

# THE FUNCTIONAL POLITICAL QUESTION DOCTRINE AND THE JUSTICIABILITY OF EMPLOYEE TORT SUITS AGAINST MILITARY SERVICE CONTRACTORS

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*In recent years, the U.S. military's use of private contractors in waging its wars has drawn increased attention from the academic literature, largely related to the growing number of cases filed by U.S. servicemen and contractor personnel against companies like Halliburton and Kellogg, Brown & Root. These suits have garnered the attention of the legal academy, particularly as federal courts dismiss such suits as nonjusticiable under the political question doctrine—a doctrine of judicial restraint long associated with voting rights and gerrymandering caselaw. The recent application of the political question doctrine to cases involving military contractors raises familiar questions regarding the scope of the judiciary's role in monitoring the actions of coordinate branches and the pragmatism of the judiciary playing such a role at all. This Note considers these matters through the lens of the functional political question doctrine. It concludes that while federal courts may have the institutional capacity to play some role in administering tort suits against private contractor firms, that participation should be carefully cabined to avoid any judicial interference with the military's authority to set standards for combat. Thus, while in-field negligence claims will usually present nonjusticiable political questions, fraudulent recruitment claims will not.*

## INTRODUCTION

In April 2004, Iraqi insurgents attacked military service contractors (MSCs)<sup>1</sup> providing in-field logistical support to U.S. troops.<sup>2</sup> The

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<sup>1</sup> For the purposes of this Note, I refer to contracting companies, like Kellogg, Brown & Root (KBR), as military service contracting firms, MSC Firms, or Firms. I refer to their employees as contractors or employees.

<sup>2</sup> This Note focuses solely on issues surrounding military *service* contractors. It does not extend to manufacturers that contract with the government to build supplies or weaponry (e.g., Lockheed Martin) nor to private military contractors acting as mercenaries. See Aaron L. Jackson, *Civilian Soldiers: Expanding the Government Contractor Defense To Reflect the New Corporate Role in Warfare*, 63 A.F. L. REV. 211, 215–19 (2009), for an explanation of the Government Contractor Defense, which applies to contractors manufacturing equipment and supplies for the U.S. government, and Ben Davidson, Note, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803 (2008), for a reading of the doctrine in the few decisions involving

fuel convoys, driven by employees of Kellogg, Brown & Root (KBR), sustained heavy casualties, losing both U.S. servicemen and KBR employees. Two years later, KBR employees and family members of the deceased brought suit against KBR and its then parent company, Halliburton, asserting a mix of common law and statutory claims, which boiled down to two basic tort actions. First, the plaintiffs alleged that KBR had been grossly negligent in allowing the convoys to enter areas known to be hostile.<sup>3</sup> Second, the plaintiffs alleged fraudulent recruitment, claiming KBR had intentionally misrepresented the risks associated with the job.<sup>4</sup>

In what has become a familiar move by MSC Firms facing liability, KBR moved to dismiss the claims, arguing that KBR's ties to the U.S. military barred the suit under the political question doctrine.<sup>5</sup> The district court agreed.<sup>6</sup> The Fifth Circuit reversed, finding that (1) the case had yet to present actual political questions even if the potential existed, and (2) a court might be able to read the negligence and fraud claims narrowly enough to avoid making policy decisions otherwise committed to military discretion.<sup>7</sup> Despite this ruling, the future of the *Lane* plaintiffs' claims still rests on shaky ground.

The *Lane* litigants are representative of a particular category of federal court claimants—MSC employees bringing suit against their employers.<sup>8</sup> *Lane* illustrates the current uncertainty and disagreement over whether courts can hear these claims, and how, if at all, the political question doctrine should apply. Within a broader landscape, the claims in *Lane* are emblematic of the current struggles within the courts, Congress, and the public to position MSCs within the extant

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suits brought by military personnel. For an overview of the history of military contracting, see John S. Kemp, *Private Military Firms and Responses to Their Accountability Gap*, 32 WASH. U. J.L. & POL'Y 489, 493–98 (2010).

<sup>3</sup> Fisher v. Halliburton, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (“[Defendants] argue that since their decisions are so interwoven with Army decisions, the court lacks jurisdiction over the case under the political question doctrine.”). Defendants also claimed that the cases were barred under the Defense Base Act, 42 U.S.C. § 1651(a) (2006), and the *Feres* exception to tort liability, 28 U.S.C. § 2680(j)–(k) (2006), but the court did not reach those issues. *Fisher*, 454 F. Supp. 2d at 639 n.14; see also *infra* note 169 (discussing *Feres* doctrine). The political question doctrine was the sole issue the court considered on appeal in *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008).

<sup>6</sup> *Fisher*, 454 F. Supp. 2d at 639.

<sup>7</sup> *Lane*, 529 F.3d at 568. For further discussion of the Fifth Circuit holding, see *infra* Part II.B.2.

<sup>8</sup> Other military contractor activities are less logistics based, and might include military training, intelligence gathering, providing security personnel, and performing combat- or mercenary-like tasks. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 138 (2005) (discussing various roles filled by military contractors).

legal framework and to hold MSC Firms accountable for their actions abroad.<sup>9</sup>

In the face of allegations by U.S. servicemen of rape,<sup>10</sup> human rights violations,<sup>11</sup> and negligent conduct by contractor personnel,<sup>12</sup> both government officials and academics are struggling to situate MSCs within the boundaries of international<sup>13</sup> and domestic law.<sup>14</sup> In this Note, I focus on the domestic legal context and, in particular, on the role that the political question doctrine plays in that analysis. There are two reasons for this narrow focus. First, jurisdictions are divided on the application of the political question doctrine in domestic tort-based employee claims in cases like *Lane*. Second, the blend of domestic and in-field claims<sup>15</sup> provides the most fruitful basis

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<sup>9</sup> See Davidson, *supra* note 2, at 807.

<sup>10</sup> See, e.g., Karen Houppert, *KBR's Rape Problem*, THE NATION, May 5, 2008, at 4, available at <http://www.thenation.com/article/kbrs-rape-problem>.

<sup>11</sup> See, e.g., Dickinson, *supra* note 8, at 139 (discussing prominent role of private contractors in Abu Ghraib scandal (citing Joshua Chaffin, *Private Workers Found Central to Jail Abuse*, FIN. TIMES (London), Aug. 27, 2004, at 7)).

<sup>12</sup> Family members of U.S. servicemen traveling with the MSC convoys have also begun to bring suit against these Firms, attempting to receive compensation or wrongful death awards. Because these claims involve the somewhat complicated interplay of an additional reparatory scheme—Veterans Affairs benefits or pensions for soldiers injured in combat—I set these claims aside for the purposes of the normative portions of this Note. However, from the court's perspective, resolution or dismissal of claims arising from injuries to servicemen and contractors alike rests on the same political question doctrine analysis, so I discuss these cases together in Part II.

<sup>13</sup> See generally Dickinson, *supra* note 8; Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004).

<sup>14</sup> For a broader discussion of MSC cases and their interplay with the political question doctrine, see Chris Jenks, *Square Peg in a Round Hole: Government Contractor Battlefield Tort Liability and the Political Question Doctrine*, 28 BERKELEY J. INT'L L. 178 (2010), which evaluates applications of the political question doctrine to tort claims relating to MSCs, claims by detainees against contractor interpreters and interrogators, and claims by soldiers against contractors. While Jenks examines a broader swath of contractor cases than this Note, the end result of his analysis is that courts *ought to* look at “(1) whether the suit arises from actions taken by a contractor in a war zone . . . ; (2) whether the U.S. military controlled the actions taken by the contractor . . . ; and (3) how the military operational control, decision making, or actions are relevant to, or a cause of, the incident at issue.” *Id.* at 214. This Note concedes that these are relevant inquiries but demonstrates in Part II, *infra*, that courts are as confused about how to analyze these issues as they are uncertain in applying the political question doctrine itself. Parts I and III, *infra*, thus attempt to add substance and form to this inquiry by drawing upon functional considerations of the competence for and necessity of court adjudication. It then applies those principles to the MSC context.

<sup>15</sup> By “in-field” claims, I refer to those claims arising while in combat or in theater, in the course of military operations. For a discussion of the admitted difficulties in narrowing the scope of this definition, see *infra* text accompanying notes 159–71.

for determining what the role of the judiciary is, and should be, in monitoring MSC conduct.

Because the political question doctrine is, operationally, a first-order inquiry, the matter is often resolved at the initial stage of litigation, before determining the nature of the underlying substantive law. However, understanding the parameters of the doctrine can help shed light on the potential application of the doctrine in other contexts and under different bodies of substantive law.<sup>16</sup>

A body of scholarship has already begun to form around this issue. Many have looked to the role of the judiciary with respect to MSC claims generally. However, these authors have focused too narrowly on political question doctrine cases involving the military alone or have resigned themselves to analyzing the cases through the framework developed under *Baker v. Carr*<sup>17</sup>—a mistake, both because the *Baker* factors are unclear and because the courts which are hearing MSC cases are confused by the *Baker* analysis.<sup>18</sup> In doing so, courts and commentators miss the broader picture: what motivates the distinctions courts draw between political and justiciable questions. Because disagreement among the courts centers on functional concerns about courts' institutional capacity<sup>19</sup> to decide these cases,<sup>20</sup> I

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<sup>16</sup> Thus, while I set aside analysis of cases involving rape, human rights violations, etc., to the extent that parties in those cases raise the political question doctrine as a defense against suit, the model I propose in this Note should apply similarly to those cases.

<sup>17</sup> 369 U.S. 186 (1962); see Davidson, *supra* note 2, at 810 (focusing narrowly on political question doctrine as applied to military); see also Joseph H.L. Perez-Montes, *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, 227–45 (2008). Perez-Montes, like Davidson, errs by looking to the textual factors carved out in *Baker v. Carr*, 369 U.S. 186 (1962), and then jumping straight to that doctrine's specific application to the military and foreign affairs context. By neglecting to give a broader reading of the doctrine, this approach bypasses any real analysis of which underlying factors trigger a court's decision to find a political question that bars justiciability of a claim. I offer a broader analysis in Part I, *infra*. For a discussion of the *Baker* framework, see *infra* notes 27–28 and accompanying text.

<sup>18</sup> See *infra* Part II (discussing courts' inconsistent application of the political question doctrine); see, e.g., Michael R. Kelly, Note, *Revisiting and Revising the Political Question Doctrine: Lane v. Halliburton and the Need To Adopt a Case-Specific Political Question Analysis for Private Military Contractor Cases*, 29 MISS. C. L. REV. 219, 238–40 (2010) (arguing that *Baker* factors do not provide meaningful guidance to courts determining whether cases implicate political questions). Kelly argues that the political question doctrine only bars cases in which separation of powers concerns are at play. *Id.* at 252. But his answer begs the very question confusing courts confronting MSC cases: What are those concerns and how might they affect the doctrine's application? This Note provides one answer.

<sup>19</sup> Note that these concerns are distinct from the separation of powers debate addressing whether the court is infringing on the power of a coordinate branch in deciding these cases, a notion lambasted by Professor Magill. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 625–26 (2001)

focus my attention on the functional political question doctrine, isolating the elements that trigger its application by a court.

In Part I, I analyze key cases in the development of the functional political question doctrine and argue that, since *Baker v. Carr*, the courts have relied on two sometimes diverging inquiries: one that focuses on whether there is a legal void that must be filled (the “Legal Void Inquiry”) and one that determines whether courts have the institutional capacity to render the decision at bar (the “Institutional Capacities Inquiry”). In Part II, I analyze the jurisdictional split at play in the MSC cases and situate *Lane* within the broader universe of cases struggling with the justiciability of private, domestic tort suits against MSC Firms.

Finally, in Part III, I apply the two-prong functional model of the political question doctrine to the MSC employee cases. Under this model, I argue that in-field negligence claims almost always present political questions beyond the scope of judicial review, but that fraudulent recruiting claims do not. This approach addresses core political question doctrine concerns while offering a clean, predictable, and prudential solution that provides plaintiffs much-needed relief in those instances in which the judiciary is equipped to manage the claim.

## I

### THE FUNCTIONAL POLITICAL QUESTION DOCTRINE

This Part discusses the boundaries and development of the functional political question doctrine. Through an analysis of key cases applying the doctrine, I demonstrate that the inquiry is driven by two functional concerns: (1) whether there is a legal void that must be filled; and (2) whether the judiciary is institutionally capable of filling it. With these questions in mind, application of the political question doctrine is a balancing of the need for judicial intervention against functional barriers that may render judicial intervention imprudent.

#### A. *Baker v. Carr and the Political Question Doctrine*

The political question doctrine, “a function of the separation of powers,”<sup>21</sup> dictates that courts should refrain from passing judgment

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(arguing that because of lack of method to classify each branch’s legitimate authority, relying on distinctions among them is wasted effort). Instead, the institutional capacity concern invites a prudential focus on whether courts *can* make these determinations, which I argue is the underlying motivation of the political question doctrine.

<sup>20</sup> See *infra* Part I.A for a discussion of the functional political question doctrine and its counterpart, the formal political question doctrine.

