THE NEW WAGES OF WAR—DEVALUING DEATH AND INJURY: CONCEPTUALIZING DUTY AND EMPLOYMENT IN COMBAT ZONES

Michael H. LeRoy*

I. INTRODUCTION: THE NEW WAR-LABOR PARADIGM

My study explores the growing interface between civilian employment and military service in war zones. It is motivated by changes in waging war. The U.S. once had a vertically integrated process to transport troops, run supply chains, and maintain equipment. Today, the military outsources these functions to private companies.[1] These contractors began to function as "force multipliers" for the military in 1992, and are in use today.[2] In 2009, 242,000 civilian contractors worked with 280,000 soldiers in Iraq and Afghanistan.[3] Also dubbed private military forces,[4] these American civilians drive trucks, cook meals, fix planes, and provide security.[5]

* Professor, School of Labor & Employment Relations and College of Law, University of Illinois at Urbana-Champaign.

1. *See* Jay M. Zitter, Annotation, *Liability of Civilian Contractors Engaged in Providing Security Services under Contract to Department of Defense, Department of State, or Coalition Provisional Authority for Injuries to Their Employees*, 24 A.L.R. FED. 2D 529 (2007).

2. *Managing Contractors During Iraq Drawdown*: *Hearing Before the Sen. Comm'n on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. (2010) (statement of James Loehrl, Executive Director, Rock Island Contracting Center). Reporting to the Senate Commission on Wartime Contracting in Iraq and Afghanistan, Loehrl explained the history of LOGCAP contracts: "In 1992, the Army competitively awarded the first multifunctional logistics support contract, now known as LOGCAP I, to Kellogg Brown and Root (KBR). This contract was established as a force multiplier with a wide range of logistics services." He explained that the first LOGCAP contract was used in support of military operations in Somalia, Rwanda, Bosnia, Haiti, and East Timor.

3. *Our View: Warfare, Outsourced*, ANCHORAGE DAILY NEWS (Jan. 3, 2010, 5:26 PM), http://www.adn.com/opinion/view/story/1077653.html.

4. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2007).

5. Kateryna L. Rakowsky, *Military Contractors and Civil Liability: Use of the*

Co-mingling military service and civilian employment raises new questions about legal remedies for Americans who are killed or injured serving their country. Increasingly, soldiers serve under the direction of contractors. Meanwhile, civilian employees work for private sector firms that are directed by the military.[6] Thus, some soldiers engage in non-combat activities such as building water treatment plants,[7] while civilians work in combat support roles such as guarding mess halls and supplying troops.[8] Afghanistan is a case in point.

Now consider how the new war-labor paradigm functions on the ground. An example is the Halliburton supply convoy that tried to deliver supplies to U.S. troops in Iraq in 2004.[9] The group was ambushed and six truck drivers were killed.[10] The day before, a similar convoy was attacked, killing a co-worker. The work was so unsafe that managers contemplated an interruption of services, but they decided to go forward, leading to the death of their employees.[11]

My study asks: how should the workers' survivors be compensated? Suing in tort, they believed that job ads misrepresented the safety of work in Iraq.[12] A judge rejected Halliburton's defense that it has immunity from suits as a

Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan, 2 STAN. J. C.R. & C.L. 365, 369 (2006).

6. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-040, REBUILDING IRAQ: STATUS OF COMPETITION FOR IRAQ RECONSTRUCTION CONTRACTS 1 (2006). "Since 2003, Congress appropriated more than $20 billion through the Iraq Relief and Reconstruction Fund (IRRF) to support Iraq rebuilding efforts, such as repairing oil facilities, increasing electricity capacity, and restoring water treatment plants." Private sector companies performed most of these projects.

7. Julie Sullivan, *Hexavalent Chromium Case: Iraq Contractor Cut Deal for Lawsuit Immunity*, THE OREGONIAN, July 13, 2010, 2010 WLNR 14012315.

8. *See, e.g.*, Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).

9. Fisher v. Halliburton, 390 F. Supp. 2d 610, 612 (S.D. Tex. 2005).

10. *Id.* at 612.

11. Mary Flood, *Judge Considers Newly Released E-Mails in KBR Case*, THE HOUSTON CHRON. (Dec. 18, 2009, 9:11 AM), http://www.chron.com/disp/story.mpl/business/6776265.html.

12. Fisher v. Halliburton, 703 F. Supp. 2d 639, 644 (S.D. Tex. 2005). For more specific allegations, see the related complaint in *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 1443369 (S.D. Tex. April 7, 2006) (stating: "Defendants' advertisements for work in Iraq appeared on Strategic Ecomm Inc.'s website and expressly stated and misrepresented to potential and hired workers that 'with new heightened security you'll be 100% safe,' while working in Iraq and that the 'Area of Operations' in which the workers would be performing their duties, was a fully secured location, completely patrolled and protected by trained, skilled, and fully armed United States military personnel, all of whom knew, understood, and agreed that their duties required providing complete protection to unarmed civilian workers, who were working in Iraq specifically to assist in the peaceful mission of rebuilding Iraq and in providing non-combat support to U.S. troops. In recruiting workers, Defendants ran a series of deceptive ads on television, radio, and on Internet websites."

government contractor.[13] Thus, the survivors' legal claims are proceeding to trial.

Consider a reciprocal case, where soldiers served on a noncombat mission under a civilian contractor. As they worked at an Iraqi water treatment plant, they developed bloody noses: a sign of poisoning from the sodium dichromate in pipes.[14] This study also asks: Should the soldiers only receive service member benefits, or should they be allowed to pursue tort and other remedies? Fearing long term effects from this deadly toxin, the soldiers sued KBR.[15] An Indiana court will decide whether their claims are dismissed under a doctrine that bars tort recovery for injuries that arise during military service.[16]

Death- and injury-benefit cases do more than raise technical legal questions. When courts award or deny monetary relief in these war labor cases, they decide whether civilians and soldiers perform "work" or "service." The distinction has profound consequences for compensating war losses. This study sheds light on growing judicial scrutiny of the integrated use of civilians and troops by asking: How are civilians and soldiers who are co-mingled in this military system paid for death and injury? Do sovereign immunity theories bar recovery? Do courts order arbitration of these claims? If courts try claims, what laws apply: tort or workers' compensation?

While the focus of my study is on the compensation of soldiers and contract employees for injuries that arise when troops and civilians are in coordinated activities, my research question is related to a broader issue. In *Saleh v. Titan Corp.*,[17] Iraqi nationals and surviving widows sued a private contractor under the Alien Tort Statute for alleged torture and other abuse allegedly carried out in the Abu Ghraib prison. Similar to most cases in my study, the contractor asserted sovereign immunity.[18] In a split decision, the D.C. Circuit ruled that the contractor was entitled to assert this defense. In a pertinent passage, the appeals court cited the close integration of military and contractor activities in managing the work of civilian employees as justification for providing the immunity.[19] The United States Supreme Court recently

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

14. Dione Searcey, *Soldiers Fight in the Courts Over Liability in War Zones*, WALL ST. J., Jan. 7, 2010, at A13.

15. *Id.*

16. *Id.* The immunity doctrine originates in *Feres v. United States*, 340 U.S. 135 (1950). *See also* Kansas v. United States, 204 U.S. 331, 342 (1907).

17. 580 F.3d 1 (D.C. Cir. 2009).

18. *Id.* at 5.

19. *Id.* at 7, stating:

> In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit. And the policies of the combatant activities exception are 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. Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges

expressed interest in addressing this immunity issue.[20] The possible import is that the Supreme Court, in the course of ruling on whether contractor employees commit actionable torts in Iraq when their conduct is co-regulated by military and civilian supervisors, could clarify whether similarly-situated employees are allowed to sue in tort for combat-related injuries.

This Article is organized in three Parts. Part II is an overview of contractor defenses to death and injury claims.[21] Part III is a typology of litigation outcomes in lawsuits by service members and civilian workers, in which I also discuss my reason for using a typology.[22] After I describe how cases were identified for this study,[23] I present the typology and discuss the cases.[24] Part IV presents my conclusions[25] and public policy options.[26]

II. CONTRACTOR DEFENSES TO CLAIMS FOR DEATH AND INJURY BY SERVICEMEMBERS AND CIVILIAN EMPLOYEES

Using federal and state court cases, and workers' compensation rulings, I explored cases where civilians or soldiers in these integrated roles were killed or injured. In each of these cases, a private employer was sued over the incident.

Mostly, plaintiffs in this study sued in tort under a variety of theories, including assault and battery,[27] negligence,[28] misrepresentation,[29] and emotional distress.[30] Spouses filed derivative claims such as wrongful death[31] and loss of consortium.[32] Parents and children sued for negligence.[33] In general, these causes of action have lucrative remedies.

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obviously are precluded by sovereign immunity).

20. Saleh v. Titan Corp., 131 S. Ct. 379 (U.S. Oct. 4, 2010) (inviting solicitor general to file briefs expressing the views of the United States).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IIIB.

24. *See infra* Part IIIC.

25. *See infra* Part IVA.

26. *See infra* Part IVB.

27. Jones v. Halliburton, 583 F.3d 228 (5th Cir. 2009).

28. Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006).

29. Lane v. Halliburton, 529 F.3d 548, 555 (5th Cir. 2008).

30. *Jones*, 583 F.3d at 228.

31. McMahon v. Presidential Airways, 502 F.3d 1331 (11th Cir. 2007).

32. Parlin v. Dyncorp Int'l, Inc., No. 08C-01-136, 2009 WL 3636756, at *6 (Del. Sept. 30, 2009) ("Cynthia Parlin did not sign the agreement or a release. The sense of justice that saved the loss of consortium claim in *Jones* is at least as compelling in the wrongful death context.").

33. Smith v. Halliburton, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).

In response to these lawsuits, contractors typically asserted three lines of defense: (1) a derivative of sovereign immunity stemming from the relationship of the contractor to the U.S. military; (2) workers' compensation as an exclusive remedy; or (3) an individual insurance contract between the employee and employer. The following explains these defenses.

A. The Contractor Asserts Sovereign Immunity

This doctrine reflects a long-held view that the United States must give consent before a party may sue it.[34] In specific instances, the federal government has waived its sovereign immunity—for example, where individuals sue on a government contract.[35] By 1946, the United States provided individuals a limited cause of action for torts,[36] thereby creating an exception to the sovereign immunity doctrine.

Suppose that an Army surgeon negligently caused a soldier's death, or that he failed to remove a towel during abdominal surgery—or in another scenario, suppose the Army's failure to fix a defective heater caused a barracks fire that killed a serviceman. Would the Federal Tort Claims Act provide recovery for these injuries? The Supreme Court ruled on these consolidated claims in a leading case, *Feres v. United States*.[37]

Finding no direct answer to the question of government liability for service-related death or injury caused by negligence, the Court derived its *Feres* military-immunity doctrine from two principles. First, "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving."[38] Second, the Court recognized the impracticality of allowing civil litigation for military torts: "A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage."[39] Thus, *Feres* concluded that the federal government is not liable under the Federal Tort Claims Act for injuries

34. Kansas v. United States, 204 U.S. 331, 342 (1907) ("It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.").

35. For example, in 1855 Congress established the U.S. Court of Claims, a special court created to hear cases against the United States involving contracts based upon the Constitution, federal statutes, and federal regulations. In 1887 Congress passed the Tucker Act to authorize federal district courts to hear contractual claims not exceeding $10,000 against the United States. Tucker Act, 28 U.S.C. § 1491 (2006).

