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Shields Of War: Defining Military Contractors' Liability For Torture

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NOTE

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INTRODUCTION

The United States' military actions in Iraq and Afghanistan have been heavily dependent on civilian contractors.[1] The reliance on personnel not under the direct control and management of the United States military[2] and the presence of contractors in foreign battle zones raise significant questions about how military contractors can be held responsible for their actions abroad. Abuses perpetrated by military contractors abroad are exemplified by several contractors' participation—or complicity—in the torture and abuse of Iraqi detainees at the Abu Ghraib prison and other locations in Iraq.[3]

In September of 2011, a panel of the United States Court of Appeals for the Fourth Circuit decided two related cases addressing the ability of federal courts to review U.S. government contractors' misbehavior in war zones. *Al-Quraishi v. L-3 Services, Inc.*[4] and *Al Shimari v. CACI International, Inc.*[5] directly addressed the ability of foreign citizens to sue government contractors for their actions abroad.[6] The panel reached two conclusions in these cases. First, the court held that it had appellate jurisdiction under the collateral order doctrine.[7] Second, it held that state tort actions against military

1. *See* T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, http://articles.latimes.com/2007/jul/04/nation/na-private4 (noting that about 180,000 civilian contractors were working in Iraq in 2007, including 21,000 Americans, 118,000 Iraqis, and 43,000 from other countries).

2. *Id.*; *see also* Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 415–16 (4th Cir. 2011) (explaining the role of contractors in interrogations in Iraq and detailing the military procedures applicable to all personnel involved in military detentions, including contractors), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

3. *See CACI*, 658 F.3d at 414–16 (recounting that a shortage of military personnel led the U.S. government to contract with private corporations to conduct interrogations in Iraq, including at Abu Ghraib prison, where some contractors allegedly conspired to commit and cover up torture); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2085 (2005) (situating images of the torture at Abu Ghraib in the context of government denials that no United States actors ever engaged in torture).

4. 657 F.3d 201 (4th Cir. 2011), *vacated sub nom.* Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

5. 658 F.3d 413 (4th Cir. 2011), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

6. Both cases involved suits by Iraqi citizens who claimed to have been held and tortured by the United States military with the aid of government contractors. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 414–15.

7. *L-3 Servs.*, 657 F.3d at 203–05.

contractors are preempted by important federal interests.[8] Rehearing the cases en banc, the Fourth Circuit dismissed both appeals, holding that the collateral order doctrine did not confer appellate jurisdiction.[9] This Note will argue that the Fourth Circuit panel decisions missed an opportunity to clarify the precise nature of the defense available to military contractors and failed to determine whether contractors can be held liable at all for their actions overseas. The en banc decision correctly clarified that contractor defenses do not rise to the level of immunity from suit, but it did not further define the nature of contractor defenses.[10]

Part I of this Note will present the facts and holdings of *L-3 Services* and *CACI* and briefly describe the underlying law. Part II will critique the panel's holdings, argue that the panel conflated the doctrines of sovereign immunity and federal preemption, and detail the procedural and practical consequences of the panel's conflation. Part II will then conclude that preemption analysis is the most appropriate approach to both protecting the federal interests inherent in military actions abroad and the ability of foreign citizens to hold military contractors accountable for their actions.

I. BACKGROUND

A. *The Cases:* Al-Quraishi v. L-3 Services, Inc. *and* Al Shimari v. CACI International, Inc.

Both *L-3 Services* and *CACI* were suits filed by Iraqi citizens against American military contractors.[11] The plaintiffs in both cases claimed that they were detained by the United States military in Iraq.[12] The United States government had hired contractors to provide interrogation and translation services at military detention sites.[13] While the Fourth Circuit panel noted in *CACI* that the contractors were required to comply with U.S. Department of Defense (DOD) interrogation policies and practices,[14] the plaintiffs in both *L-3 Services*

