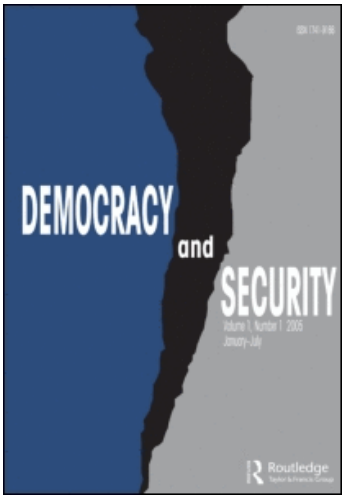


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Michael P. Fix [a]; Kirk A. Randazzo [a]
[a] Department of Political Science, University of South Carolina, Columbia, SC

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# Judicial Deference and National Security: Applications of the Political Question and Act of State Doctrines

Michael P. Fix and Kirk A. Randazzo

Department of Political Science, University of South Carolina, Columbia, SC

This article briefly examines the history of federal court adjudication of national security issues to determine how judges have employed specific legal rationales for deciding not to decide in order to avoid confrontation with the executive branch. By focusing on the historical development of these legal strategies, we demonstrate that while judges have been generally deferential to the executive on national security issues, this deference increases in times of crisis. Through a series of qualitative case studies, we examine the use of threshold issues as a legally justifiable means to avoid ruling on the merits. Specifically, we focus on the use of the political question and act of state doctrines both historically and in the post-September 11th environment. We conclude that the federal courts continue to employ these techniques to avoid resolving challenges to national security, thereby promoting a continued deference to the executive branch.

**Keywords:** Act of State Doctrine, Constitutional Law, Judicial Decision Making, National Security, Political Question Doctrine



In the aftermath of the September 11th terrorist attacks, the US federal government developed new policies and enacted new laws under the theme of protecting national security that are generating numerous legal challenges in the federal courts. These challenges have incited several debates, across all levels of society, about the proper role of the federal judiciary in cases involving national security. Among the polarized opinions are those advocating that the judiciary exert an extremely limited role in resolving national security issues. Rather, this perspective argues that the executive branch retain broad authority under Article II of the US Constitution, subject only to a small number of

Address correspondence to Kirk A. Randazzo, 329 Cambrell Hall, Department of Political Science, University of South Carolina, Columbia, SC 29208. E-mail: kirk.randazzo@sc.edu

constraints imposed by Congress. Conversely, there are those individuals who echo the words of de Tocqueville when he stated that "there is hardly a political question . . . which does not sooner or later turn into a judicial one."[1] Advocates of this position claim that an independent judiciary is essential to preserve the fundamental rights and liberties of individuals against intrusion by the political branches in the name of national security.

This article examines the history of federal court adjudication of national security issues to show that the former argument often triumphs. While the executive wins many of these cases on the merits (especially since courts are likely to defer to the executive branch), judges often employ a variety of legal rationales for deciding not to decide. This tactic allows federal courts to give the executive wide discretion in national security policy, precisely by avoiding the substantive arguments made by opposing parties during litigation. For example, courts readily invoke threshold issues such as the act of state or political question doctrine to avoid reaching the merits of a challenge to national security.

We proceed by initially reviewing the history of judicial involvement in national security litigation. By focusing on how courts handle these cases, we demonstrate that while judges have been generally deferential to the executive on national security issues, this deference increases in times of crisis. Therefore, we initially conclude that the current position of the federal courts in the post-September 11th environment is neither historically unprecedented nor likely to encourage judicial opposition to executive policies.

Next, we qualitatively analyze the use of threshold issues as a legally justifiable means to avoid ruling on the merits. Specifically, we focus on the use of the political question and act of state doctrines both historically and in the post-September 11th environment. We conclude that the federal courts continue to employ these techniques to avoid resolving challenges to national security, thereby promoting a continued deference to the executive branch.

