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Political Question Doctrine: Preventing the Challenge of U.S. Foreign Policy in 767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia

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NOTES

THE POLITICAL QUESTION DOCTRINE: PREVENTING THE CHALLENGE OF U.S. FOREIGN POLICY IN *767 THIRD AVENUE ASSOCIATES V. CONSULATE GENERAL OF SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA*

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Deriving from the doctrine of separation of powers,[1] the political question doctrine prevents courts from adjudicating issues that are constitutionally committed to the "political branches"[2] of the federal government.[3] The political question doctrine[4] limits judicial power by curtailing the ability of courts to adjudicate issues best left to the

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1. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The non-justiciability of a political question is primarily a function of separation of powers."). The judicial resolution of a controversy depends on whether the Constitution has committed the issue to the Judicial Branch rather than to another branch. *See* 16 AM. JUR. 2D *Constitutional Law* § 265 (1998).

2. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (stating that the conduct of foreign relations is committed to the Executive and Legislative Branches, considered to be "the political departments of the government").

3. *See* Japan Whaling Assoc. v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (noting that this doctrine excludes from review "those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch"). *See also* United States v. Noriega, 746 F. Supp. 1506, 1538 (S.D. Fla. 1990) (noting that the political question doctrine "precludes courts from resolving issues more properly committed to the political branches").

4. Some scholars have doubted that such a thing exists, rather believing there are other legal rules that require dismissal of a claim for lack of jurisdiction instead of the "political question." *See* Michael E. Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970) (arguing "that there is, properly speaking, no such thing" as a political question doctrine); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599 (1976) (arguing that the "doctrine" is not necessary since it is underneath the general question of justiciability). Additionally, Professor Thomas Franck believes that judicial adherence to the political question doctrine is wrong because the doctrine "is not only not required by but wholly incompatible with American constitutional theory." THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 4-5 (1992).

discretion of Congress or the Executive Branch.[5] Political questions often arise in the area of foreign relations.[6] One such discretionary foreign policy issue constitutionally committed to the Executive Branch is the issue of foreign state succession.[7]

Courts have determined that the recognition of a new foreign state or nation is not a proper subject for judicial review.[8] Rather, recognition of a successor state is a discretionary function reserved for the Executive Branch.[9] Article II of the Constitution expressly grants the President the exclusive authority to recognize a foreign government.[10] Because the

5. *See* DAVID BORN, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 702 (3d ed. 1996).

6. *See* Barclay's Bank v. Franchise Tax Bd. of Cal., 512 U.S. 298, 328-29 (1994) (explaining that the courts have no constitutional authority to make the policy judgments necessary to conduct foreign relations); *see also Japan Whaling*, 478 U.S. at 230 (acknowledging that the courts are generally not equipped to make national policy).

7. Can v. United States, 14 F.3d 160, 163 (1994) (explaining that foreign state recognition is committed by the Constitution to the Executive Branch). Foreign State succession is a recognition issue, in which the President has the "exclusive authority to recognize or not to recognize a foreign state or government." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987). The President alone has the power of recognition. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964). *See also* Geoffrey R. Watson, *The Jerusalem Embassy Act of 1995*, 45 CATH. U. L. REV. 837, 846 (1996) (stating that "it is true . . . that the President holds the power to recognize foreign states and governments").

8. Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (establishing that the Executive Branch determines the sovereignty of a foreign nation, and it is not for the court to determine whether it is right or wrong).

9. *See Japan Whaling*, 478 U.S. at 230 (discussing statutes that implicate foreign relations and recognizing the important role that the Executive Branch, as well as Congress, play in the field of foreign relations); Jones v. United States, 137 U.S. 202, 212 (1890) (noting that recognition of a foreign sovereign is a political question for the Executive and not the Judiciary to decide); *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) at 420 (determining that recognition of a foreign sovereign is a political question for the Executive and not the Judiciary to decide); *see also* JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 6.2 (4th ed. 1991) ("Traditionally the President has been considered responsible for conducting the United States' foreign affairs."). Additionally, one scholar notes that by replacing the Articles of Confederation with the Constitution, the Framers intended a strong Executive with broad and effective foreign relations power. *See* Jonathan I. Charney, *Judicial Deference in Foreign Relations*, *in* FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 98, 99 (Louis Henkin et al. eds., 1990).

10. U.S. CONST. art. II, §§ 2-3. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 cmt. a (1987) (commenting on the express power of appointing and receiving ambassadors given to the President in Article II, sections 2 and 3). The President's receiving of an ambassador grants recognition of that foreign government. *See* Watson, *supra* note 7, at 846 (determining that because "the Constitution vests the President with 'executive power' to receive ambassadors. . . he holds the power to recognize foreign states and governments"). This executive authority also has been created by extra-constitutional means. *See Can*, 14 F.3d at 163 (interpreting sections two and three of Article II of the Constitution as granting complete authority to the President to recognize a foreign state and to control diplomatic relations); United

issue is considered constitutionally committed to the Executive Branch,[11] the Judiciary has determined that issues raising questions of foreign state succession are political questions,[12] thereby preventing any form or type of adjudication.[13] Effectively, the political question doctrine prevents the Judiciary from reviewing controversies that circle around policy or value considerations of the Executive Branch of the government,[14] including the recognition of successor states.[15]

Deferring the issue of foreign state succession to the Executive Branch, the U.S. Court of Appeals for the Second Circuit recently decided in *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*[16] that determining the liability of the former Socialist Federal Republic of Yugoslavia (SFRY) and its successor states[17] was an issue for the Executive rather than the Judicial

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States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936) (assigning the President a number of powers not specified in the Constitution). Moreover, the *Sabbatino* Court stressed that "[p]olitical recognition [of foreign states] is exclusively a function of the Executive." *Sabbatino*, 376 U.S. at 410. However, Congress plays some role in recognition policy. *See generally* Watson, *supra* note 7, at 837 (discussing Congress' decision to move the U.S. embassy in Israel to Jerusalem).

11. *See Can*, 14 F.3d at 162 (holding that foreign sovereignty is for the Executive to decide); *see infra* notes 74-76 and accompanying text (showing that the six factors established in *Baker v. Carr* should be used to determine whether a political question arises in the foreign relations area). An early Senate Foreign Relations Committee recognized the President as the constitutional representative regarding foreign relations. *See* 8 U.S. Sen. Rep. 24 (Feb. 15, 1816) ("The President is the constitutional representative of the United States with regard to foreign relations."), *cited in Curtiss-Wright Export Corp.*, 299 U.S. at 220-21.

12. *See Can*, 14 F.3d at 165 (recognizing that resolving state succession issues are political questions that can only be accomplished by the Executive Branch). Accordingly, the recognition of foreign governments is primarily a function of the Executive Branch and the Judiciary typically follows the Executive regarding sovereignty issues. Baker v. Carr, 369 U.S. 186, 212 (1962) (recognizing that the Judiciary typically follows the Executive's opinion regarding foreign affairs issues).

13. *See, e.g., Can*, 14 F.3d at 163 (declaring that the issue of state succession is constitutionally committed to the Executive rather than the Judiciary). *See also* Oetjen v. Cent. Leather Co., 246 U.S. 297 (1918) (determining not to adjudicate a claim involving the proper succession of Mexico).

14. *See* Japan Whaling Assoc. v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (clarifying, however, that although the judiciary does not hear political questions, not every matter referring to politics is a political question).

15. *See Can*, 14 F.3d at 163 ("The recognition of any rights of succession to a foreign sovereign's power . . . is in the first instance constitutionally committed to the Executive Branch of the government, not to the judiciary.").

16. 218 F.3d 152 (2d Cir. 2000).

17. The five successor states to the former SFRY are Slovenia, Croatia, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia (FRY), which is comprised of Serbia and Montenegro. *See id.* at 155.

Branch to decide.[18] Essentially, the court followed the long-standing rule that if the claim challenges the wisdom of a particular foreign policy — in this case the recognition of successor states to the former SFRY — rather than the implementation procedure of that policy or a substantive right of individuals compromised by the policy, the claim will generally be a nonjusticiable political question.[19]

The political upheaval and military conflict in the former SFRY created the issue presented in *767 Third Avenue Associates*.[20] Following a civil war that led to the disintegration of the former SFRY and subsequent formation of five successor states,[21] the three SFRY governmental agencies occupying property in New York City were expelled from the United States by the George H.W. Bush Administration.[22] Prior to the expulsion however, all three tenants signed lease extensions with 767 Third Avenue Associates, the property owners,[23] which resulted in the rent falling into arrears.[24] Consequently,

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18. *See id.* at 161 (relying on the precedent of *Baker* and *Can* to rule that the issue of successor state liability is constitutionally committed to the Executive Branch and that there are no practical standards to resolve this issue of liability).

19. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1996) (permitting plaintiffs to sue a foreign military leader for war crimes because the action fell under the Alien Tort Claim Act); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (allowing a suit that implicated foreign relations because it could be decided under tort law); *compare* Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 650-51 (2d Cir. 1988) (allowing an action that challenged the implementation of the government's policy), *with Can*, 14 F.3d at 165 (rejecting an action that challenged the policy of the government itself). Recognizing the difference between challenging foreign policy and bringing a substantive claim, the Southern District of Florida stated that "[t]he distinction is therefore between justiciable questions of constitutional authority and nonjusticiable broad challenges to the conduct of foreign policy, the resolution of which threatens to entangle the court in the management of foreign affairs." United States v. Noriega, 746 F. Supp. 1506, 1539 (S.D. Fla. 1990). *See infra* note 94 and accompanying text (discussing when suits involving foreign relations can be adjudicated).

20. *See* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 60 F. Supp. 2d 267, 270 (S.D.N.Y. 1999) (explaining that the civil war in Yugoslavia ultimately led the tenants to default on their lease payments).

21. *See supra* note 17 (listing the successor states). The United States has recognized all but the FRY, and formally acknowledged that the SFRY ceased to exist on May 24, 1992. *See* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 156 (2d Cir. 2000).

22. *767 Third Ave. Assocs.*, 60 F. Supp. 2d at 270 (noting that in expressing its opposition to the conduct of the regime in power, the U.S. government under President George H.W. Bush forced all SFRY consulate staff in the United States to leave, in addition to freezing Yugoslav assets in the United States).

23. *767 Third Ave. Assocs.*, 218 F.3d at 156-57. The Consulate General extended its lease on October 28, 1991, for five years; the Chamber of Economy extended its lease on August 5, 1991, for five years; and the Cultural Center lease was extended on October 28, 1991, for three years. *Id.*

24. *Id.* at 157 (discussing the facts that because the lease extensions were broken, the

the landlords brought an action in the United States District Court for the Southern District of New York to recover the total rent owed plus interest.[25]

In what appeared to be a "garden-variety" landlord-tenant dispute,[26] the landlords sued the former SFRY and its successor states, alleging that the states were successors to the SFRY's liabilities.[27] The district court ruled that the claim presented nonjusticiable political questions because the Executive Branch had not made a decision regarding the liability of the former SFRY and its successors.[28] Moreover, the court could not adjudicate the practical problems of allocating liabilities and assets presented by the claim.[29] Consequently, the district court placed the action on the suspense calendar,[30] which would have postponed any possible adjudicative action until after the Executive Branch made a policy determination.[31]

The landlords appealed the decision of the district court, raising the question of whether the claims and relief sought are the type that can be adjudicated.[32] Using the precedent established by the Supreme Court to determine if questions involving foreign relations presented political questions,[33] the Second Circuit rejected the arguments by the landlord that its claim presented judicially resolvable issues.[34] The court

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landlords now seek the rent owed on the leases).

