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## CHAPTER 5

### Foreign Relations

#### A. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT

##### 1. Overview

The Alien Tort Statute (“ATS”), also referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court held that the ATS is “in terms only jurisdictional” but that, in enacting the ATS in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2014 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

##### 2. Extraterritorial Reach of ATS post- *Kiobel*

In 2013, the U. S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the

principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” Several courts applied the *Kiobel* decision in 2014.

**a. Apartheid litigation**

In 2014, the district court again considered the claims brought against corporate defendants for allegedly aiding and abetting violations of customary international law committed by the South African government during the apartheid era. As discussed in *Digest 2013* at 117-19, the U.S. Court of Appeals for the Second Circuit directed the parties in a 2013 opinion to return to the district court for a determination in light of the Supreme Court’s decision in *Kiobel*. *Balintulo et al. v. Daimler AG, Ford Motor Co., and IBM Corp.*, 727 F.3d 174 (2d. Cir. 2013). The United States had submitted a statement of interest, as well as multiple amicus briefs at earlier stages in the long-running litigation. See *Digest 2009* at 140-44; *Digest 2008* at 236-38; and *Digest 2005* at 400-11. For further background on the case, see *Digest 2007* at 226-27 and *Digest 2004* at 354-61.

The district court determined first, in April 2014, that the *Kiobel* decision did not preclude corporate liability as a rule. *In re South African Apartheid Litigation (Ntsebeza, et al. v. Ford Motor Co., and Int’l. Business Machines Corp.)*, Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524 (S.D.N.Y. 2014). However, in August 2014 the court dismissed all claims in accordance with *Kiobel*’s application to the ATS of principles underlying the presumption against extraterritoriality. Excerpts follow from the opinion of the district court dismissing the case (with footnotes and citations to the record omitted).

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Despite plaintiffs’ tenacious effort to revive this litigation, the bar set by the Supreme Court in *Kiobel II*, and raised by the Second Circuit in *Balintulo*, is too high to overcome. Defendants argue, and plaintiffs cannot plausibly deny, that while the newly proposed allegations are substantially more detailed and specific, the theories of the American corporations’ liability are “essentially the same as those in plaintiffs’ existing complaints.”

Plaintiffs argue that “the two U.S. corporations were integral to the creation, maintenance, and enforcement of the apartheid regime—and its attendant international law violations” because “[c]ritical policy-level decisions were made in the United States, and the provision of expertise, management, technology, and equipment essential to the alleged abuses came from the United States.” Although now supported with detailed facts, this theory of liability was already rejected by the Second Circuit in *Balintulo* as establishing vicarious liability at most, and therefore being insufficient to overcome *Kiobel II*’s presumption against extraterritoriality. The *Balintulo* court also rejected plaintiffs’ effort to tie the international law

violations to the “affirmative steps” defendants “took ... in this country to circumvent the sanctions regime.”

Plaintiffs urge this Court to reject *Balintulo* and follow a recent Fourth Circuit case, *Al-Shimari v. CACI Premier Technology, Inc.* ...\*

Even apart from my obligation to follow *Balintulo* as controlling law in the Circuit and as the law of the case, the facts in *Al-Shimari* are clearly different than the facts in this case and involve much greater contact with the United States government, military, citizens, and territory. Here, any alleged violation of international law norms was inflicted by the South African subsidiaries over whom the American defendant corporations may have exercised authority and control. While corporations are typically liable in tort for the actions of their putative agents, the underlying tort must itself be actionable. However, plaintiffs have no valid cause of action against the South African subsidiaries under *Kiobel II* because all of the subsidiaries' conduct undisputedly occurred abroad. Thus, even the *Al-Shimari* court implicitly accepted *Balintulo*'s conclusion that ATS jurisdiction does not extend “to claims involving foreign conduct by [foreign] subsidiaries of American corporations.” As we have now made clear, *Kiobel* forecloses the plaintiffs' claims because the plaintiffs have failed to allege that any relevant conduct occurred in the United States. The plaintiffs resist this obvious impact of the *Kiobel* holding on their claims. The Supreme Court's decision, they argue, does not preclude suits under the ATS based on foreign conduct when the defendants are American nationals, or where the defendants' conduct affronts significant American interests identified by the plaintiffs. Curiously, this interpretation of *Kiobel* arrives at precisely the conclusion reached by Justice Breyer, who, writing for himself and three colleagues, only concurred in the judgment of the Court affirming our decision to dismiss all remaining claims brought under the ATS. *See Kiobel*, 133 S.Ct. at 1671 (Breyer, J., concurring). The plaintiffs' argument, however, seeks to evade the bright-line clarity of the Court's actual holding—clarity that ensures that the defendants can obtain their desired relief without resort to mandamus. We briefly highlight why the plaintiffs' arguments lack merit.

a.

The Supreme Court's *Kiobel* decision, the plaintiffs assert, “adopted a new presumption that ATS claims must ‘touch and concern’ the United States with ‘sufficient force’ to state a cause of action.” The plaintiffs read the opinion of the Court as holding only that “mere corporate presence” in the United States is insufficient for a claim to “touch and concern” the United States, but that corporate citizenship in the United States is enough. *Id.* at 11 (“[I]nternational law violations committed by U.S. citizens on foreign soil ‘touch and concern’ U.S. territory with ‘sufficient force’ to displace the *Kiobel* presumption.”). Reaching a conclusion similar to that of Justice Breyer and the minority of the Supreme Court in *Kiobel*, the plaintiffs argue that whether the relevant conduct occurred abroad is simply one prong of a multi-factor test, and the ATS still reaches extraterritorial conduct when the defendant is an American national. *Id.* at 8–11.

We disagree. The Supreme Court expressly held that claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States. *Kiobel*, 133 S.Ct. at 1662, 1668–69. The majority framed the question presented in these terms no fewer than three times; it repeated the same language, focusing solely on the location of the relevant “conduct” or “violation,” at least eight more times in other parts of

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\* Editor's note: the *Al-Shimari* case is discussed in section B.2.b., *infra*.

its eight-page opinion; and it affirmed our judgment dismissing the plaintiffs' claims because "all the relevant conduct took place outside the United States," *id.* at 1669. Lower courts are bound by that rule and they are without authority to "reinterpret" the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants. *See Agostini v. Felton*, 521 U.S. 203, 237–38, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Accordingly, if all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.