## A HISTORY OF THE FEDERAL JUDICIARY AND CASES INVOLVING ISSUES OF NATIONAL SECURITY

In recent years, since the attacks of September 11, 2001, the national news media have devoted a substantial amount of attention to litigation brought before federal courts that challenges various policies related to national security as violations of individual civil rights and liberties. Cases involving the classification and detention of "enemy combatant[s],"[2] their right of access to the judicial system,[3] and presidential authority to conduct the war on terror,[4] have captured the media spotlight, presenting the impression that these issues are unique and new to the courts. Yet this initial impression belies a long tradition of national security litigation in the federal courts.

This is not to say that the role of the judiciary in resolving these issues ever garnered the level of attention witnessed in the current environment, nor that the impact of judicial decisions shaped foreign policy similar to the impact from other branches. Rather, throughout US history the federal courts have consistently deferred to the opinions of the political branches of government in these areas, especially to the policies of the executive branch.

Historically, this deferential nature is most visible in cases involving the nation's war powers, which often require the courts to mediate disputes between the president and Congress. This role is reflected in some of the earliest cases decided by the Supreme Court. Early in the Marshall Court, the justices resolved a series of cases including *Bas v. Tingy*,[5] *Talbot v. Seeman*,[6] and *Little v. Barreme*[7] involving attempts to define the powers of Congress and the president relating to their war powers.

In the landmark case *Marbury v. Madison*,[8] the Supreme Court managed to develop a foundation of deference to the executive branch, while simultaneously establishing the power of judicial review. In the opinion, Chief Justice Marshall noted that "the President is invested with certain political powers, in the exercise of which he is to use his own discretion and is accountable only to his country in his political character, and to his own conscience."[9] Although the specific legal question at issue in *Marbury* was one of a purely domestic nature, this point made by Marshall has played a significant role in defining executive power in the field of foreign affairs and national security. Marshall went on to add that in cases involving these presidential powers, "[t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive . . . [and that t]he acts of such an officer, as an officer, can never be examinable by the courts."[10] These words essentially establish the modern proposition that "the conduct of foreign affairs by the political agencies should be immune to judicial scrutiny."[11]

An historical examination of judicial decisions also reveals that even in the few cases where courts ruled against the executive, the rulings were either limited in scope, practically irrelevant, or completely ignored. An example of the latter occurs in the case *Ex Parte Merryman*,[12] where an individual challenges the constitutionality of his arrest and imprisonment by military forces during the Civil War. The individual, who resided in Maryland and was not formally involved in the war, presents the following facts in his petition to the Court: "While peaceably in his own house, with his family, it was two o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority."[13] In ruling for the petitioner, Chief Justice Taney—acting in his capacity as a circuit judge—declares unconstitutional the suspension of *habeas corpus* by President Lincoln. Despite this decision, in which Taney used much the same line of

reasoning later employed by the Supreme Court in ruling against the executive in the case of *Ex Parte Milligan*,[14] the Lincoln Administration ignored the decision and continued to hold Merryman in military prison. In addition, the administration did not even bother to appeal the decision to the Supreme Court.[15]

In the *Milligan* case, the Supreme Court declared that martial law could not be imposed in states that had not seceded and in which "the courts are open and their process unobstructed."[16] Even though the Court ruled against the executive, the decision only impacted citizens of the states that had remained in the Union, thus greatly limiting the potential impact of the decision toward reconstruction policy. Even more importantly, the decision was not rendered until after the end of hostilities.[17]

World War I brought the Espionage and Sedition Acts, designed to essentially silence all opposition to the war. Under these statutes the government leveled criminal charges against individuals for circulating pamphlets supporting the Bolshevik Revolution,[18] accusing the US government of entering the war to further the economic interests of big business,[19] and opposing the draft.[20] These acts, described by Chief Justice Rehnquist as "draconian,"[21] also saw convictions of individuals for publishing cartoons critical of the government's war policy,[22] and even for speaking out against the very pieces of legislation under which they were to be convicted.[23]

The advent of World War II witnessed a myriad of civil liberties challenges to US foreign policies, similar to those seen in the Civil War and World War I. Perhaps the most infamous example involved the internment of Japanese Americans, which led to the case *Korematsu v. United States*.[24] Writing on behalf of the majority, Justice Black stated that "[c]ompulasry exclusion of large groups of citizens from their homes, *except* under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[25]

