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The Political Question Doctrine: Justiciability and the Separation of Powers

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Summary

Article III of the Constitution restricts the jurisdiction of federal courts to deciding actual "Cases" and "Controversies." The Supreme Court has articulated several "justiciability" doctrines emanating from Article III that restrict when federal courts will adjudicate disputes. One justiciability concept is the political question doctrine, according to which federal courts will not adjudicate certain controversies because their resolution is more proper within the political branches. Because of the potential implications for the separation of powers when courts decline to adjudicate certain issues, application of the political question doctrine has sparked controversy. Because there is no precise test for when a court should find a political question, however, understanding exactly when the doctrine applies can be difficult.

The doctrine's origins can be traced to Chief Justice Marshall's opinion in *Marbury v. Madison*; but its modern application stems from *Baker v. Carr*, which provides six independent factors that can present political questions. These factors encompass both constitutional and prudential considerations, but the Court has not clearly explained how they are to be applied. Further, commentators have disagreed about the doctrine's foundation: some see political questions as limited to constitutional grants of authority to a coordinate branch of government, while others see the doctrine as a tool for courts to avoid adjudicating an issue best resolved outside of the judicial branch. Supreme Court case law after *Baker* fails to resolve the matter. The Court has historically applied the doctrine in a small but disparate number of cases, without applying clear rules for lower courts to follow. Possibly as a result of the murky nature of the doctrine, it has regularly been invoked in lower federal courts in cases concerning foreign policy.

However, a recent Supreme Court case, *Zivotofsky v. Clinton*, appears to have narrowed the scope of the political question doctrine. In a suit seeking the vindication of a statutory right in the foreign affairs context, the Court reversed a lower court's finding that the case posed a political question. The Court explained that the proper analysis in such a situation begins not by asking whether adjudicating the case would require review of the foreign policy decisions of the political branches, but instead examining whether the plaintiff correctly interpreted the statute, followed by determining whether the statute was constitutional.

The Court's opinion appears to restrict the types of claims that can pose political questions, and seems to encourage courts to decide more statutory claims on the merits. In turn, the decision could lead to increased judicial resolution of controversies concerning the separation of powers, rather than resolutions between the political branches themselves.

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Introduction

Article III of the Constitution defines the proper scope of the federal courts' jurisdiction as limited to adjudicating "Cases" and "Controversies."[1] The Supreme Court has articulated several legal doctrines emanating from Article III that restrict when federal courts will adjudicate disputes, such as standing, ripeness, mootness, and the prohibition against issuing advisory opinions.[2] These "justiciability" doctrines are rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including the "proper—and properly limited—role of the courts in a democratic society."[3] One justiciability concept is the "political question" doctrine—according to which federal courts will not adjudicate certain controversies because their resolution is more proper within the political branches.[4]

Because the doctrine implicates the separation of powers,[5] application of the political question doctrine has sparked controversy. For example, the doctrine has regularly been invoked in federal courts in cases concerning foreign policy.[6] Federal courts have declined to adjudicate a recent challenge to the operation of the United States' "kill list,"[7] certain claims alleging presidential violation of the war powers clause of the Constitution and the War Powers Resolution,[8] and

[1] U.S. CONST. art. III; *see* Massachusetts v. E.P.A., 549 U.S. 497, 516 (2007) ("Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.'").

[2] *See* Allen v. Wright, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.") (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–1179 (D.C. Cir. 1983) (Bork, J., concurring)).

[3] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[4] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) ("[T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies both the standing and political question doctrines."). *But see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 134 (2006) ("Unlike the other justiciability doctrines, the political question doctrine is not derived from Article III's limitation of judicial power to "cases" and "controversies.").

[5] *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

[6] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork. J., concurring) ("Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied.").

[7] Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 52 (D.D.C. 2010).

[8] *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir.1985) (dismissing a claim brought by Members of Congress arguing that President Reagan's aid to Contras amounted to waging war in violation of the Constitution's war powers clause on political question grounds); Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C.Cir.1983) (affirming district court's dismissal of suit brought by members of Congress challenging the presence of military advisors in El-Salvador as a violation of the War Powers Resolution and the war powers clause of the Constitution on political question grounds); Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C.1990) (challenge to President George H.W. Bush's deployment order to the Persian Gulf as violating the War Powers Resolution and the war powers clause of the Constitution posed a political question); *see also* Campbell v. Clinton, 203 F.3d 19, 24-28 (D.C. Cir. 2000) (Silberman, J., concurring) (concurring in order to dismiss claims brought by Congressman alleging President Clinton's order of airstrikes in Yugoslavia constituted violation of the war powers clause of the Constitution and the War Powers Resolution because the case presented a political question). *But see* Campbell v. Clinton, 203 F.3d 19, 37–41 (D.C.Cir.2000) (Tatel, J., concurring) (political question doctrine not implicated by a challenge to President Clinton's ordering airstrikes in Yugoslavia); Berk v. Laird, 429 F.2d 302, 306 (2d Cir.1970) (indicating that a challenge to the Vietnam War did not automatically implicate a political question).

claims whose adjudication might harm the country's foreign policy interests.[9] Some commentators have identified such cases as reflecting judicial deference to actions of the executive branch in the area of national security; deference, it may be argued, that occurs at the expense of Congress, because courts invoking the doctrine sometimes effectively decline to enforce a congressional statute.[10]

As a preliminary matter, it is important to distinguish the political question doctrine from cases presenting political issues. Courts adjudicate controversies with political ramifications on a regular basis. For example, the Supreme Court has held that certain electoral processes deny citizens the right to vote based on their skin color,[11] and has upheld a subpoena directed against the President of the United States.[12] Both decisions necessarily had political consequences. Instead, the political question doctrine applies to issues that courts determine are best resolved within the politically accountable branches of government—Congress or the executive branch.

Understanding exactly when the doctrine applies, however, can be difficult.[13] The "precise contours of the doctrine are murky and unsettled,"[14] without a clear consensus among the members of the Supreme Court or academia.[15] The Supreme Court itself has noted that the political question doctrine has caused "[m]uch confusion"; and determining if it applies to a given case requires "a delicate exercise in constitutional interpretation."[16]

In order to illuminate the circumstances in which courts find cases to present nonjusticiable political questions, this report will examine the origins of the political question doctrine and modern Supreme Court case law on the matter. In addition, it will explore a few significant applications of the doctrine in the lower federal courts. Finally, this report will unpack a recent

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[9] *See, e.g.*, Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005); *see also* Goldwater v. Carter, 444 U.S. 996 (1979).

[10] *See Constitutional Law—Political Question Doctrine—D.C. Circuit Holds That Government Officials' Potentially Defamatory Allegations Regarding Plaintiffs' Terrorist Ties Are Protected by Political Question Doctrine*., 124 HARV. L. REV. 640, 640 (2010) (noting "a pattern of increasing deference to the executive branch, whereby the D.C. Circuit in particular has expanded executive power at the expense of the legislature."); Note, *The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 Harv. L. Rev. 1193, 1196 (2009); *see generally* Stephen I. Vladeck, *The New National Security Canon*, 61 Am. U. L. Rev. 1295, 1321-25 (2012) (identifying a "new national security canon" following 9/11 whereby federal courts invoke various theories, including the political question doctrine, to deny relief in cases implicating national security).

[11] *See* Terry v. Adams, 345 U.S. 461 (1953).

[12] *See* U.S. v. Nixon, 418 U.S. 683 (1974).

[13] *See* Jack Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1401-03 (1999) (noting an "apparent lack of principle and consistency" in application of the political question doctrine in cases implicating foreign policy); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 8 (1992).

[14] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork. J., concurring); Doe v. Bush, 323 F.3d 133, 140 (1st Cir. 2003) ("The political question doctrine ... is a famously murky one.").

[15] *See* Tel-Oren, 726 F.2d at 803 n.8 (Bork, J., concurring) ("That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court and among scholars.") (citations omitted); Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 Sup. Ct. Rev. 125, 152 (1993); *see infra* "Narrowing the Scope of the Doctrine." Some commentators have criticized the very existence of the doctrine, see e.g., ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 99-100 (1987); Martin Redish, *Judicial Review and the Political Question*, 79 Nw. U.L. Rev. 1031 (1985); and another has questioned whether the doctrine actually exists, see Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976).

[16] *Baker*, 369 U.S. at 211.

