# Establishing a Practical Solution for Tort Claims Against Private Military Contractors: Analyzing the Federal Tort Claims Act's "Combatant Activities Exception" via a Circuit Split

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## Introduction

Imagine that a civilian, Bob Jones, works at a military base in a war zone—Kabul, Afghanistan. One day while using the restroom, through no fault of his own, Bob slips and breaks his leg. Bob later learns that the floor tiles in the restroom were installed and maintained improperly, making them prone to slide and shift when stepped on. Bob also learns that a private military contractor installed and maintained the bathroom facilities—not the United States Military. Bob sues the contractor for negligence, but is unsuccessful. The court rules that the private military contractor cannot be sued in tort because the "combatant activities exception" contained in the Federal Tort Claims Act (FTCA) preempts state tort law, granting the contractor immunity.[1]

This hypothetical illustrates one side of a current split in legal rationale: should non-military persons be able to sue in tort a private military contractor who provides services negligently?[2] In other words, can private military contractors who execute service contracts for the United States be granted immunity under the combatant activities exception contained in the FTCA?[3] In *Saleh v. Titan Corporation*, the D.C. Circuit Court of Appeals ruled that the combatant activities exception did apply to private military contractors who sup-

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[1] This hypothetical is roughly based on *Aiello v. Kellogg, Brown & Root Services, Inc.* *See* Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 700-01 (S.D.N.Y. 2011).

[2] *See* Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009); Koohi v. United States, 976 F.2d 1328, 1336 (9th Cir. 1992).

[3] *See* 28 U.S.C. § 2680(j) (2006).

plied services to the military, thus granting them immunity from a suit in tort.[4] On the other hand, in *Koohi v. United States*, the Ninth Circuit Court of Appeals held that the combatant activities exception only applied to those against whom force is directed, thus allowing private military contractors to be sued in some circumstances.[5] Both cases relied on *Boyle v. United Technologies Corp.*,[6] a 1988 Supreme Court case, and both have spawned criticism and contrary holdings.[7]

In light of modern warfare and the United States' heavy reliance on private military contractors, a resolution to the legal status of military contractors is needed. Throughout the Iraq and Afghanistan wars, federal reliance on private military contractors has risen to "unprecedented levels."[8] Over the course of operations in Iraq and Afghanistan, contractors have, at some points, outnumbered the total amount of military personnel in those countries,[9] with the total number of employed contractors exceeding a quarter-million people.[10] The Commission on Wartime Contracting in Iraq and Afghanistan estimated that by fiscal year 2011, the amount of money spent on these contracts would reach $206 billion.[11] Historically, the United States employed more contractors during World War II—734,000—

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[4] *Saleh*, 580 F.3d at 9 ("During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted").

[5] *Koohi,* 976 F.2d at 1336-37 (holding that "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*") (emphasis added).

[6] Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[7] *See* McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1331 (M.D. Fla. 2006) (holding that the combatant activities exception does not apply to private military contractors because the exception cannot be a basis for preempting state tort law), *aff'd on other grounds*, 502 F.3d 1331 (11th Cir. 2007); Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 715 (S.D.N.Y. 2011) (holding that the combatant activities exception shielded a private military contractor from liability when it provided latrine maintenance to the military).

[8] COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 1 (2011) [hereinafter AT WHAT RISK?], *available at* http://www.wartimecontracting.gov/docs/CWC_interimReport2-lowres.pdf.

[9] *Id.*

[10] COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 2 (2011) [hereinafter TRANSFORMING WARTIME CONTRACTING], *available at* http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.

[11] *Id.* at 198.

but the ratio of troops to contractors was seven-to-one.[12] In the Iraq and Afghanistan conflicts, that ratio was approximately one-to-one.[13] Although the United States has now withdrawn its troops from Iraq, it is estimated that about 16,000 personnel, the majority of which are contractors, will remain.[14]

Considering the United States' increased reliance on private military contractors, this Comment argues that *Koohi*'s interpretation of *Boyle* and the FTCA is the correct holding, despite being problematic in some areas. Part I of this Comment analyzes the holding in *Boyle* and discusses why it is important to the combatant activities exception. It also analyzes the reasoning of the *Koohi* and *Saleh* courts to show how they applied the *Boyle* holding differently. Part I also categorizes the district and appellate court cases that cover the combatant activities exception according to which line of reasoning they chose to follow: *Koohi* or *Saleh*. Part II argues that both *Koohi* and *Saleh* properly invoked the combatant activities exception under *Boyle*, but that *Saleh* incorrectly interpreted the policy of the exception. Part II then argues that courts should follow the *Koohi* interpretation.

## I. BACKGROUND: THE FEDERAL TORT CLAIMS ACT AND THE COMBATANT ACTIVITIES EXCEPTION

The United States federal government has sovereign immunity and cannot be sued unless it waives its immunity.[15] In 1946, Congress passed the FTCA, which waived the federal government's sovereign immunity when federal employees, in the scope of their employment, negligently injure, kill, or deprive an individual of their property.[16] However, Congress also carved out thirteen exceptions to the general waiver.[17]

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[12] Thomas Gray, Note, *Government-Contractor Immunity – I'm Just Following Orders: A Fair Standard of Immunity for Military Service Contractors*, 32 W. NEW ENG. L. REV. 373, 377-78 (2010).

[13] *See id.* at 378; AT WHAT RISK?, *supra* note 8, at 1.

[14] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-774, IRAQ DRAWDOWN OPPORTUNITIES EXIST TO IMPROVE EQUIPMENT VISIBILITY, CONTRACTOR DEMOBILIZATION, AND CLARITY OF POST 2011 DOD ROLE 4 (2011).

[15] Gray v. Bell, 712 F.2d 490, 506-07 (D.C. Cir. 1983).

[16] *See* 28 U.S.C. § 1346(b)(1) (2006); *see also* Hervey A. Hotchkiss, *An Overview of the Federal Tort Claims Act*, 33 A.F. L. REV. 51, 51 (1990).

[17] *See* 28 U.S.C. § 2680 (2006).

Two relevant exceptions to the waiver of sovereign immunity are the discretionary function exception[18] and the combatant activities exception.[19] The discretionary function exception bars a tort suit for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[20] The Supreme Court has interpreted this to mean that Congress wished to avoid judicial "'second-guessing' of legislative and administrative decisions" that were "grounded in social, economic, and political policy" reasoning.[21]

The combatant activities exception bars any claim "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[22] Congress's purpose in passing the combatant activities exception—and what they intended it to mean—is questionable because the legislative history is "singularly barren."[23] Another wrinkle in analyzing the combatant activities exception is that Congress explicitly excluded private military contractors from the FTCA.[24] Despite this, some courts have allowed private military contractors to take advantage of the sovereign immunity intended for the United States under the doctrine of federal preemption.[25] The courts use preemption because of *Boyle*, where the Supreme Court crafted the government contractor defense using a federal preemption analysis.[26]

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[18] *Id.* § 2680(a); *see also* James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (explaining that the most "frequently litigated of the FTCA's exceptions is the 'discretionary function exception'").

[19] 28 U.S.C. § 2680(j) (2006); *see also* Koohi v. United States, 976 F.2d 1328, 1333 (9th Cir. 1992).

[20] 28 U.S.C. § 2680(a) (2006).

[21] United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 798 (1984).

[22] 28 U.S.C. § 2680(j) (2006).

[23] Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948).

[24] 28 U.S.C. § 2671 (2006) ("As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' . . . does not include any contractor with the United States.").

[25] *See* Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 417 (4th Cir. 2011), *on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012) (citing Boyle v. United Technologies Corp., 487 U.S. 500 (1988)); Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009); Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 715 (S.D.N.Y. 2011).

[26] Boyle v. United Technologies Corp., 487 U.S. 500, 508-13 (1988).

