Berkeley Journal of International Law

Volume 28 | Issue 2 Article 8

2010

The Judicial Answer: Treatment of the Political Question Doctrine in Alien Tort Claims

Amy Endicott

The Judicial Answer?

Treatment of the Political Question Doctrine in Alien Tort Claims

Amy Endicott*

I.
INTRODUCTION: "QUESTIONS, IN THEIR NATURE POLITICAL"[1]

After *Sosa v. Alvarez-Machain*, the plaintiff who successfully asserts a claim under the Alien Tort Statute (ATS) may have reason to rejoice, but the struggle for adjudication does not end with the grant of jurisdiction.[2] The international scope of ATS claims leaves broadly pleaded complaints vulnerable to dismissal on "political question" grounds.[3] The Supreme Court first articulated the political question doctrine in *Marbury v. Madison*, when it held that the constitutional separation of powers renders certain claims nonjusticiable because adjudicating those claims would encroach on the powers of the political branches.[4] The ATS, as a jurisdictional vehicle for asserting violations of the law of nations, often necessitates this political question analysis.[5] Realizing the

---

* Amy Endicott is a 2011 J.D. Candidate at the University of California Berkeley, School of Law. Special thanks to Professors David Caron, Richard Buxbaum and Daniel Farber for their comments and support and to David Wallach and Anderson Berry for their insight.

1. Marbury v. Madison, 5 U.S. 137, 170 (1803).

2. Sosa v. Alvarez-Machain, 542 U.S. 692, 724, 732 n.21 (2004) (limiting the range of causes of action available under the ATS and cautioning that any cause of action is still subject to the need for "deference to the executive.").

3. *See* Alperin v. Vatican Bank, 410 F.3d 532, 560 (9th Cir. 2005) (explaining that the ability to adjudicate claims depends on the context in which they are presented).

4. *Id.* This conflict became known as a "political question" and is one of several traditional justiciability doctrines. *See* U.S. v. Jones, 137 U.S. 202, 212 (1890) (referring to the power of the executive to recognize another government as a political question). The other traditional justiciability doctrines include advisory opinions, mootness, standing and ripeness, which are outside the scope of this paper. *See* 13B CHARLES WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS. § 3531.12 (3d ed. 2009).

5. *See* Kadic v. Karadzic, 70 F.3d 232, 248-49 (2d Cir. 1995) (acknowledging that ATS cases naturally "pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations" and may "implicate sensitive

potential for these conflicts in ATS litigation, the Supreme Court, in *Sosa*, warned that "attempts by federal courts to craft remedies for the violation of new norms of international law... should be undertaken, if at all, with great caution."[6]

The cautious approach urged by *Sosa*[7] has led the lower courts to meticulously scrutinize political questions in ATS claims.[8] Yet, after having done their due diligence, courts have continued to find ATS claims justiciable in the majority of cases.[9] Recent case law reveals that a sense of constitutional duty has driven the development of this new post-*Sosa* norm of justiciability.[10] This judicial persistence in hearing ATS claims renders the role of the political question doctrine unclear. This uncertainty has reignited the separation of powers debate that initially gave rise to the political question doctrine. While some scholars advocate an increased need for judicial deference in light of the expanding scope of the law of nations,[11] others insist that systematic dismissal of ATS claims on political question grounds will create ambiguous precedent and harm the reputation of the American judiciary abroad.[12] With these considerations in mind, this Article will focus on the role of the political question doctrine in ATS cases and will examine the separation of powers debate they have reignited.

II.
MARBURY TO THE MODERN DAY: AN OVERVIEW OF THE POLITICAL QUESTION DOCTRINE

The political question doctrine represents a judicial effort to ensure courts do not hamper the functioning of the political branches. As a procedural mechanism, the doctrine mandates dismissal of a claim if adjudication revolves around "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[13]

---

matters of diplomacy").

6. *Sosa*, 542 U.S. at 728.

7. *Id.* at 702, 725.

8. *See Alperin*, 410 F.3d at 545; Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700 (E.D.Va 2009). Note: the *Sosa* opinion lists four other grounds for caution but this Article focuses on the need for "case specific deference." *Sosa*, 542 U.S. at 725-28.

9. For example, of ten cases since *Sosa* raising political question claims, seven have been held justiciable.

10. *See, e.g.*, *Alperin*, 410 F.3d at 547.

11. *See* Lucien J. Dhooge, *The Political Question Doctrine and Corporate Complicity in Extraordinary Rendition*, 21 TEMP. INT'L & COMP. L. J. 311 (2007).

12. Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2147 (1995).

13. Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986); *see* FED. R. CIV. PRO. 12(h)(3)(providing the procedural mechanism for dismissal).

Jurisprudentially, the doctrine seeks to preserve the separation of powers between the judiciary and the "political branches" of the government articulated in the Constitution.[14]

In the international context of foreign affairs, however, a traditional textual analysis of the Constitution proves less instructive to courts because the executive branch routinely exercises powers not enumerated in the text of the Constitution.[15] Some scholars classify these non-textual powers as "plenary."[16] They maintain that plenary powers can be derived from the Constitution by extrapolating from the broad language of the enumerated powers and the Article II vesting clause.[17] An alternative theory, following the Supreme Court reasoning in *United States v. Curtiss-Wright Export Corporation*, suggests that these powers are not implied but actually extra-constitutional.[18] This view holds that a court conducting a political question inquiry at the international level may take into account powers that arise from traditional notions of sovereignty, rather than treating the Constitution as the sole source of authority for government action.[19]

Ultimately, both theories validate the exercise of powers beyond those enumerated in the Constitution. However, the plenary powers insistence on an implied constitutional grant of authority stemming from a textual link to the Constitution renders it difficult to understand elements of the political question analysis that bear no direct relation to the text.[20] The extra-constitutional theory offers a more expansive rationale for recognizing non-enumerated powers and acknowledges the influence of the origins of that rationale on the political question analysis. Because understanding that historical link is essential to understanding political question dismissals for ATS claims, this Article will employ the extra-constitutional theory to examine the genealogy of the political

14. Baker v. Carr, 369 U.S. 186, 216 (1962; *see* U.S. CONST. art. II, §§ 2-3, art III, § 2 (delineating the powers of the executive and judiciary branches).

15. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."); RONALD ROTUNDA & JOHN NOWAK, 1 TREATISE ON CONST. L. § 6.1(a) (4th ed. 2010).

16. ROTUNDA AND NOWAK, *supra* note 15, §6.1(b)-(d).

17. *Id.* §6.1(b)-(d); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION 44-45 (2002); *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (articulating but not applying the theory of plenary powers implied from Article II).

18. *See* Curtiss-Wright, 299 U.S. at 315-16, 319.

19. *Id.*

20. Of the six factors in the test for political question established by *Baker* only the first factor directly references the Constitution as a guideline for determining whether adjudication violates the separation of powers. *See Baker*, 692 U.S. at 217. As explained later, few of the ATS cases dealing with political question dismiss a case solely on the basis of this first factor. Therefore, to understand what drives the political question analysis requires looking beyond constitutionally enumerated powers.

question doctrine.

A. The Separation of Powers and the Authority of Sovereignty

The extra-constitutional view recognizes that the Constitution plays a different role in international law than it does domestically. In domestic law, the Constitution *prescribes* the powers of government and authorizes federal action. Nonetheless, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs."[21] Internationally, the Constitution acts as a law within the law of nations for the United States rather than as the only original source of law.[22] In this role, the Constitution *proscribes* the sovereign rights of the United States reified by the law of nations. Therefore, for a court to successfully analyze separation of powers in an international case, it must examine the Constitution as a limit on the authority of sovereignty rather than as the sole source of that authority.

One way the Constitution imposes this limit on the authority of sovereignty is by granting courts the power of judicial review.[23] Specifically, Article III of the Constitution gives courts the power to adjudicate cases arising from international treaty obligations.[24] The ATS, legitimated by the constitutional authority of the judicial powers clause, supplements the courts' power to interpret treaties by specifically granting courts the power to hear claims for violations of the law of nations brought by aliens.[25] Together, Article III and the ATS, curtail the broad sovereign powers authorized by the law of nations, by subjecting actions performed under color of that law to judicial scrutiny.

To justify limiting the sovereign rights of nations in this manner, the separation of powers requires any court examining a law of nations claim to engage in a two-part inquiry. First, courts must decide whether the Constitution specifically authorizes the action taken by the political branches.[26] If the action is constitutionally delegated to either the executive or the legislature, the court's

---

21. *Curtiss-Wright*, 299 U.S. at 315-16.

22. *See* VED NANDA & DAVID PANSIUS, 3 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 14:4 (2010).

23. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 462 (1964) (White, J., dissenting) (noting that the broad scope of the constitutional judicial mandate to adjudicate claims forecloses the possibility of "exclusive jurisdiction of the executive" over foreign affairs); *Japan Whaling Ass'n*, 478 U.S. at 230 (holding that executive decisions in foreign affairs may still be subject to compliance with the judiciary's interpretation of international law).

24. *See* U.S. CONST. art. III., cl. 2. This clause also includes the power to adjudicate claims between any state and a foreign state.

25. *See* 28 U.S.C. §1350; *but see,* M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute* 27 BERKELEY J. INT'L L. 316 (2009) (noting that ATS jurisdiction may be limited to foreign nationals resident in the United States).

26. Goldwater v. Carter, 444 U.S. 996, 998 (1979).

inquiry stops.[27] Any further judgment on the action would unjustly encroach on rights granted to the political branches.[28] However, if the Constitution does not apportion the power exercised to the political branches, the court must determine if customary international law does. If the rights exercised are customarily delegated to the political branches the court's final step is to ensure this categorization is consistent with the Constitution's allocation of powers. If the political branches' exercise of these powers does not conflict with the Constitution, the court's inquiry ends because actions conducted under this international authority are beyond the constitutional scope of judicial review: they are non-justiciable.[29]

Nonetheless, when these customary powers of the political branches affect the rights of individuals, as in ATS claims, the exercise of these powers may still give rise to causes of action that trigger the courts' Constitutional obligation to adjudicate claims. Gauging the limits of judicial powers to resolve these cases is complicated in ATS claims, because international law, rather than the Constitution, defines both the political powers and the individual rights at issue.[30] In the absence of constitutional guidelines, the political question doctrine arose to set this limit and to preserve the balance of power between sovereign rights and judicial review.[31]

B. The Political Question in Case Law

One of the first cases to recognize the need for judicial self-restraint was *Marbury v. Madison* in 1803.[32] In *Marbury*, the Supreme Court held that "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[33] The disjunctive syntax of this statement highlights the extra-constitutional aspect of the political

---

27. Arguably, under this logic any inquiry into a violation of the law of nations committed by the U.S. government would be estopped by the fact that the Constitution delegates the right to define and punish offenses against the law of nations to Congress. U.S. CONST. art. I, § 8., cl. 9. As discussed below, direct involvement of the U.S. government does normally yield dismissal on political question grounds; however this clause in the Constitution is never cited.

28. Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that resolution of those issues would require "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry").

29. U.S. CONST. art. III (limiting the powers of the courts to interpretation of domestic law, treaties and the Constitution).

30. *Sosa*, 542 U.S. at 714.

31. Ironically, the doctrine is only given force by the discretion of the courts determining its applicability and thereby limiting themselves. Nonetheless, from their beginnings, the federal courts have heeded this guiding principle of compartmentalized powers and recognized that some cases are nonjusticiable. *See* Atlee v. Laird, 347 F.Supp. 689, 692 n.4 (D.C. Pa. 1972) *aff'd*, Atlee v. Richardson, 411 U.S. 911 (1973).

32. *Marbury*, 5 U.S. at 170.

33. *Id.*

question. The wording indicates that "questions, in their nature political" are not limited to those constitutionally "submitted to the executive".[34] While this holding acknowledged the existence of non-justiciable questions, it left later courts to determine just what those questions were.[35]

To aid in this determination, in *Baker v. Carr*, the Supreme Court attempted to provide a standard for measuring the impact of judicial review on sovereign rights and other extra-constitutional prerogatives.[36] To this end, the Court established a six-factor test for determining non-justiciability on political question grounds. These factors are:

> [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.[37]

The presence of any one of these factors may render a case non-justiciable.[38] Nonetheless, it is important to note that the phrasing of the *Baker* test operates on a presumption of justiciability. "*Unless* one of these formulations is inextricable from the case at bar, there should be no dismissal for

---

34. *Id.*

35. Courts after *Marbury* applied the political question principle to render certain issues of foreign affairs categorically nonjusticiable. *See Alperin*, 410 F.3d at 545; *Baker*, 369 U.S. at 212, nn.35-37. For example, in 1918 the Supreme Court held that the executive's decision to recognize another nation's government lay beyond the scope of judicial review. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). The court justified this holding stating, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative-'the political'-departments of the government, and . . . is not subject to judicial inquiry or decision." *Id.* at 302. Yet, the *Oetjen* court does not cite the text of this constitutional grant. Instead, the Court supports its determination by citing rules of "international law" and principles of law that have "always been." *Id.* The Court notes that these rules are enshrined in precedent and cites an 1890 case, *United States v. Jones*, which directly attributes authority to the "law of nations, recognized by all civiliezed [sic] states." *United States v. Jones*, 137 U.S. at 212 (cited in *Oetjen* for the principle that "who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges"). The opinion makes clear that the *actual* basis of its authority is the precedent of customary international law; though *Oetjen* is more frequently cited for its unsubstantiated reference to the Constitution as a basis for the case's non-justiciability. The tendency to overlook *Oetjen's* significant extra-constitutional reliance on international law highlights a problem in the application of the political question doctrine.

36. *Baker*, 369 U.S. at 217.

37. *Id.*

38. *Id.*

non-justiciability."[39] This syntax takes the form of an imperative to adjudicate, which may be disobeyed *only* if one of these factors is present.

Baker's emphasis on maintaining a norm of justiciability stems from the tension between the constitutionally defined tasks of the court and the common law genesis of the political question doctrine.[40] The case law explicitly notes that courts, constitutionally bound to hear "cases and controversies"[41] may not arbitrarily refuse to hear a valid claim merely because it presents a thorny political issue.[42] To avoid this result, the Supreme Court, in *Baker,* held that analysis of the political question mandates "the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[43]

The *Baker* factors guide this inquiry by first addressing the scope of judicial power and then examining the extent of the authority of the political branches. The first factor mandates the textual analysis of the Constitution alluded to in *Marbury.*[44] The other *Baker* factors attempt to grapple with less definite divisions of powers and each factor presents concerns farther removed from the idea of a constitutional authorization.[45] While the first three factors explore the limits of the judicial review and competence, the last three factors focus more on the powers of the executive branch.

Factors four through six focus on the powers of the political branches and address situations where the exercise of judicial powers would infringe on sovereign rights in a manner unlicensed by the Constitution. In particular, these factors relate to the importance of the sovereign will as the single and enduring voice of the nation. The Supreme Court explained the importance of this idea stating, "[r]ulers come and go . . .but sovereignty survives. A political society

39. *Baker*, 369 U.S. at 217 (emphasis added).

40. *See*, U.S. CONST., art. III., cl. 2. (obligating courts to "hear cases and controversies").

41. *Id.*

42. *Baker*, 369 U.S. at 217; *see also Alperin*, 410 F.3d at 538 ("The Constitution gives no explicit support to the theory that federal courts may properly decline to hear cases or decide particular issues merely because they involve political questions"); *Japan Whaling Ass'n*, 478 U.S. at 230.

43. *Baker*, 369 U.S. at 217.

44. *See id.* (requiring a determination as to whether the powers are "textually committed" to a political branch); *compare Marbury*, 5 U.S. at 170 (distinguishing powers which are, "by the Constitution submitted" to the political branches).

