
War and Justiciability

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In a coda to his opinion for the Supreme Court in *Boumediene v. Bush*,¹ Justice Kennedy offered a curious reflection on judicial review of the government's war powers. In his words, "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."² As a historical claim, Justice Kennedy's rhetorical flourish is deeply flawed. Up until Vietnam, federal courts routinely reviewed a wide range of questions arising from military operations during wartime, including, among others: the legality of particular maritime captures during the "Quasi-War" with France; the validity of the naval blockade imposed by President Lincoln during the Civil War; the constitutionality of military commissions convened by President Roosevelt to try Nazi saboteurs during World War II; and the propriety of President Truman's seizure of steel mills during the Korean War.³

Instead, Justice Kennedy was presumably alluding to the array of decisions that began during the Vietnam War, in which federal courts relied upon a host of justiciability rules—especially Article III standing and the political question doctrine—to avoid settling inter-branch disputes over the constitutionality of particular uses of military force. Between 1965 and 1974, the Supreme Court used every way imaginable to avoid deciding on the merits any fundamental questions about the legality or scope of the Vietnam War, even as public and academic debate on those questions intensified.⁴ As one academic

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1. 553 U.S. 723 (2008).

2. *Id.* at 797-98.

3. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (holding neither Article II nor any congressional act authorized President Truman's Korean War steel mill seizures); *Ex parte Quirin*, 317 U.S. 1, 20-21 (1942) (upholding U.S. military commission jurisdiction to try eight Nazi saboteurs); *The Prize Cases*, 67 U.S. (2 Black) 635, 655 (1863) (upholding President Lincoln's naval blockade at outset of Civil War); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding President lacks authority ordering Navy ship to seize vessel when order contradicts congressional statutes).

4. See Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275,

commentator has written,

Avoiding decisions on the merits of justiciable Vietnam issues presented by litigants with requisite standing through cryptic silence would be an ignoble abdication of the Court's constitutional responsibilities, whether or not a judgment on the merits would have sustained or invalidated the Government's prosecution of the war. The Court had frequently declared its power and duty to adjudicate federal questions on the merits, but it withheld judgment on the Vietnam cases. The Court was willing to approve the war by silence but would neither confirm nor condemn that result by opinion for or against the Government. Although concealed by the privilege of discretionary review, the Court's apparent failure of courage was inexcusable.⁵

The lower federal courts followed suit in similarly Delphic decisions. In dozens of suits, federal judges relied on two different procedural barriers to justify not reaching the merits of a wide range of litigants' challenges to the constitutionality of the war, the draft, and a host of other Vietnam-era measures.⁶ In one class of cases, these courts held that the plaintiffs lacked "standing"; they could not prove that the allegedly unlawful government action they sought to challenge injured or would injure them specifically.⁷ In another class of cases, courts relied on the "political question" doctrine, holding that the Constitution committed disputes over the scope of whatever authorization Congress had provided for military force in Southeast Asia to the political branches, not to the courts.⁸

The Supreme Court during the same period heard various disputes related to the war, several of which are now part of our constitutional canon and historical consciousness. For example, in *New York Times Co. v. United States*⁹ (the *Pentagon Papers* case), the Court famously rejected the government's effort to enjoin the *New York Times* and the *Washington Post* from printing the

278-99 (1994) (discussing Court's refusal to review and decide on merits any case regarding legality of Vietnam War); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 123 (2011).

5. Schoen, *supra* note 4, at 317 (critiquing Court for remaining silent throughout Vietnam War). "The Court's evasive, perplexing, even craven silence on the Vietnam War was then and seems now a sad and arrogant abuse of its power of final decision." *Id.* at 321.

6. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973); *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302, 305-06 (2d Cir. 1970); *Mora v. McNamara*, 387 F.2d 862, 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967).

7. See *Mottola v. Nixon*, 464 F.2d 178, 179 (9th Cir. 1972).

8. See *Mitchell*, 488 F.2d at 615 (deeming suit seeking declaration of unconstitutionality of Indo-China war "political question" outside federal jurisdiction).

9. 403 U.S. 713 (1971) (*per curiam*).