In the conclusion of its opinion, the Supreme Court stated in dicta that, even when claims brought under the ATS "touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S.Ct. at 1669 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, —U.S. —, 130 S.Ct. 2869, 2883–88, 177 L.Ed.2d 535 (2010)). As the Court observed in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S.Ct. at 2884. But since *all* the relevant conduct in *Kiobel* occurred outside the United States—a dispositive fact in light of the Supreme Court's holding—the Court had no reason to explore, much less explain, how courts should proceed when *some* of the relevant conduct occurs in the United States.

**b.**

The plaintiffs also assert that "the *Kiobel* presumption is displaced here" because of the compelling American interests in supporting the struggle against apartheid in South Africa. These case-specific policy arguments miss the mark. The canon against extraterritorial application is "a presumption about *a statute's meaning*." *Morrison*, 130 S.Ct. at 2877 (emphasis supplied). Its "wisdom," the Supreme Court has explained, is that, "[r]ather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis supplied). For that reason, the presumption against extraterritoriality applies to the *statute*, or at least the part of the ATS that "carries with it an opportunity to develop common law," *Sosa*, 542 U.S. at 731 n. 19, 124 S.Ct. 2739, and "allows federal courts to recognize certain causes of action," *Kiobel*, 133 S.Ct. at 1664. In order "to rebut the presumption, the ATS [*i.e.*, *the statute*] would need to evince a clear indication of extraterritoriality." *Id.* at 1665 (quotation marks omitted). Applying this approach in *Kiobel*, the Supreme Court held as a matter of statutory interpretation that the implicit authority to engage in common-law development under the ATS does not include the power to recognize causes of action based solely on conduct occurring within the territory of another sovereign. In *all* cases, therefore the ATS does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign. In other words, a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should.

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**b. Al-Shimari v. CACI**

On June 30, 2014, the U.S. Court of Appeals for the Fourth Circuit applied the reasoning in *Kiobel* to remand to the district court for further proceedings ATS claims against military contractors by plaintiffs alleging they were abused and tortured while detained at Abu Ghraib prison in Iraq. *Al-Shimari v. CACI*, 758 F.3d 516 (4<sup>th</sup> Cir. 2014). *See Digest*

2012 at 619-29 for discussion of, and excerpts from, the *amicus* brief filed by the United States in the Fourth Circuit in a previous appeal in the case in 2012. Excerpts below (with footnotes omitted) from the opinion explain why the court deemed these claims to sufficiently “touch and concern” the United States under *Kiobel*.

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The “touch and concern” language set forth in the majority opinion [in *Kiobel*] contemplates that courts will apply a fact-based analysis to determine whether particular ATS claims displace the presumption against extraterritorial application. . . .

In the present case, the plaintiffs argue that based on *Kiobel*, the ATS provides jurisdiction for claims that “touch and concern” United States territory with “sufficient force to displace” the presumption. *See id.* (majority opinion). The plaintiffs contend that their claims’ substantial connections to United States territory are sufficient to rebut the presumption.

In response, the defendants argue that, under the decision in *Kiobel*, the ATS does not under any circumstances reach tortious conduct occurring abroad. The defendants maintain that the sole material consideration before us is the fact that the plaintiffs’ claims allege extraterritorial tortious conduct, which subjects their claims to the same fatal outcome as those in *Kiobel*. We disagree with the defendants’ argument, which essentially advances the view expressed by Justices Alito and Thomas in their separate opinion in *Kiobel*.

Because five justices, including Justice Kennedy, joined in the majority’s rationale applying the presumption against extraterritorial application, the presumption is part of the calculus that we apply here. However, the clear implication of the Court’s “touch and concern” language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory. Under the “touch and concern” language, a fact-based analysis is required in such cases to determine whether courts may exercise jurisdiction over certain ATS claims. Accordingly, the presumption against extraterritorial application bars the exercise of subject matter jurisdiction over the plaintiffs’ ATS claims unless the “relevant conduct” alleged in the claims “touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption....” 133 S.Ct. at 1669.

In *Kiobel*, the Court’s observation that all the “relevant conduct” occurred abroad reflected those claims’ extremely attenuated connection to United States territory, which amounted to “mere corporate presence.” Indeed, the only facts relating to the territory of the United States were the foreign corporations’ public relations office in New York City and their listings on the New York Stock Exchange. Because the petitioners in *Kiobel* were unable to point to any “relevant conduct” in their claims that occurred in the territory of the United States, the presumption was conclusive when applied to the facts presented.

In the present case, however, the issue is not as easily resolved. The plaintiffs’ claims reflect extensive “relevant conduct” in United States territory, in contrast to the “mere presence” of foreign corporations that was deemed insufficient in *Kiobel*. When a claim’s substantial ties to United States territory include the performance of a contract executed by a United States corporation with the United States government, a more nuanced analysis is required to determine whether the presumption has been displaced. In such cases, it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.

Here, the plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.

In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense.

Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, and "implicitly, if not expressly, encouraged" it.

These ties to the territory of the United States are far greater than those considered recently by the Second Circuit in *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir.2013). In that case, the Second Circuit declined to extend ATS jurisdiction to claims involving foreign conduct by South African subsidiaries of American corporations. *See id.* at 189–94. The plaintiffs in *Balintulo* alleged that those corporations "s[old] cars and computers to the South African government, thus facilitating the apartheid regime's innumerable race-based deprivations and injustices, including rape, torture, and extrajudicial killings." *Id.* at 179–80. Interpreting the holding of *Kiobel* to stand for the proposition that "claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States," *id.* at 189 (citing *Kiobel*, 133 S.Ct. at 1662, 1668–69), the Second Circuit construed the Court's "touch and concern" language as impacting the exercise of jurisdiction only "when *some* of the relevant conduct occurs in the United States." *Id.* at 191 (footnote omitted) (emphasis in original); *see also Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 45–46, 49–50 (2d Cir.2014) (applying *Kiobel* to foreclose jurisdiction over ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner).

Although the "touch and concern" language in *Kiobel* may be explained in greater detail in future Supreme Court decisions, we conclude that this language provides current guidance to federal courts when ATS claims involve substantial ties to United States territory. We have such a case before us now, and we cannot decline to consider the Supreme Court's guidance simply because it does not state a precise formula for our analysis.

