
PRIVATE WARRIORS AND POLITICAL QUESTIONS: A
CRITICAL ANALYSIS OF THE POLITICAL QUESTION
DOCTRINE'S APPLICATION TO SUITS AGAINST PRIVATE
MILITARY CONTRACTORS

I. INTRODUCTION

The political question doctrine is a common law doctrine that can be traced to the founding era,¹ but its modern form was explicated in the landmark 1962 case of *Baker v. Carr*.² According to the *Baker* Court, suits are nonjusticiable under the doctrine only if they are “inextricable” from one of six factors,³ which are encapsulated by: (1) concerns for the separation of powers,⁴ (2) the presence of applicable judicial standards,⁵ and (3) prudential concerns.⁶ During the *Baker* era, the doctrine was limited to suits against government actors and entities, especially the U.S. government. Beginning in the 1990s, however, federal district courts have extended the doctrine to private military contractors (“PMCs”).⁷

Paralleling the expansion of the political question doctrine to private party defendants, the military has become increasingly reliant on PMCs to further strategic objectives. Now, more than ever, civilians are active in the theater of war. A recent Department of Defense census, for example, estimates that there are 180,000 contractors operating in Iraq alone,⁸ fulfilling numerous roles, ranging from logistical support to armed escort services for diplomats.⁹ Incidents resulting in the injury or death of U.S. service members, PMC employees, and Afghan and Iraqi civilians at the hands of contractors have become more common. As a result, suits against PMCs are now a fixture on the judicial landscape.¹⁰

1. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (articulating political question doctrine). See *infra* notes 11–13 and accompanying text for a discussion of *Marbury*.

2. 369 U.S. 186 (1962). See *infra* Part II.A.2 for a discussion of *Baker*.

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

4. See *infra* notes 36–44 and accompanying text for a discussion of *Baker* factor one and the separation of powers.

5. See *infra* note 52 and accompanying text for a discussion of *Baker* factor two.

6. See *infra* notes 45–48 and accompanying text for a discussion of *Baker* factors two through six and prudential concerns.

7. See generally *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1487, 1497 (C.D. Cal. 1993) (applying political question doctrine to suit against PMC weapons manufacturer). See *infra* notes 135–43 for a discussion of *Bentzlin*.

8. P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 245 (updated ed. 2008).

9. See *infra* Part II.D for a discussion of the military's increased reliance on PMCs and the numerous roles that PMCs fill.

10. See *infra* Part II.E.2 for a discussion of suits against PMCs operating in Iraq and Afghanistan.

These suits provide significant challenges for the judiciary and its political question jurisprudence. Absent legislative guidance, courts have been forced to address the justiciability of diverse claims, ranging from negligence to torture, arising from PMC activity under a judge-made doctrine predating contemporary battlefield conditions. The outcome has been disparate and confusing, frequently resulting in victims being deprived of their day in court.

This Comment suggests that the factors supporting the political question doctrine are rarely present in tort suits for damages against private parties. As such, its application in the PMC context is generally improper. Part II of this Comment offers an overview of the development of the political question doctrine and its application to damages and injunction suits involving the government and private parties. With a careful analysis of supporting law, it becomes clear in Part II.C.2 that common law tort suits for damages against the government are less susceptible to political question doctrine challenges than constitutional claims seeking equitable relief, and are therefore more frequently subject to thorough judicial review. This judicial treatment was extended, in part, to suits involving PMCs prior to and during the occupations of Afghanistan and Iraq, as analyzed in Part II.E. However, Part II.E also demonstrates that suits against PMCs are not immune from application of the political question doctrine.

Part III applies the logic supporting the *Baker* factors to suits for damages against PMC defendants. Part III.A explains that suits for damages against private parties mitigate concerns about violating the separation of powers. Part III.B maintains that tort suits weigh in favor of justiciability and that common law tort standards provide the flexibility necessary for the judiciary to adjudicate suits arising in a war zone. Part III.C asserts that prudential concerns are not a legitimate obstacle to suits against PMCs as damages against private parties are less intrusive than injunctive relief.

II. OVERVIEW

A. *The Origins of the Political Question Doctrine*

As early as *Marbury v. Madison*,¹¹ a case famous for establishing “judicial constitutional review,”¹² the U.S. Supreme Court noted that certain questions, which are “in their nature political . . . can never be made in this court.”¹³ Since *Marbury*, courts have frequently declined to review cases, especially those involving foreign relations and military affairs, because they implicate political, as opposed to judicial, questions. Such questions are considered nonjusticiable.

11. 5 U.S. (1 Cranch) 137 (1803).

12. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1998 (2004).

13. *Marbury*, 5 U.S. (1 Cranch) at 170. The Court clarified, “[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character.” *Id.* at 165–66; see also *Atlee v. Laird*, 347 F. Supp. 689, 692 (E.D. Pa. 1972) (noting nonjusticiability of certain political questions was recognized by courts prior to and following Constitution’s ratification), *aff’d sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973).

1. The Political Question Doctrine in Foreign and Military Affairs Cases
Before *Baker v. Carr*

While the Supreme Court, on several occasions, permitted plaintiffs to successfully pursue tort claims for damages incurred at the hands of government actors, including soldiers, during wartime,¹⁴ suits challenging decisions touching upon foreign or military affairs made by the political branches were frequently held nonjusticiable. Illustrative is *Jones v. United States*.¹⁵ In *Jones*, the defendant was convicted in the United States District Court for the District of Maryland of murdering a man on an island in the Caribbean Sea.¹⁶ In challenging his conviction, the defendant argued that U.S. courts lacked jurisdiction to hear the case because the statute, which granted the President the authority to proclaim the island part of U.S. territory, was unconstitutional.¹⁷ In rejecting the defendant's argument, the Court reasoned: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a *political question*, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."¹⁸ As such, courts were extremely deferential to the political branches' decisions regarding foreign relations, often treating such decisions as binding.¹⁹

This view of the justiciability of cases involving foreign relations and military affairs continued into the twentieth century. In *Oetjen v. Central Leather Co.*,²⁰ the plaintiff sought to recover leather hides that were confiscated by soldiers of the victorious General Carranza during the Mexican Revolution.²¹ In declining to review the plaintiff's claims that General Carranza's forces violated the Hague Convention, the Court reasoned 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

14. See, e.g., *The Paquete Habana*, 175 U.S. 677, 713–14 (1900) (imposing damages for seizure of fishing vessels in violation of laws of nations during naval blockade of Havana Harbor); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 130 (1851) (involving suit filed by citizen against soldier for seizure of various goods during Mexican War); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that ship owner was entitled to damages for seizure of his vessel by naval officer).

15. 137 U.S. 202 (1890).

16. *Jones*, 137 U.S. at 203–04.

17. *Id.* at 209.

18. *Id.* at 212 (emphasis added).

19. See *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (holding that when executive branch has decided that government is foreign sovereign, it is not within province of Court to question).

20. 246 U.S. 297 (1918).

21. *Oetjen*, 246 U.S. at 299–301.

decision.”²² As such, the Court held that it would not examine the actions of foreign forces that the Executive recognized as a branch of the legitimate government of Mexico.²³

2. A Modern Restatement: *Baker v. Carr*

The modern political question doctrine was established in the landmark 1962 case of *Baker v. Carr*.²⁴ In *Baker*, Tennessee citizens alleged that the application of a 1901 state statute, which resulted in legislative districts based upon census data from 1901 despite significant population growth, denied them the equal protection of the laws as required by the Fourteenth Amendment.²⁵ Overruling the district court’s application of the political question doctrine to the plaintiffs’ claim, the Supreme Court held that the case was justiciable.²⁶

More importantly for the purposes of this Comment, the Court established the framework by which courts today examine cases potentially triggering political questions. In establishing this framework, the Court reviewed past political question cases “to expose the attributes . . . which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness.”²⁷ According to the Court, political question cases involve one or more of the following six factors or tests:

- [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- [2.] a lack of judicially discoverable and manageable standards for resolving it; or
- [3.] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- [4.] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- [5.] an unusual need for unquestioning adherence to a political decision already made; or
- [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁸

Only where one or more of the aforementioned factors applies may a court refuse to hear a case on political question grounds.²⁹ Moreover, although the *Baker* Court

22. *Id.* at 302; *see also* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“The President is the sole organ of the nation in its external relations” (internal quotation marks omitted) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshal on Mar. 7, 1800))).

23. *Oetjen*, 246 U.S. at 303.

24. 369 U.S. 186 (1962).

25. *Baker*, 369 U.S. at 187–88.

26. *Id.* at 237.

27. *Id.* at 210.

28. *Id.* at 217 (line breaks inserted for clarity).

did not expressly rank the factors (or tests) in order of importance, the Supreme Court recently noted that “[t]hese tests are probably listed in descending order of both importance and certainty.”³⁰

The *Baker* Court also specifically addressed the past and proper treatment of cases involving foreign relations.³¹ Although the Court in *Oetjen* held that “[t]he conduct . . . of . . . foreign relations . . . is not subject to judicial inquiry or decision,”³² the Court in *Baker* clarified, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”³³ It is thus necessary for a court to conduct a “discriminating inquiry into the precise facts and posture of the particular case, and [to recognize] the impossibility of resolution by any semantic cataloguing.”³⁴

B. *Scholarship Addressing the Political Question Doctrine*

The establishment of the *Baker* test and its ensuing application discussed below have drawn significant attention from academics, as the doctrine’s nebulous aspects have made it ripe for scholarly analysis. As noted by Martin H. Redish, “The doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity . . . but they have also differed significantly over the doctrine’s scope and rationale.”³⁵ In establishing the *Baker* factors, Justice Brennan combined three prominent considerations of his time for courts to refuse to hear political questions: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?”³⁶ These categories derive from the widely known

29. According to the Court, “[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.” *Id.* at 217.

30. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

31. *Baker*, 369 U.S. at 211.

32. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

33. *Baker*, 369 U.S. at 211. As such, the *Baker* Court was not claiming to alter the Court’s treatment of cases involving foreign relations. However, courts and scholars have noted that this case signaled a shift in the level of deference given to the political branches in cases involving foreign relations. *See, e.g.*, *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008) (noting that no longer are cases implicating foreign relations “categorically removed” from judicial review); *cf.* John M. Hillebrecht, Note, *Foreign Affairs Cases and Political Question Analysis: Chaser Shipping v. United States*, 649 *F. Supp.* 736 (*S.D.N.Y.* 1986), 23 *STAN. J. INT’L L.* 665, 668–70 (1987) (acknowledging that *Baker* Court’s holding changed discourse surrounding political question doctrine).

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

35. Martin H. Redish, *Judicial Review and the “Political Question,”* 79 *NW. U. L. REV.* 1031, 1031 (1985); *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 85 (6th ed. 2002) (“Even those who accept the existence of the [political question] doctrine recognize that there is no workable definition of characteristics that distinguish political questions from justiciable questions, and that the category of political questions is ‘more amenable to description by infinite itemization than by generalization.’” (citation omitted)).

36. *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring).

“Classical Theory,”³⁷ which stresses the importance of the separation of powers in political question jurisprudence, and the “Prudential Theory,”³⁸ which analyzes prudential reasons why certain suits should be nonjusticiable.

The Classical Theory was developed by Herbert Wechsler.³⁹ According to Wechsler, “the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”⁴⁰ Illustrative is Wechsler’s example of impeachment.⁴¹ Under the Classical Theory, it is clearly inappropriate for courts to review the legislature’s judgment of impeachment, because “article I, section 3 declares that the ‘sole Power to try’ is in the Senate.”⁴² One year later, the Court in *Baker* incorporated this reasoning into the first factor, “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁴³ The Classical Theory therefore remains relevant today, particularly in cases implicating foreign affairs.⁴⁴

The Prudential Theory is attributed to the work of Alexander Bickel.⁴⁵ Bickel rejected Classical arguments of a constitutionally mandated political question doctrine, pointing instead to prudential concerns.⁴⁶ According to Bickel, the political question doctrine derives from the Court’s lack of capacity resulting from:

- (a) the strangeness of the issue and its intractability to principled resolution;
- (b) the sheer momentousness of it, which tends to unbalance judicial judgment;
- (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
- (d) finally (“[i]n a mature democracy”), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.⁴⁷

37. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 538 (1966).

38. *Id.* at 548.

39. See generally HERBERT WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 3 (1961).

40. *Id.* at 13.

41. See generally *id.* at 12–14.

42. *Id.* at 12 (quoting U.S. CONST. art. I, § 3).

43. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The overlap between *Baker* factor one and Wechsler’s Classical Theory is widely accepted. See, e.g., Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 949 (2004) (noting similarity of *Baker* factor one and Wechsler’s notion of political question doctrine).

44. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 219 (1990) (noting Wechsler’s interpretation of political question doctrine best incorporates doctrine’s constitutional underpinnings).

45. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

46. See *id.* at 199–200 (rejecting Classical position and delineating other principles that constrain courts’ interpretive reach).

47. *Id.* at 184 (quoting *Greene v. McElroy*, 254 F.2d 944, 954 (D.C. Cir. 1958)).

Such prudential concerns overlap convincingly with *Baker* factors two, three, four, five, and six.⁴⁸ The Classical and Prudential Theories, therefore, continue to provide a convincing theoretical foundation for the political question doctrine.

Scholars have frequently questioned the use of constitutional and prudential concerns, applied independently⁴⁹ or collectively,⁵⁰ to support the application of the political question doctrine in the context of foreign affairs. For instance, Jide Nzelibe, in arguing for a hybrid approach combining Wechsler's Classical Theory and Bickel's Prudential Theory, argues that the "'textual commitment' prong" (or *Baker* factor one) cannot account for every application of the doctrine, especially in instances where "a 'political' function touches on questions that are essentially adjudicative in nature."⁵¹

Nzelibe also questions sole reliance upon *Baker* factor two. Pointing to the courts' creation of judicial standards to resolve domestic constitutional issues, Nzelibe argues that "the 'lack of judicially discoverable standards' rationale does not seem on its own to justify disparate judicial treatment of foreign and domestic disputes."⁵² That is, if the judiciary can create standards to address domestic constitutional disputes, it is unclear why courts are unwilling to do the same in cases involving foreign affairs.

Finally, Nzelibe again relies on the courts' willingness to adjudicate controversial domestic constitutional issues to question reliance on other prudential concerns that render a suit nonjusticiable. According to Nzelibe, "the Supreme Court's willingness to engage the most politically contentious issues," such as the 2000 presidential election dispute "demonstrate that the courts will not necessarily shy away from resolving legal disputes merely because they touch upon politically controversial issues."⁵³ Specifically applied to the foreign affairs context, Nzelibe's critique is strengthened by noting that the Supreme Court did not even examine the Guantanamo detainee cases under the political question doctrine.

One notable challenge to the Court's treatment of the political question doctrine was leveled by Louis Henkin. Henkin argued that "there may be no doctrine requiring abstention from judicial review of 'political questions.'"⁵⁴ In instances where the Supreme Court has cited the political question doctrine in suits implicating foreign affairs, the Court is not refusing to determine "whether

48. See *supra* text accompanying note 28 for a list of the *Baker* factors.

49. See, e.g., Nzelibe, *supra* note 43, at 950–51 (rejecting reliance upon either constitutional concerns or prudential factors independently).

50. See Redish, *supra* note 35, at 1033 (arguing political question doctrine should play no role in judicial review power).

51. Nzelibe, *supra* note 43, at 952, 961.

52. *Id.* at 964 (quoting *Baker*, 369 U.S. at 214). Applied to the foreign relations context, "[t]he sorts of issues posed by foreign relations law are not as a matter of legal interpretation inherently different from other questions of law." Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 677 (2002).

53. Nzelibe, *supra* note 43, at 965–66.

54. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 600 (1976).

the President ha[s] exceeded his constitutional authority.”⁵⁵ Instead, it is actually concluding that “the President’s decision was within his authority and therefore law for the courts.”⁵⁶ Under Henkin’s reasoning, it is misleading to argue that the political question doctrine is an exception to judicial review.⁵⁷ Rather, the Court is reviewing the Executive’s action in question and holding that it is within the Executive’s constitutional authority, validating the action in question.⁵⁸

One example within Henkin’s framework that is important for the purposes of this Comment is the conflation of nonjusticiability under the political question doctrine and “federal courts deny[ing] a remedy for want of equity.”⁵⁹ In the latter, courts “do not declare an issue nonjusticiable, whether on textual or prudential grounds; they make no extra-ordinary exception to judicial review. Rather they review, and they may even declare invalid, though they deny all or some equitable remedies.”⁶⁰ In such instances, the relief will be denied “on the ground that the remedy was inappropriate for an equity court.”⁶¹ Despite the critiques by Henkin, Nzelibe, and others, courts have continued to rely on the doctrine to render suits involving foreign relations or military affairs nonjusticiable.

C. *The Baker v. Carr Test Applied in the Foreign Relations Context*

Cases involving foreign relations, especially military affairs, have frequently required application of the political question doctrine as elaborated in *Baker*.⁶² Two categories of cases are particularly prominent.⁶³ The first category involves constitutional challenges to the political branches, acting independently⁶⁴ or in concert,⁶⁵ *deciding* to use military force. In such cases, plaintiffs request

55. *Id.* at 612.

56. *Id.*

57. *Id.* at 601.

58. *Id.*

59. Henkin, *supra* note 54, at 618.

60. *Id.* at 618.

61. *Id.* at 621 (discussing *Gilligan v. Morgan*, 413 U.S. 1 (1973)). See *infra* notes 84–90 and accompanying text for a general discussion of *Gilligan*.

62. While this Comment focuses on the use of the political question doctrine in the foreign relations context, the doctrine is sometimes triggered in the domestic context in addition to *Baker*. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 520–22 (1969) (electing not to apply political question doctrine to challenge of House of Representative’s decision to disqualify an elected member).

63. The specified categories do not encapsulate all instances in which the political question doctrine is triggered in the foreign affairs context. For instance, in *Goldwater v. Carter*, Justice Rehnquist, concurring in the outcome, asserted that a suit brought by members of Congress challenging the constitutionality of President Carter’s termination of a mutual defense treaty with Taiwan was nonjusticiable. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

64. This subcategory includes cases in which one political branch challenges the constitutionality of the acts of another. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987) (involving members of House of Representatives seeking declaratory judgment against President Reagan for allegedly failing to follow protocol of War Powers Resolution).

65. See, e.g., *Atlee v. Laird*, 347 F. Supp. 689, 691 (E.D. Pa. 1972) (challenging constitutionality of congressional expenditures to fund Vietnam War), *aff’d sub nom.* *Atlee v. Richardson*, 411 U.S. 911 (1973).

injunctions that, if successful, would alter foreign policy by halting the military activity in question. Such cases are universally considered nonjusticiable political questions. As the Supreme Court stated in *Johnson v. Eisentrager*,⁶⁶ “it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”⁶⁷

The second category of cases evaluates the *manner* in which military force was used whereby plaintiffs more frequently seek damages as opposed to an injunction. This line of cases can be further divided into cases against the federal government on the one hand and private parties, usually corporations, on the other. While both subcategories of cases are of particular importance for this Comment, the following section will begin with an examination of cases challenging the decision to use military force. They provide important insight into instances that trigger consideration of the political question doctrine as well as the *Baker* test’s application.

1. Cases Challenging the Decision to Use Military Force

Illustrative of suits challenging the decision to use military force are those disputing the constitutionality of the Vietnam War.⁶⁸ One notable example is *Atlee v. Laird*.⁶⁹ The plaintiffs in *Atlee* sought a permanent injunction on, among other things, congressional expenditures funding the war as Congress had not formally declared war.⁷⁰ The court held that the plaintiffs’ claim was a nonjusticiable political question because it required deciding whether the conflict constituted a “war,”⁷¹ whether Congress sufficiently authorized said war,⁷² and whether the President could keep forces in the region.⁷³ Echoing the second *Baker* factor, the court found that it could “conceive of no set of judicially manageable standards to apply to reach a factual determination” whether the country was at war.⁷⁴ Second, the court found that “the Constitution has given to Congress, and not the courts, the initial policy determinations whether to declare war formally.”⁷⁵ Third, the

66. 339 U.S. 763 (1950).

67. *Johnson*, 339 U.S. at 789.

68. *E.g.*, *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308–09 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973); *Sarnoff v. Connally*, 457 F.2d 809, 809–10 (9th Cir. 1972); *Orlando v. Laird*, 443 F.2d 1039, 1040–41 (2d Cir. 1971); *Simmons v. United States*, 406 F.2d 456, 460 (5th Cir. 1969); *Atlee*, 347 F. Supp. at 705–07; *see also* Henkin, *supra* note 54, at 623 n.74 (noting that “constitutionality of the war in Vietnam was challenged in more than 70 reported cases”).

69. 347 F. Supp. 689 (E.D. Pa. 1972), *aff’d sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

70. *Atlee*, 347 F. Supp. at 691.

71. *Id.* at 705.

72. *Id.* at 706.

73. *Id.*

74. *Id.* at 705.

75. *Atlee*, 347 F. Supp. at 706; *see also* *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971) (holding issue of whether congressionally chosen means to approve military operations in Vietnam were constitutional in absence of formal war declaration presented nonjusticiable political question).

court noted that, congruent with the first *Baker* factor, the Constitution bestows “broad power” on the Executive “to make the policy decisions underlying any inquiry into the propriety of maintaining forces in Vietnam.”⁷⁶

Courts have continued to hold that challenges to decisions by the Executive to use military force trigger nonjusticiable political questions,⁷⁷ including, most recently, constitutional challenges to the Executive’s decision to invade Iraq.⁷⁸ In *Doe I v. Bush*,⁷⁹ the court held that a suit seeking to “enjoin the President from launching a military invasion of Iraq” presented a nonjusticiable political question.⁸⁰ Similar to the cases challenging the constitutionality of the Vietnam War, the court held that “the courts have no power to second guess the wisdom or form of” congressional approval of “the President’s decision to initiate military action.”⁸¹ Taken together, it is clear that suits seeking injunctive relief against the political branches in deciding to use military force present nonjusticiable political questions.

2. Cases Involving Challenges to the Manner in Which Force Was Used

In cases where plaintiffs challenge the manner in which force was used, plaintiffs frequently seek damages as opposed to an injunction to recover for injuries they sustained.⁸² In such instances, courts are more willing to conduct a searching inquiry into the facts of each case and, at times, do not address or explicitly refuse to apply the political question doctrine to bar such suits.

76. *Atlee*, 347 F. Supp. at 707.

77. *See, e.g.*, *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (citing political question doctrine to dismiss suit by members of Congress against President Reagan challenging constitutionality of military activities in El Salvador); *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (dismissing under “prudential considerations” of political question doctrine claim by members of Congress that President violated War Powers Resolution following use of U.S. military in Persian Gulf).

78. *See, e.g.*, *Doe I v. Bush*, 257 F. Supp. 2d 436, 437 (D. Mass. 2003) (dismissing under political question doctrine suit by service members, parents of service members, and members of U.S. House of Representatives seeking injunction to prevent invasion of Iraq).

79. 257 F. Supp. 2d 436 (D. Mass. 2003).

80. *Doe I*, 257 F. Supp. 2d at 437.

81. *Id.* at 439.

82. *See, e.g.*, *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (reviewing suit for damages after U.S. military mistakenly fired live missile during NATO war game); *Koochi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992) (reviewing suit for damages against U.S. government and PMC following downing of civilian aircraft resulting in 290 deaths); *Tiffany v. United States*, 931 F.2d 271, 274–75 (4th Cir. 1991) (reviewing suit for damages after U.S. Air Force intercepted civilian plane resulting in deaths of seven civilians on board); *Peterson v. United States*, 673 F.2d 237, 238 (8th Cir. 1982) (reviewing suit for damages against U.S. government for conducting B-52 training mission designed to simulate combat over farm); *Rappenecker v. United States*, 509 F. Supp. 1024, 1025–26 (N.D. Cal. 1980) (hearing suit for damages against United States for failure to warn of risk of capture while transporting military supplies near disputed island chain). However, not all suits challenging the manner in which force is used are for damages. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973) (seeking injunction against governor of Ohio and Ohio National Guard following shooting deaths of protesting students at Kent State University).

Importantly, courts find such cases justiciable more frequently than suits challenging the decision to apply military force.⁸³

One important example where plaintiffs sought equitable relief in challenging the manner in which force was used was *Gilligan v. Morgan*.⁸⁴ *Gilligan* resulted from the deaths of Kent State University students at the hands of the Ohio National Guard during student protests of the Vietnam War.⁸⁵ The plaintiffs-students claimed that the National Guard “violated students’ rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification.”⁸⁶ In response, the students sought “an injunction to restrain leaders of the National Guard from future violation of the students’ constitutional rights,”⁸⁷ which, on appeal, included “supervisory relief” whereby “the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court.”⁸⁸ The Court held that the case presented a nonjusticiable political question.⁸⁹ According to the Court, the training of the National Guard is a “governmental action that was intended by the Constitution to be left to the political branches” of government, and that the “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.”⁹⁰

More representative of cases challenging the manner in which military force was used is *Peterson v. United States*.⁹¹ In *Peterson*, the Eighth Circuit did not even consider whether negligence claims against the United States following a B-52 training mission triggered a political question.⁹² During a training mission designed to “simulate wartime conditions,” in which “bombers were to simulate bomb drops at specified target sites,” one pilot’s mapping navigational radar equipment failed, causing him to fly off course.⁹³ The pilot was also flying below the acceptable altitude set by the United States Air Force based on North Dakota law and Federal Aviation Administration regulations.⁹⁴ When the pilot flew over

83. Compare *Peterson*, 673 F.2d at 242 (directing district court to find United States negligent in conducting military training mission without addressing political question doctrine), with *Doe I*, 257 F. Supp. 2d at 437 (applying political question doctrine to dismiss suit seeking to enjoin invasion of Iraq).

