
CONSTITUTIONAL LAW — POLITICAL QUESTION DOCTRINE —
D.C. CIRCUIT HOLDS THAT GOVERNMENT OFFICIALS’ POTENTIALLY
DEFAMATORY ALLEGATIONS REGARDING PLAINTIFFS’
TERRORIST TIES ARE PROTECTED BY POLITICAL QUESTION
DOCTRINE. — *El-Shifa Pharmaceutical Industries Co. v. United
States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc).

The political question doctrine, “essentially a function of the separation of powers,”¹ exists to prevent courts from making “policy choices and value determinations [that are] constitutionally committed” to the political branches.² The D.C. Circuit frequently encounters cases implicating decisions of the political branches, and thus its political question jurisprudence is particularly important in managing the separation of powers.³ Recently, in *El-Shifa Pharmaceutical Industries Co. v. United States*,⁴ the D.C. Circuit applied the doctrine to dismiss a statutory defamation claim relating to President Clinton’s allegation that the owner of a Sudanese pharmaceutical plant was affiliated with terrorists. The court’s decision risks being read as a subtle expansion of the political question doctrine to cover cases that might simply reflect negatively on the executive branch. *El-Shifa* represents the latest iteration in a pattern of increasing deference to the executive branch, whereby the D.C. Circuit in particular has expanded executive power at the expense of the legislature.

In August 1998, President Clinton ordered a missile strike against the El-Shifa pharmaceuticals plant in Sudan in response to the terrorist bombings of the United States embassies in Kenya and Tanzania earlier that month.⁵ The President and other government officials publicly justified the El-Shifa strike with allegations that the plant was financed by Osama bin Laden and produced an ingredient used in chemical weapons.⁶ According to Salah Idris, El-Shifa’s owner, United States government officials became aware within days of the strike that the alleged ties to terrorism did not exist, and subsequently adopted an alternative justification for the attack: that Idris himself

¹ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

² *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

³ See, e.g., *Zivotofsky v. Sec’y of State*, 571 F.3d 1227 (D.C. Cir. 2009); *Lin v. United States*, 561 F.3d 502 (D.C. Cir. 2009); *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); cf. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 697 (2005) (“A single circuit [(the D.C. Circuit)] has decided most of the key cases involving a conflict between national security and individual liberty.”).

⁴ 607 F.3d 836 (D.C. Cir. 2010) (en banc).

⁵ *Id.* at 838.

⁶ *Id.*

had terrorist connections.⁷ Idris alleged that this claim was false and had been made merely to avoid embarrassment.⁸

Idris and El-Shifa brought suit against the United States government, seeking a declaratory judgment that the government's accusations against Idris were false and that the government's failure to compensate Idris for the damage to the plant constituted a violation of the law of nations.⁹ The district court granted the government's motion to dismiss, holding that sovereign immunity barred all of the plaintiffs' claims.¹⁰ The court also offered an alternative rationale for its decision, asserting that the claims "likely present[ed] a nonjusticiable political question."¹¹

In a judgment later vacated, the D.C. Circuit affirmed.¹² Writing for the panel, Judge Griffith¹³ held that the plaintiffs' claims raised a nonjusticiable political question because they would have compelled the court to pass judgment on "the President's battlefield actions."¹⁴ Judge Ginsburg, concurring in the judgment in part and dissenting in part, argued that the defamation claim did not present a political question, both because there was no evidence that the allegedly defamatory statement served any strategic objectives¹⁵ and because claims implicating strategic decisions do not necessarily raise political questions.¹⁶

After rehearing the case en banc, the D.C. Circuit affirmed.¹⁷ Writing for the court, Judge Griffith¹⁸ again held that the political question doctrine barred the plaintiff's claims.¹⁹ The court found that the plaintiffs' request for a declaratory judgment concerning the law of nations would require the court to rule, impermissibly, on whether the

⁷ *Id.* at 839.

