

Hello, this is Leslie Gielow Jacobs. I'm a Professor at University of the Pacific, McGeorge School of Law, and I direct our Capital Center for Law & Policy. The topic of this In Brief is Political Question.

The Political Question Doctrine is one of a number of rules that the courts have made up to limit the cases that they hear. That is, the Constitution - these are the Federal courts - the Constitution, establishes enumerated powers for all the branches of government and that includes the courts.

So the courts have interpreted their power to be limited to certain types of cases that are in certain types of situations. So these are called the Justiciability Doctrines - meaning whether the court can hear the claim at all. And these doctrines include: ripeness, mootness, this doctrine of standing - whether this plaintiff is the proper plaintiff, the person to bring the case - and a rule against giving advisory opinions. And political question falls into this.

If something is determined to be a political question by the Court, the Court will not decide the case. It says, "Oh, we don't have the power to do so. It would be unconstitutional, outside our ability."

So what is a political question? Well, in order to figure out whether a political question exists the Court actually has to look at the Constitution itself and see what it says about the Court's power or about the question that needs to be decided. And so, it looks and it sees whether in fact the Constitution has given the absolute power to decide the question to another branch of the federal government. That's one thing it looks at it, textually demonstrable commitment, meaning in the text of the Constitution, did the whole deciding of this question is given over to either to the President or to Congress? Or, whether the question requires some standards for the Court to even make a decision that it can't possibly find in the Constitution itself? And so, either of these grounds will cause the Court to say it's a political question, we don't have either the power or the ability to decide this.

A final consideration can be whether there's an extraordinary need for the decision made by either the President or Congress to be final. That is the Court would disrupt things so much that the Framers of the Constitution must not have meant the Court to decide it. And this would be, for example, the legality of a war two years into it happening. The Court would well say, Number One, it's not clear it could decide it, but Number Two, it would lead to chaos if a court were to decide that a war were unconstitutional. So then, those are the types of consideration that the Court looks to, and in only a few cases has the Supreme Court found things to be political questions.

It's found things to be a political question, the so called Guarantee Clause - that Congress is the one who determines whether the government of a state is "a Republican form of government." Also, the amendment to the Constitution process and the Constitution, what constitutes a reasonable time. The Court's found that Congress is the one that makes that determination. There's no way for the Court to do it and it wasn't supposed to do it.

And then finally, the power of the branches of the Congress to decide on impeachment, in particular, the Senate to try an impeachment. And that the method of trying an

impeachment, what the framers said the Senate got the power to decide how to do it. The Court doesn't have the power to step in and say how it's supposed to go and go it and do it.

Modern application of the Political Question Doctrine has often involved foreign relations, and that is because those are so clearly committed to the President and to Congress. They share them, and that the ramifications of the Court deciding are so dramatic. So, for example, as I said use of force - either in wart or other types of use of force, thorough missile strikes - lower courts have determined to be political questions. So, for example, challenges were brought to the Vietnam War, alleging that it was unconstitutional, it was not declared by Congress the way it was supposed to be. And lower courts said they could not decide that question because what it would require them to decide a political question, whether the war was an appropriate war, and they read the Constitution to say that was left to a decision by Congress and the President.

More modernly, a number of courts have dealt with questions dealing with drone strikes and challenges by people here in the United States with relationships to the people who are victims of the drone strikes and claims that in fact the drone strikes are unlawful. And, courts have dismissed the cases saying that in fact they are political questions because what it would require the court to make a judgment about whether a drone strike is lawful and they have read that to be committed to the discretion, in these case it would be of the President, because he's Commander in Chief of the Army and Navy

And then making these decisions, the courts have made a distinction between cases that require them to decide about the legality of what one of the other branches of government is doing as opposed to the wisdom or the policy judgment of what they're doing. So, for example, if in fact, Congress writes a statute and then people challenge it and say, "That statute intrudes upon the power of the President" then the Courts have said, and they said so in a recent case, where Congress was attempting to tell the President what the President would put on a passport, what Country of Origin the President would put on a passport, the court said, "No, you can't write that statute. It's not a political question, we're going to decide the question, the statute itself is illegal. You have asserted a power that you do not have."

As opposed to these cases that challenge the decisions themselves by the branches of government and the wisdom of them. And so, another example of this, which might help us be able to see it, is a recent 9th Circuit case. People in the United States who had family members who were killed when the Israeli defense forces used Caterpillar bulldozers to destroy their homes in the Palestinian territories brought a lawsuit under several statutes, including a federal tort statute, against the Caterpillar bulldozer company saying that they had in fact committed a tort, an unlawful act against these people. And the Caterpillar bulldozers were paid for a given to the Israeli defense forces by the United States government. So notice the lawsuit was against a private company, it wasn't against the United States, but nevertheless, the 9th Circuit said this is a political question that we would be called upon to decide, because in order to decide whether this private company committed a tort, did this unlawful act by giving these bulldozers to the Israeli defense force, we would have to make a judgement about whether the United States decision to fund these bulldozers was an appropriate policy judgment, That's a political question, the court said. We've looked in the Constitution. That political judgment is given over to Congress to make that judgment. It's not for us the courts, it's a political question.

The final instance where a political question can arise and one that's in front of the Supreme Court this year, which is 2017, has to do with the way state legislatures draw their lines to elect people to Congress or to their state offices. And the Supreme Court has held that it can decide whether the legislature's line drawing is race based and in fact, almost always strikes down the use of race in drawing district lines. But as far as the use of political party, the Supreme Court has come very, very close, four votes, to saying that it's a political question. And the reason here is not necessarily that the constitution gives it over to state governments - although it does say that the Legislature shall draw the lines - but also a concern that there's absolutely no standards for the Supreme Court to decide whether a particular party based line drawing to advantage one political party, Republicans, for example, over Democrats, by drawing these lines is in fact a Constitutional violation, is discrimination; denies someone their equal right to vote. So as I said, we don't know the answer to this question, whether in fact it is a political question. And we will learn whether in fact there's standards that possibly exist for the Court to make that sort of judgment.

So that concludes our talk here about political questions, that is it's a justiciability doctrine it's one that causes the Court not to decide the case at all because a court says either, what, the Constitution has said we're not supposed to, or what they're absolutely no standards by which we could decide this and be exercising our judicial role as opposed to a policy making role.

So that concludes this In Brief on the topic of Political Questions. This is Leslie Gielow Jacobs of McGeorge School of Law in Sacramento. Thanks so much for listening.