Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority

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El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010)

In 1998, President Clinton responded to the bombing of United States embassies in Africa by launching missile strikes against an al-Qa'ida training camp in Afghanistan and a pharmaceutical factory in Sudan. The administration claimed that the Sudanese factory supplied chemical weapons to al-Qa'ida. The administration soon admitted that little evidence existed that the Sudanese factory was associated with al-Qa'ida or produced the components of chemical weapons. Rather, the factory was likely simply the largest supplier of pharmaceuticals to the citizens of Sudan. The owners of the factory pursued a variety of options in an attempt to win financial compensation from the U.S. government, but with little success. Among those efforts was a suit filed in federal district court seeking damages from the federal government for defamation and for an unjust and mistaken destruction of property in violation of customary international law. The district court dismissed the case for lack of subject matter jurisdiction as a consequence of sovereign immunity. A divided panel of the U.S. Court of Appeals for the District of Columbia affirmed the lower court's dismissal of the claims on the grounds that such claims were barred by the political question doctrine. In an en banc decision of the full circuit court, the panel's judgment was unanimously affirmed. A majority of the circuit court endorsed the political question doctrine analysis, but four judges would have dismissed the case on other grounds.

Assuming that the plaintiff had a valid claim under federal statutes, why was the case barred by the political question doctrine? Can this case be distinguished from other cases involving military decisions that have been resolved by the courts, such as the detainee cases? Would the reasoning in this case also bar a suit by an individual targeted for a drone strike in a foreign country? Would the answer be different if the target of the drone strike was an American citizen residing abroad? Would this case have been resolved in the same way if the factory in Sudan had been owned by American citizens? If the case involved the victim of torture by officers of the United States? Is the political question doctrine here substituting for judicial analysis of the scope of the president's authority under Article II? Is the court implicitly expanding presidential power?

GRIFFITH, JUDGE.

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"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison* (1803), but some "[q]uestions, in their nature political," are beyond the power of the courts to resolve. The political question doctrine is "essentially a function of the separation of powers," *Baker v. Carr* (1962), and "excludes from judicial review 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." . . .

That some governmental actions are beyond the reach of the courts reflects the Constitution's limitation of the "judicial power of the United States" to "cases" or "controversies." . . . "It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA* (2007).

In the seminal case of *Baker v. Carr*, the Supreme Court explained that a claim presents a political question if it involves:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [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.

"To find a political question, we need only conclude that one [of these] factor[s] is present, not all." *Schneider v. Kissinger* (D.C. Cir. 2005).

Disputes involving foreign relations, such as the one before us, are "quintessential sources of political questions." . . . Even in the context of military action, the courts may sometimes have a role. Therefore, we must conduct "a discriminating analysis of the particular question posed" in the "specific case" before the court to determine whether the political question doctrine prevents a claim from going forward. . . .

In undertaking this discriminating analysis, we note, for example, that the political question doctrine does not bar a claim that the government has violated the Constitution simply because the claim implicates foreign relations. See *INS v. Chadha* (1983). . . . Because the judiciary is the "ultimate interpreter of the Constitution," in most instances claims alleging its violation will rightly be heard by the courts. . . .

We have consistently held, however, 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. . . .

The 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. A plaintiff may not, for instance, clear the political question bar simply by "recasting [such] foreign policy and national security questions in tort terms." . . . Likewise . . . a statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions. . . . Neither a common law nor statutory claim may require the court to reassess "policy choices and value determinations" the Constitution entrusts to the political branches alone.

The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters. . . . In military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded.

The complex, subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action.

. . . . If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that. Therefore, we affirm the district court's dismissal of the plaintiffs' law-of-nations and defamation claims.

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We begin our analysis with the rule we have already identified and upon which both parties agree: courts cannot reconsider the wisdom of discretionary foreign policy decisions. The plaintiffs' law-of-nations claim falls squarely within this prohibition because it would require us to declare that the bombing of the El-Shifa plant was "mistaken and not justified." Whether an attack on a foreign target is justified -- that is whether it is warranted or well-grounded -- is a quintessential "policy choice[] and value determination[] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." . . .

Moreover, *Baker*'s prudential considerations counsel judicial restraint as well. First, the court lacks judicially manageable standards to adjudicate whether the attack on the El-Shifa plant was "mistaken and not justified." . . . We could not decide this question without first fashioning out of whole cloth some standard for when military action is justified. The judiciary lacks the capacity for such a task. . . . Second, the decision to take military action is a "policy determination of a kind clearly for nonjudicial discretion." . . . In short, the decision to launch the military attack on the El-Shifa plant was constitutionally committed to the political branches. . . .

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[T]he court cannot judge the veracity of the President's initial public explanations for the attack for the same reasons we cannot examine whether the attack was "mistaken and not justified." The President's statements justifying the attack are "inextricably intertwined" with a foreign policy decision constitutionally committed to the political branches, because determining whether the President's statements were true would require a determination "whether the alleged conduct should have occurred." . . .

