A Cautionary Tale For Contractors On The Battlefield

By Alex L. Sarria and Marianne F. Kies


The district court in the Eastern District of Washington recently issued an opinion denying the defendants’ motion for summary judgment on the basis of the political question doctrine and derivative sovereign immunity. Less than two weeks later, the contractors agreed to settle the case for an undisclosed amount. The Salim case illustrates why government contractors must proactively assess and mitigate potential tort liabilities before entering into high-risk federal contracts, such as contracts for military logistics support, private security and intelligence-support services.

The Early Proceedings in Salim

The Salim plaintiffs were three foreign nationals who were captured and detained by the CIA as suspected enemy combatants. The plaintiffs claimed that, during their detention, they were subjected to intense psychological and physical torture and that two American psychologists working under CIA contracts — James Mitchell and John Jessen — were to blame for their injuries.

Though the plaintiffs acknowledged the CIA and U.S. Department of Justice reviewed and approved the “enhanced interrogation techniques” (“EIT”) to which they were subjected, they alleged that Mitchell and Jessen were liable under the ATS because — “together with the CIA” — they (1) designed the CIA’s EIT program, (2) personally conducted and oversaw interrogations, and (3) trained and supervised CIA personnel in applying the EIT.[1]

Early in the case, Mitchell and Jessen filed a motion to dismiss, arguing that the political question doctrine (“PQD”) deprived the court of jurisdiction and that they were entitled to derivative sovereign...
immunity ("DSI") because they had acted under the CIA’s control. The court denied the motion as premature, and the parties engaged in discovery.

The Salim Court’s Decision on Summary Judgment

At the conclusion of discovery, Mitchell and Jessen filed a motion for summary judgment in which they reasserted the PQD and DSI as defenses. But the court denied their motion for the reasons discussed below, and the case settled just a few days later.

Political Question Doctrine

Mitchell and Jessen argued the plaintiffs’ ATS claims were nonjusticiable because, inter alia, the CIA “exercised complete operational control over the defendants at all relevant times.”[2] Purporting to apply the Fourth Circuit’s 2016 decision in Al Shimari v. CACI Premier Technology, the district court rejected this argument.

According to the court, Mitchell and Jessen’s PQD defense presented “ultimate questions,” including whether the defendants “acted only under the control of the CIA” and “if Defendants’ actions were lawful.”[3] The court concluded it could not decide these issues on summary judgment because: (1) it was impossible to separate the jurisdictional issues (i.e., the CIA’s control over the defendants) from the merits of the plaintiffs’ ATS claims (i.e., that the EIT constituted “torture”); and (2) “[o]ther courts have adjudicated cases touching on the same, or similar, subject matter.”[4]

The court’s ruling on PQD is interesting in several respects.

First, at approximately three pages in length, and with no discussion of the six-factor PQD test established by the U.S. Supreme Court in Baker v. Carr,[5] the court’s decision is far from the “discriminating inquiry into the precise facts and posture” that is required by federal common law.[6] For example, the court did not consider how the plaintiffs would pursue their claims or how the contractors would defend, a key consideration in any PQD analysis.[7]

Second, while the 2016 Al Shimari decision implies that courts should “proceed to the merits of the case” if disputed jurisdictional facts are “inextricably intertwined” with the merits of a plaintiff’s claims,[8] the Salim court did not even attempt to explain why the jurisdictional issues could not be separated from the merits on the record before it.[9] In doing so, the court ignored several decisions in which other courts — faced with similar facts and arguments — have ably resolved the jurisdictional issue of “control” under the PQD without reaching the merits.[10]

Third, contrary to the modern PQD jurisprudence, the court focused solely on the issue of “control,”[11] and ignored whether deciding the merits of the plaintiffs’ claims would require it to “question actual, sensitive judgments made by the military.”[12] Numerous courts, including the Fourth Circuit in the 2016 Al Shimari case, have made clear that “[a]n affirmative response to either ... the fact of direct control or the need to question sensitive military judgments, generally triggers application of the political question doctrine.”[13] The Salim court’s PQD analysis was therefore incomplete.

Fourth, to support the ultimate conclusion that it was not “required to decline jurisdiction based on the [PQD],” the court cited three post-9/11 opinions that purportedly “touch[] on the same, or similar, subject matter.”[14] But the court did not expound on how those cases were analogous, much less explain why the facts of Salim would not raise non-justiciable political questions. Again, this was not the
type of “discriminating analysis” the Supreme Court had in mind when it established the six-factor PQD test.[15]

**Derivative Sovereign Immunity**

To support their DSI defense, Mitchell and Jessen argued, inter alia, that “they acted pursuant to validly conferred [governmental] authority and within the scope of their contracts.”[16] Though the court agreed this is the correct test to apply,[17] it rejected the defendants’ DSI argument because, in its view, the CIA did not retain “absolute control” over interrogations and Mitchell and Jessen did not act “merely and solely” at the CIA’s direction.[18]

The court’s ruling on DSI also raises some important questions.

