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Executive Branch Fact Deference as a Separation of Powers Principle

EMILY A. KILE*

On March 17, 2011, responding to human rights violations by the Libyan government, the United Nations Security Council adopted Resolution 1973,¹ “establishing a no-fly zone in Libyan airspace, authorizing strong enforcement of [an] arms embargo, and encouraging member states to protect civilians without occupying Libya.”² Two days later, President Barack Obama commenced Operation Odyssey Dawn to enforce the no-fly zone with air strikes and provided a report to Congress “‘consistent with’ the [War Powers Resolution].”³ Under the War Powers Resolution, President Obama had a maximum of sixty days to engage in military action without congressional approval before he would be required to withdraw.⁴ As the sixty-day clock expired, though, President Obama ignited a constitutional and statutory firestorm by failing to withdraw. He took the position, instead, that the air strikes in Libya did not constitute “hostilities” as contemplated by the War Powers

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1. S.C. Res. 1973 (Mar. 17, 2011).

2. Eileen Burgin, *Where’s the Consultation? The War Powers Resolution and Libya*, 12 U.N.H. L. REV. 175, 189 (2014); *see also* S.C. Res. 1973, *supra* note 1, ¶¶ 6–12, 13–16, 4–5.

3. Burgin, *supra* note 2, at 189. President Obama did not seek congressional authorization before initiating air strikes, with support from an Office of Legal Counsel opinion justifying the use of force without prior congressional approval due to limited “nature, duration, and scope” of the air strikes. *Id.* at 189–90. The validity of that legal analysis is beyond the scope of this Note’s analysis. Other scholars have provided much more detailed analyses of the Office of Legal Counsel memorandum and the legality of initiating Operation Odyssey Dawn without prior congressional approval. *See* Bruce Ackerman, Response, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. FORUM 13, 36–37 (2011); Ganesh Sitaraman, Essay, *Credibility and War Powers*, 127 HARV. L. REV. FORUM 123 (2014); Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion*, HARV. NAT’L SEC. J. (Apr. 14, 2011, 2:57 PM), <http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion-2/> [https://perma.cc/XW3Z-VHTZ]; Jack Goldsmith, *War Power: The President’s Campaign Against Libya Is Constitutional*, SLATE (Mar. 21, 2011, 6:48 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/03/war_power.single.html [https://perma.cc/RCE9-WN2U?type=image]; David B. Rivkin Jr. & Lee A. Casey, *Why Obama’s Libya Strikes Don’t Require Congressional Approval*, WASH. POST (Mar. 24, 2011), https://www.washingtonpost.com/opinions/why-obamas-libya-strikes-dont-require-congressional-approval/2011/03/24/AB9nxMQB_story.html [https://perma.cc/X27A-8WNB].

4. Burgin, *supra* note 2, at 190.

Resolution, and therefore the sixty-day clock did not apply, and he was not required to withdraw.⁵

The vast majority of commentators (including members of Congress) disagreed with the Obama Administration's legal analysis and conclusions.⁶ State Department Legal Advisor Harold Koh testified before the Senate Foreign Relations Committee, arguing that the air strikes did not constitute hostilities for a combination of four factors: (1) the mission of the air strikes was limited, as the United States was merely supporting a North Atlantic Treaty Organization operation to enforce the United Nations Security Council Resolution; (2) the exposure of U.S. forces was limited because there were no active exchanges of fire or threat of casualties to U.S. forces; (3) the risk of escalation was limited because there were no ground troops; and (4) the military means employed were limited, because the violence inflicted by U.S. forces was "modest in terms of its frequency, intensity, and severity."⁷

The disagreement over the meaning of "hostilities" represents exactly the type of separation of powers dispute between Congress and the President that courts are reluctant to resolve on the merits. Particularly in matters of foreign affairs, war, and

5. *Id.* at 191. The sixty-day clock begins when U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a) (2012); *see also* Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 117 (1995) ("The Resolution starts a sixty-day clock when 'United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.'" (omission in original) (emphasis omitted) (quoting § 1543(a))). The Resolution itself does not define "hostilities," but there is some evidence that at least one drafter of the Resolution intended for "hostilities" to be interpreted broadly, therefore applying to limit more military operations: Representative Clement J. Zablocki, a co-author of the Resolution, criticized President Carter and his administration for "attempt[ing] to narrowly define 'imminent involvement in hostilities' with respect to section 4(a)(1). . . . Such definitions and assertions constituted nothing more than calculated efforts to limit situations in which WRP [sic] provisions were relevant." Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579, 585–86 (1984) (quoting § 1543(a)).

6. *See, e.g.*, Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176 (2012); Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43 (2012). Much of the criticism of the Obama Administration's "hostilities" determination has focused on the fact that President Obama reportedly ignored the Office of Legal Counsel's opinion that the air strikes *did* constitute hostilities in favor of the State Department's opposite conclusion. *See, e.g.*, Trevor W. Morrison, *Libya, "Hostilities," The Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62, 65 (2011); Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/F6JU-C4AY>]. That discussion is beyond the scope of this Note.

7. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7, 9 (2011) (statement of Hon. Harold Koh, Legal Adviser, U.S. Department of State). Koh emphasized the fact that at this point, U.S. forces had "shift[ed] to a constrained and supporting role in a multinational civilian protection mission . . . authorized by a carefully tailored U.N. Security Council Resolution." *Id.* at 12 (prepared statement).

national security,⁸ courts are hesitant to “curb the federal political branches . . . and have even developed doctrines of special deference to them” that lead courts to refuse to disturb decisions of the political branches.⁹ The political question doctrine is one such deference regime courts sometimes employ as a function of the separation of powers.¹⁰ Recent developments in political question jurisprudence, though, suggest that when federal statutes are involved, courts might not invoke the political question doctrine and might instead more often decide disputes between the political branches on the merits. Part I of this Note explores the history of the political question doctrine and its evolution in the Court’s decision in *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*).¹¹

Part II examines existing explanations for the recent increased activism by the Supreme Court in the realm of foreign affairs, showing that *Zivotofsky I* may be part of a broader and desirable trend. Part III of this Note, however, explores a second form of judicial deference: deference given to the executive branch’s factual findings in areas of foreign affairs, national security, and war powers.¹² One recent case in

8. The terms “foreign affairs,” “war,” and “national security” are not always used interchangeably, but scholars have long noted that the distinction among them is not always clear. *E.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 6 (2d ed. 1996) (“Implied [in a book about foreign affairs] is that for this purpose ‘foreign affairs’ can be defined, isolated, distinguished. That is hardly obvious. In many aspects of national economic life, for example, the domestic and the foreign are thoroughly mixed.”). There is inarguably a distinction between domestic powers and foreign affairs or national security powers when it comes to defining what the powers of the President are in any given situation. *See, e.g.*, Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 22 (2000) (discussing an “understanding that the President possesses greater constitutional authority in national security affairs than he does in the domestic arena”). The precise contours of that distinction, though, are a matter of intense debate, as are the exact distinctions between the related concepts of “foreign affairs,” “war powers,” and “national security.” For example, scholars are intensely divided as to whether the famous case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), involving a president’s seizure of the nation’s steel mills to prevent a wartime crisis, involved a question of domestic authority, foreign affairs, or national security. *See* Brownell, *supra*, at 79–80 (summarizing commentators divided among the case’s classification as a “national security,” “foreign affairs,” or “domestic” war powers case). For purposes of this Note, I consider the terms to be interchangeable to the extent that they involve similar claims by the executive branch that separation of powers principles require deference to its findings of fact or legal conclusions.

9. HENKIN, *supra* note 8, at 132.

10. *Id.* at 133 n.* (footnote referring to “political question” doctrine and judicial review as “aspects of ‘separation of powers’ between the Executive and the Judiciary”); *see also* *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

11. 132 S. Ct. 1421 (2012).

12. *See, e.g.*, Deborah N. Pearlstein, *Law at the End of War*, 99 MINN. L. REV. 143, 209 (2014) (describing such deference as appearing in situations in which “the executive’s superior expertise and access to information, its need to protect operational security and efficiency, and its direct accountability to the voters, are said to justify the executive’s demand that the Court defer to its findings of fact”).

particular—*Holder v. Humanitarian Law Project*¹³—gives rise to a concern that federal courts are giving excessive deference to executive branch fact-finding, a phenomenon referred to throughout this Note as “executive branch fact deference.”¹⁴ Part III of this Note examines these two forms of deference as applied in *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*.¹⁵ It concludes that excessive executive branch fact deference threatens to offset the improvements to executive branch accountability garnered from *Zivotofsky I*’s less aggressive version of political question doctrine deference. When it replaces the political question doctrine and performs functionally the same role, executive branch fact deference is just another separation of powers principle.

Finally, Part IV of this Note explores the possible ramifications of, these two developments in combination, namely, (1) courts finding certain questions related to statutory interpretation justiciable as in *Zivotofsky I* and (2) courts deferring to executive branch fact finding as in *Zivotofsky II*. Specifically, it applies the reasoning of *Zivotofsky I* and *Zivotofsky II* to consider application of the War Powers Resolution’s “hostilities” provision to the Obama Administration’s actions in Libya.

This Note concludes that, although *Zivotofsky I* provides a basis for judicial review of the legality of the Obama Administration’s “hostilities” determination (and, by extension, other questions of statutory interpretation related to foreign affairs), that review could be blunted by judicial deference to the executive branch’s factual determinations relevant to whether the Libyan airstrikes constituted “hostilities” within the War Powers Resolution. By addressing the political question doctrine’s history and the response to *Zivotofsky I*, this Note will explore whether the political question doctrine—particularly in cases of statutory interpretation—has lost some of its force as a justiciability doctrine. This Note will demonstrate that a court has precedent to find the interpretation of the War Powers Resolution to be a justiciable question post-*Zivotofsky I*, and it will examine whether a court would apply principles of executive branch fact deference to the executive branch’s interpretation of “hostilities” and whether the statutory condition of “hostilities” in the War Powers Resolution is met.