<sup>21</sup> *Baker*, 369 U.S. at 217.

on certain legal controversies when doing so would render an “inappropriate interference in the business of the other branches of Government.”<sup>22</sup> Matters that often trigger the doctrine are those presenting competing policy goals, making it impossible for a court to apply principles of law without first rendering some type of discretionary policy decision,<sup>23</sup> or those requiring some expertise in managing the issue.<sup>24</sup> Such matters are thought to be better managed by a coordinate political branch.

The Supreme Court developed the contemporary version of the doctrine<sup>25</sup> in *Baker v. Carr*, a 1962 decision that invalidated Tennessee’s voter apportionment scheme under the Equal Protection Clause.<sup>26</sup> In *Baker*, voters sued the state of Tennessee, alleging that the state’s voter apportionment system unlawfully diluted their voting power.<sup>27</sup> Petitioners sought a declaration that the scheme was unconstitutional, an injunction preventing the state from conducting future elections pursuant to that scheme, and, if necessary, reapportionment by the state according to a mathematical formula.<sup>28</sup> Tennessee argued that, under Court precedent, the Guarantee Clause<sup>29</sup> barred judicial interference on the basis of gerrymandering claims.<sup>30</sup> Justice Brennan,

<sup>22</sup> *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

<sup>23</sup> This argument is made perhaps most famously by Alexander Bickel. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986). To Bickel, political questions were those which presented the Court with a choice between potential outcomes based on adherence to a particular set of values, which courts are ill equipped to weigh. *Id.* at 186. For a discussion of a stronger form of the argument that principled rules alone ought to guide the judicial process, see Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419 (1992). Neuborne describes a formalist preference that judges “act as a highly skilled mechanic with significant responsibility for identifying the ‘right’ externally-mandated rule, but with little legitimate discretion of the choice of the rule.” *Id.* at 421.

<sup>24</sup> See *infra* Part III.A.2 for further discussion of this issue.

<sup>25</sup> The doctrine finds its roots in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803), but has since expanded to cover a wide array of matters. *E.g.*, *Colegrove v. Green*, 328 U.S. 549, 552–56 (1946) (apportionment); *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (ratification of constitutional amendments); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (foreign affairs); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133–37 (1912) (initiative and referendum requirements); *Luther v. Borden*, 48 U.S. (7 How.) 1, 40–43 (1849) (Guarantee Clause). For an overview of the origins and evolution of the political question doctrine, see Jenks, *supra* note 14, at 182–86.

<sup>26</sup> 369 U.S. 186 (1962).

<sup>27</sup> *Id.* at 192. The plaintiffs claimed that the apportionment plan ignored modern census reports on population distribution and diluted urban voting power, disproportionately affecting low-income and minority communities.

<sup>28</sup> *Id.* at 194–95.

<sup>29</sup> U.S. CONST. art. 4, § 4, cl. 1.

<sup>30</sup> The Court had previously held that gerrymandering claims are nonjusticiable under Article I of the Constitution. *Colegrove*, 328 U.S. at 554–56 (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912)).

writing for the majority, denied that there was a political question and instead decided the case under the Equal Protection Clause. In doing so, he distilled political question doctrine case law into an oft-cited six-factor test:

Prominent on the surface of any case held to involve a political question is found[:]

[1] a textually demonstrable commitment of the issue to a coordinate political department;

[2] or a lack of judicially discoverable and manageable standards for resolving it;

[3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

[4] or the impossibility of a court's undertaking of independent resolution without expressing lack of the respect due to coordinate branches of government;

[5] or an unusual need for unquestioning adherence to the political decision already made;

[6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>31</sup>

Because application of the political question doctrine is meant to be an extraordinary occurrence, only the "inextricable" presence of a factor requires dismissal.<sup>32</sup> Justice Frankfurter, writing for the dissent, cited a host of logistical problems that counseled against judicial review.<sup>33</sup>

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<sup>31</sup> *Baker*, 369 U.S. at 217. The *Baker* factors themselves are often distinguished as either "classical" or "prudential." See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). The classical factors focus on a particular issue's textual commitment to a coordinate branch, *id.* at 246–48, while the prudential factors are more aptly described as a "judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches," *id.* at 253. The classical strand of the doctrine thus requires a discriminating inquiry into the *who* of the matter: Which branch has received the constitutional delegation of authority to decide the issue? The prudential strand, on the other hand, first looks to the *what* of the matter, that is, the "nature of the claim" and the relief requested: What standards might it apply, what means does it have (comparatively) to apply those standards, and what are the consequences of such an application? The prudential strand examines whether the judiciary is the branch best positioned to decide the issue.

<sup>32</sup> *Baker*, 369 U.S. at 217.

<sup>33</sup> *Id.* at 323 (Frankfurter, J., dissenting). Among those concerns were: considerations of geography, demography, electoral convenience, economic and social cohesions or divergences among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others

Since *Baker*, scholars have conceptualized the Court's application of the political question doctrine as either formal or functional. When courts apply the political question doctrine formalistically, they recognize a constitutional or textual commitment of the issue to a coordinate branch and thus consider it improper for the judiciary to interfere.<sup>34</sup> When courts apply the political question doctrine functionally, however, they look to the ramifications of judicial involvement and determine whether the judiciary could manageably resolve the case or controversy. This approach centers on the relative institutional capacity of each branch and allocates functions to the institution best positioned structurally to perform them.<sup>35</sup> Scholars have

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*Id.*; see also Part I.C, *infra* (elaborating Court's concern with judiciary's institutional capacity to resolve cases).

<sup>34</sup> This reading typifies the "negative" model of the separation of powers, which embraces the maxim that "tall fences make good neighbors." See LEARNED HAND, THE BILL OF RIGHTS 1-30 (1958) (urging courts to abstain absent pressing need); see also Burt Neuborne, *In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to the Separation of Powers*, 26 LAND & WATER L. REV. 385, 391 (1991) (describing "negative" separation of powers concept). The principle finds its roots in political theory surrounding the founding. See, e.g., THE FEDERALIST NO. 51, *supra* note 34, at 325 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."); NO. 78, at 483 (Alexander Hamilton) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . . [I]t has no influence over either the sword or the purse . . . . It may truly be said to have neither force nor will, but merely judgment." (emphasis omitted)).

<sup>35</sup> Burt Neuborne has described this approach as the "functional" separation of powers model. Neuborne, *supra* note 34, at 391. A functional analysis will often consider factors such as the availability of information on the issue, the courts' ability to gather such information if lacking, the need for uniformity between the branches, and the deference to the wider role that coordinate branches play in the issue. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-83 (1966); see also N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59, 59 (2001) ("The essence . . . of separation of powers lies in the meeting of form and function; the matching of tasks to those bodies best suited to execute them."). This is somewhat distinct from the functional model as defined by Magill, *supra* note 19, at 609 (describing focus of functional model as "whether an institutional arrangement upsets the overall balance among those branches by permitting one of them to compromise the 'core' function of another"). The two are related, but not coterminous.

It is important to bear in mind, however, that while they may seem similar, the classical and prudential strands of the political question doctrine, discussed *supra* note 31, are not necessarily coterminous with the formal and functional models of the separation of powers. "Classical" and "prudential" refer to categories of factors under the political question analysis by which a court considers the facts and claims for relief. "Formal" and "functional" refer to the diverging models through which a court might read those factors, value them, and make its determination based on them. For example, a court may engage in a classical strand inquiry and determine that it is constitutionally vested with authority to determine an issue but also recognize prudential concerns may make the issue very difficult for it to manage. A court applying a formal model of the separation of powers would nonetheless determine that it possesses sufficient authority to hear the case. A court oper-

argued that it is most often the functional analysis, not the formal, that drives the Court's decisions.<sup>36</sup>

Consider that, in *Baker*, the Justices in majority and in dissent agreed that a functional analysis of the political question doctrine should apply rather than a formal one; the disagreement was instead over *which* form of consideration should govern. For Justice Frankfurter, institutional capacity concerns presented sufficient reason to dismiss. For Justice Brennan, concerns about the *need for* judicial review, rather than the practical difficulties that would follow, governed.

Likewise, in the MSC context, the controversies largely focus on the functional rather than formal aspects of the political question doctrine. Namely, courts diverge on whether sufficiently manageable standards to resolve these cases exist.<sup>37</sup> The remainder of this Part adopts the functional approach to the doctrine.

### B. *The Legal Void Inquiry*

As part of the political question analysis, courts analyze a matter to determine whether there is a regulatory gap that requires judicial intervention, that is, a legal void. A legal void might occur in one of two manners. The first occurs where the political branches have failed to regulate, whether through inadvertent omission or intentional design.<sup>38</sup> In such instances, courts will step in to establish the rule of law. The second way, far more common, occurs where a coordinate branch has regulated a field, but courts find that regulation unconstitutional because it inadequately protects the relevant constitutional interests at stake or because it is beyond the scope of permissible regulation by that branch.

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ating under the functional model, however, might identify other institutional actors better equipped to manage the issue and thus decide that the case presents a political question.

<sup>36</sup> The formal and functional analyses are not mutually exclusive. Particularly where ambiguous language is at play or where a given cause of action does not clearly trigger a textual commitment, courts will resort to functional considerations as indicia of what the Framers might have intended. It is likely that, in the original allocation of power among the three branches, considerations of institutional capacity and structural policing of the branches' respective checks and balances guided the Framers' hands in determining which branch was to make which decision.

<sup>37</sup> For an extended discussion of the jurisdictional split at play in the MSC context, see *infra* Part II. For now, it suffices to acknowledge that courts have not considered these cases to present formal political questions as they have been unwilling to conflate the identities of the military and the third parties it hires to do its work. Nonetheless, the fact that these cases involve matters closely intertwined with the military signals that there may be issues of specialization or expertise at play, triggering the functional aspect of the doctrine.

<sup>38</sup> See Raymond E. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Regulation*, 57 *BUFF. L. REV.* 1361, 1408 (2009) (describing "either a lack of regulation or positive legal exemptions" as "legal black holes").

Often such inadequate regulation is present when the coordinate branches have perverse incentives to under-regulate or they are ill equipped to impose structural limitations. In these instances, judicial review serves two purposes. First, it can impose substantive standards that accord with constitutional requirements. Second, and more importantly, it can police the outer bounds of political power, thereby realigning the coordinate branches' incentives to regulate according to constitutional standards and, in the long term, lessening the need for judicial review.

Consider, as an example, Justice Brennan's majority opinion in *Baker*. The Tennessee apportionment scheme presented a canonical example of a legal void. Because the case involved the apportionment of legislative districts, a process crucial to the functioning of political elections, abstention would have left the issue in the hands of the Tennessee legislature, which had every incentive to gerrymander and disenfranchise certain populations in order to ensure its own reelection. The citizens dissatisfied with the system were sufficiently disenfranchised that neither an election nor an attempt at a constitutional amendment would afford any means of political remedy.<sup>39</sup> While a formal or narrow institutional capacity-focused approach would have acknowledged that a political branch was better equipped to handle the matter, the Court recognized based on a functional analysis that a judicial remedy was a necessary structural check on the enforcement of constitutional voting interests under the Equal Protection Clause.<sup>40</sup> To put it differently, concerns about manageability and standard setting aside, the Court held that prudence dictated that the judiciary intervene because it was the only branch with the proper incentives to do so. Thus, to Justice Brennan, functional concerns regarding the structural maintenance of the separation of powers and the system of checks and balances trumped concerns regarding the court's institutional capacity to decide the matter.

Two more recent instances of the Court's taking the Legal Void approach are the controversial decisions in *Bush v. Gore*<sup>41</sup> and *Boumediene v. Bush*.<sup>42</sup> Both cases present compelling examples of the sort of logistical manageability problems that could have implicated the *Baker* factors and barred justiciability. Yet, in both instances, the Court found no political question, recognizing the presence of a legal void and the need for judicial cure.

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<sup>39</sup> *Baker*, 369 U.S. at 193.

<sup>40</sup> *Id.* at 258–59 (Clark, J., concurring) (“[Without] judicial intervention [plaintiffs] will be saddled with the present discrimination in the affairs of their state government.”).

<sup>41</sup> 531 U.S. 98 (2000).

<sup>42</sup> 128 S. Ct. 2229 (2008).

The Court's 2000 decision in *Bush v. Gore* was shocking for many, largely because of what was at stake: the presidential election.<sup>43</sup> The Court's decision, which held that the Florida Supreme Court's order to recount ballots was a violation of the Equal Protection Clause, decided the election in favor of George W. Bush and in so doing ignited academic debate across the country. Liberals wondered whether the Equal Protection Clause supported such a reading and whether the Court had any business involving itself in a case so fraught with politics.<sup>44</sup> Many argued that *Bush v. Gore* was a classic instance in which formal delegation and functional concerns as to manageability and institutional capacity counseled against judicial intervention.<sup>45</sup> A closer look, however, reveals that the Court's actions can be more appropriately understood as an application of the Legal Void Inquiry.