36. *See* Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–78 (2006) (authorizing federal district courts to hold the United States liable for torts committed by its agencies, officers, and employees just as the courts would hold individual defendants liable under similar circumstances).

37. 340 U.S. 135, 146 (1950).

38. *Id.* at 141.

39. *Id.* at 145.

to servicemen that arise as an incident to service.[40]

The Supreme Court reaffirmed the *Feres* doctrine in *United States v. Shearer* but instructed courts to take a case-by-case, rather than *per se*, approach to claims for immunity.[41] Thus, the "*Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."[42]

Courts often cite the *Feres* doctrine to deny a tort recovery for military claimants.[43] The doctrine has been broadened to provide derivative immunity to private entities. In *United States v. Munoz*, the Supreme Court allowed lower courts to dismiss lawsuits against private actors based upon the political question doctrine.[44] A common case involves claims for defective military products, where the contractor is a manufacturer.[45] However, after *Shearer* some courts find that the *Feres* doctrine does not apply.[46] My study does not examine contractor liability for defective equipment that caused death or injury in Iraq or Afghanistan.[47] Again, it focuses on losses that were proximately

40. *Id.* at 146.

41. United States v. Shearer, 473 U.S. 52, 57 (1985).

42. Hayes v. United States *ex rel.* U.S. Dep't of Army, 44 F.3d 377 (5th Cir. 1995) (quoting United States v. Shearer, 473 U.S. 52, 57 (1985)).

43. *See, e.g.*, United States v. Johnson, 481 U.S. 681 (1987); *see also* Morey v. United States, 903 F.2d 880, 881-82 (1st Cir. 1990); Matthew v. United States, 311 F. App'x 409, 411-12 (2d Cir. 2009); O'Neill v. United States, 140 F.3d 564 (3d Cir. 1998); Loughney v. United States, 839 F.2d 186 (3d Cir. 1988); France v. United States, 225 F.3d 658 (6th Cir. 2000); Walls v. United States, 832 F.2d 93, 93-95 (7th Cir. 1987); Brown v. United States, 151 F.3d 800, 803 (8th Cir. 1998); Purcell v. United States, 137 F. App'x 158, 159-62 (10th Cir. 2005); Kitowski v. United States, 931 F.2d 1526, 1527-28 (11th Cir. 1991); Schnitzer v. Harvey, 389 F.3d 200, 202-04 (D.C. Cir. 2004).

44. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) ("[T]he identity of the *litigant* is immaterial to the presence of [political question] concerns in a particular case.").

45. Boyle v. United Technologies Corp., 487 U.S. 500 (1988). In *Boyle*, the Supreme Court held that the district court was required to dismiss a tort suit brought by the survivors of a soldier killed in a helicopter crash in the course of training. The suit alleged that the helicopter manufacturer defectively designed the aircraft's emergency escape system.

46. *See, e.g.*, M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992), where the Army negligently tested a soldier and mistakenly told her that she was HIV-positive. After she was honorably discharged, the Army discovered its mistake but did not communicate to her that she was not HIV positive when she was tested. In the meantime, she became severely depressed and tried to commit suicide. The Seventh Circuit ruled that the government was immune from suit for the mistaken test; however, since the government discovered its mistake after she left the service, the *Feres* doctrine did not apply to that circumstance. *See also* Whitley v. United States, 170 F.3d 1061 (11th Cir. 1999). The decedent, an Army lieutenant, died in a crash caused by another serviceman's negligence. The men were participating in an international rugby tournament held at an Army base in Georgia. The court said that *Feres* did not apply to these facts: the trip was not officially sanctioned or approved; the activity, a rugby tournament was purely recreational; and Lt. Whitley merely requested permission to attend.

47. *Shearer*, 473 U.S. at 57. A clear example of an excluded case is *Getz v. Boeing Co.*, 690 F. Supp. 2d 982 (N.D. Cal. 2010). The precipitating event was a crash of a Chinook helicopter in Zabul Province in Afghanistan on February 17, 2007. Twenty-two service

caused by the contractor's activities in the war zone.

B. The Contractor Asserts the Exclusive Remedy Provision in Workers' Compensation

State worker compensation statutes were enacted "to remove [n]egligently caused industrial accidents from the common law tort system."[48] This law requires employers or their insurers to pay for loss of income, medical costs, and loss of work capacity for injuries that arise in the course of employment. Where an injury arises in situations that are only tangentially work-related, the law still applies—but it also extinguishes an employer's tort liability, even for exposing the employee to extraordinary risk.[49] Courts have summarized this trade-off: "That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits."[50]

C. The Contractor Asserts That Its Employment Contract with the Employee Precludes Legal Remedies and Access to Court, and Provides Designated Foreign Choice of Law

A strong public policy allows employers to impose mandatory arbitration agreements on workers as a condition of employment.[51] Military contractors used these contracts to require employees stationed in combat zones to forego their access to courts.[52] Other contractors required these workers to accept life insurance as an exclusive recovery for death in the course of employment.[53]

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members died or were injured. They, and their survivors, sued several companies who designed, assembled, manufactured, inspected, tested, marketed, and sold the helicopter. Relying on an immunity doctrine, the court held that the engine manufacturer was entitled to military contractor defense; the component manufacturer was entitled to military contractor defense; the helicopter manufacturer was entitled to military contractor defense; and the military contractor defense barred failure to warn claim.

48. Mandolidis v. Elkins Indus., Inc., 246 S.E.2d 907, 911 (W.Va. 1978).

49. Eckis v. Sea World Corp., 134 Cal. Rptr. 183 (1976). The employer arranged for secretary in a bikini to ride Shamu, a killer whale, for a promotional photo. After exhibiting signs of anger, Shamu attacked the secretary, inflicting severe bite wounds. *Id.*

50. Dominion Caisson Corp. v. Clark, 614 A.2d 529, 532-33 (D.C. 1992) (quoting Meiggs v. Associated Builders, Inc., 545 A.2d 631, 634 (D.C. 1988)).

51. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (determining that employee's age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in employer's securities registration application).

52. Jones v. Halliburton, 583 F.3d 228 (5th Cir. 2009).

53. Parlin v. Dyncorp Intern., Inc., No. 08C-01-136, 2009 WL 3636756, at *1 (Del. Super. Sept. 30, 2009) (summarizing Parlin's employment relationship: Before beginning work in Iraq, Parlin signed an employment agreement with Dyncorp. The agreement expressly provides that it is governed by the law of the Dubai Internet City. The agreement also describes the general nature and duties of Parlin's job, and further states: "The

III. A TYPOLOGY: WAR ZONE DEATH AND INJURY IN THE COURSE OF SERVICE AND EMPLOYMENT

A. Why Use a Typology?

The integrated work performed by civilians and soldiers in wars exemplifies the aphorism "out of sight, out of mind." Recently, however, research has begun to explore a variety of legal and public policy issues that arise from the new war-labor model.[54]

This research literature led me to create the following typology.[55] Typologies are useful as "a starting point for developing a systematic, theory based study"[56] of a subject that will be examined more rigorously when better data or information is available. For the following reasons, this approach fits the study of court decisions that deal with compensating civilians and service members in war zones.

Emerging Phenomenon: The current war-labor paradigm began in the Persian Gulf War, and has continued in the wars in Iraq and Afghanistan. In this relatively short time, this model has expanded from strictly military to

Employee understands and accepts the fact that he . . . may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of death . . . to Employee, except as stated below. Employer will obtain . . . insurance . . . on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, injury or disability against Employer and its affiliates.").

54. *See* Jeffrey F. Addicott, *The Political Question Doctrine and Civil Liability for Contracting Companies on the "Battlefield,"* 28 REV. LITIG. 343 (2008); Chad Carter, *Halliburton Wears a Who? Political Questions Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86 (2009); Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005); Andrew Finkelman, *Suing Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT'L L. 395 (2009); Aaron L. Jackson, *Civilian Soldiers: Expanding the Government Contractor Defense to Reflect the New Corporate Role in Warfare*, 31 A.F. L. REV. 211 (2009); Chris Jenks, *Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine*, 28 BERKELEY J. INT'L L. 178 (2010); John L. Watts, *Differences Without Distinctions: Boyle's Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647 (2007); Trevor Wilson, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Wartime Realities*, 38 TUL. L. REV. 225 (2008); Comment, *Justiciability in Modern War Zones: Is the Political Question Doctrine a Viable Bar to Tort Claims Against Private Military Contractors*? 83 TUL. L. REV. 219 (2008); Note, *Revisiting and Revising the Political Question Doctrine: Lane v. Halliburton and the Need to Adopt a Case-Specific Political Question Analysis for Private Military Contractor Cases*, 29 MISS. C. L. REV. 219 (2010).

55. A typology is a "study or analysis or classification based on types or categories." Sandra L. Robinson & Rebecca J. Bennett, *A Typology of Deviant Workplace Behaviors: A Multidimensional Scaling Study*, 38 ACAD. MGMT. J. 555, 557 (1995).

56. *Id.*

include some nation-building operations. In Afghanistan, for example, the leading American general said that the most important key to winning the war is ensuring that Afghan girls are educated in schools.[57] This means that American forces and contractors need to build an education infrastructure.

Unobservable Disputes: There are some simple reasons why the deaths and injuries in this study are relatively unobservable. They occur in war theaters that are far from the United States. Thus, lawyers and courts are also removed from these events. Less obvious is the possibility that the injured parties might not question or complain about their current compensation. Service members and their dependents already have an elaborate benefit system for these injuries. It is not unreasonable to assume that some—perhaps many—parties with a possible legal claim outside this system would fail to consider litigating a claim.

In addition, information available to the United States about war-zone contractors is limited. Thus, the government may not know the full extent of injuries or how they occurred. A recent GAO report reviewed 223 federal contracts and task orders active during fiscal year 2008 or the first half of fiscal year 2009 in Iraq and Afghanistan, and concluded: "DOD, State, and USAID officials told us that there were no agency-wide data sources that provided detailed information about the functions performed by contractors. . . ."[58] The report also identified a concern that contractors perform "inherently governmental functions" but do so without adequate control by the government.[59]

Protracted Litigation: The court opinions that comprise this study reflect the evolving and opaque nature of integrated combat zone work. This means

57. Elisabeth Bumiller, *Unlikely Tutor Giving Military Afghan Advice*, N.Y. TIMES, July 18, 2010, at A1, http://www.nytimes.com/2010/07/18/world/asia/18tea.html.

58. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-357, CONTINGENCY CONTRACTING: IMPROVEMENTS NEEDED IN MANAGEMENT OF CONTRACTORS SUPPORTING CONTRACT AND GRANT ADMINISTRATION IN IRAQ AND AFGHANISTAN 8 (2010).

59. *See id.* at 5-6 (affirming that "inherently governmental functions are so intimately related to the public interest as to require performance by government employees, and include functions that require discretion in applying government authority or value judgments in making decisions for the government. FAR 7.503(c) provides 20 examples of functions considered to be inherently governmental, including determining agency policy or federal program budget request priorities; directing and controlling federal employees; and awarding, administering, or terminating federal contracts. Similarly, FAR 7.503(d) provides examples of functions that while not inherently governmental, may approach the category because of the nature of the function, the manner in which a contractor performs the contract, or the manner in which the government administers performance under a contract. These functions closely support the performance of inherently governmental functions and generally include professional and management support activities, such as those that involve or relate to supporting budget preparation, evaluation of another contractor's performance, acquisition planning, or technical evaluation of contract proposals. *When contractors perform these functions, there is a risk of inappropriately influencing the government's control over and accountability for decisions that may be based, in part, on contractor work*." (emphasis added)).

that litigation has only begun to appear in published decisions. As a group, these opinions are not decisions on the merits of compensation claims, but instead, deal with preliminary issues—do courts have jurisdiction, or is the contractor entitled to immunity?

Even though most of these lawsuits are far from over, much time has passed. *Fisher v. Halliburton* is a case in point, with an initial ruling in September 2006 and a recent ruling in May 2010[60]—a decision at the trial court level that could result in another appeal.

Overall, this study examines disputes that lack clear precedents. The great losses claimed in these lawsuits mean that the stakes are high. Litigation usually involves sensitive or privileged or copious information, any of which can slow discovery.[61] In sum, these factors explain why so few cases have resulted in a published opinion. A typology, therefore, is appropriate for this kind of preliminary study.

B. How Were Cases Identified?

I explored three different sources for cases. First, I executed keyword searches using Westlaw's internet service. Using an appropriate federal law database (FLB-ALL) and state database (ALLSTATES), I employed a variety of keyword searches, such as "IRAQ" or "AFGHANISTAN" and "CONTRACT!" Later, I incorporated specific contractor names in my search, such as "KBR," or "HALLIBURTON," or "DYNCORP." Separately, I began a keycite check using *Feres*—the primary decision for the doctrine of contractor immunity in military settings. As cases accumulated, I also checked their keycite history to identify newer cases that were not discovered in my keyword search.

Second, I used Google's news database and archive to identify cases that were not yet reported in Westlaw as published rulings. I discovered, for example, the early stages of the litigation involving soldiers who are suing in an Indiana court to recover for their alleged exposure to a highly carcinogenic substance while they worked in a water treatment plant in Iraq.[62]

Third, I used a website called "Ms Sparky" for research leads.[63] For

60. Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Fisher v. Halliburton, 703 F. Supp. 2d 639 (S.D. Tex. 2010), *reconsideration denied sub nom.* Smith-Idol v. Halliburton, No. H-06-1168, 2010 WL 2196268 (S.D. Tex. May 27, 2010).

61. *See Smith-Idol*, 2010 WL 2196268, at *2 (consolidating *Fisher* claims), where the plaintiff contended that the defendants produced tens of thousands of documents, totaling 68,000 pages, and that the court's dismissal order prevented plaintiff from having enough time to review this information.

62. *See, e.g.*, August Cole, *Senate Slams Reckless Behavior*, WALL ST. J., Feb. 24, 2010, at A13 (describing how a contractor's recklessness in Afghanistan led to the shooting death of a civilian security force trainer).

63. MS SPARKY (Oct. 28, 2010, 5:26 PM), http://mssparky.com/.

example, the website has information on "Contractor Deaths." This tab lists the names of civilian employees and their manner of death. To illustrate, there is a report on the electrocution of Adam Hermanson, a contract worker who died in his shower at Triple Canopy's Camp Olympia in the Baghdad's Green Zone in September 2009.[64] The website also has a tab for "Lawsuits." It reports, for example, on the February 2010 filing of a class action lawsuit in a Maryland federal district court. Since the case is at an early stage, it is not reported in a legal database. Nonetheless, it fits the criteria for cases in this study: the plaintiffs are soldiers who have died or been injured, they say, because of their work around extremely hazardous "burn pits" run by KBR/Halliburton.[65]

Finally, it is important to explain the meaning of a "case." While I make occasional reference to the filing of a lawsuit, I do so only to illustrate the factual possibilities of death and injuries that can occur in this integrated war-labor model. But these lawsuits are not cases for purposes of this study. The focus of my study is judicial decision-making. My purpose is to understand how courts rule on threshold issues such as jurisdiction, immunity defenses, and arbitrability of claims, as well as substantive issues such as exclusive remedies provided in insurance-type systems or tort liability. For this study, a "case" is a published court opinion or ruling.

C. The Typology and Cases

1. Worker Compensation Claims (Cell 1 and Cell 2)

Cell 1 examines a case where a civilian employee received benefits under a workers' compensation law. The law in question was a federal version of workers' compensation. Called the Defense Base Act,[66] it allows civilians to obtain recovery for work-related injuries on overseas military bases. Cell 2 deals with soldiers, and their survivors, who failed to obtain a tort remedy. As a result, they received only insurance. For death benefits claims, their recovery

64. *Janine Hermanson Still Seeks Answers in Adams Electrocution Death*, MS SPARKY (Dec. 13, 2009), http://mssparky.com/2009/12/janine-hermanson-still-seeks-answers-in-adams-electrocution-death/.

65. Nora Eisenberg, *The Army Made Us Burn It!*, MS SPARKY (Feb. 12, 2010, 10:37 AM), http://mssparky.com/2010/02/the-army-made-us-burn-it-says-kbr/; *Iraq Burn Pit Claims Will Proceed – Another Stunning Blow to KBR*, MS SPARKY, (Feb. 12, 2010, 11:56 AM), http://mssparky.com/category/chemical-and-other-exposures/burn-pits/ (describing how the federal filing consolidated twenty-two lawsuits from forty-three states, alleging that KBR, Halliburton, and other military contractors harmed soldiers by exposing them to toxins, including known carcinogens, while burning huge waste piles in Iraq and Afghanistan. The allegations claim the negligent burning of refuse such as lithium batteries, petroleum, asbestos, trucks, cars, paint, plastic, Styrofoam, medical waste, including human limbs, and more.).

66. Defense Base Act, 42 U.S.C. §§ 1651-1654 (2006) (provides workers' compensation for many employees stationed outside of the United States).

was limited to $400,000.[67]

2. Tort Claims (Cell 3 and Cell 4)

Cell 3 has cases where a civilian employee was allowed to pursue a tort remedy. These cases are significant because courts rejected a contractor's attempt to invoke immunity doctrines. These rulings differ from the main trend when defense contractors are sued in tort—typically for defective military products that cause death or injury. The result in Cell 3 is that courts do not limit civilians to an insurance-type recovery. In Cell 4, soldiers and survivors were allowed to sue contractors in tort because courts rejected a contractor's effort to invoke immunity doctrines. This allowed service members and their family to receive more compensation than insurance.

Table 1
Compensation for Soldiers and Civilian Employees Killed or Injured in War

	Civilian Employee	**Soldier**
Worker Compensation	Cell 1 Case Outcomes: *Jones v. Halliburton*: grant relief under Defense Base Act.[68] *Eysselinck*: affirm denial of workers' comp. programs.[69]	Cell 2 Case Outcomes: *Smith v. Halliburton*: deny relief in tort due to "political question" doctrine.[70] *Carmichael v. KBR*: deny relief in tort due to "political question" doctrine.[71] *Whitaker v. KBR*: deny relief in tort due to "political question" doctrine.[72]

67. *See* House Committee on Veterans' Affairs, *Servicemembers' and Veterans' Life Insurance*, *available at* http://veterans.house.gov/benefits/insurance.shtml.

68. Jones v. Halliburton, 583 F.3d 228 (5th Cir. 2009).

69. Eysselinck v. Dir., Office of Workers' Comp. Programs, 392 F. App'x. 262 (5th Cir. 2010).

70. Smith v. Halliburton, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).

71. Carmichael v. Kellogg Brown & Root, 572 F.3d 1271 (11th Cir. 2009).

72. Whitaker v. Kellogg Brown & Root, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

	Cell 3	Cell 4
Tort	Case Outcomes: *Fisher v. Halliburton*: allow tort claim to proceed.[73] *Lane v. Halliburton*: allow tort claim to proceed.[74] *Potts v. Dyncorp*: allow tort claim to proceed.[75] *Parlin v. Dyncorp*: allow tort claim to proceed.[76] *Barker v. Halliburton*: order arbitration of tort claim.[77] *Jones v. Halliburton*: allow tort claim to proceed.[78] *Martin v. Halliburton*: allow tort claim to proceed.[79]	Case Outcomes: *Lessin v. KBR*: allow tort claim to proceed.[80] *McMahon v. Pres. Air.*: allow tort claim to proceed.[81]

a. Cell 1: Civilians Who Work Like Soldiers: Worker Compensation Remedy

Private military forces do not usually qualify for workers' compensation because they work beyond state borders. Only a few states apply this law for injuries outside their jurisdiction. The Federal Employees' Compensation Act is a workers' compensation law for federal employees,[82] but it does not apply to contractor employees. Thus, most private military force employees fall in a

73. Fisher v. Halliburton, 390 F. Supp. 2d 610 (S.D. Tex. 2005).
74. Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008).
75. Potts v. Dyncorp, 465 F. Supp. 2d 1245 (M.D. Ala. 2006).
76. Parlin v. Dyncorp, No. 08c-01-136, 2009 WL 3636756 (Del. Super. Ct. Sept. 30, 2009).
77. Barker v. Halliburton, 541 F. Supp. 2d 879 (S.D. Tex. 2008).
78. Jones v. Halliburton, 583 F.3d 228 (5th Cir. 2009).
79. Martin v. Halliburton, 618 F.3d 476 (5th Cir. 2010).
80. Lessin v. Kellogg Brown & Root, 2006 WL 3940556 (S.D. Tex. June 12, 2006).
81. McMahon v. Presidential Airways, Inc., No. H-05-01853, 502 F.3d 1331 (11th Cir. 2007).
82. Pub. L. No. 89-554, 80 Stat. 547 (1966); Pub. L. No. 90-83, § 1(61), 81 Stat. 211 (1967); Pub. L. No. 93-416, § 15, 88 Stat. 1147 (1974).

workers' compensation void. However, the Defense Base Act applies to some of these workers.[83] It pays civilians who are killed or injured on public works projects outside the United States.[84]

My research found one case of compensation under the Defense Base Act. Halliburton transferred Jamie Leigh Jones from her job in Texas to Baghdad.[85] Within days, she was raped by co-workers in her barracks, located in Camp Hope.[86] This area was jointly controlled by the United States and her employer.[87] Badly beaten, Jones went to the Army hospital.[88] After her release, she was placed under armed guard in a container.[89] Jones received benefits under the Defense Base Act.[90] Separately, she sued Halliburton on several tort theories (see discussion in Cell 3, above).[91]

A civilian contractor employee who supervised de-mining operations in Iraq is discussed in *Eysselinck v. Director, Office of Workers' Compensation Programs*.[92] During a three-month leave of absence from war operations, while Eysselinck was at home, he committed suicide.[93] His wife filed for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) for workers' compensation, claiming that his suicide was a work-related manifestation of post-traumatic stress disorder (PTSD).[94] After hearing expert witness testimony from both parties, the administrative law judge rejected the wife's claim for survivor benefits.[95]

The LHWCA compensates for injuries incurred by certain overseas workers, but excludes payments "if the injury was occasioned solely by the

83. Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622; Act of Dec. 2, 1942, ch. 668, § 301, 56 Stat. 1035.