84. 413 U.S. 1 (1973).

85. *Gilligan*, 413 U.S. at 3.

86. *Id.*

87. *Id.*

88. *Id.* at 5–6.

89. *Id.* at 10.

90. *Gilligan*, 413 U.S. at 10.

91. 673 F.2d 237 (8th Cir. 1982).

92. See *Peterson*, 673 F.2d at 242 (ordering district court to “find the Government negligent and determine plaintiff’s damages” without examining political question doctrine).

93. *Id.* at 238–39.

94. *Id.* at 240–41.

the plaintiff's farm, the noise from the jet frightened the plaintiff's cows.⁹⁵ The plaintiff was injured by the startled cows, several of the cows died, and "he was eventually forced to sell his dairy herd."⁹⁶ The Eighth Circuit, in overruling the district court, held that the government acted negligently and remanded the case so that the district court could assess damages.⁹⁷

Courts also find justiciable similar suits arising outside the boundaries of the United States. In *Rappenecker v. United States*,⁹⁸ plaintiffs sought to recover damages for injuries allegedly incurred during the U.S. military's response to seizure of a privately owned U.S. vessel, the *Mayaguez*, by a Cambodian gunboat in the Gulf of Thailand.⁹⁹ The seizure occurred while the *Mayaguez* was transporting U.S. military cargo from Hong Kong to Thailand.¹⁰⁰ The *Mayaguez*'s route, which followed directions published by the U.S. government,¹⁰¹ brought it near a group of islands whose sovereignty was disputed by Cambodia, Thailand, and Vietnam.¹⁰²

The plaintiffs claimed that the United States breached its duty to warn them about the risk of being captured near the disputed island chain, because the government knew of the danger of seizure.¹⁰³ The court denied the government's motion for summary judgment on the claim without even conducting a political question doctrine analysis.¹⁰⁴

However, suits challenging the manner in which military force was used are clearly not immune from application of the political question doctrine. In *Rappenecker*, the plaintiffs also claimed the government was negligent in "undertaking and executing the [ensuing rescue] military operation," as ordered by the President.¹⁰⁵ The court dismissed the claim on political question grounds, holding that challenges to the manner in which military force is used trigger the same concerns as challenges to the Executive's initial policy decision to use military force.¹⁰⁶ According to the court, "the same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates."¹⁰⁷

95. *Id.* at 238.

96. *Id.*

97. *Peterson*, 673 F.2d at 242.

98. 509 F. Supp. 1024 (N.D. Cal. 1980).

99. *Rappenecker*, 509 F. Supp. at 1025-26.

100. *Id.* at 1026.

101. *Id.*

102. *Id.*

103. *Id.* at 1030.

104. *Rappenecker*, 509 F. Supp. at 1030; *see also* *Koohi v. United States*, 976 F.2d 1328, 1331-32 (9th Cir. 1992) (expressly rejecting application of political question doctrine to suit for damages against United States and PMC following downing of Iranian civilian aircraft). *See infra* notes 144-51 and accompanying text for a discussion of *Koohi*.

105. *Rappenecker*, 509 F. Supp. at 1025.

106. *Id.* at 1030. *But see* *Koohi*, 976 F.2d at 1331-32 (holding political question doctrine did not bar suit against U.S. military alleging negligence in downing Iranian passenger plane).

107. *Rappenecker*, 509 F. Supp. at 1030.

Also illustrative is *Tiffany v. United States*,¹⁰⁸ where the plaintiffs sought damages for the alleged negligence of the United States in intercepting a civilian plane in such a manner that it caused a midair collision, resulting in the death of seven civilians.¹⁰⁹ The Fourth Circuit held that the suit triggered a nonjusticiable political question.¹¹⁰ Applying the second *Baker* factor, the court held that “[j]udges have no ‘judicially discoverable and manageable standards for resolving’ whether necessities of national defense outweigh risks to civilian aircraft.”¹¹¹ The court also held that resolution in the case would necessarily involve a lack of respect for the political branches, thus fulfilling *Baker* factor four.¹¹²

D. The Increased Reliance on Private Military Contractors After Baker v. Carr

Private military contractors (“PMCs”) are commonly defined as “businesses that provide governments with professional services intricately linked to warfare.”¹¹³ Reliance on private groups during armed conflict is not a new development in the international system.¹¹⁴ “As early as the Revolutionary War, contract teamsters provided support to General George Washington’s army, feeding the cavalry horses, and hauling supplies.”¹¹⁵ During World War II, “[r]oughly 1,200 contractor employees were performing construction services on Wake Island when the Japanese attacked.”¹¹⁶ And PMCs assisted the United States Military in “operat[ing] electrical plants, perform[ing] aircraft maintenance, and support[ing] complex equipment” during the Vietnam War.¹¹⁷ Yet U.S. reliance on contractors in such instances was “primarily [for] supplies and transportation.”¹¹⁸

Since the 1990s, reductions in military personnel after the fall of the Soviet Union “mean that the requirement for [PMC] support has seen exponential growth,”¹¹⁹ especially during the wars in Afghanistan and particularly Iraq.¹²⁰ In

108. 931 F.2d 271 (4th Cir. 1991).

109. *Tiffany*, 931 F.2d at 272–75.

110. *Id.* at 278; see also *Aktepe v. United States*, 105 F.3d 1400, 1402–03 (11th Cir. 1997) (barring negligence claim under political question doctrine against United States for inadvertently firing live missile during NATO war game).

111. *Tiffany*, 931 F.2d at 279 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). However, the Eighth Circuit in *Peterson v. United States* found that it could apply negligence standards to determine if the United States was liable for its conduct during a B-52 training mission. 673 F.2d 237, 241–42 (1982).

112. *Tiffany*, 931 F.2d at 279.

113. P.W. Singer, *Outsourcing War*, FOREIGN AFF., Mar.–Apr. 2005, at 119, 120.

114. See SINGER, *supra* note 8, at 19 (noting prevalent use of contracted troops throughout history).

115. Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 373 (2004) (footnotes omitted).

116. *Id.* at 374.

117. *Id.*

118. *Id.* at 371.

119. SINGER, *supra* note 8, at 16.

120. *Id.*; see also Singer, *supra* note 113, at 122 (noting that PMCs have played an integral role in U.S. operations in Iraq).

Afghanistan, PMC employees “deployed with U.S. forces on the ground[,] . . . maintained combat equipment, provided logistical support, and routinely flew on joint surveillance and targeting aircraft.”¹²¹ PMCs continue to play a prominent role in Afghanistan, with one contractor providing protection for Afghan President Hamid Karzai.¹²²

In Iraq, the United States has relied upon three categories of contractors to support reconstruction efforts.¹²³ The first category includes “private security providers” which include U.S. or foreign staff who provide a range of services including “security for government employees, contractor employees, or others as they move through Iraq.”¹²⁴ The second category is constituted by “reconstruction contractors,” who provide, for example, construction infrastructure assistance.¹²⁵ The third category includes “[c]ontractors accompanying the force” which include contractors providing fuel-transportation services within military-operated convoys.¹²⁶

While exact figures are unknown, the Department of Defense estimates that security providers alone have 25,000 employees among at least sixty agencies.¹²⁷ Accounting for other types of contractors operating in Iraq, the Department of Defense estimates swell to over 180,000.¹²⁸ The costs have been significant. Between 2001 and 2004, the U.S. Army spent roughly \$15.4 billion on PMCs providing logistical support under the “Logistics Civil Augmentation Program” (“LOGCAP”).¹²⁹ Coordination between PMCs and the U.S. military was piecemeal but has increased over time. Prior to October 2004, coordination between the military and private security providers was “informal.”¹³⁰ In response, “the Project and Contracting Office opened the Reconstruction Operations Center to share intelligence and coordinate military contractor interactions.”¹³¹ The advent of the “Reconstruction Operations Center” resulted in increased intelligence sharing and greater coordination of operations between the military and private security contractors.¹³² Despite this increased level of coordination, “U.S. military forces in

121. SINGER, *supra* note 8, at 17.

122. *Id.*

123. See U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS, GAO-05-737, 8 (2005) (depicting three types of contractors in figure of “complex battle space” in Iraq).

124. *Id.* at 8–9.

125. *Id.* at 10.

126. *Id.* at 8.

127. *Id.*

128. SINGER, *supra* note 8, at 245.

129. U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: HIGH-LEVEL DOD ACTION NEEDED TO ADDRESS LONG-STANDING PROBLEMS WITH MANAGEMENT AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES, GAO-07-145, 1 (2006). See *infra* notes 176–78 and accompanying text for a discussion of LOGCAP contracts.

130. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 123, at 4.

131. *Id.*

132. *Id.*

Iraq have no command and control over [certain contractors, including] private security providers.”¹³³

E. The Political Question Doctrine Applied in Suits Against PMCs

As discussed in Part II.C.2, suits that challenge the manner in which military force was used are susceptible to application of the political question doctrine, but less so than constitutional claims challenging the Executive’s decision to use force.¹³⁴ Suits against PMCs are for damages and involve an additional complicating feature: the defendants are corporations—not the U.S. government. When faced with these factors, courts have come to varying and at times conflicting conclusions regarding the applicability of the political question doctrine. This section will examine prominent cases in which courts determined whether the political question doctrine applied to cases involving PMC activity prior to and during the invasions and occupations of Afghanistan and Iraq.

1. Cases Prior to the Invasion of Afghanistan and Iraq

One example in which a court examined the justiciability of a claim against a PMC arising during wartime was *Bentzlin v. Hughes Aircraft Co.*¹³⁵ In *Bentzlin*, survivors of six marines who were killed by friendly fire during Operation Desert Storm sued the manufacturer of the missile that killed the marines.¹³⁶ The plaintiffs claimed that the missile was defectively manufactured and negligently “tested, inspected, stored, transported, distributed, and controlled.”¹³⁷ The court held that the allegations were nonjusticiable under the political question doctrine.¹³⁸ Although the court did not explicitly apply the *Baker* factors, it reasoned that evaluating whether there was a manufacturing defect would require examining other factors that would trigger political questions.¹³⁹ For instance, the court found that the deaths occurred during wartime and noted that “[t]he conduct of such affairs are constitutionally committed to the Executive Branch under the President as Commander-in-Chief.”¹⁴⁰ The court also reasoned that adjudicating the plaintiffs’ claims would require examining military strategy—something courts rarely do.¹⁴¹ These two points, according to the court, satisfied factors one, four,

133. *Id.* at 20.

134. Compare *Haig v. Agee*, 453 U.S. 280, 292 (1981) (noting that “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention”), with *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (noting that just because actions are conducted during military conflict does not make them nonjusticiable under political question doctrine).

135. 833 F. Supp. 1486 (C.D. Cal. 1993).

136. *Bentzlin*, 833 F. Supp. at 1487.

137. *Id.* (internal quotation marks omitted) (quoting text of complaint).

138. *Id.* at 1497.

139. *Id.*

140. *Id.* Arguably, this is an application of the first *Baker* factor: “a textually demonstrable constitutional commitment of the issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

141. *Bentzlin*, 833 F. Supp. at 1497; see also *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (barring as nonjusticiable claim requiring court to examine U.S. Navy decision

five, and six of the *Baker* analysis.¹⁴² Moreover, the court determined that the policy decisions made by the political branches during wartime, which the court would be required to examine, implicated factors two and three.¹⁴³

*Koohi v. United States*¹⁴⁴ involved the downing of a civilian Iranian aircraft by the U.S. Navy during the Iran-Iraq War.¹⁴⁵ The Navy fired upon the aircraft in the apparent belief that it was an enemy fighter, resulting in 290 deaths.¹⁴⁶ In response, the families of the victims sued the U.S. government and the PMCs that manufactured the air defense system.¹⁴⁷ Significantly, the court denied the government and PMCs' assertion that the suit presented a nonjusticiable political question.¹⁴⁸ In upholding the suit against the government, the court noted that "[a] key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages" as opposed to an injunction.¹⁴⁹ According to the court, a damage award would not bring the judiciary into conflict with the executive branch, in part because "[d]amage actions are particularly nonintrusive."¹⁵⁰ The court ultimately barred the suit, however, under the Federal Tort Claims Act.¹⁵¹

2. Cases Involving PMCs Operating in Afghanistan and Iraq

The conflicts in Afghanistan and Iraq, coupled with the U.S. military's increased reliance on PMCs, have led to a significant increase in the number of cases involving service members and civilians, usually contractor employees, suing private companies operating on the battlefield.¹⁵² These cases are diverse,

making). According to the court in *Lessin v. Kellogg Brown & Root*, "where the military's strategy, decision-making, or orders are necessarily bound up with the claims asserted in a case, the political question doctrine is implicated, and the case is inappropriate for judicial inquiry." No. CIVA H-05-01853, 2006 WL 3940556, at *3 (S.D. Tex. June 12, 2006).