### A. *Getting to the Combatant Activities Exception via* Boyle

On April 27, 1983, David A. Boyle died when the helicopter he was piloting crashed off the Virginia coastline.[27] Although he survived the initial impact, he drowned when he was unable to open the emergency escape hatch because the water pressure on the outward opening door was too great.[28] Boyle's father sued the contractor who made the helicopter for failing to design an inward opening door.[29] The Court ruled for the private military contractor, holding that where a procurement contract was at issue, federal law preempts state tort law, thus extending the FTCA discretionary function exception to the private military contractor.[30]

The majority framed its analysis by recognizing that the Court has been reluctant to allow federal law to preempt state law, but will do so in cases where a "uniquely federal interest" is involved.[31] The Court held that two such federal interests are (1) the obligations and rights in federal contracts and (2) the liability of federal officials in the course of their duty.[32] The Court then recognized that in the present case, the second "uniquely federal interest" was satisfied: there was a private military contractor carrying out duties outlined in a federal contract.[33] The Court reasoned that although a private military contractor was in the course of *its* duty—*not* a federal officer—the federal contract for the private military contractor "obviously implicated the same interest in getting the Government's work done."[34] Thus, the Court deemed a procurement contract to be a uniquely federal interest.[35]

Although the Court held that a procurement contract is a uniquely federal interest, the Court said that this is a "necessary" but not "sufficient" condition for the displacement of state tort law.[36] Relying on *Wallis v. Pan American Petroleum Corp.*, the Court held

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27 *Id.* at 502.

28 *Id.* at 502-03.

29 *Id.* at 502-03.

30 *See id.* at 504-06, 511-12.

31 *Id.* at 504 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

32 Boyle v. United Technologies Corp., 487 U.S. 500, 504-05 (1988).

33 *Id.* at 505-06.

34 *Id.* at 505.

35 *Id.* at 507.

36 *Id.*

that the necessary condition for displacement of state law is a "significant conflict" between federal policies, interests, or legislation and the operation of state law.[37] The significant conflict that the Court identified in *Boyle* was the discretionary function exception of the FTCA.[38]

The Court held that designing a military helicopter is a discretionary function because it involved complex considerations and judgments that required weighing social and engineering costs against the overall requirements and needs of a military grade helicopter.[39] By granting the discretionary function exception in the FTCA to the private military contractor, the Court recognized that it was avoiding the second-guessing of the United States Military, which was a primary purpose of the exception.[40] To give a bright line to its analysis, the Court held that liability for design defects "cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) 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."[41]

In short, the *Boyle* Court assessed the discretionary function exception by first identifying a uniquely federal interest—federal contracts and the liability associated with them—and applying that uniquely federal interest to private military contractors.[42] Second, the Court required and identified a significant conflict with state tort law—the discretionary function exception.[43] The uniquely federal interest and the significant conflict were enough to apply the FTCA exception to a procurement contract.

### B. Koohi v. United States*: An Extension of Boyle to the Combatant Activities Exception*

Four years after *Boyle*, the Ninth Circuit expanded the reasoning of *Boyle* by holding that the combatant activities exception, like the discretionary function exception, could be used to preempt state law,

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37 *Id.* at 507 (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

38 Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988).

39 *Id.* at 511.

40 *See id.* at 511 (citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)).

41 *Id.* at 512.

42 *Id.* at 505-06.

43 *Id.* at 507.

thus barring a tort claim against a private military contractor.[44] The essential facts of *Koohi* are similar to those of *Boyle*. A private military contractor installed the Aegis Air Defense System, a weapons system that was designed to shoot down enemy aircraft, on the USS Vincennes, a naval cruiser.[45] On the morning of July 3, 1988, the USS Vincennes dispatched reconnaissance helicopters to investigate Iranian gunboat activity during an undeclared "tanker war" that was part of the larger hostilities between Iran and Iraq.[46] Iranian anti-aircraft guns allegedly fired on the helicopters.[47] Meanwhile, Iran Air Flight 655 took off from a joint military-commercial airport in Bandar Abbas, Iran.[48] Flight 655 crossed the path of the USS Vincennes and the Vincennes shot it down, mistaking it for an Iranian fighter jet.[49] Heirs of the deceased passengers and crew of Flight 655 sued the United States for negligent operation of the USS Vincennes, and the private military contractor for design defects in the Aegis Air Defense System.[50]

Although the Ninth Circuit never explicitly mentioned the *Boyle* terms of "uniquely federal interest" or "significant conflict," it is clear that the court grounded its reasoning upon the *Boyle* case.[51] First, it used *Boyle* to hold that the FTCA exceptions can be used to preempt state tort law, thus barring claims against private military contractors.[52] The Ninth Circuit then held that the combatant activities exception should preempt state law.[53] In supporting its answer, the Ninth Circuit couched its reasoning in terms of "reasonable care," holding that "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."[54] The Ninth Circuit explained that while the private military contractor may have owed a duty of reasonable care to

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44 Koohi v. United States, 976 F.2d 1328, 1336 (9th Cir. 1992).

45 *Id.* at 1330-31.

46 *Id.* at 1330.

47 *Id.*

48 *Id.*

49 *Id.*

50 Koohi v. United States, 976 F.2d 1328, 1330 (9th Cir. 1992).

51 *See id.* at 1337; *see also* Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988).

52 *See Koohi*, 976 F.2d at 1336-37 (citing Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988)).

53 *Id.*

54 *Id.* at 1337.

United States service members, it certainly owed no such duty to enemy forces or persons associated with enemy forces.[55] If liability were imposed on the private military contractor, the Ninth Circuit reasoned that this would go against *Boyle*'s injunction that preemption of state law is appropriate when liability of the private military contractor would "produce [the] same effect sought to be avoided by the FTCA exemption."[56]

By couching its reasoning and the combatant activities exception in terms of reasonable care—and who should be the recipient of reasonable care—the Ninth Circuit left open the possibility that federal law will not always preempt state tort law in regard to private military contractors who seek refuge under the combatant activities exception.[57] For example, *Koohi*'s holding regarding the combatant activities exception explains that "no duty of reasonable care is owed to those *against whom force is directed* as a result of *authorized military action*."[58] This holding states two propositions. First, military contractors have a duty of reasonable care, but that duty of care is suspended against those to "whom force is directed."[59] Second, the government or military must authorize this use of force.[60] Thus, when one of these elements is not satisfied, a court invoking *Koohi* could hold that federal law should *not* preempt state law when the combatant activities exception is at issue.

### C. Saleh v. Titan*: A Departure from Congressional Intent?*

*Saleh* is fundamentally different from both *Boyle* and *Koohi* because *Saleh* covered a service contract, not a procurement contract.[61] Thus, *Saleh* is not a products liability case.[62] Rather, the private military contractors in *Saleh* provided translation and interrogation services for the United States Military.[63] These private military contractors were stationed at Abu Ghraib military prison during the Iraq war and were involved in the alleged "abuse" and "harm"

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55 *Id.*
56 *Id.* (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 511 (1988)).
57 *See* Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).
58 *Id.* (emphasis added).
59 *Id.*
60 *Id.*
61 Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009).
62 *Id.*
63 *Id.* at 2.

of the detainees.[64] The detainees and their heirs claimed that the private military contractors harmed the detainees by (1) beating them; (2) urinating on them; (3) stripping them naked and roping their genitals together; (4) sodomizing them; and (5) forcing them to watch family members being beaten and killed.[65]

The *Saleh* court expressly relied on *Boyle*'s reasoning and logic to apply the combatant activities exception.[66] First, the court acknowledged that both parties agreed that "uniquely federal interests" were at stake—the detention of enemy combatants—and that their detention fell within the meaning of the combatant activities exception.[67] The point at issue was whether a "significant conflict" existed when applying state tort law to the private military contractors when they were invoking the FTCA's combatant activities exception.[68]

Relying on the "singularly barren" legislative history of the combatant activities exception, the court dismissed the plaintiff's argument that a significant conflict did not exist.[69] The court held that the policy embedded in the combatant activities exception is "simply the elimination of tort [liability] from the battlefield" and that this policy is "equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control."[70] Thus, a conflict with state law will *always* exist because there is no allowance for tort liability in the battlefield.[71]

To defend this expansion of immunity, the court pointed to the language of the FTCA exception, which bars "[a]ny claim *arising* out of the combatant activities of the military . . . during time of war."[72] The court claimed that the word "arising" makes the combatant activities exception much broader than the discretionary function exception because "arising" casts a net over anything that comes from—or arises out of—combatant activities.[73] Thus, the court does not need to find a "discrete discretionary governmental decision" to grant preemption as