Supreme Court case rejecting application of the doctrine that may have significant implications for the political question doctrine in the future.[17]

Origins of the Political Question Doctrine

The origins of the political question doctrine can be traced back to Chief Justice Marshall's opinion in *Marbury v. Madison*.[18] Chief Justice Marshall, in addressing whether the judiciary could issue a writ of mandamus against an executive branch official, distinguished between individual rights dependent on executive branch legal duties on the one hand, and political matters left to presidential discretion on the other.[19] While the former are justiciable, the latter might not be.[20] Justice Marshall explained that the Constitution entrusted a scope of discretion in some areas to the "executive departments alone";[21] but "whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act."[22] "[T]he President is invested with certain important political powers," in which he—and those officers he appoints to carry out his will—are not accountable to the judicial branch.[23] These political powers "respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[24] Accordingly,

> The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[25]

The definition of a political question given by Chief Justice Marshall appears to include only those matters where the President is entrusted by the Constitution with unrestricted discretion, such as choosing who to nominate to the Senate for confirmation as executive branch officers,[26] but not matters that implicate individual rights.[27]

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[17] *See* Zivotofsky *ex rel*. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012).

[18] 5 U.S. 137 (1803). Hints of the political question doctrine also appear in the Federalist Papers. *See* The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution."); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 246 (2002); Robert J. Pushaw, Jr., *Justiciability and the Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 424 (1996).

[19] *Marbury*, 5 U.S. at 163-170.

[20] *Id*.

[21] *Id*. at 164.

[22] *Id*. at 165.

[23] *Id*. at 165-66.

[24] *Id*. at 166.

[25] *Id*.

[26] *Id.* at 167.

[27] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 129-130 (2006).

Nonetheless, the scope of what constitutes a political question appears to have broadened since *Marbury v. Madison*. Courts have found political questions in areas not solely committed to the President's discretion,[28] including when individual rights are implicated.[29] The beginning of this shift can be seen in the Supreme Court's next "classic representation of the early political question doctrine."[30] In *Luther v. Borden*, the Court declined to adjudicate a challenge to the Rhode Island charter government[31] under the republican form of government clause in Article IV, Section 4 of the U.S. Constitution.[32] At the time of the Dorr Rebellion in the 1840s, Rhode Island had not adopted a state constitution. Instead, it operated under a charter established by King Charles II in 1663.[33] The charter government was challenged as violating the Guarantee Clause, which provides that the "United States shall guarantee to every State in this Union a Republican form of government."[34] The Court held that the challenge was a political question, explaining that under the Guarantee Clause,

> it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.... And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.[35]

Because the determination of which entity was the lawful state government was committed to another branch of government—Congress—the Court refused to provide its own interpretation. As noted above, while *Marbury v. Madison* identified some matters entrusted to the executive branch as political questions, at least by the time *Luther v. Borden* was decided, certain matters committed to the discretion of Congress could also pose political questions.

In addition, the Court in *Luther v. Borden* also noted certain prudential considerations that weighed against judicial resolution of the case, such as the chaos that would ensue if the Court invalidated a state's government.[36] The Court has subsequently characterized the case as resting in part on the "lack of criteria by which a court" could make the determination;[37] and these prudential concerns were later repeated by the Court in a subsequent challenge to a state law under the Guarantee Clause.[38]

[28] *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993).

[29] *See, e.g.*, Luther v. Borden, 48 U.S. 1 (1849).

[30] Martin Redish, *Judicial Review and the Political Question*, 79 Nw. U.L. Rev. 1031, 1036 (1985).

[31] 48 U.S. 1, 10 (1849).

[32] U.S. CONST. art. IV, §4.

[33] *Luther*, 48 U.S. at 3.

[34] U.S. CONST. art. IV, §4.

[35] *Luther*, 48 U.S. at 42.

[36] *Id*. at 39-40.

[37] *See* Baker v. Carr, 369 U.S. 186, 222-23 (1962).

[38] Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 141-42 (1912); *see* Barkow, *supra* note 18, at 253-58.

Modern Application of the Doctrine

Baker Factors

Following *Luther v. Borden*, the Court dismissed challenges to state or congressional action under the Guarantee Clause on a number of occasions,[39] including challenges to state congressional districting.[40] Nevertheless, in the Court's "oft-quoted"[41] modern encapsulation of the political question doctrine, *Baker v. Carr*, the Court explained that challenges to election districts could be brought under the Equal Protection Clause.[42] In that case, a challenge was brought to a state's legislative apportionment of election districts, which, the plaintiffs claimed, resulted in an "impairment of their votes" through a "classification [that] disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties."[43] The Court distinguished claims brought under the Guarantee Clause from claims under the Equal Protection Clause.[44] Cases presenting political questions—including the Guarantee Clause cases—implicated the relationship between the "judiciary and the coordinate branches of the Federal Government, and not the judiciary's relationship to the states."[45] In addition, while the Guarantee Clause did not contain "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government,"[46] standards "under the Equal Protection Clause are well developed and familiar."[47] The Court thus ruled that the Equal Protection claim was justiciable,[48] and outlined six matters that could present political questions in other circumstances:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[49]

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[39] *See, e.g.*, Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); Taylor & Marshall v. Beckham, 178 U.S. 548 (1900); State of Ga. v. Stanton, 73 U.S. 50 (1867); *see also* Baker, U.S. at 223-24 (collecting cases). *But see* New York v. United States, 505 U.S. 144, 185 (1992) ("More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. ... We need not resolve this difficult question today.") (citations omitted); Reynolds v. Sims, 377 U. S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are nonjusticiable").

[40] *See* Colegrove v. Green, 328 U.S. 549 (1946).

[41] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 131 (2006).

[42] *See* Baker v. Carr, 369 U.S. 186 (1962).

[43] *Id*. at 207-208.

[44] *Id*. at 226.

[45] *Id*. at 211.

[46] *Id*. at 223.

[47] *Id*. at 226.

[48] *Id*. at 237.

[49] *Id*. at 217.

The Court did not, however, explain precisely how these factors were to be applied in future cases, nor did it describe the relative weight of each factor; although in a later case applying the doctrine, a plurality of the Court explained that they "are probably listed in descending order of both importance and clarity."[50] In addition, the Court in *Baker* noted that cases implicating foreign policy could frequently pose political questions,[51] and explained that in such cases the Court engages in a "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[52]

Foundation of the Political Question Doctrine

While the Court in *Baker* delineated what factors were relevant in determining whether a case posed a political question, the Court did not explicitly identify the doctrine's foundation. It characterized the political question doctrine as "essentially a function of the separation of powers"; but the factors it listed nonetheless appear to include both constitutional[53] and prudential[54] considerations.[55] It is thus unclear whether the basis for the political question doctrine emanates solely from the Constitution, or if it also finds a foundation in prudential considerations about the proper role of the judiciary. Commentators have disagreed on this question, reflecting a divergence in how the doctrine is conceived and the situations where it is thought to be applicable. At least two major theories about the proper role of courts vis-a-vis the other branches of government can be discerned in the doctrine.[56]

According to one such theory, in what has been called the "classical" version of the doctrine,[57] political questions emanate from the Constitution itself. Courts have a duty to adjudicate cases properly presented before them, which includes interpreting the Constitution when appropriate,

[50] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

[51] *Baker*, 369 U.S. at 211.

[52] *Id*. at 211-212.

[53] *See id*. (the first factor is a "textually demonstrable constitutional commitment of the issue to a coordinate political department").

[54] *See id*. (the third factor is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"); *id*. (the third and fourth factors are "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");

[55] *See* Nixon v. United States, 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) ("[T]he political question doctrine is 'essentially a function of the separation of powers,' existing to restrain courts 'from inappropriate interference in the business of the other branches of Government,' and deriving in large part from prudential concerns about the respect we owe the political departments.") (quoting *Baker*, 369 U.S. at 217 and United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)) (internal citations omitted); Goldwater v. Carter, 444 U.S. 996, 1000 (1979) (J. Powell, concurring) ("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government. Thus, the Judicial Branch should avoid 'the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question.' Similarly, the doctrine restrains judicial action where there is an 'unusual need for unquestioning adherence to a political decision already made.'") (citing *Baker*, 369 U.S. at 217) (brackets in original).

[56] *Compare* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L. J. 517, 566-83 (1966) (arguing for a third, "functional" theory of the doctrine based on various factors the court has used to find political questions) *with* Martin H. Redish, *Judicial Review and the "Political Question*," 79 Nw. U. L. Rev. 1031, 1043 (1985) (characterizing the functional theory as a "subset" of the prudential theory).

