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The Political Question Doctrine and Civil Liability for Contracting Companies on the “Battlefield”

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The Political Question Doctrine and Civil Liability for Contracting Companies on the “Battlefield”

Jeffrey F. Addicott *

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I. INTRODUCTION

*“The question whether contractors may be sued, in any court, for war casualties while the military services may not . . . could determine whether the President, as Commander-in-Chief, will be able to deploy the Total Force decades into the future.”*¹

While the use of civilian contractors to support military operations is not a new phenomenon in American history, their use in the War on Terror² has been unprecedented. Whether one looks at

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1. JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY 300 (2007) (quoting Brief for Appellants at 7, *In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (No. 05-2033)).

2. 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.” Military Commissions Act of 2006 (MCA), 10 U.S.C. § 948a(1)(i) (2006). One of the clearest indications of the Congressional authorization for war and for the use of the law of war, the MCA lists “unlawful enemy combatants” as:

(i) a person who has engaged in hostilities or who has purposefully and

the actual numbers of civilian contractors in active combat zones overseas, which exceeds well over 100,000 in Iraq alone,³ or in the specific activities performed by civilian contractors, for example, the use of civilian contractors as armed security forces, the legal and policy ramifications are significant.⁴

Out of a myriad of concerns in this evolving arena⁵—ranging from criminal jurisdiction, to training, to labor and employment law—this Article focuses on providing an overview of the “political question” doctrine’s development in recent case law associated with civil complaints brought in American courts against contracting companies operating in battlefield environments such as Iraq and Afghanistan, a matter addressed by the author at the *Review of Litigation’s* Symposium—Terror on Trial: Civil Litigation in the

materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id.

3. According to a Freedom of Information Act (FOIA) request to United States Central Command by ePluribus Media, as of January 1, 2008, there were approximately 133,196 civilian contractors of various nationalities working under U.S. contracts in Iraq. Susie Dow, *Iraq Contractors: Raw Data from CENTCOM*, EPLURIBUS MEDIA, July 8, 2007, http://www.epluribusmedia.org/features/2007/20070708_contracting_numbers.html; see also Christina M. Blyth, *Minding the Liability Gap: American Contractors, Iraq, and the Outsourcing of Impunity*, 62 U. MIAMI L. REV. 651, 651 (2008) (estimating the number of civilian contractors to be “somewhere over 100,000” in Iraq).

4. See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000) (discussing the emerging legal and policy issues prior to the War on Terror).

5. See generally Jeffrey F. Addicott, *Contractors on the “Battlefield:” Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT’L L. 323 (2006) (evaluating and discussing the provision of adequate protection, anti-terrorism training, and personnel recovery for civilian contractors deployed to support United States military operations).

War on Terror.⁶ The political question doctrine, which excludes from judicial review all controversies involving policy choices and other value determinations that the Constitution reserves to the Congress and the Executive for resolution, represents a formidable jurisdictional shield and will no doubt continue to be a source of jurisprudence and debate in the future.

II. STATUS OF CONTRACTORS ON THE BATTLEFIELD

“The terrible thing about war is that it usually kills the wrong people.”—Anonymous.⁷

According to a 2007 Congressional Research Service (CRS) Report for Congress, the level of civilian contractor activities to Department of Defense (DOD) missions—which encompass a wide range of technical, logistical, maintenance, and security support services—has caused a “substantial shift in the types of contracts for troop support services.”⁸ To put it bluntly, without the extensive use of civilian contractors in the War on Terror, the American military could not conduct combat operations or contingency operations (also called “military operations other than war” (MOOTW)).⁹

6. Jeffrey F. Addicott, Professor, Saint Mary’s Univ. Sch. of Law, Remarks at the Review of Litigation Symposium: Terror on Trial: Civil Litigation in the War on Terror (Mar. 28, 2008).

7. E.C. MCKENZIE, 14,000 QUIPS & QUOTES FOR WRITING & SPEAKERS 541 (Wings Books 1980).

8. See VALERIE BAILEY GRASSO, DEFENSE CONTRACTING IN IRAQ: ISSUES AND OPTIONS FOR CONGRESS ii (Congressional Research Service, CRS Report for Congress No. RL33834, 2007), available at http://meetings.abanet.org/webupload/commupload/PC704400/otherlinks_files/CRS_Report_on_Defense_Contracting_Iraq_11_15_07.pdf (discussing the various types of Logistics Civil Augmentation Program (LOGCAP) contracts that have been awarded).

9. See 10 U.S.C. § 101(a)(13) (2006), which states that:

The term “contingency operation” means a military operation that—
 (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
 (B) results in the call or order to, retention on, active duty of members of the uniformed services . . . or any other provision of law during a war or during a national emergency declared by the President or Congress.