45. The second factor, "a lack of judicially discoverable and manageable standards," establishes the impropriety of adjudicating a claim without authoritative legal standards. While it does not directly reference the Constitution, the second factor acknowledges that the constitutional character of the courts depends on foundation of judgment in principles of positive law. The third factor—"the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion"— sets the limits of judicial power by positing a situation in which there are no laws to guide the court's decision. In this situation, the issue becomes non-justiciable, since any decision would be founded purely in policy rather than reasoned by law.

cannot endure without a supreme will somewhere."[46] While the Constitution makes no explicit recognition of this necessity, the case law designates the executive branch as the keeper of that sovereign will. Thus, the last three *Baker* factors[47] aim at ensuring that the courts do not encroach on this power.[48]

Taken as a whole, the factors create a discretionary framework that provides guidelines for analyzing issues of international law and sovereign rights and pose the option of dismissing such issues on political question grounds. By addressing first the limits on judicial powers and then the bounds of executive powers, the *Baker* factors engage in the separation-of-powers rationale espoused by the Constitution. This framework is particularly useful in ATS cases, where adjudication necessarily involves an analysis of the law of nations and therefore implicates many principles of international law and sovereign rights.

III.
A CAUTIONARY TALE: "CASE-SPECIFIC DEFERENCE" IN *SOSA V. ALVAREZ-MACHAIN*

The six-factor test established by *Baker* is all the more relevant in the ATS context because the Supreme Court has failed to provide concrete guidelines for determining if ATS claims conflict with executive powers of foreign policy. In *Sosa*, though it did not consider the political question doctrine, the Court addressed the issue of executive powers in foreign affairs by expounding the propriety of caution and restraint when the exercise of judicial review involved the assessment of foreign policy.[49] At the same time, the *Sosa* Court acknowledged that neither international law nor the Constitution categorically barred judicial review of international questions.[50] The court verified that the purpose of the ATS was to explicitly grant jurisdiction over these questions to federal courts.[51] Despite recognizing the courts' ability to hear these international claims, the *Sosa* Court, in *dicta*, urged caution in exercising that ability and, even then, recommended deference to the political branches subject to case-by-case analysis.[52]

---

46. *Curtiss-Wright*, 299 U.S. at 316-17.

47. The last three factors are: the need to avoid expressing lack of the respect due coordinate branches of government or for unquestioning adherence to a prior political decision or to avoid possible embarrassment from multifarious pronouncements on one question. *Baker*, 369 U.S. at 217.

48. *Id.*

49. *Sosa*, 542 U.S. at 728.

50. *Id.* at 712, 714. Indeed, the Court explained that customary international law actually authorized judicial review of individual's claims under the law of nations.

51. *Id.*

52. *Id.* at 733 n.21. In this regard, the *Sosa* opinion deviates from the strong presumption of adjudication favored in earlier political question cases.

In reaching this conclusion, the *Sosa* Court traced the history of the ATS to its roots in the law of nations.[53] While performing this regression, the Court bifurcated the law of nations into two "spheres"—one dedicated to the political branches and the other to the judiciary.[54] The two spheres were considered distinct in that the law of nations did not include a sphere for judicial determination of norms of conduct between states.[55] Yet, the opinion also relates that, in practice, this distinction broke down giving rise to a third set of cases in which the "rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships."[56] ATS claims, by virtue of their requirement that the subject tort be "committed in violation of the law of nations" fall squarely and consistently into this set of cases.[57] In effect, the ATS codified an expanded scope of the judicial sphere by allowing judicial review of international norms in the context of claims by individuals.

The Court, in *Sosa*, was quick to limit this expansion of judicial power. Its opinion narrowed claims cognizable under the ATS to those traditionally recognized as violations of the laws of nations.[58] While the majority of the opinion is focused on establishing this line, footnote 21 to the opinion suggests establishing further limitation of judicial review through the judiciary's exercise of judicial self-restraint.[59] In addition to suggesting an exhaustion requirement,[60] the court proposed, "a policy of case-specific deference to the political branches" as another possible limitation on judicial review of customary international law claims.[61] While this language essentially restates the rationale of the political question doctrine in the context of ATS claims, it reverses the presumption favoring adjudication expressed in *Baker*.[62]

Instead of couching dismissal on political question grounds as a last resort,

---

53. *Id.* at 714-15.

54. The Court distinguished these spheres by content, explaining that the political aspect of the law of nations was concerned with the formation and maintenance of norms of state behavior whereas the judicial aspect was concerned with the "more pedestrian" matters of individual conduct. The judicial sphere consisted of "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor." *Id.*

55. *Id.* at 714. ("This [political] aspect of the law of nations thus occupied the executive and legislative domains, *not* the judicial.") (emphasis added). Such a prohibition on judicial determination of norms harkens back to the necessity for a "supreme" sovereign will. *See Curtiss-Wright*, 299 U.S. at 316-17.

56. *Sosa*, 542 U.S. at 715.

57. Indeed, the *Sosa* opinion posits that the purpose of the ATS was to ensure federal courts had jurisdiction over this type of claim, "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs." *Id.*

58. *Id.* at 712.

59. *Id.* at 733 n.21.

60. Regina Waugh, *Exhaustion of Remedies and the Alien Tort Claims Act*, 28 BERKELEY J. INT'L L. 555 (2010).

61. *Sosa*, 542 U.S. at 733 n.21.

62. *See Baker*, 369 U.S. at 214-17.

the Court in *Sosa* advised that, in ATS cases, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[63] The Court rationalized this switch by arguing that the potential for ATS cases to make international rules privately actionable could seriously impinge the discretion of political branches in managing foreign affairs.[64] From this logic in *Sosa*, a reduced role for federal courts in the realm of customary international law emerges, limited to the adjudication of individual claims asserting traditional and narrowly defined causes of action.[65] This limitation marks a more distinct separation of powers than that suggested by the *Baker* test and yet retains *Baker*'s discretionary dynamic. In short, *Sosa* demands a cautious case-by-case inquiry into the propriety of judicial review but falls short of mandating categorical deference to the political branches in international affairs.[66]

IV.
ALL THINGS IN MODERATION: THE STATUS OF THE POLITICAL QUESTION

In the absence of a strict mandate of deference, however, courts have been reticent to relinquish their constitutional duties to adjudicate claims and the jurisdiction bestowed on them by the ATS.[67] In keeping with this concern, courts have rejected the *Sosa* indication that ATS claims, in deference to the executive, will more often than not require dismissal.[68] Instead, courts across the country employed "a surgical approach rather than a broad brush in benchmarking the *Baker* formulations against the individual claims."[69] This approach pays heed to the *Sosa* dicta by ensuring that the political question issue is thoroughly analyzed on a case-by-case basis.