8. *CACI*, 658 F.3d at 417.
9. Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773, at *13 (4th Cir. May 11, 2012) (en banc).
10. *See id.* at *3 (declining to express an "opinion as to the merits of any immunity" asserted by CACI and also declining to draw a distinction between derivative sovereign immunity and derivative absolute official immunity); *see also infra* Part II.A (arguing that the Fourth Circuit conflated two different defenses potentially available to military contractors and identifying the procedural incongruity that results from this conflation).
11. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 414.
12. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 414.
13. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 414.
14. *CACI*, 658 F.3d at 415.

and *CACI* asserted that their detentions in Abu Ghraib and other facilities involved dangerous stress positions; beatings; assaults; sensory deprivation; food, water, and sleep deprivation; and other abuses that were in direct contravention of DOD policies.[15] Despite the factual similarities between these cases, the panel addressed two different legal questions.

1. Al-Quraishi v. L-3 Services, Inc. *and the court's appellate jurisdiction over appeal from a denied motion to dismiss*

In *L-3 Services*, the Fourth Circuit panel addressed whether it had appellate jurisdiction over the district court's denial of the defendant's motion to dismiss.[16] Seventy-two Iraqis initiated the litigation in *L-3 Services* after being detained by the United States in Iraq.[17] The plaintiffs alleged that federal government contractors tortured them and other detainees rather than simply providing translation services during interrogations.[18]

The defendants filed a motion to dismiss based on "numerous grounds,"[19] which the district court denied.[20] The Fourth Circuit reversed the district court's denial and remanded the case with instructions to dismiss the litigation.[21] While the Fourth Circuit cited *CACI* to justify its substantive holding regarding federal preemption, its decision in *L-3 Services* provided the reasoning for asserting appellate jurisdiction in both cases.[22]

Though the Fourth Circuit panel acknowledged that its appellate jurisdiction is generally limited to final district court decisions,[23] the panel held that the appeal was justified under the "collateral order doctrine" for several reasons.[24] First, the court asserted that the questions of immunity, separation of powers, and federal preemption raised by the appeal could not be revisited upon a final district court decision.[25] Second, the court reasoned that the "battlefield

15. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 416.
16. *L-3 Servs.*, 657 F.3d at 203.
17. *Id.* at 202.
18. *Id.*
19. *Id.* at 202–03 (identifying the political question doctrine, law of war immunity, federal preemption, and derivative absolute immunity as the grounds asserted for dismissal).
20. *Id.* at 203.
21. *Id.*
22. *Id.* at 203–05 (holding that a district court's denial of a sovereign immunity-based motion to dismiss was immediately appealable under the collateral order doctrine because allowing the case to proceed would require judicial scrutiny of military policies, which immunity precludes).
23. *Id.* at 204.
24. *Id.* at 204–05; *see infra* Part I.B (defining the collateral order doctrine).
25. *L-3 Servs.*, 657 F.3d at 205.

preemption" asserted by the defendants was equivalent to immunity and, therefore, must be addressed before trial to preserve the defense.[26] Third, the court approached the questions of federal preemption and immunity as distinct from the merits of the litigation.[27] Finally, the court identified a "strong public policy" rationale for preventing actions taken in foreign war zones from being scrutinized and litigated in civil courts.[28]

2. Al Shimari v. CACI International, Inc. *and possible defenses against tort liability for contractors acting abroad*

The *CACI* litigation was commenced by four Iraqi citizens who had been detained by the United States military in Abu Ghraib prison.[29] Like the litigation in *L-3 Services*, *CACI* involved contractors who were retained by the military to provide interrogation and intelligence collection services.[30] The plaintiffs alleged that the contractors participated in a conspiracy to torture the prisoners.[31] The district court denied the contractor's motion to dismiss.[32]

In *CACI*, the Fourth Circuit panel examined the substantive law regarding the military contractors' liability in federal court.[33] The court determined that federal law preempted the plaintiffs' claims of torture and abuse.[34] The court reasoned that because the contractors acted on behalf of the United States, important federal interests were implicated by the litigation.[35] In particular, the court noted that civil actions would place a burden on military personnel,[36] and potential liability would impact the availability and cost of services required by the military.[37] The court determined that these interests were

