

NOTE

**MILITARY CONTRACTORS & CIVIL LIABILITY:
Use of the Government Contractor Defense to
Escape Allegations of Misconduct in Iraq &
Afghanistan**

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INTRODUCTION

This Note evaluates current avenues of accountability for private military contractors in Iraq and Afghanistan, with a focus on private tort actions involving wrongful death, civil rights claims, and human rights claims. Military contractors and their corporate employers—private military firms (PMFs)¹—play an essential, albeit ill-defined, role in the United States' nation-building efforts in Iraq and Afghanistan. However, due in part to the government's expanding use of PMFs to perform traditionally governmental functions, their precise legal status has yet to be determined. This Note argues against a sweeping expansion of the limited legal immunity historically available to PMFs through federal common law. A standard more closely tied to the underlying legal principles justifying immunity is proposed instead.

Part I considers the scope of the government's use of PMFs in military operations in Iraq and Afghanistan, and examines current regulatory provisions applicable to PMFs and their employees. While precise figures are unavailable, the estimated number of contractors in Iraq alone ranges from 20,000 to 155,000, depending on how one defines them and—more importantly—who is giving the estimate.² Responsibilities assigned to PMFs have evolved beyond non-military logistical support to include strategic advice, military training, and security services, straining contractors' legal status as noncombatants.³ Past experience illustrates that legal loopholes in both U.S. and Iraqi law make criminal prosecution of contractor misconduct difficult.⁴ Civil oversight and regulation by government agencies, the military, or even the public has been criticized by many observers as inadequate.⁵

1. The term PMF is taken from Peter Singer, National Security Fellow at the Brookings Institution and author of *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003) [hereinafter *CORPORATE WARRIORS*] (widely credited as a seminal work on the privatized military industry).

2. See *infra* notes 26-29.

3. See Ann Scott Tyson, *Private Security Workers Living on Edge in Iraq*, WASH. POST, Apr. 23, 2005, at A1 (discussing the "controversial" role of contractors and the fact that they are not considered combatants); see also Peter W. Singer, *Warriors for Hire in Iraq*, SALON, Apr. 15, 2004, <http://dir.salon.com/story/news/feature/2004/04/15/warriors/index.html>.

4. See *infra* Part I.B.1.

5. See *infra* Part I.B.2. The most recent example of lack of oversight was the release of a controversial "trophy" video in December, 2005, in which military contractors were apparently caught on tape "randomly" shooting at civilian Iraqi vehicles. *British, US Forces in Iraq are Urged to Drop Security Firms after "Trophy" Video is Shown*, BELFAST NEWS LETTER (N. IRELAND), Dec. 2, 2005, at 14; see also Wolf Blitzer, *The Situation Room: Bill Clinton Weighs in on Iraq War; Civilian Contractors Caught on Tape in Iraq* (CNN broadcast Dec. 1, 2005, 19:00 E.T.).

Part II turns to the role courts have played—and continue to play—in fostering accountability in the PMF industry. This Part first examines the history and development of suits against military contractors, in the context of the ever-evolving government contractor defense (the GCD). The GCD is a judicially created affirmative defense with modern-day statutory roots in the “discretionary function” exception to the Federal Tort Claims Act (FTCA). It allows for the preemption of state tort claims against PMFs, where certain conditions are met. Current litigation threatens to extend the scope of the defense beyond the “discretionary function” exception, to cloak PMFs in a much broader immunity from liability based on another rarely invoked FTCA provision: the “combatant activities” exception. This Note argues that to do so without retaining certain checks risks circumventing fundamental safeguards insisted upon by the Supreme Court in *Boyle v. United Tech. Corp.*,⁶ when the Court first formally extended the GCD to PMFs. These checks were created to ensure that only behavior that in fact was authorized by the government was granted immunity from liability.

Parts I and II illustrate the existing ambiguities surrounding legal issues applicable to PMFs and their employees. This uncertainty is harmful for all involved. PMFs, many of whom are beholden to shareholders,⁷ face unpredictable levels of tortious exposure in civil cases alleging misconduct or negligence. Respectable PMFs suffer a loss in image and public trust when the acts of less responsible firms go unpunished.⁸ Their employees exist in a state of legal limbo with few certain rights under either international or domestic law. Soldiers and civilians injured by PMFs and their employees must grapple with an increasingly complicated and inconsistent tangle of nascent doctrine. Such doctrine at times seems to promise relief, and at times to bar all hope of recovery.⁹

Complications are sure to arise in courts’ applications of this developing doctrine to novel questions of law implicating military affairs. However, the judiciary has a responsibility to adjudicate many of the legal issues that arise in the course of the government’s use of civilian contractors in Iraq and Afghanistan. As Part I will show, government agencies, the military, and the current administration have much work to do to ensure that PMFs and their employees are held to a fair and consistent standard of accountability. The private suits examined in Part II fill a void, emerging as a key instrument in the exercise of social control over contractors on both an individual and industry-

6. *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988).

7. “[M]any Americans already unknowingly own slices of the PMF industry in their 401Ks.” Singer, *supra* note 3.

8. Onnesha Roychoudhuri, *Who’s Fighting Our Wars?*, ALTERNET, Jan. 9, 2006, <http://www.alternet.org/waroniraq/30462/> (interview with Nick Bicanic, documentary filmmaker, discussing in part how “unprofessional ‘cowboys’ . . . give the industry a bad name and create a very negative reputation.”).

9. *See infra* Part II.

wide level.

This leaves the judiciary with a delicate task, one which this Note argues is best addressed through a principled adherence to the jurisprudence underlying the Supreme Court's decision in *Boyle*. Current circumstances in Iraq and Afghanistan add a new dimension to the inquiry concerning the GCD, complicating the analysis with issues arising from overseas combat and outsourced military duties. Yet the fundamental principle delineating the scope of PMFs' immunity from civil liability remains the same: only non-governmental actors carrying out the will of the sovereign should obtain the benefits of sovereign immunity. If courts are to re-fashion *Boyle's* grant of immunity in light of contemporary developments in American warfare, they must remain faithful to this fundamental principle. In conclusion, this Note proposes a standard tied to specific military orders or commands to ensure that immunity from liability—an immunity typically reserved for the government—will apply only in cases where contractors act according to the government's will.

PART I: INTRODUCTION TO PMFS

The rise to prominence of PMFs in current conflicts around the world is a relatively recent phenomenon. Section A describes the industry, detailing its basic corporate structure and the different specialties that have emerged within it. It also discusses the significance of PMFs in the United States' current nation-building and security efforts in Iraq and Afghanistan. Section B examines some existing forms of accountability applicable to the PMF industry and demonstrates why current avenues of accountability—both criminal and civil—fall short of ensuring adequate oversight.

A. Modern Day Overview of PMFs

PMFs play key roles in American military operations both domestically and abroad.¹⁰ The industry is comprised of three types of firms: military support firms, military consultant firms, and military provider firms.¹¹ The first

10. While this Note focuses on PMFs' presence in Iraq and Afghanistan, their domestic impact is not to be understated. For instance, ROTC training programs at over two hundred US universities have been contracted to PMFs. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004). After hurricane Katrina devastated Navy bases in Mississippi, "the Navy turned immediately to the Halliburton Company's KBR subsidiary for tasks like restoring electricity, repairing roofs and clearing debris at bases." John H. Cushman, Jr., *Navy Turns to Halliburton For Help on Damaged Bases*, N.Y. TIMES, Sept. 4, 2005, at 30.

11. SINGER, *supra* note 3, at 93; see also Private Military Companies, Partial Extracts from the Encyclopedia Encarta, http://www.privateforces.com/index.php?option=com_content&task=view&id=18&Itemid=47 (last visited Sept. 19, 2005). Note that, due in part to the emerging nature of the field

type, the military support firm, offers a wide range of support services traditionally handled by military forces—from driving convoys to cooking meals and maintaining war planes.¹² The Kellogg, Brown & Root subsidiary, Halliburton, is perhaps the most widely known American military support firm. The second type, the military consultant firm, provides strategic advice and military training.¹³ The American military consultant firm, Military Professional Resources, Inc. (MPRI), for example, is credited with training the Croat militia, enabling it to defeat the powerful Serbian army in 1995.¹⁴

The third category, military provider firms, provide “security services.”¹⁵ While PMF work in Iraq and Afghanistan spans all three categories, firms in this sector engender the most debate. Once called mercenaries, the industry now prefers the descriptor “private military companies.”¹⁶ Following the Geneva Convention in 1949 essentially outlawing the use of mercenary forces, traditional military security firms were relegated to the widely ignored, anarchic insurrections enveloping much of Africa. These firms regained legitimacy, however, by shying away from the brazen “guns for hire” image of their predecessors, focusing instead on defense work.¹⁷ For many outside observers, this transition began with the 1995 intervention in Sierra Leone by one (now defunct) South African firm, Executive Outcomes.¹⁸ Hired for an estimated \$15 million and various diamond mining concessions, two hundred well-armed “security providers” fought off approximately 10,000 rebels on behalf of the country’s besieged government.¹⁹ More recently, the United

(and, in turn, of scholarly writing concerning it) this definition is not universal. Some scholars consider the term “PMF” to be limited to contractors undertaking arms-bearing work (security services), distinct from “battlefield contractors” who provide logistical services. See, e.g. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 554 (2005) [hereinafter Schooner, *Contractor Atrocities*] (referring to “contractor personnel”), and email from Steven L. Schooner dated Jan. 18, 2006 [hereinafter Schooner, email] (discussing distinction between “PMFs” (e.g. arms-bearing contractors) and “battlefield contractors (cooks, cleaners, drivers, carpenters, etc.)”) (on file with author).

12. SINGER, *supra* note 3, at 136-48; see also *Private Military Companies*, *supra* note 11.

13. SINGER, *supra* note 3, at 119-35; see also *Private Military Companies*, *supra* note 11.

14. Interview with Peter Singer in *Privatizing War*, THE NATIONAL INTEREST (aired Dec. 26, 2004), transcript available at <http://www.abc.net.au/rn/talks/natint/stories/s1257290.htm> (last visited Sept. 21, 2005).

15. SINGER, *supra* note 3, at 101-18; see also *Private Military Companies*, *supra* note 11.

16. Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29.

