STUDENT NOTE

Pulling Back the Covers: *Saleh v. Titan Corporation* and (Near-) Blanket Immunity for Military Contractors in War Zones

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I. INTRODUCTION

Private corporations contracting with the U.S. military have been crucial to U.S. war efforts in Iraq and Afghanistan.[1] But, as one might expect, the road to victory is proving to be bumpy. On numerous occasions, military contractors and their employees have been guilty of misconduct, ranging from simple negligence to deliberate, sometimes egregious wrongdoing.[2] When victims try to hold them accountable through remedies provided by state tort law, the question of whether and to what extent contractors in war zones should be liable for their misconduct arises.

Many contractors in litigation have sought to benefit from the "government contractor defense," rooted in the Supreme Court's 1988 decision in *Boyle v. United Technologies Corporation*.[3] The Court in *Boyle* held that a product liability claim against a contractor for equipment it had manufactured according to military specifications was preempted by the "uniquely federal interest" in military procurement.[4] In 2009, in *Saleh v. Titan Corporation*, the D.C. Circuit Court of Appeals applied *Boyle* and preempted state law tort claims against military contractors providing translation and interrogation services at Iraq's infamous Abu Ghraib prison.[5] *Saleh* is an important case because, among other reasons, it represents the first appellate victory for military contractors seeking to apply *Boyle* in civil suits and to immunize their war-zone conduct.[6]

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[1] Adam Ebrahim, Note, *Going to War With the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT'L L.J. 181, 182 (2010) ("Private military companies . . . play an unquestionably prominent role in the twenty-first century [U.S.] military apparatus, offering logistical support, strategic consulting, and frontline combat operations." (citing P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 88 (Robert J. Art, et al. eds., Cornell University Press 2008) (2003))).

[2] *See* André M. Peñalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J.L. & PUB. POL'Y 459, 460–62 (2010); Jenny S. Lam, Comment, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CAL. L. REV. 1459, 1461–64 (2009).

[3] 487 U.S. 500 (1988).

[4] *See id.* at 505 (internal quotation marks omitted).

[5] Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009).

[6] *Compare Saleh*, 580 F.3d, *with* Fisher v. Halliburton, Nos. H-05-1731, H-06-1971, H-06-1168, 2010 WL 519690 (S.D. Tex. Feb. 8, 2010) (preemption inappropriate under Fifth Circuit precedent and *Boyle* because actions on which claims were premised exceeded authority of government contract and state-imposed tort duties did not conflict with contract); Harris v. Kellogg, Brown & Root Servs., Inc., 618 F. Supp. 2d 400 (W.D. Pa. 2009) (preemption inappropriate under *Boyle* and combatant activities exception because case did not involve claims arising from active military combat operations); Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700, 720–25 (E.D. Va. 2009) (preemption inappropriate under *Boyle* and combatant activities exception because interrogation was not combatant activity, case did not

This paper takes *Saleh* as a starting point for a broader discussion about what the scope of liability for military contractors in Iraq and Afghanistan ought to be. My thesis here is rather straightforward and may be stated in two parts.

First, where the application of state tort law to the conduct of military contractors is at issue, the preemption analysis, in truth, masks underlying policy choices by the court about the scope of contractor liability. Normatively speaking, contractor liability may be assessed on the basis of a "liability rule" or an "immunity rule." The former would generally *permit* application of state tort law to a contractor's conduct except in limited circumstances. The latter, conversely, would generally *prohibit* application of state tort law unless an exception applied. Importantly, a court's preemption analysis is often nothing more than a judicial vehicle for adopting one or the other rule. A review of the Supreme Court's decision in *Zschernig v. Miller*[7]—the Court's lone example of so-called "dormant foreign affairs preemption"[8]—shows how the theories of conflict and field preemption are mirror images of the liability and immunity rule, respectively, for contractor misconduct.

Second, with that essential connection unmasked, and taking a cue from *dicta* in the Supreme Court's most recent pronouncement on foreign affairs preemption, I suggest that courts faced with thorny questions about the liability of military contractors in war zones should be more straightforward in assessing the balance of interests at stake. In applying its tort law, a state has strong, legitimate interests in punishing and deterring wrongdoing by resident corporations and providing compensation to resident victims (whether they be employees of the contractor, U.S. soldiers, or otherwise). By the same token, the federal government has a paramount and exclusive interest in the conduct of war, although in some circumstances it may see state tort law as useful—as an off-the-shelf mechanism for helping regulate contractor misconduct. Finally, in weighing

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involve "uniquely federal interests," and even if such interests did exist, imposition of state tort liability would not significantly conflict with them); Lessin v. Kellogg Brown & Root, No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006) (preemption inappropriate under *Boyle* and combatant activities exception because military decisionmaking not implicated by contractor's provision of convoy services and case concerned liability of contractor to U.S. citizens); Carmichael v. Kellogg, Brown & Root Servs., Inc., 450 F. Supp. 2d 1373 (N.D. Ga. 2006) (preemption inappropriate under *Boyle* and combatant activities exception because case concerned liability of contractor to U.S. citizen (soldier) and would not require divulgence of military secrets); McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) (preemption inappropriate under *Boyle* and combatant activities exception because "private contractors may not bootstrap the Government's sovereign immunity"); Smith v. Halliburton Co., No. H-06-0462, 2006 WL 1342823 (S.D. Tex. May 16, 2006) (preemption inappropriate under *Boyle* and combatant activities exception because government contractor defense could not be extended to suit by non-military personnel against contractor for negligence in security measures on military base).

[7] 389 U.S. 429 (1968).

[8] *See* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203 (2000); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (Ginsburg, J., dissenting) ("We have not relied on *Zschernig* since it was decided . . . .").

these interests, the culpability of a contractor or its employees should be considered. Applying tort principles to mere negligence by contractors may frustrate the federal interest in prosecuting a successful war (which generally necessitates significant risk-taking). However, the more reckless or deliberate the wrongdoing is, the greater role state tort law has to play; similarly, the more attenuated the federal interest because egregious misconduct may itself violate federal law or policy.

Ultimately, I express no opinion on the D.C. Circuit's ultimate resolution of the *Saleh* case. I do, however, quibble with its analysis. The court might have approached the question of contractor liability in a more pragmatic way, and it might have crafted a narrower decision, one that left a court free to strike the balance differently in a future case.

The rest of this paper proceeds in three parts. First, I review and summarize the *Saleh* decision and, as part of that, discuss the government contractor defense recognized in *Boyle*. Second, with reference to the *Zschernig* decision, I explore the underlying connection between the paradigms of conflict and field preemption and the normative choices about the scope of contractor liability. Finally, I suggest that courts take a more pragmatic, case-by-case approach to the question of contractor liability, and I articulate some of the state and federal interests that should be weighed in that analysis.

II. *SALEH V. TITAN CORPORATION*, THE GOVERNMENT CONTRACTOR DEFENSE, AND FOREIGN AFFAIRS PREEMPTION

On September 11, 2009, the D.C. Circuit in *Saleh v. Titan Corporation* held that state law tort claims against two private corporations under contract with the U.S. military in Iraq were federally preempted due to the "uniquely federal interests" at stake.[9] The plaintiffs in the case were Iraqi nationals who alleged that they or their late husbands had suffered torture and mistreatment by employees of two private contractors at Abu Ghraib prison.[10] Abu Ghraib was a U.S.-run "correctional facility" in Baghdad, Iraq, and the site of horrendous abuse—indeed, torture—of Iraqi prisoners by U.S. military personnel.[11] The plaintiffs alleged that defendants Titan Corporation, a provider of translation

[9] *See Saleh*, 580 F.3d at 6–7.

[10] *See id.* at 2; Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 2 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom.*, 580 F.3d 1 (D.C. Cir. 2009).

[11] *See* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42; Scott Higham & Joe Stephens, *New Details of Prison Abuse Emerge*, WASH. POST, May 21, 2004, at A1 ("Some of the detainees described being abused as punishment or discipline . . . . Some said they were pressed to denounce Islam or were force-fed pork and liquor. Many provided graphic details of how they were sexually humiliated and assaulted, threatened with rape, and forced to masturbate in front of female soldiers."). The *Saleh* plaintiffs claimed that the defendant contractors participated in and committed these and other abuses. *See Ibrahim*, 391 F. Supp. 2d at 12–13. The Abu Ghraib facility was turned over to the Iraqi government in 2009 and reopened under the new moniker "Baghdad Central Prison." *See* Sam Dagher, *Fresh Paint and Flowers at Iraqi House of Horrors*, N.Y. TIMES, Feb. 21, 2009, at A10.

services, and CACI International, a provider of interrogation services, participated in the prison abuses.[12]

The central issue on appeal was the "government contractor defense" that Titan and CACI put forth.[13] The contractors asserted that the state law tort claims against them "should be preempted as claims against civilian contractors providing services to the military in a combat context."[14] The D.C. Circuit agreed, resting its holding on two alternative grounds: "the Supreme Court's decision in *Boyle* . . . and the Court's other preemption precedents in the national security and foreign policy field."[15]

A. Boyle *and the Government Contractor Defense*

Boyle, decided in 1988, was not the first case in which a government contractor claimed immunity to suit. In 1940, in *Yearsley v. W.A. Ross Construction Company*, the Supreme Court held that a contractor acting under the direction and supervision of the federal government could not be held liable for damage to the plaintiff's land due to its construction of dikes on the Missouri River.[16] "[I]t is clear," the Court wrote in a short opinion, "that if [the] authority to carry out the project was validly conferred, . . . there is no liability on the part of the contractor for executing" the government's will.[17]

