Legal Backgrounder

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HOLDING BATTLEFIELD CONTRACTORS ACCOUNTABLE:

FEDERAL "REMOVAL" PROTECTS FEDERAL INTERESTS

By

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"We the People of the United States" have relied on military contractors to provide goods and services in every major war since the American Revolution. Today, many of our country's most respected contractors are called upon to serve as indispensable parts of the U.S. military's "Total Force" mix. As part of the Total Force, contractors are often required to provide critical supplies and services in the war zone where casualties are inevitable. When casualties result in civil lawsuits alleging contractor negligence while supporting the U.S. military operations, the *procedural protection* of "removal" to a federal forum is necessary to protect significant and intertwined federal interests. Although some courts recognize the need for a federal forum, current federal statutes do not acknowledge the realities of modern, contractor-supported warfare. Clearly establishing a federal forum for tort lawsuits against battlefield contractors will ensure that federal contractors and the related federal interests are not subject to the vagaries and inherent uncertainties of fifty different states' tort systems.

The Military's Reliance on Contractors

The Secretary of Defense possesses the authority to decide the most efficient and effective mix of military, civilian, and contractors to execute a mission. *See* 10 U.S.C. § 192a. Contractors are an integral part of the Total Force:

> The Department's Total Force – its active and reserve military components, its civil servants, and its contractors – constitutes its warfighting capability and capacity. Members of the Total Force serve in thousands of locations around the world, performing a vast array of duties to accomplish critical missions . . . . [T]he Department's policy now directs that performance of commercial activities by contractors, including contingency contractors and any proposed contractor logistics support arrangements, shall be included in operational plans and orders. By factoring contractors into their planning, Combatant Commanders can better determine their mission needs.

David C. Hammond is a partner in the law firm of Crowell & Moring LLP specializing in government contract law. He recently filed an *amicus curiae* brief on behalf of two trade associations with the United States Court of Appeals for the Fourth Circuit in support of federal removal jurisdiction in connection with a state tort action brought against a contractor operating in Iraq. **Amy Laderberg**, also with Crowell & Moring, contributed to this article. ***The views expressed here are those of the author and do not necessarily reflect the views of the Washington Legal Foundation. This publication should not be construed as an attempt to aid or hinder the passage of legislation.***

Department of Defense, *Quadrennial Defense Review Report* at 75, 81 (Feb. 6, 2006). As part of the Total Force, contractors benefit the Government by augmenting existing capabilities, improving response times, freeing scarce military logistical assets, and reducing the U.S. military presence when limitations are imposed on the number of soldiers deployable. *See* Joint Pub. 4-0, *Doctrine for Logistics Support of Joint Operations* at V-1 (Apr. 6, 2000).

Contractors Operating in a War Zone Will Inevitably Result in Contractor Casualties

As directed by DoD, contractors work not only behind the scenes but also on the battlefield itself, "and in roles functionally close to combatants; many of these roles formerly exclusively held by uniformed members of the armed forces." Steven J. Zamparelli, *Competitive Sourcing and Privitization: Contractors on the Battlefield, What Have We Signed Up For?*, A.F.J. LOG. 9 (Fall 1999). Not surprisingly, the rate of injury and death of contractor personnel has increased along with their greater role in support of the military. During the 1991 Gulf War, there were only seven contractor deaths. Renae Merle, *Contract Workers Are War's Forgotten*, Washington Post, July 31, 2004, at A01. In comparison, as of September 30, 2005, 147 U.S. and 265 non-U.S. personnel of U.S. contractors have been killed in Iraq since the commencement of military operations. *See* Oct. 30, 2005, Special Inspector General for Iraq Reconst. ("SIGIR") Report to Congress, at 12. Indeed, the number of fatalities of U.S. contractor personnel in Iraq exceeds the total military fatalities of all non-U.S. and U.K. coalition countries. *See* The Brookings Inst., *Iraq Index* at 8 (Oct. 27, 2005).

Strong Federal Interests are Intertwined with Tort Claims Against Military Contractors

Congress and the courts already recognize the strong federal interests intertwined in tort actions against military contractors in variety of contexts. For contractor *employees* working overseas – as opposed to *third parties* (*e.g.*, uniformed personnel or civilians) as discussed *infra* – Congress already decided that tort actions should be replaced with a generous workers' compensation remedy. First enacted in 1941 at the request of the Secretary of War to save the significant expense of providing contractors with liability insurance, the Defense Base Act ("DBA"), 42 U.S.C. §§ 1651 *et seq.*, provides an exclusive workers' compensation remedy to contractor employees injured or killed while working outside the United States on federal contracts or subcontracts. Claims under the DBA must be initially adjudicated within the U.S. Department of Labor, with appeal rights to the federal courts. 33 U.S.C. §§ 919, 921; 42 U.S.C. § 1653. Congress decided that these claims – arising on foreign soil in support of U.S. deployments – should be decided *exclusively* within the federal sphere of government, rather than in state courts. *See In re CSX Transp., Inc. v. Shives*, 151 F3d 164, 167 (4th Cir. 1998) (ordering the dismissal of an action to allow the claims to proceed at the Department of Labor rather than remanding the case to a state court).