25. *Id.* (explaining the plaintiff's claim that the tenants owe $2,262,224 plus interest).

26. *See id.* at 155 (insinuating that while this appears to be a simple landlord-tenant action, the court ultimately needed to decide much more).

27. *767 Third Ave. Assocs.*, 60 F. Supp. 2d at 269 (explaining that the five successor states countered the complaint by moving for summary judgment and dismissal).

28. *See id.* at 275 (holding that a judicial determination would violate separation of powers principles because the Executive Branch, "which should set national foreign policy," has not fully assessed the liability of the successor states but rather insists that the unfinished international negotiation efforts should be the basis for U.S. policy).

29. *Id.* at 274 (recognizing that it would be problematic for the court to allocate the SFRY assets and liabilities among the successor states).

30. *Id.* at 282 (ordering a stay of the case).

31. *Id.* (reconciling the lack of adjudication of the landlords' claim by placing the case on the suspense calendar, the court abstained from deciding the issue until the Executive Branch made a policy determination on the issue).

32. *See 767 Third Ave. Assoc.*, 218 F.3d at 159 (citing Powell v. McCormack, 395 U.S. 486, 517 (1969)).

33. *See* Baker v. Carr, 369 U.S. 186, 212 (1962) (looking at the facts of each foreign relations case determines if it is justiciable or not).

34. *See 767 Third Ave. Assocs.*, 218 F.3d at 159-60 (relying on Supreme Court precedent). The landlords argued that (1) there was no textual commitment of the succession issues to the other branches; (2) the Executive Branch had recognized the successors; (3) application of state law provided judicially manageable standards for relief; and (4) applying international law would give the same result. *See id.*

recognized that the determination of successor state liability for the former SFRY is properly allocated to the Executive Branch,[35] and that a judicial conclusion regarding the situation could result in a hindrance of executive foreign policy.[36] Unlike the district court, however, the Second Circuit concluded that when an adjudication of a claim involving a political question occurs, courts should dismiss the case rather than place it on the suspense calendar.[37] Consequently, if the *767 Third Avenue Associates* decision prevails, litigants will not be able to pursue actions involving foreign policy in the Second Circuit unless they challenge the policy's implementation procedure[38] or use a claim within a substantive area of law.[39] Under Second Circuit precedent, the decision not to adjudicate is a necessary evil that, on one hand, prevents litigants from challenging the policy of the United States, even if they are wronged, but on the other hand, protects the Executive Branch's decision-making power in the area of foreign relations.

This Note examines the political question doctrine regarding foreign relations, and more specifically, the policy of successor state liability as applied in *767 Third Avenue Associates*. This Note first discusses the political question doctrine that developed from the principle of

35. *See id.* at 160 (concluding that constitutional jurisprudence prohibits the Judiciary from usurping the Executive Branch's role in foreign state recognition). *See also* Oetjen v. Cent. Leather Co., 246 U.S. 298, 302 (1918) (holding that the conduct of foreign relations is committed to the other two branches); Can v. United States, 14 F.3d 160, 163 (1995) (holding that sovereign succession is constitutionally committed to the Executive).

36. *See 767 Third Ave. Assocs.*, 218 F.3d at 160 (agreeing with the government's amicus brief that the U.S. government is looking towards international forums to resolve the liability question due to the volatile atmosphere in the area of the former SFRY).

37. *See id.* at 163-64 (believing that dismissal is more appropriate than the stay order). The Second Circuit decided that the lower court was incapable of adjudicating the issue because there was no policy determinant made within a reasonable time, thus eliminating the reason for the stay order. *See id.* at 164.

38. *See, e.g.*, Lamont v. Woods, 948 F.2d 825, 827 (2d Cir. 1991) (challenging the federal funding to foreign schools under a claim of an Establishment Clause violation); Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 650 (2d Cir. 1988) (challenging federal funding of foreign medical organizations that approve abortions).

39. *See, e.g.*, Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (adjudicating a claim under common law torts even though the action involved foreign affairs); Sage Realty Corp. v. Jugobanka D.D., No. 95 CIV. 0323, 1998 WL 702272, at *2 (S.D.N.Y. Oct. 8, 1998) (deciding a contract issue despite a political question defense because the court was not required to make any foreign policy determinations). Recognizing the difference between challenging foreign policy and bringing a substantive claim, the Southern District of Florida stated that "[t]he distinction is therefore between justiciable questions of constitutional authority and nonjusticiable broad challenges to the conduct of foreign policy, the resolution of which threatens to entangle the court in the management of foreign affairs." United States v. Noriega, 746 F. Supp, 1506, 1539 (S.D. Fla. 1990).

separation of powers, including the allocation of foreign relations decision-making power to the Executive Branch. Next, this Note examines the leading cases that developed the political question doctrine, with a special focus on Second Circuit decisions concerning challenges to U.S. foreign policy and the implementation of foreign policy. This Note then scrutinizes the Second Circuit's rationale behind its *767 Third Avenue Associates* decision. Finally, this Note analyzes the significance of *767 Third Avenue Associates* and argues that challenges to U.S. foreign policy should be dismissed as nonjusticiable political questions to ensure that the President's inherent role in shaping foreign policy is protected despite the potential harm to innocent parties.

I. THE POLITICAL QUESTION DOCTRINE IN THE REALM OF FOREIGN RELATIONS

The constitutional doctrine that the Judiciary cannot adjudicate political questions stems from the doctrine of separation of powers.[40] Dispersed among the first three articles of the U.S. Constitution, each branch of the national government receives authority over certain areas.[41] Mainly because of textual commitments in Article II, the Executive Branch has been identified as having the most control over foreign relations.[42] On the other hand, the precise role of the Judicial Branch in foreign relations has been muddled,[43] as courts generally defer to the Executive Branch because it is the best equipped to make foreign policy determinations.[44] The power to recognize foreign state succession is one area that has been considered within the power of the Executive Branch rather than the Judiciary.[45]

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40. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (noting the role the Judiciary plays in the U.S. system of government).

41. *See* U.S. CONST. arts. I-III (giving law-making power to the Legislative Branch, law enforcement power to the Executive Branch and adjudicative power to the Judicial Branch); CHARLES GUNTHER & KATHERINE SULLIVAN, CONSTITUTIONAL LAW 354 (4th ed. 1999) (noting that the Framers of the Constitution deliberately provided for the horizontal allotment in order to safeguard against tyranny). Nevertheless, legislative, executive and judicial powers are often intertwined. *See id.* at 354. An example of this overlap is having the "President [participate] in the legislative process through the veto power." *Id.*

42. *See* U.S. CONST. art. II, §§ 2-3 (allowing the President to make treaties and appoint and receive ambassadors).

43. *See* Charney, *supra* note 9, at 98.

44. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (explaining that the discretion used in exercising the political power of policy determinations "is not subject to judicial inquiry or decision").

45. *See* Baker v. Carr, 369 U.S. 186, 212 (1962) (commenting that the Executive Branch recognizes foreign states and the Judiciary may only review the status of a nation

A. The Development of the Political Question Doctrine in Foreign Relations

Specifically providing for the distribution of national authority among the three branches of government, the Framers of the Constitution allocated the Legislative, Executive and Judicial Branches an area of power.[46] As Justice Louis Brandeis noted in *Myers v. United States*,[47] the separation of powers doctrine was developed to save the American people from autocracy by preventing the exercise of arbitrary power by any single branch.[48] For instance, Article III grants the Judiciary the power to adjudicate and review law,[49] but not to create or enforce the law that was adjudicated.[50] This general rule upholds the separation between the three branches by ensuring that the Judiciary does not encroach upon the legislative or executive tasks of government.[51]

The political question doctrine originated in 1803 in *Marbury v. Madison*,[52] where Chief Justice John Marshall stated, "questions in their nature political, or which are, by the constitution and laws, submitted to the executive [or legislative branch], can never be made in this court."[53] The political question doctrine, therefore, is an extension of the separation of powers because it excludes from judicial review policy concerns and value determinations textually committed to either of the two political branches.[54]

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following a determination by the Executive).

46. *See supra* note 41 (identifying the areas of power); *see also* GUNTHER & SULLIVAN, *supra* note 41, at 354.

47. 272 U.S. 52 (1926).

48. *Id.* at 293 (Brandeis, J., dissenting) (noting that the purpose of separation of powers was to create friction amongst the branches to protect against an arbitrary government).

49. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

50. *Compare* U.S. CONST. art. I (allocating law-making powers to the Legislative Branch), *and* U.S. CONST. art. II (allocating to the Executive law enforcement power), *with* U.S. CONST. art. III, § 2 (allocating to the courts the power of judicial review).

51. *See* 16 AM. JUR. 2D *Constitutional Law* § 267 (1998) (discussing the impermissibility of imposition of non-judicial functions upon the Judiciary).

52. 5 U.S. (1 Cranch) 137 (1803).

53. *Id.* at 170 (declaring the inappropriateness of judicial review of foreign affairs because it generally constitutes an inherently political question). Nevertheless, Professor Franck believes that adherence to the doctrine is wrong and should be eliminated because it rests on "pure dicta" from the *Marbury* decision. *See* Franck, *supra* note 4, at 18.

54. *See* 16 AM. JUR. 2D *Constitutional Law* § 285 (1998) (noting that cases and controversies can only be reviewed when consistent with the separation of powers doctrine); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 213 (1972) ("The doctrine of political questions is constitutionally significant only as an ordinance of extraordinary judicial abstentation . . . ."). Significantly, the courts will not

The establishment and administration of foreign policy is considered an area that is political rather than judicial in nature.[55] Issues of foreign relations, such as the recognition of foreign states,[56] are prime examples of the type of political questions the courts have declined to review.[57]

Traditionally, the administration of foreign relations is considered constitutionally committed to the Executive Branch within Article II, which delegates to the President the power to appoint and receive foreign ambassadors.[58] Chief Justice John Marshall first noted in 1800 that "[t]he President is the sole organ of the nation in its external relations."[59] Since 1800, in a series of decisions, the Supreme Court has recognized the important role the Executive plays in the field of foreign relations,[60] including the inherent authority to recognize the legitimacy of foreign sovereigns and state succession.[61] Although foreign relations is

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adjudicate issues that are primarily political rather than judicial in nature. *See, e.g.* U.S. CONST. art. III, § 2 (directing that judicial power extends only to cases and controversies); Nixon v. United States, 506 U.S. 224 (1993) (holding that the Senate has sole discretion from the Constitution to choose impeachment procedures); Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995) (refusing to adjudicate whether a state's right to a republican form of government had been violated); *see also* 16 AM. JUR. 2D *Constitutional Law* § 285 (1998) (discussing the "fundamental characteristics of non-justiciable political questions").

55. *See* HENKIN, *supra* note 54, at 205 (noting that foreign relations are political relations, but these issues do occasionally enter court).

56. *See* Can v. United States, 14 F.3d 160, 165 (2d Cir. 1994) (determining that the recognition of the former Vietnam was a political question).

57. *See* HENKIN, *supra* note 54, at 210 (recognizing the political question as an additional obstacle for the review of foreign relations).

