HALLIBURTON HEARS A WHO? POLITICAL QUESTION DOCTRINE DEVELOPMENTS IN THE GLOBAL WAR ON TERROR AND THEIR IMPACT ON GOVERNMENT CONTINGENCY CONTRACTING

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So you know what I think? Why, I think that there must
Be someone on top of that small speck of dust!
Some sort of a creature of very *small size,*
too small to be seen by an elephant's eyes . . . .[1]

. . . .

"I think you're a fool!" laughed the sour kangaroo
And the young kangaroo in her pouch said, "Me, too!
You're the biggest blame fool in the Jungle of Nool!"[2]

. . . .

"For almost two days you've run wild and insisted
On chatting with persons who've never existed.
Such carryings-on in our peaceable jungle!

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[1] DR. SEUSS, HORTON HEARS A WHO! 5 (1954). In this children's book, a speck of dust on a clover, which is in fact a tiny planet inhabited by creatures known as Whos, speaks to the main character, an elephant named Horton. *Id.* For the majority of the story, Horton is the only character who can hear the Whos and he is ridiculed by the other residents of the Jungle of Nool because of his belief in the Whos' existence. *Id.*

[2] *Id.* at 14.

We've had quite enough of your bellowing bungle![3]

— Horton Hears a Who!

I. Introduction

Recent court decisions exhibit the potential for increased defense contractor[4] liability,[5] which could, in turn, increase the costs of Government contingency contracting[6] in the Global War on Terror

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[3] *Id.* at 36.

[4] A defense contractor is "[a]ny individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the Department of Defense to furnish services, supplies, or construction." U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES para. E2.1.5 (3 Oct. 2005).

[5] *See* 22 NASH & CIBINIC REP. ¶ 44 (2008) [hereinafter NASH & CIBINIC REP.] (discussing Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008)).

> The U.S. Court of Appeals for the Fifth Circuit has opened the door to lawsuits by or on behalf of contractor employees who are injured or killed while working in combat zones . . . . The Fifth Circuit concluded that the tort claims could be litigated without delving into political questions.
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> . . . .
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> In allowing this case to go to trial, the Fifth Circuit has more widely opened the door for suits by contractor employees who work in combat zones. This obviously imposes significant risks on such contractors and may affect the ability of the Government to persuade such contractors to undertake this type of work.

Id.; *see also infra* Section V.

[6] *See infra* Section VIII. Regarding the term contingency contracting, Defense Acquisition University states "[a]t this time there is not universal agreement as to a definition of this term[,]" but defines the term for academic purposes as "[d]irect contracting support to tactical and operational forces engaged in the full spectrum of armed conflict and Military Operations Other Than War, both domestic and overseas." Defense Acquisition University, CON 234 Contingency Contracting, Pre-Course Materials, *available at*: http://www.dau.mil/registrar/pre-courses/CON%20234%20Pre-Course%20Materials.pdf (last visited July 9, 2009). The definition is "purposely exclusive of: military training exercises, routine installation and base operations, and systems/inventory control point contracting," both inside and outside the continental United States. *Id.* The major difference between these types of contracting and contingency contracting is "the element of *immediate risk* to human life or significant

(GWOT).[7] Specifically, the Fifth and Eleventh Federal Circuit Courts of Appeals have allowed tort cases[8] by military members and U.S. civilians injured in Iraq and Afghanistan to proceed.[9] Significantly, such cases may involve "political questions" that the Judicial Branch is ill-equipped to decide.[10] Some defense contractor advocates claim these actions must be dismissed, else there be grim consequences for Government contingency contracting.[11] Much like Horton's singular awareness of the

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national interests." *Id*. This is the context in which this article uses the term government contingency contracting.

[7] *See generally* Jeffrey F. Addicott, *The Political Question Doctrine and Civil Liability for Contracting Companies on the "Battlefield*,*"* 28 REV. LITIG. 343, 343 n.2 (2008) ("The term 'War on Terror' is used both as a metaphor to describe a general conflict against all international terrorist groups and, more precisely, to describe the ongoing international armed conflict between the United States of America and the 'Taliban, al-Qaeda, or associated forces.'") (citing 10 U.S.C. § 948a(1)(i) (2006)). Recent news reports indicate a desire by the Obama Administration to replace the GWOT label with the term "overseas contingency operations." *See generally* Jon Ward, *White House: 'War on Terrorism' is Over*, WASHINGTONTIMES.COM, Aug. 6, 2009, http://www.washingtontimes.com/news/2009/aug/06/white-house-war-terrorism-over/?feat=home_headlines; Scott Wilson & Al Kamen, *'Global War On Terror' Is Given New Name*, WASHINGTONPOST.COM, Mar. 25, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html. Because the GWOT label was the appropriate terminology at the time of the events in the relevant cases discussed in this article, this article continues to use that term.

[8] *See generally* LAWRENCE J. MCQUILLAN & HOVANNES ABRAMYAN, U.S. TORT LIABILITY INDEX: 2008 REPORT 7 (2008).

> A tort, French for "wrong," is best defined as wrongful conduct by one individual that results in injury to another. A tort has been committed when someone has suffered injury caused by the failure of another person to exercise a required duty of care. The actor is to blame, and the injured party is entitled to recover damages. The function of torts is to provide the injured party with a remedy, not to punish the actor.

Id.

[9] *See Lane*, 529 F.3d 548; McMahon v. Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007).

[10] *See infra* Section II.

[11] *See generally* Brief for Prof'l Servs. Council as Amicus Curiae Supporting Defendant, Smith-Idol v. Halliburton, 2006 U.S. Dist. LEXIS 75574, (S.D. Tex. 2006) (No. H-06-1168).

> [T]he devastating effects of such state-law tort suits would be far more profound than financial. If federal courts [allow such suits to proceed,] existing and future battlefield contractors, out of fear of state-law liability, may decline to follow, or unilaterally alter or deviate from, the military's combat zone instructions . . . .

Whos, are defense contractors by themselves aware of an impending crisis in Government contingency contracting? Does this "tiny planet" of a presaged broken combat zone procurement system really exist?

Using established political question doctrine precedent, federal courts recently designed a workable analytical framework for the identification of political questions in a modern contingency environment. These decisions protect military policy and decision-making from improper judicial intervention. This development is important because of its potential effect on Government contingency contracting.

Before the court cases are examined, it is important to review what the political question doctrine is, why it is important, and how it has developed over time. Sections II, III, and IV of this article examine the relevance and history of the political question doctrine. The doctrine's impact on the federal judiciary's involvement in foreign and military affairs is also addressed. Sections V and VI of this article discuss recent GWOT cases involving the doctrine and its current status involving tort suits against defense contractors in contingency environments. Finally, Sections VII and VIII of this article clarify the impact of these developments on Government contingency contracting.

The recent developments in political question doctrine case law are significant to the future of Government contingency contracting. However, they are not catastrophic—although portrayed as such by some defense contractor advocates.[12] There will not be an explosion of contracting costs passed on to the Government. There will not be a mass refusal of defense contractors to accept contingency contracts. There will not be chaos on the battlefield. Such predictions are nothing more than "bellowing bungle," and this article demonstrates why.

II. The Political Question Doctrine: What Is It? Why Is It Important?

Before the impact of the cases on Government contingency contracting can be accurately analyzed, it is first necessary to establish

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Id.

[12] *See, e.g.*, *supra* note 11.

the meaning of the term political question doctrine and explain its relevance to contemporary legal analysis.

What is the political question doctrine? According to Chief Justice John Marshall, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in [the U.S. Supreme Court]."[13] In 2004, the Court held "[s]ometimes . . . the law is that the judicial department has no business entertaining [a] claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. Such questions are said to be 'nonjusticiable,' or 'political questions.'"[14] While judicial abstention of political questions has remained a consistent practice throughout the history of American jurisprudence,[15] what actually makes up a political question is less obvious.[16]

A portion of the confusion surrounding the doctrine[17] originates from its label. Some scholars contend the term "political" should more appropriately be interpreted as "discretionary."[18] Furthermore, just

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[13] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
[14] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (citations omitted).
[15] *See, e.g.*, *supra* notes 13–14 and accompanying text.
[16] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 144 (1996) ("That there is a 'political question' doctrine is not disputed, but there is little agreement as to anything else about it—its constitutional basis and scope; whether abstention is required or optional; how the courts decide whether a question is 'political,' and which questions are." (end note omitted)); *see also* Lane v. Halliburton, 529 F.3d 548, 559 (5th Cir. 2008) ("[W]hether an issue presents a nonjusticiable political question cannot be determined by a precise formula.") (quoting Saldano v. O'Connell, 322 F.3d 365, 368 (5th Cir. 2003)); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933 (D.C. Cir. 1988) ("No branch of the law of justiciability is in such disarray as the doctrine of the 'political question.'") (quoting CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 74 (4th ed. 1983)); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005) (contending the political question doctrine "may lack clarity"); NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 51 (5th ed. 2008) ("[T]hough Chief Justice Marshall stated that political questions were not within judicial competence, he did not indicate what made a question political within the meaning of the rule."); Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924) ("[T]he chaos that exists in the cases with reference to what are and what are not political questions defies classification."); A.E. Gold, *Jurisdiction and the Supreme Court Over Political Questions: What is a Political Question?*, 9 CORNELL L.Q. 50, 50 (1923) ("[T]he line of demarcation between justiciable and political questions has never been clearly drawn.").
[17] *See generally supra* note 16.
[18] Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 68–69 (1977) ("Chief Justice Marshall used the term 'political' to mean 'discretionary'. . . . [W]hen a discretionary function of the President or Congress is

because an issue can be termed political in nature does not mean the political question doctrine will automatically bar federal courts from deciding it.[19] In attempting to identify political questions it is more important to use as a guide those issues historically viewed as "outside the sphere of judicial power"[20] than it is to look for a magical source of direction in the term political.

The political question doctrine relates directly to the U.S. Government's separation of powers.[21] The 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."[22] Furthermore, "[b]ecause political questions are nonjusticiable under Article III of the Constitution, courts lack jurisdiction to decide such cases."[23] The doctrine serves to "prevent[] federal courts from overstepping their constitutionally defined role."[24] Correspondingly, the political question doctrine performs an important function in protecting the separation of powers.

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sought to be adjudicated, the Court will, in most cases, refuse independent review because the nature of the issue is political and not juridical.").

[19] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 229 (1986) ("[N]ot every matter touching on politics is a political question."); INS v. Chadha, 462 U.S. 919, 942–43 (1983) ("[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress."); Suhail Najim Abdullah Al Shimari v. CACI Premier Tech., Inc., 2009 U.S. Dist. LEXIS 29995, at *13 (E.D. Va. 2009) ("The concern is not with 'political cases' carrying the potential to stir up controversy, but instead with 'political questions' which, by their nature, create separation of powers concerns.") (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

[20] LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 103 (6th ed. 2005) (quoting Velvel v. Johnson, 287 F. Supp. 846, 850 (D. Kans. 1968)).

[21] *Lane*, 529 F.3d at 559 ("[T]he purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government.").

[22] Lessin v. Kellogg Brown & Root, 2006 U.S. Dist. LEXIS 39403, at *3 (S.D. Tex. 2006) (quoting *Japan Whaling Ass'n*, 478 U.S. at 230).

[23] *Id*. (citing Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978)).

[24] McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1357 (11th Cir. 2007), (citing *Baker*, 369 U.S. at 210).

Like the other self-imposed limits on judicial review (e.g., standing, ripeness, mootness, etc.), the political question doctrine is not expressly mentioned in the Constitution.[25] However, while other limits on judicial review focus on the status of the party bringing the action,[26] the political question doctrine instead focuses on the substance of the issue presented.[27] In that sense, the doctrine functions as a merit determination of the issue at hand. Consequently, some scholars argue the doctrine should be viewed differently than the other limitations on judicial review.[28]

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[25] *See* Firmage, *supra* note 18, at 66 ("Unchecked judicial review is avoided in part by constraints imposed by the judicial branch itself."); *see also* Gold, *supra* note 16, at 53 ("The refusal of the Supreme Court to take jurisdiction of 'political questions' . . . constitutes an entirely self-imposed limitation. There is no provision of the Constitution which requires it.").

[26] Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 231–32 (1985).

[27] Made in USA Found. v. United States, 56 F. Supp. 2d 1226, 1254 (N.D. Ala. 1999).

> An important consequence of the political question doctrine is that a holding of its applicability to a theory of a cause of action renders the government conduct immune from judicial review. Unlike other restrictions on judicial review—doctrines such as case or controversy requirements, standing, ripeness, and prematurity, abstractness, mootness, and abstention—all of which can be cured by different factual circumstances, a holding of nonjusticiability is absolute in its foreclosure of judicial scrutiny.

