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## THE REAL MEANING OF *ZIVOTOFSKY* AND ITS IMPACT ON TARGETED KILLINGS CASES

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### INTRODUCTION

In 2012, the Supreme Court decided *Zivotofsky*,<sup>1</sup> considered by many to be an immensely consequential political question case. Commentators called the decision “far-reaching”<sup>2</sup> and stated that the Court had “[gone] out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question doctrine really should be . . . .”<sup>3</sup> Scholars of international law, in particular, said that *Zivotofsky* “point[ed] the way to greater judicial participation in foreign affairs.”<sup>4</sup>

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<sup>1</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

<sup>2</sup> VED P. NANDA & DAVID K. PANSIUS, 3 *LITIGATION OF INT’L DISPUTES IN U.S. COURTS* § 14:3, *Zivotofsky and Political Questions* (2012).

<sup>3</sup> Steve Vladeck, *What’s Really Wrong With the Targeted Killing White Paper*, *LAWFARE* (Feb. 5, 2013, 6:44 PM), <http://www.lawfareblog.com/2013/02/whats-really-wrong-with-the-targeted-killing-white-paper/>.

<sup>4</sup> Peter Spiro, *In Other Supreme Court News: Political Question Doctrine Takes a Hit in Jerusalem Passport Case*, *OPINIO JURIS* (Mar. 26, 2012, 11:49 AM), <http://opiniojuris.org/2012/03/26/in-other-supreme-court-news-political-question-doctrine-takes-a-hit-in-jerusalem-passport-case/>; see also Zachary D. Clopton, *Foreign Affairs Federalism and the Limits of Executive Power*, *MICH. L. REV. FIRST IMPRESSIONS*, <http://www.michiganlawreview.org/articles/foreign-affairs-federalism-and-the-limits-on-executive-power> (last visited Mar. 30, 2014) (“In *Zivotofsky*, the

More specifically, from a doctrinal perspective, some academics suggested that the Court in *Zivotofsky* signaled that it was returning to the classical, and away from the prudential, version of the political question doctrine.<sup>5</sup> Such a shift would arguably be significant, in that it would lead to more frequent judicial involvement in foreign affairs disputes.<sup>6</sup> Yet, given various factors, *Zivotofsky* is probably not a meaningful jurisprudential move on this score. In particular, the Supreme Court in prior cases had already demonstrated its preference for *Baker*'s classical factors over the prudential components of the *Baker* test,<sup>7</sup> and lower courts continue to cite all six *Baker* factors in the wake of *Zivotofsky*.<sup>8</sup>

Nevertheless, three other aspects of the case that encouraged lower courts to decide even seemingly controversial foreign affairs disputes may prove to be systemically important: *Zivotofsky* (1) vigorously reasserted the narrowness of the political question doctrine; (2) stated that the existence of a statute and the question of its constitutionality meaningfully altered the political question analysis; and (3) was arguably path-breaking in its refusal to defer to the Executive Branch regarding the potential foreign policy costs of

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Supreme Court called for increased judicial participation in contests between Congress and the President in foreign affairs.”).

<sup>5</sup> 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, 358 (2014); *The Supreme Court 2011 Term: Leading Cases*, 126 HARV. L. REV. 307, 311 (2012) [hereinafter *Leading Cases*]. Under the classical version, a nonjusticiable political question exists where the Constitution has committed to another branch of government the determination of the issue. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 232 (6th ed. 2009) [hereinafter "HART & WECHSLER"] (citation omitted). By contrast, the prudential theory posits that a court must weigh the consequences of deciding a particular case, before proceeding to address a question on the merits. See David Gray Adler, *Court, Constitution, and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 35 (David Gray Adler & Larry N. George, eds., 1996) (citations omitted).

<sup>6</sup> *Leading Cases*, *supra* note 5, at 307 (*Zivotofsky*'s return to the classical version of the political question doctrine is “significant” because it “risk[s] drawing courts into separation of powers disputes that would be better left undecided.”).

<sup>7</sup> See *infra* notes 41-43 and 102, and accompanying text.

<sup>8</sup> See *infra* note 127, and accompanying text.

judicial review.<sup>9</sup> Taken together, these components of *Zivotofsky* signal to Congress that it can encourage judicial review of, in particular, sensitive Executive-driven national security policies by enacting statutes on point.

If one's aim is to hold the Executive accountable for its policies, then one might, at first, think a broad, pro-justiciability reading of *Zivotofsky* will impel beneficial rule of law and accountability results. Congress can effectuate its resistance to Executive national security actions via statute, bolstered by judicial support *ex post*.<sup>10</sup> More likely, however, encouraging judicial review in this way will be a dangerous avenue for critics of targeted killings<sup>11</sup> to take.<sup>12</sup> In particular, if Congress enacts a statute giving the families of those killed via targeting a cause of action, courts may use *Zivotofsky* to more frequently find cases involving that statute justiciable. But after so doing, those courts may actually legitimate questionable Executive policies, without providing any real oversight or review. Consequently, if one is interested in constraining the Executive in the national security realm, then—somewhat counter-intuitively—one should be skeptical of *Zivotofsky* as a means to effectuate such constraints.

This Article explores the likely impact of *Zivotofsky* on the political question doctrine. Because the Supreme Court had already heavily emphasized the classical *Baker* factors prior to 2012, *Zivotofsky*'s mere *implicit* rejection of *Baker*'s prudential considerations will not dramatically shift political question

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<sup>9</sup> See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427-30 (2012).

<sup>10</sup> See, e.g., Kristen E. Eichensehr, Comment, *On Target? The Israel Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873 (2007) (arguing for *ex post* review).

<sup>11</sup> The term “targeted killings” refers to “premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody.” Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (May 23, 2013), <http://www.cfr.org/counterterrorism/targeted-killings/p9627>. It is not defined under international law, but has been used widely since Israel announced its policy of targeting alleged terrorists in the Palestinian territories. *Id.*

<sup>12</sup> See, e.g., Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 410 (2009) (“[N]othing could be more absurd than courts attempting to conform armed conflict to judicial norms.”).

jurisprudence back toward the classical version of the doctrine. Nevertheless, *Zivotofsky* has changed the political question doctrine in other ways. Namely, the *Zivotofsky* Court relied upon a federal statute to frame the question presented so as to ensure a finding of justiciability. Likewise, the Court broke with prior precedent and refused to defer to the Executive's prediction that judicial review would lead to serious foreign policy harms. Consequently, *Zivotofsky*—notwithstanding its failure to definitively reject the prudential version of the political question doctrine—may yet spur more aggressive judicial review in at least some circumstances.

This Article proceeds as follows. Part I explores the origins of and differences between the classical and prudential versions of the political question doctrine. Part II discusses the *Zivotofsky* litigation. Part III argues that, although *Zivotofsky* portends only a modest shift in the tug-of-war between the classical and prudential versions of the political question doctrine, other facets of *Zivotofsky* may have significant effect in lower courts. To support that assertion, Part III discusses the likely impact of *Zivotofsky* on targeted killing cases in particular. Namely, this Article considers how *Zivotofsky*'s political question analysis would apply to a targeted killing case in the existing landscape, as well as its application in a hypothetical world in which Congress enacted a statute giving a private cause of action to the families of those killed by the U.S. government via targeted killing. The end of Part III discusses the normative implications of *Zivotofsky*'s likely effects, and argues that one seeking to curtail the Executive in the national security context should doubt that *Zivotofsky* provides appropriate means to establish such limitations. Part IV concludes.

## I. THE HISTORICAL EVOLUTION OF THE POLITICAL QUESTION DOCTRINE

Generally, federal courts have a duty to decide those cases properly presented to them, even if they would “gladly avoid” doing so.<sup>13</sup> However, in certain circumstances, a court may deem an issue,

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<sup>13</sup> *Zivotofsky*, 132 S. Ct. at 1427 (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

otherwise validly before it, to be a nonjusticiable political question.<sup>14</sup> The political question doctrine posits that some constitutional questions “are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution.”<sup>15</sup> The doctrine, however, does not permit courts to avoid adjudicating every case with potentially significant policy consequences.<sup>16</sup> Rather, the political question doctrine is an exception to the otherwise prevailing command that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>17</sup>

Yet, despite scholars’ facial agreement about the narrowness of the doctrine, the scope of and proper approach to the political question doctrine have been hotly contested.<sup>18</sup> In particular, throughout the history of the federal judiciary, the doctrine has undulated between two primary theories: a categorical or classical version, and a prudential conception of the doctrine.<sup>19</sup>

Before 1962, when the seminal case of *Baker v. Carr*<sup>20</sup> was decided, the Supreme Court took a largely categorical approach to the political question doctrine.<sup>21</sup> Under the classical version of the doctrine, courts “treated certain well-defined . . . decisions by the political branches as final and binding.”<sup>22</sup> On this view, “the

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<sup>14</sup> *Id.* (citing *Japan Whaling Assn. v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

<sup>15</sup> Martin H. Redish, *Judicial Review and the ‘Political Question’*, 79 NW. U. L. REV. 1031, 1031 (1984).

<sup>16</sup> See Aziz Z. Huq, *Removal As A Political Question*, 65 STAN. L. REV. 1, 22 n.121 (2013) (stating that the Supreme Court will not treat every politically sensitive case as “nonjusticiable merely because of the complexity and magnitude of the [controversy’s] policy consequences . . .”).

<sup>17</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803); see also *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”).

<sup>18</sup> See Adler, *supra* note 5, at 35.

<sup>19</sup> *Id.*

<sup>20</sup> *Baker v. Carr*, 369 U.S. 186, 186 (1962).

<sup>21</sup> CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 56 (4th ed. 2011).