84. *See, e.g.*, Overseas African Constr. Corp. v. McMullen, 367 F. Supp. 202 (S.D.N.Y. 1973) (upholding compensation of an employee who contracted a serious skin disease while working on a harbor improvement for the U.S. Army Corps of Engineers in a Somali port).

85. Jones v. Halliburton, Co., 583 F.3d 228, 231 (5th Cir. 2009).

86. *Id.* at 231-32.

87. *Id.* at 231; *see also* Jones v. Halliburton Co., 625 F. Supp. 2d 339, 343 n.2 (S.D. Tex. 2008) (stating that "Ms. Jones began work at Camp Hope, located in the 'Green Zone' of Baghdad, on July 25, 2005." The district court also reported that "[p]laintiff alleges that Camp Hope was under the direct control and authority of the United States Department of State, the United States Department of Defense, KBR, and Halliburton, collectively.").

88. *Id.* at 232.

89. *Id.*

90. *Id.*

91. *Id.* (Jones filed claims for negligence, sexual harassment and hostile work environment under Title VII, as well as retaliation, breach of contract, fraud in the inducement to enter the employment contract, fraud in the inducement to agree to arbitration, assault and battery, intentional infliction of emotional distress, and false imprisonment.).

92. 392 F. App'x. at 263.

93. *Id.*

94. *Id.*

95. *Id.*

intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."[96] The administrative law judge, who heard one expert attribute Eysselinck's suicide in part to alcohol consumption,[97] reasoned that the claimant had the burden of proving that her husband's suicide resulted from "an irresistible impulse to kill himself."[98] The claimant failed to prove that her husband "suffered from a mental disease or impairment that created the impulse leading to the suicide."[99] In concrete terms, she was unable to prove that her husband's PTSD made suicide an involuntary act.[100] The Fifth Circuit ruled that the administrative law judge ruling was based on voluminous record evidence, and was not inconsistent with the law.[101]

b. Cell 2: Soldiers Who Work Like Civilians: Worker Compensation Remedy

Cell 2 shows that no soldiers received workers' compensation for their losses. When soldiers die during active duty, the United States provides survivor benefits.[102] These include monthly payments to spouses, children, and other dependents under the Dependency and Indemnity Compensation and Survivor Benefit program.[103] Alternatively, survivors are eligible for lump sum payments from the death gratuity program.[104] This provides a maximum benefit of $100,000.[105] Service Members Group Life Insurance supplements this automatic benefit by allowing soldiers to buy up to $400,000 in insurance.[106]

The cases arose in Cell 2, however, because servicemen—or their estates and survivors—believed that death and injuries were proximately caused by contractors. Cell 2 shows that these lawsuits were unsuccessful. Courts applied immunity doctrines to dismiss these claims. As the following discussion shows, judges believed that these cases raised political questions that were only remotely legal in character.

In *Smith v. Halliburton Co.*, the wife and children of a fallen soldier sued a contractor who provided security to the Army.[107] A suicide bomber detonated

96. *Id.* at 264.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at n.1.

101. *Id.* at 264.

102. *See* Dana J. Chase, *Survivor Benefits Update*, 2008 ARMY LAW 20, 20.

103. *See* U.S. DEP'T OF VETERANS AFFAIRS, SURVIVORS' VA BENEFITS (2011), *available at* http://www.vba.va.gov/survivors/vabenefits.htm (last visited Nov. 3, 2010).

104. *See Death Gratuity*, OSD MILITARY COMPENSATION, http://militarypay.defense.gov/benefits/deathgratuity.html.

105. *Id.*

106. U.S. DEP'T OF VETERANS AFFAIRS, SERVICEMEMBERS' & VETERANS' GROUP LIFE *Ins.* (2010), *available at* http://www.insurance.va.gov/SGLISITE/SGLI/sgli.htm.

107. 2006 WL 2521326, at *1.

explosives in a Halliburton dining tent.[108] Mrs. Smith sued for negligence and premises liability, noting that Halliburton possessed, operated, and occupied the dining tent.[109] Dismissing the lawsuit, the court cited the political question doctrine—meaning that it would need to make judgments reserved for the Commander in Chief and the military.[110] In this case, the contractor was following military orders while providing security.[111]

The court ruled that it lacked jurisdiction because the case presented a nonjusticiable political question.[112] Reading the Field Manual, the court saw that the government specified that military commanders are responsible for protecting contractor employees.[113] This led the court to apply the factors that relate to the political question doctrine.[114] First, the court found that the legal issues presented in the complaint were inextricably linked to issues that the Constitution commits to the political branches.[115]

A trial "would require the court to substitute its judgment on military decision-making for that of the branches of government entrusted with this task."[116] This type of review would "intrude onto critical areas reserved to the Legislative and Executive Branches of government by the Constitution."[117] In addition, the court lacked judicially discoverable and manageable standards to hold a trial.[118] Finally, the court said that it could not resolve the case without

108. *Id.*

109. *Id.* at *5.

110. *Id.* at *6.

111. *Id.* at *5.

112. *Id.* at *7.

113. *Id.* at *4 (citing DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD ¶ 6-4 (2003)).

114. *Id.* at *2 (citing Baker v. Carr, 82 S. Ct. 691, 710 (1962)). The court noted these factors:

> (1) a textually demonstrable commitment of the issue to a coordinate political department;
>
> (2) a lack of judicially discoverable and manageable standards;
>
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
>
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
>
> (5) an unusual need for unquestioning adherence to a political decision already made; and
>
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

115. *Id.* at *6.

116. *Id.* The court elaborated: "To determine whether the force protection in place was adequate the intelligence gathering, risk assessment, and security measures implemented by the military at FOB Marez would have to be examined. Because the suicide bomber managed to enter the base, the court would also have to examine base perimeter security."

117. *Id.*

118. *Id.* The court explained that it lacked the resources and judgment to determine "what constitutes reasonable security measures at a military base located in an area of Iraq subject to threats from hostile forces."

exercising nonjudicial discretion.[119]

In *Carmichael v. Kellogg, Brown & Root Services, Inc.*, a sergeant in Iraq was thrown from a speeding fuel truck.[120] Pinned under the vehicle, he could not breathe for several minutes.[121] He is now in a vegetative state.[122] His wife sued the contractor whose employee lost control of the truck.[123] Applying the political question doctrine, the appeals court said it lacked jurisdiction to consider the contractor's liability.[124] The military decided the convoy's speed, route, and intervals.[125] Because the Army decided each travel factor, the matter was an issue for other branches of government to decide.[126]

In *Whitaker v. Kellogg Brown & Root, Inc.*, a soldier was providing security as an armed escort for a KBR supply convoy when the truck in front of him hit a bridge guard rail.[127] Stopping his vehicle to help, the soldier was hit from behind by another truck.[128] Private Whitaker was thrown into a river and drowned.[129] His surviving parents sued KBR for the negligence of its drivers.[130] Applying the political question doctrine, the court barred the claims of the soldier's estate.[131] The Army controlled all aspects of the convoy operation.[132] The court noted that the military provided "a seamless transportation system that supports the movement requirements of the joint force and the Army."[133] It added: "When the military seeks to accomplish its mission by partnering with government contractors who are subject to the military's orders, regulations, and convoy plan, the use of those civilian contractors to accomplish the military objective does not lessen the deference due to the political branches in this area."[134]

119. *Id.* A trial would require the "court [to] substitute its judgment for that of the military on the issue of whether adequate force protection measures were in place." This analysis would delve into the military's policy of centralizing the feeding of troops, and specific mess-hall policies about allowing entrance of Iraqi soldiers in this area (the suicide bomber was believed to have worn an Iraqi uniform).

120. 572 F.3d 1271, 1278 (11th Cir. 2009).

121. *Id.*

122. *Id.*

123. *Id.* at 1278-79.

124. *Id.* at 1281 (explaining that "a political question is raised when a suit requires reexamination of issues entrusted by the Constitution's text to a coordinate political department"). The court said: "[t]here can be little doubt that military judgments generally fall into this category."

125. *Id.* at 1281-82.

126. *Id.* at 1282-83.

127. 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1282.

132. *Id.* at 1279.

133. *Id.*

134. *Id.* at 1281.

c. Cell 3: Civilians Who Work Like Soldiers: Tort Remedy

A contractor who hired civilians to drive fuel trucks is discussed in *Fisher v. Halliburton*.[135] In April 2004, the Army assembled two separate convoys to deliver fuel to the Baghdad airport.[136] Halliburton employees were provided military-style camouflage tankers—but they had no armored plating.[137] Directed to travel a different route from the military convoy, they were attacked.[138] Six workers were killed.[139] Suing in tort, surviving family members claimed that Halliburton falsely recruited their relatives by concealing serious safety risks.[140] Alleging wrongful death, they also claimed that Halliburton used civilians as decoys.[141] Halliburton argued that survivors could not recover damages under the Defense Base Act or the Federal Tort Claims Act.[142] *Fisher* ruled that the Defense Base Act does not bar a recovery in tort when an employer acts with specific intent to injure its employee.[143] The court also rejected Halliburton's immunity defense to the survivors' Federal Tort Claims Act (FTCA) claim.[144]

135. 390 F. Supp. 2d 610 (S.D. Tex. 2005).

136. *Id.* at 612.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* Plaintiff's First Amended Federal Complaint for Damages Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637 (S.D. Tex. 2006), *rev'd sub nom*. Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (alleging that Halliburton and its subsidiaries and agents ran a nationwide recruitment campaign and advertised via national radio and television that misled job applicants). One ad said "Work In Rebuilding Iraq and Earn $60,000 to $200,000 Per Year Guaranteed!" Other ads concealed the true risks associated with this work. For example, one message stated that civilian truck drivers would enjoy "full 24 hour a day U.S. military protection . . . ." *Id.* at 17. Other ads misled potential workers into believing that the contractors' primary mission was to rebuild Iraq, peacefully assist the Iraqi people, and provide non-combat support to the U.S. troops. For example, Halliburton's website said: "Rebuilding Iraq is one of the largest and most complex reconstruction undertakings of the past half century. The people of Kellogg Brown & Root are proud to continue to play a role in the transformation of Iraq." *Id.* at 18. This campaign failed to disclose the military character of the work performed by Kellogg Brown & Root civilian employees in a war zone.

