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THE BATTLE OVER COMBAT: A PRACTICAL APPLICATION OF THE COMBATANT ACTIVITIES EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

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INTRODUCTION

The combatant activities exception to the Federal Tort Claims Act is a preservation of sovereign immunity from liability for injuries resulting from the “combatant activities” of the United States military.¹ The exception is designed to protect the undeniably compelling government interest of defending the nation from harm without the burden of liability for action necessary to achieve that goal.² It addresses the concern that imposing tort liability on the military could lead to a chilling effect on decision-making that would cause hesitation to act in the interest of national defense.³ To that end, the exception has in recent years been applied by federal courts in such a way as to effect a policy of “elimination of tort from the battlefield” entirely.⁴ At first glance, this interpretation seems quite neatly tailored to reflect the exception’s goal. After all, it can hardly be said that the federal government intended to waive its sovereign immunity with respect to battlefield injuries caused by the direction of force towards enemy combatants. Viewing this interpretation in the context of the exception’s application,

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¹ See *infra* notes 68–71 and accompanying text.

² See *infra* notes 67–70 and accompanying text.

³ See *infra* notes 68–70 and accompanying text.

⁴ See *infra* Part II.B.2–3; see also *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009) (“In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield . . .”).

however, reveals that it extends immunity to a far broader range of activities than those involving the use of force against the enemy.

Promulgated by the District of Columbia Circuit's 2009 decision in *Saleh v. Titan Corp.*,⁵ the interpretation of the combatant activities exception as a tool to eliminate tort liability from the battlefield has led to a standard that runs contrary not only to Supreme Court precedent, but also to basic concepts of fairness. In *Aiello v. Kellogg, Brown & Root Services, Inc.*, the United States District Court for the Southern District of New York applied this interpretation of the exception to a lawsuit brought by a private contractor employed by the United States government.⁶ The plaintiff was injured when he fell in a bathroom on a forward operating base that was negligently maintained by the defendant.⁷ The court applied the combatant activities exception and denied the plaintiff the chance to recover for his injuries.⁸ Essentially, the court believed that the maintenance of a bathroom was a combatant activity for the purpose of this exception because the bathroom was located on what it considered a battlefield.⁹

That a lawsuit arising out of activity which is so far from the common understanding of combat could be preempted by the combatant activities exception simply because it occurred on a battlefield inexorably raises questions about what other types of actions would be similarly barred. What, for example, of the claims brought by Jamie Leigh Jones, who in 2004 was brutally sexually assaulted in the "Green Zone" of Baghdad at an installation owned by Halliburton?¹⁰ Ms. Jones's repeated complaints of sexual harassment and requests for the all-female housing that she claimed was promised in her contract were ignored by Halliburton before she was beaten and gang raped by several Halliburton employees in her barracks bedroom.¹¹ Her claims could likewise be preempted by the combatant activities exception under this interpretation. It does not make sense that Ms. Jones and other similarly injured women could be denied

⁵ 580 F.3d 1.

⁶ 751 F. Supp. 2d 698, 710–11 (S.D.N.Y. 2011).

⁷ *Id.* at 700.

⁸ *Id.* at 715.

⁹ *Id.* at 713–14.

¹⁰ *See Jones v. Halliburton Co.*, 583 F.3d 228, 231–32 (5th Cir. 2009).

¹¹ *Id.* at 231.

relief by a statute designed to shield the government from liability resulting from military action simply because they were injured on or near a battlefield.

Further equitable concerns surrounding this interpretation of the exception arise when considering the countless civilians whose hometowns and villages have become warzones.¹² Under this approach, these civilians would be unable to bring civil actions for grossly negligent or even malicious conduct of American troops or private contractors simply because an impersonal foreign power determined that it was necessary to conduct combat operations steps away from their homes.

A second interpretation of the exception exists that takes some of these equitable concerns into account. The Ninth Circuit, in deciding *Koochi v. United States*,¹³ promulgated an interpretation of the combatant activities exception that is more narrowly tailored to accomplishing the statute's goals. Essentially, the Ninth Circuit interprets the exception as applying only to activities that involve the direction of hostile force.¹⁴ In *Koochi*, for example, the tracking and engagement of a civilian aircraft mistaken for an enemy warplane was preempted by the exception.¹⁵ This is the type of activity, as opposed to bathroom maintenance, which one would logically assume would be preempted by the combatant activities exception in light of its wording and apparent intent. It is unlikely that under this interpretation a suit for something like a slip and fall in a bathroom would be barred. Under this interpretation, the application of the exception seems to turn on whether or not the activity involved actual combat, rather than the activity's location relative to combat.

The Ninth Circuit's approach is not without flaws, however. Developed in the context of a conflict which is very different from those in which the United States is currently engaged,¹⁶ this interpretation is simultaneously too broad and too narrow. It is too broad because unlike the conflict surrounding *Koochi*, current battlefields are often densely populated urban areas.¹⁷ Providing

¹² See Sabrina Tavernise & Andrew W. Lehren, *Buffeted by Fury and Chaos, Civilians Paid Heaviest Toll*, N.Y. TIMES, Oct. 23, 2010, at A1.

¹³ 976 F.2d 1328 (9th Cir. 1992).

¹⁴ *Id.* at 1335.

¹⁵ *Id.* at 1337.

¹⁶ See *infra* note 119 and accompanying text.

¹⁷ See *supra* note 12 and accompanying text.

a broad shield from liability for the direction of hostile force becomes less reasonable as the risk that that hostile force will harm noncombatants increases. At the same time, the approach is too narrow because it may open the government to liability for activities that do not involve the direction of hostile force but to which strong policy considerations nonetheless favor the extension of immunity.

Under both circuits' interpretations, the government may be shielded from liability for injuries resulting from activities that could have been more safely performed without compromising national defense. This Note takes the position that in light of the inadequacies of both the Ninth and D.C. Circuits' interpretations of the combatant activities exception, a new approach is needed that will strike an appropriate balance between the government's interest in defending the nation unencumbered by the threat of tort liability and the rights of injured parties to recover.

Part I of this Note provides a brief history of the Federal Tort Claims Act ("FTCA") and discusses the Supreme Court's prevailing approach to interpreting the Act's various exceptions. The Supreme Court's approach to interpreting the congressional intent of these exceptions, which is based on giving effect to the plainest meaning of their language, lends invaluable insight into how the combatant activities exception should be applied. Part II examines the combatant activities exception itself, introducing its component parts and discussing in greater detail the above-referenced circuit split concerning its interpretation. While there is a consensus as to the actors covered by the exception and the general circumstances under which it may apply, the circuits disagree on what types of activities are covered.

Part III provides an overview of the problems inherent to each circuit's understanding of what activities are covered by the exception. Part IV, in light of these problems, proposes a solution which more adequately addresses the policy concerns attached to the exception. These policy concerns, along with Supreme Court precedent and basic principles of equity, counsel strongly against the continued use of either approach. The proposed approach discussed in this Part will take all of these considerations into account.

The proposed solution is a two-part test. It looks first, as the Supreme Court would, to the plain meaning of the exception's language, and asks if the activity in question constitutes combat

as it is commonly understood. An affirmative answer will give rise to a rebuttable presumption that the exception applies, thereby protecting the government's interest. However, the injured party will retain a chance to recover if he or she can present evidence that the complained-of activity violated the rules of engagement for the area in which it occurred.¹⁸ If the activity in question does not conform to common understandings of combat, a presumption will arise that the combatant activities exception does not apply, protecting injured parties' interests in recovery. However, this presumption, too, can be rebutted if the government can show that the activity is similar enough to combat that imposing liability for it would give rise to the same policy concerns as would imposing liability for combat. To do this, the government would provide evidence based on the nature of the act in question and the physical and temporal proximity of the activity to actual combat.