Id. (citing RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW § 2.16 (2d ed. 1992)); Champlin & Schwarz, *supra* note 26, at 231–32; Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 537–38 (1966).

[28] *See* Champlin & Schwarz, *supra* note 26, at 231–32.

> Nonjusticiability . . . exists separately from the political question doctrine. Standing, ripeness and mootness, for example, are situations where the status of a party disables her from invoking judicial action over an issue. In the political question context, by contrast, the issue itself, independent of the status of the parties, has been termed non-justiciable.

Id. Furthermore, there is a lack of consensus of nomenclature as to how the term political question doctrine relates to the term nonjusticiable. *Cf.*, *supra* note 27; Nejad v. United States, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (equating the terms political and nonjusticiable.); ROTUNDA & NOWAK, *supra* note 27, § 2.16(a) (contending the doctrine "should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration").

The political question doctrine generates strong opinions among legal scholars. Because the doctrine involves a court's refusal to exercise jurisdiction in matters where it otherwise would,[29] some scholars criticize the doctrine[30] while others laud it.[31] Critics view it as a form of "judicial avoidance" whereby federal courts improperly abandon their responsibility to interpret the Constitution.[32] Other critics go so far as to declare the doctrine an affront to the Constitution and its history.[33] These

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[29] Potts v. Dyncorp Int'l, LLC, 465 F. Supp. 2d 1245, 1248 (M.D. Ala. 2006) ("If the doctrine applies, courts refuse to exercise jurisdiction they otherwise might have.").

[30] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 184 (2d ed. 1986). The political question doctrine is founded on

> the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Id.; THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 4 (1992) ("[T]he abdicationist tendency, primarily expounded in what has become known as the 'political question doctrine,' is not only not required by but wholly incompatible with American constitutional theory."); Firmage, *supra* note 18, at 66.

> The importance and seriousness of the debate arise primarily from one fact. Under the political question doctrine, a court may refuse to render an independent ruling on an issue arising under the Constitution in a case in which all normal prerequisites, constitutional and non-constitutional, to an independent juridical determination have been met.

Id.; *infra* notes 32–35.

[31] *See, e.g.*, *infra* note 36.

[32] Scharpf, *supra* note 27, at 535–38 ("[W]hen it holds that a question is 'political' rather than 'judicial,' the Court renounces [its] responsibility altogether, and leaves the performance of this function to the political institutions. . . . When it applies the doctrine to a question, the Court abdicates its responsibility 'to say what the law is.'"); Champlin & Schwarz, *supra* note 26, at 220 (contending invocation of the political question doctrine is an "extreme position" where a court "abdicate[s] its most important function—Constitutional review").

[33] Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 243 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007).

individuals contend the courts are better suited than the electoral process at protecting and interpreting the Constitution.[34] Such scholars prefer courts which operate on a system of well-reasoned decisions and precedent to political branches that operate merely on "majoritarian preference."[35] Conversely, other scholars view the doctrine as an important element of good Government.[36] Not only has the very existence of the political question doctrine served as a lightning rod for scholarly debate, but disagreement also exists among scholars as to the procedural implication of the doctrine.

Ultimately, courts have decided the political question doctrine can be implicated in one of two ways—on textual or prudential grounds.[37] Textual implication arises when the Constitution specifically grants the power to decide a particular matter to one or both of the political

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> The puzzling and troubling feature of the political question doctrine is the potential it seems to have to render constitutional provisions meaningless. After armed struggle and tremendous political effort, our ancestors gave us the magnificent achievement of a written Constitution that limits the powers of government. Under the political question doctrine, however, the principal enforcement mechanism for those constitutional limits—judicial review—is not available for certain constitutional provisions.

Id. (footnote omitted).

[34] *Id*. at 244.

> [T]he electoral process lacks crucial structural elements provided by the judicial process that make the latter a proper mechanism for the enforcement of constitutional constraints. The judicial process is mandatory in nature; it focuses on particular issues; it provides a statement of reasons for its decisions; it operates within a system of precedent; and it operates according to law, not according to majoritarian preference. These features of the judicial process . . . are not found in the electoral process and are crucial to the appropriateness of the judicial process for resolving constitutional issues.

Id.

[35] *Id*.

[36] *See* Finkelstein, *supra* note 16, at 345 (contending the doctrine supports the public's interest in "effective legal action").

[37] *See generally* Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES, *supra* note 33, at 23; Joseph H.L Perez-Montes, Comment, *Is the Political Question Doctrine a Viable Bar to Tort Claims Against Private Military Contractors?*, 83 TUL. L. REV. 219, 228–30 (2008).

branches.[38] More controversially, prudential implication arises when courts look outside the text of the Constitution to determine whether a particular matter *should* be decided by the judicial branch.[39] The tension between these two competing versions of political question doctrine philosophy has generated scholarly debate.[40]

Beyond the political question doctrine's meaning and relevance, an appreciation of the doctrine's impact on today's cases requires an understanding of the doctrine's historical basis and development.

III. History and Development of the Political Question Doctrine

Although the doctrine's current analytical framework originates from a handful of landmark U.S. Supreme Court opinions,[41] the political question doctrine arrived in America as a component of the common law.[42] Some scholars argue Alexander Hamilton contemplated the basic principle behind the doctrine in *The Federalist Papers*.[43] However, John Marshall deserves much of the credit for bringing the doctrine to the forefront of American jurisprudence.[44] Three years before Marshall discussed political questions as a limit on judicial review in *Marbury v. Madison*,[45] he warned of the potential danger of a court without jurisdictional limits.[46] Marshall cautioned that "if the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision."[47] This would undermine the separation of powers and "the other

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[38] *See generally* Barkow, *supra* note 37; Perez-Montes, *supra* note 37, at 228–30.
[39] *See generally* Barkow, *supra* note 37; Perez-Montes, *supra* note 37, at 228–30.
[40] *See generally* Perez-Montes, *supra* note 37, at 228–30 (providing a brief summary of the debate between Professor Herbert Wechsler and Professor Alexander Bickel on this subject).
[41] *E.g.*, Baker v. Carr, 369 U.S. 186 (1963); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[42] Firmage, *supra* note 18, at 68.
[43] Barkow, *supra* note 37, at 24 (claiming "Hamilton . . . recognized a constitutionally based political question doctrine . . . ." in *The Federalist No. 78*). *See* THE FEDERALIST NO. 78 (Alexander Hamilton).
[44] *See generally infra* notes 45–51 and accompanying text.
[45] 5 U.S. (1 Cranch) 137 (1803).
[46] Barkow, *supra* note 37, at 25.
[47] *Id*. (quoting Representative John Marshall, Speech on the Floor of the House of Representatives (Mar. 7, 1800), *in* 18 U.S. (5 Wheat.) app. note I, at 16–17 (1820)).

departments would be swallowed up by the judiciary."[48] Marshall carried these notions of judicial restraint with him to the Supreme Court.

Marbury v. Madison is of course the case in which judicial review was "firmly established as a keystone of our constitutional jurisprudence."[49] However, *Marbury* also conveyed the message that judicial review is not without limitation: "the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[50] Those words set forth the principle that some discretionary actions of the political branches cannot be reviewed by the courts.[51] Therefore, despite not being widely known as such, *Marbury* was quite significant in the development of the political question doctrine.

The most consequential U.S. Supreme Court case regarding the political question doctrine is a voting rights reapportionment case from 1963, *Baker v. Carr*.[52] In *Baker*, the Court held that the determination of whether a matter has been committed to another branch of the Federal Government "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[53] The *Baker* case delineated six criteria[54] to be used in determining the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political

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[48] *Id*.
[49] Louis Henkin, *Is There a "Political Question Doctrine?,"* 85 YALE L.J. 597, 600 (1976).
[50] *Marbury*, 5 U.S. at 165–66.
[51] Nada Mourtada-Sabbah & John W. Fox, *Two Centuries of Changing Political Questions in Cultural Context*, *in* THE POLITICAL QUESTION DOCTRINE, *supra* note 33, at 90.
[52] 369 U.S. 186 (1963); *see* Rogers v. Lodge, 458 U.S. 613, 634 (1982) (contending *Baker* "represents one of the great landmarks in the history of [the U.S. Supreme Court's] jurisprudence"); *Developments in the Law: Access to Courts*, 122 HARV. L. REV. 1151, 1195 (2009) [hereinafter *Developments*] (describing *Baker* as the case which "announced [the political question] doctrine's modern contours").
[53] *Baker*, 369 U.S. at 211.
[54] The *Baker* criteria are also described as formulations, tests, and indicia. *See id*. at 217 (describing the criteria as formulations); Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (describing the criteria as tests); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1357 (11th Cir. 2007) (describing the criteria as indicia). However, the *Baker* criteria are not factors to be weighed against one another. *See generally Baker*, 369 U.S. at 218–24.

> 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 respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[55]

These six *Baker* criteria serve as standards with which political question cases are to be measured.[56] Unless one of the six presents itself in a particular case, there should be no dismissal on political question grounds.[57]

Subsequent cases further clarified and refined the *Baker* criteria.[58] For example, somewhat recently the Court held the *Baker* criteria "are probably listed in descending order of both importance and certainty."[59] Other cases suggested the six criteria could be viewed together or combined into more succinct inquiries.[60] Despite these suggestions,

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[55] *Baker*, 369 U.S. at 217.

[56] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005) ("The political question doctrine may lack clarity, but it is not without standards.") (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933 (D.C. Cir. 1988)).

[57] *Baker*, 369 U.S. at 217 ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."); *see* Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1203 (5th Cir. 1978) ("[T]he inextricable presence of one or more of these factors will render the case nonjusticiable under the Article III 'case or controversy' requirement . . . .").

[58] *See infra* notes 59–60.

[59] *Vieth*, 541 U.S. at 278.

[60] *See* Goldwater v. Carter, 444 U.S. 996 (1979). In a concurring opinion, Justice Powell contended a court's analysis of political question doctrine issues "incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Id*. at 998; *see also* Nixon v. United States, 506 U.S. 224 (1993).

> [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the

today's cases still prominently use the *Baker* criteria to identify political questions.[61] These criteria form the primary analytical framework relied upon by courts today to decide GWOT political question cases.[62]

IV. The Political Question Doctrine in Relation to Foreign Affairs and the Military

Despite the long history of judicial involvement in American foreign affairs,[63] courts today are somewhat reluctant to inject themselves into matters involving foreign affairs or the U.S. military.[64] This reluctance comes from the perception that the political branches are better equipped to handle such affairs.[65]

> lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

Id. at 228–29.

[61] Lane v. Halliburton, 529 F.3d 548, 558 (5th Cir. 2008); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1358 (11th Cir. 2007) ("A case may be dismissed on political question grounds if—and only if—the case will require the court to decide a question possessing one of these six characteristics."); *Developments*, *supra* note 52, at 1195 ("In its foreign relations jurisprudence following [*Baker*], the Supreme Court has clarified these categories but never increased their number.") (citing as examples Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986); *Vieth*, 541 U.S. at 277–78).

[62] *See infra* Sections V and VI.

[63] *See generally* LOUIS FISHER & NADA MOURTADA-SABBAH, IS WAR A POLITICAL QUESTION? (2001) (containing detailed discussion of numerous such cases from 1789–1999).

> Contrary to the general impression that war power disputes present political questions beyond the scope of judicial scrutiny, courts have often regarded the exercise of war powers by the political departments as subject to their independent judicial review. Throughout the past two centuries, federal courts have reviewed a broad range of issues involving foreign conflicts . . . .

Id. at 81.

[64] *See generally* Baker v. Carr, 369 U.S. 186 (1963); *infra* notes 68–74 and accompanying text.

[65] *Baker*, 369 U.S. at 211 ("Not only does resolution of such 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 single-voiced statement of the Government's views.").

The first half of the twentieth century marshaled a judicial philosophy that clearly favored use of the doctrine in foreign affairs cases. In "sweeping judicial dicta," several Supreme Court cases indicated "all questions touching foreign relations are political questions."[66]

More recently, courts have continued to defer to the political branches in matters of foreign policy and military affairs.[67] Our system of separation of powers affords great deference to the "underlying factual or legal determinations" made by the President in his conduct of foreign relations.[68] Policy decisions regarding the employment of U.S. military forces in combat belong to the political branches, not the courts[69] The Supreme Court has held that, due to their "complex, subtle, and professional" nature, decisions as to the "composition, training, equipping, and control of a military force" are "subject *always*" to the

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[66] Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the* Chadha *Case*, 79 AM. J. INT'L L. 912, 953 (1985) (citing as examples Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918); Chicago & S. Airlines, Inc., v. Waterman S.S. Corp., 333 U.S. 103 (1948)). In *Chicago & Southern Airlines*, the Court firmly stated:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Airlines, Inc., 333 U.S. at 111 (citing Coleman v. Miller, 307 U.S. 433, 454 (1939); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319–21 (1936); *Oetjen*, 246 U.S. at 302).