Pentagon Papers.¹⁰ In *Cohen v. California*,¹¹ the Court threw out the conviction of an anti-war protestor who was prosecuted for wearing a “Fuck the Draft” jacket.¹² In *United States v. O’Brien*,¹³ the Court upheld a federal law that made it a crime to burn a draft card.¹⁴ And in *Clay v. United States*,¹⁵ the Court threw out the conviction of Muhammad Ali for refusing to report for induction, holding the government failed to demonstrate that Ali’s application for conscientious objector status was properly denied.¹⁶

Every time, however, a litigant sought to contest the substance of U.S. military or paramilitary activities in Southeast Asia, or the means by which soldiers were conscripted to participate in those operations, the Court ducked and declined to review lower court decisions, virtually all of which concluded that such disputes were not justiciable.¹⁷ For a time, the Supreme Court’s repeated avoidance provoked dissents from as many as three of the nine Justices, Douglas foremost among them.¹⁸ Those dissents, however, had no visible effect on the Court’s majority, which only appeared to harden against intervention as the war dragged on.¹⁹

Nor did things change in the first years—or decades—after Vietnam. An

10. See *id.* at 714 (holding government did not meet First Amendment’s exceedingly high burden to justify injunction restraining publication).

11. 403 U.S. 15 (1971).

12. See *id.* at 16-17, 26.

13. 391 U.S. 367 (1968).

14. See *id.* at 382 (concluding statute punishing destruction of selective service certificates constitutional). The Court determined that the statute was an “appropriately narrow” way to protect the government’s substantial interest in assuring the availability of such certificates. See *id.*

15. 403 U.S. 698 (1971) (per curiam).

16. See *id.* at 703-04 (concluding Department of Justice erred in advising Appeal Board to deny objector’s application).

17. See *supra* notes 8-12 and accompanying text; see also *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (denying leave to file original bill of complaint). In *Massachusetts v. Laird*, the Commonwealth of Massachusetts tried to invoke the Supreme Court’s original jurisdiction on grounds that it was seeking an injunction against the drafting of Massachusetts’ residents. 400 U.S. at 886.

18. See, e.g., *Sarnoff v. Shultz*, 409 U.S. 929, 932 (1972) (Douglas, J., dissenting) (disagreeing with denial of certiorari); *DaCosta v. Laird*, 405 U.S. 979, 979-81 (1972) (Douglas, J., dissenting); *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (Douglas, J., dissenting); *Hart v. United States*, 391 U.S. 956, 960 (1968) (Douglas, J., dissenting); *Holmes v. United States*, 391 U.S. 936, 949 (1968) (Douglas, J., dissenting); *Mora v. McNamara*, 389 U.S. 934, 939 (1967) (Douglas, J., dissenting); *Mitchell v. United States*, 386 U.S. 972, 974 (1967) (Douglas, J., dissenting). Justice Douglas was not always alone. In *Sarnoff*, Justice Brennan joined in his dissent. 409 U.S. at 929 (Douglas, J., dissenting) (disagreeing with Court’s denial of certiorari). In *Mora*, Justice Stewart wrote a dissent in addition to Justice Douglas’s dissent, which Justice Stewart joined. 389 U.S. at 934-35 (Stewart, J., dissenting). Lastly, in *Massachusetts v. Laird*, Justices Harlan and Stewart would have ordered briefing and argument on the questions of standing and justiciability. 400 U.S. at 886. Where the other Justices’ participation was sporadic, however, Justice Douglas dissented in each of these cases.

19. See *supra* note 18 and accompanying text (noting dissent and reduction in dissenting votes as years pass). Importantly, this period also coincided with a significant turnover in the Court’s membership. Chief Justice Burger replaced Chief Justice Warren in 1969; Justice Blackmun replaced Justice Fortas in 1970; Justice Powell replaced Justice Black in 1972; and then Justice Rehnquist replaced the younger Justice Harlan in 1972. Both as a group and individually, the newer Justices were no more sympathetic—and in some cases far less sympathetic—to the plaintiffs’ claims in these cases.

especially illustrative case in point is *Campbell v. Clinton*,²⁰ where three D.C. Circuit judges relied on a combination of Article III standing and the political question doctrine to avoid reaching the merits of a claim that nineteen members of Congress brought challenging the constitutionality of U.S. airstrikes over Kosovo.²¹ As *Campbell* illustrates, from the end of the Vietnam War through September 11th, courts faced with lawsuits challenging overseas military operations consistently relied on the same two doctrines—standing and the political question doctrine—to avoid reaching, let alone resolving, such thorny constitutional questions.