Yearsley involved federal claims against a non-military contractor under a performance contract.[18] *Boyle* might be seen as its converse, involving state law tort claims against a military contractor under a procurement contract.[19] The plaintiff in *Boyle* alleged that the contractor, United Technologies, had defectively designed the emergency escape hatch on certain helicopters manufactured for the U.S. military.[20] The hatch opened outward instead of inward, rendering it inoperable due to water pressure when the helicopter was submerged.[21] The

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[12] *Saleh*, 580 F.3d at 2.
[13] *See id.* at 4–5.
[14] *Id.* at 4.
[15] *Id.* at 5.
[16] *See* 309 U.S. 18, 19 (1940).
[17] *Id.* at 20–21.
[18] Specifically, the *Yearsley* plaintiffs alleged that the contractor was liable for a taking of their property in violation of the Fifth Amendment to the Constitution. *See id.* at 19–20. In *Boyle*, Justice Scalia noted that the claim in *Yearsley* was based on *state* law. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 506 (1988). In *Yearsley*, the plaintiffs appear initially to have founded their claims on state law. *See* W.A. Ross Constr. Co. v. Yearsley, 103 F.2d 589, 590 (8th Cir. 1939). In reply to the contractor's answer that it was acting within the scope of its contract with the government, the plaintiffs "admitted that the contractor was operating under a Government contract, and alleged that the contract did not contemplate the taking of their land without just compensation and due process of law, and that the contractor's acts resulting in the destruction of a part of their land was a violation of their rights under the Fifth Amendment to the Constitution of the United States." *Id.* at 591.
[19] *See Boyle*, 487 U.S. at 502–03.
[20] *Id.* at 503.
[21] *Id.*

plaintiff's son, a Marine pilot, had died as a result of this defect.[22] In an opinion authored by Justice Scalia, the Supreme Court held that the state law claims against the contractor were preempted, and the Court went on to fashion a federal common law rule to govern the case.[23]

i. Preemption

On the issue of preemption, the Court noted that "a few areas, involving 'uniquely federal interests' . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced."[24] For three reasons, the Court found that, indeed, "uniquely federal interests" were at stake.[25] First, though the case involved liability of a third party and not the government, it nevertheless arose out of a government contract, and Supreme Court precedent made clear that such contracts were within the exclusive domain of federal law.[26] Second was the "peculiarly federal concern" with "getting the Government's work done," whether that involved a federal employee carrying out his duties or a private party performing its obligations under a contract with the federal government.[27] Finally, the interests of the United States were directly affected by government contractor suits because the cost of any resulting liability would be passed on directly to the government.[28]

The preemption analysis did not end there.[29] Having identified the federal interests at stake, the Court went on to examine whether a "significant conflict" existed between these interests and the operation of state law.[30] Implicitly, this part of the Court's analysis took place in two steps.

a. "Precise" Conflict Between State and Federal Duties

First, the Court examined the nature of the duties imposed by state tort law and the government contract.[31] It found a sharp conflict between them, noting that a contractor could not comply both with the state-imposed duty to manufacture a "safe" escape hatch and with the duty imposed by the government

[22] *Id.* at 502.
[23] *See id.* at 512.
[24] *Id.* at 504.
[25] *See id.* at 504–07.
[26] *See id.* at 504–05.
[27] *See id.* at 505.
[28] *See id.* at 506–07.
[29] *See id.* at 507 ("That the procurement of equipment by the United States is an area of uniquely federal interest . . . merely establishes a necessary, not a sufficient, condition for the displacement of state law.").
[30] *See id.* (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).
[31] *See id.* at 508–09.

contract to manufacture the escape hatch called for by military specifications.[32] The one was "precisely contrary" to the other.[33]

b. Significance of the Conflict

Despite the clear conflict, the Court acknowledged that this sort of situation did not always present a *significant* conflict.[34] The crucial issue was the government's interest in the "particular feature" subject to the conflicting duties.[35] The Court imagined a scenario in which "a federal procurement officer orders, by model number, a quantity of stock helicopters that happen to be equipped with escape hatches opening outward."[36] In such a case, it would be "impossible to say that the Government has a significant interest in that particular feature."[37]

For the conflict's significance, the Court looked to a particular provision of the Federal Tort Claims Act ("FTCA").[38] The FTCA waives the United States' sovereign immunity in suits seeking damages for the tortious conduct of government employees.[39] The United States is liable to the extent that a private person would be liable in like circumstances under the "law of the place" where the conduct occurred.[40] The FTCA thus incorporates state law rules of negligence, duty of care, causation, and others.[41]

There are, however, a number of exception to the waiver.[42] The *Boyle* Court pointed to the so-called discretionary function exception, a provision that retains the government's sovereign immunity for claims based on a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function."[43] This exception is designed to shield "policy decisions"—decisions calling for the exercise of judgment and discretion by government officials—from private liability.[44] The Court found that purpose implicated in *Boyle*:

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[32] *See id.* at 509.
[33] *Id.*
[34] *See id.*
[35] *See id.*
[36] *Id.*
[37] *Id.*
[38] *See id.* at 511.
[39] *See* 28 U.S.C. § 1346(b); *Boyle*, 487 U.S. at 511.
[40] *See* 28 U.S.C. § 1346(b); *Boyle*, 487 U.S. at 511.
[41] *See* Hetzel v. United States, 43 F.3d 1500, 1503–04 (D.C. Cir. 1995).
[42] *See* 28 U.S.C. § 2680.
[43] *Id.* § 2680(a).
[44] *See* United States v. Varig Airlines, 467 U.S. 797, 811–12 (1984). *Varig Airlines* involved tort claims against the United States for injuries arising out of the alleged negligence of the Federal Aviation Administration ("FAA") in certifying certain aircraft as safe. *See id.* at 799–803. At the time of the action, the FAA consisted of fewer than 400 engineers. *Id.* at 807. With limited manpower, the FAA safety certification process was done through a "spot check" program: an aircraft manufacturer had primary responsibility for the safety of the aircraft, and the FAA's role was to police compliance by inspecting a representative sample of the manufacturer's aircraft and its various features. *See id.* at 816–19. The intensity of spot checking was tailored to the

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.[45]

"It makes little sense," the Court continued, "to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."[46] It therefore concluded that allowing for the imposition of tort liability on the contractor would produce a "significant conflict" with federal policy and that preemption was warranted.[47]

ii. Fashioning a Federal Common Law Rule

Bare preemption, however, did not end the matter. If that were true, state law would have been totally displaced, and, without any federal law in place to delineate the scope of the contractor's liability, the contractor would have been completely immune to state law tort claims. Instead, the Supreme Court fashioned a federal common law rule to govern such claims:

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manufacturer's track record. *See id.* at 817–18. The more experienced and well-known the manufacturer, the greater the FAA's confidence in it and the less intense the inspections required. *See id.* The Supreme Court found that the FAA's spot check program was "plainly discretionary activity of the nature and quality protected by" the discretionary function. *Id.* at 819 (internal quotation marks omitted). The Court explained:

> Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

Id. at 819–20.

[45] *Boyle*, 487 U.S. at 511.

[46] *Id.* at 512.

[47] *Id.*

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[48]

The Court explained that the first two conditions ensured that the suit was one in which, if liability were imposed, the discretionary function exception to the FTCA would be frustrated.[49] The third was a kind of backstop provision. Without it, the contractor would have the incentive to withhold knowledge of risks, since informing the government might disrupt its contract but withholding information would produce no liability.[50] The third condition ameliorated this perverse incentive and facilitated the sharing of information between the contractor and the government, information "highly relevant to the [government's] discretionary decision."[51]

B. Saleh's Boyle *Analysis*

The D.C. Circuit saw the state law tort claims raised in *Saleh* as controlled by *Boyle*.[52] On whether the claims were preempted, there was no dispute that "uniquely federal interests" were in play.[53] Rather, the plaintiffs contended that applying state tort law to the contractors did not produce a "significant conflict" with federal policy "because the U.S. government itself openly condemned the behavior of those responsible for abusing detainees at Abu Ghraib."[54]

On this issue, the court of appeals proceeded immediately to an examination of the Federal Tort Claims Act.[55] However, the provision to which it referred to delineate the scope of the federal-state conflict was the "combatant activities exception."[56] That exception to the FTCA's general waiver for tort claims against the United States provides that the federal government retains its sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[57]

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[48] *Id.*
[49] *See id.*
[50] *Id.*
[51] *Id.* at 512–13.
[52] Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009).
[53] *Id.* at 6.
[54] *Id.* at 7.
[55] *See id.* at 6.
[56] *See id.*
[57] 28 U.S.C. § 2680(j).