First, by focusing on whether the contractors acted “merely and solely” at the CIA’s direction and under the CIA’s “absolute control,” the court lost sight of the relevant DSI test cited earlier in its opinion — that is, (1) did the government validly give the contractors the authority to act, and (2) if so, did the contractors perform within the scope of that authority?[19] Notably, the court did not find the CIA lacked the authority to award contracts for the development and implementation of an “enhanced interrogation program.” And, while the opinion catalogues ways in which Mitchell and Jessen “exercised some discretion,” the court did not explain if or how the defendants acted outside the scope of their contractual authority.[20] Still, the court denied the contractors’ DSI defense.

Second, the court’s emphasis on “absolute control” is a departure from how other courts have viewed the role of tort law in a military or battlefield context.[21] Also, categorically denying derivative immunity to contractors unless they acted “merely and solely” at the government’s direction,[22] would, as the Supreme Court has put it, result in “unwarranted timidity” and “harmful distractions [in] carrying out the work of government.”[23] It does not appear the Salim court considered these alternative viewpoints.

**Lessons Learned From the Salim Case**

In the wake of the Salim case, in-house counsel and risk managers for government contractors performing high-risk work — and particularly those that provide military support services on foreign battlefields — should consider implementing a “best practices” program to mitigate your company’s exposure to tort liability. Such programs should be carefully designed to help you:

- Assess the potential tort risks associated with each government contract before initiating performance and, where advisable, decline to perform ultrahazardous activities. Though the Salim court suggested the defendants’ contracts contained “an indemnity provision ... under which the CIA has paid the considerable defense litigation expenses for this action,”[24] in retrospect, Mitchell and Jessen would have been well-advised to avoid “personally administering” any of the EIT, a factor that seemed to drive many of the court’s negative findings. Knowing when to say “no” is especially important when the government asks contractors to exercise significant discretion in high-risk situations because many so-called ‘indemnity provisions’ in government contracts contain exceptions for “willful misconduct or lack of good faith.”[25]
• Protect your company from potential tort liability by conducting a pre-award “gap analysis” of your commercial insurance coverage, as well as a review of the immunity, indemnity and cost recovery mechanisms that may be available from the government. In some cases, procuring additional insurance will effectively mitigate a contractor’s tort risk, but in other scenarios, contractors will need to secure protection under, for example, Public Law 85-804, 10 U.S.C. § 2354, the Price Anderson Act, FAR 52.228-7 or other similar provisions (e.g., DEAR 970.5228-1), the SAFETY Act, and/or the Defense Base Act. Many of these measures require contractors to apply for protection and, therefore, it is critical to present the government with a compelling and well-supported request for relief.

• Defend your company by negotiating contractual language that will facilitate the assertion of threshold federal defenses in litigation. In Salim, the court acknowledged that Mitchell and Jessen worked “together with the CIA” and that the government reviewed and approved the core elements of the EIT program.[26] While these facts were not ultimately relied upon by the court, contractors can greatly enhance their tort defenses through contract provisions that: (1) memorialize the extent of the government’s “control” over its activities, (2) describe the contractor’s level of “integration” with sensitive military functions, and (3) which establish meaningful “review and approval” by knowledgeable government personnel. Again, crafting such provisions and persuading the government to adopt them requires a degree of skill, but the protection afforded by such clauses is well worth the effort and is matter of mutual interest to contractors and the government.

• Respond to lawsuits in a manner that establishes, at the outset, the unique “federal interests” at play whenever a government contractor is sued in tort. This includes obtaining direct and indirect litigation support from your federal customer, as well as strategically staging and asserting the many federal defenses that are available to government contractors. Though perhaps not viable in Salim for one reason or another (e.g., no tort claims were filed pursuant to state law), cases involving similar facts may be good candidates for other defenses, such as combatant activities preemption, the state secrets privilege, the government contractor defense, or the Westfall doctrine. To be successful, contractors that are sued in tort need to think critically and strategically about whether, when, and how to assert these unique defenses.

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[4] Id.


[6] Id. at 216.


[17] Id. at 21-22 (quoting Campbell-Ewald v. Gomez, 136 S. Ct. 663, 673 (2016)).

[18] Id. at 24-25.


[21] See, e.g., Saleh v. Titan Corp., 580 F.3d 1, 4–5, 9 (D.C. Cir. 2009) (rejecting an “exclusive” operational control test and focusing instead on whether the contractor was “integrated” into combatant activities “over which the military retains command authority”); Boyle v. United Technologies, 487 U.S. 500, 512-13 (1988) (“[I]t does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process [for military equipment], placing the contractor at risk unless it identifies all design defects.”).