Whatever their merits, the pre-September 11th line of cases Justice Kennedy may have had in mind in *Boumediene*, such as *Campbell*, invariably involved separation of powers claims, i.e., that the particular use of military force at issue was unconstitutional insofar as it was not duly authorized by Congress. Since September 11th, however, a number of courts have relied on these justiciability constraints—especially the political question doctrine—to dismiss an ever-expanding array of challenges to U.S. military operations overseas, including claims that such operations violate individual rights under federal statutes, the Constitution, and/or international law.²²

For example, in *Wu Tien Li-Shou v. United States*,²³ the U.S. Court of Appeals for the Fourth Circuit threw out a tort suit arising out of the U.S. Navy's allegedly wrongful killing of an innocent Taiwanese fisherman and its intentional destruction of his boat during a counter-piracy operation in the Gulf of Aden.²⁴ The court concluded that the case presented a non-justiciable political question "[b]ecause allowing this action to proceed would thrust courts

20. 203 F.3d 19 (D.C. Cir. 2000) (per curiam).

21. See *id.* at 19 (concluding congressmen lacked standing to challenge lawfulness of executive's actions). The congressmen argued that the President's use of American forces in Yugoslavia was unlawful under both the Constitution's Declare War Clause and the War Powers Resolution, which required the President to report within forty-eight hours when U.S. armed forces are introduced into hostile situations and to withdraw such troops after sixty days unless Congress declared war. See *id.* at 19. The government moved to dismiss on the grounds that the case was moot, the appellants lacked standing, and the case was nonjusticiable. See *id.* at 20.

22. See generally Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012) (discussing contrast between pre- and post-September 11th approaches to doctrines in federal court jurisprudence). As I have argued previously, the post-September 11th developments in four general doctrines of federal jurisprudence—*Bivens* remedies, contractor preemption, the political question doctrine, and qualified immunity—have led to:

[T]he existence of a new national security canon—a body of jurisprudence in which distinct (and sometimes poorly articulated) national security concerns have prompted courts to disfavor relief, even when either: (1) relief should otherwise have been available; or (2) other settled (and typically neutral) doctrines would likely have foreclosed relief in any event.

Id. at 1329.

23. 777 F.3d 175 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 139 (2015).

24. See *id.* at 185-86.

into the middle of a sensitive multinational counter-piracy operation and force courts to second-guess the conduct of a military engagement.”²⁵

Five months later in *Shimari v. CACI Premier Technology, Inc.*,²⁶ a federal district court also relied on the political question doctrine in dismissing state-law and Alien Tort Statute claims against private military contractors arising out of the torture of detainees at the Abu Ghraib prison.²⁷ As Judge Lee concluded in *Shimari*, the “Defendant was under the ‘plenary’ and ‘direct’ control of the military and . . . national defense interests are so ‘closely intertwined’ with the military decisions governing Defendant’s conduct, such that a decision on the merits would require this Court to question actual, sensitive judgments made by the military.”²⁸

In separate decisions, two different courts of appeals also relied on the political question doctrine to dismiss a range of constitutional and statutory claims arising out of the military’s allegedly wrongful destruction of a Sudanese pharmaceutical plant in 1998.²⁹ In the first case, the Federal Circuit held that President Clinton’s determination that the plant was “enemy property” was itself unreviewable, so the court could not reach the merits of the plaintiff’s takings claim.³⁰ In the second case, the D.C. Circuit (sitting en banc) threw out the plaintiff’s tort claims because “[t]he political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.”³¹

Despite this rhetoric, an even larger number of courts have *rejected* arguments, both expressly and implicitly, that similar claims are nonjusticiable. Consider, for example, the D.C. district court’s 2014 ruling in *Al-Aulaqi v. Panetta*,³² a suit for damages brought on behalf of a U.S. citizen suspected of terrorism who was killed in a drone strike.³³ Although Judge Collyer ultimately granted the defendants’ motion to dismiss on the merits, she found that the plaintiffs’ claims *were* justiciable.³⁴ As she concluded,

25. *Id.* at 179.