[57] *See* Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031, 1039 (1985).

and may not sidestep this role for prudential reasons.[58] Instead, a political question only arises when the Constitution itself clearly commits the resolution of a question to another branch of government.[59] In determining whether the Constitution does so, the theory goes, the judiciary does not abdicate its duty to interpret the Constitution, but interprets it as assigning discretion over an issue to another branch.[60] The judiciary thus grounds its decisions on principle, rather than on an *ad hoc* measuring of the expediency of deciding a particular case one way or the other.[61]

In contrast, another theory, famously explained by Alexander Bickel in his enunciation of the "passive virtues" of the judiciary, understands the political question doctrine to permit courts to decline to adjudicate a case for prudential reasons as well.[62] Writing in the aftermath of *Brown v. Board of Education* and the significant pushback that decision engendered in the South, Bickel sought to preserve the legitimacy of an unelected judicial branch.[63] On the one hand, when courts declare legislation or executive branch actions to be unconstitutional, Bickel argued, they frustrate the will of the people.[64] This "countermajoritarian difficulty" posed a significant problem because the judiciary's power arises from its perceived legitimacy in adjudicating cases, rather than from passing or enforcing laws.[65] At some point, continued judicial invalidation of public will risks losing that legitimacy. But at the same time, judicial rulings upholding the constitutionality of legislation also risk legitimating unprincipled or harmful policies. Bickel noted that "[t]he Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures.... The Court, regardless of what it intends, can generate consent and may impart permanence."[66] Upholding a statute or government practice as constitutional, while usually not intended to function as an endorsement on policy grounds, could nevertheless be perceived as such by the public.

Accordingly, rather than risk losing legitimacy by invalidating a law or entrenching a poorly conceived policy choice by upholding it, a court may exercise the passive virtues by refraining from adjudicating the case at all.[67] And when it does so, Bickel noted, the judiciary often sparks and participates in a dialogue with the other branches of government and the public which helps develop the issue further.[68] One method Bickel identified of practicing the passive virtues is by

[58] *See* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L. J. 517, 517-518 (1966).

[59] *See* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 6-10 (1959).

[60] *Id*. at 8-10.

[61] *Id*. at 14.

[62] Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 74-80 (1961); *see* CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*, by Andrew Nolan.

[63] *See* Floyd Abrams, *Online Alexander Bickel Symposium: On Rereading The Least Dangerous Branch*, SCOTUSblog (August 15, 2012, 10:25 AM), http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-on-rereading-the-least-dangerous-branch/.

[64] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-17 (1962).

[65] *Id*. at 16.

[66] Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 48-59 (1961).

[67] *Id*. at 50-51.

[68] *Id*.

invoking the political question doctrine to decline to adjudicate a case.[69] Bickel argued that the political question doctrine was founded on

> the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ('in a mature democracy'), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[70]

Rather than issuing rulings that outstripped the mood and temper of the country, a court could invoke the passive virtues, like the political question doctrine, to restrict itself to "declar[ing] as law only such principles as will—in time, but in a rather immediate foreseeable future—gain ... widespread acceptance."[71] By "stay[ing] its hand" and declining to adjudicate certain issues, the judiciary could thus allow the political branches to hash out issues over time—"elicit[ing] the correct answers to certain prudential questions that ... lie in the path of ultimate issues of principle."[72]

It bears mentioning that the line between these two theories may not be precise. For example, the prudential considerations have been described by the Ninth Circuit Court of Appeals as examinations of the "consequences of a court asserting its jurisdiction," which, due to the "broad strokes" of the "Constitution's grants of authority," can "assist [courts] in the difficult task of discerning which cases the Constitution forbids them from hearing."[73] According to this understanding of the doctrine, *Baker*'s prudential factors work to elucidate what the Constitution in fact requires, a conception arguably distinct from preserving the judiciary's legitimacy. In addition, courts applying the doctrine sometimes mention both prudential and constitutional factors without clear lines of differentiation, with the "analyses often collapsing into one another."[74]

As seen below, the Supreme Court has sometimes invoked both constitutional and prudential factors in finding a case to be a political question, without clearly stating which factors are dispositive.[75] The Court has also noted the interdependence of the *Baker* factors, explaining that whether an issue is textually committed to another branch of government "is not completely separate" from whether there exist judicially manageable standards to adjudicate the issue; a lack of standards can "strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[76]

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[69] *Cf.* Scharpf, *supra* note 58, at 537-39 (expressing agreement with Bickel's basic theory but criticizing the political question doctrine as a means to achieving the end of legitimacy).

[70] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962).

[71] *Id.* at 239 (quotations omitted); s*ee* Sweezy v. New Hampshire, 354 U.S. 234, 255, 266-67 (1957).

[72] *Id.* at 70.

[73] Corrie v. Caterpillar, Inc., 503 F.3d 974, 981 (9th Cir. 2007).

[74] Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005).

[75] *See e.g.*, Nixon v. U.S., 506 U.S. 224, 236 (1993) ("In addition to the textual commitment argument, we are persuaded that the lack of finality and the difficulty of fashioning relief counsel against justiciability.").

[76] *Id.* at 228-29.

Modern Supreme Court Case Law

Since the articulation of the *Baker* factors, a majority of the Supreme Court has ruled that cases were nonjusticiable under the political question doctrine on two occasions. In two others, a plurality of the Court determined that a case should be dismissed on this basis, and the Court has hinted at its applicability in others. As the Court in *Baker* described however, the "attributes" of the political question doctrine "in various settings, diverge, combine, appear, and disappear in seeming disorderliness,"[77] and the *Baker* factors themselves can overlap. Cases posing a political question cannot be identified by "semantic cataloguing,"[78] or by identifying a comprehensive rule.[79] Instead, whether a case raises a political question must be determined on a "case-by-case" basis.[80]Accordingly, this report will examine the Supreme Court's application of the doctrine in particular cases since the elucidation of the *Baker* factors. These cases have addressed areas ranging from foreign policy matters to the impeachment process.

Foreign Policy and Military Affairs

Prior to *Baker v. Carr*, the Court had found that, *inter alia*, the determination of when hostilities begin,[81] when a state of war concludes,[82] the recognition of Indian tribes,[83] and the recognition of foreign governments[84] are questions vested in the political branches. After *Baker*'s articulation of the factors relevant to the political question doctrine, in *Goldwater v. Carter*, a plurality of the Court held that a challenge brought by Members of Congress against President Carter's rescission of a treaty presented a nonjusticiable political question.[85] The Court first analogized to *Coleman v. Miller*, decided in 1939, where the Court found that the "efficacy of ratifications by state legislatures" was a political question.[86] In that case, state legislators challenged the ratification of the Child Labor Amendment by the state senate on the grounds that it had earlier been rejected.[87] The Court noted in *Coleman* that Article V of the Constitution spoke only to ratification, but was silent concerning rejection.[88] Accordingly, Congress—not the courts—"has the final determination of the question whether by lapse of time its proposal of the amendment had lost its

[77] *Baker*, 369 U.S. at 210.

[78] *Id*. at 217.

[79] *Id*. at 215.

[80] *Id*. at 211.

[81] *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).

[82] *See* Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Ludecke v. Watkins, 335 U.S. 160, 168-69 (1948) ("'The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

[83] *See* United States v. Sandoval, 231 U.S. 28 (1913).

[84] *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.") (quoting Jones v. United States, 137 U.S. 202, 212 (1890)) (quotations omitted).

[85] Goldwater v. Carter, 444 U.S. 996, 1004 (1979).

[86] 307 U.S. 433, 450 (1939).

[87] *Id*. at 436-37.

[88] *Id*. at 450.

vitality prior to the required ratifications."[89] Applying this reasoning to the case at hand, the plurality in *Goldwater* found that while the Constitution explains the Senate's role in ratifying treaties, it is silent as to a treaty's "abrogation."[90] As in *Coleman*, the plurality explained, the "absence of any constitutional provision governing the termination of a treaty" indicated that the question was not for the courts to decide.[91]

The Court continued by distinguishing the matter from the *Steel Seizure* case, where the Court had invalidated presidential action.[92] The Court noted two important differences. First, whereas the plaintiffs in the *Steel Seizure* case were private litigants, here the Court was "asked to settle a dispute between two coequal branches of our Government, each of which has resources available to protect and assert its interests" outside of the courts.[93] Second, while the actions challenged in the *Steel Seizure* case had direct domestic effect, the "effect of this action ... is entirely external to the United States, and [falls] within the category of foreign affairs."[94] Accordingly, the Court dismissed the case as presenting a nonjusticiable political question.

