

The Political Question Doctrine:

A Potential Weapon for Military Contractors

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For many attorneys, it may seem odd to discuss the political question doctrine in the context of product liability or tort law. The doctrine usually is associated with legal issues that are more obviously “political” in nature than standard product defect claims. Political question doctrine cases generally have focused on whether one of the other branches of government has the constitutional power to make decisions in a particular area without judicial intervention. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962) (concerning politically sensitive issues of legislative reapportionment). However, it is this central concern—the separation of powers between the political and judicial departments—as well as “the inherent limits on judicial capabilities,” that makes the political question doctrine highly relevant to product liability and other tort suits involving military contractors. *Banner v. U.S.*, 303 F. Supp. 2d 1, 9 (D. D.C. 2004), *aff’d*, 428 F.3d 303 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006).

The Constitution expressly assigns primacy over certain military powers to the President (*e.g.*, Commander in Chief of the armed forces, Art. II, §2) and Congress (*e.g.*, power to declare war, Art. I, §8). Some product liability and other tort suits involving mili-

tary contractors have been determined to intrude upon the powers assigned to the “political” branches and involve military issues that extend beyond the competence of the courts. Those cases are deemed to present non-justiciable political questions. Furthermore, even if the allegations concern only defects in manufacturing or design, the defense against those claims could implicate issues related to military policy, strategy and training, and therefore may be outside of what courts are allowed to decide under this developing doctrine.

Invocation of the Political Question Doctrine

The U.S. Supreme Court in *Baker* laid out six factors that guide the identification of a non-justiciable political question:

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

ments by various departments on one question.

Baker, 369 U.S. at 217. The political question doctrine is invoked if just one of these factors is “inextricable from the case.” *Id.* The factors are generally thought to be listed in the order of their importance, *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004), and the first two are the most likely to be invoked in product liability cases involving military contractors.

For example, in *Zuckerbraun v. General Dynamics Corp.*, a product liability suit against the manufacturers of the Phalanx Anti-Missile System was dismissed because the court “would need to examine the appropriateness of the rules of engagement and the standing orders, which are committed to the executive branch,” and the court lacked standards “with which to judge whether reasonable care was taken to achieve tactical objectives in combat while minimizing injury and loss of life.” 755 F. Supp. 1134, 1142 (D. Conn. 1990). However, a product liability suit invoking the political question doctrine can touch upon any or even all of the *Baker* factors. *See Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (citing all 6 *Baker* factors in dismissing a product liability suit against the manufacturers of the Maverick AGM-65D missile).

There are few hard and fast rules for a determination of whether dismissal of a lawsuit against a military contractor is proper pursuant to the political ques-

tion doctrine, but certain factors are relevant, and each case must be analyzed based on its own particular facts.

Fact-Specific Analysis

Whether a non-justiciable political question exists requires a case by case analysis. *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997). Courts must look at “the history of [the issue’s] management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action.” *Id.* quoting *Baker*, 369 U.S. at 211.

A good illustration of this is found in *Smith v. Halliburton Co.*, where the district court dismissed the case pursuant to the political question doctrine based on a detailed analysis of the defendants’ contract with the U.S. government. No. H-06-0462, 2006 U.S. Dist. LEXIS 61980, at *9-11, *15-16, *28 (S.D. Tex. Aug. 30, 2006). The court determined that under the contract in question, the military, not the defendants, were required to provide force protection for a military dining facility operated by the defendants. *Id.* at *11-12. Because control of force protection was under the purview of the military, the defendants were not liable for the deaths of U.S. personnel resulting from a suicide bomb attack. *Id.* at *15-16, *28.

Nevertheless, while the political question analysis is very fact-specific, there are certain guiding principles that may be considered in assessing the likelihood of dismissal under the political question doctrine, and the identity of the parties, the nature of the damages sought, and the relationship between the government and defendant are extremely relevant

Military Plaintiffs versus Civilian Plaintiffs

Generally, dismissal under the political question doctrine is more likely if the plaintiff is a member of the military (or the beneficiary of a member of the military). *See, e.g., Koohi v. United States*, 976 F.2d 1328, 1328 (9th Cir. 1992) (citing *The Paquete Habana*, 175 U.S. 677 (1900) (“federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians”). This general rule is explained in part by the fact that the “special status of the military has required, the Constitution has contemplated, Congress has created, and this [Supreme] Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel.” *See Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). Furthermore, the responsibility for establishing a system of justice for military personnel has rested with the political departments of the government. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (declaring that “judges are not given the task of running the Army [and] responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates”).