26. No. 1:08-cv-00827-GBL-JFA, 2015 WL 4740217, at *1 (E.D. Va. June 18, 2015).

27. *See id.* at *4 (dismissing because military exercised control over defendant and claims intertwined with military decisions).

28. *Id.* (internal quotation marks omitted).

29. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 837-38 (D.C. Cir. 2010) (en banc); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1349 (Fed. Cir. 2004).

30. *El-Shifa Pharm. Indus. Co.*, 378 F.3d at 1365.

31. *See El-Shifa Pharm. Indus. Co.*, 607 F.3d at 842-44 (barring review of President’s decision to destroy plant and whether government defamed plant owners).

32. 35 F. Supp. 3d 56 (D.D.C. 2014).

33. *See id.* at 58-59.

34. *See id.* at 69-70 (finding case justiciable because plaintiffs alleged government targeted and killed U.S. citizen abroad without due process). Nevertheless, the case was dismissed for failing to state a claim under the Fourth Amendment and the Fifth Amendment’s Due Process Clause. *See id.* at 72-73.

The powers granted to the Executive and Congress to wage war and provide for national security do[] not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without any judicial review. The interest in avoiding the erroneous deprivation of one's life is uniquely compelling.³⁵

Even outside the unique context of the targeted killing of a U.S. citizen, there have been a veritable bevy of cases in the past decade in which courts did not balk at reaching the merits of civil lawsuits challenging various aspects of overseas military operations. Some involved habeas suits brought by Guantánamo detainees³⁶; others involved suits against military contractors for a wide range of torts committed in Iraq³⁷; others involved claims for damages against senior military officials arising out of the allegedly wrongful detention and treatment of terrorism suspects and innocent civilians alike.³⁸ Although the plaintiffs in these cases often encountered separate obstacles to relief, those barriers typically arose on the merits, and only after entirely ordinary exercises of judicial power to determine their specific applicability.³⁹

Thus, it is no small exaggeration to suggest that contemporary courts are all over the place when it comes to the circumstances under which judicial review of U.S. military operations is—and ought to be—constitutionally permissible. Neither is the suggestion that Justice Kennedy's *Boumediene* coda dramatically oversimplified the existing state of play. And yet, as the cases discussed above illustrate, the Supreme Court's recent reiteration of the narrowness of the political question doctrine did not seem to affect how lower courts have approached the issue.⁴⁰

Of course, for as long as courts have sought refuge in the political question doctrine from legal challenges to military operations, scholars have criticized these rulings as reflecting the worst kind of judicial abdication: courts staying out of disputes not because they are beyond the jurisdiction of the federal courts, but because of a deeply contested self-assessment of relative judicial

35. *Id.* at 69.

36. See *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (holding noncitizen detained at Guantánamo lawfully held under Authorization for Use of Military Force). See generally Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011) (summarizing Guantánamo habeas jurisprudence).

37. See *Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009) (dismissing tort claims brought by foreign nationals challenging their detention and abuse at Abu Ghraib).

38. See *Meshal v. Higgenbotham*, 804 F.3d 417, 418 (D.C. Cir. 2015) (holding no *Bivens* action for U.S. citizen's claim FBI in Africa kidnapped and tortured him); *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (en banc) (holding no *Bivens* action existed for claims arising from military's alleged mistreatment of military contractor); *Arar v. Ashcroft*, 585 F.3d 559, 563-65 (2d Cir. 2009) (en banc) (holding no cause of action under *Bivens* for claims arising out of government rendition policies).

39. See Stephen I. Vladeck, *The Torture Report and the Accountability Gap*, 16 GEO. J. INT'L AFF. 174 (2015) (explaining hardships plaintiffs faced in pursuing relief).

40. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1426-27 (2012) (holding challenge to Secretary of State's refusal to identify "Israel" as citizen's birthplace not barred).

incompetence.⁴¹ Thus, perhaps these cases are just another instance of history repeating itself, provoking the same criticisms that have been leveled at the lower federal courts' overuse of the political question doctrine for decades.