Justice Frankfurter wrote a separate concurring opinion and was more direct in his analysis of executive power. While Justice Black implied that in times of war a different set of rules exist, and the courts should not attempt to restrain the executive in the application of these rules, Justice Frankfurter did not bother with implications. He bluntly stated that "[t]o find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. *That is their business, not ours*."[26]

In *Duncan v. Kahanamoku*,[27] the Supreme Court ruled, as it did in *Milligan*, against the executive branch's declaration of martial law in war. Here, it held that the use of martial law in Hawaii during World War II was

unconstitutional. However, it is important to note that "both of these cases limiting the power of the President to declare and enforce martial law were decided after hostilities had subsided."[28] Therefore, although these cases provide the appearance of judicial involvement as a viable check to executive authority in national security issues, in reality these cases did not hamper the executive's ability to implement policy.

More recent years provide for an expansion of executive power, similar to the foundation established in *Marbury*. The federal courts continue to assert a limited role in areas of national security and foreign policy beyond mediating conflicts between the two political branches. For example, Judge Coffin (First Circuit Court of Appeals) acknowledges the difficulty of this role in a case that challenges the constitutionality of the Vietnam War on due process grounds. In his conclusion to the majority opinion in *Massachusetts v. Laird*,[29] he notes that

> [a]ll we hold here is that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. This question we do not face. Nor does the prospect that such a question might be posed indicate a different answer in the present case.[30]

In sum, what appears to be a substantial increase in national security litigation after September 11th is actually part of a continuing trend of judicial resolution of foreign policy disputes. During times of crisis the potential for government infringement upon individual rights increases, thereby producing a corresponding increase of legal challenges to national security policies. An examination of cases from the early history of the US, through the Civil War and into the twentieth century reveals that the current legal environment is not an historical exception, but rather part of a consistent trend in terms of the number of cases and the deferential treatment received in federal court.

## POLITICAL QUESTION AND ACT OF STATE DOCTRINES

The federal courts in the US are not constitutionally empowered to adjudicate just any case brought before them. Before they can decide a case, the case must pass certain qualifications set forth by the text of the Constitution, certain congressional legislation, and prior court decisions. In many cases, judges

must first address these so-called threshold issues before they can consider the actual merits of the case that is before them.[31]

The primary example of these threshold issues is set out directly in Article III of the US Constitution, where it is specifically outlined that federal courts can only decide actual "cases" or "controversies."[32] The definition of this issue has required the Supreme Court to develop "an elaborate body of justiciability doctrine in effort to give meaning to the case or controversy requirement."[33] Examples of some of the most frequent occurrences can help to clarify what is meant by the term "threshold issue." According to the tenets of judicial process a court must (1) consider whether a party is sufficiently harmed by some law or action in order to properly bring the action to court (i.e., standing); (2) whether the issue has already been resolved (i.e., mootness); (3) whether the issue has fully developed for litigation (i.e., ripeness); and (4) whether the court has jurisdiction to hear the dispute. The Supreme Court consistently reinforces the importance of these threshold issues. As the justices often state, these threshold issues place "fundamental limits on federal judicial power in our system of government."[34]

In the area of foreign policy and national security, the federal courts historically have often invoked threshold issues as a means to justify and legitimate judicial deference. Similar to the application of broader threshold issues, the courts are simply declaring that the issues involved in these cases are outside the limits of judicial authority. However, the specific threshold issues used most frequently to avoid reaching the merits of national security cases the political question doctrine and act of state doctrine are qualitatively different and merit additional attention.



## Political Question Doctrine

The political question doctrine is the more established of these two threshold issues, and the one more frequently invoked by the courts. While the origins of the doctrine lie primarily in domestic, separation of powers issues,[35] over time it has been invoked more often to serve as a legal justification for the deference by the federal courts to the political branches in regards to cases with foreign policy or national security implications.