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64 *Id.* at 2-3.
65 *Id.* at 18 (Garland, J., dissenting).
66 *Id.* at 5-6.
67 Saleh v. Titan Corp., 580 F.3d 1, 6 (D.C. Cir. 2009).
68 *Id.* at 7.
69 *Id.* (quoting Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948)).
70 *Id.*
71 *See id.*
72 28 U.S.C. § 2680(j) (2006) (emphasis added).
73 Saleh v. Titan Corp., 580 F.3d 1, 6 (D.C. Cir. 2009) (internal citation omitted).

the Supreme Court did in *Boyle*.[74] Rather, the word "arising" turns the combatant activities exception into a "general conflict preemption."[75] The court named this general preemption a "battle-field preemption," holding that the federal government alone occupies this field in warfare and, as such, the federal government's interest in combat is "always 'precisely contrary' to the imposition of a non-federal tort duty."[76]

Choosing to endorse an ever-present significant conflict, which will always preempt state law, the court claimed that problems are created if state law is *not* preempted.[77] Such conflicts would be (1) higher taxes for Americans because contractors will pass tort costs onto the government, which will then pass them onto the American taxpayer; (2) the prospect of hauling high ranking military officers into court to resolve conflicts; and (3) less military flexibility and cost effectiveness because private military contractors will be less likely to expose themselves to tort-prone situations.[78]

The new test that the *Saleh* court put forward for deciding if a private military contractor should be a part of the preemption of state law is whether the "private service contractor is integrated into combatant activities over which the military retains command authority."[79] In fashioning this test, the court rejected the district court's formulation of an "exclusive operational control" test, reasoning that such a test would be too high of a standard for private military contractors to meet.[80] Because the only argument in *Saleh* was the degree to which the private military contractors were integrated into the military's operational activities, and not whether they were integrated at all, the court ruled that state law was preempted and the claims against the private military contractors were barred.[81]

In short, the *Saleh* court leaves no room for a duty of care analysis because it holds that anything that arises out of a combatant activity will preempt state law.[82] This reasoning conflicts with *Koohi*'s reasonable care language. Furthermore, *Saleh* holds that service con-

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74 *See id.* (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943)).
75 *Id.* at 7.
76 *Id.* (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 500 (1988)).
77 *Id.*
78 *Id.* at 8.
79 Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009).
80 *Id.* at 8-9 (internal citations omitted).
81 *Id.* at 6-7.
82 *See id.* at 7.

tracts fall under the combatant activities exception whereas *Koohi* dealt with a procurement contract and products liability, thus also making the two cases factually distinguishable.[83]

### D. *The Fallout: Differing Reasoning and District Court Splits*

The Ninth Circuit in *Koohi*, and the D.C. Circuit in *Saleh*, both extended the reasoning of *Boyle* to apply the combatant activities exception to private military contractors, but did so in different ways. This Part utilizes these two holdings to demonstrate four different theories of the combatant activities exception, under which other district and circuit court cases have been decided. These four theories are based on the extent to which they accept or reject the use of *Boyle* and how they apply the combatant activities exception to private military contractors. Part 1 analyzes cases that use the Legal Purist Theory, which completely rejects an extension of the combatant activities exception, via *Boyle*, to private military contractors. Part 2 analyzes cases that use the Textualist Theory, which accepts *Boyle*'s reasoning to the extent that the contractor's activities actually involve combatant activities. Part 3 analyzes cases that use *Koohi*'s Reasonable Care Theory, which accepts *Boyle*'s reasoning by holding that private military contractors owe a duty of reasonable care in some circumstances. Part 4 analyzes cases that use *Saleh*'s No Tort Liability Theory, which accepts *Boyle*'s reasoning based on the policy rationale that Congress intended to eliminate tort liability from the battlefield.

#### 1. The Legal Purist Theory: No Extension of the Combatant Activities Exception to Private Military Contractors

Some courts apply a Legal Purist Theory that is incompatible with *Koohi* and *Saleh*. Under this theory, both of those cases were decided incorrectly because they improperly extended the reasoning of *Boyle* to apply the combatant activities exception to private military contractors.[84] This theory further holds that an extension of

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[83] *See id.* at 2, 9.

[84] *See* McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1329-30 (M.D. Fla. 2006), *aff'd on other grounds*, 502 F.3d 1331 (11th Cir. 2007); Fisher v. Halliburton, 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005).

*Boyl*e from a products liability case to a services case is not legally sound.[85]

In *McMahon v. Presidential Airways, Inc.*, the plaintiffs were the survivors of three United States service members who died in a plane crash in Afghanistan in 2004.[86] The plaintiffs sued the private military contractor who provided air transportation and operational support services to the Department of Defense.[87]

In addressing the combatant activities exception, the court recognized that both *Koohi* and *Bentzlin v. Hughes Aircraft Company*[88] used the combatant activities exception to preempt state law.[89] The court then questioned if those courts "unwittingly confused" the government contractor defense in *Boyle* with the combatant activities exception, or if they "crafted an entirely new defense based on sovereign immunity and federal preemption."[90] In the court's view, the combatant activities exception and the government contractor defense in *Boyle* are two different things: the former preserves sovereign immunity while the latter is a judicially-recognized affirmative defense only applicable in procurement contracts and when the government specifies the design.[91]

Because sovereign immunity cannot be granted to private parties and there is no judicial authority for mixing the combatant activities exception and the general contractor defense, the court held that the combatant activities exception did not bar suit.[92] For the court, the issue was a matter for Congress to decide and until they did, private military contractors were limited to the *Boyle* analysis and could not "bootstrap" the United States' sovereign immunity unless they qualified as employees of the federal government.[93]

The court acknowledged that *Koohi* and *Bentzlin* could be correct, but even if they were, it held that the combatant activities exception was limited to products liability claims when applied to private

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85 *See McMahon*, 460 F. Supp. 2d at 1330; *Fisher*, 390 F. Supp. 2d at 615-16.

86 *McMahon*, 460 F. Supp. 2d at 1318.

87 *Id.*

88 Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1494 (C.D. Cal. 1993) (finding *Koohi* "wholly persuasive" and barring a suit against the private military contractors because of the combatant activities exception).

89 *McMahon*, 460 F. Supp. 2d at 1330.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

military contractors.[94] Because all of the cases up to that point in time only dealt with defects in "complex military machinery," the court held that service contracts cannot be a basis for federal preemption of state law.[95] This holding conflicts with the later decision in *Saleh*, which did extend the exception to service contracts.[96]

2. The Textualist Theory: An Extension of the Combatant Activities Exception to Contractors Involved in "Actual Combat Operations"

A Textualist Theory holds that a contractor's activities must actually be 'combatant' for the combatant activities exception to apply.[97] In *Harris v. Kellogg, Brown & Root Services, Inc.*, the private military contractor installed and maintained showers at a military base in Iraq.[98] After reports of electrical shocks in a shower, the private military contractor replaced various parts on a water pump and the shocks stopped.[99] However, on January 2, 2008, Staff Sergeant Ryan D. Maseth was electrocuted and died.[100] An investigation found that the water pump overheated and was not properly grounded.[101] In a short holding, the court noted that other cases like *Koohi* are distinguishable, but held that "this case does not involve claims arising from active military combat operations."[102] The court viewed the private military contractor's role as "providing maintenance services to the United States Military."[103] Therefore, the court did not allow a defense on the combatant activities exception.

*Harris*'s requirement—that the contractor activity in question must be sufficiently involved in "actual combat operations" for the

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94 *Id.* (internal citations omitted).

95 McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1331 (M.D. Fla. 2006), *aff'd on other grounds*, 502 F.3d 1331 (11th Cir. 2007); *see also* Fisher v. Halliburton, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005) (denying a defense based on the combatant activities exception because the plaintiff's allegations did not claim that the defendants "supplied equipment, defective or otherwise, to the United States military").

96 *See* Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

97 Harris v. Kellogg, Brown & Root Servs., 618 F. Supp. 2d 400, 434 (W.D. Pa. 2009), *appeal dismissed*, 618 F.3d 398 (3d Cir. 2010).