I have, however, increasingly come to think that there is a principled middle ground here, and endeavor in this short paper to unpack and defend it.

In essence, my thesis starts elsewhere, with the discretionary function exception to the Federal Tort Claims Act (FTCA), and the idea that the federal government should not face civil liability for how its officers choose among different available courses of lawful conduct, even if negligence results.⁴² As Justice White explained, "the purpose of the exception is to 'prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy.'"⁴³ Courts have not just applied the discretionary function broadly, but they have fashioned a number of additional doctrines as a matter of statutory interpretation and/or federal common lawmaking in an effort to export the principles behind the discretionary function exception into contexts where it does not expressly apply, but the concerns motivating it are nevertheless implicated.

The first related doctrine derives from the Supreme Court's decision in *Feres v. United States*⁴⁴ in 1950, which bars any and all tort suits by a service member or her heirs arising out of, or incident to, her military service.⁴⁵ Since,

41. 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, 258 (2002) (discussing use of political question doctrine as "general tool of avoidance"); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1460 (2005) (discussing whether there should be political question doctrine and how it should be implemented); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976); (characterizing political question doctrine as "unnecessary, deceptive packaging of several established doctrines"); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1984) ("This Article is designed to explain why the political question doctrine should play no role whatsoever in the exercise of the judicial review power."); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1213 (2002) (alleging Court used political question doctrine as avoidance tool).

42. See 28 U.S.C. § 2680(a) (2012) (setting forth exception to FTCA for claims arising from exercise of discretionary duty). The provision exempts:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.

43. *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (citation omitted).

44. 340 U.S. 135 (1950).

45. See *id.* at 141-42 (concluding government not liable under FTCA for injuries to service members incident to their service). The Court arrived at this conclusion by considering, among other things, the lack of any precedent wherein a service member recovered against his superior officers for negligence. See *id.* at 146. The Court viewed this as evidence that Congress did not intend to create such a cause of action in the FTCA, despite the existence of express exemptions elsewhere in the Act. See *id.*

Feres has been heavily criticized for its sweeping scope and lack of statutory foundation.⁴⁶ The rule's strongest defense is as a prophylactic for the discretionary function exception, with the core purpose of *Feres* being to foreclose litigation over the applicability of the discretionary function exception to military torts.⁴⁷

The second doctrine springs from the Supreme Court's decision in *Boyle v. United Technologies Corp.*⁴⁸ in 1988, where the Court authorized the judicial displacement of state tort law as applied to a private government contractor where allowing such cases to go forward would redound to the pecuniary detriment of the federal government and there was a "significant conflict" between state tort law and an identifiable federal policy.⁴⁹ In essence, *Boyle* was aimed at "plaintiffs seeking to use state law to recover against contractors for claims that would have been barred under the discretionary function exception if brought directly against the responsible government officers."⁵⁰ At least until September 11th, "lower courts had primarily understood *Boyle* as nothing more than an extension of the FTCA's 'discretionary function' exception to a particular type of state-law tort suits against contractors, whether because it was a 'derivative immunity' or a form of 'federal common law preemption.'"⁵¹

For example, in 2000, the Fifth Circuit cited *Boyle* for the premise that "[g]overnment contractor immunity is derived from the government's immunity from suit where the performance of a discretionary function is at issue."⁵² Additionally, in an earlier case, the Seventh Circuit described *Boyle* as holding that "under certain circumstances, government contractors are shielded from state tort liability [only] for products manufactured for the

46. See, e.g., *Ortiz v. United States ex rel. Evans Army Cmty. Hosp.*, 786 F.3d 817, 822-23 (10th Cir. 2015) (critiquing "confusion and lack of uniform standards" of *Feres* doctrine), *petition for cert. filed*, (U.S. Oct. 19, 2015) (No. 15-488); *Lanus v. United States*, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting). Justice Thomas agreed with Justice Scalia that "*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received." *Lanus*, 133 S. Ct. at 2732 (Thomas, J., dissenting) (quoting *United States v. Johnson*, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting)).

47. See generally Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010) (evaluating criticisms of *Feres* decision and arguing correctly decided).

48. 487 U.S. 500 (1988).