17. *Id.*

18. *Id.*

19. Elizabeth Rubin, *Mercenaries*, CRIMES OF WAR (Roy Gutman, ed. 1999), available at <http://www.crimesofwar.org/thebook/mercenaries.html>; see also Bergner, *supra* note 16. Industry commentators note that EO was on the most extreme end of the spectrum of security providers in that EO not only “fought off” rebels, but—unlike a firm limited solely

States hired forty private gunmen from American-based DynCorp, Inc. to protect Afghani President Hamid Karzai in 2002.²⁰ Once relegated to the murky underworld of post-colonial conflict,²¹ post-Cold War demilitarization brought new demand to the market for private security providers.²²

Privatization has reached across the entire spectrum of military function, and the current U.S.-backed initiatives in both Iraq and Afghanistan depend heavily on PMFs to meet their needs. Experts widely recognize that “without contractors, our military simply cannot project its awesome technical superiority abroad.”²³ This is most starkly illustrated by the fact that, “[i]n the Persian Gulf war of 1991, the ratio of soldiers to contractors was 50 to 1. In the current Iraqi conflict, it is 10 to 1 and falling.”²⁴ The Pentagon estimates that there are approximately 20,000 civilians working in Iraq, “driving trucks, serving food and conducting other duties.”²⁵ Yet experts in terrorism law place figures at closer to 80,000 to 100,000, once security personnel are taken into account.²⁶ The Public Broadcasting Service (PBS) program, *Frontline*, observes that military contractors employ up to 155,000 individuals in Iraq, including those hired to handle support/logistics, security, and reconstruction efforts.²⁷

to defensive security services—also followed rebels, seeking them out and “attempt[ing] to destroy them, etc. (just like an army would).” See, e.g., email correspondence with Nick Bicanic, co-writer and co-director of *Shadow Company: Inside the World of Private Militaries* (forthcoming documentary film exploring the role of security contractors in Iraq), (Jan. 17, 2006) (on file with Author).

20. Bergner, *supra* note 16.

21. Office of the United Nations High Commissioner for Human Rights, *The Impact of Mercenary Activities on the Right of Peoples to Self-Determination*, HUMAN RIGHTS FACT SHEET No. 28 (2002), at 5.

22. SINGER, *supra* note 3, at 49-118.

23. Schooner, *Contractor Atrocities*, *supra* note 11, at 554; see also Laura Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005).

24. Rebecca Ulam Weiner, *Sheep in Wolves' Clothing: Private Military Men Patrol Iraq in Constant Jeopardy of Stepping on Legal Landmines*, LEGAL AFFAIRS, (Jan./Feb. 2006), available at http://www.legalaffairs.org/issues/January-February-2006/argument_weiner_janfeb06.msp.

25. Guy Taylor, *Legal Limbo Shadows Civilians in War Zone*, WASH. TIMES, July 6, 2005, at A1.

26. *Id.* Taylor cites Jeffrey Addicott, head of St. Mary's University's Center for Terrorism Law, who observed that “[t]he Pentagon likes to go with a lower number, but they're not counting the large number of security personnel hired to provide security for civilian contractors building bridges, roads and providing transportation.” *Id.*; see also Bergner, *supra* note 16.

27. Private Warriors, Frequently Asked Questions, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> (last visited Nov. 15, 2005) [hereinafter Private Warriors]. The precise breakdown is as follows:

—50,000 support/logistics contractors: These are civilians hired by KBR, the Halliburton subsidiary which holds the military's logistical support contract. They work as weathermen, cooks, carpenters, mechanics, etc. Most are from Third World countries

The entire PMF industry is currently said to number “several hundred [firms] around the globe,”²⁸ and PMFs now operate in over fifty conflict zones.²⁹ Their combined annual revenue is as much as \$100 billion.³⁰ The United States alone has entered into over 3,000 contracts with PMFs over the last decade.³¹ The Center for Public Integrity lists “150 companies with contracts worth up to \$48.7 billion for work in Iraq and Afghanistan” on its Web site.³² Yet, as the next Section shows, various legal and regulatory obstacles contribute to a lack of transparency in accounting for the precise number of contractors, the scope of their contracts, and their exact duties and responsibilities while in Iraq and Afghanistan. This secrecy is just one of the many obstacles undermining accountability in the industry.

B. The Legal Status of Military Contractors in Iraq & Afghanistan: Criminal Prosecution & Other Attempts at Forcing Accountability on the Industry.

[P]rivate military firms and their employees . . . tend to fall through the cracks of current legal codes, which sharply distinguish civilians from soldiers. Contractors are not quite civilians, given that they often carry and use weapons, interrogate prisoners, load bombs and fulfill other critical military roles. Yet they are not quite soldiers, either.

Peter Singer, *Outsourcing War*³³

Military contractors have received some degree of domestic legal immunity from tort claims since at least the latter half of the twentieth

and the majority is Filipino.

—20,000 non-Iraqi security contractors: Of these, 5,000-6,000 are British, American, South African, Russian or European; another 12,000 are from Third World countries, such as Fiji, Colombia, Sri Lanka, and India.

—15,000 Iraqi security contractors: Most of these were hired mainly by the British security firm Erinys to guard Iraq's oil infrastructure.

—40,000-70,000 reconstruction contractors: Hired to rebuild Iraq. Some are Iraqis, but they're mostly from the U.S. and dozens of other countries and employed by companies such as General Electric, Bechtel, Parsons, KBR, Fluor and Perini.

Id. See also interview by PBS Frontline with Doug Brooks, President of the Int'l Peace Operations Ass'n (IPOA), an association of private contractors (Mar. 22, 2005) <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/brooks.html> (last visited Jan. 10, 2006) (stating that there may be upwards of 50,000 to 60,000 security contractors in Iraq, once Iraqi security providers are taken into account).

28. Private Military Companies, *supra* note 11.

29. Singer, *supra* note 3.

30. Private Military Companies, *supra* note 11.

31. Singer, *supra* note 3.

32. *Windfalls of War, U.S. Contractors in Iraq and Afghanistan*, THE CENTER FOR PUBLIC INTEGRITY, <http://www.publicintegrity.org/wow/> (last visited Nov. 15, 2005).

33. Peter Singer, *Outsourcing War*, FOREIGN AFFAIRS, Mar. 1, 2005, available at <http://www.brookings.edu/views/articles/fellows/singer20050301.htm>.

century,³⁴ and this protection has vastly increased in scope over the last two decades.³⁵ This, coupled with the phenomenon created by the rash of contracts “hastily executed” between the PMF industry and the government in the early days of its occupation of Iraq and Afghanistan,³⁶ has resulted in an industry with only cursory government oversight.³⁷ Additionally, due to the fact that most recent contracts are executed abroad, an ambiguous legal status exists for the purpose of both civil and criminal liability. While this Note will primarily address civil liability, this Section will touch on some of the prosecutorial obstacles in bringing criminal charges against military contractors. It will also consider other attempts at forcing accountability on the industry, what has succeeded, and what limitations remain in current methods available to either Congress or the public. These examples serve to highlight the difficulties in categorizing PMFs for legal and administrative purposes—difficulties that are only echoed in the current civil litigation.

1. Avenues (and Obstacles) to Criminal Prosecution: Memorandum 17, MEJA, & the SMTJ

Aside from the traditional legal protections available to military contractors discussed in Part II (such as judicially created immunity from liability and the statutory preemption of claims), the situation in Iraq and Afghanistan is complicated by additional political developments. As a consequence of Memorandum 17, for instance, criminal prosecution of contractors for misconduct in Iraq is very likely impossible. Enacted by the Coalition Provisional Authority (and extended under the interim Iraqi government), Memorandum 17 provides a framework for the regulation of private security companies,³⁸ but it also provides them with immunity from Iraqi law.³⁹

34. See *infra* Part II.A (discussing the history of civil litigation against military contractors).

35. The cost to the government of indemnifying contractors, the currently existing workers compensation schemes (for claims brought by employees of PMFs), and the unique needs of the military are some of the pragmatic reasons given by courts for the immunity. See *infra* Part II.A.

36. John Helyar, *Fortunes of War; A Mercenary's Dream at the Outset of the War*, FORTUNE at 80 (July 26, 2004).

37. *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers* U.S. GEN ACCOUNTING OFFICE REPORT, GAO-05-737, 4 (July 2005) [hereinafter GAO Report].

38. Christian Lowe, *Marines Detain Contractors After Shots Reportedly Fired*, MARINE CORPS TIMES, 21 (June 20, 2005); see also Helyar, *supra* note 36 (“[w]ith the transfer of power from the Coalition Provisional Authority to the Iraqi interim government, security firms must now be licensed. They must show the Iraq Ministry of the Interior that they have adequate insurance; they must submit to semiannual audits; and they must satisfy a host of other requirements to prove they're substantive, law-abiding businesses.”).

39. *Coalition Provisional Authority Memorandum Order Number 17* (REVISED), at 4 (2004), available at

Contractors are instead subject to the legal authority of their home county.⁴⁰

In the U.S. at least, this is problematic. Unless a formal war is declared by Congress, civilians—military contractors included—are not subject to the legal code governing members of the U.S. military, the Uniform Code of Military Justice (UCMJ).⁴¹ Thus, even if the contractor in question is working under some type of military supervision (a significant assumption⁴²), he or she nonetheless would not fit into the disciplinary structure applicable to normal soldiers. Contractors are outside the typical military chain of command for punitive purposes. This is true even for contractors “embedded” within military units, carrying out traditional military functions such as translation or interrogation.⁴³

The other option, to prosecute contractors as civilians, has posed only slightly less difficult jurisdictional hurdles. Until recently, American case law effectively shielded civilians employed by the military overseas from prosecution when the crimes in question were committed abroad.⁴⁴ Congress attempted to curb this civilian immunity by enacting the Military Extraterritorial Jurisdiction Act (MEJA)⁴⁵ in 2000. MEJA provides for federal prosecution of certain crimes committed by U.S. civilians while employed by or accompanying U.S. forces abroad.⁴⁶ However even this provision is not without its weaknesses: MEJA was originally limited to civilian employees of the Department of Defense, and at least some contractors in Iraq are employed

http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf.

40. Private Warriors, *supra* note 27.

41. Uniform Code of Military Justice, 10 U.S.C.S. prec § 801, at 802(a)(10)1-946 (2000). For cases addressing military jurisdiction over civilians, see *Reid v. Covert*, 354 U.S. 1 (1957) and *Kinsella v. Singleton*, 361 U.S. 234 (1960).

42. Many contractors do not fall under military control. A 2005 Report by the GAO found that “[t]he relationship between the military in Iraq and employees of private security providers is one of coordination and cooperation, not control. Both U.S. Central Command officials and military personnel previously stationed in Iraq told us that there is no command and control relationship between the military and private security provider employees.” GAO Report, *supra* note 37.

43. See discussion *infra* Part II.B.2. Additionally, some contractual obligations of PMFs’ employees may cause them to lose their noncombatant status and associated rights under the Geneva Convention.

44. “Civilian contractors have been able to operate with little fear of sanction because of a series of Supreme Court rulings going back at least to *Reid v. Covert*, 354 U.S. 1 (1957). That decision held that the Uniform Code of Military Justice did not cover crimes committed by spouses of military personnel. Other cases extended the exemption to civilians.” Chris Lombardi, *Law Curbs Contractors in Iraq; Statute Fills Void in Prosecution for Abuses During Conflict*, ABA JOUR. E-REPORT (May 14, 2005), available at <http://www.scrivovivo.net/chris/my14iraq.html>.

45. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-778.523, 114 Stat. 2488 (codified at 18 U.S.C. § 3261 (2000)).

