
FEDERAL COURTS — POLITICAL QUESTION DOCTRINE — D.C. CIRCUIT DECLINES TO OVERTURN LOWER COURT'S FINDING OF JUSTICIABILITY IN TORT SUIT BROUGHT BY INDONESIAN VILLAGERS. — *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

In *Baker v. Carr*,¹ the Supreme Court articulated both the separation of powers principle underlying the political question doctrine² and six factors³ to guide courts in the doctrine's application. The Court's attempt at guidance, however, has contributed more confusion than clarity.⁴ In the midst of this continuing uncertainty, the Bush Administration has sought to expand executive prerogative in the area of foreign policy,⁵ in a manner consistent with its approach to executive power in other domains.⁶ Recently, in *Doe v. Exxon Mobil Corp.*,⁷ the D.C. Circuit confronted an aggressive political question claim supported by a State Department statement of interest that detailed only indirect foreign policy consequences. Although the court declined on narrow grounds to overturn the district court's rejection of the political question claim, its reasoning did not provide useful guidance to lower courts facing similar attempts to expand the political question doctrine beyond its separation of powers rationale.⁸ The court should

¹ 369 U.S. 186 (1962).

² See *id.* at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

³ The Supreme Court explained that the presence of one of the following six factors is necessary to establish a political question:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

⁴ See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 9 (1992) (describing the "current state of jurisprudential incoherence"); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1402–03 (1999) (describing the lack of principle and consistency in the doctrine's application since *Baker*).

⁵ See, e.g., Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 982–84 (2004) (comparing the Bush Administration's aggressive assertion of the political question doctrine to the approaches of previous administrations).

⁶ See 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, 706–11 (2008) (illustrating the Bush Administration's "preclusive power" approach in areas such as enemy combatant detention, treatment of detainees, and electronic surveillance).

⁷ 473 F.3d 345 (D.C. Cir. 2007).

⁸ The more general debate over when minimalist decisions are appropriate lies beyond the scope of this comment. Even proponents of minimalism, however, recognize that some situations

have taken the opportunity to reinforce that central rationale by sharpening the distinction between cases involving true political questions and cases involving mere political overtones.

In 2001, Exxon Mobil Corporation (Exxon) operated a natural gas extraction and processing facility in the Aceh province of Indonesia.⁹ Eleven Acehese villagers sued Exxon in the U.S. District Court for the District of Columbia, alleging that Exxon's security forces — composed of members of the Indonesian military — committed murder, torture, sexual assault, and other tortious acts against them.¹⁰ The plaintiffs brought claims under the Alien Tort Statute¹¹ (ATS) and the Torture Victim Protection Act¹² (TVPA), in addition to common law tort claims.¹³ Exxon filed a motion to dismiss the complaint on the ground that the claims were nonjusticiable political questions.¹⁴

In a statement of interest solicited by the district court, the State Department expressed concerns that the suit “would harm relations with Indonesia — a key ally in the war on terrorism — and that it would discourage foreign investment in Indonesia.”¹⁵ The statement of interest included the caveat, however, that “[m]uch of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation.”¹⁶ The district court granted Exxon's motion to dismiss the plaintiffs' claims under the ATS and TVPA,¹⁷ but denied the motion to dismiss the common law tort claims, holding that they did not present a nonjusticiable political question.¹⁸ The court noted that it would exercise “firm control” over discovery so as to prevent interference with Indonesian sovereignty.¹⁹

call for broader rulings. See Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1917 (2006) (concluding that the “choice between narrow and wide rulings must itself be made on a case-by-case basis”).

⁹ *Exxon*, 473 F.3d at 346.

¹⁰ *Id.*

¹¹ 28 U.S.C. § 1350 (2000).

¹² Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (2000).

¹³ *Exxon*, 473 F.3d at 346. The common law tort claims included wrongful death, false imprisonment, intentional and negligent infliction of emotional distress, negligence (in hiring and supervision), and conversion. *Id.*

¹⁴ *Id.* at 347.