Lastly, Part V illustrates how this new standard would be applied to a variety of scenarios like those mentioned above, and in doing so will address the major criticisms that are likely to arise. Starting with the facts of *Aiello* and moving into those surrounding Ms. Jones's injuries, this Part will show how this new standard will provide more equitable results to activities that are clearly not combat, while preserving the government's immunity in those cases where non-combat activities implicate the same policy concerns as actual combat. Transitioning into injuries likely to result from the encroachment of warzones into densely populated urban areas, this Part will next discuss the benefits of this new approach to activities which are combat, but where non-combatants are injured.

I. HISTORY OF THE COMBATANT ACTIVITIES EXCEPTION

This Part examines the process behind determining what kind of liability the government did or did not assume with the FTCA. In order to define "combatant activities" for the purposes of this exception, an examination of the history of the Federal Tort Claims Act and some of its exceptions is necessary. To determine what kind of liability the government never intended to assume, and therefore, what type of activities should not give

¹⁸ This Note does not, of course, suggest that enemy combatants should be able to seek relief in U.S. courts for injuries suffered as a result of U.S. military activity.

rise to liability under the FTCA, it is instructive to examine the process of determining what type of liability the government *did* intend to assume.

A. *History of the Federal Tort Claims Act*

The Federal Tort Claims Act is a qualified waiver of the sovereign immunity of the United States government with respect to civil actions.¹⁹ Enacted into law by Congress in 1948, the FTCA provides jurisdiction to the district courts over civil actions against the federal government, permitting claimants to seek judicial, rather than legislative, relief.²⁰ Prior to the enactment of the FTCA, anyone seeking to press claims against the federal government for injuries to person or property was forced to introduce a private bill in Congress.²¹ These bills would go then to the Committee on Claims for consideration.²²

Not surprisingly, the Committee eventually became so inundated with bills that within a given session of Congress it was able to review only about half of the claims referred to it.²³ As a result, many injured parties were forced to wait years for the merits of their claims to be considered.²⁴ After suffering this delay, claimants were next confronted by a “rule of unanimous consent,” by which a proposed bill of relief, having been given due consideration by a majority of the committee, could be defeated at the whim of one member, even if barely familiar with the claim.²⁵ By 1931, however, Congress realized that this antiquated method of handling tort claims against the federal government was unjust and unsustainable,²⁶ and it recognized the need for change.²⁷ It was not until the FTCA was enacted, however, that a tenable and maintainable method of adjudicating claims against the federal government was established.

¹⁹ See 28 U.S.C.A. § 1346(b) (West 2013); 28 U.S.C. § 2680 (2006).

²⁰ See *id.* § 1346(b).

²¹ 71 CONG. REC. 6868 (1931).

²² *Id.*

²³ *Id.*

²⁴ See *id.*

²⁵ *Id.*

²⁶ *Id.* (noting that “[m]any times bad humor and prejudice on the part of some Member will defeat a worthy and just claim,” and that “with the vast number of bills referred to [the] committee it is impossible to keep up with [the] work”).

²⁷ See *id.*

The FTCA is an expression of the federal government's willingness to accept liability for injuries caused by the negligence or wrongful acts of government employees acting within the scope of their duty.²⁸ Taken together, the terms of the FTCA open the government to liability as if it were a private actor, and the remnants of sovereign immunity are preserved only in a handful of exceptions enumerated in § 2680 of the United States Code.²⁹

One of these exceptions, aptly dubbed the “combatant activities exception,” expressly exempts the government from liability for injuries “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”³⁰ This ostensibly straightforward language belies the complexity of the considerations inherent to the exception's creation. A discussion of these considerations, an understanding of which is crucial to applying the exception appropriately, is informed by examining some of the Act's other exceptions.

B. The Supreme Court's Treatment of Other Exceptions to the FTCA

To best infer which activities may properly be considered “combatant activities,” and therefore exempt from litigation under the FTCA, it is helpful to look at the process used to determine what kind of liability the government did or did not intend to assume. This intention is revealed through other statutory exceptions to the FTCA.³¹ Each of these exceptions manifests an attempt to balance a government interest in efficient and effective operation within a given field against a private interest in recovery for injuries resulting from that operation.³² If the threat of liability would interfere too greatly with this government interest, then that field of operation would

²⁸ See 28 U.S.C.A. § 1346(b) (West 2013).

²⁹ See *id.* §§ 1346(b), 2680.

³⁰ *Id.* § 2680(j).

³¹ See *id.* § 2680.

³² See *Kosak v. United States*, 465 U.S. 848, 858 (1984) (stating that there are three objectives most commonly cited in legislative history as rationales for the exceptions to the FTCA: “ensuring that ‘certain governmental activities’ not be disrupted by the threat of damage suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available”).

be exempted from suit by § 2680.³³ While some of the exceptions under § 2680 preempt litigation of claims arising out of government operation within a discrete, clearly defined field, others, like the combatant activities exception, require some degree of interpretation.³⁴

1. *Dolan v. United States Postal Service*

The Supreme Court has chosen to narrowly interpret exceptions to the FTCA, applying them in a manner that best conforms to a reasonable understanding of the language used.³⁵ In *Dolan v. United States Postal Service*,³⁶ the Court held that a suit against the United States Postal Service for injuries resulting from negligently placed mail was not barred by § 2680(b), an exception to the FTCA that covers the “negligent transmission of letters or postal matter.”³⁷ The plaintiff in that case, Barbara Dolan, was injured after she tripped and fell over mail left on her porch by postal employees.³⁸ Dolan brought suit in United States District Court for the Eastern District of Pennsylvania, claiming that the postal employees’ negligent placement of the mail had opened the government to liability under the FTCA.³⁹ The district court dismissed the suit and the Third Circuit affirmed, with both courts concluding that although

³³ See *id.*; see also 28 U.S.C. § 2680.

³⁴ Compare § 2680(d) (preempting “[a]ny claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States”), § 2680(e) (preempting “[a]ny claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix”), § 2680(k) (preempting “[a]ny claim arising in a foreign country”), § 2680(l) (preempting “[a]ny claim arising from the activities of the Tennessee Valley Authority”), and § 2680(m) (preempting “[a]ny claim arising from the activities of the Panama Canal Company”), with § 2680(b) (preempting “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter”), § 2680(i) (preempting “[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system”), and § 2680(j) (preempting “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”).

³⁵ See *Kosak*, 465 U.S. at 854 (stating that “the fairest interpretation of the crucial portion of [§ 2680(c)] is the one that first springs to mind”).

³⁶ 546 U.S. 481 (2006).

³⁷ *Id.* at 488–89; see § 2680(b).

³⁸ *Dolan*, 546 U.S. at 483.