The reason for this phenomenon rests in 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.¹⁰ 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. Accordingly, tens of thousands of civilian engineers, technicians, construction workers, food service providers, weapon specialists, security guards,¹¹ and others work under government contracts with,

MOOTW operations include: Arms Control, Combating Terrorism, DOD Support to Counterdrug Operations, Enforcement of Sanctions and/or Maritime Intercept Operations, Enforcing Exclusion Zones, Ensuring Freedom of Navigation and Overflight, Humanitarian Assistance, Military Support to Civilian Authorities, Nation Assistance and/or Support to Counterinsurgency, Noncombat Evacuation Operations, Peace Operations, Protection of Shipping, Recovery Operations, Show of Force Operations, Strikes and Raids, and Support to Insurgency. J-7 OPERATIONAL PLANS & INTEROPERABILITY DIRECTORATE, JOINT CHIEFS OF STAFF, MILITARY OPERATIONS OTHER THAN WAR 17-27 (Joint Force Employment Briefing Modules, 1997), *available at* <http://www.dtic.mil/doctrine/jrm/mootw.pdf>.

10. Force Caps set strict limits on the number and type of DOD personnel that may be physically committed to a particular location, combat zone, or mission. *See also* DEP'T OF THE ARMY, FIELD MANUAL NO. 3-100.21, CONTRACTORS ON THE BATTLEFIELD § 1-1 (2003), http://www.afsc.army.mil/gc/files/fm3_100x21.pdf ("When military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units.").

11. Americans serving as part of an armed security force under government contract overseas are sometimes derogatorily referred to as mercenaries. This categorization is false as civilian contractors employed as armed security forces do not fit the accepted definition of a mercenary as set out in Article 47 of Protocol I to the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts art. 47, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. To be considered a mercenary an individual must meet all of the elements set out at Article 47:

A mercenary is a person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party

for example, the DOD and Department of State (DOS) to provide not only “bullets and beans” to the military but also significant amounts of the “muscle and brains.” In addition, because civilian employees of contractor companies work shoulder to shoulder with their military counterparts in areas of present and imminent danger, over a thousand of them have been killed and wounded.¹²

Civilian contractors function under individualized contracts either directly with the DOD or with other federal agencies such as DOS.¹³ Defense contracting can be divided into three general categories: theater support contracts, external support contracts, and systems contracts.¹⁴

One of the significant issues associated with the increased use of civilian contractors in the War on Terror concerns the matter of status. Under the law of war,¹⁵ which consists of customary principles¹⁶ and international treaties—primarily the 1949 Geneva

to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

12. See David Ivanovich, *Contractor Deaths up 17 Percent Across Iraq in 2007: As ‘Surge’ Took Effect, Spike in Killings Subsided*, HOUS. CHRON., Feb. 10, 2008, at A1, available at <http://www.chron.com/disp/story.mpl/front/5528613.html> (“From the start of the war in March 2003 through Dec. 31 2007—the latest figures available—1,123 civilian contractors are known to have died in Iraq, according to the U.S. Labor Department.”).

13. See GRASSO, *supra* note 8 (reviewing logistical support or “service contracts”).

14. See Addicott, *supra* note 5, at 335–36 (discussing the three main types of defense contracts).

15. The basic goal of the law of war is to mitigate its inevitable evils by: “a. [p]rotecting both combatants and noncombatants from unnecessary suffering; b. [s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and c. [f]acilitating the restoration of peace.” DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE ¶ 2, at 3 (1956), available at http://www.loc.gov/frd/Military_Law/pdf/law_warfare-1956.pdf.

16. Customary international law consists of all those binding norms practiced by nations. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (“Customary international law results from a general

Conventions¹⁷—all militaries must distinguish between combatants (armed forces) and non-combatants (civilians) during international armed conflicts.¹⁸ Although allowed to accompany the military on all categories of military operations, private civilian contractors are neither combatants nor non-combatants. As recognized by the Geneva Convention Relative to the Treatment of Prisoners of War, non-combatants have a special status that mandates they be treated as prisoners of war (POWs), even though they are not military personnel: “persons who accompany the armed forces without actually being members thereof, such as civilian members of aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces” are treated as POWs when captured.¹⁹

While the vast majority of the activities conducted in Iraq and Afghanistan relate to military operations conducted outside the scope of a state of international armed conflict,²⁰ United States policy

and consistent practice of states followed by them from a sense of legal obligation.”).

17. The primary international treaties dealing with the law of war are the 1949 Geneva Conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

18. See DEP'T OF THE ARMY, *supra* note 10, §§ 4-49 to 4-53 (describing the status of contractors under the regulations set out in the Geneva convention). The term “combatant” and “non-combatant” have extremely important implications in the context of combat operations, especially with regard to prisoner of war (POW) status. A civilian contractor who engages in combat operations may lose POW status and even be categorized as an illegal combatant.

19. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 17, art. 4A(4).

