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Square Peg In A Round Hole: Government Contractor Battlefield
Tort Liability and the Political Question Doctrine

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I. INTRODUCTION

As United States military involvement in Iraq and Afghanistan enters its sixth and seventh year respectively, there are as many or possibly more contract employees than uniformed service members in the two combat theatres. This reliance on contractors is nothing new; George Washington’s Continental Army utilized contractors. Yet, while not new, the current utilization of contractors is both quantitatively and qualitatively different than in previous military operations. In odd contrast to the U.S. governments’ seeming embrace of contractors,

1 Reinforcing the adage that “there are lies, damn lies, and statistics,” personnel statistics for both contract and military personnel involved in the conflicts in Iraq and Afghanistan widely vary. See Mark Twain, CHAPTERS FROM MY AUTOBIOGRAPHY, (North American Review 186 1907) available at http://www.gutenberg.org/ebooks/19987 (Twain attributes the phrase to Disraeli but the exact origins are unclear). The Congressional Budget Office reported in August 2008 that “as of early 2008 at least 190,000 contractor personnel, including subcontractors, were working on U.S. funded contracts in the Iraq theatre.” CONGRESSIONAL BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ, 1 (Aug. 2008) [hereinafter CBO]. The CBO defined the Iraq theatre as including Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey, and the United Arab Emirates. CBO at 1 fn. 1. In October 2008, the Government Accounting Office reported that as of January 2008, the Department of Defense alone employed 200,111 contract personnel in Iraq and Afghanistan. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING DO D, STATE AND USAID CONTRACTS AND CONTRACT PERSONNEL IN IRAQ AND AFGHANISTAN, 25 (Oct. 2008) [hereinafter GAO]. For the variations in reported military personnel numbers, a Congressional Research Service report issued in October 2008 describes some of the different methods used to calculate troop strength. CONGRESSIONAL RESEARCH SERVICE, RL33110, THE COST OF IRAQ, AFGHANISTAN AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, 36-37 (Oct. 2008) [hereinafter CRS]. Whether or not to include military personnel deployed to the region but not specifically to Iraq and Afghanistan as well as personnel training in the United States to deploy are two factors that completely alter the statistics. The CRS uses the example that as of 1 October 2006, DoD listed 139,000 military personnel in Iraq and another 19,000 in Afghanistan, for a total of 158,000 “boots on the ground.” Id. at 36-37. Including military deployed to the respective regions and activated reservists brings the total to 297,000 military personnel. Id. at 37.


3 In terms of the qualitative difference, see JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTICAL SUPPORT OF JOINT OPERATIONS V-1 (18 Apr. 2008) (describing DoD’s increasing reliance on contractors to perform a wide range of functions and tasks); U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD para. 1-2 (3 Jan. 2003) (“When considering contractor support, it should be understood that it is more than just logistics; it spans the spectrum of combat support (CS) and combat service support (CSS) functions.”). In terms of the quantitative difference, the CBO reports that the current ratio of contractor to military personnel in Iraq is “at least 2.5 times higher than the ratio during any other major U.S. conflict….” CBO at 1. The CBO claims that the ratio of contractors to military personnel in Iraq is 1 to 1 and that while that ratio is “roughly comparable” to that during U.S. military operations in the Balkans, “those operations involved no more than 20,000 U.S. military personnel at any time, about one-tenth of the total in the Iraq theatre as of December 2007.” Id. at 1, 12. The CBO report provides an informative table which lists an estimated ratio of contractor to military personnel. Id. at 13. Other than the Korean conflict, in which the ratio was 1 contractor to every 2.5 military personnel, and the Balkan...
according to an October 2008 Government Accountability Office report, the Department of State (DoS) and the United States Agency for International Development (USAID) were unable to provide the number or value of subcontracts they awarded or even the number of contractors they employ in Iraq and Afghanistan. Possibly even more striking, DoS, USAID, and the Department of Defense (DoD) are not tracking the number of contract employees wounded or killed in Iraq and Afghanistan.

The incongruous combination of necessity and apathy arguably defines, at least in part, the relationship between the United States government and the contractors it employs. It also serves as backdrop for a host of civil lawsuits filed against those contractors stemming from work done at the behest of the U.S. government. The lawsuits stem from alleged wrongs in both Iraq and Afghanistan and include plaintiffs ranging from local nationals suing contract

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4 GAO, supra note 1, at 30, 37.

5 Id. at 33, 37.

6 Id. at 27-28, 33, and 38.


interrogators and interpreters, to contract employees\(^9\) suing another contractor following insurgent attacks, to U.S. service members suing contractors after vehicle and airplane crashes.\(^{10}\) The majority of the lawsuits involve tort claims, many of which on their face do not conjure up images of a constitutional power struggle\(^{11}\) but in at least fifteen cases thus far contractor defendants have asserted the political question doctrine as a defense.\(^{12}\) The political question

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\(^9\) Employee suits include: Smith v. Halliburton, 2006 WL 2521326 (S.D. Tex.) (estate of a contract employee filed suit after a suicide bomber detonated a suicide vest in a KBR operated dining facility on a U.S. military Forward Operating Base in Iraq); Woodson v. Halliburton, 2006 WL 2796228 (S.D. Tex.) (suit filed by former KBR employee stemming from an insurgent act on a supply convoy in which plaintiff was a driver); Fischer v. Halliburton, 454 F. Supp. 2d 637 (S.D. Tex. 2005), Lane v. Halliburton, 2006 WL 2396249 (S.D. Tex.); Smith Idol v. Halliburton, 2006 WL 2927685 (S.D. Tex.) (plaintiffs or their family members were among 18 Logistics Civil Augmentation Program (LOGCAP) drivers killed, missing, or injured following an April 2004 attack on a fuel convoy in Iraq).

\(^{10}\) Servicemember initiated suits include: McMahon v. Presidential Airways, 502 F.3d 1331 (9th Cir. 2007) (suit by the estates of three U.S. servicemembers killed when the contractor-operated plane in which they were passengers crashed on a November 2004 flight in Afghanistan); Complaint, Harris v. KBR, No. 08-0563 (W.D. Penn. 22 Apr. 2008) (wrongful death suit by the survivors of an Army Non Commissioned Officer electrocuted in January 2008 while showering at a facility in Iraq for which KBR was allegedly responsible for maintaining.); Complaint, Bucklin v. Halliburton, No. 07-1522 (S.D. Tex. 7 May 2007) (wrongful death suit by the estate of Army Corporal killed in May 2005 by a cable being used to pull a stuck KBR vehicle); Baragona v. Kuwait Gulf Link Transport Co., 2007 WL 4125734 (N.D. Ga.) (wrongful death suit filed by the survivors of a U.S. Army officer killed when his military vehicle was struck by a Kuwaiti Gulf Link Transport Company vehicle in May 2005); Complaint, Monroe v. Erinys, No. 07-3528 (S.D. Tex. 10 Oct. 2007) (wrongful death suit by the father of a U.S. Army NCO killed when his vehicle was struck by one driven by a British private security company); Carmichael v. KBR, 450 F. Supp. 2d 1373 (N.D. Ala. 2006) (guardian of Army Sergeant filed suit for injuries he suffered while performing security duty for a KBR fuel tanker which overturned) [hereinafter Carmichael I]; Whitaker v. KBR, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (suit by family of Army Soldier who drowned in the Tigris river in Iraq in April 2004 after he fell in the river following a traffic accident involving KBR vehicles and drivers); Lessin v. KBR, 2006 WL 3940556 (S.D. Tex.) (suit by U.S. Army soldier injured by KBR convoy vehicle); Potts v. DynCorp International, 465 F. Supp. 2d 1245 (M.D. Ala. 2006) (suit by U.S. Soldier injured by vehicle driven by contractor employee); Complaint, Webster v. Halliburton, No. 05-3030 (S.D. Tex. 26 Aug. 2005) (wrongful death suit by the estate of Army non-commissioned officer killed when his military vehicles was struck by a KBR vehicle in Iraq). See also Ben Davidson, Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors, 37 PUB. CONT. L.J. 803 (2008).

\(^{11}\) Which is not to suggest that a constitutional issue is required \textit{per se} for the application of the political question doctrine. Indeed, as Professor Henkin stated, “presumably, courts may, or must abstain on a ‘political question’ in any kind of case, not only where constitutional issues are raised.” Louis Henkin, Foreign Affairs and the Constitution, 145 (Oxford University Press 2d ed. 1996).

\(^{12}\) See Al-Shimari, supra note 7; Ibrahim, supra note 7; Saleh, supra note 7; Fisher, supra note 8; Lane, supra note 8; Smith, supra note 8; Smith-Idol, supra note 8; Woodson, supra note 8; Bucklin, supra note 9; Carmichael, supra note 9; Lessin, supra note 9; McMahon, supra note 9; Potts, supra note 9; Webster, supra note 9; Whitaker, supra note 9. Contractors successfully employed the political question doctrine in Carmichael, Fisher, Lane, Smith, Smith-Idol, Whitaker, and Woodson, although the U.S. Court of Appeals for the Fifth Circuit reversed the decision in Fisher, Smith-Idol and Lane.
doctrine “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch.” The political question doctrine addresses whether the judiciary should review government action or decisions and yet, in but one example of the confusing application of the doctrine to battlefield related litigation, contractors are the ones asserting the defense in cases where the government is not a named party and the government has yet to intervene or submit an amicus brief in any of the cases. The political question doctrine traces back to Marbury v. Madison. Despite its longevity the doctrine has been subject to various interpretations and inconsistently applied, yielding more confusion than clarity. There have even been periods in which commentators questioned whether the doctrine still existed. While the present use of the doctrine proves its existence, the confused


16 Justice Brennan, author of the seminal Baker v. Carr opinion, acknowledged that the political question doctrine was comprised of “attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness.” Baker v. Carr, 369 U.S. 186, 210 (1962).

17 See, e.g., Louis Henkin, Is There a Political Question Doctrine? 85 YALE L.J. 597 (1976); Linda Sandstrom Simard, Standing Alone: Do We Still Need a Political Question Doctrine? 100 DICK. L. REV. 303 (1996). On perhaps the flip side of Henkin and Simard questioning the existence of the political question doctrine is Professor Chemerinksy, who acknowledges the doctrine’s existence, but labels it “the most confusing of the justiciability doctrines.” ERWIN CHEMERINSKY, FEDERAL JURISDICTION 142 (Little, Brown and Co. 2d ed. 1994). According to Professor Chemerinksy, the confusion begins with the doctrine’s name as the federal courts deal with political issues all of the time. Id. at 143. The confusion is amplified by the very different definitions of the doctrine emanating from the Supreme Court over time. Id. “Finally, and perhaps most importantly, the political question doctrine is confusing because of the Court’s failure to articulate useful criteria for deciding what subject matter presents a nonjusticiable political question.” Id. at 144. In similar fashion, Professor Charles Wright claimed that “[n]o branch of the law of justiciability is in such disarray as the doctrine of the ‘political question.’” CHARLES WRIGHT, THE LAW OF FEDERAL COURTS 74 (4th ed. 1983). According to Professor Wright, ”there is no workable definition of characteristics that distinguish political questions from justiciable questions” and the doctrine is “more amenable to description by infinite itemization than by generalization.” Id. at 75.
application in the contractor cases analyzed in this article, and the correspondingly inconsistent
decisions which follow, raise questions of the appropriateness of applying the doctrine in
battlefield-related contractor tort litigation.

II. OVERVIEW

This article will examine the assertion of the political question doctrine as a defense in tort
litigation against government contractors stemming from the conflicts in Iraq and Afghanistan.
In the third section, the article will review the origins and evolution of the political question
doctrine and demonstrate the difficulties presented when the doctrine is applied to the military.
The fourth section explores how those difficulties manifest themselves in the varied analyses and
outcomes in current contractor litigation involving the doctrine through a series of case
comparisons. The fifth section examines the government’s role in creating some of the confusion
involved in war time contractor tort liability and the political question doctrine and the
ramifications of the government’s conspicuous silence. In the sixth section, the article assesses
the cumulative confusion from, and resulting inconsistent application of, the political question
doctrine and proposes a methodology to bring clarity to future decisions. Ultimately, the article
concludes that absent changes in the government’s attitude towards the litigation and a more
rigid analytical approach by the judiciary, the confusion surrounding the political question
doctrine and the inconsistency of its application will only increase.