[67] *See generally infra* notes 68–74 and accompanying text.

[68] Rappenecker v. United States, 509 F. Supp. 1024, 1028 (N.D. Cal. 1980) (citing Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 419–20 (1839)). Such determinations made by the President are "not subject to judicial scrutiny." *Id.*

[69] Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) ("[t]he policy decisions made in war are clearly beyond the competence of the courts to review . . ."); Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991) ("Of the legion of governmental endeavors, perhaps the most clearly marked for judicial deference are provisions for national security and defense. The decisions whether and under what circumstances to employ military force are constitutionally reserved for the executive and legislative branches.") (citations omitted).

control of the political branches.[70] Tort suits that challenge the internal operations of these areas of the military are likely to be dismissed as political questions.[71] As one court succinctly stated, "[t]he judicial branch is by design the least involved in military matters. . . . Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy."[72] Lacking the electoral accountability of the other two branches, the Judicial Branch is ill-suited to make decisions regarding the employment of military forces.[73] Even though courts have now backed off the sweeping dicta of the early cases, one constant has prevailed: "[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review."[74]

Notwithstanding the foregoing prohibitions on judicial conduct, the Supreme Court has cautioned, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[75] As mentioned earlier, vast precedent exists for judicial involvement in foreign and military affairs.[76] Case law establishes that military decisions *are* reviewable by federal courts.[77] An assertion of

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[70] Gilligan v. Morgan, 413 U.S. 1, 10 (1973); *see* Carmichael v. Kellogg Brown & Root Serv., Inc., No. 08-14487, 2009 U.S. App. LEXIS 14237, at *39 (11th Cir. Jun. 30, 2009) (holding that military decisions "pertain[ing] to battlefield or combat activities . . . are paradigmatically insulated from judicial review.").

[71] Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) ("The Supreme Court has generally declined to reach the merits of cases requiring review of military decisions, particularly when those cases challenged the institutional functioning of the military in areas such as personnel, discipline, and training.") (citing Chappell v. Wallace, 462 U.S. 296, 304 (1983); *Gilligan*, 413 U.S. at 5–13; Orloff v. Willoughby, 345 U.S. 83, 90–92 (1953)).

[72] Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986).

[73] *Id*. (contending that it would not be "seemly" for "a democracy's most serious decisions, those providing for common survival and defense, [to] be made by its least accountable branch of government").

[74] *Tiffany*, 931 F.2d at 277 (citing DaCosta v. Laird, 471 F.2d 1146, 1155–56 (2d Cir. 1973)).

[75] Baker v. Carr, 369 U.S. 186, 211 (1963); *see* Suhail Najim Abdullah Al Shimari v. CACI Premier Tech., Inc., No. 1:08CV827 (GBL), 2009 U.S. Dist LEXIS 29995, at *27 (E.D. Va. Mar. 18, 2009) ("[M]atters are not beyond the reach of the judiciary simply because they touch upon war or foreign affairs.") (citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Dames & Moore v. Regan, 453 U.S. 654 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002)).

[76] *See supra* note 63 and accompanying text.

[77] Koohi v. United States, 976 F.2d 1328, 1331 (9th Cir. 1992) ("The Supreme Court has made clear the federal courts are capable of reviewing military decisions . . . .") (citing The Paquete Habana, 175 U.S. 677 (1900); Scheuer v. Rhodes, 416 U.S. 232 (1974)); *see Developments*, *supra* note 52, at 1199.

military necessity, standing alone, is not a bar to judicial action.[78] Merely because a dispute can be tied in some way to combat activities does not prevent a court from reviewing it.[79] Although an action arises in a contingency environment, if a case is essentially "an ordinary tort suit" it is well within the competence of the courts to entertain.[80] Courts have underscored the point: no litmus test exists that prohibits judicial action merely because an issue involves the military in some fashion.

Where plaintiffs seek only damages and not injunctive relief, such cases are "particularly judicially manageable."[81] When such a damages-only lawsuit concerns only a defense contractor (as opposed to the Federal Government), courts have held that such actions do not involve "overseeing the conduct of foreign policy or the use and disposition of military power."[82] Thus, those actions are less likely to raise political

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> [T]here can be no doubt that the Constitution places primary power to conduct foreign relations in the executive branch. Nevertheless, the Constitution grants unreviewable authority only in tightly defined areas—never for the entire swath of "foreign relations." In the absence of extenuating circumstances, litigation that carries the simple possibility (or probability, or even certainty) of impeding one of the Executive's international relations interests is no less justiciable than litigation that might impede, say, one of its domestic regulatory interests. Because both the Constitution and Congress can constrain the Executive's pursuit of its interests, the judiciary must be ready to judge those interests if it aims to act as a meaningful check on the Executive's power.

Id. (footnotes omitted).

[78] *Koohi*, 976 F.2d at 1331.

[79] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005) ("The 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[]' . . . .") (citing *Hamdi*, 542 U.S. at 526–38).

[80] Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) ("[T]he common law of tort provides clear and well-settled rules on which the district court can easily rely . . . .") (citing Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)); *see* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1364 (11th Cir. 2007) ("The flexible standards of negligence law are well-equipped to handle varying fact situations.").

[81] *Koohi*, 976 F.2d at 1332 ("Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.").

[82] *Ibrahim*, 391 F. Supp. 2d at 15 (D.D.C. 2005) (citing Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967)); *see* Suhail Najim Abdullah Al Shimari v. CACI Premier

questions than suits against the Government, suits seeking injunctive relief, or both.

Although courts have now generally rejected their earlier tendency to liberally apply the doctrine in any case touching foreign affairs or the military, courts still hesitate to question executive policy on foreign affairs and military decisions made on the battlefield. Regardless, courts today *will* entertain combat zone tort actions provided such actions stop short of infringing on prohibited areas of military operations.

V. Recent Developments in the Political Question Doctrine: The GWOT Cases

Given the enormous amount of money involved in Government contingency contracting[83] and the correspondingly large number of contractors and contractor employees performing GWOT contingency contracts,[84] the number of plaintiffs seeking redress for tortious conduct was certain to rise—and it did.[85] Universally, defendant defense contractors invoked the political question doctrine in order to shield

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Tech., Inc., No. 1:08CV827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *17 (E.D. Va. Mar. 18, 2009) (contending "a key distinction" exists when the defendant is a private party as opposed to the Government).

[83] The U.S. Government Accountability Office (GAO) reports the Department of Defense (DoD), the Department of State, and U.S. Agency for International Development "obligated at least $33.9 billion during fiscal year 2007 and the first half of fiscal year 2008 on 56,925 contracts with performance in either Iraq or Afghanistan." U.S. GOV'T ACCOUNTABILITY OFFICE, REP. NO. 09-19, CONTINGENCY CONTRACTING: DOD, STATE AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN 5 (2008) [hereinafter GAO REP.]. Approximately 90% of this amount was obligated to DoD contracts. *Id.* at summary. Furthermore, with President Obama's decision to leave combat troops in Iraq until August 2010, and logistics and supply forces there for longer (possibly until 31 December2011), coupled with his stated desire to increase combat troop strength in Afghanistan, there is no indication the government's commitment to contingency contracting in support of the missions in Iraq and Afghanistan will soon wane. *See generally* Dan Lothian & Suzanne Malveaux, *Obama: U.S. to Withdraw Most Iraq Troops by August 2010*, CNN.COM, Feb. 27, 2009, http://www.cnn.com/2009/POLITICS/02/27/obama.troops/index.html; Paul Steinhauser, *Poll: Most Support Plan to Bolster U.S. Troops in Afghanistan*, CNN.COM, Feb. 26, 2009, http://www.cnn.com/2009/POLITICS/02/26/us.troops.poll/.

[84] *See* GAO REP., *supra* note 83, at 6. As of April 2008, DoD had almost 200,000 contractor personnel in Iraq and Afghanistan. *Id.*

[85] *See generally infra* pp. 103–12.

themselves from liability in their performance of GWOT contracts,[86] some with more success than others.[87] The first significant case centered around the tragic events at the Abu Ghraib prison in Iraq.[88]

In *Ibrahim v. Titan Corp*., Iraqi plaintiffs alleged they were tortured, raped, humiliated, beaten, and starved while in U.S. custody.[89] Apparently fearing a dismissal on sovereign immunity grounds if they sued the U.S. Government, the plaintiffs instead chose to name as defendants the contractors who provided interpreters and interrogators for the prison.[90] The defendants filed a motion to dismiss, alleging the matter involved political questions.[91] The court held the case should not be dismissed at such an early stage on political question grounds, especially because the United States was not a party to the case.[92] *Ibrahim* is significant because it was the first GWOT case to underscore the need for full factual development of a case prior to an assessment of justiciability.

Beginning with *Fisher v. Halliburton, Inc.*,[93] district courts heard a series of cases involving injuries sustained from convoy operations in Iraq in 2004.[94] In *Fisher*, the plaintiffs were civilian truck drivers providing transportation services for Kellogg Brown & Root (KBR)[95] under the U.S. Army's Logistics Civil Augmentation Program (LOGCAP) contract.[96] While following the Army's local Iraqi guide,

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[86] *See generally* Addicott, *supra* note 7, at 351 ("[S]ince the case can be disposed of as non-justiciable, defense counsel representing a subject contracting company invariably include the political question doctrine either as a pre-answer motion or as an integral part of the responsive pleading.").
[87] *See generally infra* pp. 103–12.
[88] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005).
[89] *Id.* at 12.
[90] *Id.*
[91] *Id.* at 12–13.
[92] *Id.* at 16.
[93] 454 F. Supp. 2d 637 (S.D. Tex. 2006), *rev'd sub nom.*, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008).
[94] *Id.*; *see generally infra* pp. 103–06.
[95] At the time, KBR was a subsidiary of Halliburton. *See* Kelly Kennedy, *Suit Alleges KBR, Halliburton Misconduct at Balad*, ARMY TIMES, Dec. 15, 2008, at 31 ("Halliburton announced in April 2007 that it had dissolved ties with KBR, which had been its contracting, engineering and construction unit since the 1960s.").
[96] Fisher v. Halliburton, Inc., 454 F. Supp. 2d 637, 638–39 (S.D. Tex. 2006), *rev'd sub nom.*, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); *see* U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (16 Dec. 1985).

plaintiffs' convoy suffered an attack by anti-American forces and several members were killed and injured.[97] Plaintiffs subsequently filed suit, alleging negligence in KBR's operation of the convoy and fraudulence in the contractor's representations of a "safe work environment."[98] Claiming plaintiffs' allegations were barred by the political question doctrine, KBR filed a motion to dismiss alleging the Army controlled convoy deployment and protection, and that any decisions made by KBR were inextricably "interwoven" with those of the Army.[99] The court analyzed the competing allegations using the *Baker* criteria.

In addressing the first *Baker* criterion, the *Fisher* court broadly stated "war and foreign policy are the provenance of the Executive," and even more broadly proclaimed "courts have consistently held that issues involving war, and actions taken during war, are beyond judicial competence."[100] Despite the previously discussed precedent to the contrary,[101] the court held it could not "try a case set on a battlefield during war-time without an impermissible intrusion into powers expressly granted to the Executive by the Constitution."[102] Given the long history of judicial involvement in foreign and military affairs, these statements are overbroad and unsupported by the weight of political question law. Nonetheless, the *Fisher* court found the first *Baker* criterion implicated.[103]

In a holding more consistent with precedent, the court found the second *Baker* criterion implicated because the Army was responsible for

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> The LOGCAP objective is to preplan for the use of civilian contractors to perform selected services in wartime to augment Army forces. Utilization of civilian contractors in a theater of operation will release military units for other missions or fill shortfalls. This provides the Army with an additional means to adequately support the current and programmed force.

Id. para. 1-1; *see also* Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist LEXIS 26547, at *4–5 (W.D. Pa. Mar. 31, 2009) (explaining the implementation of the LOGCAP contract in the Iraq and Afghanistan theater of operations).

[97] *Fisher*, 454 F. Supp. 2d at 639.

[98] *Lane*, 529 F.3d at 555 (referencing the facts of *Fisher*).

[99] *Fisher*, 454 F. Supp. 2d at 639.

[100] *Id*. at 641.

[101] *See supra* notes 63, 75–82, and accompanying text.

[102] *Fisher*, 454 F. Supp. 2d at 641.