Applying this guidance, we conclude that the ATS claims' connection to the territory of the United States and CACI's relevant conduct in the United States require a different result than that reached in *Kiobel*. In its decision in *Morrison*, the Supreme Court emphasized that although the presumption is no "timid sentinel," its proper application "often[ ] is not self-evidently dispositive" and "requires further analysis." 561 U.S. at 266, 130 S.Ct. 2869. We have undertaken that analysis here, employing the "touch and concern" inquiry articulated in *Kiobel*, by considering a broader range of facts than the location where the plaintiffs actually sustained their injuries.

Indeed, we observe that mechanically applying the presumption to bar these ATS claims would not advance the purposes of the presumption. A basic premise of the presumption against

extraterritorial application is that United States courts must be wary of “international discord” resulting from “unintended clashes between our laws and those of other nations.” *Kiobel*, 133 S.Ct. at 1664 (citation omitted). In the present case, however, the plaintiffs seek to enforce the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced. Thus, any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable. Moreover, this case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens. *Cf. Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 322–24 (D.Mass.2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because “[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself”).

We likewise note that further litigation of these ATS claims will not require “unwarranted judicial interference in the conduct of foreign policy.” *Kiobel*, 133 S.Ct. at 1664. The political branches already have indicated that the United States will not tolerate acts of torture, whether committed by United States citizens or by foreign nationals.

The plaintiffs do not appear to have access to federal courts under the Torture Victim Protection Act of 1991 (TVPA), presumably because they did not suffer injury “under actual or apparent authority, or color of law, of any *foreign* nation....” Pub.L. No. 102–256, 106 Stat. 73, note following 28 U.S.C. § 1350 (emphasis added). Nevertheless, the TVPA’s broad prohibition against torture reflects Congress’s recognition of a “distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.” *Kiobel*, 133 S.Ct. at 1671 (Breyer, J., concurring in the judgment). This conclusion is reinforced by the fact that Congress has authorized the imposition of severe criminal penalties for acts of torture committed by United States nationals abroad. *See* 18 U.S.C. § 2340A. The Supreme Court certainly was aware of these civil and criminal statutes when it articulated its “touch and concern” language in *Kiobel*. *See Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring) (predicting that “[o]ther cases may arise with allegations of serious violations of international law principles protecting persons” that are “covered neither by the TVPA nor by the reasoning and holding of today’s case”).

We conclude that the plaintiffs’ ATS claims “touch and concern” the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI’s status as a United States corporation; (2) the United States citizenship of CACI’s employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI’s contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI’s employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI’s managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to “cover up” the misconduct, and “implicitly, if not expressly, encouraged” it; and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad. Accordingly, we hold that the district court erred in concluding that it lacked subject matter jurisdiction under the ATS, and we vacate the district court’s judgment dismissing the plaintiffs’ ATS claims on that basis.

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## B. ACT OF STATE, POLITICAL QUESTION, AND PREEMPTION DOCTRINES

### 1. *Al-Shimari v. CACI*

As discussed in section A.2.b., *supra*, the U.S. Court of Appeals for the Fourth Circuit remanded ATS claims to the district court for further proceedings in *Al-Shimari v. CACI*, 758 F.3d 516 (4<sup>th</sup> Cir. 2014). In addition to considering whether the claims sufficiently “touch and concern” the United States, the Court of Appeals also considered whether the political question doctrine precludes further adjudication. Excerpts below (with footnotes omitted), include the court’s reasoning that the fact-based political question doctrine requires further inquiry at the district court level before a determination could be made.

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Our decision regarding the ATS answers only the first issue of subject matter jurisdiction presented in this appeal. We also must consider whether the record before us adequately supports a finding that litigation of the plaintiffs’ ATS claims and common law tort claims will avoid any “political questions” that would place those claims outside the jurisdiction of the federal courts.

The political question doctrine is a “function of the separation of powers,” and prevents federal courts from deciding issues that the Constitution assigns to the political branches, or that the judiciary is ill-equipped to address. *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir.1991) (stating that the constitutional separation of powers “requires that we examine the relationship between the judiciary and the coordinate branches of the federal government cognizant of the limits upon judicial power”). The Supreme Court has defined a political question by reference to whether a case presents any of the following attributes: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made;” or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217, 82 S.Ct. 691.

\* \* \* \*

We first observe that CACI's position asserting the presence of a political question was resolved by the district court in the plaintiffs' favor much earlier in this litigation. In March 2009, before any discovery had been conducted, CACI challenged the court's subject matter jurisdiction on political question grounds, based on the allegations in the complaint.

At that time, the district court analyzed the six factors set forth by the Supreme Court in *Baker* solely by reference to the plaintiffs' complaint, and rejected CACI's jurisdictional challenge. ...

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Although CACI appealed the district court's ruling on numerous bases, including justiciability, our conclusion that we lacked jurisdiction over the interlocutory appeal under the collateral order doctrine returned the case to the district court without a decision whether the case presented a political question. *See Al Shimari*, 679 F.3d at 224. On remand, the district court dismissed the plaintiffs' ATS claims for lack of jurisdiction under *Kiobel*, and also dismissed the plaintiffs' remaining common law tort claims under Federal Rule of Civil Procedure 12(b)(6).

In this appeal, CACI renews its political question challenge, contending that the treatment and interrogation of detainees during war is a key component of national defense considerations that are committed to the political branches of government. CACI also asserts that there are no judicially discoverable standards for deciding intentional tort claims in the context of a war zone, and that CACI interrogators were performing a "common mission" with the military and were acting under direct military command and control. CACI further maintains that most of the alleged forms of abuse at issue "were approved by the Secretary of Defense and incorporated into rules of engagement by military commanders at Abu Ghraib."

CACI's arguments are based on constitutional considerations and factual assertions that are intertwined in many respects. We begin our consideration of these arguments by recognizing that "most military decisions" are matters "solely within the purview of the executive branch," *Taylor*, 658 F.3d at 407 n. 9, and that the Constitution delegates authority over military matters to both the executive and legislative branches of government. *See Burn Pit*, 744 F.3d at 334; *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir.2012).

Nevertheless, the fact that a military contractor was acting pursuant to "orders of the military does not, in and of itself, insulate the claim from judicial review." *Taylor*, 658 F.3d at 411. Accordingly, before declaring such a case "to be nonjusticiable, a court must undertake 'a discriminating analysis' that includes the litigation's 'susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.'" *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir.2008) (quoting *Baker*, 369 U.S. at 211–12, 82 S.Ct. 691). Such an analysis involves a "delicate exercise in constitutional interpretation." *Baker*, 369 U.S. at 211, 82 S.Ct. 691.