III. THE POLITICAL QUESTION DOCTRINE

A. Origin and Evolution
The political question doctrine dates back to 1803 and Chief Justice John Marshall’s defining opinion in *Marbury v. Madison*, which established the doctrine of constitutional judicial review in the United States.\(^{18}\) Chief Justice Marshall explained that it is “emphatically the province and duty of the judicial department to say what the law is.”\(^{19}\) In *Marbury*, Justice Marshall outlined the delicate balance “that for every violation of a vested right, there should be a legal remedy” but that “not all disputes are susceptible to judicial resolution.”\(^{20}\) Under Marshall’s construct, some government actions are political acts that are not examinable in a court of justice.\(^{21}\) To what extent and under what circumstances the conduct of military contractors equates to or implicates the government action Marshall spoke of is a central issue in the present day litigation.

In the early twentieth century, in *Oetjen v. Cent. Leather Co*, the Supreme Court appeared to shift from Marshall’s interpretation that some government actions are political and not reviewable to a categorical limitation on judicial review.\(^{22}\) In the 1950 case, *Johnson v. Eisentrager*, the Court later continued this approach to the question of the executive branch deploying the military, raised in 1950 in *Johnson v. Eisentrager*.\(^{23}\)

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18 See *Marbury*, supra note 14.

19 *Id.* at 177.


21 *Marbury*, supra note 14, at 164-165. (emphasis added). "Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 165-166.

22 *Oetjen v. Cent. Leather Co.,* 246 U.S. 297, 302 (1918) (stating that “[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative - ‘the political’- Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”) (emphasis added).

23 *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). Eisentrager addressed whether German nationals captured and tried by military commission in China by the U.S. Army after the end of World War II were entitled to file a writ of habeas corpus petition in a U.S. court. While the case focuses on the applicability of the writ, one of the German
The Court signaled its willingness to return to, and reexamine, the field in 1961 in what is considered the cornerstone for the modern interpretation and application of the political question doctrine, *Baker v. Carr.* In *Baker*, the Court reaffirmed itself as “the ultimate interpreter of the Constitution” and thus responsible for the “delicate exercise of constitutional interpretation” which the Court explained amount to “[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed.”

The Court outlined the challenges the field itself poses, that “not only does resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand a single-voiced statement of the Government's views.” But the Court turned away from the limited, if any, judicial review of foreign policy espoused by *Oetjen* and *Eisentrager*, announcing that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”

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25 *Id.* at 211.

26 *Id.*

27 See *Oetjen, supra* note 21.

28 See *Eisentrager, supra* note 22.

29 *Baker, supra* note 15, at 211.
The Supreme Court acknowledged that “[m]uch confusion results from the capacity of the political question label to obscure the need for case-by-case inquiry”\textsuperscript{30} but stressed that making the determination that the issues raised by a case were beyond judicial cognizance required a discriminating case specific analysis.\textsuperscript{31} In \textit{Baker} the Court attempted to define the parameters for cases and controversies the Court would, and would not, examine.\textsuperscript{32} The Court listed “several formulations,” which “vary slightly according to the setting in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.”\textsuperscript{33} The \textit{Baker} formulations were:

\begin{quote}
[1] [A] textually demonstrable constitutional commitment of the issues to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestionable adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{34}
\end{quote}

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{See Baker, supra} note 15.

\textsuperscript{33} \textit{Id.} at 217.

\textsuperscript{34} \textit{Id.} at 217. More recently, the Court described the six \textit{Baker} “formulations” as “six independent tests.” \textit{Vieth} v. \textit{Jubelirer}, 541 U.S. 267, 277 (2004). Accordingly, hereinafter they are referred to as tests. Additionally, while the \textit{Baker} Court merely listed the tests, the \textit{Vieth} Court, while maintaining the same order as in \textit{Baker}, numbered the tests and explained that “[t]hese tests are probably listed in descending order of both importance and certainty.” \textit{Vieth} at 278. This approach was arguably the logical result of how the Court had previously considered and weighted the tests. For example, in \textit{Powell} v. \textit{McCormack}, the Court conducts an extensive analysis of the first test and then consolidates the analysis of the remaining five tests in two paragraphs. \textit{Powell} v. \textit{McCormack}, 395 U.S. 486, 548-549 (1969). Notwithstanding the number and labeling of the tests as independent, discrete analysis of an individual test seems unlikely. \textit{See Nixon} v. \textit{United States}, 506 U.S. 224, 228-29 (1993) (explaining the connection between what is now referred to as the first and second \textit{Baker} tests). Arguably, that the \textit{Baker} tests do not lend themselves to discrete analysis may suggest that the nature of the inquiry is not one well suited for the judiciary, or at least not using the \textit{Baker} tests.
The *Baker* framework envisioned “a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”\(^{35}\) Dismissal on the basis of the political question doctrine is appropriate only if one of these tests is "inextricable" from the case.\(^ {36}\)

The Court stated it was impossible to resolve political question cases through “semantic cataloguing”\(^ {37}\) yet the manner in which the Court reached its decision in *Baker* was “to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine.”\(^ {38}\) The difference between the prohibited semantic cataloging and the permissible inference from analytical threads seems illusory. Indeed a judicial inquiry to identify representative cases would seem to quickly devolve into semantic cataloging, as would the sum total of the analytical threads gleaned from analyzing such cases. Perhaps given that seemingly internal contradiction in *Baker* it should not come as a surprise that the Court in subsequent cases found analytical threads which do lend themselves to cataloguing, albeit in limited areas.\(^ {39}\)

While most cases involving foreign affairs defy clean application of the *Baker* tests, *Baker* remains the starting point for assessing the application of the political question doctrine to

\(^{35}\) *Baker*, *supra* note 15, at 211-212.

\(^{36}\) *Id.* at 217.

\(^{37}\) *Id.*

\(^{38}\) *Id.* at 211.

\(^{39}\) See, e.g., Japan Whaling Ass'n, *supra* note 12 (determining that interpretation of statutes involving foreign affairs is a justiciability question) and Goldwater v. Carter, 444 U.S. 996 (1979) (concluding that a challenge to the President's unilateral termination of a treaty presents a political question).
the executive branch’s employment of the military. REVIEWING THE DIFFICULTY IN APPLYING THE POLITICAL QUESTION DOCTRINE IN *GILLIGAN V. MORGAN*, A CASE INVOLVING MILITARY FUNCTIONS, SETS THE STAGE FOR THE INCREASED DIFFICULTY AND RESULTING CONFUSION WHEN THE DOCTRINE IS APPLIED TO CASES INVOLVING MILITARY FUNCTIONS CONTRACTED OUT BY THE GOVERNMENT IN IRAQ AND AFGHANISTAN.

**B. Political Question Doctrine Applied to Functions Performed by the Military**

Those looking for a discernible pattern of how courts at all levels interpret and apply the *Baker* tests are likely to be disappointed if not confused. Illustrative of the difficulties that political question cases dealing with the military present is the Supreme Court case *Gilligan v. Morgan*, which stemmed from an incident at Kent State University where members of the Ohio National Guard wounded and killed several students in 1970. The Court in *Gilligan* reviewed a challenge to military readiness decisions made by the Ohio National Guard. By the time oral argument was held several underlying facts had changed such that the case was arguably moot. None of the respondents were still students at Kent State, individually named defendants were no longer in positions of authority over the Ohio National Guard, and the Ohio National Guard had already substantially changed the rules for the use of force from those in place at the time of the shooting.

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40 See *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (stating that just because [the political question] doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise.”); *Davis v. Bandemer*, 478 U.S. 109, 123-27 (1986) (reviewing the *Baker* formulations and reaffirming the Court’s commitment to *Baker* while “declining Justice O’Connor’s implicit invitation to rethink [the *Baker*] approach.”).

41 See *Gilligan*, supra note 40.

42 *Id.* at 10.

43 *Id.* at 12-13. (Blackmun, J. concurring) (stating that “[w]ere it not for the continuing surveillance respondents seek, I would have little difficulty concluding that the controversy is now moot.”).

44 *Id.* at 1.
The district court dismissed the case for failing to state a claim upon which relief could
be granted, but the U.S. Court of Appeals for the Sixth Circuit reversed and remanded the case to
the district court to answer the question of whether there was a pattern of training, weaponry
and/or orders within the Ohio National Guard which made the use of lethal force at Kent State
inevitable.45 The Supreme Court in turn addressed the appropriateness of judicial involvement
with the underlying issues of that question and the requested injunctive relief, which sought to
limit the Governor’s use of the National Guard.46 The Supreme Court cited with approval to
Judge Calebrezzi’s dissent from the Sixth Circuit’s ruling.47 In his dissent, Judge Calebrezzi
explained how judicial regulation of National Guard training and weaponry was clearly
precluded.48

One interpretation of Gilligan may be that the majority looked past the mootness issue in
order to provide guidance on the parameters and limitations of judicial review of the military:

45 Id.

46 See Gilligan, supra note 40.

47 Id. at 8.

48 Id. The Court quoted from Judge Calebrezzi’s dissent:

I believe that the congressional and executive authority to prescribe and regulate the training and
weaponry of the National Guard, as set forth above, clearly precludes any form of judicial
regulation of the same matters. I can envision no form of judicial relief which, if directed at the
training and weaponry of the National Guard, would not involve a serious conflict with a
"coordinate political department; . . . a lack of judicially discoverable and manageable standards for
resolving [the question]; . . . the impossibility of deciding without an initial policy determination of
a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent
resolution without expressing lack of the respect due coordinate branches of government; . . . an
unusual need for unquestioning adherence to a political decision already made; [and] the
potentiality of embarrassment from multifarious pronouncements by various departments on one
question." . . . "Any such relief, whether it prescribed standards of training and weaponry or simply
ordered compliance with the standards set by Congress and/or the Executive, would necessarily
draw the courts into a nonjusticiable political question, over which we have no jurisdiction."

Id. (emphasis in original).
It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.\(^49\)

Yet another interpretation, suggested by the Court itself, is that the fact that plaintiffs were requesting injunctive relief regarding ongoing and future conduct, as opposed to damages for injury arising from past conduct, was the reason both for the Court hearing the case and the decision to apply the political question doctrine.\(^50\) The Court reinforced this interpretation when, having reversed the Sixth Circuit for not dismissing the *Gilligan* case, a year later the Supreme Court again reversed the Sixth Circuit, this time in *Scheuer*, for dismissing a damages suit against the governor of Ohio and the head of the Ohio National Guard for the Kent State shootings.\(^51\)

One conclusion is that the Court was more inclined to invoke the political question doctrine in *Gilligan* because injunctive relief against the military (which the *Gilligan* plaintiffs

\(^49\) *Id.* at 10-11 (emphasis in original).

\(^50\) *Id.* at 5. The Court acknowledged that:

> [i]t is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.

*Id.*

requested) admittedly would require more judicial intrusion into how the military trains, equips, and employs its forces, here, the Ohio National Guard. Yet even where the requested relief is limited to monetary damages (which the *Scheuer* plaintiffs requested), the district court would seem to be on almost equally unsteady footing in hearing a case to recover damages for injuries suffered stemming from scenarios implicating the military. In either case (damages or injunctions), the judiciary would be depriving the executive and legislative branches of the “ultimate authority” in areas committed to those branches under the Constitution’s separation of powers.

Based on *Gilligan* and then *Scheuer*, a court focusing on the distinction between injunctive and monetary relief would seem to be following the edict from *Baker* “to analyze representative cases and to infer from them the analytical threads” as a way to determine the applicability of the political question doctrine.\(^{52}\) Instead, the arguably false, or at least superficial, dichotomy between forms of relief masks the difficulties courts face in trying to identify real analytical threads from cases involving military functions.

These difficulties are readily apparent in recent litigation involving U.S. government contractors working in Iraq and Afghanistan. Courts seem to understandably struggle with the applicability of the political question doctrine to the expanding use of contractors in battlefield or quasi battlefield environments. Courts vary in their ability to reduce the cases down to the specific military decision(s) the contractor defendant claims warrants the application of the political question doctrine and whether those decisions implicate at least a cause if not the proximate cause of the plaintiff’s tort case. Before discussing a methodology which may bring

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\(^{52}\) *Baker*, *supra* note 15, at 211.
some clarity and consistency to future cases, the disparate results from variations in the level and
type of judicial analysis warrants discussion, as well as the government’s role in adding to the
confusion.

IV. CURRENT CONTRACTOR LITIGATION INVOLVING POLITICAL QUESTION

A. Contract Interrogators Compared to Contractor Interpreters

1. Saleh and Ibrahim

The first example is found in two related cases, Saleh and Ibrahim, which are illustrative of
suits filed by former Iraqi detainees against contract interrogators and translators, who in turn
asserted the political question doctrine as a defense.53 In both cases the defendants included
CACI, a government contractor which provided interrogators, and Titan, a government
contractor which provided interpreters.54 Eventually the interpreter defendants were dismissed
from the suits, but the grounds on which they were dismissed while the interrogator defendants
remain parties to the litigation seem counter-intuitive and emblematic of the enhanced difficulty
in applying the political question doctrine to contractors providing war time related services.