46. Q&A: *Private Military Contractors and the Law*, HUMAN RIGHTS WATCH (October 21, 2004), available at http://hrw.org/english/docs/2004/05/05/iraq8547_txt.htm (last visited Nov. 15, 2005).

by either the Department of the Interior.⁴⁷

MEJA amendments in 2004, supported by both members of the military and PMF industry organizations,⁴⁸ attempt to close that loophole by expanding jurisdiction to employees of “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”⁴⁹ However, these amendments do not appear to have a retroactive effect; and since contractor misconduct arising out of incidents such as the Abu Ghraib torture scandal appears to fall outside of pre-amended MEJA,⁵⁰ their true impact has yet to be felt. “As of June 2005, the only person to be prosecuted under MEJA was Latasha Lorraine Arnt, who in February 2005 was sentenced to eight years in prison for killing her husband, a military policeman stationed at a U.S. Air Force Base in Turkey.”⁵¹

Other avenues for criminal prosecution remain, although they are rarely invoked for the purpose of criminal prosecution of military contractors.⁵² David Passaro, a CIA contractor allegedly responsible for the torture of a detainee in Afghanistan, has been charged with assault⁵³ under a provision of the USA PATRIOT Act⁵⁴ that extends the Special Maritime and Territorial

47. This was true in the case of the Titan and CACI employees implicated in the Abu Ghraib torture scandal. See Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004, at A18.

48. Major Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, THE ARMY LAWYER, June 2005, at 41 (discussing the need to amend MEJA to include contractors employed outside of the Department of Defense); see also Peter Spiegel, *No Contractors Facing Abu Ghraib Abuse Charges*, LONDON FIN. TIMES, Aug. 9, 2005, at 6 (“Douglas Brooks, head of the Washington-based International Peace Operations Association, said the industry supported last year’s expansion of the MEJA, which formerly applied only to contractors deployed with US troops.”).

49. 18 U.S.C. § 3267 (1)(A)(i)(II) (2004), amended by Pub. L. No. 108-375, 118 Stat 1811 (rewriting para. (A), which formerly read: “employed as a civilian employee of the Department of Defense (including a nonappropriated fund instrumentality of the Department), as a Department of Defense contractor (including a subcontractor at any tier), or as an employee of a Department of Defense contractor (including a subcontractor at any tier)”).

50. This concern was raised in the Fay Report, which observed that some contractors, not employed by the Department of Defense, may avoid criminal prosecution. MG George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 50* (2004), <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf> (last visited Mar. 26, 2005) [hereinafter Fay Report].

51. Private Warriors, *supra* note 27.

52. Also available to prosecutors is the U.S. War Crimes Act of 1996 (18 U.S.C. § 2441) (effective against U.S. nationals only), and the federal anti-torture statute (18 U.S.C. § 2340). For a discussion of legal obstacles unique to these provisions, see Mark W. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1250-53 (2005).

53. *CIA Contractor Charged with Assaulting Afghan Detainee*, 18 No. 5 Andrews Gov’t Cont. Litig. Rep. 1 (July 7, 2004).

54. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56,

Jurisdiction Act to include “diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership.”⁵⁵ His case, *United States v. Passaro*, is pending in the U.S. District Court for the Eastern District of North Carolina.⁵⁶ While the USA PATRIOT Act provision is not the only means by which criminal charges can be brought against military contractors, the *Passaro* case appears to be the first, and only, of its kind.

2. Additional Strategies for Accountability: Governmental Regulation & Oversight, Public FOIA Requests, & Market Forces

Criminal prosecution is only one form of accountability. Certain regulatory measures by Congress are aimed at increasing oversight, and laws such as the Freedom of Information Act (FOIA) give regular citizens some power to make inquiries into the scope of government contracts with PMFs. Also, as for-profit corporations, PMFs are naturally vulnerable to market forces and the various incentives a capitalist system provides. While each of these controls provides some amount of accountability, this Section demonstrates why most observers find them far from adequate.

The International Traffic in Arms Regulations (ITAR)⁵⁷ provide a limited licensing scheme for PMFs in the U.S., where firms’ contracts involve arms transfers.⁵⁸ Unfortunately, ITAR captures only a fraction of the PMFs working in Iraq and Afghanistan. Government contracts worth less than \$50 million are exempt from the reporting requirements, and the practice of subcontracting also

115 Stat. 272-402 (codified as amended in scattered sections of 50 U.S.C.).

55. 18 U.S.C. § 7(9)(A) (2006).

56. *United States v. Passaro*, No. 5:04-CR-211-1, *indictment filed* (E.D.N.C. June 17, 2004); *CIA Contractor Charged with Assaulting Afghan Detainee*, *supra* note 53.

57. The International Traffic in Arms Regulation, 22 C.F.R. 120, 1-30 (2001) [hereinafter ITAR].

58. ITAR implements § 38 of the Arms Export Control Act (AECA), Pub. L. No. 90-629, 82 Stat. 1320 (codified as amended at 22 U.S.C. 2778). 22 C.F.R. 120.1(a).

An amendment to the AECA in July 1996, implemented by Part 129 of the ITAR, requires brokers of defense articles and defense services to register with the Department. This change expanded registration coverage of the defense community to include all U.S. persons, “wherever located, and any foreign person located in the U.S., or otherwise subject to the jurisdiction of the United States” who engage “in the business of brokering activities.” Brokering activities are defined as including “the financing, transportation, freight forwarding or taking of any other action that facilitates the manufacture, export or import of a defense article or defense services.” The statute and regulations have broad jurisdictional reach at to the persons it covers.

Philip S. Rhoads, *The International Traffic In Arms Regulations: Compliance and Enforcement in the Directorate of Defense Trade Controls U.S. Department of State*, 857 PLI/COMM 493, 499 (2003) (footnotes omitted). For additional discussion of ITAR limitations, see Singer, *supra* note 10, at 538-39.

seems to allow other PMFs to escape government scrutiny.⁵⁹ ITAR also fails to provide a mechanism for continued supervision once a license is granted by the government.⁶⁰ Even the most basic governmental oversight of certain PMFs—simply tracking costs—was recently found lacking in a 2005 Government Accountability Office report to Congress. In it, the GAO found that “neither the Department of State, nor DOD nor the U.S. Agency for International Development (USAID) have complete data on the costs of using private security providers.”⁶¹ While at least one bill, introduced in the House of Representatives in April of 2005, seeks to impose greater oversight on private security providers, it continues to await consideration by the House committees.⁶²

Public requests for information under the Freedom of Information Act have run into even greater obstacles. FOIA does not apply to private contractors,⁶³ and, as one scholar notes, “[a]lthough FOIA does permit the public to request information about the terms of contracts, the contractors essentially have a veto over the release of contract terms if they contain ‘trade secrets and commercial or financial information obtained from a person and [are] privileged or confidential.’”⁶⁴ Attempts by journalists to obtain government records detailing contractor involvement in violent incidents have also stalled, leading to a recent FOIA lawsuit by the *L.A. Times*.⁶⁵

Another potential control over PMFs is the very market in which they

59. U.S. GOVERNMENT CONTRACTS WORTH \$50 MILLION OR MORE WITH PRIVATE COMPANIES MUST BE REPORTED TO CONGRESS, AND THE COMPANIES MUST COMPLY WITH THE U.S. INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (ITAR), WHICH REGULATES THE IMPORT AND EXPORT OF ARMS MATERIAL AND SERVICES. BUT, FOR EXAMPLE, OF THE 60 KNOWN PRIVATE SECURITY COMPANIES OPERATING IN IRAQ, ONLY EIGHT WORKED DIRECTLY FOR THE CPA; THE REST ARE SUBCONTRACTED TO PROVIDE PROTECTION FOR THE PRIMARY CONTRACTORS OR EVEN OTHER SUBCONTRACTORS. WHEN COMPANIES ARE NOT CONTRACTED DIRECTLY TO THE GOVERNMENT, THEY ARE ACCOUNTABLE ONLY TO THE CONTRACTOR WHOM EMPLOYS THEM.

Private Warriors, *supra* note 27; see also Singer, *supra* note 10, at 539 (“[m]any contracts naturally fall under [\$50 million], while larger ones are easily broken up to do so”).

60. Singer, *supra* note 10, at 539 (“once a PMF receives a license, there are no specific follow-up oversight requirements to see how they carry out the contract in reality”).

61. GAO Report, *supra* note 37. For additional discussion on oversight problems, see Dan Guttman, *The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work—Mostly Out of Public View*, THE CENTER FOR PUBLIC INTEGRITY (Sept. 29, 2004), <http://www.publicintegrity.org/pns/report.aspx?aid=386>; see also Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 192-93 (2005).

62. H.R. 2011, 109th Cong. (2005). At the time of this writing, the bill—the Transparency and Accountability in Security Contracting Act—was awaiting consideration by the House Armed Services Committee and the International Relations Committee.

63. 5 U.S.C. § 552(b)(4) (2000).

64. Dickinson, *supra* note 23, at 192.

65. Dana Point, *Los Angeles and Orange County Roundup City News Service*, CITY NEWS SERVICE (Nov. 23, 2005).

operate.⁶⁶ The government, as consumer, is not obligated to renew contracts and can cancel them where certain conditions are met. Additionally, PMFs themselves have incentives to hire responsible, qualified employees. While these employees may not be subject to the UCMJ, individuals can be sent back to the United States and their employment terminated.⁶⁷ Critics, however, point out that insufficient resources have been invested in contract management and that as a result, contractors' performance is not adequately monitored.⁶⁸ Regular market forces do not apply to irrational consumers who are unaware of what precisely they are purchasing, or its quality. Additionally, while PMFs have incentives to hire qualified workers, a high demand and short supply of trained individuals means that, in at least some cases, PMFs provide (and the military accepts) untrained workers.⁶⁹

For these reasons, oversight of PMFs, whether governmental, public or market-driven, has been criticized as far from adequate. If military reliance on PMFs continues, as most observers expect, many of the shortcomings outlined above will be addressed in one form or another. Until a fair and consistent system of accountability is put into place, however, civil lawsuits fill a vacuum. These suits are the subject of Part II, below.

PART II: CASE LAW INVOLVING PMFS

Part II first examines the history of litigation against PMFs in the context of the government contractor defense (the GCD). As noted in the Introduction, the GCD is a judicially created affirmative defense with statutory roots in the "discretionary function" exception to the Federal Tort Claims Act. It provides PMFs with immunity from state tort liability where certain conditions are met. Section A traces the evolution of the GCD from its initial recognition by the Supreme Court in 1940 to more recent expansions of the doctrine. Section B

66. For a more general discussion on government contracting and market forces, see Dan Guttman, *Governance by Contract: Constitutional Visions; Time of Reflection and Choice*, 33 PUB. CONT. L.J. 321, 344 (2004) (discussing realities underlying "the invocation of competition as key to the benefits of contracting").

67. See discussion *infra* Part II.B.2.

68. For a comprehensive account of obstacles faced by the government in its management of contracts, see Schooner, *Contractor Atrocities*, *supra* note 11. The lack of proper management was one factor that contributed to contractor involvement in the Abu Ghraib torture scandal, according to the Fay Report, *supra* note 50.