The court in *Saleh* opined that this exception was even broader than the discretionary function exception.[58] For the latter, the court explained, one must identify "a discrete discretionary governmental decision," and all suits based on that decision are preempted.[59] The combatant activities exception, however, brought to the court's mind a preemption doctrine called field preemption.[60] This exception, the court said, "casts an immunity net over any claim that *arises* out of combat activities."[61] The court explained that the arising-out-of test denoted "*any* causal connection" between those activities and resulting injury.[62]

The court read the combatant activities exception as embodying a policy of "elimination of tort from the battlefield."[63] The rationales that underlay tort law—deterrence of risk-taking, compensation of victims, and punishment of wrongdoers—"are singularly out of place in combat situations, where risk-taking is the rule."[64] The exception evinced congressional intent both to preempt non-federal regulation of the military's conduct during wartime and "to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit"—purposes equally implicated whether an alleged victim sought damages from the military or from a contractor acting at the military's behest.[65]

The court concluded that the "significant conflict" between state law and federal policy in this case arose not because of a conflict between discrete duties imposed by state and federal law.[66] "Rather, it is the imposition *per se* of the state . . . tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield."[67] This was thus a case of "battle-field preemption": "[T]he federal government," the court wrote, "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."[68]

Like the Supreme Court in *Boyle*, the D.C. Circuit went on to craft a federal common law rule to protect the federal interest it had identified: "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."[69] This rule must be contrasted to that adopted by the district court, which would have preempted state tort law claims if the contractor was within the "exclusive operational

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[58] *See Saleh*, 580 F.3d at 6.
[59] *See id.*
[60] *See id.*
[61] *Id.*
[62] *See id.*
[63] *Id.* at 7.
[64] *Id.*
[65] *Id.*
[66] *See id.*
[67] *Id.*
[68] *Id.* (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 509 (1988)).
[69] *Id.* at 9.

control of the military chain of command."[70] The court of appeals thought this test did not fully protect the federal interests at stake because those interests were implicated in situations where military's operational control fell short of exclusive.[71] Moreover, the district court's rule created "a powerful (and perverse) economic incentive" for the contractors in this case—in the future, they would be deterred from reporting the Abu Ghraib abuses to higher military authorities because such reporting might suggest that military prison officials' control over the contractor was not exclusive.[72] The court of appeals opined that the rule it had fashioned better secured the federal interests at issue and mitigated any perverse incentive created by the contractor's immunity.[73]

C. Analysis of Foreign Affairs Preemption Precedents in Saleh

While the D.C. Circuit's *Boyle* analysis occupied the bulk of its opinion, it also stated an alternative ground for its holding.[74] Citing the Supreme Court's preemption precedents in the area of foreign affairs, the court declared that "even in the absence of *Boyle*[,] the plaintiffs' claims would be preempted."[75] In this vein, it relied primarily on two Supreme Court cases: *American Insurance Association v. Garamendi*[76] and *Crosby v. National Foreign Trade Council*.[77] A brief review of those cases is in order.

i. *American Insurance Association v. Garamendi*

Garamendi involved a California statute, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), that required insurance companies doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945.[78] The object of the legislation was primarily to compel prompt compensation by insurers who had defaulted on life insurance claims by victims of Nazi persecution.[79] The law also created a new cause of action against these insurers.[80]

Meanwhile, the federal government had been making similar efforts at restitution.[81] These culminated in an executive agreement in July 2000 between President Clinton and the German Chancellor, Gerhard Schröder, under which Germany agreed to establish a national fund for the compensation of victims of

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[70] *See id.* at 8.
[71] *See id.*
[72] *See id.* at 9.
[73] *Id.*
[74] *See id.* at 13.
[75] *See id.* 12–13.
[76] 539 U.S. 396 (2003).
[77] 530 U.S. 363 (2000).
[78] *See Garamendi*, 539 U.S. at 409–10.
[79] *See id.* at 410.
[80] *Id.* at 409.
[81] *See id.* at 404–05.

Nazi persecution.[82] Seeking to ensure that the fund would be the exclusive means for compensation, President Clinton agreed that when a German company was sued on a Holocaust-era claim in a U.S. court, the executive branch would submit a statement to the court recommending dismissal.[83]

The issue for the Supreme Court was whether the executive agreement between the United States and Germany preempted the California statute, and the Court held that it did.[84] It found a "clear conflict" between the state law and federal policy.[85] The Court acknowledged that the California statute and the federal agreement shared a broad common goal—compensation for Holocaust victims—but their mechanisms for achieving this goal were different.[86] The California statute imposed more stringent disclosure requirements and, by permitting litigation of claims in California courts, thwarted the United States' interest in directing all claims to the German foundation fund.[87] The statute thus impinged on U.S. foreign policy as embodied in the federal executive agreement.[88] It "employ[ed] 'a different, state system of economic pressure'";[89] it "undercut[] the President's diplomatic discretion";[90] and it prevented the President from speaking with "'one voice'" with respect to the nation's foreign policy.[91] Given its clear conflict with federal policy, the California law had to give way.[92]

ii. *Crosby v. National Foreign Trade Council*

At issue in *Crosby* were a 1996 Massachusetts law that prohibited state entities from buying goods or services from companies doing business with Burma and a subsequent federal statute imposing a set of mandatory and conditional sanctions on that country.[93] The federal law imposed an initial set of economic sanctions on Burma (for example, prohibiting bilateral aid) but authorized the President, under specified conditions, to terminate those sanctions or impose others.[94] The President was also authorized to waive any sanctions imposed by the act if he found them to be contrary to U.S. national security interests,[95] and was directed to develop a comprehensive strategy for improving human rights, democracy, and quality of life in Burma.[96]

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[82] *See id.* at 405.
[83] *See id.* at 406.
[84] *See id.* at 420.
[85] *Id.* at 421.
[86] *See id.* at 424–25.
[87] *See id.* at 423–25.
[88] *See id.* at 421.
[89] *Id.* at 423 (quoting Crosby v. National Foreign Trade Council, 530 U.S. 363, 376 (2000)).
[90] *Id.* at 423–24.
[91] *Id.* at 424 (quoting *Crosby*, 530 U.S. at 381)).
[92] *See id.* at 427.
[93] *See Crosby*, 530 U.S. at 367–68.
[94] *See id.* at 374.
[95] *Id.*
[96] *Id.* at 369.

In a challenge to the operation of the Massachusetts law, the Supreme Court held that it was preempted because it stood "as an obstacle to the accomplishment of Congress's full objectives under the federal Act."[97] First, the state law undermined congressional policy delegating to the President the authority to determine the appropriate amount of economic coercion over Burma.[98] Second, the state law imposed a different, more stringent system of economic pressure; it was thus "at odds with achievement of the federal decision about the right degree of pressure to employ."[99] Finally, the Massachusetts law interfered with the President's ability to act for the nation as a whole and to carry out an effective diplomatic strategy to bring Burma in line with U.S. objectives.[100]

iii. *Saleh*'s Use of These Precedents

The D.C. Circuit in *Saleh* read both *Garamendi* and *Crosby* as involving federal preemption of state law "not because the state law conflicted with the express provisions of federal law, but because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests."[101] The court pointed out that neither *Garamendi* nor *Crosby* involved any express conflict between state and federal law because companies could comply with both the state and federal laws at issue in those cases.[102] For the court, then, those cases stood for the broader proposition that state laws must give way when they are inconsistent with, though not necessarily expressly contrary to, federal foreign policy interests.[103] The *Saleh* court applied this principle to case before it, establishing an alternative ground for its holding that state tort law had to give way to the federal interest in exclusion of tort from the battlefield.[104]

III. PREEMPTION ANALYSIS AS POLICY CHOICE

A. Normative Question

Before launching into a critique of the *Saleh* decision, it is useful to step back for a moment and contemplate the important normative question that *Saleh* raises: What *should* the scope of liability be for military contractors in war

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[97] *Id.* at 373.
[98] *See id.* at 374–77.
[99] *See id.* at 377–80.
[100] *See id.* at 380–82.
[101] Saleh v. Titan Corp., 580 F.3d 1, 13 (D.C. Cir. 2009).
[102] *See id.* at 12 ("The state and federal law [in *Garamendi*] thus posed no express conflict—it would have been entirely possible for insurance companies to disclose information under California's legislation and still benefit from the national government's intervention should suit be filed against them in U.S. courts."); *id.* at 13 ("[In *Crosby*,] despite the fact that companies could comply with both state and federal laws, the Court explained that the state statute was preempted . . . .").
[103] *See id.* at 13.
[104] *See id.*

zones? In the absence of action by the political branches, the judiciary has three alternatives.

Under an absolute liability regime, contractors would be unqualifiedly subject to state tort law. This would permit contractor employees (or their survivors), U.S. soldiers, or other victims to pursue a variety of claims against a contractor, including negligence, assault and battery, wrongful death, and intentional infliction of emotional distress.[105] Importantly, under this scenario, the limits on the application of state tort law would be few, and the federal courts would play no gatekeeping function. The precise opposite of this regime is a regime of absolute immunity. Under it, contractors would be completely immune to tort claims, no matter how wrongful their conduct.

A third regime, one of qualified immunity, strikes a balance between the previous two and comes in two varieties. Under one scheme, contractors would be subject to state tort law, except in specified circumstances. Under a second scheme, contractors would *not* be subject to state tort law, except in specified circumstances.

The difference between these two schemes is the "baseline." In the first, the baseline is *liability*; in the second, *immunity*. In the first—call it a "liability rule"—contractor immunity claims are given a narrow berth, and state tort law applies to contractor misconduct unless some specific exception applies. The second scheme—call it an "immunity rule"—casts a much broader net of immunity over a contractor's conduct and allows for operation and application of state tort law in limited circumstances only.