58. U.S. CONST. art. II, §§ 2-3. Article II states, in pertinent part, that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ambassadors . . .; [H]e shall receive Ambassadors . . . ." *Id. See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (interpreting Article II, the Supreme Court stated that "[T]he President alone has the power to speak or listen as a representative of the nation . . . ."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive . . . Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *see also Nixon*, 506 U.S. at 228 (identifying the concern that once the Judiciary determines whether and to what extent the issue is textually committed, it can make a decision upon the issue).

59. 6 ANNALS OF CONGRESS 613-14 (1800) (statement of John Marshall) (noting that the President is the "sole representative" of the United States with foreign nations).

60. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation . . . .").

61. *See* Jones v. United States, 137 U.S. 202, 212 (1890) (noting that recognition of a foreign sovereign is a political question for the Executive and not the Judiciary to decide); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (noting that recognition of a foreign sovereign is a political question for the Executive and not the Judiciary to decide); *see also* NOWAK & ROTUNDA, *supra* note 9, § 6.2 ("Traditionally the President has been considered responsible for conducting the United States' foreign affairs.").

considered the natural territory of the Executive Branch,[62] the Court has declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[63] The Judiciary receives power under Article III to review foreign relations by allowing the courts to adjudicate cases that involve ambassadors, foreign states and citizens, and consuls.[64] Additionally, the courts are empowered to construe the constitutionality of treaties and executive agreements,[65] as well as interpret legislation that involves foreign affairs.[66] However, the courts balk at employing any authority in the area of foreign relations that would overstep the boundaries of Article III.[67] The courts are also less willing to curb the discretion of the political branches because the courts lack the institutional expertise and resources necessary to conduct foreign affairs.[68] Therefore, before the Judiciary will involve itself in a foreign relations matter, it will focus on the particular area of foreign relations to determine if there is a textual commitment in the Constitution or a prudential allocation concern that requires a court to defer to another branch.[69]

B. Baker v. Carr: *Defining a Political Question*

The quintessential restatement of the political question doctrine is contained in *Baker v. Carr*.[70] In *Baker*, the Supreme Court rejected the argument that lawsuits challenging the apportionment plan of the

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62. *See* Jack Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW AND POLICY IN INT'L BUS. 461, 481 (1993) (explaining that jurisdictional questions between the Executive and Legislative Branches regarding foreign relations can be decided by the Judicial Branch).

63. Baker v. Carr, 369 U.S. 186, 211 (1962) (noting that a broad statement that courts should never adjudicate cases involving foreign relations is not proper, rather, each issue should be looked at on a case-by-case basis).

64. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . affecting Ambassadors, other public ministers and Consuls"). Article III also gives to the courts the power to adjudicate cases between a U.S. citizen and Foreign States, citizens or subjects. *See id.*

65. *See* Japan Whaling Assoc. v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (acknowledging the holding in *Baker* that the courts can construe treaties and executive agreements).

66. *See id.*

67. *See* NOWAK & ROTUNDA, *supra* note 9, § 6.4 (recognizing a hindrance to the judicial review power of the court).

68. *See* HENKIN, *supra* note 54, at 206 (concluding that judicial power is limited in cases of foreign affairs).

69. *See Baker*, 369 U.S. at 217 (discussing that there is no way to catalogue cases that are political questions, rather the Court must inquire as to the particular facts of each case).

70. 369 U.S. 186 (1962).

Tennessee General Assembly presented a nonjusticiable political question.[71] Although recognizing that the political question doctrine serves to protect the separation of powers doctrine,[72] the Court determined that adjudication of the claim was possible because the political question doctrine does not prevent a court from hearing a case simply because it involves a political issue.[73]

In determining that the claim against the Tennessee apportionment statute was justiciable, Justice William Brennan established a six-part methodology to distinguish between a political question and a justiciable claim.[74] According to Justice Brennan, a court should dismiss a claim as a nonjusticiable political question when the claim involves (1) a textual commitment to another branch in the Constitution; (2) a lack of judicial standards for deciding the issue; (3) the impossibility of deciding the issue without the court making a nonjudicial policy determination; (4) the impossibility of a judicial resolution of the issue without encroaching upon another branch's constitutional prerogatives; (5) the obedient adherence to a previously made political decision; or (6) the potential chance of multifarious pronouncements by various departments within the three branches on the same question.[75]

A conflict falling within one or more of these categories is considered inappropriate for resolution by the courts.[76] Derived from Article III,[77]

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71. *See id.* at 237 (holding that the equal protection claims are valid under the Fourteenth Amendment where qualified citizens' votes were debased by the then current apportionment plan of the Tennessee General Assembly).

72. *See id.* at 210 (establishing a basis for the political question doctrine).

73. *Id.* at 217; *see* Japan Whaling Assoc. v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (noting that the Judiciary "cannot shirk [its constitutional] responsibility merely because [a] decision may have significant political overtones").

74. *See Baker*, 369 U.S. at 217 (identifying six concerns to determine whether an issue is a nonjusticiable political question).

75. *See id.* Justice Brennan articulated that:

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

Id. See also NOWAK & ROTUNDA, *supra* note 9, at 206 (stating that "[t]he court hesitates to exercise any authority . . . that would exceed the scope [of their] express constitutional grants").

76. *Baker*, 369 U.S. at 217 (holding that any one of these factors will create a political question).

the first factor is considered dominant when determining whether the issue presents a political question.[78] The second and third factors suggest a functional approach to determining a political question because they each ask if the Judiciary has the ability to make a determination on the issue presented.[79] The final three are all prudential considerations that are relevant only when a judicial resolution would interfere with governmental policy interests established by one or both of the political branches.[80]

More importantly, the *Baker* Court discussed several categories of law that may invoke the political question doctrine, including foreign relations.[81] The Court noted that "sweeping statements" have been made that any conflict touching foreign relations is a political question that is not to be adjudicated by the Judiciary.[82] The Court quickly brushed aside such generalities by declaring that not every case relating to foreign relations is a political question.[83] After analyzing various

77. *See* CHARLES ALAN WRIGHT, LAW OF THE FEDERAL COURTS § 14 (4th ed. 1983) (commenting that Article III gives the Judiciary power to review certain cases and controversies only, thus limiting the Judiciary's textual commitments).

78. *See* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (noting that the first *Baker* factor is the most important and dominant of the six); Lamont v. Woods, 948 F.2d 825, 831-32 (2d Cir. 1991) (trying to uphold the separation of powers doctrine while noting that the textually demonstrable commitment is the most dominant factor). *See also* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 60 F. Supp. 2d at 274 (stating that separation of powers concerns are at the heart of the first factor).

79. *See* WRIGHT, *supra* note 77, § 14 (observing that the functional approach is one of three theoretical strands). Additionally, the Southern District of New York stated that the basis of the second and third factors are limitations on judicial competence and the judicial role. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 272.

80. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d. at 272; Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1996) (using the *Baker* factors to determine whether a claim against a particular foreign policy issue would constitute a political question); *see also* George Sylz, *International Law in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 65, 108 (1996) ("The underlying concern in disputes about whether or not to apply the political question doctrine is the possible inhibiting effect of judicial rulings on the flexibility of the political branches in foreign affairs.").

81. *See Baker*, 369 U.S. at 211-15 (analyzing certain areas that may raise political questions, such as dates and duration of hostilities, validity of enactments, and the status of Indian Tribes in addition to the foreign relations area).

82. *See id.* (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)). In *Oetjen*, rival generals both claimed control of Mexico for themselves. *See Oetjen*, 246 U.S. at 299-300. The former owner of leather hides brought an action against a hide purchasing company that implicated one of the Mexican generals who claimed to be the de facto leader of the country, which would have required the Court to make a policy determination. *See id.* at 300-01. The Court rejected the claim as nonjusticiable because the conduct of foreign relations is constitutionally committed to the political branches and is not subject to judicial inquiry. *Id.* at 302.

83. *Baker*, 369 U.S. at 211; *see also Kadic*, 70 F.3d at 249 (stating that the court should

foreign relations scenarios,[84] the *Baker* Court pointed out that before the Judiciary may act in a foreign relations matter, the Executive Branch must make the initial policy determination.[85] Following the executive action, a court may examine the underlying statute or treaty at issue to determine whether it is constitutional.[86] Consequently, a court must analyze the relevant factors of a foreign relations issue on a case-by-case basis to ascertain whether the court should utilize the political question doctrine.[87]

Following *Baker*, the Supreme Court made it clear that the Judiciary is the branch that determines whether a nonjusticiable political question exists.[88] Justice Brennan noted in his dissent to *First National City Bank v. Banco National de Cuba*,[89] that "[t]he Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim."[90] Although the views of the Executive Branch are generally considered in determining the justiciability of a claim, those views are not necessarily persuasive.[91] Even in cases of state succession, in which state recognition is exclusively the function of the Executive Branch,[92] the court remains

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not brush aside difficult decisions in the name of the political question doctrine).

84. *See Baker*, 369 U.S. at 212 (discussing the examples of questionable foreign sovereignty, recognition of belligerency, and diplomatic status – all of which the Executive must make the initial policy decision).

85. *See id.* at 212 (recognizing that once sovereignty over an area is declared, the courts may examine the resulting status).

86. *See id.* (allowing a court to review foreign affairs legislation); *see also* Terlinden v. Ames, 184 U.S. 270 (1902) (construing a "purely political" treaty as being asserted by the government).

87. *Id.* at 211 (declaring that a court must ultimately make the decision of whether a case presents a nonjusticiable political question based on the facts); Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 103 F. Supp. 2d 134, 137 (N.D.N.Y. 2000). In *Attorney General of Canada*, the Northern District of New York determined that foreign policy was only tangentially affected, after utilizing the six *Baker* factors to overcome the political question doctrine. *Id.* at 145-46.

88. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762-70 (1972); *see also* 767 Third Ave. Assocs. v. Consulate Gen. of Fed. Rep. of Yugoslavia, 60 F. Supp. 2d 267, 274 (S.D.N.Y. 1999) (stating that the opinion of the Executive Branch is informative, but not binding).

89. 406 U.S. 759 (1972).

90. *Id.* at 788 (Brennan, J., dissenting).

91. Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1996) (stating that the Executive Branch's assertion is respected, but does not preclude adjudication); Jugobank A.D. Belgrade v. Sidex Int'l Furniture Corp., 2 F. Supp. 2d 407, 416 (S.D.N.Y. 1998) (declaring that although "the views of the Executive Branch often will have an important bearing on a court's determination . . . they are not conclusive").

92. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964) (noting that judicial recognition of a foreign state may not be incongruent with the Executive Branch's function when only diplomatic relations are broken).

the ultimate adjudicator of the issue presented.[93]

C. Presenting a Political Question: The Distinction Between Foreign Policy and Implementation

In foreign relations cases, a distinguishing characteristic of justiciable claims in which courts reject political question attacks is that the claims generally do not challenge a particular foreign policy position but rather involve a substantive area of the law or the implementation procedure of foreign policy.[94] The courts are reluctant to adjudicate claims implicating national foreign policy because of either the separation of powers doctrine,[95] or their clear incapacity to handle such complicated matters.[96]

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93. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 274. In *767 Third Avenue Associates*, the United States proposed a legal conclusion to the liability of the successor states in an attempt to avoid a political question challenge. *Id.* The court found the government's position informative but would not use its theory to adjudicate the issue. *Id.*

94. *See* Flynn v. Schultz, 748 F.2d 1186, 1191 (7th Cir. 1984). In *Flynn*, the court stated:

> As a general rule, requests for relief involving foreign affairs which are not based on a constitutional right, treaty, congressional directive or established administrative procedure fall squarely under the category of political questions outlined in *Baker* which involve "potential judicial interference with executive discretion in the foreign affairs field" and which seek to "dictate foreign policy."