Importantly, in the present case, more than five years have elapsed since the district court rendered its initial determination of justiciability. During the intervening period, this Court has formulated a test for considering whether litigation involving the actions of certain types of government contractors is justiciable under the political question doctrine. *See Taylor*, 658 F.3d at 411.

In our decision in *Taylor*, we adapted the Supreme Court's analysis in *Baker* to a particular subset of lawsuits, namely, those brought against government contractors who perform services for the military. *See Burn Pit*, 744 F.3d at 334 (observing that *Taylor* "adapted *Baker* to

the government contractor context through a new two-factor test”). The factual record in *Taylor* involved a soldier who was performing work on an electrical box at a military base in Iraq, and was electrocuted when an employee of a government contractor activated a nearby generator despite an instruction from military personnel not to do so. *Taylor*, 658 F.3d at 404. When the soldier sued the military contractor for negligence, the government contractor claimed that the case presented a nonjusticiable political question. *Id.*

In analyzing the justiciability of the soldier’s negligence claim, we recognized the need to “carefully assess the relationship” between the military and the contractor, and to “gauge the degree to which national defense interests may be implicated in a judicial assessment” of the claim. *Id.* at 409–10. We distilled the six *Baker* factors into two critical components: (1) whether the government contractor was under the “plenary” or “direct” control of the military; and (2) whether national defense interests were “closely intertwined” with military decisions governing the contractor’s conduct, such that a decision on the merits of the claim “would require the judiciary to question actual, sensitive judgments made by the military.” *Id.* at 411 (quotation omitted). We noted that an affirmative answer to either of these questions will signal the presence of a nonjusticiable political question. *See Burn Pit*, 744 F.3d at 335 (stating that under *Taylor*, a formal “*Baker* style analysis” is not necessary, and that “if a case satisfies either factor [articulated in *Taylor* ], it is nonjusticiable under the political question doctrine”).

We further explained in *Taylor* that, in conducting this two-part inquiry, a court must “‘look beyond the complaint, and consider how [the plaintiffs] might prove [their] claim[s] and how [the contractor] would defend.’ ” *Taylor*, 658 F.3d at 409 (quoting *Lane*, 529 F.3d at 565) (original brackets omitted) (alterations added) (emphasis in original). This determination requires consideration of the facts alleged in the complaint, facts developed through discovery or otherwise made a part of the record in the case, and the legal theories on which the parties will rely to prove their case.

In *Taylor*, we stated that “if a military contractor operates under the plenary control of the military, the contractor’s decisions may be considered as de facto military decisions.” 658 F.3d at 410. Based on the factual record presented in that case, we concluded that the military did not exercise “direct control” over the contractor because the record showed that responsibility for the manner in which the job was performed was delegated to the contractor. *Id.* at 411. In drawing this conclusion, we relied on the parties’ contract, which recited that “[t]he contractor shall be responsible for the safety of employees and base camp residents during all contractor operations,” and that “the contractor shall have exclusive supervisory authority and responsibility over employees.” *Id.* at 411.

We contrasted these facts with those reviewed in *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1275–79 (11th Cir.2009), a case in which the plaintiff had sued a military contractor for negligence resulting from injuries sustained when the plaintiff’s husband, a sergeant in the United States Army, was thrown from a vehicle in a military convoy that was driven by the contractor’s employee. In deciding whether the case presented a political question, the Eleventh Circuit observed that there was no indication in the record that the contractor had any role in making decisions regarding the movement of the military convoy vehicle. *Id.* at 1282. Thus, the court held that the case was nonjusticiable, “[b]ecause the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, [and] it would be impossible to make any determination regarding [either party’s] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny.” *Id.* at 1282–83. Because the facts in *Taylor* did not manifest such “direct control” over the

contractor's performance of its duties, we resolved this factor in the plaintiff's favor. 658 F.3d at 411.

Since our decision in *Taylor*, we have clarified that the critical issue with respect to the question of "plenary" or "direct" control is not whether the military "exercised some level of oversight" over a contractor's activities. *Burn Pit*, 744 F.3d at 339. Instead, a court must inquire whether the military clearly "chose *how* to carry out these tasks," rather than giving the contractor discretion to determine the manner in which the contractual duties would be performed. *Id.* (emphasis added); *see also Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 467 (3d Cir.2013) (stating that plenary control does not exist when the military "merely provides the contractor with general guidelines that can be satisfied at the contractor's discretion" because "contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359–61 (11th Cir.2007) (holding that a contract for aviation services in Afghanistan did not manifest sufficient military control to present a political question because the contractor retained authority over the type of plane, flight path, and safety of the flight).

The second *Taylor* factor concerns whether "a decision on the merits ... would require the judiciary to question actual, sensitive judgments made by the military." *Taylor*, 658 F.3d at 412 (internal quotation marks omitted). In analyzing this factor, a court must focus on the manner in which the plaintiffs might attempt to prove their claims, and how the defendants are likely to defend against those claims. *See id.* at 409. Addressing this issue in *Taylor*, we held that a political question was presented because a military contractor's contributory negligence defense to the plaintiff's common law negligence claim "would invariably require the Court to decide whether the Marines made a reasonable decision in seeking to install the wiring box," and would oblige the court to evaluate the reasonableness of military decisions. *Id.* at 411–12.

By contrast, in *Burn Pit* we analyzed a military contractor's "proximate causation" defense, in which the contractor maintained that the plaintiff's alleged injuries were caused by military decisions and conduct. 744 F.3d at 340. After examining the record that the district court considered, we concluded that the contractor's causation defense would require an examination of the reasonableness of military decisions only if the case ultimately proceeded under the law of a state having a proportional-liability system that assigns liability based on fault. *Id.* at 340–41; *see also Harris*, 724 F.3d at 463 (holding that the contractor's assertion that the military was a proximate cause of the alleged injury did not present a political question under a joint-and-several liability regime, and that even if proportional liability applied, the plaintiffs could proceed on any damages claim that did not implicate proportional liability); *Lane*, 529 F.3d at 565–67 (concluding that the assertion of a causation defense to fraud and negligence claims did not necessarily implicate a political question).

In the present case, however, we do not have a factual record developed by the district court like the records considered in *Taylor* and in *Burn Pit*. And, from our review of the record before us, we are unable to determine whether a political question exists at this stage of the litigation.