98 *Id.* at 413-15.

99 *Id.* at 413-14.

100 *Id.* at 414.

101 *Id.* at 414-15.

102 *Id.* at 434.

103 Harris v. Kellogg, Brown & Root Servs., 618 F. Supp. 2d 400, 434 (W.D. Pa. 2009), *appeal dismissed*, 618 F.3d 398 (3d Cir. 2010).

combatant activities exception to apply—aligns with the reasoning of two of the first cases to interpret the exception: *Skeels v. United States*[104] and *Johnson v. United States*.[105] Although *Skeels* and *Johnson* did not involve private military contractors,[106] their analysis of the combatant activities exception is consistent with the reasoning of the Textualist Theory.

In *Skeels*, a 1947 district court case, a piece of pipe fell from a United States aircraft, killing a fisherman in the Gulf of Mexico.[107] The United States moved to dismiss the case under the combatant activities exception, arguing that the aircraft was engaged in target practice.[108] The court denied the motion and held that the combatant activities exception was not triggered because the conduct that led to the accident was not sufficiently "combatant" to trigger the combatant activities exception, even though the accident occurred during World War II.[109] The court reasoned, after consulting two dictionaries, that the word "combatant" denoted actual conflict, such as bombing an enemy territory or using force to repel an attack.[110] The court explained that if Congress wanted all military activities to fall within the exception, they would have used a phrase such as "war activities," but instead Congress chose to keep the exception "restricted to 'combat activities,' which as indicated by the definitions, means the actual engaging in the exercise of physical force."[111] According to the court, non-combat situations such as training activities and target practice do not fall under the combatant activities exception because the military is still capable of exercising care in non-combat situations.[112] The court held that the need for actual force in a combat situation was the

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104 Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947).

105 Johnson v. United States, 170 F.2d 767 (9th Cir. 1948).

106 *Johnson*, 170 F.2d at 768; *Skeels*, 72 F. Supp. at 373-74.

107 *Skeels*, 72 F. Supp. at 373.

108 *Id.* at 373-74.

109 *Id.* at 373.

110 *Id.*

111 *Id.*

112 *See id.*

> To hold that mere practice or training activities, even in time of war, come within the exception, would be to relieve the Government from liability for collision of its vehicles with those of private persons upon the highway, the damage or destruction of property, timber, crops, etc., by the wilful or negligent acts of the armed forces, in whatever locality they might be stationed for training so long as the individual offender was performing some act connected with training or practice.

*Id.* at 374.

"common sense" reading of the combatant activities exception and was in line with the "ordinary meaning of the words."[113]

The second case to interpret the combatant activities exception was *Johnson*, a Ninth Circuit decision.[114] In *Johnson*, the United States Navy polluted the plaintiff's clam farm when it was returning navy ships from the Pacific Theater after World War II.[115] In holding that the United States could not invoke the combatant activities exception, the court relied on a textual reading of the exception similar to that of the *Skeels* court.[116] The court explained that the words of the exception "mean exactly what they say" and that a reasonable reading would not "justify grammatical distortion of the meaning of [the] words in [their] common use."[117] The court held that the word "combatant" denotes "physical violence" and therefore the exception requires "actual hostilities."[118] The court recognized that the word "activities," in "combatant activities," includes a wider scope than just physical violence, but held that such activities must be "both necessary to and in direct connection with actual hostilities."[119] Because ships returning from the Pacific Theater in World War II were not engaging in actual hostilities or directly connected to actual hostilities, the court held that the exception did not apply.[120]

Although *Skeels* and *Johnson* do not involve private military contractors, their analysis is useful because it aligns with the reasoning of the Textualist Theory cases. These cases, such as *Harris*, are important because they recognize that the combatant activities exception can apply to private military contractors under *Boyle*, but require the activity in question to be part of "actual combat operations."

### 3. *Koohi*'s Reasonable Care Theory: Extension of the Combatant Activities Exception Unless the Contractor Owes a Duty of Reasonable Care

A third theory follows the *Koohi* court in arguing that an extension of the combatant activities exception under the reasoning of

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113 Skeels v. United States, 72 F. Supp. 372, 374 (W.D. La. 1947).
114 Johnson v. United States, 170 F.2d 767 (9th Cir. 1948).
115 *Id.* at 768.
116 *See id.* at 769.
117 *Id.*
118 *Id.* at 770.
119 *Id.*
120 Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948).

*Boyle* is legally justifiable.[121] These rulings—to one extent or another—leave the door open to the *Koohi* reasonable care limitation.[122] However, the cases that follow *Koohi* present a problem: It is difficult to know if a court followed *Koohi* simply because the court was dealing with a products liability claim like *Koohi*, or if it is following *Koohi*'s reasonable care holding. At least one case strictly relies on the former justification.[123]

In *Bentzlin v. Hughes Aircraft Co*., family members of six deceased Marines sued a private military contractor after the Marines were killed by an AGM-65D missile, fired from a United States Air Force A-10 aircraft.[124] In framing its analysis, the court recognized that the combatant activities exception manifests the government's interest in "determining the duty of care in combat."[125] The court then retraced the reasoning of the *Koohi* court and found it "wholly persuasive."[126] The court recognized that *Koohi*'s precise holding was limited to enemies of the United States, but claimed that there is no reason that *Koohi*'s precise holding was meant to be "narrowly construed."[127] *Bentzlin* then held that the suit against the private military contractors was barred because of the combatant activities exception.[128]

*Lessin v. Kellogg Brown & Root* took a different approach from *Bentzlin*.[129] In *Lessin* a "ramp assist arm" of a malfunctioning truck struck the head of a United States soldier—the plaintiff—causing traumatic brain injury.[130] A private military contractor owned the truck.[131] The court distinguished *Koohi* and *Bentzlin* because both of those cases dealt with products liability of complex weapons systems.[132] The court then noted that *Koohi* was concerned with the duty

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121 *See* Flanigan *ex rel.* Flanigan v. Westwind Technologies, Inc., 648 F. Supp. 2d 994 (W.D. Tenn. 2008); Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. 2006); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486 (C.D. Cal. 1993).

122 *See Lessin*, 2006 WL 3940556, at 4-5; *Bentzlin*, 833 F. Supp. at 1494.

123 *See Flanigan*, 648 F. Supp. 2d at 1005-07.

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

125 *Id.* at 1492.

126 *Id.* at 1494.

127 *Id.*

128 *Id.*

129 *See* Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556, at 4-5 (S.D. Tex. 2006).

130 *Id.* at 1.

131 *Id.*

132 *Id.* at 4 (citing Fisher v. Halliburton, 390 F. Supp. 2d 610, 615-16 (S.D. Tex. 2005)).

of care owed to a perceived enemy of the United States, which was not the case here.[133] Rather, this case involved "the duty of care owed by a private corporation to United States citizens."[134] The court then held that the combatant activities exception could not shield the private military contractor from liability.[135] Instead of embracing *Koohi* while downplaying its reasonable care language—as in *Bentzlin*—the *Lessin* court recognized the reasonable care language and, at least in part, based its decision to deny extension of the combatant activities exception on this language.[136]

### 4. *Saleh*'s No Tort Liability Theory: Absolute Extension of the Combatant Activities Exception to Private Military Contractors

The final theory, *Saleh*'s No Tort Liability Theory, argues that an extension of the combatant activities exception via *Boyle* reasoning is legally justifiable for services contracts—not just procurement contracts or products liability cases.[137] It also rejects *Koohi*'s reasonable care holding. Thus, federal law will always preempt state law and the contractor will always be shielded from a tort suit because there is no duty of reasonable care in the battlefield.[138]

The court in *Aiello v. Kellogg, Brown & Root Services, Inc.* openly criticized the holding in *Koohi*.[139] In *Aiello*, the plaintiff was a civilian working at Camp Shield, a military base in Iraq.[140] While using a bathroom that was maintained by a private military contractor, the plaintiff slipped and was injured.[141] The plaintiff sued the private

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133 *See id.*

134 *Id.*

135 Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556, at 5 (S.D. Tex. 2006).