I. THE POLITICAL QUESTION DOCTRINE AND ITS EVOLUTION IN *ZIVOTOFSKY V. CLINTON*

Since 1948, every President has refused to recognize any country as having sovereignty over Jerusalem.¹⁶ Throughout those seven decades, the status of Jerusalem

13. 561 U.S. 1 (2010).

14. Throughout this Note, I use the term “fact deference” or “executive branch fact deference” to refer to arguments by the executive branch or by courts that judges should defer to the executive’s findings of fact in traditionally sensitive areas, including foreign affairs, national security, and war powers, if judges are going to decide those issues on the merits in the first place. This term is adapted from Robert Chesney’s original concept of “national security fact deference.” Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362 (2009); see *infra* text accompanying notes 114–29.

15. 135 S. Ct. 2076 (2015).

16. Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 5 (2013). Recognition of the status of Jerusalem is not to be confused with recognition

has remained just one piece of the ongoing conflict between Israel and Palestine.¹⁷ The U.S. State Department has consistently enforced this recognition decision by refusing to issue passports to American citizens born in Jerusalem with anything but “Jerusalem” listed as the applicant’s place of birth.¹⁸ In 2002, however, President George W. Bush signed into law the Foreign Relations Authorization Act (FRAA),¹⁹ notwithstanding a provision that directed the State Department to list “Israel” as the birthplace for those applicants born in Jerusalem who request it on their U.S. passports.²⁰ This section of the FRAA—section 214(d)—directly challenged the executive branch’s long-standing policy of neutrality²¹ regarding the sovereignty of Jerusalem.²² President Bush’s signing statement challenged the constitutionality of

of Israel as a sovereign nation. President Truman formally recognized Israel as a sovereign nation in 1948. Statement by the President Announcing Recognition of the State of Israel, PUB. PAPERS 258 (May 14, 1948). President Truman’s statement did not, however, confer any formal recognition of Israel’s sovereignty over Jerusalem, a status that “has long been, and remains, one of the most sensitive issues in American foreign policy, and indeed . . . one of the most delicate issues in current international affairs.” *Zivotofsky II*, 135 S. Ct. at 2081; see *infra* note 17.

17. The status of Jerusalem is central to the ever-ongoing Israeli-Palestinian conflict in part because resolving whether Israel controls the territory is a necessary condition of achieving the “two-state solution” in Israel. See Sam F. Halabi, *Jerusalem in the Courts and on the Ground*, 26 FLA. J. INT’L L. 223, 225 (2014); Max Fisher, *The Two-State Solution: What It Is and Why It Hasn’t Happened*, N.Y. TIMES (Dec. 29, 2016), <http://www.nytimes.com/2016/12/29/world/middleeast/israel-palestinians-two-state-solution.html> [<https://web.archive.org/web/20170506194234/https://www.nytimes.com/2016/12/29/world/middleeast/israel-palestinians-two-state-solution.html>]. Traditionally, American foreign policy in Israel, along with that of the United Nations, has had the goal of achieving the two-state solution, dividing the contested territory between Israel and Palestine and establishing two independent states. Fisher, *supra*. Because both Israel and Palestine “claim Jerusalem as their capital and consider it a center of religious worship and cultural heritage,” the two-state solution cannot be achieved without resolving the status of Jerusalem. *Id.* U.S. neutrality toward the status of Jerusalem is consistent with United Nations General Assembly Resolution 181, which “provided for the separation of the British Mandate of Palestine into Jewish and Arab states and carved out Jerusalem as a *corpus separatum* under the sovereignty of no state.” Halabi, *supra*, at 224 (italics in original). For more on the history of U.S. policy toward Jerusalem, see generally *id.* See also CrashCourse, *Conflict in Israel and Palestine: Crash Course World History 223*, YOUTUBE (Jan. 28, 2015), <https://youtu.be/1wo2TLIMhiw> [<https://perma.cc/3D44-2RC7>].

18. *Zivotofsky II*, 135 S. Ct. at 2082.

19. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

20. § 214(d), 116 Stat. 1366.

21. This is not the first time that Congress and the President have clashed over the status of Jerusalem since Israel declared its independence in 1948. In 1995, Congress enacted the Jerusalem Embassy Act, which was an attempt to force the executive branch to move the United States Embassy in Israel to Jerusalem. Cara J. Grand, *Zivotofsky v. Kerry: Of Passports, Politics, and Foreign Policy Powers*, 10 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 39, 42 (2015).

22. Zachary A. Kady, Note, *Who Decides Where You’re Born? Zivotofsky v. Clinton and the Recognition of Foreign States*, 26 GEO. IMMIGR. L.J. 667, 669 (2012).

section 214(d),²³ arguing that it “would, if construed as mandatory rather than advisory, impermissibly interfere with the President’s constitutional authority to . . . determine the terms on which recognition is given to foreign states.”²⁴ In direct opposition to Congress and section 214(d), both Presidents Bush and Obama refused to enforce the FRAA as it applied to passports for American citizens born in Jerusalem.²⁵

Menachem Zivotofsky was born an American citizen in Jerusalem in 2002.²⁶ His parents sued when the State Department refused to comply with their request—pursuant to section 214(d)—that his birthplace be listed as “Israel” on his American passport.²⁷ His parents filed suit to enforce his statutory rights in 2003,²⁸ and his case spent almost twelve years in federal court before the Supreme Court finally resolved it in the summer of 2015.²⁹ The District Court for the District of Columbia first dismissed the suit on the grounds that Zivotofsky lacked standing and that the case

23. While it may seem strange for a president to sign a law that he believes may be unconstitutional, signing statements such as the one issued by President Bush in connection with the FRAA are increasingly common. See William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 304, 319 (2011) (explaining that it has become common for Presidents to sign laws that they think are unconstitutional and that Presidents can clarify their views through signing statements). Presidents issue signing statements for a variety of reasons, including “to remind Congress of the president’s constitutional powers.” Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006). In many of his signing statements containing constitutional objections to laws, President Bush “interpret[ed] statutory language that otherwise appear[ed] to be mandatory as being merely advisory” to avoid these constitutional problems. *Id.* at 319. President Bush was criticized for what many call an abuse of the signing statement, as he challenged 172 laws with them, but President Obama continued the practice of sometimes issuing signing statements. Karen Tumulty, *Obama Circumvents Laws with ‘Signing Statements,’ a Tool He Promised To Use Lightly*, WASH. POST (June 2, 2014), https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html [<https://perma.cc/M6K7-6BXY>]. For an analysis of what *Zivotofsky II* means for the validity of signing statements, see CHARLIE SAVAGE, *POWER WARS* 671–72 (2015) (presenting the argument that the Supreme Court “implicitly” accepted presidents’ practice of issuing signing statements to “bypass provisions of bills they are signing into law, so long as their legal theories are credible ones”).

24. Reinstein, *supra* note 16, at 5 (omission in original) (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1698 (Sept. 30, 2002)).

25. Ryan M. Scoville, *Compelled Diplomacy in Zivotofsky v. Kerry*, 9 N.Y.U. J.L. & LIBERTY 148, 148 (2015).

26. Reinstein, *supra* note 16, at 5.

27. The initial lawsuit also claimed a violation of section 214(d) as it applied to Zivotofsky’s Consular Report of Birth Abroad. *Zivotofsky I*, 132 S. Ct. 1421, 1425–26 (2012); *Zivotofsky II*, 135 S. Ct. 2076, 2083 (2015). By the time the case made its way to the Supreme Court a second time, though, Zivotofsky had dropped that part of his claim and was only concerned with the birthplace designation on his passport. *Zivotofsky II*, 135 S. Ct. at 2083.

28. *Zivotofsky ex rel. Zivotofsky v. The Secretary of State*, Nos. 03-1921, 032048, 2004 WL 5835212, at *2 (D.D.C. Sept. 7, 2004), *rev’d in part, remanded in part*, 444 F.3d 614 (D.C. Cir. 2006).

29. *Zivotofsky II*, 135 S. Ct. 2076 (decided June 8, 2015).

presented a nonjusticiable political question.³⁰ The D.C. Circuit reversed the district court's decision on standing but, after further factual development on remand, affirmed the district court's dismissal on political question grounds, finding that the case asked the court to interfere with the President's recognition power.³¹

In *Zivotofsky I*, the Supreme Court reversed the finding that the case presented a nonjusticiable political question, as it only asked the Court to determine the correct interpretation of section 214(d), and statutory interpretation "is a familiar judicial exercise."³² The Court remanded and instructed the lower courts to decide the case on the merits—essentially asking the courts to resolve the dispute between Congress and the President about the extent of the President's recognition power and, in turn, the statute's constitutionality.³³

Many scholars have debated the significance of the Court's decision and questioned its likely impact on future political question doctrine claims, with some predicting that the decision will be read narrowly³⁴ and others suggesting broader interpretations, including that no question of statutory interpretation ever again will present a political question.³⁵ One author has suggested that the opinion represents a rejection of the multifactor, prudential political question doctrine analysis in favor of the classical political question doctrine.³⁶ Another took the reasoning a step further and argued that the evolution of the political question doctrine as expressed in *Zivotofsky I* "may increase the likelihood that lower courts find questions justiciable, particularly where federal statutes are involved."³⁷ Yet another went even further and argued "that the case supports a sweeping and significant rule: a claim to a federal statutory right can never present a political question."³⁸

A. The Origins of the Political Question Doctrine

The political question doctrine originated in Chief Justice Marshall's landmark decision for the Court in *Marbury v. Madison*.³⁹ There, the "judiciary gave itself . . . the duty to 'say what the law is,'" with the result being that "the United States has

30. *Zivotofsky I*, 132 S. Ct. at 1426.