¹⁵ *Id.*; see also Letter from William H. Taft, IV, Legal Adviser to the State Department, to Judge Louis F. Oberdorfer (July 29, 2002), *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. CIV.A. 01-1357(LFO)) [hereinafter Statement of Interest]. To supplement its concerns, the State Department attached a letter from the Indonesian ambassador indicating the Indonesian government's disapproval of U.S. adjudication of alleged human rights abuses by the Indonesian military. See *id.* at 7.

¹⁶ Statement of Interest, *supra* note 15, at 2 n.1.

¹⁷ *Exxon*, 393 F. Supp. 2d at 21. Neither of these rulings was challenged on appeal. *Exxon*, 473 F.3d at 347.

¹⁸ *Exxon*, 393 F. Supp. 2d at 28–29.

¹⁹ *Id.* at 29.

Exxon appealed the district court's decision to uphold the common law tort claims, but the D.C. Circuit declined to overturn the ruling below. Writing for the panel, Judge Sentelle²⁰ first held that the court lacked jurisdiction to hear Exxon's appeal. The district court's order did not end the litigation, and the order was not "effectively unreviewable"²¹ so as to qualify as appealable under the "collateral order" doctrine.²² Turning to Exxon's request that the court treat the appeal as a petition for a writ of mandamus, Judge Sentelle held that mandamus relief was unwarranted because Exxon had not shown "clear and indisputable" error by the district court.²³ He explained that the limitations that the district court had placed on discovery provided important protection for the Indonesian government's interests.²⁴ Moreover, focusing on a footnote about the contingent nature of the State Department's concerns, he interpreted the statement of interest as providing guidance on how to contain the litigation rather than as an unqualified request to dismiss the suit.²⁵ Accordingly, the district court was not clearly and indisputably wrong to deny Exxon's motion to dismiss the plaintiffs' claims on political question grounds.²⁶

Judge Kavanaugh dissented. He argued that "federal courts should dismiss the complaint on justiciability grounds if the Executive Branch has reasonably explained that the suit would harm U.S. foreign policy interests," and he concluded that the State Department had made such a reasonable statement of harm.²⁷ He disagreed with the majority's characterization of the letter as equivocal, noting that caveats about the predictive nature of a letter's findings would apply equally to any statement of interest purporting to determine the consequences of future events.²⁸ Moreover, the majority's reading of the letter as a warning to confine the litigation would be at odds with the State Department's bottom-line message that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on signifi-

²⁰ Judge Edwards joined Judge Sentelle's opinion.

²¹ *Exxon*, 473 F.3d at 349 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) (internal quotation mark omitted).

²² *See id.* Specifically, Exxon had not shown that "the political question doctrine confers a 'right not to stand trial' that can justify an immediate appeal." *Id.* at 351. Although other decisions had treated separation of powers concerns as justifying immediate appeal, the court concluded that most of those cases involved claims of immunity, where a right to avoid trial would be rendered moot by the time a final decision was issued. *See id.*

²³ *Id.* (quoting *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989)) (internal quotation marks omitted).

²⁴ *Id.* at 353-54.

²⁵ *See id.* at 354.

²⁶ *See id.* at 356-57.

²⁷ *Id.* at 363 (Kavanaugh, J., dissenting).

²⁸ *See id.* at 366.

cant interests of the United States.”²⁹ Therefore, Judge Kavanaugh concluded that the petition for a writ of mandamus should have been granted.³⁰

The majority’s approach of relying on an interpretation of the State Department’s intent was defensible, if not entirely satisfactory, because a petition for a writ of mandamus presents the limited question of whether the district court committed clear and indisputable error. If the State Department’s letter could plausibly be read as a request not to dismiss the litigation altogether but rather to confine its scope, then the district court, in dismissing Exxon’s motion, could not have committed the requisite level of error to warrant mandamus relief. But an inquiry into the State Department’s intent is not an easily administrable standard for lower courts to use in determining whether a political question exists. Moreover, both the majority and dissenting opinions failed to attend to the separation of powers principle underlying the doctrine. The court should instead have seized the opportunity to sharpen the distinction between political questions and questions with political overtones by classifying the State Department’s speculative concerns about indirect consequences as the latter.

