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NOTE

THE POLITICAL QUESTION DOCTRINE IN THE NINTH CIRCUIT AND WHY IT SHOULD NOT HAVE BARRED THE ADJUDICATION OF *CORRIE V.* *CATERPILLAR*

*KRISTINA MAALOUF**

INTRODUCTION

On March 16, 2013, 23-year-old human rights activist Rachel Corrie was run over and killed in the Gaza Strip by a bulldozer manufactured by Caterpillar, Inc. Only one term shy of obtaining her Bachelor of Arts degree in International Studies from The Evergreen State College in Olympia, Washington, Rachel had left school to embark on a mission to Rafah, Palestine.¹ Traveling with the International Solidarity Movement (ISM), a group dedicated to taking nonviolent action against Israeli expansion into Palestinian territory (commonly

* J.D. Candidate 2014, Golden Gate University School of Law. This Comment may touch on a sensitive subject for some readers. My goal is not to perpetuate dividing lines, but to call attention to the injustices suffered by ordinary people as a result of political situations. Both sides of the Israeli-Palestinian conflict have suffered tremendously, and between the lines of my argument, I encourage the reader to draw the conclusion that effective judicial processes on all sides of the debate could significantly aid, if not resolve, this conflict as well as others. Thank you for allowing me to share my perspective with you.

¹ Rafah is a small town in the Gaza Strip and home to 140,000 Palestinians, mostly refugees. Tomas Alex Tizon & Lynn Marshall, *Activist Had Soft Spot for Underdogs*, L.A. TIMES, Mar. 18, 2003, <http://articles.latimes.com/2003/mar/18/nation/na-corrie18>.

referred to as “settlements”),² Rachel’s goal was to help create a sister-city relationship between her hometown of Olympia and Rafah.³

On the day she was killed, Rachel and fellow ISM activists had staged a peaceful protest against Israeli Defense Forces (IDF) soldiers who were preparing to bulldoze a Palestinian physician’s home outside of Rafah.⁴ Acting as a human shield, Rachel stood between the home and the bulldozer in an attempt to prevent the driver from carrying out the IDF’s objective.⁵ Rachel, wearing a brightly colored jacket, waved her arms to signal the bulldozer to stop while onlooking protestors also yelled for it to stop.⁶ The armored bulldozer continued forward and caused the ground underneath Rachel to give way.⁷ As Rachel fell down, the bulldozer moved forward and backward over her body, crushing her head and chest and killing her.⁸

On March 15, 2005, the Center for Constitutional Rights (CCR)⁹ filed *Corrie v. Caterpillar, Inc.*, on behalf of Rachel’s family in the U.S. District Court for the Western District of Washington.¹⁰ The CCR alleged seven causes of action against Caterpillar.¹¹ Defendant Caterpillar moved to dismiss under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim and for nonjusticiability under the political question doctrine,¹² claiming that the plaintiffs’ claims were

² *Id.*

³ *Id.*

⁴ *Id.*; Mohammed Abed, *Israeli Bulldozer Kills American Woman*, USA TODAY, Mar. 16, 2003, http://usatoday30.usatoday.com/news/world/2003-03-16-american-woman-killed_x.htm.

⁵ Tizon & Marshall, *supra* note 1.

⁶ Abed, *supra* note 4.

⁷ Tizon & Marshall, *supra* note 1.

⁸ *Id.*

⁹ The Center for Constitutional Rights, a New York-based legal and educational nonprofit organization, is “dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.” *Mission and History*, CENTER FOR CONST. RTS., <http://ccrjustice.org/missionhistory> (last visited Nov 1, 2013).

¹⁰ See First Amended Complaint for War Crimes; Extrajudicial Killing; Cruel, Inhuman, or Degrading Treatment or Punishment; Violation of the Racketeer Influenced and Corrupt Organizations Act; Wrongful Death; Public Nuisance; and Negligence, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (No. C05-5192FDB), available at http://ccrjustice.org/files/Corrie_AmendedComplaint.pdf, *aff’d*, 503 F.3d 974 (9th Cir. 2007). Caterpillar, Inc., is incorporated in Delaware has its primary place of business in Illinois. The plaintiffs alleged that the corporation did business in Washington State, *see id.* at 6, and personal jurisdiction was not an issue in the case. *See Corrie*, 403 F. Supp. 2d 1019.