20. The actual period of a state of international armed conflict in both military engagements was measured in months. The military campaign against the Taliban regime took approximately three months, from October 7, 2001, until December 23, 2001. The military campaign against Saddam Hussein's Iraq took less than two months, from March 20, 2003, to May 1, 2003, when President Bush declared an end to major combat operations in Iraq.

requires its armed forces to abide by the law of war on all operations.²¹ There are no exceptions.

III. THE POLITICAL QUESTION DOCTRINE AS A SHIELD TO LIABILITY FOR THE PARENT CONTRACTING COMPANY

“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”²²

Because military operations give rise to their fair share of untoward activities caused by negligent or intentional acts, including wrongful deaths and accidents, it is not surprising that during the War on Terror parent contracting companies have faced a number of civil law suits emanating from their civilian employees, other contractors, military personnel, and host nation foreigners.²³ In tandem with the issue of criminal responsibility, which was ad-

21. DEP'T OF DEFENSE, DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM 2 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>.

22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

23. But see Coalition Provisional Authority Order No. 17 § 2 (June 17, 2004), http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf, which provides immunity from all Iraqi civil and criminal law for actions by coalition military forces as well as diplomats, contractors, and consultants. The order, signed by Paul Bremer just prior to leaving office, provides that:

Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided, however, that Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts. Notwithstanding any provisions in this Order, Private Security Companies and their employees operating in Iraq must comply with all CPA Orders, Regulations, Memoranda, and any implementing instructions or regulations governing the existence and activities of Private Security Companies in Iraq, including registration and licensing of weapons and firearms.

dressed by Congress in the 2007 Defense Authorization Act,²⁴ the matter of civil liability for contracting companies has become an important concern.

An often raised “defense”²⁵ employed by the contracting companies early on in the litigation process was the political question doctrine, which, if adopted by the court, would serve as a complete jurisdictional bar to the suit. As set out in the Supreme Court case of *Japan Whaling Ass’n v. American Cetacean Society*, “the political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution in the halls of Congress or the confines of the Executive Branch.”²⁶ In other words, even if the plaintiff’s lawsuit is appropriate and meritorious as to every other procedural and substantive matter, the political question doctrine renders the case non-justiciable.²⁷ Although the court may have subject matter jurisdiction, the issues at hand are deemed inappropriate for judicial resolution and left to the other two branches of the federal government for resolution.²⁸ Accordingly,

24. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (authorizing trial by military courts-martial for crimes committed by civilian contractors who accompany military forces in both declared wars by Congress and on contingency operations).

25. Other defenses on the merits revolve around the contract itself, which commonly includes a variety of clauses that serve to indemnify the parent contracting company from all liability. See Addicott, *supra* note 5, at 364–77.

26. 478 U.S. 221, 230 (1986).

27. The “Government Contract Defense” is another defense that shields contracting companies from judicial review for civil actions. The defense is spelled out in the 1988 Supreme Court case *Boyle v. United Technologies Corp.* 487 U.S. 500 (1988). In *Boyle*, a civil action was brought against a defense contractor for negligently designing a helicopter escape hatch, resulting in the death of the pilot when the helicopter crashed. The Supreme Court applied a three-prong test to determine whether the contractor was immune from suit and found that: (1) the contractor had taken actions at the direction of agency officials exercising their discretionary authority; (2) the directions involved reasonably precise specifications created by the government with which the contractor complied; and (3) the contractor did not fail to warn the government of known dangers associated with the government’s design. *Id.* at 509. Therefore, the court held that the contractor was immunized from tort liability for damages arising from the alleged helicopter design defects. *Id.* at 512.

28. *But cf.* ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.6.1 (4th ed., Aspen Publishers 2003) (arguing that a court cannot apply the *Baker* test, which is

since 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.²⁹

The political question doctrine is firmly set in separation of powers concerns and originates under the case and controversy requirement of Article III of the Constitution.³⁰ In essence, courts should refuse to intrude on those matters that are properly the dominion of the more accountable branches of the federal government. The question of how to identify a non-justiciable political question was explored by the Supreme Court in *Baker v. Carr*.³¹ The so-called *Baker* inquiry lists six separate factors, any one of which renders the case non-justiciable.³² The six *Baker* factors are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

While the test in *Baker* is broadly defined and apparently listed in descending order of importance, with the first and second

used to identify a non-justiciable political question, in a principled way to identify cases that raise non-justiciable "political questions").

29. See Ian Kierpaul, *The Mad Scramble of Congress, Lawyers, and Law Students after Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407 (2008) (discussing the political question doctrine as it applies to lawsuits against parent contracting companies).

30. U.S. CONST. art. III, § 2, cl. 1.

31. 369 U.S. 186 (1962).

32. *Id.* at 217.