With respect to the first *Taylor* factor, the evidence in the record is inconclusive regarding the extent to which military personnel actually exercised control over CACI employees in their performance of their interrogation functions. CACI argues that military control is evidenced by the contract's stipulation that CACI would provide services "as directed by military authority." CACI also cites a deposition in which a military officer stated that [redacted]

According to that officer, [redacted] Finally, a military contracting officer declared that [redacted]

The plaintiffs argue in response that there was an absence of “direct control” by the military over the manner in which CACI’s contract was to be performed, and that the contract language reflects a broad grant of discretion to CACI. *See Taylor*, 658 F.3d at 411. In support of their position, the plaintiffs point to the contract’s statement that “[t]he Contractor is responsible for providing supervision for all contractor personnel,” and that CACI was required to “supervise, coordinate, and monitor all aspects of interrogation activities.” The plaintiffs also note that the military officer upon whose testimony CACI relies [redacted] Additionally, the record lacks any evidence whether any of the alleged acts of abuse by CACI personnel ever were ordered, authorized, or approved by the United States military or by other governmental authority.

This limited record suggests that, at least for required interrogations, CACI interrogators may have been under the direct control of the military if they submitted and executed interrogation plans approved by the military, and if those interrogation plans detailed particular methods for treating detainees. However, based on the minimal evidence before us, we are unable to determine whether the actual content of any interrogation plans subjected the CACI interrogators to such direct control. We also are unable to determine the extent to which the military controlled the conduct of the CACI interrogators outside the context of required interrogations, which is particularly concerning given the plaintiffs’ allegations that “Most of the abuse” occurred at night, and that the abuse was intended to “soften up” the detainees for later interrogations.

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## 2. ***Villoldo v. Castro Ruz v. Computershare***

On June 30, 2014, the United States filed a statement of interest in an action by a plaintiff seeking to enforce a judgment against Cuba by attaching securities and accounts, registered to individuals who listed Cuban addresses, that are maintained by Computershare Ltd. in the United States. *Villoldo et al. v. Castro Ruz et al. v. Computershare Ltd.*, No. 4:13-mc-94014-TSH (D. D. Mass). The plaintiffs sought to execute on a \$2.8 billion judgment they obtained for alleged acts of torture by the Cuban government. The federal district court ordered the attachment before the United States became involved in the case. The U.S. brief argues that the assets at issue are not subject to attachment because they have not been demonstrated to be assets owned by the Cuban government. Excerpts from the section of the U.S. brief relating to the impropriety of attaching the assets appear in Chapter 10. Excerpted below (with footnotes omitted) is the section of the brief arguing that the act of state doctrine is not applicable in this case. The full text of the brief is available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). The United States filed a brief that also argued the inapplicability of the act of state doctrine in a case brought by the same plaintiffs seeking to attach assets held by the Comptroller of New York in his capacity as custodian of unclaimed funds under New York’s Abandoned Property Law. That brief is also available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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Although the Court’s Turnover Order does not cite the Act of State doctrine as the basis for its application of Cuban law, the plaintiffs, in their most recent filing, argue that the doctrine should apply in this case. See Pls.’ Reply at 6. These arguments reflect a misunderstanding of the doctrine, which, by its terms, applies only to acts of a sovereign affecting property within its own territory. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.” (emphasis added)); *Hilton v. Kerry*, --- F.3d ---, 2014 WL 2611146, at \*4 n.4 (1<sup>st</sup> Cir. 2014) (same). The requirement that the act must occur and be operative in the sovereign’s own territory is an essential element of the doctrine. Here, where the property allegedly affected by an official act of Cuba is in the United States, the doctrine is simply inapplicable.

Plaintiffs attempt to argue that an “extraterritorial exception” somehow creates an exception to the requirement that the act of state be in the territory of the state. This is simply not the case. The “extraterritorial exception” is an exception to the rule that an act of state must be given effect and holds that, when inconsistent with the policy and law of the United States, “our courts will *not* give ‘extraterritorial effect’ to a confiscatory decree of a foreign state, even where directed against its own nationals.” *Tchacosh Co., Ltd. v. Rockwell Int’l Corp.*, 766 F.2d 1333, 1336 (9th Cir. 1985) (emphasis added) (quoting *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972)); see also *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903 (2d Cir. 1981). In simple terms, the exception allows courts to examine an act of state’s effects on property in the United States; the court need not follow the Act of State doctrine when the exception applies. Most courts, in the face of foreign confiscatory laws purporting to affect property in the United States, have declined on policy grounds to give effect to the act of state; in rare circumstances unlike those presented here, . . . courts have found that giving effect to certain such laws furthers U.S. policy. But the exception does not in any way require or suggest that the act of state must be given effect; in fact, just the opposite—the extraterritorial exception frees the court from the constraints of the Act of State doctrine.

Here, as a threshold matter, and for reasons explained above, choice-of-law rules dictate what substantive law should be applied, and thus the Act of State doctrine and extraterritorial exception are irrelevant. Likewise, plaintiffs’ contention that “the Cuban laws at issue are not confiscatory,” but instead are criminal laws that impose a forfeiture penalty for non-compliance, Pls.’ Reply at 6-7 (emphasis added), underscores that the penal law rule would bar the Court from giving effect to the Cuban laws. . . .

In any event, plaintiffs’ contention that reliance on Cuban law for the turnover of the assets in the United States is appropriate because (1) such transfer is consistent with U.S. policy, and (2) the previous owners have not objected, is meritless. See Pls.’ Reply at 11-16.12 Even if these factors were relevant, it is the executive’s determination of policy interests, not plaintiffs’ views, that should control. See *Rubin*, 709 F.3d at 57; *Heiser*, 885 F. Supp. 2d at 441. As noted above, the United States has a strong interest in preserving the President’s ability to use blocked assets as a tool of U.S. foreign policy. Moreover, it would be contrary to U.S. policy interests to interpret and apply Cuban law such that it automatically transfers assets owned in the United

States by private parties to the Government of Cuba without a license and without compensation, and then allow those assets to be used to satisfy Cuba's legal obligation to other private parties—with one set of Cuba's victims effectively paying Cuba's debt to other victims. Similarly, it would not be consistent with U.S. policy interests to permit attachment of property subject to U.S. regulatory controls based on application of a Cuban penal law for the confiscation of property. Lastly, the failure of the record account holders to object, or otherwise to assert an interest in these assets during the period in which they have been blocked, should not be viewed as consent. The Government has serious concerns as to whether the notice protocol utilized here was adequate to provide account holders with actual notice. In any event, the absence of objections by the account holders cannot substitute for a sound legal basis establishing Cuban government ownership of the property.