[103] *Id.*

the security, intelligence, and route selection of the convoy operations.[104] Thus, any inquiry into causation regarding the plaintiffs' injuries would require judicial examination of the Army's decisions in these areas—something courts lack standards to accomplish.[105] After finding the second *Baker* criterion implicated, the court speculated that in order to resolve the matter it may need to question the wisdom of the Executive's policies of convoy operations and employment of civilian contractors in a combat zone. Because of the likelihood of this prohibited task, the court found the third *Baker* criterion implicated as well.[106]

In another KBR LOGCAP convoy case from 2004, *Whitaker v. Kellogg Brown & Root*, a U.S. Soldier was killed due to the alleged negligence of a KBR driver.[107] KBR filed a motion to dismiss, claiming the matter "turn[ed] on strategic and tactical military decisions made in a combat zone."[108] The court based its conclusion that a political question existed on the non-GWOT case of *Aktepe v. United States*,[109] which did not involve a defense contractor defendant.[110] Nonetheless, the court held "the same principles apply[,]" and "a soldier injured at the hands of a contractor which is performing military functions subject to the military's orders and regulations also raises the same political questions" as if the Government were the defendant.[111] As such, the *Whitaker* court

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[104] *Id.* at 642.
[105] *Id.* at 643.

> In order to hear this case, the court would have to substitute its judgment for that of the Army. For example, the court would need to determine 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. Even if KBR had authority to deploy or recall the convoys, the court would still need to determine whether the Army could or should have countermanded that order. No judicial standards exist for making these determinations.

Id. (footnote omitted).
[106] *Id.* at 644.
[107] Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006).
[108] *Id.* In support of its contention, KBR relied on "Army regulations regarding convoy operations and the use of civilian contractors." *Id*. at 1278–79.
[109] 105 F.3d 1400 (11th Cir. 1997).
[110] Aketpe v. United States, 105 F.3d 1400 (11th Cir. 1997); *Whitaker*, 444 F. Supp. 2d at 1281 ("The Court recognizes that the claims in *Aktepe* were against the United States and not a government contractor.").
[111] *Whitaker*, 444 F. Supp. 2d at 1281.

found both the first and second *Baker* criteria implicated and granted defendant KBR's motion to dismiss.[112]

In *Lessin v. Kellogg Brown & Root*,[113] another Army Soldier was injured on convoy duty due to the alleged negligence of KBR employees. The defense contractor alleged this case "involve[d] a political question of the military's decision-making in combat scenarios."[114] The court conceded "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."[115] However, the court found that the facts were not yet developed enough in this case to indicate the presence of a political question and denied KBR's motion to dismiss.[116] The court added that this incident was "essentially, a traffic accident" and "[c]laims of negligence arising from this type of incident are commonly adjudicated by courts, using well-developed judicial standards."[117] *Lessin* underscored the importance of a plaintiff's ability to untangle allegations regarding a contractor's actions from the actions and decisions of the military.

The principles set forth in *Lessin* also proved persuasive to other district courts. In *Carmichael v. Kellogg Brown & Root Services, Inc.*,[118] a subsequent convoy case in which the plaintiff was an Army Soldier injured due to the alleged negligence of KBR, the court chose to follow the holding of *Lessin* rather than *Whitaker*.[119] The *Carmichael* court claimed that *Lessin* "best states the test"[120] for such cases: "plaintiff's claims are barred by the political question doctrine if 'military decision-making or policy would be a necessary inquiry, inseparable from the claims asserted.'"[121] Viewed together, the convoy cases underscore the

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[112] *Id.* at 1281–82. This case was not appealed. Lane v. Halliburton, 529 F.3d 548, 568 n.9 (5th Cir. 2008).
[113] No. H-05-01853, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex. June 12, 2006).
[114] Lessin v. Kellogg Brown & Root, 2006 U.S. Dist. LEXIS 39403, at *2.
[115] *Id.* at *8.
[116] *Id.* at *15.
[117] *Id.* at *8.
[118] 450 F. Supp. 2d 1373 (N.D. Ga. 2006).
[119] *Id.* at 1376.
[120] *Id.* at 1375; *see also* Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist. LEXIS 26547, at *62 (W.D. Pa. Mar. 31, 2009) (finding *Lessin* "particularly persuasive").
[121] *Carmichael*, 450 F. Supp. 2d at 1375 (quoting Lessin v. Kellogg Brown & Root, 2006 U.S. Dist. LEXIS 39403, at *7). Following the completion of discovery in this case the

requirement for a connection to *military* decision-making or policy prior to dismissal on political questions grounds.

Smith v. Halliburton[122] was another significant GWOT district court case decided prior to the input of the appellate courts. The case involved an allegation of negligence against a defense contractor charged with operating a dining facility in Iraq pursuant to LOGCAP.[123] In December 2004, a suicide bomber infiltrated the dining facility at a forward operating base (FOB) in Mosul, Iraq, and detonated explosives, killing twenty-three people and wounding sixty-two.[124] Plaintiffs alleged defendants failed to properly secure the mess tent, despite repeated warnings that attacks were likely to occur.[125] The *Smith* court held the first *Baker* criterion was implicated because the military, not the contractor, was responsible for force protection at the FOB:[126] "[a]llowing 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."[127] The court also found the second and third *Baker* criteria were implicated, holding that it lacked the standards to determine what adequate force protection measures should have been[128] and that "[p]olicy determinations involving force protection measures in a hostile area of Iraq are clearly not appropriate for judicial determination."[129] The district court granted the defendants' motion to dismiss.[130] *Smith* reinforces the previously discussed convoy cases' theme that certain military policy matters are off limits to judicial discretion.

In 2004, three U.S. Army Soldiers serving in Afghanistan were killed when the aircraft in which they were passengers crashed into a

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defendant contractor again moved to dismiss and the motion was granted. Carmichael v. Kellogg Brown & Root Servs., Inc., 564 F. Supp 2d 1363 (N.D. Ga. 2008), *aff'd* No. 08-14487, 2009 U.S. App. LEXIS 14237 (11th Cir. June 30, 2009).

[122] No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006).

[123] *Id.* at *2–5.

[124] *See Smith*, 2006 U.S. Dist. LEXIS 30530, at *2–3.

[125] *Id.* at *3–4.

[126] *Smith*, 2006 U.S. Dist. LEXIS 61980, at *15.

[127] *Id*. at *23. The court added, "[t]he control of access to a military base is clearly within the constitutional powers granted to both Congress and the President." *Id*. at *24 (citing Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 890 (1961)).

[128] *Smith*, 2006 U.S. Dist. LEXIS 61980, at *24–25.

[129] *Id*. at *26.

[130] *Id.* at *28. This case was not appealed. Lane v. Halliburton, 529 F.3d 548, 568 (5th Cir. 2008).

mountain.[131] A defense contractor owned and operated the aircraft.[132] In the case of *McMahon v. Presidential Airways, Inc*., the plaintiffs brought wrongful death actions against the contractor alleging negligence in the equipment and operation of the aircraft.[133] Under the statement of work of the contract,[134] the contractor was required to furnish the aircraft, flight personnel, maintenance, and supervision for the air transportation services, while the military "directed what missions would be flown, when they would be flown, and what passengers and cargo would be carried."[135] Prior to denying the defendant's motion to dismiss on political question grounds,[136] the district court invited the U.S. Government to intervene—the Government declined.[137] The contractor appealed the denial of this motion to the United States Court of Appeals for the Eleventh Circuit.[138] The Eleventh Circuit addressed the political question issue by applying the *Baker* criteria.

As to the analysis of the first *Baker* criterion, the court held the defendant to a "double burden" because the case involved a private contractor and not the U.S. Government.[139] In order to show the matter

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[131] McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1336 (11th Cir. 2007).
[132] The court dismissed the claims against one defendant contractor on jurisdictional grounds. *Id.* at 1336 n.2. The court then referred to the remaining defendants collectively as "Presidential." *Id.* at 1336. Presidential owned and operated the plane. *Id*. Presidential was under contract with the military "to provide air transportation and other support services in aid of the military mission in Afghanistan." *Id.*
[133] *Id.* at 1337. Both pilots were employees of Presidential. *Id*. at 1336 n.1.
[134] A statement of work is:

> [t]he portion of a contract that describes the actual work to be done by means of (1) specifications or other minimum requirements, (2) quantities, (3) performance dates, (4) time and place of performance of services, and (5) quality requirements . . . . It plays a key role in the solicitation because it serves as the basis for the contractor's response. It also serves as a baseline against which progress and subsequent contractual changes are measured during contract performance.

RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 492 (2d ed. 1998).
[135] *McMahon*, 502 F.3d at 1336.
[136] *Id.* at 1337–38. Prior to denying defendant's motion to dismiss, the district court also considered defendant's *Feres* immunity claim and preemption claim under the Federal Tort Claims Act. *Id*.
[137] *Id.* at 1337 n.4.
[138] *Id.* at 1338.
[139] *Id.* at 1359–60.

was textually committed to the political branches, first the contractor would need to demonstrate that adjudication of the issue would require the court to reexamine a *military* decision, then the contractor must prove that such military decision was "insulated from judicial review."[140] The court found the contractor could not meet the first part of this test based on the limited factual development in the case thus far[141] but noted the statement of work gave the contractor "general responsibility for making the decisions regarding the flights it provided" to the military.[142] The contractor failed to meet its burden under the first *Baker* criterion.[143]

With the second *Baker* criterion, the *McMahon* court held that the defendant failed to show the case would require the court to resort to judicially undiscoverable or unmanageable standards.[144] The court found it significant that the plaintiffs' allegations of contractor negligence did not "involve combat, training activities, or any peculiarly *military* activity at all."[145] Absent a reexamination of any military decision, "[i]t is well within the competence of a federal court to apply negligence standards to a plane crash."[146] Furthermore, the court also found significance in the U.S. Government's election not to intervene in the case[147] as well as the fact that the suit sought only damages, not

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[140] *Id.* at 1360.
[141] *Id.*
[142] *Id.* The court found that the statement of work gave the military only "discrete" areas of control. *Id*. at 1361. None of those discrete areas appeared to be implicated by plaintiff's allegations. *Id*.
[143] *Id.* at 1360–63.
[144] *Id.* at 1363.
[145] *Id*.
[146] *Id*. at 1364.

> [F]lying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently non-justiciable. While the court may have to apply a standard of care to a flight conducted in a less than hospitable environment, that standard is not inherently unmanageable. . . . The flexible standards of negligence law are well-equipped to handle varying fact situations. The case does not involve a sui generis situation such as military combat or training, where courts are incapable of developing judicially manageable standards.

Id. (citations and footnotes omitted).
[147] *Id.* at 1365.

injunctive relief.[148] The Eleventh Circuit affirmed the denial of defendant's motion to dismiss.[149]

In *Lane v. Halliburton*,[150] the United States Court of Appeals for the Fifth Circuit weighed in on the political question issue through its consolidated opinion involving three LOGCAP convoy cases, including *Fisher v. Halliburton*, [151] discussed earlier.[152] All three cases involved allegations of fraud against KBR in guaranteeing the safety of its convoy operations in Iraq[153] and negligence in allowing the convoys to proceed on the specific dates the convoys were attacked.[154] The district court[155] had previously dismissed all three cases with prejudice, finding political questions present.[156] The *Lane* court framed the issue as follows: "[W]ould resolving the Plaintiffs' tort-based legal claims invariably require analyzing the Executive's war-time decision-making, or do KBR's actions and motives form the sole issues?"[157] Not surprisingly, the court based its analysis on the *Baker* criteria.