<sup>22</sup> Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1400 (1999) (citing Edwin D. Dickinson, *International Political Questions in National Courts*, 19 AM. J. INT’L L. 157 (1925)). Cases in which

existence of a political question in any particular issue [was] determined by ‘whether the Constitution has committed to another agency of government the autonomous determination of the issue.’”<sup>23</sup> This approach, then, was seen as constitutionally required.<sup>24</sup>

The second predominant theory of the political question doctrine—the prudential view—asserts that courts must consider and weigh the consequences of deciding a particular case prior to adjudicating a question on its merits.<sup>25</sup> According to the prudential position, the political question doctrine “appropriately reflects prudential concerns about the exercise of judicial power.”<sup>26</sup> This is because, the theory goes, the legitimacy of judicial review (and therefore its longer term efficacy) depends on balancing principle and practicality, which vis-à-vis judicial review, can be achieved through well-timed judicial abstention.<sup>27</sup> According to Alexander Bickel, the prudential theory’s most famous proponent, that balancing hinges on the “distinction between judicial judgments on the merits, which . . . must be unyieldingly principled and determinations of justiciability, which . . . could and should turn largely on prudential concerns.”<sup>28</sup> On this view, courts could rightly abstain from a matter based on policy reasons, so as to avoid having to decide merits questions that could not be answered in any principled way.

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courts treated determinations by the political branches as final and binding are “[w]hen the political branches declared war or peace, or asserted jurisdiction over a foreign territory, or when the President recognized a new government, or determined a territorial boundary under a treaty, or decided that a foreign government had the power to ratify a treaty . . . .” *Id.* at 1401-02 (citing, *inter alia*, *Jones v. United States*, 137 U.S. 202, 212 (1890), in which the Supreme Court stated, “[w]ho is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . [t]his principle has always been upheld by this [C]ourt, and has been affirmed under a great variety of circumstances.”).

<sup>23</sup> Adler, *supra* note 5, at 35 (quoting Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959)).

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> HART & WECHSLER, *supra* note 5, at 233.

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

With *Baker v. Carr* in 1962, the Supreme Court shifted its political question jurisprudence toward this second, prudential theory.<sup>29</sup> *Baker* described the doctrine as “essentially a function of the separation of powers,”<sup>30</sup> and mandated that courts conduct a “case-by-case inquiry”<sup>31</sup> using various factors that, in light of past cases, “may describe a political question.”<sup>32</sup> The Court enumerated six relevant, but not explicitly exclusive, factors:

Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>33</sup>

While the first two factors reflect the classical, constitution-based formulation of the political question doctrine, the Court’s inclusion of the third through sixth factors demonstrated that it had also embraced the prudential, discretionary theory of the doctrine.<sup>34</sup>

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<sup>29</sup> See 369 U.S. 186 (1962).

<sup>30</sup> *Id.* at 217.

<sup>31</sup> *Id.* at 211.

<sup>32</sup> *Id.* at 217.

<sup>33</sup> *Id.*

<sup>34</sup> See 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 (2002); see also RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM SUPPLEMENT 22-23 (2012) [hereinafter “HART & WECHSLER’S 2012 SUPPLEMENT”].

Since *Baker*, lower courts have “incanted . . . [the] *Baker* clauses ritually.”<sup>35</sup> Yet many courts have criticized the case’s multi-factored analysis. In particular, many believe that the prudential version of the political question doctrine is indeterminate and inappropriate for judicial consideration.<sup>36</sup> Consequently, some commentators have asked the Supreme Court to provide a clearer definition of what constitutes a nonjusticiable political question.<sup>37</sup> Even more strongly, some have called for repudiation of the prudential approach to political questions.<sup>38</sup> Others have even urged the elimination of the doctrine in its entirety.<sup>39</sup>

Despite such calls, the Supreme Court long persisted in reciting the entire *Baker* formulation.<sup>40</sup> Yet, in its more recent holdings, the Court has, in practice, relied predominantly on *Baker*’s classical factors.<sup>41</sup> For example, in *Nixon v. United States*,<sup>42</sup> the Court

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<sup>35</sup> LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 89 (1990) (citing *Comm’r. of Internal Revenue v. Sansome*, 60 F.2d 931, 933 (2d Cir. 1932) (describing the *Baker* factors as “anodynes for the pains of reasoning”).

<sup>36</sup> See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (“[T]he proper application of *Baker*’s six factors has generated substantial confusion in the lower courts.”); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 149-50 (5th ed. 2007) (arguing that “the[] [*Baker*] criteria seem useless in identifying what constitutes a political question” and that it is, therefore, “hardly . . . surprising that the doctrine is described as confusing and unsatisfactory”); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PENN. L. REV. 97, 107, 163 (1988) (“Most [lower court political question] cases do little more than cite *Baker v. Carr*.”).

<sup>37</sup> See, e.g., HENKIN, *supra* note 35, at 89; see also THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 9 (1992) (“[Given] [t]he current state of jurisprudential incoherence . . . [i]t is time, surely, to examine the history, theory, and practice that have shaped the way we treat foreign affairs in our courts and to explicate a principled role for the courts that comports with the nation’s highest purposes.”).

<sup>38</sup> Barkow, *supra* note 34, at 333.

<sup>39</sup> See, e.g., FRANCK, *supra* note 37, at 4-5 (arguing that the political question doctrine is “not only not required by but wholly incompatible with American constitutional theory”).

<sup>40</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004); *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990); *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969).

<sup>41</sup> See Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1307 (2012) [hereinafter *Canon*] (citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the



cursorily referenced the full *Baker* test, yet focused on only the first two *Baker* factors in finding that the question whether the Senate had properly “tried” an impeachment of a federal judge was a nonjusticiable political question.<sup>43</sup> In *Zivotofsky*, the Supreme Court seemed to go even further, explicitly referencing only those first two factors, and not even mentioning the remaining four *Baker* considerations.<sup>44</sup> Did the *Zivotofsky* Court reject the prudential approach to the political question doctrine and, thus, return emphatically to the classical conception of that doctrine?<sup>45</sup>

## II. THE *ZIVOTOFSKY* LITIGATION

It had been the longstanding policy of the United States to take no position in the debate regarding whether Jerusalem is part of Israel.<sup>46</sup> Then, in 2002, Congress passed the Foreign Relations Authorization Act (“Act”),<sup>47</sup> which, in part, challenged the Executive Branch’s established approach to the status of Jerusalem. In

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judgment) (noting that, over the past fifty years, the Court has exclusively relied on these two *Baker* factors in applying the political question doctrine), *cert. denied*, 131 S. Ct. 997 (2011)).

<sup>42</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>43</sup> *Id.* at 228-29.

<sup>44</sup> *Zivotofsky*, 132 S. Ct. at 1427 (citing *Nixon*, 506 U.S. at 228).

<sup>45</sup> HART & WECHSLER’S 2012 SUPPLEMENT, *supra* note 34, at 23 (“By framing the political question inquiry wholly in terms of the first two *Baker* factors—textual commitment and absence of judicially manageable standards—did *Zivotofsky* signal the Roberts Court’s endorsement of Professor Wechsler’s ‘classical’ position over Professor Bickel’s ‘prudential’ one?”).

<sup>46</sup> *Zivotofsky*, 132 S. Ct. at 1424. The State Department’s Foreign Affairs Manual mandates that “[w]here the birthplace of the applicant is located in territory disputed by another country, the city or area of birth may be written in the passport.” 7 Foreign Affairs Manual § 1383.5-2, App. 108. The manual “specifically directs that passport officials should enter ‘JERUSALEM’ and should ‘not write Israel or Jordan’ when recording the birthplace of a person born in Jerusalem on a passport.” *Zivotofsky*, 132 S. Ct. at 1425 (citing 7 Foreign Affairs Manual §§ 1383.1–1383.5-6 (1987)); *see also* Adam Liptak, *Question of Birth Becomes One of President’s Power*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/2011/07/26/us/26bar.html> (“The status of Jerusalem has long divided not only Israelis and Arabs but also Congress and presidents of both parties.”).

<sup>47</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

particular, Section 214 of the Act, entitled “United States Policy with Respect to Jerusalem as the Capital of Israel,” provided that if a citizen born in Jerusalem, or that citizen’s legal guardian, requests his place of birth be listed in his passport and consular report of birth abroad as “Israel,” then the “Secretary [of State] *shall* . . . record the place of birth as Israel.”<sup>48</sup> President George W. Bush, in 2002, signed the Act into law, but in so doing, attached a signing statement making clear that he believed Section 214 of the Act was unconstitutional.<sup>49</sup> If Section 214 is “construed as mandatory,” he said, then it would “interfere with the President’s constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states.”<sup>50</sup>

Menachem Binyamin Zivotofsky, the son of two American citizens (and, therefore, an American citizen himself), was born in Jerusalem in October of 2002, soon after Congress passed Section 214.<sup>51</sup> Zivotofsky’s mother, in applying for a U.S. passport and a consular report of birth abroad for her son, requested that his place of birth be listed on both items as “Jerusalem, Israel.”<sup>52</sup> U.S. officials refused.<sup>53</sup>

Zivotofsky’s parents then filed suit on Zivotofsky’s behalf against the Secretary of State.<sup>54</sup> They sought declaratory and injunctive relief permanently requiring the Secretary to list Zivotofsky’s place of birth on his passport and consular report of birth as “Jerusalem, Israel.”<sup>55</sup> The District Court for the District of Columbia dismissed the complaint, holding that Zivotofsky lacked

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<sup>48</sup> Foreign Relations Authorization Act § 214(d) (emphasis added).

<sup>49</sup> Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

<sup>50</sup> *Id.*

<sup>51</sup> *Zivotofsky*, 132 S. Ct. at 1425 (citing 8 U.S.C. § 1401(c)); *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (foreign-born children of American citizens acquire citizenship at birth through “congressional generosity”).

<sup>52</sup> *Zivotofsky*, 132 S. Ct. at 1425.

<sup>53</sup> *Id.* at 1425–26.

<sup>54</sup> *Id.* at 1426.

<sup>55</sup> *Id.*

Article III standing and that the case presented a nonjusticiable political question.<sup>56</sup>

The Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) reversed, finding that the child had suffered injury in fact and, thus, had standing to sue.<sup>57</sup> The D.C. Circuit then remanded the case to the district court so that it could develop a more complete record regarding whether the action presented a nonjusticiable political question.<sup>58</sup>

After further findings, the district court held that Zivotofsky’s request to have his passport and consular report of birth identify his place of birth as “Israel” presented a nonjusticiable political question.<sup>59</sup> The D.C. Circuit affirmed, likewise finding the case nonjusticiable.<sup>60</sup> The D.C. Circuit framed the issue as whether the State Department could lawfully refuse to record a Jerusalem-born U.S. citizen’s place of birth as “Israel” on his official documentation. The court, citing *Baker’s* first factor, explained that the text of the Constitution exclusively commits to the Executive Branch the power to recognize foreign sovereigns,<sup>61</sup> and that, consequently, the Executive’s exercise of that power was unreviewable by courts.<sup>62</sup> The court then stated that “policy decisions made pursuant to the President’s recognition power”—

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<sup>56</sup> Zivotofsky v. Sec’y of State, Nos. 03-1921 & 03-2048, 2004 WL 5835212, at \*3-4 (D.D.C. Sept. 7, 2004).