33. *Id.*

factors providing the most weight,³⁴ it is well established that not all matters regarding foreign policy would automatically trigger exclusion from judicial review.³⁵ Each case mandates “a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”³⁶ Because each case must be evaluated in light of the factors in *Baker*, it is not surprising that lower courts will place great emphasis on previous judicial rulings dealing with whether the actions of a particular contracting company involved issues barred from review under the political question doctrine. The problem, of course, is that the various contingency operations associated with the War on Terror have so far only provided a handful of cases against contracting companies where federal courts have been able to make comparisons and extrapolate common areas of agreement.

IV. APPLICATION OF THE POLITICAL QUESTION DOCTRINE IN LAWSUITS AGAINST THE CONTRACTING COMPANY

*“We readily acknowledge that flying over Afghanistan during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently non-justiciable.”*³⁷

The civil lawsuit against a contracting company operating in Iraq that has drawn the most national attention is a 2004 action filed in the Superior Court of Wake County, North Carolina, against the contracting company Blackwater Security Consulting and other named defendants.³⁸ *Nordan v. Blackwater Security Consulting* was filed by the survivors of four deceased independent contractors who

34. *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004).

35. *Baker*, 369 U.S. at 211 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

36. *Id.* at 211–12.

37. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007).

38. For a good introduction to the issues at the initial filing of the case, see Joseph Neff & Jay Price, *Courts to Resolve Contractors’ Deaths*, NEWS & OBSERVER (Raleigh, N.C.) Jan. 9, 2005, at A1, available at <http://www.newsobserver.com/front/story/283686.html>.

were murdered by terrorists on March 31, 2004, while escorting a civilian convoy through Fallujah, Iraq.³⁹ Among other allegations of wrongdoing, the families asserted that Blackwater deliberately sent the contractors into a hostile environment without proper equipment and two armed team members, as promised in the contract.⁴⁰ After a long series of pleadings and various motions (including two attempts by Blackwater to remove to federal court), North Carolina Eastern District Court Judge James Fox sent the case into secret arbitration based on an independent service agreement.⁴¹ Blackwater's attorneys argued the political question doctrine during the legal process prior to arbitration, but no solid resolution of the issue was ever provided by the court.⁴²

While no contracting company has yet been held liable for torts committed in the War on Terror, a handful of civil actions are meandering through the judicial system and provide a sense of how the political question doctrine is being developed.⁴³ These decisions, outlined in this section, will certainly assist in developing a working legal framework.

Ibrahim v. Titan Corp., decided in 2005, provided one of the early attempts to address the political question doctrine.⁴⁴ In *Ibrahim*, seven Iraqi nationals brought suit in federal court seeking compensation against two private contracting companies, Titan and CACI, operating under government contract in Iraq to provide interpreters and interrogators for the U.S. military at the infamous Abu Ghraib prison.⁴⁵ The plaintiffs alleged various acts of assault

39. 382 F. Supp. 2d 801 (E.D.N.C. 2005).

40. *Id.* at 804–05.

41. *Democracy Now!* (Television broadcast May 23, 2007), available at <http://play.rbn.com/?url=demnow/demnow/demand/2007/may/video/dnB20070523a.rm&proto=rtsp>. A transcript of the relevant interview is available online. *Democracy Now!*, Pivotal Family Lawsuit Against Blackwater USA Blocked from Court -- and Moved to Panel with Company Ties (May 23, 2007), http://www.democracynow.org/2007/5/23/pivotal_family_lawsuit_against_blackwater_usa.

42. See SCAHILL, *supra* note 1, at 301–03 (discussing Blackwater's appellate brief, filed October 31, 2005).

43. See, e.g., Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259 (2008) (commenting that as of 2007 no civilian contractor has been held liable for alleged torts).

44. 391 F. Supp. 2d 10 (D.D.C. 2005).

45. *Id.* at 12.

and battery, false imprisonment, intentional infliction of emotional distress, wrongful death, and torture at the hands of the contractors and also sought recovery under the Alien Tort Statute⁴⁶ and the Racketeer Influenced and Corrupt Organizations Act (RICO).⁴⁷ Although the defendants moved to dismiss the lawsuit as non-justiciable because it implicated political questions, the court flatly ruled that the plaintiffs' claims were not barred by the political question doctrine.⁴⁸

While the ruling was clear, the accompanying legal analysis for the decision was extremely weak. With only a passing acknowledgment of the six-part *Baker* criteria, the court held that the "political question doctrine may lack clarity . . . but it is not without standards."⁴⁹ Instead of fleshing out the specifics of the *Baker* factors, the court simply paraphrased the plurality's implicit conclusion in the 2004 Supreme Court case of *Hamdi v. Rumsfeld*⁵⁰ and declared that not every dispute that "can arguably be connected to 'combat'" is excluded from judicial review by a separation of powers argument.⁵¹

The *Ibrahim* court wrote that "[a]n action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in" overseeing foreign policy or the use of military force.⁵² Indeed, the court's shallow justification for rejecting the political question doctrine seems to have relied on the fact that the suit was against a private contracting company, not the United States government, for "actions of a type that both violate clear United States policy . . . and have led to recent high profile court martial proceedings against United States soldiers."⁵³

The 2006 case of *Smith v. Halliburton Co.* involved a suit against a civilian contractor who operated a dining facility on Forward Operating Base (FOB) Marez in Mosul, Iraq.⁵⁴ In December 2004, a suicide bomber entered the dining facility, detonated

46. 28 U.S.C. § 1350 (2000).

