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## Courts Have Answers to the Military Contractors' So-Called Political Questions Raised in *Carmichael v. Kellogg, Brown & Root Services, Inc.*

### Cover Page Footnote

J.D. Candidate, May 2012, The Catholic University of America, Columbus School of Law; B.A., 2006, The University of Iowa. First, I would like to thank my parents, Richard and Mary Kuhn, for providing love and support during my legal education. I also thank Professor Michael Noone, as well as Timothy Canney, Richard Hagerman, and Kristen Sinisi for their candid and thoughtful feedback. Additionally, I am grateful to the editorial staff and the executive board of the Catholic University Law Review for their attention to detail, thoughtful analysis, and constructive criticism throughout the publication process of this Note. Of these individuals, I am especially thankful for the efforts of Channele Blackie, Sarah Conkright, Matthew Dawson, Craig Gaver, and Katharine Mason. And most importantly, I thank my lovely fiancé, Emily Longcore, for everything that she does to brighten my day and her unending patience over these past four years.

COURTS HAVE ANSWERS TO THE MILITARY  
CONTRACTORS' SO-CALLED POLITICAL  
QUESTIONS RAISED IN *CARMICHAEL V. KELLOGG,  
BROWN & ROOT SERVICES, INC.*

*Kaelin Patrick Kuhn*<sup>+</sup>

In April 2004, Sergeant Keith Carmichael was thrown from a tanker truck in Iraq when the driver lost control of the vehicle.<sup>1</sup> The driver was not a government employee—he was a contractor working for Kellogg, Brown & Root Services (KBR).<sup>2</sup> Sergeant Carmichael sustained massive brain injuries and today remains in a persistent vegetative state.<sup>3</sup> Sergeant Carmichael’s wife sued the driver and KBR, alleging that the driver had been negligent in the operation of the vehicle and that KBR was liable for such negligence under the doctrine of respondeat superior.<sup>4</sup> In *Carmichael v. Kellogg, Brown & Root Services, Inc.*, the U.S. District Court for the Northern District of Georgia dismissed the suit.<sup>5</sup> The U.S. Court of Appeals for the Eleventh Circuit affirmed the dismissal, finding that the suit raised “political questions.”<sup>6</sup>

The federal judiciary will not hear cases that it deems to involve a political question.<sup>7</sup> The political question doctrine functions to “exclude[] from judicial

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1. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1278 (11th Cir. 2009).

2. *Id.*

3. *Id.*

4. *Id.* at 1278–79.

5. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008).

6. *Carmichael*, 572 F.3d at 1281–83.

7. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (dismissing a challenge to partisan gerrymandering because the issue raised nonjusticiable political questions); *Goldwater v. Carter*, 444 U.S. 996, 997, 1002–03 (1979) (Rehnquist, J., concurring) (plurality opinion) (determining that a senator’s challenge to the President’s decision to revoke a treaty with Taiwan was a nonjusticiable political question); *Gilligan v. Morgan*, 413 U.S. 1, 5, 11–12 (1973) (rejecting plaintiffs’ call for “judicial power to assume continuing regulatory jurisdiction over the

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.”<sup>8</sup> The Constitution commits control of foreign policy and military affairs to the legislative and executive branches.<sup>9</sup> As such, cases involving these issues are “rarely proper subjects for judicial intervention.”<sup>10</sup> Accordingly, when plaintiffs bring tort claims against the U.S. military for negligently performing military functions, federal courts have dismissed the claims on the basis of the political question doctrine.<sup>11</sup>

Although courts typically apply the doctrine in suits involving decisions made by the government,<sup>12</sup> recently, federal courts have been asked to apply the doctrine in cases involving actions of military contractors. For example, in *Whitaker v. Kellogg Brown & Root, Inc.*, a federal district court dismissed a suit under the political question doctrine where a truck driven by a contractor struck a U.S. soldier who had been tasked with protecting a convoy; the soldier fell from the bridge and died.<sup>13</sup> After finding that “[t]he Army regulate[d] all aspects of control, organization, and planning” of the convoy, the court ruled that “a soldier injured at the hands of a contractor which is performing military functions subject to the military’s orders and regulations . . . raise[s] . . . political questions.”<sup>14</sup> Similarly, in *Carmichael*, although the contractor’s internal review board found that the contractor’s driver had caused the accident, the Eleventh Circuit invoked the political question doctrine after it found that the military set parameters for the contractor that “required the specific exercise of *military* expertise and

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activities of the Ohio National Guard” on the basis that this was a nonjusticiable political question and thus not appropriate for review); *Terlinden v. Ames*, 184 U.S. 270, 282, 288–89 (1902) (finding that the determination of a treaty’s validity following state succession is a nonjusticiable political question); see also ERWIN CHERMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.81, at 129 (3d ed. 2006) (detailing the Supreme Court’s view that issues relating to the constitutionality of the government’s conduct should not be resolved by the judiciary).

8. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

9. See U.S. CONST. art. I, § 8, cls. 3, 10–14; *id.* art. II, § 2, cls. 1–2; *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”).

10. *Haig v. Agee*, 453 U.S. 280, 292 (1981).

11. See, e.g., *Aktepe v. United States*, 105 F.3d 1400, 1402–03 (11th Cir. 1997); *Tiffany v. United States*, 931 F.2d 271, 278–79 (4th Cir. 1991); see also *infra* Part I.C (discussing *Aktepe v. United States* and *Tiffany v. United States* in detail).

12. See, e.g., *Gilligan*, 413 U.S. at 10 (stating that evaluating complex military judgments is beyond the competency of the courts).

13. 444 F. Supp. 2d 1277, 1278, 1280–81 (M.D. Ga. 2006) (noting that the contractor committed the acts that gave rise to the wrongful death while working on military-related tasks).

14. *Id.* at 1279, 1281.

judgment.”<sup>15</sup> In doing so, the Eleventh Circuit became the first federal appellate court to hold that actions arising out of performance of a military contract can raise political questions.<sup>16</sup> This holding not only denies the plaintiff his or her day in court, but could also severely limit the ability of the legislative and executive branches to determine how best to impose liability on military contractors while carefully weighing the interests of the country.<sup>17</sup>

This Note analyzes the Eleventh Circuit’s decision to apply the political question doctrine in *Carmichael*. Part I provides a general overview of the political question doctrine and its evolution. Additionally, this section analyzes jurisprudence involving the application of the political question doctrine to military functions—including court decisions that apply the doctrine to military contractors. Part II describes the underlying events of *Carmichael* and the Eleventh Circuit’s application of the political question doctrine. Part III discusses the potential ramifications of the *Carmichael* decision and alternatives that the *Carmichael* court failed to consider. Ultimately, this Note concludes that the Eleventh Circuit improperly invoked the political question doctrine in *Carmichael*, and should have let the case proceed on its merits.

## I. APPLICATION OF THE POLITICAL QUESTION DOCTRINE TO MILITARY FUNCTIONS

### A. *The Political Question Doctrine Defined*

The subject-matter jurisdiction of federal courts is limited in two primary ways.<sup>18</sup> First, the Constitution limits the cases that federal courts can hear through the principles of standing,<sup>19</sup> ripeness,<sup>20</sup>

15. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1278 n.8, 1281–83 (11th Cir. 2009) (reasoning that the contractor’s actions were “pervaded by military judgments and decisions, and thus [were] beyond the court’s power to review”).

16. Brief of Respondent Opposing Writ of Certiorari at 18, *Carmichael*, 130 S. Ct. 3499 (No. 09-683).

17. See *infra* Part III.A.

18. See *United States v. Denedo*, 129 S. Ct. 2213, 2221 (2009) (identifying the scope of federal courts’ subject-matter jurisdiction); see also CHEMERINKSY, *supra* note 7, § 2.1, at 38.

19. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (holding that for plaintiffs to bring suit, the “constitutional minimum of standing” requires plaintiffs to have (1) “suffered an ‘injury in fact’”; (2) the injury must be “‘fairly . . . trace[able] to the challenged action of the defendant’”; and (3) it must be “‘likely’ . . . that the injury will be ‘redressed by a favorable decision’”) (citations omitted) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); see also *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 19–20 (1998) (explaining that the prudential standing requirement requires that the plaintiff’s injury must be “‘arguably . . . within the zone of interests to be protected or regulated by the statute . . . in question’”) (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998)).

20. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 2, 11 (1972) (holding that a class action suit brought for injunctive relief against the Army for its “surveillance of lawful citizen political

mootness,<sup>21</sup> and the political question doctrine.<sup>22</sup> Second, assuming an absence of other constitutional constraints, Congress may prescribe the types of cases federal courts can hear.<sup>23</sup> For example, Congress passed the Federal Tort Claims Act (FTCA) to grant federal courts jurisdiction over some civil claims brought against the United States.<sup>24</sup>

Cases involving political questions are nonjusticiable, meaning that the judiciary cannot review them; instead, resolution must come from the political branches of government.<sup>25</sup> In *Marbury v. Madison*, Chief Justice John Marshall described the political question doctrine, stating, “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>26</sup> Many years later, the Supreme

activity” did not meet the constitutional ripeness requirement because the “chilling” effect” of the government’s actions only arose from an individual’s fears and suspicions, not knowledge or likelihood of actual government action).

21. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (per curiam) (finding that a student’s petition to challenge a law school’s admissions program was moot because, by the time the Supreme Court heard the case, the student was in his final semester at that law school).

22. See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (providing that the Court is not equipped to review policy decisions).

23. *United States v. Denedo*, 129 S. Ct. 2213, 2221 (2009) (“Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts.”); see also U.S. CONST. art. I, § 8, cl. 7; *id.* art. III, § 1; *id.* art. III, § 2, cl. 2.