<sup>57</sup> Zivotofsky v. Sec’y of State, 444 F.3d 614, 617 (D.C. Cir. 2006). The D.C. Circuit explained that while “it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by [a] statute” like the Foreign Relations Authorization Act. *Id.* at 619. Such a statutorily-based injury is sufficient under Article III’s case or controversy requirement because it is concrete, namely in “a form traditionally capable of judicial resolution,” *id.* (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974)), and, even more so, “because, as the violation of an *individual* right, it affects the plaintiff in a personal and individual way.” *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

<sup>58</sup> Zivotofsky v. Sec’y of State, 444 F.3d 614, 620 (D.C. Cir. 2006).

<sup>59</sup> Zivotofsky v. Sec’y of State, 511 F. Supp. 2d 97, 102 (D.D.C. 2007).

<sup>60</sup> Zivotofsky v. Sec’y of State, 571 F.3d 1227, 1333 (D.C. Cir. 2009).

<sup>61</sup> *Id.* at 1231.

<sup>62</sup> *Id.* at 1231-33.

such as a decision to record “Jerusalem” and not “Israel” on a Jerusalem-born U.S. citizen’s passport—are nonjusticiable political questions.<sup>63</sup> The court rejected Zivotofsky’s assertion that Section 214 changed the political question analysis.<sup>64</sup> Thereafter, the D.C. Circuit denied Zivotofsky’s petition for rehearing *en banc*.<sup>65</sup>

The Supreme Court granted certiorari in 2011.<sup>66</sup> Upon review, the Supreme Court held in 2012 that Zivotofsky’s action was not barred under the political question doctrine.<sup>67</sup> Chief Justice Roberts, writing for the majority, first emphasized that “[i]n general, the Judiciary has a responsibility to decide cases properly before it” and that the political question doctrine is merely “a narrow exception to that rule.”<sup>68</sup> The Court explained that the case required a court to determine only if Zivotofsky was able to vindicate the statutory right granted to him by Congress in Section 214(d).<sup>69</sup> It did not require a court to “decide the political status of Jerusalem.”<sup>70</sup> The Court described Congress’s enactment of Section 214 as “relevant to the Judiciary’s power to decide Zivotofsky’s claim” because the courts were, by virtue of the statute, being asked to “enforce a specific statutory right,” and, thus, needed only to perform “a familiar judicial exercise.”<sup>71</sup> The parties did not dispute the interpretation of

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<sup>63</sup> *Id.* at 1231.

<sup>64</sup> *Id.* at 1233.

<sup>65</sup> Zivotofsky v. Sec’y of State, 610 F.3d 84, 84 (D.C. Cir. 2010).

<sup>66</sup> Zivotofsky v. Clinton, 131 S. Ct. 2897 (2011) (granting certiorari on the question whether “Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President’s power to recognize foreign sovereigns”).

<sup>67</sup> Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430-31 (2012).

<sup>68</sup> *Id.* at 1427.

<sup>69</sup> *Id.* In so describing the case, the Supreme Court rejected the stance taken by the D.C. Circuit. Whereas the D.C. Circuit focused on the President’s power that Zivotofsky’s claim had called into question, the Supreme Court “began from a different premise,” instead asking whether or not the source of Zivotofsky’s claimed statutory right was valid. *Leading Cases, supra* note 5, at 311; *see also* Curtis Bradley, *Interesting Case Concerning the President’s Recognition Power*, LAWFARE (May 10, 2011, 1:37 PM), <http://www.lawfareblog.com/2011/05/interesting-case-concerning-the-presidents-recognition-power/> (Because “the issue presented in this case is not whether to recognize Israeli sovereignty over Jerusalem but rather whether Section 214(d) invades the President’s exclusive authority to make that determination,” there is little reason that the question should be deemed nonjusticiable.).

<sup>70</sup> Zivotofsky, 132 S. Ct. at 1427.

<sup>71</sup> *Id.* at 1427.

Section 214(d) and, therefore, the Court had a duty to decide the only question—namely, the constitutionality of the statute—before it.<sup>72</sup>

Then, rather than citing the full *Baker* formulation, the Court stated—quoting *Nixon v. United States* (which only referenced the classical factors of the political question doctrine), not *Baker* itself—that a case “involves a political question . . . where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’”<sup>73</sup> That is, the majority described the political question doctrine as consisting of only the first two classical *Baker* factors.<sup>74</sup> And the Court held that neither of those two factors was present in the controversy before it.

Under the “textual commitment” prong, the Court emphasized that there was “no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.”<sup>75</sup> Rather, the Court said, such a decision is within the province of the judiciary.<sup>76</sup> With respect to the second, “judicially manageable standards” factor, the Court stated that, once the issue was properly framed in terms of the constitutional validity of Section 214(d) (rather than as hinging upon the political status of Jerusalem), it was clear that the issue required legal, not policy, analysis.<sup>77</sup> This case, even if not an easy one, the Court explained, “does not turn on standards that defy judicial application” but rather “demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers.”<sup>78</sup> That sort of inquiry, the Court concluded, is “what courts do.”<sup>79</sup> The Court then remanded the case

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<sup>72</sup> *Id.* at 1427–28.

<sup>73</sup> *Id.* at 1427 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (in turn quoting *Baker*, 369 U.S. at 217)).

<sup>74</sup> See *Zivotofsky*, 132 S. Ct. at 1427.

<sup>75</sup> *Id.* at 1428.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1428–29.

<sup>78</sup> *Id.* at 1430 (citing, in part, *Baker*, 369 U.S. at 211).

<sup>79</sup> *Id.*

for consideration by the lower courts of its merits in the first instance.<sup>80</sup>

Justice Sotomayor agreed with the majority that the case did not present a nonjusticiable political question, but wrote separately to emphasize her belief that the political question doctrine required analysis “more demanding than that suggested by the Court.”<sup>81</sup> Justice Sotomayor quoted, and then discussed, all six *Baker* factors as comprising the test governing the political question doctrine. She acknowledged, however, that *Baker* “left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication.”<sup>82</sup> Justice Sotomayor thus sought to clarify the role and interplay of the *Baker* factors. As one commentator explained:

[Justice Sotomayor] grouped the factors into three categories: (1) where the Constitution textually commits the resolution of an issue to one of the political branches (*Baker*'s first factor), courts lack authority to decide; (2) where there are no “judicially discoverable and manageable standards” for resolving the issue, or where resolution requires an “initial policy determination” (*Baker*'s second and third factors), courts lack the ability to decide; and (3) where judicial resolution implicates various prudential concerns (*Baker*'s fourth, fifth, and sixth factors), courts should abstain from deciding the issue.<sup>83</sup>

Justice Sotomayor noted that courts “should be particularly cautious” before finding a question nonjusticiable based on one of the reasons

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<sup>80</sup> *Zivotofsky*, 132 S. Ct. at 1431. On remand, the D.C. Circuit held that Section 214 impermissibly intrudes upon the President's exclusive recognition authority, and is therefore unconstitutional. *Zivotofsky v. Sec'y of State*, 725 F.3d. 197, 220 (D.C. Cir. 2013).

<sup>81</sup> *Zivotofsky*, 132 S. Ct. at 1431.

<sup>82</sup> *Id.* at 1431-34.

<sup>83</sup> Alan Rozenshtein, *Supreme Court Holds No Political Question in Zivotofsky, Remands for Decision on the Merits*, LAWFARE (Mar. 26, 2012, 1:22 PM), <http://www.lawfareblog.com/2012/03/supreme-court-holds-no-political-question-in-zivotofsky-remands-for-decision-on-the-merits/> (citing *Zivotofsky*, 132 S. Ct. at 1431-32).

contained in her third grouping.<sup>84</sup> Only in the most “unusual case,” she emphasized, should a court decline to adjudicate a case on the basis of its own prudential determination.<sup>85</sup> The Zivotofskys’ suit, she concluded, was not that sort of rare case.<sup>86</sup>

Justice Alito concurred in the judgment.<sup>87</sup> He stated simply: “This case presents a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport.”<sup>88</sup> Although, under Supreme Court precedent, “determining the constitutionality of an Act of Congress *may* present a political question,” he said, the narrow question at issue here did not so qualify, even though “[d]elineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter.”<sup>89</sup> Justice Alito thus found this case justiciable, in part, by framing the question as one of statutory and constitutional interpretation.<sup>90</sup> Yet he recognized—arguably more so than the majority—that not all cases implicating congressional enactments could automatically escape the political question doctrine’s net of nonjusticiability.

Justice Breyer, alone, dissented.<sup>91</sup> He agreed with Justice Sotomayor that all six *Baker* factors remained relevant.<sup>92</sup> However, parting ways with her and the other seven justices, Justice Breyer found that the case presented a nonjusticiable political question.<sup>93</sup> He based his finding on “four sets of prudential considerations, *taken together*,”<sup>94</sup> namely: (1) the case arose in the foreign affairs arena;<sup>95</sup>

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<sup>84</sup> *Zivotofsky*, 132 S. Ct. at 1432.

<sup>85</sup> *Id.* at 1433; Rozenstein, *supra* note 83 (According to Justice Sotomayor, “this third category could, albeit rarely, be enough to render a case nonjusticiable—for example, ‘if Congress passed a statute . . . purporting to award financial relief to those improperly ‘tried’ of impeachment offenses.”).

<sup>86</sup> See Rozenstein, *supra* note 83.

<sup>87</sup> *Zivotofsky*, 132 S. Ct. at 1436.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1436-37 (emphasis added).

<sup>90</sup> *Id.* at 1436.

<sup>91</sup> *Id.* at 1437.

<sup>92</sup> *Id.*

<sup>93</sup> *Zivotofsky*, 132 S. Ct. at 1437.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1437.