⁸ *Id.* at 846. Suspicion of the reasons given for the bombing, and speculation regarding the true motivations, abounded at the time. See, e.g., James Bennet, *Launched by Ships*, N.Y. TIMES, Aug. 21, 1998, at A1 (noting suspicions that attack was related to "howling political storm" created by Monica Lewinsky affair); Tim Weiner & Steven Lee Myers, *Flaws in U.S. Account Raise Questions on Strike in Sudan*, N.Y. TIMES, Aug. 29, 1998, at A1 (noting that "secrecy and the inconsistencies in [the Clinton administration's] public statements have given the Sudanese Government . . . a chance to challenge the justification for the attack").

⁹ *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578, 582 (D.C. Cir. 2009).

¹⁰ *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267, 270-73 (D.D.C. 2005). Idris and El-Shifa also brought claims for negligence and trespass under the Federal Tort Claims Act, but these were also dismissed on sovereign immunity grounds and were not appealed. *El-Shifa*, 559 F.3d at 582.

¹¹ *El-Shifa*, 402 F. Supp. 2d at 276.

¹² *El-Shifa*, 559 F.3d at 581.

¹³ Judge Griffith was joined by Judge Henderson.

¹⁴ *El-Shifa*, 559 F.3d at 583.

¹⁵ *Id.* at 589 (Ginsburg, J., concurring in the judgment in part and dissenting in part).

¹⁶ *Id.* at 590.

¹⁷ *El-Shifa*, 607 F.3d at 838.

¹⁸ Judge Griffith was joined by Judges Henderson, Tatel, Garland, and Brown.

¹⁹ *El-Shifa*, 607 F.3d at 837-38.

decision to attack the plant was “mistaken and not justified” — a political question.²⁰ The court stated that the government’s allegedly defamatory justifications for the attack were likewise “‘inextricably intertwined’ with a foreign policy decision constitutionally committed to the political branches,” because deciding whether the statements were true would require passing judgment on whether the bombing should have occurred.²¹ The court declined to distinguish between the government’s initial and subsequent justifications, asserting that the latter at most “elaborate[d] upon the nature of the connection between the plant and bin Laden — a connection the President offered on the day of the attack.”²² Finally, the court asserted that deciding the political questions at issue in the case would “expand judicial power at the expense of the democratically elected branches.”²³

Judge Kavanaugh concurred in the judgment²⁴ but would have dismissed the claims because the plaintiffs had alleged no “cognizable cause of action.”²⁵ He argued that by applying the political question doctrine, the majority was rejecting Congress’s power to enact statutes that might constrain the types of executive action at issue here: the President possesses some “exclusive, preclusive Article II authority,” but “backdoor use of the political question doctrine” to define these areas is “indirect, haphazard, and unprincipled.”²⁶ Rather than “reflect[ing] benign deference to the political branches,” the court’s decision upset the balance of power by favoring the Executive over Congress.²⁷ For this reason, Judge Kavanaugh noted, the Supreme Court has never applied the political question doctrine in a statutory case — only in cases involving alleged constitutional violations.²⁸

Judge Ginsburg also filed a brief opinion concurring in the judgment.²⁹ He agreed with Judge Kavanaugh that the court should have

²⁰ *Id.* at 844 (quoting Complaint at 30, *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C. 2005) (No. Civ.A. 01-731), available at <http://homepage.ntlworld.com/jksonc/docs/el-shifa-ddc-d1.html>) (internal quotation marks omitted).

²¹ *Id.* at 846 (quoting *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006)).

²² *Id.* at 847.

²³ *Id.* at 850. Furthermore, the court distinguished *El-Shifa* from several Supreme Court precedents on the basis that those cases did not concern issues that the Constitution commits solely to the political branches, *id.* at 848–49, and rejected the argument that it should have dismissed the plaintiffs’ claims as legally insubstantial, *id.* at 849–50.

