Too Hot to Handle: Difficulties and Dangers in the Wake of *El-Shifa*

**INTRODUCTION**

In 1998, the United State government, despite the misgivings of intelligence officials, bombed a Sudanese pharmaceutical plant and lambasted its principal owner in both official and unofficial comments in its justification for the strike.¹ In a 2010 en banc decision, *El-Shifa Pharmaceutical Industries Co. v. United States*, the United States Court of Appeals for the District of Columbia held that the political question doctrine barred the plaintiffs’ defamation claim.² Although there was no dissenting opinion, the justices were strongly divided over the applicability of the political question doctrine.³ Those concurring feared that the precedential power of the opinion would lead to an expansion of executive power, disrupting the constitutionally mandated separation of powers.⁴

Part I of this Case Comment presents the story of what brought a Sudanese factory owner to sue the United States government for defamation.⁵ It subsequently provides an overview of the United States District Court case that gave rise to the D.C. Circuit’s en banc decision.⁶ Part II outlines the majority opinion written by Circuit Judge Thomas B. Griffith.⁷ Examining the en banc decision, Part III of this Case Comment dissects Judge Griffith’s attempt to separate complaints that question the wisdom of an executive action from those “[p]resenting purely legal issues.”⁸ Then, it explains how *El-Shifa* is symbolic of the high bar international litigants must cross in order to have their complaints heard in federal court.⁹

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² See id. at 837–38.
³ See id. at 850–51.
⁴ See id. at 857.
⁵ See infra notes 10–31 and accompanying text.
⁶ See infra notes 32–41 and accompanying text.
⁷ See infra notes 42–60 and accompanying text.
⁸ See infra notes 61–81 and accompanying text.
⁹ See infra notes 82–87 and accompanying text.
I. RETALIATORY STRIKE AND COUNTER-SUITS

A. The Bombing of the El-Shifa Facility and its Aftermath

On August 7, 1998, a terrorist organization lead by Osama bin Laden bombed United States embassies in Kenya and Tanzania, killing hundreds and injuring thousands.\(^\text{10}\) The next day, President Clinton’s advisors asked the Central Intelligence Agency (“C.I.A.”) for a list of targets associated with bin Laden that could be bombed in retaliation.\(^\text{11}\) After some debate, a formal recommendation was made to the President to bomb three targets: a camp in Afghanistan, a Sudanese tannery, and the El-Shifa pharmaceutical plant.\(^\text{12}\) Despite internal skepticism about the factory’s inclusion, the President ordered its destruction.\(^\text{13}\) A soil sample collected near the El-Shifa facility that contained unusually high concentrations of a chemical used in the production of nerve gas was persuasive enough to keep it on the list.\(^\text{14}\) In the early evening of August 20, 1998, thirteen Tomahawk cruise missiles leveled the El-Shifa pharmaceutical plant in North Khartoum, Sudan.\(^\text{15}\)

In justifying the strike, President Clinton stated, “[O]ur goal was to destroy, in Sudan, the factory with which bin Ladin’s network is associated, which was producing an ingredient essential for nerve gas.”\(^\text{16}\) Furthermore, unidentified administration officials told members of


\(^{12}\) See id. Fearful of the “global reach” exhibited by bin Laden’s attack, officials remarked that the White House appeared determined to strike in more than one location. See id. Nonetheless, meeting notes show that the Director of Central Intelligence, George J. Tenet, was working to “close the intelligence gaps on [El-Shifa].” See id. Undeterred, national security advisor Samuel R. Berger reportedly warned that the Administration would be ridiculed if bin Laden unleashed a chemical attack as El-Shifa stood. See id. Due to potential civilian casualties and its weak evidentiary link to Osama bin Laden, however, officials persuaded Clinton to remove the tannery from the target list mere hours before the strike. See id.

\(^{13}\) See Marc Lacey, Look at the Place! Sudan Says, ‘Say Sorry,’ but U.S. Won’t, N.Y. TIMES, Oct. 20, 2005, at A4.

\(^{14}\) See Risen, supra note 11.

\(^{15}\) See Lacey, supra note 13.