Regarding the first *Baker* criterion, the court cited *McMahon's* "double burden"[158] that first requires a defendant contractor to show a *military* decision will need to be reexamined.[159] Holding this instance to be a "matter[] of tort-based compensation," the court found no textual commitment of this matter to other branches of government.[160] As in

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[148] *Id.* at 1364.
[149] *Id.* at 1366.
[150] 529 F. 3d 548 (5th Cir. 2008). *Lane* is the case contemplated by the Nash & Cibinic Report mentioned earlier. NASH & CIBINIC REP., *supra* note 5, ¶ 44.
[151] *Lane* also consolidated two other factually similar cases. Smith-Idol v. Halliburton, No. H-06-1168, 2006 U.S. Dist. LEXIS 75574 (S.D. Tex. Oct. 11, 2006), *rev'd sub nom.*, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Lane v. Halliburton, No. 11-06-1971, 2006 U.S. Dist. LEXIS 63948 (S.D. Tex. Sept. 7, 2006), *rev'd*, Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008).
[152] *See supra* notes 95–106 and accompanying text.
[153] *Lane*, 529 F. 3d at 555 ("The essence of these claims is that KBR utilized intentionally misleading and false advertisements and recruiting materials to induce Plaintiffs to accept employment with KBR and relocate to Iraq.").
[154] *Id.*
[155] The same district court judge presided over all three cases.
[156] *Id.* at 554.
[157] *Id.* at 557.
[158] *See supra* notes 139–40, and accompanying text.
[159] The *Lane* court held this was necessary because "KBR is not part of a coordinate branch of the federal government." *Lane*, 529 F. 3d at 560.
[160] *Id.*

McMahon, the contractor in *Lane* was unable to meet its burden under the first *Baker* criterion.[161]

As to the second *Baker* criterion, the court found it to be "arguably the most critical factor in the political question analysis . . . because at least some of the allegations would draw a court into a consideration of what constituted adequate force protection for the convoys."[162] Central to this issue was the negligence element of causation. If a court will need to explore the military's role as to causation, a political question problem "will loom large."[163] The court held plaintiffs' fraud claims were less likely to invoke political question problems as to causation[164] than would plaintiffs' negligence claims.[165] The second *Baker* criterion was not implicated.[166]

With the third *Baker* criterion, the *Lane* court found the prohibition on nonjudicial policy determinations likely inapplicable, holding "[t]he court will be asked to judge KBR's policies and actions, not those of the military or Executive Branch."[167] With no *Baker* criteria implicated, the court reversed and remanded the district court opinions. It concluded that, at least at this early stage of the litigation, political questions were not present.[168]

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[161] *Id.*
[162] *Id.*
[163] *Id.* at 561.
[164] *Id.* at 567 ("[T]he cases might be triable without raising a political question because the court could assess KBR's liability by simply being aware of the information the military provided to KBR, not second-guessing that information.").
[165] *Id.*

> Proving KBR's negligent breach of a duty in Iraq not to allow a convoy to proceed if conditions were too dangerous will involve rather different evidence than would proof of misrepresentations made during hiring or later about safety. . . . [A]t some point the political question analysis between the two will likely diverge. The Plaintiffs' negligence allegations move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred.

Id.
[166] *Id.* at 563.
[167] *Id.*
[168] *Id.* at 568–69.

McMahon and *Lane* remain the prominent cases on point. To date, only one appellate court has upheld a political question dismissal of a tort suit based on the combat zone conduct of defense contractors or their employees.[169] Since *McMahon* and *Lane*, more district courts have faced these issues.[170] Based on the particular facts presented in each case, all held the political question doctrine did not serve as a bar to suit.[171] From the initial GWOT district court cases through *McMahon*, *Lane* and beyond, defense contractors accused of tortious combat zone conduct continue to regularly invoke the doctrine in an attempt to avoid liability.

VI. Lessons Learned from the GWOT Cases: The Current Test for Political Questions

By applying traditional political question doctrine principles to modern combat zone realities, *McMahon*, *Lane*, and the other GWOT cases set forth a workable framework for courts to use in applying the political question test to current cases. The analysis begins generally with the *Baker* criteria—the presence of any one of which will result in a

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[169] *See* Carmichael v. Kellogg Brown & Root Serv., Inc., No. 08-14487, 2009 U.S. App. LEXIS 14237 (11th Cir. June 30, 2009). This convoy case distinguished both *McMahon* and *Lane*, citing the military's "plenary" control over the contractor's actions here as opposed to *McMahon*, the differing nature of the tortious allegations here as opposed to *Lane*, and the limited factual development of both. *Id*. at *47–52. The *Carmichael* court found the existence of a political question in large part because the court would have been required to examine military judgments. *Id*. at *24–25.

> Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [the defendants'] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. . . . [I]t is precisely this kind of scrutiny that the political question doctrine forbids.

Id.

[170] *See, e.g.*, Harris v. Kellogg, Brown & Root Servs., Inc., 2009 U.S. Dist. LEXIS 26547; Flanigan v. Westwind Techs., Inc., 2008 U.S. Dist. LEXIS 82203; Getz v. The Boeing Co., No. CV07-639CW, 2008 U.S. Dist. LEXIS 87557 (N.D. Cal. July 8, 2008); Potts v. Dyncorp Int'l, LLC, 465 F. Supp. 2d 1245 (M.D. Ala. 2006) (post-*McMahon*, pre-*Lane*).

[171] *See, e.g.*, Harris v. Kellogg, Brown & Root Servs., Inc., 2009 U.S. Dist. LEXIS 26547; Flanigan v. Westwind Techs., Inc., 2008 U.S. Dist. LEXIS 82203; Getz v. The Boeing Company, 2008 U.S. Dist. LEXIS 87557; Potts v. Dyncorp Int'l, LLC, 465 F. Supp. 2d 1245.

finding of a political question—and develops through its own specific application to defense contractor torts suits.

The analysis of the first *Baker* criterion, the textual commitment by the Constitution of a certain matter to one of the other Governmental branches, starts with an application of *McMahon*'s "double burden" test.[172] A defendant contractor must first show the plaintiff's allegations require the court to question a *military* decision.[173] If the allegations would require only an assessment of the contractor's own decisions or policies, this first prong of the test has not been established.[174] To satisfy the first half of this burden, a contractor must do more than merely allege a nexus between itself and the military[175] or broadly proclaim the Constitution delegates foreign policy or military matters to the political branches.[176] The contractor must offer concrete proof of the particular military decision called into question by the plaintiff's allegations.[177] With the first portion of the double burden established, the defendant contractor must then show the particular military decision is insulated from judicial review.[178] The more control the military has over a contractor's conduct the more likely a political question will present itself in the form of the first *Baker* criterion.[179]

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[172] *See supra* notes 139–40, and accompanying text; *Lane*, 529 F. 3d at 560; *Flanigan*, 2008 U.S. Dist. LEXIS 82203, at *16; *Getz*, 2008 U.S. Dist. LEXIS 87557, at *18; *Potts*, 465 F. Supp. 2d at 1252.

[173] *See supra* note 139 and accompanying text; *Lane*, 529 F. 3d at 560; *Flanigan*, 2008 U.S. Dist. LEXIS 82203, at *16; *Getz*, 2008 U.S. Dist. LEXIS 87557, at *18; *Potts*, 465 F. Supp. 2d at 1252.

[174] *Potts*, 465 F. Supp. 2d at 1250–52.

[175] *See* Addicott, *supra* note 7, at 363 ("It is clear that the political question doctrine will not preclude judicial review simply because there exists some nexus between the contractor and the military."); *id.* at 363 n.120 ("All contractors may lay claim to this nexus—they are, by definition, under contract with the government.").

[176] *See Potts*, 465 F. Supp. 2d at 1248.

[177] *See* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1359–60 (11th Cir. 2007); *Lane*, 529 F. 3d at 560; *Flanigan*, 2008 U.S. Dist. LEXIS 82203, at *16; *Getz*, 2008 U.S. Dist. LEXIS 87557, at *18; *Potts*, 465 F. Supp. 2d at 1252.

[178] *See supra* note 140 and accompanying text. Examples of decisions courts have held to be insulated from judicial review include "'core military decisions, including [military] communication, training, and drill procedures' or 'the strategy and tactics employed on the battlefield.'" Carmichael v. Kellogg Brown & Root Servs., No. 1:06CV-507-TCB, 2008 U.S. Dist. LEXIS 52126, at *21–22 (N.D. Ga. July 8, 2008) (quoting *McMahon*, 502 F.3d at 1359).

[179] *See Potts*, 465 F. Supp. 2d at 1252 ("The courts in [*Smith* and *Whitaker*] emphasized the control that the United States had over the conduct at issue or the private parties themselves.") (citing McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315, 1320 (M.D. Fla. 2006), *aff'd* 502 F.3d 1331 (11th Cir. 2007)). *See generally* Smith v.

The second *Baker* criterion, which arises upon a lack of judicially manageable standards for resolving the issue, requires a determination of the standards that will be used to resolve the matter.[180] Will a court need to create standards based on the exigencies of combat or military policy and procedures?[181] Federal courts are not equipped to evaluate the reasonableness of military decisions in combat.[182] Such decisions result from "a complex, subtle balancing of many technical and military considerations, including the trade-off between safety and greater combat effectiveness."[183] Or alternatively, does the matter merely involve an ordinary tort suit[184] that can be resolved simply by the application of well-established standards of tort-based compensation, which can be tailored "to account for the 'less than hospitable environment'" of a combat zone?[185] Another key fact[186] regarding the second *Baker*

Halliburton, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980 (S.D. Tex. Aug. 30, 2006); Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277 (M.D. Ga. 2006). For example, one district court noted that the GWOT district court cases which found the presence of political questions "each involved some form of active combat operations." Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist. LEXIS 26547, at *64 (W.D. Pa. Mar. 31, 2009) (citing Smith v. Halliburton, 2006 U.S. Dist. LEXIS 61980; Carmichael v. Kellogg, Brown & Root Servs., Inc., 564 F. Supp. 2d 1363 (N.D. Ga. 2008); *Whitaker*, 444 F. Supp. 2d 1277; Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486 (C.D. Cal. 1993)).

[180] Lane v. Halliburton, 529 F. 3d 548, 560 (5th Cir. 2008) ("One of the most obvious limitations imposed by Article III, § 1, of the Constitution is that judicial action must be governed by *standard*, by *rule*.") (quoting Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).

[181] *See Getz*, 2008 U.S. Dist. LEXIS 87557, at *24 ("[C]ourts lack standards with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.") (quoting Zuckerbraun v. Gen. Dynamics Corp., 755 F. Supp. 1134, 1142 (D. Conn. 1990)).

[182] *See McMahon*, 502 F.3d at 1363 (quoting Gilligan v. Morgan 413 U.S. 1 (1973); citing Boyle v. United Techs. Corp., 487 U.S. 500 (1988)).

[183] *Getz*, 2008 U.S. Dist. LEXIS 87557, at *24 (quoting Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997)).

[184] *Id.* at *25 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991)).

[185] *Lane*, 529 F. 3d at 563 (quoting *McMahon*, 502 F.3d at 1363–64). In a subsequent district court case involving the electrocution of an Army Ranger due to a defective water pump in a shower at a base in Baghdad, the court expanded upon *McMahon's* "Kansas" analogy discussed previously. Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist. LEXIS 26547, at *75 (W.D. Pa. Mar. 31, 2009).

> The Court recognizes that the standard of care to be applied in this matter raises unique issues and that providing maintenance services at a military base in Iraq is certainly different than providing the same at a civilian facility in Pennsylvania. However, these differences do not make the case non-justiciable. . . . The applicable duty owed by KBR to [the deceased Ranger], if any, can be defined with reference

criterion is whether a plaintiff seeks injunctive relief or only monetary damages—actions for damages are more judicially manageable.[187] Essentially, courts will avoid political question problems under the second criterion provided they rely on established judicial standards.

The third *Baker* criterion mandates a finding of a political question when a court cannot decide a case "without an initial policy determination of a kind clearly for nonjudicial discretion."[188] Applying this criterion to GWOT contractor cases, "[t]he judiciary cannot announce policy positions on military readiness for which it is neither equipped nor, more importantly, constitutionally empowered to speak."[189] To accomplish this element of review, one must determine if a court will need to second guess the policy determinations of the Executive or the military.[190] If so, a political question exists.[191] Such impermissible policy determinations include judicial examination of the decision to go to war, the decision to hire contractors to perform traditional military missions in combat zones, and the manner in which

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> to common law negligence principles as well as [the contract and related service requests], and KBR's internal operating procedures. While the Court cannot ignore the context in which the contract was performed, i.e., at a military base in Iraq, the reasonableness of KBR's conduct can be evaluated in relation to any duty owed.

Id. (citing *McMahon*, 502 F.3d at 1363) (footnote omitted); *supra* note 146.

[186] *Getz*, 2008 U.S. Dist. LEXIS 87557, at *17 ("This fact . . . is relevant, but not dispositive.").

[187] *See supra* note 81 and accompanying text; *see also McMahon*, 502 F.3d at 1364 n.34 ("[M]erely a suit for tort damages . . . is less likely to implicate the second *Baker* factor."); *Harris*, 2009 U.S. Dist. LEXIS 26547, at *81 ("Plaintiffs seek compensation for [the decedent's] injuries and death allegedly caused by KBR's negligence. They do not seek to enjoin KBR's conduct. This finding weighs in favor of judicial resolution.").

[188] Baker v. Carr, 369 U.S. 186, 217 (1962); Flanigan v. Westwind Techs., Inc., No. 07-1124, 2008 U.S. Dist. LEXIS 82203, at *23 (W.D. Tenn. Sept. 15, 2008) ("A political question under the third factor exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis.") (quoting Gross v. German Found. Indus. Initiative, 456 F.3d 363, 388 (3d Cir. 2006)).

[189] *Lane*, 529 F. 3d at 563.