(2) answering the constitutional question presented in this case might require courts “to evaluate the foreign policy implications of foreign policy decisions”;<sup>96</sup> (3) the “countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones”;<sup>97</sup> and (4) the political branches have sufficient non-judicial means to resolve their differences at issue in this case.<sup>98</sup> Justice Breyer, thus, concluded that the case was nonjusticiable, and in so deciding, reaffirmed his commitment to the prudential version of the political question doctrine.<sup>99</sup>

### III. THE IMPACT OF THE COURT’S POLITICAL QUESTION APPROACH ON NATIONAL SECURITY POLICY

#### A. *Zivotofsky Portends a Modest Shift in Political Question Jurisprudence, But Does So for Reasons Ignored by Many Commentators*

*Zivotofsky* is unlikely to spur significant changes in federal courts’ political question jurisprudence vis-à-vis the tug-of-war between the classical and prudential versions of the political question doctrine. Nevertheless, it may increase the likelihood that lower courts find questions justiciable, particularly where federal statutes are involved. Thus, in turn, it may encourage Congress to assert its prerogatives via statutory enactment. If that is the case, then *Zivotofsky* may have a jurisprudential impact, albeit in an unanticipated way.

#### 1. One (Small) Step Closer to Explicitly Repudiating the Prudential Political Question Doctrine

The Court only mentioned the two constitution-based *Baker* factors in analyzing the justiciability question in *Zivotofsky*. It

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<sup>96</sup> *Id.* at 1438.

<sup>97</sup> *Id.* at 1440. In particular, Justice Breyer emphasized, *Zivotofsky* “[did not] assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government.” *Id.*

<sup>98</sup> *Zivotofsky*, 132 S. Ct. at 1441.

<sup>99</sup> *Id.*



ignored *Baker*'s other considerations, causing Justice Sotomayor—in contrast to the majority—to take pains to emphasize all six *Baker* factors.<sup>100</sup> But, that does not mean the Court in *Zivotofsky* unambiguously rejected the prudential approach to the political question doctrine.

The Court ignored, but did not explicitly eliminate, the prudential *Baker* factors from the political question doctrine test.<sup>101</sup> In addition, the two factors cited by the *Zivotofsky* Court were, in recent years, already coming to be seen as the dominant—if not the only real—factors in federal courts' political question doctrine analysis.<sup>102</sup> In fact, as in *Zivotofsky*, the Supreme Court in *Nixon v. United States* quoted only the first two *Baker* prongs.<sup>103</sup> Thus, it is not clear that *Zivotofsky* is, in a practical sense, any different from antecedent Supreme Court precedent.

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<sup>100</sup> See Rozenshtein, *supra* note 83.

<sup>101</sup> See *Constitutional Law: Political Question Doctrine Designation of Passport Applicant's Birthplace: Zivotofsky ex rel. Zivotofsky v. Clinton*, 126 HARV. L. REV. 307 (2012).

<sup>102</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (“These tests are probably listed in descending order of both importance and certainty.”); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (focusing on the first two *Baker* factors); *Canon*, *supra* note 41, at 1307 n.71 (citing *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment), *cert. denied*, 131 S. Ct. 997 (2011)); see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 329 (2007) (quoting *Goldwater v. Carter*, 444 U.S. 996, 1006–07 (1979) (Brennan, J. dissenting)) (internal quotation marks omitted) (“[T]he political-question doctrine . . . does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power.”); HART & WECHSLER, *supra* note 5, at 236 (“[T]he Court’s application of the political question doctrine still requires an interpretation of the underlying constitutional provision to determine where the relevant discretion or interpretive authority is vested.”); Mark Tushnet, *Symposium: Baker v. Carr: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket: Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1207 (2002) (“For the political question doctrine, the ‘issue,’ in the Court’s sense, is: Who gets to decide what the right answer to a substantive constitutional question is?”).

<sup>103</sup> *Nixon*, 506 U.S. at 228 (“A controversy is nonjusticiable—*i.e.*, involves a political question—where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .’”).

In fact, scholars have several times declared the death knell of the prudential approach, if not the entire doctrine. For example, one author wrote in 1984 that the doctrine had withered to nearly nothing, as “only once in the [prior] two decades ha[d] the Court decided that an issue raised a nonjusticiable political question.”<sup>104</sup> Likewise, some scholars thought the 1986 case of *Japan Whaling Association v. American Cetacean Society*<sup>105</sup>—where the Supreme Court rejected the assertion that judicial review would be imprudent and held that an action alleging the Secretary of Commerce breached his statutory duty to enforce international whaling quotas was justiciable because it presented issues of statutory interpretation falling squarely within the province of the federal courts—marked a “retreat from [the] effects-based political question doctrine,” and apparently several lower courts did, too.<sup>106</sup> Thomas Franck, a professor of international law and author of an oft-cited book on the political question doctrine’s application to foreign affairs cases, wrote twenty years before *Zivotofsky* that “[p]articularly in the Supreme Court, the political-question doctrine is now quite rarely used” and, in its entirety, “may be falling into desuetude.”<sup>107</sup> Others predicted

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<sup>104</sup> Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984).

<sup>105</sup> *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986).

<sup>106</sup> Jack L. Goldsmith, *The New Formalism in the United States Foreign Relations Law*, 70 COLO. L. REV. 1395, 1428 (1999) (citing *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993); *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991); *Chiles v. Thornborough*, 865 F.2d 1197 (11th Cir. 1989)) (“Several lower federal courts have invoked the [*Japan Whaling*] decision as a basis for rejecting the political question doctrine” when invoked by a litigant only because of the alleged “adverse foreign relations consequences of an adjudication.”).

<sup>107</sup> See FRANCK, *supra* note 37, at 61; see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (“Recent cases raise doubts about the contours and vitality of the political question doctrine, which continues to be the subject of scathing scholarly attack.”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984) (Edwards, J., concurring) (“Nonjusticiability based upon ‘political question’ is at best a limited doctrine . . .”). While Rachel Barkow rightly asserts that such “predictions proved premature . . . when the Court [in 1993] concluded in *Nixon v. United States* that whether the Senate could impeach a federal judge pursuant to Article I, Section 3, Clause 6 based on the report of a fact-finding committee presented a nonjusticiable political question,” she also acknowledges that “Rehnquist’s opinion for the Court [in *Nixon*] was based predominantly on the classical political question doctrine” and thus might still be consistent with the

the demise of the political question doctrine in the wake of the Supreme Court's decision in 2000 to adjudicate *Bush v. Gore*.<sup>108</sup> More pertinently for purposes of this Article, many took the Supreme Court's willingness to decide several controversial national security cases, like *Rasul v. Bush*<sup>109</sup> and *Boumediene v. Bush*,<sup>110</sup> as yet another sign of the political question doctrine's expiry.<sup>111</sup>

In addition, since *Baker* was decided in 1962, even that case's classical factors rarely—at least at the level of the Supreme Court—resulted in the finding of a nonjusticiable political question. “[O]nly twice in the past half-century has the Court relied on the existence of a ‘textually demonstrable commitment’ to another branch to dismiss a case on political question grounds, and the cases involving the absence of ‘judicially manageable standards’ have all fallen within the same subject-matter: challenges to ‘partisan’ gerrymandering.”<sup>112</sup> The finding of justiciability in *Zivotofsky* thus can hardly be called unusual. Rather than radically changing the Supreme Court's

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theory that the *prudential* version of the doctrine had withered. Barkow, *supra* note 34 at 271-72.

<sup>108</sup> Margit Cohn, *Form, Formula and the Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems*, 59 AM. J. COMP. L. 675, 678-79 (2011).

<sup>109</sup> *Rasul v. Bush*, 542 U.S. 466, 483 (2004) (holding that, at the time, non-U.S. citizens detained as enemy combatants by the U.S. government at Guantanamo had a *statutory* right under the general federal habeas corpus statute, 28 U.S.C. § 2241, to seek habeas corpus review in U.S. federal court).

<sup>110</sup> *Boumediene v. Bush*, 553 U.S. 723, 724 (2008) (holding that non-U.S. citizens detained as enemy combatants by the U.S. military at Guantanamo have a *constitutional* right to seek habeas corpus review in U.S. federal courts).

<sup>111</sup> Cohn, *supra* note 108, at 679. In *Boumediene*, for example, the Court carefully framed the issue before it so as to reject *on the merits* the Executive's claim that the Suspension Clause affords Guantanamo detainees no rights because the United States does not assert sovereignty over Guantanamo, the place of their detention. *Boumediene*, 553 U.S. at 753. The Court explained that, even though the Court would not question the Executive's position that Cuba, not the U.S., had *de jure* sovereignty over Guantanamo, the Court could inquire into the “objective degree of control” the United States exercises over the base. *Id.* at 754. That is, the Court narrowly defined which sovereignty-related questions are nonjusticiable and, in so doing, determined it could decide on the merits an otherwise highly controversial foreign affairs-related issue. *Id.*

<sup>112</sup> *Canon*, *supra* note 41, at 1308.

political question jurisprudence, *Zivotofsky* simply confirmed existing law.<sup>113</sup>

Nevertheless, there are signs<sup>114</sup> that *Zivotofsky* evidences a more pro-justiciability conception of the political question doctrine than did prior cases only hinting at such a shift.<sup>115</sup> First, it is potentially meaningful that Justices Sotomayor, Alito, and Breyer so explicitly took the majority to task for failing to cite the entire *Baker* formulation. This could indicate that the majority's truncated reference to *Baker* (even if not an explicit repudiation of its prudential factors) was significant. This is particularly so, given that even in cases like *Vieth v. Jubelirer*,<sup>116</sup> where the Court emphasized *Baker's* classical components, the Court continued to at least cite to the full *Baker* test.<sup>117</sup> Second, the case built upon *Japan Whaling* to more strongly assert that the existence of a statutory question significantly affects the political question analysis.<sup>118</sup> Similarly, the Court took pains to formulate the question presented to avoid finding a nonjusticiable political question. Third, even those few justices willing to consider the prudential *Baker* factors in *Zivotofsky* emphasized that justiciability should almost never be refused on such grounds.<sup>119</sup> Lastly, the Court mechanically recited the full test for so

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<sup>113</sup> Cf. PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 60 (1996) (citing Symposium, *Comments on Powell v. McCormack*, 17 UCLA L. R. 1 (1969)).