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### 3. *Kellogg Brown & Root Servs., Inc., v. Harris*

In December 2014, the United States submitted an amicus brief in the U.S. Supreme Court in the wrongful death suit brought against a military contractor based on its wartime activities in Iraq. *Kellogg Brown & Root Servs., Inc., ("KBR") v. Harris*, No. 13-817. The estate of a soldier who was electrocuted in a facility where KBR performed the electrical work during the war in Iraq brought the wrongful death suit, which was dismissed by a federal district court as barred by both the political question doctrine and preemption due to the foreign battlefield and military context. The U.S. Court of Appeals for the Third Circuit reversed and remanded, rejecting KBR's argument that the claims were preempted by the federal interests in the combatant-activities exception to the Federal Tort Claims Act ("FTCA"). KBR petitioned for certiorari. The U.S. brief opposes granting certiorari in this case but expresses disagreement with aspects of the preemption analysis by the court of appeals. More specifically, the U.S. brief asserts that the court of appeals "applied an imprecise and unduly narrow understanding of preemption." The U.S. brief endorses the lower court's determination that the claims are not barred by the political question doctrine. Excerpts follow (with most footnotes omitted) from the U.S. amicus brief.\*\*

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\*\* Editor's note: On January 20, 2015, the Supreme Court denied the petition for certiorari.

**A. Although This Case Is Justiciable At This Stage Of The Litigation, Respondents' Claims Are Preempted**

1. The court of appeals correctly held that respondents' claims are not barred by the political-question doctrine at this stage of the litigation.

a. The political-question doctrine is "primarily a function of separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as relevant here, "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." 369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid.*

The Constitution confers on the Legislative and Executive Branches broad authority over the military. See U.S. Const. Art. I, § 8, Cls. 11-16; *id.* Art. II, § 2, Cl. 1. Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, military affairs feature prominently among the areas in which the political-question doctrine traditionally has been implicated. In *Gilligan v. Morgan*, 413 U.S. 1 (1973), for example, this Court held that the political-question doctrine barred a suit seeking injunctive relief based on allegations that the National Guard used excessive force in responding to Vietnam war protesters at Kent State University, because "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Id.* at 5, 10. Indeed, the Court found it "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," and "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10.

The basic principle, therefore, is that where resolving a legal claim would require an evaluation of quintessentially military judgments, such as operational decision-making in foreign theaters of war, the claim is nonjusticiable under the political-question doctrine. Courts of appeals have steadfastly applied that principle in cases seeking review of military judgments. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007); *Aktepe v. United States*, 105 F.3d 1400, 1403-1404 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); *Tiffany v. United States*, 931 F.2d 271, 275, 277-278 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992).

b. In this case, respondents do not assert that petitioner was negligent for engaging in conduct ordered or approved by the military. Rather, they argue that within general parameters set by the military, petitioner acted negligently and that petitioner breached its contracts with the military. See Pet. App. 16 ("[Respondents] argue only that [petitioner] failed to satisfy the contractual standards."). Evaluating that claim would not necessarily require a factfinder to "scrutiniz[e] sensitive military decisions" (Pet. 15). Accordingly, if the claims were not otherwise barred (but see pp. 11-17, *infra*), the district court could treat military standards and orders as a given, such that the trier of fact could not question the wisdom of military judgments. Under such an approach, a jury could conclude that petitioner failed to act reasonably within the

parameters established by the military, such as the terms of the pertinent contracts. Or petitioner could prevail by demonstrating that it acted in a reasonably prudent manner given the military's parameters and the circumstances present in the theater of war at the time. Either way, while we believe respondents' claims are preempted, adjudication of those claims would not violate the constitutionally grounded political-question doctrine because it would not require searching judicial inquiry into the soundness of judgments made by the military itself.

The analysis of the decision below is consistent with that general approach. The court of appeals recognized that a claim that a contractor that adhered to military standards or orders should nevertheless be held liable under state law would pose a nonjusticiable political question because "review of the contractor's actions [would] necessarily include[] review of the military order directing the action[s]." Pet. App. 11. At the same time, the court correctly held that petitioner's assertion of a particular defense—such as contributory negligence—could render a claim nonjusticiable because, depending on the requirements for proving the defense or calculating damages, it might require an assessment of whether and to what extent the military should be regarded as having been at fault. See *id.* at 29, 35-36. The court correctly held, however, that determining whether such an assessment will be necessary for respondents to succeed on their claims must await further developments in the litigation, including identification of the applicable rules of liability.

c. Petitioner contends (Pet. 21) that adjudicating respondents' claims "would unquestionably require courts to review the Army's strategic judgments about placing soldiers in harm's way, such as its decisions concerning the acceptable level of risk in troop housing and the allocation of scarce resources." That is incorrect. Rather, the lawfulness and wisdom of the military's judgments must be taken as given, and the actions of petitioner must be evaluated in light of those judgments, such as the military's decision to house troops in Iraqi buildings. The United States shares petitioner's concern with the application of state tort law to regulate important contractor functions in an active war zone. That concern, however, is more appropriately addressed through preemption, not the political-question doctrine. Still, the deference owed to the political Branches on military matters, as reflected in the political-question doctrine, does reinforce the conclusion that respondents' claims here are preempted in the absence of affirmative authorization by Congress for state tort law to enter that field.