31. *Id.*

32. *Id.* at 1427.

33. *Id.* at 1431.

34. See, e.g., Lyle Denniston, *Opinion Analysis: Enabling a Constitutional Fight*, SCOTUSBLOG (Mar. 26, 2012, 6:00 PM), <http://www.scotusblog.com/2012/03/opinion-analysis-enabling-a-constitutional-fight> [<https://perma.cc/48MW-M582>] (suggesting that the case "might not require judges to second-guess major foreign policy choices").

35. See, e.g., Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L.J. 253, 254 (2013).

36. Carol Szurkowski, Recent Development, *The Return of Classical Political Question Doctrine in Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), 37 HARV. J.L. & PUB. POL'Y 347, 348 (2014).

37. Samantha Goldstein, *The Real Meaning of Zivotofsky and Its Impact on Targeted Killings Cases*, 2 NAT'L SECURITY L.J. 147, 162 (2014) (emphasis added).

38. Michel, *supra* note 35, at 254 (emphasis in original).

39. 5 U.S. (1 Cranch) 137 (1803); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 3 (1992).

found itself with the world's most powerful judiciary."⁴⁰ In addition to adopting an expansive view of judicial authority, *Marbury* contains roots of the political question doctrine, or the first statement of what would become "a long-standing reluctance of U.S. judges to decide an entire category of serious disputes in which the legitimacy of an exercise of political power is questioned"⁴¹:

Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But where [the head of a department] is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, . . . it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual⁴²

The *Marbury* Court thus endorsed judicial review of the constitutionality of ministerial executive actions—those that do not involve political discretion—but found judicial review of *discretionary*, or political, executive actions, inappropriate.⁴³ Because the duty to deliver Marbury's commission was assigned by law and was not a discretionary executive action, it was not a political question, and Marbury could seek a remedy through the courts.⁴⁴

The political question doctrine is one of several doctrines of justiciability—such as standing, ripeness, and mootness—that “define the judicial role” by “determin[ing] when it is appropriate for the federal courts to review a matter and when it is necessary to defer to the other branches of government.”⁴⁵ The political question doctrine does not prevent judicial review of questions simply because they might have “potentially significant policy consequences.”⁴⁶ Rather, the doctrine directs courts to find that some questions are inappropriate for judicial review because they “are more effectively resolved by the political branches of government,”⁴⁷ the political branches being Congress and the executive branch.⁴⁸ Commentators have

40. FRANCK, *supra* note 39, at 10.

41. *Id.* at 11.

42. *Marbury*, 5 U.S. (1 Cranch) at 170–71 (emphases added).

43. See Michel, *supra* note 35, at 254–55.

44. *Marbury*, 5 U.S. (1 Cranch) 137; see also Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The “Political Question Doctrine” as a Justiciability Doctrine*, 29 J.L. & POL. 427, 433 (2014).

45. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 49 (5th ed. 2015). Other justiciability doctrines include: standing (“whether the plaintiff is the appropriate person to present the dispute to the courts”); ripeness (“whether a dispute has progressed far enough to make judicial review appropriate”); and mootness (when “the dispute between the parties is stale”). DONALD L. DOERNBERG, C. KEITH WINGATE & DONALD H. ZIEGLER, *FEDERAL COURTS, FEDERALISM, AND SEPARATION OF POWERS* 23–24 (4th ed. 2008).

46. Goldstein, *supra* note 37, at 151.

47. *Id.* (quoting Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1031 (1985)).

48. See HENKIN, *supra* note 9, at 26 (“In the governance of foreign relations, too, the

identified two primary versions of the political question doctrine employed by the federal courts throughout history: (1) the *classical* (or constitutional) political question doctrine and (2) the *prudential* political question doctrine.⁴⁹ Both versions include factors that are disproportionately present in cases that involve foreign affairs, war powers, or national security.

1. The Classical Political Question Doctrine

The classical version of the political question is “invoked to dismiss cases only when the text and structure of the Constitution itself demand[] it.”⁵⁰ Many commentators trace this version of the political question doctrine back to the origins of the doctrine in *Marbury*, when Chief Justice Marshall defined “the role of the federal courts in the new constitutional system.”⁵¹ This early version of the political question doctrine “focused closely on constitutional text and structure” and was seen as “stem[ming] from the Constitution’s separation of powers.”⁵² Under the classical doctrine, a political question exists *only* if the Constitution’s text and structure designates another branch of government to make the decision before the court. If a political question exists, courts will “treat[] certain well-defined . . . decisions by the political branches as final and binding.”⁵³ But if the Constitution’s text and structure do not clearly indicate which branch of government is to make the decision, the courts have “not only the ability, but also the obligation to decide cases or controversies that [came] before them.”⁵⁴

2. The Prudential Political Question Doctrine

The prudential political question doctrine originated when courts “began to consider arguments from outside the four corners of the Constitution,” or nontextual and

political authority of the United States is lodged in the President and Congress . . .”).

49. See, e.g., Goldstein, *supra* note 37, at 150–55; Szurkowski, *supra* note 36, at 347–48. The classical political question doctrine is often also referred to as the “no power” theory; the prudential political question doctrine may also be referred to as the “discretionary” political question doctrine. Theodore Lawrence Craft, Note, *Political Questions—Classical or Discretionary Applications of Judicial Review?*, 4 SUFFOLK U. L. REV. 127, 128–29 (1969). In the context of the justiciability doctrines, “prudential” often refers to considerations that stem not from Article III constitutional and mandatory limitations on judicial power but from a court’s own considerations of “prudent judicial administration.” ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 42 (7th ed. 2016). It has never been clear whether the political question doctrine is a “constitutional” or “prudential” limitation, and the Supreme Court “has sometimes invoked both constitutional and prudential factors in finding cases to be a political question.” JARED P. COLE, CONG. RESEARCH SERV., R43834, *THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS* 6–8 (2014).

50. Szurkowski, *supra* note 36, at 347.

51. *Id.* at 352.

52. *Id.* at 353.

53. Goldstein, *supra* note 37, at 151 (alteration added) (omission in original) (quoting Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1400 (1999)).

54. Szurkowski, *supra* note 36, at 353.

nonstructural arguments, “when making political question determinations.”⁵⁵ *Baker v. Carr*⁵⁶ is widely recognized as the landmark case that established a multifactor test employing “prudential” concerns, as opposed to the less flexible nature of the classical approach, in deciding whether a case presents a nonjusticiable political question.⁵⁷

The plaintiffs in *Baker* asked the Supreme Court to declare that Tennessee’s apportionment statute denied them equal protection under the Fourteenth Amendment by affecting the strength of their votes for state legislators.⁵⁸ In the decades prior to *Baker*, courts (under the guise of the political question doctrine) consistently declined to get involved in questions of equal protection and apportionment, even when those schemes were “recognizably discriminatory.”⁵⁹

In changing course and deciding that the issue did *not* present a nonjusticiable political question, the Supreme Court instructed courts to conduct a “case-by-case inquiry,”⁶⁰ applying a multifactor test that considers various prudential factors and “sought to identify cases that courts *could* hear (i.e., where jurisdiction is properly established) but *should not* hear because of the inappropriateness of the subject matter given the proper role and abilities of the Judiciary.”⁶¹ Where the classical version of the political question doctrine required courts to hear cases unless the decision at issue was constitutionally designated to another branch, the prudential version gives courts discretion to consider “extra-constitutional factors in determining whether they will exercise the power of review.”⁶²

After *Baker v. Carr*, a political question existed if the issue presented the following:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of

55. *Id.*

56. 369 U.S. 186 (1962).

57. See, e.g., Goldstein, *supra* note 37, at 151 (referring to *Baker* as “the seminal case” in political question doctrine jurisprudence); Skinner, *supra* note 44, at 450 (arguing that the political question took on “new . . . life” after *Baker*); Szurkowski, *supra* note 36, at 354 (calling *Baker* a “watershed case”).

58. *Baker*, 369 U.S. at 187–88.

59. See T. Rodman Layman, *Aftermath of Baker v. Carr*, 4 WM. & MARY L. REV. 93, 95–97 (1963) (citing *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (per curiam); *Colegrove v. Green*, 328 U.S. 549 (1946)).

60. *Baker*, 369 U.S. at 211.

61. Andrew Hand, *Forbidden Territory or Well-Defined Boundaries? M.B.Z. v. Clinton and the Overzealous Application of the Political Question Doctrine*, 7 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 61, 64 (2011) (emphases in original).

62. Craft, *supra* note 49, at 129.

embarrassment from multifarious pronouncements by various departments on one question.⁶³

The first three factors embody the classical or mandatory version of the political question doctrine; the final three, the prudential factors.⁶⁴ The factors are disjunctive, so the presence of any one factor gives a court discretion to dismiss a case as a non-justiciable political question.⁶⁵ In *Baker*, though, the Supreme Court found that the case did *not* present a nonjusticiable political question because it found none of the factors, classical or prudential, present.⁶⁶ The plaintiffs were asking the Court only to determine whether a state law complied with the Constitution:

We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.⁶⁷

While the Court in *Baker* employed these factors and found that the equal protection issue did *not* present a political question, the prudential, multifactor analysis gives courts *more* discretion to dismiss a case as presenting a nonjusticiable political question.⁶⁸ The Court has found only two cases post-*Baker* to present nonjusticiable political questions, but lower courts frequently apply the prudential political question doctrine, particularly in the area of foreign affairs.⁶⁹

3. The Political Question Doctrine in Questions of Foreign Affairs

The historical reluctance of courts to resolve foreign affairs disputes between the political branches of government⁷⁰ can be traced all the way back to Chief Justice Marshall's opinion in *Marbury v. Madison*.⁷¹ In introducing the political question doctrine, the Court singled out foreign affairs as an example of an area of politics into which courts should tread lightly:

63. *Baker*, 369 U.S. at 217 (numbering added).