Id. (quoting Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982)); *see also* Can v. United States, 14 F.3d 160, 162 (2d Cir. 1995) (determining that a claim involving foreign affairs cannot be adjudicated "on the basis of political theories that incorporate no statutory, constitutional or common-law basis").

Significantly, the U.S. Court of Appeals for the District of Columbia Circuit held that attacks on foreign policy-making are nonjusticiable, but "claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs." *See* DKT Mem'l Fund, Ltd. v. Agency for Int'l. Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987) (citing Population Inst. v. McPherson, 797 F.2d 1062, 1068-70 (D.C. Cir. 1986)). In *DKT Memorial Fund*, domestic and foreign nongovernmental organizations ("NGOs") challenged the lawfulness of the Agency for International Development's ("AID's") implementation of a governmental policy that eliminates funding for NGOs that perform, promote or furnish assistance to abortion-related activities. *See id.* at 1237. The court concluded that the challenge did not present a political question since the NGOs "did not seek to litigate the political and social wisdom of AID's foreign policy," but rather "[t]hey challenge[d] the legality of AID's implementation of the policy." *Id.* at 1238.

95. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasizing the textual commitment to the other branches).

96. *See* Michael Glennon, *Foreign Affairs and the Political Question Doctrine*, *in* FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 107, 108 (Louis Henkin, et al. eds., 1990) (recognizing that the courts are trying to protect their legitimacy by not adjudicating cases that they are incapable of); *see also Flynn*, 748 F.2d at 1193 (hesitating to resolve the issue at hand because it would "require ascertainment of facts and standards of decision that are beyond judicial discovery and management"); United States & Namibia Trade Council v. United States Dep't of State, 90 F.R.D. 695, 698 (D.D.C. 1981) ("Although there are some situations where judicial review is appropriate, these generally

However, when the rights of individuals or federalism principles are involved,[97] the courts are more likely to review issues of foreign relations.[98] Consequently, whether a political question is presented or not in a foreign policy matter often depends on the issue before the court.[99]

As the Second Circuit discovered, the distinction between a challenge of foreign policy and the implementation procedure of foreign policy has important consequences for the justiciability of an action.[100] For instance, in *Planned Parenthood Federation of America, Inc. v. Agency for International Development*,[101] an abortion rights group challenged the implementation of an anti-abortion policy by the Agency for International Development ("AID"), an Executive Branch agency.[102]

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involve the interpretation of statutes, executive declarations, etc., rather than the making of the kind of substantive determinations embodied in executive or congressional action in the foreign affairs field.").

97. *See* Charney, *supra* note 9, at 100 (noting that in cases or controversies such as these, the courts must adjudicate the issues or else compromise the authority of the federal courts in maintaining separation of powers).

98. *See id.*; *see, e.g.,* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (allowing a suit that implicated foreign relations because it could be decided under tort law); *see also* Kadic v. Karadzic, 70 F.3d 244, 249 (2d Cir. 1996) (permitting plaintiffs to sue a foreign military leader for war crimes because the action fell under the Alien Tort Claims Act).

99. *See* Ukrainian-American Bar Ass'n, Inc. v. Baker, 893 F.2d 1374, 1380 (D.C. Cir. 1990) ("That a claim implicates important government polices however, does not necessarily mean that the political question doctrine precludes the judiciary from hearing it."). *See, e.g.,* Richardson v. Simon, 560 F.3d 500, 502 (2d Cir. 1977) (rejecting a due process challenge by the executors of a Cuban national's will seeking to unfreeze the national's assets blocked by the Secretary of the Treasury). In *Richardson*, the Secretary of the Treasury blocked the assets of a Cuban national pursuant to federal law. *Id.* at 502. Viewing the due process challenge under a rational basis standard, the Second Circuit rejected the executor's arguments and found that what to do with the blocked funds is a policy judgment which is "in the first instance for the Executive and Legislative branches." *Id.* at 505. Interestingly, the court concluded that "[w]hile there are strong human arguments in favor" of finding for the executors and releasing the assets, the court ultimately held "that the final disposition of the interests held by [the Cuban National] at the time of his death in Cuba must await determination by Congress and the Executive of the interests of the United States in its relations with Cuba." *Id.* at 506. Nevertheless, it has been argued that courts circumvent the political question issues by finding another way to decide the case. *See* Franck, *supra* note 4, at 61 ("This can be done by simply reclassifying the subject matter of the case; for example, deciding that [the case] deals with treaty interpretation or a First Amendment claim rather than foreign affairs.").

100. *See infra* section III (arguing that challenging foreign policy itself, such as foreign state succession, will be considered a nonjusticiable political question).

101. 838 F.2d 649 (2d Cir. 1988).

102. *See id.* at 650. The President delegated his authority to the Director of the U.S. International Development and Cooperation Agency who in turn delegated its authority to the AID. *Id.* at 651.

The AID policy precluded any federal assistance to foreign organizations that performed or promoted abortions.[103] The Second Circuit rejected AID's argument that its policy was a nonjusticiable political question.[104] Applying First Amendment jurisprudence to the plaintiffs' freedom of expression claim, the court reasoned that it was not required to evaluate the merits of AID's underlying policy of withholding federal funds to foreign organizations that perform abortions.[105] Rather, the court could use legal standards to determine if this policy was a violation of Planned Parenthood's First Amendment rights.[106] Therefore, the Second Circuit concluded that challenging the constitutionality of an executive action that implemented U.S. foreign policy through monetary grants did not present a nonjusticiable political question because the method of implementation was not itself an expression of foreign policy.[107]

The Second Circuit again faced the question of policy versus implementation in *Lamont v. Woods*.[108] In *Lamont*, AID was sued for violating the establishment clause of the First Amendment[109] because the agency dispersed public funds for the purpose of building and maintaining religious schools abroad.[110] In addressing the issue of justiciability, the Second Circuit first determined whether the issue was

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103. *See id.* at 651. The financial support given by the United States comes from the Foreign Assistance Act of 1961 ("FAA"), which authorizes foreign assistance for voluntary population planning. *See id.* Although Congress provided the President discretionary power to administer foreign assistance, the FAA expressly prohibited the President from granting assistance to foreign organizations that performed abortions. *See id.* The President delegated his authority to the Director of AID. *See id.* The Standard Clause, which requires certification in writing that international assistance organizations seeking funds "do[] not perform or actively promote abortion as a method of family planning," originated from a White House policy statement, which committed the United States to withhold funding for organizations that perform abortions regardless of whether or not abortions were financed with federal funds. *Id.* Planned Parenthood challenged the Standard Clause contained in the cooperative agreement because, under the FAA, funds were to be withheld only for the actual performance of abortions. *Id.* at 650-51. Planned Parenthood argued that the clause violated its First Amendment right of freedom of expression. *See id.*

104. *Id.* at 651.

105. *Id.* at 656.

106. *Id.*

107. *Id.* (stating that simply calling the Standard Clause in question "foreign policy" does not make it an expression of foreign policy).

108. 948 F.2d 825 (2d Cir. 1991).

109. U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

110. *See Lamont*, 948 F.2d at 827-28 (explaining that the American Schools and Hospitals Abroad program allows AID to furnish assistance to foreign schools "serving as study and demonstration centers for ideas and practicesof the United States").

expressly committed to another branch under the Constitution.[111] After concluding that the Constitution did not expressly preclude judicial involvement,[112] the court evaluated whether the plaintiffs were challenging the wisdom of the underlying policy of promoting the study of the United States in religiously affiliated foreign schools or AID's administration of that policy.[113] Relying upon *Planned Parenthood*, the court held that the plaintiffs were challenging AID's method of administering the policy of promoting foreign schools with federal funds in violation of the First Amendment and thus presented a justiciable issue.[114] According to the Second Circuit, the minimal invasion into the area of foreign relations did not make this claim a nonjusticiable political question.[115]

In *Klinghoffer v. S.N.C. Achille Lauro*,[116] the Second Circuit was presented with multiple lawsuits brought against the Palestinian Liberation Organization (PLO) as the result of its alleged terrorist activities that caused the death of an American man.[117] In upholding the district court's denial of the PLO's motion to dismiss on political question grounds, the Second Circuit reasoned that the complaint presented a justiciable issue.[118] Because the claim was an ordinary tort suit, the court decided that it could decide the claim without compromising U.S. foreign policy.[119] Similarly, in *Kadic v. Karazdic*,[120]

111. *Id.* at 832 (examining caselaw to determine whether the administration of foreign aid to foreign schools was committed to the Executive Branch); *see also* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (noting that the dominant consideration of the court in determining a political question is whether the claim is textually committed to another branch).

112. *See Lamont*, 948 F.2d at 832 (finding that managing of foreign aid to foreign schools was not textually committed to the Executive Branch after evaluating caselaw interpreting the Constitution).

113. *See id.* at 832; *but cf.* Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975) (holding that an Establishment Clause suit against the U.S. government challenging funding of Israel's military was a nonjusticiable political question because the foreign policy itself was being questioned).

114. *See Lamont*, 948 F.2d at 832 (applying the Establishment Clause jurisprudence after the court compared its factual situation with that in *Planned Parenthood*). *See also* Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 656 (2d Cir. 1988) (applying the policy versus implementation logic).

115. *Id.* at 834.

116. 937 F.2d 44 (2d Cir. 1991).

117. *Id.* at 47. The PLO boarded and seized an Italian cruise ship, and during the melee, killed a passenger on the ship. *Id.* at 47.

118. *Id.* at 49-50 (using the six factors outlined in *Baker* to determine whether the case should be adjudicated by the court).

119. *Id.* at 49-50 (explaining that because the claim involves tort law, it is a proper case and controversy for the court to consider); *see also* Linder v. Portocarrero, 963 F.2d 332, 333, 336 (11th Cir. 1992). In *Linder*, a Nicaraguan anti-government military group

the Second Circuit rejected a political question defense even though the suit against a foreign military leader accused of war crimes potentially implicated the conduct of U.S. foreign relations.[121] Rather than dismissing the claim based on the potential of political implications, the court decided that the claim could be adjudicated under the Alien Tort Claims Act[122] without interfering with a policy determination of the U.S. government.[123] In both *Klinghoffer* and *Kadic*, the Second Circuit determined that although these cases arose in a politically charged context, the issues were not transformed into nonjusticiable political questions.[124] Therefore, when a claim involves a substantive area of law or a violation of individual rights, courts generally reject challenges based on the political question doctrine even when a claim involves foreign relations.[125]

D. Determining Successor State Liability in the Second Circuit

The issue of foreign state succession has traditionally been recognized as a foreign policy prerogative of the Executive Branch.[126] Courts rarely involve themselves in such matters either because they do not have the resources or judicial standards to adjudicate claims of state succession[127]

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tortured and killed an American citizen working in Nicaragua. *See id.* at 333. The court held that because the amended complaint fell under Florida tort liability law, it did not challenge American foreign policy nor did it require the court to make policy determinations. *Id.* at 336-37.

120. 70 F.3d 232 (2d Cir. 1995).

121. *Id.* at 249 (noting that judicial involvement may not be proper in cases involving foreign military leaders for alleged war crimes because issues such as these are usually left in the hands of the foreign policy makers – i.e., the Executive Branch).