\(^{16}\) President William J. Clinton, The President’s Radio Address, 2 PUB. PAPERS 1464, 1465 (Aug. 22, 1998). Similarly, the Secretary of Defense asserted that Osama bin Laden “had some financial interest in contributing to this particular facility,” while another official remarked, “[W]e know that bin Laden has made financial contributions to the Sudanese Military Industrial Complex[,] of which, we believe, the Shifa pharmaceutical plant is part.” See El-Shifa, 607 F.3d at 838.
the press that Salah El Din Ahmed Mohammed Idris ("Idris") “maintained direct or indirect financial relations with bin Laden, purchased the plant on bin Laden’s behalf, acted as a front man or agent for bin Laden in Sudan, and has ‘ties’ to bin Laden.”17

With the Sudanese government up in arms over the attack, the press began to scrutinize the President’s explanation for the attack.18 In response, senior officials began to soften their stance, revealing that the connection between bin Laden, the El-Shifa plant and Idris was “indirect.”19 Internally, senior intelligence officials expressed greater misgivings about the attack.20 Particularly, they questioned the tenuous link between bin Laden and the plant, ordering a separate C.I.A. investigation to determine the background of Idris, the plant’s owner.21 The investigation uncovered that the government was unaware of Idris’s ownership of the pharmaceutical plant prior to the strike.22 Further, it revealed that the soil sample that prompted the facility’s destruction was collected before Idris took ownership.23 Nonetheless, the government froze more than $24 million dollars of Idris’s assets.24 This prompted the first of several lawsuits from Idris against the government.25 Idris obtained the release of his funds in the months following the bombing and then sought additional avenues to recover his losses.26 Denied by the Court of Federal Claims,27 the Court of Appeals for the Federal Circuit,28 the CIA,29 and by congressional committee,30 Idris and his business, El-Shifa Pharmaceuti-

17 See id. at 839.
18 See id.
19 See id.
20 See Risen, supra note 11.
21 See id.
22 See id.
23 See id.
24 See id.
25 See Lacey, supra note 13, at A4.
26 See id.
27 See El-Shifa, 607 F.3d at 839. Invoking the Takings Clause of the Constitution, Idris also sought $50 million dollars in compensation for the financial losses suffered from the strike that destroyed his factory. Id. In dismissing the claim, the Court of Federal Claims asserted that “the enemy target of military force” has no right to compensation for ‘the destruction of property designated by the President as enemy war-making property.’” Id.
28 See id. Foreshadowing the latest El-Shifa opinion, the Court of Appeals for the Federal Circuit held that Idris’s Takings Clause claim raised a non-justiciable political question, affirming the trial court’s decision.
29 See El-Shifa, 607 F.3d at 839. Idris’s request to the CIA for compensation and a retraction of their statements alleging a link between Idris and bin Laden was denied. Id.
30 See id.; H.R. 894, 107th Cong. (2001). Aware of the inability of those harmed by the missile strike to recover from the United States government, a sole member of the House
B. Idris’s Legal Counterstrike

Relying on the Federal Tort Claims Act (“FTCA”), which grants U.S. district courts discretion over any civil action against the United States, the plaintiffs sought $50 million dollars in damages for the destruction of the El-Shifa plant. They alleged that the United States government acted negligently in its investigation of the connections between the El-Shifa plant, chemical weapons, and Osama bin Laden. In addition to monetary damages, the plaintiffs sought a declaration stating that, in failing to reimburse them for the destruction of their property, the United States had violated international law. Finally, the plaintiffs sought an order requiring the United States to issue a press release retracting the allegedly defamatory statements made by the President and other government officials linking the plaintiffs to international terrorism, chemical weapons, and Osama Bin Laden.

Finding that sovereign immunity barred all of the plaintiffs’ claims, the district court granted the government’s motion to dismiss for lack of subject-matter jurisdiction. The district court also warned that, notwithstanding the government’s sovereign immunity defense, the plaintiffs’ claims would likely be non-justiciable under the political question doctrine. On appeal, the plaintiffs dropped their damages claims, challenging only the dismissals of their two charges seeking declarations of fault from the United States. The U.S. Court of Appeals for the D.C. Circuit affirmed the district court, holding that the plaintiffs’ claims were barred by the political question doctrine.

of Representatives introduced a bill aimed at granting Idris and others the chance to receive relief. See El-Shifa, 607 F.3d at 839; H.R. 894. With little fanfare, the bill, which matched Idris’s requested relief in dollar value, died in committee. See El-Shifa, 607 F.3d at 839; H.R. 894.