53 Saleh, supra note 7; Ibrahim I, supra note 7. With the exception of a conspiracy allegation in Saleh, “the factual
allegations of the two cases are virtually indistinguishable from one another. Both cases involve the same corporate
defendants, allegedly doing (or negligently allowing to be done, or failing to prevent) the same kinds of acts, in the
same place, at the same time.” Saleh at 57. In both cases, the plaintiffs sought damages for alleged mistreatment
during U.S. military detention in Iraq. The plaintiffs in Ibrahim include “seven Iraqi nationals who allege that they
or their late husbands were tortured while detained by the U.S. military at the Abu Ghraib prison in Iraq.” Ibrahim I
at 12. By slight contrast, the allegations in Saleh encompass all the U.S. detention facilities in Iraq and the plaintiffs
include “twelve named Iraqis, the estate of a thirteenth, and 1050 unnamed Does comprising "classes of persons
similarly situated."” Saleh at 57. Both cases eventually ended up in the U.S. District Court for the District of
Columbia and were consolidated for discovery and summary judgment. See Saleh at 57 n.1, 60. The one Saleh
specific point which merits mention is the conspiracy allegation. Prior to consolidation, the court ruled on the initial
motions to dismiss, first in Ibrahim I, then in Saleh. In Ibrahim I the court held that the conduct of private parties
was not actionable under the Alien Tort Statute (ATS). Ibrahim I at 14. In Saleh, the court stated that the plaintiffs
“apparently saw daylight” in a footnote in the Ibrahim decision that torture by private parties would be actionable
under the ATS if the private parties were acting under color of law. Saleh at 57. The court added that while the
Saleh plaintiffs had run to the presumed daylight, not only did the ATS remain unavailable, “the more plaintiffs
assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitation of the
political question doctrine.” Saleh at 58.

54 See Saleh, supra note 7; Ibrahim I, supra note 7.
That the interrogator defendants remain parties to the litigation is even more striking when the overlooked point that interrogation is an inherently governmental function is considered in the political question doctrine analysis.

The suit alleged that while forcibly detained in Iraq, the plaintiffs or their decedents:

were unlawfully tortured by agents or employees of [CACI and Titan], who were under contract with the United States government to provide security and intelligence services and to maintain facilities for the incarceration of said detainees, with the result being that said Plaintiffs or their decedents suffered significant physical injury, emotional distress, and/or wrongful death for which [CACI and Titan] are liable for compensatory and punitive damages.  

CACI and Titan both filed motions to dismiss, on, among other grounds, the political question doctrine. CACI claimed that the cases asked the court “to sit in judgment of the manner in which the United States has waged the war in Iraq.”

CACI framed the plaintiffs’ suit as a demand for war time reparations, which it claimed “is an issue textually committed to the political branches.”

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55 Complaint at 2-3, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005) (No. 04-1248) (The plaintiffs also alleged that the “tortuous and unlawful acts of [CACI and Titan] were part of an ongoing pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act” (RICO). Id. The district court held that the RICO claim “could be dismissed for a number of reasons,” but that it was sufficient that the plaintiffs lacked standing as they failed to allege “damage to business or property” as the RICO statute requires. Ibrahim I, supra note 7, at 19 citing 18 USC § 1964(c). Potentially more relevant to the political question inquiry, the plaintiffs also sought injunctive relief, a prohibition against CACI and Titan from “engaging in future contracts with the United States Government.” Id. at 2-3. However, CACI and Titan argued, and the Court agreed, that the contracting laws the plaintiffs relied on provide no right of action. Id. at 20. In dismissing the injunctive relief claims, the Court also held that the plaintiffs “failed to join an indispensable party, (the United States)….” Id. Strangely, elsewhere in its opinion the court stated that the plaintiffs only sought damages and, harkening to the Gilligan/ Scheuer distinction, that where injunctive relief is not sought, the court is not involved “in overseeing the conduct of foreign policy or the use and disposition of military power.” Id. at 15 quoting from Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967).


57 Id. at 21.
CACI also argued that there are no judicially discoverable and manageable standards to evaluate the plaintiffs’ claims.\textsuperscript{58} CACI claimed the case was judicially unmanageable as it would be impossible to obtain all relevant evidence due to the “fog of war” and the security classification of information on the former detainees’ arrest, intelligence value, and interrogation methods.\textsuperscript{59} CACI added that the court lacked recognized standards for evaluating war time tort claims seeking to impose liability stemming from the treatment of detainees the United States government believed possessed valuable information.\textsuperscript{60} The inevitable result, according to CACI, would be the court having to “conduct a detailed inquiry into the advisability and reasonableness of wartime interrogation tactics.”\textsuperscript{61}

The other defendant, Titan, framed the plaintiffs’ case as “ask[ing] the [c]ourt to insert itself into the most contentious political debate of our time, namely, the conduct of war in Iraq and the propriety of the United States' actions there.”\textsuperscript{62} Titan argued that “[t]his case must also be dismissed because at least one of the six \textit{Baker} factors is inextricable from this case. The conduct of war and war reparations involve matters textually committed to the political branches by the Constitution.”\textsuperscript{63}

\footnotesize
\textsuperscript{58} Id. at 25.
\textsuperscript{59} Id. at 27.
\textsuperscript{61} CACI Motion to Dismiss, supra note 55, at 27.
\textsuperscript{62} Titan Motion to Dismiss, supra note 59, at 42.
\textsuperscript{63} Id. Titan claimed that “[b]ecause the detention of prisoners in a war zone is an element of the war power, and war reparations are inherently a foreign policy decision, all plaintiffs' claims must be dismissed as invoking issues textually committed by the Constitution to the political branches.” Id. at 56.
The district court, while noting that the defendants’ political question doctrine argument was of “particular interest,” did not find the arguments persuasive, at least initially. The court noted that “[t]he political question doctrine may lack clarity[,] but is not without standards. The court held that the defendants’ “efforts to reframe [the] case as a standard matter of “war reparation”” failed to successfully invoke the political question doctrine. The court claimed that “[h]ere, unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings.”

In response to the argument that relevant evidence may not be available or may be classified, the court acknowledged that “[m]anageability problems may well emerge as the litigation in this case proceeds, especially if discovery collides with government claims to state secrecy.” But the court noted that the government is not a party and that the court was “not prepared to dismiss otherwise valid claims at this early stage in anticipation of obstacles that may or may not arise.”

In December 2007, following limited discovery, the court granted Titan’s motion for summary judgment under the combat activity exception to the Federal Tort Claims Act (FTCA),

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64 Ibrahim I supra note 7, at 15. In August 2005, the district court dismissed the Ibrahim Plaintiffs’ claims under the Alien Tort Statute, RICO, various international laws and agreements, U.S. contracting laws and common law claims for false imprisonment and conversion. This left four common law claims: assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence. Id. at 20.

65 Id. at 15. The standards according to the district court are the Baker tests. Id.

66 Id. at 16.

67 Id.

68 Id.

69 Id. In setting the stage for subsequent discovery and motions practice, the court added that the “plaintiffs’ state tort claims would be preempted if the defendants could show that their employees at Abu Ghraib functioned as soldiers in all but name.” Id. at 19.
finding that the Titan linguists performed their duties under the exclusive operational control of
the Army.\textsuperscript{70} The court denied CACI’s motion, also made on combat activities grounds.\textsuperscript{71} The
significance to the political question doctrine of the court dismissing the suit against Titan under
an FTCA exception is that it highlights the difficult position the judiciary finds itself in these
cases. The courts make determinations on federal interests and conflicts with those interests
despite the government’s lack of government involvement in the litigation, which is discussed
more fully in Section V. In Ibrahim I, the court determined that “treatment of prisoners during
wartime undoubtedly implicates uniquely federal interests.”\textsuperscript{72} The court went on to identify “the
uniquely federal interest at stake” in the litigation as well as a “significant conflict with federal
policies or interests” which warranted dismissal for Titan, but not for CACI.\textsuperscript{73}

In January 2008, CACI renewed its motion to dismiss on political question grounds,

Under the FTCA, the government’s liability is limited to “circumstances where the United States, if a private person,
would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28
U.S.C. § 1346(b). The combat activities exception to the FTCA “bars suits against the federal government for “any
claim arising out of the combatant activities of the military or naval forces…..” Id. at 4.

\textsuperscript{71} Id. The court held in its December 2007 ruling that it was “unable to conclude at this summary judgment stage
that the federal interest underlying the combatant activities exception requires the preemption of state tort claims
against CACI. This does not mean that CACI may not successfully prove this affirmative defense at trial, but the
task of sorting through the disputed facts regarding the military’s command and control of CACI’s employees will
be for the jury.” Id. at 6.

\textsuperscript{72} Ibrahim I, supra note 7, at 19. The word “treatment” would seem to apply more to the CACI interrogators than
the Titan interpreters.

\textsuperscript{73} Ibrahim II, supra note 69, at 3 referring to Boyle v. United Technologies Corporation, 487 U.S. 500 (1988).

\textsuperscript{74} Exhibits A, B, and C to Attachment 1, CACI Motion To Dismiss, Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 2007
available to the plaintiffs and of a “state negotiated reparations scheme” the court found did not exist in its August 2005 denial of CACI’s motion to dismiss.\(^\text{75}\) A ruling on CACI’s motion is pending cross appeals to the U.S. Court of Appeals for the District of Columbia Circuit.\(^\text{76}\) As the cases currently stand, the contract interpreter defendants have been dismissed as parties and the case continues against the contract interrogator defendants.

Given detainee abuse issues, that the Army purportedly exerted more control over contract interpreters than contract interrogators is problematic. Perhaps more troubling is the lack of attention devoted to the fact that the U.S. government contracted out interrogation of wartime combatants. On its face, interpreting is not a function which immediately suggests an issue committed to the executive branch. Interrogation of suspected wartime enemies, however, seems an inherently governmental function, which raises much more difficult and as yet unanswered questions.\(^\text{77}\)

2. Interrogation as an Inherently Governmental Function

In the lawsuits by local nationals against contract interrogators, no mention appears to have been made that the government’s use of contract interrogators violates a determination the Army made in 2000 that “the gathering and analysis” of tactical intelligence is considered “an

\(^\text{75}\) Id. CACI included as an exhibit to the attachments to its motion to dismiss correspondence between the U.S. Army Claims Service and the Army General Counsel. Exhibit A to Attachment, CACI Motion To Dismiss, Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 2007 U.S. Dist. LEXIS 81794 (D.D.C. 2007) (04-1248). In the correspondence the Army Claims Service states its determination that while Mr. Saleh was properly apprehended, he was negligently detained at Abu Ghraib. The negligence, at least according to the Army, was that Mr. Saleh was not interrogated, which led to his “unnecessary internment at Abu Ghraib.” Id. at 7. (emphasis added). This would seem to bolster an argument by CACI that its interrogators did not act inappropriately but it also would seem to support the courts’ finding that the Army did not exercise much control over the CACI interrogators. Ironically (given the host of detainee abuse issues arising from Abu Ghraib some would say perversely), the Army’s determination raises the question of whether interrogators may be liable for not interrogating.


inherently governmental function barred from private sector performance." The Army’s determination was reinforced in 2003 by the White House’s Office of Management and Budget (OMB), which included in its reissued federal policy for competition for commercial activities the requirement that all governmental agencies shall “perform inherently governmental activities with government personnel.”

In 2004, the U.S. Army acknowledged both its use of contract interrogators in Iraq and that this use violated the Army’s 2000 policy determination. The Department of Defense has since issued instructions which detail under what circumstances contract interrogators may be used.

78 Memorandum from the Assistant Secretary for the Army for Manpower and Reserve Affairs to the Deputy Chief of Staff For the Army for Intelligence, Dec. 26, 2000, available at http://projects.publicintegrity.org/docs/wow/25-d_Intelligence.pdf. The determination stated that “[a]t the tactical level, the intelligence function under the operational control of the Army performed by military in the operating forces is an inherently Governmental function barred from private sector performance.” Id. The memorandum also that stated that the “gathering and analysis of [tactical] intelligence…requires the exercise of substantial discretion in applying Government authority because intelligence at the tactical level is integral to the application of combat power by the sovereign authority.” Id. The policy did not just prohibit contract interrogators at the tactical level. According to the policy, “at the operational and strategic level, the intelligence function (less support) performed by military personnel and Federal civilian employees is a non-inherently government function that should exempted from private sector performance on the basis of risk to national security from relying on contractors to perform this function.” Id.