B. Relationship Between Qualified Immunity and the Preemption Paradigms

These alternative schemes of qualified immunity operate in parallel to two doctrines of preemption. Specifically, the liability rule and the immunity rule are, in substance, mirror images of the theories of conflict preemption and field preemption, respectively. A review of *Zschernig v. Miller*,[106] a 1968 Supreme Court case, helps illustrate these two theories and their relationship to a qualified immunity regime for military contractors.

i. Preemption Paradigms in *Zschernig v. Miller*

At issue in *Zschernig* was an Oregon probate statute that prohibited inheritance of property within the state by a foreign national unless American citizens enjoyed a reciprocal right of inheritance in the foreigner's home country and the foreigner had a right to receive proceeds from the property "without

[105] *See, e.g.*, Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 2 (D.D.C. 2007), *aff'd in part, rev'd in part sub nom.*, Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).
[106] 389 U.S. 429 (1968).

confiscation" by his country's government.[107] The statute reflected Cold War resistance to Communist regimes of government, and Oregon, like many states, was concerned that its probate laws would effectively enrich Communist governments by allowing property to pass into the hands of foreign nationals and thereby to the government itself, which refused to recognize the private property rights of its citizens.[108]

The majority in *Zschernig* held that the Oregon law was preempted because, as applied by the Oregon probate courts, it "affect[ed] international relations in a persistent and subtle way."[109] Because the law required the foreign heir to establish that he would enjoy the "benefit, use or control" of the inherited property "without confiscation, in whole or in part, by" his home government,[110] the Oregon courts were led to make "minute inquiries [into] the actual administration of foreign law [and] into the credibility of foreign diplomatic statements" concerning property rights.[111] The law, in short, invited judicial criticism of authoritarian governments.[112]

In spite of assurances from the Executive Branch that the Oregon law did not "unduly interfere[] with the United States' conduct of foreign relations,"[113] the Court found that "[t]his kind of involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is . . . forbidden . . . ."[114] It conceded that that "[t]he several States, of course, have traditionally regulated the descent and distribution of estates."[115] However, those laws had to "give way" because they "impair[ed] the effective exercise of the Nation's foreign policy."[116]

Justice Harlan concurred in the result but disagreed that the Oregon law impermissibly trenched on the federal government's foreign relations power.[117]

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[107] *See id.* at 430–31.
[108] *See id.* at 435; *see also id.* at 438 n.8 (quoting, among other cases, In re Belemecich's Estate, 411 Pa. 506, 511 (1963) ("[S]ending American money to a person within the borders of an Iron Curtain country is like sending a basket of food to Little Red Ridinghood in care of her 'grandmother.'")).
[109] *Id.* at 440.
[110] *Id.* at 432.
[111] *Id.* at 435.
[112] *Id.* at 440. The phenomenon was not confined to Oregon. Several states had such laws, and the Court cited several state court decisions where criticism of Communist governments was especially acerbic. For example, "[i]n Pennsylvania, a judge stated at the trial of a case involving a Soviet claimant that '[i]f you want to say that I'm prejudiced, you can, because when it comes to Communism I'm a bigoted anti-Communist.'" *Id.* at 438 n.8 (citing Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 257 & n.3 (1962)).
[113] *Id.* at 434 (internal quotation marks omitted).
[114] *Id.* at 436.
[115] *Id.* at 440.
[116] *Id.* at 440–41 (citations omitted).
[117] *See id.* at 457 (Harlan, J., concurring in result).

On this point, he was joined (in substance) by Justice White.[118] In Harlan's view, there was no bar to the operation of state law where a state had legislated in an area of "traditional competence" and where there was no "conflicting federal policy" on point, even if the state law had an "incidental effect on foreign relations."[119] Harlan noted that probate law was within the traditional competence of the states and that there was "no specific interest of the Federal Government" with which the Oregon law interfered.[120]

Zschernig is an example of so-called "dormant" preemption, whereby a court preempts state law under its own authority, in the absence of any particular federal law on point.[121] It is the only case involving foreign affairs in which the Supreme Court has applied a dormant preemption theory.[122] *Boyle*, too, is a dormant preemption case, although the foreign affairs aspects of that case were minimal at best. Still, *Zschernig* and *Boyle* share the most important feature of dormant preemption analysis: preemption of state law based, not on express federal law (such as a statute or treaty), but on the impact that state law has on some consummately "federal" matter, such as U.S. foreign relations or a federal contract.[123]

The majority opinion and Justice Harlan's concurrence in *Zschernig* illustrate the theories of field preemption and conflict preemption, respectively. Under field preemption, state law is preempted when the federal government "occup[ies] an entire field of regulation, leaving no room for the States to supplement federal law."[124] This may occur when "the federal interest is so dominant" in a particular field that enforcement of state laws on the subject is precluded.[125] Conflict preemption, on the other hand, occurs when compliance with both state law and federal law is impossible.[126] In such case, "preemption follows by necessary implication from the fact of conflict."[127]

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[118] Justice Harlan concurred in the result because he would have found that the Oregon law was preempted by a 1923 treaty between the United States and Germany. *See id.* at 443. Reaching this result required overruling precedent, which the majority declined to do. *See id.* at 432 (majority opinion). Justice White thought the Oregon law was preempted neither by the treaty (agreeing with the majority) nor by its supposed impact on U.S. foreign relations (agreeing with Justice Harlan). *See id.* at 462 (White, J., dissenting). He therefore dissented because he would have upheld the state court judgment below. *See id.*

[119] *Id.* at 458–59 (Harlan, J., concurring in result).

[120] *Id.* at 459.

[121] Goldsmith, *supra* note 8; *see also* Ernest A. Young, *Treaties as "Part of Our Law,"* 59 AM. U. L. REV. 259, 332 (2009) ("*Zschernig* . . . suggest[s] the existence of a dormant foreign affairs power.").

[122] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (Ginsburg, J., dissenting) ("We have not relied on *Zschernig* since it was decided . . . .").

[123] *See* Goldsmith, *supra* note 8.

[124] Nw. Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 509 (1989).

[125] *Id.* (citations omitted); *see also* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 398 (3d ed. 2009).

[126] BRADLEY & GOLDSMITH, *supra* note 125.

[127] *Id.*

The difference between field and conflict preemption is the *degree* of conflict necessary to trigger preemption. When a court applies the theory of conflict preemption, it generally requires an "actual conflict" between state and federal law.[128] This can arise when state law mandates what federal law prohibits, or (vice-versa) when federal law mandates what state law prohibits.[129] The conflict, in other words, must be specific. By contrast, with field preemption, no actual conflict need be identified. It is enough that state law intrudes on an exclusively federal domain.[130] The federal purposes and interests that warrant preemption are drawn more broadly, not from any particular provision of law (as in conflict preemption), but from the existence of a broad regulatory scheme or from a federal interest existing apart from a particular law.[131]

The majority opinion in *Zschernig* is an example of field preemption. The Oregon probate statute did not interfere, either on its face or in application, with any specific federal law. In fact, the statute did not even interfere with federal *policy* since the Executive Branch had informed the Court that it had no opposition to the law.[132] Rather, the law was preempted because it amounted to "state involvement in foreign affairs" and might "adversely affect the power of the central government" to conduct foreign relations.[133]

By contrast, Justice Harlan's concurrence in *Zschernig* exhibits the theory of conflict preemption. Harlan thought the majority opinion was far too broad. He was certainly open to the possibility that state law might be preempted in the face of "conflicting federal policy."[134] Harlan found important, however, that no such conflict had been shown.[135] Oregon had legislated in an area within the "traditional competence" of the states, and there was no "*specific* interest of the

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[128] *See* Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 748 (1991).
[129] *See id.* at 748–49.
[130] *See* Hines v. Davidowitz, 312 U.S. 52 (1941) (not identifying any specific conflict between a federal and state law requiring registration of resident aliens, but nevertheless concluding that the state law was preempted because immigration, as a subset of foreign affairs, is the exclusive domain of the federal government and the federal law "plainly manifested a purpose" to provide a single, uniform rule of registration).
[131] BRADLEY & GOLDSMITH, *supra* note 125.
[132] Zschernig v. Miller, 389 U.S. 429, 434 (1968); *see also id.* at 460 (Harlan, J., concurring).
[133] *Id.* at 436, 441 (majority opinion). In a separate concurrence, Justice Stewart made this point even more strongly: "The Solicitor General, as *amicus curiae*, says that the Government does not 'contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.' But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States." *Id.* at 443 (Stewart, J., concurring).
[134] *See id.* at 458–59 (Harlan, J., concurring in the result).
[135] *See id.*

Federal Government" that was impaired by the statute.[136] In other words, Harlan contended, there was no actual conflict here.

ii. Connection to the Schemes of Qualified Immunity

Now, the connection between the judicial preemption analysis and qualified immunity for military contractors can be made. In a case involving application of state tort law to a military contractor, the court's adoption of the theory of conflict preemption is, implicitly, an adoption of a liability rule for qualified immunity. Conflict preemption analysis, like Justice Harlan's concurrence in *Zschernig*, rests on the premise that state law stands absent an actual, specific conflict with federal law or policy. In the context of military contractors, this means that state tort law applies to their conduct unless a particular federal law or policy stands in the way. *Boyle* falls into this category: it is a conflict-preemption, liability-rule case.

Displacement of state law, the Court wrote in *Boyle*, "will occur only where . . . a 'significant conflict' exists between an identifiable federal policy or interest and the operation of state law."[137] The Court made clear that this conflict had to be both "precise" (such that the contractor could not comply with both the duty imposed by state law and the federal contract)[138] and "significant."[139] *Boyle*, then, does not stand for the proposition that state tort law is broadly preempted when a federal contract is at issue. Rather, *Boyle* is a narrow decision. It requires

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[136] *Id.* at 459 (emphasis added). Harlan criticized the majority's reasoning for relying on pure speculation: "[T]he Court does not mention, nor does the record reveal, any instance in which [criticism of foreign governments by state court judges] has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequences whatsoever." *Id.* at 460.

[137] *Boyle*, 487 U.S. at 507 (citation, alterations, and some internal quotation marks omitted). The Court added that preemption will also occur where "the application of state law would 'frustrate specific objectives' of federal legislation." *Id.* (citation omitted). However, because federal legislation was not at issue in *Boyle*, and is not at issue in *Saleh*, this alternative basis for preemption has been omitted from the discussion.