69. "One of the most troubling aspects of using contractor personnel to augment government personnel shortfalls is that, all too often, the contractor personnel lack appropriate training to replace government personnel, and government personnel lack appropriate training to supervise the contractor personnel." Schooner, *Contractor Atrocities*, *supra* note 11, at 563; see also the Fay Report, *supra* note 51 (noting that "35% of contract interrogators lacked formal military training as interrogators"). Industry representatives are also concerned over "unqualified contractors," and some have expressed interest in working with Congress to create rules that would "weed" such employees out. *Fresh Bid to Lift Veil on U.S. Security Contractors*, AFX INT'L FOCUS (May 16, 2005).

examines current litigation against PMFs and their employees arising out of alleged misconduct by defendants in the course of their work in Iraq and Afghanistan.

A. The Government Contractor Defense & Its Extension in the Military Contractor Context

While the 1940 Supreme Court case of *Yearsley v. W.A. Ross Construction Co.* was the formal introduction of the GCD to American jurisprudence, the Federal Tort Claims Act (FTCA)⁷⁰ was the impetus for the creation of the modern affirmative defense as it now applies to PMFs. The FTCA “waiv[es], with certain enumerated exceptions, the Federal government’s sovereign immunity from liability in tort for the acts of its officers, employees, and representatives.”⁷¹ The statute allows parties to sue the government for property damage and personal injury or death resulting from a government employee’s “negligence or wrongful act or omission.”⁷² However, the FTCA has a number of exceptions, and resulting case law significantly limiting the military’s liability to tort claims had a profound effect on liability of contractors working for the military.

As Section 1 demonstrates, the GCD was borne of the concern that contractors designing and manufacturing military equipment according to government specifications would be left to shoulder the cost of product liability judgments when the government’s own specifications led to accidental injury or death. Section 2 details the formal extension of government immunity to military contractors by the Supreme Court in *Boyle v. United Tech. Corp.*⁷³ This immunity was originally rooted in an exception to the FTCA’s waiver of immunity—the discretionary function exception⁷⁴—and it came with a series of necessary conditions PMFs had to meet to ensure that the immunized conduct was in fact conduct requested by the government. Section 3 considers modern elaborations on the Court’s theory of government contractor immunity, examining the expansion of the GCD beyond the product liability context. The section also addresses efforts by some courts to apply a Boyle-like extension of immunity to PMFs under a different FTCA exception: the combatant activities exception.

1. History of the GCD

The GCD was first articulated by the Supreme Court in the 1940 case

70. 28 U.S.C. § 1346(b)(1) (2005).

71. P. H. Vartanian, *Federal Torts Claims Act*, 1 A.L.R.2d 222, § 1 Introduction.

72. *Id.* § 2.

73. *Boyle*, 487 U.S. 500 (1988).

74. 28 U.S.C. § 2680(a) (2005).

*Yearsley v. W.A. Ross Construction Co.*⁷⁵ In *Yearsely*, the Court held that a construction company working for the government could not be held liable for damage to plaintiff's land.⁷⁶ Chief Justice Hughes, writing for the court, observed that "if [the] 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."⁷⁷ The exact basis for the Court's ruling was less than clear, as it cited to both agency theory⁷⁸ and the Fifth Amendment's Takings Clause⁷⁹—neither of which play a significant role in the modern legal underpinnings of the GCD as it applies to PMFs.⁸⁰ Indeed, almost forty years passed before the GCD was applied to military contractors. Following *Yearsley*, and through the late 1970s, the GCD was largely limited to civil suits arising out of government (non-military) construction projects.⁸¹

The passage of the FTCA in 1946, and courts' subsequent retrenchment of its provisions in cases involving the military, set in motion the events that would eventually lead to the extension of the GCD to PMFs. Only four years after its passage, the FTCA's waiver of sovereign immunity was sharply curtailed. Originally, courts interpreted the FTCA's waiver to include the military.⁸² However, in 1950, the Supreme Court essentially reinstated military

75. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). See also *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444, 448 (9th Cir. 1983) ("the so-called government contractor defense . . . first articulated by the Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), protects a government contractor from liability for acts done by him while complying with government specifications during execution of performance of a contract with the United States").

76. *Yearsley*, 309 U.S. at 20-21.

77. *Id.*

78. "Where an agent or officer of the Government purporting to act on its behalf 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 21.

79. 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.

80. Both were cited in subsequent cases involving government contractors involved in construction work. See, e.g., *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965).

81. See, e.g., *Myers*, 323 F.2d 580; *Dolphin Gardens*, 243 F. Supp. 824. However, military contractors did attempt to (unsuccessfully) employ the GCD before the late 1970s. See, e.g., *Littlehale v. E.I. du Pont de Nemours & Co.*, 380 F.2d 274 (2d Cir. 1967); *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867 (8th Cir. 1974); R. Todd Johnson, *In Defense of the Government Contractor Defense*, 36 CATH. U. L. REV. 219, 229-31 (1986) (discussing early attempts at extending the GCD to military contractors). The one successful early attempt was *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1 (Law Div. 1976).

82. *Brooks v United States*, 337 U.S. 49 (1949) (FTCA gave service members the right

immunity in *Feres v United States*.⁸³ In *Feres*, the Court held that “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”⁸⁴

In cases involving product defects, injured soldiers or their estates—now barred from suing the government—began looking to military contractors involved in the manufacture or design of military equipment for relief. Military contractors responded by suing the government for indemnity, to recover the costs associated with their product liability litigation. This strategy was closed to them in 1977, in *Stencel Aero Engineering Corp. v. U.S.* In *Stencel*, the Supreme Court held that the government is protected from such third-party indemnity claims where the original claims are service-related law suits brought by military members.⁸⁵ Justice Burger, writing for the majority, cited to the Court’s decision in *Feres v. United States* immunizing the government from suit by soldiers.⁸⁶ He rationalized that it “makes . . . little sense” to immunize the government from suits by soldiers only to allow contractors to seek indemnity for damages arising from the same injury.⁸⁷

Taken together, the resulting *Feres-Stencel* doctrine “created an insurmountable dilemma for military contractors by excusing the government both from suit by servicemen and from indemnification actions brought by the contractor.”⁸⁸ It soon became clear that military contractors would be forced “to pay for injuries resulting from their implementation of government specifications.”⁸⁹ As a result, courts became more open to arguments by defendant PMFs that the GCD should be extended to include them.

Judge Pratt, in *In re “Agent Orange” Product Liability Litigation*,⁹⁰ was among the first to examine the applicability of the GCD to military contractors in depth. After evaluating its evolution over the preceding forty years,⁹¹ the court concluded that “a government contract defense exists and has possible application to the facts at bar.”⁹² Two years later, for the same litigation, Pratt

to bring claims against the government, where those claims arose out of negligence).

83. *Feres v United States*, 340 U.S. 135 (1950).

84. *Id.* at 146.

85. *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673-74 (1977).

86. “In *Feres v. United States* . . . the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act.” *Id.* at 669 (citing *Feres*, 340 U.S. 135).

87. *Stencel Aero Eng’g Corp.*, 431 U.S. at 672.

88. Johnson, *supra* note 81, at 228.

89. Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 ALB. L. REV. 403, 412 (1998).

90. *In re “Agent Orange” Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1980).

91. In particular, Pratt considered “discretionary function” arguments for the extension of governmental immunity to contractors. *Id.* at 794.

92. *Id.* at 796.

created a test for applying the GCD to military contractors. He held that if defendant chemical companies could pass a three part test, they could avail themselves of the GCD.⁹³ The companies would have to prove (1) that government specifications existed for Agent Orange, (2) that manufacturers met those specifications, and (3) that “the government knew as much as or more than the defendant about the hazards to people that accompanied use of ‘Agent Orange.’”⁹⁴

Subsequent courts soon adopted—and adapted—Judge Pratt’s test. Among them was the Ninth Circuit in *McKay v. Rockwell International Corp.*⁹⁵ In *McKay*, the Ninth Circuit built on a rationale of fairness and policy considerations fast gaining acceptance in the courts. This rationale was largely premised upon the *Feres-Stencel* doctrine:

[H]olding the supplier liable in government contractor cases without regard to the extent of government involvement in fixing the product’s design and specifications would subvert the *Feres-Stencel* rule since military suppliers, despite the government’s immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales.⁹⁶

The court also considered the proper role of the judiciary vis-à-vis military decision-making,⁹⁷ the military’s need to “push technology” and incur risks above those tolerated for regular consumers,⁹⁸ and the wisdom of encouraging close collaboration between the military and its contractors.⁹⁹ As a result, the Ninth Circuit created a GCD test similar to that of Judge Pratt’s, requiring defendants to prove:

(1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government’s specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.¹⁰⁰

Yet not all circuits were uniform in their application of the GCD. For instance, the Eleventh Circuit renamed the GCD the “military contractor defense,” holding that the doctrine was distinct from the traditional GCD first evoked in *Yearsley*.¹⁰¹ The court found that the legal basis for the defense was

93. *Id.* at 1055.

94. *Id.* at 1055.

95. *McKay*, 704 F.2d 444, *cert. denied*, 464 U.S. 1043 (1984).

96. *Id.* at 449.

97. *Id.*

98. *Id.* at 449-50.

99. *Id.* at 450.

100. *Id.* at 451.

101. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985).

rooted in separation of powers doctrine, and it created an alternate test.¹⁰²

2. The Supreme Court's Interpretation of the Modern-Day GCD: *Boyle v. United Technologies Corp.*

The Supreme Court resolved the differences between the circuits in *Boyle v. United Technologies Corp.*¹⁰³ In *Boyle*, the Court determined that the GCD was based not on the *Feres-Stencel* doctrine or on the separation of powers doctrine, but rather in the discretionary function exception to the FTCA.¹⁰⁴ More importantly, the Court set out two interconnected tests, which, taken together, embody the standard for determining when claims against PMFs can be dismissed to claims based on the GCD. This holding, and the rationale behind it, is at the heart of current attempts to expand the scope of the GCD.

Boyle involved a product liability suit brought by the estate of a drowned Marine helicopter pilot.¹⁰⁵ Plaintiffs sued the maker of the helicopter, the Sikorsky Division of United Technologies Corporation, alleging that the design (a government specification) was defective in that it did not allow the pilot to escape when his helicopter became submerged under water.¹⁰⁶ Plaintiffs-petitioners argued that there was no basis for judicial recognition of the GCD “in the absence of legislation specifically immunizing government contractors from liability for design defects.”

The Court disagreed. Justice Scalia, writing for the five-Justice majority, stated that the Court had a duty to determine whether or not the case before it merited federal preemption of the claims. Scalia explained:

[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.”¹⁰⁷

As a first step in the analysis, Scalia observed that the dispute in *Boyle* implicated unique federal interests, since they involved civil liabilities arising out of the performance of federal procurement contracts.¹⁰⁸ Scalia adopted the

102. *Id.* at 740. Shaw's alternative legal rationale for the GCD was based in separation of powers doctrine: “The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense.” *Id.*

103. *Boyle*, 487 U.S. 500.