¹¹ The seven causes of action were (1) war crimes; (2) extrajudicial killing; (3) aiding and abetting, conspiring in, or ratifying cruel, inhuman, or degrading treatment or punishment in violation of the laws of nations; (4) violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”); (5) wrongful death; (6) public nuisance; and (7) negligence. *See Corrie*, 403 F. Supp. 2d at 1023.

¹² *Id.*

barred from adjudication because they “challenge[d] the actions of a foreign government and implicate[d] United States foreign policy.”¹³

On November 22, 2005, the district court granted Caterpillar’s motion to dismiss,¹⁴ holding that the political question doctrine barred adjudication because the case “interfere[d] with the foreign policy of the United States of America.”¹⁵ Rachel’s family filed an appeal on March 20, 2006, with the support of amicus curiae briefs filed by the Human Rights Program at Harvard Law School, Loyola Law School, and the Chamber of Commerce of the United States and Business Roundtable; Earthrights International also filed an amicus brief.¹⁶ In their appellate brief, the plaintiffs argued that the district court improperly dismissed their claims under the political question doctrine. On September 17, 2007, the U.S. Court of Appeals for the Ninth Circuit rejected the plaintiffs’ appeal and affirmed the district court’s dismissal.¹⁷ The court of appeals denied the plaintiffs’ petition for panel rehearing or rehearing en banc on January 12, 2009.¹⁸

This Comment argues that the Ninth Circuit should not have affirmed the dismissal of *Corrie v. Caterpillar*. Although Rachel’s death occurred in the context of the highly politicized Israeli-Palestinian conflict, the court’s failure to find justiciable a cause of action between a U.S. citizen and a U.S. corporation was grounded on an undue application of the political question doctrine. The Ninth Circuit could have allowed the district court to adjudicate Rachel’s family’s claims under a narrow tort-liability framework without interfering with U.S. foreign policy. Rachel’s family deserved the opportunity to litigate its

¹³ Motion to Dismiss by Defendant Caterpillar Inc. Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure To State a Claim and Pursuant to the Political Question and Act of State Doctrines; Memorandum of Law in Support at 13, *Corrie*, 403 F. Supp. 2d 1019 (No. C05-5192FDB), available at http://ccrjustice.org/files/Corrie_MtnDis_05_05.pdf, *aff’d*, 503 F.3d 974 (9th Cir. 2007).

¹⁴ *Corrie*, 403 F. Supp. 2d 1019.

¹⁵ *Id.* at 1032.

¹⁶ See Brief of Amici Curiae Professors Roger Clark, Deena Hurwitz, Derek Jinks, Naomi Roht-Arriaza, and Beth Stephens in Support of Plaintiffs-Appellants and Reversal (Filed With the Consent of All Parties), *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210), 2006 WL 3098706; Amicus Brief on Behalf of Professors of Constitutional and International Law, *Corrie*, 503 F.3d 974 (No. 05-36210), 2006 WL 2952507; Brief for the Chamber of Commerce of the United States of America and Business Roundtable As Amici Curiae in Support of Affirmance [Filed with the consent of all parties], *Corrie*, 503 F.3d 974 (No. 05-36210), 2006 WL 2451835; Brief of Amici Curiae Career Foreign Service Diplomats in Support of Neither Party, *Corrie*, 503 F.3d 974 (No. 05-36210), 2006 WL 2952508.

¹⁷ *Corrie*, 503 F.3d at 977.

¹⁸ *Corrie*, No. 05-36210 (9th Cir. Jan. 12, 2009) (order denying panel rehearing and rehearing en banc), available at <http://ccrjustice.org/files/1.12.09%20Order%20Denying%20Rehearing%20En%20Banc.pdf>.

case against Caterpillar, the company whose product foreseeably caused their daughter's death.

I. OVERVIEW OF THE POLITICAL QUESTION DOCTRINE

Marbury v. Madison, the landmark United States Supreme Court case establishing that the Constitution vests federal courts with the power to conduct judicial review, held that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”¹⁹ Known today as the political question doctrine, the Supreme Court's holding in *Marbury* was based on the constitutional separation of powers between the executive, legislative, and judicial branches. The adjudication of lawsuits involving political questions falls outside the judicial powers conferred by Article III of the Constitution.²⁰

In *Baker v. Carr*, the Supreme Court enumerated six factors to guide courts in determining whether a claim should be barred by the doctrine.²¹ Under the doctrine, a case is nonjusticiable and must be dismissed if the court finds that at least one of the following factors is inextricable from the case:²²

- (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department,
- (2) A lack of judicially discoverable and manageable standards for resolving it,
- (3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,
- (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government,
- (5) An unusual need for unquestioning adherence to a political decision already made, or
- (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.²³

These factors have remained the criteria by which courts analyze the political question doctrine.