²⁴ Judge Kavanaugh was joined by Chief Judge Sentelle and joined in part by Judges Ginsburg and Rogers. For ease of explanation, the concurring opinions are presented in a different order than in the decision itself.

²⁵ *El-Shifa*, 607 F.3d at 852 (Kavanaugh, J., concurring in the judgment); see also *id.* at 852–53 (asserting that there is no federal cause of action for defamation available against the United States and no customary international law norm requiring compensation for mistaken bombing).

²⁶ *Id.* at 857.

²⁷ *Id.*

²⁸ *Id.* at 856–57.

²⁹ Judge Ginsburg was joined by Judge Rogers.

dismissed the plaintiffs' claims for lack of a cause of action.³⁰ But Judge Ginsburg also worried that the court, in a break from precedent, had created a "new political *decision* doctrine," which makes a case nonjusticiable "if deciding it could merely reflect adversely upon a decision constitutionally committed to the President,"³¹ and therefore requires dismissal of a claim "regardless whether the court would actually have to decide a political question . . . to resolve it."³²

Judge Ginsburg was correct that the D.C. Circuit suggested a new iteration of the political question doctrine by invoking it to dismiss Idris and El-Shifa's defamation claim. Yet he may have read the majority's opinion too broadly, missing the court's possible implicit motive of avoiding the potential embarrassment of differing pronouncements from different branches on a single question. Nonetheless, the *El-Shifa* decision goes beyond the circuit's political question precedent and fits into a broader trend of increasing deference to the Executive.

The "classical"³³ political question doctrine bars a court from hearing a claim only if doing so would require the court to judge "policy choices and value determinations" entrusted by the Constitution to the political branches.³⁴ In *El-Shifa*, the court stated that evaluating the plaintiffs' defamation claim would necessarily have forced it to do just that.³⁵ Yet the court could have resolved that claim without finding the El-Shifa attack unjustified or making any other policy decision or value judgment.³⁶ At most, a factual finding that any of the government's subsequent justifications for the attack were false might have led to a suspicion that the original justifications were also inaccurate,³⁷

³⁰ *El-Shifa*, 607 F.3d at 851 (Ginsburg, J., concurring in the judgment).

³¹ *Id.* at 852.

³² *Id.* at 851.

³³ 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, 247–48 & n.24 (2002) (describing the constitutionally based "classical" doctrine); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (asserting that abstention from judicial review is proper only where the matter is constitutionally committed to another branch); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

³⁴ *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The classical iteration of the doctrine is the only one that the Supreme Court has invoked. See *Nixon v. United States*, 506 U.S. 224, 228–36 (1993); *Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973).

³⁵ *El-Shifa*, 607 F.3d at 846.

³⁶ Idris's claim that the government had violated the law of nations, in contrast, included as an element a "mistaken and not justified" destruction of property, *id.* at 844 (quoting Complaint, *supra* note 20, at 30), an implicit policy judgment. Cf. *Schneider v. Kissinger*, 412 F.3d 190, 196–97 (D.C. Cir. 2005) (rejecting wrongful death action under the political question doctrine because "wrongful" element was essentially a policy judgment).

³⁷ See *El-Shifa*, 607 F.3d at 848 (arguing that "the veracity of the allegedly defamatory statements is 'inextricably intertwined' with the merits of the actual justifications for the attack" (citation omitted) (quoting *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006))).

which might have cast doubt on the decision to attack the plant.³⁸ But this chain of inference would have been logically tenuous. The strike could well have been justified for other reasons, stated or unstated. And the court could still have reviewed whether the government based its statements on a sufficient amount of information, as it has done in another context,³⁹ to determine whether they were made with reckless disregard for the truth.⁴⁰ Since under either circumstance the court could have considered the defamation claim without judging the ultimate correctness of the Executive's decision, the court erred in calling the claim a nonjusticiable political question.