122. 28 U.S.C. § 1350 (1994).

123. *See Kadic*, 70 F.3d at 249-50 (acknowledging that policy determinations by the court are not necessary because universally recognized norms of international law provide judicially manageable standards for suits under the Alien Tort Claims Act).

124. *Id.* at 249; Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991) (acknowledging that although the PLO is involved, the case remains an ordinary tort suit).

125. *See* Flynn v. Schultz, 748 F.2d 1186, 1191 (7th Cir. 1984) (noting that unless an action involving foreign relations is based on a constitutional right, treaty or administrative procedure, the claim will present a political question); *Klinghoffer*, 937 F.2d at 49 (determining that the claim in the case could be decided with tort principles).

126. *See* Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question the determination of which binds the judges... of that government. This principle has always been upheld by this court."). *See also* CARSTEN THOMAS EBENROTH & MATTHEW JAMES KEMNER, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 768 (1996) (citing Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1937)).

127. *See* EBENROTH & KEMNER, *supra* note 126, at 767 (determining that foreign state succession is "completely outside the power of the courts"). One commentator

or because of expressed commitments in the Constitution that favor the Executive Branch.[128] Successor states arise from various events and circumstances, including military conflict that force the dismemberment of the former state,[129] or when the former state becomes obsolete and a new state replaces it.[130] There is a significant difference, however, between the succession of a state, which creates a discontinuity of statehood, and the succession of a government, which leaves statehood unaffected.[131] Regardless of how a successor state is created, its recognition is considered to be wholly within the power of the Executive Branch.[132]

The principle case in the Second Circuit regarding the adjudication of

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argues that the political question doctrine specifically prevents federal judges from creating foreign policy. Bruce Fein, *Judicial Drug-Trafficking Jam*, THE RECORDER, Aug. 7, 1991, at 4 ("The political question doctrine serves in part to save the nation and humanity from visionary international relations schemes concocted by naïve federal judges."). *But cf.* Franck, *supra* note 4, at 7 ("Judges are much better suited than is sometimes alleged to make decisions incidentally affecting foreign relations and national security.").

128. *See* U.S. CONST. art. II, §§ 2–3 (granting the Executive Branch the power to appoint ambassadors and to receive ambassadors from foreign nations). The Supreme Court determined that these constitutional grants give the Executive exclusive authority to recognize foreign states or governments. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964).

129. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES at § 208, cmt. b (1987) (defining types of successor states, including a state wholly absorbing another state, a state that becomes independent of another state of which it was a part, and a new state that arises because of the dismemberment of the former state). *See also*, PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 165-68 (7th rev. ed. 1997) (giving the examples of the Baltic States, the Soviet Union, Yugoslavia, Czechoslovakia, Germany and Yemen to describe state succession issues).

130. *See* EBENROTH & KEMNER, *supra* note 126, at 756 (noting that "'[s]tate succession' is an amorphous term").

131. *Id.* at 756 ("State succession involves a complete discontinuity of statehood."). *See also* Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 731 F. Supp. 619, 621 (S.D.N.Y. 1990), *aff'd* 925 F.2d 566 (2d Cir. 1991) (recognizing that the changing of the Sudanese government did not create a new state, because a simple change in government leaves statehood unaffected).

132. *See* EBENROTH & KEMNER, *supra* note 126, at 767; *see also* Baker v. Carr, 369 U.S. 186, 212 (1962) (noting that after the Executive Branch determines that a territory has a sovereign the courts can review whether a statute or treaty applies to the territory but cannot review the Executive's policy determination). According to the Restatement of Foreign Relations, the Executive Branch, rather than Congress or the courts, has the exclusive authority to conduct or not to conduct diplomatic relations, and to recognize or not to recognize a foreign state or government. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1997). Additionally, the President can arrange international agreements involving the recognition of foreign governments without authorization from Congress or consent of the Senate. United States v. Belmont, 301 U.S. 324, 326, 330-31 (1937).

a state succession question is *Can v. United States*.[133] In *Can*, nationals of the former Republic of South Vietnam sued the United States in an attempt to release the assets frozen by the U.S. government after the fall of the South Vietnamese government to North Vietnam in 1975.[134] Basing their argument on a political theory, the plaintiffs contended that because South Vietnam was a "republican form of government," all the assets of the former government essentially belonged to the South Vietnamese people.[135] Although "cautiously invoked,"[136] the Second Circuit ultimately decided that because the courts have no standards to judge a claim of succession,[137] the argument presented a nonjusticiable political question.[138] The court declared that the Executive Branch was in the best position to decide issues of state succession.[139] First, the court determined that because Article II implicitly places the foreign relations power in the Executive Branch,[140] it is the President's prerogative to recognize any rights of succession.[141] Additionally, the court decided that if the former South Vietnamese citizens prevailed, the decision would, in effect, be creating national foreign policy.[142]

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133. 14 F.3d 160 (2d Cir. 1994); *see also* United States v. Uhl, 137 F.2d 903, 906 (2d Cir. 1943) (stating that "[r]ecognition of foreign nations, it is settled, is a political question, the determination of which by the legislative and executive departments if the government conclusively binds the court.").

134. *Can*, 14 F.3d at 161-62.

135. *Id.* at 162 (explaining the plaintiff's contention that sovereignty belongs to the people in a republican form of government).

136. *Id.* at 163 (recognizing that although the case may implicate foreign affairs, it should not automatically be considered a political question); *see also* Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 655-56 (2d Cir. 1988) (evaluating the political question doctrine in reference to the particular facts).

137. *Can*, 14 F.3d at 163 (noting that the Executive Branch recognizes foreign governments rather than the Judiciary).

138. *Id.* at 163-64 (using the *Baker* factors, the court determined that an initial policy determination by the Executive Branch was required before the court could act).

139. *Id.* at 162-63 (declaring that the courts have no standards for succession claims and the Executive Branch has been committed by the Constitution to determine succession issues).

140. *Id.* at 163 (determining that sections two and three of Article II of the Constitution give the Executive Branch the power over foreign relations).

141. *Id.* The court recognized the importance of succession policy making by the President as an important tool in negotiations with foreign governments, and would not want to upset this bargaining chip with an adverse judicial determination. *Id.*

142. *Id.* If the court granted the plaintiffs' relief and enabled them to take control of the former South Vietnamese assets, then they would be disturbing a potential leveraging tool of the United States in its relations with the current Vietnamese government. *Id. See also* EBENROTH & KEMNER, *supra* note 126, at 768 (indicating that "*Can* reflects the long standing precedent that the U.S. Judiciary will refuse to rule on what it views as an exclusively political issue").

Similar to the events in Southeast Asia, the disintegration of the SFRY spawned numerous civil suits in the district courts of the Second Circuit regarding the assets and liabilities of the former country.[143] Of these cases, most were dismissed as raising nonjusticiable political questions because in order for the court to adjudicate the claim, it had to determine the issue of state succession.[144] Although the claims seemed to involve substantive issues of law or questions of constitutional rights,[145] the

143. *See* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 156-57 (2d Cir. 2000); *see infra* note 144 (discussing the former SFRY suits).

144. *See, e.g.*, Fed. Rep. of Yugoslavia v. Park-71st Corp., 913 F. Supp. 191, 194 (S.D.N.Y. 1995). In *Park-71st Corp.*, an argument arose over who owned the property previously occupied by the former SFRY's representative to the United Nations. *Id.* at 192. The court dismissed the case because FRY's argument that it was the successor of the SFRY was considered a policy question for the Executive Branch to decide. *Id.* at 193-94 (following precedent from *Can* to avoid the encroachment upon the Executive's prerogative).

Second Circuit courts have also considered and dismissed multiple lawsuits involving the ownership of loans extended from banks in the former SFRY. *See* Yucyco, Ltd. v. Rep. of Slovenia, 984 F. Supp. 209, 219 (S.D.N.Y. 1997); Beogradska Banka A.D. Belgrade v. Interenergo Inc., No. 97 CIV. 2065, 1998 WL 661481, at *10 (S.D.N.Y. Sept. 24, 1998); Jugobanka v. Sidex Int'l Furniture Corp., 2 F. Supp. 2d 407, 409 (S.D.N.Y. 1998). In *Yucyco*, for instance, a Cyprian bank sued the former Yugoslavian Republic of Slovenia to recover loans made to the government of Slovenia and Slovenian controlled banks. *See Yucyco*, 984 F. Supp. 209, 212. Yucyco, Ltd. argued that the Republic is liable for an "equitable" share of the SFRY's obligations under a debt restructuring guaranty. *Id.* at 218. Because the court would have been forced to make a decision on the proportion of Yugoslavian debt that Slovenia was responsible for, it decided that the issue was political and nonjusticiable. *Id.* at 219 (recognizing that "the settlement of foreign debts falls squarely within the ambit of the President's and Congress' constitutional authority"). Similarly, in *Beogradska Banka v. Interenergo, Inc.*, a bank organized in the FRY sought to collect debts owed by a Bosnian corporation. *See Beogradska*, 1998 WL 66148, at *3. The defendant argued that there was a succession issue, which raised a political question, whereas the plaintiff argued that the case involved a simple debt collection issue. *Id.* at *5-6. Because the plaintiff's legal claim to the banks of the former SFRY, and consequently their loans was disputed as a matter of facts, the court refused to dismiss the case without eliciting facts at trial. *Id.* at *10.

Moreover, in *Jugobanka*, a bank incorporated in FRY, which was the reputed successor of two banks incorporated under the laws of the former SFRY, sued a corporation to recover the balance on loans extended by the two former banks. *See Jugobanka*, 2 F. Supp. 2d at 409. The court held that the bank's claims were nonjusticiable political questions because in order for the bank to prevail it had to establish that it succeeded to the property of the former SFRY banks. *Id.* at 416. Based on the precedent developed in *Can*, the court determined that it could not properly decide the issue of state succession without encroaching upon the duties of the political branches. *Id.* at 415-17.

145. *See Jugobanka*, 2 F. Supp. 2d at 409 (describing the plaintiff's claim that the case involved a simple debt collection matter); *Beogradska*, 1998 WL 661481, at *2-3 (explaining the plaintiff's effort to collect debts owed to a FRY bank); *Yucyco*, 984 F. Supp. at 212 (noting that the claim sought to recover loans made to the Republic of Slovenia and Slovenian-controlled banks).

courts dismissed these suits because of the policy determinations raised by state succession.[146]

Nevertheless, the courts did not dismiss all of the cases resulting from the demise of the SFRY as nonjusticiable. For instance, in *Sage Realty Corp. v. Jugobanka, D.D.*,[147] the Southern District of New York adjudicated a claim to recover overdue rent involving a former Yugoslavian bank.[148] The Yugoslavian bank argued that the doctrine of commercial frustration[149] excused the performance of the lease, thus excusing their payment of the rent.[150] However, the Southern District of New York rejected this argument because it was reasonable for the bank to foresee the U.S. government's imposition of sanctions against Yugoslavia.[151] In making this determination, the court did not address any issues concerning the sovereignty or succession of the former SFRY republics.[152] Thus, the court could fully adjudicate the case because there were no issues of succession or other foreign policy issues.[153]

II. *767 THIRD AVENUE ASSOCIATES*: DECIDING NOT TO DECIDE AN ISSUE OF FOREIGN POLICY

In concluding that the recognition of a foreign state and its successors is a non-justiciable political question, the Second Circuit acknowledged that the determination of successor state liability for the former SFRY is

146. *See Jugobanka*, 2 F. Supp. 2d at 415 (recognizing that the political question doctrine requires the court to dismiss the claim). *See, e.g., Beogradska*, 1998 WL 661481, at *10 (dismissing the claim because of political question grounds once certain facts are proven at trial); *Yucyco*, 984 F. Supp. at 219 (dismissing the claim because of the political question doctrine).