24. Federal Tort Claims Act (FTCA) of 1948, 28 U.S.C. § 1346(a)(2), (b)(1) (2006).

25. The Court has identified two broad constraints on judicial review. Article III of the Constitution imposes *constitutional* limitations on the reach of the federal judiciary. CHEMERINKSY, *supra* note 7, § 2.3, at 50. Additionally, the Court has identified *prudential* constraints as those that, although not rooted in the Constitution, nonetheless impose restraints on adjudication because “wise policy militates against judicial review.” *Id.*; see, e.g., *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 19–20 (1998). The difference between the limitations is important: Congress may eliminate prudential constraints by legislation, but has no power to statutorily remove constitutional limitations. See *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III’s requirement remains: the plaintiff must still allege a distinct and palpable injury to himself . . .”). The Supreme Court has not unequivocally decided the source of the political question doctrine’s limitations. CHEMERINKSY, *supra* note 7, § 2.3, at 50. However, in *Sierra Club v. Morton*, the Supreme Court suggested that the doctrine was a *constitutional* limitation, stating that “Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions . . . or to resolve ‘political questions.’” 405 U.S. 727, 732 n.3 (1972) (citations omitted).

26. 5 U.S. (1 Cranch) 137, 165–170 (1803). Professor Erwin Chemerinsky described the definition of the political question doctrine in *Marbury* as including only those cases “where the president had unlimited discretion and [where] there was thus no allegation of a constitutional violation.” CHEMERINKSY, *supra* note 7, § 2.8.1, at 130. For example, such a situation could involve a challenge of the President’s decision to either approve or veto a bill. *Id.* Because the Constitution gives the President complete control over this decision, no grounds for a constitutional violation could exist. *Id.* In *Marbury*, Chief Justice John Marshall emphasized that “[t]he province of the court is, solely, to decide on the rights of individuals,” and not to review the discretionary actions of the Executive Branch. *Marbury*, 5 U.S. (1 Cranch) at 170. *Marbury*’s

Court clarified the definition and the purpose of the political question doctrine in *Japan Whaling Ass'n v. American Cetacean Society* by emphasizing the impracticality of having courts review policy decisions made by the legislative and executive branches.<sup>27</sup> Nonetheless, the Court cautioned that “under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”<sup>28</sup> More than a century after *Marbury*, the Supreme Court held in *Oetjen v. Central Leather Co.* that cases involving the conduct of foreign relations were among those involving nonjusticiable political questions.<sup>29</sup>

Although the political question doctrine has existed since the early nineteenth century, the Supreme Court did not provide clear guidelines for when courts should invoke the doctrine until 1962 in *Baker v. Carr*.<sup>30</sup> In *Baker*, the Supreme Court distilled its previous political-question decisions into six formulations that courts could use to identify a political question.<sup>31</sup>

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narrow definition of political questions would likely not have encompassed claims of infringements of individual rights. CHEMERINKSY, *supra* note 7, § 2.8.1, at 130. The Supreme Court, however, has expanded the definition of political questions to include instances in which plaintiffs have suffered a concrete, particularized injury. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 20–21, 39–42 (1849) (finding that the question of whether a state government violated the Constitution’s republican-form-of-government clause was a nonjusticiable political question).

27. 478 U.S. 221, 230 (1986). The Supreme Court explained that “courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.” *Id.* (citing *United States ex rel. Joseph v. Cannon*, 642 F.2d 1371, 1379 (D.C. Cir. 1981)). Defenders of the political question doctrine have argued that the doctrine gives the branches with more expertise the opportunity to resolve the issues. See, e.g., Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567 (1966) (arguing that in the foreign-policy realm, courts are less prepared to gather the information necessary to make an informed ruling compared to the resources and expertise of the executive branch). Similarly, the political question doctrine can be used to minimize the involvement of the judicial branch in the operations of the executive and legislative branches. See *Gilligan v. Morgan*, 413 U.S. 1, 5, 10–12 (1973) (holding that the political question doctrine barred judicial review and regulation of the Ohio National Guard).

28. *Japan Whaling Ass'n*, 478 U.S. at 230. One commentator suggested that the modern Supreme Court utilizes the political question doctrine “because of an unstated fear that resolution is for some reason beyond its province . . . or because the Court is concerned about the adherence to its decision by the political branches.” Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1037 (1985).

29. 246 U.S. 297, 302 (1917). Specifically, the Court in *Oetjen* explained that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Id.* Later, in *Johnson v. Eisentrager*, the Supreme Court explained that the judiciary has no role in assessing the propriety of the President’s decision to send military troops abroad. 339 U.S. 763, 789 (1950).

30. 369 U.S. 186, 217 (1962).

31. *Id.* It appears that the *Baker* Court did not account for a handful of older cases in which the Supreme Court had exercised its jurisdiction in cases involving military functions. Compare *id.* at 211–26 (developing the six *Baker* formulations by analyzing political-question cases

Two of the key tests included: (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.”<sup>32</sup> The Supreme Court further explained that “[u]nless 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.”<sup>33</sup> In addition to identifying six tests for determining what constitutes a political question,<sup>34</sup> the Court emphasized that the ultimate determination of a political question “requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine.”<sup>35</sup> Thus, an analysis of what constitutes a political question begins—not ends—with the *Baker* tests.

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pertaining to “[f]oreign relations,” “[d]ates of duration of hostilities,” “[v]alidity of enactments,” “[t]he status of Indian tribes,” and “Republican form of government”), *with* *The Paquete Habana*, 175 U.S. 677, 678–79, 714 (1900) (holding that the military was not justified in capturing two boats during the Spanish American War), *Ford v. Surget*, 97 U.S. 594, 605–07 (1878) (finding that a soldier would be exempt from liability for trespass only if consistent with “legitimate warfare”), *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133–35 (1851) (finding that a soldier wrongfully seized private property during war), *and* *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–79 (1804) (finding that a military officer following orders from the President was liable for damages for wrongfully seizing a private vessel during war). In 2004, the Supreme Court in *Veith v. Jubelirer* enumerated the *Baker* functions and described them as “independent tests.” 541 U.S. 267, 277–78 (2004) (plurality opinion). Therefore, for the remainder of this Note, the functions will be referred to as tests.

32. *Baker*, 369 U.S. at 217. The Supreme Court later explained that “[t]hese [six] tests are probably listed in descending order of both importance and certainty.” *Veith*, 541 U.S. at 278. Courts and commentators have noted that the first *Baker* test has an inverse relationship with the second *Baker* test: “The more a decision is committed to another branch or branches of government, the less likely a court will find judicially discoverable and manageable standards to apply.” *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 644 (S.D. Tex. 2006), *rev’d sub nom. Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *see also* Aaron J. Fickes, Note, *Private Warriors and Political Questions: A Critical Analysis of the Political Question Doctrine’s Application to Suits Against Private Military Contractors*, 82 TEMP. L. REV. 525, 556 (2009) (highlighting the relationship between the first two *Baker* tests). The last four *Baker* tests include:

[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [and] [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 217.

33. *Baker*, 369 U.S. at 217.

34. *Id.*

35. *Id.* at 211. Professor Erwin Chemerinsky suggested that “the political question doctrine is the most confusing of the justiciability doctrines” because the Supreme Court has not provided workable guidelines for determining what represents a political question. CHEMERINKSY, *supra* note 7, § 2.8.1, at 129, 131. For example, because the Constitution does not explicitly enumerate the “textually demonstrable commitments” to the executive and legislative branches, courts have



*B. The Supreme Court Has Not Clearly Articulated When the Political Question Doctrine Applies to Cases Involving Military Functions*

Since *Baker*, the Supreme Court has considered the political question doctrine in two cases involving military functions: *Gilligan v. Morgan* and *Scheuer v. Rhodes*.<sup>36</sup> These cases reached contradictory results and provide little direction to lower courts.<sup>37</sup> However, courts may also be guided by cases not involving the political question doctrine, such as *Boyle v. United Technologies Corp.*, which suggest that courts should avoid reaching the political question doctrine unless absolutely necessary.<sup>38</sup>

In *Gilligan v. Morgan*, the Supreme Court dismissed the suit under the political question doctrine where plaintiffs challenged the actions of the National Guard at Kent State University.<sup>39</sup> In *Gilligan*, students at Kent State University alleged that the National Guard injured and killed students without legal justification while responding to civil disorder on the university campus.<sup>40</sup> The students filed suit seeking injunctive relief that would “evaluat[e] the appropriateness of the ‘training, weaponry and orders’ of the Ohio National Guard.”<sup>41</sup> The Supreme Court deemed the action a nonjusticiable political question and concluded that it should be left to the executive and legislative branches.<sup>42</sup> The Court noted that the dissenting judge in the lower court’s decision had correctly applied *Baker* when that judge stated, “congressional and executive authority to prescribe and regulate the

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difficulty in determining what cases are political questions using only the *Baker* tests. *Id.* § 2.8.1, at 131. Instead, courts must examine the areas in which the Supreme Court has identified the existence of a political question and decide whether a new case would properly fit within those areas. *Id.*

36. See generally *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 820 (1982); *Gilligan v. Morgan*, 413 U.S. 1 (1972).

37. See *infra* text accompanying notes 46–49.

38. See 487 U.S. 500, 511 (1988); *infra* notes 50–53.

39. 413 U.S. at 3.

40. *Id.*

41. *Id.* at 3, 5–6.

42. *Id.* at 8–10. The *Gilligan* Court explained:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.