The political question doctrine is defined as something that "arises from separation of powers concerns and allows the Court to decline to exercise judicial review if its decision would intrude into the spheres of the political branches or be judicially unenforceable. This doctrine holds generally that a controversy, though ripe and of great public interest and debate, may nonetheless be nonjusticiable if judicial review would result in the usurpation of power from either of the other coordinate branches."[36] This concept is based in large part on Chief Justice Marshall's description of presidential authority in *Marbury v. Madison*, in which he stated that certain political acts "can

never be examinable by the courts,"[37] even though he failed "to explain *why* foreign affairs should be placed beyond the reach of judicial review."[38] Despite claims by some scholars that the political question doctrine "is not only not required by but wholly incompatible with American constitutional theory,"[39] it still remains a well-entrenched part of constitutional law.

Similar to most areas of American constitutional jurisprudence, the evolution of the political question doctrine developed as a result of Supreme Court precedent. According to O'Brien,[40] the doctrine first began to develop under the Taney Court in the case *Luther v. Borden*,[41] and evolved into its modern form with the decision in *Baker v. Carr*.[42] In *Baker v. Carr*, the Supreme Court "reasserted its power to decide what is and is not a political question."[43] In doing so, the Court outlined a test that is still used by the federal courts to determine if a case poses a political question. Writing for the majority, Justice Brennan described six factors, the existence of any of which would constitute a nonjusticiable political question:

1. [A] textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. A lack of judicially discoverable and manageable standards for resolving it;
3. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
4. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. An unusual need for unquestioning adherence to a political decision already made;
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.[44]

Relying on the analysis proscribed in *Baker*, the already deferential judiciary employed a new method to avoid reaching the merits of cases challenging national security or foreign policy. According to Ramsey, "the point of the doctrine is that, whether or not war initiation powers belong to the President, the courts will not, as a matter of the proper role of the judiciary, entertain lawsuits seeking to constrain the President's conduct of war."[45]

While the political question doctrine played a major role in the shaping of constitutional doctrine in a variety of areas, some scholars have argued that it is no longer relevant. Frank argues that since "in the Supreme Court, the political-question doctrine is now quite rarely used and may be falling into desuetude,"[46] it is essentially a dead letter. However, Frank fails to note two key facts that undermine this argument. First, since the Supreme Court has never declared the political question doctrine to be bad law, it can be and is

still widely used in the lower courts. Second, the Supreme Court reviews less than one percent of all cases decided in the US federal courts—consequently, the decisions of the lower courts carry greater importance for the shaping of national policy.

Therefore, while Frank's claim about the decline in the use of the political question doctrine in the Supreme Court is correct, this doctrine remains vibrant in the lower federal courts, and continues to serve as a vehicle for those judges to defer to the political branches in national security cases. Several recent decisions issued by the Courts of Appeals illustrate this point. First, in 2005, the Second Circuit Court of Appeals made quite clear its reliance on the political question doctrine in the case, *Whiteman v. Dorotheum GmbH & Co KG*.[47] Here, a group of current and former Austrian citizens and their heirs sought to recover monetary damages for property taken during World War II from the Austrian government by suing in US court under exemptions to the Foreign Sovereign Immunities Act.[48] The US and Austrian governments asked the court to dismiss as a political question, arguing that the US government had a stated policy for handling all Holocaust-era claims through international mechanisms rather than domestic courts; for the court in the case to do otherwise would interfere with the expressed foreign policy interests of the US. In siding with the governments, the court held that

> Our inquiry into the proper deference to be accorded to the United States Statement of Interest is guided by our application of the political question doctrine because this doctrine "reflects the judiciary's concerns regarding separation of powers." Our resolution of this case under *the political question doctrine is greatly reinforced by the historic deference due to the Executive in the conduct of the foreign relations* of the United States ... [w]e further note that our decisions and those of other courts considering the application of the political question doctrine have properly relied on the views of the United States Government, as expressed in its statements of interest.[49]

Also in 2005, the DC Circuit affirmed a district court ruling that the court lacked jurisdiction under the political question doctrine to hear a suit brought against the US and former National Security Advisor Henry Kissinger by the survivors of a former Chilean general killed in a military coup backed by the US. The sons sued under the Federal Tort Claims Act[50] for "negligent failure to prevent summary execution, arbitrary detention, cruel, inhumane, or degrading treatment, torture, wrongful death, and assault and battery, and ... for intentional infliction of emotional distress."[51] In dismissing the lawsuit, Circuit Judge Sentelle wrote that "there could still be no doubt that decision-making in the fields of *foreign policy and national security is textually committed to the political branches* of government."[52]