³⁹ *Id.*

the FTCA waives sovereign immunity with respect to federal postal employees' torts, the claim was barred by § 2680(b).⁴⁰ The Supreme Court disagreed.⁴¹

The Court declined to read breadth into the exception that was not expressed by the language Congress used. It concluded that § 2680(b), which states that the government is not liable for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter,”⁴² was never intended to apply to suits for injuries that were not “the sort primarily identified with the Postal Service’s function of transporting mail throughout the United States.”⁴³ The Court stated that “both context and precedent require a narrower reading [of § 2680(b)], so that ‘negligent transmission’ does not go beyond negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address.”⁴⁴ The Court felt that if Congress meant to preserve sovereign immunity for activities other than those most commonly associated with the Postal Service’s primary function of delivering mail, it would not have specified those activities as the only activities to which the exception extends.⁴⁵

The Court found additional significance in the statute’s wording beyond its specificity. It was quick to note that “the words ‘negligent transmission’ in § 2680(b) follow two other terms, ‘loss’ and ‘miscarriage,’ ”⁴⁶ and felt that the phrase “negligent transmission” should be interpreted in light of these accompanying terms.⁴⁷ Because “both those terms refer to failings in the postal obligation to deliver mail,” the Court reasoned that “it would be odd if ‘negligent transmission’ swept

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² § 2680(b).

⁴³ *Dolan*, 546 U.S. at 489.

⁴⁴ *Id.* at 486.

⁴⁵ *See id.* at 489–90 (stating that “[o]ther FTCA exceptions paint with a far broader brush,” and that “[h]ad Congress intended to preserve immunity for all torts related to postal delivery—torts including hazardous mail placement at customer homes—it could have used similarly sweeping language”); *see also* § 2680(b) (specifying “loss, miscarriage, or negligent transmission” as the only sources of injuries against which the government retains immunity).

⁴⁶ *Dolan*, 546 U.S. at 486.

⁴⁷ *Id.*

far more broadly to include injuries . . . that happen to be caused by postal employees but involve neither failure to transmit mail nor damage to its contents."⁴⁸

This was the "context" that the Court referred to as "requir[ing] a narrower reading [of § 2680(b)]."⁴⁹ Briefly combining contextual and precedential analyses, the Court noted that the established "rule" that "[a] word is known by the company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."⁵⁰ This, however, was only a cursory glance at precedent by the Court. The Court's full analysis of precedent that "require[d] a narrower reading [of § 2680(b)]," revolved around *Kosak v. United States*.⁵¹

2. *Kosak v. United States*

The *Dolan* Court's deference to apparent legislative intent, reflected by its narrow interpretation of § 2680(b), was premised in large part on *Kosak*.⁵² In *Kosak*, the Court took a similar analytical approach to reach a different, but consistent, conclusion with respect to § 2680(c), finding that the absence of specific limiting language was a clear expression of congressional intent that the exception apply more broadly.⁵³

Kosak dealt with a claim against the government brought under the FTCA by a plaintiff whose property had been seized by the United States Customs Service.⁵⁴ Alleging that some of the property eventually returned to him was damaged by the government while it was detained, plaintiff sought relief under the FTCA in the District Court for the Eastern District of Pennsylvania.⁵⁵ The government moved for dismissal of the

⁴⁸ *Id.* at 487.

⁴⁹ *See id.* at 486–87; *see also supra* note 25 and accompanying text.

⁵⁰ *Dolan*, 546 U.S. at 486 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

⁵¹ 465 U.S. 848 (1984); *see Dolan*, 546 U.S. at 487 (stating "[o]ur interpretation would be less secure were it not for a precedent we deem to have decisive weight here. We refer to *Kosak v. United States* . . .").

⁵² *See id.* at 487–88.

⁵³ *Kosak*, 465 U.S. at 855 (comparing the language of § 2680(b) and § 2680(c) and noting "[t]he absence of any analogous desire to limit the reach of the statutory exception pertaining to the detention of property by customs officials . . . in the phraseology of § 2680(c)").

⁵⁴ *Id.* at 849–50.

⁵⁵ *Id.* at 850.

complaint and for summary judgment, arguing that the claim was barred by § 2680(c).⁵⁶ The district court granted the government's motion, and the court of appeals affirmed.⁵⁷ The court of appeals held that the plaintiff failed to state a claim for which relief could be granted because "the 'clear language' of § 2680(c) shields the United States from 'all claims arising out of detention of goods by customs officers and does not purport to distinguish among types of harm.'"⁵⁸ The Supreme Court affirmed, finding that the complaint was properly dismissed as barred by § 2680(c).⁵⁹

The Court interpreted § 2680(c) in the manner that it felt most closely reflected the plain meaning of its language.⁶⁰ At the time *Kosak* was decided, § 2680(c), which has since been amended, exempted from suit under the FTCA "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs."⁶¹ The plaintiff argued that this language only covered claims for damage caused by the detention itself and not claims for damage inflicted while the property was in the possession of the Customs Service.⁶² The Court disagreed, finding that the phrase "any claim arising in respect of the detention of goods," as used in the statute, meant "any claim 'arising out of the detention of goods,'" and included handling and storing detained property.⁶³

In reaching its decision, the Court juxtaposed the very general language of § 2680(c) with the specific language of § 2680(b), the postal services exception.⁶⁴ The Court recognized that the specificity in the postal services exception was not accidental; it was a product of the fact that one of the primary

⁵⁶ *Id.*

⁵⁷ *Id.* at 850–51.

⁵⁸ *Id.* at 851 (quoting *Kosak v. United States*, 679 F.2d 306, 308 (3d Cir. 1982)).

⁵⁹ *Id.* at 862.

⁶⁰ *See id.* ("The language of [§ 2680(c)] as it was written leaves us no choice but to affirm the judgment of the Court of Appeals that the [FTCA] does not cover suits alleging that customs officials injured property that had been detained by the Customs Service.")

⁶¹ *Id.* at 852 (alteration in original) (citation omitted). The repeated use of the word "any" in this statute suggests a range of activities and persons covered, which stands in stark contrast to the specific and limited range of activity and persons covered by the combatant activities exception. *See id.* at 853, 855; *see also infra* note 70 and accompanying text.

⁶² *Kosak*, 465 U.S. at 852–53, 862.

⁶³ *Id.* at 854.

⁶⁴ *Id.* at 855.

goals of the FTCA was to waive the government's immunity against liability for injuries caused by motor vehicle accidents in which postal employees were at fault.⁶⁵ The Court reasoned that to ensure that § 2680(b) did not bar the exact type of suit that Congress was concerned about allowing, the exception's drafters "carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, 'the loss, miscarriage, or negligent transmission of letters or postal matter'—thereby excluding, by implication, negligent handling of motor vehicles."⁶⁶ Clearly, the Court felt that had Congress meant for § 2680(b) to preclude suits for motor vehicle accidents, the exception would have said so explicitly. Similarly, had Congress meant to limit the application of § 2680(c) to damage to property caused by detention itself, it would have used limiting language instead of the broad sweeping terms it chose.

II. THE COMBATANT ACTIVITIES EXCEPTION

The combatant activities exception to the FTCA is designed to reflect the policy that the government should not be liable for injuries resulting from action taken by the armed forces in defense of the nation.⁶⁷ Seemingly an extension of the doctrine of *salus populi*,⁶⁸ the combatant activities exception is best understood as reflecting the principle that the interests of an injured few in recovering damages are outweighed by the interests of the United States in engaging enemies in combat unhindered by the threat of civil liability.⁶⁹ The statute makes a very plain statement to this effect: "The provisions of . . . [the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992).

⁶⁸ *Salus populi suprema lex esto* is a legal maxim that means "let the welfare of the people be the supreme law." *Salus Populi Suprema Lex Esto*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/salus%20populi%20suprema%20lex%20esto> (last visited Jan. 15, 2014).