[138] The Court highlighted three situations in which a contractor's duties under a federal contract interact with state law. *See id.* at 508–09. First, the contractor's duties under state law may be identical to those under federal law (for example, state law operates to enforce the federal contractual duty). *See id.* at 508. The example the Court gave of this sort of situation was drawn from a previous case, *Miree v. DeKalb County*, 433 U.S. 25 (1977), in which state law was allowed to determine whether third-party beneficiaries could sue to enforce a contract between a municipality and the Federal Aviation Administration. *See id.* at 508–09.

Second, the state law duty and the federal contractual duty may not be identical, but not contrary either. *See id.* at 509. The Court noted as an example that the federal government might contract "for the purchase and installation of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction." *Id.* In such case, if state law imposed on the manufacturer "a duty of care to include a certain safety feature," "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care," and preemption would not be warranted. *Id.*

Finally, it may be the case that the duty imposed by state law is "precisely contrary" to that imposed by the federal contract because the contractor cannot comply with both. *See id.* Only in this third situation was preemption potentially warranted. *See id.*

[139] *See id.*

a discriminating analysis into the actual content of the duty of care that state law imposes and the duties assumed under the federal contract.

Even where preemption obtains, state tort law is not totally superseded. The three-prong rule crafted by the *Boyle* Court was tailored to protect the federal interests it had identified.[140] State tort duties were displaced only if, and the to the extent that, the rule's three conditions were met.[141]

The conflict-preemption theory of *Boyle* thus masks an underlying policy choice about the scope of liability of government contractors. *Boyle*'s requirement that a specific, significant conflict be identified, and its narrowly tailoring a federally protective rule, amount to a liability rule. Under *Boyle*, a military contractor is subject to duties of care under state law, except in specified circumstances.

In contrast to *Boyle*, when a court adopts a theory of field preemption, it is, implicitly, opting for an immunity rule for qualified immunity. Field preemption analysis imports broad ideas about federal power, and in the foreign affairs context, this power is very broad indeed.[142] In such a case, preemption will often follow, not from any actual conflict between state and federal law, but simply from the fact that state law implicates the "uniquely federal interest" in foreign affairs.[143] This is especially true where state law does not bear on a

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[140] *See id.* at 512–13.

[141] *See id.* at 512. Against this reading of *Boyle*, it might be objected that such "selective preemption" has the potential to upset any balance struck by the state legislatures and judiciaries in crafting regulatory regimes, such as tort regimes. *Cf.* Hoke, *supra* note 128, at 688, 694, 696 ("American citizens often have focused their efforts on creation of state and local laws to address critically pressing public concerns, such as environmental damage, nuclear power safety, divestment from South Africa, [and others]. . . . [But a] federal preemption ruling authoritatively revokes state and local governmental power over the subject matter . . . [and] undermines the political space within which grass-roots citizens must act to modify governmental or legal policies."). Moreover, that balance is apparently one Congress sought to preserve by incorporating entire state law tort regimes into the FTCA. *See supra* text accompanying notes 38–41. The response to this objection is that taking a narrow view of *Boyle* and the preemption analysis helps to preserve state regulatory regimes generally, superseding particular elements of them only when the federal interest is truly supreme. As the Court explained in *Boyle*, "In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. . . . In others, the conflict is more narrow, and *only particular elements of state law are superseded*." *Boyle*, 487 U.S. at 508 (emphasis added).

[142] Zschernig v. Miller, 389 U.S. 429, 436 (1968) (foreign affairs is a matter entrusted "solely to the Federal Government"); *see also* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) ("Any concurrent state power that may exist [in the field of foreign affairs] is restricted to the narrowest of limits."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (citing *Hines* for the proposition that "the federal interest [may be] so dominant [in a field] that the federal system *will be assumed to preclude* enforcement of state laws on the same subject") (emphasis added); *see also* Carlos Vazquez, 46 VILL. L. REV. 1259, 1302–04, 1323 (2001) (reading *Crosby v. National Foreign Trade Council* and *Hines* as establishing a *de facto* presumption in favor of preemption where state law implicates U.S. foreign relations).

[143] Vazquez, *supra* note 142, at 1303.

subject of "traditional state responsibility."[144] Thus, under a field preemption analysis, the federal interest in the field controls, absent a strong countervailing state interest. In the context of military contractors, where foreign affairs are implicated, this means that state tort law generally cannot be applied to their conduct. *Saleh* is this type of case: a field-preemption, immunity-rule case.

While the D.C. Circuit in *Saleh* declared that the case was "controlled by *Boyle*,"[145] it nevertheless distinguished that precedent. It pointed out that it was relying on the combatant activities exception to the Federal Tort Claims Act, not the discretionary function exception as in *Boyle*.[146] The former, the court said, was broader than the latter.[147] "In the latter situation, to find a conflict, one must discover a discrete discretionary governmental decision, which precludes suits based on that decision, but the former is more like . . . field preemption, because it casts an immunity net over any claim that arises out of combat activities."[148]

Thus, the nature of the conflict at issue in *Saleh* was different from that in *Boyle*.[149] While *Boyle* was "a sharp example of discrete conflict in which satisfying both state and federal duties was impossible," in the present case, it was the "imposition *per se*" of state tort law that conflicted with the federal policy, embodied in the combatant activities exception, of eliminating tort from the battlefield.[150] In perhaps its broadest statement of the law in the case, the court declared:

> The very purposes of tort law are in conflict with the pursuit of warfare. Thus, the instant case presents us with a more general conflict preemption, to coin a term, "battle-field preemption": 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.[151]

Saleh, then, despite formal adherence to *Boyle*, could not be more different than it. In fact, it is hardly exaggerating to say that *Saleh* lies at the opposite end of the spectrum. *Boyle*'s careful language and analysis preserved the operation of state tort law generally, save in circumstances like those presented in the case. By contrast, *Saleh* would displace *all* of state tort law, casting a wide immunity blanket over military contractors in war zones.

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[144] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 n.11 (2003); *Hines*, 312 U.S. at 68 & n.22 (contrasting state law regulating immigration to state laws bearing on more "local matters" such as taxation, food and health laws, and transportation); *cf. Zschernig*, 389 U.S. at 459 (Harlan, J., concurring in the result).
[145] Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009).
[146] *See id.* at 6.
[147] *Id.*
[148] *Id.* (citation omitted; emphasis deleted).
[149] *Id.* at 7.
[150] *Id.*
[151] *Id.* (emphasis added).

In this regard, it is worth highlighting a confusing tension in the *Saleh* opinion. After stating emphatically that state tort law was inapplicable to military contractors in a battlefield context, the court went on, à la *Boyle*, to "carefully tailor[]" a common law rule "to coincide with the bounds of the federal interest being protected"[152]: "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."[153] Despite the court's overtures to "careful[] tailor[ing],"[154] this rule is quite broad.

However, in a seeming retreat from its earlier comments, the court went on to note, "We recognize that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military"—"although," the court added parenthetically, "we are still puzzled at what interest . . . any state . . . would have in extending its tort law onto a foreign battlefield."[155]

Somewhere in this ambivalence on the part of the court is the possibility that state tort law *can* be applied to the conduct of military contractors in war zones. There is no doubt, however, that *Saleh* announces a broad rule, and the field (or "battle-field") preemption theory it articulates also masks an underlying policy choice. The rule that the federal interest in military combat will "always" conflict with the imposition of state-imposed duties of care,[156] subject perhaps to narrow exceptions, amounts to a immunity rule for qualified immunity. Under *Saleh*, a military contractor in a war zone will generally operate free from duties of care under state law.

Linking conflict preemption theory to the liability rule and field preemption theory to the immunity rule helps demonstrate that a court's preemption analysis is not some rarified, abstract judicial inquiry. It is, rather, laden with policy choices about how military contractor liability should be approached. For this reason, in the next Part, I suggest that courts conducting preemption analyses where a contractor's conduct is at issue should be more straightforward in assessing the state and federal interests at stake in the litigation.

IV. A PRAGMATIC APPROACH TO THE PREEMPTION ANALYSIS

Having thus contrasted the *Boyle* and *Saleh* decisions and uncovered the underlying policy choice that each decision embodies, a critique of both decisions, based on recent Supreme Court guidance on foreign affairs preemption,

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[152] *Id.* at 8.
[153] *Id.* at 9.
[154] *Id.* at 8.
[155] *Id.*
[156] *See id.* at 7.

is worthwhile. Above, the contrast between the theories of field and conflict preemption was illustrated by reference to the *Zschernig* decision. The tension in that case between the majority opinion and Justice Harlan's concurrence parallels the tension between the preemption paradigms that *Saleh* and *Boyle* articulate.

Though the Supreme Court has never relied on *Zschernig* since it was decided,[157] it has hinted at how it might apply its principles in a future case. In its 2003 decision in *American Insurance Association v. Garamendi*, the Court suggested that where state law implicates the federal government's foreign relations power, the "choice between the contrasting theories of field and conflict preemption" need not be a "categorical" one.[158] Rather, "[t]he two positions can be seen as complementary."[159] The Court then explained how a dormant preemption analysis might look. In so doing, it seemed to favor a pragmatic approach, one that looked explicitly to the state and federal interests in play.