47. 18 U.S.C. §§ 1961–1968 (2006); *Ibrahim*, 391 F. Supp. 2d at 13.

48. *Ibrahim*, 391 F. Supp. 2d at 15.

49. *Id.*

50. 542 U.S. 507 (2004).

51. *Ibrahim*, 391 F. Supp. 2d at 15.

52. *Id.* at 16 (citing *Luftig v. McNamara*, 373 F.2d 664, 666 (D.C. Cir. 1967)).

53. *Id.*

54. No. H-06-0462, 2006 WL 2521326, at *1 (S.D. Tex. Aug. 30, 2006).

explosives packed with shrapnel, and murdered twenty-two people.⁵⁵ In contrast to *Ibrahim*, the *Smith* court applied the *Baker* factors and determined that the contractor was operating pursuant to the military's orders, instructions, regulations, and protection, and therefore the contractor was under military control.⁵⁶ Since the control and access of military bases is clearly within the constitutional powers reserved by both the President and Congress, the court held that it would be overstepping its authority by ruling on such decisions and intruding on constitutional powers granted to the legislative and executive branches.⁵⁷ The court concluded that the political question doctrine would bar the contractor's claim, and thus held that the case was non-justiciable.⁵⁸ Indeed, at the heart of the *Baker* analysis is the concern that the court may substitute its own judgment for that of the military, which the court would surely have to do in the context of FOB security measures.

In *Lessin v. Kellogg Brown & Root*, the defendant moved for dismissal, citing the political question doctrine.⁵⁹ The facts of the case revealed that plaintiff Lessin, a U.S. Army active duty military police (MP) soldier, suffered traumatic brain injury in Iraq while providing a military escort for a truck convoy owned and operated by private contracting company Kellogg Brown & Root. While assisting the civilian driver of a Kellogg Brown & Root truck that had stopped on the side of the road, Lessin was struck in the head by the truck's ramp. The 2006 lawsuit, filed in the United States District Court for the Southern District of Texas, alleged that the parent contracting company was negligent in "inspecting, maintaining, and repairing the truck that injured Lessin, and in supervising the driver who was operating the truck."⁶⁰

The defendant asserted that the case should be dismissed based on one or more of the first four factors of the *Baker* test.⁶¹ Respectively, the defendant argued that: (*Baker* factor one) adjudicating the plaintiff's claims would require a detailed inquiry by the court into military regulations and orders associated with military escort procedures for civilian convoys; (*Baker* factor two) there are

55. *Id.* at *1.

56. *Id.* at *3.

57. *Id.* at *6.

58. *Id.* at *6-7.

59. No. 05-01853, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006).

60. *Id.* at *1.

61. *Id.* at *2.

no judicially discoverable standards to determine whether or not the military exercised reasonable judgment in regard to allowing the subject truck to be a part of the convoy, halting and assisting the subject truck in a combat zone, and overseeing proper maintenance standards for the convoy truck; and (*Baker* factors three and four) the court would be required to undertake a policy decision vis-à-vis the military and civilian contractors in a combat zone which would “express a lack of respect due to coordinate branches of government that oversee such war efforts.”⁶²

The *Lessin* court disagreed, noting that the case at hand was a mere traffic accident that raised standard tort issues related to negligence by the civilian driver coupled with allegations that the company failed to properly train and supervise the employee.⁶³ The court wrote that the incident “was, essentially, a traffic accident, involving a commercial truck alleged to have been negligently maintained, as well as a civilian truck driver who was allegedly negligent in operating the truck and insufficiently trained. Claims of negligence arising from this type of incident are commonly adjudicated by courts, using well-developed judicial standards.”⁶⁴ Still, the court did agree that discovery might reveal additional facts to support dismissal based on the political question doctrine.⁶⁵ The court ruled that, at this stage of the lawsuit, “it is by no means clear that the policies or decisions of the military or of the executive branch itself will be implicated in this case.”⁶⁶

A month after the 2006 ruling in *Lessin*, a similar set of facts was presented to a federal district court in Georgia.⁶⁷ In *Whitaker v. Kellogg Brown & Root, Inc.*, however, the court found that a U.S. Army soldier killed in a vehicle accident while escorting a truck supply convoy operated by Kellogg Brown & Root posed a non-justiciable political question.⁶⁸ The soldier, Whitaker, was serving duty as part of a military escort for a civilian convoy delivering supplies under a government contract in Iraq. During the convoy, Whitaker was struck by a civilian contractor driving a civilian truck