80 Brinkley, supra note 76. While not revoking the 2000 policy determination, Army officials in Iraq claimed that they "retain the right to make exceptions” and that “in light of 9/11 and the war on terror, the world is a different place than it was when that was written in 2000.” Id. See also, David Isenberg, Dogs of War: Inherently Governmental?, UPI.COM, May 9, 2008, available at http://www.njscvva.org/Armed%20Forces%20News%20PDFs/200805/2008%2005%2009%20-%20Dogs%20of%20War.pdf.

81 U.S. DEPT’T OF DEFENSE, INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX (7 Sep. 2006) [hereinafter DODI]. Enclosure 2, ¶ 2.1.6.2 provides that if interrogations are to be “performed in hostile areas where security necessary for DoD civilian performance cannot be provided” then the interrogation position is considered a function which “cannot be legally contracted and shall be designated for performance by government personnel.” DODI at ¶ 6.1.2. But “in areas where adequate security is available and is expected to continue, properly trained and cleared contractors may be used to draft interrogation plans for government approval and conduct government approved interrogations.” Enclosure 2, ¶ 2.1.6.2. The DODI claims that “[r]esponsibility for [detainee] handling as
Eventually Congress weighed in. An interim version of 2009 National Defense Authorization Act (NDAA) banned the use of contract interrogators in combat zones. This led to the Executive Office of the President issuing a statement that:

The Administration strongly objects to requirements that would prevent the Department of Defense from conducting lawful interrogations in the most effective manner by restricting the process solely to government personnel; in some cases, a contract interrogator may possess the best combination of skills to obtain the needed

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82 S. 3001, 110th Cong. § 1036 (2008) (as reported by the S. Comm. On Armed Services, May 12, 2008); H.R. 5658 § 1077, 110th Cong. (as passed by House, May 22, 2008)(2008) (Requiring that by one year after the enactment of the FY 2009 NDAA:

The DOD manpower mix criteria [discussed in the DODI, supra note 81, at ¶ 6.1]and the [Federal Acquisition Regulation] be revised to provide that: (1) the interrogation of prisoners of war and other detainees is an inherently governmental function that cannot be transferred to private contractors who are beyond the reach of controls applicable to government personnel; and (2) properly trained and cleared contractors may be used as linguists, interpreters, report writers, and information technology technicians if their work is properly reviewed by appropriate government personnel.)

Referring to section 1036, the Committee report accompanying S3001 recommended “a provision that would provide that the interrogation of detainees during or in the aftermath of hostilities is an inherently governmental function that cannot be transferred to private sector contractors. The provision would become effective 1 year after the date of the enactment of this Act, to provide the Department of Defense (DOD) time to comply.” S. Rep. No.110-335 at § 1036. The committee report noted that DOD guidance in effect through 2005 was that interrogation entailed the discretionary exercise of government authority which could not be contracted but that “[i]n 2006, however, this guidance was revised to expressly authorize the use of contractors to perform interrogations.” Id. The report also chronicled how despite past representations by the Acting Secretary of the Army that the Army would increase the number of military interrogators, “the Department of Defense still has almost 100 contractor employees conducting interrogations of detainees.” Id. The report concluded by stating that

The interrogation of detainees during or in the aftermath of hostilities entails the exercise of substantial discretion in applying government authority and is likely to have a significant impact on the life and liberty of the individuals questioned. The committee concludes that the conduct of such interrogations is an inherently governmental function that should be performed exclusively by military or civilian employees of the Department. Id.

Congress then agreed to an amendment to the NDAA which changed the prohibition against the use of contract interrogators to a non binding sense of Congress.\footnote{National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 100-417 § 1057 (2008). The sense of Congress is titled “Interrogation of Detainees by Contractor Personnel” and states that It is the sense of Congress that— (1) the interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and criminals when captured, transferred, confined, or detained during or in the aftermath of hostilities is an inherently governmental function and cannot appropriately be transferred to private sector contractors; (2) not later than one year after the date of the enactment of this Act, the Secretary of Defense should develop the resources needed to ensure that interrogations described in paragraph (1) can be conducted by government personnel and not by private sector contractors; and (3) properly trained and cleared contractors may appropriately be used as linguists, interpreters, report writers, information technology technicians, and other employees filling ancillary positions, if the private sector contractors are subject to the same rules, procedures, policies, and laws pertaining to detainee operations and interrogations that govern the execution of these positions by government personnel.}

That the Army determined that interrogation is an inherently governmental function, at a minimum for the time period at issue in the litigation, would seem to aid the contract interrogators’ political question doctrine argument. The Army’s determination coupled with the White House’s OMB policy approaches black letter “textual commitment” of interrogation to the executive branch. That the Army violated its own determination and triggered Congressional involvement only strengthens the argument for the doctrine’s applicability.

The contract interrogators would seem to be able to argue that for the judiciary to speak on an issue for which both the executive and legislative branches have spoken would be the “lack of respect due coordinate branches of government.”\footnote{Baker, supra note 15, at 217.} Additionally, for the courts to address the use of contract interrogators when the executive branch has said one thing (while doing another) and...
Congress has also spoken would seem to be the “multifarious pronouncements by various
departments on one question” which Baker forbids.\(^{86}\)

\[ \text{ } \]

\[ \text{B. Insurgent Attacks Compared to Vehicle and Aircraft Crashes} \]

The strained application of the political question doctrine to war time contractor activities is perhaps most glaring when cases involving insurgent attacks against contractors are compared to cases involving contractor vehicle and aircraft crashes in Iraq and Afghanistan. Similar to the interpreter/interrogator cases, with few exceptions the outcomes are counter-intuitive and inconsistent.

\[ \text{1. Insurgent Attacks} \]

The Fisher, Lane, and Smith-Idol line of federal cases from Texas provide contrasting views, first by the U.S. District Court for the Southern District of Texas, and then by the U.S. Court of Appeals for the Fifth Circuit, as to the applicability of the political question doctrine to suits by contractor employees stemming from insurgent attacks.\(^{87}\) The plaintiffs are former truck drivers (or their representatives) who worked for Kellogg Brown and Root (KBR) in Iraq and were injured or killed when insurgents attacked the logistics convoys in which they were driving in April, 2004.\(^{88}\) KBR operated the logistics convoys pursuant to a contract the Army awarded

\[ \text{ } \]

\(^{86}\) \text{Id.} \\

\(^{87}\) At the district court level, see Fisher, supra note 8; Lane, supra note 8; and Smith-Idol, supra note 8. At the appellate level, see Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) [hereinafter Lane appeal], the consolidated appeal. Although not part of the Fisher, Lane, and Smith-Idol series, Woodson, supra note 8, involved “significantly similar” facts, arguments, and evidence, the difference essentially being that the plaintiff was injured by an insurgent attack of a Halliburton logistics convoy on a different date and at a different location in Iraq. Woodson at 1. Accordingly, the district court dismissed Woodson on the same political question grounds as in Fisher, Lane, and Smith Idol. Id. at 1-2.

\(^{88}\) See generally Fisher, supra note 8; Lane, supra note 8; and Smith-Idol, supra note 8.
under the Logistics Civil Augmentation Program (LOGCAP).  

Under its LOGCAP contract with the Army, KBR was to provide essential services in support of U.S. military operations in Iraq, including transportation services, for which KBR hired drivers, including the Fisher, Lane, and Smith-Idol plaintiffs. The plaintiffs claimed that during its efforts to hire the needed truck drivers, KBR committed fraud and deceit by intentionally misrepresenting the dangers in Iraq. The plaintiffs also alleged that KBR had control over when, where, and how to deploy the logistics convoys and the negligent manner in which it did so led to the plaintiffs’ physical injury and/or death.

The defendants moved to dismiss the plaintiffs’ claims based on, among other grounds, the political question doctrine. KBR argued that the Army, not KBR, controlled the deployment and protection of logistics convoys and that what decisions KBR did make were “so interwoven with Army decisions, the court lacks jurisdiction …under the political question doctrine.”  

The plaintiffs argued that the political question doctrine did not apply because their complaint

89 Fisher, supra note 8, at 638.
90 Id. at 638-639.
91 Fisher, supra note 8, at 639; Lane, supra note 8, at 1; Smith-Idol, supra note 8, at 1.
92 Fisher, supra note 8 at 639.
93 Id. Specifically, KBR argued that:

The Complaint necessarily raises issues regarding the conduct of military operations during armed conflict that are committed to the discretion of the political branches of government. Further, no judicially manageable standards exist to evaluate the propriety of the issues here, including: whether the military adequately considered security concerns and supply needs when it planned, scheduled, and deployed the fuel supply convoy; whether it assigned force protection sufficient to deal with potential threats along the convoy route it selected; whether it properly evaluated the level of threats present on that route; and whether it properly trained, prepared, and equipped the military personnel providing force protection to the convoy.

“involves claims by civilians, not military personnel, questions [KBR’s] actions as civilian contractors, not the Army’s execution of a mission…” and alleged that [KBR], not the Army, directed the convoys in question, “making inquiry into military decisions and rules of engagement unnecessary.”

The district court thought otherwise and dismissed the three cases on political question grounds, finding that the nature of the suit implicated three of the Baker tests. The court stated that Baker requires a determination of “whether a political question will arise during the course of the trial, not whether it is evident from the face of the complaint.” The court claimed that “[e]ven if KBR had authority to deploy or recall convoys, the court would still need to determine whether the Army could or should have countermanded that order.” The court claimed that

94 Fisher, supra note 8, at 641. The plaintiffs argued that the very language of the LOGCAP contract required KBR to “manage and direct their own convoys.” Id. at 642. The plaintiffs quoted from an Army publication entitled “Contractors on the Battlefield” to support the proposition that military “[c]ommanders do not have direct control over contractors or their employees (employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees.” Id. referring to plaintiffs’ quote from the Army publication “Contractors on the Battlefield.”

95 Id. at 639-644. Under the first Baker test, textual constitutional commitment to a coordinate branch, the court held that “it cannot try a case set on a battlefield during war-time without an impermissible intrusion into powers expressly granted to the Executive by the Constitution.” Id. at 641. The court also found the second Baker test, lack of judicially discoverable and manageable standards “equally implicated.” Id. While the plaintiffs contended that their focus was on KBR’s actions and not those of the Army, the court held it would “inexorably be drawn” to distinguish and examine decisions by both KBR and the Army, a task for which the judiciary lacks “discoverable and meaningful standards.” Id. at 644. The court concluded its Baker analysis by applying the third test, nonjudicial policy determination and lack of respect. Id. The court couched this test as asking the court to determine why the convoy attack happened as opposed to the second test which required a determination of what happened. Id. at 641-644. To answer the question “why the attack happened” would require, in the court’s estimation, delving into the wisdom of using contractors on the battlefield at all as well as using them on the specific convoys at issue. Id. at 644. The court labeled attempts at answering either question as tantamount to examining the policies of the Executive Branch during war time, “a step the court declines to take.” Id.

96 Id. at 641 quoting Occidental of Umm Al Qaywayn v. Certain Cargo of Petroleum, 577 F.2d 1196, 1202 (5th Cir. 1978).

97 Id. at 643. The court added that that “[t]he evidence shows overwhelmingly that the Army was an integral part of any decision to deploy and protect convoys.” Id.
“[i]n order to hear this case, the court would have to substitute its judgment for that of the Army.”

The plaintiffs appealed to the Fifth Circuit and attempted to frame the issue as a damages claim by civilian truck drivers employed by a private contractor that was “providing non-combat logistical support services in Iraq.” By contrast, KBR asked the appellate court “[w]hether [a]ppellants’ damages suits, if adjudicated, would require the district court to second-guess U.S. military policies and decisions that resulted in the convoy incidents involved in these appeals and relate to the conduct of the ongoing war in Iraq, and thus are barred by the political question doctrine.”

The plaintiff-appellants claimed that while “the conflict in Iraq happens to be a politically charged matter, but that does not make this case nonjusticiable under the political question doctrine.” The appellants contended that the district court “simply saw Iraq and stopped.” In response, the defendant-appellees reiterated their arguments that “the Baker [tests]

98 Id. The court listed examples of areas in which it believed it would have to impermissibly substitute its judgment for that of the Army, including “determining what intelligence the Army gave to KBR about the route, whether that intelligence was sufficient, what forces were deployed with the convoys, whether they were sufficient, and whether they performed properly.” Id.

99 Appellants’ Brief at 2, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (No. 06-0874 28 Feb. 2007).

100 Appellees’ Brief at 1, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (No. 06-0874 1 May 2007).

101 Appellants’ Brief, supra note 93, at 21.

102 Id. While contending that both sets of claims were justiciable, the appellants focused on the fraud claim, claiming that the district court failed to analyze the fraud claim under the political question doctrine. Id. at 39. The appellants claimed that their argument that the district court ignored the fraud claims is bolstered by the fact that other than mentioning that the plaintiffs asserted a fraud claim, the word fraud or fraudulent is not subsequently used in the district court’s dismissal order. Id. at 26. Under the appellants’ view, the district court focused on the circumstances surrounding the convoys in Iraq in April 2004, while the fraud claims predate the convoys and occurred during KBR’s driver recruitment efforts in the U.S. Id. at 25-26. The appellants’ view was that they brought fraud and tort claims for which far from being outside the purview of the judiciary, the judiciary is ideally suited among the three branches of government.
demonstrate that adjudication of appellant’s claims would require resolution of non-justiciable political questions.”