49. See *id.* at 512 (barring state tort action against government contractor because military equipment design selection is discretionary function). The Court reasoned "[i]t makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.*

50. Vladeck, *supra* note 22, at 1307.

51. *Id.*

52. *Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431, 435 (5th Cir. 2000) (holding *Boyle* displaced state law tort claim against contractor for alleged defective pilot restraint design). The court concluded the state law tort claims were preempted because the government approved precise specifications for the design features. See *id.* at 438.

Armed Forces of the United States.”⁵³

To be sure, some courts in recent years have applied *Boyle*’s mode of analysis to other exceptions to the FTCA, including the combatant activities exception.⁵⁴ Those rulings, however, have been met with extensive and sharp criticism precisely because they departed from the discretionary function-protecting principle that animates *Boyle*.⁵⁵ As Judge Garland pointed out in his dissent in *Saleh v. Titan Corp.*,

Boyle has never been applied to protect a contractor from liability resulting from the contractor’s violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both. Hence, these cases are not “within the area where the policy of the ‘discretionary function’ would be frustrated,” and they present no “significant conflict” with federal interests. Preemption is therefore not justified under *Boyle*.⁵⁶

Finally, outside of these specific contexts, there is the Supreme Court’s 1985 decision in *Heckler v. Chaney*,⁵⁷ and its general conclusion that the Administrative Procedure Act (APA) does not contemplate judicial review of matters committed by Congress to an agency’s discretion as a matter of law.⁵⁸ Like *Boyle* and the core of *Feres*, *Heckler* reflects the general proposition that it is not for the courts to second-guess the wisdom of policy judgments committed by statute or the Constitution to the Executive Branch—even if those judgments might have been unreasonable under the circumstances. Put another way, the government’s waiver of sovereign immunity should be read narrowly where acts of legal discretion are involved, and all the more so where the actor is the military or its agents.

Although there is plenty more to say about *Feres*, *Boyle*, and *Heckler*, I do

53. *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996) (barring state law design defect claim against military vehicle manufacturer).

54. *See Saleh v. Titan Corp.*, 580 F.3d 1, 6-7 (D.C. Cir. 2009) (holding combatant activities exception justified displacement of state-law tort claims alleging abuse of Iraqi detainees).

55. *See id.* at 17-36 (Garland, J., dissenting) (arguing “[n]othing in *Boyle* itself warrants . . . preemption of state tort law in these cases”); *see also* Vladeck, *supra* note 22, at 1317-21 (discussing *Saleh*’s differing application of *Boyle* as compared to other cases).

56. *Saleh*, 580 F.3d at 23 (Garland, J., dissenting) (footnote and citation omitted).

57. 470 U.S. 821 (1985).

58. *See id.* at 831-32 (articulating presumption of nonreviewability of agency decision not to take enforcement action). In *Heckler*, the Court explained,

[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion. In such a case, the statute (“law”) can be taken to have “committed” the decision making to the agency’s judgment absolutely.

Id. at 830.

not mean to get lost in the weeds. The larger point is that, across different doctrines and contexts, a particular type of claim that courts have historically sought to insulate from judicial review is one that effectively asks courts to second-guess the military's exercise of discretion, as opposed to one that challenges the *legality* of military conduct, because it is axiomatic that government agents possess no legal discretion to break the law.⁵⁹ Indeed, one need not look far for reported decisions in which courts have rejected application of the FTCA's discretionary function exception because of the alleged illegality of the underlying government conduct at issue.

Of course, the pre-September 11th cases relying on the political question doctrine to sidestep inter-branch disputes over the war powers had very little to do with concerns over the reasonableness of particular military decisions and everything to do with demarcating the limits of the President's power to engage in unilateral war-making.⁶⁰ However, as more civil litigants sought to challenge post-September 11th military conduct as a violation of individual rights, some courts identified comparable concerns. Consider Judge Griffith's summary for the en banc D.C. Circuit in *El-Shifa*:

We have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was "wise"—"a 'policy choice[] and value determination [] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch"—and claims "[p]resenting purely legal issues" such as whether the government had legal authority to act.⁶¹

Reduced to its simplest, Judge Griffith's assessment appears to be that the political question doctrine in this context is, in effect, a constitutionalized discretionary function exception, barring judicial review of claims regarding the underlying reasonableness of the military's (or its agent's) exercise of discretion, but not foreclosing review of claims regarding whether the military's conduct was *ultra vires*, or otherwise in violation of a statutory or constitutional constraint on that discretion.