26. *Id.* The court later defined "battlefield preemption" as "*complete eradication* of the 'imposition *per se*' of tort law, that is the complete removal of even the *possibility* of suit from the battlefield." *Id.* at 206 (citing Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011)).
27. *Id.* at 205.
28. *Id.*
29. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 414 (4th Cir. 2011), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).
30. *Id.*
31. *Id.* at 414–15; *see also id.* at 416 ("While some of the abuses that the plaintiffs detailed in the allegations of their complaint appear to have been approved by the military . . . others were clearly not.").
32. *Id.* at 415. Like the motion to dismiss in *L-3 Services*, the defendants' motion to dismiss relied on the political question doctrine, derivative sovereign immunity, and federal preemption. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 417–19.
36. *Id.* at 418.
37. *Id.*

sufficiently weighty to justify preempting the plaintiffs' state tort actions.[38]

Sitting en banc, the Fourth Circuit dismissed both *L-3 Services* and *CACI*.[39] The Court rejected the panel's reasoning that the circuit court's denial of the contractors' motion to dismiss was a final decision permitting appellate jurisdiction.[40]

B. The Collateral Order Doctrine and Appellate Jurisdiction

The litigation in *L-3 Services* and *CACI* first arrived in the Fourth Circuit on appeal from the district court denials of the defendants' motions to dismiss.[41] A denial of a motion to dismiss is generally insufficient to grant appellate jurisdiction to federal courts of appeals.[42] The "collateral order doctrine," however, allows appellate jurisdiction over non-final judgments in certain circumstances.[43] This expansion of appellate jurisdiction beyond the strict boundaries of the final order requirement is premised on the contention that non-final orders, including denials of motions to dismiss, may be of sufficient importance to merit review before litigation is terminated.[44]

For example, cases implicating a right to avoid trial, such as immunity or violation of the double jeopardy prohibition, cannot be adequately reviewed after trial because the right to avoid trial has already been violated and cannot be remedied later.[45] Courts can, therefore, review a non-final order if the order "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue

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38. *Id.* at 417.

39. Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773, at *13 (4th Cir. May 11, 2012) (en banc).

40. *Id.*

41. Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 202–03 (4th Cir. 2011), *vacated sub nom.* Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc); *CACI*, 658 F.3d at 416.

42. *See* 28 U.S.C. § 1291 (2006) ("The courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States . . . ." (emphasis added)); *see also* Abney v. United States, 431 U.S. 651, 658–59 (1977) (noting that only a "small class of cases" are not subject to the final-judgment rule and holding that a pretrial order to dismiss an indictment on double jeopardy grounds is one such case).

43. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–46 (1949) (recognizing appellate jurisdiction from non-final orders, but limiting the availability of such appeals to rights that are "separable from" the rights asserted in the litigation and significant enough to require a review that might not be possible after a final judgment).

44. *See, e.g.*, Will v. Hallock, 546 U.S. 345, 350–53 (2006) (holding that, in the pretrial order context, the collateral order doctrine does not apply to the "mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest," such as separation of powers, government efficiency, respecting a state's dignitary interests, and mitigating the government's advantage over an individual).

45. *Id.* at 350–51.

completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment."[46] Because the collateral order doctrine allows appellate jurisdiction in limited circumstances, the grounds for appeal will determine whether an appeal is available.

C. Defenses Available for Contractors Sued Under State Tort Law

In asserting a defense for private action, government contractors primarily argue that a contractual relationship with the government entitles the contractor to similar protections in litigation as those granted to the government.[47] Generally, courts have extended defenses to government contractors based on a theory of either derivative sovereign immunity or federal preemption of state tort actions.[48]

1. Derivative sovereign immunity

The government enjoys an absolute immunity from litigation.[49] Though government actions can be challenged through suits against government officers,[50] contractors often argue that their contractual

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46. *Id.* at 350 (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993)) (internal quotation marks omitted).

47. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 511–12 (1988) (considering a contractor defense based on the incompatibility of the state-imposed standard of care and the specifications for production established in the government contract); Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009) (holding that contractor defendants were not subject to state tort law for actions taken during a military contract in Iraq), *cert. denied*, 131 S. Ct. 3055 (2011). *See generally* George E. Hurley, Jr., *Government Contractor Liability in Military Design Defect Cases: The Need for Judicial Intervention*, 117 MIL. L. REV. 219 (1987) (reviewing cases involving military contractors' product liability before *Boyle* was decided by the Supreme Court); Aaron L. Jackson, *Civilian Soldiers: Expanding the Government Contractor Defense to Reflect the New Corporate Role in Warfare*, 63 A.F. L. REV. 211 (2009) (arguing that existing precedent focused on product manufacturing liability should be extended to reflect the role of government contractors in providing military services).

48. *See generally* Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005) (examining the use of private contractors in different areas of government and the apparent lack of accountability for contractors' actions); Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391 (1990) (considering *Boyle* as a hybrid of several different theories of government immunity and arguing against the creation of a "Contractor Defense").

49. *See* United States v. Lee, 106 U.S. 196, 204 (1882) (reasoning that sovereign power and interests would be significantly harmed if private citizens were constantly able to litigate against the federal government); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . . .").

50. *See Lee*, 106 U.S. at 205 (rejecting the argument that officers, as agents of the United States, are entitled to sovereign immunity).

relationship with the government entitles them to derivative sovereign immunity.[51]

Where contractor activities are integrated with a government function, the government's sovereign immunity can be extended to cover the contractor. In *Mangold v. Analytic Services, Inc.*,[52] the Fourth Circuit concluded that a government contractor would not be liable for statements made to a government official during an official investigation.[53] The court reasoned that immunity was recognized as a means of protecting government functions.[54] Thus "[i]f absolute immunity protects a particular governmental function . . . it is a small step to protect that function when delegated to private contractors."[55]

The federal government can, however, waive sovereign immunity and subject itself to liability.[56] The most significant example of this waiver is the Federal Tort Claims Act (FTCA).[57] The FTCA permits tort litigation against the government,[58] but it contains several exceptions that preserve sovereign immunity against certain types of suits.[59]

2. Federal preemption of state tort claims

Rather than extend sovereign immunity to contractors, some courts have simply precluded state tort actions by finding the state laws are preempted by federal interests.[60] The Supremacy Clause of

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51. *See* Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1447 (4th Cir. 1996) (defining the applicability of sovereign immunity by the governmental function, rather than the identity of the party performing that function, and holding that "the public interest may demand that immunity protect [government contractors] to the same extent that it protects government employees").

52. 77 F.3d 1442 (4th Cir. 1996).

53. *Id.* at 1449.

54. *Id.* at 1448.

55. *Id.* at 1447–48.

56. *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2006) (authorizing original jurisdiction in federal courts for suits in state tort law listing the United States as a defendant, with certain exceptions); Gray v. Bell, 712 F.2d 490, 506 (D.C. Cir. 1983) ("The United States is protected from *unconsented* suit under the ancient common law doctrine of sovereign immunity." (emphasis added)).

57. 28 U.S.C. § 1346(b).

58. *Id.* § 1346(b)(1).

59. *Id.* § 2680. Contractors can be deemed federal employees but only if the federal government controls detailed physical aspects of their work. *See* United States v. Orleans, 425 U.S. 807, 808 (1976) (noting that receiving federal money or being subject to federal regulations is irrelevant to whether contractors qualify as federal employees); Logue v. United States, 412 U.S. 521, 530 (1973) (finding that prison workers employed pursuant to a contract with the federal government were not federal government employees because the government had no role in physically supervising the employees).

60. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (noting that federal statutes or common law replace state law where "uniquely federal interests . . . are so committed by the Constitution and laws of the United States to federal control

the U.S. Constitution mandates that all federal laws are the "supreme Law of the Land."[61] State laws, such as tort law, are, therefore, preempted where they conflict with federal laws.[62]