147. No. 95 Civ. 0323, 1998 WL 702272, at *1 (S.D.N.Y. Oct. 8, 1998).

148. *Id.* at *3-4 (treating the case as a simple contract action, which led the court to reject the defendant's argument of contract frustration because of the foreseeability of sanctions).

149. Black's Law Dictionary defines "commercial frustration in contracts" as the "doctrine that, if the entire performance of a contract becomes fundamentally changed without any fault by either party, the contract is considered terminated." *See* BLACK'S LAW DICTIONARY 679 (7th ed. 1999).

150. *See Sage Realty*, 1998 WL 702272, at *2 (explaining the defendant's commercial frustration claim that the imposition of sanctions against FRY was not foreseeable). Failure on the part of the bank to foresee U.S. sanctions would have ultimately led to the frustration of the contract. *See id.* at *3-4.

151. *Id.* at *3 (acknowledging that the Deputy General Manager if the bank knew of the situation in FRY).

152. *Id.* at *3-4 (deciding the case without facing succession issues). Additionally, the court denied Jugobanka's political question defense. *Id.* at *5 n.6.

153. *Id.* at *1-4 (treating the case as a simple contract matter rather than as a succession issue).

properly allocated to the Executive Branch,[154] and that a judicial conclusion regarding the situation could hinder executive foreign policy.[155] In addition, the Second Circuit concluded that a claim involving a political question should be dismissed rather than placed on the suspense calendar.[156]

A. Turmoil in the Balkans

Between 1991 and 1995, a bloody ethnic war consumed the SFRY, which resulted in the disintegration of the Balkan country into separate sovereign states.[157] The United States government, which opposed the regime controlling the remnants of the former SFRY, blocked all Yugoslavian assets[158] and forced all of the SFRY's consulate staff out of the United States.[159] Formally acknowledging that the SFRY ceased to

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154. *See* 767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 160, 163 (2d Cir. 2000) (concluding that constitutional jurisprudence prohibits the Judiciary from usurping the Executive Branch's power to recognize foreign states). *See also* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (holding that the conduct of foreign relations is committed to the other two branches); Can v. United States, 14 F.3d 160, 164 (1994) (holding that state succession is constitutionally committed to the Executive).

155. *See 767 Third Ave. Assocs.*, 218 F.3d at 160 (agreeing with the government's amicus brief that the U.S. government is looking towards international forums to resolve the liability question due to the volatile atmosphere in the area of the former SFRY).

156. *Id.* at 163-64 (believing that dismissal is more appropriate than a stay order). The Second Circuit decided that the lower court was incapable of adjudicating the issue because there was no policy determination made within a reasonable time, thus eliminating the reason for the stay order. *Id.* at 163.

157. *See Jugobanka*, 2 F. Supp. 2d at 409 (indicating that "ethnic, religious, and nationalistic rivalries" stemming from the government's collapse caused the subsequent civil war); *see also* 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1577 (Fed. Cl. 1995) (discussing the history of the Yugoslav breakup in this action by the landlords alleging an illegal taking by the United States government).

The aggression of the state of Serbia propelled each individual Yugoslavian state to declare independence. *See* Yucyco, Ltd. v. Rep. of Slovenia, 984 F. Supp. 209, 212-13 (S.D.N.Y. 1997). After declaring their independence in 1991, Croatia and Slovenia faced a conflict with the highly nationalistic Serb minorities and the Serbian-controlled Yugoslavian armies. *See* U.S. Department of State, BOSNIA FACT SHEET: CHRONOLOGY OF THE BALKAN CONFLICT, *available at* http://www.state.gov/www/regions/eur/bosnia/balkan_conflict_chron.html (last visited Mar. 13, 2001) [hereinafter *Bosnia Fact Sheet*]. Additionally, when Bosnia declared independence in 1992, the Bosnian Serbs resisted the independence movement. *See id.* The Serb resistance to the Yugoslavian breakup led to the protracted conflict. *See id.*

158. *767 Third Ave. Assoc.*, 218 F.3d at 156. Due to the threat to the national security of the United States, executive orders by the President froze Yugoslavian property within the United States and blocked all Yugoslavian assets in the United States. *Id.*

159. *Id.* at 157. Specifically, the U.S. government ordered that all SFRY offices close immediately, terminate operations by May 31, 1992, and have all staff leave the country by the first week of June 1992. *See id.*; Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (May 30,

exist on May 24, 1992,[160] the United States also formally recognized the independent sovereign states of Slovenia, Croatia, Bosnia-Herzegovina, and the Former Yugoslav Republic of Macedonia between 1992 and 1994.[161] In an attempt to resolve the succession issue, the Republics of Serbia and Montenegro declared themselves the continuation and sole successors of the SFRY by forming the FRY on April 27, 1992.[162] Despite its declaration of succession, neither the United States, the United Nations nor the European Union recognized the Federal Republic of Yugoslavia (FRY) as the continuation to the SFRY.[163] In 1995, the United States negotiated the Dayton Accords with the FRY and the other successor states in order to end the ethnic war.[164] Simultaneously, the Dayton Accords established a Peace Implementation Council, in part, to resolve succession issues.[165] Resolution of succession issues remain elusive, however, as negotiations continue to this day.[166]

B. The Second Circuit: Extending Political Question Jurisprudence to the Detriment of the Innocent Landlords

In *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*,[167] owners of property in New York City claimed that three agencies of the former SFRY breached the lease extensions signed in 1991, which resulted in overdue rent totaling $2,262,224 plus interest.[168] Not only did the landlords sue the specific

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1992) (declaring a national emergency to deal with the threat to national security, foreign policy and the economy, and ordering "all property and interests in the property in the name of the Government of the Socialist Federal Republic of Yugoslavia or the government of the Federal Republic of Yugoslavia that are in the United States . . . are hearby blocked"); Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (June 5, 1992) (expanding the aforementioned sanctions to all Yugoslavian assets within the United States).

160. *767 Third Ave. Assocs.*, 218 F.3d at 156.

161. *Id.* Additionally, the United Nations admitted Slovenia, Croatia and Bosnia-Herzegovina in 1992, with Macedonia being admitted in 1993. *Id.*

162. *Id.*

163. *Id.* (stating that neither the United States nor the European Union would recognize the FRY). Moreover, the United Nations denied the FRY's request to automatically succeed to the SFRY's membership in the United Nations. *See* 31 I.L.M. 1427, 1454 (1992).

164. *767 Third Ave. Assoc.*, 218 F.3d at 156. The Dayton Accords were the culmination of the peace effort to mark the end of the armed conflict in Bosnia. *See Bosnia Fact Sheet*, *supra* note 157. This United States-led mediation established the basic principles of a settlement as well as a cease-fire. *Id.*

165. *767 Third Ave. Assoc.*, 218 F.3d at 156.

166. *Id.*

167. 218 F.3d 152 (2d Cir. 2000).

168. *See* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of

SFRY tenants, they also included the five successor states in the suit to recover the rent.[169] In asserting a Statement of Interest in the case, the United States Department of State admitted that the successor states have interests in the liabilities of the former SFRY, but explained that the Administration had not yet determined what those interests were[170] because it was deferring to international negotiations to produce a determination.[171] Regardless of the outcome of these negotiations, the United States argued that the Constitution delegates the issue of successor liability to the Executive Branch rather than the Judiciary.[172]

After analyzing the issues,[173] the U.S. District Court for the Southern District of New York determined that the action presented a nonjusticiable political question.[174] Applying the six factors presented in *Baker*,[175] the court determined that the separation of powers doctrine and the risk of inconsistent allocation issues precluded adjudication of the matter.[176] Noting the constitutional textual commitment to the Executive Branch in the area of state recognition,[177] the court reasoned

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Yugoslavia, 60 F. Supp. 2d 267, 269-70 (S.D.N.Y. 1999).

169. *Id.* at 270 (describing the plaintiff's claim that "the five state defendants are successors to the SFRY's liabilities as sovereign states that formerly were part of, and that together constitute the whole of, the SFRY").

170. *Id.* at 271.

171. *Id.* To help maintain peace in the Balkans, the U.S. government wished to let international agreements determine the successor's liability rather than have the U.S. government determine liability. *See id.*

172. *See id.* The court considered the Executive's policy, but it was not conclusive for the court's determination. *See id.* at 274.

173. *See id.* at 277-82. The Second Circuit considered the District Court's opinion "an extensive and thorough" one. 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Rep. of Yugoslavia, 218 F.3d 152, 157 (2d Cir. 2000).

174. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 282 (reasoning that a suspension is necessary until the Executive Branch determines liability). The opinion began with the recognition of Second Circuit precedent "that successorship is the classic sort of political question that the courts cannot decide." *See id.* at 272 (quoting Can v. United States, 14 F.3d 160, 163 (2d Cir. 1995) (stating that "courts have no standards for judging a claim of succession to a former sovereign . . . "). The court concluded that the successorship issues would also present practical problems for the Judiciary. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 273-74 (recognizing that issues, such as whether each of the successor states actually used the tenant's offices, were not clear). Additionally, the court rejected the request of the U.S. government that the five newly created states be dismissed as parties to the suit and limit the action to the SFRY. *See id.* at 274 (noting that protecting the interest of the government in avoiding all successor liability issues would preclude adjudicating any liability).

175. *See supra* notes 74-76 and accompanying text (discussing the factors proposes in *Baker* to define a political question).

176. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 274-75.

177. *See id.* (citing *Can* in determining that only the Executive Branch has authority to recognize a foreign government).

that any determination of the successor liability would create a situation detrimental to the foreign policy position of the Clinton Administration, which was to allow international agreements to determine the issue of liability.[178] Additionally, the concerns of inconsistency raised by the fifth and sixth *Baker* factors[179] could arise if the Judiciary and the Executive answered the allocation question in two different ways, thus allowing the court to encroach upon the Executive's power to make foreign policy.[180] After concluding that the issue of liability presented a political question, the court placed the action on the suspense calendar, to await executive determination of the liability allocation for the Yugoslavian successor states.[181]

The Second Circuit considered *767 Third Avenue Associates* on appeal after ruling that the lower court's stay effectively prohibited the landlords from resolving the issue of liability for the overdue rent.[182] After agreeing with the district court that the factors outlined in *Baker* applied to this case,[183] the Second Circuit ruled that the issues raised presented a nonjusticiable political question because the area of foreign relations is constitutionally committed to the Executive Branch,[184] and

178. *See id.* (concluding that a judicial determination of liability would violate the separation of powers doctrine because such a foreign policy issue is committed to the Executive Branch).

179. *See supra* text accompanying notes 75-76.