In light of *Feres*, *Boyle*, and *Heckler*, my submission is that this understanding of the political question doctrine in suits challenging military operations is both analytically and normatively satisfying. Analytically, this

59. See generally *Dalehite v. United States*, 346 U.S. 15 (1953) (holding government should not be liable for discretionary acts in performance of government function).

60. See generally Schoen, *supra* note 4 (discussing Court's declination to decide Vietnam War cases on merits).

61. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc).

understanding turns on the supposition that the Constitution commits resolution of these disputes to the discretion of the political branches. This is a far more convincing view than the all-but-indefensible suggestions that emerge in some of these cases that the Constitution commits disputes over the war powers in general to the political branches, and the necessary implication that courts lack the constitutional competence to resolve disputes over the war powers. Normatively, having courts rely on the political question doctrine *only* in cases seeking to challenge the exercise of legally delegated discretion by the military or its agents seems to more carefully balance the tension between judicial review as a check on the political branches and undue judicial interference in policy, rather than legal judgments. Other approaches seem to tip the scale too far in one direction or the other.

That is not to suggest that drawing the line between matters committed to the military's discretion and judicially enforceable legal constraints will always be easy. The critical point for present purposes is that it is a line courts routinely draw in *other* contexts in assessing the applicability of the FTCA's discretionary function exception, and one that they have drawn ever since the FTCA's enactment. So construed, the question courts should ask in assessing the justiciability of a civil suit seeking to challenge the conduct of the military or its agents is whether the relevant actors had legally vested discretion to engage in the contested conduct. If the conduct giving rise to the suit, as alleged, lacked legal authorization or violated a legal constraint on the relevant actor's discretion, then it should follow that the suit is justiciable.

Reassessed in this light, the district court's decision in *Shimari* is clearly wrong. The basic claim at the heart of the litigation is that the defendant contractor's interrogators aided and abetted military soldiers who abused and tortured the plaintiffs while they were detained at Abu Ghraib.⁶² However one defines torture, there can be no question that government officers or their agents have no legal discretion to commit it, regardless of the relative responsibility of the government vis-à-vis the contractors for the misconduct. Although there may be *other* defenses available to the contractor arising from its relationship with the government, relying on the political question doctrine cannot be squared with the articulation advanced above.⁶³

To similar effect, the D.C. district court's refusal to rely on the political question doctrine in *Al-Aulaqi* seems clearly right, because the plaintiff's principal claim alleged a constitutional violation in the targeted killing of his son; a claim that, whatever its merits, necessarily involves a constraint upon

62. See *Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-00827-GBL-JFA, 2015 WL 4740217, at *1-2 (E.D. Va. June 18, 2015) (setting forth allegations underlying plaintiffs' complaint).

63. See *generally* *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (relying on preemption to displace state-law tort claims arising out of Abu Ghraib).

any discretion the relevant government agents might otherwise possess.⁶⁴

The Fourth Circuit's decision in *Wu Tien Li-Shou v. United States* is a half-step harder, because the plaintiff in that case based his tort claims on violations of a pair of statutes: the Suits in Admiralty Act and the Public Vessels Act.⁶⁵ As Judge Wilkinson explained, however, both of those statutes have been read to include judge-made discretionary function exceptions, such that they provide no freestanding constraint on government counter-piracy operations.⁶⁶ Thus, the plaintiff failed to identify a specific constraint on the government's discretion that the counter-piracy operation violated, even though it resulted in the death of her husband and the destruction of his ship. At its core, the suit was about whether the Navy acted reasonably.