*Id.* This rationale has been sharply criticized for failing to provide a “constitutional floor” and thus seemingly precluding review even if the military decisions “clearly transcended constitutional grounds.” Redish, *supra* note 28, at 1056. For example, one commentator suggested that if the military had a stated policy of mandatory racial discrimination, then “[s]urely issues of executive and military expertise and flexibility [would be] irrelevant to the constitutionality of such training.” *Id.*

training and weaponry of the National Guard . . . clearly precludes any form of judicial regulation of the same matters.”<sup>43</sup> This case seemingly stands for the proposition that courts cannot review the appropriateness of actions relating to military functions because of the political question doctrine; however, that changed when the Supreme Court decided another case involving military functions.

Less than two years later, in a case also arising out of the Kent State incident, the Supreme Court rendered an opinion that stands at odds with its decision in *Gilligan*.<sup>44</sup> In *Scheuer v. Rhodes*, the estates of the three students killed by National Guardsmen sought damages from various persons involved in the incident, alleging that the National Guard should not have been deployed and had been ordered to take illegal actions.<sup>45</sup> The Supreme Court reversed the lower court’s dismissal and remanded the case.<sup>46</sup> Attempting to distinguish *Scheuer* from *Gilligan*, the Court explained that *Gilligan* “by no means indicates a contrary result. Indeed, there we specifically noted that we neither held nor implied ‘that the conduct of the National Guard is always beyond judicial review . . . whether by way of damages or injunctive relief.’”<sup>47</sup> While recognizing that the two cases resulted in opposite outcomes, the Court failed to identify determinative factors that would explain the different holdings.

Courts and scholars have suggested that *Gilligan* and *Scheuer* can be reconciled based on the premise that injunctive relief, more than monetary damages, requires courts to probe deeper into military decisions and thus involves nonjusticiable analysis.<sup>48</sup> However, one commentator has suggested that courts would need to probe just as deeply when resolving cases involving

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43. *Gilligan*, 413 U.S. at 8 (quoting *Morgan v. Rhodes*, 456 F.2d 608, 619 (6th Cir. 1972) (Celebrezze, J., dissenting)). However, the Court noted that, although concluding that the matter was a nonjusticiable political question, it was not holding “that the conduct of the National Guard is always beyond judicial review.” *Id.* at 11.

44. *Scheuer v. Rhodes*, 416 U.S. 232, 234 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

45. *Id.*

46. *Id.* at 235.

47. *Id.* at 249 (quoting *Gilligan*, 413 U.S. at 11–12).

48. Chris Jenks, *Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine*, 28 BERKELEY J. INT’L L. 178, 187–88 (2010); *see also* *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (distinguishing between cases seeking damages and those seeking injunctive relief, and concluding that “[d]amage actions are particularly judicially manageable. By contrast, . . . injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches”). One commenter noted that permitting actions for damages against military contractors could still tangentially affect the military and, therefore, still implicate the political question doctrine. Fickes, *supra* note 32, at 555. For example, in *Lane v. Halliburton, Inc.*, the Fifth Circuit noted that holding a contractor liable for torts could deter contractors from entering into military contracts. 529 F.3d 548, 563 n.6 (5th Cir. 2008). However, the Fifth Circuit held that this argument was “not a factor that we may use to deny [p]laintiffs a forum in federal court.” *Id.* (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1985)).

damages arising from decisions made by the military, and correctly noted that distinguishing between money damages and injunctive relief merely obscures the court's task.<sup>49</sup>

To further demonstrate a lack of a clearly articulated framework for assessing whether cases involving military functions require dismissal under the political question doctrine, it is worth examining a related suit where the Supreme Court could have raised the political question doctrine, but did not. In *Boyle v. United Technologies Corp.*, the Court found a defense contractor not liable under the FTCA for the defective design of a military helicopter that allegedly resulted in the death of a marine.<sup>50</sup> Although this case appeared to warrant a discussion of the political question doctrine, the Court did not reach the issue and instead dismissed the case on statutory grounds.<sup>51</sup> The *Boyle* Court reasoned:

[S]election of the appropriate design for military equipment to be used by our Armed Forces is assuredly within the meaning of [the discretionary function exception of the FTCA]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.<sup>52</sup>

If the Court had dismissed the suit because of the political question doctrine, then the holding, as applied to other cases, could not be altered absent a constitutional amendment.<sup>53</sup> However, by resting on statutory grounds, the Court gave the legislative and executive branches leave to change the FTCA if they did not approve of the Court's decision. The Court's prudent decision could instruct other courts faced with a similar issue.

### *C. Lower Federal Courts Have Held that the Political Question Doctrine Bars Tort Claims Against the U.S. Military When Performing Military Functions*

In *Aktepe v. United States* and *Tiffany v. United States*, lower federal courts correctly held that the political question doctrine bars tort claims against the

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49. Jenks, *supra* note 48, at 188. However, the two most prominent circuit cases dealing with alleged torts committed by the military were not decided based on this distinction between forms of relief. See *Aktepe v. United States*, 105 F.3d 1400, 1402–04 (11th Cir. 1997); *Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991).

50. 487 U.S. 500, 500, 502–03, 511–13, 514 (1988).

51. *Id.* at 511.

52. *Id.* Compare *id.* (finding justiciable a military contractor's selection of a design for military equipment—a decision that necessarily involved an analysis of social considerations as well as military objectives), with *Gilligan*, 413 U.S. at 10 (finding nonjusticiable decisions regarding military training and use made by the civilian governor).

53. See *infra* text accompanying notes 162–66.

U.S. armed forces when the court would be required to assess military decisions.<sup>54</sup> The courts applied the first two *Baker* tests to reach this result.<sup>55</sup>

In *Aktepe v. United States*, the Eleventh Circuit considered whether the political question doctrine precluded judicial analysis regarding the United States' liability for firing on a Turkish vessel during a naval exercise.<sup>56</sup> In October 1992, one of the U.S. naval vessels engaged in a war-games exercise launched a missile attack on the opposing team.<sup>57</sup> When ordered to conduct the attack, however, some members of the missile-firing team were unaware that the attack was merely a drill.<sup>58</sup> As a result, the U.S. ship fired two live missiles that struck a Turkish naval vessel, resulting in several casualties.<sup>59</sup> Consequently, the Turkish sailors and their families brought personal-injury and wrongful-death claims against the United States, alleging that the military had been negligent during the drill.<sup>60</sup>

On appeal, the Eleventh Circuit held that the suit presented a nonjusticiable political question because it satisfied nearly all of the *Baker* tests.<sup>61</sup> Most notably, the Eleventh Circuit found the case fell under the second *Baker* test.<sup>62</sup> The court explained that there were no judicially discoverable and manageable standards for resolving the dispute because “[i]n order to determine whether the Navy conducted the missile firing drill in a negligent manner, a court would have to determine how a reasonable military force would have conducted the drill.”<sup>63</sup> Such a determination would be inappropriate for the judiciary to make.<sup>64</sup>

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54. See generally *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997); *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991).

55. See *infra* text accompanying notes 56–73.

56. 105 F.3d at 1401–02.

57. *Id.*

58. *Id.* at 1402. Although the missile-system operator indicated that he was arming a live missile, the supervising officers did not understand the terminology used by the operator, and thus failed to realize that a live missile would be fired. *Id.*

59. *Id.*

60. *Id.* The district court granted the United States' motion for summary judgment on the basis that the suit presented a nonjusticiable political question. *Id.*

61. *Id.* at 1403–04. Regarding the first *Baker* test, the Eleventh Circuit found that the issues raised by the suit dealt with foreign policy of the United States and were thus committed to the political branches of government. *Id.* at 1403. Specifically, the court noted that courts are “unschooled” in diplomacy between nations during conflicts. *Id.* Additionally, the court relied on the Supreme Court's decision in *Gilligan* in finding that “the Constitution reserves to the legislative and executive branches responsibility for developing military training procedures that will ensure the combat effectiveness of our fighting forces.” *Id.*

62. *Id.* at 1404.

63. *Id.* Specifically, the court pointed to its lack of standards for assessing the reasonableness of military actions. *Id.* When discussing the second *Baker* test, the Eleventh Circuit relied on the Supreme Court's opinion in *Gilligan*, noting that the Court observed that “it is difficult to conceive of an area of governmental activity in which the courts have less competence.” *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1972) (internal quotation marks omitted)). The court also relied on the Supreme Court's decision in *Boyle v. United Technologies*

In *Tiffany v. United States*, the Fourth Circuit considered whether the widow of a civilian pilot could bring a wrongful death suit against the U.S. military after a military jet collided with the civilian aircraft.<sup>65</sup> Because the civilian plane failed to file a flight plan and unknowingly entered into a military air zone, the military initially characterized the plane as an “unidentified and potentially hostile aircraft.”<sup>66</sup> Two military jets attempted to make visual contact with the plane.<sup>67</sup> Inhibited by poor weather conditions, one of the jets took a sharp turn to avoid colliding with the civilian aircraft, but a collision nonetheless occurred.<sup>68</sup> The civilian pilot’s widow sued the United States, alleging that both the jet pilot and ground control had been negligent.<sup>69</sup>

The Fourth Circuit held that the case was nonjusticiable under the political question doctrine, concluding that the application of tort law was an inappropriate method of changing the military’s air-attack response policy.<sup>70</sup> The court asserted that the case fell under the first *Baker* test, reasoning that the Constitution vested in the executive and legislative branches the responsibility to weigh “many technical, military, and even social considerations” when developing aircraft-interception procedures.<sup>71</sup> The court

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*Corp.*, stating, “decisions relative to training result from a complex, subtle balancing of many technical and military considerations,” which courts are not competent to review. *Id.* (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988)).

64. *Id.*

65. 931 F.2d 271, 272 (4th Cir. 1991).

66. *Id.*

67. *Id.*

68. *Id.* at 272, 274.