When the Supreme Court previously considered liability for military contractors, it held that important federal interests could preempt state tort actions. In *Boyle v. United Technologies Corp.*,[63] the Court held that the federal government's important interest in military operations preempted a state wrongful death claim by the family of a helicopter pilot.[64] The Court in *Boyle* reasoned that the duty of care imposed by state tort law significantly interfered with the contractor's duty to follow the terms and specifications of its contract with the federal government.[65] Thus, the Court recognized that federal interests could preempt state law even where no conflicting federal law existed.[66] In *Saleh v. Titan Corp.*,[67] the United States Court of Appeals for the District of Columbia Circuit extended the *Boyle* preemption to include military contractors in Iraq.[68]

In both of these cases, the courts defined the bounds of federal preemption using specific exceptions to the FTCA. In *Boyle*, the Court relied on the FTCA exception for government officials exercising their legal discretion.[69] In *Saleh*, the court extended *Boyle* to include the "combatant activities" exception to the FTCA.[70]

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that state law is preempted").

61. U.S. CONST. art. VI, cl. 2.

62. *See Boyle*, 487 U.S. at 507–08 (detailing the circumstances in which the conflict between federal interests and state laws will require that the state law be displaced by federal law).

63. 487 U.S. 500 (1988).

64. *Id.* at 502, 511–12.

65. *Id.* at 509.

66. *See id.* at 512 (explaining that a government contractor will not be liable under state tort law where the government provides specifications, the contractor conforms to those specifications, and the contractor warns the government about potential dangers).

67. 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011).

68. *Id.* at 5. The logic of extending *Boyle* to military contractors in Iraq is beyond the scope of this Note. This Note will not address the extension of *Boyle* in *Saleh*, but it will assume that *Saleh* represents the current state of the law and that some form of federal law will protect military contractors in Iraq.

69. *See Boyle*, 487 U.S. at 509, 511 (identifying the FTCA as an appropriate "limiting principle" for the bounds of federal interest that would require preempting state tort law). The decision in *Boyle* explicitly rejected the reasoning of the lower court, which relied on Supreme Court precedent prohibiting tort claims by members of the military. *See id.* at 509–10 (citing Feres v. United States, 340 U.S. 135 (1950)) (determining that only the FTCA avoids contractor preemption that is overly broad or overly narrow). *See generally*, Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 394 (2010) (detailing the evolution and utility of the *Feres* doctrine).

70. *See Saleh*, 580 F.3d at 6 (describing the combatant activities exception to the FTCA as the most appropriate standard to measure the extent of federal preemption in cases involving military contractors' actions abroad); *see also*, 28 U.S.C. § 2680(j)

Because these cases preclude tort action against government contractors on the basis of preemption, the decisions do not actually extend sovereign immunity to contractors. Rather, the two decisions overlay preemption precedent with the FTCA's sovereign immunity framework.[71]

II. ANALYSIS

A. Conflation of Preemption and Immunity Defenses

The Fourth Circuit panel opinions in *L-3 Services* and *CACI* purport to address two different, but interrelated, issues. First, the opinion in *L-3 Services* defended the court's ability to render a decision by holding that the Fourth Circuit has appellate jurisdiction over the denial of a motion to dismiss.[72] Second, the court in *CACI* held that federal law preempted the plaintiffs' claims against several military contractors.[73]

A court's jurisdiction to hear an appeal from denial of a motion to dismiss is contingent on the contractors asserting an immunity defense.[74] The panel in *CACI* held explicitly that important federal interests preempted the tort claims asserted by the Iraqi plaintiffs.[75] The panel in *L-3 Services*, however, justified the court's appellate jurisdiction by citing prior Supreme Court decisions applying the collateral order doctrine to immunity assertions.[76] Additionally, the panel in *L-3 Services* described the goal of federal preemption as "the complete removal of even the *possibility* of suit from the battlefield."[77]

The basis of the panel's opinion in *L-3 Services* indicates that it utilized more of an immunity rationale rather than a preemption

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(2006) (reserving federal sovereign immunity against claims arising out of "combatant activities").

71. *See Boyle*, 487 U.S. at 511 (using the exceptions to the FTCA as a proxy statute to identify federal interests that may conflict with state tort law); *Saleh*, 580 F.3d at 6 (applying a different FTCA exception that fit the fact pattern before the court).

72. Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 205 (4th Cir. 2011), *vacated sub nom.* Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

73. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 420 (4th Cir. 2011), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

74. *See supra* Part I.B (describing the collateral order doctrine). Immunity is not the only defense that would allow appeal under the collateral order doctrine, but preemption likely would not succeed. *See* Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989) (distinguishing between true rights not to stand trial (immunity) and substantive law that could result in termination or dismissal of the litigation (preemption)).

75. *CACI*, 658 F.3d at 420.

76. *L-3 Servs.*, 657 F.3d at 204–05.

77. *Id.* at 206.

rationale. Preemption analysis determines whether state law can apply.[78] Immunity, on the other hand, determines whether *any* law will apply.[79] The panel's reliance on immunity analysis in *L-3 Services* and its assertion that "preemption" is necessary to keep battlefield conduct out of the courts indicates that the Fourth Circuit meant to remove military contractor conduct from courts entirely.[80] This is a different aim than simply displacing state law in deference to federal interests.[81] While preemption analysis determines whether state or federal substantive law governs a situation—or, more precisely, whether state law can apply—the panel's reasoning in *L-3 Services* reflects a desire to remove these contractor suits from the courts entirely.[82]

B. Contradictory Holdings in L-3 Services *and* CACI

The Fourth Circuit panel's conflation of preemption and immunity defenses led to contradictory holdings in *L-3 Services* and *CACI*. As the dissent in *L-3 Services* argued, designating an immunity or preemption defense is central to determining whether the Fourth Circuit had jurisdiction to review these cases before the district court reached a final decision on the merits.[83] The Fourth Circuit's decisions were contradictory because the court relied on an immunity defense for the purposes of establishing jurisdiction[84] but relied on the federal preemption doctrine to hold that the contractors' motions to dismiss should have been granted.[85]

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78. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 507–08 (1988) (explaining that state law can only be "displaced").

79. *See id.* at 504–12 (distinguishing between the preemption of state tort claims against government contractors necessary to protect federal interests and the absolute immunity preventing any claims at all against the federal government).

80. *See L-3 Servs.*, 657 F.3d at 204–06 ("Just as immunity from suit must be recognized in the early stages of litigation in order to have its full effect, battlefield preemption must also be recognized in order to prevent judicial scrutiny of an active military zone.").

81. *See id.* at 209 (King, J., dissenting) (distinguishing between immunity—the right not to stand trial—and preemption—the displacement of state tort actions by federal interests).

82. *See id.* at 203–06 (majority opinion) (emphasizing that federal preemption represents a strong public policy interest during wartime "to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit" (citation omitted) (internal quotation marks omitted)).

83. *See id.* at 206 (King, J., dissenting) (asserting that immunity and preemption are different doctrines and should not be conflated for the purposes of determining jurisdiction to preserve the narrowness of the collateral order doctrine).

84. *Id.* at 204–05 (majority opinion) (citing cases involving presidential absolute immunity, Eleventh Amendment immunity, qualified immunity, and double jeopardy as support for finding appellate jurisdiction in a case involving federal preemption).

85. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 417 (4th Cir. 2011) ("[W]e

By declaring that federal law preempted the plaintiffs' state tort claims, the Fourth Circuit eviscerated its immunity-based jurisdiction.[86] By basing its jurisdiction on an immunity defense, but reasoning that the case should be dismissed due to federal preemption, the Fourth Circuit panel confused the two doctrines and missed an opportunity to clarify the nature of the protection enjoyed by military contractors.

The Fourth Circuit's en banc decision resolved the contradiction between the two panel decisions on jurisdictional grounds, but left open the question as to the exact nature and extent of the defenses available to government contractors.[87] By dismissing the appeals, the majority both clarified that the defenses asserted by the contractors in *L-3 Services* and *CACI* are not tantamount to immunity from suit and avoided deciding the merits of those defenses.[88] While the en banc decision begins to clarify the nature of a contractor defense, further development is necessary.