The *El-Shifa* court may have been concerned about the potential awkwardness of making a finding contrary to one promulgated by the executive branch.⁴¹ To be sure, "prudential"⁴² political question analysis allows for consideration of "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁴³ But embarrassment is rarely even addressed in political question cases, and no court has ever found it sufficient to support the invocation of the doctrine.⁴⁴ Furthermore, a decision based explicitly on

³⁸ See *id.* at 846 (stating that "initial public explanations for the attack" were "'inextricably intertwined' with a foreign policy decision constitutionally committed to the political branches" (quoting *Bancoult*, 445 F.3d at 436 (D.C. Cir. 2006))).

³⁹ See *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999) (reviewing whether Secretary of State "had enough information" to arrive at her conclusion).

⁴⁰ Further, conducting only partial review of a claim is not unprecedented. See *id.* at 23–25 (reviewing two factors underlying foreign terrorist organization designation despite third factor's presentation of political question). Thus, even if the court felt unequipped to make the veracity determination, it could still have reviewed for reckless disregard for the truth.

⁴¹ See, e.g., *El-Shifa*, 607 F.3d at 842 (asserting that review of claims that "call into question the prudence of the political branches in matters of foreign policy or national security" is barred); *id.* at 848 ("A court's pronouncement that the plant's owner had no financial ties to bin Laden would directly contradict the government's justification for the attack by disclaiming the asserted association . . .").

⁴² See, e.g., Barkow, *supra* note 33, at 247 n.24, 253 (discussing nonconstitutionally based "prudential" political question doctrine); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

⁴³ *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker* represented the convergence of classical and prudential factors into a single test. See, e.g., Barkow, *supra* note 33, at 265. Thus, *El-Shifa* is not quite the extension "well beyond the bounds delineated in *Baker v. Carr*" that Judge Ginsburg decried. *El-Shifa*, 607 F.3d at 851 (Ginsburg, J., concurring in the judgment).

⁴⁴ See, e.g., *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986) (rejecting argument that possibility of embarrassment barred judicial review). Some cases have noted potential for embarrassment when a finding contrary to the executive's pronouncement would undermine other, different foreign policy decisions — a situation not present in *El-Shifa*. See, e.g., *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982–84 (9th Cir. 2007) (finding several *Baker* factors, including both embarrassment and constitutional commitment of the issue to the political branches, and noting that judicial consideration could undermine sensitive diplomatic efforts in the Middle East). Even this relatively permissive application of the doctrine represents a change from the pre-9/11 era, however, when some lower courts invoked *Japan Whaling* to reject application of the political question doctrine even where adjudication might have had "adverse foreign relations

this factor would likely have been unconvincing in *El-Shifa*, considering that it had been more than a decade — and two presidential administrations — since the attack itself and that even at the time, various governmental actors were expressing divergent opinions regarding both the justifications for and the wisdom of the strike.⁴⁵

Nor does *El-Shifa* fit comfortably with the D.C. Circuit's political question precedents. In one category of cases, the court has refused to interfere with a policy choice already made, or consciously *not* made, by the executive branch — refusing, for example, to determine which nation exercises sovereignty over Taiwan in *Lin v. United States*,⁴⁶ an issue the executive branch had avoided.⁴⁷ Because the defamation claim in *El-Shifa* would not have upset an ongoing policy, it does not fall within this category. In another category of cases, the court has held that there is no difference between policy decisions and measures to implement those decisions for the purposes of the political question doctrine.⁴⁸ In *Bancoult v. McNamara*,⁴⁹ for example, the court refused to review a claim challenging depopulation measures undertaken to implement the decision to establish a military base.⁵⁰ *El-Shifa*'s facts seem somewhat closer to this category. It is possible, for instance, that the court viewed the relevant policy choice as broadly undertaking a global confrontation of a terrorist network, and both the El-Shifa attack and the statements justifying it as implementation measures. This argument was not before the court, however;⁵¹ nor did the court

consequences." Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1428 (1999).