104. *Id.* at 511.

105. *Id.* at 502.

106. *Id.*

107. *Id.* at 504 (internal cites omitted).

108. *Id.* at 505-506. Scalia concluded that the case was sufficiently related to other areas where such interests had been found: in the rights of the U.S. under its contracts and in civil liability of federal officials, arising from “actions taken in the course of their duty.” *Id.*

“pass-through” rationale, arguing that allowing the imposition of civil liability would affect the interests of the federal government, either by affecting the price of the contract or in convincing manufacturers to decline to work for the government altogether.¹⁰⁹

However, Scalia emphasized that the Court’s finding that government procurement of equipment is an area of unique federal interest did not end the inquiry.¹¹⁰ “[t]hat merely establishes a necessary, not a sufficient, condition for the displacement of state law,” he wrote.¹¹¹ Step two of his analysis involved the identification of a significant conflict with the federal interest. “Displacement will occur only where . . . a significant conflict exists between an identifiable ‘federal policy or interest and the [operation] of state law,’ or the application of state law would ‘frustrate specific objectives’ of federal legislation.”¹¹² For instance, Scalia pointed out that, in the case at hand, the necessary conflict would not exist if the government had merely ordered a quantity of stock helicopters (without providing design specifications) which happened to be designed with the alleged defective escape hatch.¹¹³ In such a case, it would be “impossible to say that the government [had] a significant interest in that particular feature.”¹¹⁴

Recognizing this was a broad rule, Scalia sought to delineate a “limiting principle” that would help identify when such a conflict existed.¹¹⁵ He observed that many courts identified the *Feres* doctrine as the source of the conflict, but he dismissed that analysis because it would produce results both too broad and too narrow.¹¹⁶ Results would be too broad because *Feres* prevents all service-related suits against the government, and thus would bar all suits against contractors, even those arising from injuries caused by stock equipment (as illustrated in the helicopter example).¹¹⁷ The reach of the applied doctrine would also be too narrow because *Feres* only applies to soldiers, and a limiting principle based upon it would allow suits by civilians.¹¹⁸

Scalia turned instead to the discretionary function exception to the FTCA. The discretionary function exception of the FTCA exempts the government from its consent to suit for “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government,

109. *Id.* at 507.

110. *Id.*

111. *Id.*

112. *Id.* (internal citations omitted).

113. *Id.* at 509.

114. *Id.*

115. *Id.*

116. *Id.* at 510.

117. *Id.*

118. *Id.*

whether or not the discretion involved be abused.”¹¹⁹ Scalia held that “the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision.”¹²⁰ The discretionary function exception “suggest[ed] the outlines” of the necessary “significant conflict.”¹²¹ The Court’s analysis could have ended at that point; however, Scalia went further, seeking to determine the scope of the resulting displacement of state tort law.¹²²

To complete his articulation of the necessary limiting principle, Scalia adopted the Ninth Circuit’s three-part test in *McKay*.¹²³ He explained that the first two prongs of the test¹²⁴ served to “assure that the suit is within the area where the policy of the ‘discretionary function’ would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.”¹²⁵ The third prong of the test¹²⁶ was intended to avoid giving manufacturers incentives to withhold knowledge of risks, “lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.”¹²⁷

This final set of checks was fundamental to the Court’s construction of the GCD. In predicating defendants’ use of the GCD on passage of this test, the Court clearly signaled that the potential conflict of “unique federal interests” with state tort laws alone was not a sufficient basis for preemption of those laws. The three-part test ensured that the immunity from liability provided by the discretionary function exception—and typically reserved for the government—would only apply to PMFs in cases where contractors acted according to the government’s will.

In this sense, *Boyle* reinforced the jurisprudence underlying most GCD cases, from *Yearsley* to *McKay*. It did not matter that *Yearsley* was a performance contract, while *Boyle* (and its immediate predecessors) dealt with product liability and procurement contracts.¹²⁸ Perhaps even more tellingly, it did not matter, for Scalia’s purposes, that the “limiting” principle in *McKay* was the *Feres* doctrine, not the discretionary function of the FTCA. The *McKay*

119. 28 U.S.C. § 2680(a).

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

121. *Id.*

122. *Id.* at 512.

123. *Id.*

124. Prong 1 and 2 allow the GCD where “(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications.” *Id.*

125. *Id.*

126. Prong 3 requires that “the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.” *Id.*

127. *Id.* at 512-13.

128. Indeed, in citing to *Yearsley*, Scalia stated that “[t]he federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction.” *Id.* at 506.

test applied regardless of the legal foundation of the limiting principle. Finally, even a Court conscious of the perils of second guessing military decisions¹²⁹ felt it necessary to ensure that the GCD applied only to cases where the liability in question arose from actual decisions made by the government, as evinced by Scalia's rationale for prongs one and two of the final test.

3. The Expansion of the GCD—*Koohi & Bentzlin*

Boyle gave courts an analytical framework to examine claims brought against PMFs without delving too deeply into military decision-making. Since 1988, the resulting *Boyle* GCD has been expanded “vertically” by some courts to include failure-to-warn claims¹³⁰ and manufacturing defects.¹³¹ It has also been broadened “horizontally” to shield products (and manufacturers) outside the traditional military context, encompassing items purchased by the military and resold,¹³² items provided by subcontractors,¹³³ and nonmilitary contractors.¹³⁴ This last extension is notable because it led full circle back to PMFs in the broader context of service contracts.¹³⁵ The most far-reaching expansion took place in 1992, when the Ninth Circuit in *Koohi v. United*

129. *Id.* at 511.

130. *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626 (2nd Cir. 1990). *Contra Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995) (criticizing *Joint E & S*).

131. *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993); *see also Snell v. Bell Helicopter Textron*, 107 F.3d 744, 749 (9th Cir. 1997) (recognizing manufacturing claims fell within scope of *Boyle* test, but holding that in the suit against helicopter manufacturer, “the record [did] not permit finding as a matter of law that the government approved reasonably precise specifications for the drive shaft and its components, [and] it necessarily preclude[d] application of the military contractor defense as a matter of law to Snell’s manufacturing defect claim.”); *Ammend v. BioPort, Inc.*, 322 F. Supp. 2d 848 (W.D. Mich. 2004).

132. *Miller v. United Tech. Corp.*, 233 Conn. 732 (1995) (U.S. military contractor-manufacturer of aircraft eligible for *Boyle* immunity on all three types of product liability claims, even where aircraft was resold to foreign government).

133. *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990).

134. *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119-20 (3d Cir. 1993) (observing that there is a “unique federal interest” in “in all contracts in which the government procures equipment, not just those with military suppliers”).

135. *Lamb v. Martin Marietta Energy Sys., Inc.*, 835 F. Supp. 959 (W.D. Ky. 1993). The *Lamb* court quoted *Boyle*'s citation to *Yearsley*, a case involving a performance contract (“the federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction”). *Id.* at 966 n.7 (citing *Boyle*, 487 U.S. at 506). It also referred to the Third Circuit's logic in *Carley*, which extended the GCD to nonmilitary contracts, holding that “[s]imilarly, this Court finds no reason to limit *Boyle* to procurement contracts, as opposed to performance contracts as is involved in the case at bar.” *Id.* at 966 n.7. Other courts followed suit. *See Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (holding the GCD “applies to performance contracts, not just procurement contracts” in a negligence case involving a nonmilitary contractor / security provider); *see also Crawford v. Nat'l Lead Co.*, 784 F. Supp. 439, 445-46 n.7 (S.D. Ohio 1989); *Richland-Lexington Airport Dist. v. Atlas Prop., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994).

*States*¹³⁶ determined that PMFs were eligible for preemption of claims under a different exception to the FTCA: the combatant activities exception.¹³⁷ This radical and rarely cited extension of the GCD is the focus of this Section, as it forms the basis of current defendant PMFs' arguments that claims against them are preempted.

In *Koohi v. United States*¹³⁸ the Ninth Circuit considered claims brought by Iranian heirs to civilian passengers aboard a commercial flight accidentally shot down by a U.S. naval cruiser during the Iranian-Iraqi "tanker war."¹³⁹ Plaintiffs sued both the U.S. government and the maker of the weapons system which misidentified the civilian plane.¹⁴⁰ Judge Reinhardt, writing for the three-judge panel, dismissed claims against the government under the combatant activities exception of the FTCA.¹⁴¹ This exception exempts from the government's waiver of sovereign immunity "[a]ny claim arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war."¹⁴² After a prolonged discussion determining that the hostilities involved constituted a "time of war," and after establishing the validity of the exception itself,¹⁴³ Reinhardt turned to the question of the PMF's liability.

Devoting a scant two paragraphs to the issue, he noted that *Boyle* "recognized that the exceptions to the FTCA may preempt common law tort actions against defense contractors under certain circumstances."¹⁴⁴ Extending the analysis he applied to the government, Reinhardt observed that the court's task was to determine the applicability of the combatant exception to the weapons manufacturer, holding that the exception so applied.¹⁴⁵ "One purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."¹⁴⁶ To allow the imposition of tort liability was to "create a duty of care where the combatant activities exception is intended to ensure none exists."¹⁴⁷

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

137. 28 U.S.C.A. § 2680(j) (2006).

138. *Koohi*, 976 F.2d at 1333.

139. *Id.* at 1329-30.

140. *Id.* at 1330-31.

141. *Id.* at 1330-33.

142. *Id.* (citing 28 U.S.C. § 2680(j)).

143. *Koohi*, 976 F.2d at 1333-36.

144. *Id.* at 1336. Interestingly, with the exception of *Koohi*, the Ninth Circuit has perhaps the most limited definition of the GCD. In that circuit, the GCD is referred to as the "military contractor defense," because "[i]n the Ninth Circuit [the defense] is only available to contractors who design and manufacture military equipment." *Snell v. Bell Helicopter Textron*, 107 F.3d 744, 746 (9th Cir. 1997) (citing *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990)).

145. *Koohi*, 976 F.2d at 1336.

146. *Id.* at 1337.