62. *Id.*

63. *Id.* at *3.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

68. *Id.* at 1282.

over the Tigris River in Iraq, fell into the Tigris River, and drowned. Whitaker's parents, as plaintiffs, alleged negligence against the contracting company Kellogg Brown & Root under the doctrine of respondeat superior for the negligence of its drivers.⁶⁹

Using the *Baker* factors as its guide, the court refused to characterize the incident as a traffic accident involving standard negligence claims, but instead viewed the matter as a wreck that occurred in a combat zone during wartime involving "strategic and tactical military decisions made in a combat zone."⁷⁰ Paying great attention to a variety of U.S. Army regulations, which authorize the use of civilian contractors "to perform selected services in wartime to augment Army forces," the court went into great detail about how these orders and regulations impacted across the full range of the *Baker* factors.⁷¹ Further, the court ruled that there were no judicially discoverable and manageable standards to apply to the incident because the standard for review is not what a reasonable driver would have done, but what a reasonable driver in a combat zone subject to military regulations and orders would have done.⁷² Finally, the court specifically recognized that because the military was accomplishing "its mission by partnering with government contractors who are subject to the military's orders, regulations, and convoy plan," due deference had to be given to the political branches of Congress and the Executive.⁷³ "The Army will fight as a total force—active and reserve components and *civilians*."⁷⁴

69. *Id.*

70. *Id.* at 1278.

71. *Id.* at 1279 (quoting DEP'T OF THE ARMY, ARMY REGULATION NO. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) I-1 (1985)). The court placed great emphasis on *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997). The court in *Aktepe* found that the lawsuit for negligence brought by Turkish nationals for injury suffered when two live missiles from a U.S. ship accidentally stuck a Turkish vessel was barred by the political question doctrine. *Id.* at 1403-04.

72. *Whitaker*, 444 F. Supp. 2d at 1282.

73. *Id.* at 1281 ("The Court finds that 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 a soldier injured at the hands of the military].").

74. *Id.* at 1279 (emphasis added); *see also id.* ("The Army will fight as part of a joint team. Motor transport units must be prepared to support the inland surface movement requirements of other services or nations and to integrate HN [Host Nation], LOGCAP, or other contract support.").

In *Fisher v. Halliburton, Inc.*, another 2006 decision, which was subsequently overruled by the Fifth Circuit, employees of a civilian contractor in Iraq filed suit alleging that the parent contracting company had committed a wide variety of actionable wrongs, including wrongful death, intentional infliction of physical and emotional distress, and fraud.⁷⁵ The case arose from an attack on a convoy by anti-American forces in Iraq on the morning of April 9, 2004, resulting in the deaths and injury of several civilian contractors. Defendant's motion for dismissal based on the political question doctrine was granted.⁷⁶ In short, the court determined that decisions regarding when and where the convoy would be sent that day were "so interwoven with Army decisions" that they touched at least three of the *Baker* factors.⁷⁷

The court held that "[t]he case at bar meets not one, but three of the formulations described in *Baker v. Carr*."⁷⁸ In fact, it actually listed four of the *Baker* factors.⁷⁹ The *Fisher* court reasoned that it could not "try a case set on a battlefield during wartime without an impermissible intrusion into powers expressly granted to the Executive by the Constitution."⁸⁰ *Baker* factor one applied even if the Army had no direct control over the civilian members of the convoy—"Even assuming the court found this statement to be true [that the civilian contractor company deployed, directed, and controlled the convoy's civilian members], the private character of the actions do not preclude the application of the political question doctrine."⁸¹ In addition, the court found that the second *Baker* factor applied since a lack of judicially discoverable and manageable standards existed by which it could measure the responsibility of the military in the context of the attack.⁸² Finding that the Army played an integral part in the decision to deploy and protect the convoy, the court noted that it would have to "substitute its judgment for that of

75. 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006), *rev'd sub nom.* *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

76. *Id.*

77. *Id.*

78. *Id.* at 644.

79. *Id.* (adding *Baker* factor four—a lack of respect due coordinate branches of government).

80. *Id.*

81. *Id.* at 641.