In a concurring opinion, however, Justice Powell found the case to be justiciable, but not ripe for judicial review because Congress had not directly "confront[ed] the President."[95] He noted that the Senate had considered, but did not pass, a resolution declaring the necessity of Senate approval for the termination of a treaty.[96]

The Court has also indicated that judicial relief may be barred in certain cases where the executive branch determines that adjudication of the matter would harm U.S. foreign policy interests. In *Sosa v. Alvarez-Machain*, the Court noted that "the availability of relief in federal court for violations of customary international law" under the Alien Tort Statute might be limited by a "policy of case-specific deference to the political branches."[97] The Court pointed to several class actions in the lower courts seeking damages from corporations that allegedly aided the former apartheid regime of South Africa.[98] The United States had entered a Statement of Interest urging dismissal of those cases on foreign policy grounds. Without ruling on the issue, the Court noted that "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[99] The Court has also recognized the possibility of similar concerns with regard to specific claims brought under the Foreign Sovereign Immunities Act.[100] Lower courts have sometimes cited these cases to find a

[89] *Id*. at 456. Justice Black wrote a concurring opinion, joined by a plurality of the Court, which concluded that the entire amendment process was immune from judicial review. *See id*. at 459 (Black, J., concurring) ("Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress.").

[90] *Goldwater*, 444 U.S. at 1003.

[91] *Id*.

[92] *Id*. at 537-38 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

[93] *Id*. at 1004.

[94] *Id*. (citations omitted) (brackets in original).

[95] *Id*. at 998-1002 (J. Powell, concurring).

[96] *Id*.

[97] Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

[98] *Id*.

[99] *Id.*

[100] *See* Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004) (explaining that in the context of claims under the Foreign Sovereign Immunities Act, "should the State Department choose to express its opinion on the implications of (continued...)

political question when claims are brought whose adjudication might harm U.S. foreign policy interests.[101] However, the Court's mention of "deference" to the political branches does not necessarily imply that a political question is present; courts can grant deference in the interpretation of a statute to the executive branch without declining to adjudicate a case at all.[102]

Similarly, the political question doctrine has also been invoked by the Court in a challenge to military training procedures. In *Gilligan v. Morgan*, students of Kent State University who were present when the National Guard was called to campus to quell civil disorder—resulting in the deaths of several students—brought a claim for injunctive relief to restrain the officers of the National Guard from future violation of their constitutional rights.[103] The plaintiffs sought for the district court to "establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard," as well as continuing judicial supervision to ensure compliance with the court's order.[104] In finding the matter to be a nonjusticiable political question, the Supreme Court emphasized the important separation of powers concerns at issue. It noted that Article I of the Constitution vests Congress with authority over the militia (with specific powers reserved for the states).[105] Requiring judicial review of the National Guard's training procedures, and exercising judicial supervision thereafter, would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of Government."[106] Judicial intrusion into "substantive political judgments entrusted expressly to the coordinate branches of government," the Court reasoned, was inappropriate.[107] The Court explained that

> [i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system.[108]

(...continued)

exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.") (footnotes omitted) (emphasis in original).

[101] *See, e.g.*, Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005).

[102] *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.").

[103] 413 U.S. 1, 3-4 (1973).

[104] *Id*. at 4.

[105] *Id*. at 6-7.

[106] *Id*. at 7.

[107] *Id*. at 11.

[108] *Id*. at 10.

As discussed more fully below, lower federal courts have often dismissed claims implicating foreign policy as presenting nonjusticiable political questions.[109] However, the Supreme Court has cautioned that a case does not present a political question simply because it touches upon foreign affairs. In *Japan Whaling Association v. American Cetacean Society*, the Court examined whether specific legislation required the Secretary of Commerce to certify to the President that the whaling practices of Japan "diminish the effectiveness"[110] of the International Convention for the Regulation of Whaling.[111] The Court ruled that the case did not raise a political question, explaining that the interpretation of treaties, executive agreements, and legislation was a proper judicial function.[112] Determining whether the Secretary was required to make a certification under the statute was a "purely legal question of statutory interpretation."[113] The Court noted the "premier role which both Congress and the Executive play" in foreign affairs, but concluded that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[114]

Elections

Challenges to partisan gerrymandering may also pose a nonjusticiable political question.[115] In *Vieth v. Jubelirer*, the plaintiffs brought a challenge to the electoral map drawn by a state assembly, alleging that the map "constitutes a political gerrymander."[116] A plurality of the Court ruled that claims alleging political gerrymandering were nonjusticiable political questions because there were no "judicially discernable and manageable standards" to adjudicate them.[117] In doing so, the Court overruled its decision 18 years earlier in *Davis v. Bandemer*,[118] in which the Court had ruled that such claims were justiciable.[119] *Bandemer*, the plurality found, failed to articulate a "judicially discernable standard[]" to decide a political gerrymandering case, and since then the lower courts that applied *Bandemer* had been unable to as well.[120] The plurality examined the various alternative standards proposed by the plaintiffs and the dissenting Justices, but found them all to be lacking.[121] One problem, the Court explained, was that "[p]olitical affiliation is not an immutable characteristic," which means it is "impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy."[122] Another was "ascertaining whether an entire statewide plan is motivated by political

[109] *See infra* "Foreign Policy Decisions."

[110] 478 U.S. 221, 223 (1986).

[111] *See* International Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force November 10, 1948).

[112] *Id*. at 230.

[113] *Id*.

[114] *Id*.

[115] *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).

[116] *Id*. at 271.

[117] *Id*. at 281.

[118] 478 U.S. 109 (1986).

[119] *Vieth*, 541 U.S. at 305-306.

[120] *Id*. at 282-283.

[121] *Id*. at 284-305.

[122] *Id*. at 287.

or neutral justifications."[123] Justice Kennedy, on the other hand, wrote a concurring opinion which agreed that this case should be dismissed, but expressly left open the question whether judicial standards could be developed in the future that would permit such a case to be adjudicated.[124]

Disputes concerning the operations of political parties may also present a political question. In *O'Brien v. Brown*, the Court stayed an appellate court's decision which found that the actions of the Credentials Committee of the Democratic National Convention of 1972 violated the Constitution.[125] The Credentials Committee recommended that certain delegates to the Convention be unseated, and the Court reviewed the appellate court's order three days before the seating of delegates was to be determined.[126] The Court did not expressly invoke the political question doctrine, but cited *Luther v. Borden* and noted that no federal court had ever "interject[ed] itself" into the inner workings of political conventions due to the "relationships of great delicacy that are essentially political in nature."[127]

Impeachment

The Court has also declined to review the impeachment process. In *Nixon v. United States*, a former federal judge had been convicted on two counts of making false statements before a grand jury and was sent to prison.[128] He refused, however, to resign and continued to receive his salary as a judge while in prison. The House of Representatives adopted articles of impeachment against the judge and presented the Senate with the articles.[129] The Senate invoked Impeachment Rule XI, a Senate procedural rule which permits a committee to take evidence and testimony. After the committee completed its proceedings, it presented the full Senate with a transcript and report. Both sides then presented briefs to the full Senate and delivered arguments, and the Senate then voted to convict and remove him from office.[130] The judge thereafter brought a suit arguing that the use of a committee to take evidence violated the Constitution's provision that the Senate "try" all impeachments.[131]

The Court noted that the Constitution grants "the sole Power"[132] to try impeachments "in the Senate and nowhere else";[133] and the word "try" "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[134] This constitutional grant of sole authority, the Court reasoned, meant that the "Senate alone shall have authority to determine

[123] *Id*. at 300; *see id*. at 288-90.

[124] *Id*. at 306-17. Subsequently, the Court dismissed another challenge to gerrymandering in League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). In a fractured opinion, Justice Kennedy's opinion did not revisit the holding in *Bandemer*, but found that the challengers had not provided a "reliable standard," *id*. at 423, to use to "determin[e] whether a partisan gerrymander violates the Constitution." *Id*. at 414.

[125] 409 U.S. 1 (1972).

[126] *Id*. at 2.

[127] *Id*. at 4.

[128] 506 U.S. 224, 226-27 (1993).

[129] *Id*. at 226-27.

[130] *Id*. at 227-28.

[131] *Id*. at 228.

[132] U.S. CONST. Art. I. s 3, cl. 6.

[133] *Nixon*, 506 U.S. at 229.