A. Garamendi's Dictum *as Pragmatic Guidance*

"If a State," the Court said in *Garamendi*, "were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine."[160] This was true regardless of "whether the National Government had acted and, if it had, without reference to the degree of any conflict" because it is an established principle "that the Constitution entrusts foreign policy exclusively to the National Government."[161] On the other hand, if "a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."[162] Lastly, the Court intimated that "the federal foreign policy interest" also deserved consideration.[163] It cited *Boyle* for this proposition and spliced together two quotes from that opinion: "'In an area of uniquely federal interest,' '[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption.'"[164]

To summarize the Court's position: Where state law touches on U.S. foreign affairs, a court's first task is to examine the state interest embodied by the law. The strength or traditional importance of that interest bears a direct relationship to the degree of conflict necessary to trigger preemption. The

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[157] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting). *But cf.* Vazquez, *supra* note 142, at 1323 ("[I]t is only a slight exaggeration to say that *Crosby* [*v. National Foreign Trade Council*] is a dormant foreign affairs case [like *Zschernig*] in disguise.").
[158] *See Garamendi*, 539 U.S. at 419 (majority opinion).
[159] *Id.* at 420 n.11.
[160] *Id.*
[161] *Id.*
[162] *Id.* (citation omitted).
[163] *See id.*
[164] *Id.* (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 507–08 (1988)).

stronger the state interest asserted, the sharper the conflict with federal law or policy must be in order to displace the state law. Conversely, where the state's concern is less compelling—for example, where it acts outside of a "traditional state responsibility"[165]—the conflict need not be as sharp. Indeed, where the state interest in the matter is especially weak, no conflict at all is necessary; preemption may follow simply because the state has intruded on the federal domain of foreign affairs.

A court's second task is to examine the federal interest at stake. The strength of that interest mitigates the degree of conflict that is necessary for preemption. The more compelling the federal interest, the less a state law must conflict with federal law or policy to be displaced. The converse is also true.

Garamendi's *dictum* effectively transmutes the categorical choice between field and conflict preemption into a balancing test that weighs the state and federal interests and the conflict between them, if any.[166] And because the preemption doctrines, in cases like *Boyle* and *Saleh*, are but judicial vehicles for policy choices about the scope of tort liability of military contractors, those policy choices, it might be said, are non-categorical, too. That is to say, a court is not faced with an "either-or" choice between a liability rule or immunity rule for contractors. In effect, there is no operative baseline. Rather, the liability-immunity question should be approached on a case-by-case basis, with attention to the state interest in regulating a contractor's conduct, the federal interest in combat operations and other "battlefield" activities, and the degree to which the former conflicts or interferes with the latter.[167] *Garamendi*'s rubric can thus guide the assessment of whether, and to what extent, state tort law is applicable to military contractors in war zones.

B. Critiquing Saleh *and Weighing the State and Federal Interests*

We now have a definitive basis for critiquing the *Saleh* decision. At a basic level, the court's preemption analysis may be faulted for the precedents it utilized. That analysis took place in two, independent parts. The court wrote "that plaintiffs' [tort] claims are preempted for either of two alternative reasons: (a) the Supreme Court's decision in *Boyle*; and (b) the Court's other preemption precedents in the national security and foreign policy field."[168] As discussed, those "other preemption precedents" were *Garamendi* and *Crosby v. National*

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[165] *Id.*

[166] *See* Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 661–62 (2007).

[167] *Cf. id.* (under *Garamendi*'s *dictum*, "[t]o determine what severity of conflict is necessary, the Court should weigh the respective state and national interests involved").

[168] Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009).

Foreign Trade Council.[169] The court did not rely on *Zschernig* and mentioned it only in passing.[170]

However, there are good reasons to think that along with *Boyle*, *Zschernig*—not *Garamendi* or *Crosby*—should have controlled the outcome of the case. The facts of *Saleh* most certainly implicated *Boyle*: the plaintiffs sought to apply state tort law to the conduct of a military contractor acting pursuant to its federal contract.[171] The facts equally implicated *Zschernig*: the defendants argued that state law was preempted, not by explicit federal law or policy, but by the "federal interest" in foreign affairs.[172]

By contrast, *Garamendi* and *Crosby* are distinguishable. Those cases involved state laws that conflicted with explicit federal law. In *Garamendi*, a California statute was in conflict with a federal executive agreement in which President Clinton agreed that a fund established by Germany would be the exclusive means of affording compensation to Holocaust victims.[173] In *Crosby*, a Massachusetts law interfered with a federal statute establishing a scheme of economic sanctions against Burma.[174]

In *Zschernig*, no such explicit federal law was drawn in view. The Oregon law was displaced because it intruded on the federal domain of foreign affairs.[175] The defendants in *Saleh* put forth a similar argument: state tort law interfered with "uniquely federal interests" in combat operations.[176]

Garamendi and *Crosby* are examples of executive branch and statutory preemption, respectively.[177] As has been noted, *Zschernig* exhibits the theory of dormant preemption, whereby a court preempts state law under its own authority, in the absence of any express federal law or policy.[178] *Boyle* is likewise an instance of dormant preemption. As the Court explained in that case:

> A few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit

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[169] *See id.* at 12–13.
[170] *See id.* at 12 (citing *Garamendi*, *Crosby*, *Zschernig*, and *Hines* for the proposition that "states . . . constitutionally and traditionally have no involvement in federal wartime policy-making").
[171] *See id.* at 2; *Boyle*, 487 U.S. at 502–03
[172] *See* Motion of Defendants CACI International Inc. to Dismiss Plaintiffs' Complaint, Ibrahim v. Titan Corp., 556 F.Supp.2d 1 (D.D.C. 2007) (No. 1:04-CV-01248-JR) ("The foreign affairs implications of suits such as this cannot be ignored . . . ."); Zschernig v. Miller, 389 U.S. 429, 436 (1968).
[173] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 406, 420 (2003).
[174] Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000).
[175] *Zschernig*, 389 U.S. at 436.
[176] *See Saleh*, 580 F.3d at 6–7.
[177] *See* BRADLEY & GOLDSMITH, *supra* note 125.
[178] Goldsmith, *supra* note 8; Young, *supra* note 121.

> statutory directive) by the courts—so-called "federal common law."[179]

Thus, in addition to *Boyle*, *Zschernig* supplies the proper paradigm for the *Saleh* case.[180] This is not to say that *Garamendi* and *Crosby* are irrelevant, only that the D.C. Circuit should have made *Zschernig* more central to its analysis. Indeed, in light of the facts of *Saleh*, *Zschernig* is even more on-point than *Boyle* in one respect. *Boyle* involved U.S. military procurement of equipment from a supply contractor[181] and thus bore only a tangential relationship to foreign affairs. In *Saleh*, by contrast, the tort claims were asserted by foreign nationals and arose out of interrogation practices in a U.S. military prison in Iraq[182]—making *Saleh*, like *Zschernig*, quintessentially a foreign affairs case.

It is of course true that the Supreme Court has not relied on *Zschernig* since it was decided.[183] However, as noted above, the Court in *Garamendi* signaled that *Zschernig* remains good law[184] and hinted at how it would apply *Zschernig*'s principles in a future case.[185] Consequently, the *Saleh* court should have given the dormant preemption analysis in *Zschernig*, as perceived through the lens of *Garamendi*, a more robust treatment.

i. The State Interests

Garamendi teaches that the selection of a conflict or field preemption paradigm need not be a "categorical choice."[186] Consequently, the D.C. Circuit in *Saleh* need not have distinguished *Boyle* so sharply as a conflict preemption case and settled on field preemption as the rule for its decision.[187] Rather, as our

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[179] Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988); *see also* Vazquez, *supra* note 142, at 1302 ("[T]he dormant foreign affairs [preemption] doctrine shares important attributes of federal common law."). The Court in *Zschernig* did not craft any particular federal common law rule in place of the Oregon statute; it merely held that the statute could not be enforced. This may be an example of what one commentator has called "null preemption," whereby state law is affirmatively displaced but no federal substitution is made. *See* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1017 (2010).

[180] *Cf.* Christina M. Manfredi, Comment, *Waiving Goodbye to Personal Jurisdiction Defenses: Why United States Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver Within the Context of International Litigation*, 58 CATH. U. L. REV. 233, 237 n.18 (2008) (citing both *Boyle* and *Zschernig* as "examples of judicial preemption through federal common law").

[181] *Boyle*, 487 U.S. at 502–03.

[182] *Saleh*, 580 F.3d at 2.

[183] *See supra* note 157.

[184] *See also* Young, *supra* note 121, at 332–33 ("*Zschernig* was . . . resurrected and greatly extended in *Garamendi*.").

[185] *See Garamendi*, 539 U.S. at 419–20 & n.11.

[186] *See id.* at 420.

[187] *See Saleh*, 580 F.3d at 6 ("[The combatant activities] exception [to the FTCA] is even broader than the discretionary function exception. In the latter situation, to find a conflict, one must discover a discrete discretionary governmental decision, which precludes suits based on that decision, but the former is more like a field preemption . . . because it casts an immunity net over any claim that *arises* out of combat activities.").

discussion of *Garamendi*'s *dictum* above illuminates, the requisite degree of conflict for preemption purposes should have been assessed only after weighing the interests at stake in the litigation. The court's might have begun by examining the state interest embodied by application of state tort law to the contractors' conduct.