⁴⁵ See, e.g., Bennet, *supra* note 8; James Risen, *To Bomb Sudan Plant, or Not: A Year Later, Debates Rankle*, N.Y. TIMES, Oct. 27, 1999, at A1 (discussing dissent and uncertainty within executive branch regarding wisdom of bombing and sufficiency of evidence behind it); cf. Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 714 (E.D. Va. 2009) (noting, in case presenting torture claims against government contractor, that "the only potential for embarrassment would be if the Court declined to hear these claims on political question grounds").

⁴⁶ 561 F.3d 502 (D.C. Cir. 2009).

⁴⁷ *Id.* at 508; see also *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1228 (D.C. Cir. 2009) (dismissing claim requesting that birthplace of child born in Jerusalem be listed as Israel because it would directly second-guess executive branch decision not to take a side regarding whether Jerusalem is part of Israel); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (declining to adjudicate claims that the Executive had already determined would be resolved diplomatically).

⁴⁸ See, e.g., *Harbury v. Hayden*, 522 F.3d 413, 415, 420–21 (D.C. Cir. 2008) (refusing to review claims related to alleged torture and murder undertaken in furtherance of U.S. intelligence policy); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263–64 (D.C. Cir. 2006) (refusing to review claims related to alleged torture undertaken in furtherance of policy to support Augusto Pinochet); *Bancoult v. McNamara*, 445 F.3d 427, 436–37 (D.C. Cir. 2006) (discussed in the text); *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005) (refusing to review claims related to alleged murder undertaken in furtherance of policy to prevent Salvador Allende from taking power in Chile).

⁴⁹ 445 F.3d 427.

⁵⁰ See *id.* at 436.

⁵¹ See *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578, 589 (D.C. Cir. 2009) (Ginsburg, J., concurring in the judgment in part and dissenting in part).

rely on or even address it.⁵² Moreover, it is difficult to imagine how statements made days after an attack, in the face of political criticism and based on facts not known prior to the attack itself, could be construed as implementation of any characterization of policy. At the very least, the court's claim of inextricability between the policy decision and the two rounds of justifications was more attenuated than in *Ban-coult*. By squeezing the subsequent justifications in with the first, construing them as mere "elaborat[ions],"⁵³ and calling all the justifications part of a policy decision constitutionally committed to the executive branch — while its apparent goal of avoiding embarrassment remained a continuous subtext — the court stretched the political question doctrine beyond the limits set by precedent.

El-Shifa's expansion of the doctrine is part of a broader trend of increasing judicial deference to the executive branch, both in the political question context⁵⁴ and elsewhere⁵⁵ — at least outside the Supreme Court.⁵⁶ The D.C. Circuit in particular has found political questions in a number of cases in the past decade.⁵⁷ With post-9/11 national security concerns as a backdrop, it is perhaps no surprise that courts want the President to have freedom to make decisions necessary to protect the country, without worrying about later having to answer for them in court.⁵⁸ Nor is this the first time the climate of the times has arguably increased judicial deference to the political branches.⁵⁹

⁵² The vacated panel opinion, by contrast, did attempt to call the making of the statements a policy choice in itself. *See id.* at 585 (majority opinion) ("We have no trouble concluding that the President's public justifications for discrete military action are always offered, in part at least, with strategic military, national security, or foreign policy objectives in mind.")

⁵³ *El-Shifa*, 607 F.3d at 847.

⁵⁴ *See generally* *Developments in the Law — Access to Courts*, 122 HARV. L. REV. 1151, 1193–1204 (2009) (noting increasing use). Scholars had noted the decline in invocation of the doctrine in the pre-9/11 era, *see, e.g.*, Barkow, *supra* note 33, at 273, 300, 317, following a history of expansion of the doctrine itself, *see id.* at 265 (noting the convergence of the classical and prudential strands of the political question doctrine in the *Baker* test).

⁵⁵ *See* Sunstein, *supra* note 3, at 697–700 (noting the D.C. Circuit's increased deference to the Executive in the national security context).