142. *Bentzlin*, 833 F. Supp. at 1497. See *supra* note 28 and accompanying text for the list of *Baker* factors.

143. *Id.* at 1497.

144. 976 F.2d 1328 (9th Cir. 1992).

145. *Koohi*, 976 F.2d at 1330.

146. *Id.*

147. *Id.*

148. *Id.* at 1332 n.3.

149. *Id.* at 1332; see also *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 430 (W.D. Pa. 2009) (relying on *Koohi*, noting damages action "weighs in favor of judicial resolution"); *Getz v. Boeing Co.*, No. CV 07-6396 CW, 2008 WL 2705099, at *5 (N.D. Cal. July 8, 2008) (relying on *Koohi*, noting relief sought is relevant to political question analysis).

150. *Koohi*, 976 F.2d at 1332.

151. *Id.* at 1336. See *infra* Part II.F for a discussion of the Federal Tort Claims Act as an obstacle to a judgment on the merits.

152. See, e.g., *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (deciding suit by employees of PMC against PMC); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1336 (11th Cir. 2007) (hearing claims of survivors of U.S. service members suing PMC); *Harris*, 618 F. Supp. 2d at 403 (hearing claims of survivors of U.S. service member against PMC); *Camichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1364 (N.D. Ga. 2008) (deciding suit filed by guardian of service member against PMC); *Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245, 1247-48 (M.D. Ala. 2006) (hearing claims of civilian contractor suing PMC for injuries sustained in convoy accident);

ranging from simple negligence claims by employees or service members against PMCs to claims by Iraqi nationals alleging torture,¹⁵³ with disparate results.¹⁵⁴

Generally, the greater the degree of control by the U.S. military, the more likely courts are to find that claims against the PMC present nonjusticiable political questions.¹⁵⁵ As a result, courts are less willing to shield PMCs from liability under the political question doctrine when the military exerts less control over PMC actions, as the actions in question are more clearly linked to decisions made by PMCs, not the U.S. military.

In *McMahon v. Presidential Airways, Inc.*,¹⁵⁶ the Eleventh Circuit held that the political question doctrine did not render a suit against a PMC providing transport services in Afghanistan nonjusticiable.¹⁵⁷ The suit arose after a plane operated by a PMC, Presidential Airways (“Presidential”), struck a mountain in Afghanistan, killing all on board, including three U.S. service members.¹⁵⁸ In response, survivors of the service members brought a wrongful death suit against Presidential,¹⁵⁹ alleging that it “negligently staffed, equipped, and otherwise

Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006) (deciding suit by survivors of U.S. service member against PMC); *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006) (hearing claims of U.S. service member suing PMC).

153. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *1 (E.D. Va. Mar. 18, 2009) (involving claims of torture by Abu Ghraib detainees against PMC interrogators); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56 (D.D.C. 2006) (hearing suit of Abu Ghraib detainees against PMC interrogators and interpreters); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (hearing suit by torture victims against PMCs).

154. Compare *Lane*, 529 F.3d at 554–55, 568 (analyzing LOGCAP contract and holding that claim against PMC for fraud and intentional infliction of emotional distress resulting from PMC’s false recruiting materials did not present nonjusticiable political question), with *Whitaker*, 444 F. Supp. 2d at 1281 (analyzing same contract and holding that claim against PMC for negligent hiring, training, and supervising presented nonjusticiable political question based on high degree of military control over convoys). Scholars have recently addressed this tension. Ben Davidson examines the relationship between the political question doctrine and the government contractor defense, discussed in suits against PMCs. Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 822–34 (2008). More directly on point, Joseph Perez-Montes has argued that the tension among PMC cases can be resolved through “strict application” of the *McMahon* test. Joseph H.L. Perez-Montes, Comment, *Justiciability in Modern War Zones: Is the Political Question Doctrine a Viable Bar to Tort Claims Against Private Military Contractors?*, 83 TUL. L. REV. 219, 246 (2008). See *infra* Part II.F for a discussion of the *McMahon* test. Although the *McMahon* test addresses the presence of private parties in the litigation as opposed to the U.S. government, it does little to account for the remedy sought. Consequently, additional examination of suits against PMCs will demonstrate the impact of damages on the rationales for the political question doctrine.

155. Compare *Potts*, 465 F. Supp. 2d at 1252 (rejecting application of political question doctrine in suit against PMC where suit “require[d] the court to assess [the PMC’s] own internal polices and does not concern a direct relationship between [the PMC] and the United States military”), with *Whitaker*, 444 F. Supp. 2d at 1281 (holding PMC was “subject to military’s orders, regulations, and convoy plan,” rendering suit against PMC arising out of convoy accident nonjusticiable).

156. 502 F.3d 1331 (11th Cir. 2007).

157. *McMahon*, 502 F.3d at 1365.

158. *Id.* at 1337.

159. *Id.*

operated the flight in question.”¹⁶⁰ In defense, Presidential claimed that the issue triggered a nonjusticiable, political question.¹⁶¹

Before applying the first *Baker* factor, the court noted that the political question analysis is altered “because it is against a private contractor,” not “part of a coordinate branch of . . . government.”¹⁶² Thus, the court required Presidential to fulfill a “double burden” to trigger the first *Baker* factor.¹⁶³ “First, [Presidential] must demonstrate that the claims against it will require reexamination of a decision *by the military*.”¹⁶⁴ Then, it must demonstrate that the military decision at issue is of the kind insulated from judicial review.¹⁶⁵

With respect to the first prong of the double burden analysis, the court held that Presidential failed to demonstrate that the court would be required to examine a military decision.¹⁶⁶ Pointing to Presidential’s service contract with the Department of Defense (“DOD”), the court noted that Presidential was charged with “general responsibility for making the decisions regarding the flights it provided to DOD,”¹⁶⁷ the operation of which plaintiffs were challenging.¹⁶⁸

Applying the second *Baker* factor, the court held that the case could be resolved with judicially discoverable and manageable standards.¹⁶⁹ According to the court, although “flying over Afghanistan during wartime is different from flying over Kansas on a sunny day,”¹⁷⁰ that did “not render the suit inherently non-justiciable.”¹⁷¹ Instead, the court was willing to apply modified negligence standards: “While the court may have to apply a standard of care to a flight conducted in a less than hospitable environment, that standard is not inherently unmanageable.”¹⁷² Such a standard was manageable under the *Baker* framework

160. *Id.* at 1360.

161. *Id.* at 1337.

162. *McMahon*, 502 F.3d at 1359. *But see* *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (holding “identity of the *litigant* is immaterial” to political question analysis).

163. *McMahon*, 502 F.3d at 1359.

164. *Id.* at 1359.

165. *Id.* at 1359–60.

166. *Id.* at 1360.

167. *Id.* *But see* *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279 (M.D. Ga. 2006) (holding under LOGCAP contract Army regulates “all aspects of control, organization, and planning” of convoys, thus any challenge to operation of convoys invokes political question doctrine).

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

169. *Id.* at 1363.

170. *Id.* at 1364.

171. *Id.*

172. *Id.*; *see also* *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 428 (W.D. Pa. 2009) (recognizing ability of court to apply modified standard of care for events occurring at military base in Iraq); *Potts v. Dyncorp Int’l LLC*, 465 F. Supp. 2d 1245, 1253 (M.D. Ala. 2006) (holding suits justiciable, in part, because “the court is able to assess whether the private contractor was negligent or wanton, even when performing services in a war zone”); *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at *3 (S.D. Tex. June 12, 2006) (holding accident in PMC convoy escorted by military in Iraq was “essentially, a traffic accident”). *But cf. Whitaker*, 444 F. Supp. 2d at 1282 (rejecting plaintiff’s claim that accident was “garden variety road wreck,” in large part because it occurred in theater of war).

because “[t]he flexible standards of negligence law are well-equipped to handle varying fact situations.”¹⁷³ As a result, the court could quickly dispose of the prudential concerns in *Baker* factors three through six¹⁷⁴ as “the case appear[ed] to be an ordinary tort suit.”¹⁷⁵

PMCs operating in Afghanistan and Iraq under contracts executed pursuant to the “Logistics Civil Augmentation Program” (“LOGCAP”) are subject to a higher degree of control by the military than the contracts at issue in *McMahon* and *Lessin*. For instance, “the military is responsible for providing adequate force protection and a safe workplace for contractors” employed pursuant to LOGCAP.¹⁷⁶ In convoy operations, for example, where contractors provide transportation services with the protection of the army, “convoy plans are made by military personnel” including “placement of vehicles in the convoy . . . [and] rate of speed of the convoy.”¹⁷⁷ Nonetheless, “Army Regulations provide that contractors employed pursuant to LOGCAP are not under the direct supervision of the military.”¹⁷⁸

*Lane v. Halliburton*¹⁷⁹ involved fuel convoys that came under attack in two successive days, resulting in deaths and injuries to multiple drivers employed by Kellogg Brown & Root, Inc. (“KBR”).¹⁸⁰ The plaintiffs claimed that in its recruitment materials, KBR misrepresented the degree of danger employees would face and that it overstated its ability to halt work if security conditions deteriorated.¹⁸¹ In its defense, KBR argued that “the relevant LOGCAP contracts and implementing Task Orders place the responsibility for force protection squarely on the Army.”¹⁸² Reversing the Southern District of Texas in *Fisher v. Halliburton, Inc.*,¹⁸³ the Fifth Circuit held that the political question doctrine did not apply prior to discovery because “it may be possible to resolve the claims without needing to make a constitutionally impermissible review of wartime decision-making.”¹⁸⁴

173. *McMahon*, 502 F.3d at 1364.

174. *Baker* factors three through six are: “the impossibility of deciding without an initial policy determination”; “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; “an unusual need for unquestioning adherence to a political decision already made”; “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

175. *McMahon*, 502 F.3d at 1364–65.

176. *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008).

177. *Whitaker*, 444 F. Supp. 2d at 1279.

178. *Lane*, 529 F.3d at 554; *see also Whitaker*, 444 F. Supp. 2d at 1279 (noting military does not directly supervise PMC employees).

179. 529 F.3d 548 (5th Cir. 2008).

180. *Lane*, 529 F.3d at 554–55. *Lane* was the consolidation of three cases: *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006); and *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2796249 (S.D. Tex. Sept. 26, 2006). *Lane*, 529 F.3d at 554, 155 nn.1–2.

181. *Lane*, 529 F.3d at 554–55.

182. *Id.* at 561.

183. 454 F. Supp. 2d 637 (S.D. Tex. 2006).

184. *Lane*, 529 F.3d at 568.

The court began by examining the LOGCAP contract, noting that contractors operating abroad pursuant to such authority are not actually under the “direct supervision of the military,” but the military is responsible for “security-related intelligence gathering and force protection for KBR convoys in Iraq.”¹⁸⁵ Following the Eleventh Circuit in *McMahon v. Presidential Airways, Inc.*,¹⁸⁶ the court stated that because KBR is not a political branch of government, it has a “double burden” to successfully invoke the first *Baker* factor.¹⁸⁷ First, KBR must show that the court will be forced to address a decision by the military—as opposed to merely KBR.¹⁸⁸ Second, even if there is a military decision at issue, KBR must then demonstrate that the military decision is nonjusticiable.¹⁸⁹ In applying the first step of the “double burden,” the court determined that the case did not require an examination of a military decision and noted that with such “ordinary tort suit[s]” the calculation weighs in favor of justiciability.¹⁹⁰

Nor did the court find that the second *Baker* factor applied in favor of KBR, because there was a judicially discoverable and manageable standard.¹⁹¹ For the second factor to apply and render a suit nonjusticiable, courts must be unable to apply a legal standard or rule.¹⁹² In applying this requirement, the court found that the army’s role may not be implicated because KBR’s alleged misrepresentation would have been a cause in fact of the plaintiffs’ injuries.¹⁹³ This is significant because it would avoid examining a “‘prudent force protection’ standard” for the army by shifting the focus to KBR’s knowledge of the security situation.¹⁹⁴ Accordingly, the court held that with such an “ordinary tort suit”¹⁹⁵ the common law of torts provides the requisite judicial standards to apply to the case.¹⁹⁶

185. *Id.* at 554.