[134] *Id*.

whether an individual should be acquitted or convicted."[135] In addition, because impeachment functions as the "*only* check on the Judicial Branch by the Legislature,"[136] the Court noted the important separation of powers concerns that would be implicated if the "final reviewing authority with respect to impeachments [was placed] in the hands of the same body that the impeachment process is meant to regulate."[137] Further, the Court explained that two of *Baker*'s prudential considerations, "the lack of finality and the difficulty of fashioning relief counsel[ed] against justiciability."[138] Judicial review of impeachments could create considerable political uncertainty, if, for example, an impeached President sued for judicial review.[139]

The Court was careful to distinguish the situation from *Powell v. McMormack*, a case also involving congressional procedure where the Court declined to apply the political question doctrine.[140] That case involved a challenge brought by a member-elect of the House of Representatives who had been excluded from his seat pursuant to a House Resolution.[141] The precise issue in *Powell* was whether the judiciary could review a congressional decision that the plaintiff was "unqualified" to take his seat.[142] That determination had turned, the Court explained, "on whether the Constitution committed authority to the House to judge its Members' qualifications, and if so, the extent of that commitment."[143] The Court noted that while Article I, Section 5 does provide that Congress shall determine the qualifications of its members,[144] Article I, Section 2 delineates the three requirements for House membership—a Representative must be at least 15, have been a U.S. citizen for at least seven years, and inhabit the state he represents.[145] Therefore, the *Powell* Court concluded, the House's claim that it possessed unreviewable authority to determine the qualifications of its members "was defeated by this separate provision specifying the only qualifications which might be imposed for House membership."[146] In other words, finding that the House had unreviewable authority to decide its members' qualifications would violate another provision of the Constitution. The Court therefore concluded in *Powell* that whether the three requirements in the Constitution were satisfied was textually committed to the House, "but the decision as to what these qualifications consisted of was not."[147] Applying the logic of *Powell* to the case at hand, the *Nixon* Court noted that here, in contrast, leaving the interpretation of the word "try" with the Senate did not violate any "separate provision" of the Constitution.[148]

[135] *Id*. at 231.

[136] *Id*. at 235 (italics in original).

[137] *Id*.

[138] *Id*. at 236.

[139] *Id*.

[140] *Id*. at 236-38 (discussing Powell v. McCormack, 395 U.S. 486 (1969)).

[141] *See* Powell v. McCormack, 395 U.S. 486, 489-495 (1969).

[142] *Nixon*, 506 U.S. at 236-37 (quotations omitted).

[143] *Id*. at 237.

[144] *Id*. *See* U.S. Const. art I. §5.

[145] *Nixon*, 506 U.S. at 236-37. *See* U.S. Const. art I. §2.

[146] *Id*.

[147] *Nixon*, 506 U.S. at 236-37.

[148] *Id*.

Lower Courts' Application

Foreign Policy Decisions

In *Baker v. Carr*, the Court specifically noted that cases addressing foreign policy decisions could present a political question.[149] Lower federal courts have dismissed cases on this basis on a number of occasions.[150] Generally speaking, lower courts have sometimes dismissed suits seeking judicial review of discretionary military or foreign policy decisions by the executive branch as raising nonjusticiable political questions. In addition, certain claims have been dismissed under the doctrine because their adjudication would harm the foreign policy interests of the United States. However, the precise circumstances where the doctrine applies are unclear; courts have invoked constitutional and prudential considerations (and sometimes both) in order to dismiss cases implicating foreign policy as political questions.[151]

Some lower courts have determined that discretionary military decisions are textually committed to the political branches and the judiciary lacks manageable standards to review them. For example, a district court in the D.C. Circuit dismissed a suit challenging the operation of the

[149] *Baker*, 369 U.S. at 211.

[150] *See, e.g.*, Spectrum Stores, Inc. v. Citgo Petrol. Corp., 632 F.3d 938, 943 (5th Cir. 2011) (dismissing as a political question two class actions alleging violations of the Sherman Act and Clayton Act brought against oil production companies because the claims "effectively challenge the structure of OPEC and its relation to the worldwide production of petroleum"); Corrie v. Caterpillar, Inc., 503 F.3d 974, 982 (9th Cir. 2007) (dismissing various common law and statutory claims on political question grounds because "[a]llowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel"); Bancoult v. McNamara, 445 F.3d 427, 429 (D.C. Cir. 2006) (dismissing claims alleging "the United States government forcibly removed them from their homes on islands in the Indian Ocean in order to construct a military base" on political question grounds); Schneider v. Kissinger, 412 F.3d 190, 191-192 (D.C. Cir. 2005) (holding that claims brought against United States and former national security advisor for causing a Chilean general's "kidnapping, torture, and death" through a military coup posed a nonjusticiable political question); Aktepe v. United States, 105 F.3d 1400 (11th Cir. 1997); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir.1985) (dismissing a claim brought by Members of Congress arguing that President Reagan's aid to Contras amounted to waging war in violation of the Constitution's war powers clause on political question grounds); Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (affirming district court's dismissal of suit brought by members of Congress challenging the presence of military advisors in El-Salvador as a violation of the War Powers Resolution and the war powers clause of the Constitution on political question grounds); Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) (challenge to President George H.W. Bush's deployment order to the Persian Gulf as violating the War Powers Resolution and the war powers clause of the Constitution posed a political question); Holtzman v. Schlesinger, 484 F.2d 1307, 1309–11 (2d Cir. 1973) (holding that a challenge brought against United States' military activities in Cambodia posed a political question). *But see* Campbell v. Clinton, 203 F.3d 19, 37-41 (D.C. Cir. 2000) (Tatel, J., concurring) (political question doctrine not implicated by a challenge to President Clinton's ordering airstrikes in Yugoslavia); Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970) (indicating that a challenge to the Vietnam War did not automatically implicate a political question).

[151] *See* Jack Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1401-03 (1999). In addition to claims that directly seek judicial review of military decisions, a number of suits for damages have been brought against military contractors employed by the United States, which can also implicate the political question doctrine. *See* Al-Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (4th Cir. 2014) (remanding for further factual development to determine if case posed political question); Harris v. Kellog Brown & Root Services, Inc., 724 F.3d 458 (3d Cir. 2013) (same); Taylor v. Kellog Brown & Root Services, Inc., 658 F.3d 402 (4th Cir. 2011) (claim brought by servicemember against military contractor was barred by the political question doctrine); Carmichael v. Kellog Brown & Root Services, Inc., 572 F.3d 1271 (11th Cir. 2009) (claim against military contractors for negligence in driving truck posed political question). For more information on tort suits brought against federal contractors, see CRS Report R43462, *Tort Suits Against Federal Contractors: Selected Legal Issues*, by Rodney M. Perry.

United States' "kill lists" as raising a political question.[152] In that case, the father of Anwar Al-Aulaqi—who was allegedly on the government's "kill list"—sought a judicial declaration of when the United States may "select individuals for targeted killing" and an injunction preventing the United States from doing so to Anwar Al-Aulaqi unless it meets that standard.[153] The court ruled that there were no judicially manageable standards by which to adjudicate the case. Evaluating "the merits of the President's (alleged) decision to launch an attack on a foreign target," the court noted, would "require this court to elucidate the ... standards that are to guide a President when he evaluates the veracity of military intelligence."[154] However, "there are no judicially manageable standards" for courts to employ in reviewing the President's "interpretation of military intelligence," his decision to use military force on the basis of that intelligence, or the "nature and magnitude of the national security threat posed by a particular individual."[155]

The court noted that the D.C. Court of Appeals had previously held that whether a "particular organization's alleged terrorist activity threatens national security" raised a political question;[156] likewise, it was "axiomatic that courts must also decline to assess whether a particular individual's alleged terrorist activities threaten national security."[157] Accordingly, the court could not determine whether the United States was justified in using force against Al-Aulaqi.[158] In addition, the court noted that *Bakers*' first, fourth, and sixth factors also weighed against justiciability because decisions of when to use military force were "textually committed to the political branches," and any *ex post* judicial review of the matter "would reveal a 'lack of respect due coordinate branches of government' and create 'the potentiality of embarrassment of multifarious pronouncements by various departments on one question.'"[159]

Similarly, in *El-Shifa v. United States.*, the D.C. Court of Appeals held that a suit seeking review of "the President's decision to launch an attack on a foreign target" presented a nonjusticiable political question.[160] In response to the 1998 terrorist bombing of United States embassies in Kenya and Tanzania, President Clinton ordered airstrikes against two targets, including a factory in Sudan believed to be associated with the terrorists and producing materials for chemical weapons.[161] Owners of the plant brought suit against the United States alleging that the

[152] Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 52 (D.D.C. 2010).

[153] *Id*. at 47-48. The plaintiffs conceded that ex ante judicial review of targeting decisions would be "infeasible," *id*. at 48 (quotations omitted), and requested the court to enter a preliminary injunction enforced after via an "after-the-fact contempt motion or an after-the-fact damages action." *id*. at 48 (quotations omitted).

[154] *Id*. at 47 (citing El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 846 (D.C. Cir. 2010)) (internal quotations omitted).