136 *Id.* at 4.

137 *See* Al Shimari v. CACI Int'l., Inc., 658 F.3d 413, 420 (4th Cir. 2011), *on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012); Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 700-01 (S.D.N.Y. 2011).

138 *See Al Shimari*, 658 F.3d at 419 (citing Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009)); *Aiello*, 751 F. Supp. 2d at 709 (citing Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009); Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir.1992)).

139 *See* Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 709 (S.D.N.Y. 2011).

140 *Id.* at 701.

141 *Id.*

military contractor claiming that it was negligent in designing and maintaining the bathroom facility.[142]

The court retraced the reasoning of *Boyle*, acknowledged that both parties recognized a "unique federal interest," and then asked what the "contours of that unique interest" should be.[143] According to the court, *Saleh* held that the policy rationale for the combatant activities exception was the elimination of tort liability from the battlefield, while *Koohi* held that the rationale was to establish that no duty of care was necessary against a perceived enemy.[144] Here, the difference in the policy of the combatant activities exception would change the outcome of the case. The reasoning of *Koohi* would not allow federal preemption of state law because the plaintiff should have been given a duty of care. On the other hand, the reasoning of *Saleh* says that there is no tort liability in the battlefield, thus a significant conflict always exists.[145]

The court held that the *Koohi* approach was "unduly narrow."[146] It justified this position because of (1) the "arising out of" language of the exception; (2) the risk that bystanders of military activities could sue contractors; and (3) the need to avoid second-guessing of the military.[147] The court went on to hold that maintaining bathroom facilities was a combatant activity because such maintenance is "necessary to and in direct connection with actual hostilities."[148]

The Fourth Circuit has also supported the *Saleh*'s No Tort Liability Theory.[149] In *Al Shimari v. CACI International, Inc.*, the facts were analogous to those of *Saleh*: Abu Ghraib torture victims sued the private military contractor CACI for alleged abuse.[150] The court relied heavily on *Saleh* and agreed with its reasoning.[151] It reasoned that the uniquely federal interests in this case were the cost and availability of

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142 *Id.*

143 *Id. at* 709 (internal citations omitted).

144 *Id.* (citing Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009); Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992)).

145 *See* Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 709 (S.D.N.Y. 2011).

146 *Id.*

147 *Id.* (internal citations omitted).

148 *Id.* at 712-13 (quoting Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948)).

149 Al Shimari v. CACI Int'l., Inc., 658 F.3d 413, 419 (4th Cir. 2011), *on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012); *see also* Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 203 (4th Cir. 2011).

150 *Al Shimari*, 658 F.3d at 414.

151 *See id.* at 417-20.

private military contractors that the United States could use, the shortage of military personnel, the need for assistance in interrogating detainees, the prospect that military commanders would have to testify in court, and the need for flexibility in the military.[152] The court relied on *Saleh* to hold that the purpose of the combatant activity exception is to eliminate tort liability from the battlefield. Thus, the significant conflict created when state tort law is applied to the military is the military's inability to control the war and conduct intelligence-gathering activities.[153]

## II. ANALYSIS: *KOOHI* AS A WORKABLE JUDICIAL SOLUTION IN LIGHT OF MODERN WARFARE

All of the above theories have legally valid justifications for their holdings. The Legal Purist Theory argues that the combatant activities exception cannot be applied to private military contractors via *Boyle* reasoning because the Supreme Court never intended such an application.[154] The Textualist Theory argues that the combatant activities exception can apply under *Boyle*, but the contractor must be involved in "actual combat operations."[155] The Reasonable Care Theory, which aligns with *Koohi*, has followed the Supreme Court by using *Boyle* reasoning and has narrowly interpreted the FTCA to balance national security interests while deferring to Congress as much as possible.[156] The No Tort Liability Theory, which follows *Saleh* by granting private military contractors refuge under the combatant activities exception, likewise follows *Boyle* and interprets congressional intent as banning tort from the battlefield.[157]

The most prudent approach, and the approach that should govern in all future cases, is that of the *Koohi* court, which holds that a reasonable care standard for private military contractors is appropriate in some circumstances. Part A addresses the concern that *Boyle* was not intended to apply to services contracts and the concern that Congress

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152 *Id.* at 418.

153 *Id.*

154 McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006), *aff'd on other grounds*, 502 F.3d 1331 (11th Cir. 2007).

155 Harris v. Kellogg, Brown & Root Servs., 618 F. Supp. 2d 400, 434 (W.D. Pa. 2009), *appeal dismissed*, 618 F.3d 398 (3d Cir. 2010).

156 Koohi v. United States, 976 F.2d 1328, 1336-37 (9th Cir. 1992).

157 Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009) (citing Boyle v. United Technologies Corp., 487 U.S. 500, 500 (1988)).

excluded private military contractors from the FTCA. It then argues that *Boyle* was properly decided and creates a valid defense, based on preemption, for private military contractors who provide both products and services. Part B examines the policy that Congress envisioned for the combatant activities exception and argues that the *Koohi* approach of a reasonable care standard is in line with congressional and executive intent. Finally, Part C proposes a reasonable care test based on the *Koohi* holding and argues that this test is the most advantageous under the circumstances of modern warfare.

### A. *The Reasoning of* Boyle *Justifies Federal Preemption Using the Combatant Activities Exception*

The main argument of the Legal Purist Theory is that an extension of *Boyle* to apply the combatant activities exception to service contracts is not justified because *Boyle* itself did not allow for such an extension and Congress banned private military contractors from the FTCA.[158] Thus, private military contractors have no defense unless they deal with procurement contracts, as in *Boyle*.

There are two reasons why the Legal Purist Theory is untenable under *Boyle*. First, *Boyle* recognizes that sovereign immunity cannot be granted to private military contractors.[159] As Justice Scalia explains, "Justice Brennan's dissent misreads our discussion here 'to intimat[e] that the immunity [of federal officials] . . . might extend . . . [to] nongovernment employees' such as a Government contractor. But we do not address this issue, as it is not before us."[160] By clarifying that sovereign immunity is not at issue, Justice Scalia avoided a showdown over congressional intent of the FTCA and who Congress thought should have sovereign immunity.[161] This is a fight that could arguably be lost because the FTCA explicitly bans private contractors, which means they would not be able to take advantage of the exceptions contained within the FTCA.[162] By framing the general contractor defense as a federal common law case—preemption of

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158 *See* McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006), *aff'd on other grounds*, 502 F.3d 1331 (11th Cir. 2007); Fisher v. Halliburton, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005).

159 *See* Boyle v. United Technologies Corp., 487 U.S. 500, 505 n.1 (1988).

160 *Id.* (alterations in original) (citation omitted).

161 *See* 28 U.S.C. § 2671 (2006); *Boyle*, 487 U.S. at 522-23 (Brennan, J., dissenting).

162 28 U.S.C. § 2671; *see also Boyle*, 487 U.S. at 522-23 (Brennan, J., dissenting).

state law—*Boyle* sidesteps the concerns of those cases that hold that congressional intent bars the use of the combatant activities exception in relation to private military contractors.

Second, *Boyle* recognized and allowed service contracts and not just procurement contracts to come under its reasoning.[163] While assessing the uniquely federal interests, the Court said, "The federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction."[164] In addition to the cases discussed above,[165] other courts have followed this reasoning. In *Hudgens v. Bell Helicopters/Textron*, the Eleventh Circuit Court of Appeals held that *Boyle*'s analysis "is not designed to promote all-or-nothing rules regarding different classes of contract[s] . . . . We would be exceedingly hard-pressed to conclude that the unique federal interest recognized in *Boyle*, as well as the potential for significant conflict with state law, are not likewise manifest in the present [service contract] case."[166]

Some, however, have been critical of *Boyle*'s approach in making federal common law. One writer has noted, "If federal common law is to be successful or legitimate, it should inspire a judicial legacy that is consistent and capable of being expanded to address the myriad factual situations that courts must confront. *Boyle* has not adequately succeeded in this respect."[167] Another has said that although the Supreme Court had the power to create a general contractor defense through federal common law, "it failed to create a defense that truly balances the interests involved. Only Congress has the flexibility to create such a defense."[168]

The critics are somewhat correct: *Boyle* is not a perfect case and, in a perfect world, Congress would craft a general contractor defense that has clear congressional intent and bright line rules that delineate

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163 *Boyle*, 487 U.S. at 507.