69. *Id.* at 272. The district court ruled in favor of the civilian pilot’s widow, finding that ground control acted negligently by failing to alert the jet pilot to compensate for a 180-foot error in its altimeter. *Id.* at 275. The district court also found the military pilot negligent for failing to judge the distance between his jet and the civilian plane appropriately, failing to maintain a safe vertical distance between the plane, and turning left and gaining altitude when he should have decreased his altitude and turned right. *Id.* The court found that the U.S. government was liable in the amount of \$1,394,342 to the pilot’s estate. *Id.*

70. *Id.* at 278–79. The Fourth Circuit noted that it did not hold every military action performed for the purpose of national defense exempted from judicial oversight. *Id.* at 280. The court explained that the military could be liable for negligence during training missions and for operations near civilians, citing the two cases described below. *Id.* In *Peterson v. United States*, the Eighth Circuit found a B-52 bomber pilot negligent when he flew “below acceptable levels” on a training mission, injuring a farmer and his cattle. 673 F.2d 237, 238–39, 242 (8th Cir. 1982). In *Ward v. United States*, the Third Circuit held that the government could be liable for injuries caused by the negligent execution of supersonic flights from a government aircraft. 471 F.2d 667, 670 (3d Cir. 1973).

71. *Tiffany*, 931 F.2d at 278 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988)). The Fourth Circuit rejected the plaintiff’s argument that courts can determine if a negligent action exists without infringing upon the authority vested in the other branches by examining whether the government followed the pertinent military procedures. *Id.* at 279. The court reasoned that the military must be able to conduct operations without fearing that courts will later determine that the mission could have been better executed. *Id.* The court also noted that each mission might contain unique variables that would make it difficult for a court to evaluate

also determined that the second *Baker* test required dismissal because the courts do not have “‘judicially discoverable and manageable standards for resolving’ whether necessities of national defense outweigh risks to civilian aircraft.”<sup>72</sup> As such, the court lacked the authority to dictate to the military what constituted a “prudent intercept.”<sup>73</sup>

*D. Federal Courts Have Invoked the Political Question Doctrine to Bar Liability for Military Contractors When Courts Would Have to Review Military Decisions to Resolve the Dispute*

The decision of whether to invoke the political question doctrine in suits against contractors turns on the extent to which the contractors’ challenged conduct is intertwined with decisions made by the military. A court will likely not invoke the doctrine when it does not need to review military decisions to decide the merits of the case.<sup>74</sup> Conversely, if the military’s control over the contractor extends so far that the case cannot be adjudicated without reviewing military decisions, courts will generally dismiss the suit under the political question doctrine.<sup>75</sup>

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the military’s compliance with applicable procedures. *Id.* The court further found that even stated military procedures provide “significant discretion” to those who execute the procedure. *Id.* at 281. For example, the court classified the military’s failure to identify the civilian plane as “friendly” sooner and the military’s interception of the plane at the wrong angle as discretionary within the military regulations. *Id.* at 282. As such, the court deemed executive and legislative oversight of military force preferential to any judicial oversight. *Id.*

72. *Id.* at 279 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

73. *Id.*

74. See *infra* Part I.D.1; see also *Potts v. Dyncorp Int’l LLC*, 465 F. Supp. 2d 1245, 1250–52 (M.D. Ala. 2006) (finding that a military contractor’s internal policies governing the training and procedures of its employees while in Iraq could be reviewed by the court); *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at \*1–3 (S.D. Tex. June 12, 2006) (concluding that the suit would not necessarily require an assessment of military decisions when a soldier was injured while assisting a military contractor repairing a tanker); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12, 15–16 (D.D.C. 2005) (holding that an Iraqi detainee who was held at Abu Ghraib was not barred from bringing torture claims against U.S. contractors by the political question doctrine, in part because the private parties “violate[d] clear United States policy”).

75. See *infra* Part I.D.2; see also *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 642–44 (S.D. Tex. 2006) (finding that the political question doctrine barred the court from hearing a case brought by contractor employees because the contractor and the Army were jointly responsible for protecting the contractor’s convoys, which were attacked by Iraqi insurgents), *rev’d sub nom.* *Lane v. Halliburton*, 529 F.3d 548, 554, 569 (5th Cir. 2008). The court’s logic is similar to the traditional test to determine whether to apply derivative sovereign immunity to federal government contractors. See *Lane*, 529 F.3d at 565 (noting that the military contractor sought to dismiss the action on the grounds of both the political question doctrine and derivative sovereign immunity). Under this test, a court will hold a contractor liable for negligent actions only when the government afforded the contractor discretion and the negligent actions fell within that discretion. See, e.g., *Schrader v. Hercules, Inc.*, 489 F. Supp. 159, 161 (W.D. Va. 1980) (noting that claims should be dismissed under the theory of derivative sovereign immunity “‘when the incidental injury is the necessary and unavoidable consequence of [the contractor] doing the work

*1. The Political Question Doctrine Does Not Apply When the Military Exerted Little Control Over the Negligent Actions of the Contractors*

In *McMahon v. Presidential Airways, Inc.* and *Lane v. Halliburton*, plaintiffs injured in Iraq and Afghanistan brought suit against military contractors, alleging that the contractors' actions caused their injuries.<sup>76</sup> The Eleventh and Fifth Circuits held that the cases did not present political questions.<sup>77</sup> In each case, the courts did not need to review decisions made by the military to resolve the issues pending before the court.<sup>78</sup>

In *McMahon v. Presidential Airways, Inc.*, the Eleventh Circuit contemplated whether survivors of U.S. soldiers could bring a suit against the civilian contractors who operated the plane that crashed into a mountain in Afghanistan while transporting the soldiers.<sup>79</sup> Presidential Airways owned the aircraft involved in the crash.<sup>80</sup> The survivors of the soldiers sued Presidential Airways, seeking damages under Florida's wrongful-death statute.<sup>81</sup>

The Eleventh Circuit held that the case did not present a nonjusticiable political question.<sup>82</sup> Considering the first *Baker* test, the Eleventh Circuit concluded that the case did not involve a decision that had been textually committed to a political branch.<sup>83</sup> The court explained that because the suit involved tort claims against military contractors, the defense had to "carry a

[on behalf of the federal government or] . . . when the work cannot be done without inflicting the injury" (quoting *Converse v. Porstmouth Cotton Oil Ref. Corp.*, 281 F. 981, 984 (4th Cir. 1922))).

76. See *Lane*, 529 F.3d at 545–55; *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1336–38 (11th Cir. 2007).

77. See *Lane*, 529 F.3d at 568; *McMahon*, 502 F.3d at 1365.

78. See *infra* text accompanying notes 79–110.

79. *McMahon*, 502 F.3d at 1336–38.

80. *Id.* at 1336. Presidential Airways contracted with the Department of Defense to transport passengers and cargo between sites in Afghanistan, Uzbekistan, and Pakistan. *Id.* The Department of Defense specified "what missions would be flown, when they would be flown, and what passengers and cargo would be carried." *Id.* Under the terms of the contract, Presidential Airways was required to establish a safety plan to comply with federal air regulations. *Id.* Those regulations required Presidential Airways to "supervise crew selection,' 'ensure that risk associated with all flight operations [was] reduced to the lowest acceptable level,' 'ensure that applicants' [for the flight crew were] carefully screened, and 'ensure[] the proper pairing of aircrews on all flights.'" *Id.* (quoting 32 C.F.R. § 861.4(e)(3)(ii), (iii), (vi) (2010)).

81. *Id.* The plaintiffs later filed an amended complaint alleging that Presidential Airways negligently hired, trained, and assigned the flight crew, as well as negligently equipping and operating the plane. *Id.* at 1337. The plaintiffs did not allege that any military actions contributed to the crash. *Id.* at 1337 n.3. Subsequently, Presidential Airways moved to dismiss the suit based, in part, on the political question doctrine. *Id.* at 1337.

82. *Id.* at 1365. The court cited the lack of discovery in holding that the case did not yet present a political question. *Id.*

83. *Id.* at 1358–60. In doing so, the court distinguished *Aktepe* and *Tiffany*, which involved negligence claims against the U.S. military and not against a contractor. *Id.* at 1359. The court further noted that *Aktepe* and *Tiffany* both involved sensitive military judgments—military training and air defense—that were "insulated from judicial review." *Id.* at 1359–60.

double burden” to satisfy the first *Baker* test.<sup>84</sup> First, the defendant would have to “demonstrate that the claims against it [would] require reexamination of a decision by the military.”<sup>85</sup> Second, the defendant would also have to “demonstrate that the military decision at issue is . . . insulated from judicial review.”<sup>86</sup> Regarding the first prong, the Eleventh Circuit held that the record provided no evidence that the suit required review of a *military* decision.<sup>87</sup> The court reasoned that Presidential Airways—not the military—was responsible for the safety of the flight.<sup>88</sup> Additionally, the plaintiff did not allege that any of the factors under *military* control contributed to the crash.<sup>89</sup> The Eleventh Circuit did not find it necessary to reach a determination as to the second prong of the double-burden analysis because analysis under the first prong revealed that no military decisions warranted examination.<sup>90</sup>

The Eleventh Circuit also considered whether the case fell under the second *Baker* test, and held that the suit did not involve a lack of judicially discoverable and manageable standards.<sup>91</sup> Rather, the court found that “[i]t is well within the competence of a federal court to apply negligence standards to a plane crash.”<sup>92</sup> Unlike the situations in *Aktepe* and *Tiffany*, the court found that entertaining the case would not require it to question whether the defendant’s military activities were themselves reasonable, but rather only required the court to apply an ordinary standard of care to the operation of a flight.<sup>93</sup> The Eleventh Circuit acknowledged that “flying over Afghanistan

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84. *Id.* at 1359.