They argued that political questions were inherent in both the fraud and tort claims and “could not be avoided.” KBR stressed that the “appellants’ claims must be analyzed as they would be tried, not as they are pleaded, to determine whether they present political questions.”

The Fifth Circuit

[A]cknowledge[d] that the [p]laintiffs’ claims are set against the backdrop of United States military action in Iraq. Thus these cases are at the very least in sight of an arena in which the political question doctrine has served one of its most important and traditional functions – precluding judicial review of the decisions made by the Executive during war time.

The court noted that the days in which “the Supreme Court would categorically remove disputes implicating the “conduct of foreign relations” from judicial purview” were long past and

103 Appellees’ Brief, supra note 94, at 32. KBR essentially repeated their arguments from the district court that:

[1] [T]he Constitution textually commits to the political branches consideration of the military, national security, and foreign policy decisions and issues that adjudication of appellants claims would entail;
[2] There are no judicially discoverable manageable standards for resolving the military, national security, and foreign affairs decisions and issues that adjudication of appellants claims would require; and
[3] [A]djudication of appellant’s claims would require policy determinations that exceed judicial discretion and demonstrate lack of respect for the political branches.

Id. at 32-47.

104 Id. at 36, 42.

105 Id. at 28. The Fifth Circuit supports the appellee’s position in this regard. See Occidental, supra note 89, at 1202 (stating that the court considers the complaint “as it would be tried, to determine whether a political question will emerge.”).

106 Lane, supra note 81, at 558.

107 Id. citing Oetjen, supra note 21, at 302.
referenced the Baker court’s admonition that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”

The appellate court disagreed with the lower court’s application of the Baker tests. According to the Fifth Circuit, “the first Baker [test] is primarily concerned with direct actions taken by a coordinate branch of the federal government” so that KBR, by invoking the textual commitment test faced a “double burden.” Under this double burden, “[f]irst, [KBR] must demonstrate that the claims against it will require reexamination of a decision by the military. Then it must demonstrate the military decision at issue is …insulated from judicial review.”

With little to no explanation of how KBR failed to meet that double burden, the court then claimed that “[there is no textual commitment to the coordinate branches of the authority to adjudicate the merits of the Plaintiff’s claims against KBR for breach of its duties.”

The court of appeals was more sympathetic to the district court’s analysis of the second Baker test, lack of judicially manageable standards. The court claimed that it was “arguably the most critical factor” in Lane “because at least some of the considerations would drag a court

108 Id. citing Baker, supra note 15, at 211.
109 Id. at 560 quoting McMahon, supra note 9, at 1359.
110 Id. at 560 quoting McMahon at 1359-1360 (original emphasis in McMahon, used in Lane).
111 Lane, supra note 81, at 560. The Court of Appeals claimed that it would be an “extraordinary occasion, indeed, when the political branches delve into matters of tort-based compensation” citing the September 11 Victim Compensation Fund as one such occasion. Id. The Court made this point in support of its claim that there is “no textual commitment to the coordinate branches of the authority to adjudicate the merits of the Plaintiffs’ claims against KBR.” Yet as previously discussed, the U.S. Army Claims Service adjudicated the merits of Mr. Saleh’s tort claim in which the negligence, at least according to the Army, was not that of the Army, at least directly, but of the contract interrogators. The executive branch’s involvement in tort-based compensation may not be that out of the ordinary, rendering the Fifth Circuit’s reliance on that point for its political question doctrine analysis misplaced.

112 Id. In a footnote to its analysis of the second Baker formulation the court stated that the plaintiffs’ claims did not “directly challenge any government or Executive action” and were “far enough removed from the type of textual commitment envisioned by Baker and its progeny to shift [the court’s] primary analysis to the second factor.” Id.
into a consideration of what constituted adequate force protection for the convoys.”

But the court stated the claims “primarily raised legal questions that may be resolved by the application of traditional tort standards” albeit this “may require a court to adjust traditional tort standards to account for the “less than hospitable environment” in which KBR operated, the court will arguably have no need to develop any standards at all.”

The court made relatively short work of the district court’s determination that under the third Baker test the claims would “necessarily entail a judicial pronouncement as to the wisdom of the military’s use of civilian contractors in a war zone.” In the Fifth Circuit’s view, the district court would be “asked to judge KBR’s policies and actions, not those of the military or executive branch.” Indeed the court surmised that “the application of traditional tort standards may permit the district court to navigate through this politically significant case without confronting a political question.”

Under the Fifth Circuit’s analysis even where insurgent attacks in Iraq were the cause of the injury or death, the political question doctrine was little more than theoretically applicable. Ultimately the court was not persuaded that the doctrine applied and thus was persuaded that the judiciary could properly hear the plaintiffs’ claims. That insurgent attacks on U.S. logistics

113 Id.

114 Id. at 563, referring to McMahon, supra note 9, at 1363-1364.

115 Id. at 563, referring to McMahon, supra note 9, at 1364.

116 Lane, supra note 81, at 563.

117 Id. (emphasis in original).

118 While reversing the district court on the application of the political question doctrine, in remanding the case, the court of appeals explained that it did not “mean to indicate the district court is bound to continue its efforts to extricate the plaintiff’s claims from the military’s decisions indefinitely.” Id. at 556.
convoys in Iraq did not, at least in *Lane*, result in the application of the political question doctrine may seem surprising to some.\(^{119}\)

Courts should be more likely to dismiss a case on political question grounds if it believes that the specific contractor actions relevant to an element of the tort suit are controlled by the military. Conversely, courts should be less likely to dismiss a case if the relevant contractor actions are independent of military control. In practice, the outcome of the political question analysis seems to depend upon the decision making level the court considers when assessing the suit. Assessing the suit at a macro decision making level, the foreign affairs and Commander-in-Chief powers of the executive branch inherent in the decision to invade Iraq and to rely on contractors are relevant, but surely any and all actions which follow the commitment of the military do not necessarily result in a non justiciable political question. On the other, micro level extreme, the decision making inquiry focuses on whether the government or the contractor controlled a logistics convoy’s movement from point A to point B and under what conditions. As the cases which follow demonstrate, while this approach brings the specificity and detail the

\(^{119}\) *But see* Smith, *supra* note 8 (holding that the political question doctrine prevented the court from hearing a case brought by the representatives of a KBR employee killed when a suicide bomber detonated an explosive in a dining facility on a U.S. military forward operating base in Iraq). The court determined that the military and not KBR was responsible for security or force protection functions. The plaintiffs framed their suit “in terms of simple premise liability by arguing that the court need only determine what duties [KBR] as possessor, occupier, and operator of the [dining facility] owed to Allen Keith Smith as the invitee.” *Id.* at 5. The district court was not persuaded, holding that the plaintiffs’ formulation “fails to recognize that were the case to proceed, this court would have to second-guess the decisions of the United States military, even though the suit is ostensibly against only military contractors.” *Id.* This led the court to determine that “the first three Baker [] tests are inextricable from the case….” *Id.* at 6. The district court added that:

> allowing this action to proceed would require the court to substitute its judgment on military decision making for that of the branches of government entrusted with this task. To determine whether the force protection in place was adequate the intelligence gathering, risk assessment, and security measures implemented at [the forward operating base] would have to be examined. Because the suicide bomber managed to enter the base, the court would also have to examine base security.

*Id.*
macro view lacks, trying to parse out the level and type of control over a logistics convoy as a way to determine the applicability of the political question yields outcomes no more coherent or predictable.

2. Convoy and Aircraft Accidents

In two cases, *Carmichael*\textsuperscript{120} and *Whitaker*\textsuperscript{121}, different district courts in Georgia found the level of the military’s control of convoy operations in Iraq such that the political question doctrine precluded the courts from hearing the cases. Yet in neither case did the court link the military’s control to a cause of the accident, proximate or otherwise. It is also not clear what specific unreviewable military decision the court believed was inextricably linked to the case.

In *Whitaker*, a U.S. Army Soldier was killed in Iraq in April, 2004, while escorting a KBR logistics convoy.\textsuperscript{122} More specifically, after a KBR vehicle drove off a bridge, Private First Class (PFC) Whitaker stopped his vehicle, which was then struck by the KBR vehicle following it, knocking PFC Whitaker’s vehicle near the edge of the bridge.\textsuperscript{123} In trying to get out of his precariously positioned vehicle, PFC Whitaker fell off the bridge and drowned.\textsuperscript{124} Private First Class Whitaker’s parents filed suit, labeling the case a “garden variety road wreck” for which they claimed judicially discoverable and manageable standards existed.\textsuperscript{125} KBR moved to

\begin{itemize}
\item \textsuperscript{120} *Carmichael I*, supra note 9.
\item \textsuperscript{121} *Whitaker*, supra note 9.
\item \textsuperscript{122} *Id.* at 1278.
\item \textsuperscript{123} *Id.*
\item \textsuperscript{124} *Id.*
\item \textsuperscript{125} *Id.* at 1282.
\end{itemize}
dismiss on political question grounds, which the court granted.\textsuperscript{126} The U.S. District Court for the Middle District of Georgia held that the convoy operation was “planned by the military, which determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy.”\textsuperscript{127} The court stated that the circumstances, which did not involve insurgent activity, were dramatically different than in the United States and that “[t]he question here is not just what a reasonable driver would do—it is what a reasonable driver in a combat zone, subject to military regulations and orders, would do.”\textsuperscript{128}

Yet the court never explained how PFC Whitaker being subject to military regulations and orders had any bearing on the incident which tragically claimed his life. Similarly, while all of Iraq may generally be considered a combat zone, unless PFC Whitaker or others in the convoy took actions on the bridge in Iraq in a manner different than they would have had the incident occurred in comparatively safe Kuwait or even the United States, then just being in a combat zone seems to have little bearing on causation. Likewise the court’s reliance on the fact that the military planned the convoy also appears misplaced, unless the manner in which the military planned the convoy was a significant factor in the first vehicle going off the bridge, PFC Whitaker’s decision to stop his vehicle, or the vehicle behind PFC Whitaker’s striking his. In the end, while there may be “dramatically different” circumstances between the incident occurring in Iraq versus the United States, the court did not explain them.

\textsuperscript{126}See Whitaker, \textit{supra} note 9.

\textsuperscript{127}\textit{Id.} at 1282.

\textsuperscript{128}\textit{Id.} The district court likened the political question analysis in \textit{Whitaker} to an 11th Circuit case involving a suit filed by Turkish sailors after two missiles fired by a U.S. ship during a training exercise injured them. Aktepe v. United States, 105 F.3d 1400 (11th Cir. 1997). In Aktepe, as in Whitaker, the court found that there were no judicially discoverable and manageable standards, that a decision on the merits would require the court to make policy decisions “of a kind appropriately reserved for military discretion,” and that “adjudicating the case would express a lack of respect for the political branches of the government.” Whitaker, \textit{supra} note 9, at 1280-1291 \textit{quoting from} Aktepe at 1403-1403.
In *Carmichael*, the District Court for the Northern District of Georgia initially denied a motion to dismiss on political question grounds, stating its disagreement with the *Whitaker* decision from its middle district colleagues in the process.\(^{129}\) Yet two years later, the court in *Carmichael* dismissed the case on political question grounds, providing no more clarity than in *Whitaker*.\(^{130}\)

In May, 2004, Sergeant (SGT) Keith Carmichael was a military escort and passenger in a KBR tractor-trailer which a contractor employee, Mr. Irvine, lost control of and drove off the road in Iraq, overturning the vehicle in a ravine, devastatingly injuring SGT Carmichael in the process.\(^{131}\) Sergeant Carmichael’s wife filed suit against KBR on her husband’s behalf.\(^{132}\) The court initially denied KBR’s motion to dismiss on political question grounds.\(^{133}\) After two years of discovery, KBR renewed its motion to dismiss on political question grounds, which the court granted.\(^{134}\) The plaintiffs presented evidence that “the convoy was a non-combat operation and

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\(^{129}\) *Carmichael I*, *supra* note 9, at 1377. In its initial ruling, the court stated that it respectfully disagreed with, and would not follow, the middle district’s ruling in *Whitaker*. *Id.*

\(^{130}\) *Carmichael v. KBR*, 564 F.Supp.2d 1363 (N.D. Ga. 2008) [hereinafter *Carmichael II*].