64. *See Zivotofsky I*, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring) (referring to the final three factors as “address[ing] circumstances in which prudence may counsel against a court’s resolution of an issue presented”); *see also* Szurkowski, *supra* note 36, at 355.

65. *Id.*; *see also* Hand, *supra* note 61, at 64.

66. *Baker*, 369 U.S. at 226.

67. *Id.* (footnote omitted).

68. Szurkowski, *supra* note 36, at 355.

69. 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, 267–68, 267 n.158 (2002).

70. HENKIN, *supra* note 48, at 132–33.

71. FRANCK, *supra* note 39, at 3.

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his own country in political character and to his own conscience

The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs The acts of such an officer, as an officer, can never be examinable by the courts.⁷²

In the centuries since, courts and even more executive branch lawyers have widely accepted this dicta as support for the principle “that foreign affairs are *different* from all other matters of state in some crucial fashion.”⁷³ Because courts have historically been more hands-off in the realm of foreign affairs, “the most basic questions concerning allocation of the foreign affairs power remain unanswered” by courts.⁷⁴

One explanation for this result is that some of the *Baker* factors—“constitutional commitment to the political branches, the need for fact-finding by the political branch, a lack of judicially manageable standards, and prudential considerations”⁷⁵—are inherently more likely to be tangled in the resolution of any foreign affairs debate.⁷⁶ *Zivotofsky I* was arguably such a case,⁷⁷ but the Court declined to find a political question in the statutory interpretation of section 214(d). This decision will be explored in Part I.B.

B. Statutory Political Questions and *Zivotofsky v. Clinton*

Scholars argue that *Zivotofsky I* represents a significant shift in the Court’s application of the political question doctrine.⁷⁸ Perhaps most striking, the majority opinion in *Zivotofsky I* did not consider the prudential factors by name or even acknowledge the *Baker* test as a precedential framework.⁷⁹

Justice Sotomayor concurred with the Court’s conclusion that the case did not

72. *Id.* (omissions in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

73. *Id.* (emphasis in original); see also Szurkowski, *supra* note 36, at 357.

74. Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 215–16 (1985) (“Although the allocation question [of the foreign affairs power] is as old as the Constitution, the Supreme Court has made little effort to supply answers”); see also Theodore Y. Blumoff, *Judicial Review, Foreign Affairs and Legislative Standing*, 25 GA. L. REV. 227, 229 (1991) (“To which branch of government the Constitution consigns particular foreign relations powers—and how the courts should determine title to these powers—are questions that still defy simple answers.”).

75. Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 U. COLO. L. REV. 65, 67 (1977).

76. For example, courts have long applied functionalist approaches to separation of powers analyses in the realm of foreign affairs. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384 (2015). Perhaps the prudential version of the political question doctrine more easily allows courts to take functionalist concerns into consideration.

77. See *Zivotofsky I*, 132 S. Ct. 1421, 1437–41 (2012) (Breyer, J., dissenting) (arguing that the case presented a political question under the *Baker* factors).

78. See Michel, *supra* note 35 and accompanying text.

79. Szurkowski, *supra* note 36, at 358.

present a political question but wrote separately to contest the majority opinion's omission of a *Baker* analysis.⁸⁰ Her concurrence applied all six *Baker* factors, eventually concluding that the case only presented a question of constitutional and statutory interpretation, which is "textually committed" to the judiciary.⁸¹ Justice Breyer shared Justice Sotomayor's concerns about the majority opinion's lack of *Baker* analysis and joined that part of her opinion; he ultimately dissented because he believed that under *Baker*, the case *did* present a political question, giving special weight to "prudential considerations."⁸²

One commentator was similarly shocked by the lack of *Baker*-type prudential political question analysis because *Zivotofsky I* seemed to present an easy case for a nonjusticiable political question under the prudential factors:

[I]f a court were to enforce the Foreign Relations Authorization Act in this case, it could effectively resolve one of the country's most sensitive foreign relations questions: the political status of Jerusalem. Strong arguments could be made that the fourth, fifth, and sixth *Baker* factors—which are present when a court's decision could express a lack of respect for coordinate branches of the federal government, when there is an "unusual" need for the court to adhere to a decision that has already been made, and when there is a potential for embarrassment to the United States resulting from the conflicting decisions of various branches—were all present in *Zivotofsky*.⁸³

Instead, the *Zivotofsky I* Court took a different approach, marking the political question doctrine as a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"⁸⁴ The Court emphasized "[t]he existence of a statutory right" as being relevant to its decision:

The federal courts are 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. To resolve his claim, the Judiciary must decide if *Zivotofsky*'s interpretation of the statute is correct, and whether the statute is constitutional. *This is a familiar judicial exercise*.⁸⁵

Returning to the landmark case of *Marbury v. Madison*, the majority declared that "when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"⁸⁶ Just

80. *Zivotofsky I*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring).

81. *Id.* at 1435.

82. *Id.* at 1437 (Breyer, J., dissenting).

83. Szurkowski, *supra* note 36, at 358 (footnotes omitted).

84. *Zivotofsky I*, 132 S. Ct. at 1427 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

85. *Id.* (emphasis added).

86. *Id.* 1427–28 (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch)

as there is something different about foreign affairs and the political question doctrine, there is something different about statutory rights and the political question doctrine. Prior to *Zivotofsky I*, the Supreme Court had never found a political question in a case involving a statutory claim, but lower courts had.⁸⁷ *Zivotofsky I* likely gives lower courts less discretion to avoid the merits of tough separation of powers disputes involving statutory claims.⁸⁸

Many critics of the political question doctrine saw this as an improvement. For example, one author has suggested that by creating a general rule *against* political questions of statutory interpretation, *Zivotofsky I* “injects needed doctrinal clarity and vindicates fundamental values of separation of powers, access to courts, and executive compliance with the law.”⁸⁹ If previous applications of the political question doctrine made it easy to find executive foreign affairs questions nonjusticiable, a rule against political questions of statutory interpretation could lead courts to be much more active in the area of foreign affairs, which could theoretically lead to greater executive compliance with the law.⁹⁰ After all, the Supreme Court’s “role as the ultimate tiebreaker between the political branches helps sustain the constitutional order.”⁹¹

A more active federal judiciary will seem like an improvement to those who see the political question doctrine as “operat[ing] asymmetrically in favor of the executive.”⁹² In other words, when a court finds a claim to present a political question, “the defendant wins and the status quo prevails.”⁹³ When the central allegation is that the executive branch is not complying with a statute, we are right to be wary of judicial passivity, as the result is that Congress and individuals with statutorily protected rights and interests are without redress.⁹⁴ A rule against statutory political questions prevents the executive branch from relying on faulty statutory interpretations to defy statutory commands without having to defend its interpretations on the merits.⁹⁵

Praise of a rule against statutory political questions is misguided, though, if it ignores the possibility that the judiciary will continue to legitimize illegal activity by a political branch of government by ruling in favor of that branch on the merits, possibly applying other modes of deference, such as executive branch fact deference.⁹⁶ Instructing lower courts to decide difficult questions on the merits does not necessarily mean that those courts will be any less deferential to the executive

137, 177 (1803)).

87. Michel, *supra* note 35, at 256 (“[L]ower federal courts have increasingly embraced statutory political questions, especially as statutory claims against the executive multiplied after September 11, 2001.”).

88. COLE, *supra* note 49, at 22 (“[M]any lower federal courts have dismissed cases involving statutes that concern foreign affairs on political question grounds. A fair reading of *Zivotofsky* indicates much less room to do so in the future.”).

89. Michel, *supra* note 35, at 254.

90. *See id.* at 261.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 262.

96. *See infra* Part III.

branch.⁹⁷ At least one commentator expressed this fear post-*Zivotofsky I*, worrying that “judicial review might effectively act as a rubber stamp, solidifying even the most questionable of the Executive’s practices, without providing a real procedural check on his actions.”⁹⁸ This will be explored in Part IV.

II. FOREIGN AFFAIRS IN THE COURTS: SOME RECENT TRENDS AND EXPLANATIONS

The Supreme Court’s decision in *Zivotofsky I* is not necessarily out of line with many of its recent decisions in the realm of foreign affairs. Many scholars have recognized that in recent years, the Supreme Court has been more willing to tread into the waters of foreign affairs and has been somewhat less deferential to the political branches in doing so.⁹⁹

For example, Professor Cohen identified a trend of the Roberts Court taking a more active role in deciding foreign affairs cases (such as cases involving enemy combatants and foreign sovereign immunity).¹⁰⁰ Specifically, he found that in those cases, the Roberts Court “jettisoned its traditional functionalism in favor of formalism.”¹⁰¹ Functionalist approaches to constitutional and statutory interpretation questions in the area of foreign affairs are more likely to favor the executive branch.¹⁰² According to Cohen, as the Court began to see more cases come before it regarding President George W. Bush’s expansive views of his own executive authority, the Court became more “wary to give the Executive unfettered control of foreign affairs law, rejecting on multiple occasions the executive branch’s view of the law.”¹⁰³ Similarly, the Court seemed to be losing faith in Congress and its willingness “to play its constitutional role and check the President effectively.”¹⁰⁴ Cohen calls this the “formalism of distrust,” or “the Court reasserting control and taming the political branches.”¹⁰⁵

97. See Goldstein, *supra* note 37, at 195 (“[W]ith respect to foreign policy questions, courts—even when refusing to defer to the Executive on his claims of nonjusticiability—tend to be highly deferential to the President on the merits.”).

98. *Id.*

99. See, e.g., Cohen, *supra* note 76; Dawn Johnsen, “*The Essence of a Free Society*”: *The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467 (2012).