Many acknowledged that there was a pressing need for *some* resolution of the election, whatever the outcome.<sup>46</sup> For over a month, tensions had run high as the election stalled and the nation awaited announcement of its new president. Resolution from within the political branches was arguably unattainable, with Congress and the nation split so clearly along political lines. With the political branches at a standstill, only the Court was positioned to act quickly to resolve a political, structural defect that was paralyzing the nation and drawing increased attention in the international community.<sup>47</sup> It was due to

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<sup>43</sup> For a comprehensive account of the facts leading up to the 2000 presidential election and the legal controversy that preceded the Court's decision in *Bush v. Gore*, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 332–37 (2009).

<sup>44</sup> See *id.* at 336–37, 553–54 nn.108–19 (documenting liberal academics' criticism of Court's decision).

<sup>45</sup> *E.g.*, Barkow, *supra* note 31, at 276–77 (“[A] powerful case can be made that the issue presented a political question for determination by Congress, not by the Supreme Court [and under] either the classical or the prudential versions of the political question doctrine . . . the Supreme Court should not have vacated the Florida Supreme Court's opinion . . .”).

<sup>46</sup> *E.g.*, FRIEDMAN, *supra* note 43, at 335–36; see also *id.* at 554 & nn.125–27 (describing political deadlock surrounding election (citing KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 193 (2006)); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 147 (2001); Linda Greenhouse, *Learning To Live with Bush v. Gore*, 4 *GREEN BAG* 381, 382–83 (2001); William P. Marshall, *The Supreme Court, Bush v. Gore, and Rough Justice*, 29 *FLA. ST. U. L. REV.* 787, 788–89 (2001)).

<sup>47</sup> Richard Posner shows, in *Breaking the Deadlock*, that, absent judicial intervention, the Congress that would have inherited the election dispute in 2000, would likely have deadlocked in determining the outcome of the election. He argues that the House, controlled by the Republicans, and the Senate, controlled by Democrats, would have endorsed conflicting slates, further stalling the outcome of the election and potentially returning the matter back to Florida. See POSNER, *supra* note 46, at 133–47 (describing “what ifs” had Congress been permitted to resolve dispute itself and arguing that Congress, in 2000,

these circumstances that prudence gave way to necessity, and the Legal Void Inquiry model governed.

Seven years later, the Court again allowed necessity to overcome the *Baker* factors, filling the void left when Congress and the Executive failed to regulate adequately detainee treatment at Guantanamo Bay. In *Boumediene v. Bush*, the Court ruled that limiting detainees' process to military commissions was a constitutionally inadequate alternative to the writ of habeas corpus, and that, as a result, access to the federal courts could not be denied.<sup>48</sup> In doing so, the Court bypassed the functional considerations regarding manageability that might otherwise have militated against judicial involvement. The case was notable on two fronts. First, the fact that detainee treatment is so closely tied to the exercise of military discretion would normally have dictated judicial abstention in recognition of the coordinate branches' superior expertise in the realm of military affairs and national security.<sup>49</sup> Second, Congress had made it abundantly clear in the years preceding *Boumediene* that it did not want the judiciary involved in such determinations. Congress attempted to strip the Court of jurisdiction over detainees' habeas claims through the Detainee Treatment Act of 2005<sup>50</sup> and the Military Commission Act of 2006.<sup>51</sup> Indeed, it was only in the wake of a barrage of reports and testimony regarding the failings of the military commission system that Congress had set up as an alternative to habeas review that the Court acted.<sup>52</sup> *Boumediene* presented the Court with a legal void—one that Congress and the Executive had *intentionally* created to

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would likely have been deadlocked through January of the following year). Any such deadlock would have undermined the presidency, embarrassed the government, and frustrated the administration's ability to rule effectively. *Id.* at 140–46. The Court's decision to intervene instead avoided the risk of “precipitating a political and constitutional crisis merely in order to fuss” with what Posner convincingly argues might have been a “statistical tie that—given the inherent subjectivity involved in hand counting spoiled ballots—[could] never be untied.” *Id.* at 147.

<sup>48</sup> 128 S. Ct. 2229, 2260 (2008).

<sup>49</sup> See Gilligan v. Morgan, 413 U.S. 1 (1973). For a discussion of the Institutional Capacities Inquiry in *Gilligan*, see *infra* Part I.C.

<sup>50</sup> Pub. L. No. 109-148 §§ 1001–06, 119 Stat. 2689, 2739–44 (codified as amended in scattered sections of 10 and 42 U.S.C.).

<sup>51</sup> Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of U.S.C.). The acts were direct responses to the Court's decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), respectively.

<sup>52</sup> In fact, the Court had denied *Boumediene*'s first petition for certiorari in April 2007. *Boumediene v. Bush*, 549 U.S. 1328 (2007). It was only two months later that the Court reversed course and granted certiorari to hear petitioner's claims. *Boumediene v. Bush*, 551 U.S. 1160 (2007). See, e.g., Lyle Denniston, *Court Switches, Will Hear Detainee Cases*, SCOTUSBLOG (June 29, 2007, 12:03 PM), <http://www.scotusblog.com/2007/06/court-switches-will-hear-detainee-cases/> (discussing Court's decision to grant rehearing of case).

evade Article III judicial review.<sup>53</sup> In reasserting its power, the Court acted to ensure individual rights and to impose a structural check on the coordinate branches.

In the wake of *Bush v. Gore* and *Boumediene*, many wondered whether the existence of a legal void was all the Court needed to decline review under the political question doctrine. In each case, the Court's decision to grant review left unclear whether concerns about institutional capacity held any weight in the inquiry.<sup>54</sup>

### C. *The Institutional Capacities Inquiry Survives*

While cases like *Baker*, *Bush v. Gore*, and *Boumediene* suggest that a court may act notwithstanding institutional capacity concerns, this section argues that the Institutional Capacities inquiry still plays a determinant role in the Court's functional political question doctrine, particularly in the realm of military affairs. Under an Institutional Capacities Inquiry, a court focuses on the nature of the issue presented to the judiciary and determines whether the judiciary has the requisite tools to adjudicate the issue in a consistent, predictable, and manageable way.<sup>55</sup> When a court finds its abilities comparatively lacking, it may decide to abstain. Recall Justice Frankfurter's dissenting opinion in *Baker*. Justice Frankfurter argued that gerrymandering was a matter that courts were ill equipped to handle. The Court lacked the tools to gather data, consider geographical factors, weigh the value of economic and social cohesions among local communities, etc.<sup>56</sup> In light of what Justice Frankfurter believed was a lack of firm,

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<sup>53</sup> Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1815 (2009) (describing Guantanamo as "legal black hole"). At the very least, reports of the inadequacies of the military commissions suggest that Guantanamo presented a case of imperfect regulation. At worst, we might consider this a direct attempt to subvert constitutional standards in the interests of national security. More important, for purposes of this Note, is the Court's decision to fill that void by asserting its power to conduct habeas review.

<sup>54</sup> See, e.g., Barkow, *supra* note 31, at 273 (identifying *Bush v. Gore* as "nadir of the political question doctrine and the zenith of judicial supremacy"); accord Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1017 n.38 (2007) ("[T]he Constitution almost surely did not contemplate judicial review of issues concerning the commencement or conduct of war, but likely permitted review of claims that the exercise of military powers violated individual legal rights . . .").

<sup>55</sup> See Neuborne, *supra* note 34; see also Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 951 (2004) ("[T]he Court often uses prudential considerations, more specifically *institutional competence considerations*, to inform its textual analysis when deciding whether the Constitution requires abstention on any specific issue." (emphasis added)). For example, under the *Baker* factors, a lack of judicially manageable standards may indicate that the matter is "textually committed" to a coordinate branch. *Nixon v. United States*, 506 U.S. 224, 228–29 (1993).

<sup>56</sup> *Baker v. Carr*, 369 U.S. 186, 323 (1962) (Frankfurter, J., dissenting).

manageable, and constitutionally dictated legal standards, the judiciary should have abstained and deferred to the political process.<sup>57</sup>

The Court's more recent decision in *Vieth v. Jubelirer*<sup>58</sup> suggests that practical difficulties of this nature are sufficient to require abstention. The *Vieth* plurality opinion indicates that the Court's inability to discern a precise, constitutionally mandated standard is still sufficient grounds for dismissal, even in the face of a legal void.<sup>59</sup> Justice Scalia, writing for the plurality, reversed a decades-long trend, since *Baker*, in which the Court had adjudicated gerrymandering claims under a standard of "one person, one vote."<sup>60</sup> Justice Scalia distinguished *Vieth* as an instance of political, rather than racial, gerrymandering, and argued that years of judicial standard seeking had yielded "neither discernible nor manageable" standards. He thus refused to thrust the issue upon lower courts to "ask them to make determinations that not even election experts could agree upon" and that Congress, a more competent branch in this realm, had taken steps to correct.<sup>61</sup>

While Justice Scalia dismissed the claim of political gerrymandering as categorically outside the province of the judiciary, Justice Kennedy concurred on more limited grounds, explaining that "there [we]re . . . no agreed upon substantive principles of fairness in districting."<sup>62</sup> Even read on its narrowest terms, *Vieth* strongly suggests that institutional capacity concerns, particularly a lack of standards and expertise, are sufficient to ward off judicial review—at least with a

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<sup>57</sup> *Id.* at 269–70 (arguing that logistical factors, taken together, "implic[d] a sorry confession of judicial impotence" and explaining that "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power").

<sup>58</sup> 541 U.S. 267 (2004) (plurality opinion).

<sup>59</sup> Admittedly, Scalia denied that there was a void at all, noting that "[t]he power bestowed upon Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant." *Id.* at 276. Even if one were to concede this point, earlier cases suggest that congressional misregulation would have been enough to prompt earlier courts more concerned with congressional incentives to comply with constitutional norms. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). In *Vieth*, Scalia was careful to claim not that there was no injury but only that "[s]ometimes, the law is that the judicial department has no business entertaining the claim of unlawfulness." 541 U.S. at 277.

<sup>60</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

<sup>61</sup> *Vieth*, 541 U.S. at 290 (plurality opinion). Congressional action loomed in the background of Scalia's discussion of standards and manageability. In the beginning of his opinion, Scalia looked to congressional activity in the realm of political gerrymandering. *Id.* at 276. Since 1980, Congress had asserted its own role in controlling abuse in state redistricting schemes. *Id.* at 276–77 (noting five bills introduced on issue since that date). In light of the presence of other institutions regulating the unlawful conduct and, more importantly, a determination that it was the least capable among the branches in definitively deciding the matter, Scalia believed the Court should abstain. For a discussion of congressional gap filling in the MSC cases, see *infra* Part III.A.1.a.

<sup>62</sup> *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring).

majority of members of the Court.<sup>63</sup> The Institutional Capacities Inquiry thus appears essential to any continuing functional political question doctrine analysis.

In the realm of foreign affairs and the military, the Institutional Capacities Inquiry has perhaps its strongest hold.<sup>64</sup> In these areas, where a court finds that a coordinate branch is acting within its constitutionally designated role, it will decline judicial review in recognition of its lack of expertise, lack of access to information and the necessary factfinding tools, and inability to predict the consequences of establishing a judicial rule in an otherwise complicated and context-specific area.<sup>65</sup> In the realm of military affairs, in particular, Article III courts conducting the Institutional Capacities Inquiry have dismissed cases under the political question doctrine. Thus, in 1973 in *Gilligan v. Morgan*, the Court declined review of a request by students of Kent

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<sup>63</sup> The counterpoint here, argued by many dissatisfied scholars in the wake of the Court's decision in *Vieth*, is that political gerrymandering presented no more of a standard setting challenge than that of the average case. By the time *Vieth* had been decided, many had proposed standards to remedy the political gerrymandering problem; the Court could have simply chosen one of those solutions. Luis Fuentes-Rohwer has catalogued proposals and argued that standards "abound" within the gerrymandering context. Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1932–37 (2006); *id.* at 1939 ("It is impossible to believe that the Court was as artless as it represented itself to be . . ."); see also Joshua S. Stillman, Note, *The Costs of "Discernible and Manageable Standards" in Vieth and Beyond*, 84 N.Y.U. L. REV. 1292 (2009) (arguing that Court's rational basis review standard presents same issues of "manageability" and "discernability"). The counterargument is twofold (though neither may satisfy critics). First, Justice Scalia rests his opinion not on the manageability of the standard alone but on the fact that none of the proposed standards themselves seem to be *dictated* by the Constitution. (Perhaps here, it would have been better had petitioner, amici, and the dissenting justices agreed on one standard, rather than proposing a multitude of possibilities.) That the Court would have to choose from among those standards itself presented a judgment that was essentially political and was therefore not fit for judicial review. *Vieth*, 541 U.S. at 290. Second, the merits of the Institutional Capacities Inquiry in *Vieth* perhaps matter less than that the argument was raised at all. We might read *Vieth* as signaling that institutional capacity concerns are alive and well and continue to hold significant weight with at least five members of the Court. A political question doctrine analysis that ignores such concerns dismisses what may be a substantial factor driving the Court's decision.