\(^{131}\) *Carmichael I*, *supra* note 9, at 1374.

\(^{132}\) *Carmichael I*, *supra* note 9.

\(^{133}\) *Id.*

\(^{134}\) *Carmichael II*, *supra* note 124. During the discovery period the Eleventh Circuit issued its decision in *McMahon*, affirming a trial court’s denial of a contractor motion to dismiss on political question grounds in a case arising out of contract aviation in Afghanistan. *McMahon*, *supra* note 9. While rejecting KBR’s argument that the *McMahon* decision implicitly endorsed the middle district’s *Whitaker* ruling, the District Court in *Carmichael* did grant KBR’s renewed motion to dismiss. Based on evidence derived from four Army officers and deposition testimony of five KBR employees the court concluded “that the army did in fact control every aspect of the organization, planning, and execution of the convoy in question.” *Carmichael II*, *supra* note 124, at 1368.
that each individual driver retained discretion to vary his speed or course within the convoy to operate his vehicle safely.” The court however was persuaded by KBR’s evidence that:

[T]he army did in fact control every aspect of the organization, planning and execution of the convoy in question. The KBR drivers were trained according to military standards, the military convoy commander retained responsibility for inspecting both drivers and their equipment before commencing the convoy, and the route and speed of the convoy were set by the military and not by the civilian drivers. Therefore, the conduct of the military and its handling of supply convoys used to support military operations would necessarily be questioned were this case allowed to go forward.

When the court denied KBR’s motion, its inquiry focused on the actions of Mr. Irvine, the KBR employee driving the tractor-trailer in which SGT Carmichael was a passenger. Specifically, the court hypothesized that “it is conceivable that at the time of the accident [Mr.] Irvine was driving the truck within the speed limit set by the military [which would implicate the political question doctrine] yet in a manner that was negligent in some other respect” [thus not implicating the doctrine]. The court did not revisit its own hypothetical when later dismissing the case, which seems particularly odd in light of the evidence the plaintiffs presented concerning options individual drivers had in terms of speed and course and the fact that only the vehicle driven by Mr. Irvine went off the road and into a ravine. The court claimed that “[i]f there is no showing that resolution of a survivor's negligence claims would require the court's reexamination of any decision made by the U.S. military, the case presents no political question, and therefore the court has jurisdiction over the case.” Yet in dismissing the case, the court

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135 Carmichael II, supra note 124, at 1368.
136 Id.
137 Id. at 1367.
138 Id.
139 Id. at 1367.
failed to state what decision by the military the court would have to examine to resolve the inquiry of a vehicle driving off the road. Once again, the military makes numerous decisions, and the incident happened in Iraq, but unless those decisions and the situs of the incident influence the tort elements in some way, they do not seem legally relevant and certainly not dispositive of a justiciability issue like the political question doctrine.

Ironically, in one case, *Potts*, where combat circumstances in Iraq played a role in the accident, the political question was found not to apply. The case involved a suit by a contract employee, Potts, who worked for Worldwide Network Services, Inc. Mr. Potts filed suit against Dyncorp for injuries he suffered as a result of a car accident in Iraq where he was the passenger in a vehicle driven by a Dyncorp employee, Mr. McCants. While driving at a high rate of speed, Mr. McCants swerved to avoid what he thought may be an improvised explosive device (IED), later determined to be a dog, which resulted in the vehicle flipping, bursting into flames, and severely injuring Mr. Potts. The court denied Dyncorp’s attempt to amend its answer to assert the political question doctrine, holding that “Dyncorp mischaracterizes the issue by implying that the court would have to access United States Military or State Department policies to determine whether Dyncorp was negligent.” The court added that the plaintiffs correctly summarized the case as involving a “civilian contract to provide non-military security

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140 Potts, *supra* note 9.

141 See *id*. Dyncorp operated in Iraq pursuant to a contract with the U.S. government for an “oil for food” project. *Id.* at 1248.

142 For general information on IEDs, see *CONGRESSIONAL RESEARCH SERVICE*, RS22330, *IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES* (Sep. 2006).

143 Potts, *supra* note 9, at 1248.

144 *Id.* at 1251.
services to non-military personnel for the purpose of delivering non-military supplies."145 The court concluded it was “able to assess whether the private contractor was negligent or wanton, even when performing services in a war zone. The fact that the car accident at issue occurred in a war zone does not automatically result in a lack of judicially discoverable and manageable standards for resolving the issue.”146

The decision making level the court considered in Potts dictated the outcome of the political question analysis. The court focused on the macro level of Dyncorp’s contract with the government instead of the specific cause of the accident, a cause which was uniquely related to battlefield conditions in Iraq. While not suggesting that the court ignore Dyncorp’s contract with the government, the court may have been better served by focusing on how and from whom Dyncorp drivers learned of IED threats and received training on how to respond. As it stands, how the court will develop judicial standards to evaluate the threat of IEDs, whether the driver’s belief that the object in the road was an IED, and whether his subsequent reaction was reasonable, is unclear.

3. The Real Inquiry

Not all courts have struggled when applying the political question doctrine to wartime contractor tort litigation. In Lessin147 and McMahon148, both a district and an appellate court provide examples of how to resolve plaintiffs’ attempts to avoid, and defendants’ attempts to apply, the political question doctrine.

145 Id.
146 Id. at 1253.
147 Lessin, supra note 9.
148 McMahon, supra note 9.
The *Lessin* case dealt with a U.S. Army Soldier injured while providing a military escort to a KBR logistics convoy in Iraq.\(^{149}\) While the convoy was enroute from Iraq to Kuwait, one of KBR’s trucks stopped due to a malfunctioning loading ramp.\(^{150}\) While Lessin attempted to help the driver of that truck, the ramp struck him in the head, severely injuring him.\(^{151}\) Lessin filed suit against KBR, which moved to dismiss the complaint based on the political question doctrine.\(^{152}\)

The court disagreed, holding that KBR failed to demonstrate that “military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted.”\(^{153}\) Instead, the court determined that Lessin’s claims of KBR’s negligence were “not certain to implicate such topics, or any others that are committed to the political branches. The incident at issue in this case was, essentially, a traffic accident, involving a commercial truck alleged to

\(^{149}\) *Lessin*, *supra* note 9, at 1.

\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) *Id.* at 2. KBR argued that the case involved the first four Baker tests. *Id.* at 3. Under the first Baker test, KBR argued that Lessin’s claims “necessarily involve issues committed to the executive branch, including military decision-making and the conduct of military operations.” *Id.* KBR argued that “because Lessin was injured while attempting to assist the malfunctioning convoy truck, adjudicating Plaintiffs’ claims will require an inquiry into whether Lessin was trained properly on civilian equipment, whether he complied with applicable military regulations and directives regarding civilian contractor convoys, and whether these military regulations were adequate to prevent his injury.” *Id.* KBR attempted to bolster its argument that the Plaintiffs’ allegations would involve military decision making by claiming that following an investigation of Lessin’s injury, the military purportedly developed new procedures limiting military personnel from assisting civilian convoys. *Id.* For the second Baker test, KBR contended that Lessin’s claims were not susceptible to resolution by judicially discoverable standards. *Id.* at 3-4. KBR’s argument of how the second Baker test applied was that the court was unable to develop standards to access the reasonableness of the military’s judgment in “permitting the civilian truck at issue to be a part of the military convoy… for the military to stop the convoy in a combat zone to attempt to repair the truck, whether it was appropriate for Lessin to assist in the truck’s repair, and whether the military exercised an appropriate level of maintenance over the truck.” *Id.* KBR concluded its political question argument by arguing that the third and fourth Baker tests were also implicated as the case, in KBR’s view, would “require the Court to undertake an initial policy decision concerning the interaction between military personnel and civilian contractors in a combat zone, and to express a lack of respect due to the coordinate branches of government that oversee such war efforts.” *Id.* at 4.

\(^{153}\) *Id.* The court acknowledged that where the military’s strategy, decision-making, or orders are necessarily bound up with the claims asserted in a case, the political question doctrine is implicated, and the case is inappropriate for judicial inquiry. *Id.*
have been negligently maintained, as well as a civilian truck driver who was allegedly negligent in operating the truck and insufficiently trained.”"^{154}

In similar fashion, the Eleventh Circuit in *McMahon* distinguished the defendant’s claim of the political question doctrine’s applicability from the realities of the plaintiffs’ claims and the evidence required to prove those claims.^{155} On November 27, 2004, an airplane, contractor owned and operated, crashed into the side of a mountain in Afghanistan killing all aboard, including three active duty members of the U.S. Army.^{156} Relatives of the Soldiers filed a wrongful death suit against the contractor, Presidential Airways.^{157} Presidential Airways filed a motion to dismiss on the political question doctrine arguing that “were this lawsuit to proceed, [the district court] would inevitably be asked to resolve a number of military “policy choices and value determinations,” such as why the DoD specified, among other things, the aircraft type, the aircraft equipment, and the pilot qualifications and approved the route structures of the acknowledged DoD mission…”^{158} Presidential claimed that these are “military choices and value determinations that are “constitutionally committed for resolution to the legislative or executive branches.”^{159}

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^{154} Id. at 4-5.

^{155} McMahon, *supra* note 9.

^{156} Id. at 1336.

^{157} Id.

^{158} Motion to Dismiss at 19, McMahon v. Presidential Airways, (No. 05-1002) (M.D. Fla. 15 Dec. 2005).

^{159} Id.
The district court denied the motion and Presidential filed an interlocutory appeal with the Eleventh Circuit. At this point in the litigation the evidence before both the district and appellate court was limited to the complaint, the contract between Presidential and DoD to provide air transport, and the statement of work (SOW) for that contract. In affirming the lower court’s ruling, the court of appeals determined that Presidential did not even satisfy the threshold requirement of the first Baker factor – a demonstration that the case would “require examination of any decision made by the military.” The court acknowledged that “[t]he military chose the start and the end points of the flights, and when the flights would be flown” but that “[i]t was not evident that [the plaintiffs’] allegations relate to any of these discrete areas of military responsibility.”

In addition to not demonstrating the existence of a military judgment which the lawsuit would implicate, the court held that Presidential “also failed to show that the case will require the application of judicially unmanageable standards.” The court conceded that “flying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But that does

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160 McMahon, supra note 9, at 1336.

161 Id. at 1360. On appeal, Presidential unsuccessfully argued that in addition to the complaint, contract and SOW, the court should also consider declarations from Presidential employees which the contractor claimed “tended to demonstrate that the military made certain decisions with respect to the operation of the flight on the day in question.” Id.

162 Id. (emphasis in original).

163 Id. at 1361.

164 Id. at 1363.
not render the suit non justiciable.”165 In the court’s view, “[a]s in any tort suit involving a plane crash, the court will simply have to determine whether the choices made were negligent.”166

The Lessin and McMahon decisions identified the relevant contractor actions in relation to the tort claim and that those actions were independent of military control. Other courts have had not the same success in identifying at which decision making level to evaluate whether the suit implicates the political question doctrine. The court’s challenge in applying the political question doctrine to wartime contractor litigation is daunting—applying a loosely defined doctrine to situations arising from the United States fighting two wars with a military force in which contractors play a much greater role in proportional numbers and functionally diversity than ever before. The litigants of course have their own agendas, plaintiffs couching their complaint as little more than the “red car/blue car” traffic accident of law school torts, while defendants claim that for the court to even hear a case involving a vehicle running off the road would involve the court overstepping constitutional bounds and intruding on the executive branch. Meanwhile, changes in how the government views and employs contractors, and its conspicuous absence from the litigation in which contractors have asserted the political question doctrine, have only increased the difficulty of the challenge courts face.

V. THE GOVERNMENT’S ROLE IN CREATING CONFUSION (OR AT LEAST NOT HELPING TO CLARIFY)

A. Changes in How the Government Views Contractors

According to the Congressional Research Service, “[n]ot since the 17th century has there been such a reliance on private military actors to accomplish tasks directly affecting the success

165 Id. at 1364.
166 Id.
of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return.”

Others refer to contractors as a “fourth branch of government” and “quasi agencies” of the federal government.

The Joint Chiefs of Staff attribute DoD’s increased reliance on contractors on a host of factors, including:

- reductions in the size of military forces (especially in the combat support and combat service support areas), increases in operations tempo and missions undertaken by the military, increased complexity and sophistication of weapon systems, and a continued push to gain efficiencies and reduce costs through the outsourcing or privatizing of commercially adaptable functions.

This increased reliance has in turn rendered operational contract support a “core logistic capability” which provides a military commander the “ability to synchronize and integrate both the delivery of service, agency, and other government organization contract support.”