186. 502 F.3d 1331 (11th Cir. 2007).

187. *Lane*, 529 F.3d at 560 (internal quotation marks omitted) (quoting *McMahon*, 502 F.3d at 1359).

188. *Id.*; see also *Potts v. Dyncorp Int’l LLC*, 465 F. Supp. 2d 1245, 1252 (M.D. Ala. 2006) (holding *Baker* factor one did not render suit nonjusticiable when court was required to examine PMC’s policies and employee’s performance, instead of military decision). The court in *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556 (S.D. Tex. June 12, 2006), arguably extended this reasoning. In *Lessin*, a U.S. service member was injured while attempting to aid a vehicle owned, maintained, and operated by Kellogg Brown & Root. *Id.* at *1. The court held that it would not be required to question a military decision even though the military decided to provide an escort for the truck convoy. *Id.* at *3.

189. *Lane*, 529 F.3d at 560.

190. *Id.* (internal quotation marks omitted) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

191. *Id.* at 560–63.

192. *Id.* at 562–63.

193. *Id.* at 567.

194. *Lane*, 529 F.3d at 563 (citing *Tiffany v. United States*, 931 F.2d 271, 278–79 (4th Cir. 1991)); see also *id.* at 567 (noting that case involved how KBR used information rather than how well military gathered information or made strategic decisions).

195. *Id.* at 560 (internal quotation marks omitted) (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007)).

196. *Id.* at 563.

Applying the third *Baker* factor, the court found that no nonjudicial policy determination was required because it appeared that no military decision would be questioned.¹⁹⁷ If successful, the plaintiffs' claimed misrepresentation would have been committed in the United States, "with damages arising in a war zone."¹⁹⁸ It is unlikely that the parties would ask the court to evaluate the efficacy of the Executive's policy of utilizing PMCs.¹⁹⁹ In consideration of all the *Baker* factors, the court found that "the application of traditional tort standards may permit the district court to navigate through this politically significant *case* without confronting a political *question*."²⁰⁰

Contrary to the court in *Lane*, the court in *Whitaker v. Kellogg Brown & Root, Inc.*,²⁰¹ examining the degree of control exercised by the army over KBR pursuant to the LOGCAP contract, held that the claims against KBR were nonjusticiable under the political question doctrine.²⁰² *Whitaker* concerned the death of a U.S. soldier, Private Whitaker, who was killed in an automobile accident in Iraq while escorting a military convoy operated by KBR.²⁰³ According to the complaint, a KBR-employed driver in the convoy drove through a guardrail on a bridge and plunged into the Tigris River.²⁰⁴ Whitaker, who was driving the following vehicle, stopped on the bridge.²⁰⁵ However, the vehicle behind his, operated by another KBR employee, struck Whitaker's vehicle, pushing it near the edge of the bridge where the previous vehicle had destroyed the guardrail.²⁰⁶ Whitaker attempted to escape from the vehicle but fell off the bridge and into the river, where he drowned.²⁰⁷ Whitaker's parents sought to "hold KBR liable under the doctrine of *respondeat superior* for the negligence of its drivers" as well as for negligent hiring, training, and supervising.²⁰⁸ In defense, KBR invoked the political question doctrine, arguing that "the case turn[ed] on strategic and tactical military decisions made in a combat zone."²⁰⁹ According to KBR, the U.S. Army controlled "all aspects of control, organization, and planning of Army

197. *Id.* at 563.

198. *Id.* at 563 n.6.

199. *Id.* at 563; *see also* *Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245, 1253–54 (M.D. Ala. 2006) (rejecting PMC's argument that hearing case would require court to question Executive's "decision to hire private contractors" as hearing case would not involve review of any "initial" policy decision, as explicitly required in third *Baker* factor).

200. *Lane*, 529 F.3d at 563. The court did not specifically address the fourth, fifth, or sixth *Baker* factors. In *Potts*, the court flatly rejected the argument that determining whether a PMC acted negligently or wantonly would "evidence a lack of due respect" for the political branches. *Potts v. Dyncorp Int'l LLC*, 465 F. Supp. 2d 1245, 1254 (M.D. Ala. 2006).

201. 444 F. Supp. 2d 1277 (M.D. Ga. 2006).

202. *Whitaker*, 444 F. Supp. 2d at 1279–81.

203. *Id.* at 1278.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Whitaker*, 444 F. Supp. 2d at 1278.

208. *Id.*

209. *Id.*

convoy operations.”²¹⁰ Under this mandate, the army regulated “placement of vehicles in the convoy, distance between vehicles in the convoy, rate of speed of the convoy, and convoy escort and security.”²¹¹

In applying the first *Baker* factor, the court found that “[t]here is a textually demonstrable constitutional commitment of oversight and control of military force to the legislative and executive branches, and those political branches receive deference in the area of military affairs.”²¹² Although the court acknowledged that according to LOGCAP contracts, “[c]ontract employees are not under the direct supervision of the military,” the court reasoned that the army’s oversight and control is not diminished when private contractors are participants in the convoy.²¹³ Importantly—and without reference to precedential support—the court reasoned that the level of deference given to the political branches is not lessened where the military relies on PMCs to achieve military objectives.²¹⁴

Next, the court applied the second *Baker* factor, finding that “there [were] no judicially discoverable and manageable standards for resolving the questions.”²¹⁵ The court rejected the plaintiff’s assertion that the accident was a “garden variety road wreck,” because the U.S. Army oversaw the convoy, which operated in the theater of war.²¹⁶ Consequently, the question was not “what a reasonable driver would do,” but a modified issue of “what a reasonable driver in a combat zone, subject to military regulations and orders, would do.”²¹⁷ As a result, the court held

210. *Id.* at 1279.

211. *Id.*

212. *Whitaker*, 444 F. Supp. 2d at 1281 (citing *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (noting high level of deference due political branches in handling of military affairs)).

213. *Id.* at 1279, 1281–82. Compare *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1368 (N.D. Ga. 2008) (applying *McMahon* step one, holding army controlled “every aspect of the organization, planning and execution of the convoy in question”), with *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at *3 (S.D. Tex. June 12, 2006) (holding *Baker* factor one not triggered in adjudicating accident during convoy).

214. *Whitaker*, 444 F. Supp. 2d at 1281. But see *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007) (finding nongovernment defendants seeking to invoke political question doctrine have “double burden” requiring defendant to show court will be forced to address military decision and military decision is nonjusticiable). Other courts have applied the *McMahon* double-burden analysis to suits against PMCs. See, e.g., *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008) (finding suit against private military contractor justiciable under double-burden framework); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 423 (W.D. Pa. 2009) (using double-burden analysis to find suit against PMC justiciable); *Carmichael*, 564 F. Supp. 2d at 1370–71 (applying *McMahon* double-burden framework to suit against PMC, but finding case involved nonjusticiable military decision).

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

216. *Id.* (internal quotation marks omitted). But see *McMahon*, 502 F.3d at 1364 (finding negligence standards could be applied to plane crash where plane was operated by private military contractor transporting troops in Afghanistan); *Lessin*, 2006 WL 3940556, at *3 (finding negligence standards could be applied to accident involving soldier’s attempts to assist PMC convoy vehicle that resulted in injuries to soldier).

217. *Whitaker*, 444 F. Supp. 2d at 1282; see also *Carmichael*, 564 F. Supp. 2d at 1372 (finding second *Baker* factor rendered suit nonjusticiable because court would have answered “what a reasonable driver subject to military control over his exact speed and path would have done”). But see *McMahon*,

that the political question doctrine rendered the case nonjusticiable because the suit “necessarily implicate[d] the wisdom of the military’s strategic and tactical decisions, a classic political question over which this Court has no jurisdiction.”²¹⁸

However, suits against PMCs are not limited to claims brought by service members or former PMC employees. Several suits have been filed by Iraqi nationals following the Abu Ghraib detainee abuses.²¹⁹ In *Ibrahim v. Titan Corp.*,²²⁰ seven Iraqi nationals sued two PMCs, Titan Corporation and CACI, under the Alien Tort Statute (ATS) and common law tort claiming that they were tortured by contractors while in U.S. custody.²²¹ Titan and CACI were at Abu Ghraib, working as interpreters and interrogators, respectively.²²² The court denied the contractors’ motion to dismiss on two grounds.²²³ First, rejecting concerns of a violation of the separation of powers, the court held that an action for damages against a private contractor “does not involve the courts in ‘overseeing the conduct of foreign policy or the use and disposition of military power.’”²²⁴ Second, touching upon prudential concerns, the court held that the suit against the PMCs was “for actions of a type that both violate clear United States policy and have led to recent high profile court martial proceedings against United States soldiers.”²²⁵

F. Other Potential Obstacles to Judgment on the Merits

It should be noted that even if courts reject a defendant’s challenge on political question grounds, plaintiffs suing PMCs may have additional obstacles to clear before a court will reach the merits of the claims. The “government

502 F.3d at 1364 (selecting standard of what reasonable pilot would have done given “less than hospitable environment” rather than pilot flying in optimal conditions).

218. *Whitaker*, 444 F. Supp. 2d at 1282; *see also Carmichael*, 564 F. Supp. 2d at 1372 (holding political question doctrine applied where service member’s guardian claimed contractor was liable for service member’s injuries suffered from auto accident caused by contractor while escorted by service member); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 639, 644 (S.D. Tex. 2006) (holding political question doctrine rendered nonjusticiable claim by employees of contractor that convoy was dispatched as decoy into area known to be under attack to ensure safety of second convoy), *rev’d sub nom. Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

219. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *1 (E.D. Va. Mar. 18, 2009) (involving claims of torture by Abu Ghraib detainees against PMC interrogators); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56 (D.D.C. 2006) (hearing suit of Abu Ghraib detainees against PMC interrogators and interpreters); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (hearing suit by torture victims against PMCs).

220. 391 F. Supp. 2d 10 (D.D.C. 2005).

221. *Ibrahim*, 391 F. Supp. 2d at 12–13.

222. *Id.* at 12.

223. *Id.* at 15–16.

224. *Id.* at 15 (quoting *Luftig v. McNamara*, 373 F.2d 664, 666 (D.C. Cir. 1967)).

225. *Id.* at 16 (citation omitted). *See infra* note 235 for a discussion of *Ibrahim* and how the court subsequently dismissed the suit against Titan in its interpreter function under the combatant activities exception but not as to CACI acting as interrogators.

contractor defense” and the *Feres* Doctrine²²⁶ have been applied to bar suits against government contractors. However, several courts have explicitly refused to extend these immunities to actors within the scope of this Comment: PMC service providers as opposed to products manufacturers. In instances where courts have extended these defenses to PMC service providers, the logic supporting the extension will almost certainly limit its application to suits brought by the targets of military action, as opposed to those brought by U.S. service members and former PMC employees. Even where the courts have extended these defenses, the claims have had to survive a political question challenge. As such, the political question doctrine remains the most significant hurdle to a judgment on the merits in PMC service provider cases.

The “government contractor defense”²²⁷ bars product liability claims against PMCs.²²⁸ This affirmative defense derives from the “discretionary function exception”²²⁹ of the Federal Tort Claims Act (“FTCA”),²³⁰ and has been extended in some jurisdictions to include combatant activities²³¹ under the “combatant activities exception.”²³² This defense remains a formidable hurdle to a judgment on the merits for claims against PMCs acting as suppliers as opposed to service providers, especially where the products at issue were designed pursuant to military specifications.²³³ While some jurisdictions have explicitly limited this defense to products manufacturers,²³⁴ courts examining cases brought by former Abu Ghraib detainees have applied the combatant activities exception to preempt some claims against PMC service providers.²³⁵ Courts have applied this extension,

226. See *infra* notes 238–40 and accompanying text for a discussion of *Feres v. United States*, 340 U.S. 135 (1950) and the *Feres* Doctrine.

227. *Ibrahim*, 391 F. Supp. 2d at 16.

228. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511–12 (1988) (citing discretionary function exception as guiding establishment of judge-made rule to bar products liability case where product at issue conformed to precise specifications provided by military).

229. See 28 U.S.C. § 2680(a) (2006) (immunizing government from “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused”).

230. *Id.* §§ 2671–2680.