141. Fisher v. Halliburton, 390 F. Supp. 2d 610, 612 (S.D. Tex. 2005).

142. *Id.* at 613.

143. *Id.* at 613-14 ("A very narrow exception to the DBA's exclusive liability provision applies where the employer acted with the specific intent to injure the employee. *See, e.g.*, Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313, 316 (D. Me. 1981)." The court continued: "On a Motion to Dismiss, the Court must accept Plaintiffs' allegations as true. Plaintiffs have alleged facts that fall within the exception to the exclusivity provision of the DBA for intended harm. Accordingly, Defendants' motion to dismiss based on the DBA must be denied.").

144. *Id.* at 616 ("Plaintiffs' claims in this case do not involve any allegation that Defendants supplied equipment, defective or otherwise, to the United States military. The Court concludes that extension of the government contractor defense beyond its current boundaries is unwarranted and the FTCA does not bar Plaintiffs' claims.").

Lane v. Halliburton involved the convoy attack that occurred the day before the assault in *Fisher*.[145] Reginald Lane's lawsuit alleged that KBR used false advertising to induce him to signup as a truck driver in Iraq.[146] On April 9, 2004, his convoy was dispatched to an area that his employer understood was at a very high risk of insurgent attack."[147] As the convoy came under fire, many civilians were injured.[148] Lane lost the use of an arm and suffered irreparable brain damage.[149] His lawsuit alleged fraud and deceit and intentional infliction of emotional injuries.[150]

The Fifth Circuit Court of Appeals held that the political question doctrine did not bar Lane's claims against private military contractors because, "[c]ontrary to the situations regarding matters of war, there is no textual commitment to the coordinate branches of the authority to adjudicate the merits of the Plaintiffs' claims against KBR for breach of its duties."[151] A trial could proceed because the company's conduct could "be examined by a federal court without violating the Constitution's separation of powers."[152] Continuing, the court reasoned that these claims raised "legal questions that may be resolved by the application of traditional tort standards . . . . We are not asked to develop a 'prudent force protection' standard and then impose that standard directly on the Army."[153]

Potts v. Dyncorp involved a civilian employee who was seriously injured in a car accident in Iraq.[154] The vehicle, driven at high speeds by another employee, flipped and burned as it swerved to miss a dog on the road.[155] Potts sued the driver's employer, Dyncorp, under several negligence theories.[156] The employer said that the court lacked jurisdiction under the political question doctrine.[157] Ruling for Potts, the judge said: "[c]onsidering the contract as a whole, one critical fact is evident. Dyncorp's own internal policies regarding procedures, training and management controlled its conduct in Iraq."[158] These were unrelated to military control. Dyncorp was under contract to support the oil-for-food program, a non-military effort.[159] The company agreed to be

145. Lane v. Halliburton, 529 F.3d 548, 555 (5th Cir. 2008) (reporting the April 8th date of attack); *see also id.* n.2 (referencing the *Fisher* case).

146. *Id.*

147. *Id.*

148. *Id.*

149. Brief for Appellant at 5, Lane v. Halliburton, 529 F.3d 548 (2006).

150. *Lane*, 529 F.3d at 555.

151. *Id.* at 560.

152. *Id.*

153. *Id.* at 563.

154. Potts v. Dyncorp, 465 F. Supp. 2d 1245, 1248 (M.D. Ala. 2006).

155. *Id.*

156. *Id.* at 1246-47.

157. *Id.* at 1246-47 n.1.

158. *Id.* at 1250-51.

159. *Id.*

"'responsible for the professional and technical competence of its employees and that it would select reliable individuals' who would 'perform effectively in the implementation of this Contract . . . .'"[160] Dyncorp's agreement also said that its employees would not be treated as government employees for any purpose.[161] Thus, the court said: "[t]he fact that the car accident at issue occurred in a war zone does not automatically result in a lack of judicially discoverable and manageable standards for resolving the issue."[162] Because Dyncorp provided security to non-military personnel who delivered non-military supplies, the case did not raise political questions.[163]

Parlin v. Dyncorp involved a Georgia resident who was employed as a police officer in Iraq when he was killed by a roadside bomb.[164] Dyncorp, his Delaware-based company, used a Dubai subsidiary to employ him.[165] Before beginning work in Iraq, Parlin signed an employment agreement that provided an exclusive death benefit of $250,000.[166] As promised, DynCorp obtained a $250,000 insurance plan.[167] Because Parlin's wife received the policy's limits, the court dismissed her lawsuit for a survivor's claim.[168] However, the court did not dismiss her separate claim for wrongful death, explaining that a "wrongful death action is maintained for the benefit of the loved ones of the decedent and not for the benefit of the [deceased's] estate."[169] The court explained that wrongful death has elements that are independent of survivor claims, such as loss of marital intimacy.[170]

The facts in *Barker v. Halliburton Co.*were similar to those in *Jones*. A Halliburton employee was sexually assaulted in Baghdad and constantly harassed.[171] Her company's human resources department locked her in a room and interrogated her for hours.[172] Later, staff employees retaliated against Barker by continuing to harass her.[173] After she sued under Title VII and tort law, Halliburton moved to compel the arbitration of her claims.[174]

160. *Id.*

161. *Id.* ("Most important, the contract clearly states that Dyncorp is an independent contractor and that its employees 'will not be considered government employees for any purpose.'").

162. *Id.* at 1253.

163. *Id.*

164. Parlin v. Dyncorp Int'l, Inc., No. 08C-01-136 FSS, 2009 WL 3636756 (Del. Super. Ct. Sept. 30, 2009).

165. *Id.* at *1.

166. *Id.*

167. *Id.*

168. *Id.* at *5.

169. *Id.* at *6 .

170. *Id.* at *5.

171. Barker v. Halliburton Co., 541 F. Supp. 2d 879 (S.D. Tex. 2008).

172. *Id.*

173. *Id.*

174. *Id.* at 883.

Barker wanted to avoid arbitration. Thus, she contended that the assault occurred outside the scope of her employment. The judge disagreed, stating that "overseas employees do not have bright lines between their working time and their leisure time."[175] Even though this employee was attacked during her leisure time, the incident fell under her employment contract—and consequently, the court ordered her to arbitration.[176] After a rehearing failed to change the outcome,[177] Barker went to arbitration and won a $3 million award.[178] Halliburton is challenging the ruling in court.[179]

Returning to *Jones*, recall that the rape victim received compensation under the Defense Base Act for her injuries (Cell 1, above).[180] She also brought tort claims that are classified in Cell 3. Halliburton asked the court to order Jones to arbitrate all of her legal claims.[181] The district court disagreed, finding that rape was not within the scope of her employment.[182] Although the arbitration agreement extended to personal injury claims arising in the workplace, the judge did "not believe [Jones'] bedroom should be considered the workplace, even though her housing was provided by her employer"[183] Therefore, legal claims arising out the attack were not subject to arbitration.[184]

On appeal, the Fifth Circuit examined precedents that dealt with sexual assault in the workplace.[185] Agreeing with the lower court that the alleged attack on Jones was not in the course of employment, the appellate court noted that the incident occurred after her duty hours when she was in her bedroom.[186] Although Jones' attackers violated company policies by assaulting Jones, this fact did not bring the incident within the course of employment.[187] Thus, some tort claims were beyond the scope of the arbitration clause.[188] As a result, her

175. *Id.* at 887.

176. *Id.* at 887-88.

177. Barker v. Halliburton Co., No. H-07-2677, 2008 WL 1883880 (S.D. Tex. Apr. 25, 2008).

178. *Woman Awarded $3M in Rape Case*, NEWSDAY, 2009 WLNR 23422143, Nov. 20, 2009.

179. *Id.*

180. Jones v. Halliburton, 583 F.3d 228, 232 (5th Cir. 2009).

181. Jones v. Halliburton, 625 F. Supp. 2d 339, 344 (S.D. Tex. 2008).

182. *Id.* at 351.

183. *Id.* at 353-54.

184. *Id.* at 355.

185. Jones v. Halliburton, 583 F.3d 228, 235-37 (5th Cir. 2009).

186. *Id.* at 232.

187. *Id.* at 239 ("In interpreting the arbitration provision at issue, and in the light of the above-discussed precedent, we conclude that the provision's scope certainly stops at Jones' bedroom door . . . . As such, it was not contradictory for Jones to receive workers' compensation under a standard that allows recovery solely because her employment created the 'zone of special danger' which led to her injuries, yet claim, in the context of arbitration, that the allegations the district court deemed non-arbitrable did not have a 'significant relationship' to her employment contract.").

188. *Id.* at 241.

lawsuit could go forward.

The surviving daughter of a civilian truck driver sued, in *Martin v. Halliburton*, after her father was shot and killed in a friendly fire incident.[189] Allegedly induced by advertisements that represented his work would be "100% safe and protected by the United States military,"[190] the decedent, Donald Tolfree, worked as a "chase truck" driver who accompanied military convoys.[191] During the mission, he was instructed to return to the base because his escort was no longer needed.[192] His civilian supervisor did not arrange for him to be accompanied by a military gun truck—a requirement when approaching a United States base in a war zone.[193] In addition, his supervisor did not radio the base that the driver would be returning.[194] When Tolfree approached the base unescorted, a gunner fired 100 rounds of ammunition into his truck, killing him instantly.[195] His daughter sued on various tort claims, including fraud, gross negligence, emotional distress, and wrongful death.[196]

The federal district, sitting in diversity, denied all of Halliburton's threshold defenses.[197] Granting the survivor's motion to dismiss the interlocutory appeal,[198] the Fifth Circuit concluded that Halliburton failed to show on the pleadings that it was entitled to official immunity.[199] The company cited actions they performed such as allowing Tolfree's truck to return to the base without coordinating its return and training, and also its supervision of employees, as "activities that involve 'policy-making work for the United States Government.'"[200] Applying Army LOGCAP regulations which state that "[c]ontractors will not be used to perform inherently governmental functions,"[201] the appeals court rejected this reasoning. The court saw no evidence in the pleadings that indicated that Halliburton was involved in "the exercise of discretion in applying Government authority or the use of value judgments in making decisions for the Government."[202] The appeals court also ordered Halliburton to pay the costs of the interlocutory appeal.[203]

189. Martin v Halliburton, 601 F.3d 381, 383 (5th Cir. 2010).

190. *Id.*

191. *Id.* at 384.

192. *Id.* at 383.

193. *Id.* at 384.

194. *Id.*

195. *Id.*

196. *Id.* at 386 n.4.

197. *Id.* at 386.

198. *Id.* at 392.

199. *Id.* at 388-89.

200. *Id.* at 389.

201. *Id.* (citing LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP), U.S. ARMY REG. 700-137, 3-2 (d)(8) (1985)).