100. Cohen, *supra* note 76, at 384.

101. *Id.* at 384–85. Courts often choose between “formal and functional tools” when deciding constitutional and statutory interpretation. *Id.* at 391. Scholars have enumerated a number of ways to distinguish between the two approaches, but Cohen summarized the distinction as such: “Should the Constitution and statutes be interpreted strictly, to guarantee that all act within established rules and roles [formalistically], or broadly, with an eye towards achieving the government’s or Constitution’s goals [functionally]?” *Id.*

102. *Id.* at 395. One reason for this is that the executive branch can rely on “unique functions of the President as ‘sole organ of the federal government in the field of international relations’ to justify expansive Executive power.” *Id.* at 395 (footnote omitted) (quoting *United States v. Curtiss-Wright Exp. Corp.*, 229 U.S. 304, 320 (1936)). Another is that so few foreign affairs powers are explicitly defined in the Constitution, making it difficult to rely on formalistic tools to answer questions of foreign affairs in favor of the President. *Id.* at 395–96.

103. *Id.* at 420.

104. *Id.*

105. *Id.* at 421.

Professor Johnsen also recognized a trend in the Supreme Court's decisions in the area of foreign affairs that she similarly saw as a reaction to the Bush Administration's sweeping and expansive views of presidential authority.¹⁰⁶ Even though "[f]oreign affairs, national security, [and] war powers . . . all top the list of areas in which the judiciary historically has practiced the greatest restraint and deference in reviewing executive action," the Court demonstrated that there are limits to that restraint and deference when it showed uncharacteristic willingness "to scrutinize and reject early Bush Administration policies regarding the detention and prosecution of those suspected of terrorism."¹⁰⁷ She attributed this to the legacy and leadership of Justice John Paul Stevens and argued that more recent silence from the Court on matters of detainee treatment can be attributed to Justice Stevens's retirement from the Court.¹⁰⁸ Similar to Cohen, Johnsen also saw this trend as possibly motivated by "the exceptional circumstances surrounding [the] cases, and especially the Bush Administration's flawed approach to its own constitutional authority."¹⁰⁹ Therefore, in situations without these special factors (including, possibly, a different President), "the Court may afford significant deference to executive interpretations involving foreign affairs."¹¹⁰

These theories, among others, offer thorough analyses and explanations of a recent trend, which is that, overall, federal courts have become more receptive to deciding tough foreign affairs questions on their merits. They do not, however, explain the recent examples of executive branch fact deference as demonstrated in *Holder v. Humanitarian Law Project* and *Zivotofsky II*. Cohen's argument that the Supreme Court is increasingly moving toward a formalist approach to foreign affairs might explain the application of the political question doctrine in *Zivotofsky I*, but it simply cannot explain why the Supreme Court would then be willing to defer to executive branch findings of fact in *Holder v. Humanitarian Law Project* and *Zivotofsky II*.¹¹¹

106. See generally Johnsen, *supra* note 99.

107. *Id.* at 469.

108. *Id.* at 470–72, 472 ("Undoubtedly, Justice Stevens championed detainees' rights and the rule of law while on the Court, and the loss of his passionate and principled voice inevitably altered internal Court dynamics on detainee issues."). For example, Justice Stevens authored the Court's opinion in *Rasul v. Bush*, 542 U.S. 466 (2004), holding that the federal habeas corpus statute applied to detainees at Guantánamo Bay. Johnsen, *supra* note 99, at 469–70. "After deciding five military detention cases in five years, the Supreme Court has not since 2008 decided the merits of another case that involves the rights of Guantánamo detainees or otherwise defines the scope of the President's military detention authority." *Id.* at 470. Justice Stevens retired in 2010, and in the year following his retirement, "the Court denied certiorari in six Guantánamo cases from the D.C. Circuit." *Id.* at 471.

109. Johnsen, *supra* note 99, at 501.

110. *Id.* For example, Johnsen notes that President Barack Obama made a concerted effort at the beginning of his term to "reject[] the Bush Administration's approach as inconsistent with our legal traditions and values." *Id.* at 517. She offers the Obama Administration's "more modest view of executive authority" as a possible explanation for why the Supreme Court has been more silent in its review of detainee habeas corpus cases lately. *Id.* at 519. ("Not a single detainee has prevailed on appeal and secured release since the Supreme Court ordered habeas corpus review in *Boumediene v. Bush* in 2008 . . .").

111. In fact, under Cohen's theory, *Zivotofsky II* probably should have come out differently, as the majority opinion took a very functionalist approach to find that the recognition

Johnsen's argument that the Supreme Court distrusted the Bush Administration's legal interpretations might explain its activism in certain kinds of post-9/11 cases and its more recent silence in those same cases, but it does not explain why the Supreme Court would once again begin to take a more active role in deciding questions of foreign affairs by scaling back its application of the political question doctrine.

Part III of this Note is devoted to explaining the concept of executive branch fact deference and demonstrating that the Court implicitly relied on it in *Humanitarian Law Project* and *Zivotofsky II*.

III. FOREIGN AFFAIRS AND EXECUTIVE BRANCH FACT DEFERENCE

If the Supreme Court is truly moving away from applying the political question doctrine as a separation of powers principle,¹¹² we must begin to wonder how that trend will interact with other trends in foreign affairs jurisprudence. As the rest of this Note will demonstrate, the increasing willingness of the courts to decide foreign affairs cases on the merits is meaningless without an accompanying change in the current deference given to the executive branch's findings of fact in the realm of foreign affairs and national security. In fact, if both of these trends hold, the change in courts' application of the political question doctrine may do more harm than good, as it will result in the courts "rubber stamping" and legitimizing actions of the executive branch that they previously might have found nonjusticiable.¹¹³

Professor Robert Chesney coined the term "national security fact deference" to characterize arguments by the executive branch that judges should "defer to factual judgments made by the executive branch in litigation involving national security."¹¹⁴ As an initial matter, Chesney notes that some might object to the characterization of certain claims as being "national security" in nature because of traditional definitions associated with that term.¹¹⁵ However, his fact deference decision rule for judges is a four-part consideration of various factors that can be "appl[ied] by extension to fact deference claims having little or no relation to national security."¹¹⁶ Therefore, even though his examples are primarily illustrative of fact deference in the realm of national security, it is not difficult to extrapolate principles from his theory to be applied to areas such as foreign affairs or war powers more generally.¹¹⁷

Chesney's theory for when judges will defer to executive branch findings of fact comprises four clusters of considerations: "core accuracy, weighted accuracy, prudence, and legitimacy."¹¹⁸ "Core accuracy" concerns institutional competency: a court is more likely to defer to another institution (i.e., political branch) when that

power resides exclusively in the executive branch. See Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 131 (2015) (describing the majority opinion as a "detailed functional analysis in support of exclusive presidential power" (emphasis added)).

112. See *supra* Part I.

113. See *infra* Parts III–IV.

114. Chesney, *supra* note 14, at 1362.

115. *Id.* at 1402.

116. *Id.* at 1403 n.147.

117. See *supra* note 8.

118. Chesney, *supra* note 14, at 1392.

institution is more competent in the given realm and more likely to resolve the issue in front of it accurately.¹¹⁹ “Weighted accuracy” concerns the possibility of error with respect to the gravity of the error: judges are likely to consider the weight of the interests at stake when making a decision, because “in some contexts there may be more harm in a false positive than a false negative.”¹²⁰ “Prudence” includes such concerns as “efficiency, collateral impact, institutional self-preservation, and democratic accountability concerns.”¹²¹ For example, judges might be more likely to opt for fact deference when another branch has the advantage in speedy decision making.¹²² Finally, concerns of “legitimacy” might arise when “various functional or prudential factors warrant giving the authority to that institution,” or when a source of law—such as the Constitution—directly commits the decision to an institution.¹²³

The scenarios most relevant for Chesney in which the executive branch tends to argue for fact deference are individual eligibility for military detention, group compliance with the law of war, the state secrets privilege, and military exigency and preparedness.¹²⁴ Many fact deference cases involve claims by the executive (1) of various justiciability grounds to hearing the case and (2) that, in the alternative, the courts should at least defer to the executive’s findings of fact when deciding the merits.¹²⁵

Chesney gives *United States v. Lindh* as an example of his theory playing out in full force.¹²⁶ The government argued for dismissal on political question grounds and, in the alternative, deference to the executive branch’s findings of fact.¹²⁷ The government’s political question argument essentially rested on what it saw to be varying institutional competencies among the branches of government: the judiciary is simply not fit to make factual determinations “about conditions in an area of active combat operations,” and it should leave that task to the President, who has “multiple sources of information and intelligence about organization and structure of forces opposing the United States.”¹²⁸ This sounds like the prudential version of the political question doctrine—but it is a version of the political question doctrine that the district court in *Lindh* rejected.¹²⁹

As Chesney notes, however, “it is one thing to insist that there must be some form of judicial review, and quite another to say that such review must be non-deferential.”¹³⁰ The government alternatively argued that the President’s determination of Lindh’s eligibility for immunity under the Geneva Conventions deserved deference under “a doctrine calling for courts to defer to the President’s interpretation

119. *Id.* at 1393.

120. *Id.* at 1395.

121. *Id.* at 1397.

122. *Id.*

123. *Id.* at 1399.

124. *Id.* at 1366.

125. *See id.* at 1367.

126. *Id.* at 1371 (citing *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002)).

127. *Id.* at 1373–74.

128. *Id.* at 1374–75.

129. *Id.* at 1375.