231. The Ninth Circuit in *Koohi v. United States* extended the defense to combatant activities to cover PMC manufacturers. 976 F.2d 1328, 1336–37 (9th Cir. 1992).

232. See 28 U.S.C. § 2680(j) (providing exception for waiver of immunity for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war”).

233. See *Koohi*, 976 F.2d at 1336–37 (applying combatant activities exception to bar claim against manufacturer of missile system); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1488–90 (C.D. Cal. 1993) (barring suit against manufacturer under combatant activities exception).

234. See *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at *5 (S.D. Tex. June 12, 2006) (limiting combatant activities exception to products manufacturers and denying KBR’s motion to dismiss under combatant activities exception); *Fisher v. Halliburton*, 390 F. Supp. 2d 610, 616 (S.D. Tex. 2005) (refusing to extend combatant activities exception to manufacturers).

235. In *Ibrahim v. Titan Corp.*, the court noted that there was “no controlling authority applying the combatant activities exception to the tortious acts or omissions of civilian contractors in the course of rendering services during ‘wartime encounters,’” yet applied the government contractor defense to Titan in

noting “that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.”²³⁶ As such, the logic supporting extension of the combatant activities exception to PMC service providers does not apply where the suit is brought by a service member or employee of the PMC as they are not the targets of “authorized military action.” Consequently, numerous jurisdictions have rejected the defense in the PMC-service-provider context where the suits were brought by employees or U.S. service members.²³⁷

A second potential hurdle for plaintiffs is the *Feres* Doctrine, which is a common law rule providing immunity beyond the language of the FTCA. In *Feres v. United States*,²³⁸ the Supreme Court held that the government was not liable under the FTCA—despite the absence of an applicable waiver exception—“for injuries to servicemen where the injuries [arose] out of or [were] in the course of activity incident to service.”²³⁹ The *Feres* Doctrine could bar suits against PMCs if it is extended to apply to private actors under “derivative sovereign immunity.”²⁴⁰

The Eleventh Circuit directly addressed this issue in *McMahon v. Presidential Airways, Inc.*²⁴¹ In *McMahon*, the Eleventh Circuit rejected the PMC’s argument that *Feres* immunity applies to private contractors through derivative sovereign immunity.²⁴² The court reasoned that extension of *Feres* immunity to suits against PMCs would be inappropriate for two primary

its interpreter function but not to CACI acting as interrogator as questions of fact remained. 556 F. Supp. 2d 1, 3, 10 (D.D.C. 2007); see also *Al Shimari v. CACI Premier Tech., Inc.*, No: 1:08cv827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *49–50 (E.D. Va. Mar. 18, 2009) (ordering additional discovery to determine if CACI’s interrogations at Abu Ghraib constitute “combatant activities”).

236. *Ibrahim*, 556 F. Supp. 2d at 3 (quoting *Koochi*, 976 F.2d at 1337).

237. For a rejection of the application of the combatant activities exception to PMCs providing services, see *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 432–34 (W.D. Pa. 2009); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373, 1377–81 (N.D. Ga. 2006); and *Lessin v. Kellogg Brown & Root*, No. CIV A H-05-01853, 2006 WL 3940556, at *4–5 (S.D. Tex. June 12, 2006).

238. 340 U.S. 135 (1950).

239. *Feres*, 340 U.S. at 146. As a result of the *Feres* Doctrine:

When a soldier incurs injuries incident to service, the United States is deemed not to have waived its sovereign immunity from suit. As a result, the soldier may not recover in a wide variety of tort suits against *the government*, ranging from suits based on combat activities, to suits based on training activities, to suits based on medical malpractice in a military hospital, to suits based on slips and falls attributable to the government’s negligence on military bases in the United States during peacetime.

McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1343 (11th Cir. 2007) (emphasis added).

240. See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940) (applying what was later termed derivative sovereign immunity).

241. 502 F.3d 1331 (11th Cir. 2007). See *supra* notes 156–75 and accompanying text for a discussion of *McMahon* regarding application of the political question doctrine to PMCs.

242. *McMahon*, 502 F.3d at 1354; see also *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *82 (E.D. Va. Mar. 18, 2009) (denying CACI’s motion to dismiss under derivative sovereign immunity in suit alleging CACI interrogators tortured plaintiffs at Abu Ghraib).

reasons.²⁴³ First, it would “sweep[] far too broadly,” protecting contractors in all instances, including those where no military judgments are at issue.²⁴⁴ Second, extending *Feres* would be inequitable because it would only bar suits initiated by service members, not civilians.²⁴⁵ As such, the *Feres* Doctrine does not present an outright bar to cases against PMCs.

Taken together, the government-contractor defense and *Feres* Doctrine may bar product liability cases against PMCs, and the defenses are not categorically removed from cases involving PMC service providers, especially the combatant activities exception in suits brought by the targets of “authorized military action,” such as former detainees of Abu Ghraib. However, several jurisdictions have refused to extend these immunities to suits against PMC service providers. The political question doctrine thus remains the most significant barrier to suits against PMC service providers operating in Iraq and Afghanistan.

III. DISCUSSION

This Discussion of the courts’ application of the political question doctrine to render suits against private military contractor (“PMC”) service providers is placed within the context of the three categories²⁴⁶ of factors presented in *Baker v. Carr*:²⁴⁷ the separation of powers,²⁴⁸ the applicability of judicial standards,²⁴⁹ and prudential concerns triggered in litigating cases touching upon military affairs.²⁵⁰ These categories overlap with three characteristics of suits against PMCs that weigh in favor of justiciability. First, the suits are against corporations, not the U.S. government. Second, the suits are for damages as opposed to injunctive relief.²⁵¹ Finally, the suits are common law tort claims instead of constitutional claims.

Section A maintains that plaintiffs seeking damages against private parties operating in a war zone do not challenge the legitimacy of any executive decision nor do they require courts to exert direct control over military planning, and therefore do not violate the separation of powers. Section B argues that the common law of tort provides courts with the flexibility to apply modified standards to account for the dangerous situations in which PMCs operate. Section C concludes the Discussion, contending that prudential concerns are greatly alleviated or even removed when plaintiffs are seeking damages as opposed to injunctive relief. Taken

243. *McMahon*, 502 F.3d at 1354.

244. *Id.* at 1351.

245. *Id.* at 1354.

246. See *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (condensing six *Baker* factors into three).

247. 369 U.S. 186 (1962).

248. See *infra* Part III.A for a discussion of separation of powers concerns.

249. See *infra* Part III.B for a discussion of common law tort standards.

250. See *infra* Part III.C for a discussion of prudential concerns and damages.

251. See Hillebrecht, *supra* note 33, at 667 (asserting political question doctrine should rarely apply to suits where plaintiffs seek damages against U.S. government in military operations).

together, this Discussion asserts that the political question doctrine should rarely, if ever, apply to render suits for damages against PMC service providers nonjusticiable.

A. Executive's Commander-in-Chief Function and Damages Claims Against PMCs

Plaintiffs seeking damages for the actions of PMCs operating in Afghanistan and Iraq are not challenging the legitimacy of any executive action nor the decision to utilize the services of PMCs to further strategic goals. Instead, plaintiffs are challenging “actions taken and omissions made only by”²⁵² PMCs. Even in instances where the U.S. military exerts a high degree of control over PMC activity, actions for damages are unlikely to pull the judiciary into the domain of the political branches, specifically, the Executive's Commander-in-Chief function. Consequently, courts should rarely, if ever, apply the first *Baker* factor to render suits for damages against PMCs nonjusticiable, because such suits do not violate the separation of powers, and thus do not run afoul of *Baker* factor one.²⁵³

Suits challenging the decision to apply military force, such as challenges to the constitutionality of the Vietnam War, are nonjusticiable under the political question doctrine.²⁵⁴ However, the first *Baker* factor does not completely insulate military judgments from judicial review.²⁵⁵ As discussed in Part II.C.2, suits challenging the manner in which force is used are subject to a more searching factual inquiry and less susceptible to political question doctrine challenges.²⁵⁶ Importantly, plaintiffs in such suits, as with suits against PMC service providers, seek damages based on common law and statutory tort claims as opposed to some form of equitable relief.²⁵⁷ Therefore, separation of powers concerns are “difficult to justify” as “these questions come up in the context of controversies over which a court has proper jurisdiction, such as tort, contract, or property disputes.”²⁵⁸ Nonetheless, in *Whitaker v. Kellogg Brown & Root, Inc.*²⁵⁹ and *Carmichael v. Kellogg, Brown & Root Servs., Inc.*,²⁶⁰ the courts applied the first *Baker* factor,

252. *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008).

253. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing first factor as “a textually demonstrable constitutional commitment of the issue to a coordinate political department”).

254. *See supra* Part II.C.1 for a discussion of challenges to the decision to use military force and application of the political question doctrine.

255. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358 (11th Cir. 2007) (reviewing suits challenging manner in which military force was used and noting “it is clear that not even military judgments are completely immune from judicial review”).

256. *See, e.g., Peterson v. United States*, 673 F.2d 237, 238 (8th Cir. 1982) (finding claims resulting from B-52 plane on training mission flying at low altitude justiciable).

257. *See supra* Part II.C.2 for a discussion of suits seeking damages in challenging the manner in which force was used.

258. Nzelibe, *supra* note 43, at 962.

259. 444 F. Supp. 2d 1277 (M.D. Ga. 2006). *See supra* notes 201–18 and accompanying text for a discussion of *Whitaker*.

260. 564 F. Supp. 2d 1363 (N.D. Ga. 2008).

finding the suits nonjusticiable by highlighting the degree of control exercised by the U.S. Army over the contractor at issue.²⁶¹

Contracts between PMCs and the U.S. government are diverse, and thus deserve close inspection by the courts. Many PMCs operate in Afghanistan and Iraq pursuant to contracts with the Department of State, not the U.S. military, with important implications. For “private security providers” such as Dyncorp, the defendant in *Potts v. Dyncorp Int’l LLC*,²⁶² the absence of a contractual relationship with the U.S. military results in military commanders lacking a command-and-control relationship over such PMCs.²⁶³ In such situations, as correctly noted by the court in *Potts*, a PMC’s “own internal policies regarding procedures, training and management controlled its conduct in Iraq.”²⁶⁴ Consequently, claims relating to negligence in fulfilling contractual obligations have no bearing on military behavior.

A comprehensive contractual relationship between the U.S. military and a PMC does not necessarily correlate with a high degree of military control over PMC conduct. Recall that in *McMahon v. Presidential Airways, Inc.*,²⁶⁵ Presidential Airways (“Presidential”) was conducting transport services for U.S. troops pursuant to a services contract with the Department of Defense (“DOD”).²⁶⁶ According to the Statement of Work, Presidential was required to “[p]rovide all fixed-wing aircraft, personnel, equipment, tools, material, maintenance, and supervision necessary to perform . . . air transportation services” for the DOD.²⁶⁷ Therefore, the plaintiffs’ claims that Presidential—a private corporation, not the U.S. military—“negligently staffed, equipped, and otherwise operated the flight in question”²⁶⁸ clearly do not touch upon a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”²⁶⁹

Under the more comprehensive “Logistics Civil Augmentation Program” (“LOGCAP”) contracts,²⁷⁰ the U.S. military admittedly exercises a relatively high degree of control over PMC operations. In both *Carmichael* and *Whitaker*, the court examined the LOGCAP contract and determined that the military exercised such a high degree of control over PMC operations that the suit was nonjusticiable.²⁷¹ For instance, the court in *Whitaker* found that “[t]he Army

261. In *Whitaker*, the court found that the PMC was “subject to the military’s orders, regulations, and convoy plan.” 444 F. Supp. 2d at 1281. In *Carmichael*, the court found that the army controlled PMC-convoy operations “at the most granular level.” 564 F. Supp. 2d at 1369.

262. 465 F. Supp. 2d 1245 (M.D. Ala. 2006).

263. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 123, at 20–21.

264. *Potts*, 465 F. Supp. 2d at 1250.

265. 502 F.3d 1331 (11th Cir. 2007).

266. *McMahon*, 502 F.3d at 1336.

267. *Id.* at 1360 (internal quotation marks omitted).