[155] *Id*. at 47.

[156] *Id*. (citing People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999)).

[157] *Id*.

[158] *Id*.

[159] *Id*. at 48 (quoting Baker, 369 U.S. at 217). In a subsequent action in a district court in the District of Columbia, Anwar Al-Aulaqi's father brought a damages action against U.S. government officials in their personal capacities for violations of, *inter alia*, the Fifth Amendment. Al-Aulaqi v. Panetta,—F. Supp. 2d. – (D.D.C. 2014). That court, in an opinion written by Judge Rosemary M. Collyer, held that the political question doctrine did not apply, noting that the "powers granted to the Executive and Congress to wage war and provide for national security does not give them *carte blanche* to deprive a U.S. citizen of his life without due process and without judicial review." *Id*. at 9 (italics in original). Nevertheless, the court dismissed the action "because special factors counsel hesitation in implying a *Bivens* remedy in these circumstances. *Id*. at 6.

[160] El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc).

[161] *See id*. at 838-39.

destruction of their plant violated the law of nations, as well as a claim seeking a declaration that the statements made by government officials about them were defamatory.[162]

The court explained that, at least in cases concerning national security and foreign relations, "the presence of a political question ... turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action."[163] In this vein, the court distinguished between "claims requiring us to decide whether taking military action was 'wise,' and suits concerning "'purely legal issues' such as whether the government had legal authority to act."[164] The former, the court explained, was a determination committed to the political branches, and the "courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security."[165] Such "strategic choices" were "constitutionally committed to the political branches."[166] This constitutional commitment "reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters."[167] The plaintiffs' claim under the law of nations would require judicial analysis into whether the airstrikes were "mistaken and not justified,"[168] and the claim for defamation would require a judicial determination of the "factual validity of the government's stated reasons for the strike."[169] The court concluded that the political question doctrine barred courts from "assessing[ing] the merits of the President's decision to launch an attack on a foreign target."[170]

However, two separate concurrences questioned the panel's reasoning, arguing that the proper basis for dismissal was on statutory grounds—the plaintiffs did not allege a "cognizable cause of action"—rather than because the case posed a political question.[171] Judge Ginsberg criticized the court for expanding the political question doctrine to the point where "even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision constitutionally committed to the President."[172] This "new political question doctrine" permitted the court to decline to adjudicate a case "regardless whether the court would actually have to decide a political question in order to resolve it."[173]

Likewise, Judge Kavanaugh's concurring opinion argued that the court's opinion improperly invoked the political question doctrine. While the doctrine was applicable to "cases alleging violations of the Constitution," it did not apply to cases that concerned "alleged *statutory* violations."[174] Here, the plaintiffs' claim was not that the "Executive Branch violated the Constitution," but that "the Executive Branch violated congressionally enacted statutes that

[162] *See id*. at 839-40.

[163] *Id*. at 842.

[164] *Id*. at 842 (quoting Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring)).

[165] *Id*. at 842.

[166] *Id*. at 843.

[167] *Id*.

[168] *Id*. at 844 (quotations omitted).

[169] *Id*.

[170] *Id*.

[171] *Id*. at 852-859 (Kavanaugh, J., concurring); *id*. at 851 (Ginsberg, J., concurring).

[172] *Id*. at 852 (Ginsberg, J., concurring).

[173] *Id*. at 851.

[174] *Id*. at 856 (Kavanaugh, J., concurring) (emphasis in original).

purportedly constrain the Executive."[175] The proper question for the court when confronting a statutory claim then was "whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II of the Constitution."[176] Judge Kavanaugh explained that application of the political question doctrine in statutory cases does "not reflect benign deference to the political branches," but "systematically favor[s] the Executive Branch over the Legislative Branch."[177] This serves to bar Congress from restricting the executive branch "in the challenged sphere of action," and essentially holds that the President's power is "exclusive and preclusive."[178] He thus concluded that "whether a statute intrudes" on the President's Article II authority "must be confronted directly through careful analysis of Article II—not answered by backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner."[179] Nonetheless, Judge Kavanaugh concurred in the judgment because there was no cause of action for either of the plaintiffs' claims.[180]

Lower courts have also dismissed claims as nonjusticiable political questions because adjudication would show a lack of respect for a coordinate branch of government—*Baker*'s fourth factor. This reasoning appears to be buttressed by courts' conclusion that foreign policy decisions are committed to the political branches. In *In re Nazi Era Cases Against German Defendants Litigation*, for example, a Holocaust survivor brought claims against German corporations who allegedly cooperated with the Nazi regime.[181] The executive branch, however, had negotiated with the government of Germany to establish a foundation for making payments to victims, and entered an executive agreement that recognized the foundation as the sole forum for such claims.[182] The Third Circuit Court of Appeals affirmed dismissal of the case as presenting a nonjusticiable political question because adjudication "would express a lack of respect for the Executive Branch because of the Executive Branch's longstanding foreign policy interest that issues relating to World War II and Nazi-era claims be resolved through intergovernmental negotiation."[183]

Similarly, the D.C. Circuit Court of Appeals has refused to substitute its own judgment as to which nation is sovereign over Taiwan when the executive branch avoided doing so.[184] In *Lin v. United States*, residents of Taiwan sought a judicial declaration they were U.S. nationals and were entitled to U.S. passports. They based their claim on the San Francisco Peace Treaty with Japan[185]—which established the United States as Taiwan's "principal occupying power"—arguing that this gave the United States "temporary *de jure* sovereignty."[186] The court noted that it "*could*

[175] *Id*. at 855.

[176] *Id*.

[177] *Id*. at 857.

[178] *Id*.

[179] *Id*.

[180] *Id*. at 853-55.

[181] 196 Fed.Appx. 93, 94-96 (3d Cir. 2006).

[182] *Id*. at 94-95.

[183] *Id*. at 98.

[184] *See* Lin v. United States, 561 F.3d 502, 508 (D.C. Cir. 2009); *see also* Corrie v. Caterpillar, Inc., 503 F.3d 974, 983 (9th Cir. 2007) ("Plaintiffs' action also runs head-on into the fourth, fifth, and sixth Baker tests because whether to support Israel with military aid is not only a decision committed to the political branches, but a decision those branches have already made.").

[185] *See* Treaty of Peace with Japan, art. 2(b), September 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

[186] *Lin*, 561 F.3d at 505.

resolve this case through treaty analysis and statutory construction," but declined to do so because resolution of the issue posed a political question.[187] The court reasoned that the executive has discretion to determine who exercises sovereignty over a country, and the U.S. had strategically avoided doing so with regard to Taiwan; therefore, "judicial modesty as well as doctrine caution[ed]" against a court inserting its own judgment.[188] The court concluded that the judiciary does "not dictate to the Executive what governments serve as the supreme authorities of foreign lands, [a] rule [that] applies *a fortiori* to determinations of U.S. sovereignty."[189]

Similarly, in line with the Supreme Court's caution expressed in *Sosa v. Alvarez-Machain*,[190] the D.C. Circuit dismissed as a nonjusticiable political question claims under the Alien Tort Statute seeking damages from Japan and alleging violations of international law.[191] Adjudication of the case would have required determining whether the claims of various plaintiffs were extinguished when their governments signed treaties with Japan.[192] The executive branch filed a Statement of Interest with the court urging that resolution of the case would damage the United States' foreign policy interests. The court reasoned that the Constitution committed the issue to the political branches—primarily the President[193]—and "defer[red] to the judgment of the Executive Branch ... that judicial intrusion into the relations between Japan and other foreign governments would impinge upon the ability of the President to conduct the foreign relations of the United States."[194]

Executive Discretion

On a more limited basis, some lower courts have dismissed challenges to the executive branch's law enforcement discretion as nonjusticiable political questions. For example, the Tenth Circuit Court of Appeals dismissed a suit seeking to compel the executive branch to "maintain market conditions favorable to small farmers" as a nonjusticiable political question.[195] In particular, the plaintiffs sought, *inter alia*, a "moratorium on farm foreclosures" and judicial "oversight of the Justice Department's enforcement of antitrust laws against agribusinesses."[196] Finding *Baker*'s first category applicable to these claims, the court dismissed them as nonjusticiable political questions. The court noted that the Constitution vests the executive power in the President and instructs him to "take care that the Laws be faithfully executed."[197] Therefore, the court explained, "there is a textual commitment to the Executive Branch to enforce banking laws and to exercise prosecutorial discretion in bringing antitrust suits."[198]

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[187] *Id*. at 506 (emphasis in original).