82. *Id.* at 641–42.

the Army,” a determination prohibited by *Baker*.⁸³ Finally, the court listed the third and fourth *Baker* factors together—“nonjudicial policy determination and lack of respect [due to coordinate branches of government]”—as the final reasons for granting dismissal of the civil action.⁸⁴ The court recognized that it was not equipped to formulate an examination of the many questions associated with the incident—ranging from the wisdom of sending the convoy on a particular route to the use of civilian contractors to drive the trucks.⁸⁵ When the case was appealed, the Fifth Circuit held that there was not yet sufficient evidence to dismiss under the political question doctrine, and the case was remanded for further factual hearings.⁸⁶

In *McMahon v. Presidential Airways, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit upheld the lower court’s denial of a motion to dismiss based on the political question doctrine.⁸⁷ The facts of the case show that civilian contractor company Presidential Airways (Presidential) was under military contract to provide transportation and operational support to the DOD in Afghanistan. On one such flight in Afghanistan, the plane crashed, killing all aboard.⁸⁸

Survivors of United States soldiers brought suit against Presidential in a Florida federal district court claiming negligence regarding the staffing, equipping, and operation of the subject flight.⁸⁹ In the Eleventh Circuit opinion, the court dismissed the first *Baker* factor, finding that while the military was involved in choosing the starting and ending points of various Presidential flights, the military’s role in directing the activities was “relatively discrete.”⁹⁰ The court reasoned that because the contract provided that Presidential was responsible for supervision, management, and administration of its operations, the trial court would not be challenging the duties assigned by the military, but the duties performed by Presidential.⁹¹

83. *Id.* at 643.

84. *Id.* at 644.

85. *Id.*

86. *Lane v. Halliburton, Inc.*, 529 F.3d 548, 568 (5th Cir. 2008).

87. 502 F.3d 1331 (11th Cir. 2007), *aff’g* 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

88. *McMahon*, 460 F. Supp. 2d at 1318.

89. *Id.* at 1315.

90. *McMahon*, 502 F.3d at 1361.

91. *Id.* at 1362 (“While Presidential had these general supervisory responsibilities according to the SOW [Statement of Work], the military’s duties

The court found that the second *Baker* factor did not present matters that were inherently unmanageable since the standards to assess the issue were the same “as in any tort suit involving a plane crash.”⁹² Because the court felt the facts demonstrated minimal military involvement and the type of claim was squarely in the realm of a negligence claim, the remaining *Baker* factors were disposed of in quick step.⁹³

An Alabama federal district court also addressed the issue of the political question doctrine in the 2006 case of *Potts v. Dyncorp International, LLC*.⁹⁴ Potts, a civilian contractor in Iraq, sued another contractor company over personal injuries he suffered as a result of a car accident in Iraq. Potts was a passenger in a convoy traveling on the main supply route from Trebil, Jordan, to Baghdad, Iraq. The driver of the vehicle was a Dyncorp employee who crashed the vehicle at a high rate of speed while trying to avoid a “black object in the road.”⁹⁵

Analogizing to *Lessin*, the *Potts* court found that the case did not satisfy any of the *Baker* factors.⁹⁶ The court held that the first and third *Baker* factors were not satisfied because the incident at hand related to assessing Dyncorp’s internal policies concerning its contract with the Coalition Provisional Authority (CPA), which did not involve “decisions regarding foreign policy at such a level where judicial review would encroach upon the constitutional authority of one or both of the politically accountable branches.”⁹⁷ In contrast to the *Whitaker* approach, which focused heavily on a variety of military directives and orders associated with civilian contractors and the fact that convoy operations were controlled by the military,⁹⁸ the court in *Potts* focused on the terms of the specific contract between Dyncorp and the CPA and ignored any connection with the military

(according to the SOW) were relatively discrete. The military chose the start and end points of the flights, and chose when the flights would be flown (qualified by Presidential’s power to decline a mission for safety reasons.)”).

92. *Id.* at 1364.

93. *Id.* at 1364–65.

94. 465 F. Supp. 2d 1245 (M.D. Ala. 2006).

95. *Id.* at 1248. The case indicates that the object was actually a black dog and not a roadside bomb. *Id.*

96. *Id.* at 1253–54 (citing *Lessin v. Kellogg Brown & Root*, No. 05-01853, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006)).

97. *Id.* at 1249, 1252–54.

98. *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281–82 (M.D. Ga. 2006).

that would activate the first *Baker* factor.⁹⁹ In discounting the second *Baker* factor, the court ruled that because the vehicle accident was a claim of negligence commonly adjudicated under well-established legal parameters, it was able to “assess whether the private contractor was negligent or wanton, even when performing services in a war zone.”¹⁰⁰

In 2008, a federal district court in Georgia held that a civil action brought against Kellogg Brown & Root was non-justiciable under the political question doctrine.¹⁰¹ After first denying a motion to dismiss based on the political question doctrine,¹⁰² the court allowed Kellogg Brown & Root to renew the motion at the close of discovery.¹⁰³ Taking cognizance of the Eleventh Circuit’s ruling in *McMahon*, which spoke favorably about the *Whitaker* finding of a non-justiciable political question,¹⁰⁴ the court in *Carmichael* ruled in favor of the motion to dismiss.¹⁰⁵

Clearly, the facts in *Carmichael* were very similar to the facts of *Whitaker*. In *Carmichael*, a United States Army soldier was injured in a convoy accident.¹⁰⁶ The soldier was an armed escort passenger in a tractor-trailer driven by a civilian contractor in a convoy in Iraq when the vehicle’s driver lost control and drove off the road, causing the vehicle to overturn. In finding that the first *Baker* factor applied, the court concluded “the army did in fact control every aspect of the organization, planning and execution of the convoy in question.”¹⁰⁷ Accordingly, the court determined that it would have to pass judgment on military decisions “of the type typically insulated from judicial review.”¹⁰⁸

99. *Potts*, 465 F. Supp. 2d at 1252–53.