⁶⁹ *See, e.g., Koohi*, 976 F.2d at 1334–35 ("Congress certainly did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our soldiers . . . to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat."); *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009) ("The legislative history of the combatant activities exception is 'singularly barren,' but it is plain enough that Congress sought to exempt combatant activities because such activities 'by their very nature should be free from the hindrance of a possible damage suit.'" (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948))).

FTCA] shall not apply to . . . [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”⁷⁰

Viewed in light of this principle and the Supreme Court’s narrow interpretation of some of the FTCA’s other exceptions, the combatant activities exception can most sensibly be understood as preserving sovereign immunity against claims arising out of military combat.⁷¹ As discussed above, that this conclusion seems obvious serves only to reinforce that it is correct.⁷² An examination of the exception’s history, however, reveals that this understanding is far from universal.

There appears to be a general consensus as to the actors covered by the exception and the context in which an act must occur to be covered; but there is significant disharmony regarding what types of activities constitute “combatant activities” and therefore fall under the exception. Turning first to the agreed-upon elements, it is widely accepted that in addition to uniform members of the United States armed forces, the combatant activities exception also shields private contractors from liability.⁷³ Likewise, the exception is generally understood to apply to military activities even absent a formal declaration of war.⁷⁴

A. *To Whom and When Does the Exception Apply?*

The Ninth and D.C. Circuits have used the combatant activities exception to the FTCA to shield both uniform soldiers and private contractors from liability.⁷⁵ Both courts share an understanding that the policies behind the combatant activities exception are the same whether the party responsible for an injury is a soldier or a private contractor.⁷⁶ Accordingly, both

⁷⁰ 28 U.S.C. § 2680(j) (2006).

⁷¹ See *supra* Parts I.B.1–2.

⁷² See *supra* note 35 and accompanying text.

⁷³ See *Saleh*, 580 F.3d at 9; *Koohi*, 976 F.2d at 1337.

⁷⁴ See *Koohi*, 976 F.2d at 1335.

⁷⁵ See *Saleh*, 580 F.3d at 9 (“During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”); *Koohi*, 976 F.2d at 1336–37 (holding that plaintiffs’ action against the private manufacturers of an Aegis Air Defense System deployed by the United States Navy and used to shoot down a civilian airliner was preempted by the combatant activities exception).

⁷⁶ See *Saleh*, 580 F.3d at 8; *Koohi*, 976 F.2d at 1337.

courts seem to agree that the imposition of liability on contractors for injuries caused in combat would interfere with the same interests that the imposition of liability on soldiers would.⁷⁷ Therefore, in situations where the combatant activities exception would bar claims against the government, it preempts claims against government contractors.⁷⁸

Similar policy-based reasoning serves as the foundation for the consensus among these courts that a formal declaration of war is not a prerequisite for applying the combatant activities exception.⁷⁹ Just as those policy concerns are equally implicated whether the actor is a uniformed soldier or private contractor, they are also equally implicated “[w]hether that combat is formally authorized by the Congress or follows less formal actions of the Executive and Legislative branches.”⁸⁰ Indeed, both the Ninth and D.C. Circuits have applied the exception to shield the government and private contractors from liability for injuries arising out of combat in the absence of a congressional declaration of war.⁸¹

B. “Combatant Activities”

Whatever uniformity may result from this common understanding of the actors and circumstances covered by the exception is threatened by a potentially decisive split between the Ninth and D.C. Circuits as to what actual activity is covered. The two courts have taken very different approaches to interpreting the term “combatant activities.” On the one hand, the Ninth Circuit’s approach can best be understood as precluding only claims for injuries arising out of what is most commonly understood as combat—“hostile encounters” with the enemy.⁸² It is therefore not only well in line with the Supreme Court’s approach to interpreting FTCA exceptions, but it also accounts for the exception’s foundational policy concern.⁸³

⁷⁷ See *Saleh*, 580 F.3d at 8; *Koohi*, 976 F.2d at 1337.

⁷⁸ See *Saleh*, 580 F.3d at 9; *Koohi*, 976 F.2d at 1337.

⁷⁹ See *Koohi*, 976 F.2d at 1334.

⁸⁰ See *id.*

⁸¹ See *id.* at 1333. The *Saleh* court seemed to assume that a declaration of war was not necessary to apply the exception, as the subject was not discussed in the case.

⁸² *Id.* at 1335.

⁸³ See *supra* notes 35, 69 and accompanying text.

On the other hand is the D.C. Circuit's approach, which far more broadly interprets the exception as applying in such a way as to "eliminat[e] tort concepts from the battlefield."⁸⁴ While this approach does reflect the exception's policy considerations, it seems to depart from Supreme Court precedent by reading unintended breadth into the statute.⁸⁵ The difference between these two interpretations, which at first glance may seem merely semantic, is actually quite decisive. An examination of the cases in which these respective approaches were promulgated and contrasted for subsequent application palpably highlights just how consequential the difference is.

1. *Koohi v. United States*

In *Koohi v. United States*, the Ninth Circuit held that the combatant activities exception barred claims against the government and private contractors brought by the families of passengers and crew members of an Iranian airliner shot down by a United States warship.⁸⁶ The warship, the USS Vincennes, was a naval cruiser equipped with an Aegis Air Defense System manufactured by defendant contractors.⁸⁷ As part of the American effort to protect ships carrying Iraqi cargo during the Iran-Iraq war, United States naval forces began engaging Iranian naval vessels in combat.⁸⁸ In the midst of this ongoing conflict, the USS Vincennes dispatched a helicopter to investigate reports of activity by Iranian gunboats.⁸⁹ When the helicopter reported that it had taken anti-aircraft fire, the Vincennes crossed into Iranian waters and engaged the enemy gunboats.⁹⁰ Minutes later, an Iranian civilian airliner departed from a "joint commercial-military airport" in Iran.⁹¹ "The Vincennes was in the vicinity of the aircraft's flight path" and mistook it for an

⁸⁴ Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009).

⁸⁵ See *supra* Part I.B.

⁸⁶ *Koohi*, 976 F.2d at 1330, 1333.

⁸⁷ *Id.* at 1330.

⁸⁸ *Id.* (citing multiple "publicized incidents" in which Iranian and United States naval forces clashed, resulting in casualties and extensive damage to property on both sides).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Iranian military jet.⁹² Using the Aegis Air Defense System, the crew of the Vincennes targeted the airliner and shot it down over the Persian Gulf, killing all 290 people aboard.⁹³

Plaintiffs brought suit against the United States government and the various manufacturers of the Aegis Air Defense System, alleging that negligent operation of the Vincennes and design defects in the air defense system led to misidentification of the airliner and the decision to fire on it.⁹⁴ While the court recognized that the incident was tragic, it nevertheless held that the action was barred by the combatant activities exception.⁹⁵

The action taken by the Vincennes was found to constitute combatant activity because it involved the direction of hostile action towards what was perceived as an enemy.⁹⁶ Although the court did not go so far as to define combatant activity as necessarily involving hostile action or conduct directly connected to it, its repeated association of the combatant activities exception with acts of hostility leads to this conclusion.⁹⁷ This conclusion is also consistent with the Ninth Circuit's understanding that the policy behind the combatant activities exception "is to ensure that the government will not be liable for negligent conduct by our armed forces in times of combat."⁹⁸

Understanding the exception to be limited to hostile engagements or conduct directly connected to them is fairly well in keeping with Supreme Court precedent. As discussed above, the Supreme Court narrowly interprets exceptions to the FTCA, using the most reasonable understanding of the exception's

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 1330–31.