2. The court of appeals erred in holding that respondents' state-law tort claims are not preempted.

a. This Court has long recognized that even absent a federal statute, a federal-law rule of decision must govern certain questions involving "uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), such as where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). For example, this Court has held that a federal rule of decision displaces state law with respect to "[t]he rights and duties of the United States on commercial paper which it issues," *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943), "the priority of liens stemming from federal lending programs," *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), and "the scope of the act of state doctrine," *Sabbatino*, 376 U.S. at 427. Those fields "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." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

This Court applied those preemption principles in *Boyle* to hold that in certain circumstances state-law claims against federal procurement contractors are preempted. 487 U.S. at 512. *Boyle* held generally that “displacement of state law” is appropriate if “a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law,” or if “the application of state law would frustrate specific objectives of federal legislation.” *Id.* at 507 (internal quotation marks and citations omitted; brackets in original). The Court further held that “[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption.” *Ibid.*

Applying that framework, the Court concluded that application of state tort law to particular design features of military equipment would conflict with the federal policy embodied in the discretionary-function exception of the FTCA, which exempts from the FTCA’s waiver of sovereign immunity “[a]ny claim \* \* \* based upon the exercise or performance \* \* \* [of] a discretionary function,” 28 U.S.C. 2680(a). The “selection of the appropriate design for military equipment,” the Court explained, “is assuredly a discretionary function within the meaning of this provision,” because it involves “judgment as to the balancing of many technical, military, and even social considerations.” *Boyle*, 487 U.S. at 511. Although the FTCA does not apply to actions of contractors, 28 U.S.C. 2671, the Court concluded that it would “make[] little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.” *Boyle*, 487 U.S. at 512. Such liability “would produce the same effect sought to be avoided by the FTCA exemption” in that the “financial burden of judgments against the contractors would be passed through, substantially if not totally, to the United States itself.” *Id.* at 511-512.

b. The decision below correctly recognized that the general preemption framework set forth in *Boyle* and its antecedents governs this case. See Pet. App. 37- 45. It also correctly held, consistent with the holdings of three other circuits, that the FTCA’s combatant-activities exception codifies federal interests that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military’s auspices. See *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014), petition for cert. pending, No. 13-1241 (filed Apr. 11, 2014) (*Burn Pit*); *Saleh v. Titan Corp.*, 580 F.3d 1, 5-7 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011); *Koohi v. United States*, 976 F.2d 1328, 1336-1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). The military’s effectiveness would be degraded if its contractors were subject to the tort law of multiple States for actions occurring in the course of performing their contractual duties arising out of combat operations.

But the decision below articulated a preemption standard that is both imprecise and too narrow. Adopting a test first articulated by the D.C. Circuit in *Saleh*, the court held that a battlefield contractor is shielded from state-law tort liability if the contractor was “integrated into combatant activities over which the military retains command authority.” Pet. App. 42 (quoting *Saleh*, 580 F.3d at 9).

That standard appears to rest on a misunderstanding about the role of private contractors in active war zones and to reflect an unduly narrow conception of the federal interests embodied in the FTCA’s combatant-activities exception. Under domestic and international law, civilian contractors engaged in authorized activity are not “combatants.” Rather, they are civilians accompanying the force. They cannot lawfully engage in combat functions or combat operations, which are uniquely sovereign functions. See *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, DoD Instruction 3020.4.1, para. 6.1.1 (Oct. 3, 2005); *id.* para. 6.1.5; *Policy*

*& Procedures for Determining Workforce Mix*, DoD Instruction 1100.22, Encl. 4, para. 1.c(1)(b) (Apr. 12, 2010); 73 Fed. Reg. 16,764-16,765 (Mar. 31, 2008); Army Reg. 715-9, para. 3-3(d) (1999).

At the same time, however, the FTCA's combatant-activities exception does not apply only when the challenged act was itself a "combatant activity" or the alleged tortfeasor was itself engaged in a "combatant activity." The statute instead bars claims "arising out of the combatant activities of the military \* \* \* during time of war," 28 U.S.C. 2680(j) (emphasis added), and therefore applies not only to claims challenging the lawfulness of combatant activities, but also to claims seeking redress for injuries caused by combat support activities. Such claims are naturally understood to "arise out of" the military's combat operations. The scope of preemption of claims against military contractors should be equivalent.

Accordingly, under a properly tailored preemption test, claims against a contractor are generally preempted if (i) a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities, and (ii) 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. That test is particularly appropriate in situations where, as here, the contractor was integrated with military personnel on the same military base in the performance of the military's combat-related activities.<sup>1</sup> This rule respects the military's reliance on the expert judgment of contractors, gives effect to the reality of informal interactions between contractors and military personnel in combat and support operations, and guards against timidity of contractor personnel in performing critical functions out of fear of tort liability.

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 general scope of the contractual relationship between the contractor and the federal government. Determination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the responsibility of the United States, through contractual, criminal, or other remedies—not private state-law suits by individual service members or contractor employees. Compare *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); see also *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). But preemption would not apply to conduct of a contractor employee that is unrelated to the contractor's duties under the government contract; a claim challenging such conduct would not ordinarily be said to "arise out of" the military's combatant activities. That standard assures that preemption is properly tailored to the federal interest inherent in the combatant-activities exception: that actions arising out of the Nation's conduct of military operations should not be regulated by tort law.

Importantly, other legal avenues for obtaining compensation are available to service members and others injured by contractor negligence. For example, the Department of Veterans Affairs provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110; see also 38 U.S.C. 1131. In

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<sup>1</sup> Even if all these factors exist, however, in narrow circumstances countervailing federal interests may make preemption inappropriate. For example, preemption should not apply to shield a contractor from liability for acts of torture as defined by federal law. See 18 U.S.C. 2340A.

addition, a variety of benefits, including payment of a death gratuity, see 10 U.S.C. 1475, are provided to the survivors of service members who die while on active duty.

c. The claims against petitioner should be dismissed under the preemption standard proposed here. Respondents claim that petitioner acted negligently in performing contractual duties arising out of the military activities of the United States on a foreign battlefield. The maintenance of buildings on forward bases is an essential support service when the United States military conducts combat operations. Furthermore, when petitioner raised the United States' proposed preemption standard in the courts of appeals, respondents did not identify any sound reason to believe that petitioner was acting outside the scope of its contractual relationship with the military. See Resp. C.A. Reply Br. 14-17. As explained, respondents' claims that petitioner violated the terms of its contracts are insufficient to demonstrate that petitioner was acting outside the scope of the contractual relationship. Accordingly, the court of appeals erred in holding that the claims could proceed.

**B. Given The Interlocutory Posture Of This Case, Review Is Not Warranted At This Time**

Despite the importance of the preemption issue and the incorrect standard adopted by the court of appeals, the United States believes, on balance, that review is not warranted at this time given the interlocutory posture of this case.