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

²⁰ *Corrie*, 503 F.3d at 980.

²¹ *Baker v. Carr*, 369 U.S. 186 (1962).

²² *Id.* at 217.

²³ *Id.*

A. APPLICATION OF THE POLITICAL QUESTION DOCTRINE IN *CORRIE V. CATERPILLAR*

In *Corrie*, the Ninth Circuit first looked to whether the doctrine is jurisdictional or purely prudential in nature.²⁴ If purely prudential, the court would have been bound to decide the Rule 12(b)(6) motion to dismiss solely on the basis of the allegations in the complaint. On the other hand, if the court found the doctrine to be jurisdictional, the court could look outside the four corners of the complaint to treat the motion as a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. In the complaint, Rachel's family did not mention the government's role in the sales of bulldozers to the IDF. Thus, the Ninth Circuit needed to determine if the doctrine was jurisdictional to know whether it should consider or ignore evidence of the government's role in selling bulldozers to the IDF.

In emphasizing the separation of powers under the Constitution and the deference given to the political branches of government regarding political decision-making, the court held that, "[b]ecause the political question doctrine curbs a court's power under Article III to hear a case, the doctrine is inherently jurisdictional."²⁵ However, the court also held the doctrine to be prudential in that it invokes "self-imposed restraints that arise at the judiciary's discretion rather than by the command of the Constitution."²⁶ Prudential concerns, however, only supplement jurisdictional ones and cannot serve as a substitute for constitutional limits on judicial authority.²⁷ In other words, a lack of jurisdiction will always trump the court's prudential instincts in deciding whether to hear a case.

Under this framework, the Ninth Circuit held that due to its lack of subject-matter jurisdiction to adjudicate cases involving political questions, defendant Caterpillar's Rule 12(b)(6) motion to dismiss for failure to state a claim should instead have been treated as a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, since the claims alleged a nonjusticiable political question.²⁸ Thus, in determining whether the district court properly applied the political question doctrine in dismissing the plaintiffs' claims, the Ninth Circuit looked outside the four corners of the complaint to analyze both the

²⁴ *Corrie*, 503 F.3d at 979.

²⁵ *Corrie*, 503 F.3d at 981.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 982.

jurisdictional and prudential concerns surrounding the plaintiffs' claims.²⁹ From a purely jurisdictional approach, the court observed that "the conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative [branches] . . . and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."³⁰ However, the court also noted that the Supreme Court has said that it would be a mistake to suppose that "every case or controversy which touches foreign relations lies beyond judicial cognizance"³¹ and rejected the notion that courts should find a political question "merely because [a] decision may have significant political undertones."³²

In assessing the implication of the political question doctrine in *Corrie*, the Ninth Circuit focused on the fact that the United States paid for the Caterpillar bulldozer sales to Israel through the Arms Export Control Act (AECA)³³ and found that the plaintiffs' claims "unavoidably rest[ed] on the singular premise that Caterpillar should not have sold its bulldozers to the [IDF]."³⁴ The AECA is an act of Congress that establishes the Foreign Military Financing program and affirms executive branch discretion over foreign policy and national security decisions.³⁵ Applying the *Baker* factors, the court held that the adjudication of the plaintiffs' claims "would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel."³⁶

Under the first *Baker* factor, the court found that granting foreign military aid to a foreign nation is "inherently entangled with the conduct

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

³² *Id.* (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

³³ See 22 U.S.C.A. § 2751 et seq. (Westlaw 2014); see also *Arms Export Control Act (1976)*,

CORNELL U. L. SCH. LEGAL INFO. INST.,

http://www.law.cornell.edu/wex/arms_export_control_act_1976 (last visited Nov. 1, 2013) ("The Arms Export Control Act authorizes the president to control the import and export of defense articles and services. If the president chooses, he can issue a license to an individual or organization that wishes to export defense articles or services. Otherwise, exportation of these items is not permitted. Decisions on whether to issue an export license for the defense article or service take into account whether the export would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements. The defense items controlled by the Arms Export Control Act appear in the United States Munitions List.").