⁹⁵ *Id.* at 1335–36.

⁹⁶ *Id.* at 1337.

⁹⁷ *Id.* at 1335 (noting that "tort law, in toto, is an inappropriate subject for injection into the area of *military engagements*. The FTCA clearly recognizes this principle . . ." (emphasis added)); *id.* (stating the FTCA applies "when . . . United States armed forces engage in an organized series of *hostile encounters* on a significant scale" (emphasis added)); *id.* at 1335–36 (noting that for purposes of the exemption from the FTCA, "it is of no significance whether a plane that is shot down is civilian or military, so long as the person *giving the order or firing the weapon* does so for the purpose of furthering our *military objectives* or of *defending* lives, property, or other interests" (emphasis added)); *id.* at 1337 (stating that "one purpose of the combatant activities exception is to recognize that during *wartime encounters* no duty of reasonable care is owed to those *against whom force is directed* as a result of authorized *military action*" (emphasis added)).

⁹⁸ *Id.* at 1334.

language.⁹⁹ Interpreting the combatant activities exception using the same methods employed by the Supreme Court, it seems likely that Congress meant to exempt from the FTCA only military activity involving or necessary to hostile action.

Had Congress intended to exempt a broader range of activity, as some courts argue, it could simply have left out the descriptive word “combatant” in the exception.¹⁰⁰ If, as the Supreme Court suggested in *Kosak v. United States*, “the fairest interpretation of the crucial portion of [an exception to the FTCA] is the one that first springs to mind,” then “combatant activities” should be interpreted as requiring hostile action.¹⁰¹ However, the D.C. Circuit opened the door for a much broader interpretation.

2. *Saleh v. Titan Corp.*

In *Saleh v. Titan Corp.*, the D.C. Circuit held that the combatant activities exception preempted claims brought by Iraqi nationals against private military contractors used by the United States government for interrogation and interpretation services.¹⁰² The plaintiffs claim that they were subjected to abuse by the defendants while held at the Abu Ghraib military prison in Iraq.¹⁰³ The court, relying on its understanding that “all of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule,”¹⁰⁴ concluded that “the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield.”¹⁰⁵

⁹⁹ See *supra* note 35 and accompanying text.

¹⁰⁰ See generally *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011). Congress could certainly have drafted or modified the exception to say, “The provisions of . . . [the FTCA] shall not apply to any claims arising out of the activities of the military or naval forces, or the Coast Guard, during a time of war.”

¹⁰¹ *Kosak v. United States*, 465 U.S. 848, 854 (1984). The first interpretation of “combatant activities” that comes to mind, especially when viewed in light of the accompanying terms, is a hostile military engagement. It is not a great stretch to say that the interpretation of “combatant activities” that “first springs to mind” would include the tracking, targeting, and engaging of what was legitimately perceived as a hostile aircraft.

¹⁰² *Saleh v. Titan Corp.*, 580 F.3d 1, 2, 9 (D.C. Cir. 2009).

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.* at 7 (emphasis omitted) (citing *Koohi v. United States*, 976 F.2d 1328, 1334–35 (9th Cir. 1992)).

¹⁰⁵ *Id.*

Because the imposition of tort liability would necessarily conflict with “the FTCA’s policy of eliminating tort concepts from the battlefield,” the court determined that this case presented it with a form of general conflict preemption.¹⁰⁶ Coining the term “battle-field preemption,” the court announced that “the federal government occupies the field when it comes to warfare, and its interest in combat is *always* ‘precisely contrary’ to the imposition of a non-federal tort duty.”¹⁰⁷ It would not be long before this broad-sweeping concept was taken to its logical conclusion.

3. *Aiello v. Kellogg, Brown & Root Services, Inc.*

In *Aiello v. Kellogg, Brown & Root Services, Inc.*, the United States District Court for the Southern District of New York held that the combatant activities exception preempted claims brought by a civilian contractor who was injured when he fell in a bathroom within Camp Shield, a forward operating base in Iraq.¹⁰⁸ The plaintiff alleged that the defendant, a private service contractor retained by the government to provide support services at Camp Shield, was negligent in its construction and maintenance of the latrine facility.¹⁰⁹ The Southern District granted the defendant’s motion for summary judgment, finding that the maintenance of the latrine facility fell into the category of “combatant activity.”¹¹⁰ Applying the doctrine promulgated by the D.C. Circuit in *Saleh v. Titan Corp.*, this decision highlights the dramatic difference between the Ninth and D.C. Circuits’ interpretations of combatant activities.¹¹¹

The court found that the Ninth Circuit’s approach of “remov[ing] the duty of care only as to ‘those against whom force is directed’ [was] unduly narrow.”¹¹² It reasoned that the *Koohi* standard, “which limits the [government] interest to precluding

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (emphasis added) (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1988)).

¹⁰⁸ 751 F. Supp. 2d 698, 700 (S.D.N.Y. 2011).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 715.

¹¹¹ *Id.* at 709–10. Beyond the outcome of the case, which itself exemplifies the substantial differences between the two approaches, the court remarked that “the differences between these formulations are significant,” and that if the *Koohi* standard were applied, there would be no conflict in this case and therefore no preemption. *See id.* at 709.

¹¹² *Id.* at 709 (quoting *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992)).

suits brought by those against whom force is directed,” would not serve the policies underlying the exception.¹¹³ The court instead adopted the D.C. Circuit’s formulation and stated that “the combatant activity exception creates a type of field preemption[;] . . . [i]t is not necessary to determine whether military judgments would necessarily be examined . . . because any claim arising out of combatant activities is preempted.”¹¹⁴ In keeping with this understanding that there is no room on the battlefield for tort liability, regardless of whether military judgment is implicated in a decision which caused injury, the court determined that for the purposes of this exception, the maintenance of a bathroom was a combatant activity.¹¹⁵ This conclusion seems to clash with both Supreme Court precedent and the purpose of the combatant activities exception.

It is difficult to imagine that the Supreme Court, in light of its narrow treatment of other exceptions to the FTCA, would apply the combatant activities exception to the maintenance of a bathroom absent some extenuating circumstances. It is true, as the *Aiello* court noted, “that the creation and maintenance of these necessary facilities is integral to sustaining combat operations.”¹¹⁶ But is latrine maintenance any more integral to sustaining combat operations than is the use of motor vehicles by the Postal Service to the delivery of mail? The Supreme Court has clearly stated that negligent operation of postal vehicles, though necessary for the postal service to perform its primary function, is not exempt from suit under the “Postal Service Exception.”¹¹⁷ That an activity is necessary to combat, it would appear, should not be enough to bring that activity under the ambit of the combatant activities exception.

Even assuming that the Ninth Circuit’s interpretation of the combatant activities exception is too narrow, and that the direction of hostility is not a prerequisite for its application, it can hardly be said that the most reasonable interpretation of the exception’s plain language would necessarily extend immunity to

¹¹³ *Id.* at 710.

¹¹⁴ *Id.* at 710–11.

¹¹⁵ *Id.* at 713.

¹¹⁶ *Id.* at 714.

¹¹⁷ *Kosak v. United States*, 465 U.S. 848, 855 (1984). On the contrary, the *Kosak* Court noted that “[o]ne of the principal purposes of the Federal Tort Claims Act was to waive the Government’s immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault.” *Id.*

latrine maintenance simply because of location. Applying the same methods that the Supreme Court has, it becomes clear that this area is simply too far removed from the most likely intent of Congress in drafting the combatant activities exception.