<sup>114</sup> See Spiro, *supra* note 4 (“In the long run, [*Zivotofsky*] could prove a watershed decision.”).

<sup>115</sup> Cf. HART & WECHSLER'S 2012 SUPPLEMENT, *supra* note 37, at 23.

<sup>116</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>117</sup> *Id.* at 277-78 (plurality opinion) (“These tests are probably listed in descending order of both importance and certainty.”). *But see* *Nixon v. United States*, 506 U.S. 224, 228 (1993).

<sup>118</sup> Cf. Chris Michel, *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) (“[*Zivotofsky*] supports a sweeping and significant rule; a claim to a federal statutory right can never present a political question.”); *Leading Cases*, *supra* note 5, at 311 (“In *Zivotofsky*, the Court aligned the D.C. Circuit's classical jurisprudence with the basic principle that executive and legislative power are interdependent. But read broadly, *Zivotofsky* also suggests that an entire category of cases—ones in which a plaintiff invokes a statutory constraint on the Executive—is inherently justiciable.”).

<sup>119</sup> See, e.g., *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring in part and concurring in the judgment).

long that any deviation from that baseline of rote repetition should be taken as a meaningful in and of itself. The *Zivotofsky* Court's quoting *Nixon*—which likewise cited only *Baker*'s classical factors as the source of the “textual commitment” and “judicially manageable standards” prongs—seems particularly significant on this score.

Still, *Zivotofsky*'s weakly pro-justiciability adoption of the classical theory is unlikely to tangibly affect the lower federal courts' approach to the political question doctrine, where most political question cases are decided.<sup>120</sup> On the one hand, the case seems to be having a modest impact: at least some litigants and lower courts have begun citing only the first two, classical factors from *Baker*.<sup>121</sup> Lower courts more zealously apply the political question doctrine—that is, they are more likely to find cases nonjusticiable—than does the Supreme Court.<sup>122</sup> And the political question doctrine has “become an increasingly prominent defense in post-September 11 national security cases.”<sup>123</sup> Viewed against that backdrop, one might understand *Zivotofsky* as sending a responsive signal to the lower

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<sup>120</sup> Cf. Zachary D. Clopton, *Foreign Affairs Federalism and the Limits of Executive Power*, 111 MICH. L. REV. FIRST IMPRESSIONS 1 (2012) (“In *Zivotofsky*, the Supreme Court called for increased judicial participation in contests between Congress and the President in foreign affairs.”); see also 3 *Litigation of International Disputes in U.S. Courts* § 15:6, *Conflict and Comity*, n.19 (“[T]he political question doctrine may be more narrowly applied in the future considering the Supreme Court’s recent ruling in *Zivotofsky*.”).

<sup>121</sup> See, e.g., *Doe v. Franklin Cnty., Mo.*, No. 4:12-CV-918-SNLJ, 2013 WL 2467926, at \*6 (E.D. Mo. June 7, 2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427) (“A political question exists ‘where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicial discoverable and manageable standards for resolving it.’”); Final Response/Principal Brief of Plaintiffs-Appellees/Cross Appellants at 52-53, *Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013) (Nos. 11-7096, 12-7025, 12-7026), 2012 WL 5460858, at \*52-53 (citing only those two *Baker* factors cited by the *Zivotofsky* majority while undertaking a political question doctrine analysis); Reply Brief for Petitioners-Appellants at 2-3, *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (No. 12-5087), 2012 WL 6085407, at \*2-3 (same); see also 16 C.J.S. *Constitutional Law* § 309 (2014) (quoting only those two *Baker* factors cited by the *Zivotofsky* majority).

<sup>122</sup> See *Canon*, *supra* note 41, at 1307-08.

<sup>123</sup> *Id.* at 1321.

courts that they should resolve skirmishes between the political branches, even in the context of foreign affairs.<sup>124</sup>

Yet, given the prevalence of the doctrine in the lower courts, it seems more likely that the relatively weak signal in *Zivotofsky* will not have that much of an impact there after all. Certainly, there is reason to be skeptical about the likely impact of *Zivotofsky*. One district court asserted that the case in no way altered existing doctrine,<sup>125</sup> and another cited Justice Breyer's *Zivotofsky* dissent for the proposition that the political branches have indefatigable primacy over the judiciary in matters relating to foreign affairs.<sup>126</sup> Moreover, several district court cases and appellate briefs have cited Justice Sotomayor's concurrence (which emphasizes the need to apply all six *Baker* factors), rather than the majority's opinion (which only references *Baker*'s two classical factors).<sup>127</sup> Other district court

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<sup>124</sup> Cf. NANDA & PANSIUS, *supra* note 2.

<sup>125</sup> See, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 3441578, at \*4 (D. Kan. Aug. 15, 2012) ("*Zivotofsky*, however, did not substantially change the political question doctrine. It therefore does not constitute an intervening change in controlling law.").

<sup>126</sup> *In re Restraint of All Assets Contained or Formerly Contained in Certain Inv. Accounts at UBS Fin. Servs., Inc.*, 860 F. Supp. 2d 32, 41 (D.D.C. 2012) (quoting *Zivotofsky*, 132 S. Ct. at 1437 (Breyer, J., dissenting)) ("The Constitution primarily delegates the foreign affairs powers to the political departments of the government, Executive and Legislative, not to the Judiciary.").

<sup>127</sup> See, e.g., *Gill v. Arab Bank, PLC*, 891 F. Supp. 2d 335 (E.D.N.Y. 2012) (citing Justice Sotomayor's *Zivotofsky* concurrence and quoting all six factors from *Baker*); *Arunga v. Romney* No. 2:12-CV-873, 2012 WL 5269174, at \*2 (S.D. Ohio Oct. 24, 2012) (citing Justice Sotomayor's *Zivotofsky* concurrence, although nothing that, among the factors set forth in *Baker*, a court is required to consider "a lack of judicial standards . . . and the impossibility of judicial resolution without policy determinations committed to other branches of government"); Motion of Professor Victor Williams for Leave to File a Brief Amicus Curiae in Support of Respondent NLRB Raising Political Question Nonjusticiability at 3, *Direct Holdings, LLC v. Nat'l Lab. Rel. Bd.* (Nos. 12-72526, 12-72639), 2013 WL 298322, at 3 (citing Justice Sotomayor's *Zivotofsky* concurrence) ("Justice Sotomayor helpfully detailed the 'demanding' inquiry required of a political question analysis.") (citation omitted); Reply Brief in Support of Defendant's Motion for Reconsideration of Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, for Judgment on the Pleadings, *In re Motor Fuel Temperature Sales Practices Litig.*, 2012 WL 3441578 (No. 07-MD-01840-KHV), 2012 WL 3176596; see also *Rangel v. Boehner* No. 13-540, 2013 WL 6487502, at \*9-10, \*21 n.24 (D.D.C. Dec. 11, 2013) (quoting *Baker*'s list of all six factors, but then asserting that the first two factors are the most

cases exhibit even more confusion about the scope of the political question doctrine in the wake of *Zivotofsky*, namely by citing *Zivotofsky*'s majority opinion to support the two *Baker* factors it mentioned, yet then applying the remaining four *Baker* factors as well.<sup>128</sup> Litigants—though, perhaps opportunistically—have asserted confusion in the doctrine, too.<sup>129</sup>

But *Zivotofsky*'s modest repudiation of *Baker*'s prudential factors could synergize with other trends to more strongly influence national security doctrine. Specifically, even though *Zivotofsky* is

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important and later referencing *Zivotofsky* for the proposition that the court could not reach the merits of the plaintiff's claims); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 961 F. Supp. 2d 185, 191-92 (D.D.C. 2013) (citing *Baker*'s list of all six factors but then explicitly discussing only the two factors mentioned by the majority in *Zivotofsky*); *Peterson v. Islamic Republic of Iran*, No. 10 Civ. 4518 (KBF), 2013 WL 1155576, at \*20, \*22 (S.D.N.Y. Mar. 13, 2013) (citing *Zivotofsky* for the proposition that “[c]ourts lack authority to decide non-justiciable political questions,” but then quoting all of *Baker*'s six factor list).

<sup>128</sup> See, e.g., *Alaska v. Kerry*, No. 3:12-cv-00142-SLG, 2013 WL 5269760, at \*7-18 (D. Alaska Sept. 17, 2013); *Kerr v. Hickenlooper*, 800 F. Supp. 2d 1112, 1147 n.35 (D. Colo. 2012), *aff'd and remanded by* 2014 WL 889445 (“Some recent Supreme Court decisions have only identified the first two *Baker* tests in describing the test for whether the political question doctrine applies in a particular case, suggesting the importance of the first two tests.”); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2012 WL 3441578 (D. Kan. Aug. 15, 2012) (citing to *Zivotofsky* and quoting the two *Baker* factors mentioned in *Zivotofsky*, but then discussed all six *Baker* factors); *Davis v. Detroit Fin. Review Team*, 821 N.W.2d 896, 927, 929 (Mich. Ct. App. 2012) (O’Connell, J., concurring in part and dissenting in part) (citing at first only those two *Baker* factors mentioned in *Zivotofsky*, but then perhaps referring to an additional *Baker* factor when stating that certain issues “by their very nature are beyond judicial competence”).

<sup>129</sup> *Petition for Certiorari, Ancient Coin Collectors Guild v. U.S. Customs and Border Protection, Dept. of Homeland Security*, 2013 WL 522043, at \*17–18 (U.S. Feb. 12, 2013) (No. 12-996) (identifying a need for “the Court to clarify not only that the ‘political question test’ applies whenever ‘foreign policy concerns’ are raised, but [also] the exact nature of that test”); *Brief of Appellees, Lavergne v. Bryson*, No. 12-1171, 2012 WL 1649995, at \*36-37 (3d Cir. Apr. 18, 2012) (citing *Zivotofsky* as “suggesting that ‘political question’ inquiry may be limited to first two *Baker* formulations” but then going on to quote all six *Baker* factors); see also Aziz Z. Huq, *Removal As A Political Question*, 65 STAN. L. REV. 1, 76 n.116 (2013) (citing *Zivotofsky* in one part of the article, but in another, analyzing all six *Baker* factors as still relevant “triggers” under current law); Risa E. Kaufman, “By Some Other Means”: *Considering the Executive’s Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2012).

unlikely to push the jurisprudential pendulum any further away from the prudential and back toward the categorical political question approach, there are reasons to think that *Zivotofsky* will lead to increased judicial review, especially in the long run.<sup>130</sup> First, many of the cases mentioned above, even those that cite to *Zivotofsky* only via Justice Sotomayor's concurrence, did not find a nonjusticiable political question.<sup>131</sup> Thus, such lower courts may have heeded the Supreme Court's command that they more rigorously apply the political question doctrine, even when applying *Baker's* prudential factors.