130. *Id.*

of ambiguous treaty language.”¹³¹ The district court *did* accept that argument—thereby reaching, functionally, the same result as if it had dismissed the case as a nonjusticiable political question: Lindh lost his argument for immunity.¹³²

Chesney is not the only scholar to attempt to categorize judicial deference to the political branches. Professor William Eskridge and Lauren Baer categorized a continuum of deference regimes employed by the Supreme Court when it is asked to defer to executive branch interpretation of a statute.¹³³ They found the “strongest form of deference” in cases involving foreign affairs and national security, labeling it “*Curtiss-Wright* Super-Deference” after *United States v. Curtiss-Wright Export Corp.*¹³⁴ According to Eskridge and Baer’s empirical analysis, the arena of foreign affairs and national security is one where the judiciary frequently defers to the executive branch’s interpretation of statutes, even if the Court does not mention *Curtiss-Wright* explicitly, instead “go[ing] along with legally weak executive department arguments in cases involving foreign affairs or national security.”¹³⁵

A. *Holder v. Humanitarian Law Project: Defining “Material Support”
and “Foreign Terrorist Organizations”*

The 2010 case of *Holder v. Humanitarian Law Project*¹³⁶ is an instructive example of the theories of executive branch fact deference at play in a case that may not have raised separation of powers concerns on its face. The plaintiffs in *Humanitarian Law Project* brought a First Amendment challenge to 18 U.S.C. § 2339B, which criminalizes the provision of “material support or resources” to organizations deemed “foreign terrorist organization[s]” (FTOs).¹³⁷ They wanted to provide monetary support for the humanitarian and political activities of two groups that were deemed FTOs and argued that § 2339B violated the First Amendment because it criminalizes *all* support given to FTOs, even if the plaintiffs did not intend to “further the *unlawful* ends of those organizations.”¹³⁸

The Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, has the power to designate which organizations are considered FTOs for purposes of § 2339B.¹³⁹ The Secretary has discretion to designate an organization as an FTO “upon finding that it is foreign, engages in ‘terrorist activity’ or ‘terrorism,’ and thereby ‘threatens the security of United States nationals or the national security of the United States.’”¹⁴⁰ Technically, an organization that has been deemed an FTO has the right to appeal that decision in the D.C. Circuit, but

131. *Id.*

132. *Id.* at 1375–76.

133. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

134. *Id.* at 1100 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936)).

135. *Id.* at 1102.

136. 561 U.S. 1 (2010).

137. *Id.* at 8.

138. *Id.* at 11 (emphasis added).

139. *Id.* at 9.

140. *Id.*

that right appears—in practice—to be limited. That court has twice asked the Secretary of State to “convene a hearing” to allow the FTO to challenge its status, but it “has so far refused to review the Secretary’s determination that an FTO threatens the security of U.S. nationals or American national security, effectively insulating that type of political question from judicial review.”¹⁴¹ Therefore, it appears that courts give the Secretary of State’s determination that a particular group is an FTO great fact deference.

The Supreme Court applied “rigorous scrutiny”¹⁴² and upheld the statute as applied to the plaintiffs against the First Amendment challenge. The decision relied not only on the Secretary of State’s determination that the groups at issue were FTOs but also on the finding that *all* support to an FTO is “material support”—namely, that “money is fungible, and that the terrorist organizations—in general—are not known for erecting institutional ‘firewalls’ to prevent commingling of funds between their nonviolent and violent wings.”¹⁴³ Therefore, the plaintiffs could not donate *any* money for *any* purpose—even a peaceful one—to an organization deemed an FTO without violating § 2339B. Professor Said criticized this portion of the Court’s opinion for its reliance on only a few sources for this assertion, two of which were (1) an affidavit by a *State Department official*, and (2) a book by a *former Treasury Department official*.¹⁴⁴ Justice Breyer noted as much in his dissent when he argued that “the Government has provided us with no empirical information that might convincingly support this claim.”¹⁴⁵

In short, as Professor Said writes:

Once the Secretary of State declares that a group is an FTO, the group becomes so toxic and irredeemable that any coordinated activity that contributes to the nebulous quality of legitimacy is illegal. Arguments about the justness of the FTO’s cause are rejected as justification for terrorism, and any attempts to encourage the FTO to eschew violence are viewed as naïve ruses intended to allow a group to continue its violent mission surreptitiously.¹⁴⁶

While the foreign affairs question in *Humanitarian Law Project* involved the *co-operation* of Congress and the executive branch (Congress to enact the statute, and the Secretary of State to determine which groups qualify for FTO status)—and not the *opposition* of Congress to an executive branch foreign affairs or national security policy—the decision in *Humanitarian Law Project* raises troubling questions about the level of executive branch fact deference the Supreme Court will show the political branches of government in cases involving national security and foreign affairs. This deference regime may just be another way for the courts to avoid getting

141. Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYU L. REV. 1455, 1489.

142. *Id.* at 1499 (noting as interesting that the opinion did not use the term “strict scrutiny”).

143. *Id.* at 1500–01.

144. *Id.* at 1501.

145. *Humanitarian Law Project*, 561 U.S. at 47 (Breyer, J., dissenting).

146. Said, *supra* note 141, at 1504.

involved in foreign affairs and national-security politics, just as the political question doctrine is.

B. Executive Branch Fact Deference as a Separation of Powers Principle: The New Political Question Doctrine in Action in Zivotofsky v. Kerry

When Menachem Zivotofsky's passport case made it back to the Supreme Court (after almost twelve years), the Supreme Court found itself tasked with resolving a dispute between the political branches of government. Not surprisingly,¹⁴⁷ the majority invoked the familiar tripartite framework from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*:¹⁴⁸

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.¹⁴⁹

The Secretary of State acknowledged that the executive branch's policy of refusing to enforce section 214(d)¹⁵⁰ put the President in category three—in which his power was at “its lowest ebb.”¹⁵¹ Even acknowledging that claims in this third category must be “scrutinized with caution,”¹⁵² the Supreme Court went on to strike down section 214(d) as unconstitutionally infringing on what it saw to be the “President's exclusive recognition power.”¹⁵³ It was the first time in history that the Supreme Court “accepted a President's direct defiance of an Act of Congress in the field of foreign affairs.”¹⁵⁴ More notably, the decision marks only the second time in the history of the Constitution that the Supreme Court has found a *nonenumerated* executive branch power to be exclusive (the other being the power to remove executive officials).¹⁵⁵

147. AMANDA DiPAOLO, *ZONES OF TWILIGHT* 11–12 (2010) (“Jackson's concurrence is cited in federal court opinions today as a framework to be used in deciding cases dealing with which branch of government has authority to use the war powers.”).

148. *Zivotofsky II*, 135 S. Ct. 2076, 2083–84 (2015).

149. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) (emphases added).

150. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d) 116 Stat. 1350, 1366 (2002) (codified in scattered sections of the U.S.C.).

151. *Zivotofsky II*, 135 S. Ct. at 2084 (quoting *Youngstown*, 343 U.S. at 637).

152. *Id.* (quoting *Youngstown*, 343 U.S. at 638).

153. *Id.* at 2087 (emphasis added).

154. *Id.* at 2113 (Roberts, J., dissenting).

155. Reinstein, *supra* note 16, at 58–60 (arguing, instead, that “executive recognition de-

To be clear, there is no explicit language of deference to the executive branch in the majority opinion of *Zivotofsky II*. In fact, the majority actually rejected the broadest form of the executive branch's argument regarding its powers in foreign affairs, which is that the President "has 'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers.'"¹⁵⁶ Instead, the majority purports to confine its statement of executive authority to that of the recognition power alone.¹⁵⁷

Still, the majority opinion's acceptance of various other arguments is an exercise of executive branch fact deference. For example, the majority accepted the executive branch's assertion that enforcing section 214(d) would infringe on the president's recognition powers by irreparably signaling a shift in America's recognition policy regarding the status of Jerusalem.¹⁵⁸ The executive branch argued that listing "Israel" on passports for citizens born in Jerusalem would have disastrous foreign affairs consequences in the area of conflict.¹⁵⁹ However, the debate surrounding section 214(d) is remarkably analogous to the debate surrounding the Taiwan Relations Act,¹⁶⁰ part of which "directed the Secretary of State to permit United States citizens born in Taiwan to list 'Taiwan' as their place of birth on their passports, despite the fact that the United States did not recognize Taiwan as a foreign state."¹⁶¹ In response, the

cisions are not exclusive but are subject to laws enacted by Congress"). The other non-enumerated, exclusive power is the power of the President "to remove executive officials." *Id.* at 58.

156. *Zivotofsky II*, 135 S. Ct. at 2089.

157. *Id.*

158. *Id.* at 2095–96 ("[I]ndeed, observers interpreted § 214 as altering United States policy regarding Jerusalem—which led to protests across the region.").

159. *See id.* at 2081–82.

160. Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified in scattered sections of the U.S.C.).