III. A NEW STANDARD IS NEEDED

The Ninth Circuit's interpretation of "combatant activities" is closer to the plain text of the statute than the D.C. Circuit's. Instead of including any activity that occurs on a battlefield, it only includes the direction of hostile force or other activity that is immediately connected thereto, such as the tracking and targeting of the enemy aircraft in *Koohi*.¹¹⁸ It is sensible to say that it becomes less likely that the government intended to assume liability for an activity the closer that activity is to engaging an enemy.

When *Koohi* was decided, however, the nature of wars being fought by the United States was very different than it is today.¹¹⁹ As enemies become increasingly difficult to discern from civilians, and warzones become increasingly urbanized, it becomes more likely that the U.S. military will injure noncombatants while directing force at the enemy.¹²⁰ Therefore, the "blanket" protection of hostile action afforded by the *Koohi* standard may be inappropriate.

At the same time, the same policy concerns underlying the exception still favor ensuring that military decision-makers, at whatever level, are not so concerned with incurring liability that they refrain from acting in defense of the nation. While the D.C. Circuit's standard clearly accounts for these concerns, its continued application will lead to more inequitable results like that seen in *Aiello*. Simply precluding any action for injuries that occurred on a battlefield, regardless of their cause, gives the government too much immunity at the expense of injured parties. A better balance must be struck between the conflicting interests of the government in defending the nation free from the threat of

¹¹⁸ See *Koohi v. United States*, 976 F.2d 1328, 1333–36 (9th Cir. 1992).

¹¹⁹ The conflict surrounding *Koohi* involved the United States conducting naval combat operations against Iranian military forces in a clearly-defined, recognizable, and relatively uninhabited combat zone. See *id.* at 1329–30, 1337. The current war in Iraq, on the other hand, involves combat operations in populated cities against ununiformed insurgents. See Tavernise & Lehern, *supra* note 12.

¹²⁰ See Tavernise & Lehern, *supra* note 12.

liability, and those of parties injured as a result of activity that cannot rightly be considered combat, but nevertheless may currently be precluded from suit by the combatant activities exception.

IV. A NEW STANDARD

This Note proposes that a possible solution to this dilemma lies in a two-step process that will account for the government's interest in preserving its immunity for activities necessary to national defense as well as the interests of injured parties. The first step is to ask whether or not the activity that gave rise to the injury was clearly combatant, as the word is most commonly understood. In other words, the question becomes: "Did the injury arise from the direction of hostile force?" Step two depends on the answer to that question. If the answer is no, a rebuttable presumption arises that the combatant activities exception does not apply.¹²¹ If the answer is yes, a rebuttable presumption arises that it does.

A. *Step One—Is the Activity Clearly "Combatant?"*

Step one begins essentially with an application of the Ninth Circuit's standard: The court must determine if the activity that gave rise to the injury is one that would be considered combat as it is commonly understood.¹²² This reflects both the Supreme Court's interpretation of other exceptions to the FTCA and the policy concerns behind the combatant activities exception.

If the activity was clearly not combative, a rebuttable presumption arises that the combatant activities exception does not apply. To overcome this, the government will have to show that the activity, although it was not the direction of force or connected immediately to the direction of force, was so like combat that it implicates the same policy concerns that serve as the foundation for the combatant activities exception. In other words, the government will have to show that the threat of imposing tort liability for this activity would cause hesitation to

¹²¹ It should be noted that the inapplicability of the combatant activities exception does not necessarily mean that the government will be liable for the injury. There are other exceptions to the FTCA, such as the discretionary function exception and foreign country exception, which may still bar the suit. See 28 U.S.C. § 2680(a), (k) (2006).

¹²² See *supra* Part II.B.1.

act that would be detrimental to national defense. This showing should be based on three criteria: the nature of the act performed, the physical proximity of the act to combat, and the temporal proximity of the act to combat.

The nature of the activity and its physical and temporal proximity to combat are logical considerations when determining whether an act, though not actually combat, is similar enough to combat that it raises the same policy concerns. An examination of the nature of the activity should focus on how necessary it is to combat. The more necessary an activity is to combat, the higher the risk becomes that imposing liability on it would harm national security interests. Similarly, the closer an activity occurs to combat, in terms of both physical space and time, the more likely it becomes that it would implicate the same concerns as combat. The physical proximity consideration should therefore be based, quite simply, on how near or far from a combat zone the activity occurred. As for the temporal proximity consideration, any bright line rule based on the time elapsed since the last shot was fired would obviously be inappropriate. Therefore, this consideration should be based on whether the activity was performed so long after hostilities had ceased that, depending on the activity, neither additional deliberation nor earlier action would reasonably have threatened military interests. Taken together, these three considerations provide a lens through which to view the overlap, if any, of the policy concerns behind the combatant activities exception and those raised by a given non-combat military activity.

B. Step 2—Applying the Rules of Engagement

If the activity in question is clearly combat, a rebuttable presumption arises in favor of the government that the combatant activities exception applies. To overcome this presumption, the plaintiff will have to show that the activity which gave rise to the injury violated the rules of engagement for the field in which the injury occurred. The rules of engagement are statements issued by the United States military that govern when force can be used by military personnel outside of the United States.¹²³ They are designed to “provide guidance from

¹²³ See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CJCSI 3710.01B, DOD COUNTERDRUG SUPPORT A-17, GL-5 (2007).

the President and Secretary of Defense (SECDEF), as well as subordinate commanders, to *deployed units* on the use of force.”¹²⁴ They are mission-specific and are intended to be promulgated to each individual soldier and commander.¹²⁵

Because soldiers should always be operating within the rules of engagement, imposing tort liability for a clear violation of them will not cause the chilling effect on life-or-death decision-making that the courts have feared.¹²⁶ Deployed units will not have to take any precautions to avoid tort liability beyond those they must already take upon entering a combat zone. If the injury arose as a result of the direction of force that was sanctioned by the rules of engagement, which any force used should have, the combatant activities exception will apply.

V. HYPOTHETICAL APPLICATION OF THE TWO-PART TEST TO VARIOUS FACT PATTERNS

Applying this two-part test to sample fact patterns reveals that it prevents some injured parties' claims from being denied by a tool never intended to be put to that use, while at the same time protects the government's interest in engaging hostile forces free from the threat of liability. Critics of this approach will likely argue foremost that opening the government to liability for combat-related injuries at all will compromise the military's ability to perform its most essential function. However, under this test the government is only liable for combat-related injuries when that combat violates the rules of engagement, which gives the military a considerably wide berth in waging war. Further, it is not at all anomalous to Supreme Court jurisprudence that the government may be held liable when its agents depart from a governmentally prescribed course of action.¹²⁷

¹²⁴ See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 73 (2010) [hereinafter OPERATIONAL LAW HANDBOOK].

¹²⁵ *Id.* at 80–81.

¹²⁶ See *supra* note 69 and accompanying text.

¹²⁷ See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (“Thus, the discretionary function exception [to the FTCA] will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.”).

A. *Application to Aiello v. Kellogg, Brown & Root Services, Inc.*

Applying this new standard to the *Aiello* case illustrates its advantages over either of the inflexible existing standards discussed in this Note. The Ninth Circuit's approach would immediately preclude the application of the exception in a case like *Aiello* because the complained-of activity, negligent maintenance of a bathroom, did not involve the direction of hostile force.¹²⁸ On the other hand, under the D.C. Circuit's approach the exception would immediately be applied because the activity occurred on what was considered a battlefield. The approach proposed by this Note considers additional factors that allow it to account for the unique circumstances of a given case that can inform a decision to assign liability.