147. *Id.*

Koohi is striking in its seemingly superficial analysis extending a governmental immunity to a non-governmental party under a novel application of an exception to the FTCA. Surprisingly, this aspect of the decision has received little attention. Most scholars cite to *Koohi* in the context of the court's determination that the suit was justiciable (for which the Ninth Circuit was roundly criticized),¹⁴⁸ that a "time of war" existed (thus allowing the combatant activities exception to apply),¹⁴⁹ or in general discussions on the FTCA and sovereign immunity.¹⁵⁰ Even those writing on the topic of the GCD failed to capture the significance of the case,¹⁵¹ while the few writers that did examine its extension of immunity focus on a case that followed, *Bentzlin v. Hughes Aircraft Co.*¹⁵²

Bentzlin, decided one year later in the Central District of California, is the sole case to apply *Koohi*'s ruling on the applicability of the combatant activities exception to PMFs.¹⁵³ It considered claims arising from the accidental deaths of six Marines during Operation Desert Storm in 1991.¹⁵⁴ Plaintiffs' estates sued the manufacturer of the missile that killed the marines, claiming that a defect caused it to deviate from its target.¹⁵⁵ The court held that three different grounds merited dismissal of the claims: the GCD,¹⁵⁶ the state secrets

148. See, e.g., Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 134 n.210 (1999); Barbara Burgess Hillson, *Comment: Koohi v. United States: The Ninth Circuit Leads Federal Jurisdiction Into Battle*, 28 GA. L. REV. 269 (1993); John Postl, *Sovereign Immunity—Federal Tort Claims Act—Wrongful Death Action Against the United States Barred by the Sovereign Immunity Doctrine*, *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), cert. denied, 113 S. CT. 29, 17 SUFFOLK TRANSNAT'L L. REV. 620 (1994).

149. John M. Hagan, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1327, 1360-63 (2004); Postl, *supra* note 148.

150. Jennifer L. Carpenter, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the Feres Doctrine*, 26 U. HAW. L. REV. 35, 37 n.24 (2003); Jennifer L. Carpenter, *Latchum v. United States: The Ninth's Circuit's Four-Factor Approach to the Feres Doctrine*, 25 U. HAW. L. REV. 231, 232 n.16 (2002).

151. William C. Buckhold & Lisa D. Goekjian, *The Government Contractor's Defense to Product Liability Claims*, 99 COM. L.J. 64, 88 n.108 (1994) (citing the holding—incorrectly—in a footnote).

152. *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), cited by Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075, 1101, n.140 (1996), and *Government Contractor Defense Applies to Manufacturing Defect in Weapon That is Sophisticated or Malfunctions in War—State Secrets and Political Question Doctrines Invoked*, 36 GOV'T CONTRACTOR 42 (1994).

153. In fact, this was noted by one court currently evaluating claims against a PMF. *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615 n.4 (S.D. Tex. 2005). "The *Koohi* decision applying the FTCA's 'combatant activities' provision to government contractors has been cited only by a single court." *Id.* (citing *Bentzlin*, 833 F. Supp. at 1489).

154. *Bentzlin*, 833 F. Supp. at 1487.

155. *Id.*

156. *Id.* at 1488. The opinion relied most heavily on the GCD since this defense allows dismissal based on the pleadings. *Id.* at 1488 n.2.

privilege¹⁵⁷ and the political question doctrine.¹⁵⁸ In its discussion of the GCD, the court—unlike the Ninth Circuit in *Koohi*—partially followed *Boyle*'s preemption analysis based on the discretionary function exception.¹⁵⁹ It did not, however, attempt to determine the scope of the preemption through a similar three-part test, observing that, unlike *Boyle*, the case involved an alleged manufacturing defect of a missile during a time of war.¹⁶⁰

The court also examined the GCD through the combatant exception raised in *Koohi*, holding that “the federal interest in controlling military policy in war” preempted common law tort claims.¹⁶¹ The court echoed the “three principles underlying the combatant activities exception to the FTCA” set out in *Koohi*, which considered the government’s interest in combat vis-à-vis the objectives of tort law (“deterrence, punishment and providing a remedy to innocent victims”).¹⁶² The court held that, as in *Koohi*, those principles “are inconsistent with the government’s interest in combat.”¹⁶³

No court has followed the GCD portion of *Bentzlin*'s ruling. Aside from surveys summarizing the holding,¹⁶⁴ scholarly analysis concerning *Bentzlin* has primarily focused on the political question doctrine¹⁶⁵ and the state secrets privilege.¹⁶⁶ However, current litigation arising from PMF involvement in Iraq and Afghanistan has given new life to what some defendants refer to as the “the combatant activities exception under *Koohi*.”¹⁶⁷ The next Section considers arguments based on this exception, and their place within the larger *Boyle*-based GCD jurisprudence.

157. *Id.* at 1495.

158. *Id.* at 1497.

159. *Id.* at 1490-92 (finding that the government’s unique federal interest in “sophisticated ‘combat use weaponry’” (and the secrecy surrounding it) clashed with state tort laws).

160. *Id.* at 1490.

161. *Id.* at 1492.

162. *Id.* at 1493.

163. *Id.*

164. Lisa J. Savitt & Michael J. Collieran, *Recent Developments in Aviation and Space Law*, 30 TORT & INS. L.J. 249, 251 (1995).

165. Hagan, *supra* note 149, at 1331 n.22 (citing *Bentzlin* in a footnote for the court’s observations that “‘policy decisions made in war’ implicate the lack of judicially discoverable and manageable standards” and noting “the impossibility of deciding without an initial policy determination prongs of *Baker*”).

166. J. Steven Gardner, *Comment: The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 569 n.23 (1994); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205, 231-232 n.101, 103 (2000); Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing a Manufacturer’s Liability for Defective Products?*, 28 SETON HALL L. REV. 430, 439 n.57 (1997).

167. Defendant’s Motion to Reconsider and/or Clarify Order Denying Motion to Dismiss With Respect to Combatant Activities Exception, at 2, *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005).

B. Current Litigation & Attempts at Extending the Scope of the GCD

The Court in *Boyle* sought to fashion a test (or series of tests) that would help courts determine when to extend the benefits of sovereign immunity to non-government actors working on behalf of the sovereign. In the cases examined below, defendants argue for an extension of *Boyle*-like reasoning—which provides the means for extending governmental immunity to PMFs—based on *Koohi* and *Bentzlin*'s novel use of the combatant activities exception to the FTCA. This Note does not argue against such an extension. However, as the court noted in *Boyle*, certain conditions must be met before non-government actors are given government immunity, to ensure that immunity is granted only for those acts requested by the sovereign.¹⁶⁸ This principle applies regardless of the FTCA exception relied upon, be it the discretionary interest exception or the combatant activities exception. In sum, the resulting defense cannot be extricated from the parameters of the judicial reasoning that gave rise to it without sacrificing the legal justification for its existence.

The full spectrum of cases implicating PMF liability for alleged misconduct arising out of events in Iraq and Afghanistan cannot be exhausted here. Pending litigation brought by civilians or soldiers against PMFs and their employees includes suits arising from the Abu Ghraib torture scandal (*Ibrahim v. Titan Corp.* and *Saleh v. Titan Corp.*),¹⁶⁹ as well as wrongful death and personal injury actions brought by soldiers allegedly harmed or killed by negligent or reckless conduct by PMFs.¹⁷⁰ The second category of litigation addresses rights of military contractors vis-à-vis their employers, the PMFs. One such case, *Nordan v. Blackwater Security Consulting, LLC*, alleges causes of action for wrongful death and fraud arising from the March 21, 2004 murder and mutilation of four military contractors in Fallujah, Iraq.¹⁷¹ Two other cases, *Fisher v. Halliburton* and *Johnson v. Halliburton et al.*, allege that an employer-PMF knowingly used one convoy as a decoy for a second convoy in Iraq, resulting in the deaths of at least six drivers, and injuries to eleven

168. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14 (1988).

169. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005), and *Saleh v. Titan Corp.*, No. 04 CV 1143 R (NLS), 361 F. Supp. 2d 1152, (S.D. Cal. Mar 21, 2005) (order granting transfer to E.D. Va.).

170. *McMahon v. Presidential Airways, Inc.* is one such case, brought by the widows of three soldiers killed in an aviation accident in the mountains of Afghanistan. *McMahon et al. v. Presidential Airways Inc. et al.*, No. 05CV11601, complaint filed (Fla. Cir. Ct., Brevard County June 10, 2005). Currently cited as *McMahon et al. v. Presidential Airways Inc. et al.*, Case No. 6:05-cv-1002-ORL-28-JGG (M.D. Fla.). Plaintiffs claim that a poorly equipped airplane and inexperienced flight crew were responsible for the crash. Pls.' Compl. at ¶¶ 33, 39, 40-42, *McMahon et al. v. Presidential Airways Inc. et al.*, Case No.: 6:05-cv-1002-ORL-28-JGG (M.D. Fla.).

171. *Nordan v. Blackwater Security Consulting, LLC*, 382 F. Supp. 2d 801 (E.D.N.C. 2005); see also Estes Thompson, *Families Sue Over Workers' Slaying in Iraq*, WASH. POST, Jan. 6, 2005, at E7.

others.¹⁷² As in *Nordan*, plaintiffs in these cases bring wrongful death and fraud claims, as well as a 42 U.S.C. § 1983 claim for the alleged violation of decedents' constitutional rights.¹⁷³

The following section focuses on *Fisher* and *Ibrahim*, two cases with developed articulations of defendants' arguments concerning *Koohi*. Judges in both cases have made preliminary rulings on the issue of a *Koohi*-based GCD, indicating the beginnings of a new framework for civil liability in cases implicating misconduct by PMFs and their employees.

1. *Fisher v. Halliburton*

The court in *Fisher* has already ruled that the combatant activities exception under *Koohi* is inapplicable to the facts of the case. Defendant's arguments leading up to the ruling offer insight into the litigation strategy behind current attempts to reshape the GCD. In ruling on defendant Halliburton's motion to dismiss, Judge Atlas of the Southern District of Texas refused to extend the Ninth Circuit's holding in *Koohi* to immunize defendants from civil liability.¹⁷⁴ Observing that both *Boyle* and *Koohi* were based on military procurement contracts, Atlas stated:

Defendants herein have cited no case in which the § 2680(j) "combatant activities" exception or any other exception to the FTCA's waiver of sovereign immunity has been held to bar (or, in the Boyle/Koohi phraseology, to "preempt") claims against a defense contractor other than in situations in which the contractor has provided allegedly defective products, and this Court's research has found none.¹⁷⁵

He elaborated by pointing out the necessary discretion and "sophisticated judgments" that are "inevitably implicate[d]" in the procurement of complex equipment.¹⁷⁶ He also cited to *Boyle*'s discussion acknowledging the trade-offs the military must sometimes make between "greater safety and greater combat effectiveness."¹⁷⁷ Atlas concluded by holding that "extension of the government contractor defense beyond its current boundaries is unwarranted and the FTCA does not bar Plaintiffs' claims."¹⁷⁸

Defendant Halliburton promptly filed a motion requesting the court to reconsider its ruling with respect to the combatant activities exception, arguing that it "did not intend to raise and did not brief the government contractor

172. Plaintiff's Complaint, at ¶¶ 48-65, *Fisher*, 390 F. Supp. 2d 610 (S.D. Tex. 2005); Plaintiff's Complaint, at ¶¶ 11-53, *Johnson*, No: EDCV05-265 (C.D. Cal. filed Mar. 29, 2005).

173. Plaintiff's Complaint, at ¶¶ 87-104, *Johnson*, No: EDCV05-265.

174. *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 615-16 (2005).

175. *Id.*

176. *Id.* at 616.