Nonetheless, though the courts are diligent in performing this analysis, they have curtailed both its depth and its application. A survey of nineteen ATS cases in which a defendant raised a political question, revealed that, after *Sosa*, courts dismissed over ten percent fewer cases on political question grounds.[70]

---

63. *Sosa*, 542 U.S. at 733 n. 21.

64. *Id.* at 727.

65. *Id.* at 712.

66. Dhooge, *supra* note 11, at 339 ("Sosa represents the underlying complexity of ATS actions, including the need for courts to exercise caution so as not to intrude upon the province of the executive and legislative branches.").

67. The Ninth Circuit opined, "in our system of separation of powers, we should not abdicate the court's Article III responsibility—the resolution of 'cases' and 'controversies'—in favor of the Executive Branch." *Alperin*, 410 F.3d at 538.

68. *See, e.g.*, In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 281 (S.D.N.Y. 2009) [hereinafter *South African*] ("footnote 21 [in *Sosa*] merely provides guidance concerning the need for deference with regard to foreign policy matters; it does not mandate summary dismissal.").

69. *Alperin*, 410 F.3d at 547.

70. This survey was conducted through Westlaw by running a search string in the "all federal"

This low number of dismissals should not be surprising as the fact that ATS claims "arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."[71] Yet, this statement contrasts sharply with the dicta in *Sosa* that seems to urge that deference, including political question analysis, is all the more fitting in these cases because of the international nature of ATS claims.[72]

In practice, however, courts have found that the international nature of ATS claims limits the effectiveness of the political question analysis. The result is that while courts hearing ATS claims diligently undergo that analysis, as encouraged by *Sosa*, they adapt the traditional *Baker* method to account for their specific grant of jurisdiction to hear ATS claims. These adaptations have taken two forms. The Second Circuit advances the theory that the specific jurisdictional grant of the ATS obviates the need to engage in the first three factors of the *Baker* analysis, which address concerns of judicial powers and competencies of courts.[73] The crux of this argument is that the ATS both grants court jurisdiction to hear ATS claims and ensures judicial competence by providing a manageable standard that obviates the need for policy determinations.[74]

In *Alperin v. Vatican Bank*, the Ninth Circuit rejected this simplification of the *Baker* test and instead embraced a context-dependent approach to the applicability of all the *Baker* factors. This approach examined both the type of claim presented and the immediacy of the impact of adjudication.[75] In applying the first three *Baker* factors, the court held that if certain claims presented in a case invoked recognized causes of action, the court could adjudicate those claims, regardless of whether other causes of action alleged in the case lay

---

database for cases containing the terms "political question" and "alien tort" in their syllabus description. The survey is current as of December 16, 2009.

71. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991).

72. *Sosa*, 542 U.S. at 733 n.21.

73. In an exercise of the discretion granted by the political question doctrine and in recognition of the adjudicatory powers granted by §1350, the Second Circuit and several lower courts have scaled back the *Baker* factors in their political question analysis. *See generally Kadic*, 70 F.3d at 249; Tel-Oren v. Libyan Arab Republic, 726 F.2d 744, 797 (D.C. Cir. 1984) (Edwards, J., concurring); *South African*, 617 F.Supp.2d at 282; Mujica v. Occidental Petroleum Corp., 381 F.Supp.2d 1164, 1193 (C.D. Cal. 2005) ("After all, in *Sosa*, the Supreme Court recently concluded that the ATS provided a substantive cause of action and set out the framework . . . for discerning cognizable theories under that statute.").

74. *See, e.g.*, *Kadic*, 70 F.3d at 243 (holding that "universally recognized norms of international law provide judicially discoverable and manageable standards" for adjudicating ATS suits and that these standards obviate any need to make "initial policy decisions reserved for nonjudicial discretion"). Building on this reasoning the court also eliminated the first factor explaining that the existence judicial standards "undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Id.* While *Sosa* narrowed the set of norms recognized, this distinction does not prevent those norms from serving as "judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act." *Id.*

75. *See Alperin*, 410 F.3d at 538.

beyond the scope of judicial competence.[76] In addressing the last three factors, the Ninth Circuit reasoned that conflict arose only if the impact of litigation on foreign policy would be immediate and direct.[77] These contextual distinctions represent another move away from blanket dismissal of ATS claims.

Indeed, the context-driven Ninth Circuit approach, focusing the political question analysis on the specificity and immediacy of a claim as alleged, has gained a following. Notably, courts have relied on contextual distinctions to deny dismissal when claims are brought against corporations.[78] These courts have emphasized, that claims against government contractors were justiciable because "[d]efendants [were] private corporations and civil tort claims against private actors for damages do not interfere with the separation of powers between the executive branch and the judiciary."[79] This holding echoes the *Alperin* logic of distinguishing the causes of action by their elements rather than their overtones and adjudicating all claims that fall within traditional judicial competence, even if those claims arise in a politically charged context.