<sup>64</sup> See PETER W. LOW & JOHN C. JEFFRIES, JR., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 516 (6th ed. 2008) ("Though successful resort to the political question doctrine in purely domestic disputes is unusual, the doctrine appears to have greater vitality in foreign affairs."); Nzelibe, *supra* note 55, at 962 (noting that courts consider institutional competence in deciding political questions arising in federal affairs context).

<sup>65</sup> See Nzelibe, *supra* note 55, at 958; *id.* at 980–81 (arguing that it is difficult for courts to set standards in foreign affairs realm in part because scope of power and its applications change with context and in part because standards are often guided by shifting political norms or exigencies); see also THE FEDERALIST NO. 23, *supra* note 34, at 121 (Alexander Hamilton) ("These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies . . .").

State University that the Court “restrain leaders of the National Guard from future violation of the students’ constitutional rights.”<sup>66</sup> Petitioners’ requested relief would have required the Court to monitor the methods by which the Guard trained and operated—a task involving “complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force” or “essentially professional military judgments.”<sup>67</sup> Justice Burger wrote that it was “difficult to conceive of an area of governmental activity in which the courts have less competence,”<sup>68</sup> and noted that the matter “embrace[d] critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.”<sup>69</sup> From a functional perspective, the Court’s opinion signaled a hesitancy to render a decision that might place it in a supervisory role over the military—both because the authority was textually committed to a coordinate branch<sup>70</sup> and, more importantly for our purposes here, because the *nature* of that function was more political and regulatory than courts could manage. When faced with similar demands, the Court held, future courts should find the matter a nonjusticiable political question.

#### D. *The Two-Pronged Functional Inquiry, Distilled*

The political question doctrine cases demonstrate a functional inquiry that relies simultaneously on the positioning of the courts as a check on political power and the capacity of the courts to render decisions relative to the other branches. The political question doctrine is thus governed both by the function that a court’s judgment on the matter would serve and the court’s ability to serve that function.

Where there is no legal void and a coordinate branch acts within a wide range of legal, discretionary authority, the judiciary will abstain, particularly where prudential and institutional capacity concerns cut against its involvement.<sup>71</sup> Where political omission or manip-

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<sup>66</sup> Gilligan v. Morgan, 413 U.S. 1, 3–6 (1973).

<sup>67</sup> *Id.* at 10.

<sup>68</sup> *Id.*; see also Morgan v. Rhodes, 456 F.2d 608, 619 (6th Cir. 1972) (Calabrezzi, J., concurring in part and dissenting in part) (“Any such relief, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.”).

<sup>69</sup> Gilligan, 413 U.S. at 7.

<sup>70</sup> Cf. Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—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.”).

<sup>71</sup> Gilligan, 413 U.S. at 10–11 (suggesting separation of powers analysis consider branch’s institutional competence and electoral accountability).

ulation has created a legal void, the Court often will feel compelled to assert itself in the matter, whether as monitor of the bounds of the negative separation of powers or, relatedly, as protector of individual rights. *Vieth*, however, signals that even that impulse must be tempered by prudential considerations regarding institutional competence and the availability of clear standards. The next Part shows that lower courts deciding MSC cases have failed to apply the functional inquiries driving the political question doctrine consistently.

## II

### THE CONTRACTOR CASES

This Part provides an overview of the military contractor cases, demonstrating that courts have split on whether private claims against military contractors present nonjusticiable political questions and discussing how that split is problematic.

#### A. *Diverging Approaches to Military Service Contractor Suits*

The recent surge in military contractor activity has been accompanied by a corresponding increase in the number of injuries and fatalities to employees of firms operating overseas. In 2007, more than 900 contractors were killed, and more than 12,000 wounded.<sup>72</sup> In the wake of such injuries, service contractors and their family members have begun to bring suit against the Firms, alleging negligence in allowing them to work in such dangerous conditions and asserting a bevy of statutory and common law claims concerning fraudulent recruiting and hiring. KBR and Firms like it have consistently relied on the political question doctrine as a shield against such suits. Courts primarily have responded in one of two ways: either by tabling the political question issue until further factual development in the case makes it clear whether the political question is avoidable—an approach I term the “justiciable-as-is approach”—or by rendering an immediate determination as to whether or not the nature of the claim is likely to present a political question—what I call the “absolutist” approach. This section discusses each of these approaches.

#### 1. *The Justiciable-As-Is Approach*

Courts in at least three circuits have ruled that MSC cases do not present political questions on their face and that discovery may continue unimpeded. Many have done so in the context of products-liability-like claims concerning faulty design of military equipment,

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<sup>72</sup> John M. Broder & James Risén, *Death Toll for Contractors Reaches New High in Iraq*, N.Y. TIMES, May 19, 2007, at A1.

failure to maintain military equipment, and failure to warn.<sup>73</sup> Such decisions have focused closely on the precise, tort-based nature of the claims raised, as well as the control over the harm. In ruling that control rests with contractors, these decisions have relied upon older cases concerning military contractor liability and the military-contractor defense<sup>74</sup> as well as a discriminating inquiry into the nature of the relief requested.<sup>75</sup> For example, in *McMahon v. Presidential Airways*, the Eleventh Circuit declined to dismiss claims brought by the families of three deceased soldiers who had died after their helicopter, operated by a defense contractor, crashed in Afghanistan.<sup>76</sup>

The *McMahon* court held that a contractor attempting to prevail on a political question doctrine argument carries a “double burden.”<sup>77</sup> The contractor must prove that review of its decisions would require reexamination of *military* decisionmaking, which must be insulated from judicial review.<sup>78</sup> Finding that the defendant had retained control over flight plans and the discretion to “refuse any mission for safety reasons,” the court ruled there was no political question.<sup>79</sup> Despite the military’s substantial role in planning missions and takeoff times, providing defense to transport planes—and the fact that military field regulations governed contractors’ conduct in Afghanistan—the court ruled that McMahon’s “allegations relate[d] principally to the operation of the flight, for which [the contractor] retained residual responsibility.”<sup>80</sup> Thus, the plaintiff’s claims raised no justiciability bar.

A more recent case—a wrongful death claim against KBR brought by family members of a soldier electrocuted while taking a

<sup>73</sup> See, e.g., *Getz v. Boeing Co.*, No. CV 07-6396 CW, 2008 WL 2705099 (N.D. Cal. July 8, 2008) (allowing manufacturing defect claim); *Flanigan v. Westwind Techs. Inc.*, 648 F. Supp. 2d 994, 1003, 1007 (W.D. Tenn. 2008) (recognizing defective design suit against equipment manufacturer as justiciable but dismissing under combatant activities exception to Federal Tort Claims Act); *Norwood v. Raytheon Co.*, 455 F. Supp. 2d 597, 599, 608 (W.D. Tex. 2006) (allowing x-ray exposure claims by American and German soldiers against manufacturers of radars); *Lessin v. Kellogg Brown & Root*, No. CIV A H-05-01853, 2006 WL 3940556, at \*1–3 (S.D. Tex. June 12, 2006) (holding political question doctrine did not govern negligence claims against KBR for failure to maintain condition of military vehicle).

<sup>74</sup> *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512–13 (1988) (creating limited defense for products contractors). In the MSC context, courts have held that the *Boyle* doctrine does not apply. For an argument that it should, see Jackson, *supra* note 2, at 221–22.

<sup>75</sup> See *Koochi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) (holding that, because plaintiffs requested money damages rather than injunctive relief, case presented less interference with military affairs and thus was justiciable).

<sup>76</sup> *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1336, 1363–65 (11th Cir. 2007).

<sup>77</sup> *Id.* at 1359–60.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1361, 1365 (internal citations omitted).

<sup>80</sup> *Id.* at 1361.

shower at an army base in Baghdad—demonstrates similar analysis. In *Harris v. Kellogg, Brown & Root Services, Inc.*, a Pennsylvania district court declined defendant's motion to dismiss, noting that the mere presence of military decisionmaking (here, concerning where to set up a base and how to fund its maintenance expenses) was insufficient to trigger the political question doctrine.<sup>81</sup> Because the suit focused on the installation and maintenance of the electric shower pumps, and not the military's decision to have KBR perform that work, the district court treated the matter as a standard tort suit. Crucial to the court's inquiry was the lack of combat operations, which might be sufficient to trigger the political question doctrine.<sup>82</sup> That the claim required the court to judge the contractor's performance, and not military decisionmaking itself, was determinative.<sup>83</sup>

## 2. *The Absolutist Approach*

While some courts have been willing to parse the claim and attempt to delineate the extent to which the contractor retains control over the injurious acts, certain district courts have been reluctant to do so. Instead, acknowledging the intertwined nature of the contractor and military affairs, these courts have granted defendants' motions for dismissal. These decisions assume that the facts of the case, no matter how they may develop during discovery, will inevitably force the courts to render a decision that exceeds the limits of the judiciary's authority to act. A Georgia district court's decision in *Whitaker v. Kellogg Brown & Root, Inc.*<sup>84</sup> to dismiss under the political question doctrine demonstrates this divergence.

In *Whitaker*, family members of a U.S. soldier sued KBR after a KBR employee driving a supply convoy truck over a bridge rammed into the back of their son's vehicle, pushing it through the guardrail. The soldier, attempting to extricate himself from the car, fell from the bridge and died. Plaintiffs brought suit for the in-field negligence of the KBR driver and the negligent hiring, training, and supervision of KBR personnel.<sup>85</sup> Under the analysis in *McMahon* and *Harris*, a court might have found no problem: The accident did not occur in the midst of combat and KBR's hiring decisions are within the control of the

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<sup>81</sup> *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 423–24 (W.D. Pa. 2009).

<sup>82</sup> *Id.* at 424.

<sup>83</sup> *Id.*; see also *Getz v. Boeing Co.*, No. CV 07-6396 CW, 2008 WL 2705099, at \*6 (N.D. Cal. July 8, 2008) (“[T]he key inquiry is whether a court will have to consider the wisdom of military operations and decision-making, or whether it need only consider the private contractor's performance.”).

<sup>84</sup> 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006).

<sup>85</sup> *Id.* at 1278.

company. At least some of the claims might, then, be conceptually severable from military strategy. Yet the court in *Whitaker* reached the opposite conclusion. Relying on the facts that contractor personnel worked closely with military personnel under Army regulations, and that “[t]he Army regulates all aspects of control, organization, and planning of Army convoy operations,”<sup>86</sup> the court held that the actions of KBR employees were inseparable from the military orders that compelled them. The facts of the case thus struck upon matters delegated to the Executive and would have forced the court to render a decision in which they lacked judicially manageable standards. The court did not view the suit as a “garden variety road wreck” and adjudicate on the merits.<sup>87</sup> Instead, according to the court, the plaintiffs asked the court to decide what “a reasonable driver in a combat zone, *subject to military regulations and orders*, would do.”<sup>88</sup> That question was better left to the military.

Some courts that previously attempted to distinguish military decisionmaking from contractor liability have begun to reverse tide, instead adopting the absolutist approach. In *Carmichael*, a judge in the Northern District of Georgia refused to dismiss a tort suit against KBR for the alleged negligence of its employees in a supply convoy accident, a claim identical to that brought in *Whitaker*, noting that dismissal would be inappropriate prior to discovery.<sup>89</sup> The claims themselves, the court wrote, did not on their face present political questions since it was not clear that adjudication of the dispute would “necessarily implicate[ ] military decision-making.”<sup>90</sup> Two years later, following discovery in the matter, the Georgia district court dismissed under the political question doctrine.<sup>91</sup> In the two years since, defendants had satisfied their burden of showing that the case involved substantial military judgments, relying largely on military regulations and testimony “confirming that the army, in commanding a dangerous military mission in an active combat zone, exercised plenary control over

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<sup>86</sup> *Id.* at 1279.

<sup>87</sup> *Id.* at 1282; *see also* Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (“No trier of fact can reach the issue of manufacturing defect without eliminating other variables which necessarily involve political questions. Plaintiffs’ claims necessarily require inquiry into military strategy . . .”).

<sup>88</sup> *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) (emphasis added).

<sup>89</sup> *Carmichael v. Kellogg, Brown & Root Servs., Inc. (Carmichael I)*, 450 F. Supp. 2d 1373, 1376 (N.D. Ga. 2006), *rev’d on rehearing*, *Carmichael v. Kellogg, Brown & Root Servs., Inc. (Carmichael II)*, 564 F. Supp. 2d 1363 (N.D. Ga. 2008).

<sup>90</sup> *Carmichael I*, 450 F. Supp. 2d at 1376. The court explained that it was at least “conceivable that at the time of the accident [the driver] was driving the truck within the speed limit set by the military, yet in a manner that was negligent in some other respect.” *Id.*

<sup>91</sup> *Carmichael II*, 564 F. Supp. 2d 1363.

the convoy[ ].”<sup>92</sup> The court agreed, finding that the complex interplay of military strategy relegated the matter to the discretion of the executive branch.