Despite this recognition of contractor importance, according to a descriptively titled General

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168 Scott Shane and Ron Nixon, U.S. contractors becoming a fourth branch of government, INT’L HERALD TRIBUNE, February 4, 2007 available at http://www.iht.com/articles/2007/02/04/america/web.0204contract.php. Shane and Nixon contend that the government’s “reflexive answer to almost every problem” is to “hire another contractor” and that “the most successful contractors are not necessarily those doing the best work, but those who have mastered the special skill of selling to Uncle Sam.” Id.

169 Singer, supra note 160. According to Singer, “[w]e’ve created huge behemoths that are doing 90 or 95 percent of their business with the government….t]hey're not really companies, they're quasi agencies.” Id. at 6. Yet Singer refers to the use of Brown and Root to provide logistics for U.S. military forces deployed in and around Kosovo instead of calling up 9,000 reservists as “one of the quiet triumphs of the war in Kosovo.” Id.

170 JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTICAL SUPPORT OF JOINT OPERATIONS II-15 (18 Apr. 2008).

171 Id.
Accountability Office report, DoD plans do not adequately address contractors.\textsuperscript{172} Indeed, the GAO found that while DoD relies on contractors “to supply a wide variety of services,” DoD and the military services “could not quantify the totality of support that contractors provide to deployed forces around the world.”\textsuperscript{173}

The government’s relationship with contractors appears schizophrenic. The government obviously values and increasingly relies on contractors, even including contractors and their functions in military doctrine manuals, yet the government does not adequately plan for contractors and as mentioned in the introduction, does not track when contractors are wounded or killed.\textsuperscript{174} In some instances, the government does not even know how many contracts it has obligated or how many contractors it employs.\textsuperscript{175} Further complicating questions of tort liability and the applicability of the political question doctrine, the government has changed how it views contracts.\textsuperscript{176} Yet the government remains conspicuously absent from litigation over claims arising from the contractors’ performance of those contracts, which further muddies its relationship with contractors and the resulting judicial inquiry into their potential liability.

\textbf{B. Changes to how the Government views contracts}

Absent from cases thus far is any discussion of the U.S. government’s shift to performance-based acquisition, a shift which changed how the executive branch views and structures the contracts which underlie the litigation. The GSA defines performance based acquisition as “a


\textsuperscript{173} \textit{Id.}

\textsuperscript{174} GAO, \textit{supra} note 1, at 27-28, 33, and 38.

\textsuperscript{175} GAO, \textit{supra} note 1, at 33, 37.

\textsuperscript{176} As discussed above, the government employs contractors to perform the inherently governmental function of interrogation and several lawsuits against contract interrogators are ongoing.
technique for structuring all aspects of an acquisition around the purpose and outcome desired as opposed to the process by which the work is to be performed.” 177 The concept is not new, having been around since the 1990s. 178 The 2001 NDAA established a preference for performance-based contracts. 179 The preference is now a requirement under the FAR 180 and a separate approval process is required if an acquisition for services is not performance-based. 181

Performance-based acquisition would seem to aid at least the framework by which some of the plaintiffs attempt to argue their case, while undermining the contractor defendants’ arguments. In an acquisition for logistics services, the convoys which form the basis for much of

177 See http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=%252Fep%252Fchannel%252FgsaOverview.jsp&channelId=13077. The term performance based acquisition replaced the term performance based contracting. Id.

178 See U.S. General Services Administration Performance-Based Acquisition, available at http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=%252Fep%252Fchannel%252FgsaOverview.jsp&channelId=13077.


180 See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 37.000 (January 2009) [hereinafter FAR], which “requires the use of performance-based acquisitions for services to the maximum extent practicable and prescribes policies and procedures for use of performance- based acquisition methods.”

181 See FAR § 7.105(b)(4), which requires that a written acquisition plan “[p]rovide rationale if a performance based acquisition will not be used or if a performance-based acquisition for services is contemplated on other than a firm fixed- price basis.” See U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.170-2 (Sep. 15 2008), which describes the required approval process to acquire services through a non performance based contract. See U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. pt. 5137.590-1 (Mar. 22, 2007) stating that the Army acquisition team will “focus on the importance of developing and maintaining sound acquisition strategies to ensure services are properly planned, based upon clear, performance-based requirements and acquired by sound business practices.” In Whitaker, supra note 9, KBR effectively avoided this issue by focusing not on the LOGCAP contract under which it operated but on the Army’s field manual governing motor transport operations. Whitaker, supra note 9, at 1279 referring to Army Field Manual 55-30, Army Motor Transport Units and Operations.
the litigation previously discussed, the government’s focus is now required to be on purpose and outcome, and not, as contractors argue, on the control of convoy details.

C. Conspicuous Silence

Despite the important role contractors play in today’s military, in the host of contractor related litigation where the government is not a party, there is not a reported case where the government has either intervened or submitted an amicus curiae brief to the court that the litigation involved a political question. The closest the government seems to have come to was in Lane, discussed above.\footnote{Lane appeal, supra note 80} During the pendency of the appeal the Department of Justice (DoJ) filed a motion requesting an extension of time to file an amicus curiae brief.\footnote{See docket entry dated 24 May, 2007, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (requesting extension to file an amicus brief). The published opinion lists the United States as amicus curiae.} Having received the requested extension, the following month DoJ filed a letter with the Fifth Circuit “advising that an amicus brief will not be filed.”\footnote{See docket entry dated 24 May, 2007, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (approving extension); see docket entry dated 12 June, 2007, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) (reflecting notice by the government that it would not be submitting a brief).}

The fact that the United States is not a party does not preclude the existence and application of the political question doctrine.\footnote{See U.S. v. Munoz-Flores, 495 U.S. 385, 394 (1990) (stating that the identity of the parties is immaterial to the presence of the political question doctrine in a particular case).} But what if anything may a court permissibly infer from the government’s lack of involvement in a case in which a defense contractor is asserting the political question doctrine as a defense? With the exception of the McMahon case discussed below, answering that question requires considering the political question doctrine in broader terms than battlefield contractor litigation. Those broader terms yield a mixed answer,
although the current trend appears to be that courts will consider the government’s lack of involvement in cases which the government is not a party and the political question doctrine is raised. For example, the Ninth Circuit held that silence by the government is a neutral factor while the Third and Eleventh Circuits have held that courts may make inferences based on the government’s silence in cases involving the political question doctrine.\footnote{Alperin v. Vatican Bank, 410 F.3d 532, 556 (9th Cir. 2005); see also Richard O. Hatch, \textit{Relevant Considerations in Determining What Role If Any, the Army Should Play in GWOT-Related Litigation involving Army Contractors}, (not dated) (unpublished article on file with author) Colonel (retired) Hatch, the former head of the U.S. Army Judge Advocate General’s Corps Litigation Division, contends that Alperin and Assicurazioni, a U.S. District Court case from the Southern District of New York, stand for the proposition that “courts should be very wary of drawing inferences from decisions by the United Stated not to take positions in private litigation even though it could do so,” \textit{Hatch} at 7. fn 12. \textit{See In Re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation}, 340 F. Supp 2d 494, 506 (S.D.N.Y. 2004) (stating that “…the Government’s decision to intervene, or not, in a particular case relating to foreign affairs, and what forms its intervention should take were it to do so, is informed by a variety of intricate diplomatic and political considerations what make this sort of inferential reasoning by a courts a perilous enterprise.”).}

The Ninth Circuit, in \textit{Alperin v. Vatican Bank}, addressed claims against the Vatican Bank stemming from World War II claims issue.\footnote{Gross v. German Foundation Industrial Initiative, 456 F.3d 363 (3rd Cir. 2006); McMahon, \textit{supra} note 9.} The court noted that “[a]lthough the political question doctrine often lurks in the shadow of cases” that the doctrine is “infrequently addressed head on.”\footnote{Alperin, \textit{supra} note 180.} The court found that the political question barred some of the claims.\footnote{\textit{Id.} at 537.} Similar to the contractor litigation, the United States did not intervene or otherwise inform the court of the government’s view of whether the political question doctrine should apply. Interestingly, the court addressed this lack of involvement, stating that, “[i]t is unclear, however, how courts should construe executive silence. We are not mind readers. And, thus, we cannot discern

\footnote{186 Alperin v. Vatican Bank, 410 F.3d 532, 556 (9th Cir. 2005); see also Richard O. Hatch, \textit{Relevant Considerations in Determining What Role If Any, the Army Should Play in GWOT-Related Litigation involving Army Contractors}, (not dated) (unpublished article on file with author) Colonel (retired) Hatch, the former head of the U.S. Army Judge Advocate General’s Corps Litigation Division, contends that Alperin and Assicurazioni, a U.S. District Court case from the Southern District of New York, stand for the proposition that “courts should be very wary of drawing inferences from decisions by the United Stated not to take positions in private litigation even though it could do so,” \textit{Hatch} at 7. fn 12. \textit{See In Re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation}, 340 F. Supp 2d 494, 506 (S.D.N.Y. 2004) (stating that “…the Government’s decision to intervene, or not, in a particular case relating to foreign affairs, and what forms its intervention should take were it to do so, is informed by a variety of intricate diplomatic and political considerations what make this sort of inferential reasoning by a courts a perilous enterprise.”).}

\footnote{187 Gross v. German Foundation Industrial Initiative, 456 F.3d 363 (3rd Cir. 2006); McMahon, \textit{supra} note 9.}

\footnote{188 Alperin, \textit{supra} note 180.}

\footnote{189 \textit{Id.} at 537.}

\footnote{190 \textit{Id.}}
whether the State Department’s decision not to intervene is an implicit endorsement, an objection, or simple indifference. At best this silence is a neutral factor.”  

In the Third Circuit, *Gross v. German Foundation Industrial Initiative* involved a suit seeking additional funds for a foundation established to pay victims of Nazi era wrongs. The United States was not a party to the litigation, and while the government submitted correspondence to the court, the correspondence reflected that the United States did not have a position on the justiciability of the case. The Third Circuit also noted that the United States could have intervened in the case or petitioned the court to participate as amicus curiae, but did not. The court determined that the political question doctrine did not apply, at least in part, “[b]ecause the United States Executive has declined to take a formal position on the justiciability of this case….”

The *McMahon* case is even more instructive as it involved allegations of war time contractor liability and the court was even more direct in its assessment of the government’s silence. In upholding the district court’s denial of Presidential Airways’ motion to dismiss on political question grounds, the Eleventh Circuit stated that: “[w]e note that to this point, the United States has not intervened in the instant case, despite an invitation to do so….The apparent

191 *Id.* at 556.

192 *Gross*, *supra* note 181.

193 *Id.* at 384-395.

194 *Id.* at 385.

195 *Gross*, *supra* note 181. The Third Circuit reversed the trial court decision that the political question doctrine did apply.

196 *McMahon*, *supra* note 9.
lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question.\textsuperscript{197}

The absence of U.S. involvement in cases involving the political question doctrine is even more striking when compared with U.S. involvement with another doctrine which also limits justiciability, the act of state doctrine.\textsuperscript{198} In contrast to the government’s silence on the political question doctrine in contractor cases, the government developed “the Bernstein Letter” whereby the DoS informs the court if the executive branch believes that the act of state doctrine applies to pending litigation.\textsuperscript{199}

So why hasn’t the government made its views known? Expressing the executive branch’s view on the applicability of the political question doctrine in a given case would benefit one side of the litigation over the other, an outcome which, particularly when U.S. service members are suing contractors, the government may wish to avoid.\textsuperscript{200} For other plaintiff categories, the government likely does not want to involve itself where contractors are suing contractors. Likewise, the executive branch submitting a position to the court on the applicability of the doctrine to suits by persons the executive branch detained at Abu Ghraib is problematic. If the executive branch’s position is that the doctrine does not apply, then they have increased the chances of litigation success against companies with whom the government has billions of dollars of contracts and without whose support the military would have difficulty functioning. If the executive branch’s position is that the doctrine does apply, that may result in

\textsuperscript{197} Id. at 1365.


\textsuperscript{199} Id.

\textsuperscript{200} Hatch, \textit{supra} note 179.
the case being dismissed against the contractor but in so doing may later require the executive branch explain to at least two treaty bodies whether a remedy exists for detainees who allege torture.\textsuperscript{201} By not submitting a position to the courts on contractor litigation potentially involving the political question doctrine, the government may avoid initial offense to one party but almost ensures offense to both in the end.