This approach has transformed the case-by-case analysis urged by *Baker* into a claim-by-claim inquiry. In doing so, courts have managed to follow both the *Baker* test and the *Sosa* suggestion while avoiding a categorical dismissal of ATS claims. Yet, in many of these cases, compliance with *Sosa* has been simplified by the silence of the executive branch. This silence diminishes the possibility for expressing deference to the executive branch's views as urged by the Court in *Sosa*. Both the Ninth and Second Circuits note that when the executive branch discards silence in favor of active admonishment of judicial review the political question analysis becomes more complicated.

Indeed, almost every court to engage in a political question analysis of an ATS case has admitted that a Statement of Interest (SOI) by the executive is

---

76. In *Alperin*, plaintiffs presented claims both for conversion of property and for war crimes. *Id.* at 551, 555. The court reasoned that the political nature of the war crimes claims did not negate its competency to hear the property claims and accordingly dismissed only those claims for atrocities of war. *Id.*

77. The court held that given the absence of policies already in place and the lack of current objections by the executive the claims could not be said to violate the fourth or fifth *Baker* factors. *Id.* at 555-56 (noting that the defendant's government had last lodged objections to the claim with the State Department four years previously and the State Department had not issued any expression of interest).

78. *See, e.g.*, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 15 (D.D.C. 2005); *Al Shimari*, 657 F. Supp. 2d at 709, 724-25; Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 (11th Cir. 2004) ("Federal courts adjudicate claims against foreign corporations every day and can consider the nation's foreign policy interests and international comity concerns in their decisions."); *but see* Industria Panificadora, S.A. v. U.S., 763 F. Supp. 1154, 1160-61 (D.D.C. 1991), *aff'd*, 957 F.2d 886, (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992) ("[W]hile plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political questions that encompass U.S. foreign policy and military operations.").

79. *Al Shimari*, 657 F. Supp. 2d at 704.

entitled to consideration.[80] No court, however, has categorically found such an expression of executive views to be dispositive.[81] Instead, the case law has begun to define various standards of deference depending on both the presence and presentation of an SOI. First, it is almost universally established that where the executive declines to comment courts are less inclined to dismiss a case.[82] Second, courts have emphasized that the specificity and tone of the SOI affects its impact on the litigation.[83] Finally, courts generally limit any impact the SOI has to only the fourth through sixth factors of the *Baker* analysis.[84] Accordingly, courts adjudicating ATS claims normally consider any SOI presented but require a high standard of specificity and urgency in order for it to impact their political question analysis.[85]

Despite the judicial reluctance to defer to SOIs, submissions by the executive have played a pivotal role in the dismissal of some cases on political question grounds. Cases that are dismissed under the *Baker* test normally involve issues in which the executive has had either direct involvement or has pronounced a policy that disfavored adjudication. This executive involvement normally falls within the category of a constitutionally mandated power. Therefore, the cases dismissed typically implicate the first *Baker* factor. Most frequently, cases that place wartime alliances and policies under judicial review without alleging liability of non-governmental actors end up dismissed on

---

80. *E.g.*, *Alperin*, 410 F.3d at 556 (Had the State Department expressed a view, that fact would certainly weigh in evaluating this fourth *Baker* formulation.).

81. *See* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 23 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) ("Courts do not abdicate their Article III responsibilities on executive command."); *see also* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1207 (9th Cir. 2007) ("We are mindful of *Sosa's* instruction to give 'serious weight' to the views of the executive, but we cannot uphold the dismissal of this lawsuit solely on the basis of the SOI."); *Kadic*, 70 F.3d at 250 ("even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication").

82. *See Sarei*, 487 F.3d at 1206 ("Without the SOI, there would be little reason to dismiss this case on political question grounds, and therefore . . . the SOI must carry the primary burden of establishing a political question."); *see also Kadic*, 70 F.3d at 250.

83. *See, e.g.*, *South African*, 617 F.Supp.2d at 282 (citing City of New York v. Permanent Mission of India to the United States, 446 F.3d 365, 376 n.17 (2d Cir. 2006) ("The Executive Branch's views will not prevail if they are 'presented in a largely vague and speculative manner' or if the Executive's concerns are not 'severe enough or raised with the level of specificity required to justify . . . a dismissal on foreign policy grounds.'"); *see also*, *Sarei*, 487 F.3d at 1208.

84. In the absence of an SOI one court has held that a statute, expressing a codified consensus reached among the executive and legislative branches of government, might serve a similar function and have an analogous effect on a court's analysis of the last three *Baker* factors. *See Al Shimari*, 657 F. Supp. 2d at 713.

85. This limited application is predicated on *Baker*'s requirement that nonjusticiable questions be *inextricable* from the claim presented. *Baker* 369 U.S. at 217. The intractable nature of the issue must be conveyed in an SOI in order for the statement to be persuasive. *See, e.g.*, *Sarei*, 487 F.3d at 1206-07, 1206 n.12 (dismissing an SOI by noting that, "[t]he State Department explicitly did *not* request that we dismiss this suit on political question grounds.").

political question grounds.[86]

An ongoing example of such wartime conflicts is claims against Israeli government actors brought by Palestinian nationals.[87] In *Matar v. Dichter*, the Eleventh Circuit dismissed plaintiff's claims for extrajudicial killing during a bombing carried out by defendant Israeli secret service on political question grounds.[88] The court held that because the Israeli policy "involved a response to terrorism in a uniquely volatile region," it could not ignore the impact of adjudication on "the Middle East's delicate diplomacy."[89] The court went on to remark that the status of Israel as an ally of the U.S. presented "unique foreign policy implications."[90]

Similarly, in *Doe I v. State of Israel*, plaintiffs sought redress for a variety of violent torts committed by the Israeli government and its officials in coordination with the U.S. government.[91] The D.C. district court dismissed the claim on political question grounds reasoning that the first *Baker* factor was "undeniably implicated."[92] Adopting the contextual approach used in the Ninth Circuit, the court reasoned that the claims presented were not ordinary torts but "would require the Court to characterize the ongoing armed conflict in the West

---

86.