On review, the Eleventh Circuit affirmed. Distinguishing *Carmichael* from *McMahon*, in which it had held that the political question doctrine did not apply, the court of appeals noted that *Carmichael* necessarily required “reexamination of many sensitive judgments and decisions entrusted to the military in a time of war.”<sup>93</sup> Here, unlike in *McMahon*, the military governed all aspects of planning and execution.<sup>94</sup> As for the other claims, the court found the training and supervision claims touched too heavily on military training regulations and policy.<sup>95</sup> Although the negligent hiring claim perhaps stood the best chance of being severed from the military-intertwined aspects of the case, the court of appeals ruled that the plaintiff had failed to pursue it on appeal.<sup>96</sup> Thus, the extent to which decisions made solely by contractors and before military combat decisions were at play could be susceptible to judicial review went unanswered. An alternate attempt to navigate this realm is the subject of the following section.

### B. Lane v. Halliburton: *The Middle-Road Approach*

*Lane v. Halliburton* originated as three separate cases brought by civilian employees of KBR, stemming from injuries each sustained in 2004 while working as service contractors in Iraq.<sup>97</sup> In each, KBR employees were attacked while driving fuel convoy trucks through an active combat zone in Iraq. Plaintiffs filed separate cases in district court,<sup>98</sup> each alleging that KBR had intentionally used materially misleading recruiting materials to convince plaintiffs to contract for employment with KBR and to agree to work in Iraq<sup>99</sup> and that KBR

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<sup>92</sup> *Id.*

<sup>93</sup> *Carmichael v. Kellogg, Brown & Root Servs., Inc. (Carmichael III)*, 572 F.3d 1271, 1275, 1281 (11th Cir. 2009).

<sup>94</sup> *Id.* at 1290 (noting that, in *McMahon*, military’s control over contractor’s activities was “limited and discrete”). Moreover, the accident in *McMahon* was merely “incidental” to combat activities in Afghanistan. *Id.* at 1291.

<sup>95</sup> *Id.* at 1293 (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

<sup>96</sup> *Id.* at 1293.

<sup>97</sup> *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008).

<sup>98</sup> *Fisher v. Halliburton*, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006); *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2796249, at \*1 (S.D. Tex. Sept. 26, 2006). These three cases were consolidated and reversed as *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

<sup>99</sup> *Lane*, 529 F.3d at 555. Plaintiffs alleged that KBR assured applicants that military protection would keep them safe twenty-four hours a day, relying on representations made on the firm’s website. They also pointed to communication from KBR to its employees

was negligent or grossly negligent in supervising its employees in Iraq.<sup>100</sup> The district court's dismissal of the cases and the more cautious approach suggested by the Fifth Circuit's decision to allow the case to proceed highlight courts' doctrinal confusion.

### 1. *The Texas District Court Takes the Absolutist Approach*

In *Fisher v. Halliburton*,<sup>101</sup> KBR moved to dismiss the complaints against it, claiming that the matter was constitutionally delegated to the political branches and that courts lacked sufficiently manageable standards to decide the issue.<sup>102</sup> The district court dismissed the claims, agreeing that the issues presented were too interwoven with Army decisions.<sup>103</sup> Given the presence of national security and foreign policy issues, the court found a textual commitment to the executive branch, reasoning that "issues involving war, and actions taken during war, are beyond judicial competence."<sup>104</sup> Though the face of the complaint concerned only the actions of KBR and the plaintiff and did not specifically address military policy,<sup>105</sup> the court signaled its concern that such policy would necessarily be called into question.<sup>106</sup> The court relied on similar logic in finding that it lacked judicially discoverable and manageable standards.<sup>107</sup> The court repeatedly noted that it could not substitute its judgment for that of the military and seemed most concerned with line drawing.<sup>108</sup> Where, in deciding the negligence claim, for example, would military fault end and contractor fault begin?

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assuring them that their safety would not be compromised, even while working in a hostile environment. *Id.* at 554–55.

<sup>100</sup> *Id.* at 555. Plaintiffs also alleged that KBR's actions amounted to an intentional infliction of emotional distress (IIED). *Id.* However, such claims are actionable only insofar as a plaintiff can prove both a wrongful or reckless act on defendant's part and causation of the alleged injury. *Id.* at 564. Thus, to the extent that the negligence and IIED allegations troubled the court on grounds of causation—and the potential political question that might result—the court in *Lane* seems to have lumped in analysis of the IIED claim with the negligence claim for purposes of its opinion. *Id.* at 564–65.

<sup>101</sup> *Fisher*, 454 F. Supp. 2d at 639.

<sup>102</sup> See *Lane*, 529 F.3d at 556 n.3 (discussing claims raised by defendants below, including those dismissed for want of subject matter jurisdiction).

<sup>103</sup> *Fisher*, 454 F. Supp. 2d at 639.

<sup>104</sup> *Id.* at 640–41.

<sup>105</sup> *Id.* at 641.

<sup>106</sup> *Id.* (noting that true test is "whether a political question will arise during the course of the trial, not whether it is evident from the face of the complaint").

<sup>107</sup> *Id.* at 642 ("Those standards are particularly elusive in the case at bar, where . . . the question becomes whether the court could extricate the defendants' acts from the Army's acts.").

<sup>108</sup> See *id.* at 644.

Furthermore, the district court was concerned that, no matter how the case was framed or what cause of action plaintiffs pursued, a judgment as to defendant's liability would require the court to "examine the policies of the Executive Branch during wartime."<sup>109</sup> Framed broadly, "the Executive Branch policy of using civilian contractors to free up military personnel for military missions would be under scrutiny."<sup>110</sup> Read narrowly, "the question would become why the defendants and the military sent two convoys on the road . . . on that fateful day."<sup>111</sup> Certain that either question ran afoul of the political question doctrine, the court dismissed the case. Relying on *Fisher*, the district court then dismissed the other two MSC cases pending before it: *Lane v. Halliburton*,<sup>112</sup> and *Smith-Idol v. Halliburton*.<sup>113</sup>

## 2. *Discrete Inquiry of the Claims: A Middle Road?*

Hearing the consolidated cases on appeal, the Fifth Circuit took a different approach. Recognizing that political issues *could* arise in the process of discovery, the court of appeals reversed the rulings below<sup>114</sup> and relied on a stricter reading of Rule 12(b)(6),<sup>115</sup> to hold that the mere potential for political questions was not enough; defendants had to prove that "all plausible sets of facts . . . would implicate particular authority committed by the Constitution to Congress or the Executive."<sup>116</sup> Until the evidence showed, clearly and without doubt, that political questions were unavoidable, the court was unwilling to dismiss under the political question doctrine.<sup>117</sup>

Where the court below found the matter's proximity to military affairs reason enough to dismiss, the appellate decision implies that the presence of military activity alone is insufficient to trigger the doctrine.<sup>118</sup> Where the district court found an absence of manageable

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2796249, at \*1 (S.D. Tex. Sept. 26, 2006).

<sup>113</sup> *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685, at \*1 (S.D. Tex. Oct. 11, 2006).

<sup>114</sup> *Id.* at 554 ("[T]he case needs further factual development before it can be known whether that doctrine is actually an impediment. We therefore reverse and remand.").

<sup>115</sup> FED. R. CIV. P. 12(b)(6) (providing for dismissal for failure to state claim upon which relief may be granted).

<sup>116</sup> *Lane*, 529 F.3d at 559–60. In one sense, we might read this as a case about contractors failing to meet their initial burden of showing that they are under the "direct supervision of the military." *Id.* at 554.

<sup>117</sup> This conclusion is a strong contrast to the claim of the court below. *See supra* notes 109–13 and accompanying text.

<sup>118</sup> *Lane*, 529 F.3d at 560.

standards, the court of appeals found that ordinary tort law could govern so long as the court remained capable of separating the actions of the military from those of the defendant. By applying principles of tort law with adjustments for the “less than hospitable environment” in which the harms occurred,<sup>119</sup> the court found it could apply standards<sup>120</sup> and avoid making policy determinations.<sup>121</sup> While the negligence claims might prove more difficult down the line, the court reasoned that the plaintiffs’ fraud claims, in particular, seemed likely to survive discovery.<sup>122</sup>

The lower court dismissals in *Smith*, *Lane*, and *Fisher* represented the absolutist method. The Fifth Circuit’s reversal in *Lane* signaled an alternative approach. In tabling the political question doctrine determination, the Fifth Circuit’s opinion is an attempt to harmonize the absolutist approach with those cases that parsed the nature of the claim.<sup>123</sup> While the middle road perhaps seems the most pragmatic, the next section argues that the Fifth Circuit approach misses the forest for the trees.

### C. *The Need for Judicial Clarity and the Harms of Judicial Delay*

In attempting to navigate an old doctrine as applied to a new factual context, courts’ military contractor decisions, to date, have muddled the meaning and the purpose of the political question doctrine. In so doing, they threaten both the doctrine’s coherence and efficient resolution of judicial disputes.

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<sup>119</sup> *Id.* at 563.

<sup>120</sup> The court tipped its hat to the possibility of joint and several liability as one such mitigating doctrine. *Id.* at 566. The point was made in response to claims by Halliburton that any determination of factual causation would require a jury to consider whether the Army provided adequate protection to the convoys, thus requiring a finding of liability as against the Army—a matter much closer to the core of the political question doctrine’s concerns. *Id.* Joint and several liability would allow the jury to find that the Army bore some responsibility for the harms without directly burdening the Army with monetary damages for that fault, as a defendant found jointly and severally liable can be forced to pay the full damage amount, regardless of its ability to collect from the third party defendant. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 448–49 (1965)).

<sup>121</sup> *Id.* at 563 (“The court will be asked to judge KBR’s policies and actions, not those of the military or Executive Branch. . . . [A]pplication of traditional tort standards may permit the district court to navigate through this politically significant *case* without confronting a political question.”).

<sup>122</sup> *Id.* at 567 (“[T]he court may not have to inquire into the adequacy of the Army’s intelligence and planning to determine whether, based on the information it possessed, KBR made misrepresentations or breached a duty to its employees.”).

<sup>123</sup> See *supra* Part II.A (discussing two approaches). The *Carmichael III* court might have taken a similar route had plaintiff briefed the negligent hiring claim earlier. See *supra* notes 94–96 and accompanying text.

The absolutist approach notes the presence of military-related matters and dismisses cases under the doctrine's textual commitment prong—the matter has been exclusively delegated to a coordinate branch—and judicial standards prong—the courts lack the capacity to render consistent and predictable standards.<sup>124</sup> Courts adopting this approach have abdicated their responsibility to engage in meaningful, scrutinizing analysis of the particular claims presented and the types of standards and rulings they necessarily implicate. Thus, the *Whitaker* court's failure to address those aspects of KBR's hiring of its employees that may have rendered the negligent hiring claims justiciable ignores the *Baker* Court's admonition that courts engage in a “discriminating analysis”<sup>125</sup> of the claims raised and the relief sought.

Those courts attempting to parse these inquiries pay more heed to *Baker*'s demand for careful scrutiny of plaintiffs' claims and pleas for relief. But they also misunderstand the weight that the presence of military decisions regarding strategy and tactics are meant to play in the political question doctrine analysis. By drawing too fine a line between the contractor and military, these courts afford insufficient weight to the political branches' interest in military and foreign affairs. Both approaches substitute somewhat stilted analysis for the separation of powers and institutional capacity concerns that drive the functional inquiry.

Finally, the Fifth Circuit's opinion in *Lane*, which attempted to strike a balance between the two, did so at the cost of the separation of powers norms and concern with efficiency that justiciability doctrines are at least in part meant to safeguard.<sup>126</sup> In tabling the decision and allowing discovery to proceed, the judiciary subjects the MSC, and the Executive, to the very sort of delay and interference that the doctrine and the more general limits on justiciability were meant to

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<sup>124</sup> See *supra* text accompanying notes 31–32 (discussing *Baker* factors).

<sup>125</sup> *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (noting tradition of “a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action”).

<sup>126</sup> See Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007) (discussing motivations underlying courts' justiciability requirements). Consider too the costs of subjecting firms—and, to an extent, the military—to the long process of discovery, particularly for claims that are likely to be found nonjusticiable in the end, as in *Carmichael III*. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (noting that costs of unnecessary litigation and discovery hinder Government's ability to perform core functions); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing impact of high litigation costs on participating parties); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 98 (2007) (noting general rise in discovery costs corresponding with increased complexity in federal litigation).

avoid.<sup>127</sup> While the political question doctrine, as an issue of subject matter jurisdiction, may be raised and reviewed at any point in the case, I argue that courts should take a more prudential path and categorically dismiss in-combat claims as an initial matter, in recognition of the near impossibility that such claims will ultimately be held justiciable. The next Part applies the functional political question doctrine model to demonstrate why this categorical approach ought to apply.

### III

#### APPLYING THE TWO-PRONG FUNCTIONAL POLITICAL QUESTION DOCTRINE TO THE MILITARY CONTRACTOR CASES

##### A. *The Two-Prong Functional Approach Favors Categorical Dismissal of In-Field Negligence Claims*

To establish a *prima facie* case of negligence, a party must demonstrate duty, breach, causation, and damages.<sup>128</sup> Courts hearing claims in the MSC context must determine whether MSC Firms “exercise[d] reasonable care under all the circumstances,” considering factors such as the foreseeability and severity of the harm and the “burden that would be borne by the actor and others” if the firm took measures to avoid the possible harm.<sup>129</sup> This Part demonstrates that a combination of military regulation and market incentives has already established such standards and that, even where a regulatory gap remains, courts are ill situated to set negligence standards to govern in-field conduct.