In *Garamendi*, the Court wrote that if "a State has acted within what Justice Harlan [in *Zschernig*] called its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."[188] Tort law falls squarely within the "traditional competence" of the states.[189] In a case like *Saleh*, the state whose law applies is not simply "tak[ing] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility."[190] Rather, through its tort system, the state is addressing its classic concern for the punishment and deterrence of wrongdoing and compensation of victims.[191]

When it comes to the application of state tort law to U.S. military contractors, the interests of the state are manifested on two fronts. First, a state has a strong, legitimate interest in regulating the conduct of corporations that incorporate or locate in the state.[192] In *Saleh*, Virginia and California—home to the two defendant corporations—may have been keenly interested in ensuring that contractor employees were not engaged in unlawful behavior, including torture.[193]

Second, a state has an acute interest in ensuring that its residents receive compensation for wrongs suffered.[194] This concern does not implicate *Saleh*'s

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[188] *Garamendi*, 539 U.S. at 420 n.11.

[189] *See* Wyeth v. Levine, 129 S.Ct. 1187, 1194–95 (2009) (calling tort law a "field which the States have traditionally occupied" (internal quotation marks and citation omitted)); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (calling tort law an "area[] of traditional state regulation"); Alexandra Reeve, Note, *Within Reach: A New Strategy for Regulating American Corporations That Commit Human Rights Abuses Abroad*, 2008 COLUM. BUS. L. REV. 387, 418 (2008) ("Traditional tort doctrines such as assault and battery, wrongful death, or negligence present just such an example of traditional state competency.").

[190] *Garamendi*, 539 U.S. at 420 n.11.

[191] *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979); Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 835 (2008) ("[T]ort liability systems are based on a set of distinct goals, among them compensation for the injured, deterrence of disfavored behavior, and punishment of the tortfeasor." (citing GUIDO CALABRESI, THE COST OF ACCIDENTS (1970)).

[192] *See Saleh*, 580 F.3d at 30–31 (Garland, J., dissenting) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f (1971) ("[A] person is most closely related to the state of his domicil[e], and this state has jurisdiction to apply its local law to determine certain of his interests even when he is outside its territory. It may, for example, . . . forbid him to do certain things abroad.")); Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 499 (2007) ("States traditionally can regulate the conduct of corporations within their borders[.]").

[193] *See Saleh*, 580 F.3d at 30–31 (Garland, J., dissenting).

[194] *Id.* at 31.

facts since the plaintiff-victims were Iraqi nationals.[195] Nonetheless, that a state resident may be subject to a military contractor's tortious conduct while in a war zone is not only conceivable—it is real. Consider the following, real-life scenarios:

- Employees of a contractor, U.S. citizens hailing from a variety of states, are providing convoy services in Iraq and are killed when their convoy—a decoy for another convoy delivering fuel—comes under attack. The employees' survivors bring tort claims against the contractor on the ground that it placed the employees at a substantial risk of harm by failing to adequately protect the decoy convoy.[196]

- A U.S. soldier and resident of Pennsylvania is electrocuted while showering at a military base in Iraq. The soldier's estate alleges that a contractor responsible for maintenance at the base negligently caused the death.[197]

- A U.S. soldier and resident of Georgia is permanently disabled after being ejected from a truck driven by the employee of a military contractor in Iraq. The soldier's wife seeks relief, alleging that the contractor employee was driving too fast and negligently failed to maintain control of the vehicle.[198]

- An employee of a civilian contractor in Iraq, a resident of Alabama, is a passenger in a convoy vehicle operated by a military contractor. The civilian is severely injured when the vehicle's driver swerves to avoid a dog in the road, causing the vehicle to flip and burst into flames. He and his wife bring tort claims against the contractor.[199]

In each of these cases, the state is undoubtedly concerned with providing compensation to its residents who have suffered harm, whether they be employees of the contractor itself, soldiers, or otherwise. Indeed, some courts have explicitly taken the victims' identity into account in holding that state tort law is not preempted.[200]

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[195] *See id.* at 2 (majority opinion).
[196] *See* Fisher v. Halliburton, 390 F. Supp. 2d 610, 612 (S.D. Tex. 2005).
[197] *See* Harris v. Kellogg, Brown & Root Servs., Inc., 618 F. Supp. 2d 400, 403 (W.D. Pa. 2009).
[198] *See* Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1275–79 (11th Cir. 2009).
[199] *See* Potts v. Dyncorp Int'l LLC, 465 F. Supp. 2d 1245, 1247–48 (M.D. Ala. 2006).
[200] *See* Smith v. Halliburton Co., No. H-06-0462, 2006 WL 1342823, at *5 (S.D. Tex. May 16, 2006) (distinguishing prior precedent finding preemption of state law because plaintiffs in present case, unlike in prior case, were U.S. citizens); Carmichael v. Kellogg, Brown & Root Servs., Inc., 450 F. Supp. 2d 1373, (N.D. Ga. 2006) (same).

ii. The Federal Interests

Garamendi's rubric also directs a court to examine the federal interests at stake in a preemption analysis. With respect to military contractors in war zones, two discrete federal interests are in play, and they work at cross-purposes to one another. First is the paramount and exclusive federal interest in conducting war. The states simply have no role to play here. Article I, section 10 of the Constitution states that absent congressional consent, "[n]o State shall . . . keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[201] That the states surrendered their sovereign war-making powers at the Constitutional Convention has long been recognized.[202] It follows that state attempts to regulate the federal government's prosecution of war cannot stand.[203]

On the other hand, the federal government also has an interest in placing fetters on the conduct of the contractors it hires. It may perceive state tort law, at least in some instances, as a ready-made mechanism for ensuring that contractors behave themselves.[204] In 2008, the Department of Defense issued regulations with respect to military contractors that contemplate this very possibility:

> Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties. Contractors are equally or more responsible to research host nation laws and proposed operating environments and to negotiate and price the terms of each contract effectively. Accordingly, [these regulations] retain[] the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors.[205]

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[201] U.S. CONST. art. I, § 10.

[202] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382 (1821) ("The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States . . . .").

[203] *See* Major Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in* Userra *Enforcement Actions is a Valid Exercise of the Congressional War Powers*, 195 MIL. L. REV. 91, 112 (2008) ("Federal courts have long recognized that statutes passed by Congress pursuant to the War Powers clauses are qualitatively different than those passed pursuant to its other enumerated powers. . . . [T]he very nature of the sovereign federal government is that it can wage war, and raise and support armies to do that, at the expense of the states, if such governmental rights are at cross purposes.").

[204] *See, e.g.*, Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700, 722–23 (E.D. Va. 2009) ("[P]ermitting this litigation against [a military contractor] to go forward actually advances federal interests (and state interests, as well) because the threat of tort liability creates incentives for government contractors engaged in service contracts at all levels of government to comply with their contractual obligations to screen, train and manage employees.").

[205] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764, 16768 (Mar. 31, 2008).

The preamble continues, arguing for a narrow application of *Boyle*—specifically, that *Boyle* does not apply to service contracts "because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors."[206]

Of course, executive policy favoring application of state tort law to military contractors is not alone sufficient to save state law from preemption. Recall that in *Zschernig*, the executive branch made known to the Court that it had no objections to the Oregon law at issue and that the law did not interfere with federal foreign affairs prerogatives.[207] The Court, however, preempted the law on its own authority because it amounted to impermissible involvement of the state in a foreign affairs, a matter exclusively within the federal purview.[208] State tort law as applied to military contractors could suffer the same fate on the ground that it constitutes state involvement in the conduct of war. Nonetheless, that the Department of Defense not only *permits* application of state tort law to military contractors but appears actually to *welcome* it is an important fact. It makes the relationship between federal and state interests more harmonious and calls for a stronger conflict before preemption is triggered.[209]

iii. The Role of Contractor Culpability

A final factor to be weighed in the state-federal balance is the contractor's culpability. Consider three degrees of culpability: negligence, recklessness, and willful misconduct. It is fair to say that the degree of culpability will vary (1) directly with a state's interest in applying its tort law and (2) inversely with the federal interest in combat.

When the D.C. Circuit wrote in *Saleh* that tort law is "singularly out of place in combat situations, where risk-taking is the rule,"[210] it appears to have had negligence, and perhaps recklessness, in mind. By all means, the court is right. Concepts of "reasonableness" in the relative tranquility of American suburbia do not translate well to the war-torn streets of Baghdad. For example, driving that may qualify as unnecessarily risky on a U.S. highway may be eminently reasonable when transporting military supplies on a stretch of Iraqi road known

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[206] *Id.*; *see also id.* ("Asking a contractor to ensure its employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions. . . . [T]o the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, [these regulations] should not send a signal that would invite courts to shift the risk of loss to innocent third parties. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions.").

[207] Zschernig v. Miller, 389 U.S. 429, 434 (1968).

[208] *Id.* at 435–36.

[209] In dissent in *Saleh*, Judge Garland argued that it was the *majority's opinion* that interfered with Executive Branch wartime policymaking. Saleh v. Titan Corp., 580 F.3d 1, 29 (Garland, J., dissenting).

[210] *Id.* at 7 (majority opinion).

for insurgent ambushes.[211] Tort law concepts of negligence and even recklessness are simply inapplicable in these situations.