> A plurality of the Supreme Court recently reaffirmed that the judicial branch 'accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide.

Alperin, 410 F. 3d at 559 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)); *but see Alperin*, 410 F.3d at 559 n.17 (We stress, however, that courts are not powerless to review the political branches' actions during wartime); *see also* Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (Fed. Cir. 2006) (dismissing a claim over U.S. support of the Pinochet government).

87. Dismissals are by no means limited to conflicts in the Middle East. Several Latin American cases indicate that, where adjudication of claims necessarily passes judgment on policies developed to further the executive branch's war time objectives, the claim will be barred because war powers are constitutionally delegated to the executive and because war calls for adherence to previous decisions. *See, e.g.*, Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) (holding that "broad allegations of the claims . . . against the defendant organizations . . . which comprise the entire military and political opposition in Nicaragua, are non-justiciable); *Mujica*, 381 F. Supp. 2d at 1194 (holding that "the fourth *Baker* factor applies to the instant case because proceeding with the litigation would indicate a "lack of respect" for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."); *Gonzalez-Vera*, 449 F.3d at 1264 (holding that actions taken to place and keep President Pinochet of Chile in power "were 'inextricably intertwined with the underlying' foreign policy decisions constitutionally committed to the political branches").

88. Matar v. Dichter, 500 F. Supp. 2d 284, 293 (S.D.N.Y. 2007), *aff'd*, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009).

89. *Id.* at 295.

90. *Id.*

91. Doe I v. State of Israel, 400 F.Supp.2d 86, 97 (D.D.C. 2005).

92. *Id.* at 111-12. (noting the political nature of the conflict) ("It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for decades.").

Bank as either 'genocide,' or 'self-defense' [to genocide]".[93] The court concluded that such a ruling required a policy determination rather than a legal analysis.[94] These Israel-Palestine ATS cases, along with the handful of others that have been dismissed on political question grounds, demonstrate that, in exercising their discretion, courts have set a high bar for dismissal. This standard requires concerns on the level of ongoing armed conflict or a direct exercise of the executive's constitutional powers to justify a political question dismissal. Clearly, these cases are exceptions to the norm of justiciability.

Though the *Baker* test lays out six factors for determining justiciability, courts have recently held that ATS claims are justiciable unless adjudication would conflict with the constitutional mandate of the executive or foreign policies in a time of war. Even these concerns are usually entertained only after an express statement by the executive branch. No matter the context, to be persuasive an SOI must relate specifically to the case at hand and be corroborated by other evidence.[95]

In claims where the government does not submit an SOI, courts tend to focus on the first three *Baker* factors. In analyzing these factors, courts examine the temporal and claim-specific impact of adjudication. In doing so, they frequently treat the ATS as a constraint on the political question doctrine by noting that § 1350 expressly provides standards for adjudication and jurisdiction to the courts.[96] An examination of the cases that employ this carefully-framed analysis reveals reluctance among the judiciary to dismiss cases on political question grounds. In the absence of an immediate negative effect on clearly declared foreign policies, the courts frequently reiterate that not "every case or controversy which touches foreign relations lies beyond judicial cognizance."[97]

V.
THE DEBATE OVER THE ROLE OF THE POLITICAL QUESTION IN ATS CLAIMS

The uncertain status of the political question doctrine in the wake of *Sosa*'s suggestions of deference and caution has sparked new debate over the role of separation of powers in the international sphere. As the court noted in *Sosa*, hearing individual claims for violations of the law of nations is a quintessentially judicial task. This function, however, inevitably overlaps with the role of the

93. *Id.* (citing Schneider v. Kissinger, 310 F. Supp. 2d 251, 260 (D.D.C. 2004)).

94. *Id.*

95. Interestingly, this evidence has begun to include statements by the nation where the alleged tort occurred. Courts have treated these foreign state-authored statements as tools for evaluating the weight of an SOI or have relegated discussion of foreign government statements to a segment of their opinion analyzing comity arguments. *See generally*, *South African*, 617 F. Supp. 2d at 277; Lizarbe v. Rondon, 642 F.Supp.2d 473, 483 (D.Md. 2009), *Sarei*, 487 F.3d at 1207 n.15.

96. *See, e.g.*, *Kadic*, 70 F.3d at 243.

97. *Baker*, 369 U.S. at 211.

political branches to create and define the norms of international law, which give rise to causes of action for individuals' claims. The debate centers on the role of the judiciary in adjudicating law of nations claims, and the way in which such adjudication facilitates the participation of individual actors in shaping that law.