161. Grand, *supra* note 21, at 45. The history of U.S. relations with China and Taiwan is complex and is largely beyond the scope of this Note. Simply put, the United States has *officially* adhered to a one-China policy since 1972, meaning that the United States formally recognizes only one China and recognizes Taiwan as being part of China. *What Is the One-China Policy?*, SLATE (May 24, 2000, 10:31 PM), http://www.slate.com/articles/news_and_politics/explainer/2000/05/what_is_the_onechina_policy.html [<https://perma.cc/B3CU-LKRY>]. However, despite this official policy, the United States maintains "unofficial" relations with Taiwan, including trade and the sale of defense weapons from the United States to Taiwan. Justin Fishel & Elizabeth McLaughlin, *The US's One-China Policy Explained*, ABCNEWS (Feb. 10, 2017, 8:26 AM), <http://abcnews.go.com/Politics/uss-china-policy-explained/story?id=43983884> [<https://perma.cc/8WK9-H8UF>]. It is unclear what the status of the one-China policy will be going forward. President Donald Trump recently made headlines when, shortly after his election as president in November 2016, he accepted a congratulatory phone call from Taiwan's President Tsai Ing-wen. Mark Landler & David E. Sanger, *Trump Speaks with Taiwan's Leader, an Affront to China*, N.Y. TIMES (Dec. 2, 2016), <http://www.nytimes.com/2016/12/02/us/politics/trump-speaks-with-taiwans-leader-a-possible-affront-to-china.html> [<https://web.archive.org/web/20170504182003/https://www.nytimes.com/2016/12/02/us/politics/trump-speaks-with-taiwans-leader-a-possible-affront-to-china.html>]. He is believed to be the first U.S. president or president-elect to speak with any Taiwanese leader in decades. *Id.* With "a single protocol-shattering phone call," President Trump has "shaken up the diplomatic status quo on the issue." Mark Landler, *Donald Trump Thrusts Taiwan Back on the Table, Rattling a Region*, N.Y. TIMES (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/us>

State Department complied with the law, while “issuing a formal policy declaration stating that its ‘one-China’ policy had not changed despite the new passport legislation.”¹⁶² Despite this historical precedent involving formal recognition decisions and passports, the Supreme Court went on to hold that requiring the Secretary of State to list “Israel” on passports for citizens born in Jerusalem would force the President to contradict his own recognition determination (even though, as the majority recognized, “the statement required by § 214(d) would not itself constitute a formal act of recognition”).¹⁶³

The majority of the Court’s opinion is devoted to the consideration of whether the recognition power lies exclusively in the President,¹⁶⁴ and this Note does not address whether that decision was correct on the merits. To be sure, reasonable minds can and have differed on the issue of whether the recognition power lies exclusively in the executive branch,¹⁶⁵ and U.S. policy toward Jerusalem and Israel will continue to remain a delicate and sensitive issue.¹⁶⁶ Instead, this Note attempts to address the *process* by which the majority arrived at its decision in order to show that the majority exhibited patterns of deference to the executive branch. That process has already been criticized by Jack Goldsmith, who argues that the decision will be read by

/politics/donald-trump-taiwan-china.html [http://web.archive.org/web/20170509172023/https://www.nytimes.com/2016/12/03/us/politics/donald-trump-taiwan-china.html?_r=1].

162. Grand, *supra* note 21, at 45.

163. *Zivotofsky II*, 135 S. Ct. at 2095.

164. Goldsmith, *supra* note 111, at 127.

165. Compare Reinstein, *supra* note 16, at 2 (arguing that the recognition power is not exclusive and is “subject to the legislative control of Congress”), with Kady, *supra* note 22 (arguing that the recognition power belongs exclusively to the president).

166. In recent months, U.S. policy toward Israel has become even more complicated by the election of President Donald Trump and U.S. abstention from a United Nations Security Council vote condemning Israeli settlements on Palestinian land. Before his inauguration, President-elect Trump had urged the United States to veto the resolution, and Israeli Prime Minister Benjamin Netanyahu saw the abstention as a direct affront to U.S.-Israeli relations. Karen DeYoung, *How the U.S. Came To Abstain on a U.N. Resolution Condemning Israeli Settlements*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/world/national-security/how-the-us-came-to-abstain-on-a-un-resolution-condemning-israeli-settlements/2016/12/28/fed102ee-cd38-11e6-b8a2-8c2a61b0436f_story.html [https://perma.cc/T4KX-K4Y9]. Departing Secretary of State John Kerry defended the abstention a few days later in a speech that Israeli leaders saw “as a parting shot from an unfriendly American administration in its final weeks.” Felicia Schwartz & Rory Jones, *U.S. Escalates Tensions with Israel*, WALL ST. J., Dec. 29, 2016, at A1. Shortly after the abstention, the President-elect tweeted, “Stay strong Israel, January 20th [the inauguration] is fast approaching!” Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 28, 2016, 6:25 AM), <https://twitter.com/realdonaldtrump/status/814114980983427073> [https://perma.cc/A538-TJLQ]. Since President Trump’s election and his appointment of David M. Friedman, an “ardent settlement supporter,” as ambassador to Israel, some Israeli leaders have “declared the death of the two-state solution,” and it is not yet clear how, if at all, U.S. foreign policy in Jerusalem and Israel will change. Peter Baker, *U.S. Transition Puts Israeli Focus Back on Palestinians*, N.Y. TIMES (Dec. 24, 2016), <http://www.nytimes.com/2016/12/24/world/middleeast/trump-may-complicate-israeli-diplomacy.html> [https://web.archive.org/web/20170103163258/http://www.nytimes.com/2016/12/24/world/middleeast/trump-may-complicate-israeli-diplomacy.html]; see *supra* note 17.

executive branch lawyers “generously in favor of the President in resolving everyday foreign policy disputes between the political branches.”¹⁶⁷

Goldsmith, too, criticizes not the *conclusion* regarding the recognition power, but the *process* by which the Court arrived at that conclusion.¹⁶⁸ Because the parties were in Zone 3 of Justice Jackson’s tripartite framework,¹⁶⁹ if the President wanted to go against Congress’s explicit will, he would need to rely on his independent constitutional powers, so the conclusion that the recognition power lies exclusively with the president is extremely significant for the analysis—and Goldsmith sees flaws in the Court’s logic in that section of its opinion.¹⁷⁰ For example, the Court relied solely on its interpretation of Article II of the Constitution without even analyzing Congress’s Article I powers.¹⁷¹ Additionally, the Court made no mention of who bears the burden of proving the exclusive nature of the President’s power in Zone 3.¹⁷² “If anything, the Court reversed the burden by accepting *weak arguments* for an exclusive presidential power over recognition without even considering the ‘constitutional powers of Congress over the matter,’ as [Zone] Three appeared to require.”¹⁷³

Goldsmith also criticizes the second part of the majority opinion—that section 214(d) is unconstitutional because a passport birthplace recognition *actually* infringes on the recognition power—going as far as to describe that section of the opinion as having “no legal analysis.”¹⁷⁴ Justice Scalia says as much in his dissent, accusing the majority of “announc[ing] a rule that is blatantly gerrymandered to the facts of this case.”¹⁷⁵ Justice Scalia criticizes the opinion for “identif[y]ing no reason to believe that the United States—or indeed any other country—uses the place-of-birth field in passports and birth reports as a forum for performing the act of recognition.”¹⁷⁶

Justice Scalia and Professor Goldsmith criticize the majority opinion for many of the same reasons that Justice Breyer and Professor Said criticize the majority opinion in *Humanitarian Law Project*: both opinions are said to have relied on weak legal arguments and scant factual evidence to arrive at favorable conclusions for the executive branch. In this way, executive branch fact deference performs a role similar to that of the political question doctrine. Instead of relying on the political question doctrine—which is “essentially a function of the separation of powers”¹⁷⁷—the majority opinions arrived at the same end result by deferring to executive branch findings of fact, even without saying explicitly that they were giving the executive branch any deference at all.

Humanitarian Law Project and *Zivotofsky II* are examples of why a return to the

167. Goldsmith, *supra* note 111, at 114.

168. *Id.* at 120.

169. *Zivotofsky II*, 135 S. Ct. 2076, 2084 (2015).

170. Goldsmith, *supra* note 111, at 126.

171. *Id.* at 120.

172. *Id.* at 126.

173. *Id.* (emphasis added).

174. *Id.*

175. *Zivotofsky II*, 135 S. Ct. 2076, 2121 (2015) (Scalia, J., dissenting).

176. *Id.* at 2122.

177. *Zivotofsky I*, 132 S. Ct. 1421, 1431 (2012) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

classical political question doctrine¹⁷⁸—giving courts less discretion to dismiss cases on justiciability grounds—may not actually lead to more rulings in favor of plaintiffs on the merits. Samantha Goldstein predicted as much post-*Zivotofsky I* and pre-*Zivotofsky II*, arguing that “*Zivotofsky*’s weakly pro-justiciability adoption of the classical theory” may send a signal to lower courts that “they should resolve skirmishes between the political branches, even in the context of foreign affairs,” but that when those lower courts actually decide those cases, they are likely to be deferential to the executive branch on the merits.¹⁷⁹

The idea that courts may be better off not reviewing these kinds of issues at all is not new—it was expressed as early as 1944 by Justice Jackson in his dissent in *Korematsu v. United States*.¹⁸⁰ When the majority upheld a military order excluding Japanese Americans from certain West Coast military areas, Justice Jackson expressed fear that courts would have no choice but to rule in favor of the military in all such cases, because “military decisions are not susceptible of intelligent judicial appraisal,” and courts would be required to defer to scant evidence and military judgments instead of making their own independent judgments about whether the orders have “a reasonable basis in necessity.”¹⁸¹ In Justice Jackson’s view, that is worse than not deciding the case at all:

[C]ourts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.¹⁸²

In other words, if courts want to defer to the executive branch, perhaps it is better for them to do so by applying the political question doctrine (or another justiciability doctrine) and not decide the merits of the case, as opposed to rejecting a justiciability argument but deferring to the executive branch on the merits. Both approaches would reach the same result, but the justiciability approach avoids setting a precedent of deference through substantive doctrine (in *Humanitarian Law Project*, First Amendment doctrine; in *Zivotofsky*, constitutional doctrine).

IV. MOVING FORWARD: THE POLITICAL QUESTION DOCTRINE, EXECUTIVE BRANCH FACT DEFERENCE, AND THE EXISTENCE OF “HOSTILITIES”

Prior to *Zivotofsky I*, legal scholars had suggested that whether war or armed conflict exists was a nonjusticiable political question.¹⁸³ In an article examining the justiciability of two statutes with various triggers related to the existence of hostilities—

178. See *supra* Part I.A.1.

179. Goldstein, *supra* note 37, at 167–68.

180. 323 U.S. 214 (1944).

181. *Id.* at 245 (Jackson, J., dissenting).

182. *Id.* at 245–46.