Basing the political question doctrine on an inquiry into the State Department’s intent is problematic for two reasons. First, such an inquiry raises practical concerns. The majority and dissenting opinions in *Exxon* demonstrate how a single letter can be interpreted in opposing ways.³¹ Judge Sentelle construed the letter’s qualification about contingent concerns to mean that the State Department had no objection to the suit so long as those concerns could be preemptively addressed.³² In contrast, Judge Kavanaugh highlighted what he considered to be the letter’s unqualified objections to the suit and argued that the majority’s reliance on boilerplate caveats in a footnote rendered the letter illogical.³³ Neither interpretation was demonstrably false, and together the opinions illustrate the kind of indeterminacy that arguably plagues any statement of interest attempting to offer a nuanced recommendation.

A second, independent problem with the majority’s approach is that it fails to engage the separation of powers principle that the Su-

²⁹ *Id.* (quoting Statement of Interest, *supra* note 15, at 1) (internal quotation marks omitted).

³⁰ *Id.* at 367.

³¹ It may be true that all documents that courts interpret have inevitable ambiguities, but the State Department is subject to a particularly wide range of influences, both domestic and foreign. See Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department “Statements of Interest” in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 832 (2006). For that reason, statements of interest may be more likely to include deliberate hedging.

³² See *Exxon*, 473 F.3d at 354.

³³ See *id.* at 366 (Kavanaugh, J., dissenting).

preme Court has placed at the heart of the political question doctrine since *Baker*. Even if the State Department issued clearer recommendations in the wake of *Exxon*, its statements of interest would still be subject to influences, such as domestic political pressures, that have nothing to do with separation of powers concerns.³⁴ To avoid giving undue weight to such improper influences, a court should focus on the facts and policy elaborations that the State Department has the expertise to provide and not on its final recommendations.³⁵

The dissent's "reasonable explanation of harm" standard, although arguably one that lower courts could administer, also runs afoul of separation of powers concerns. First, even if the threat of improper influence did not exist, this standard would exclude cases that Supreme Court precedent has placed within the judiciary's domain. In *Baker*, the Supreme Court explained that unless one of the six specifically enumerated factors was implicated, "there should be no dismissal for nonjusticiability on the ground of a political question's presence."³⁶ The State Department could offer a reasonable explanation of harm that nevertheless does not rise to the level of foreign policy interference that *Baker* requires.³⁷ Thus, under Judge Kavanaugh's lower threshold, cases that should be heard under *Baker* would potentially be dismissed. In light of that possibility, deferring to a merely reasonable explanation would constitute an abdication of the courts' proper role in identifying constitutional boundaries.³⁸ Judge Kavanaugh's standard would therefore violate separation of powers principles on a second level, by taking the question of whether to hear such cases out of the hands of the rightful decisionmakers.³⁹

Instead of deciding *Exxon* on a narrow ground, the D.C. Circuit should have reinforced the separation of powers principle underlying the political question doctrine by declaring that the doctrine does not

³⁴ See Baxter, *supra* note 31, at 829–35 (detailing examples of the impact of corporate lobbying and political pressure on the State Department's recommendations).

³⁵ See *id.* at 836 (citing with approval cases in which courts have reviewed statements of interest with a critical eye).

³⁶ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³⁷ See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 43–44, 69 (E.D.N.Y. 2005) (denying a motion to dismiss on political question grounds because, despite a statement of interest offering a reasonable explanation of harm, the defendants failed to establish the presence of any of the *Baker* factors).

³⁸ See *Baker*, 369 U.S. at 211 (noting that the task of identifying political questions is the responsibility of the Supreme Court "as ultimate interpreter of the Constitution").