##### 1. *The Legal-Void-Filling Role of Military Regulations and Contractual Incentives*

MSCs are subject to two varieties of “regulation” that govern their actions while on assignment. The first is a web of Department of Defense and military regulations that governs the supervision and in-field conduct of contractors. The second is a form of congressionally created market forces which, by putting firms in competition with each other for jobs, creates an incentive for firms to deliver high quality, efficient service.

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<sup>127</sup> See Siegel, *supra* note 126, at 112–13 (describing purpose of political question doctrine as freeing coordinate branches from judicial review when it “would do more harm than good”).

<sup>128</sup> RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 170 (9th ed. 2008).

<sup>129</sup> RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 4 (Discussion Draft 1999); see generally Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001).

### a. Military Regulation

Unlike in *Baker* and other instances of regulatory voids, the coordinate branches have a genuine interest in adequately regulating the field of military contractors.<sup>130</sup> In the MSC context, the military stands only to *gain* by ensuring that military contractors act according to a reasonable standard of care. Contractors' mistakes may risk soldiers' lives, undermine military strategy, and cost the government supplies or manpower.

Indeed, the military heavily regulates the in-field conduct of military service contractors, both in combat situations and in day-to-day operations.<sup>131</sup> Because military commanders have final oversight, in-field military regulations dictate the activities of MSC personnel overseas.<sup>132</sup> While each branch of the military has its own set of guidelines regulating MSC conduct, U.S. Army regulations provide a useful example for indepth study.

U.S. Army service contracting is largely governed by the Logistics Civil Augmentation Program (LOGCAP), which gives military personnel wide latitude in hiring and supervising MSC Firms and employees.<sup>133</sup> LOGCAP contract terms, which the military has

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<sup>130</sup> In *Baker* and in *Boumediene*, the coordinate branches had a vested interest in keeping the judicial legal landscape untouched. See *supra* notes 39–40, 50–53 and accompanying text.

<sup>131</sup> Several of the MSC cases, likely at defendants' urging, discuss these regulations in detail. See, e.g., *Fisher v. Halliburton*, 454 F. Supp. 2d 637, 642–43 (S.D. Tex. 2006). While the regulations discussed here are by no means comprehensive, they do offer a representative view of the nature and extent of military regulation of MSC Firms and employees.

<sup>132</sup> The U.S. Army describes oversight of contracting firms as “centralized management and decentralized execution.” U.S. ARMY, CONTRACTING SUPPORT ON THE BATTLEFIELD 2-10 (1999) [hereinafter CONTRACTING SUPPORT]. The Head of the Contracting Activity (HCA), generally the head of command in the particular theater of combat, has ultimate authority over all decisions made regarding the contracting firm. *Id.* at 2-12. While contractors are given some discretion in determining *how* to accomplish military objectives, firms constantly work in conjunction with Army personnel in determining the means by which such objectives will be accomplished. U.S. ARMY, LOGCAP 101 WORKING WITH LOGCAP IN SWA (DRAFT) 14–15, available at <http://www.scribd.com/doc/1809269/US-Army-LOGCAP-101> [hereinafter WORKING WITH LOGCAP] (discussing interaction between contractors and military Administrative Contracting Officer during planning phase). Additionally, as regards oversight itself, the commander bears complete responsibility for all actions of contractors taken under his command. *Id.* at 10.

<sup>133</sup> The program “preplan[s] for the use of civilian contractors to perform selected services in wartime to augment Army forces . . . releas[ing] military units for other missions or [to] fill shortfalls.” U.S. DEP’T OF THE ARMY, ARMY REGULATION 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (1985) [hereinafter LOGCAP]. All contracting through the Pentagon is governed by the Defense Procurement and Acquisition Policy’s Defense Federal Acquisition Regulation Supplement (DFARS), FAR 201.3 (2008), available at <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>. Because those regulations are largely coextensive with the Army LOGCAP program, I focus on LOGCAP.

authority to amend should conditions of war require, govern MSC Firms.<sup>134</sup> The military has substantial control over the hiring, equipping, and training of MSC personnel.<sup>135</sup> Once under contract, the commanding officer that hired the Firm has formal control over the MSC Firm and functional control over its employees. To ensure the safety and quality of services provided, commanders are to periodically institute equipment and performance tests, set baseline standards for conduct and safety,<sup>136</sup> and, accordingly, organize the necessary training programs.<sup>137</sup>

While LOGCAP does not provide substantive regulations, Army regulations—mostly via the Army Field Manual—govern in-field conduct in a wide array of situations. Many of these regulations are necessarily vague to allow for in-the-moment exercises of commander discretion, but they nonetheless serve as a regulatory floor governing the actions of service members. The Army Field Manual makes it clear that MSC Firms (and, by extension, the employees subject to their control) are required to comply with regulations and logistics necessary to the accomplishment of the goals of the contract.<sup>138</sup> Thus, by extension, many of the standards and policies that govern the actions of U.S. soldiers govern the contractors accompanying them. Within these regulations are standards directed toward contractors

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<sup>134</sup> LOGCAP, *supra* note 133, at 3-2 (stating that “continued performance [on the contract] may be required for the duration of the wartime conditions”). This suggests that there may be something to KBR’s claims that it was not free to refuse to go on missions simply because it felt conditions were unsafe. Contractors’ decisions to break contract and refuse to go on missions have created substantial problems in the past. *See, e.g., Private Warriors, Frequently Asked Questions*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/> (last visited Sept. 25, 2010) [hereinafter *Private Warriors*] (noting one instance in which contractors refused to participate in mission and military subsequently fell short on supplies for weeks).

<sup>135</sup> LOGCAP, *supra* note 133, at 3-2 (“Contractors should be assured that the Government will provide equipment and training as stated in the contract.”); CONTRACTING SUPPORT, *supra* note 132, at 3-16 to 3-17 (noting crucial nature of military-provided training to contractors).

<sup>136</sup> For example, commanders may enter into agreements with contractors for activities and locations where they perceive the need for support services. However, commanders must first assess risks “to both the overall mission and to the safety of contractor personnel” before engaging in such contracting. *Id.* at 3-1.

<sup>137</sup> *Id.* at 3-2.

<sup>138</sup> DEP’T OF THE ARMY, FIELD MANUAL NO. 3-100.21, CONTRACTORS ON THE BATTLEFIELD 1-1 to 1-11 (2003) [hereinafter CONTRACTORS ON THE BATTLEFIELD], available at [http://www.aschq.army.mil/supportingdocs/fm3\\_100x21.pdf](http://www.aschq.army.mil/supportingdocs/fm3_100x21.pdf) (“Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract.”).

specifically and more general combat standards that denote military protocol.<sup>139</sup>

On any given assignment, military commanders govern the timing, strategy, and logistics of each mission. The scope of this control includes matters as broad as the decision to dispatch a convoy and the route by which it will travel, and as narrow as the speed at which the convoy will travel and the distance to be maintained between vehicles.<sup>140</sup> MSC Firms retain almost no discretion in this process, as some form of Army procedure, logistics, and tactical standards govern all actions they take. The military regulations thus provide a framework that strikes an important balance between governing contractor conduct and accommodating military need.

Recent amendments to the Military Authorization Act have brought private contractors within the jurisdictional reach of the Uniform Code of Military Justice (UCMJ).<sup>141</sup> The UCMJ is the basis of military law in the United States, governing the conduct of all servicemen and women and those individuals in military custody. In 2006, Congress amended the UCMJ so that it would also apply to all “persons serving with or accompanying an armed force in the field,” whether in a time of declared war or during contingency operations such as those in Iraq and Afghanistan.<sup>142</sup> While the Act does not explicitly state that it applies to contractors,<sup>143</sup> many understand the amendment as being targeted toward them.<sup>144</sup> Under the amendment,

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<sup>139</sup> For a comprehensive look at the governance of Army-contractor relations, including contractors’ relation to combatant commanders and guidelines for commanders working with contractors in field, see generally *id.*

<sup>140</sup> In *Carmichael III*, for example, the court found that “critical determinations” in the mission were “made exclusively by the military,” including the “particular date and time for the convoy’s departure; the speed at which the convoy was to travel; the decision to travel along a particular route . . . ; the distance to be maintained between vehicles; and the security measures that were to be taken.” 572 F.3d 1271, 1281–82 (11th Cir. 2009). It should be noted that this extensive military control does not extend to contractor discretion regarding how certain tasks, such as procurement of equipment in the theater, are to be accomplished. In such instances, contractors have discretion to enter into contracts on behalf of the armed forces, as limited by the scope of the Firm’s agreement with the military HCA. See CONTRACTING SUPPORT, *supra* note 132, at 1-17 (discussing latitude given to contractors in decentralized execution of military objectives).

<sup>141</sup> 10 U.S.C. ch. 47 (2006).

<sup>142</sup> *Id.* § 802(a)(10).

<sup>143</sup> Craig S. Jordan, Note: *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 318–19 (2009) (noting Code does not directly address contractors and questioning whether application of military law to civilians outside formal declarations of war is constitutional).

<sup>144</sup> See, e.g., John Riley & Michael Gambone, *Men with Guns*, 28 WIS. INT’L L.J. 39, 53 (2010) (discussing UCMJ amendments as attempt to “tighten up controls” on MSC Firms); David L. Snyder, *Civilian Military Contractors on Trial: The Case for Upholding the*

a contractor may be tried by court martial for disobeying a commander's orders or for violating the Code's punitive regulations (which are somewhat akin to criminal laws).<sup>145</sup> This system brings contractors, at least potentially, within the direct purview of military law and an alternative court system intended to manage complex issues of military affairs.<sup>146</sup> Additionally, the threat of prosecution at least serves as an incentive for contractors and contracting firms to comply with military regulations and to obey commanders' orders, to the extent it is possible that intentional disobedience and not mere negligence or accidental conduct lead to the tort claims discussed in this Note. More importantly, the Code amendments signal a judgment by Congress that avenues of military justice are the appropriate means of regulating contractor conduct.<sup>147</sup>

### b. Market Incentives as Regulation

Beyond actual regulations governing the contracting scheme, congressionally established economic incentives help regulate the conduct and quality of service of MSC Firms. Pursuant to changes made in 2008, LOGCAP creates market competition by placing firms such as DynCorp International, Fluor Intercontinental, and KBR in competition with each other for individual assignments.<sup>148</sup> Rather than

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*Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65, 68 (2008) (describing 2006 amendments as most promising attempt to extend rule of law to military contractors but arguing that attempt nonetheless falls short). This is particularly true given the history of court cases preceding the 2006 amendment holding that the UCMJ could be applied to civilian conduct only in times of *declared* war. *E.g.*, *Solorio v. United States*, 483 U.S. 435, 439 (1987) (holding military law applies to military personnel only); *United States v. Averette*, 19 C.M.A. 363 (1970) (setting aside conviction of contractor during Vietnam War because Code only applied to civilians where Congress had declared war).

<sup>145</sup> See Mark Hemingway, *Blackwater's Legal Netherworld*, NAT'L REV. ONLINE, Sept. 26, 2007, <http://article.nationalreview.com/328566/blackwaters-legal-netherworld/mark-hemingway>. Senator Lindsay Graham explained that the amendment was meant to "give military commanders a more fair and efficient means of discipline on the battlefield. The provision clarifies the Uniform Code of Military Justice to place civilian contractors accompanying the Armed Forces in the field under court-martial jurisdiction during contingency operations as well as in times of declared war." *Id.*

<sup>146</sup> As of 2009, no charges were filed against civilians using this mechanism. Jordan, *supra* note 143, at 319. However, as Part III.A.2 explains, this may reflect more than a mere failure of the system and instead represent the military's weighing of complex and competing values pertaining to the execution of military strategy.

<sup>147</sup> Presumably, had Congress wished also to extend a direct civil liability cause of action against these companies, it could and likely would have done so. To be sure, critics of contractor conduct had long discussed means of checking contractors' actions, including civil liability.

<sup>148</sup> Press Release, U.S. Army, LOGCAP IV Logistics Contracts Awarded Through Full and Open Competition (Apr. 17, 2008), *available at* <http://www.army.mil/newsreleases/2008/04/17/8573-logcap-iv-logistics-contract-awarded-through-full-and-open-competition/>.

create umbrella contracts for a set durational period, the amendments put contractors in competition on a project-by-project basis, so as to “control costs and enhance quality.”<sup>149</sup> Thus, the Army’s use of open market principles incentivizes MSC Firms to act in accordance with Army regulations, and to perform their roles safely and efficiently. Because the same theater commanders dealing with contractors (and their potential misconduct) are responsible for contracting for new projects, the system is that much more effective at incentivizing quality performance.<sup>150</sup> Additionally, Congress’s proactive alteration of the scope of contractor regulation by adjusting market incentives *without* simultaneously adding a civil regulatory scheme could be seen as some evidence of a congressional determination that market forces were the best means of regulating contractor conduct.