Even in a case like *Aiello*, which did not involve combat, an argument can be made that the combatant activities exception should apply. Because such a case clearly does not arise out of combat as it is commonly understood, under the proposed approach, a presumption arises that the combatant activities exception does not apply. To maintain immunity under this exception, the government must show that the activity in question implicates the same policy concerns as combat itself. This showing should be based on the nature of the act and its physical and temporal proximity to combat.

Turning first to the nature of the activity in *Aiello*, it must be noted that bathroom maintenance is essential to combat activity.¹²⁹ That activity may then be an appropriate basis for applying the exception if the government can show that, based on its physical and temporal proximity to combat, imposing liability would run contrary to national security interests. As for the physical proximity of the bathroom to combat, it was located on a forward operating base about three miles outside of the "Green Zone" in Baghdad, Iraq.¹³⁰ This base served as "a refit, re-arming point, and a living area' for U.S. and coalition military forces."¹³¹ Significantly, the base had come under attack by hostile forces "[a]round Easter 2008,"¹³² so an argument could be

¹²⁸ See *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 700 (S.D.N.Y. 2011).

¹²⁹ *Id.* at 713–14.

¹³⁰ *Id.* at 701.

¹³¹ *Id.* (citation omitted).

¹³² *Id.*

made that the base itself was a combat zone, or at least physically close enough to one, so that imposing tort liability for government action there could implicate some of the policy concerns embodied in the combatant activities exception. Even giving the government contractor the benefit of this doubt, however, the combatant activities exception should not be used to bar this action.

Application of the combatant activities exception in this case would be foreclosed under this proposed approach because of the temporal disconnection of the involved negligence to combat. The amount of time that elapsed between the last hostilities at the base and the plaintiff's injuries was simply too great to say that earlier action would have imperiled military interests. The facts of the case suggest that the last hostile action to cause any sort of danger on the base occurred towards the end of March 2008.¹³³

The plaintiff was injured "on or about May 18, 2008" when he fell in a bathroom on the base.¹³⁴ For over a month the defendant contractor had the opportunity to repair what were allegedly obvious, dangerous defects in the bathroom.¹³⁵ Certainly, failing to repair these defects within the hours, or even days, immediately following an attack could be excused because of the elevated risk to maintenance personnel. However, as the amount of time since the last hostile exchange increased, the risk to such personnel must have started to be outweighed by the interests in the efficient operation of the base. Surely the base was not so paralyzed for an entire month by the threat of another attack that all basic support functions ceased.

Contractors who knowingly enter combat zones should not be excused by the combatant activities exception for failing to act to remedy obvious dangers to military personnel when presented with such a long period of relatively low risk. Even if an activity is essential to combat and takes place in a combat zone, it cannot be said that it raises the same policy concerns as actual combat if the actor is not under the same kind of duress as actual combatants. A month-long, unexcused disregard of unsafe

¹³³ See *id.* (stating that "[a]round Easter 2008, [the base] was subject to three incidents of mortar and rocket attacks," and not indicating other attacks on the base); see also *Easter 2008 Is the Earliest in Nearly a Century*, TIMEANDDATE.COM (Mar. 14, 2008), <http://www.timeanddate.com/news/holidays/early-easter-2008.html> (stating that in 2008, Easter fell on March 23).

¹³⁴ *Aiello*, 751 F. Supp. 2d at 701.

¹³⁵ See *id.*

conditions in a restroom simply does not involve the kind of life-or-death, instantaneous decision-making that the combatant activities exception was designed to protect.

As highlighted by its application to the facts of the *Aiello* case, the advantage of this proposed approach over the Ninth and D.C. Circuits' current approaches lies in its flexibility. This approach considers factors beyond the location of the activity or whether it involved the direction of force. Therefore, it would enable the combatant activities exception to be applied in a manner more in line with both Supreme Court precedent and fundamental concepts of fairness without exposing the government to undue liability. This advantage is further underscored by an application of the approach to Jamie Leigh Jones's case.

B. Application to Jamie Leigh Jones's Injuries

Jamie Leigh Jones was a clerical worker for a company called Overseas Administrative Services, a wholly-owned subsidiary of Halliburton/KBR.¹³⁶ Her employment placed her in the United States Army's Central Command Area of Operations, which was located in an area of Baghdad known as the "Green Zone."¹³⁷ Almost immediately upon arriving in Iraq, Ms. Jones was subjected to sexual harassment.¹³⁸ Making matters worse, she was not provided with the private, female-only housing she claims she was promised in her contract; instead, she was housed in a barracks shared with other, mostly male, employees.¹³⁹ Her complaints of sexual harassment were crassly ignored by Halliburton/KBR management.¹⁴⁰ On the evening of her third day in Iraq, Ms. Jones "was drugged, beaten, and gang-raped by several Halliburton/KBR employees in her barracks bedroom."¹⁴¹ Although Ms. Jones's eventual case was not decided based on application of the combatant activities exception, after *Aiello* it seems possible that a similar case might be barred if brought today in a jurisdiction applying the D.C. Circuit's interpretation.¹⁴²

¹³⁶ Jones v. Halliburton Co., 583 F.3d 228, 231 (5th Cir. 2009).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² It should be noted that even the *Aiello* court discussed the importance of the fact that the activity at issue in that case was necessary to combat. See *Aiello v.*

Given the obvious lack of combat in this scenario, it is clear that under the Ninth Circuit's standard the combatant activities exception would not bar Ms. Jones's claims; however given the location of Ms. Jones's attack, one wonders whether the D.C. Circuit's standard might. Although the "Green Zone" is not itself a combat zone,¹⁴³ is it far enough removed from combat operations that the D.C. Circuit's approach would not bar Ms. Jones's claim? What if a similar incident happened outside of the "Green Zone," in an area like the forward operating base in *Aiello*? It is highly doubtful that the drafters of the combatant activities exception ever meant for it to apply in such scenario, but that outcome is not entirely unlikely given the D.C. Circuit's understanding that the policy behind the exception is to "eliminat[e] . . . tort from the battlefield."¹⁴⁴ The solution proposed in this Note would help to ensure that the combatant activities exception is not applied to claims brought by individuals situated similarly to Ms. Jones.

Because Ms. Jones's claims against the government arose out of activity that was clearly not combat, under the proposed solution a presumption would arise that the exception does not apply. To rebut this presumption, the government would have to show that the activity in question raised the same policy concerns as combat. Using the three proposed criteria, the government contractor would understandably be unable to make this showing with respect to the sexual assault committed by its employees.

Looking first at the nature of the activity in question, it goes without saying that sexual assault on an administrative contractor employee is not essential to combat. This criterion therefore presents a high hurdle for the government contractor to overcome. It would be very difficult for the contractor to show that such an activity, nonessential to combat, raises the same policy concerns that combat does. Even if a sexual assault were

Kellogg, Brown & Root Servs., Inc., 751 F. Supp. 2d 698, 711–12 (S.D.N.Y. 2011). However, if courts were to strictly apply the exception in such a way as to "eliminat[e] . . . tort from the battlefield," as the D.C. Circuit has suggested, claims for sexual assault may be barred. See *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

¹⁴³ See Liz Sly, *Goodbye to Baghdad's Inner Sanctum; U.S. Hands Control of the Green Zone to Iraq. Inside Is a Haven; Outside, Resentment*, L.A. TIMES, June 2, 2010, at A3.