For example, the plaintiffs in *Bentzlin* (the family members of six Marines who were killed in combat during the Persian Gulf War when their vehicle was struck by a missile) brought suit against the company that manufactured the missile. *Bentzlin*, 833 F. Supp. at 1487. The *Bentzlin* court dismissed the plaintiffs’ claims due to the fact that plaintiffs died during war and the conduct of a war is constitutionally com-

mitted to the political branches. *Id.* at 1497. It should be noted, however, that at least one Supreme Court case *not involving military contractors* opines that the “identity of the litigant is immaterial” in political question cases. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

War versus Peace

The political question doctrine also is more likely to be applied in times of war or circumstances of military conflict. As the district court in *McMahon* put it, there is “a circumstance which does generally trigger application of the political question doctrine—injury or death as a result of direct combat-like activity.” *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1321 (M.D. Fla. 2006), *aff’d*, 502 F.3d 1331 (11th Cir. 2007). Indeed, the “greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination, which, in and of itself, is not subject to judicial second-guessing,” and there are few military decisions greater in scope than those exercised in times of war. *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 204, 206 (2d Cir. 1987). The *Bentzlin* court succinctly stated: “policy decisions made in war are clearly beyond the competence of the courts to review.” *Bentzlin*, 833 F. Supp. at 1497.

However, the simple fact that an accident occurs during a time of war does not mean that the political question doctrine will automatically apply. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1360 (11th Cir. 2007) (holding that political question doctrine did not apply where a contractor was asked to provide transportation air charter services to the military).

“[T]he case does not involve a *sui generis* situation such as military combat or training, where courts are incapable of developing judicially manageable standards.” *Id.* at 1364. Thus, the facts of the case will be very important to determining whether the political doctrine will apply.

Damages versus Equitable Relief

The political question doctrine can be difficult for defendants to assert if the plaintiff only seeks damages. *Koobi*, 976 F.2d at 1332 (stating that “[d]amage actions are particularly judicially manageable” while “injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches”). In *Giligan v. Morgan*, a case that arose from the Kent State shootings in Ohio, the Supreme Court deemed it “important to note” that the plaintiffs were not seeking damages but rather “a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard”—*i.e.*, equitable relief. 413 U.S. 1, 5 (1973). This “far-reaching demand for relief present[ed] important questions of justiciability.” *Id.* Ultimately, the Court refused to grant the equitable relief sought. *Id.* at 12. Interestingly, the Court allowed a damages suit to proceed against the governor of Ohio and a leader of the Ohio National Guard in a case decided the following year. *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974).

Many of the most recent political question doctrine cases have, however, involved claims for damages, and reveal that the mere fact that damages alone are sought in a case does not mean the case is justiciable. *See, e.g., Aktepe*, 105 F.3d at 1402 (seeking damages for

wrongful death and personal injury); *Tiffany v. United States*, 931 F.2d 271, 275 (4th Cir. 1991) (seeking wrongful death damages); *Smith*, 2006 U.S. Dist. LEXIS 61980, at *1 (seeking negligence damages); *Smith-Idol v. Halliburton*, No. H-06-1168, 2006 U.S. Dist. LEXIS 75574, at *4 (S.D. Tex. Oct. 11, 2006) (seeking exemplary damages); *Fisher v. Halliburton, Inc.*, 454 F. Supp. 2d 637, 639 (S.D. Tex. 2006) (seeking compensatory and exemplary damages); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1278 (M.D. Ga. 2006) (seeking tort damages); *Bentzlin*, 833 F. Supp. at 1487 (seeking tort damages); *Nejad v. United States*, 724 F. Supp. 753, 754 (C.D. Cal. 1989) (seeking compensatory and wrongful death damages). Thus, the political question doctrine may apply to preclude a case even where no equitable relief is sought.

Government Control versus Contractor Control

There are cases which emphasize the importance of government control over a military contractor when determining whether the political question doctrine applies. *See, e.g., McMahon*, 460 F. Supp. 2d at 1320; *see also McMahon*, 502 F.3d at 1363 (political question doctrine requires involvement in military operations or military activities). Two cases involving military convoys in Iraq demonstrate this point well. In each case, the U.S. military was found to have had significant control over the operation of the convoy and in both cases, the political question doctrine was found to bar a suit against the military contractor operating the convoy. In *Fisher*, the Court held that the case presented a political question after determining that “the Army, not the defendants, was respon-

sible for the security of the convoys, up to and including the force protection for the trucks, the intelligence regarding the possible routes, the decision regarding which route to take, and the manner in which the drivers were to operate”. 454 F. Supp. 2d at 642, 644. In *Whitaker*, the court decided that the case presented a political question after noting that the “convoy operation was planned by the military, which determined the placement of vehicles in the convoy, the speed of the convoy, and the distance between vehicles in the convoy”. *Whitaker*, 444 F. Supp. 2d at 1282. In general, the more control the government has over the operation of a military contractor, the more likely it is that the political question doctrine will apply.

Conclusion

The political question doctrine is a potentially powerful defense for military contractors battling a product liability or other tort suit that arises in the context of military operations. Determining the applicability of the doctrine requires a fact-specific analysis that takes into account a number of variables, including: the identity of the plaintiff (whether the plaintiff is a civilian or member of the military), the nature of the relief sought (damages versus equitable relief), the context in which the injury or death occurred (the facts of the accident and whether it is a combat situation), and the degree of control exercised by the government over the contractor (to determine responsibility for the underlying facts of the incident). While this is a developing field, the law provides important protection for manufacturers and designers of military products used in combat zones.