Similarly, several other circuits continue to invoke the political question doctrine. The Federal Circuit used it to avoid deciding a suit against the

US by Korean veterans seeking enforcement of a "government-to-government agreement within the sole authority of the executive."[53] Specifically, several veterans of the Korean military sought to recover moneys they claimed the US had agreed to pay to the Republic of Korea in return for the participation of Korea's military forces during the Vietnam War. In dealing with both issues of standing and the political question doctrine, the court held that the agreement at issue was "a government-to-government agreement within the sole authority of the Executive, and confers no private right of action. Compliance remains in the arena of foreign policy and foreign relations."[54] Furthermore, the court went on to note that such issues "are matters of foreign affairs and policy, and do not meet the criteria of judicial resolution."[55]

The Tenth Circuit also invoked this doctrine in dismiss a challenge to the Federal Aviation Authority's (FAA's) power to "determine whether airspace is necessary to national defense."[56] This case involved an administrative decision by the FAA and the Air National Guard to provide special airspace for military training exercises. The petitioners—environmental groups, local government entities, and airports—asked the court to invalidate the FAA's action on the grounds that it violated the property rights of some petitioners as well as agency guidelines for environmental impact. In evaluating the importance of the FAA's decision for national defense, the court held that the "political question doctrine precludes us from second-guessing or interfering with the FAA's decision because the Initiative is necessary to provide airspace for military training."[57]

In sum, it is apparent that the political question doctrine remains a viable tool for the lower federal courts to avoid reaching the merits of cases that challenge national security and foreign policy. This continued use reinforces the judicial branch's deferential nature to the political branches of government. Additionally, in three of the four cases discussed above, the US Supreme Court later denied certiorari.[58] While this does not show explicit support by the Supreme Court for these rulings, it illustrates how vehicles for abolishing the use of the political question doctrine have been available. Therefore, while the Court may have decreased its reliance on this doctrine, it has not attempted to instruct the lower courts to do so; they continue to apply this threshold issue to cases involving questions of national security. As a result, the political question doctrine continues to encourage judicial deference to the executive in national security cases.

## Act of State Doctrine

Like the political question doctrine, the act of state doctrine developed through Supreme Court decisions as a threshold issue bars adjudication on the merits of certain cases containing foreign policy or national security issues. While its evolution is more recent than that of the political question doctrine,

it is still an important doctrine to consider in an evaluation of the deferential nature of the federal courts in these areas of the law.

The modern application of the act of state doctrine was established near the turn of the twentieth century, and is best described in the case *Underhill v. Hernandez*.[59] There, Chief Justice Fuller wrote that "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."[60]

The basic principle of this doctrine dates back to seventeenth-century Britain.[61] The doctrine first made its way into American jurisprudence in the early nineteenth century in *Hudson v. Guestier*,[62] although it did not become ensconced there until the very end of the nineteenth century in *Underhill*. Even though this key case developed the definition still used by US federal courts, this doctrine was not actually termed "the act of state doctrine" until the 1964 case of *Banco Nacional de Cuba v. Sabbatino*.[63]

Between the *Underhill* and *Sabbatino* decisions, the Supreme Court did have a few opportunities in which to confront these issues. As noted by Justice Harlan in the *Sabbatino* decision, these exceptions essentially reaffirmed the principle laid out in *Underhill* actually applying the term "act of state" to Chief Justice Fuller's definition.[64] With Sabbatino, however, this doctrine began to evolve into its modern form in both name and application.