Courts also recognize the strong federal interests involved when *third parties* pursue tort actions against military contractors. For example, the "government contractor defense" sanctioned by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), provides contractors with immunity for design defects in equipment specified by the military. In *Boyle*, the Supreme Court concluded that "the civil liabilities arising out of the performance of federal procurement contracts" implicates "unique federal interests":

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacturer the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

Id. at 507. Although *Boyle* did not involve the removal of a state tort action to federal court, the federal interests cited in *Boyle* justify removal jurisdiction by raising substantial questions of federal law. *See, e.g.*, *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1200-02 (M.D. Fla. 2006) (relying heavily on *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005)).

Similarly, courts have recognized a strong federal interest in lawsuits against military contractors when: (1) the injury or death arises from "combatant activities," *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992); (2) the lawsuit requires access to classified information, *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992); and (3) the claims require an inquiry into military strategies, orders, and other areas that are constitutionally committed to the Executive Branch under the President as Commander-in-Chief and are nonjusticiable under the "political question" doctrine, *see, e.g., Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497-98 (C.D. Cal. 1993) (dismissing suit by family members of Marines killed in combat by a missile and brought against the missile's manufacturer).

Courts have also recognized federal interests when state tort actions are removed to federal court under 28 U.S.C. § 1442(a)(1) because the contractor acts under the direction of a federal agency or officer, asserts a "colorable federal defense," and a "causal nexus [exists] between the federal direction . . . and the conduct in question." *McMahon*, 410 F. Supp. 2d at 1197-99 (removing state tort action because the military retained a "significant amount of control over the operation" and the contractor asserted a colorable government contractor defense). "If cases [where contractors act under the direction of a federal agency or officer] were scattered throughout state courts, manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government . . . . [W]hile on balance state tort law does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement." *In re "Agent Orange" v. Dow Chem. Co.*, 304 F. Supp. 2d 442, 451 (E.D.N.Y. 2004).

Federal Interests Outweigh Any State Interest in Tort Actions against Battlefield Contractors

The federal interests intertwined in tort claims against military contractors – previously recognized in different contexts and principally involving conduct occurring within the continental United States (*e.g.*, design decisions for military systems) – become even stronger when applied to the conduct of military contractors on foreign soil, in a theater of war, under the direct or indirect control of the Commander-in-Chief. A foreign battlefield with U.S. troops is a uniquely federal place where federal control dominates and federal law regulates conduct; here, federal interests outweigh any interest states may have in regulating the overseas conduct of contractors supporting our Armed Forces. "The federal issues [intertwined in the tort suit against a military contractor] are quite substantial and exercise of jurisdiction by this federal district court does not offend the traditional state-federal judicial balance." *McMahon*, 410 F. Supp. 2d at 1202.

Regulating conduct on a foreign battlefield is a matter of foreign affairs where state law should not interfere. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (a state law restricting the ability of state agencies to purchase from companies doing business with disfavored nations is unconstitutional); *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (States "lack . . . power to reach outside of their borders, making the presumption of exclusive domestic application even stronger"). State law should not be allowed to set standards for how battlefield contractors support our Armed Forces

overseas. For example, to the extent that tort lawsuits against battlefield contractors are allowed to proceed, defining the duty of care in a foreign war zone is uniquely a federal issue to be addressed by federal courts. *See Boyle*, 487 U.S. at 510-12 (requiring the displacement of state tort suits seeking to impose a duty of care upon military contractors); *Bentzlin*, 833 F. Supp. at 1492 ("The combatant activities exception [to the Federal Tort Claims Act] manifests the federal interest in determining the duty of care in combat.").

Lawsuits against battlefield contractors will require courts to decide in the first instance whether and to what extent immunity exists under federal statutes or federal common law. Should a case proceed, courts will face decisions regarding what tort or other liability laws govern (domestic law or the foreign law of where the injury occurred), discovery requests for classified or unclassified information that could give aid to the enemy or place lives at risk, and whether the injured or deceased plaintiff expressly or implicitly assumed the risk associated with working in a war zone. All of these inquiries implicate federal interests and justify resorting to the "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 125 S. Ct. at 2367.

That federal law should regulate conduct in a foreign war zone is reflected, at least implicitly, by the congressional decision to extend certain federal criminal statues to contractor personnel "accompanying the Armed Forces overseas" under 18 U.S.C. § 3261. In addition, the federal government further regulates the conduct of military contractors overseas by requiring compliance with "all applicable (1) United States, host country, and third country national laws; (2) Treaties and international agreements; (3) United States regulations, directives, instructions, policies, procedures; and (4) Orders, directives, and instructions issued by the Combatant Commander relating to force protection, security, health, safety, or relations and interaction with local nationals." 48 C.F.R. 252.225-7040(d). "The United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution." *Bentzlin*, 833 F. Supp. at 1493.

Procedural Protections in Federal Common Law

Because of the intertwined, critical federal interests, both the courts and the Congress can play a role in acknowledging the federal common law that protects those interests by affording battlefield contractors the *procedural protection* of removal to a federal venue when faced with a tort action alleging negligence while supporting our Armed Forces overseas. Such an approach limits neither the accountability nor the potential liability of battlefield contractors beyond existing law. It would only ensure *procedural protection* by affording the advantages inherent in a federal forum, with the added benefit of avoiding costly legal battles regarding proper jurisdiction – costs that ultimately are passed on to "We the People" in one form or another.

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