85. *Id.*

86. *Id.* at 1359–60.

87. *Id.* at 1360.

88. *Id.* at 1360–61.

89. *Id.* at 1361. Under the terms of the contract, the military decided the origin and destination of flights, limited the hours that pilots could work, set requirements for the aircraft, and specified the upper and lower limits for cargo and passengers. *Id.*

90. *Id.* The court again distinguished the instant case from the facts of *Aktepe*, explaining that in *Aktepe*, the suit would “require the judiciary to determine whether members of the . . . missile team should have demanded confirmation of their superior’s apparent instruction to fire a live missile.” *Id.* at 1362 (quoting *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997)). In addition, the Eleventh Circuit distinguished *McMahon* from *Whitaker v. Kellogg Brown & Root, Inc.*, in which the court concluded that the suit would necessarily call into question military judgments because “[t]he Army regulate[d] all aspects of control, organization, and planning of Army convoy operations.” *Id.* (quoting *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279 (M.D. Ga. 2006)).

91. *Id.* at 1363–64.

92. *Id.* at 1364.

93. *Id.* at 1363. The court also remarked that “the district court cases that have dismissed suits against private contractors on political question grounds all involved combat activities.” *Id.* at 1363 n.32 (citations omitted). For example, in *Fisher v. Halliburton, Inc.*, contractor employees sued their employer after Iraqi insurgent forces attacked them. 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). The district court held that the matter was a nonjusticiable political question. *Id.* at 644. However, the Fifth Circuit reversed this decision in light of cases such as *McMahon*. *Lane*, 529 F.3d at 568,



during wartime is different from flying over Kansas on a sunny day. But this does not render the suit inherently nonjusticiable. While the court may have to apply a standard of care to the operation of flight conducted in a less than hospitable environment, that standard is not inherently unmanageable.”<sup>94</sup> Therefore, the second *Baker* test did not preclude the court from deciding the case.

In *Lane v. Halliburton*, the Fifth Circuit determined whether a suit brought by employees of a civilian contractor in Iraq presented a justiciable issue when the plaintiffs alleged that their employer failed to exercise reasonable care in protecting them from Iraqi insurgents.<sup>95</sup> In particular, the plaintiffs claimed that promotional materials used to recruit KBR truck drivers contained misleading information as to the risks that the drivers would face in Iraq.<sup>96</sup> For example, a KBR website promised future employees that the U.S. military would provide “24 hour a day” protection and that “[w]ith new heightened security you’ll be 100% safe.”<sup>97</sup> The plaintiffs further alleged that KBR had knowledge of unsafe conditions of a planned route, but decided to send fuel convoys along this route anyway without notifying its employees of the unsafe conditions.<sup>98</sup> The fuel convoys were attacked, causing injuries to some KBR drivers and killing others.<sup>99</sup> In three separate suits, civilian truck drivers and surviving family members sued KBR for intentional infliction of emotional distress, negligence, and fraud.<sup>100</sup> In each of the three suits, the district court

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569. In *Bentzlin v. Hughes Aircraft Co.*, family members of six Marines who were killed when their vehicle was hit by an Air Force missile sued the missile’s manufacturer, alleging a manufacturing defect. 844 F. Supp. 1486, 1487 (C.D. Cal. 1993). The district court held that the suit presented a nonjusticiable political question because “soldiers injured at the hands of the military raise political questions.” *Id.* at 1498. In contrast with *Fisher* and *Bentzlin*, *Whitaker v. Kellogg Brown & Root, Inc.* did not involve combat activities insofar as the convoy in *Whitaker* was not attacked or about to engage enemy forces at the time of the plaintiff’s death. *See Whitaker*, 444 F. Supp. 2d at 1278.

94. *McMahon*, 502 F.3d at 1364; *see also* *Linder v. Portocarrero*, 963 F.2d 332, 333–34, 337 (11th Cir. 1992) (rejecting the use of the political question doctrine in a suit brought under Florida tort law against Nicaraguan contras who allegedly tortured and killed a U.S. citizen and noting that “the common law of tort provides clear and well-settled rules on which the district court can easily rely” (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991))).

95. *Lane*, 529 F.3d at 554–55.

96. *Id.*

97. *Id.* Additionally, a KBR memorandum circulated to employees stated that although they were working in dangerous places, “this does not mean your safety will be compromised.” *Id.* at 555.

98. *Id.* at 555. On April 8, 2004, Iraqi insurgents attacked a fuel convoy, injuring one of the plaintiffs. *Id.* Despite this attack, the plaintiffs alleged that KBR nonetheless decided to send the convoy along the same route the next day. *Id.*

99. *Id.*

100. *Id.*

ruled that the case presented a nonjusticiable political question.<sup>101</sup> The Fifth Circuit consolidated the three cases and determined that “it may be possible to resolve the claims without needing to make a constitutionally impermissible review of wartime decision-making.”<sup>102</sup> Therefore, the Fifth Circuit reversed the lower court’s finding of nonjusticiability.<sup>103</sup>

With respect to the first *Baker* test, the Fifth Circuit found that the suits did not involve a decision that had been textually committed to a political branch.<sup>104</sup> In particular, the court reasoned that the first *Baker* test is “primarily concerned with direct challenges to actions taken by a coordinate branch of the federal government.”<sup>105</sup> Therefore, it did not preclude judicial review in the instant case in which the defendant contractor was not part of the federal government.<sup>106</sup>

Applying the second *Baker* test, the Fifth Circuit concluded that it could ascertain judicially manageable standards.<sup>107</sup> The court found that “[t]he standards for judging at least the assertions of civilian employers that cause injury to their employees are readily available.”<sup>108</sup> To demonstrate this point, the court analyzed the specific tort elements that the plaintiffs would need to prove to prevail on their claims—focusing on the element of causation

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101. See *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685, at \*1–2 (S.D. Tex. Oct. 11, 2006) (concluding that the suit presented political questions because even if KBR was solely responsible for deciding to deploy the convoy, the court would still be required to review decisions made by the Army), *rev’d sub nom. Lane*, 529 F.3d at 548; *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006) (concluding that because KBR and the Army were jointly responsible for protecting the convoys the court would need to assess decisions made by the Army), *rev’d sub nom. Lane*, 529 F.3d at 548; *Fisher v. Halliburton*, No. H-06-1971, 2006 WL 2796249, at \*1 (S.D. Tex. Sept. 26, 2006) (relying on *Fisher* to conclude that the case presented a nonjusticiable political question), *rev’d sub nom. Lane*, 529 F.3d at 548.

102. *Lane*, 529 F.3d at 554, 568. The court was not definitive in its language because, given that limited discovery had been performed, an issue involving a political question could still arise. *Id.* at 568.

103. *Id.*

104. *Id.* at 559–60 (“[W]e cannot find that all plausible sets of facts that could be proven would implicate particular authority committed by the Constitution to Congress or the Executive.”).

105. *Id.* at 560.

106. *Id.* Finding the Eleventh Circuit’s opinion in *McMahon* persuasive because both matters involved cases against military contractors—not coordinate branches of the federal government—the Fifth Circuit cited *McMahon*’s double-burden analysis in applying the first *Baker* test. *Id.* Although the court did not explicitly analyze the facts of *Lane* under the *McMahon* double-burden analysis, it implied that the facts of *Lane* did not satisfy the *McMahon* test. *See id.*

107. *Id.* at 563.

108. *Id.* The court also noted that “[w]hile the resolution of the Plaintiff’s claims may require a court to adjust traditional tort standards to account for the ‘less than hospitable environment’ . . . the court will arguably have no need to develop any standards at all.” *Id.*

“because it . . . present[ed] the greatest potential for inextricableness.”<sup>109</sup> The Fifth Circuit explained that the plaintiffs could potentially prove that the contractor knowingly made misrepresentations about the government’s ability to ensure the safety of the contractor employees.<sup>110</sup>

## *2. The Political Question Doctrine Applies When the Military’s Decisions Are Intertwined with the Contractor’s Challenged Conduct*

In *Whitaker v. Kellogg Brown & Root, Inc.*, the U.S. District Court for the Middle District of Georgia invoked the political question doctrine in a case involving the death of a U.S. soldier in a convoy accident because the court could not adjudicate the suit without reviewing military decisions.<sup>111</sup> Sergeant Anthony Whitaker died when a truck driven by a KBR driver struck his vehicle, knocking him off a bridge and causing him to drown.<sup>112</sup> Whitaker’s parents sued KBR, alleging that the employer should be held liable for the negligent driving of its employees.<sup>113</sup> The district court, however, agreed with the defendant’s assertion that the suit involved a nonjusticiable political question.<sup>114</sup> At the outset of its discussion, the court found that “[t]he Army regulate[d] all aspects of control, organization, and planning of Army convoy operations.”<sup>115</sup> Finding the facts analogous to those in *Aktepe*,<sup>116</sup> the district court declared 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 [that were raised in *Aktepe*].”<sup>117</sup> Therefore, the court could not review the case.

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109. *Id.* at 564. Regarding causation, KBR argued that during trial it would defend itself by highlighting the “inadequacy of the Army’s intelligence gathering, route selection and defensive response to the attacks.” *Id.* at 566. The plaintiffs argued that a common theory of tort law permits recovery even when there is an independent intervening cause. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 448–49, 480, 482–83 (1965); PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 303–06 (W. Page Keeton et al., eds., 5th ed. 1984)).

110. *Id.* at 567. The court also noted that if the plaintiffs established that “KBR knew or should have known . . . that the situation was likely to be so hostile that KBR could not reasonably believe that its employees would be ‘100% safe,’” it would not need to invoke the political question doctrine, even if it reviewed Army intelligence. *Id.*

111. 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006).

