctrine has been applied as a defense to claims arising in combat zones.

The political question doctrine is a "narrow exception" to a federal court's "responsibility to decide cases properly before it." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2011). Private contractors have argued that tort claims against them raise nonjusticiable political questions that threaten the separation of powers by questioning military judgments and decision-making in a

war environment. The landmark Supreme Court case of *Baker v. Carr*, 369 U.S. 186, 217 (1962), set forth six indicia of a political question, which the Fourth Circuit recently distilled into two critical components in military contractor cases: first, the extent to which the government contractor was acting under the military's control; and second, whether national defense interests were closely intertwined with military decisions governing the contractor's conduct, so that a decision on the merits of the claim would require the judiciary to question actual sensitive judgments made by the military. *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011).

Two Eleventh Circuit cases illustrate the parameters of the political question doctrine in military contractor cases. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), involved the death claims for three soldiers killed in the crash of a flight operated by a private carrier hired by the government. The Eleventh Circuit rejected the carrier's claim of a political question, finding that the allegations raised an ordinary negligence claim based on pilot error (the plane was flown into a mountain) and did not require the court to examine any military decision or judgment.

By contrast, the Eleventh Circuit applied the political question doctrine to bar suit in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009). *Carmichael* was brought to recover damages for severe injuries suffered by an Army Sergeant as he was guarding the defendant contractor's tanker truck, which overturned while part of a convoy navigating a dangerous route through a war zone. The court found that the truck was under the direct control of the military and that any negligence claim against the contractor implicated military judgments and decisions regarding the multiple hazards (speed, road conditions and routing) of the operation. The court observed that while *McMahon* involved "a

more or less routine airplane flight" in which "the fact that the crash took place over Afghanistan during wartime was incidental[,]" the military mission and dangers faced by the truck convoy in *Carmichael* were "utterly central" to the case. *Id.* at 1291.

The complexity of applying the political question doctrine in cases stemming from combat zones is demonstrated well by the Third Circuit's decision in *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013), cert. denied, 135 S. Ct. 1152 (2015), which also addressed the related, but distinct combat activities defense. The serviceman in Harris died when he was electrocuted while taking a shower at a military base in Iraq. His family sued alleging that the electrocution was caused by the defendant contractor's negligent installation and maintenance of a water pump. The contractor in *Harris* argued that a nonjusticiable political question was raised by its causation defense that the military's own decisions were at least in part responsible for the serviceman's electrocution. The Third Circuit determined that the application of the doctrine hinged on state choice of law. If Pennsylvania law applied, the case could proceed without impediment. That is because Pennsylvania recognizes the doctrine of joint and several liability and the contractor could be held liable for all of plaintiff's damages without making any determination regarding the government's conduct. But the outcome was different if Tennessee or Texas law applied, since those states apply proportional liability and would require the fact-finder to weigh the responsibility of the contractor and the government in setting damages. The *Harris* decision remanded the case for the district court to make a choice of law determination, noting that "[e]ven if Tennessee or Texas law applies . . . only the fact finder's calculation of damages would be nonjusticiable. This means that we can extract the nonjusticiable issue in a manner that possibly preserves some of the plaintiffs' claims by dismissing only the damages claims that rely on proportional liability." *Id.* at 474.

Finally, the Fourth Circuit recently made a key decision on the political question doctrine in a case stemming from a group of prisoners who were allegedly tortured at the Abu Ghraib prison in Iraq. After nine years of litigation including a series of decisions and appeals, the district court held that the political question doctrine barred the claims, determining that the military exercised control over the interrogation process and "the Court is simply unequipped to second-guess the military judgments in the application or use of extreme interrogation measures in the theatre of war." *Al Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 449 (E.D. Va. 2015). On appeal, the Fourth Circuit reversed and held that any acts committed by a contractor are shielded from judicial review only if they were not unlawful when committed and occurred under the actual control of the military or involved sensitive military judgments. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 151 (4th Cir. 2016).

Very recently, the court in *Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2016), denied the motion by government contractors to dismiss the claims of alleged victims of torture at the hands

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