202. *Id.*

203. *Id.* at 392.

d. Cell 4: Soldiers Who Work Like Civilians: Tort or Other Remedy

In *Lessin v. Kellogg Brown & Root*, an Army soldier was killed while he was helping a civilian employee fix a truck.[204] As he escorted a commercial supply convoy from Iraq to Kuwait, a truck loading ramp malfunctioned.[205] While helping the KBR driver, Lessin was struck in the head by the ramp assist arm.[206] This caused fatal brain injuries.[207] His survivors sued KBR for negligent maintenance and failure to supervise a safe repair.[208]

The court rejected KBR's political question argument. The judge reasoned that the incident "was, essentially, a traffic accident, involving a commercial truck alleged to have been negligently maintained, as well as a civilian truck driver who was allegedly negligent in operating the truck and insufficiently trained."[209] He said negligence claims like this are adjudicated by courts, and are resolved by using familiar standards.[210]

Three Army soldiers were killed in Afghanistan when their private plane, piloted by a civilian, crashed into the side of a mountain, described in *McMahon v. Presidential Airways, Inc*.[211] Survivors of the fallen soldiers sued Presidential Airways for wrongful death.[212] The firm was under a military contract to provide air transportation in Afghanistan.[213] The company said it acted as an agent of the U.S. military while transporting soldiers in a war zone.[214] Thus, it argued that the *Feres* doctrine of sovereign immunity barred tort actions.[215]

The Eleventh Circuit disagreed, concluding that the company did not enjoy immunity.[216] *Feres* did not apply because the cause of the plane crash was

204. 2006 WL 3940556 at *1.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at *3.

210. *Id.* (stating that "military decision-making is not implicated here, where, instead of manufacturing weapons, which were then procured and utilized by the military in combat, Defendant itself provided a convoy service. . . . This case, on the contrary, concerns the duty of care owed by a private corporation to United States citizens . . . .").

211. McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007).

212. *Id.* at 1236.

213. *Id.*

214. *Id.* at 1239.

215. *Id.* at 1237.

216. *Id.* at 1255 ("[W]e must hold that derivative *Feres* immunity does not exist in this case. Three of the four recognized *Feres* rationales do not apply to private contractors. And while protecting sensitive military judgments could conceivably ground an immunity, *Feres* is an inappropriate vehicle because it would single out soldiers and would not protect sensitive military judgments in suits brought by anyone else (including journalists or private contractor employees).").

unrelated to military command or rules.[217] The court explained that "[i]mmunity for private contractors is justified only by the need to protect the making and execution of sensitive military judgments."[218] The court reasoned that "a number of 'incident to service' suits— probably a substantial number— do not implicate sensitive military judgments, because they can be brought by civilians."[219] Thus, the court concluded that the "derivative *Feres* immunity of private contractors cannot possibly extend to the outer limits of 'incident to service.'"[220]

IV. ANALYSIS AND PUBLIC POLICY OPTIONS

A. Analysis

Preliminary conclusions emerge from the litigation of death and injury claims. These points are presented first, and are followed by Table 2. Table 2 shows that two federal appeals courts known for their conservatism rejected these defenses (*see* "Decision," Table 2— *Jones* [5th Circuit]; *McMahon* [11th Circuit]).[221] This contrasts with military product liability cases, where soldiers and their survivors sue contractors for defective equipment and lose due to immunity defenses.[222] Notably, some courts view war zone injuries as ordinary accidents or common assaults.[223]

Table 2 also shows that most cases involve protracted pretrial litigation (*see* "Incident-Ruling"). Only three have been dismissed (*see* "Case Status"). Seven cases are continuing to trial—though it is important to note that some rulings are appealable. This means that the path to trial could still be blocked. One case was ordered to arbitration. The "Incident/Ruling" column in Table 2 shows that most cases took two to three years just to rule on pre-trial motions.

217. *Id.* at 1252-53.

218. *Id.* at 1252.

219. *Id.*

220. *Id.* at 1252-53.

221. *See Jones*, 583 F.3d at 232; McMahon v. Presidential Airways, Inc, 502 F.3d 1331 (11th Cir. 2007).

222. *See* Brinson v. Raytheon Co., 571 F.3d 1348, 1351 (11th Cir. 2009); Tate v. Boeing Helicopters, 140 F.3d 654, 656 (6th Cir. 1998); Hercules Inc. v. United States, 24 F.3d 188, 198 (Fed. Cir. 1994); Dean v. Sikorsky Aircraft, 16 F.3d 1219, 1219 (6th Cir. 1994); Guerinot v. Rockwell Int'l Corp., 923 F.2d 862, 862 (9th Cir. 1991); Harduvel v. Gen. Dynamics Corp., 878 F.2d 1311, 1313 (11th Cir. 1989); Tozer v. LTV Corp., 792 F.2d 403, 406 (4th Cir. 1986); Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985); Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 738 (11th Cir. 1985); *in re* Air Crash Disaster at Mannheim Germany on Sept. 11, 1982, 769 F.2d 115, 122 (3d Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 597 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983).

223. *See Jones*, *583* F.3d at 236-38; *McMahon*, 502 F.3d at 1331.

This is not unusual for tort litigation, where cases take years to get to trial.[224]

Most cases in Table 2 involve tort claims (*see* "Legal Claim"). Only two cases raised discrimination issues. Business tort cases are notable for providing injured parties remedies that are costly for companies.[225] Table 2 shows the potential for tort claims to reach juries on claims for negligence, wrongful death, and intentional misrepresentation.

Table 2
Litigation Characteristics and Outcomes

Decision	Incident	Injury	Venue	Legal Claim	Incident-Ruling	Case Status
Jones v. Halliburton, 583 F.3d 228 (5th Cir. 2009)	Civilian raped by co-worker in barracks	Torn muscles; emotional distress	Federal	Title VII; torts—assault/battery, emotional distress, negligence	06/05 - 09/2009 4 yr 3 months	Deny arbitration, proceed to trial
Smith v. Halliburton, 2006 WL 2521326 (S.D. Tex. 2006)	Suicide bombing in dining facility	Death of solider	Federal	Torts—negligence (fail to secure, warn, prevent)	12/04 – 09/06 1 yr 9 month	Dismiss lawsuit
Carmichael v. Kellogg Brown & Root, 572 F.3d 1271 (11th Cir. 2009)	Truck accident	Severe brain injury to soldier	Federal	Torts—negligence (reckless driving, supervision)	05/04 - 06/09 5 yr 1 month	Dismiss lawsuit
Whitaker v. Kellogg Brown & Root, 444 F.Supp.2d 1277 (M.D.Ga. 2006)	KBR truck hits Army escort	Death of soldier escorting KBR convoy	Federal	Torts—negligence (hiring, training, supervision)	04/04 - 07/06 2 yr 3 month	Dismiss lawsuit

224. *See, e.g.*, Jonathan Todres, *Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 681 (2006) (explaining how in medical malpractice lawsuits, plaintiffs usually wait two years before trial).

225. For perspective see Bradley J. Bondi, *An Economy in Crisis–Law, Policy, and Morality During the Recession*, 33 HARV. J.L. & PUB. POL'Y 607, 612 (2010), reporting: "[a]lthough small companies account for nineteen percent of business revenue in the United States, they bear sixty-nine percent ($98 billion) of the business tort costs."

Decision	**Incident**	**Injury**	**Venue**	**Legal Claim**	**Incident-Ruling**	**Case Status**
Fisher v. Halliburton, 390 F.Supp.2d 610 (S.D. Tex. 2005)	Contractor convoy attacked while used as decoy	Death of six drivers	Federal	Tort—intentional misrepresentation	04/04 - 07/05 1 yr 3 month	Proceed to trial
Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008)	Contractor convoy attacked	Driver loses arm and has permanent brain damage	Federal	Tort—intentional misrepresentation	04/04 - 05/08 4 yr 1 month	Proceed to trial
Potts v. Dyncorp, 465 F.Supp.2d 1245 (M.D.Ala. 2006)	Supply truck flipped at 100 m.p.h.	Civilian passenger suffered broken bones	Federal	Tort—negligence	09/04 - 12/06 2 yr 3 month	Proceed to trial
Parlin v. Dyncorp, 2009 WL 3636756 (Del. 2009)	Roadside bombing	Civilian security officer killed	State	Tort—wrongful death	01/06 - (09/09) 3 yr 8 month	Proceed to trial
Barker v. Halliburton, 541 F.Supp.2d 879 (S.D. Tex. 2008)	Pattern of sexual harassment; sexual assault	Civilian employee forced to have sex	Federal	Title VII; torts—negligent supervision; assault and battery	06/05 - 01/08 2 yr 7 month	Proceed to arbitration
Lessin v. KBR, 2006 WL 3940556 (S.D.Tex. 2006)	Civilian truck ramp malfunctions	Army escort suffers traumatic brain injury	Federal	Tort—negligence	03/04 - 06/06 2 yr 3 month	Proceed to trial
McMahon v. Pres. Air., 502 F.3d 1331 (11th Cir. 2007)	Inexperienced pilots crash plane into mountain ridge	Three soldiers die in crash	Federal	Tort—wrongful death	11/04 - 10/07 2 yr 11 month	Proceed to trial
Martin v. Halliburton, 2010 WL 3467086 (5th Cir. 2010)	Contractor truck driver attacked by friendly fire	Civilian employee dies from gunshot	Federal	Tort—intentional misrepresentation, negligence, wrongful death, fraud	02/07 - 09/10 3 yr 7 month	Proceed to trial

B. Public Policy Options

The cases in the typology lead me to suggest four public policy options for compensating civilians and soldiers who are killed or injured while they work together in a war zone. Before I discuss these possibilities, I explain how the current array of contractor defenses present obstacles to these alternatives. The success of contractor immunity defenses appears to have several objectionable short-term effects. They terminate court proceedings that result in intensive fact-finding. A potential byproduct of ending discovery is to shield contractors from answering questions that implicate public interests. Contractors have a special relationship to military commanders. It does not necessarily follow, however, that sexual assaults of civilian workers should be hidden from public scrutiny, or that air-taxi companies with poorly trained pilots should be free from judicial discovery when their possible negligence kills service members, or plausible claims of contractor indifference to the likelihood of civilian-employee slaughter by enemy ambush should not be tried to a United States civilian court.

At another level, the successful invocation of these defenses stifles consideration of a main question posed by this study: should the employment relationship of contractor employees be federalized for purposes of awarding workers' compensation benefits? Consider a major workers' compensation policy, the Federal Employers Liability Act (FELA), which is a federal law that provides workers' compensation benefits for privately-employed railroad workers. Advocating for the law's passage in 1889, President Benjamin Harrison told Congress: "It is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."[226] His quote reveals a longstanding sense that some private employments are at the same time so hazardous and clothed with a national interest that a federal interest must be recognized and protected.