³⁹ Justice Powell noted the irony in excessive deference when he wrote, "I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Powell, J., concurring).

apply to cases that merely touch on foreign relations.⁴⁰ By recognizing *Baker*'s distinction between "political questions" and "political cases"⁴¹ — or, as the First Circuit put it, between "political questions and cases having political overtones"⁴² — courts can respect the domains of other branches while avoiding the reverse extreme of dismissing cases that should be heard and thereby failing to exercise the powers constitutionally allocated to them.⁴³ Although there seems to be consensus that the distinction does and should exist, in practice the line may be difficult to draw.

The six *Baker* factors were an attempt to provide guidance on how to draw that line. Following the lead of Justice Powell's opinion in *Goldwater v. Carter*,⁴⁴ commentators have grouped these factors into three categories: those founded on classical, functional, and prudential concerns.⁴⁵ It is the last set, composed of the final three factors — "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"⁴⁶ — that raises particular challenges of indeterminacy. The difficulty is that these factors lack substance and therefore leave much to discretion.⁴⁷

⁴⁰ See *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.")

⁴¹ See *id.* at 217.

⁴² *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274, 281 (1st Cir. 2005); see also *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (recognizing that although cases can "present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions").

⁴³ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); see also Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts To Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 172 (2004) ("When cases touch upon foreign affairs, the judiciary traces a path between two equally unconstitutional extremes: intrusion into powers assigned to other branches and abdication of judicial oversight.")

⁴⁴ 444 U.S. 996, 998 (1979) (Powell, J., concurring in the judgment).

⁴⁵ See Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1556 (1993). The first factor — "a textually demonstrable constitutional commitment . . . to a coordinate political department," see *Baker*, 369 U.S. at 217 — stems from a "classical" concern about the text of the Constitution. See Smith, *supra*, at 1556. The second and third factors — "a lack of judicially . . . manageable standards," and the "impossibility of deciding" without exercising "nonjudicial discretion," see *Baker*, 369 U.S. at 217 — constitute the functional category and derive from concerns about judicial competence. See Smith, *supra*, at 1557. The final three factors constitute the prudential category, addressing the harms that may result from judicial interference with the policies of the political branches. See *id.* at 1556–57.

⁴⁶ *Baker*, 369 U.S. at 217.

⁴⁷ See Goldsmith, *supra* note 4, at 1417.

Phrases such as “lack of the respect due” and “unusual need for unquestioning adherence to” do not lend themselves to clear-cut answers. Thus, courts are forced to apply what Professor Jack Goldsmith calls the “foreign relations effects test,” which entails a difficult determination of the point at which interference threatens the separation of powers.⁴⁸ This uncertainty has opened the way to attempts by the executive branch to expand the political question doctrine⁴⁹ — and to instances of lower court acquiescence.⁵⁰

By deciding *Exxon* on the basis of the State Department’s intent without performing a separation of powers analysis, the D.C. Circuit missed an opportunity to add substance to the indeterminate *Baker* factors. Presented with consequences of a particularly indirect and speculative nature, the court should have marked the case as belonging squarely in the political overtones category. Indeed, the D.C. Circuit had previously acknowledged that vague concerns about and indirect effects on foreign relations do not suffice for nonjusticiability.⁵¹ Moreover, most cases in which the D.C. Circuit has applied the political question doctrine have involved an unambiguous and direct impact on foreign policy. For example, in *Bancoult v. McNamara*,⁵² the court applied the doctrine because adjudicating the suit would have involved evaluating specific foreign policy and national security decisions made by the Executive.⁵³ Similarly, in *Hwang Geum Joo v. Japan*,⁵⁴ the court applied the doctrine because adjudication would have undone a clear and settled policy of foreclosing private war-related claims against Japan in favor of resolution through political means.⁵⁵ In both *Bancoult* and *Hwang Geum Joo*, the D.C. Circuit could prop-

⁴⁸ See *id.* at 1402–03 (describing the lack of principle and consistency in the effects test).