⁵⁶ *See El-Shifa*, 607 F.3d at 856 (Kavanaugh, J., concurring in the judgment) (discussing the Supreme Court's extremely limited use of the doctrine).

⁵⁷ *See* cases cited *supra* note 3. *But see* *Wilson v. Libby*, 535 F.3d 697, 703–04 (D.C. Cir. 2008).

⁵⁸ *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1428–29 (2009) (noting that judicial self-preservation, including the aim of preventing political backlash following involvement in national security issues, may lead courts to defer); Sunstein, *supra* note 3, at 702, 706 (noting that judges, like others, "want to support the president when the nation is at risk," *id.* at 706); *cf.* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (arguing that "the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and its deliberations" than Congress, and that it "has access to broader forms of information about foreign affairs").

⁵⁹ *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 685 (2000) ("[T]he political question doctrine

But increasing deference creates troubling incentives, both for executive branch officials to exercise unrestrained discretion and for courts to refrain from resolving politically difficult questions.⁶⁰ Further, if *El-Shifa* is read, for example, to foreclose the creation of a statutory provision for review of an executive branch decision to bomb a target, Judge Kavanaugh may be correct to worry that it will undermine Congress's ability to check the President.⁶¹ This concern may not be particularly great in the defamation context, because as even the majority recognized, Congress probably did not create a cause of action against the government.⁶² *El-Shifa*'s effects could thus be limited to cases where the court implicitly recognizes that Congress has not chosen to act.⁶³ If not so limited, however,⁶⁴ the same factual scenario presented in another context where it might easily raise a statutory right of action — for example, if Idris and El-Shifa had challenged their designation, hypothetically, as a foreign terrorist organization⁶⁵ — might have to be dismissed as a political question because it could result in a finding embarrassing to the Executive.

The *El-Shifa* court resolved an admittedly tricky set of facts in favor of the Executive. The court's expansion of the political question doctrine in the process, however, threatens to create poor incentives for courts and the Executive, and perhaps even to enable the President to skirt statutory checks on his authority. These troubling consequences may be good reason to search for *El-Shifa*'s limiting factors.

reached its zenith with the New Deal Court — a Court that sought to allow the federal government freedom to address the needs of the emerging national economy.” (footnote omitted)).

⁶⁰ See Barkow, *supra* note 33, at 263 (“[O]nce the political question doctrine is unleashed entirely from the Constitution itself, what keeps a judge’s use of the doctrine in check? What prevents a court from avoiding a case simply because it believes the issue is too complicated or is too politically charged?”); see also *id.* at 267 nn.156–57 (cataloguing criticism of the doctrine).

⁶¹ See *El-Shifa*, 607 F.3d at 857 (Kavanaugh, J., concurring in the judgment); cf. 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) (“One need only consider the cases that could arise in the contemporary setting to see that leaving the question of the President’s constitutional authority to defy a statutory restriction on his war powers to the give-and-take of the political branches would be quite radical in its implications.”); Sunstein, *supra* note 3, at 703 (“Nor does the Constitution support the view, at least implicit in the rulings of the D.C. Circuit, that the domain of war is the domain of largely unbounded presidential discretion.”).

⁶² See *El-Shifa*, 607 F.3d at 850. Defamation claims against the government would likely be undesirable as a policy matter because of the ease of baseless accusation, or because of the government’s need to publicly justify its decisions even when made quickly out of necessity. Furthermore, the *El-Shifa* court’s disposition of the defamation claim was perhaps influenced by knowledge that Idris’s accompanying claim *did* ask for direct review of a policy choice.

⁶³ Cf. Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 256 (1985) (arguing that political question dismissal can be a “de facto merit determination”).

⁶⁴ The *El-Shifa* majority stated that the “plaintiffs’ claims are not so unsound as to warrant dismissal” for lack of subject matter jurisdiction. *El-Shifa*, 607 F.3d at 850.

⁶⁵ Cf. *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 21 (D.C. Cir. 1999).