The Jones Act federalized another vital and hazardous private employment relationship—that of merchant seamen—by adopting FELA's substantive recovery provisions.[227] The Longshoremen's and Harbor Workers' Compensation Act is yet another federalized workers' compensation law, extending to employees of government contractors injured overseas by war-risk hazards who incur their injuries while working on docks or harbors.[228] The employment of civilian contractors in war zones appears to be sufficiently

226. 12 MESSAGES AND PAPERS OF THE PRESIDENT 5486 (James D. Richardson ed., 1897), *reprinted in* Lance P. Martin, Comment, *The Discombobulated State of FELA and Jones Act Jurisprudence and a Prognostication for Seamen's Claims for Purely Emotional Injuries*, 19 TUL. MAR. L.J. 433, 436 n.19 (1995).

227. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 281 (2d ed. 1975); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 289 (2d ed. 1994).

228. *See supra* notes 208-09.

analogous to these other types of labor to warrant consideration of its own workers' compensation policy. But again, immunity defenses have the effect of limiting death and injury claims to the private provisions of firms that have a financial incentive to pay meager benefits.

1. Option One: Preserve the Status Quo

The present method for resolving death and injury claims does not necessarily need to change. Most civilians and service members are able to try cases in civil law courts. This means that judges are open-minded in responding to the new war-labor paradigm. In other words, courts are not dismissing complaints simply because incidents occurred: (a) outside the United States, (b) in active combat zones, and (c) in conjunction with military command. These three points are remarkable given that courts usually dismiss liability suits against contractors by applying immunity doctrines. In sum, courts are grappling with the new war-labor paradigm but have ponderous methods to rule on claims.

McDonald's Corp. v. Ogborn[229] illustrates how tort law could compensate Jamie Lee Jones and Tracy Barker, the two sexual assault victims in this study. Louise Ogborn, an 18 year-old employee, was subjected to a prank strip search in a McDonald's restaurant office.[230] During the time of her false detention, the fiancé of a shift supervisor sexually assaulted Ogborn.[231] The prank had occurred more than thirty times at other McDonald's locations, and came to the attention of lawyers at corporate headquarters.[232] However, the company failed to follow up with training of and direction to store managers.[233] A jury ordered more than $1 million in compensatory damages, and $5 million in punitive damages, to compensate Ogborn for, *inter alia*, false imprisonment and premises liability.[234] The case is similar to the assaults of Jones and Barker insofar as the attacks occurred on premises controlled by the employer, and managers responded inappropriately to these disturbing situations. The fact that Jones was gang-raped suggests that her damages would be higher than Ogborn's.

XL Specialty Insurance Co. v. Kiewit Offshore Services, Ltd. suggests how Lane, a civilian truck driver who was severely injured in an ambush notwithstanding the safety assurance that Halliburton provided him, might be compensated under Texas tort law.[235] *XL Specialty Insurance* shows how courts

229. McDonald's Corp. v. Ogborn, 309 S.W.3d 274 (Ky. Ct. App. 2009).

230. *Id.* at 281-82.

231. *Id.*

232. *Id.* at 283.

233. *Id.* at 282.

234. *Id.*

235. XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd., 513 F.3d 146 (5th Cir. 2008).

and litigants place a monetary value on severe injuries that employees incur while they work.

Two Kiewit workers, Mann Nguyen and Ernesto Moreno, were killed after Nguyen entered a confined tank to perform a welding operation.[236] Kiewit made no provision for ventilating the tank with an explosive-proof fan.[237] After Nguyen entered the tank to perform a welding job, the gas that accumulated in the tank exploded, immediately killing Moreno and hospitalizing Nguyen with severe burns for one week before he died.[238] Kiewit's internal investigation concluded that a jury would likely attribute liability to the company on a variety of negligence claims,[239] and the prolonged suffering of Nguyen could lead to damages of $20 million.[240] Kiewit therefore settled claims with Moreno's and Nguyen's survivors, respectively, for $1 million and $4 million. The Fifth Circuit Court of Appeals—the same court that decided the immunity issue in *Lane*—ruled that Kiewit was not unreasonable in settling these claims.[241]

Baragona v. Kuwait Gulf Link Transport Co. provides a similar example of valuation for fatal workplace injuries.[242] In 2003, Lieutenant Colonel Dominic R. Baragona died in Iraq after his vehicle collided with a truck operated by KGL, a Kuwaiti-based contractor.[243] The serviceman's family sued on various tort claims in a United States district court, and served the Kuwaiti firm through an international courier.[244] After the defendant failed to appear, the court entered a default judgment in favor of the survivors for $4,907.05.[245] While the Eleventh Circuit affirmed the district court's ruling to vacate the judgment on procedural grounds,[246] the case is an example of how much a court values a serviceman's loss of life when the proximate cause is a motor vehicle accident with a contractor firm.

2. Option Two: Create a Federal Workers' Compensation Policy for Civilians Who Work with Military Forces in War Zones

Workers' compensation is an insurance system to replace lost wages, reimburse medical expenses, and provide a death benefit for workplace

236. *Id.* at 148.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 149.
241. *Id.* at 153.
242. Bargona v. Kuwait Gulf Link Transp. Co., 594 F.3d 852 (11th Cir. 2010).
243. *Id.* at 853.
244. *Id.*
245. *Id.* at 854.
246. *Id.* at 854-55.

injuries.[247] Called the grand compromise, it provides injured workers a timely remedy but also insulates employers from liability for tort damages.[248] The strict liability feature of workers' compensation avoids the complex issues of causation that arise in war zone cases. A strict liability system would simply compensate injuries and deaths that arose in the course of employment. Fault would be irrelevant. This would reduce the need for court adjudication. The fact that these civilians are employed by for-profit firms strengthens the case for workers' compensation. Ordinarily, all employers must provide for this benefit as a matter of law.[249]

The Longshore and Harbor Workers' Compensation Act offers a useful framework for the injuries in this study.[250] A 1942 amendment to the law provides coverage to "employees of government contractors injured overseas by war-risk hazards,"[251] so long as injuries occur in conjunction with dock or harbor work within the scope of the law. In addition, consider the thorny jurisdiction issues that Congress addressed here. If a stevedore was injured while he unloaded cargo on a ship in a United States port, he was subject to a federal court's admiralty jurisdiction.[252] But if he was injured a few feet away—on the dock, and off the ship—state workers' compensation law applied to his case.[253]

Just as the Longshore and Harbor Workers' Compensation Act bridges the legal dichotomy in shipside or dockside accidents by treating them alike, a new law could use this approach to deal with the knotty jurisdiction issues at the military-contractor interface. This could be accomplished by enlarging the scope of the Defense Base Act.[254] Recall that this type of workers' compensation pays civilians who are injured or killed on public works projects that occur outside the United States. The law was applied in *Jones* because her injuries occurred in Camp Hope, a military base. But the Defense Base Act was

247. MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 786-87 (6th ed. 2007).

248. *See, e.g.*, Ottesen v. Food Serv. of Am., Inc., 126 P.3d 832, 835 (Wash. Ct. App. 2006) (stating that Washington's workers' compensation system "was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers." (citations omitted)).

249. *See, e.g.*, Lockett v. HB Zachry Co., 285 S.W.3d 63, 75 (Tex. App. 2009) (noting that the Texas Workers' Compensation Act broadly defines an employer as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage." (citation omitted)).

250. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-980 (2006).

251. *See* Director, Office of Workers' Comp. Programs v. Perini North River Associates., 459 U.S. 297, 326 (1983) (Stevens, J., dissenting) (discussing Act of Dec. 2, 1942, ch. 668, describing workers on oil drilling rigs on the outer continental shelf).

252. Atlantic Transp. Co. of West Virginia. v. Imbrovek, 234 U.S. 52, 62 (1914).

253. State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263, 275-76 (1922).

254. Defense Base Act, 42 U.S.C. §§ 1651-1654 (2006).

not applied to convoy drivers who were killed or injured on Iraqi highways away from military bases. Option Two would make the situs of a war-zone injury irrelevant.

Doi v. Union Pacific RR. Co.[255] shows how a federalized workers' compensation system would improve compensation for contractor employees. A railroad worker was part of a traveling work "gang" when the truck he was riding swerved, veered off the road, ejected him, and left him as a quadriplegic.[256] A California appeals court recently affirmed an award of $35.7 million in noneconomic damages for his past and future pain and mental suffering.[257] The award, ordered under a federal workers' compensation law for railroad employees (called the Federal Employers Liability Act),[258] was based on detailed evidence of his daily struggles with routine activities, such as urinating.[259] Doi's truck accident, and his injuries, are comparable to Sergeant Carmichael's case. While he and his wife argued to the court that his injury was a "garden variety road wreck"[260] caused by a contractor's negligence, the court never reached that issue[261] and consequently, there is no indication that Sergeant Carmichael received any compensation above and beyond what a soldier receives for similar injuries incurred in a battle.

3. Option Three: Apply Extra-Territorial Provisions in Current State Workers' Compensation Laws to Civilians Injured in a War

As interstate commerce grew in the United States, California passed Labor Code Section 36005(a).[262] The law extends workers' compensation to an employee who has been hired, or is regularly employed, in the state but is injured in the course of employment outside of California. The law overruled *North Alaska Salmon Co. v. Pillsbury*.[263] There, a California fisherman employed by a San Francisco company was injured while working in Alaska. The Supreme Court of California denied his workers' compensation claim.[264]

255. Doi v. Union Pac. R.R. Co., No. B214287, 2010 WL 298387 (Cal. Ct. App. Jan. 27, 2010).

256. *Id.* at *1-*2.

257. *Id.* at *1.

258. *Id.* at *3.

259. *Id.* at *4 (explaining that "[h]is morning routine, from awakening until he is able to eat breakfast, takes two and one half hours and includes a bowel program for removal of his stool and a bladder program requiring catheterization through his penis to drain urine").

260. Carmichael v. Kellogg Brown & Root Serv., 572 F.3d 1271, 1289 (11th Cir. 2009).

261. *Id.* at 1289-90.

262. CAL. LAB. CODE § 36005(a).

263. Northern Alaska Salmon Co. v. Pillsbury, 174 Cal. 1 (Cal. 1916).

264. *Id.* at 7 (explaining that "there is strong authority in support of the proposition that workmen's compensation statutes, in the absence of express declaration that they shall operate extraterritorially, are not to be given such effect"). Thus, the court concluded that

Today, courts uphold the extraterritorial reach of Labor Code Section 36005(a). This occurred when a minor league pitcher who signed a professional contract in California injured his arm in a Florida league game. After Florida denied his workers' compensation, he applied for compensation in California—and was denied again. Reversing this decision, *Bowen v. Workers' Compensation Appeals Board* reasoned that the state board failed to liberally apply the provisions of the extra-territorial law.[265] Michigan had a similar case that ruled that its workers' compensation law was amended to cover out-of-state injuries incurred by that state's residents.[266] Workers' compensation laws that reach beyond the state's borders would avoid messy tort litigation while paying appropriate benefits to private military forces employees.