177. *Id.*, citing *Boyle v. United Techs. Corp.*, 487 U.S. at 511.

178. *Fisher*, 390 F. Supp. 2d at 616.

defense based on the discretionary function exception.”¹⁷⁹ In doing so, Halliburton attempted to distinguish—and distance—the *Koohi* defense from the traditional *Boyle*-based GCD.

[I]n extending the exception to the government contractor, the [Koohi] Court did not engage in a government contractor defense analysis under the discretionary function exception applied by *Boyle* [emphasis added]. Instead, consistent with the purposes underlying the exception to FTCA liability, the Court found that the “imposition of liability on the manufacturers of the Aegis would create a duty of care where the combatant activities exception is intended to ensure that none exists.”¹⁸⁰

Halliburton focused on the Ninth Circuit’s statement that “the only question that need be answered is whether the challenged action constituted combatant activity during time of war.”¹⁸¹ Framing the inquiry in this manner would guarantee dismissal of the complaint against Halliburton, since it was clear in the complaint that insurgents had been the source of the attack that killed and wounded contractors in the “decoy” convoy.¹⁸² The motion made scant reference to plaintiffs’ arguments that defendants were in “complete control of [d]efendant’s operations in deploying Convoy 1, and that [d]efendant’s activities were not done under any specific orders of the U.S. military.”¹⁸³ Under the framework posed by Halliburton, the source of the alleged instructions sending Convoy 1 as a decoy would matter little—the dispositive issue would be that plaintiffs were killed or injured as a result of combatant activities.

The court denied defendant’s motion, repeating its refusal to “extend *Koohi* beyond its current boundaries” as a products liability case.¹⁸⁴ Judge Atlas did provide, however, that defendant was entitled to an opportunity to raise what defendants had distinguished as the “government contractor defense based on the discretionary function exception” in a motion for summary judgment.¹⁸⁵ At the time of this writing, the case was undergoing discovery.¹⁸⁶

The court’s ruling in *Fisher* sets clear boundaries for the GCD in cases alleging PMF misconduct: the *Koohi*-based extension of the combatant activities exception to FTCA will not be considered in the context of service contracts. However, the defendant in *Fisher* is not without other, non-GCD

179. Defendant’s Motion to Reconsider, *supra* note 167.

180. *Id.* at 3-4.

181. *Id.*

182. Plaintiff’s Complaint at ¶¶ 48-65, *Fisher*, 390 F. Supp. 2d 610.

183. *Id.* at ¶¶ 64. Defendant did, however, state that it “believe[d] the discretionary function exception would similarly bar Plaintiffs’ claims,” requesting an opportunity to raise it in the future. *Id.* at 2, 7.

184. Order denying Defendant’s Motion to Reconsider and/or Clarify Order Denying Motion to Dismiss With Respect to Combatant Activities Exception (Aug. 18, 2005) at 1, *Fisher*, 390 F. Supp. 2d 610.

185. *Id.* at 3.

186. Docket as of Dec. 20, 2005, *Fisher*, 390 F. Supp. 2d 610.

defenses, chief among them the statutory preemption of claims under a federal workers compensation scheme called the Defense Base Act.¹⁸⁷ Nonetheless, if Halliburton wishes to avail itself of the GCD in any form, it will have to do so according to the standards applicable under the traditional, *Boyle*-based affirmative defense, rooted in the discretionary function exception of the FTCA.

Judge Atlas demonstrated one strategy available to courts faced with adjudicating claims for civil liability arising from PMF involvement in Iraq and Afghanistan. The next Section offers a different approach: application of the *Koohi*-based defense. This approach, while possibly more appropriate to the current situation facing PMFs, offers courts a less defined set of standards by which to evaluate claims.

2. *Ibrahim v. Titan Corp.*

*Ibrahim*¹⁸⁸ offers an interesting contrast to the ruling in *Fisher*. As noted previously, *Ibrahim* arises from the Abu Ghraib torture scandal. Plaintiffs are former Iraqi detainees and (where detainees were killed) their estates, with causes of action against two American PMFs, CACI International and its subsidiaries, and Titan Corporation.¹⁸⁹ CACI and Titan provided interrogation and translation services, respectively, and the plaintiffs allege that employees of the PMF's took part in the torture at the prison.¹⁹⁰ In evaluating the applicability of the GCD in the case before him, Judge Robertson of the District of Washington D.C. attempted to strike a balance between allowing plaintiffs to argue their claims and permitting defendants an opportunity to present some

187. The DBA is a federal statute that extends provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), a worker's compensation scheme, to certain employment outside of the U.S. 42 U.S.C. § 1651(a). It:

provides an employee's exclusive remedy if the employee was engaged in employment outside the United States under a contract between his employer and the United States for the purpose of engaging in public work, including contracts and projects in connection with national defense and war activities, where the employee suffered an injury within the course and scope of his employment.

Fisher, 390 F. Supp. 2d at 613.

The DBA poses a significant hurdle for plaintiffs who are covered by it, one that claimants in *Fisher* have thus far avoided by alleging that defendant acted with a specific intent to harm its employees. *Id.* at 613-14 ("A very narrow exception to the DBA's exclusive liability provision applies where the employer acted with the specific intent to injure the employee.") (citing *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313, 316 (D. Me.1981)). It remains to be seen if the *Fisher* plaintiffs will be able to "prove that Defendants *specifically intended* for Plaintiff truck drivers to be attacked by the anti-American insurgents." *Fisher*, 390 F. Supp. 2d at 614, n. 2 (reminding plaintiffs of their burden).

188. *Ibrahim*, 391 F. Supp. 2d 10.

189. Plaintiff's Second Amended Complaint, at ¶¶ 2-8, 9-14, *Ibrahim*, 391 F. Supp. 2d 10.

190. *Ibrahim*, 391 F. Supp. 2d at 13.

form of the *Koohi*-based GCD. It remains unclear, however, how the court will evaluate defendants' "preemption" arguments.¹⁹¹

In his order ruling on defendants' motion to dismiss, Robertson considered their arguments that claims against them should be dismissed under the *Koohi*-based extension of the combatant activities exception to the FTCA.¹⁹² He observed that "[d]efendants want me to expand Boyle's preemption analysis beyond *Koohi*'s negligence/product liability context to automatically preempt any claims, including these intentional tort claims, against contractors performing work they consider to be combatant activities."¹⁹³ Yet Robertson noted that providing PMFs with immunity from *suit* was not the Court's goal in *Boyle*: "*Boyle* explicitly declined to address the question of extending federal immunity to non-government employees," he wrote, pointing out that the traditional GCD is an affirmative defense involving civil liability, the burden of which is on the defendants.¹⁹⁴

Considering the *Boyle* preemption analysis, Robertson agreed that "the treatment of prisoners during wartime implicates uniquely federal interests."¹⁹⁵ Moving to the second step, he looked to the FTCA to determine whether the suit before him would result in a "significant conflict" with federal policies or interest.¹⁹⁶ Robertson cited *Boyle*'s reasoning that it made "little sense" to immunize the government from liability for judgments it made when producing its own equipment, while allowing liability when it contracted that production. From this he concluded that "[t]he inquiry then turns to whether allowing a suit to go forward would conflict with the purposes of the FTCA and whether defendants have shown that they were essentially soldiers in all but name."¹⁹⁷

Robertson examined the legislative history of the combatant activities exception to the FTCA, noting that it was "singularly barren,"¹⁹⁸ and that there was little case law to guide him.¹⁹⁹ He observed:

The exception seems to represent Congressional acknowledgment that war is an inherently ugly business for which tort claims are simply inappropriate. . . . State law regulation of combat activity would present a "significant conflict" with [the] federal interest in unfettered military action. This is true even with regard to intentional torts, because exceptions to FTCA represent "Governmental activities which by their very nature should be free from the

191. "Preemption," as noted by the court in *Fisher*, is the "*Boyle/Koohi* phraseology" employed by defendants seeking to employ the *Koohi*-based defense. *Fisher*, 390 F. Supp. at 615-16.

192. *Ibrahim*, 391 F. Supp. 2d at 17.

193. *Id.* at 17-18.

194. *Id.* at 18.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 18 (citing *Johnson v. United States*, 170 F.2d 767, 769 (1948)).

199. *Id.*

hindrance of a possible damage suit.”²⁰⁰

His analysis brought him once again to the conclusion that preemption would rest on whether or not “defendants’ employees were essentially acting as soldiers.”²⁰¹ He proceeded with a litany of questions for defendants: “More information is needed on what exactly defendants’ employees were doing in Iraq. What were their contractual responsibilities? To whom did they report? How were they supervised? What were the structures of command and control?” Having laid out the means by which he would delineate the scope of preemption, Robertson stated that if defendants’ employees were, “indeed soldiers in all but name,” the GCD would succeed.²⁰²

In response, both CACI and Titan again raised the GCD—argued as “preemption of claims” based on the combatant activities exception²⁰³—in their motions for summary judgment. They presented the court with a formidable list of ways in which their employees “were soldiers in all but name.”²⁰⁴ Titan argued that the military exerted “total operational control” over the linguists assigned to Iraq, and that the linguists reported to military personnel, who in turn “directly supervised” them.²⁰⁵ CACI made similar arguments, stating that “CACI . . . interrogators and their military counterparts answered to the same military chain of command, were subject to the same rules for interrogators, and had the same interrogation reporting obligations.”²⁰⁶ It remains to be seen if defendants’ submissions will meet the standard set by Robertson—nor is it the purpose of this Note to evaluate defendants’ claims.²⁰⁷

200. *Id.* at 18-19 (citing *Johnson*, 170 F.2d at 769, and *Koohi*, 976 F.2d at 1335).

201. *Id.* at 19.

202. *Id.* at 19.

203. *See, e.g.*, Memorandum of D. CACI Premier Tech. Inc. In Support of Its Motion For Summary Judgment, at 13-19, *Ibrahim*, 391 F. Supp. 2d at 13 (eschewing the term “GCD” and instead arguing that “Plaintiffs’ common law claims against CACI PT are preempted”).

204. *See* Defendant L-3 Commc’n Titan Corp’s Statement of Material Facts As to Which There Is No Genuine Issue, *Ibrahim*, 391 F. Supp. 2d at 13 (stating that “military supervisors exercised authority over how, where and when Titan linguists could be assigned to translate or interpret in support of military operations,” that “military supervisors directly tasked . . . linguists with work assignments,” that “linguists reported to military supervisors within their assigned units,” that they were “fully integrated into their military units,” etc.); Defendant L-3 Communications Titan Corp’s Memorandum in Support of Its Motion to Dismiss and for Summary Judgment, at 1-2, 6-14, 17-20, *Ibrahim*, 391 F. Supp. 2d at 13; *see also* Statement of Undisputed Material Facts In Support of the Motion For Summary Judgment CACI Premier Tech. Inc., at 2-10, *Ibrahim*, 391 F. Supp. 2d at 13; Memorandum of D. CACI Premier Tech. Inc. In Support of Its Motion For Summary Judgment, at 1-10, 16-18, *Ibrahim*, 391 F. Supp. 2d at 13.