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We conclude our political question analysis by addressing the plaintiffs' argument that they are asking nothing more than that we review the government's designation of them as supporters of the nation's enemies, something courts have done in other contexts. . . .

. . . . But the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area. . . . The plaintiffs can point to no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target. . . .

The plaintiffs also point to another line of cases in which courts have reviewed Executive Branch determinations that a certain asset is "enemy property" or belongs to a terrorist organization and therefore is eligible for seizure pursuant to statute. . . . These cases are not helpful to the plaintiffs for the same reasons the detainee cases are not. None required the courts to scrutinize a decision constitutionally committed wholly to the political branches. . . . The plaintiffs do not ask whether the government's conduct was prohibited by the Constitution. Instead, they seek declarations that the President should not have launched a military strike that the plaintiffs deem unwise and ill founded, and an injunction requiring the government to retract its justifications for the attack. The Constitution denies the courts the ability to grant such extraordinary relief.

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. . . . The cases relied upon by the concurrence might "render [plaintiffs'] claims of doubtful or questionable merit," but they do not "foreclose the subject" and therefore "do not render them insubstantial." . . . "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."

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Affirmed.

JUDGE GINSBURG, with whom JUDGE ROGERS joins, concurring.

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The Court today expands the political question doctrine by reading into several of our recent cases something of a new political decision doctrine. On that approach, we are first to identify some "conduct" or "decision" (the opinion alternates) constitutionally committed to the Executive and then to ask whether the plaintiff's "claim[] … call[s] into question," "require[s] the court to reassess," or is "inextricably intertwined with" that Executive conduct or decision. If so, then the claim is non-justiciable, regardless whether the court would actually have to decide a political question in order to resolve it.

. . . . Under *Baker v. Carr* a statutory case generally does not present a non-justiciable political question because "the interpretation of legislation is a 'recurring and accepted task for the federal courts.'" . . . .

Under the Court's new political decision doctrine, however, even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision constitutionally committed to the President. . . . The result of staying the judicial hand is to upset rather than to preserve the constitutional allocation of powers between the executive and the legislature.

JUDGE KAVANAUGH, with whom CHIEF JUDGE SENTELLE joins, and with whom JUDGE GINSBURG and JUDGE ROGERS join in part, concurring.

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Federal courts lack subject matter jurisdiction over claims that are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." . . . Plaintiffs' two claims in this case fall into that category.

. . . . The problem for plaintiffs is that there is no federal cause of action for defamation available against the United States. . . . [P]laintiffs have cited no customary international law norm that would require compensation by the United States under the Alien Tort Statute for mistaken war-time bombings.

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The key point for purposes of my political question analysis is this: Plaintiffs do not allege that the Executive Branch violated the Constitution. Rather, plaintiffs allege that the Executive Branch violated congressionally enacted statutes that purportedly constrain the Executive. The Supreme Court has never applied the political question doctrine in cases involving statutory claims of this kind. As Judge Edwards has correctly explained, the proper separation of powers question in this sort of statutory case is whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II of the Constitution. . . . That is a weighty question -- and one that must be confronted directly through careful analysis of Article II, not resolved *sub silentio* in favor of the Executive through use of the political question doctrine.

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As the Supreme Court has explained, the interpretation of legislation is a "recurring and accepted task for the federal courts." . . . Under Article III of the Constitution, "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." . . .

There is good reason the political question doctrine does not apply in cases alleging statutory violations. If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action. As a result, the court would be ruling (at least implicitly) that the statute intrudes impermissibly on the Executive's prerogatives under Article II of the Constitution. In other words, the court would be establishing that the asserted Executive power is exclusive and preclusive, meaning that Congress cannot regulate or limit that power by creating a cause of action or otherwise.

Applying the political question doctrine in statutory cases thus would not reflect benign deference to the political branches. Rather, that approach would systematically favor the Executive Branch over the Legislative Branch -- without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues. . . .

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The absence of a cause of action covering the national security activities . . . is hardly surprising. The political branches, mindful of the need for Executive discretion and flexibility in national security and foreign affairs, are unlikely to unduly hamper the Executive's ability to protect the Nation's security and diplomatic objectives. Relatedly, it is well-established that courts must be cautious about interpreting an ambiguous statute to constrain or interfere with the Executive Branch's conduct of national security or foreign policy. And apart from all that, if a statute were passed that clearly limited the kind of Executive national security or foreign policy activities at issue in these cases, such a statute as applied might well violate Article II.

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A statute regulating or creating a cause of action to challenge the President's short-term bombing of foreign targets in the Nation's self-defense (or contesting the Executive Branch's subsequent statements about it as defamatory) might well unconstitutionally encroach on the President's exclusive, preclusive Article II authority as Commander in Chief. . . .

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Given that no cause of action exists here, the political question and Article II issues in this case have an abstract and hypothetical air to them. . . . We should decline the opportunity to expound on the scope of the President's exclusive, preclusive Commander-in-Chief authority under Article II. . . .