112. *Id.*

113. *Id.* KBR moved to dismiss the suit because it claimed that the case would necessarily require the court to review military decisions made during war, and thus involved a political question. *Id.*

114. *Id.* at 1282.

115. *Id.* at 1279.

116. *Aktepe v. United States*, 105 F.3d 1400, 1403–04 (11th Cir. 1997); *see also* notes 56–63 and accompanying text.

117. *Whitaker*, 444 F. Supp. 2d at 1281. Immediately preceding this sentence, the court, citing the Supreme Court’s opinion in *Bentzlin v. Hughes Aircraft Co.*, stated that “[i]t is well accepted that, in general, soldiers injured at the hands of the military raise political questions.” *Id.* (citing *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1498 (C.D. Cal. 1993)). In

The district court determined that the first *Baker* test applied because the military's decision to employ contractors to carry out military objectives still required deference to the political branches.<sup>118</sup> Additionally, the district court concluded that the case also fell under the second *Baker* test because the pertinent inquiry would require analyzing "what a reasonable driver in a combat zone, subject to military regulations and orders, would do."<sup>119</sup> Answering this question, the court reasoned, would require judicial review of military decisions and, therefore, raised nonjusticiable political questions.<sup>120</sup>

## II. *CARMICHAEL*: THE FIRST CASE IN WHICH A FEDERAL CIRCUIT COURT INVOKED THE POLITICAL QUESTION DOCTRINE TO BAR SUIT AGAINST A MILITARY CONTRACTOR

In *Carmichael v. Kellogg, Brown & Root Services, Inc.*, Sergeant Keith Carmichael was thrown from a tanker truck in Iraq when the driver, a government contractor employed by KBR, lost control of the vehicle during a turn.<sup>121</sup> The Eleventh Circuit invoked the political question doctrine after finding that it would need to review military decisions to adjudicate the plaintiff's claims.<sup>122</sup>

In 2001, KBR and Halliburton contracted with the U.S. military to provide logistical services during the war in Iraq.<sup>123</sup> Under this contract, KBR transported fuel between military bases in convoys of tanker trucks.<sup>124</sup> The convoy missions traversed dangerous war zones and frequently encountered improvised explosive devices (IEDs).<sup>125</sup> Because of this danger, military vehicles were spread throughout the convoys and members of the military rode

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*Bentzlin*, the Court explained that cases involving soldiers injured during military activities raise political questions, but cases involving civilians injured by the same activities do not. *Bentzlin*, 833 F. Supp. at 1498. However, the *Bentzlin* court did not provide any principled arguments for distinguishing between civilians and military personnel with regard to the political question doctrine, stating only that "tort suits brought by civilian plaintiffs are clearly within the judicial system's expertise. . . . [Whereas, a suit] brought on behalf of soldiers, serving within the Executive Branch [are not]." *Id.* at 1497-98.

118. *Whitaker*, 444 F. Supp. 2d at 1281.

119. *Id.* at 1282. The district court found that the suit presented more than just a "garden variety road wreck" because it occurred in a war zone, and because the KBR drivers were subject to the military's orders regarding the speed and distance between each vehicle. *Id.*

120. *Id.*

121. See notes 123-47 and accompanying text.

122. See notes 123-47 and accompanying text.

123. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275-76 (11th Cir. 2009).

124. *Id.*

125. *Id.* at 1276. The missions had become so dangerous that they had been temporarily halted two months before the convoy mission during which Sergeant Carmichael was severely injured. *Id.*

in the tanker trucks alongside KBR drivers.<sup>126</sup> A military commander, following “strict military regulations,” led these missions.<sup>127</sup>

Before the convoy mission scheduled for May 22, 2004 departed, the military commander set the following parameters for the mission: the tanker trucks were to maintain speeds between fifty and sixty miles per hour; the tanker trucks were to keep one hundred meters between their vehicles; and the convoy was to take the “ASR Phoenix” route.<sup>128</sup> Not only was the ASR Phoenix comprised of rough terrain and hard to navigate, but it was also the site of previous attacks on convoys that had resulted in casualties to both the military and KBR employees.<sup>129</sup>

On May 22, 2004, a militarized convoy led by the military commander and consisting of approximately fifteen trucks traveled along the ASR Phoenix in a single-file line.<sup>130</sup> Sergeant Carmichael was assigned to ride with David Irvine, who was driving the sixth truck in the convoy.<sup>131</sup> As the convoy approached a section of the route that was particularly difficult to navigate,<sup>132</sup> the leading military truck alerted the rest of the convoy about the road’s upcoming curves.<sup>133</sup> The five tanker trucks preceding Irvine and Carmichael in the convoy maneuvered the curves without issue.<sup>134</sup> However, as Irvine turned into the second curve, the tanker veered off of the road and rolled over, throwing Carmichael from the truck and trapping him under it.<sup>135</sup> Rescue personnel soon freed Carmichael from underneath the truck.<sup>136</sup> However, Carmichael had suffered massive brain injuries and remains in a persistent vegetative state.<sup>137</sup> KBR’s accident review board concluded that Irvine’s inattention and high speed while rounding the route’s curvy roads caused the accident.<sup>138</sup>

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126. *Id.*

127. *Id.*

128. *Id.* at 1277.

129. *Id.*

130. *Id.* at 1277–78.

131. *Id.* at 1278. When KBR hired Irvine in April 2004, he was sixty-six years old. *Id.* at 1278 & n.7. KBR did not hire Irvine when he initially applied for the job in January 2004 because of his “erratic’ blood pressure.” *Id.* at 1278 n.7. Irvine began taking medication for the condition and was eventually hired by KBR. *Id.* Prior to May 22, 2004, Irvine had driven in five or six convoys, traveling the ASR Phoenix three times. *Id.* at 1278.

132. *Id.* at 1278.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1278 n.8. Another KBR report indicated that Irvine’s inability to control the tanker truck caused the accident. *Id.* Although the board recommended that Irvine be allowed to resume his duties driving tanker trucks after a suspension, a KBR manager ordered that Irvine be permanently banned from driving tanker trucks. *Id.*

In February 2006, Sergeant Carmichael's wife sued KBR and Irvine, asserting that Irvine had been negligent by speeding despite the rough road conditions and failing to pay attention while driving.<sup>139</sup> The district court concluded that the suit satisfied both the first and second *Baker* tests and was therefore nonjusticiable.<sup>140</sup>

The Eleventh Circuit affirmed the district court's determination,<sup>141</sup> concluding that the suit raised political questions that would require the court to review military wartime judgments.<sup>142</sup> In particular, the Eleventh Circuit emphasized that the military's decisions regarding the departure date and time, speed at which to travel, and the distance to keep between tankers "required the specific exercise of military expertise and judgment."<sup>143</sup> Therefore, the court concluded that the case fell outside of the realm of judicial review under the first *Baker* test.

With regard to the second *Baker* test, the Eleventh Circuit noted that "given the extent to which the convoy was subject to military regulation and control, the question of whether Irvine acted reasonably or breached the standard of care cannot be answered by reference to the standards used in ordinary tort cases."<sup>144</sup> The court reasoned that the common sense notions a jury typically

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139. *Id.* at 1279. Sergeant Carmichael's wife also alleged that KBR negligently hired, trained, and supervised Irvine. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1374 (N.D. Ga. 2006), *aff'd*, 572 F.3d 1271. This Note focuses only on the negligence claims arising out of the accident. For a compelling argument as to why the negligent hiring, training, and supervising claims do not implicate the political question doctrine, see *Carmichael*, 572 F.3d at 1296–1300 (Kravitch, J., dissenting).

140. *Carmichael*, 564 F. Supp. 2d at 1372. The district court determined that the first *Baker* test applied because the suit would raise a textually demonstrable constitutional commitment of the issue to a coordinate political department as "the army did in fact control every aspect of the organization, planning and execution of the convoy in question. . . . [T]he conduct of the military and its handling of supply convoys used to support military operations would necessarily be questioned were this case allowed to go forward." *Id.* at 1368, 1371. The district court determined that the second *Baker* test also applied because no judicially manageable standards existed due to the unusual circumstances surrounding the accident, including the fact that the "rollover took place on a route notorious for lethal insurgent activity." *Id.* at 1371.

141. *Carmichael*, 572 F.3d at 1296.

142. *Id.* at 1281. The Eleventh Circuit noted that "[i]n *McMahon*, the military's authority and responsibility over [the contractor's] activity was limited and discrete," whereas in *Carmichael*, the military's control over the convoy was "plenary." *Id.* at 1290.

143. *Id.* at 1281–82. The court also rejected Carmichael's argument that Irvine, a civilian contractor, retained ultimate control over the vehicle because Irvine's "physical control over his tanker does not change the fact that he was operating at all times under orders and determinations made by the military." *Id.* at 1284. The court noted that although Irvine could have "flouted the military's orders . . . any defense mounted by KBR or Irvine would undoubtedly cite the military's orders as the reason why Irvine did not reduce his speed." *Id.* at 1284–85.