[190] *See Flanigan*, 2008 U.S. Dist. LEXIS 82203, at *23 ("The court's inquiry here focuses on 'whether it will impermissibly intrude on the Executive's role in formulating policy.' In resolving cases, courts are not to 'make initial policy decisions of a kind appropriately reserved for military discretion.'") (quoting *Gross*, 456 F.3d at 389; Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997)); *see also Lane*, 529 F. 3d at 563.

[191] *See Lane*, 529 F. 3d at 563.

contractors are utilized on the battlefield.[192] On the other hand, if merely called upon to determine the negligence or otherwise tortious conduct of a contractor or its employees, the court is not in danger of exceeding the bounds of the third *Baker* criterion.[193]

The fourth, fifth, and sixth *Baker* criteria generally do not significantly impact the disposition of a political question case unless a court's decision will "contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[194] When they do arise, these issues usually present themselves intertwined with one or more of the first three criteria or they are merely raised in a conclusory fashion by defendant contractors.[195] As such, the final three *Baker* criteria are seldom case dispositive in and of themselves.

Several additional considerations arise outside of the framework of the *Baker* criteria. Due to the requirement for a "discriminating inquiry into the precise facts and posture"[196] of each political question case, courts should be reluctant to grant defense motions to dismiss at early stages of the litigation.[197] Rather, only when the facts of a case are fully developed can an accurate diagnosis of a political question be made.[198]

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[192] *See* Fisher v. Halliburton, 454 F. Supp. 2d 637, 644 (S.D. Tex. 2006), *rev'd sub nom.* Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008); Smith v. Halliburton, No. H-06-0462, 2006 U.S. Dist. LEXIS 61980, at *25–26 (S.D. Tex. Aug. 30, 2006).

[193] Potts v. Dyncorp Int'l, LLC, 465 F. Supp. 2d 1245, 1254 (M.D. Ala. 2006) ("[W]hether [a contractor] acted negligently and wantonly [is] a decision that does not require an initial policy determination of a kind clearly for non-judicial discretion.").

[194] *Flanigan*, 2008 U.S. Dist. LEXIS 82203, at *24 (quoting Norwood v. Raytheon Co., 455 F. Supp. 2d 597, 606 (W.D. Tex. 2006)).

[195] *See id.* In *Flanigan*, the defendants contended the last three *Baker* criteria were applicable, but did so only "in conclusory fashion, without presenting any case law or evidence supporting their assertions." *Id*. *See generally* McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1364–65 (11th Cir. 2007).

[196] Baker v. Carr, 369 U.S. 186, 216 (1962).

[197] *See generally Lane*, 529 F.3d at 568; *McMahon*, 502 F.3d at 1365 n.36; Carmichael v. Kellogg Brown & Root Servs., 450 F. Supp. 2d 1373, 1376 (N.D. Ga. 2006).

[198] Because the defendants in both *Lane* and *McMahon* sought to invoke the political question doctrine at such an early stage of the proceedings, the factual information considered by the district courts was more favorable to the plaintiffs that it likely would have been if raised later in the proceedings. *See Lane*, 529 F.3d at 557 ("In reviewing the dismissal order, we take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff."); *McMahon*, 502 F.3d at 1365 n.36; Addicott, *supra* note 7, at 363–64.

Furthermore, the involvement of the U.S. Government in a case should be considered a factor as well.[199] If the Executive Branch is invited to join the suit or otherwise provide its input and declines, the apparent lack of interest may signal a concession that the matter does not raise political questions.[200] Though not dispositive by itself, this additional consideration should be viewed in conjunction with the other *Baker* criteria.

In summary, the current test for political questions in contingency contracting cases generally follows the *Baker* analysis. The first relevant issue in the political question analysis is whether a military decision is in question. If not, there can be no demonstration of textual commitment by the Constitution to the political branches. Even if a military decision is questioned, no political question problem presents itself unless the decision is insulated from judicial review. If traditional tort-based standards can be applied to adequately resolve the matter, the case will not fail for a lack of judicially manageable standards. However, if a court must create new standards that require it to judge the reasonableness of military conduct in combat, a political question will present itself. Courts likewise run afoul of the doctrine when they question Executive Branch policy determinations on the strategy and

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> [I]t is not surprising that the developing trend for dealing with motions to dismiss based on the political question doctrine is for the subject court to delay the determination until the close of discovery, when the fullest amount of information is available to measure against the Baker factors. Given the consequences of a non-justiciability finding, each side deserves the fullest opportunity to present all the facts at hand.

Id.

[199] *See McMahon*, 502 F.3d at 1365; Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist. LEXIS 26547, at *84 (W.D. Pa. Mar. 31, 2009).

[200] *See McMahon*, 502 F.3d at 1365; *Harris*, 2009 U.S. Dist. LEXIS 26547, at *84. However, some scholars question the wisdom of a judicial practice which uses executive branch interest in a case to gauge justiciability for political question purposes. *See Developments*, *supra* note 52, at 1200.

> [B]y deferring to the Executive on the question of which suits it will hear, the judiciary is entrusting to the Executive its own duty to recognize violations of individuals' rights. . . . [W]hen the courts defer to the State Department's judgment on which cases should be dismissed, they entrust that institution with balancing both foreign relations concerns and access to the courts.

Id.

tactics of combat operations. One final take away from the GWOT political question cases: courts should be loath to grant motions to dismiss on political question grounds at early stages of litigation. The *Baker* criteria, if they exist, often do not present themselves until cases have undergone significant factual development.

VII. Other Defense Contractor Options: The Government Contractor Defense, Indemnification, and the Defense Base Act

Defense contractors frequently raise multiple defenses when sued over alleged torts committed in a contingency environment. The impact of potentially unfavorable[201] recent developments in the political question doctrine may be lessened when a contractor can complement its case with a more cogent defense argument or avoid a lawsuit altogether. Therefore, a brief discussion of these defenses and alternative courses of action is warranted.[202]

The Federal Tort Claims Act (FTCA) provides two prominent contractor defenses. Because the United States cannot be sued without a waiver of its sovereign immunity,[203] the FTCA conveys a limited waiver

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[201] *See supra* notes 5 and 11.

[202] Section VII is not intended to provide an exhaustive list of all possible contractor defenses or courses of action to avoid contingency-related tort suits. Rather, Section VII is intended to discuss several relevant alternatives which, in conjunction with the political question doctrine, could be avenues for defense contractor indemnification, reimbursement, immunity, or liability limitation. Other potentially viable alternatives not discussed in detail in Section VII include: the state secrets privilege, the Support Antiterrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), and the Public Readiness and Emergency Preparedness Act (PREP Act). The state secrets privilege is "an evidentiary privilege that requires either the outright dismissal of a case or significant limitations on discovery where litigation would involve disclosure of important state secrets." Holly Wells, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967 (2008); United States v. Reynolds, 345 U.S. 1 (1953). The SAFETY Act provides limited immunity for "sellers (and purchasers) of qualified anti-terrorism technologies . . . .", Agnes P. Dover & Thomas L. McGovern III, *Risk Mitigation Approaches for Government Contractors* (07-5 Briefing Papers) 5 (Thomson & West 2007); 6 U.S.C. §§ 441–44 (2006). The PREP Act offers liability protections to "entities that produce and administer biological countermeasures . . . ." Dover & McGovern, *supra*, at 7; 42 U.S.C.A. §§ 247d-6d, 247d-6e (LexisNexis 2009).

[203] Smith v. Halliburton, No. H-06-0462, 2006 U.S. Dist. LEXIS 30530, at *15 (S.D. Tex. May 16, 2006) (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)); Fisher v. Halliburton, 390 F. Supp. 2d 610, 614 (S.D. Tex. 2005) (citing Loeffler v. Frank, 486 U.S. 549, 554 (1988); Zayler v. Dep't of Agric. (*In re* Supreme Beef Processors, Inc.), 391 F.3d 629, 633 (5th Cir. 2004)).

under certain circumstances,[204] with exceptions.[205] The exceptions apply only to suits against the Federal Government, not Government contractors.[206] However, in *Boyle v. United Technologies Corporation*,[207] the Supreme Court held that the FTCA's discretionary function exception[208] preempts, in certain situations, tort suits against defense contractors based on harm caused by design specifications in military equipment.[209] This first exception, known as the Government

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[204] *Fisher*, 390 F. Supp. 2d at 614 ("The FTCA authorizes civil actions for damages against the United States for personal injury or death caused by the negligence of a government employee under circumstances in which a private person would be liable under the law of the state in which the negligent act or omission occurred.") (quoting Bursztajn v. United States, 367 F.3d 485, 489 (5th Cir. 2004)).

[205] Lessin v. Kellogg Brown & Root, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403, at *10 (S.D. Tex. June 12, 2006) (citing 28 U.S.C. § 2674 (2006); Quijano v. United States, 325 F.3d 564, 567 (5th Cir. 2003)).

[206] Carmichael v. Kellogg Brown & Root Servs., Inc., 450 F. Supp. 2d 1373, 1377 (N.D. Ga. 2006); *see Lessin*, 2006 U.S. Dist. LEXIS 39403, at *10–11.

[207] 487 U.S. 500 (1988).

[208] 28 U.S.C. § 1346(b) (2006). Excepted from the Government's consent to suit is "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.*

[209] Boyle v. United Techs., Corp., 487 U.S. 500 (1988). The Court set out the test as:

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

Id. at 512. However, before applying this test, the following two elements must be present: "(a) a determination that the subject matter of the contract involves uniquely federal interests and (b) a significant conflict between an identifiable federal policy and the operation of state law." Dover & McGovern, *supra* note 202, at 10. If the test is satisfied, a contractor is eligible for a qualified immunity:

> [T]he defense does not protect the manufacturer of a product ordered by the Government from the manufacturer's stock. Moreover, it is not enough for the contractor to prove that it acted in accordance with the Government's direction. It must also establish that allowing the plaintiff to challenge the contractor's actions under state law would be inconsistent with a specific and significant exercise of Federal Government discretion.

Id. (citing *Boyle*, 487 U.S. at 511). A rationale offered for this exception is that it "prevents courts from second-guessing legislative and administrative conduct that implements policy goals." Andrew Finkelman, *Suing the Hired Guns: An Analysis of*

Contractor Defense (GCD), is frequently raised by defense contractors when an alleged tort occurs inside the United States.[210]

The second prominent contractor defense consists of an alternative version of the GCD, one based instead on the FTCA's combatant activities exception.[211] This defense was adopted by the United States Court of Appeals for the Ninth Circuit in *Koohi v. United States*.[212] The *Koohi* court extended the protections of the GCD to weapon manufacturers sued for harm caused to a perceived enemy by the U.S. military using such weapons.[213] In *Bentzlin v. Hughes Aircraft Company*, the *Koohi* holding was expanded by a federal district court to

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Two Federal Defenses to Tort Lawsuits Against Military Contractors, 34 BROOK. J. INT'L L. 395, 397 (2009) (citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 814 (1984)).

[210] Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL'Y 691, 712 (2007) ("[Private security contractors] sued under state tort law principles are almost uniformly invoking the GCD.").

[211] 28 U.S.C. § 2680(j) (2006). Excepted from the Government's consent to suit is "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* One rationale offered for this exception is "it being the nature of the sovereign at war to be able to incur injury and death without tort liability." Mateo Taussig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J.L. & HUMAN. 101, 141 (2009). Another rationale offered for this exception is the need to "restrict interference with decisions of federal agents regarding military affairs." Finkelman, *supra* note 209, at 405 (citing Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948)). The FTCA also prohibits suits against the government based on intentional torts and suits involving torts arising outside the United States. *Id.* §§ 2680(h), 2680(k). However, these aspects of the FTCA have not been extended to cover the activities of Government contractors. *See, e.g.*, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 19 n.6 (D.D.C. 2005); Valerie C. Charles, *Hired Guns and Higher Law: A Tortured Expansion of the Military Contractor Defense*, 14 CARDOZO J. INT'L & COMP. L. 593, 612–13 (2006).

[212] 976 F.2d 1328 (9th Cir. 1992).

[213] *Id.* at 1336–37 (9th Cir. 1992); *see* Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1493 (C.D. Cal. 1993).

> In *Koohi*, the Ninth Circuit recognized three principles underlying the combatant activities exception to the FTCA. These principles are based on the premise that the objectives of tort law—deterrence, punishment, and providing a remedy to innocent victims—are inconsistent with the government's interests in combat, and thus tort law cannot be applied to government actions in combat. Similarly, the application of tort law to contractors for suits arising from combat would frustrate government combat interests.