180. *See 767 Third Ave. Assocs.*, 60 F. Supp. 2d at 274-75. Also, the court worried that inconsistencies could result if each district court developed its own liability distribution formula for the former SFRY states. *Id.* at 275. The court concluded that only the U.S Court of Appeals for the Second Circuit has the authority to prevent inconsistent foreign affairs pronouncements within the Second Circuit. *Id.*

181. *Id.* at 282 (allowing the landlords to wait for a decision of the Executive). The landlords also presented theories of allocation of liability for the SFRY by either using the distribution scheme presented by the International Monetary Fund ("IMF") or using basic joint and several liability jurisprudence. *Id.* at 276. However, the court did not think that either solution escaped the political question doctrine. *Id.* at 276-77 (recognizing that the Executive Branch's policy conflicts with the IMF's and the joint and several liability law's theories of allocation). The district court concluded that once the Executive Branch formulates a policy on the succession issue, the court may properly adjudicate the case. *Id.* at 277-79 (ordering a stay on the case). The question of whether the case was properly placed on the suspense calendar is not examined in this Note.

182. *See 767 Third Ave. Assocs.*, 218 F.3d at 159. The court followed the Supreme Court's ruling that an "abstention-based stay order was appealable as a 'final decision'" because it put the landlords out of court. *Id.* (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 713 (1996)). The Second Circuit decided that whenever a plaintiff loses because the claim presents a political question, the case should be dismissed rather than suspended. *767 Third Ave. Assocs.*, 218 F.3d at 163-64. Although the procedural posture of the case may itself be a question for review, this Note does not focus on the applicability of the landlord's appeal.

183. *Id.* at 160.

184. *Id.* at 160-61 (relying on the precedents of *Baker* and *Can* the court decided that

because there are no judicially manageable standards for determining the issues presented.[185]

The Second Circuit first decided that the issue of foreign state succession is an area reserved for executive control.[186] The court noted that the Supreme Court declared that the conduct of foreign relations is committed to the political branches,[187] and that decisions in this area are generally not subject to judicial inquiry.[188] The Second Circuit also noted its previous determination[189] that the recognition of a foreign sovereign is a traditional area of foreign policy reserved for the Executive.[190] The court pointed to the politically charged atmosphere that continued to exist in the Balkans to explain why it would not interfere with a foreign policy still in development.[191]

Next, the court determined that the legal relief sought by the landlords did not have judicially discoverable or manageable standards.[192] The court rejected the landlords' argument that tort principles could be used to adjudicate the issue of liability because the court determined that such common law principles have no basis in international law.[193] Moreover, the court found that international law did not support the claim of liability against the successor states.[194] In support of this conclusion, the court turned to the *Restatement (Third) of Foreign Relations Law of the United States*,[195] which suggests that successor states do not succeed to previous state debt without a specific agreement to the contrary.[196]

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foreign policy issues like state succession are reserved for the Executive's discretion).

185. *Id.* at 161-62 (recognizing that standards to determine state succession and relief are nonexistent).

186. *Id.* at 160.

187. *Id.* (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 298 (1918)).

188. *See id.* (discussing the conclusion of the Court in *Oetjen* that the Constitution commits the power of conducting foreign relations to the Executive and Legislative Branches).

189. *Id.* (citing Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994)).

190. *See id.* (concluding that the precedents of *Can* and *Oetjen* "squarely apply here").

191. *Id.* (deferring to the Executive Branch in allowing international agreements to shape foreign policy, as well as fearing that a judicial determination would hinder the international process).

192. *Id.* at 161 (stating that the district court "relied primarily" on the second *Baker* factor).

193. *Id.* at 161 (citing First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 622 n.11 (1983) (holding that international law rather than state law governs liability allocation among foreign states)).

194. *Id.* (stating that the landlords' argument that international law automatically makes the successor states liable is not true).

195. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2).

196. *767 Third Ave. Assocs.*, 218 F.3d at 161 (finding no agreements between the

The final argument raised by the landlords to support their contention of justiciability was that the district court granted jurisdiction,[197] and therefore the appellate court had the capability to decide the issues before it.[198] The court rejected this argument because the jurisdictional issues were completely distinguishable from the non-justiciability issues in a suit assessing the liability of a foreign state.[199] Using the *Baker* factors to define a nonjusticiable political question,[200] as well as the holding in *Can* that determining successor liability is reserved for the Executive,[201] the Second Circuit agreed with the lower court's opinion that the issue of Yugoslavian liabilities was a non-justiciable political question.[202] Consequently, the court remanded the case to the district court to be dismissed.[203]

III. REFUSING TO ADJUDICATE A CHALLENGE TO U.S. FOREIGN POLICY: *767 THIRD AVENUE ASSOCIATES* CONTINUES TO DEFER STATE SUCCESSION ISSUES TO THE EXECUTIVE

A. Rejecting a Challenge to U.S. Foreign Policy

By refusing to adjudicate the question of the liability of the former SFRY and its successor states, the Second Circuit in *767 Third Avenue Associates* implicitly acknowledged the difference between challenging U.S. foreign policy and challenging the implementation of that policy, which often involves substantive issues of law or the infringement of

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former SFRY and the present states). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 210(3). Successor states do not automatically succeed to the predecessor's debt simply by being a successor state. *See Yucyco, Ltd. v. Rep. of Slovenia*, 984 F. Supp. 209, 217 (S.D.N.Y. 1997) (using international law principles to determine that a successor state is not bound by the precedent's agreements).

197. *767 Third Ave. Assocs.*, 218 F.3d at 162; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994) ("FSIA") (allowing suits against foreign states or nationals by eliminating sovereign immunity in certain circumstances, such as the "commercial entity" exception).

198. *767 Third Ave. Assocs.*, 218 F.3d at 162. The landlords' claim was not raised in the district court, and the Court of Appeals quickly dismissed it because it would not consider an argument raised for the first time on appeal. *Id.*

199. *Id.* at 162-63 (explaining that the sections cited of the FSIA are not relevant to the justiciability of the landlord's claims).

200. *See supra* notes 74-76 and accompanying text (discussing the *Baker* factors).

201. Can v. United States, 14 F.3d 160, 162-63 (2d Cir. 1994) (recognizing the lack of judicial standards to determine succession claims).

202. *767 Third Ave. Assocs.*, 218 F.3d at 160 (agreeing "with the district court that virtually all of the *Baker v. Carr* factors apply to this case").

203. *Id.* at 164. The Second Circuit reviewed the district court's decision to stay the case and decided that political question cases should be dismissed rather than placed on the suspense calendar. *Id.*

constitutional rights.[204] Consistent with forty years of political question jurisprudence,[205] the *767 Third Avenue Associates* decision continues to uphold the separation of powers doctrine by refusing to adjudicate a policy issue reserved for Executive Branch action,[206] namely the issue of foreign state succession.[207] In refusing to adjudicate a foreign policy matter, the Second Circuit relied on the Constitution's textual commitment to the Executive Branch in establishing national foreign policy.[208] The court also conceded the lack of judicially manageable standards for resolving issues of liability of former sovereign states and their successors.[209] Moreover, the Second Circuit used Supreme Court jurisprudence,[210] as well as its own precedent, to conclude that questions of foreign state succession are best determined by the Executive Branch rather than the Judiciary.[211] Consequently, the issue of liability in matters concerning former and successor states is determined to be a nonjusticiable political question because it would require a court to make

204. *Id.* at 160-62 (recognizing that determining the succession issues of the SFRY require a determination of policy). *See, e.g.*, Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 650-51 (2d Cir. 1988) (allowing a challenge on the implementation of U.S. policy); *but cf.* Flynn v. Schultz, 748 F.2d 1186, 1199 (7th Cir. 1984) (refusing to allow a challenge of the actual U.S. policy towards a foreign government because the judicial determination may harm U.S. policy).

205. *See* Baker v. Carr, 369 U.S. 186, 210-11 (1962) (stating that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers").

206. *767 Third Ave. Assocs.*, 218 F.3d at 160 (finding that virtually all of the *Baker* factors apply in this case).

207. *Baker*, 369 U.S. at 212 (noting that under the Constitution, the Executive Branch recognizes foreign states); *see also* Jones v. United States, 137 U.S. 202, 212 (1890) (determining that the recognition of a foreign sovereign is a political question reserved for the executive and legislative bodies).

208. *767 Third Ave. Assocs.*, 218 F.3d at 160 (analyzing the allocation of powers to the three branches under the Constitution); *see* discussion *supra* Part I.A.

209. *767 Third Ave. Assocs.*, 218 F.3d at 161 (stating that there are no standards for state succession); *see* discussion *supra* Part I.D. It could be argued, however, that the international conventions on state succession would give the Judiciary standards to determine these issues. *See* United States v. Kin-Hong, 110 F.3d 103, 131 n.10 (1st Cir. 1997) (consulting the Vienna Convention on Succession of States in Respect of Treaties when addressing a state succession issue and stating that "the Convention is nonetheless viewed as an authoritative statement of the rule governing the succession of states under public international law").

210. *See* discussion *supra* Part I.A. The Second Circuit, as well as the district court, primarily relied on the *Baker* decision. *767 Third Ave. Assocs.*, 218 F.3d at 160.

211. *767 Third Ave. Assocs.*, 218 F.3d at 160 (relying on *Can* to adjudicate the issue of foreign succession rights); *see* discussion *supra* Part II.B. Additionally, although Professor Franck disagrees with judicial adherence to the political question doctrine, he states that "[o]nly the State Department recognizes governments or withholds recognition." Franck, *supra* note 4, at 6. Thus, Professor Franck may agree with the *767 Third Avenue Associates* outcome, because the court's holding results in allowing only the State Department to recognize the successors to the FRY, not the Second Circuit.

a foreign policy determination normally afforded to the Executive Branch.[212]

Attacking the implementation of foreign policy or the substantive right of an individual that has foreign policy implications may not involve a political question.[213] However, attacking the prudence of a particular policy will likely trigger the political question doctrine.[214] Accordingly, the court in *767 Third Avenue Associates* looked closely at the facts and how the claim was presented to determine if the claim implicating foreign relations involved a political question.[215]

The landlords' claim in *767 Third Avenue Associates* presented what

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212. *767 Third Ave. Assocs.*, 218 F.3d at 160-62 (refusing to adjudicate a succession issue); *see* discussion *supra* Part I.D. By focusing on whether the issue presented in *767 Third Avenue Associates* involved a political question and whether there are judicial standards to adjudicate a question of liability, the Second Circuit concerned itself with its obligation to uphold the proper position of the branches in the Constitution's separation of powers scheme. *Id.* at 159-62 (applying only two of *Baker*'s six factors, even though the court agreed with the district court that all of the factors apply to the issue); *see also Baker*, 369 U.S. at 210 (stating that the function of the political question doctrine is one of separation of powers). In recognizing the Executive's responsibility to make foreign policy, the court deferred to the Executive Branch the responsibility of resolving questions of foreign state succession. *767 Third Ave. Assocs.*, 218 F.3d at 160 (using the precedent of *Can* to hold that the succession issue was one for the Executive to make the primary interpretation). Similarly, because there lacked any judicially discoverable or manageable standards for the court to utilize in adjudicating issues of liability concerning former and newly created foreign countries, the court acquiesced that the dispute involved a nonjusticiable political question. *Id.* at 161 (determining that the landlords did not present any theories of which the court could use to resolve the issue); *see also* Nixon v. United States, 506 U.S. 224, 228-29 (1993) (looking at whether an issue presents a political question, the Supreme Court stated "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch"). In refusing to change its view that the Executive should make decisions that concern state succession, the court extended the use of the *Baker* factors when reviewing a potential political question. *Id.* at 160-61 (placing, along with the district court, much emphasis on *Baker* and *Can*). The court also continued the tradition of having the Executive decide important foreign policy matters, such as determining the liability of a former country and its successors for torts committed against U.S. citizens. *Id.* at 160.