³⁴ *Corrie*, 503 F.3d at 982.

³⁵ *Id.*

³⁶ *Id.*

of foreign relations.”³⁷ Since the executive and legislative branches of government are constitutionally empowered to make decisions concerning foreign relations, the court found that if it proceeded with the adjudication of Rachel’s family’s claims, the court would indirectly and inappropriately interfere with the political branches’ decision to grant military aid to Israel.³⁸

Although the *Baker* test requires the satisfaction of only one factor to implicate the political question doctrine, the court analyzed the fourth, fifth, and sixth *Baker* factors to underscore its conclusion that the adjudication of *Corrie* was barred by the doctrine.³⁹ Under the fourth and fifth *Baker* factors, the court held that since the executive and legislative branches had already made the decision to provide financial assistance to Israel, an adjudication of the case would show a lack of respect to the other branches and question the political decision already made.⁴⁰ Finally, under the sixth *Baker* factor, the court concluded that the United States would be subject to “international embarrassment were a federal court to undermine foreign policy decisions in the sensitive context of the Israeli-Palestinian conflict.”⁴¹

B. POLITICAL QUESTION DOCTRINE IN THE NINTH CIRCUIT

The political question doctrine is analyzed on a case-by-case basis.⁴² Therefore, no bright-line rule exists for determining whether a controversy presents a nonjusticiable political question. The following cases, however, demonstrate how the Ninth Circuit has responded to assertions that the doctrine should apply in various contexts. Although the facts of these cases differed from those of *Corrie*, the court’s holdings speak directly to the issues posed by her case.

1. *Koohi v. United States*

In *Koohi*, survivors of the deceased passengers and crew members of a civilian aircraft that was shot down by a U.S. missile sued the United States and defense contractors for negligent operation and design

³⁷ *Id.* at 983.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 984.

⁴² *Id.* at 982 (quoting *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005)); see *Baker v. Carr*, 369 U.S. 186, 211 (1962) (courts should undertake a discriminating case-by-case analysis to determine whether the question posed lies beyond judicial cognizance).

defects.⁴³ The shooting occurred in the context of a “tanker war” between Iran, Iraq, and Kuwait in the late 1980s.⁴⁴ In March 1987, the United States announced that the United States Navy would provide certain Kuwaiti tankers with protection.⁴⁵ On July 3, 1988, a United States naval cruiser mistook an Iranian civilian aircraft for an Iranian fighter jet and shot it down, killing all 290 civilians aboard the plane.⁴⁶

The court held that the political question doctrine did not bar the plaintiffs’ claims against the United States and its defense contractors.⁴⁷ In particular, the court held that the lawsuit was not “judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.”⁴⁸

Furthermore, the court held that the defense of military necessity alone would not preclude governmental operations from judicial review, and “when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury.”⁴⁹ Finally, and of utmost importance, the court held that it was not barred by the doctrine because the plaintiffs were only seeking damages for their injuries, finding damage actions to be “particularly judicially manageable.”⁵⁰ Injunctive relief, on the other hand, could require the court to overstep its bounds and “engage in the type of operational decision-making beyond [its] competence and constitutionally committed to other branches.”⁵¹

2. *Alperin v. Vatican Bank*

In *Alperin*, decided after *Koohi*, the court held that several of the plaintiffs’ claims were not barred by the political question doctrine.⁵² The plaintiffs in the case were Holocaust survivors who alleged that the Vatican Bank, the Order of Friars Minor, and the Croatian Liberation

⁴³ *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).

⁴⁴ *Id.* at 1329-30.

⁴⁵ *Id.* at 1330.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1332.

⁴⁸ *Id.* at 1331.

⁴⁹ *Id.* at 1331-32.

⁵⁰ *Id.* at 1332.