[188] *Id*.

[189] *Id*. at 507.

[190] 542 U.S. 692, 733 n.21 (2004).

[191] Hwang Geum Joo v. Japan, 413 F.3d 45, 49, 52-53 (D.C. Cir. 2005) (noting that the Supreme Court's opinion in Sosa v. Alvarez-Machain gives "direction ... closely related to the legal and factual circumstances of this case: A policy of 'case-specific deference to the political branches' may be appropriate in cases brought under the Alien Tort Statute) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)).

[192] *Id*. at 51-52.

[193] *Id*. (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 423 n.12 (2003).

[194] *Id*. at 48.

[195] Schroder v. Bush, 263 F.3d 1169, 1171 (10th Cir. 2001).

[196] *Id*. at 1175.

[197] *Id*. (quotations omitted) (quoting U.S. Const. art. II, §3).

[198] *Schroder*, 263 F.3d at 1175.

Similarly, the Ninth Circuit Court of Appeals has ruled that a discretionary decision of the Secretary of Commerce was a nonjusticiable political question.[199] In that case, the defendants were indicted for violation of the Export Administration Act of 1979 (EAA),[200] which allows the Secretary of Commerce to impose and enforce export controls via licensing requirements for certain commodities.[201] Commodities requiring export licenses are placed on the Commodities Control List (CCL).[202] The defendants moved to discover all relevant documents for the purpose of examining "'whether the government followed the legislative mandate ... in placing the items listed on the indictment' on the CCL."[203] The court noted that the Secretary's decision to place an item on the CCL involved national security and foreign relations concerns—"matters of policy entrusted by the Constitution to the Congress and the President, for which there are no meaningful standards of review."[204] The court thus ruled that the decision by the Secretary to place a commodity on the CCL was a nonjusticiable political question.[205] Nevertheless, given that the court's decision included national security concerns, one might argue that this case is distinguishable from the Tenth Circuit Court of Appeal's refusal to adjudicate a suit seeking to compel the executive branch to take specific enforcement actions.

Narrowing the Scope of the Doctrine

Zivotofsky v. Clinton

Recently, in *Zivotofsky v. Clinton*, the Court rejected application of the political question doctrine to a plaintiff's statutory claim, and harnessed an interpretive approach that may have narrowed the doctrine's scope.[206] At issue in the case was a congressional statute providing that, upon their request, the Secretary of State should list the place of birth as Israel on passports for United States citizens born in the city of Jerusalem.[207] Zivotofsky, an American citizen born in Jerusalem, sought to have his passport read "Jerusalem, Israel" as the place of birth; but the State Department refused consistent with department policy to "not write Israel or Jordan" as the birthplace of someone born in Jerusalem.[208] Zivotofsky then brought suit in federal court, seeking a declaratory judgment and a permanent injunction directing the Secretary of State to list "Jerusalem, Israel" as his place of birth.[209] The D.C. Court of Appeals found the case to present a nonjusticiable political question and affirmed dismissal of the case.[210] The court reasoned that

[199] United States v. Mandel, 914 F.2d 1215 (9th Cir. 1990).

[200] *See* 18 U.S.C. 371.

[201] *See* 50 U.S.C.A. 2402(2), (10), 2403-06.

[202] *See* 50 U.S.C.A. 2403(b), (c).

[203] *Mandel*, 914 F.2d at 1218 (quotations omitted).

[204] *Id*. at 1223-23.

[205] *Id*. The court thus reversed the district court's discovery order compelling the government to release the records relevant to the Secretary's decision. *Id*.

[206] Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1425 (2012).

[207] *See* Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350.

[208] *Zivotofsky*, 132 S. Ct. at 1425 (quoting State Department Foreign Affairs Manual, 7 Foreign Affairs Manual §1383, Exh. 1383.1, App. 127).

[209] *Id*. at 1426.

[210] Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009).

"[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy."[211]

The Supreme Court reversed, holding that the political question doctrine did not bar adjudication of the claim.[212] Central to the Court's reasoning was its understanding of the precise legal question at issue. The Court explained that, contrary to the framing of the question given by the lower courts, it was "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right";[213] which required the Court to determine if the plaintiff interpreted the statute correctly, and whether the statute was constitutional.[214] This framing of the question ruled out application of the political question doctrine.

In its analysis, the Court described political questions as controversies involving the first two *Baker* factors—"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."[215] While the government argued that there was a "'textually demonstrable constitutional commitment' to the President of the sole power ... to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport[;]"[216] the Court noted that there was no "exclusive commitment to the Executive of the power to determine the constitutionality of a statute."[217] Likewise, the Court reasoned, there might be "'a lack of judicially discoverable and manageable standards for resolving' ... whether the Judiciary may decide the political status of Jerusalem."[218] But such "concerns ... dissipate when the issue is recognized to be the more focused one of the constitutionality of" the statute in question.[219]

Justice Sotomayor, joined in part by Justice Breyer, issued a concurring opinion.[220] In contrast to the majority, which mentioned only the first two *Baker* factors,[221] Justice Sotomayor's opinion listed all six, and explained that they represented "three distinct justifications for withholding judgment on the merits of a dispute."[222] In the first—when a case is textually committed to another branch—"the Constitution itself requires that another branch resolve the question presented."[223] The second and third factors—a lack of judicial standards and the impossibility of rendering a decision without making a nonjudicial policy decision—"reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence."[224] The remaining factors

[211] *Id*. at 1232.

[212] *Zivotofsky*, 132 S. Ct. at 1426-31.

[213] *Id*. at 1427.

[214] *Id*.

[215] *Id*. at 1427 (citing *Nixon*, 506 U.S. at 228; *Baker*, 369 U.S. 217) (quotations omitted).

[216] *Id*. at 1428.

[217] *Id*.

[218] *Id*. (quotations omitted).

[219] *Id*.

[220] *Id*. at 1431-35 (J. Sotomayor, concurring).

[221] *Id*. at 1427.

[222] *Id*. at 1431 (J. Sotomayor, concurring).

[223] *Id*. at 1432.

[224] *Id*.

"address circumstances in which prudence may counsel against a court's resolution of an issue presented."[225] Justice Sotomayor explained that "[c]ourts should be particularly cautious before forgoing adjudication of a dispute" under these last three factors, but noted that certain cases can present situations "unfit for judicial disposition."[226]

Justice Sotomayor also argued that, while this case did not present a political question, it was not the case that no statute could ever do so.[227] She pointed to a past Supreme Court decision refusing to adjudicate a challenge to a state statute under the Guarantee Clause,[228] and noted that it was possible for a statute to raise nonjusticiable issues. For example, if a statute bestowed financial relief on people "improperly 'tried' of impeachment offenses," then a court hearing claims under the statute would be forced to adjudicate matters found nonjusticiable in *Nixon v. United States*.[229] Finally, Justice Sotomayor disagreed with the majority's finding that because "the parties' arguments rely on textual, structural, and historical evidence of the kind that courts routinely consider," the case did not present an issue lacking judicial standards.[230] She explained:

> it is not whether the evidence upon which litigants rely is common to judicial consideration that determines whether a case lacks judicially discoverable and manageable standards. Rather, it is whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes, but if the parties' textual, structural, and historical evidence is inapposite or wholly unilluminating, rendering judicial decision no more than guesswork, a case relying on the ordinary kinds of arguments offered to courts might well still present justiciability concerns.[231]

What's Left of the Political Question Doctrine?

The majority opinion in *Zivotofsky* appears to have limited the scope of cases that may pose a political question; but the remaining contours of the doctrine are unclear. The Court did not overrule any of its past decisions that had found political questions, so those cases appear to remain good law; and it mentioned the first two *Baker* factors as relevant in finding a political question, which would appear to leave those factors intact for lower courts to apply.[232] However, as mentioned above, many lower federal courts have dismissed cases involving statutes that concern foreign affairs on political question grounds.[233] A fair reading of *Zivotofsky* indicates much less room to do so in the future. Commentators addressing this question have disagreed on how broadly to read the Court's opinion.[234] At a minimum, the Court's framing of the underlying

[225] *Id*.

[226] *Id*. at 1433.

[227] *Id*. at 1435.

[228] *Id*. (pointing to Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916)).

[229] *Id*.

[230] *Id*.

[231] *Id*.

[232] *See, e.g.*, Rangel v. Boehner, CV 13-540 (JDB), 2013 WL 6487502 at *15-16 (D.D.C. December 11, 2013) (ruling that [w]hether discipline of a Member [of Congress] was "proper" is textually committed to the House [and] involves a political question and the Court must dismiss his claims").