268. *Id.*

269. *Id.* at 1358–62 (internal quotation marks omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

270. See *supra* notes 176–78 and accompanying text for a discussion of LOGCAP contracts.

271. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1370 (N.D. Ga. 2008); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279–80 (M.D. Ga. 2006).

regulates all aspects of control, organization, and planning of Army convoy operations.”²⁷²

Despite the language of the LOGCAP contracts relied on by the *Carmichael* and *Whitaker* courts, the degree of military control over PMCs operating in Afghanistan and Iraq has been called into question.²⁷³ Although “[c]ontractor employees are ‘expected to adhere to all guidance and obey all instructions and general orders issued by the Theater Commander,’” under LOGCAP contracts, “[c]ontract employees are *not* under the direct supervision of the military.”²⁷⁴ Rather, a third party, the Contracting Officer, administers the contractual relationship between PMCs and the government and issues directives to contractors.²⁷⁵ Consequently, “field commanders are not authorized to direct the actions of the contractor and must work all issues through the Contracting Officer.”²⁷⁶ Moreover, testimonial evidence demonstrates that “individual drivers [in convoys] retain ultimate responsibility for the safe conduct of their vehicles.”²⁷⁷ Accordingly, a court’s mere reliance on the contract language for political question analysis is misplaced. Courts should therefore allow the parties to develop the factual record beyond the terms of the governing contract before applying the political question doctrine to determine the degree of military control over PMC conduct in the field.²⁷⁸

Even assuming a high degree of military control over PMC activity, courts should permit parties to develop the factual record to determine if military regulations were strictly observed. In numerous instances, failure to follow military regulations may be evidence of negligence or recklessness. If military regulations were not followed, the judiciary would not be forced to examine a

But see Lane v. Halliburton, 529 F.3d 548, 560–63 (5th Cir. 2008) (examining LOGCAP contract and finding suit justiciable).

272. *Whitaker*, 444 F. Supp. 2d at 1279; *see also Carmichael*, 564 F. Supp. 2d at 1368 (finding U.S. military controlled “every aspect of the organization, planning and execution of the convoy in question”).

273. *See, e.g.,* Vernon, *supra* note 115, at 382–86 (discussing military’s limited command of and control over contractors).

274. *Whitaker*, 444 F. Supp. 2d at 1279 (emphasis added) (quoting Army Reg. 715–9, at 3–2(f)); *see also* Vernon, *supra* note 115, at 382 (“Field commanders exert no direct control over contractors.”).

275. Vernon, *supra* note 115, at 383.

276. *Id.* This is supported by practice. As noted in *Carmichael*, orders are relayed from a KBR manager to their drivers, instead of the drivers receiving orders directly from the military. 564 F. Supp. 2d at 1369.

277. *Id.* at 1369.

278. Admittedly, there may be issues beyond political question jurisprudence which limit the scope of discovery, such as the state secrets privilege. According to the Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 6–7 & n.11 (1953), the privilege against disclosing military secrets is “well established in the law of evidence.” However, “[t]he [state secrets] privilege is the government’s, and the government must formally assert the privilege.” Neil Kinkopf, *The State Secrets Problem: Can Congress Fix It?*, 80 TEMP. L. REV. 489, 489 n.5 (2007). Thus, absent government intervention, PMCs cannot assert the state secrets privilege. Even if the government invokes the privilege, the suit is not rendered nonjusticiable under the political question doctrine. Rather the privilege precludes courts from compelling disclosure of certain evidence if the U.S. government—not a private party—properly asserts the privilege.

military decision. For instance, one might question whether the outcome in *Whitaker* would have been the same if the PMC-employee drivers were intoxicated.²⁷⁹ Or, examining the facts alleged by the parties in *Whitaker*, one could ask whether the PMC-employee drivers failed to drive at the specified speed or follow at the specified distance. It is insufficient for political question purposes to note that the U.S. military dictated convoy vehicles' speed and positioning²⁸⁰ without knowing whether the employees were traveling at the speed established or the distance specified. If the failure to follow military instructions is indicative of negligence or recklessness, what is presented to the court is a familiar tort suit for damages.²⁸¹ In such instances "the textual commitment factor actually weighs in favor of resolution by the judiciary."²⁸² That is, there is "a textually demonstrable constitutional commitment of the issue"²⁸³ to the judiciary.²⁸⁴

While the above analysis accounts for the presence of private-party defendants and their impact in suits specific to the PMC-service-provider context, the remedies sought by plaintiffs can also be dispositive in analyzing whether adjudicating a suit would violate the separation of powers and thus *Baker* factor one. Suits seeking equitable relief for the manner in which force is used, including troop training, present nonjusticiable political questions.²⁸⁵ According to the Supreme Court in *Gilligan v. Morgan*,²⁸⁶ "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches."²⁸⁷

If the plaintiffs in *Whitaker* and *Carmichael* sought an injunction rather than damages, and the courts granted such an injunction, the potential impact on the military could be significant. Applied to the facts of each case, an injunction could potentially result in a court ordering the military to increase the spacing of vehicles and decrease the speed of convoys with contractor participants. Such an order could result in forcing the military to act in a way that fails to minimize the threats that convoys face.²⁸⁸ Alternatively, by allowing injunctive relief, courts may be forced to order military convoys to cease using workers from a given PMC

279. Davidson, *supra* note 154, at 816. This point remains for many actions in which the employee was acting outside the scope of his employment.

280. *Carmichael*, 564 F. Supp. 2d at 1370.

281. *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008) (citing *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49–50 (2d Cir. 1991)).

282. *Id.* The *Lane* court goes further, saying "[i]t is an extraordinary occasion, indeed, when the political branches delve into matters of tort-based compensation." *Id.*

283. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

284. Finally, it should be noted that even if the claims against PMCs require examination of military decisions, they are not automatically insulated from judicial review. See *supra* Part II.C.2 for a discussion of cases addressing the manner in which military force was used.

285. See *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973) (holding suit alleging excessive force by National Guard to be nonjusticiable).

286. 413 U.S. 1 (1973).

287. *Gilligan*, 413 U.S. at 10.

288. For instance, in *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1370 (N.D. Ga. 2008), the court noted that convoy speed and spacing was established by the military "to avoid presenting a condensed enemy target, yet close enough together to not lose artillery cover."

that was previously selected by the executive branch to assist with the war effort. Because this sort of an order would amount to judicial meddling in the military's tactical decisions, many would properly find this to be a violation of the separation of powers, encroaching on the Executive's role as Commander in Chief.

However, where plaintiffs seek damages, such as in negligence claims against the government or PMCs, this calculation is altered dramatically. Even in the more difficult instance of claims against the government, the relief sought still impacts political question jurisprudence. In *Gilligan*, the Supreme Court on two occasions stressed the impact that the remedy sought had on its political question analysis.²⁸⁹ The Court prefaced its analysis of the claims by stating that “[i]t is important to note at the outset that this is not a case in which damages are sought for injuries sustained.”²⁹⁰ Reliance on the relief sought was also prominent in the Court's holding: “The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.”²⁹¹ In so holding, the Court explicitly stated that the conduct of the National Guard is not per se immune from judicial review under the political question doctrine.²⁹²

Based on the Court's language in *Gilligan*, claims for damages resulting from the Kent State incident appear to have significantly altered the Court's political question analysis, weighing heavily in favor of justiciability.²⁹³ Such a suit was presented before the Supreme Court in *Scheuer v. Rhodes*.²⁹⁴ In *Scheuer*, the plaintiffs sought damages against the Governor of Ohio and members of the National Guard, among others, following the same Kent State incident at issue in *Gilligan*.²⁹⁵ In contrast to *Gilligan*, the Court in *Scheuer* held that the district court had subject matter jurisdiction to hear the suit, thus implicitly rejecting the applicability of the political question doctrine.²⁹⁶ The remedy sought was therefore dispositive for political question purposes.

The crucial role of the remedy sought by plaintiffs was also supported by the Ninth Circuit in *Koochi v. United States*.²⁹⁷ Recall that in *Koochi* the plaintiffs sued

289. *Gilligan*, 413 U.S. at 5, 11–12. See *supra* notes 84–90 and accompanying text for a discussion of *Gilligan*.

290. *Gilligan*, 413 U.S. at 5.

291. *Id.* at 7. This point was echoed by Justice Blackmun in his concurrence: “The relief sought by respondents, moreover, is beyond the province of the judiciary.” *Id.* at 14 (Blackmun, J., concurring).

292. *Id.* at 11–12.

293. As noted by Henkin, in some instances courts may deliver relief “even when there are ‘equity reasons’ for refusing an injunction.” Henkin, *supra* note 54, at 622.

294. 416 U.S. 232 (1974), *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); see also *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (comparing Supreme Court's different treatment of suits in *Gilligan* and *Scheuer* based on remedy sought).

295. *Scheuer*, 416 U.S. at 234.

296. *Id.* at 247–49. Nor did the Sixth Circuit apply the political question doctrine to render the suit nonjusticiable on remand. See generally *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977).

297. 976 F.2d 1328 (9th Cir. 1992).

the U.S. government for negligently operating a naval vessel and PMCs for design defects in weapons systems following the downing of a commercial Iranian airliner.²⁹⁸ According to the Ninth Circuit, “because the plaintiffs [sought] only damages, the granting of relief will not draw the federal courts into conflict with the executive branch” because “[d]amage actions are particularly nonintrusive.”²⁹⁹ Importantly for political question jurisprudence, the court was addressing claims against a PMC supplier *and* the federal government, yet the claims survived a political question doctrine challenge.³⁰⁰ Alternatively, if plaintiffs were seeking an injunction from the U.S. government operating the vessel in question or using the allegedly defective weapons system, this would certainly weigh against justiciability for political question purposes.

Importantly, the damages analysis of the Ninth Circuit in *Koohi* was relied upon to reject application of the political question doctrine to a common law tort suit against PMCs operating in Abu Ghraib.³⁰¹ In highlighting the impact of the relief sought, the court held that “[a]n action for damages arising from the acts of private contractors and *not seeking injunctive relief* does not involve the courts in ‘overseeing the conduct of foreign policy or the use and disposition of military power.’”³⁰²

One might argue that permitting damages against PMCs may still indirectly impact the military, and thus potentially violate the separation of powers and trigger serious prudential concerns.³⁰³ However, the judiciary would not be exerting any direct control over the military’s conduct. Nor would courts awarding damages in suits against PMCs automatically necessitate any change in behavior by the *military*. Instead, courts requiring PMCs to pay damages for tortious behavior would likely lead to PMCs increasing the level of training of employees operating in the field, such as additional vehicle training for convoy travel.³⁰⁴ Finally, even if there were some impact on the military, such as deterring PMCs “from entering military-related contracts in the future,” the Fifth Circuit held that this “is not a factor that [courts] may use to deny Plaintiffs a forum in federal court.”³⁰⁵

298. *Koohi*, 976 F.2d at 1330.

299. *Id.* at 1332.

300. *Id.*

301. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15 (D.D.C. 2005).

302. *Id.* (emphasis added) (quoting *Luftig v. McNamara*, 373 F.2d 664, 666 (D.C. Cir. 1967)); see also *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 430 (W.D. Pa. 2009) (holding that because plaintiffs “do not seek to enjoin KBR’s conduct” but seek “money damages,” this “weighs in favor of judicial resolution”).

303. According to the court in *Lane v. Halliburton*, the National Defense Industry filed a brief as amicus curiae “suggest[ing] that a decision that KBR may be liable for the Plaintiffs’ injuries may deter civilian contractors from entering military-related contracts in the future.” 529 F.3d 548, 563 n.6 (5th Cir. 2008).

304. This would seem to be a logical response if PMCs were held liable for the accidents at issue in *Carmichael* and *Whitaker*.

305. *Lane*, 529 F.3d at 563 n.6.

B. *Common Law Tort Standards and Wartime Conditions*

Common law tort standards provide courts with the ability to apply modified standards to address claims against PMCs operating in dangerous conditions. Primary in constitutional cases is “the view that certain constitutional provisions do not lend themselves to the development of workable, generalizable standards of construction.”³⁰⁶ As with certain constitutional claims, justiciability concerns stemming from a lack of judicially manageable standards are frequently triggered in military affairs cases, including suits for damages against the government³⁰⁷ and also against private corporations, such as PMCs.³⁰⁸ However, suits against the Executive requiring courts to determine whether the country was at war³⁰⁹ are a far cry from determining whether the agent of a corporation was negligent. As discussed in Part II.C, tort claims, compared to constitutional claims, weigh in favor of justiciability. Moreover, tort claims are susceptible to modified standards to address the dangerous situations in which claims against PMCs often arise. Therefore, as a general matter, the second *Baker* factor should not apply to bar claims against PMCs.

Concerns under *Baker* factor two³¹⁰ regarding the applicability of judicially manageable standards are informed by *Baker* factor one. Where courts have found that claims against PMCs do not require examination of a military decision, but rather examination of a decision made by the PMC, they are likely to hold that *Baker* factor two does not render the suit nonjusticiable.³¹¹ Alternatively, where courts have found that claims against PMCs require review of a military decision, courts will almost certainly hold that there are no judicially manageable standards to apply to the case.³¹² In this latter category, courts highlight the degree of control by the U.S. military over the PMC actions in question and stress the requirement of applying a standard which must be modified to such a degree that it becomes unmanageable. It is this latter category of cases that demands additional attention.