⁵¹ *Id.*

⁵² *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

Movement profited from genocidal acts supported by German National Socialist forces in World War II.⁵³ The plaintiffs claimed that the profits stemmed from “looted assets and slave labor”⁵⁴ and brought suit for conversion, unjust enrichment, restitution, and the right to an accounting.⁵⁵ The plaintiffs also brought claims for human rights and international law violations.⁵⁶ The court held that although the plaintiffs’ human rights and international law violations claims were barred by the political question doctrine, the property claims were not barred because “[t]o conclude otherwise would be to shirk our judicial role as ‘courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.’”⁵⁷

C. APPLYING EXISTING PRECEDENT TO *CORRIE V. CATERPILLAR*, RACHEL’S FAMILY’S CLAIMS MIRROR *KOOHI* AND *ALPERIN* AND SHOULD NOT HAVE BEEN BARRED BY THE POLITICAL QUESTION DOCTRINE

As in *Koohi*, Rachel was killed as a result of the political branches’ decision to grant military aid to a foreign sovereign in wartime. Through an Act of Congress providing for foreign military financing and the executive branch’s discretion over its recipients, the United States paid for the sale of defense contractor Caterpillar’s bulldozers to Israel for military purposes. Likewise, under the facts of *Koohi*, the United States authorized its Navy to intervene in the tanker war. The *Koohi* court held that the plaintiffs’ claims were not automatically nonjusticiable simply because the tort claims arose under the context of an authorized military operation. In fact, the court noted that the Supreme Court specifically held that federal courts can review military decisions, particularly when those decisions cause injury to civilians.⁵⁸ Moreover, like the plaintiffs in *Koohi*, Rachel’s family sought tort damages for Rachel’s injuries, the type of claims that the

⁵³ *Id.* at 538.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 539 (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (brackets omitted)). The court cautioned that its initial finding of justiciability was not determinative of the merits of the plaintiffs’ claims, noting that the finding “in no way reflects any judgment on the threshold legal hurdles that must be overcome or the merits of the claims. . . . [T]his spectre of difficulty down the road does not inform our justiciability determination at this early stage of the proceedings.” *Id.*

⁵⁸ *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) (citing *The Paquete Habana*, 175 U.S. 677, 676–714 (1900)).

Koohi court held was “particularly judicially manageable.” In other words, in *Corrie*, the Ninth Circuit should not have dismissed for lack of justiciability the damages claims in tort for negligence and wrongful death, since these claims could have been decided without a granting of injunctive or declaratory relief.

Furthermore, in *Alperin*, where the plaintiff Holocaust survivors brought suit against private entities, including the Vatican Bank, the court found justiciability in the plaintiffs’ claims for property damages, holding that the court had the power and obligation to decide these types of claims. By bifurcating the plaintiffs’ property claims and the foreign regimes’ war objectives, the court found a way to distinguish the justiciable claims from those barred by the political question doctrine.⁵⁹ Similarly, in *Corrie*, Rachel’s family brought suit against the private corporation of Caterpillar for damages arising out of their tort claims in addition to their request for injunctive and declaratory relief. If the Ninth Circuit was willing to bifurcate the claims notwithstanding the political backdrop giving rise to the claims in *Alperin*, why did the court refuse to do so in *Corrie*?

Moreover, the *Alperin* decision emphasized that despite the difficulties that the plaintiffs would face in proving the merits of their claims, the initial finding of justiciability marked an entirely separate analysis that in no way hinged upon the plaintiffs’ ability to actually prevail on their claims. The same should have held true for Rachel’s family, for whether they would have ultimately been able to prove Caterpillar’s negligence should not have been tied to the court’s analysis of the political question doctrine.

CONCLUSION

The Ninth Circuit denied justice to Rachel and her family by holding that the political question doctrine barred the adjudication of *Corrie v. Caterpillar*. The court incorrectly framed the tort claims of Rachel’s family by reasoning that imposing liability upon Caterpillar would challenge the executive and legislative branches’ decision to supply the Israeli military with bulldozers. The issue in *Corrie* was not whether the United States should supply Israel with military aid. Rather, the issue focused on whether Caterpillar could be held liable for supplying a product that could foreseeably be used in a negligent or intentionally wrongful manner.

⁵⁹ *Alperin*, 410 F.3d at 548.

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As the Ninth Circuit reiterated in *Corrie*, courts should not dismiss cases under the political question doctrine merely because their decisions would have significant political undertones.⁶⁰ By granting Caterpillar immunity, the court both strayed from its own precedent and denied Rachel's family the fair opportunity to litigate liability for the death of their daughter. In the Ninth Circuit's own words, although some parties may "have multiple procedural and substantive challenges to overcome down the road, they are entitled to their day—or years—in court on the[ir] justiciable claims."⁶¹

⁶⁰ *Corrie*, 503 F.3d at 982 (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

⁶¹ *Alperin*, 410 F.3d at 538.