Id.

cover weapon manufacturers whose weapons injure U.S. troops in combat.[214] And in the recent GWOT case of *Ibrahim v. Titan Corp*., a district court extended the combatant activities exception to a matter involving intentional torts, with the dispositive factor the degree of control of the military over defense contractor employees at the time the torts were committed.[215] According to the *Ibrahim* court, the combatant activities exception has application where defense contractor employees have become "soldiers in all but name."[216] However, this exception is somewhat controversial.[217]

Some district courts elected not to follow the Ninth Circuit's lead regarding the combatant activities exception, particularly in cases that do

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[214] *See Bentzlin*, 833 F. Supp. at 1494 ("[A] government contractor who manufacturers [sic] the weapons of war cannot be held liable for deaths of American soldiers arising from combat activity.").

[215] Ibrahim v. Titan Corp., 556 F. Supp. 2d 1, 5 (D.D.C. 2007).

> Where contract employees are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers, preemption ensures that they need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability. It is the military chain of command that the FTCA's combatant activities exception serves to safeguard, however, and common law claims against private contractors will be preempted only to the extent necessary to insulate *military* decisions from state law regulation. This is why the degree of operational control exercised by the military over contract employees is dispositive.

Id.

[216] *Ibrahim*, 391 F. Supp. 2d at 18.

[217] *See* Carmichael v. Kellogg Brown & Root Servs., Inc., 450 F. Supp. 2d 1373, 1379 (N.D. Ga. 2006).

> Just one paragraph of the court's opinion in *Koohi* is devoted to the issue of whether the plaintiffs' claim against the defense contractors was preempted in accordance with *Boyle*. And that one paragraph is conclusory, not analytical.
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> . . . .
>
> Finally, *Koohi* represents an expansion of the holding in *Boyle* that the Supreme Court may or may not have intended.

Id.

not involve manufacturing or design defects.[218] With this exception currently in flux,[219] defendant defense contractors who might otherwise qualify for the protection may not be granted relief. Despite the district courts' reluctance to expand the defense, some commentators have recently urged its expansion to include even more combat zone situations.[220] With such divergent opinions on the combatant activities exception rampant, this exception is ripe for Supreme Court resolution.

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[218] *See generally* McMahon v. Presidential Airways, Inc., 460 F. Supp. 2d 1315 (M.D. Fla. 2006), *aff'd*, 502 F.3d 1331 (11th Cir. 2007); *Carmichael*, 450 F. Supp. 2d 1373; Lessin v. Kellogg Brown & Root, No. H-05-01853, 2006 U.S. Dist. LEXIS 39403 (S.D. Tex Jun. 12, 2006). *Koohi* and *Bentzlin* were followed by a product liability case involving the alleged defective manufacture of a helmet (and its component parts) worn by a helicopter pilot. Flanigan v. Westwind Techs., Inc., No. 07-1124, 2008 U.S. Dist. LEXIS 82203 (W.D. Tenn. Sept. 15, 2008). *Flanigan* acknowledged the differences between convoy service cases and cases involving "complex equipment acquired by the Government in its procurement process, which inevitably implicates nuanced discretion and sophisticated judgments by military experts." *Id.* at *35–36 (quoting *Carmichael*, 450 F. Supp. 2d at 1380–81). Another district court has framed the test for application of the combatant activities exception as a question of whether the plaintiff's claim arises from "active military combat operations." Harris v. Kellogg, Brown & Root Servs., Inc., No. 08-563, 2009 U.S. Dist. LEXIS 26547, at *92–93 (W.D. Pa. Mar. 31, 2009).

[219] *See generally* Joseph, *supra* note 210, at 693 ("[T]he civil tort liability regime applicable to [private security contractor] operations in war zones appears to lack uniform standards and predictable treatment.").

[220] *See* Aaron L. Jackson, *Civilian Soldiers: Expanding the Government Contractor Defense to Reflect the New Corporate Role in Warfare*, 63 A.F. L. REV. 211, 221 (2009); Trevor Wilson, *Operation Contractor Shield: Extending the Government Contractor Defense in Recognition of Modern Wartime Realities*, 83 TUL. L. REV. 255, 280 (2008) (calling for "an extension of the GCD to shield [private military contractors] when[ever] they take up arms on the battlefield with the U.S. military"); *see also* John L. Watts, *Differences Without Distinctions:* Boyle's *Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 OKLA. L. REV. 647, 675 (2007) (calling for a new "military contractor defense" that "would not apply to claims brought by civilian plaintiffs but would bar all products liability claims brought by servicemembers injured incident to service . . . . "); Joseph, *supra* note 210, at 717 (referring to courts' refusal to extend *Boyle's* holding to service contracts as "narrowly constrained" and "strange"). Because most contractors engaged in GWOT support provide services rather than the manufacture of goods, these two FTCA exceptions have proven thus far to be of limited use. Finkelman, *supra* note 209, at 397 (citing Sam Perlo-Freeman & Elisabeth Sköns, *The Private Military Services Industry*, SIPRI INSIGHTS ON PEACE AND SECURITY 8 (2008)); Jackson, *supra* note 220, at 212.

> Arising from the doctrine of sovereign immunity, the GCD provides absolute immunity to contractors facing negligence, warranty, or strict liability claims due to incidents caused by defective designs. But what protection is currently provided to contractors employed by

Another possible course of action for defense contractors performing contingency contracts is to seek indemnification from the Government for tort damages awards.[221] The Anti-Deficiency Act[222] generally prohibits the use of indemnification agreements in Government contracts,[223] but there are a few exceptions.[224] One that could most likely provide relief to defense contractors in war zones is found under Public Law 85-804.[225] This exception "provid[es] compensation to the contractor in the event of liability to third parties incurred while performing contractual duties involving 'unusually hazardous' risks."[226] If such an indemnification request is approved, the contract will include Federal Acquisition Regulation (FAR) clause 52.250-1, *Indemnification Under Public Law 85-804*, which provides indemnification for third-party tort claims resulting from the unusually hazardous risk specified in

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> the government to perform service-based contracts? Simply put, nothing.

Id.

[221] Dover & McGovern, *supra* note 202, at 1 ("In commercial contracting, contractual indemnification is an important risk mitigation tool.").

[222] The Anti-Deficiency Act is

> [a] statute prohibiting Government agencies from obligating the Government, by contract or otherwise, in excess of or in advance of appropriations, unless authorized by some specific statute. Codified at 31 U.S.C. § 1341 et seq. since 1982, the Act prevents Government employees from involving the government in expenditures or liabilities beyond those contemplated and authorized by Congress.

NASH, JR. ET AL., *supra* note 134, at 30.

[223] Dover & McGovern, *supra* note 202, at 1.

[224] *Id.* at 2–4 (citing as potential options: Pub. L. No. 85-804, 72 Stat. 972 (1958); the Price-Anderson Act, 42 U.S.C. §§ 2210 (1994); indemnification for research and development contractors under 10 U.S.C. § 2354 (2006); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.228-7 (Jan. 2009) [hereinafter FAR]).

[225] Dover & McGovern, *supra* note 202, at 2 ("P.L. 85-804 [] is an exception to the general rule providing that the Government may not enter into open-ended indemnification agreements.").

[226] C. Douglas Goins, Jr. et al., *Regulating Contractors in War Zones: A Preemptive Strike on Problems in Government Contracts*, (07-3 Briefing Papers) 22 (Thomson & West 2007).

the contract.[227] However, the high-level approval requirement[228] of this FAR clause limits its practical use.[229]

Another source in the FAR for potential indemnification of contractors in contingency environments is FAR 52-228.7, *Insurance—Liability to Third Persons*.[230] Under this clause, indemnification for third party liability becomes available for costs not otherwise provided for, but only in cost reimbursement type contracts.[231] Fixed price contracts are not included under this clause.[232] Unlike indemnification under Public Law 85-804, indemnification under FAR 52.228-7 is "subject to the availability of appropriated funds at the time a contingency occurs."[233] If the high-level approval requirement and fund availability issues can be overcome, indemnification could serve as a viable option for defense contractors seeking to recover funds paid out pursuant to tort damages awards.

Another potential avenue of relief for combat zone defense contractors is the Defense Base Act (DBA).[234] The DBA provides for worker's compensation insurance for certain types of employment taking place outside the United States.[235] If applicable, the DBA serves as the

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[227] Dover & McGovern, *supra* note 202, at 2.

[228] FAR, *supra* note 224, pt. 50.201(d). Permission for such indemnification "shall be exercised only by the Secretary or Administrator of the Agency concerned . . . . " *Id.*

[229] Furthermore, indemnification under Public Law 85-804 is described by defense contractor advocates as "burdensome," "unpredictable," and "not consistently applied." Goins, *supra* note 226, at 22 n.219 (quoting *Iraq Reconstruction: Hearing Before the H. Comm. On Oversight and Government Reform*, 110th Cong. 8 (2007) (statement of Alan Chvotkin, Senior Vice President and Counsel, Prof'l Servs. Council)).

[230] FAR, *supra* note 224, pt. 52-228.7; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 228.311-1 (Jan. 1, 2009) [hereinafter DFARS] (directing that the FAR clause be included).

[231] FAR, *supra* note 224, pt. 28.311-1; Goins, *supra* note 226, at 22; Joseph, *supra* note 210, at 706. The American Bar Association's Section of Public Contract Law has expressed a desire for this clause to be endorsed for use in fixed price contracts as well as cost reimbursement contracts. Goins, *supra* note 226, at 22 n.221 (citing Letter from Robert L. Schaefer, Chair, Section of Public Contract Law, to Dean G. Propps, Principal Deputy to the Assistant Secretary of the Army (Oct. 12, 2005), *available at* http://www.abanet.org/contract/federal/regscomm/emerging_007.pdf).

[232] Goins, *supra* note 226, at 22.

[233] FAR, *supra* note 224, pt. 52.228-7(d); Dover & McGovern, *supra* note 202, at 4.

[234] 42 U.S.C. §§ 1651–54 (2006).

[235] *Id.* § 1651(a)(1)-(2); Nordan v. Blackwater Sec. Consulting, LLC, 382 F. Supp. 2d 801, 807 (4th Cir. 2005) ("The DBA is a federal statute that incorporates and extends the comprehensive worker's compensation scheme established by the Longshore and Harbor Worker's Compensation Act (LHWCA) to select forms of employment outside of the

exclusive remedy against defense contractors for injuries sustained on the job by defense contractor personnel.[236] Employer liability under the DBA limits itself to "medical and disability benefits, statutory death benefits, payment for reasonable funeral expenses, and compensation payments to surviving eligible dependents."[237] However, disagreement currently exists among the federal courts as to the DBA's applicability.[238] The United States Court of Appeals for the Fourth Circuit held the DBA did not preempt state tort law claims because the DBA's statutory scheme did not specifically provide for a federal cause of action.[239] However, other courts have found preemption to be warranted under the DBA.[240] Recent congressional frustration with the DBA's administration[241] may ultimately bring changes that resolve these judicial disagreements via statute. Otherwise, the DBA is another area ripe for Supreme Court resolution.

Having addressed the GWOT developments in the political question doctrine and other relevant judicially-recognized limits on defense contractor tort liability, the focus now shifts to the effect these measures will have on Government contingency contracting.

United States.") (citation omitted). Types of employment covered under the DBA (via the LHWCA) consist of the

> injury or death of any employee engaged in any employment—at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States.

42 U.S.C. § 1651(a)(1)-(2).

[236] 33 U.S.C. § 904 (2006); *Nordan*, 382 F. Supp. 2d at 808; Dover & McGovern, *supra* note 202, at 9 ("If an injured worker is covered under the DBA, the worker is generally entitled to the benefits and procedures set forth in the [LHWCA]. The LHWCA is supposed to provide the exclusive remedy against a qualifying employer for injury or death of the employee.") (footnote omitted).

[237] Dover & McGovern, *supra* note 202, at 9.

[238] *See infra* notes 239–40 and accompanying text.

[239] *Nordan*, 382 F. Supp. 2d at 809–11.

[240] *See, e.g.*, Nauert v. Ace. Prop. & Cas. Ins. Co., No. 04-CV-02547-WYD-BNB, 2005 U.S. Dist. LEXIS 34497 (D. Colo. Aug. 27, 2005); Ross v. Dyncorp, 362 F. Supp. 2d 344 (D.D.C. 2005); Schmidt v. Northrop Grumman Sys., Corp., No. 3:04-CV-042-JTC, 2005 U.S. Dist. LEXIS 24688 (N.D. Ga. Mar. 2, 2005).

[241] *See generally* 50 GOVERNMENT CONTRACTOR ¶ 191 (2008). In testimony before the House Oversight and Government Reform Committee on 15 May 2008, the Committee "expressed frustration with apparent waste and mismanagement" of DBA insurance programs. *Id.*

VIII. Impact on Government Contingency Contracting

Judges and scholars openly speculate about the possible consequences of defense contractor tort liability on the federal procurement process. In *Boyle*, the Supreme Court warned that "[t]he financial burden of judgments against [ ] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability . . . ."[242] The *Nash & Cibinic Report* cited earlier alerted to "significant risks" to contractors due to the recent developments in the political question doctrine and intimated contractors may lose their desire to perform such contracts in the future.[243] But is the situation really this dire? Are contractors at a point where, because of increased litigation risks, they will be forced to charge the Government more for their services or elect to not provide services altogether?