Additionally, the act of state doctrine as applied in *Sabbatino* contained one other notable development from the *Underhill* version. This change, mostly syntactical, reflects the deferential nature of the federal courts in cases involving national security and foreign affairs. Here the Court essentially restated the logical basis of the doctrine and set out how it was to be applied in future cases. In language that "plainly paralleled the political question approach,"[65] the Court held that "the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depend[ing] on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."[66]

Soon after the *Sabbatino* decision, the Court had an opportunity to review another case involving property seizure by the Cuban government. In this case, the justices did not rely on the act of state doctrine because it "would not advance the interest of American foreign policy."[67] Though this case seemed to retreat from the doctrine announced in *Sabbatino*, it was not in opposition to the judiciary's traditionally deferential position since the executive expressed concerns about the application of the act of state doctrine in this matter.[68]

Due to the position of the executive in *First National City Bank*, the nonapplication of the act of state doctrine continues the pattern of judicial deference rather than assertion of judicial authority. Furthermore, only four years after the *First National City Bank* case, the Court "returned at least part of the way to the *Sabbatino* approach"[69] in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[70] while looking at a very similar set of facts as in *Sabbatino* and *First National City Bank*. In other words, the key distinction between the use of the act of state doctrine in *Sabbatino* and *Alfred Dunhill* and its nonapplication in *First National City Bank* appears to be the position of the executive, not a desire by the judiciary to reach the merits of a case.

Similar to the political question doctrine, the application of act of state doctrine seems to have declined in the Supreme Court recently. This is due in part to the Hickenlooper Amendment,[71] passed by Congress to protect American business interests abroad, which states that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principle of international law in a case in which a claim of title or other rights to property is asserted."[72]

Though the Supreme Court has not addressed directly the act of state doctrine since September 11th, several decisions from the Courts of Appeals examine this doctrine and its relation to the Hickenlooper Amendment. In the case *FOGADE v. ENB Revocable Trust*,[73] dealing with issues stemming from the Venezuelan banking crisis of the mid-1990s, the Eleventh Circuit severely limited the effect of the Hickenlooper Amendment upon the act of state doctrine. Specifically, the court held that, "the Second Hickenlooper Amendment did not overrule the entire decision, nor the act of state doctrine generally."[74] Further, it held that for the Amendment to apply, and thus nullify an application of the act of state doctrine, three specific criteria are necessary: a claim of title or other right to property; a claim based upon or traced through a confiscation or other taking; and a violation of international law.[75]

Other circuits continue to rely on the act of state doctrine as a method of deference in cases involving foreign affairs. The Ninth Circuit directly addressed the act of state doctrine twice in the post-September 11th environment. Both of these cases involved suits against the estate of former Philippine President Ferdinand Marcos, in which the court invoked the act of state doctrine and refused to issue a decision of the merits.[76] In one of these decisions, a bank sought a writ of mandamus against a district court to stop contempt proceedings stemming from the district court's invalidation of a Philippine Supreme Court ruling. Initially, the district court held that the decision of the Philippine Supreme Court was entitled no deference. Consequently, the bank was faced with choosing between violating an order of the Philippine Supreme Court or facing contempt by the US district court. By issuing the writ of mandamus, the Ninth Circuit held that the decision

of the Philippine Supreme Court was an "act of state" and therefore the district court's ruling was in error. Moreover, the appellate panel from the Ninth Circuit not only demonstrated that the act of state doctrine continues after the Hickenloper Amendment, but the circuit court judges expanded the doctrine in two ways. First, they declared that a judicial decision could be an act of state, even though previous interpretations only included executive or legislative actions. Second, the appellate panel went so far as to hold that the act of state doctrine applies, "even when an act of a foreign state affects property outside of its territory."[77]

Like the other circuits, the DC Circuit recently made use of the act of state doctrine to avoid ruling in a case with foreign policy implications. In *World Wide Minerals v. Kazakhstan*,[78] a Canadian corporation brought a suit against the Republic of Kazakhstan for alleged contract violations, tort claims, and racketeering. These claims were brought under the Foreign Sovereign Immunities Act (FSIA)[79] and stemmed from an agreement over uranium mining and export rights. The Canadian corporation alleged that Kazakhstan failed to issue export licenses, despite agreements to the contrary, and also seized corporate assets located in the country. Choosing to defer to the executive in this foreign policy issue, the appellate court stated that "questioning the export control policies of a foreign state would both disrupt international comity and interfere with the conduct of foreign relations by the Executive Branch."[80]

In *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*,[81] the Fourth Circuit was requested to issue an injunction to a uranium export company wholly owned by the Russian government that refused to make deliveries required under contract. Although the Fourth Circuit did not reach the act of state question, it remanded the case on other grounds but noted that the specific relief sought may be barred by the application of the act of state doctrine.