183. Pearlstein, *supra* note 12, at 146.

the Military Commissions Act of 2009 (MCA) and the 2001 Authorization to Use Military Force (AUMF)—Professor Deborah Pearlstein suggests that *Zivotofsky I* affects that assumption by clarifying the courts’ role in determining whether the existence-of-hostilities trigger in those statutes is met.¹⁸⁴ According to Pearlstein, “If the Constitution’s promise of democratic governance means anything, then surely it means that the political branches should have fundamental control over whether we are or are not at war.”¹⁸⁵ She suggested that while the existence of hostilities under the MCA and AUMF is not a political question, courts may “cede some of their interpretive authority” of the statutes and defer to the political branches on the existence-of-hostilities trigger out of this respect for the “constitutional scheme” and the separation of powers.¹⁸⁶ Pearlstein cites Chesney’s theory of “national security fact deference” as one such mode of deference that would allow courts to decide on the merits whether the factual conditions for the existence of hostilities have been met without disturbing the executive branch’s conclusions.¹⁸⁷

Ultimately, though, Pearlstein concludes that in the contexts of the MCA and the AUMF, “it is far from clear that deference to the executive on the existence of hostilities . . . invariably advances any of the separation-of-powers purposes” discussed in her article: democratic accountability and the promotion of governmental effectiveness.¹⁸⁸ Deference does not promote accountability of the executive branch because in the national security context, when the executive branch tends to shroud itself in secrecy, “the involvement of multiple branches may be required to make accountability possible at all.”¹⁸⁹ Pearlstein also argues that the promotion of governmental effectiveness should not “require[] categorical deference to the executive’s factual assertions” and that the executive branch should, at a minimum, “have a reasonable basis for its conclusions.”¹⁹⁰ Her ultimate conclusion is that “uncritical deference serves no constitutional end—even at the threshold of war,” and courts should be hesitant to abdicate their traditional role in statutory interpretation just because foreign affairs and war are involved.¹⁹¹

Pearlstein is probably correct that, in the contexts of the MCA and the AUMF, the existence of hostilities is likely *not* a political question. Similarly, the existence of hostilities under the War Powers Resolution—especially post-*Zivotofsky I*—is likely not a political question. President Obama claimed that his statutory interpretation of the War Powers Resolution allowed him to continue with air strikes past the sixty-day timeline established by the War Powers Resolution; Congress disagreed. It is the courts’ role “to say what the law is.”¹⁹² If President Obama’s interpretation of the War Powers Resolution “hostilities” provision had been challenged in court, the courts could have applied *Zivotofsky I*, concluding that the presence of a statute is

184. *Id.* at 147.

185. *Id.* at 148.

186. *Id.* at 149.

187. *Id.* at 209; *see supra* Part III.

188. Pearlstein, *supra* note 12, at 208–10.

189. *Id.* at 211.

190. *Id.* at 218.

191. *Id.* at 220.

192. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

relevant to the justiciability of the case—especially if, as some commentators have urged, *Zivotofsky I* creates a general rule against statutory political questions.¹⁹³

An important caveat to this discussion is that, of course, the political question doctrine is just one justiciability doctrine employed by courts in the area of foreign affairs to avoid deciding cases on the merits.¹⁹⁴ This Note does not attempt to predict how a court might decide any number of these other questions. For example, it is entirely possible that a court might dismiss a suit brought to challenge the War Powers Resolution for lack of standing or lack of ripeness. This Note merely attempts to explain how a court faced with an argument that such a suit involves a non-justiciable political question might decide the issue.

But if various deference theories are correct,¹⁹⁵ then courts may reject arguments about justiciability and then just find ways to defer to the executive branch's interpretation of the "hostilities" provision. Pearlstein's argument that courts should *not* use deference to executive branch findings of fact as a separation of powers principle may seem attractive to those who favor a more active judiciary, but it does not mean that courts will actually challenge, in any meaningful way, executive branch positions like the Obama Administration's interpretation of the "hostilities" provision. If a court were to apply *Zivotofsky I*, deciding that such a case does present a political question, it may end up deferring to the executive branch's interpretation anyway. That would legitimize what many commentators have called a questionable exercise of statutory interpretation by the executive branch,¹⁹⁶ perhaps meaning that it would be better for the courts not to get involved at all.

CONCLUSION

Zivotofsky I demonstrates that the Supreme Court is growing hostile to statutory political questions and may send a signal to lower courts that they should be deciding cases involving statutory interpretation on the merits, even when doing so means that courts will have to resolve sticky separation of powers disputes involving foreign affairs. Many commentators have urged that such a rule against statutory political questions is good for plaintiffs seeking to hold the political branches accountable to legal limits, but such a rule is meaningless without an accompanying change in the deference shown to the executive branch in the area of foreign affairs. Quite the opposite, *Zivotofsky I* creates the risk that deferential review may be worse than courts not deciding the cases at all, as *Holder v. Humanitarian Law Project* and *Zivotofsky II* demonstrate.

The election of President Donald Trump has complicated any discussion of executive authority, foreign affairs, or national security. Regardless of how one views his political positions, it is impossible to deny that the first several months of the Trump presidency have been tumultuous at best. The response to President Trump's first iteration of immigration reform is an instructive example of how courts and Congress

193. Michel, *supra* note 35, at 254.

194. See Blumoff, *supra* note 74, at 307 (discussing, in addition to the political question doctrine, "lack of standing for members of Congress, . . . absence of ripeness and various results on the merits and otherwise" (footnotes omitted)).

195. See *supra* Part III.

196. See *supra* note 6 and accompanying text.

might respond to claims of broad executive authority in the future of the Trump presidency. One week into his presidency, President Trump signed an executive order blocking the entry into the United States of persons from seven Muslim-majority countries.¹⁹⁷ Protests erupted as would-be immigrants were detained at airports all across the country,¹⁹⁸ prompting an immediate legal assistance effort from volunteer attorneys ready to draft and file habeas corpus petitions on behalf of the detained migrants.¹⁹⁹ Amidst the public outcry, Congress was not entirely silent; Democratic members were of course vocal about their opposition, but so, too, were several prominent Republicans, including Senators John McCain and Lindsey Graham.²⁰⁰ Federal courts played a particularly prominent role in the controversy, with one striking down parts of the order the day after it was issued,²⁰¹ and a Ninth Circuit panel unanimously affirming a different district court's preliminary injunction in a constitutional challenge to the ban.²⁰²

Most relevant for this Note, the Ninth Circuit seemed to be concerned with the Trump Administration's broad claims of executive authority and insulation from judicial review on the core constitutional claims.²⁰³ The decision ultimately prompted the administration to commit to repealing the offending executive order and replacing it with something that satisfied the courts' constitutional concerns, only two weeks after the order was first put in place.²⁰⁴ The Ninth Circuit's particular concern

197. See Liam Stack, *Trump's Executive Order on Immigration: What We Know and What We Don't*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html> [<https://web.archive.org/web/20170428215212/https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html>].

198. See, e.g., *Massive Protests at Airports Across US After Trump's Immigration Ban*, N.Y. POST (Jan. 29, 2017, 12:13 AM), <http://nypost.com/2017/01/29/massive-protests-erupt-at-airports-across-us-after-trumps-immigrant-ban> [<https://perma.cc/8HSN-Y7KT>].

199. See, e.g., Elise Viebeck & Michael Laris, *Hundreds of Lawyers Descend on Airports To Offer Free Help After Trump's Executive Order*, WASH. POST (Jan. 29, 2017, 7:20 PM), https://www.washingtonpost.com/politics/hundreds-of-lawyers-descend-on-airports-to-offer-free-help/2017/01/29/55ef11b2-e64b-11e6-bf6f-301b6b443624_story.html [<https://perma.cc/RDX5-4YXP>].

200. Madeline Farber, *Here Are the Republicans Who Have Criticized President Trump's Immigration Ban*, FORTUNE (Jan. 29, 2017), <http://fortune.com/2017/01/29/donald-trump-immigration-ban-republicans> [<https://perma.cc/8XYR-WJTH>].

201. Michael D. Shear, Nicholas Kulish & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html> [<https://web.archive.org/web/20170509000913/https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html>].

202. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam); Charlie Savage, *6 Highlights from the Ruling on Trump's Immigration Order*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/trump-travel-ban-ninth-circuit-ruling.html> [<https://web.archive.org/web/20170227093819/https://www.nytimes.com/2017/02/09/us/trump-travel-ban-ninth-circuit-ruling.html>].

203. *Washington*, 847 F.3d at 1161.

204. Jaweed Kaleem & Maura Dolan, *Trump Says He'll Repeal Travel Ban, Replace It with a New One Next Week That's 'Tailored' to Court Decisions*, L.A. TIMES (Feb. 16, 2017, 11:52 AM), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates>

with and attention to the Trump Administration's overreaching claims of executive unreviewable authority and entitlement to deference²⁰⁵ demonstrate the court's unease with claims for deference in certain content areas. Most notably, the court stressed that while "our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution."²⁰⁶ It is impossible to know whether the Trump Administration would have received the executive branch fact deference it asked for had it not also claimed insulation from any kind of review, but it is clear that, in the face of what they see as clear constitutional violations, courts may still be willing to question executive branch factual determinations.

-trump-says-he-will-repeal-travel-ban-1487273979-htmlstory.html [https://perma.cc/88MW-7JUW]. President Trump did so on March 6, 2017. Ali Vitali, *President Trump Signs New Immigration Executive Order*, NBCNEWS (Mar. 6, 2017, 7:18 PM), <http://www.nbcnews.com/politics/white-house/president-trump-signs-new-immigration-executive-order-n724276> [https://perma.cc/A787-B5N9]. However, the United States District Court for the District of Hawaii issued a preliminary injunction against the order before it was set to take effect. Matt Zapotosky, Kalani Takase & Maria Sacchetti, *Federal Judge in Hawaii Freezes President Trump's New Entry Ban*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html [https://perma.cc/MUK5-LYSS]. That litigation was still ongoing at the time this Note was published.

205. *Washington*, 847 F.3d at 1161–62.

206. *Id.* at 1162.