¹⁴⁴ See *Saleh*, 580 F.3d at 7.

to somehow occur in a combat zone during a hostile exchange, it is so unrelated to combat that there is no way it could rationally be considered as implicating the same policy concerns that combat raises. There would be no harm to national security interests in imposing liability on contractors for sexual assaults carried out by their employees. The combatant activities exception would therefore necessarily bar these kinds of claims under this proposed solution. On the other end of the spectrum of this proposed approach are activities that the exception would almost certainly bar, just as either of the existing approaches would.

C. Application to Non-Combatants in Combat Zones

A discussion of this proposed solution would be incomplete without an application to a scenario involving non-combatants injured by the direction of hostile force. Such a scenario will likely give rise to the sternest criticism of the approach. Critics would rightly be concerned about the policy implications of any approach that potentially opens the government to more liability than existing standards for conduct involving the use of force. As this section shows, however, these concerns are largely unfounded.

This approach recognizes the pressing government interest in allowing U.S. military forces to wage war free from irrational constraint, while waiving immunity only for violations of those constraints already imposed by the government itself. Using this approach, immunity for actions taken in combat would be retained unless the action was a clear violation of the rules of engagement in that particular combat zone. This has the effect of allowing non-combatants to recover for injuries suffered as a result of blatant misconduct by U.S. forces without placing any additional restraint on permissible military conduct. Soldiers in combat would not be required to act any differently in order for the exception to continue to apply.

Under this approach, if the activity in question is clearly combat as it is commonly understood, the plaintiff will have to show that the combat violated the rules of engagement in order to proceed in court. This is not easily done because the rules of engagement afford U.S. forces considerable discretion in acting to

accomplish their missions and in defending themselves.¹⁴⁵ Rules of engagement permit the use of force proportional to a perceived threat, while proscribing conduct that unnecessarily endangers civilians.¹⁴⁶ They appear to be aimed at allowing U.S. forces to accomplish their missions as safely as possible for both themselves and the surrounding civilian population.¹⁴⁷ Therefore, they are very fitting guidelines for this proposed approach, which strives to achieve an appropriate balance between the government interest in waging war free from the threat of liability and the recovery interests of unjustifiably injured noncombatants.

As an example of how this proposed approach will use the rules of engagement to strike that balance, consider an Iraqi civilian injured as part of Operation Iraqi Freedom in 2005. If the injury resulted from the direction of hostile force, that civilian would have to rebut the presumption that the combatant activities exception applies by showing that the force used violated the rules of engagement for that operation. If it did, then the case should proceed because that would mean that the U.S. military used unauthorized and unnecessary force.

The rules of engagement governing the use of force during Operation Iraqi Freedom clearly stated that soldiers had “the right to use necessary and proportional force” to defend themselves, but also that “[m]ilitary operations will, in so far as possible, minimize incidental injury, loss of life, and collateral damage.”¹⁴⁸ The rules also required that U.S. forces establish with “a reasonable certainty that the proposed target is a legitimate military target” prior to engagement.¹⁴⁹ Therefore, under this proposed approach, a civilian injured by U.S. forces during Operation Iraqi Freedom would be able circumvent the combatant activities exception only if the injury resulted from the use of clearly disproportional and essentially indiscriminate force.

Among the more glaring examples of conduct violating the rules of engagement from the Iraq war was the killing of two dozen unarmed civilians in the town of Haditha by U.S. Marines

¹⁴⁵ See generally OPERATIONAL LAW HANDBOOK, *supra* note 124, at 73–102.

¹⁴⁶ See *id.* at 97–102.

¹⁴⁷ See *id.*

¹⁴⁸ *Id.* at 102.

¹⁴⁹ *Id.*

in 2005.¹⁵⁰ After a roadside bomb killed one Marine and wounded two others, Staff Sergeant Frank Wuterich “[led] his troops to disregard rules of combat” and “storm[] two nearby homes, blasting their way in with gunfire and grenades.”¹⁵¹ The raid resulted in the deaths of unarmed women and children, as well as a man in a wheelchair.¹⁵² At a plea hearing as part of his subsequent court martial, Wuterich admitted that prior to the raid he told the squad to “shoot without hesitation, leading them to believe they could ignore the rules of combat.”¹⁵³ Wuterich further admitted that, despite his training, he did not positively identify his targets, and that at no time during the raid on the homes did his squad take any gunfire or find any weapons.¹⁵⁴ As a result of this lethal and unsanctioned raid, Wuterich was charged with manslaughter.¹⁵⁵

This massacre exemplifies just the sort of indiscriminate and clearly excessive force that the rules of engagement proscribe.¹⁵⁶ It also therefore exemplifies the precise type of misconduct that, under this proposed solution, would enable a plaintiff to overcome the combatant activities exception. If the action in question is so blatantly inappropriate as to—even in combat—give rise to criminal charges, should it not then also be sufficiently inappropriate to give rise to liability?

That soldiers would face criminal charges for this level of misconduct serves not only to validate holding it as a basis for liability, but also to abrogate perhaps the strongest criticism of doing so: the potential chilling effect on soldiers. After all, it could hardly be said that the prospect of tort liability is more likely to lead soldiers to take undue precaution in assuring they operate within the rules of engagement than is the existing threat of criminal sanctions for failing to do so.

Imposing liability on the government for the use of disproportional and indiscriminate force that violates the rules of engagement is not unduly burdensome. In fact, the government

¹⁵⁰ See Julie Watson, *Marine Accepts Plea Deal in Iraqi Civilian Deaths*, ASSOCIATED PRESS (Jan. 23, 2012), <http://news.yahoo.com/marine-accepts-plea-deal-iraqi-civilian-deaths-193047300.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* notes 145–49 and accompanying text.

has itself recognized as a legal principle, at least with respect to the use of nuclear weapons, that a “distinction must be made at all times between persons taking part in hostilities and members of the civilian population to the effect that the latter be spared as much as possible.”¹⁵⁷ If this legal principle applies to the use of weapons of mass destruction, surely it should apply to the use of far more precise and discerning force as well. Furthermore, based on Supreme Court precedent, violations of the rules of engagement may be a basis for liability because the rules are essentially sets of government regulations meant to prescribe courses of action for soldiers to follow.¹⁵⁸

CONCLUSION

The approach proposed in this Note provides a flexible standard by which courts can determine whether or not the combatant activities exception should be applied to shield the government from liability for actions taken by the nation’s military forces. It allows unjustifiably injured parties an opportunity to recover, while imposing no additional constraints on soldiers.¹⁵⁹ Therefore, it solves the dilemma of how to compensate noncombatants injured by military action without risking U.S. military interests. Soldiers can continue to fight and function just as they always have. Only those injuries that could clearly have been avoided without compromising national security, and are therefore unjustifiable, will give rise to liability.¹⁶⁰

Based on Supreme Court precedent, this approach channels the likely intent of Congress in drafting the combatant activities exception and applies it in light of contemporary realities. It protects the government from assuming liability that it never intended to assume, while allowing recovery by those injured on the rare occasions when the government goes beyond its self-imposed limitations on actions taken in national defense.

¹⁵⁷ Burrus M. Carnahan, *Nuclear Weapons*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 260, 260 (Roy Gutman et al. eds., 1999).

¹⁵⁸ See *supra* note 127 and accompanying text.

¹⁵⁹ See *supra* Part V.

¹⁶⁰ See *supra* Part V.