While the US Supreme Court has not utilized the act of state doctrine in recent years, it is far from a legal relic. Rather, similar to the political question doctrine, it continues to be invoked in the Courts of Appeals as a mechanism to defer to the executive branch in matters of foreign policy and national security. Moreover, a direct congressional attempt to limit its use (i.e. the Hickenloper Amendment) appears to have no impact on its application (some courts have even limited the effects of the Hickenloper Amendment). Finally, as the decision of the Ninth Circuit in *Philippine National Bank* indicates, there may be an attempt to expand the reach of the act of state doctrine during the period of its supposed decline.

## CONCLUSIONS

Since the terrorist attacks of September 11, 2001, several cases have been filed in the federal courts, many of which involve issues of national security.

The substantial media attention afforded these cases has reopened a debate concerning the proper role of the judiciary in foreign affairs. However, examining the historical evolution of foreign policy litigation reveals consistent patterns of increased litigation challenging executive policies in times of crisis. Additionally, history demonstrates that the federal judiciary has remained consistently deferential to the political branches; often relying on a variety of means to avoid reaching the merits of a legal challenge to foreign affairs.

Two of the most frequently used threshold issues in national security and foreign policy litigation are the political question and act of state doctrines. Despite arguments from some scholars that these doctrines are "falling into desuetude,"[82] our examination of recent litigation in the lower courts indicates that they are still a vibrant aspect of federal case law. Since a small fraction of cases reach the Supreme Court, the decisions rendered by the Courts of Appeals and District Courts become more significant. Consequently, the continued use of the political question and act of state doctrines and the continued deference to the political branches have had a tremendous (non) impact on national security and foreign policy law.



## NOTES

1. Alexis de Tocqueville, *Democracy in America* (New York: Penguin Classics, 2003).
2. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
3. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2003).
4. *Mahorner v. Bush*, 224 F. Supp. 2d 48 (D.C.C. 2002).
5. 4 U.S. 37, 4 Dall. 37 (1800).
6. 5 U.S. 1, 1 Cranch 1 (1801).
7. 6 U.S. 170, 2 Cranch 170 (1804).
8. 5 U.S. 137, 1 Cranch 137 (1803).
9. Ibid., 165–166.
10. Ibid., 166.
11. Thomas M. Frank, *Political Questions/Judicial Answers 3* (Princeton, NJ: Princeton University Press, 1992).
12. 17 F. Cas. 144 (Cir. Ct. Dist. MD 1861).
13. Ibid., 147.
14. 71 U.S. 2, 4 Wall. 2 (1866).
15. William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Knopf, 1998).
16. See note 13, 121.
17. Lawrence H. Tribe, *American Constitutional Law*, 1st ed. (Mineola, NY: Foundation Press, 1978); see also Rehnquist, note 15.
18. *Abrams v. United States*, 250 U.S. 616 (1919).