Second, with respect to the national security cases that are the subject of this Article, *Zivotofsky's* urging might interact synergistically with courts' increased—and growing—willingness to push back against the political branches. If one conceptualizes the September 11<sup>th</sup> attacks and the war in Afghanistan as the genesis of courts' current approach to national security jurisprudence, then as the United States and the world move further from that point, courts will likely become even more willing to engage with Congress and, especially, the Executive. This trend occurs in most conflicts. Judicial engagement becomes stronger as those wars become increasingly unpopular and controversial.<sup>132</sup> The trend has been particularly strong in the post-9/11 context.<sup>133</sup> *Zivotofsky*—by calling for increased judicial action, even where it might touch upon controversial foreign affairs matters—could intensify this tendency,

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<sup>130</sup> Cf. NANDA & PANSIUS, *supra* note 2 (internal citation omitted) (*Zivotofsky's* holding is “deceptively far-reaching,” although “[m]ost likely, it will take many years before the lower courts fully accept Chief Justice Roberts' clear direction to resolve conflicts between Congress and the Executive.”).

<sup>131</sup> See, e.g., Gill v. Arab Bank. PLC, No. 11-CV-3706, 2012 WL 4026941 (E.D.N.Y. Sept. 12, 2012).

<sup>132</sup> Cf. Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 730-31 (1984) (explaining that the Court's willingness to decide foreign affairs cases grows in “response to domestic conditions: the growing unpopularity of the war among the general public, heightened conflict between Congress and the President, and increasingly bold assertions and acts of presidential prerogative”).

<sup>133</sup> See David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2567 (2003) (“[C]ourts have actually been more willing to stand up to the government in [the post-9/11] period than in many prior crises.”).



especially in a world where public mistrust of government is noticeably heightened.<sup>134</sup>

2. Consequently, It is Other Facets of *Zivotofsky* That Are More Likely to Increase Judicial Involvement in Foreign Affairs Cases

From a practical perspective, *Zivotofsky*'s implicit rejection of *Baker*'s prudential factors is not the most important part of the case. That is, other aspects of *Zivotofsky* will probably have a greater jurisprudential impact than will the Court's adoption of the classical political question doctrine. In particular, the Court's emphasis on Congress's enactment of Section 214 as important to the political question issue is likely to be influential.<sup>135</sup> In contrast to the Court's *sub silentio* rejection of *Baker*'s prudential factors, the Court expressly expounded upon the importance of the case's statutory angle. In fact, at least seven of the Justices explicitly stated that the existence of Section 214 impacted their political question doctrine analysis.<sup>136</sup> Even though, as a general matter, lower courts are more

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<sup>134</sup> Cf. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 282 (2003) (arguing that, today, courts may be marginally more willing to intervene in foreign affairs disputes, given increased public distrust in government (which arose, in part, from Vietnam and Watergate) and a "massively strengthened commitment to individual rights" in U.S. constitutional law).

<sup>135</sup> Even if unjustified, see *Leading Cases*, *supra* note 5, at 312, the Court wholeheartedly recognized the importance of Section 214(d) to the question of justiciability. See *Zivotofsky*, 132 S. Ct. at 1427; Michel, *supra* note 118, at 254. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427–28 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))) ("[I]f the Executive's agreement with a plaintiff that a law is unconstitutional is enough to preclude judicial review, then . . . [t]his would undermine the clear dictate of the separation-of-powers principle 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.');" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) ("Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.") (citing *Zivotofsky*, 132 S. Ct. at 1428)).

<sup>136</sup> See *Zivotofsky*, 132 S. Ct. at 1427 ("Zivotofsky requests that the courts enforce a specific statutory right," such that, "[t]o resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional," which "is a familiar judicial exercise."); *id.* at 1434, 1436 (Sotomayor,

likely than the Supreme Court to find a case nonjusticiable,<sup>137</sup> those courts appear to be responding to *Zivotofsky*'s signal that statutory cases should be decided on their merits.<sup>138</sup> This pro-justiciability aspect of *Zivotofsky* will probably have even more of an effect on lower courts in the future.<sup>139</sup>

Likewise, *Zivotofsky* is important because, in rejecting the President's assertion of nonjusticiability, the Court refused to defer to the Executive Branch's claim that adjudication of the case would

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J., concurring in part and concurring in the judgment) (internal quotation marks omitted) ("[T]he Court appropriately recognizes that petitioner's claim to a statutory right is relevant to the justiciability inquiry required in this case."). In addition, Justice Alito framed his analysis in terms of the statute in question. *See id.* at 1436 (Alito, J., concurring in the judgment) (describing the case as "present[ing] a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport"). Justice Breyer's opinion, too, although not going as far as the other eight justices, made clear that the existence of the statute did affect his analysis. *See id.* at 1439 (Breyer, J., dissenting) ("Were the statutory provision undisputedly concerned only with purely administrative matters (or were its enforcement undisputedly to involve only major foreign policy matters), judicial efforts to answer the constitutional question might not involve judges in trying to answer questions of foreign policy.").

<sup>137</sup> *See* SHANE & BRUFF, *supra* note 116 (citing Symposium, *Comments on Powell v. McCormack*, 17 UCLA L. R. 1 (1969)).

<sup>138</sup> *See, e.g.,* Kaplan v. Cent. Bank of Islamic Rep. of Iran, Civ. No. 10-483 (RCL), 2013 WL 4427943, at \*5 (D.D.C. Aug. 20, 2013) (quoting *Zivotofsky*, 132 S. Ct. at 1427) ("[T]he present case does not present a non justiciable political question [because] the plaintiffs in this action do not ask the Court to 'supplant a foreign policy decision of the political branches with the courts' own unmoored determination' of whether the rocket attacks at issue here were examples of 'war' or 'terrorism,' but rather seek relief under several federal statutes authorizing recovery for specific conduct."); Kerr v. Hickenlooper, 880 F. Supp. 2d 1112, 1153-54 (D. Colo. 2012), *opinion amended and supplemented*, 11-CV-01350-WJM-BNB, 2012 WL 4359076 (D. Colo. Sept. 21, 2012) (citing *Zivotofsky*, 132 S. Ct. 1421) ("Earlier this year, the Supreme Court again reiterated the rule that federal courts have jurisdiction to interpret federal statutes, even in politically charged cases.").

<sup>139</sup> *See, e.g.,* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 429, n.74 (2012) (reading *Zivotofsky* as "suggesting that the [political question] doctrine may have little application to cases involving the constitutionality of federal statutes. . ."); Michel, *supra* note 118, at 254; NANDA & PANSISUS, *supra* note 2 (internal citation omitted) ("Chief Justice Roberts' language exhibits a tone that hints at impatience," and "[t]he crucial matter will be whether there is a direct conflict between branches of government as to give rise to a duty for the courts to resolve which governmental body should prevail.").

lead to drastic foreign policy consequences.<sup>140</sup> This rejection is in stark contrast to recent precedent.<sup>141</sup> For instance, in two cases in 2004, *Republic of Austria v. Altmann*<sup>142</sup> and *Sosa v. Alvarez-Machain*,<sup>143</sup> the Supreme Court insinuated that deference to the Executive in international affairs-related cases was requisite. Notwithstanding precedents like *Rasul* and *Boumediene*, which implied a narrowing of the political question doctrine,<sup>144</sup> “lower courts have taken” *Altmann* and *Sosa*, and their deference to the Executive in foreign relations cases, “as inspiration for an expansion of [that] doctrine.”<sup>145</sup> If one believes that “lower court decisions have only nominally followed the *Baker* test, using the *Baker* categories as thin pretexts for deferring to the wishes of the Executive,”<sup>146</sup> then *Zivotofsky*’s explicit rejection of such deference is particularly significant.<sup>147</sup> Moreover, the lower courts that have used deference-

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<sup>140</sup> See *Zivotofsky*, 132 S. Ct. at 1427; see also John H. Cushman, Jr., *U.S. Justices Send Jerusalem Status Case Back to Lower Court*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/us/justices-return-jerusalem-status-case-to-lower-court.html> (“The Obama administration said that the question was one that could be decided only by the president, and that the court should stay out of the matter.”).

<sup>141</sup> Cf. *Access to Courts*, 122 HARV. L. REV. 1151, 1156 (2009).

<sup>142</sup> *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (holding, contrary to the assertions of the Executive Branch, that the Foreign Sovereign Immunities Act applied retroactively against Austria and its state-owned art gallery for actions taken prior to the enactment of that Act, yet affirming that deference to the Executive might still be warranted in future cases).

<sup>143</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 733 n.21 (2004) (while holding that the Alien Tort Statute was intended only to give courts jurisdiction over certain well-defined international law violations, the Court noted that case-specific deference to the Executive might sometimes be another “principle limiting the availability of relief in the federal courts for violations of customary international law”).

<sup>144</sup> See *supra* notes 100-102 and accompanying text.

<sup>145</sup> *Access to Courts*, *supra* note 141, at 1156; see also *The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1193-94 (2009) (“Many courts have seemingly taken the Court’s references to ‘deference’ in *Republic of Austria v. Altmann* and *Sosa v. Alvarez-Machain* as invitations to defer to the executive branch’s opinions on justiciability.”).

<sup>146</sup> *Access to Courts*, *supra* note 141, at 1156 (emphasis added).

<sup>147</sup> Although lower courts had previously refused to grant the Executive such deference regarding justiciability questions, see, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (“[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily

based arguments to justify their findings of nonjusticiability—and to thereby extend the political question doctrine—have done so in special reliance on *Baker's* last three, prudential factors.<sup>148</sup> This lends additional significance to the *Zivotofsky* majority's decision to cite only the two classical *Baker* factors.