Proponents of increased executive oversight of judicial review in ATS claims emphasize that the creative role of the executive has expanded with the increased popularity of the treaty-making process.[98] They warn that adjudication of ATS claims allows individuals to preempt this process and effectively enables judicial policymaking.[99] Advocates of executive oversight emphasize that this policy-making can be particularly troublesome when it pertains to war-type activities such as rendition.[100] They conclude that the credibility of the treaty process and the security of the nation depend on the executive's ability to assert the political question as grounds for non-justiciability in ATS claims.[101]

On the other side of the debate, proponents of judicial review insist that the constitutional mandate to adjudicate claims requires at most *limited* application of the political question doctrine in ATS claims. They argue that the specific grant of the ATS, allowing courts to hear *individuals'* claims for violations of international law, supplements and reinforces the judiciary's Article III prerogative as it pertains to international law.[102] Proponents of adjudication of ATS claims argue that the increased prominence of individual actors in international law necessitates and creates a greater role for the judiciary.[103] They argue that the judiciary's effectiveness in this role requires that it remain free of unwarranted constraints by the executive branch.[104] They emphasize that this helps ensure that decisions to adjudicate create a consistent and reliable

98. *See, e.g.*, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and The Original Understanding*, 99 COLUM. L. REV. 1955, 1972-74 (1999) (discussing treaty power generally but also citing to its implication in an ATS case); *see also* John C. Yoo, *Response Essay: Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305 (2002); *contra* Michael Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 896 (2003-2004).

99. *See, e.g.*, Lisa Rudikoff Price *Note: Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323 (2006).

100. Dhooge, *supra* note 11.

101. *Id.* at 342.

102. Harold Hongju Koh, *Keynote Address: The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004).

103. Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 132 (1986).

104. Graham O'Donoghue, *Precatory Executive and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1124 (2006).

body of case law.[105] Advocates for more frequent adjudication of ATS claims argue that such a body of case law is essential to national security by demonstrating the ramifications of violating the law of nations and by representing the United States as a country that opposes such violations.[106]

VI.
CONCLUSION: DOES THE JUDICIAL ANSWER BEG THE QUESTION?

Recent ATS case law demonstrates that courts have embraced the pro-judiciary side of the political question debate. In part, this willingness to adjudicate ATS claims may be viewed as a judicial endorsement of the role of individuals in shaping international law. Less optimistically, the refusal to dismiss ATS claims may merely stem from a historical judicial reluctance to bend to an overzealous executive. This latter view draws support from the courts repeated invocations of their constitutional obligation to adjudicate controversies and their insistence that the ATS verifies the extension of that duty to individuals' claims for violations of the law of nations.

Opponents of this pro-adjudication view argue for the revival of a statist approach to international law and point to a modern trend toward treaty making to justify their view.[107] While this argument fails to overcome the judiciary's interpretation of the ATS as empowering federal courts to adjudicate claims arising from codified norms, it may carry more weight in areas where norms are not expressly codified.[108] In areas of foreign affairs, such as the war on terror or the war on drugs, the judiciary may truly lack standards for adjudicating cases and, in these instances, courts have reasoned that proceeding without discernible rules could seriously threaten foreign relations.[109]

Ultimately, the difficulty in defining the role of the political question doctrine in ATS claims stems from the statute's extra-constitutional reach.[110] In ATS claims, where conflicts are international, constitutional constraints become marginalized and the manifestation of the separation of powers paradigm

---

105. *See id.*; *see also* Rabkin, *supra* note 12, at 2121-22.

106. Rabkin, *supra* note 12, at 2147; *see also* Scoble, *supra* note 103, at 185.

107. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Introductory Note (1987) ("In our day, treaties have become the principal vehicle for making law for the international system; more and more of established customary law is being codified by general agreements"). In fact, the increased number of treaties may well serve as an indication that international codification of customary international law norms has become a norm itself.

108. This is especially true in light of the *Sosa* decision limiting adjudication of ATS claims to cases arising in response to violations of well-established rules of international law. *See* Sosa, 542 U.S. at 721.

109. *See, e.g.*, *Mujica*, 381 F. Supp. 2d at 1183 (dismissing a case on political question grounds where adjudication would have required an assessment of the U.S. military policy towards the war on drugs).

110. Scoble, *supra* note 103, at 183.

becomes amorphous. The discretionary nature of the political question provides the judiciary the means to reshape the paradigm's dividing lines. Yet this ability seems to jeopardize the balance of powers even as it seeks to establish that equilibrium.[111] Ironically, any requirement of categorical deference to the executive with regard to ATS matters would upset that equilibrium and violate of the separation of powers by constituting an executive intrusion into the judicial sphere.[112] As a result, the ultimate decision to dismiss a case remains within the discretion of the judiciary.[113]

While *Sosa* sought to limit the exercise of this discretion to ATS cases involving traditionally recognized causes of action, this restriction fell short of clearly separating judicial powers from those of the political branches. Though *Sosa* prohibits courts from creating new norms beyond those "traditionally recognized," it does not curtail the courts' power to define the scope of those permissible norms. Yet, under the political question doctrine even the act of definition could raise a non-justiciable question.[114] Courts have yet to address this issue, perhaps because to do so would question the viability of judicial self-restraint and threaten to render the judicial answer just another political question.

111. Theoretically, a narrow reading of the *Baker* factors could allow courts to constrain the executive powers in foreign affairs to near constitutional levels.

112. Unless, of course, the political branches amended the ATS. Though this has yet to happen, judicial consideration of SOIs demonstrates that the executive branch is not powerless to assert its own theories on the judiciary's role.

113. *See Sarei*, 487 F.3d at 1227.

114. If an ATS case were to raise a violation not explicitly covered by a treaty, such as extraordinary rendition, a court hearing the claim would have to decide if that tort fell within one of the recognized norms. Yet this decision itself would theoretically constitute a political question, since the judiciary rather than the executive would be defining the scope of an international norm. The act of definition would require a policy determination by the court and so, under the third *Baker* factor, it would fall beyond the scope of the judiciary's powers.