The federal interest in combat bolsters this conclusion. Successful prosecution of war affirmatively requires risk-taking.[212] There is perhaps no surer path to defeat than to require military commanders, soldiers, and contractors to act with "ordinary prudence" in the midst of the chaos and risk of war.[213] Consider, for example, the Eleventh Circuit's description of military decision-making with respect to certain fuel convoys in Iraq. The case involved tort claims against a military contractor for negligently operating one of the convoy vehicles, resulting in the death of the plaintiff's husband:[214]

> The tragic accident at the center of this case occurred on May 22, 2004 during a military operation in Iraq. On that day, a military convoy of vehicles had been organized to transport . . . fuel from Camp Anaconda, a military base near the town of Balad, Iraq, . . . to Al Asad, the second largest American air base in Iraq . . . . The fuel was carried in tanker trucks operated by [a military contractor].
>
> These convoy missions were highly dangerous: they unavoidably involved traveling through war zones, frequently exposing them to insurgent attacks in the form of improvised explosive devices ("IEDs"), small-arms fire, as well as shelling and rocket attacks. . . . Indeed, in the two months prior to the May 22 convoy, insurgent attacks had become so severe that convoy missions had been temporarily suspended. . . . As a result, military bases faced fuel shortages, requiring many of them to begin depleting their reserves. . . . In light of the urgent need for fuel, the military decided to proceed with the convoy despite the many risks.[215]

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[211] *Cf.* Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1289 (11th Cir. 2009) (In determining whether contractor employee drove convoy vehicle negligently on dangerous stretch of highway in Iraq, "the question . . . would not be what a reasonable driver would have done, or even what a reasonable driver in a 'less than hospitable environment' would have done. . . . We do not face the question of whether the defendants drove a fuel truck unsafely, say, on Interstate I-95 between Miami, Florida and Savannah, Georgia. Simply put, we have no readily available judicial standard with which to answer this question." (citation and internal quotation marks omitted)).

[212] *Saleh*, 580 F.3d at 7; *see also* Kingsley R. Browne, *Women at War*, 49 BUFF. L. REV. 51, 111–15 (2001) (describing traits of courage, aggressiveness, and risk-taking as critical to battlefield success).

[213] Browne, *supra* note 213; *see* Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (ordinary tort concepts inapplicable to battlefield situations). *But cf.* Potts v. Dyncorp Int'l LLC, 465 F. Supp. 2d 1245, 1253 (M.D. Ala. 2006) (court could decide whether driver, an employee of a military contractor, acted negligently or wantonly because driver may have violated contractor's internal policies).

[214] *Id.* at 1275.

[215] *Id.* at 1275–76.

Clearly, then, the logic of war is not the logic of tort. In this kind of battlefield scenario, imposition of state tort law undoubtedly frustrates the federal interest in successful combat.[216]

These principles, however, are not all-encompassing. The more reckless or willful a contractor's misconduct, the more likely it is that the contractor is violating federal law or policy. Indeed, egregious offenses by contractor employees may impede the federal government's war effort because of the severely negative image of the American government and military that results.[217]

For example, in the so-called "Nisur Square Incident" in September 2007, employees of Blackwater Worldwide, a private security contractor of the U.S. government in Iraq, allegedly fired indiscriminately on unarmed civilians in a crowded traffic circle in downtown Baghdad, killing fourteen persons and wounding twenty others.[218] The violence triggered immediate investigations by the U.S. State Department, the U.S. military, the Iraqi government, and the media.[219] It "frayed relations between the Iraqi government and the Bush administration and put a spotlight on the United States' growing reliance on private security contractors in war zones."[220]

Where contractor misconduct is deliberate, as it allegedly was in the Nisur Square Incident, and particularly egregious (amounting, for example, to a violation of the laws of war), the federal interest in the successful prosecution of war is significantly lessened. Rather, the interest of the federal government lies in regulating or punishing the misconduct. For this purpose, it might pursue criminal charges against the contractor,[221] but, as discussed above, might also perceive state tort law as a useful corrective. Moreover, the more deliberate and egregious the misconduct, the stronger is the interest of the contractor's home state in punishing the wrongdoing and deterring its repetition in the future.

iv. Summary

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[216] Davidson, *supra* note 191 (Imposing tort liability on military contractors "might discourage beneficial behavior . . . . The costs of liability might make military service contractors overly cautious in an environment where quick decision making could mean the difference between life and death or a mission's success or failure.")

[217] *See* Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 23–24 (Abuses by contractors at Abu Ghraib "'aided the insurgency [in Iraq] by alienating large segments of the Iraqi population.' They also alienated world public opinion, boxing the United States' effort in Iraq into a unilateral status that seemed increasingly condemned and isolated." (quoting THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 200 (2006)).

[218] *See* United States v. Slough, 677 F. Supp. 2d 112, 116 (D.D.C. 2009).

[219] *Id.*

[220] Charlie Savage, *Judge Drops Charges From Blackwater Deaths in Iraq*, N.Y. TIMES, Dec. 31, 2009, at A1.

[221] *See Slough*, 677 F. Supp. 2d.

To sum up, where contractor misconduct is alleged, a state's interest in imposing its tort law is twofold: regulating the conduct of contractors that incorporate or locate in the state and assuring compensation for resident victims. Of course, the federal interest in successful prosecution of war is plenary, and the states play no role in this regard. However, military success is as dependent on the "soft power" of reputation and image as it is on the "hard power" of military assets. Because state law duties of care can be mechanisms for controlling contractor conduct and for deterring and punishing wrongdoing, the federal government may see imposition of state tort law as consonant with its wartime interests. Finally, the culpability of a contractor's behavior is relevant: the more culpable the behavior—the more reckless or willful it is—the greater the state's interest in punishment and deterrence and the more attenuated the federal interest in military success.

How does *Saleh* measure up? As noted, states like Virginia and California (home to the two defendant contractors) presumably care about how their corporate residents conduct themselves, whether at home or abroad. On the other hand, no state residents suffered injury in *Saleh*. The plaintiffs were Iraqi nationals, significantly lessening the state interest in compensation of victims. Consequently, to trigger preemption of state tort law, the conflict between federal and state interests need not have been as sharp. Contrast *Saleh*'s facts to the situations enumerated above, where the U.S. citizenship of the tort victims militated strongly against preemption.[222]

The federal interest in military victory need not be restated. It was present in *Saleh*, as it is in any case involving contractors in war zones, and the court accorded it due recognition.[223] The court did not, however, give any consideration to the federal interest in allowing state law duties of care to regulate contractor wrongdoing. The dissent made this point strongly:

> The position [the Department of Defense] took in its rulemaking on contractor liability may reflect the government's general view that permitting contractor liability will advance, not impede, U.S. foreign policy . . . . The government may have refrained from participating in the two cases now before us for the same reason. . . . [Its] failure to defend the contractors may reflect the Executive Branch's view that the country's interests are better served by demonstrating that "people will be held to account according to our laws." And the Executive may believe that one way to show that "people will be held to account" is to permit this country's legal system to take its ordinary course and provide a remedy for those who were wrongfully injured.[224]

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[222] *See supra* notes 194–196 and accompanying text.
[223] *Saleh*, 580 F.3d at 7–8.
[224] *Id.* at 28 (Garland, J., dissenting) (citations and footnote omitted).

Finally, as to contractor culpability, *Saleh* involved conduct that was anything but negligent. The horrendous tales of sadistic abuse and torture at Abu Ghraib, where Titan Corporation and CACI provided translation and interrogation services, cannot be described as anything but deliberate wrongdoing. Federal officials at the highest levels, including then-President George W. Bush, condemned the abuse in the strongest of terms.[225] This was not a situation in which application of state tort law would have interfered with federal wartime policy. To the contrary, state tort law might have afforded a remedy for deplorable conduct that in fact *violated* federal policy and was denounced as un-American.[226] State and federal law were simply not in conflict on this front.

V. CONCLUSION

As civil suits against private military contractors continue to wind their way through the federal courts, contractors, like those in the *Saleh* case, will no doubt continue to invoke *Boyle* in their defense. In their preemption analyses, courts should be mindful of the underlying policy choices that the preemption paradigms represent. This will enable them to approach the question of contractor liability in a more straightforward, pragmatic way.

My analysis in this paper can be recapped as follows. First, I pointed out that, where litigants seek to apply state tort law to private military contractors, the paradigms of conflict preemption and field preemption correspond to a "liability rule" and an "immunity rule" for contractor conduct. Through the lens of *Zschernig v. Miller* (an example of "dormant foreign affairs preemption"), I then contrasted the Supreme Court's decision in *Boyle* with the D.C. Circuit's recent decision in *Saleh*. *Boyle*, I argued, is a conflict-preemption, liability-rule case. *Saleh* is at the opposite end of the spectrum—a field-preemption, immunity-rule case.

With that contrast drawn, my second move was to suggest that courts tasked with delineating the scope of liability of military contractors in war zones should be more straightforward in assessing the balance of interests at stake. Recent guidance from the Supreme Court in *Garamendi* directs courts to consider the interests of both the states and the federal government. For military contractor cases, I set forth what some of those interests might be and how they interact with one another.

Through its tort system, a state has strong interests in punishing and deterring wrongdoing by resident corporations and providing compensation to resident victims. On the other hand, the federal government has a paramount and exclusive interest in the conduct of war; of course, it may not view state tort law as being in conflict with wartime objectives, at least in some circumstances. In

[225] *See id.* at 17–18 (citing sources).
[226] *See id.* at 17.

weighing these interests, the culpability of a contractor or its employees should be considered. Imposing liability for mere negligence by contractors may frustrate the federal interest in prosecuting a successful war, but the more reckless or deliberate the wrongdoing, the greater role state tort law has to play and the more attenuated the federal interest in wartime success.

None of this is to say that the D.C. Circuit got it wrong in *Saleh*. Nor, for that matter, is it to say that the court got it right. My goal in this paper has been to critique the court's analysis and to suggest a different analytical paradigm for determining the scope of liability for war-zone contractors. At bottom, the court in *Saleh* might have approached the question of contractor liability in a more pragmatic way, weighing the state and federal interests that bore on the case. This would have motivated a more narrow decision, one that left a future court free to strike the balance differently.