205. Defendant L-3 Commc’n Titan Corp’s Memorandum in Support of Its Motion to Dismiss and for Summary Judgment, at 1-2, *Ibrahim*, 391 F. Supp. 2d at 13.

206. Memorandum of D. CACI Premier Tech. Inc. In Support of Its Motion For Summary Judgment, at 1, *Ibrahim*, 391 F. Supp. 2d at 13.

207. As of this writing, plaintiffs had not submitted their responses to defendant’s motions.

The ultimate question is how Robertson will frame the boundaries of this standard, the “soldiers in all but name” test. To what extent must a PMF employee “be a soldier” in order in order to cloak himself (and his employer) with the benefits of sovereign immunity? An absolutist interpretation mandates that defendants fail the test. Regardless of the level of military supervision over contractors, they are not subject to the UCMJ,²⁰⁸ nor can they be forced to remain in Iraq or Afghanistan, as can real soldiers. The strongest punishment available to *any* authority, be it the PMF employer or military commanding officers, appears to be the employee’s “removal from the theatre and from the contract.”²⁰⁹ This lack of accountability significantly differentiates PMFs’ employees from soldiers.

Another interpretation could mirror facets of the three-prong *Boyle* test, barring defendants whose behavior deviates from military regulations from seeking immunity. Traditional GCD cases involving service contracts have held that the “reasonably precise specifications” requirement in *Boyle* is met through the imposition of certain specific military “maintenance procedures.”²¹⁰ “[T]he high degree of precision reflected in . . . Army publications,” including detailed checklists, enabled past defendants to meet their burden.²¹¹ Robertson could thus look to contractors’ adherence to military codes of conduct in determining if defendants acted as “soldiers in all but name,” yet this approach risks overlooking the complexities arising from work amidst the “fog of war.” Certain situations in combat zones may necessitate deviation from regulations, and focusing on adherence to them threatens to obscure the underlying motivation of a “combatant activities” exception.

A third interpretation would find that defendants meet their burden by proving that they were at all times under the supervision of military personnel and that, as a result, they should be treated as government actors for the purpose of “combatant activities” immunity. This appears to be the interpretation espoused by defendants. CACI, in its brief to the court, adopts *Koohi*’s argument that to allow suit against the United States “would create a duty of care where the combatant activities exception is intended to ensure none exists.” CACI then argues:

Given that the combatant activities exception is grounded in the determination that no duty should exist on the battlefield, allowing detainees to skirt the exception by suing private contractors instead of the United States completely undermines Congress’s intent in excepting injuries arising out of combatant

208. See *infra* Part I.B.1.

209. Defendant L-3 Commc’n Titan Corp’s Memorandum in Support of Its Motion to Dismiss and for Summary Judgment, at 12, *Ibrahim*, 391 F. Supp. 2d at 13.

210. In *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit adapted the test to apply it to a service contract, holding that “maintenance procedures” (in that case, Army guidelines for helicopter maintenance) were the equivalent of the “reasonably precise specifications” requirement in product liability cases. *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003).

211. *Id.* at 1335.

activities from the United States' waiver of sovereign immunity.²¹²

However, accepting defendants' arguments at face value risks circumventing the checks created by the Court in *Boyle*—checks that sought to ensure that the decisions giving rise to liability were “considered by a Government officer, and not merely by the contractor itself.”²¹³ This principle is not limited to the FTCA discretionary function. Rather, it is the basic legal justification for extending government immunity to non-government actors. *Koohi* automatically extended the government's immunity to contractors because *Koohi* (and, later, *Bentzin*) applied the combatant activities exception to litigation involving weapons malfunctions.²¹⁴ The “authorized military action”²¹⁵ giving rise to the suit—and ultimately providing for PMFs' immunity under the combatant activities exception—was taken for granted: the missiles in question were clearly fired at the command of military personnel. Defendants' argument concerning the creation of “a duty of care” is a red herring. It ignores the argument's logical antecedent, glossing over the primary and more fundamental question of whether the action that gave rise to the suit was in fact authorized by the military.

A final interpretation of Robertson's test would give significant weight to the fact that a straightforward application of *Koohi* and *Bentzin* to cases such as *Ibrahim*, without an additional analytical filter that would ensure that contractors were acting according military commands, neglects the principle justifying the extension of immunity. Contrary to defendants' claims, such an inquiry would not “allow detainees to skirt the exception by suing private contractors instead of the United States,” provided that contractors verify they were acting on behalf of the United States.²¹⁶ In order to preempt civil liability for alleged torture of Iraqi detainees, the resulting interpretation in *Ibrahim* would require proof that defendants' employees were ordered to commit the acts they stand accused of. At this time, it seems that such evidence will be difficult for defendants to produce. Unlike in *Bentzin*²¹⁷ (where, as here, the government was not a named defendant) the government has not intervened, nor has it made any documented effort to formally state its interests. Furthermore, it is doubtful that the government will do so, in light of its recent statements in the David Passaro prosecution.²¹⁸

212. Memorandum of D. CACI Premier Tech. Inc. In Support of Its Motion For Summary Judgment, at 14, *Ibrahim*, 391 F. Supp. 2d at 13.

213. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

214. *Koohi v. United States*, 976 F.2d 1328, 1337 (1992) (“[n]either the United States nor its defense contractors owed any duty to [plaintiffs]”).

215. *Id.* at 1337.

216. Memorandum of D. CACI Premier Tech. Inc. In Support of Its Motion For Summary Judgment, at 14, *Ibrahim*, 391 F. Supp. 2d at 13.

217. *Bentzin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1487 (1993).

218. See Gov.'s Consolidated Motion In Limine and Mem. of Law to Exclude Def.'s Public Authority Defense, *U.S. v. Passaro*, Case No. 5:04-CR-211-1BO (E.D.N.C.) (elaborating on government's denial “that Passaro exercised any delegated “authority” to

The outcome of *Ibrahim*, whatever it may be, will obviously have immense significance to both parties in the litigation. However, the standard that the court sets in making its decision will be much more far-reaching in its impact on subsequent similar litigation. A standard tied to specific military orders or commands ensures immunity will be extended only to authorized conduct. Yet such a standard restricts court involvement in military decision-making—for the purposes of the GCD—to a bare minimum: it is not necessary for the court to question the purpose or wisdom of a military decision. Defendants meet the standard simply by proving an order was given. Most importantly, it ensures that PMFs and their employees will not be immunized for conduct not requested by the government (and, in fact, condemned by it).²¹⁹

CONCLUSION

The focus of this note is the accountability of PMFs involved in the very dangerous and complex work environments of Iraq and Afghanistan. It has attempted to demonstrate the limitations inherent in existing oversight of PMFs, whether governmental, public or market-driven. These limitations make civil lawsuits arising out of alleged PMF misconduct all the more essential, both for the purpose of recognizing claimants' rights and for delineating the scope of PMFs' tortious exposure.

The suits considered in Part II provide a necessary social control over corporations undertaking traditional governmental functions. Yet courts considering plaintiffs' claims face a challenging task. They must meet their own obligation to evaluate justiciable claims without crossing into the realm of either the Executive (by hampering the Commander-in-Chief's authority "in military and national security affairs"²²⁰) or the Legislature (by prematurely expanding federal common law, preempting Congressional debate and policy determinations²²¹). Courts in these cases walk a fine line, and a prudent

commit the criminal acts for which he has been charged"). Then-Attorney General John Ashcroft also publicly stated:

As President Bush has made clear, the United States will not tolerate criminal acts of brutality and violence against detainees such as those alleged in this indictment. The types of illegal abuse detailed run counter to our values and our policies and are not representative of our men and women in the military and associated personnel serving honorably and admirably for the cause of freedom.

CIA Contractor Charged with Assaulting Afghan Detainee, *supra* note 53, at 7.

219. *Passaro*, No. 5:04-CR-211-1 (statements by administration re: Abu Ghraib).

220. *Dep't of Navy v. Egan*, 484 U. S. 518, 530 (1988).

221. *See, e.g., United States v. Gilman*, 347 U.S. 507 (1954) (refusing to find a right to reimbursement of the United States in the Federal Tort Claims Act, where Congress specifically failed to legislate such a right).

[T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

approach closely tied to the underlying principles first laid out in *Boyle* will ensure that plaintiffs have some measure of legal redress for their injuries, without thrusting the Judiciary into overtly military or legislative matters.

The standard proposed by this Note would have a derivative effect of encouraging accountability within the government as a whole. If PMFs and their employees are allowed to escape civil liability without passing a threshold inquiry tied to specific government requests or orders, the government will avoid public scrutiny of its policies and practices. PMFs could be used by less scrupulous government officers to perform “dirty work” that the government itself may be forbidden or discouraged from undertaking. The standard discussed in the preceding Section would help to inhibit such developments. It would make clear what conduct and policies the government was (and was not) supporting, without forcing courts to make normative judgments on those decisions. Most critically, the potential for public debate—both within and without the government—will be preserved.

AUTHOR’S NOTE

Developments on both the *Passaro* and *Fisher* cases have taken place since this Note was originally completed in January, 2006. On August 18, 2006, David Passaro, the CIA contractor prosecuted for the beating of an Afghan detainee, was found guilty of assault.²²² Despite military and CIA referrals of similar interrogation abuse to the Department of Justice, the Passaro case remains the only prosecution of its kind.²²³ Further, while litigation is still in its early stages in *Fisher v. Halliburton*, Judge Atlas’s pre-trial analysis of the FTCA’s “combatant activities” exception²²⁴ has already been adopted by another court facing similar issues. In *Smith v. Halliburton Co.*, a negligence case stemming from a suicide bomb attack on a base in Iraq,²²⁵ Judge Sim Lake cited to the *Fisher* analysis in denying defendant’s motion to dismiss.²²⁶ Lake found *Koohi* to be inapplicable to the case, holding that the FTCA would “not shield defendants from potential liability.”²²⁷ Meanwhile, discovery in *Ibrahim*

Id. at 511-513. See also *United States v. Standard Oil Co.*, 332 U.S. 301, 314-15 (1947).

222. Julian E. Barnes, “CIA Contractor Guilty in Beating of Detainee,” *LA Times*, Aug. 18, 2006, available at http://www.latimes.com/news/printedition/asection/la-na-abuse18aug18,1,22159.story?coll=la-news-a_section.

223. John Sifton, “Criminal, Immunize Thyself: The Bush administration’s get out of jail card for torturers,” *Slate*, Aug. 11, 2006, available at <http://www.slate.com/id/2147585/>.

224. *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 614-16 (S.D. Tex. 2005).

225. *Smith v. Halliburton Co.*, 2006 WL 1342823, *1 (S.D. Tex. 2006) (NO. CIV. A. H-06-0462).

226. *Id.* at *5.

227. *Id.* at *5.

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v. Titan Corp. continues, focused on the narrow issue of the legal status of defendants' employees.²²⁸

228. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005)