## B. *The Impact of Zivotofsky on Targeted Killing Cases*

### 1. Introduction

As argued above, *Zivotofsky* probably will not lead to a watershed victory in the tug-of-war between the classical and prudential versions of the political question doctrine. Yet it may have real-world effect, largely due to its command to lower courts to adjudicate cases implicating statutory analysis and to refuse to so blindly defer to the Executive with regards to the applicability of the political question doctrine. More specifically, given these considerations, *Zivotofsky* will probably result in increased judicial review of national security-related cases in particular.

*Zivotofsky* tacitly encouraged lower courts to reframe questions presented so as to preclude a finding of nonjusticiability, urged them to view the Executive's anti-justiciability predictions of foreign affairs pandemonium with skepticism, and signaled to Congress that it could increase the likelihood of judicial review via statutory enactment. *Zivotofsky* may, thus, have only a marginal impact in the existing landscape, but have a greater effect if and when Congress intervenes. These two contexts will be discussed in turn: first, by analyzing how *Zivotofsky's* political question analysis would be applied on the facts of *Al-Aulaqi v. Obama*,<sup>149</sup> and second, by considering a hypothetical statute providing the families of those killed via targeted killing with a private cause of action. A normative discussion of *Zivotofsky's* likely effects follows.

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preclude adjudication. . .”), the fact that, here, the Supreme Court approved that approach is important.

<sup>148</sup> *The Political Question Doctrine, Executive Deference, and Foreign Relations*, *supra* note 145, at 1196.

<sup>149</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1 (D.D.C. 2010).

## 2. Revisiting the *Al-Aulaqi* Case in Light of *Zivotofsky*

Based upon the various considerations discussed above, *Zivotofsky* may lead lower courts to now decide even tough national security cases like those involving targeted killings. Consider, for example, *Al-Aulaqi v. Obama*, a 2010 case in which the U.S. District Court for the District of Columbia dismissed a targeting-related claim on political question grounds.<sup>150</sup> Anwar Al-Aulaqi was an American-born Muslim cleric with dual U.S.-Yemeni citizenship, who at the time of the *Al-Aulaqi* litigation was purportedly hiding in Yemen.<sup>151</sup> The U.S. government alleged that Al-Aulaqi played an operational role in Al Qaeda in the Arabian Peninsula (“AQAP”), a terrorist organization affiliated with Al Qaeda.<sup>152</sup> In particular, the government asserted that Al-Aulaqi facilitated terrorist training camps, recruited people to join AQAP, and planned attacks on the United States such as the failed “underwear bombing” of 2009.<sup>153</sup> Based on these allegations, the U.S. government added Al-Aulaqi to its secret targeted killing list.<sup>154</sup>

After learning from media reports that his son was on the U.S. government’s “kill list,”<sup>155</sup> Al-Aulaqi’s father sought an injunction in the District Court for the District of Columbia prohibiting the government from intentionally killing Al-Aulaqi “unless he presents a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat.”<sup>156</sup> Al-

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 8.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 10.

<sup>154</sup> On September 30, 2011, the U.S. government killed Al-Aulaqi, with an armed drone operated by the CIA. Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>; see also Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to Be in America’s Cross Hairs*, N.Y. Times (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted%3Dall>.

<sup>155</sup> *Al-Aulaqi*, 727 F. Supp. 2d at 10.

<sup>156</sup> *Id.* at 8.

Aulaqi's father asserted that, where those requirements were not met, "the United States' alleged policy of authorizing the targeted killing of U.S. citizens, including [his] son, outside of armed conflict," violated his son's Fourth Amendment right to be free from unreasonable seizures; his Fifth Amendment right not to be deprived of life without due process of law; and, by virtue of its failure to disclose the criteria used to place someone on U.S. government "kill lists," the notice requirement of the Fifth Amendment Due Process Clause.<sup>157</sup> Judge Bates of the District Court for the District of Columbia, however, determined that Al-Aulaqi's father's claims presented traditionally nonjusticiable foreign policy questions.<sup>158</sup>

Judge Bates began his discussion of the political question doctrine by citing all six *Baker* factors.<sup>159</sup> Judge Bates acknowledged that the "first two factors—a textual commitment to another branch of government and a lack of judicially manageable standards—are considered the most important,"<sup>160</sup> but emphasized that "in order for a case to be non-justiciable, the court need only conclude that [any] one [of the six *Baker*] factor[s] is present."<sup>161</sup> Judge Bates framed the questions presented by *Al-Aulaqi* as follows:

Judicial resolution of the "particular questions" posed by plaintiff in this case would require this Court to decide: (1) the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP; (2) whether AQAP and al Qaeda are so closely linked that the defendants' targeted killing of Anwar Al-Aulaqi in Yemen would come within the United States's current armed conflict with al Qaeda; (3) whether (assuming plaintiff's proffered legal standard applies) Anwar Al-Aulaqi's alleged terrorist activity renders him a concrete, specific, and imminent threat to life or physical safety . . . ; and (4) whether there are means short of lethal force that the United States

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<sup>157</sup> *Id.* at 15.

<sup>158</sup> *See id.* at 44-53. Judge Bates also held that Al-Aulaqi's father lacked standing to sue because he failed to adequately explain his son's inability to appear on his own behalf. *Id.* at 14-35.

<sup>159</sup> *Id.* at 44.

<sup>160</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d, 1, 44 (D.D.C. 2010).

<sup>161</sup> *Id.* at 44-45.

could reasonably employ to address any threat that Anwar Al-Aulaqi poses to U.S. national security interests.<sup>162</sup>

After framing the case as such, Judge Bates explained that “plaintiff’s claims pose[d] precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine.”<sup>163</sup>

Judge Bates began by relying on *Baker*’s classical factors. He found that *Baker*’s first factor was satisfied: the declaratory and injunctive relief Al-Aulaqi’s father had requested would require “judges to second-guess, with the benefit of hindsight, another branch’s determination that the interests of the United States call for military action” despite the fact that “[s]uch military determinations are textually committed to the political branches.”<sup>164</sup> Likewise, he found that there were no judicially manageable standards that he could use to decide such a case, as it would require him to determine the sort of national security threat posed by Al-Aulaqi.<sup>165</sup>

Judge Bates then considered *Baker*’s prudential factors. He determined that the fourth and sixth factors “militate[d] against judicial review of [Al-Aulaqi’s father’s] claims.”<sup>166</sup> Specifically, *ex post* judicial review of an Executive Branch targeted killing abroad, he said, “would reveal a ‘lack of respect due coordinate branches of government and create the potentiality of embarrassment of multifarious pronouncements by various departments on one question.’”<sup>167</sup>

The *Zivotofsky* Court’s hinting at the primacy of the categorical *Baker* factors probably would not change the result in *Al-Aulaqi*. Judge Bates not only relied on the prudential *Baker* factors in finding the case nonjusticiable; he also determined that the questions at issue were textually committed to the political branches and gave

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<sup>162</sup> *Id.* at 46 (internal quotation marks omitted).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 48 (citations omitted).

<sup>165</sup> *Id.* at 47.

<sup>166</sup> *Al-Aulaqi*, 727 F. Supp. 2d. at 48.

<sup>167</sup> *Id.* (quoting *Baker*, 369 U.S. at 217).

rise to no judicially manageable standards. Thus, taking Judge Bates' opinion at face value, one could easily conclude that *Zivotofsky* would have no impact on a case like *Al-Aulaqi*.

One could argue, however, that Judge Bates incorrectly found Al-Aulaqi's father's claims nonjusticiable under the post-*Zivotofsky* conception of *Baker's* classical factors.<sup>168</sup> For example, one might think that Judge Bates' finding of a "textual commitment" was untenable, particularly given his insistence that he was not holding that "the Executive possesses unreviewable authority to order the assassination of any American whom he labels an enemy of the state."<sup>169</sup> Likewise, one could take issue with Judge Bates' characterization of "the precise nature and extent of . . . Al-Aulaqi's affiliation with AQAP" as "pos[ing] precisely the type[] of complex policy question[] that the D.C. Circuit has historically held non-justiciable," since courts have routinely decided analogous questions in a series of post-9/11 habeas corpus cases.<sup>170</sup>

Likewise, other *Zivotofsky*-spurred developments, such as *Zivotofsky's* insinuation that questions presented should be formulated in favor of justiciability where possible, and its encouraging courts to get involved even in seemingly controversial foreign affairs-related matters, could prompt a different result in the *Al-Aulaqi* case. Properly conceived, the questions presented in *Al-Aulaqi* might not implicate *Baker's* first two classical factors. Judge Bates described *Al-Aulaqi* as asking whether the U.S. government "unlawfully applied the war-making and national defense powers of

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<sup>168</sup> See John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 179 (2011) ("While Judge Bates' decisions regarding the various standing issues were sound, his analysis of the political question doctrine seemed both unnecessary and imprecise."); see also Benjamin McKelvey, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1367-68 (2011) (internal citation omitted) (questions like that posed in *Al-Aulaqi* involve "general concepts of law, not political questions, and they are subject to judicial review").

<sup>169</sup> Dehn & Heller, *supra* note 168, at 186 (internal citation omitted).

<sup>170</sup> See BRADLEY & GOLDSMITH, *supra* note 21, at 416.



the political branches to conduct alleged missile strikes abroad.”<sup>171</sup> But if he had instead framed the case as asking whether the government’s “use of lethal force against three American citizens violated their Fourth and Fifth Amendment rights,”<sup>172</sup> he arguably should have been less likely to find the case nonjusticiable under *Baker’s* classical factors. This is because the latter hypothetical formulation arguably poses questions “squarely committed to the Judiciary”: Such “constitutional claims can be readily resolved under existing judicial standards; they involve legal issues, not policy choices; and their adjudication is not a display of disrespect to the political branches, but [federal courts’] constitutional duty.”<sup>173</sup> Because *Zivotofsky* apparently preferences such constitutionality-aimed reframing,<sup>174</sup> *Zivotofsky* could be read to require the latter approach to the *Al-Aulaqi* case.<sup>175</sup> Thus, presuming lower courts heed the Supreme Court’s urging, *Zivotofsky’s* influence might mean the U.S. government’s targeted killing program is more likely to be reviewed by a court.