Whitaker and *Carmichael* are examples. The *Whitaker* court agreed with the defense that to hear the plaintiffs’ case would require determining “what a

306. Redish, *supra* note 35, at 1046.

307. See *supra* Part II.C.2 for a discussion of justiciability in suits for damages against the government.

308. In fact, according to the court in *Lane*, the functional concerns were “arguably the most critical factor in the political question analysis in the present litigation.” *Lane*, 529 F.3d at 560.

309. See *Atlee v. Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972) (determining whether participation in Southeast Asia qualified as political question), *aff’d sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973). See *supra* Part II.C.1 for an overview of cases requiring courts to determine whether the United States was at war.

310. The second *Baker* factor is “a lack of judicially discoverable and manageable standards for resolving [the issue].” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

311. See *Lane*, 529 F.3d at 567 (noting that nature of suit weighed in favor of justiciability and determining that no examination of military decision was required).

312. See, e.g., *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1279–82 (M.D. Ga. 2006) (finding under second *Baker* factor that examination of military decision would require court to apply unmanageable standard of “what a reasonable driver in a combat zone, subject to military regulations and orders, would do”).

reasonable driver in a combat zone, subject to military regulations and orders, would do.”³¹³ In *Carmichael*, the court echoed *Whitaker* in finding that “the question before the Court would be what a reasonable driver subject to military control over his exact speed and path would have done.”³¹⁴

As discussed in Part III.A, however, common law tort claims weigh in favor of justiciability over constitutional claims, in part because the judiciary, as opposed to another branch of government, is charged with adjudicating such claims.³¹⁵ It follows that the judiciary, in carrying out these duties, has developed judicially manageable standards to address diverse issues of fact and law. The common law of torts also provides a high degree of flexibility,³¹⁶ allowing courts to apply established principles to new fact patterns, thus belying any claims of a “lack of judicially discoverable and manageable standards.”³¹⁷

As a general matter, suits at common law evolve through judicial precedent to provide courts with the analytical tools to address claims arising from new situations in the foreign- or military-affairs context. For instance, common law tort principles provided the Second Circuit with “judicially discoverable and manageable standards” to adjudicate an individual’s claims against the Palestinian Liberation Organization following the seizure of an Italian cruise liner and the killing of one of its passengers.³¹⁸ Circuit courts have also held that common law tort standards could be used to address suits against the U.S. government, including a challenge to the Navy’s decision to fire upon a passenger plane because it was thought to be an enemy fighter³¹⁹ and a case involving a B-52 pilot flying too low and off target during a training mission.³²⁰ As such, “[c]ourts are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear.”³²¹

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

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

315. *See, e.g.*, U.S. CONST. art. III, § 1, cl. 1 (vesting “[t]he judicial Power . . . in one supreme Court”).

316. *See, e.g.*, Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 584 (2006) (discussing long-held notion that common law is “flexible and susceptible to change”).

317. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (establishing *Baker* factor two). According to Professor Peter Spiro, “[t]he argument that there are no applicable legal standards by which to determine a rule of decision is, first of all, alternatively circular or self-fulfilling.” Spiro, *supra* note 52, at 676–77.

318. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47, 49–50 (2d Cir. 1991) (internal quotation marks omitted) (quoting *Baker*, 369 U.S. at 217). According to the Second Circuit, “the common law of tort provides clear and well-settled rules on which the district court can easily rely.” *Id.* at 49. Therefore, the case did not “require the court to render a decision in the absence of ‘judicially discoverable and manageable standards.’” *Id.* (quoting *Baker*, 369 U.S. at 217).

319. *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). *See supra* notes 144–51 and accompanying text for a discussion of *Koohi*.

320. *Peterson v. United States*, 673 F.2d 237, 241–42 (8th Cir. 1982). *See supra* notes 91–97 and accompanying text for a discussion of *Peterson*.

321. Redish, *supra* note 35, at 1050.

Admittedly, there are limitations to the extent to which courts can competently apply abstract principles. For instance, a suit requiring the court to develop a “prudent intercept” standard for the U.S. military to determine whether an unidentified plane is potentially hostile most certainly runs afoul of *Baker* factor two.³²² As acknowledged by the Eleventh Circuit in *McMahon*, “[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review.”³²³ If claims against PMCs trigger similar concerns, courts may be justified in dismissing the suits on political question grounds. However, courts have been willing—and should be willing—to “adjust traditional tort standards to account for the ‘less than hospitable environment’ in which” PMCs operate.³²⁴ Such modified standards are manageable and, in certain instances, preexisting, not requiring courts to “develop any standards at all.”³²⁵ Even if standards need to be developed by the judiciary, practice has demonstrated that “the Court is generally willing and able to define realistic and flexible substantive standards which will accommodate the legitimate demands of economic, social, political and military practice.”³²⁶

C. Damages and Prudential Concerns

Suits against PMCs for damages do not trigger prudential concerns to a sufficient degree that courts should render the suits nonjusticiable under the political question doctrine.³²⁷ As demonstrated in Part II.B, suits for injunctive relief in military-affairs cases are consistently held nonjusticiable under the political question doctrine based in part upon prudential concerns because granting such claims would bring the courts into conflict with the Commander in Chief. Such conflicts are alleviated in suits for damages against the government as supported by the judiciary’s willingness to adjudicate such claims, discussed in Part II.C.2. When suits for damages are against private parties, prudential concerns are insignificant as the impact on military affairs is greatly lessened. Courts should thus rarely, if ever, utilize prudential concerns to bar suits against PMCs.

322. *Tiffany v. United States*, 931 F.2d 271, 278–79 (4th Cir. 1991).

323. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007) (internal quotation marks omitted) (quoting *Tiffany*, 931 F.2d at 277).

324. *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008) (quoting *McMahon*, 502 F.3d at 1364).

325. *Id.* (citing *McMahon*, 502 F.3d at 1363–64).

326. Scharpf, *supra* note 37, at 566.

327. Prudential considerations involve *Baker* factors three: “the impossibility of deciding without an initial policy determination”; four: “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; five: “an unusual need for unquestioning adherence to a political decision already made”; and six: “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). The prudential *Baker* factors were not applied in *Carmichael* and *Whitaker*, as the cases were found nonjusticiable on *Baker* factors one and two. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 564 F. Supp. 2d 1363, 1372 (N.D. Ga. 2008); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281–82 (M.D. Ga. 2006).

As an initial matter, it is important to note that the Supreme Court has recognized the “nonintrusive” nature of damages³²⁸ beyond political question jurisprudence. The judicial abstention doctrines, for instance, are triggered when plaintiffs seek injunctions, but have not been applied by the Supreme Court to actions for damages.³²⁹ In *Younger v. Harris*,³³⁰ the Supreme Court held that absent extraordinary circumstances, federal courts may not enjoin ongoing state court criminal cases.³³¹ “The Court has not, however, extended the *Younger* doctrine to actions for damages or other remedies”³³² There is thus “no such restraint on federal damage actions arising from state criminal proceedings.”³³³ Therefore, aside from the political question context, the Supreme Court has recognized that actions for damages do not trigger the same concerns as suits seeking injunctions.

The nonintrusive nature of damages is strengthened in the PMC-suit context, as such suits challenge the actions of a corporation as opposed to the Commander in Chief. For instance, examining whether a PMC employee or the firm as a whole acted negligently rarely requires the court to make any “initial policy determination”³³⁴ or express a “lack of the respect due coordinate branches of government.”³³⁵ As noted in *Lessin*, even where the actions of a military officer are at issue to prove causation, “it is by no means clear that the policies or decisions of the military or of the executive branch itself will be implicated.”³³⁶ In such instances, the suit will not “require initial policy decisions committed to the discretion of the political branches” nor will “adjudication of the case . . . evince a lack of respect for the political branches.”³³⁷

Nor is there “an unusual need for unquestioning adherence to a political decision already made”³³⁸ or “the potentiality of embarrassment from multifarious

328. *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992).

329. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1971) (establishing what is termed “*Younger* abstention doctrine” in holding that federal courts cannot enjoin ongoing state criminal cases); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (establishing so-called “*Burford* abstention doctrine” in holding that federal courts may abstain from hearing cases involving complex issues of state law where state courts have greater expertise with that area of law).

330. 401 U.S. 37 (1971).

331. *Younger*, 401 U.S. at 44.

332. LAURA E. LITTLE, *FEDERAL COURTS: EXAMPLES & EXPLANATIONS* 191 (2006). Although the Supreme Court “has never explicitly approved or disapproved the application of *Younger* abstention in a damages action,” *Gilbertson v. Albright*, 381 F.3d 965, 969 (9th Cir. 2004), it vacated and remanded the Eighth Circuit’s application of *Younger* abstention to a suit seeking damages. *Warmus v. Melahn*, 517 U.S. 1241, 1241 (1996). The Supreme Court has directly addressed whether *Burford* abstention applies to actions for damages. In *Quackenbush v. Allstate Ins. Co.*, the Court held that a district court inappropriately remanded a suit for damages to state court under *Burford* abstention, because “federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary.” 517 U.S. 706, 731 (1996).

333. *Koohi*, 973 F.2d at 1332 (citing *Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981)).

334. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (laying out *Baker* factor three).

335. *Id.* (discussing *Baker* factor four).

336. *Lessin v. Kellogg Brown & Root*, No. H-05-01853, 2006 WL 3940556, at *3 (S.D. Tex. June 12, 2006).

337. *Id.*

338. *Baker*, 369 U.S. at 217 (laying out *Baker* factor five).

pronouncements by various departments on one question.”³³⁹ The most sensitive of PMC cases are undoubtedly those arising from the abuses at Abu Ghraib.³⁴⁰ Yet sensitivity does not necessarily lead to nonjusticiability. As noted by the Supreme Court, “we cannot shirk this responsibility [to resolve cases involving foreign affairs] merely because our decision may have significant political overtones.”³⁴¹ In suits against PMCs operating in Abu Ghraib, the “plaintiffs sue[d] private parties for actions of a type that both violate clear United States policy and have led to recent high profile court martial proceedings against United States soldiers.”³⁴² The suits therefore did not run afoul of *Baker* factors five and six.

If the most politically sensitive suits do not present prudential concerns, surely claims brought by U.S. service members and former PMC employees would not run afoul of *Baker* factors five and six. This is evidenced by the government’s decision to not intervene in cases against PMCs, such as in *McMahon*, “despite an invitation to do so.”³⁴³ The court therefore found that “[t]he apparent lack of interest from the United States to this point fortifies our conclusion that the case does not yet present a political question.”³⁴⁴

IV. CONCLUSION

With the U.S. military’s increased reliance on corporations to facilitate the pursuit of strategic objectives, suits against private military contractors (“PMCs”) are likely to continue to increase. Precedent demonstrates that claims challenging the constitutionality of the Executive’s decision to go to war present a nonjusticiable political question. However, suits challenging the manner in which military force is used have warranted a more searching judicial inquiry, and, at times, a rejection of the application of the political question doctrine.³⁴⁵ Importantly, these suits are almost universally based on common law tort claims with plaintiffs seeking damages as opposed to injunctive relief.³⁴⁶

Building upon this distinction, suits against PMC service providers involve the convergence of three key factors in determining justiciability under the

339. *Id.* (creating *Baker* factor six).

340. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08cv827 (GBL), 2009 U.S. Dist. LEXIS 29995, at *1 (E.D. Va. Mar. 18, 2009) (involving claims of torture by Abu Ghraib detainees against PMC interrogators); *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56 (D.D.C. 2006) (hearing suit of Abu Ghraib detainees against PMC interrogators and interpreters); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (hearing suit by torture victims against PMCs).

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

342. *Ibrahim*, 391 F. Supp. 2d at 16 (citation omitted).

343. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007); see also *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 431 (W.D. Pa. 2009) (noting prudential concerns do not render suit nonjusticiable because of Army’s lack of expressed concern or attempt to intervene).

344. *McMahon*, 502 F.3d at 1365.

345. See *supra* Part II.C.2 for a discussion of cases challenging the manner in which force was used.

346. See *supra* Part II.C.2 for a discussion of the remedies sought in these cases.

political question doctrine. The defendants are private corporations, the plaintiffs are seeking damages, and the lawsuits are based on common law tort claims.³⁴⁷ Taken together, these factors greatly weaken the underlying rationale supporting the political question doctrine. Courts should thus rarely, if ever, apply the doctrine to suits for damages against PMCs, and only after a searching judicial inquiry into the specific factual situation.

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347. See *supra* Part II.E for a discussion of cases involving suits against PMCs.

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