⁴⁹ See Stephens, *supra* note 43, at 182–202 (detailing arguments made by the Bush Administration that apply an expansive view of the political question doctrine to ATS litigation).

⁵⁰ For example, in *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), the State Department filed a letter emphasizing the United States’s commitment to peace in the island of Bougainville in Papua New Guinea and cautioning that adjudication could “negatively impact the peace process.” *Id.* at 1196. Based on this vague concern, the court concluded that adjudication would implicate several *Baker* factors, thereby triggering a political question issue. See *id.* at 1198. The Ninth Circuit reversed on numerous grounds, emphasizing that the statement of interest’s “nonspecific invocations of risks to the peace process” provided one reason to be less concerned about potential interference with U.S. foreign policy interests. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1207 (9th Cir. 2007). That judgment has been vacated and rehearing en banc has been granted. *Sarei v. Rio Tinto, PLC*, 499 F.3d 923 (9th Cir. 2007).

⁵¹ See *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006).

⁵² 445 F.3d 427.

⁵³ See *id.* at 437.

⁵⁴ 413 F.3d 45 (D.C. Cir. 2005).

⁵⁵ See *id.* at 51–52. The court went on to note that adjudication would disrupt Japan’s delicate relations with China and Korea, an effect that could destabilize the region. See *id.* If offered as the sole reason for dismissal without reference to a more concrete policy, these consequences might be of the indirect sort that should not implicate a political question.

erly analyze the *Baker* factors by considering the potential interference in light of concrete, specific policies.

In contrast, *Exxon* featured only the State Department's speculation about indirect effects on general policies. The State Department's letter stated concerns that the litigation would "impair cooperation" with Indonesia and discourage corporate investment in the country, potentially breeding instability in the region.⁵⁶ None of these concerns created a pure political question under a classical or functional definition.⁵⁷ *Baker*'s prudential factors, however, neither require nor preclude a finding of nonjusticiability, as they are all questions of degree. Because such indirect consequences for general policies are unlikely to pose a threat to the separation of powers, the D.C. Circuit should have recognized that the prudential concerns, in turn, are less likely to be present when the State Department cannot point to any concrete effects.⁵⁸ A clear holding on this rationale would have signaled to future defendants that speculative concerns such as the ones offered in *Exxon* fall into the political overtones category and thus are not cognizable under the political question doctrine.

The line between political questions and political overtones remains difficult to draw, though characteristics such as the degree of indirectness and speculation in the expressed consequences can inform the inquiry. Although the *Baker* factors were created to distinguish political questions from mere political cases, courts must scrutinize the nature of the policies and potential interference articulated by the State Department to avoid misapplying those open-ended factors. By bringing the distinction between political questions and political overtones to the forefront of the analysis, courts can keep the doctrine properly grounded in its separation of powers rationale. The confused state of the doctrine and the recent efforts by the executive branch to expand it beyond its original rationale indicate that the distinction needs to be reasserted and sharpened.

⁵⁶ See *Exxon*, 473 F.3d at 358 (Kavanaugh, J., dissenting) (quoting Statement of Interest, *supra* note 15, at 3).

⁵⁷ Because it was fundamentally a tort suit, the case did not require the court to resolve any issue — or evaluate any prior decision — that was either textually committed to another branch or beyond the judiciary's competence. For examples of issues that would and would not trigger classical and functional concerns, see *Goldwater v. Carter*, 444 U.S. 996, 998–99 (1979) (Powell, J., concurring in the judgment).

⁵⁸ If courts began to reject political question claims in the absence of more specific policies, the same corporations now lobbying for statements of interest might push for the passage of legislation incorporating such policies in Congress. Although this second-order effect raises the concern that the same improper influence would simply have moved to an earlier, prelitigation stage, an important distinction exists: victory in the political process requires more transparent debate and a higher threshold for success than does behind-the-scenes lobbying of the State Department.