164 *Id.* at 506.

165 *See* Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009); Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486 (C.D. Cal. 1993).

166 Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003).

167 Sean Watts, Note, Boyle v. United Technologies Corp. *and the Government Contractor Defense: An Analysis Based on the Current Circuit Split Regarding the Scope of the Defense*, 40 WM. & MARY L. REV. 687, 715 (1999).

168 George J. Romanik, Note, *Federal Common Law Alive and Well Fifty Years After* Erie*:* Boyle v. United Technologies Corp. *and the Government Contractor's Defense*, 22 CONN. L. REV. 239, 277 (1989).

what type of contracts fall under such a defense.[169] That would be the best possible outcome. However, that is simply not the case and there is no reason to believe that Congress will craft such a defense.

Although *Boyle* has its critics with regard to federal preemption, *Boyle* is still valid law and, for better or worse, "exhibit[s] core hallmarks" of federal common law.[170] As recently as 2006, the Supreme Court has relied on and discussed *Boyle* to explain the Court's preemption policy.[171] Likewise, as discussed above, district and appellate courts have relied on *Boyle* in the context of government contracting and the combatant activities exception.[172] Those who support *Boyle* have said that the lower courts' use of *Boyle*—and even an expansion of *Boyle*—is consistent with Justice Scalia's majority opinion, if the FTCA exemptions are read broadly.[173] Others have hailed *Boyl*e as a "versatile shield" that government contractors can rely on to defend against tort suits and a tool that the courts have used in managing their dockets at the summary judgment stage.[174] *Boyle* also works to protect federal interests.[175]

As a practical matter, *Boyle* properly deals with congressional intent by creating federal common law to preempt state law, not by granting sovereign immunity to private military contractors.[176] Like-

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169 *See generally* Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 839-41 (2008) (arguing that Congress should implement a narrowly tailored indemnification regime).

170 Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 418 (2011) (explaining that the core hallmarks of federal common law are "sua sponte policy identification, independent selection of the factual triggers implicating that policy, and an assertion that alternative institutional views on the policy are at most persuasive, but not binding").

171 *See* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 2006 (2011) (Sotomayor, J., dissenting); Danforth v. Minnesota, 552 U.S. 264, 290 n.24 (2008); Empire Healthchoice Assurance Inc. v. McVeigh, 547 U.S. 677, 692 (2006).

172 *See* Al Shimari v. CACI Int'l., Inc., 658 F.3d 413, 418-19 (4th Cir. 2011), *on reh'g en banc*, 679 F.3d 205 (4th Cir. 2012); Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009); Koohi v. United States, 976 F.2d 1328, 1336-37 (9th Cir. 1992); Aiello v. Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 708-09 (S.D.N.Y. 2011); Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556, at 4 (S.D. Tex. 2006); Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1492 (C.D. Cal. 1993).

173 See Roger Doyle, *Contract Torture: Will* Boyle *Allow Private Military Contractors to Profit from the Abuse of Prisoners?*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 467, 483 (2007).

174 Colin P. Cahoon, Boyle *Under Siege*, 59 J. AIR L. & COM. 815, 816 (1994).

175 Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988).

176 *See id.* at 505 n.1.

wise, *Boyle* allows service contracts to fall under its reasoning.[177] Therefore, courts have a valid justification to use *Boyle*'s preemption analysis to apply the combatant activities exception to procurement or service contracts.

### B. Koohi *or* Saleh*?: The Legal Approach and Policy Behind the Combatant Activities Exception*

Both *Koohi* and *Saleh* are correct in applying the combatant activities exception because the Supreme Court has set the reasoning and the precedent for their respective holdings. The question remains: which case is a better reflection of the legal rationale and policy behind the combatant activities exception? *Koohi* should serve as a guide because it better reflects congressional intent to limit immunity for private military contractors and it strikes an appropriate balance between guarding federal interests and holding private military contractors accountable.

The *Saleh* court found a "significant conflict" with state law because it holds that the policy embedded in the combatant activities exception is "simply the elimination of tort from the battlefield."[178] This view, however, is problematic when juxtaposed with the congressional intent contained in the actual words of the FTCA.[179] In *Saleh*, Justice Garland dissented, saying:

> The court is plainly correct that the FTCA's policy is to eliminate *the U.S. government's* liability for battlefield torts. That, after all, is what the FTCA says. But it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says. *See W. Va. Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 98, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (declaring that "[t]he best evidence of [congressional] purpose is the statutory text"). Nor, as the court recognizes, is there any sup-

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177 *Id.* at 507.

178 Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009).

179 Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2674 (2006) ("*The United States* shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ") (emphasis added).

> port for its position in the "singularly barren" legislative history of the combatant activities exception.[180]

Congress has never declared that tort liability should be completely removed from the battlefield or that private military contractors should not be accountable in the United States. There are several signs that the current trend is toward greater accountability for private military contractors in all areas of the law. For example, the military has recognized that in the absence of host nation jurisdiction, private military contractors that accompany United States Armed Forces are subject to United States federal law.[181] In 1996, Congress passed the War Crimes Act, which allows the United States to prosecute private military contractors for war crimes.[182] In 2000, Congress passed the Military Extraterritorial Jurisdiction Act to make private military contractors more accountable under United States law.[183] This Act provides for the federal prosecution of certain crimes committed by United States civilians while they are employed by, or accompanying, United States Armed Forces abroad.[184] In October 2001, Congress passed the USA PATRIOT Act, which allows the United States to apprehend and prosecute United States nationals and foreigners who commit crimes on foreign military bases.[185] Private military contractors are also subject to the Uniform Code of Military Justice and the Federal Anti-Torture Statute.[186]

Additionally, Congress knows how to clearly state its intent and has done so in other laws with private military contractors. One

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[180] Saleh v. Titan Corp., 580 F.3d 1, 26 (D.C. Cir. 2009) (Garland, J., dissenting) (internal citations omitted).

[181] DEP'T OF ARMY, FM 3-100.21, OPERATIONAL CONTRACT SUPPORT TACTICS, TECHNIQUES, AND PROCEDURES 5-22(c) (2011), *available at* http://www.fas.org/irp/doddir/army/attp4-10.pdf [hereinafter DEP'T OF ARMY 2011].

[182] War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); *see also* DEP'T OF ARMY 2011, *supra* note 181, at 5-22(c)(3) (explaining that the War Crimes Act of 1996 is an option for prosecuting military contractors).

[183] 18 U.S.C. § 3261 (2006).

[184] *Id.*; *see also* Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L 365, 373 (2006) (citing HUMAN RIGHTS WATCH, Q&A: PRIVATE MILITARY CONTRACTORS AND THE LAW (Oct. 21, 2004)).

[185] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272 (2001); *see also* DEP'T OF ARMY 2011, *supra* note 181, at 5-22(c)(4) (explaining that the USA PATRIOT Act is an option for prosecuting military contractors).

[186] DEP'T OF ARMY 2011, *supra* note 181, at (c)(1), (5).

example is 22 U.S.C. § 2291-4, which is entitled "Official immunity for authorized employees and agents of United States and foreign countries engaged in interdiction of aircraft used in illicit drug trafficking."[187] Congressional intent to immunize private military contractors is evident from the title alone because Congress specifically included the term "agents of the United States."[188] It is apparent from this law that Congress knows when and how to make its intent clear if it so desires.

In the FTCA, Congress has only made its intent clear that it wanted to remove tort liability from the battlefield *for the United States and its employees*; it makes no mention of private military contractors.[189] Thus, it is not clear that the *complete* elimination of tort liability from the battlefield is the proper policy of the combatant activities exception.