The *El-Shifa* case is perhaps the closest call. Before the Federal Circuit, the plaintiff advanced a takings claim: not that the destruction of the pharmaceutical plant was unreasonable, but rather that it was compensable.⁶⁷ Insofar as the compensability of the taking turned on the question whether the plant was "enemy property," the court of appeals concluded that it was non-justiciable because the court could not review the President's underlying determination.⁶⁸ This argument seems difficult to reconcile with the discretionary-function-based view of the political question doctrine, since it should follow (from the post-September 11th habeas litigation, if nothing else) that the President does not have absolute discretion over the designation of enemy property and/or persons. Contrast that lack of discretion with the President's discretion to choose which kind of lawful munition to use in the strike. On the merits, it may be that the reasonableness of the President's error should have militated against the plaintiff's just compensation claim, but that is analytically distinct from whether the designation of the plant as enemy property was constitutionally committed to the exclusive discretion of the President.

Similar problems arise from Judge Griffith's application of his own typology

64. See *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 74 (D.D.C. 2014) (holding political question doctrine does not bar claim for killing of U.S. citizen overseas). The court stated that the powers bestowed on the Executive and Congress do not give them complete freedom "to deprive a U.S. citizen of his life without due process and without judicial review." *Id.* at 69.

65. See *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180-81 (4th Cir. 2015) (holding political question doctrine barred claim arising out of counter-piracy operation), *cert. denied*, 136 S. Ct. 139 (2015); see also 46 U.S.C. § 30903 (2012) (providing private cause of action against government in certain admiralty cases); 46 U.S.C. § 31102 (2012) (waiving immunity in actions against U.S. for damage caused by or compensation for services to U.S. vessel).

66. See *Wu Tien Li-Shou*, 777 F.3d at 183-84 (determining both statutes contain implied discretionary function exception).

67. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1349 (Fed. Cir. 2004) (describing plaintiff's complaint seeking fifty million dollars in compensation for destruction of plant).

68. See *id.* at 1365 (concluding appellants' request unduly intrudes upon President's ability to make enemy property designations). "[T]he Constitution does not contemplate or support the type of supervision over the President's extraterritorial enemy property designations [that] appellants request in this case." *Id.*

to the plaintiff's defamation claim before the en banc D.C. Circuit in *El-Shifa*.⁶⁹ In contrast to the means the government employed in carrying out the airstrike, it is not clear how the Constitution commits to the discretion of the Executive Branch the decision of whether to make false, public statements which tend to defame the owner of the target. As with the plaintiff's takings claim in the Federal Circuit, the government may have had strong defenses on the merits of the defamation claim, but that is a far cry from concluding that the claim was categorically non-justiciable.

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Of course, one may wonder why now is an especially appropriate moment to reflect on the role of the federal courts in civil suits challenging military operations, even more so given the winding down of hostilities in Afghanistan and the settled nature of the judicial role in the Guantánamo habeas litigation. But the prompt for this paper lies in two developments that are relatively recent: the proliferation of the use of private military contractors to conduct traditional military functions (and the concomitant rise of civil suits challenging such conduct), and the blurring of conventional conceptions of the "battlefield" (and, as in the counter-piracy context, of the line between law enforcement and combat operations). For better or worse, these developments have been—and will likely continue to be—litigation-provoking, prompting an ever-growing array of courts to have to consider these same issues in an ever-growing array of contexts. Thus, this paper attempts to provide a more coherent and convincing explanation for when judicial reticence to intervene in such disputes is and is not appropriate, hopefully before the doctrine becomes completely unmoored from its analytical and normative justifications.

With that said, I do not intend to argue that my explanation is a novel way to think about this problem. In their two-part opus discussing the role of the Commander-in-Chief Clause in the relationship between Congress and the President, Professors David Barron and Marty Lederman suggested, "[i]f there is a party with constitutionally sufficient standing to demand judicial protection from a presidential refusal to obey a statute during war, it is not clear why there should be a general rule that courts must leave the question to the political branches."⁷⁰ Additionally, Judge Griffith's formulation of the line between justiciable and non-justiciable war powers disputes puts this intuition into doctrinal terms.

All that I have endeavored to add to these prior interventions are two observations: that such an approach is deeply consistent with the broader

69. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc) (barring defamation claim that required court to review government's reason for attack).

70. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) (examining scope of executive's war powers).

immunity that courts, Congress, and the Constitution have conferred upon the government's exercise of its "discretionary functions," and that such an approach should be embraced in *all* of the relevant contemporary cases, lest courts end up playing too active or too passive a role in checking the military: an especial concern as the military's role becomes that much more amorphous in the post September 11th world.