144. *Id.* at 1288. Although the court enumerated the elements of a typical negligence claim at the outset of its analysis, and further noted that under state law more than one proximate cause could exist in matters involving multiple actors, the court did not articulate precisely why these elements could not be satisfied. *Id.* at 1287–89 (citing *MCG Health, Inc. v. Barton*, 647 S.E.2d 81, 88 (Ga. Ct. App. 2007)). In contrast, the Fifth Circuit in *Lane v. Halliburton* maintained that

uses to make judgments about whether an action was reasonable in negligence claims were not appropriate to judge wartime circumstances “where any decision to slow down could well have jeopardized the entire military mission and could have made Irvine and other vehicles in the convoy more vulnerable to an insurgent attack.”<sup>145</sup> The court distinguished *Carmichael* from its previous decision in *McMahon* on the facts, explaining that “the accident at issue in *McMahon* took place during a more or less routine airplane flight,” whereas the convoy accident in *Carmichael* occurred under extremely dangerous conditions.<sup>146</sup> Thus, the court in *Carmichael* found that it lacked the appropriate standard to decide the case.<sup>147</sup>

### III. ANSWERS EXIST TO THE POLITICAL QUESTIONS RAISED BY THE MILITARY CONTRACTOR’S ACTIONS IN *CARMICHAEL*

Facially, the Eleventh Circuit’s rationale for its holding in *Carmichael* appears compelling.<sup>148</sup> The court, unable to devise a framework by which it could resolve the plaintiff’s claims given the extent to which military decisions influenced the contractor’s challenged conduct,<sup>149</sup> sought to avoid second-guessing decisions requiring military expertise.<sup>150</sup>

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the second *Baker* test turned on whether the plaintiffs could plausibly satisfy the causation element given that state law permits recovery even when another actor or cause intervenes and becomes the direct cause of the injury. 529 F.3d 548, 566 (5th Cir. 2008) (citing RESTATEMENT (SECOND) OF TORTS §§ 448–49, 480, 482–83 (1965); PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 303–06 (W. Page Keeton et al., eds., 5th ed. 1984)).

145. *Carmichael*, 572 F.3d at 1290. The court rejected Carmichael’s arguments that because the convoy was not engaged in combat immediately before or after the accident, that the rollover did not occur in a combat zone. *Id.* at 1287. Rather, the court found that IEDs and insurgent attacks had presented a constant danger along the route. *Id.* To support its conclusion, the court cited *Gilligan*, in which the Supreme Court applied the political question doctrine to military training activities. *Id.* (citing *Gilligan v. Morgan*, 413 U.S. 1, 5–6 (1973)).

146. *Id.* at 1290–91.

147. The court did recognize what the standard of reasonable care would be in this case: “what a reasonable driver subject to military control over his exact speed and path would have done.” *Id.* at 1289 (quoting *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008) (internal quotation marks omitted)). However, the court characterized this as an unmanageable standard that a jury would be unable to use to evaluate the reasonableness of the contractor’s actions. *Id.* 1288–89. Just a year earlier, however, the Eleventh Circuit in *McMahon* had found that even when circumstances surrounding a negligence claim are atypical because they occur in a war zone, the case is not automatically nonjusticiable—a standard of care may simply have to be applied to activities conducted in a dangerous environment. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007); see also *supra* text accompanying note 94.

148. See *supra* notes 142–47 and accompanying text.

149. See *Carmichael*, 572 F.3d at 1282–83.

150. See *id.* at 1281–83.

However, the Eleventh Circuit's decision in *Carmichael* raises serious concerns.<sup>151</sup> Most troubling is the implication that the court's decision could preclude the legislative and the executive branches from making policy determinations as provided by the Constitution. The Eleventh Circuit should have followed the Supreme Court's reasoning in *Boyle v. United Technologies Corp.* and avoided resolving *Carmichael* on the issue of the political question doctrine.<sup>152</sup> If the district court later needed to resolve the political-question issue, it could have directed the trier of fact to determine whether the contractor acted reasonably within the parameters of the military's control.<sup>153</sup> Additionally, the court could have used tort law to adjudicate Carmichael's claim on the merits.<sup>154</sup>

*A. Using the Political Question Doctrine to Exclude Cases Involving Military Contractors from Judicial Review Could Frustrate the Purpose of the Doctrine*

Each suit brought against military contractors performing services in Iraq and Afghanistan has the potential to implicate significant interests of the U.S. government.<sup>155</sup> For example, the government generally hopes to avoid any "second-guess[ing]" by the judiciary, and wants to ensure the safety of service members and contractors.<sup>156</sup> These interests must be balanced against those relating to contractors' exercise of appropriate care when performing contracts.<sup>157</sup> The implications of the Eleventh Circuit's decision in *Carmichael* could significantly undermine the ability of Congress and the President to create a fair system for military-contractor liability that appropriately takes into account the interests of the country.<sup>158</sup>

The issue of whether the political question doctrine is a general constitutional constraint,<sup>159</sup> a prudential constraint,<sup>160</sup> or some combination of

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151. See *infra* text accompanying notes 155–65. For example, the Eleventh Circuit found that the military's retention of complete operational control implicated the first *Baker* test. *Carmichael*, 572 F.3d at 1281–82. Extended to its logical conclusion, other courts could theoretically apply the political question doctrine to actions outside of war zones or even to actions taken by military contractors in the United States. See Jenks, *supra* note 48, at 213 (discussing the problems associated with focusing exclusively on the military's operational control).

152. See *infra* Part III.A.

153. See *infra* Part III.A.

154. See *infra* Part III.B.

155. See Brief for the United States as Amicus Curiae at 9, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 130 S. Ct. 3499 (2010) (No. 09-683), 2010 WL 2214879 [hereinafter Amicus Brief].

156. *Id.*

157. *Id.*

158. See *infra* text accompanying notes 164–66.

159. See *supra* notes 19, 25.

160. See *supra* notes 19, 25.



the two therefore remains unsettled.<sup>161</sup> The source of the limitation has important implications: Congress may eliminate prudential constraints by legislation, but lacks the power to statutorily remove constitutional limitations.<sup>162</sup> In *Carmichael*, the Eleventh Circuit's application of the doctrine upon finding a "textually demonstrable constitutional commitment of the issue to a coordinate political department" weighs heavily in favor of the doctrine being constitutional.<sup>163</sup>

The court's holding in *Carmichael* could potentially limit the ability of the political branches to determine how best to impose liability on military contractors.<sup>164</sup> To illustrate *Carmichael*'s potentially harmful implications, assume that the Supreme Court affirmed the Eleventh Circuit's holding and rationale in *Carmichael*. Assume further that Congress considered it within the best interest of the country to override the Supreme Court's decision by statutorily providing that any soldier injured by the negligent actions of a military contractor operating in a foreign country can sue that contractor for negligence in a federal court. Despite Congress's intent to subject military contractors to liability, the political question doctrine—as a constitutional constraint—would require courts to dismiss all suits brought under the new statute that are factually similar to *Carmichael*.<sup>165</sup> This outcome would frustrate the most basic and compelling rationale for the political question doctrine in that it would preclude the legislative and the executive branches from making policy determinations as provided by the Constitution.<sup>166</sup>

#### *B. Courts Should Resolve Suits on the Basis of the Political Question Doctrine Only as a Last Resort*

In *Boyle v. United Technologies Corp.*, although the case appeared to warrant a discussion of the political question doctrine, the Court avoided the

161. Compare 767 Third Ave. Assocs. v. Consulate Gen. of Yugoslavia, 218 F.3d 152, 164 (2d Cir. 2000) ("[T]he political question doctrine is essentially a constitutional limitation on the courts."), and Mobil Oil Corp. v. Attorney Gen. of Va., 940 F.2d 73, 75 (4th Cir. 1991) (explaining that the political question doctrine is grounded in Article III's "case and controversy" requirement), with Caprice L. Roberts, *Asymmetric World Jurisprudence*, 32 SEATTLE U. L. REV. 569, 584 (2009) ("[T]he political question doctrine is primarily prudential . . ."). Supreme Court dicta suggests that the political question doctrine is a constitutional limitation. See *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (commenting that resolution of political questions is "inconsistent with the judicial function under Art. III [of the Constitution]").

162. See *supra* note 25.

163. See Daniel Lovejoy, *The Ambiguous Basis for Chevron Deference: Multiple Agency Statutes*, 88 VA. L. REV. 879, 891 (2002) (noting that of the six *Baker* factors, the first is the only constitutional constraint); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (distinguishing between constitutional commitment of issues to the executive or legislative branches from situations in which the courts under the political question doctrine have discretion on whether to intervene).

164. See *supra* text accompanying notes 156–58, *infra* text accompanying notes 165–66.

165. See *infra* notes 173–75 and accompanying text.

166. See *supra* note 28 and accompanying text.

doctrine altogether, instead dismissing the case on statutory grounds.<sup>167</sup> Given the significant implications of resolving a suit on constitutional grounds, the Eleventh Circuit should have followed the Supreme Court's decision in *Boyle* and remanded *Carmichael* with instructions to continue the litigation.<sup>168</sup> If the case settled, or if the trier of fact found for KBR, then the district court would not have had to address the political-question issue. Only if the trier of fact found in favor of the plaintiff would the district court have been required to consider the political question doctrine. As demonstrated below, even if the courts needed to resolve the political-question issue raised in *Carmichael*, they could have done so without dismissing the suit.<sup>169</sup>

*C. The Negligence Claim in Carmichael Should Have Been Decided Without Reviewing Decisions Constitutionally Committed to Other Branches*

The Eleventh Circuit's decision in *McMahon* provides a sound framework for assessing the applicability of the first *Baker* test.<sup>170</sup> According to the court, for a contractor to invoke the first *Baker* test as a successful defense of nonjusticiability, the contractor must meet a double burden by showing that (1)

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167. See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 502–03, 511 (1988) (holding that the discretionary-function exception to the FTCA barred liability for the defective design of a military helicopter that allegedly resulted in the death of a U.S. marine). The Court in *Boyle* reasoned that the “selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly within the meaning of [the discretionary function exception of the Federal Tort Claims Act].” *Id.* at 511. A number of statutory schemes exist that could bar suits brought by contractors and military service members injured in the line of duty. For example, although members of the U.S. armed forces who are injured or killed while serving the country cannot bring an action under the FTCA, they are entitled to statutory benefits that resemble those available under workmen's compensation status. *Feres v. United States*, 340 U.S. 135, 142–45 (1950). The combatant-activities exception to the FTCA provides that sovereign immunity is not waived for civilians who bring a claim “aris[ing] out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” 28 U.S.C. § 2680(j) (2006 & Supp. 2011). The D.C. Circuit Court of Appeals extended this to preempt common law damage actions “where a private service contractor is integrated into combatant activities over which the military retains command authority.” *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009). Additionally, employees of contractors are barred from bringing a negligence claim against their employer if they suffer injuries while working on a government contract outside of the United States. 42 U.S.C. § 1651 (2006 & Supp. 2011) (providing that a worker's compensation system provides the exclusive remedy for such injuries). When the suit is not barred by any of the previously mentioned defenses, contractors performing services in support of the military have argued that the courts should apply the government-contractor defense articulated by the Supreme Court in *Boyle v. United Technologies Corp.* See, e.g., *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146–47 (9th Cir. 2004) (“[T]he government contractor defense does not confer sovereign immunity on contractors.”).