1. There is no substantial conflict among the circuits on either the justiciability question or the preemption question.

a. Each of the circuits to consider the applicability of the political-question doctrine in the context of battlefield contractors has held that suits that require a factfinder to assess judgments of the U.S. military are nonjusticiable. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 334-341; *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282-1283 (11th Cir. 2009), cert. denied, 561 U.S. 1025 (2010). The decision below concluded that whether a factfinder would be required to evaluate military judgments may turn on the substantive state-law rule to be applied in the proceeding—for example, the requirements for proving a particular defense or assessing damages. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 339-341 & n.4; *Lane v. Halliburton*, 529 F.3d 548, 568 (5th Cir. 2008). Contrary to petitioner's contention (Pet. 27-29), the Eleventh Circuit's decision in *Carmichael* did not reject the proposition that the substantive legal requirements for proving a claim or defense can be relevant to whether a factfinder will be required to review military judgments. Rather, the Eleventh Circuit concluded only that the substantive principles of negligence relevant in that case did not vary among States. See 572 F.3d at 1288 n.13; cf. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359, 1365 (11th Cir. 2007) (holding that for a military contractor to successfully invoke the first *Baker* factor, it "must demonstrate that the claims against it will require reexamination of a decision by the military" and remanding for further factual development).

b. Likewise, no square conflict exists among the courts of appeals over the proper preemption test applicable to state-law tort claims against military contractors. As discussed, the decision below expressly adopted the standard articulated by the D.C. Circuit in *Saleh*, *supra*. ...

Petitioner contends (Pet. 34-36) that the decision below rejected *Saleh*'s approach. But the court of appeals rejected only the breadth of the D.C. Circuit's articulation of the federal interest at stake, while ultimately adopting the same preemption standard. See Pet. App. 41-42. And the Ninth Circuit's earlier decision in *Koohi* comports with that standard. See 976 F.2d at

1336-1337 (holding that claims against manufacturers of air-defense system for downing of civilian aircraft were preempted).

Although no circuit conflict exists on the preemption question, the United States agrees with petitioner that the issue warrants this Court's review. The scope of state-law tort liability for battlefield contractors has significant importance for the Nation's military operations. A legal regime in which contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations would be detrimental to military effectiveness. And as this Court recognized in *Boyle*, 487 U.S. at 511-512, expanded liability would ultimately be passed on to the United States, as contractors would demand greater compensation in light of their increased liability risks. Indeed, many military contracts performed on the battlefield contain indemnification or cost-reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States in certain circumstances. See, e.g., 48 C.F.R. 52.228-7(c).

Moreover, allowing state-law claims against battlefield contractors can impose enormous litigation burdens on the armed forces. Plaintiffs who bring claims against military contractors (as well as contractors defending against such lawsuits) are likely to seek to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records. It is therefore imperative that courts apply a preemption standard that is consonant with the significant federal interests at stake, and that "district courts \* \* \* take care to develop and resolve [preemption] defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives." *Martin v. Halliburton*, 618 F.3d 476, 488 (5th Cir. 2010).

2. Although this Court's review of the preemption issue is warranted, this case is not an appropriate vehicle to address that question at this time. The decision below is interlocutory, and it did not definitively resolve the political-question issue. Instead, it remanded the case for further proceedings that may result in dismissal or substantial narrowing of the case. . . .

This case thus may ultimately be deemed to raise a nonjusticiable political question even under the standard challenged by petitioner. If that does not occur, this Court could consider granting review at a later stage in this case. At that point, the issues will be more sharply presented for this Court's review.

3. If this Court were inclined to grant review of the questions presented, it should grant review in *KBR, Inc. v. Metzgar*, No. 13-1241, which arises out of the Fourth Circuit's *Burn Pit* decision and raises the same questions as the petition here, and hold this case. Because *Metzgar* includes an additional question about derivative sovereign immunity, granting review in that case would ensure that this Court can consider the full range of arguments against permitting state law to govern contractors' actions on foreign battlefields.

#### **4. *KBR, Inc., et al. v. Metzgar***

As mentioned in the U.S. *amicus* brief in *Harris, supra*, the United States filed an *amicus* brief in the U.S. Supreme Court in December 2014 in another case involving military contractors, including KBR. In addition to the political question doctrine and preemption, the *Metzgar* case involves an additional issue of the possible bar to claims against military contractors presented by the doctrine of derivative sovereign immunity.

The district court dismissed the claims, concluding that the political question doctrine, preemption, and derivative sovereign immunity all presented alternative grounds for dismissal. The U.S. Court of Appeals for the Fourth Circuit reversed and remanded, relying in part on the Third Circuit’s opinion in *Harris*. KBR petitioned for certiorari. As in *Harris*, the U.S. brief in the Supreme Court opposes granting certiorari. The claims in *Metzgar* relate to the contractors’ waste disposal services, about which multiple complaints were filed in state and federal courts by U.S. military personnel and others alleging that burn pits used by the contractors had exposed them to harmful emissions and contaminated their water. The U.S. *amicus* brief in *KBR, Inc., et al. v. Metzgar*, No. 13-1241, presents the same arguments as the U.S. brief in *Harris* with respect to the political question doctrine and preemption. The section of the brief regarding the principle of derivative sovereign immunity is excerpted below.\*\*\*

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3. The petition also presents (Pet. 35-39) the question whether petitioners are entitled to derivative sovereign immunity as government contractors. The United States believes the principle of derivative sovereign immunity informs the preemption analysis set forth above. Cf. Pet. 38 (noting that “the derivative sovereign immunity issue can be understood as part and parcel of the combatant-activities exception”). Indeed, *Boyle* relied on this Court’s discussion of derivative sovereign immunity in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), in establishing the basic preemption framework that governs this case. See *Boyle*, 487 U.S. at 505-506. Accordingly, that doctrine serves to reinforce the inappropriateness of applying state law in this context.

\* \* \* \*

3. If this Court were inclined to grant review, this case would be a more suitable vehicle than *Kellogg Brown & Root Services, Inc. v. Harris*, No. 13-817, because of the breadth of the claims and the inclusion of the derivative-sovereign-immunity question, which the *Harris* petition does not include. Although the United States believes that the doctrine of derivative sovereign immunity informs the basic preemption question, granting review in this case would ensure that this Court can consider the full range of arguments against permitting state law to govern contractors’ actions on foreign battlefields.

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\*\*\* Editor’s note: On January 20, 2015, the Supreme Court denied the petition for certiorari.

**Cross References**

McKesson v. Iran, **Chapter 8.B.2.**

Zivotofsky case regarding executive branch authority over state recognition, **Chapter 9.C.**

Execution of Judgments, **Chapter 10.A.4.(note)**

Restrictions on Attachment of Property under the FSIA and TRIA, **Chapter 10.A.4.b.**

Detroit International Bridge Co. v. Canada, **Chapter 11.B.2.a.**

International Comity, **Chapter 15.C.3.**