31 See El-Shifa, 607 F.3d at 839.
33 El-Shifa, 607 F.3d at 839.
34 Id.
35 Id. at 839–40.
36 Id. at 840.
37 Id.
38 See id.
39 See El-Shifa, 607 F.3d at 840.
40 Id.
cognizing the significance of this case, the D.C. Circuit panel granted a rehearing en banc, vacating the earlier appellate judgment.\textsuperscript{41}

II. \textsc{El-Shifa} Presents a Non-Justiciable Political Question

The D.C. Circuit ultimately affirmed the district court, holding that \textit{El-Shifa} presented a non-justiciable political question.\textsuperscript{42} Writing for the majority, Circuit Judge Thomas B. Griffith began his opinion by restating a portion of \textit{Baker v. Carr}, the 1962 Supreme Court decision that held that a claim is political in nature if it involves:

\begin{quote}
[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.\textsuperscript{43}
\end{quote}

Despite the apparent simplicity in applying \textit{Baker}, it requires that courts make a “discriminating analysis” of the claim(s) before concluding whether they are justiciable.\textsuperscript{44} In doing so, Judge Griffith stated, courts have to distinguish claims that question the wisdom of a military action from those “[p]resenting purely legal issues.”\textsuperscript{45} Although this articulation was absent in \textit{Baker}, it became the heart of the majority’s analysis in \textit{El-Shifa}.\textsuperscript{46}

Rather than rely on the \textit{Baker} factors, Judge Griffith focused instead on whether Idris raised questions of wisdom or questions of legality.\textsuperscript{47} A challenge to the wisdom of another political branch’s acts, the court reasoned, raises a non-justiciable political question because the judiciary does not have sufficient expertise or resources to cast an

\textsuperscript{41} See id.
\textsuperscript{43} See id. at 841 (citing \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962)).
\textsuperscript{44} See id.
\textsuperscript{45} Id. at 842.
\textsuperscript{46} See id.
\textsuperscript{47} See id.
opinion on non-legal matters.\textsuperscript{48} Idris’s claim, the court ruled, constituted a challenge of the wisdom of an executive act.\textsuperscript{49} As such, Judge Griffith stated, it is not the place of the court, with the gift of hindsight, to analyze the merits of President Clinton’s decision to include the El-Shifa plant on a list of retaliatory targets.\textsuperscript{50} To do otherwise and question the performance of the president within his constitutionally prescribed authority would run counter to the constitutionally mandated separation of powers.\textsuperscript{51} The political question doctrine, the majority concluded, rightly protects the Legislative and Executive branches from “judicial ‘invasion of their sphere.’”\textsuperscript{52}

In reaching this conclusion, Judge Griffith addressed the United States Supreme Court’s 2008 decision in \textit{Boumediene v. Bush}.\textsuperscript{53} In \textit{Boumediene}, the Supreme Court heard the claim of a detainee alleging that the Bush Administration improperly detained him.\textsuperscript{54} The plaintiffs in \textit{El-Shifa} argued that they were merely requesting that the court review an executive action as in \textit{Boumediene}.\textsuperscript{55}

Judge Griffith, however, distinguished Idris’s claim from that in \textit{Boumediene}.\textsuperscript{56} Despite the fact that \textit{Boumediene} and \textit{El-Shifa} both questioned the wisdom of executive actions during wartime, Judge Griffith held that the Constitution only permitted review in the former.\textsuperscript{57} Referencing the Suspension Clause, Judge Griffith stated that the Constitution grants the judiciary the ability to review the detention of an individual via petitions for habeas corpus.\textsuperscript{58} In contrast to executive detentions, the court noted that there was no comparable constitutional language permitting judicial review of executive bombings.\textsuperscript{59} As such, the majority held that it was unable to grant relief to the plaintiffs because they presented a non-justiciable political question.\textsuperscript{60}

\textsuperscript{48} See \textit{El-Shifa}, 607 F.3d at 844–45.
\textsuperscript{49} See id. at 844.
\textsuperscript{50} See id. at 845.
\textsuperscript{51} See id.
\textsuperscript{52} See id. at 846 (quoting Antolok v. U.S., 873 F.2d 369, 383 (D.C.Cir. 1989)).
\textsuperscript{53} See id. at 848; \textit{Boumediene} v. Bush, 553 U.S. 723, 723 (2008).
\textsuperscript{54} See \textit{Boumediene}, 553 U.S. at 723.
\textsuperscript{55} See \textit{El-Shifa}, 607 F.3d at 848; \textit{Boumediene}, 553 U.S. at 745.
\textsuperscript{56} See \textit{El-Shifa}, 607 F.3d at 848–49.
\textsuperscript{57} See id.
\textsuperscript{58} See id.
\textsuperscript{59} See id. at 849.
\textsuperscript{60} See id.
III. DIFFICULTIES AND DANGERS IN THE WAKE OF EL-SHIFA

The *El-Shifa* decision is noteworthy for two interrelated inferences that can be drawn from the majority opinion. First, a loosely constructed methodology for determining when a claim falls under the political question doctrine gives judges more power to dismiss claims, not less. Second, *El-Shifa* represents the high bar that international litigants must cross in order to have their claims heard in federal court.