100. *Id.* at 1253.

101. *Carmichael v. Kellogg Brown & Root, Inc.*, 564 F. Supp. 2d 1363 (N.D. Ga. 2008).

102. *Carmichael v. Kellogg Brown & Root, Inc.*, 450 F. Supp. 2d 1373, 1375 (N.D. Ga. 2006).

103. *Carmichael*, 564 F. Supp. 2d at 1363.

104. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 n.32 (11th Cir. 2007) (citing *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281–82 (M.D. Ga. 2006)).

105. *Carmichael*, 564 F. Supp. 2d at 1372 (citing *McMahon*, 502 F.3d at 1364).

106. *Id.* at 1363.

107. *Id.* at 1368.

108. *Id.* at 1371.

This same analysis flowed into the second *Baker* factor. In finding that the second *Baker* factor was applicable, the court placed great emphasis on the fact that it would have to question the military's decisions regarding "the planning and conduct of the convoy," a judicially unmanageable issue.¹⁰⁹ The court refused to consider the remaining *Baker* factors because finding only one factor suffices to bar the case under the political question doctrine.¹¹⁰

The final case to date is the 2008 Fifth Circuit ruling in *Lane v. Halliburton*.¹¹¹ The case involved a civil action by a group of Halliburton civilian employees against Halliburton for injuries sustained while working in Iraq as truck drivers.¹¹² The district court had dismissed the case as non-justiciable under the political question doctrine,¹¹³ but the Fifth Circuit reversed and remanded, noting that the case needed "further factual development before it can be known whether that doctrine is actually an impediment [to jurisdiction]."¹¹⁴ The Fifth Circuit examined all of the *Baker* factors and set out all of the arguments—pro and con—regarding the political question doctrine.¹¹⁵ It warned that the matter would certainly require additional analysis at the district court level, but that it "may be possible to resolve the claims without needing to make a constitutionally impermissible review of wartime decision-making."¹¹⁶ It remains to be seen what the focused legal framework outlined by the Fifth Circuit will produce as the case is reconsidered at the district level.

V. CONCLUSION

*"The litigation [regarding the complexities associated with applying the Baker factors] is not yet there, if it ever will be."*¹¹⁷

109. *Id.* at 1372.

110. *Id.*

111. 529 F.3d 548 (5th Cir. 2008).

112. *Id.* at 554.

113. *Lane v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2007), *rev'd sub nom.* *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

114. *Lane*, 529 F.3d at 554.

115. *Id.* at 568.

116. *Id.*

117. *Id.* at 568.

Political questions are deemed non-justiciable, but the determination can only be made after a “discriminating inquiry into the precise facts and posture of the particular case.”¹¹⁸ While it is undeniable that civilian contractors provide essential combat-related services on the battlefield—as evidenced in reality and in a variety of official military instructions and regulations deeming them part of the military “total force”¹¹⁹—this does not mean that civilian contractors will be provided the same protections accorded to the military under the political question doctrine. A review of the case law suggests that a central distinction between the conflicting opinions emanating from recent cases applying the political question doctrine to civilian contractors on the battlefield is the particular contractor’s relationship to the military and the actual military operation in question.

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.¹²⁰ In the words of the Eleventh Circuit ruling in *McMahon*, for the political question doctrine to serve as a jurisdictional bar, the nexus between the contractor and the military must strike at “core military decisions, including [military] communication, training, and drill procedures.”¹²¹ Closely associated with the nature and integration of the military/contractor relationship is the question of whether a particular court will have to second-guess the particulars of a military operation, or whether the court can determine that it need only evaluate the civilian contractor’s performance under the contract.

Finally, it 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

118. *Baker v. Carr*, 369 U.S. 186, 216 (1962).

119. *See, e.g.*, DEP’T OF THE ARMY, *supra* note 10, §§ 6-4 to 6-6 (assigning the responsibility for contractors to the commander); DEP’T OF THE ARMY, ARMY REG. NO. 715-9, CONTRACTORS ACCOMPANYING THE FORCE § 1-5(k)(2), (3) (1999) (discussing military responsibility for providing adequate force protection for civilian contractors working for the military overseas).

120. *See supra* note 27 and accompanying text. All contractors may lay claim to this nexus—they are, by definition, under contract with the government.

121. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007).

a non-justiciability finding, each side deserves the fullest opportunity to present all the facts at hand.