

A V I A T I O N

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## POLITICAL QUESTION DOCTRINE REQUIRES DISMISSAL OF WRONGFUL DEATH SUIT AGAINST GOVERNMENT CONTRACTOR IN IRAQ

By Alison C. Finnegan and Peter Colonna-Romano

Earlier this month, in a lengthy and well reasoned opinion, a federal trial court relied on the Political Question Doctrine in dismissing a wrongful death action against a military contractor. In *Harris v. Kellogg, Brown & Root Services, Inc.*, the court held that negligence claims asserted against a military contractor in connection with the performance of electrical services at a military base during the Iraq War were barred under the Political Question Doctrine. *Harris v. Kellogg, Brown & Root Servs., Inc.*, No. 2:08-cv-00563, at 1 (W.D. Pa. July 13, 2012).

Staff Sgt. Maseth was electrocuted while showering at the Radwaniyah Palace Complex (“RPC”), headquarters for Special Operations Forces in Iraq. The plaintiffs claimed that Kellogg, Brown & Root Services, Inc. (“KBR”) negligently failed to employ certain safety procedures regarding electrical maintenance services at RPC. Plaintiffs alleged that KBR’s negligence caused an ungrounded water pump to fail, leading to Staff Sgt. Maseth’s death. *Id.* at 2–3.

Following extensive fact and expert discovery, prior motion practice, and an appeal to the Third Circuit, KBR argued that the Political Question Doctrine barred the claims. KBR also argued that the claims were preempted by the Combatant Activities Exception to the Federal Tort Claims Act (“FTCA”). *Id.* at 2. In this Alert, we provide a brief overview of the Political Question Doctrine, discuss the *Harris* decision, and briefly analyze the potential application of *Harris* to other types of cases.

**Political Question Doctrine.** Under the Political Question Doctrine, “exclude[d] from judicial review [are] those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Id.* at 43 (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)). Courts analyze six factors to determine whether there is a non-justiciable political question, and the finding of even one of these fac-

tors indicates the presence of a political question. *Id.* at 43–44 (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377 (3d Cir. 2006)). The Political Question Doctrine applies, however, only where one of these factors is “inextricable” to the case. *Id.* at 44 (citing *Gross*, 456 F.3d at 378).

The six factors are: (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 pronouncements by various departments on one question.” *Id.* at 43–44 (quoting *Baker*, 369 U.S. at 217). Because KBR primarily relied on the first, second, and fourth factors, the court focused only on those issues.

**Textually demonstrable commitment to coordinate political branches.** With respect to the first factor, KBR was required to demonstrate that the claims against it required the reexamination of a military decision and that the military decision is insulated from judicial review. *Id.* at 45. KBR argued these factors were present because, if the case went to trial, it would be required to use military witnesses and documents to prove that Staff Sgt. Maseth’s death was a result of discretionary decisions made by the military. *Id.* at 52.

The court agreed with KBR. The evidence demonstrated that the military was aware both that buildings in the RPC had substandard electrical systems and that these systems created the specific risk of electrocutions in the showers.

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The court also credited other aspects of KBR's defense that the case would implicate sensitive military decisions and ultimately held that the potential trade-off between troop safety in other military activities versus electrical maintenance was a sensitive military judgment not subject to judicial review. *Id.* at 71.

**Judicially discoverable and manageable standards.** "By their nature," the court wrote, "sensitive military judgments are without judicially manageable standards as 'courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life.'" *Id.* at 72 (quoting *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997)). The court held that it could not evaluate the military's risk assessment regarding showering in facilities with substandard wiring under traditional state law tort standards. *Id.* at 73.

**Lack of respect due to coordinate branches.** The court held that, although the military was not a party to the suit, KBR's defense would necessarily rely on military decision-making in an effort to place blame on the military for Staff Sgt. Maseth's death. *Id.* at 78 (citing *Feres v. United States*, 340 U.S. 135 (1950)). The court held that it would be improper to put the military and its wartime practices on trial. *Id.*

**Combatant Activities Exception.** Although it dismissed the claims under the Political Question Doctrine, the court nonetheless examined KBR's alternative basis for dismissal under the Combatant Activities Exception to the FTCA. The FTCA waives the federal government's sovereign immunity on stated conditions for certain harms caused by the negligence of its employees. The Combatant Activities Exception precludes liability for "[a]ny claim arising out of the combatant activities of the military or naval forces ... during time of war," *id.* at 81 (quoting 28 U.S.C. § 2680(j)), and may be invoked by military contractors such as KBR. *Id.* (citations omitted).

After reviewing the applicable contracts and work orders, the court determined that KBR's electrical maintenance "was not only necessary to support life activities on the base ... but also was directly connected to force protection as the military actually plugged its war-time defensive instruments used to ward off enemy attacks into the electrical facilities that KBR was paid to maintain." *Id.* at 84. Thus, KBR's services supported the military's mission in Iraq,

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fully integrating KBR into the combatant activities at RPC. *Id.* at 83.

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The opinion in *Harris* contains a significant analysis of both the Political Question Doctrine and Combatant Activities Exception — affirmative defenses to claims asserted against military contractors. While these defenses were applied to a services contractor in *Harris*, they have application to other types of military contractors. Both defenses also can be used as "colorable federal defenses" in the context of Federal Officer Removal. *See, e.g., Scrogin v. Rolls-Royce Corp.*, 2010 U.S. Dist. LEXIS 85363 (D. Conn. Aug. 16, 2010) (successfully opposing the plaintiffs' motion to remand with assertion of the Combatant Activities Exception to the FTCA); *McMahon v. Presidential Airways, Inc.* 410 F. Supp. 2d 1189 (M.D. Fla. 2006) (same). Attorneys in Schnader's Aviation Group have successfully asserted these defenses in the context of removal and as substantive defenses to claims against military contractors. ♦

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*For more information about Schnader's Aviation Group or to speak with a member of the Firm at a particular Schnader office location, please contact:*

*Eric T. Smith, Co-Chair*  
412-577-5223  
[esmith@schnader.com](mailto:esmith@schnader.com)

*Jonathan M. Stern, Co-Chair*  
202-419-4202  
[jstern@schnader.com](mailto:jstern@schnader.com)

*Alison C. Finnegan*  
215-751-2117  
[afinnegan@schnader.com](mailto:afinnegan@schnader.com)

*Peter Colonna-Romano*  
215-751-2562; 856-482-5753  
[pcolonna-romano@schnader.com](mailto:pcolonna-romano@schnader.com)

[www.schnader.com](http://www.schnader.com)

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