Coats v. Penrod Drilling Corp.[267] shows how some expatriate employees are compensated for work-related injuries. Coats's employer, Maritime Industrial Services (MIS), was a corporation organized under the laws of the United Arab Emirates.[268] The company performed repair and maintenance services for oilfield and marine vessels in several countries and employed expatriates.[269] Coats was hired during a job fair conducted by MIS in Mississippi.[270] Separately, MIS contracted with Penrod Drilling Corp., a Delaware based company with its principal place of business in Dallas, Texas, to work on a rig in the territorial waters of the U.A.E.[271] Coats, who was assigned to work on this project, was severely injured and disabled after an equipment failure caused an eruption.[272]

Coats sued Penrod and MIS in the Southern District of Mississippi.[273] The court dismissed his Jones Act claim[274]—an action under a federal law that provides for maritime workers' compensation—because Coats did not meet the statutory definition of a seaman under that law. However, the case went to trial on Coats's tort claims under federal maritime law. Coats prevailed in part, receiving a jury verdict for damages totaling $925,000, with 20% of the fault assigned to Coats.[275] The Fifth Circuit affirmed the award of $740,000 under federal maritime law.[276] The case shows that American employees are entitled

"under the statute as it read at the time of Anderson's injury the commission had no jurisdiction to award compensation."

265. Bowen v. Workers' Comp. Appeals Bd., 86 Cal. Rptr. 2d 95, 98 (Cal. Ct. App. 1999).

266. Rodwell v. Pro Football Club, Inc., 206 N.W.2d 773 (Mich. Ct. App. 1973).

267. Coats v. Pendrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995).

268. *Id.* at 1116.

269. *Id.*

270. *Id.* at 1117.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 1118.

276. *Id.* at 1139.

to damages for work-related injuries incurred in the course of expatriate employment. While the case demonstrates the extra-territorial reach of tort law, it also shows that specialized workers' compensation laws, such as the Jones Act, define an employee too narrowly to provide recovery for all expatriate employees.

The case bears some similarity to *Parlin*, where an American employee was hired by a Dubai corporation that had business contacts in Delaware and Georgia.[277] Parlin's wrongful death claim was denied, but the *Coats* case suggests that if he were killed in international waters while working as an expatriate, his estate might have received more than $250,000 in life insurance benefits.[278]

4. Option Four: As a Condition for War Contractors, Private Employers Should be Required to Pay More Generous Death, Disability, and Health Insurance Benefits

The Federal Property and Administrative Services Act provides a mechanism to improve injury and death benefits for contractor employees.[279] Passed in 1949, the Procurement Act bestows to the President broad discretion "to set procurement policy for the entire government."[280] Using this authority, presidents have required federal contractors to provide equal employment opportunities that were not otherwise required by law.[281] As a purchaser of services from private contractors, the government may require these businesses to comply with the same type of pre-conditions that a private entity would be permitted to require in a contract.[282] Just as former presidents required military contractors to desegregate workplaces during war in order to win government contracts, the President has authority to require war-labor contractors to

277. Parlin v. Dyncorp Int'l, Inc., No. 08C-01-136, 2009 WL 3636756 (Del. Super. Ct. Sept. 30, 2009).

278. *Coats*, 61 F.3d 1113.

279. *See* 40 U.S.C. § 471 et seq.

280. Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

281. *See* Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 236-51 (1996); *see also* Exec. Order No. 11,246, 3 C.F.R. 339 (1965); Exec. Order No. 11,141, 3 C.F.R. 179 (1964); Exec. Order No. 11,114, 3 C.F.R. 774 (1963); Exec. Order No. 10,925, 3 C.F.R. 448 (1961); Exec. Order No. 10,557, 3 C.F.R. 203; Exec. Order No. 10,479, 3 C.F.R. 961 (1953). Another Executive order limited the size of private-sector wage increases. Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978). Courts upheld these orders against challenges that the president exceeded his powers in Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), *cert. denied sub nom.*, Contractors Ass'n of Eastern Pennsylvania v. Hodgson, 404 U.S. 854 (1971); AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979), *cert. denied*, AFL-CIO v. Kahn, 443 U.S. 915 (1979).

282. *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc., 507 U.S. 218, 231-32 (1993).

improve benefits for employees who die or are injured in a combat zone.

5. Option Five: Improve the Compensation System for Soldiers Who Are Killed or Injured While Serving with Private Contractors

In 2008, a federal program paid about $4.7 billion every month to the survivors of Americans who died as a result of a service-connected disability.[283] In the Veterans' Benefits Improvement Act of 2008, Congress asked the GAO to compare these benefits to those for survivors of federal civilian workers.[284] The report found military benefits were far less than those paid to civilians under federal workers' compensation.[285]

The GAO reported the following comparison of death benefits to survivors of a service member and a federal civilian employee, both of whom die in the course of duty or employment. The military program, known as Death and Indemnity Compensation (DIC), pays the surviving spouse of an Army sergeant who dies while on active duty $1,154 per month.[286] The surviving spouse of a comparably paid federal employee receives $1,722 under the Federal Employees Compensation Act (FECA) for death due to a work-related injury.[287]

Supplemental benefits should be considered for soldiers who die or are injured while working with a contractor. The theory behind this idea is that a service member's labor is co-mingled with the contractor's workforce. Thus, the soldier's labor contributes value to the contractor's service. In other words, when the integration of military and civilian labor creates commercial value, contractors might contribute to a fund that supplements these service-member benefits. If employer contributions were related to experience ratings, contractors would be encouraged to adopt safer practices. Of course, war is inherently dangerous. But some of the injury incidents in this study—for example, the rape of a worker by her colleagues—should not be accepted as an ordinary war risk.

CONCLUSION

In sum, this study sheds light on the new war-labor paradigm. The integrated work performed by civilians and soldiers is barely noticeable in the

283. This is known as the Dependency and Indemnity Compensation Program, codified at 38 U.S.C. § 1301. For a pertinent study, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-62, MILITARY AND VETERANS' BENEFITS: ANALYSIS OF VA COMPENSATION LEVELS FOR SURVIVORS OF VETERANS AND SERVICEMEMBERS 1 (2009), *available at* http://www.gao.gov/new.items/d1062.pdf.

284. *Id.* at 16-17.

285. *Id.* at 16-19.

286. *Id.* at 19.

287. *Id.*

United States, except for a passing news story. When contract workers are fatally injured or killed, they do not come home to the fallen soldier's public tribute. Likewise, when soldiers suffer from an exposure disease, their hardships go largely unnoticed by the public. But courts are increasingly confronting basic employment law issues surrounding the hiring of civilian contract workers who perform services to support troops in war zones.[288]

This study also reveals a commercial side to waging war. The privatization of war means that some corporations seek to profit and grow from the new war-labor paradigm.[289] This study does not question this as a matter of principle. However, this study asks: how much financial responsibility should war contractors bear for compensating its employees and soldiers for death and serious injury? A recent decision by the Fourth Circuit Court of Appeals provides perspective for this large question. In *CACI Intern., Inc. v. St. Paul Fire and Marine Ins. Co.* the U.S. military contracted with a private company to interrogate detainees in the Abu Ghraib prison.[290] After detainees and their survivors sued the company for abuses committed by CACI employees, the contractor sued to have its insurer defend it in this lawsuit.[291] Interestingly, the detainees sued on an employment tort—negligent hiring and supervision.[292] The insurance firm refused to defend CACI because its contract only covered activities in the United States.[293] Affirming a lower court ruling that relieved the insurer from a duty to defend the contractor,[294] the Fourth Circuit rejected CACI's arguments that the policy provided coverage for activities that occur a "short time" outside the coverage area.[295]

288. *See* Nattah v. Bush, 605 F.3d 1052 (D.C. Cir. 2010). An Arabic interpreter hired by a private contractor named L-3 alleged that he was hired at a job fair and promised a safe interpreter job in Kuwait, but was later sold into slavery to the U.S. military. The D.C Circuit Court of Appeals' rulings allowed him to join the Secretary of the Army, and pursue his breach of employment contract against L-3.

289. *See* Steve Gelsi, *Halliburton quarterly profit jumps 83%*, MARKETWATCH (July 19, 2010, 3:28 PM), http://www.marketwatch.com/story/halliburton-profit-up-83-sees-gulf-impact-2010-07-19?reflink=MW_news_stmp (reporting climb in Halliburton Co.'s second-quarter net income due to "overseas growth"); *see also* Press Release, DynCorp Int'l, DynCorp International Stockholders Approve Merger Agreement with Affiliates of Cerberus (June 30, 2010), *available at* http://www.dyn-intl.com/news2010/news063010-di-stockholders-approve-merger-with-cerberus-affiliates.aspx. DynCorp International Inc. is a global government services provider in support of U.S. national security and foreign policy objectives, delivering support solutions for defense, diplomacy, and international development. The company "operates major programs in logistics, platform support, contingency operations, and training and mentoring to reinforce security, community stability, and the rule of law."

290. 566 F.3d 150, 152 (4th Cir. 2009).

291. *Id.* at 152.

292. *Id.* at 153.

293. *Id.* (defining "coverage territory" as the United States, Canada, and U.S. possessions).

294. *Id.* at 152.

295. *Id.* at 157-159.

The court noted that detainees complained of long-term abuse and torture at the hands of CACI employees:

In fact, the complaints make clear that they are alleging a long-term approach to interrogation that specifically aimed to extract more information from detainees through repeated torture and humiliation. For example, the *Saleh* complaint alleges that CACI sent its employees to Iraq "to set up a 'Gitmo-style' prison at Abu Ghraib," where the interrogations at Guantanamo Bay had been "based on study and review of what practices would be most humiliating to those who practice the Muslim faith (citation omitted)." According to the complaint, CACI specifically sought employees with cultural and social knowledge of the region, and the abuses aimed to "attack[ ] and ridicul[e] [the detainees'] religious faith of Islam (citation omitted)." Therefore, the complaints frame the alleged abuses, including beating detainees and threatening them with dogs, not as isolated incidents but as part of the "torture conspirators' "plan to "continually torture[ ] and otherwise mistreat [ ]" detainees "[b]eginning in January 2002 and continuing to present (citation omitted)."[296]

As a result, this war contractor was unable to hide behind an insurance contract to avoid liability for activities that were conducted by its employees under direct supervision of the United States military. Viewed in the context of this study, CACI raises difficult questions: If Iraqi detainees have a possible employment-law cause of action against a military contractor, why are the seriously or fatally injured employees of these contractors forced to endure many years of pre-trial maneuvers to bring their damage claims before a United States court? Why do United States troops face the same types of obstacles for recovery when Iraqi detainees are cleared to sue war contractors in American courts? And, if a war contractor is willing to pay for liability insurance for its aggressive interrogation business in an Iraqi prison, why does the same type of contractor not provide workers' compensation for cooks, mechanics, guards, engineers, pilots, and truck drivers who work in the same combat area? The United States has set an inexorable course for privatizing and commercializing the waging of its wars. However, when companies contribute to the death or injury of service members or civilian employees, there needs to be a better method to improve the compensation for these losses.

296. *Id.* at 158.