The obvious counterargument is that markets for military contracting (and government contracting, more generally) are notoriously inefficient and noncompetitive.<sup>151</sup> Military contractors add value to military operations because they provide specialized or niche services or infrastructure—a fact that decreases the number of available competitors for these goods and services. Absent an efficient market, a failure to monitor the quality of contractor services adequately can lead to fraud, waste, abuse, or contractor misconduct.<sup>152</sup> However, even taking this risk into account, recent attempts to increase competition and improve oversight represent a political judgment by a coordinate branch to regulate contractor conduct in a manner that strikes a balance between competing government needs: efficiency and oversight versus the provision of crucial military services. Increased regulation and oversight affect the separation of powers concerns that motivate the political question doctrine and counsel against judicial

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<sup>149</sup> *Id.*

<sup>150</sup> Under the old system, competition between firms prior to selection was intense. However, once awarded a contract, a firm’s incentive to perform dropped drastically, given that it was guaranteed a four-year term and even stellar service did not mean it could outbid its competitors during the next bid cycle. *Id.*; see also Robert Brodsky, *Army Cancels Competition for LOGCAP Work in Iraq*, GOVERNMENTEXECUTIVE.COM (May 6, 2010), <http://www.govexec.com/dailyfed/0510/050610rb1.htm> (discussing impetus for Army’s move toward competitive bidding system). Contracting with the firm is handled by the military commander overseeing a particular theater of operations. That commander has all authority to contract with the firm and to assign the firm to particular tasks and missions. See WORKING WITH LOGCAP, *supra* note 132, at 10.

<sup>151</sup> See, e.g., Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 110, 118 (Jody Freeman & Martha Minow eds., 2009) (“When the government is the sole purchaser, a handful of contractors dominating the field often enjoys power that undermines market efficiency and contractual accountability.”).

<sup>152</sup> *Id.* at 116.

intervention in this realm. Thus, recent actions by Congress and the Department of Defense suggesting that the coordinate branches have every incentive to regulate, counsel in favor of judicial restraint.<sup>153</sup> The argument in favor of restraint becomes that much more compelling considering the branches' institutional competency to handle these types of cases.

## 2. *The Institutional Capacities Inquiry Demonstrates That Courts Are Less Competent To Handle These Standard Setting Claims*

The Army regulates the conduct of MSC Firms and employees. But why should the Army necessarily have the final word on those standards? The response is threefold: First, many have doubted courts' ability to set clean standards that are simultaneously workable, context sensitive, and predictable, as would be required in adjudicating negligence claims. Second, and relatedly, in the MSC context, those challenges are magnified so that judicial review might actually impede a coordinate branch. Third, such review imposes an administrative burden.

The legal academy is replete with scholarship criticizing the courts' institutional capacity to weigh competing values in the context of national security and foreign affairs.<sup>154</sup> The debate rests, at least in part, on first-order concerns regarding the judiciary's ability to set standards which are appropriately tailored to strike the right balance.<sup>155</sup> In the tort literature, scholars have raised these same concerns regarding courts' general ability to manage negligence claims which, through the "reasonable person" formula, require selection of a standard of conduct from any number of points on a continuum.

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<sup>153</sup> Minow notes that the government's recent decisions to alter contract lengths, to minimize the availability of noncompetitive contracts, and to require justification of no-bid contracts are attempts to respond to perceived abuses and oversight failures. *Id.* at 117. While Minow remains uncertain about how effective these changes will be, the important point for purposes of the political question doctrine analysis is that the attempts were made at all. Particularly in areas of recognized expertise, such as military affairs, the alignment of positive incentives to regulate and attempts at such regulation are sufficient to trigger the doctrine's application.

<sup>154</sup> See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 2–4 (2006) (criticizing courts' ability to protect against excessive encroachment on basic rights in times of exigency); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3–6 (2007) (urging courts to defer in face of emergency and national security because courts are unable to respond quickly and efficiently and lack expertise needed to manage such policy-heavy matters).

<sup>155</sup> Cf. POSNER & VERMEULE, *supra* note 154, at 5–6 (arguing that courts lack institutional advantage to balance security and liberty during times of emergency).

Critics question whether courts can apply these standards properly when resolving particular cases.<sup>156</sup>

That courts may struggle at setting context-specific standards of conduct bolsters the argument that courts should abstain from doing so where the stakes are particularly high. Consider the difficulties that a jury might face in extrapolating the reasonable person standard to a reasonable person who is driving a convoy under fire on a windy day. It becomes difficult to articulate a legal standard that can account for the highly variable in-theater conditions in a consistent manner.

Even assuming that any standard can be applied consistently, a court must also be careful in choosing one that is simultaneously precise enough to be predictable and flexible enough to compensate wrongfully injured parties, yet not to overly deter net-beneficial behavior.<sup>157</sup> The court's ability to strike that balance requires sophistication in the complex nature of military decisions—which courts acknowledge they lack.<sup>158</sup> Moreover, a standard requires some agreement on the value obtained by engaging in the potentially harmful acts, and the cost of the loss or injury—an inquiry that is imprecise and difficult.<sup>159</sup> It is axiomatic that the goals of tort law are to deter and to compensate. But while a military commander likely takes concerns such as safety into consideration, he also weighs a number of other factors, including the necessity of the mission, alternative strategies, costs of delay, and implications for future strategy. In contrast, the judicial negligence standard takes an *ex ante*, victim-focused perspective. There is a low likelihood of developing a rule that both the judiciary and the military find workable.

The consequences of an incorrectly drawn line are profound. Judicially imposed standards may lack the necessary political considerations and establish judicial precedent that sets imperfect bounda-

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<sup>156</sup> See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152–60 (1973) (describing inherent difficulty in judicial determination of negligence). Despite judges' attempts to apportion liability based on culpability, Epstein argues that this method provides no real, tangible, or precise variables to account for how much "excuse" is enough to pardon the injury-causing actions of a defendant. *Id.* at 155. Moreover, foreseeability is an incredibly malleable standard, which is troubling from both rule-of-law and predictability standpoints. *Id.* at 161–63 & n.35. When combined with the additional difficulty of pinpointing causation in situations involving inherently risky behavior, administration of the claim can be burdensome.

<sup>157</sup> *Id.* at 161–63.

<sup>158</sup> Courts have generally abstained from involving themselves in case-by-case judgments of military actions. See *infra* note 164 and accompanying text; see also Gilligan v. Morgan, 413 U.S. 1 (1973) (holding complaint requesting continuing judicial review of National Guard practices nonjusticiable).

<sup>159</sup> Epstein, *supra* note 156, at 164 (citing R. H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960)).

ries on military action. The constraining nature of these decisions could unduly limit executive action in moments of exigency when discretion is most needed.<sup>160</sup> As one scholar noted, “[s]ubjecting such delicate policy judgments to exacting scrutiny by unelected judges with no expertise in military affairs seems inappropriate in a constitutional democracy.”<sup>161</sup> Moreover, the application of the UCMJ to contractors might serve as an attempt by Congress to assert the rule of law through a mechanism that is better able to balance the need for justice and retribution with the values upon which the military places a premium. Although the UCMJ might not provide injured parties with their desired remedy—such as monetary redress—to the extent this is a balance struck in the interest of military affairs, it is one that ought not be tampered with.<sup>162</sup>

As a final matter, the likelihood of imprecise standard setting is magnified by the judiciary’s remote physical location from the conduct in question, which both undermines its ability to render judgment and burdens it administratively. In the MSC context, the locus of the harm and the relevant facts are often far removed from the courtroom. Courts lack access to information, as both judicial factfinding capabilities and access to witness testimony are in limited supply. That these claims often arise from in-combat activities makes evidence gathering difficult and can challenge the courts’ ability to parse out but-for and proximate causation.<sup>163</sup> The nature of military cases taxes the courts’ capacity to engage in factfinding and, correspondingly, standard setting.<sup>164</sup> Thus, to the extent that the judiciary seems ill equipped, and

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<sup>160</sup> Cf. THE FEDERALIST NO. 23, *supra* note 34, at 121 (Alexander Hamilton) (arguing that executive powers in realm of military affairs should “exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies”). See generally Nzelibe, *supra* note 55 (noting that judicial abstention in foreign affairs is best explained by prudential considerations of judicial capacity).

<sup>161</sup> Pushaw, *supra* note 54, at 1079.

<sup>162</sup> The preemption of state tort law in favor of the balance struck by federal regulatory control, see for example, *Riegel v. Medtronic*, 128 S. Ct. 999 (2008) (holding state tort claim preempted under § 360k(a) of Medical Device Amendments to Food, Drug and Cosmetics Act), is a useful analogy in this context.

<sup>163</sup> A classic assumption of the risk argument might be raised as a defense in each of these cases. Additionally, notions of intervening harm may significantly muddy the proximate cause inquiry.

<sup>164</sup> *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (“Judges[ ] [are] deficient in military knowledge, lack[ ] vital information upon which to assess the nature of battlefield decisions, and sit[ ] thousands of miles from the field of action . . . . Are the courts required to oversee the conduct of war on a daily basis, away from the scene of action?”); see also *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (explaining that national security and foreign policy issues are not easily susceptible to judicial treatment); *Tiffany v. United States*, 931 F.2d 271, 278–79 (4th Cir. 1991) (finding military decisions beyond judicial evaluation); *supra* Part I.C (discussing *Gilligan v. Morgan*, 413 U.S. 1 (1973)).

the Army *already* regulates MSC conduct, in-field negligence claims against MSCs fit within the realm in which the Court may be most comfortable finding a bar to justiciability: “[T]he absence of judicial review” here does not necessarily “impl[y] the absence of a rule of law.”<sup>165</sup>

In many ways, this Note’s approach proposes a formalistic solution to a functional inquiry:<sup>166</sup> In-field negligence claims are nonjusticiable, as the likelihood that they will present severe institutional capacity concerns is so high, and the risks presented by judicial involvement is so great that courts should almost always abstain from interference in this area. Yet, as so often happens with bright-line rules, the ensuing debate concerns where the line is drawn: What counts as “in-field”? Certainly cases such as *Carmichael*, *Lane* and, to a lesser extent, *McMahon* present clear cases.<sup>167</sup> But what of the soldier electrocuted by a negligently installed shower, as in *Harris v. KBR*?<sup>168</sup> Under this model, those claims, too, should be dismissed.

The facts of *Harris*, alone, make judicial abstention seem distasteful in that case. After all, the relevant events occurred on an army base, outside combat conditions. A judge could plausibly look to the reasonableness of how the shower was installed. But what if the base had been closer to combat? Was the installation comparable to that done at other bases, in similar conditions? What if a contractor working maintenance on an army truck overfilled a tire, which burst while on the road in a dangerous combat zone? To what extent can the contractor be held liable if those troops are injured by insurgent attack while stranded, and how should the courts determine what weight to give to the inherently dangerous conditions. It is easy to imagine conditions in which line drawing becomes progressively more difficult.<sup>169</sup> Accordingly, a court adopting a functional approach would

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<sup>165</sup> Nzelibe, *supra* note 55, at 996. Nzelibe argues that absent judicial policing of the executive’s discretionary authority, the rule of law fails in foreign affairs matters. The counterargument made above is supported by the Army’s web of regulations and guidelines.

<sup>166</sup> This is an approach I believe to be consistent with the realities of past applications of the political question doctrine. While the *Baker* Court demanded a case-by-case inquiry and disclaimed the appropriateness of “semantic cataloguing,” *Baker v. Carr*, 369 U.S. 186, 217 (1962), the *Baker* majority went on to “analyze representative cases and to infer from them the analytical threads that make up the political question doctrine,” *id.* at 211. In the line of gerrymandering cases that followed *Baker*, the Court’s findings in *Baker* were taken to have determinative precedential value, thus rendering racial gerrymandering almost always a justiciable issue. The solution I propose urges a similar approach—a near-categorical presumption against justiciability for in-field claims going forward.

<sup>167</sup> See *supra* Part II.

<sup>168</sup> See *supra* notes 81–83 and accompanying text.

<sup>169</sup> Courts have recognized as much in cases in which the government is party to suit for harms stemming from military activities. Under the *Feres* doctrine, the government may

do well to err on the side of caution by broadly abstaining in the area of in-field claims.<sup>170</sup> This is particularly the case where, as in most claims involving in-field conduct, there are properly aligned incentives for the military to regulate.<sup>171</sup>

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claim an affirmative defense to Federal Tort Claims Act (FTCA) liability where the personal injury results from the negligence of others in the armed services. *Feres v. United States*, 340 U.S. 135 (1950). Originally cabined to injuries occurring in the exercise of combat activities, the scope of the defense has been defined to include instances as far removed from combat as a fire started in an army barrack because of a defective heating unit, *Feres*, 340 U.S. at 137, and a helicopter crash caused by negligent FAA operators, *United States v. Johnson*, 481 U.S. 681 (1987). This broad immunity avoids judicial interference with military affairs.