A plain reading of the text of the combatant activities exception also suggests that Congress wanted to hold private military contractors accountable in tort. For example, the text of the combatant activities exception applies only to the "military or naval forces, or the Coast Guard . . . ."[190] Congress's specificity suggests that it wanted a narrowly tailored exception that only applied to the Military, the Navy, or the Coast Guard—not necessarily to private military contractors. This seems especially true when one considers that Congress did not use the phrase "employee of the government," a defined phrase that is used throughout the FTCA, including in other FTCA exceptions.[191] The phrase "employee of the government," includes, *inter alios*, officers or employees of a federal agency, persons who act on behalf of a federal agency either permanently or temporarily, and members of the Military, Navy, and National Guard.[192] Because this definition includes the Military and Navy, it is possible that Congress could have used it in the combatant activities exception. The fact that Congress chose not to use the term "employee of the government" is a strong indicator that it wanted the exception only to apply to the

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187 22 U.S.C. § 2291-4 (2006) (granting private contractors immunity from suit when destroying or damaging an aircraft).

188 *Id.*

189 *Id.* § 2671 ("As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency'. . .does not include any contractor with the United States.").

190 *Id.* § 2680(j).

191 *See id.* § 2671.

192 *Id*.

Military, Navy or Coast Guard and *not* the other individuals listed in the definition, such as contractors who work "temporarily" on behalf of a federal agency.[193] All of this reinforces Congress's express exclusion of private military contractors from the FTCA's definition of "federal agency."[194]

The intent of the Executive Branch also reflects a policy that private military contractors should be held accountable. The Code of Federal Regulations states that unless a private military contractor is immune from suit under an international agreement or international law, "inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability."[195] It goes on to say that private military contractors shall comply with all United States laws, regulations, and procedures.[196] The Code of Federal Regulations even notes that when a private military contractor works in "dangerous or austere conditions," the contractor still "accepts the risks associated with required contract performance in such operations."[197] In response to criticism of these rules, the Department of Defense has said, "Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties."[198] Therefore, "the clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors."[199]

Although the government indemnifies private military contractors against some losses,[200] this indemnification does not mean that the government holds all private military contractors unaccountable. Indemnification is limited "to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise."[201] The Department of Defense Contract

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193 *See generally* 28 U.S.C. § 2671 (2006) (defining "[e]mployee of the government" to include persons temporarily acting on behalf of a federal agency in an official capacity).

194 *Id.* ("As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency'. . . does not include any contractor with the United States.").

195 FAR 252.225-7040(b)(3)(iii) (2011).

196 *Id.* 252.225-7040(d).

197 *Id.* 252.225-7040(b)(2).

198 *Id.* 212, 225, 252.

199 *Id.*

200 *See id.* 52.250-1(b).

201 FAR 52.250-1(c) (2011).

Appeals Board has interpreted this to mean that private military contractors cannot enter into a contract knowing that there is risk involved and then "propose unrealistically low prices on the hopes they may later gain indemnification."[202] Thus, even though private military contractors can gain indemnification, the direction of the legal trend is to hold them more accountable under the law.

### C. Koohi*: The Better Approach*

When considered in light of Legislative and Executive Branch intent, the *Koohi* holding is appropriate because it recognizes that private contractors do have a duty of care and risk civil and criminal liability, but that risk excludes those "against whom force is directed as a result of authorized military action."[203] The *Koohi* holding could be developed into a simple, two-step test that could be incorporated into the *Boyle* "significant conflict" analysis. First, there would be an assumption of reasonable care because the Executive Branch has said that private military contractors need to obey United States laws.[204] What is "reasonable" could be adapted to each war zone and individual situation. The first question to ask would be whether force was directed against a perceived enemy.[205] If no, then the contractor could and should be held liable to some extent. If yes, then the next question would be whether the activity or action in question was a result of "authorized military action."[206] If the activity or action in question was the result of authorized military action, then a "significant conflict" would exist and the contractor would not be held liable.[207]

The *Koohi* test is a better approach than the *Saleh* test because the *Saleh* test introduces an additional step that is unrelated to the combatant activities exception and the *Boyle* analysis. The additional step allows private military contractors to be granted immunity when the "private service contractor is integrated into combatant activities over which the military retains command authority."[208] The military and the Executive Branch have been clear that the military does not

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202 *Id.* 212, 225, 252.
203 *See* Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).
204 *See* FAR 252.225-7040(d) (2011).
205 *See Koohi*, 976 F.2d at 1336-37.
206 *See id.* at 1337.
207 *See* Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988).
208 Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009).

retain command or control over private military contractors. In Army field manuals that were current during the *Saleh* litigation, the Army stated that private military contractors are not part of the "chain of command" and that commanders do not have "direct control over contractors or their employees."[209] The Army field manuals also stated that "only contractors directly manage and supervise their employees" and "it must be clearly understood that commanders do not have direct control over contractor employees."[210] Additionally, the contractor has the "most immediate influence" in dealing with disciplinary problems with employees.[211] Updated Army manuals state similar propositions, saying, "Contractor personnel are not part of the operational chain of command. They are managed in accordance with terms and conditions of their contract."[212] The Department of Defense has stated that "contractor personnel are civilians accompanying the U.S. Armed Forces."[213]

The danger in the *Saleh* test is that it provides for much more judicial oversight of the military than is necessary because the court is not willing to trust what the military has stated—that contractors are not part of the chain of command. Justice Garland stated as much in his dissent:

> Why should we ignore the military's own description of its chain of command—as set forth in its contracts, regulations, and manuals—and instead investigate the facts on the ground? Does this not again invite the wide-ranging judicial inquiry—with affidavits, depositions, and conflicting testimony—that the court rightly abjures? The irony is again evident: we must have a robust contractor defense so as not to interfere with the Executive's conduct of war; but in applying that

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209 *See* DEP'T OF ARMY, FM 3-100.21, CONTRACTORS ON THE BATTLEFIELD 1-22 (2003), *available at* http://www.fas.org/irp/doddir/army/fm3-100-21.pdf [hereinafter DEP'T OF ARMY 2003].

210 Dep't of Army 2003, *supra* note 209, at 4-2.

211 Dep't of Army 2003, *supra* note 209, at 4-45.

212 Dep't of Army, AR 715-9 Operational Contract Support Planning and Management 4-1(d) (2011), *available at* http://www.apd.army.mil/pdffiles/r715_9.pdf . *See also* Dep't of Army 2011, SUPRA note 181, at 5-21 (explaining that "Commanders at all levels must understanding they do not have the same command authority over contractor personnel as they do military members").

213 FAR 252.225-7040(b)(3) (2011).

> defense, we do not take the military at its word and instead inquire into the actual operation of its chain of command.[214]

Because the *Saleh* test allows for too much judicial intermeddling into whether a private military contractor was integrated into combatant activities, the test should come from *Koohi* and ask whether the activity in question was "authorized" by a statement of work, contract, or other order.[215]

The *Koohi* test is a narrow interpretation of the combatant activities exception and it is favorable for several reasons. First, a *Koohi*-like test would be in line with the overarching purpose of *Boyle*: to protect the interests of the United States when a significant conflict with federal law exists.[216] With the *Koohi* test, a significant conflict would be triggered when a contractor used force against a perceived enemy and the military or government gave approval to use this force.[217] The approval to use force is the government's explicit way of identifying its significant interests.

Although this is a narrow test, tension in the *Saleh* case shows why a narrow test should be favored over a blanket exemption that eliminates tort liability from the battlefield. In *Saleh*, contractors were accused of torturing detainees and the court held that the combatant activities exception barred suit because there was a federal interest involved—the interrogation of detainees.[218] This holding is ironic because the Executive Branch denounced the abuse. President Bush said that, "the practices that took place in that prison are abhorrent, and they don't represent America . . . . It's a matter that reflects badly on my country . . . and justice will be served."[219] President Bush later stated that "people will be held to account according to our laws."[220] These statements illustrate that a policy of zero tort liability in the battlefield, as held by the *Saleh* court, can rob the Executive Branch of the ability to improve foreign relations by allowing private

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214 Saleh v. Titan Corp., 580 F.3d 1, 34 (D.C. Cir. 2009) (Garland, J., dissenting).

215 *See* Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992).

216 *See* Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988).

217 *See Koohi,* 976 F.2d at 1336-37.

218 *See Saleh*, 580 F.3d at 3, 6-7.