C. The Importance of Maintaining the Distinction Between Preemption and Immunity

Though the distinction between immunity and preemption defenses had only procedural consequences in *L-3 Services* and *CACI*,[89] the Fourth Circuit's en banc decision, which ameliorated the panel's confusion of these two doctrines, helps to resolve the current ambiguity surrounding the status of government contractors generally and of military contractors specifically.[90] While preemption is simply the removal of state tort law as the substantive standard

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conclude . . . that the plaintiffs' tort claims are preempted . . . ."), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

86. *See L-3 Servs.*, 657 F.3d at 209 (King, J., dissenting) (reasoning that preemption under *Saleh* could be effectively reviewed after a trial in the district court and arguing that allowing immediate appeal in *L-3 Services* and *CACI* overextended the reach of the collateral order doctrine); *see also* Martin v. Halliburton, 618 F.3d 476, 486 (5th Cir. 2010) (holding that a claim of federal preemption based on the combatant activities exception to the FTCA is not immediately appealable under the collateral order doctrine).

87. Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773, at *13 (4th Cir. May 11, 2012) (en banc).

88. *Id.* at *8, 13 ("*Saleh* preemption falls squarely on the side of being a defense to liability and not an immunity from suit").

89. *See* Steve Vladeck, *Immunity vs. Preemption in the Fourth Circuit Torture Cases—And Why That Distinction Matters*, LAWFARE (Dec. 20, 2011, 12:16 PM), www.lawfareblog.com/2011/12/immunity-vs-preemption (identifying the jurisdictional element as the most likely grounds for the panel decision to be overturned).

90. Jackson, *supra* note 47, at 219 (assuming that the *Boyle* Court's examination of the FTCA represented an extension of immunity to government contractors).

governing a defendant's behavior, immunity provides protection against all future lawsuits.[91]

The Fourth Circuit acknowledged in *L-3 Services* and *CACI* that military contractors can cause significant harm to foreign civilians.[92] In contrast, the court in *Saleh* indicated that military contractors enjoy some kind of protection from litigation.[93] A grant of immunity precludes all future suits against military contractors who commit abuses in foreign war zones, while recognition of federal preemption of state tort law claims under *Boyle* precludes only state tort actions.[94]

D. Preemption Is the Appropriate Understanding of a Government Contractor Defense

As the Fourth Circuit's en banc decision seems to indicate, federal preemption is the more appropriate characterization of the defenses available to government contractors acting in military operations because such defenses preclude only state tort actions and does not completely remove military contractors from court. The Court in *Boyle* emphasized that important governmental interests in the manufacturing of military equipment would be jeopardized by allowing a contractor to be liable under state product liability doctrine.[95] The Fourth Circuit panel identified several similarly important federal interests in *L-3 Services* and *CACI*: the ability to interrogate detainees in foreign battlefields; the ability of military commanders to complete their assignments without being "haled into [civilian] courts" to provide testimony; and the ability to conduct military campaigns without the interference of litigation.[96] The

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91. *See* 28 U.S.C. § 1346 (2006) (waiving federal sovereign immunity for certain civil actions by granting district courts "original jurisdiction" over suits naming the United States as a defendant); Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (characterizing the federal preemption recognized in the case for privately produced military equipment as "displacement").

92. *See, e.g.*, Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 418–19 (4th Cir. 2011) (accepting as true the plaintiffs' allegations of torture, abuse, and injury), *vacated*, No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc).

93. *See* Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009) (holding that military contractors were not liable under District of Columbia tort law, but blending discussions of federal preemption and sovereign immunity), *cert. denied*, 131 S. Ct. 3055 (2011).

94. The preclusion of state tort claims is significant. However, federal preemption leaves open the possibility that other causes of action may be available as recourse against military contractors. Immunity removes military contractors from the jurisdiction of federal courts altogether. *See supra* notes 75–78 and accompanying text (referring to the fact that federal preemption implicates only the displacement of state tort claims).

95. *See Boyle*, 487 U.S. at 509 (noting that the requirements of the defendant's military contract and the state duty of care were mutually exclusive).