The analogy to the FTCA context does not implicate the Court's public function doctrine, under which the actions of private individuals entrusted by the state to complete certain core functions are deemed governmental in nature for the purposes of establishing state action and triggering constitutional limitations. As an initial matter, the public function doctrine requires that the contractor has taken over all or nearly all of the government function in order for it to apply. *See, e.g.*, *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 858 (2d Cir. 1975) (holding that mere receipt of government funds and subsidies is insufficient to create "state action" and trigger public function doctrine). The mere fact that a private entity fulfills a normally governmental function is not sufficient to trigger the doctrine, as the intention of the doctrine is that the state *itself* not avoid the limitations of the Constitution by contracting its core functions out to government providers. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (declining to find state action in case involving private, nonprofit school paid by local municipalities to educate "maladjusted high school students"). By using military contractors, however, the government is not attempting to avoid liability because it has taken what it views as manageable and workable steps to monitor contractor conduct.

In addition, the public function doctrine sweeps too broadly—if contractor action were essentially governmental, it might require that *all* contractor conduct performed for the military fall within the scope of *Feres* protection, thus rendering all such conduct off limits for civil liability purposes. Under the functional test proposed in this Note, judicial review is at least possible in most instances. Evidence of elements of in-field contractor conduct not regulated by military policy, or instances that indicate that the military does not have sufficient incentive to regulate contractor conduct might convince a court to decline application of the political question doctrine and allow judicial review. Justifying that decision in terms of functional political question doctrine analysis is much easier than undoing a string of decisions declaring that the contractor stands in the shoes of the government for the purposes of civil liability exposure.

<sup>170</sup> To be clear, the solution does not rest on the mere tethering of the issue to a particular combat zone—an analytical shortcut that has been criticized in recent literature. *See Jenks, supra* note 14, at 199 (criticizing certain courts' reliance on combat zones as locus of harm as having little bearing on issue of causation). Rather, it is the underlying interests signaled by the presence of the combat zone, and the military's interest in the activities occurring therein, that counsel in favor of judicial abstention.

<sup>171</sup> In *Harris*, for example, the court notes that military regulations governed how and when maintenance problems were to be managed, though it delegated responsibility for completing repairs to the contractors. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 407–10 & 407 n.7 (W.D. Pa. 2009). The *Harris* court also notes that the military opted to place its soldiers in the facilities in question, despite the presence of known substandard electrical wiring, because it considered that risk appropriate in light of the added protection the structures afforded against mortar attacks and shelling. *Id.* at 405. The fact seemed to matter little to the *Harris* court, which ruled that the case presented no

Conversely, as the next section demonstrates, the absence of proper regulatory incentives, coupled with greater judicial competence, counsels in favor of judicial review in the fraudulent recruitment context.

*B. The Two-Prong Functional Approach Allows Judicial Review of Fraudulent Recruiting Claims*

A plaintiff seeking recovery under a fraud claim must demonstrate that the defendant, knowing the plaintiff reasonably relied on the defendant's statements, intentionally made a false representation which the plaintiff believed to be true and relied upon to her detriment.<sup>172</sup> In MSC cases, a deciding court would therefore be required—and well equipped—to police the bounds between mere puffery and actionable fraud in rendering judgment.

*1. Judicial Abstention Creates a Legal Void in the Regulation of Potentially Fraudulent Recruitment*

Unlike the wide net of regulations and command control governing contractors' in-field responsibilities, the period of recruitment in which employer-employee relationships are formed is largely unregulated in the absence of judicial review. Though the LOGCAP contracts may specify the amount of support the military expects a given firm to deliver—a number that thus corresponds with the number of employees that Firm must hire—there are no guidelines regulating the means by which MSC Firms recruit. Additionally, MSC Firms' potentially fraudulent conduct is not self-regulating. Contractors have much to gain from the absence of legal regulation. The nature of their work is dangerous enough that Firms must pay employees some amount of a risk premium. Current estimates place contractor wages at anywhere from \$400 to \$1000 per day.<sup>173</sup> To the extent that a firm can minimize perceived risk, it can pay a lower premium and maximize its profits. Absent some countermeasure that alters these incentives, fraudulent recruitment will continue.

Such regulation is unlikely to come from the military, which, like MSC Firms, has little incentive to regulate.<sup>174</sup> The primary goal of outsourcing military work is that it increases the administrability of mili-

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political question. But it might inform how thoroughly the functional model, as outlined above, should consider the extent the military has already considered relevant factors and made determinations it considers to be in the best interests of the war effort.

<sup>172</sup> 37 AM. JUR. 2D *Fraud and Deceit* § 116 (2001) (outlining scienter requirement).

<sup>173</sup> *Private Warriors*, *supra* note 134.

<sup>174</sup> See Minow, *supra* note 151, at 126 (arguing that outsourcing military functions allows Congress to undercut certain forms of democratic accountability).

tary logistics and shifts tasks to parties that can complete them more efficiently. First, the Army need obtain only a given number of service contractors; it may not care how. Second, stricter recruitment practices might make it more expensive for contractors to hire personnel, which might impose additional costs on the military, both in pricing and in monitoring Firms' practices.<sup>175</sup> Third, to the extent that the military can rely on contractors, it need not staff its own projects. Because of the unpopularity of a draft, and because hiring contractors allows the government to report smaller numbers of "troops" in a given venue, private contracting is advantageous to the government from a public relations standpoint.<sup>176</sup>

Congressional legislation in this realm is also unlikely, unless MSC Firms' allegedly fraudulent recruitment practices become so widespread as to draw national attention.<sup>177</sup> In the absence of judicial supervision, MSC conduct might go largely unregulated.

Courts appear reluctant to recuse themselves from all policing of coordinate branch activity, particularly where judicial abstention would commit a legal issue to a regulatory void. Thus, courts should think twice before abstaining from fraudulent recruitment claims under the political question doctrine simply because the issue touches on contractor issues that may have an indirect effect on a coordinate branch.

## 2. *Courts Are Well Equipped To Handle Factfinding in Fraud Claims*

To be sure, the creation of judicial standards in the fraud context presents some challenges. For example, proving causation, determining whether it was reasonable for a party to rely, and setting the

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<sup>175</sup> *But see* Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 *MIL. L. REV.* 86, 128–30 (2009) (claiming that firms have overstated effects on government contingency contracting).

<sup>176</sup> Minow, *supra* note 151, at 126 (discussing role that private contractors play in allowing Congress to avoid unpopular public alternatives, such as instituting draft and "avoid[ing] disclosing and reporting details, such as troop and casualty numbers").

<sup>177</sup> *Cf.* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 *N.Y.U. L. REV.* 1, 28 (2007) (discussing problem of legislative inertia, which courts can overcome by handing down democracy-forcing decisions). *See generally* CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (urging brand of democracy-promoting minimalism from Supreme Court to overcome legislative stalemates and reignite democratic constitutional debate).

burden of proof, which vary among jurisdictions,<sup>178</sup> can sometimes be difficult. While causation is a somewhat murky area in fraud cases, the most onerous cases typically involve large aggregate claims, as with securities or commodities.<sup>179</sup> In contrast, MSC cases, to date, have had fairly small plaintiff classes and have involved relationships of privity, drastically reducing the need to presume causation via complex theories.<sup>180</sup>

Reliance and the burden of proof are even less problematic from an institutional capacities approach: First, the standard for both will remain constant within a given jurisdiction, a fact which gives parties a consistent framework to guide them in building their case. This standard would be far more concrete than the highly context-specific nature of in-field negligence claims, which constantly require judges to reformulate the respective duties and assumed risks of each party given situational and logistical data (much of which might be classified).

Second, and relatedly, fraud claims do not by their nature require the judiciary to undertake as extensive an amount of long-distance factfinding or present the other administrability problems that have long concerned courts.<sup>181</sup> The claims arise in a domestic context, between domestic entities, and outside the challenges of in-combat situations. Additionally, the claims lack the extremely close nexus with military affairs presented by the in-field negligence claims. While defendants have argued (often in the alternative) that their representations to employees relied on Army assurances of safety, arguably some more limited form of discovery or in camera review would allow courts to access information on what representations were made to MSC Firms during contract negotiations without undermining military objectives. Recall that the in-field negligence claims, conversely,

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<sup>178</sup> 37 AM. JUR. 2D *Fraud and Deceit* § 493 (2001) (listing “substantial evidence;” “clear, satisfactory, and convincing evidence;” and “clear, precise, and unequivocal evidence” as most common standards).

<sup>179</sup> See, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 338, 346 (2005) (establishing requirement of “loss causation” in securities fraud); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (adopting fraud on the market theory of causation in securities fraud claims).

<sup>180</sup> See, e.g., *Carmichael v. Kellogg, Brown & Root Servs., Inc. (Carmichael II)*, 564 F. Supp. 2d 1363 (N.D. Ga. 2008) (one plaintiff); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637 (S.D. Tex. 2006) (seventeen plaintiffs); *Lane v. Halliburton*, No. H-06-1971, 2006 WL 2796249, at \*1 (S.D. Tex. Sept. 26, 2006) (two plaintiffs); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 WL 2927685 (S.D. Tex. Oct. 11, 2006) (one plaintiff); *Whitaker v. Kellogg, Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (three plaintiffs).

<sup>181</sup> See *supra* text accompanying note 164; see also *Carmichael v. Kellogg, Brown & Root Servs., Inc. (Carmichael II)*, 572 F.3d 1271, 1281–83 (11th Cir. 2009) (noting discretionary, fact-sensitive, and policy-related issues raised by plaintiffs’ in-field negligence claims).

would have set standards that governed contractor conduct while on missions.

Finally, the nature of the judicial inquiry is different in the realm of fraud.<sup>182</sup> As I argued in Part III.B, in-field negligence claims require the judiciary to engage in constant standard setting and adjustment to ensure that, depending on the context of the military activities, the reasonable person standard strikes the right balance between risk and benefit.

Further, the judiciary and the military approach issues of military protocol and standard setting with different sets of values, making agreement upon the proper balance nearly impossible: The former seeks to deter harmful conduct by potential tortfeasors; the latter seeks to effectuate military strategy. Unless it is crucial to military strategy that contracting Firms actively mislead recruits regarding the risk they face, the policies of the judiciary and the military do not inherently conflict. The MSC Firm has a direct incentive to lie (to avoid higher risk premiums), and judicial policing of MSC Firm recruitment would frustrate this intent.<sup>183</sup> Additionally, to the extent that standards are set *ex ante*, we might classify the nature of the judicial involvement here as more of a circumstance of factfinding than standard setting (e.g., “Did defendant intentionally misrepresent the risk?” versus “What actions would constitute reasonable conduct in this scenario?”). Such factfinding, because it is not variable to an extent that precludes consistent outcomes and because it does not impinge on military control of policymaking within the military’s zone of discretion, falls well within the traditional purview of the judiciary.<sup>184</sup> Because there is a regulatory gap, courts should set administrability concerns aside to police that conduct.

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<sup>182</sup> One could argue the fraudulent recruitment claims brought against MSC Firms are weak, on the merits, since one might wonder how any individual could have believed they would be safe in Iraq. At the margins, though, there is a benefit to be had in allowing some of these claims to proceed to discovery—in particular, those instances in which MSC Firms’ recruitment efforts are egregious enough to transgress the line between puffery and fraud. And, given the growth of the military contractor state, it is unlikely that these cases will continue to be limited to claims from employees in combat zones.

<sup>183</sup> Forcing MSC Firms to be honest could make it more difficult for these firms to find employees, and thus hinder military strategy. However, if we presume MSC Firms and employees to be rational actors, a firm need only increase the risk premium to counter employees’ increased reluctance to sign up. Given a choice between firms’ losing profit and individuals’ consenting to conditions at a less-than-deserved risk premium, the law should choose the former. *See also* Carter, *supra* note 175, at 128–30 (arguing that judicial involvement would have limited effect on military’s ability to contract for needed services).

<sup>184</sup> For example, federal courts are already actively engaged in policing otherwise difficult fraud claims in the realm of securities enforcement and product labeling. They rely in large part upon regulatory schemes to do so. *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2006); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78nn (2006); Food,

## CONCLUSION

Federal courts' handling of tort claims against MSCs in recent years suggests that courts are confused about the mechanics of the political question doctrine and uncertain of its application to MSC Firms, who have close ties to military and foreign policy. Their confusion should be of little surprise; the lack of clarity surrounding the political question doctrine has spawned generations of scholarship. Judicial uncertainty, too, is understandable given the rapid increase in use of the military contractor. In light of these concerns, this Note has attempted to show that, at root, the political question doctrine centers on two questions: Is there a legal void? And, if so, do courts possess the institutional capacity to fill that void? Applied to the MSC context, this framework suggests that courts should and can competently hear fraud claims but not in-field negligence claims. This categorical approach presents the best opportunity to balance individual rights against military need, while preserving judicial efficiency and, on a broader level, the separation of powers.

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Drug & Cosmetic Act, 21 U.S.C. §§ 301–99a (2006). But prior to the establishment and evolution of these regulatory schemes—many of which owe their development to the rapid expansion of the administrative state—courts utilized core legislative principles in fashioning a complex body of common law. That courts now have experience in working within the complicated disclosure regime only further suggests that they are well suited to the task of regulating fraud in the employee recruitment realm as well.