19. *Pierce v. United States*, 252 U.S. 206 (1920).
20. *Schenck v. United States*, 249 U.S. 47 (1919).
21. See note 13, 180.
22. *Masses Pub. Co. v. Patten*, 246 F. 24 (2nd Cir. 1917).
23. *Debs v. United States*, 249 U.S. 211 (1919).
24. 323 U.S. 214 (1944). Emphasis added.
25. Ibid., 220.
26. Ibid., 225. Emphasis added.
27. 327 U.S. 304 (1946).
28. Tribe, see note 17, 180–181.
29. 451 F.2d 26 (1st Cir. 1971).
30. Ibid., 34.
31. See *Allen v. Wright*, 468 U.S. 737 (1984).
32. U.S. CONST. art. III, sec. 2.
33. Tribe, see note 17, 20.
34. 468 U.S. 737 at 750.
35. For a more comprehensive treatment of the historical foundations of the political question doctrine, see John S. Schuchman, "The Political Background of the Political-Question Doctrine: The Judges and the Dorr War." *American Journal of Legal History*, 16(1972): 111.
36. Ryan McKaig, "Aid and Comfort: Rasul v. Bush and the Separation of Powers Doctrine in Wartime." *Campbell Law Review* 28(2005): 133–134. Internal citations omitted. McKaig references *Dep't of Commerce v. Montana*, 503 U.S. 442 (1992) and *Baker v. Carr,* 369 U.S. 186 (1962).
37. Marbury, see note 8, 166.
38. Frank, see note 11, 4.
39. Ibid., 4–5.
40. David M. O'Brien, *Storm Center: The Supreme Court in American* Politics (New York: W. W. Norton & Company, 2005).
41. 48 U.S. 1, 7 Howard 1 (1849).
42. 369 U.S. 186 (1962).
43. O'Brien, see note 40, 178. Internal quotation marks omitted.
44. *Baker v. Carr*, see note 36, 217. Numeration added.
45. Michael D. Ramsey, "Text and History in the War Powers Debate: A Reply to Professor Yoo." *University of Chicago Law Review*, 69(4) (2002): 1719.
46. Frank, see note 11, 61.
47. 431 F. 3d 57 (2nd Cir. 2005).
48. 28 U.S.C.S. sec. 1605.
49. Ibid., 71. Internal citations omitted. Emphasis added.

50. 28 U.S.C.S. sec. 1346(b)(1).

51. *Schneider v. Kissinger* 412 F.3d 190 at 192-93 (DC Cir. 2005). Internal citations omitted.

52. Ibid., 194. Emphasis added.

53. *Kwan v. United States* 272 F.3d 1360 at 1364 (Fed. Cir. 2001).

54. Ibid., 1364.

55. Ibid., 1365.

56. *Custer County Action Ass'n v. Garvey* 256 F. 3d 1024 at 1031 (10th Cir. 2002).

57. Ibid., 1031.

58. These cases include *Schindler v. Whiteman*, cert. denied, 126 S. Ct. 2865 (2006), *Schneider v. Kissinger*, cert denied, 547 U.S. 1069 (2006), *Custer County Action Ass'n v. Garvey*, 534 U.S. 1127 (2002).

59. 168 U.S. 250 (1897).

60. Ibid., 252.

61. Henry H. Perritt, Jr., "Resolving Claims when Countries Disintegrate: The Challenge of Kosovo." 80 *Chicago-Kent Law Review*, 80(2005): 119.

62. 8 U.S. 293, 4 Cranch 293 (1808). For discussion see id.; and Frank, note 11 above.

63. 376 U.S. 398 (1964).

64. The six Supreme Court decisions Justice Harlan cites as reaffirming *Underhill* are: *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). As noted above, none of these decisions apply the term "act of state doctrine," although *Oetjen* and *Ricaud* (each dealing with property seizures by the Mexican government) directly cite Chief Justice Fuller's definition from *Underhill*.

65. Tribe, see note 17, 77.

66. Sabbatino, see note 54, 427–428.

67. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 at 768 (1972), as quoted in Tribe, see note 17, 77.

68. Tribe, see note 17, 77.

69. Ibid., 78.

70. 425 U.S. 682 (1976).

71. 22 U.S.C. 2370 (e)(2) (1988).

72. Ibid., quoted in Frank, see note 11, 100.

73. 263 F.3d 1274 (11th Cir. 2001).

74. Ibid., 1293.

75. Ibid., 1294.

76. The two cases mentioned were: *Philippine National Bank v. U.S. Dist. Ct .for the Dist. of Hawaii*, 397 F.3d 768 (9th Cir. 2005), and *Hilao v. Estate of Ferdinand Marcos*, 393 F.3d 987 (9th Cir. 2004).

77. *Philippine National Bank*, ibid., 773.
78. 296 F.3d 1154 (DC Cir. 2002).
79. See note 48.
80. Ibid., 1165.
81. 376 F.3d 282 (4th Cir. 2004).
82. Frank, see note 11, 61.