168. See *infra* part III.C.

169. See *supra* notes 167-68 and accompanying text; see *infra* Part III.C.

170. See *Jenks*, *supra* note 48, at 202–04.

the case would “require reexamination of a decision *by the military*”<sup>171</sup> and (2) “the military decision at issue is . . . insulated from judicial review.”<sup>172</sup>

Regarding the first prong of the “double burden,” courts can still entertain a case like *Carmichael* while avoiding having to judge the prudence of the military’s guidelines.<sup>173</sup> The United States, in its amicus brief, suggested:

It may be possible for the trial court to factor military standards and orders into the inquiry as external facts to be taken as a given, such that the trier of fact would not be required to question the wisdom of military judgments.

Under such an approach, the jury could conclude that Irvine failed to behave in a reasonable manner *within* the parameters established by the military. For example, one could envision such a result if [Carmichael] was able to prove that Irvine was not paying attention when he took the . . . curve.<sup>174</sup>

The government’s suggested scope of analysis would be a prudent approach to examine cases like *Carmichael*, and would allow courts to avoid invoking the first *Baker* test in cases in which the contractor’s alleged wrongful conduct is intertwined with military decision making.

#### *D. Tort Law Provides Manageable Standards for Assessing the Plaintiff’s Claims in Carmichael*

The Fifth Circuit in *Lane* provided a sensible judicial framework that could have been used to render a decision in *Carmichael*. The Fifth Circuit assessed the elements of negligence to determine whether a court could adjudicate a case without calling into question decisions made by the military.<sup>175</sup> A typical negligence claim in Georgia<sup>176</sup> requires that plaintiffs satisfy the following four

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

172. *Id.* at 1359–60.

173. See Amicus Brief, *supra* note 155, at 17 (suggesting that a court can review an accident involving a military contractor without delving into the military’s decision making).

174. *Id.* The Supreme Court’s request that the Solicitor General submit an amicus curiae brief on behalf of the United States is indicative of the Court’s desire to grant the petition for writ of certiorari. See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1661 (2007). Although the acting Solicitor General suggested that the Eleventh Circuit erred in deciding *Carmichael*, he recommended that the Supreme Court deny the petition for a writ of certiorari because “consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation.” Amicus Brief, *supra* note 155, at 16–17, 22.

175. See *Lane v. Halliburton*, 529 F.3d 548, 564–68 (5th Cir. 2008) (outlining the elements of negligence).

176. This Note analyzes Georgia tort law because the plaintiff in *Carmichael* brought a negligence claim under Georgia common law. See *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1278–79 (11th Cir. 2009).

elements: (1) a duty to meet a standard of care; (2) breach of that duty; (3) causation between the breach and injury; and (4) damages.<sup>177</sup>

Regarding the applicable standard of care, the *Carmichael* court correctly identified the standard as “what a reasonable driver subject to military control over his exact speed and path would have done.”<sup>178</sup> Under that standard of care—which recognizes the parameters set by the military—a jury would be capable of determining whether Irvine acted in a reasonable manner.<sup>179</sup>

The Eleventh Circuit determined that the trier of fact could not assess the reasonableness of the contractor’s action in light of the standard of care because the accident occurred in a war zone—a context outside of typical everyday experiences.<sup>180</sup> The court reasoned that this prevented the trier of fact from relying on familiar benchmarks to evaluate the case.<sup>181</sup> The court improperly assumed that just because the trier of fact may lack certain “touchstones,” the court also lacks standards to manage the case.<sup>182</sup> On the contrary, courts frequently grapple with questions of what a reasonable person would do under challenging circumstances, such as cases involving medical malpractice or complex patent litigation.<sup>183</sup> Like many other cases, attorneys can present these issues using appropriate evidence, such as expert witnesses’

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177. *Id.* at 1288 (quoting *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1297 (11th Cir. 2008)). With respect to causation in Georgia, it is “well settled that there may be more than one proximate cause of an injury in cases involving the concurrent negligence of several actors.” *MCG Health, Inc. v. Barton*, 647 S.E.2d 81, 87 (Ga. Ct. App. 2007) (quoting *Walker v. Giles*, 624 S.E.2d 191, 200 (Ga. Ct. App. 2005)). In addition, “two or more tortfeasors may be found to have committed ‘concurrent’ acts of negligence whether or not they acted in concert or their acts of negligence occurred at the same time.” *Delson v. Ga. Dep’t of Transp.*, 671 S.E.2d 190, 194 (Ga. Ct. App. 2008)).

178. *Carmichael*, 572 F.3d at 1289 (quoting *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008)).

179. *Cf.* RESTATEMENT (SECOND) OF TORTS § 283, at 12–13 (1965) (“The standard [for a reasonable person] must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the *circumstances* under which he must act.” (emphasis added)); *see also* Amicus Brief, *supra* note 155, at 17 (positing that the negligence occurred within the guidelines set by the military).

180. *Carmichael*, 572 F.3d at 1289.

181. *Id.*

182. *Id.* at 1288–89.

183. *See, e.g.,* *Byrne v. Wood, Herron & Evans, LLP*, No. 2:08-102-DCR, 2010 WL 3394678, at \*3 (E.D. Ky. Aug. 26, 2010) (“In a legal malpractice action, the plaintiff must provide expert testimony to establish that the defendants violated the standard of care unless their negligence is so apparent that a layperson with general knowledge would have no difficulty recognizing it.”).

testimony,<sup>184</sup> in such a way as to assist the trier of fact in understanding and resolving the issues.<sup>185</sup>

The Eleventh Circuit also suggested that the suit presented an unmanageable standard because “the dangerousness of the circumstances under which Irvine was driving . . . render[ed] problematic any attempt to answer basic questions about duty and breach.”<sup>186</sup> The court emphasized that the “potentially life threatening” circumstances surrounding the accident distinguished the case from an ordinary experience where ordinary negligent standards could be applied.<sup>187</sup> However, the court’s attempt to distinguish life-threatening activities as beyond the scope of judicial review stands juxtaposed to prior case law in which federal courts often reviewed tort actions involving potentially life-threatening actions in other contexts.<sup>188</sup>

In addition to determining that no manageable standards existed to judge the contractor’s actions, the Eleventh Circuit in *Carmichael* also found that the plaintiffs would be unable to prove the causation element without raising a nonjusticiable political question, but failed to articulate why this would be the case.<sup>189</sup> State law allows a plaintiff to recover so long as at least one of multiple tortfeasors was the proximate cause of the plaintiff’s injury.<sup>190</sup> Additionally, the court can “factor military standards and orders into the inquiry as external facts to be taken as a given.”<sup>191</sup> Therefore, no principled reason seems to exist to explain why the element of causation would necessarily raise political-question concerns.

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184. See Amicus Brief, *supra* note 155, at 18 (drawing to the Court’s attention that expert testimony can be used to elucidate reasonable conduct with which a lay jury would otherwise be unfamiliar).

185. See FED. R. EVID. 702 (“An intelligent evaluation of the facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness . . .”).

186. *Carmichael*, 572 F.3d at 1289.

187. *Id.* at 1290.

188. See, e.g., *Arce v. Garcia*, 434 F.3d 1254, 1256, 1258, 1265 (11th Cir. 2006) (affirming judgment under the Alien Tort Claims Act against members of the El Salvadoran military who kidnapped and tortured plaintiffs during “a state of civil war”); *Klingoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47, 54 (2d Cir. 1991) (addressing the merits of a tort action stemming from the Palestine Liberation Organization’s seizure of an Italian cruise ship and murder of a passenger).

189. See *Carmichael*, 572 F.3d at 1288–92. The Fifth Circuit similarly recognized that causation was central to the second *Baker* test, and found that examining the Army’s contribution to causation might invoke political questions. *Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008). However, unlike the Eleventh Circuit, the Fifth Circuit concluded that the possibility of a political question did not necessarily preclude judicial review because plaintiffs could potentially prove causation under tort law without analyzing the Army’s role. *Id.* at 562.

190. See *supra* note 177.

191. Amicus Brief, *supra* note 155, at 17.

#### IV. CONCLUSION

Courts should only consider the political question doctrine as a last resort. Even assuming the Eleventh Circuit in *Carmichael* needed to resolve the issue, it should have found that the case did not present a political question. The court could have assessed the contractor's actions within the military's parameters without passing judgment on the prudence of those parameters themselves. Traditional tort law provides sufficient standards for the court to adjudicate the claims presented in *Carmichael*.

The United States has many reasons to shield military contractors from some liability while they provide services in support of war efforts. However, deciding cases like *Carmichael* on constitutional grounds could severely limit the ability of the legislative and executive branches to weigh the interests of the country and determine how best to impose liability on military contractors.