213. *See* Lamont v. Woods, 948 F.2d 825, 843 (2d Cir. 1991) (challenging the use of foreign aid rather than the wisdom behind it, the plaintiffs presented a judicially reviewable action); *see supra* notes 120-25 and accompanying text (discussing a claim adjudicated under the Alien Tort Claims Act that did not interfere with a policy determination of the U.S. government).

214. *See Can*, 14 F.3d at 164 (dismissing an action by Vietnamese nationals who sought to attack the United States' policy regarding foreign succession issues); Johnson v. Eisentrager, 339 U.S. 763 (1950) (noting that the Court must refuse to decide any issue that "involves a challenge to the conduct of diplomatic and foreign affairs for which the President is exclusively responsible").

215. *767 Third Ave. Assocs.*, 218 F.3d at 160; *Baker*, 369 U.S. at 211 (noting that the court must look at the claim itself when determining political questions).

seemed to be a simple landlord-tenant issue.[216] Yet, the landlords ultimately asked the court to make a policy determination of successor state liability, which in effect challenged the United States policy regarding the SFRY.[217] By requiring the court to allocate the liability of the successor states to the SFRY, the landlords challenged the underlying policy of the United States, which was to allow international negotiations decide the succession issue.[218] Inevitably, if the landlords wish to challenge the implementation of the United States' policy regarding successor state liability, they will have to wait until the Executive Branch acts in order to avoid the nonjusticiable political question.[219]

Additionally, although the courts of the Second Circuit are not permitted to make foreign policy determinations, they do have the opportunity to adjudicate claims based on substantive law that collaterally push the claim into the foreign relations arena, and therefore avoid political question determinations.[220] If landlord-tenant jurisprudence could have been applied to the landlords' claim against the SFRY in *767 Third Avenue Associates*,[221] the court may have proceeded in adjudicating the claim without having to make a foreign policy determination, as it did in *Klinghoffer*, where the court used tort jurisprudence to resolve the claim presented.[222] Moreover, if the landlords wait until the Executive makes a determination regarding the liability of the successor states, then they may be able to challenge the implementation or administration of such a policy as was done in *Lamont*, where the court decided an issue involving foreign policy

216. *767 Third Ave. Assocs.*, 218 F.3d at 155 (stating that the case looked like a "garden-variety landlord-tenant dispute").

217. *Id.* at 160-61 (recounting from the government's amicus brief that the current policy of the U.S. government was to allow international negotiations determine the SFRY liability issues).

218. *Id.* at 159-60. Making a determination of the successor states' liability required the court to contradict or ignore the policy of the United States.

219. *Id.* at 160-61. Presumably, the landlords may be able to challenge the specific proportions that the United States has agreed to allocate among the successors because the courts have the power to examine the statutes and application of that policy. *See Baker*, 369 U.S. at 212 (recognizing that once the Executive has made a decision regarding the status of a foreign government, the courts may examine it).

220. *See* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44,46 (2d Cir. 1991) (allowing an action against terrorists to go forth); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1996) (using federal tort law to decide the liability of a foreign military leader).

221. *See 767 Third Ave. Assocs.*, 218 F.3d at 155 (noting that this was not a simple landlord-tenant case).

222. *Klinghoffer*, 937 F.2d at 49.

because it had the opportunity to use constitutional standards.[223] Yet, the landlords' claim did more than just push the question presented into the realm of foreign relations;[224] the claim required the court to make an initial determination of the successor states' liability, which it could not have done under the political question doctrine without prior executive action.[225]

B. Waiting for the Executive Branch: the Future of Suits Against the Former SFRY, Its Successor States and the Implications On Other Volatile Nations

The decision in *767 Third Avenue Associates* has both positive and negative consequences. Although a majority of the district courts in the Second Circuit have essentially ruled that claims raising succession issues against the former SFRY should be dismissed,[226] the Second Circuit solidified the opinion that any claim requiring the court to make a determination of the foreign state succession issues will be dismissed as a nonjusticiable political question.[227] Now, in order to be adjudicated, claims against former or successor states will have to avoid questions of policy.[228]

Additionally, the Second Circuit reaffirmed the Executive's control over conducting foreign relations, especially in the area of foreign state succession.[229] By basing its opinion on the separation of powers principle of textual commitments, the court upheld the view that the Executive Branch is committed to making determinations of foreign state

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223. *Lamont*, 948 F.2d at 832-33 (discussing the use of constitutional law to determine the claim).

224. *See* Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, 103 F. Supp. 2d 134, 146 (N.D.N.Y. 2000) (recognizing that simply because an issue may tangentially involve the area of foreign relations does not necessarily mean that it is a nonjusticiable political question).

225. *767 Third Ave. Assocs.*, 218 F.3d at 155-59 (implying that since the SFRY has ceased to exist, the simple claim of overdue rent presents more than just a debt collection case).

226. *See, e.g.*, Yucyco, Ltd. v. Rep. of Slovenia, 984 F. Supp. 209, 217 (S.D.N.Y. 1997). *See also infra* note 144.

227. *767 Third Ave. Assocs.*, 218 F.3d at 164 (requiring cases raising political questions issues to be dismissed rather than placed on the suspense calendar). By deciding the precise issue of whether state succession can be properly adjudicated, the Second Circuit has pronounced controlling authority over its district courts as to this issue. *Id.*

228. *See supra* notes 212-214 (recognizing that challenging foreign policy will be nonjusticiable, but challenging the implementation or substantive area of law will avoid presenting a political question).

229. *767 Third Ave. Assocs.*, 218 F.3d at 160 (relying on *Oetjen* and *Can* to hold that the Executive has the power to conduct foreign relations).

succession and liability.[230] As a result, the court adheres to the precedent that an issue is a nonjusticiable political question when there is a textual commitment to a coordinate branch of the government, in this case, foreign state succession is a power committed to the Executive Branch.[231]

Although a legally sound opinion, the outcome was adverse to the landlords who, through no fault of their own, lost the rent owed to them pursuant to the leases.[232] Moreover, this decision may prevent any action being considered against former or successor states if a possible question of succession arises.[233]

On a potentially larger scale, the Second Circuit's decision could ultimately deter private individuals and corporations from engaging in business dealings with politically volatile foreign countries. As a result of the decision, U.S. investors and businesses may shy away from contracting with foreign governments in countries that have the potential of dissolving because of the fear that these countries will not be liable to pay for their obligations.[234] In such a situation, a party will not be able to

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230. *Id.* at 160 (noting that the precedents of *Oetjen* and *Can* "squarely apply here").

231. The first *Baker* factor, textual commitment, is considered the most dominant of the six. *See* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991); Lamont v. Woods, 948 F.2d 825, 831 (2d Cir. 1991). More importantly, the issue of state succession is considered committed to the Executive. *See* Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994).

232. The court correctly applied political question jurisprudence but to the detriment of the landlords. *See Baker*, 369 U.S. at 217 (proposing six factors to establish a nonjusticiable political question). However, it may be argued that the landlords did assume the business risk because they signed the new leases at the time when the former Yugoslavia was in political upheaval. *767 Third Ave. Assocs.*, 60 F. Supp. 2d at 278 (noting that the landlords should have anticipated the risk of rent issues because of the unstable climate in the former SFRY). The district court stated that the landlords' foreseeability of the political turmoil does not insulate the defendants from liability, but it does lessen the inequity involved for the landlords. *Id.* at 278.

233. *767 Third Ave. Assocs.*, 218 F.3d at 161-62. The Second Circuit's decision essentially stated that the claim will be a nonjusticiable political question if it involves a determination of foreign successor state liability. *Id.*

234. For example, the Republic of Cyprus contains two distinct ethnic groups (Greek and Turkish) that refuse to unite as a single nation. *See* U.S. Department of State, *Background Notes on Cyprus*, *available at* http://www.state.gov/www/background_notes/cyprus_9810_bgn.html (last visited Nov. 17, 2000) ("There is little movement of people and essentially no movement of goods or services between the two parts of the island. Efforts to reunite the island under a federal structure continue, however, under the auspices of the United Nations."). The possibility of internal war has kept the United Nations Peacekeepers on the island since 1964. *See id.* In addition, the United States has been a top supplier of exports to Cyprus in recent years — exporting $460.5 million worth of goods to have a 12.5 percent share of Cyprus' import market in 1998. *See* U.S. Department of State, *FY 2000 Country Commercial Guide: Cyprus*, *available at* http://www.state.gov/www/about_state/business/com_guides/2000/europe/cyprus_CCG2000.pdf (last visited July 15, 2001). Because the Cyprian government

assert liability against the country in litigation unless the succession issue is undisputed.[235] Significantly, plaintiffs seeking to bring an action against a country that has disintegrated will have to wait until the Executive Branch makes a policy determination regarding that nation's liability.[236]

IV. CONCLUSION

In determining that issues of liability in matters affected by foreign state succession must be resolved by the Executive Branch rather than the Judiciary, the Second Circuit properly utilized the political question doctrine to defend the constitutional system of separated powers. Because of the political question doctrine, the power to conduct foreign relations remains firmly entrenched within the Executive Branch, as seen in *767 Third Avenue Associates*. Therefore, when a claim challenges the foreign policy of the United States rather than the implementation of that policy, a court will likely hold that the issue presents a nonjusticiable political question because the Executive Branch has the power to conduct foreign relations and the Judiciary lacks applicable standards to adjudicate claims involving foreign policy. Consequently, the necessary

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has a very large role in the economy, U.S. companies may very well contract with the government itself. *See id.* ("Substantial assets remain in government hands in the form of Semi-Government Organizations, such as the Cyprus Telecommunications Authority, the Electricity Authority of Cyprus, etc."). Thus, the opportunity for a private contract with the volatile Cyprus exists, which could be a liability if succession issues ever arise. *See id.* Another state that may dissolve into two separate states is Sri Lanka, as "[t]he Government of Sri Lanka is currently fighting Liberation Tigers of Tamil Eelam insurgents, who seek to create a separate state in the North and East." U.S. Department of State, *FY 2000 Country Commercial Guide: Sri Lanka*, *available at* http://www.state.gov/www/about_state/business/com_guides/2000/sa/srilanka_CCG2000.pdf (last visited July 15, 2001). Resolution of the armed conflict does not seem likely in the near future because the insurgents have no intention of ceasing their goal of a separate state. *See id.* Much like Cyprus, U.S. exports to Sri Lanka have been significant in recent years – with exported goods accounting for $190 million in 1998, $155 million in 1997 and $211 million in 1996. *See id.* Likewise, the government of Sri Lanka has a large role in the economy, but it is declining. *See id.* Therefore, if U.S. companies conduct business with the government of Sri Lanka and the country disintegrates, the liability problems that occurred in the Yugoslavian situation may happen again.

235. *See Can*, 14 F.3d at 163 (declaring that Vietnamese nationals cannot recover frozen assets because the issue of state succession still exists).

236. *767 Third Ave. Assocs.*, 60 F. Supp. 2d at 278 (allowing the landlords to have their action stayed until the Executive makes the policy determination). However, if the action is brought prior to an executive determination regarding successor state liability, then the action may be dismissed based on political question grounds. *767 Third Ave. Assocs.*, 218 F.3d at 164 (reversing the district court's decision to allow the landlords to wait by stating that if an action presents a nonjusticiable political question, the proper decision is to dismiss).

evil of the political question protects the Executive's foreign policy decisions by not allowing the Judiciary to judge the wisdom behind the Executive Branch's policy.