96. *See* Al-Quraishi v. L-3 Servs., Inc., 657 F.3d 201, 206 (4th Cir. 2011) (stating an

concern for costs to the government in *CACI* mirrors a concern in *Boyle* that any costs of contractor liability would simply be passed onto the federal government in the next contract—thus defeating the purpose of sovereign immunity.[97]

The court's justifications for preemption may represent legitimate concerns that validate the displacement of state tort law. If the decision in *Saleh* represents the current understanding of the law governing suits against military contractors,[98] it is likely that those actions will be subject to some limitation. The question, therefore, is whether that limitation is based on immunity or preemption.[99] The uniquely federal interests of foreign military actions likely justify preemption.[100] Immunity, however, is inappropriate in cases alleging torture by military contractors. Immunity, the right to avoid trial, would preclude all actions against military contractors, even where the contractors are not performing a governmental function that would require extending sovereign immunity.[101] Additionally, while state tort law preemption precludes further litigation of *L-3 Services* and *CACI*, it does not preclude other suits that might render military contractors liable for their actions.[102]

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unwillingness to risk subjecting military personnel to improper court appearances or depositions), *vacated sub nom.* Al Shimari v. CACI Int'l, Inc., No. 10-1891, 2012 WL 1656773 (4th Cir. May 11, 2012) (en banc); *CACI*, 658 F.3d at 418–19 (citing *Saleh*, 580 F.3d at 7 (coining the term "battlefield preemption")).

97. *See CACI*, 658 F.3d at 418 (analogizing the cost and availability of contract workers to the increased cost of manufactured goods resulting from contractors compensating for their tort liability by increasing charges to the government).

98. The facts in *Saleh* were identical to the facts in *L-3 Services* and *CACI*. *Compare CACI*, 658 F.3d at 414 (suit against United States military contractors by Iraqi citizens detained in Iraq), *with Saleh*, 580 F.3d at 2 (suit against United States military contractors by Iraqi citizens detained at Abu Ghraib prison in Iraq). See also *supra* note 65, which identifies the correctness of the *Saleh* decision as beyond the scope of this Note.

99. The defendants in *L-3 Services* and *CACI* based their motions to dismiss on several other grounds, such as the political question doctrine. *L-3 Servs.*, 657 F.3d at 202; *CACI*, 658 F.3d at 415. However, the Fourth Circuit focused primarily on the questions of derivative sovereign immunity and preemption. *L-3 Servs.*, 657 F.3d at 203; *CACI*, 658 F.3d at 415. This Note, therefore, focuses only on these two options as well.

100. *See supra* notes 95–97 (agreeing that the federal interests at stake in litigation involving military contractors may be sufficient to require preemption of state law).

101. *See CACI*, 658 F.3d at 416 (acknowledging that some incidents of torture and abuse went beyond the authorized actions outlined in military guidelines). *Contra* Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1447 (4th Cir. 1996) (indicating that participation in a governmental investigation is sufficiently integrated with a government function to justify extending sovereign immunity to a government contractor).

102. Displacement of state law does not, for instance, preclude actions under federal law; federal law or "federal interests" form the basis for displacement under the Supremacy Clause. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988) (analyzing the clearly identifiable federal law or interests that would justify displacement of a state tort action).

CONCLUSION

The *L-3 Services* and *CACI* cases presented several challenges for federal court jurisprudence: the application of the doctrines of collateral order jurisdiction, sovereign immunity, and federal preemption to military contractors' actions overseas. Because *Boyle* and *Saleh* indicate that some type of defense will be available for military contractors, the primary question presented by these cases is the form the defense will take. While the Fourth Circuit panel opinions in *L-3 Services* and *CACI* appeared to conflate immunity and preemption, the Fourth Circuit's en banc decision correctly resolved the collateral order doctrine question in favor of a preemption-like analysis that does not grant contractors an automatic right to avoid trial entirely. The facts of *L-3 Services* and *CACI* indicate that military contractors can do significant harm to civilians, either through authorized interrogation or by unauthorized torture. While an immunity defense precludes *any* legal liability for military contractors, preemption of certain state tort suits preserves the possibility that other federal actions would remain available. The two doctrines are intertwined as a result of the federal interests at stake in military contractor litigation. Clear boundaries between immunity and preemption must be maintained, however, to ensure that government contractors are held accountable for damages caused by their inappropriate actions in war zones.