The answers may not be far away. In November 2008, Joshua Eller filed suit in the U.S. District Court for the Southern District of Texas, as a result of injuries he suffered at Balad Air Base, Iraq, while deployed as a contractor employee of KBR from February to November of 2006.[244] The complaint alleges defendants KBR and Halliburton "intentionally and negligently exposed thousands of soldiers, contract employees and other persons to unsafe water, unsafe food, and contamination due to faulty waste disposal systems . . . ."[245] The complaint also includes allegations of injury from toxic smoke which emanated from an open air burn pit at Balad.[246] The complaint alleges approximately 1,000 other individuals suffered similar injuries and it seeks to combine all of those actions into a single class action lawsuit.[247] More significantly, this

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[242] Boyle v. United Techs., Corp., 487 U.S. 500, 511–12 (1988). The same point was made in the *Ibrahim* case. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18 (D.D.C. 2005) ("[T]he government will eventually end up paying for increased liability through higher contracting prices (or through an inability to find contractors willing to take on certain tasks) . . . .").

[243] *See supra* note 5.

[244] Complaint at 1–2, Eller v. Kellogg Brown & Root, No. 4:2008cv03495 (S.D. Tex. Nov. 28, 2008); *see* Kennedy, *supra* note 95, at 31.

[245] Complaint, *supra* note 244, at 1.

[246] *Id.* at 9–10; *see* Adam Levine, *Effects of Toxic Smoke Worry Troops Returning From Iraq*, CNN.com, Dec. 15, 2008, http://www.cnn.com/2008/12/15/burn.pits/index.html.

[247] Complaint, *supra* note 244, at 2–4.

action is only one of several suits currently pending that relate to similar KBR activities in Iraq.[248]

The political question doctrine will be a major factor in this coming storm of litigation. With the large number of potential plaintiffs compounded by the seriousness of the conduct and injuries alleged, these suits have the potential to dwarf the damages awards previously sought in earlier GWOT cases. Undoubtedly, KBR will seek to raise the political question doctrine as an absolute bar to these and any similar suits.[249] Thanks to *McMahon*, *Lane*, and the other GWOT political question cases, federal district courts now have a workable political question framework in place to navigate from. The question then becomes how this coming storm will impact Government contingency contracting.

Defense contractor advocates warn of "deleterious effects" to the mission and the contractor–military relationship if tort suits against war zone defense contractors are allowed to proceed.[250] They argue such tort claims "frustrate" and "conflict with" the Government's ability to control contingency operations and would result in compromised logistical support and mission jeopardy.[251] Furthermore, many companies, especially smaller ones, could be deterred from seeking contingency contracts.[252] For those contractors who do elect to proceed, they will seek to insulate themselves from liability by either self-insuring or obtaining insurance coverage, if it is available.[253] The argument continues that such costs will then be passed onto the Government in the form of higher contract prices.[254] But, most alarmingly, some defense

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[248] *See* Kelly Kennedy, *5 More Burn-Pit Lawsuits Filed Against KBR*, AIRFORCETIMES.COM, June 16, 2009, http://airforcetimes.com/news/2009/06/military_burnpit_lawsuits_061609w/; Kelly Kennedy, *KBR Sued Over Burn-Pit Exposure*, ARMY TIMES, May 11, 2009, at 13; Scott Bronstein & Abbie Boudreau, *Guardsmen Sue KBR Over Chemical Exposure*, CNN.COM, Dec. 3, 2008, http://www.cnn.com/2008/US/12/03/guardsmen. toxic/index.html.

[249] *See generally supra* notes 86, 88–171, and accompanying text.

[250] Prof'l Servs. Council Amicus Brief, *supra* note 11, at *10, *13. *See generally* Brief for Nat'l Def. Indus. Ass'n as Amicus Curiae Supporting Appellees at *10, *23, Lane v. Halliburton, No. 06-20874 (S.D. Tex. 2006).

[251] Brief Prof'l Servs. Council Amicus Brief, *supra* note 11, at *13, *46.

[252] *Id.* at *46.

[253] *Id.*; Goins, *supra* note 226, at 22 ("The most rational behavior on the part of contractors may be to insure themselves against potential liabilities because the extent of liability to a potential claimant can be too great for self-insurance.").

[254] *See supra* note 242 and accompanying text.

contractor advocates claim the impact of such suits "would be far more profound than financial" and defense contractors may, out of a fear of being sued, refuse to follow the military's instructions altogether.[255]

Unlike the voices heard by Horton, which actually existed, the consequences predicted by defense contractor advocates vastly overstate the actual impact these GWOT tort suits will have on Government contingency contracting. Several reasons exist for this contention. First, the Government currently pays far too much money to defense contractors overseas for them to now decline performance of contingency contracts.[256] The alleged dramatic price increases in U.S. Government contracts due to the increased litigation risk are unlikely as well.[257] Contract prices may rise to some degree, but the Government can ill afford to refuse to pay them.[258] Second, the U.S. military does not

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[255] *Supra* note 11.

[256] *See supra* note 83 and accompanying text; Michael Hurst, Essay, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1325 n.104 (2008) ("'Since September 2001, the Congress has appropriated $602 billion for military operations and other activities related to Iraq, Afghanistan, and the war on terrorism.'") (quoting *Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Hearing Before the H. Comm. on the Budget*, 110th Cong. (2007) (statement of Robert A. Sunshine, Assistant Director for Budget Analysis, Congressional Budget Office), *available at* http://www.cbo.gov/ftpdocs/84xx/doc8497/07-30-WarCosts_Testimony.pdf). To further place the U.S. Government's financial investment in GWOT contingency contracting into context, the $20 billion contract awarded to KBR for logistics operations in Iraq was "roughly three times the total amount America spent to win the first Gulf War." Major Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Sector Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July 2008, at 64, 68 (citing P.W. Singer, *Can't Win with 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency*, FOR. POL'Y AT BROOKINGS 10 (Policy Paper No. 4) (2007), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf).

[257] Hurst, *supra* note 256, at 1325 n.103 ("Given the large number of firms in the industry and the competitive nature of the bidding process, it is unlikely that firms would be able to demand dramatic price increases.").

[258] *See* e-mail from Paul M. McQuain, Director, DCMA Lockheed Martin Ft. Worth, to author (Feb. 28, 2009) (on file with author). Mr. McQuain is a retired U.S. Army colonel and previously served in a contingency environment as the DCMA Commander for Iraq. He believes such tort suits against contractors, if allowed to proceed, would cause contracting costs to increase, but that they would not "have a significant impact on DoD's ability to find contractors to bid on contracts such as LOGCAP." *Id*.; *see also* Telephone Interview with Daryl Conklin, Deputy Director, DCMA Special Programs South, in Charlottesville, Va. (Feb. 27, 2009). Mr. Conklin is a retired U.S. Army lieutenant colonel and previously served in contingency environments as the DCMA Deputy Commander for Iraq and the Chief of Contracting for U.S. Forces in Croatia. He believes

own the internal means to provide the goods and perform the services contracted for in a contingency environment—such goods and services are necessary for mission accomplishment.[259] Finally, as discussed earlier, apart from the political question doctrine, defense contractors who face allegations of tortious conduct in a contingency environment have several legal defenses and other alternatives to limit or avoid liability, including insurance.[260] Viewed together, these points counter forecasts of the impending ruin of Government contingency contracting.

With their recent activity involving the political question doctrine, courts have hardly thrust open the floodgates to litigation. Rather, they have properly focused their attention on protecting military decision-making and policy from judicial intrusion, and limited their rulings accordingly. For those suits that do not question military decisions or policy, they will move forward (at least without political question problems). This may or may not cause an increase in contractor costs

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the government will cover any associated cost increases in order to facilitate mission accomplishment. *Id*.

[259] Conklin, *supra* note 258. According to Mr. Conklin, the U.S. military does not have the capability to perform contingency contracting services itself because it previously eliminated most of those functions when it "cut off its logistical tail" in the 1990s. *Id*. As such, the military no longer employs the organic forces necessary to provide sufficient LOGCAP-type services and personal protective services which make up a large part of Government contingency contracts. *Id*.; *see* GAO REP., *supra* note 83, at 1. *See generally* JACQUES S. GANSLER ET AL., URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING, REPORT OF THE "COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS" (2007) (discussing the consequences of cutbacks in Army contracting operations beginning in 1991). The GAO found the vast number of GWOT contracts and contractor employees represents "an increased reliance on contractors to carry out agency missions." GAO REP., *supra* note 83, at 1. Such personnel perform duties ranging from "interpretation/translation, security, weapons system maintenance, intelligence analysis, facility operations support, [to] road construction." *Id.* *See generally* Addicott, *supra* note 7, at 346–47 (attributing the increased reliance on combat zone defense contractors to several factors).

> First, Congressional limits on the number of DOD personnel extend both to the size of the armed forces in general and to the number of uniformed personnel authorized in a particular operational mission or area. Second, the ever-increasing sophistication and automation of a wide variety of technologies used by the military requires a workforce that often is not found in the uniformed services. Finally, strategic and tactical needs mandate that the command authority conserve DOD resources to address unanticipated exigencies.

Id. (footnote omitted).

[260] *Supra* Section VII; *see supra* note 253 and accompanying text.

due to higher insurance premiums related to tort damages, which could then be conveyed to the U.S. Government in the form of higher prices. However, the political question doctrine's purpose is *not* to inhibit the principles of accountability[261] inherent in the American tort law system. For those who wish to change this system, they should look instead toward the political branches or state governments for relief. These entities have in their arsenals statutes, regulations, and other mechanisms more appropriate for change. Such methods are much more apt for this purpose than reliance on a mutation of the political question doctrine into a form beyond its established limits.

To argue that Government contingency contracting will break down unless the political question doctrine extends to all tort suits brought against combat zone defense contractors is disingenuous. Alarming predictions of compromised logistics and mission failure grossly exaggerate the effect of these GWOT tort suits on combat zone contractors and Government contingency contracting. Such hyperbole ignores the reality and degree of the U.S. Government's financial commitment to and dependency on contingency contracting in Iraq and Afghanistan. Finally, even if the consequences to the DoD procurement system are as dire as defense contractor advocates have alleged, the political branches are in a much more appropriate position to remedy them and can do so much more immediately and effectively.

> *That one small, extra Yopp put it over!*
> *Finally, at last! From that speck on that clover*
> *Their voices were heard! They rang out clear and clean.*

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[261] *See generally* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. (forthcoming 2009). The purpose of tort law is to "provid[e] a vehicle for individuals to bring about justice, and in doing so, [to] vindicate[e] the notion of a community of equals who are answerable to one another, and expected to treat one another with equal respect." *Id.*; MCQUILLAN & ABRAMYAN, *supra* note 8, at 1.

> An efficient tort system is an important part of a thriving free-enterprise economy. It ensures that firms have proper incentives to produce safe products in a safe environment, and that truly injured people are fully compensated. An efficient tort system results in greater trust among market participants, leading to more trading, and eventually a higher standard of living for individuals in the society. An efficient tort system benefits all.

Id.

And the elephant smiled. "Do you see what I mean?[262]

IX. Conclusion

The political question doctrine is an established, important part of the American judicial system. It protects the separation of powers by restricting courts from adjudicating matters better left to other branches of Government. Recently, federal courts have applied the doctrine to cases involving allegations of tortious conduct on the part of defense contractors engaged in GWOT support. In their analysis, courts have cautiously avoided passing judgment on executive policy and military decision-making. Cases that required such action were found to present political questions and were dismissed. Alternatively, cases that only required the courts to apply well-settled tort law standards were allowed to proceed. With more serious litigation on the horizon, courts now have a reliable framework to employ. Some defense contractor advocates have predicted dire consequences for the Government's contingency contracting process if tort cases against combat zone defense contractors are allowed to proceed. However, the nature and degree of the Government's commitment to contingency contracting indicates otherwise. The bottom line is that tort suits against defense contractors that are not terminated as political questions *will* have an effect on contingency contracting—but the severity of that impact has been *far* overstated by defense contractor advocates.

Ultimately, Horton's success in winning over the Jungle of Nool came from the fact that the Whos were real—not imagined. Defense contractor predictions of impending doom are quite the opposite. Recent political question doctrine developments will not alter the nature of Government contingency contracting. Halliburton does not hear a Who.

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[262] SEUSS, *supra* note 1, at 58.