No. 09-683

JUN 14 2010

In The
Supreme Court of the United States

ANNETTE CARMICHAEL, Individually, and as Guardian for KEITH CARMICHAEL, an incapacitated adult,
Petitioners,

v.

KELLOGG, BROWN & ROOT SERVICES, INC., HALLIBURTON ENERGY SERVICES, INC. and RICHARD IRVINE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

This supplemental brief is submitted in response to the Brief for the United States as Amicus Curiae. In the government's brief, the Acting Solicitor General seems to agree that the Eleventh Circuit erred and reached the wrong conclusion under the political question doctrine, and agrees that the issues presented in this case are important, recurring, and directly implicate the interests of the United States. Despite acknowledging the importance of the case, the Acting Solicitor General recommends that the Court deny the petition. It is precisely due to the importance of the issues presented in this case, however, that the Court should grant the petition in its entirety.

I. The Solicitor General Does Not Dispute That The Eleventh Circuit Erred.

The Solicitor General does not dispute, and indeed seems to agree, that the court of appeals erred in holding that this case is barred by the political question doctrine. Brief of the United States, pp. 9, 14, 16 & 18. In its brief the government answers its Question Presented – whether the political question doctrine bars the adjudication of negligence claims against a civilian military contractor arising from the crash of a civilian-contractor vehicle during a military fuel convoy in Iraq – in the negative. Yet the Acting Solicitor General asks this Court to let stand an erroneous decision by the court of appeals that held as a constitutional matter that these lawsuits are barred.

The court of appeals' holding precludes the further percolation in the courts below that the Acting Solicitor General advocates for. Because the Eleventh Circuit held that courts do not even have subject matter jurisdiction to hear cases against civilian contractors in Iraq, there is no reason for courts to hear the other defenses the Acting Solicitor General says may be available to civilian contractors. The court's error constitutionalizes, and therefore freezes into place, a defense the Acting Solicitor General agrees is inapplicable. If this Court denies the petition, the Eleventh Circuit's decision will stand with a very significant imprimatur, and courts will follow it in erroneously dismissing cases against civilian contractors in Iraq and Afghanistan on political question grounds.

The Acting Solicitor General further argues that there is no conflict among the circuits, therefore the Court should allow further percolation to consider other defenses to these suits. Brief of the United States, p. 9. The Acting Solicitor General seems to intimate that because of the important nature of these cases, this Court should review a civilian contractor case at some point, just not this one that was wrongly decided. There is no reason for the Court to wait for a circuit split. There is ample evidence that the political question doctrine cannot be applied to these cases in a principled way, there is already a split within the Eleventh Circuit on how the political question doctrine applies. The conflicting rulings by the Eleventh Circuit in this case and in *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), and between the district court's opinions in this case on the first motion to dismiss, *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 450 F. Supp. 2d 1373 (N.D. Ga.

2006), and on the renewed motion to dismiss, *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 564 F. Supp. 2d 1363 (N.D. Ga. 2008), demonstrate that the political question doctrine is not being applied consistently. There is no principled way to distinguish those rulings.

The *de facto* immunity from negligent conduct that the Eleventh Circuit has provided contractors removes the important incentive that the risk of paying financial damages is to for-profit companies. The evidence shows that Mr. Irvine was overworked and unskilled. Despite this, KBR put him behind the wheel of a tanker that was transporting fuel for the war effort. After Mr. Irvine wrecked, catastrophically injured Sgt. Carmichael, delayed the fuel convoy, and lost the fuel on his tanker, the Eleventh Circuit's opinion immunizes KBR from suit. As a result, the United States will have to shoulder the costs of caring for Sgt. Carmichael and KBR no longer has the incentive to ensure that on future convoys it puts only well-rested and skilled employees behind the wheel of its vehicles.

If a soldier was driving the tanker, the military would have properly trained the soldier and made sure the soldier could safely perform the task. When a private contractor is providing the driver, the military must depend on the contractor to hire and train good drivers. If the contractor fails to meet these standards and injures someone as a result, the contractor should be held to account.

The effect of the Eleventh Circuit's opinion is not to protect the executive from judicial interference with executive decision making but to saddle the executive

with the cost of non-military blunders by civilian for-profit contractors, and to remove an important incentive to the for-profit contractors to properly hire and train its employees. If the political branches want to limit jurisdiction for these suits, they can do it in a much more nuanced way and in a way that enhances the war fighting capacity of the armed forces.

II. The Solicitor General Agrees That The Issue Presented In This Case Is Important And Recurring.

The Acting Solicitor General agrees that these cases against private military contractors in Iraq and Afghanistan directly implicate the interests of the United States and that the cases are recurring. Both of those facts weigh heavily in favor of this Court granting the petition. An erroneous decision by the Eleventh Circuit should not stand as final precedent on such an important issue. A recurring issue that touches on the relationship between the judicial and executive branches in the context of the war should be decided by this Court, not a court below.

The issue of contractor liability is recurring and confused. There is no reason to wait for a circuit split. Circuits are already divided on how to handle these cases. Currently before the Court is the petition for *certiorari* in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), petition for cert. pending, No. 09-1313 (filed Apr. 26, 2010), where the D.C. Circuit dismissed a case against a civilian contractor on the grounds that the claims are impliedly preempted by the combatant activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j). In *Taylor v. Kellogg, Brown & Root Services, Inc.*, 2010 U.S. Dist. LEXIS 50610 (E.D. Va.

2010), *appeal docketed*, No. 2:09cv341 (4th Cir. May 13, 2010), the court dismissed a case against KBR on political question grounds, relying in part on the Eleventh Circuit's ruling in this case, and on the combatant activities exception theory in the *Saleh* case. To promote the orderly handling of these recurring civilian contractor cases, the Court should grant our petition and set forth how courts should handle these cases.

Whether the separation of powers forecloses courts from hearing personal injury cases against military contractors for acts that occur within the context of the war effort is an important question that should be answered by this Court alone. Questions about the relationship between the judiciary and the political branches during wartime should be answered by the Supreme Court, not lower courts. The judiciary should speak with one voice on the doctrine of separation of powers as it impacts war powers.[1]

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[1] Petitioners stated in the petition that based on our research the opinion below was the first time an appellate court had dismissed a case against a private contractor on political question grounds. Our subsequent research rechecking that question revealed that we were incorrect. In *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), family members of people who were killed when the Israeli Defense Forces bulldozed homes in the Palestinian Territories with equipment manufactured by Caterpillar sued Caterpillar contending that Caterpillar should have known the equipment was going to be used in violation of international law. The undisputed evidence was that the United States approved and financed the sale. The Ninth Circuit held that a decision in the case would intrude on the government's decision to grant military aid to Israel and affirmed dismissal on political question grounds.

The Acting Solicitor General rightly states that the United States has significant interests in ensuring that military decisions are not subject to judicial second-guessing, in protecting soldiers, in making sure contractors are willing to provide the military with services, in ensuring that contractors exercise proper care in minimizing risks to service members and civilians, and do not escape responsibility for misconduct. Brief of United States, p. 9. However, effectively immunizing private contractors from negligence claims by invoking the political question doctrine is not the proper or most effective way to balance these interests.

CONCLUSION

This Court should grant the petition and exercise its jurisdiction.

Respectfully submitted,

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