A. Wisdom vs. Legality: Judicial Discretion and Separation of Powers

Unlike the thoroughly articulated elements in the 1962 United States Supreme Court decision, *Baker v. Carr*, Judge Griffith did not flesh out the wisdom versus legality dichotomy that he offered in *El-Shifa*. Rather, Judge Griffith eschewed a rigid guideline for determining whether the actions of a political branch are justiciable. Instead, he simply asked whether the plaintiff was challenging the wisdom of an executive action or presenting purely legal issues. In doing so, however, the majority potentially expanded the power of the judiciary and upset the separation of powers principle.

Judge Griffith inferred that his holding inhibited the expansion of judicial power, but his reasoning is somewhat problematic. Under Judge Griffith’s wisdom- legality approach, judges actually receive wider discretion to dismiss cases, expanding rather than narrowing their power. For example, judges fearful of interfering with the actions of the executive and legislative branches will have the broad ability to avoid politically sensitive complaints that have no other forum of adjudication. Indeed, this desire to restrict judicial power is ironic given that the first line of his analysis quotes *Marbury v. Madison*, a landmark case that vastly expanded the power of the Supreme Court.

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62 See id. at 851 (Ginsburg, J., concurring in the judgment).
63 See id. at 848 (majority opinion).
65 See *El-Shifa*, 607 F.3d at 842.
66 See id.
67 See id.
68 See id. at 851 (Ginsburg, J., concurring in the judgment).
69 See id. at 850 (majority opinion).
70 See id. at 851 (Ginsburg, J., concurring in the judgment).
71 See *El-Shifa*, 607 F.3d at 851.
72 See id. at 840 (majority opinion); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
Moreover, Judge Griffith’s statement that the political question doctrine upholds the constitutional separation of powers is fundamentally at odds with the opinions of the concurring judges. Judge Griffith noted that questioning the actions of the executive necessarily expands the power of the judiciary, upsetting the requisite balance. Inversely, the concurring judges are more fearful that weakening the ability of the judiciary to question the actions of the executive will lead to an upending of the separation of powers by turning the judiciary into a virtual rubberstamp for the purportedly wise decisions of the political branches.

Such concerns are most evident in Circuit Judge Douglas H. Ginsburg’s concurring opinion. Judge Ginsburg latches onto Judge Griffith’s lack of specificity. Criticizing Judge Griffith’s loosely crafted method of determining whether a claim is non-justiciable, Judge Ginsburg contends that Judge Griffith’s approach risks reducing the federal judiciary’s role in the constitutional scheme. Elaborating, Judge Ginsburg argues that Judge Griffith’s approach is at odds with the Baker opinion it relies upon because it does not require one to “inquir[e] into the precise facts and posture of the particular case.” Instead, so long as a complaint is concerned with executive conduct or decision-making, it will be classified as a political question under Judge Griffith’s approach. Judge Ginsburg characterizes this as an evolution of the political question doctrine into a new “political decision doctrine,” one which unacceptably upsets the allocation of power between the political branches.

B. The High Bar and Political Questions

Judge Griffith’s articulation of why El-Shifa presents a non-justiciable political question, but Boumediene does not, is indicative of the high bar that international litigants face when attempting to have
their claims heard in federal court.82 According to Judge Griffith, claims that are political in nature warrant judicial review only if the Constitution "specifically contemplates a judicial role in [that] area."83 According to the D.C. Circuit, the Constitution explicitly allowed the federal judiciary to hear habeas petitions.84 It did not specifically permit federal courts to review executive bombings, however.85 This is a sour pill for those seeking redress to swallow because the Constitution simply is not broad enough to account for the incalculable number of claims that could be brought against the government.86 Therefore, broad use of the political question doctrine becomes even more troublesome to plaintiffs like Idris who are denied a forum for their complaints.87

CONCLUSION

Given that the plaintiffs chose not to appeal the district court’s dismissal of their $50 million dollar damages claim, it is likely that even they were aware of the probable outcome of their case. El-Shifa represents the overuse of the political question doctrine, creating potentially damaging precedent. Judge Griffith’s opinion seemingly achieved the exact opposite of what he desired, expanding the power of the judiciary and serving as a symbol of the high bar that international litigants must cross to have their complaints heard in federal court. Fittingly, as Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is."88 Refusing to do so in fear of interfering with the actions of the executive impermissibly forfeits this power.

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83 See El-Shifa, 607 F.3d at 848.
84 See id.
85 See id. at 849.
86 See id.
87 See id.
88 See Marbury, 5 U.S. at 177.