[233] *See supra* "Foreign Policy Decisions."

[234] *Compare* Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 Yale L.J. 253, 264-65 (2013); Note, *The Return of the Classical Political Question Doctrine in Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) *with The Supreme Court 2011 Term – Leading Cases*, 126 Harv. L. Rev. 307, 311 (2012).

issues in the case—whether the statute granting the plaintiff a right was constitutional, rather than whether a court may adjudicate Jerusalem's political status—could caution lower courts from finding political questions in cases involving statutory claims.[235] In other words, the proper analysis under *Zivotofsky* in cases where a plaintiff seeks to vindicate a statutory right begins with whether the statute is constitutional and may be enforced against the executive, not whether resolution of the issue would pose a political question. This interpretative sequence when courts are faced with statutory claims requires adjudication on the merits in at least some cases that would otherwise be dismissed as posing political questions.[236]

In fact, one reading of the majority opinion might be that no case presenting a potential question of statutory interpretation (i.e., when a court must interpret an ambiguous statute or determine whether a statute is constitutional) can ever pose a political question. Reflecting perhaps a robust conception of judicial supremacy, the majority emphasized that when a statute is "alleged to conflict with the Constitution," it is the duty of the courts to "say what the law is."[237] Nevertheless, the majority did not expressly hold that no political question could ever arise in a case involving statutory interpretation, it simply stated that because the plaintiff sought to vindicate a statutory right, the proper analysis was whether the statute was constitutional. And the majority also did not address Justice Sotomayor's concurrence that envisioned hypothetical statutes that might do so.[238] Put another way, the Court ruled that the proper analysis when a plaintiff seeks to vindicate a statutory right is to examine the constitutionality of the statute; but did not expressly hold that the political question doctrine is always inapplicable to cases involving statutes.

The majority's analytic framework might also indicate that some cases involving statutory interpretation could still pose a political question. The majority did not fully explain why its interpretative approach was the proper one. Instead, it simply reasoned that because the plaintiff sought to vindicate a statutory right, a court should interpret the statute at issue, and the political question doctrine was inapplicable. The Court did not clearly indicate whether this was the correct approach in all cases presenting a matter of statutory interpretation. Without such an interpretative anchor for lower courts to follow, there may remain some room for courts to construe a case involving statutory interpretation in a manner that avoids falling under *Zivotofsky*'s requirements.[239] For example, a court might conclude that a statute fails to provide a court with meaningful standards to apply and find a political question on that basis.[240] And tort

[235] *See, e.g.*, Kaplan v. Central Bank of Islamic Republic of Iran, 961 F. Supp. 2d 185, 191-93 (D.D.C. 2013) (rejecting a challenge on political question grounds to a claim brought under the Alien Tort Statute and Foreign Sovereign Immunities Act because the plaintiffs "seek relief under several federal statutes authorizing recovery for specific conduct" which is justiciable under *Zivotofsky*).

[236] *See, e.g.*, *Zivotofsky*, 132 S. Ct. at 1430-31 (reversing the lower courts' finding of a political question and remanding for a ruling on the constitutionality of the statute in question).

[237] *Id*. at 1428 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

[238] *Id*. at 1334-35 (Sotomayor, J., concurring).

[239] *See generally* Arunga v. Romney, 2:12-CV-873, 2012 WL 5269174 (S.D. Ohio October 24, 2012) (ruling that the subject matter of the plaintiff's complaint—invoking jurisdiction under 18 U.S.C. §§1956 and 1957; alleging that "a presidential candidate is threatening to create an unconstitutional form of government"—was a political question).

[240] *See, e.g.*, Alaska v. Kerry, 972 F. Supp. 2d 1111, 1130 (D. Alaska 2013) (finding that a treaty did "not provide 'judicially discoverable and manageable standards' for the Court to apply in evaluating the Secretary of State's action").

claims brought against the federal government might sometimes pose a political question if they would require a court to review military discretionary decisions.[241]

Likewise, a broad reading of *Zivotofsky* might also eliminate judicial consideration of the prudential aspects of the political question doctrine or severely limit the application of *Baker*'s second factor—a lack of judicial standards.[242] In the first place, the majority opinion only mentioned the first two *Baker* factors in its analysis, declining to even mention the remaining four.[243] The Court also rejected the argument that resolution of the claim was inappropriate because of a lack of judicially manageable standards.[244] The majority noted that while adjudicating the constitutionality of the statute in question would be difficult, requiring a "careful examination of textual, structural, and historical evidence," this is exactly "what courts do.[245] In fact, the Court reasoned that while there may not be adequate judicial standards to determine the "political status of Jerusalem," that concern "dissipate[s]" when the question is the constitutionality of a statute.[246] One might even read this assertion as discouraging courts from consequentialist concerns when determining the applicability of the political question doctrine.[247]

Nonetheless, the Court did not expressly disclaim reliance on prudential factors to find that a case presented a political question; it simply omitted them in its analysis. It also failed to address Justice Sotomayor's concurrence, which argued for the continuing vitality of prudential factors. In addition, while the majority rejected the argument that there were no judicial standards in the case because the parties relied on evidence routinely considered by courts, Justice Sotomayor's concurrence pointed out that similar evidence was available in *Nixon*, a case that did pose a political question.[248] The proper question for the Court, she argued, was not "whether the evidence upon which litigants rely is common to judicial consideration," but instead "whether that evidence in fact provides a court a basis to adjudicate meaningfully the issue with which it is presented."[249] Again, because the majority did not expressly hold that the availability of such evidence precluded a finding that there were no judicial standards to apply, combined with the failure of the majority to address Sotomayor's concurrence, the political question doctrine's prudential factors may have survived.[250]

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[241] *See, e.g.*, Al-Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (4th Cir. 2014) (remanding for further factual development to determine if case posed political question); Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458, 465 (3d Cir. 2013) ("Nonetheless, these suits may present nonjusticiable issues because military decisions that are textually committed to the executive sometimes lie just beneath the surface of the case."); *see also* Arunga v. Romney, 2:12-CV-873, 2012 WL 5269174 (S.D. Ohio October 24, 2012) (ruling that the subject matter of the plaintiff's complaint—"a presidential candidate is threatening to create an unconstitutional form of government"—was a political question).

[242] *See, e.g.*, Note, *The Return of the Classical Political Question Doctrine in Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

[243] *Zivotofsky*, 132 S. Ct. at 1427.

[244] *Id*. at 1428-30.

[245] *Id*. at 1430.

[246] *Id*. at 1428.

[247] *See The Supreme Court 2011 Term – Leading Cases*, 126 Harv. L. Rev. 307, 315 (2012).

[248] *Zivotofsky*, 132 S. Ct. at 1334-35 (Sotomayor, J., concurring).

[249] *Id*. at 1435 (Sotomayor, J., concurring).

[250] *See, e.g.*, Alaska v. Kerry, 972 F. Supp. 2d 1111, 1130 (D. Alaska 2013) (applying *Baker*'s second, fourth, and sixth factors and finding the plaintiff's claim presented a political question).

Implications on the Separation of Powers

A reduction in situations where courts may decline to adjudicate a case on political question grounds may have important implications for the separation of powers, at least as between Congress and the executive branch. Finding a political question in a case where no disagreement exists between the political branches can be understood as an exercise of judicial minimalism without important consequences for the relationship between Congress and the executive branch.[251] In contrast, finding a political question in a case where a core issue presented is whether the executive branch is bound by a statute obviously can impact the separation of powers.[252]

Such judicial reluctance to enforce a statute, one might argue, leaves resolution of such questions to the political branches, and allows some constitutional questions to be resolved via a struggle between the political branches, rather than by the courts. Others have argued, however, that the practice actually favors the executive branch at the expense of Congress.[253] Instead of determining a statute's constitutionality, the argument goes, courts effectively decline to force the executive branch to comply with congressional will—essentially expanding executive branch power.

Whether the practice functioned to allow the political branches to determine separations of powers disputes between themselves, or effectively sanctioned executive branch practices, *Zivotofsky* can be read to restrict lower courts' discretion to apply the doctrine in the future. If so, this may entail more judicial resolution of separation of powers disputes, ultimately affirming the judiciary's role to "say what the law is," and possibly reducing the constitutional interpretative power of the political branches.[254]

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[251] The absence of a dispute between the political branches does not, of course, mean that a dismissal on political question grounds does not have other important consequences. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 226-27 (1993).

[252] *See, e.g.*, *Zivotofsky*, 132 S. Ct. at 1430-31.

[253] *See* El-Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 852-59 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring).

[254] *See generally* Barkow, *supra* note 18, at 300-19.