Also, and admittedly somewhat counter intuitive, by not expressing its views that the doctrine either should or should not apply, the government likely creates more work for itself, not less.\textsuperscript{202} Without the government’s view, courts inefficiently grapple with the competing characterizations of how the executive branch is or is not implicated by the questions the case presents. Regardless of which way the court rules on the political question doctrine, either or both sides will likely attempt to engage the government seeking declarations and trying to subpoena testimony and documents from the government. So the government will likely be involved, albeit indirectly, even when it does not submit its views to the court; that involvement is just more inefficient and the government’s control of its role is more limited. Moreover, the lack of government involvement has arguably played a role in the inconsistent application of the

\textsuperscript{201} See Convention on Torture, art. 14(1), ratified by the U.S. Oct. 21, 1994, 1465 U.N.T.S. 85 (stating that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation….”; International Covenant on Civil and Political Rights, art. 3(a), ratified by the U.S. Apr. 2, 1992, 999 U.N.T.S. 171 (stating that Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity…..)

\textsuperscript{202} There is also the possibility that by not submitting a statement to the court in cases in which the political question doctrine should apply, the government may end up reimbursing the contractor defendants for their litigation costs under some contract structures. In suits by servicemembers this would be an odd effect indeed as servicemembers are generally precluded from suing the government in tort. There seems little functional difference between a servicemember suing the government directly as opposed to suing and recovering from a contractor, who in turn is reimbursed by the government. See FAR § 52.228-7(c), which provides for a contractor to be reimbursed for “liabilities” arising out of the performance of the contractor, including for death and bodily injury. But see Risk/Liability to Third Parties/Indemnification, 73 Fed. Reg. 62 (Mar. 31, 2008) (to be codified at 48 C.F.R. pt. 252.225-7040(b)(2) (referencing contractor concern for the availability of indemnification and stating that contractors are accountable for the negligent or willful actions of their employees, including subcontractors. In the Federal Register, the government reiterates the view that under performance based contracting, the government “does not, in fact, exercise specific control over the actions and decisions of the contractor.”).
political question doctrine to war time contractor litigation, increasing the chances of the
Supreme Court hearing an appeal and providing guidance on the doctrine which the government
may also want to avoid.

VI. RESULTING CONFUSION AND INCONSISTENT APPLICATION

The situation in Iraq has drastically improved in the past year. Iraq now assumes
responsibility for detainees and convoys are rarely attacked. Accordingly one may question
whether the cases arising from the treatment of detainees or the conduct of convoys in Iraq have
any long term significance in terms of reconciling the issue of how the political question doctrine
applies to battlefield contractor litigation if the underlying incidents which generated the
litigation thus far are not likely to be repeated. But dealing with detainees and driving logistics
convoys are just manifestations of the broader issue—that the United States military utilizes so
many contractors and in so many different ways that tort incidents, whether between contractors
and local nationals, U.S. servicemembers, or even other contractors, are a certainty.

203 However, as the situation in Iraq has improved it has deteriorated in Afghanistan. As the United States shifts its
attention and the focus of its total military force to Afghanistan, it will be interesting to see if there is a
corresponding spike in lawsuits filed against contractors.

204 Unfortunately, the lack of insurgent attacks or convoy accidents does not portend the end of either contractor
based litigation or attempts to assert the political question doctrine. Demonstrating the inevitability of future
litigation given the number of contractors and their diverse functions in today’s military (and perhaps the start of the
next wave of contractor litigation involving the political question doctrine), see Complaint, Harris v. KBR, No. 08-
0563, (W.D. Penn. 22 Apr. 2008), a suit filed a suit by the parents of Staff Sergeant (SSG) Ryan Maseth, a U.S.
Army Special Forces Soldier (“Green Beret”) electrocuted in Iraq while in the shower of a building allegedly
maintained by KBR. KBR filed a motion to dismiss under seal, news reports indicate that motion is based, at least in
part, on the political question doctrine. See, Pittsburgh Soldier’s Iraq Death Prompts Lawsuit; KBR Responds
Military Contractor Sued After Ryan Maseth Is Electrocut In Shower available at
http://www.thepittsburghchannel.com/news/16396664/detail.html claiming that the motion to dismiss states that the
case “raises inherently political questions involving... military policy level and tactical decision making ... and the
direction the military provided to KBR regarding needed repair work.” Id. Moreover, the plaintiffs’ response to the
motion was not sealed and addresses in detail KBR’s assertion of the political question doctrine, making
considerable references to Lane appeal in the process. Brief in Opposition to Motion to Dismiss, Harris v. KBR, No.
08-0563, (W.D. Penn. 26 Jun. 2008). During Congressional hearings, KBR’s chief executive officer testified that
under the maintenance contract, the Army had primary responsibility for preventative maintenance repairs. See,
Committee Holds Hearing on Deficient Electrical Systems at U.S. Facilities in Iraq
As courts attempt to distinguish one contractor tort case involving the political question doctrine from another using increasingly strained analysis, the result is problematic for the litigants in both the instant, and inevitable future, case. One theory is that the current difficulty, at its core, flows from the case which established the tests for how to apply the political question doctrine, Baker v. Carr.\footnote{Professor Chemerinksy has labeled the Baker v. Carr criteria “useless” and impossible to apply to determine which cases present political questions. Erwin Chemerinsky, FEDERAL JURISDICTION 142, 143-145 (Little, Brown and Co., 2d ed. 1994).} The Baker tests have proved an unsteady foundation upon which to build political question doctrine jurisprudence. Courts have wrestled, unsuccessfully it seems, with the Supreme Court’s requirement to avoid “semantic cataloguing”\footnote{Baker, supra note 15, at 217.} yet “analyze representative cases and to infer from them the analytical threads that make up the political question doctrine.”\footnote{Id. at 211.} Even worse, the current political question doctrine decisions in battlefield contractor litigation are themselves the analytical threads, albeit frayed, upon which future
decisions may unfortunately attempt to rely. Another theory is that even if the Baker tests were useful when announced, the real cause of the current difficulty is the unique collision of the conflicts in Iraq and Afghanistan and the burgeoning use of contractors in roles traditionally reserved for the government, a collision for which neither the political question doctrine nor the judiciary are well equipped to handle.

Issues of justicability are a contradiction of sorts -- courts consider aspects of a case to determine whether the court may permissibly consider the case. That the U.S requires only notice pleading further complicates the court’s task. Yet similar cases should yield similar, not widely disparate, outcomes. So when should the political question doctrine apply to wartime contractor tort litigation? How do we balance that incidents occur, directly or in the shadow of combat operations, with the recognition that “[t]he Constitution’s allocation of war powers to the President and Congress does not exclude the courts from every dispute that can arguably be connected to ‘combat.’”

The government should acknowledge the certainty of litigation created by the number of contractors currently employed and the manner of functions they provide. More importantly, the government should recognize that by not involving itself in the litigation it creates more work, possibly costs, and loses the opportunity to influence the litigation and prevent not only inconsistent case results but their unintended and unforeseen consequences over time.

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208 That the U.S requires only notice pleading makes justicability determinations that much harder.

Courts should recognize that the terms combat and wartime are little more than labels which in and of themselves add little to the analysis.\textsuperscript{210} Several of the “wartime” convoy accidents do not involve any relevant wartime condition-- vehicles run into other vehicles or off the road the world over. Similarly, analysis which focuses exclusively on control would seem to result in the application of the political question doctrine to a convoy accident not only in Iraq but in also in non-war zones, including even a U.S. state, such as Kansas. This not only demonstrates that the control test can be a red herring but that applying the test without linking that control to decisions and causes relevant to the incident is unproductive at best and likely to result in confusing and inconsistent outcomes.\textsuperscript{211} Courts should also recognize the risks of either the macro or micro level of analysis.

\textsuperscript{210} For how long does “wartime” exist? Where? Labeling conditions wartime begs that inquiry, but it is likely one of little utility absent some nexus between the wartime condition and the incident.

\textsuperscript{211} The judiciary’s ability to separate relevant and irrelevant combat or wartime factors will be tested in Webster, supra note 9, another Iraq convoy accident case in which the contractor defendant has asserted the political question doctrine. The Webster case presents a slight variation from the facts of other convoy cases and may result in different political question analysis all together. Unlike the cases in which the servicemember plaintiff was a dedicated military escort to the logistics convoy, Sergeant James West was traveling with his field artillery unit in Iraq. The field artillery unit passed a KBR convoy heading in the opposite direction, during which time there was a collision between Sergeant West’s vehicle and the KBR vehicle which fatally injured SGT West. Complaint at 2, Webster v. Halliburton, No. 05-3030 (S.D. Tex. 26 Aug. 2005). Sergeant West’s mother and widow filed suit against KBR, who moved to dismiss the case on political question grounds. The defense argued that because the force of the collision ejected SGT West from his vehicle, he was not wearing a seat belt. Motion to Dismiss at 4-5, Webster v. Halliburton, No. 05-3030 (S.D. Tex. 21 Sep. 2005). The defense claimed that would force the court to impermissibly determine “[w]hether the military provided adequate and appropriate guidance and enforcement to its personnel regarding the use of passive restraint devices such as seat belts while traveling in combat zones and, if not, to what extent this inadequacy contributed to the injuries sustained by Sergeant West on July 10, 2004?” \textit{Id.} at 5. KBR argued that Webster’s claims:

…necessarily raise issues regarding the conduct of military operations that are committed to the discretion of the political branches of government. Further, no judicially manageable standards exist to evaluate the propriety of the decisions at issue here: whether MSR Tampa was constructed and maintained by the military properly and adequately to handle the traffic load; whether the Army provided Sergeant West's convoy and the military escort leading the supply convoy with adequate instructions and guidance regarding safe transit speeds along MSR Tampa; whether the military escort properly balanced the need for expeditious passage through a combat zone with the road conditions along MSR Tampa as of July 10, 2004; whether Sergeant West's death was caused in whole or in part by the military's failure to train him on the proper use of his seat belt while traveling in a combat zone; and whether his death was attributable in whole or in part to the military’s failure to provide prompt medical attention.
A suggested methodology to clarify the scope and application of the political question doctrine to future battlefield related government contractor suits is that courts consider:

(1) whether the suit arises from actions taken by a contractor in war zone, defined as geographic locations where U.S. servicemembers are eligible for “imminent danger pay”; (2) whether the U.S. military controlled the actions taken by the contractor either directly or through contract requirements; (3) how the military control, decision making, or actions are relevant to, or a cause of, the incident at issue.

Step 1 is a threshold inquiry designed to focus the inquiry of what “wartime” condition makes a fact in issue for the litigation more or less likely. Step 2 moves past abstract Constitutional arguments to the specifics of whether there is governmental conduct relevant to the litigation. Step 3 is designed to identify where on the causation spectrum that conduct or control lies and whether the political question doctrine should apply. Where the government’s role is an attenuated cause or no causes at all, the doctrine should not apply. As the government’s role moves along the spectrum to serving as a direct cause, or in the easiest application of the methodology, the proximate cause, the doctrine should apply.

If the application of the political question doctrine to war time contractor tort liability is so unwieldy, is there an alternative? One commentator has suggested revising and possibly expanding the Defense Base Act (DBA).\textsuperscript{212} The DBA “provides workers' compensation protection to civilian employees working outside the United States on U.S. military bases or

\textsuperscript{212} 42 U.S.C. §§ 1651-1654. See Jeremy Joseph, Striking the Balance: Domestic Tort Liability for Private Security Contractors, 5 GEO. J.L. & PUB. POL’Y 691, 718 (Summer 2007). Joseph recommends that the Defense Base Act should be the sole remedy for private security companies’ negligence towards their employees. Id.
under a contract with the U.S. government for public works or for national defense.\textsuperscript{213}

Significant changes would be required for the DBA to address the categories of plaintiffs and causes of action, including intentional tort claims, addressed in this article.\textsuperscript{214} Additionally, the NDAA for 2009 may limit future problems as it restricts security contractors from performing inherently governmental functions in an area of combat operations.\textsuperscript{215} Perhaps another framework altogether is needed.

\section*{VII. Conclusion}

The purpose of this article is not to argue for or against the applicability of the political question doctrine, in general or in any particular case. The purpose is to illustrate the inherent difficulties courts face in applying a confusing justiciability doctrine to war time contractor tort litigation, difficulties enhanced by the government’s use of contractors and lack of involvement in the litigation which follows. This article seeks to identify judicial approaches and methods of analysis which cloud the issue and those methods which clarify, perhaps providing the elusive analytical thread for later cases.


\textsuperscript{214} See Lane appeal, \textit{supra} note 80, at 556. In addition to its political question doctrine argument, KBR alternatively argued that the suit was barred by the DBA. \textit{Id}. Neither the district court nor the Fifth Circuit has addressed that argument yet. The response from the plaintiffs is that DBA provides a contractor a defense to contract based theories, but not tort. Appellant Reply Brief at 2, Lane v. Halliburton, 529 F.3d. 548 (5th Cir. 2008) (06-20874, 25 June, 2007).

\textsuperscript{215} See \textbf{Performance by Private Security Contractors of Inherently Governmental Functions in an Area of Combat Operations}, \textit{supra} note 77.