219 Interview with George W. Bush, President of the U.S., in Wash., D.C. (May 5, 2004), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=72618&st=&st1+#axzz1j09UIocG.

220 President George W. Bush, The President's News Conference (June 14, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060614.html.

military contractors to be sued in tort. Such a lawsuit would send a message to all nations—especially those with whom the United States is trying to improve relations—that the United States does not condone such behavior and those that carried it out will be held accountable under the law. A policy of zero tort liability in the battlefield would remove an "important tool from the Executive's foreign policy toolbox" and make it impossible for the Executive Branch to subject private military contractors to tort law even if it thought that would advance the United States' interests.[221] Such reasoning may be why the Executive Branch did not seek to defend the military contractors in *Saleh* and subsequent lawsuits.[222] By interpreting the combatant activities exception narrowly, the *Koohi* test protects the United States' interests while simultaneously giving the Executive Branch the flexibility and power it needs to shape the United States' foreign relations.

A *Koohi*-like test is also favorable because it would help the relationship between private military contractors and the United States government. In August 2011, the Commission on Wartime Contracting in Iraq and Afghanistan (the Commission)—a bipartisan congressional committee—stated that heavy reliance on private military contractors has "overwhelmed" the government's ability to properly manage contractors and, therefore, the commission concluded that the government is "over-reliant" on private military contractors.[223] This has led to a lack of oversight of private military contractors[224] and the need for a "cultural shift" within the Department of Defense.[225] The Government Accountability Office has also noted that the Department of Defense's contract management has been on the "high-risk-program lists" since 1992 because of weak contractor accountability.[226]

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221 *Saleh*, 580 F.3d at 29 (Garland, J., dissenting).

222 *See id.* at 28.

223 TRANSFORMING WARTIME CONTRACTING, *supra* note 10, at 3.

224 *Recurring Problems in Afghan Construction: Hearing Before the Comm. on Wartime Contracting*, 112th Cong. 46 (2011) (statement of Maj. Gen. Arnold Fields (USMC, Ret.), Special Inspector General for Afghanistan Reconstruction), *available at* http://www.wartimecontracting.gov/docs/hearing2011-01-24_transcript.pdf ("We don't have enough trained folks within the federal establishment to provide the oversight of the very contractors that we are bringing aboard.").

225 *See* Memorandum from Robert M. Gates, Sec'y of Def., to Sec'ys of Military Dep'ts (Jan. 24, 2011), *quoted in* AT WHAT RISK?, *supra* note 8, at 20.

226 *See Subcontracting: Who's Minding the Store?: Hearing Before the Comm. on Wartime Contracting*, 111th Cong. 2 (2010) (statement of Christopher Shays, Comm'n Co-Chair), *available at* http://www.wartimecontracting.gov/docs/hearing2010-07-26_transcript.pdf.

One specific problem that the Commission identified is the inability of the courts to gain jurisdiction over some contractors for tort claims, mainly foreign contractors.[227] The Commission recommended making consent to United States civil jurisdiction a condition of awarding the contract.[228] This recommendation would be defeated if the judiciary embraces a policy that eliminates tort liability from the battlefield. Such a policy would continue to foster and promote the lack of accountability that currently exists. Rather, the judiciary should adopt the *Koohi* test, which would hold contractors accountable by using general tort principles.

One of the main principles of tort law is that the prospect of liability deters wrongful conduct and makes the actor more careful.[229] Here, this would be a powerful tool in the overall struggle to reign in private military contractors and hold them more accountable under the laws of the United States. This is especially true in situations where "government officials will be unable or unwilling to police contractors by drafting and enforcing optimal contract terms."[230] In our current reliance on private military contractors, negligent behavior will be deterred and private military contractors will exercise greater care when executing military contracts.[231] Additionally, the private military contractor is in the best position to avoid tortious conduct.[232] Private military contractors—unlike soldiers—can evaluate the magnitude and likelihood of harm in contemplating a given action, purchase insurance, and even stop doing an activity if it is extremely risky or there is a high duty of care.[233]

Supporting another principle of tort law, the *Koohi* test would ensure that a remedy exists for harms that contractors commit.[234] Even opponents of increased liability recognize that contractors seek economic profits.[235] A private military contractor is an economic

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227 AT WHAT RISK?, *supra* note 8, at 8.

228 AT WHAT RISK?, *supra* note 8, at 8.

229 *See* RESTATEMENT (SECOND) OF TORTS § 901(c) (1979).

230 Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 261 (1991).

231 *See* Davidson, *supra* note 169, at 836.

232 Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395, 440 (2009).

233 *Id.* at 447.

234 *See* Koohi v. United States, 976 F.2d 1328, 1337 (9th Cir. 1992); RESTATEMENT (SECOND) OF TORTS § 901(c) (1979).

235 Cass & Gillette, *supra* note 230, at 260.

actor who stands to benefit from its contract with the government.[236] Thus, the risk of the contractor's liability is offset by its benefit in engaging in a profit-making activity.[237] This not only makes sense for the contractor, but also for soldiers because they can experience a "morale boost" if they know their loved ones are likely to recover if they are injured or killed by a private military contractor.[238]

Finally, the *Koohi* test is favorable because of its resemblance to *Skeels* and *Johnson*—the first cases to interpret the combatant activities exception—thus giving it a flexibility that is important in modern warfare. The first prong of the *Koohi* test considers whether force was directed against a perceived enemy. Implicit in this question is the requirement that a private military contractor use some type of actual force for the exception to apply.[239] The holdings of *Skeels* and *Johnson* support the requirement of actual force.[240] By invoking a requirement for actual force, the *Koohi* test creates a flexibility that allows the United States, or its contractors, to protect their interests during actual combat situations, while also allowing victims an opportunity to present their case in court when actual force is not used.[241] This flexibility allows the courts to apply the combatant activities exception on a case-by-case basis. It also conforms to congressional

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[236] Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle*'s Government Contractor Defense*, 63 S. CAL. L. REV. 637, 653 (1990).

[237] *Id.*

[238] *See* Davidson, *supra* note 169, at 836-37.

[239] *See* Skeels v. United States, 72 F. Supp. 372, 374 (W.D. La. 1947); Johnson v. United States, 170 F.2d 767, 769-70 (9th Cir. 1948).

[240] *Skeels*, 72 F. Supp. at 374 ("It is believed that the phrase was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc. . . . [I]n actual fighting, the attention and energies of the military personnel would be *directed and devoted* to the destruction of the enemy and its property, as well as to the protection of the lives of their own forces, citizens and property by the use of force immediately applied.") (emphasis added); Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948) ("'Combat' connotes physical violence; 'combatant,' its derivative, as used here, connotes pertaining to actual hostilities.").

[241] *Cf. Skeels*, 72 F. Supp. at 374 (W.D. La. 1947) (explaining that if a force requirement was not present in the combatant activities exception, then even "mere practice or training activities" would fall within the exception, creating liability "for collision of its vehicles with those of private persons upon the highway, the damage or destruction of property, timber, crops, etc., by the wilful or negligent acts of the armed forces, in whatever locality they might be stationed for training so long as the individual offender was performing some act connected with training or practice").

intent as interpreted by *Skeels* and *Johnson* and it allows the government to protect its actual wartime interests.[242]

## CONCLUSION

By creating a reasonable care standard, the *Koohi* court crafted a rule that respects the congressional intent of the FTCA while recognizing that the practical realities of warfare sometimes demand that federal law preempt state tort law to protect the interests of the United States. This balanced approach is supported by a textual reading of the FTCA,[243] Congressional and Executive Branch intent,[244] and the general principles of tort law.[245] The *Koohi* reasonable care standard is a modern test that adequately deals with the growing number of contractors in the military and can be easily applied in the evolving twenty-first century battlefield.

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242 *See Johnson*, 170 F.2d at 769 ("The act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a 'combatant activity,' but this fact does not make necessary a conclusion that all varied activities having an incidental relation to some activity directly connected with previously ended fighting on active war fronts must, under the terms of the Act, be regarded as and held to be a 'combatant activity.' To so hold might lead to results which need not here be considered.").

243 *See supra* Part II.B.

244 *See supra* Part II.B.

245 *See supra* text accompanying notes 229-238.