Moreover, *Zivotofsky’s* emphasis on the relevance of statutory issues to its analysis should have encouraged Judge Bates to consider the impact of potentially pertinent existing statutes, such as the Authorization for the Use of Military Force (“AUMF”), on his analysis. For instance, Judge Bates “did not clearly indicate whether he believed that the case involved an extant armed conflict or a

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<sup>171</sup> Plaintiff’s Opposition to Defendant’s Motion to Dismiss at II(A), *Al-Aulaqi v. Panetta*, No. 12-cv-01192, 2013 WL 440710, at \*13 (D.D.C. Feb. 5, 2013) (internal citation omitted).

<sup>172</sup> *Id.*

<sup>173</sup> Plaintiff’s Opposition, *supra* note 171, at \*12; see also McKelvey, *supra* note 168, at 1367 (“In the context of targeted killing, a federal court could evaluate the targeted killing program to determine whether it satisfies the constitutional standard for the use of defensive force by the Executive Branch.”); RAMSEY, *supra* note 102, at 329 (stating that questions that “turn[] on interpretation of the Constitution’s grants of power to the President and Congress” are not permitted to be treated as political questions, as “[t]hat interpretation is not committed to the political branches by any specific text”).

<sup>174</sup> See John Love, Note, *On the Record: Why the Senate Should Have Access to Treaty Negotiating Documents*, 113 Colum. L. Rev. 483, 511 (2013) (internal quotation marks omitted) (the Supreme Court in *Zivotofsky* conscientiously “reframed the issue” vis-à-vis the lower courts as a dispute about a statutory right).

<sup>175</sup> See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

separate, discrete act of national defense,”<sup>176</sup> a distinction hinging on the AUMF. The “one-off use of force against a wholly foreign threat identified by the executive branch”—which usually involves a political question—is wholly different from “the executive’s prosecution of an armed conflict authorized by Congress”—which usually does not involve a political question.<sup>177</sup> In the latter case, a court is tasked not with making policy determinations of the sort outside of the judiciary’s expertise, but rather with reviewing the Executive’s action for “compliance with congressional authorization and other applicable law.”<sup>178</sup> Judge Bates thought that *Al-Aulaqi* sharply contrasted with cases requiring “interpretations of the Constitution and of federal statutes,” which are “quintessential tasks of the federal Judiciary.”<sup>179</sup> But the existence of a congressional war-making authorization, embodied by the AUMF, should have been “relevant to the Judiciary’s power to decide [Al-Aulaqi’s] claim” because the court, “by virtue of the statute,” was simply being asked to enforce a statutory boundary, which required only “a familiar judicial exercise.”<sup>180</sup> In sum, in light of *Zivotofsky*, lower courts should be more likely to deem cases like *Al-Aulaqi* justiciable, even under the statutory status quo.

### 3. The Potential Influence of Congressional Intervention

It is possible that courts, even without congressional intervention, will be more willing to adjudicate cases like *Al-Aulaqi* in the wake of *Zivotofsky*. Nevertheless, even post-*Zivotofsky*, the argument for judicial review of cases like *Al-Aulaqi* remains uncertain. This is particularly true because suits like *Al-Aulaqi* are not ideal vehicles for surmounting justiciability hurdles to review the U.S. government’s targeting program. For example, *Al-Aulaqi* asked

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<sup>176</sup> Dehn & Heller, *supra* note 168, at 179.

<sup>177</sup> *Id.* at 180.

<sup>178</sup> *Id.* However, this would leave some of the U.S. government’s targeting decisions in the realm of nonjusticiable political questions. For instance, those targetings undertaken against a threat completely distinct from that posed by Al Qaeda and its associates may remain—under this piece of analysis—nonjusticiable. *Cf. id.* (arguing that the decision to target an “independent, imminent threat to the nation would arguably be a political question”).

<sup>179</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 51 (D.D.C. 2010).

<sup>180</sup> *Zivotofsky*, 132 S. Ct. at 1427.

the judiciary to review a targeting *ex ante*, not *ex post*.<sup>181</sup> *Al-Aulaqi* and similar cases also present hard standing questions.<sup>182</sup>

Yet courts may be more likely to get involved if Congress were to enact a statute specifically relating to the U.S. government's targeted killing program, thus triggering another one of *Zivotofsky's* justiciability buttons.<sup>183</sup> In particular, if Congress enacted a statute giving U.S. citizens killed via targeting by the U.S. government a statutory right to compensation, then courts would probably be willing to adjudicate more targeted killing-related cases.<sup>184</sup> If one thinks that oversight of the Executive's drone program is greatly needed, then one might wish to encourage such statutory action.<sup>185</sup>

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<sup>181</sup> Michael Epstein, *The Curious Case of Anwar Al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist is a United States Citizen?*, 19 MICH. ST. J. INT'L L. 723, 737 (2011) ("Although the courts have recently adjudicated several legal issues after detention in the battlefield, as seen in Hamdi and Boumediene, the question of prospective relief regarding potential military action seems to implicate specific policy judgments that may fall outside the scope of judicial review."); see also Jameel Jaffer, *Judicial Review of Targeted Killings*, 126 HARV. L. REV. F. 185, 186 (2013).

<sup>182</sup> See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 14-35 (D.D.C. 2010); see also Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT'L SEC. J. 283, 392 (2011) ("In order to get to court, complainants must satisfy strict standing requirements, establish that the action does not fall foul of the political question doctrine, show that the case can be made without impinging upon the state secrets privilege, and must finally convince a court not to exercise its 'equitable discretion' to decline to rule on sensitive matters.").

<sup>183</sup> Cf. Jack Goldsmith, *John Brennan's Speech and the ACLU FOIA Cases*, LAWFARE BLOG (May 1, 2012, 11:12 AM), <http://www.lawfareblog.com/2012/05/john-brennans-speech-and-the-aclu-foia-cases/> ("One can perhaps argue that our legal system should have more robust accountability constraints on the Commander-in-Chief's targeted killing practices in an authorized conflict . . . . But until Congress imposes such a regime, and especially in light of the political question ruling in the *al-Aulaqi* decision, the government's practices are on firm legal ground.").

<sup>184</sup> Cf. *Al-Aulaqi v. Panetta*, No. 12-1192 (RMC), slip op. at 27-37 (D.D.C. Apr. 4, 2014) (concluding that, although *Al-Aulaqi's* father stated a claim that the government violated his son's due process rights, there was no *Bivens* or other remedy under U.S. law for that claim because special factors—namely, separation of powers, national security, and the risk of interfering with military decisions—counseled hesitation in finding such a remedy).

<sup>185</sup> Dehn & Heller, *supra* note 168, at 180 ("While *ex ante* review of an unexecuted targeting decision in war is both legally and practically problematic, it is unclear why it would be improper after such force is used, particularly when a U.S. citizen has been targeted.").

However, it is plausible that such a route to increased judicial review would actually legitimate, not curtail, the Executive's program, thus undermining the objectives of those opposed to targeted killings.

One can ask two primary sorts of questions about the impact of congressional involvement in this realm. First, one must consider whether Congress's enactment of a statute like this hypothetical will, descriptively, result in additional judicial review or particular substantive outcomes. Second, one must ask whether such effects are, normatively, desirable. Each of these areas of concern will be discussed in turn.

*a. A Court is Likely to Exercise Judicial Review Over a Targeting-Related Statute*

Consider the following hypothetical: Congress enacts a law that grants the families or heirs of those wrongfully killed by U.S. drone strikes a statutory right to sue the government for compensation.<sup>186</sup> If such a family member files a complaint under that statute, then based upon the first two *Baker* factors, as applied in *Zivotofsky*, a court facing such a lawsuit will likely deem the case justiciable.

First, the Supreme Court has rarely—just twice in the past fifty years—found a case nonjusticiable based on the “textual commitment” prong.<sup>187</sup> A court should thus recognize that there is a

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<sup>186</sup> Steve Vladeck, for instance, proposes the following:

If folks are really concerned about this issue, especially on the Hill, then Congress should create a cause of action—with nominal damages—for individuals who have been the targets of such operations (or, more honestly, their heirs). The cause of action could be for \$1 in damages; it could expressly abrogate the state secrets privilege and replace it with a procedure for the government to offer at least some of its evidence *ex parte* and *in camera*; and it could abrogate qualified immunity so that, in every case, the court makes law concerning how the government applies its criteria in a manner consistent with the Due Process Clause of the Fifth Amendment.

Vladeck, *supra* note 3.

<sup>187</sup> *Canon*, *supra* note 41, at 1308; *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (explaining that surveillance over the weaponry, training, and orders of the National Guard are responsibilities vested exclusively in the executive and legislative branches).

supremely high bar to finding a case nonjusticiable on “textual commitment” grounds. Moreover, the determination of the particular question at issue here—namely, the hypothetical statute’s constitutionality—is not textually committed to one of the political branches. Despite the Constitution’s granting certain foreign affairs and war-related powers to the political branches,<sup>188</sup> it “is difficult to identify a Supreme Court decision endorsing the . . . principle that the political question doctrine categorically precludes judicial second-guessing of sensitive military judgments and decisions.”<sup>189</sup> Consequently, and just as in *Zivotofsky*, a court considering our hypothetical statute should understand the litigant before it has simply “request[ed] that the courts enforce a specific statutory right,” such that, “[t]o resolve his claim, the Judiciary must decide if [his] interpretation of the statute is correct, and whether the statute is constitutional, [which] is a familiar judicial exercise.”<sup>190</sup> Thus, if anything, Congress’s injection of the statute into the targeted killing policy realm means that the pertinent question is committed to the *judiciary* itself, and not to the political branches.<sup>191</sup>

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<sup>188</sup> HENKIN, *supra* note 35, at 26.

<sup>189</sup> *Canon*, *supra* note 41, at 1324. Importantly, for instance, the Court in the *Prize Cases* “did not believe that the executive’s determinations regarding who could be subjected to war measures were unreviewable political questions.” Dehn & Heller, *supra* note 168, at 181. See also John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 428 (2003) (“Federal courts still have a role to play with regard to the domestic effects of war, particularly when the war involves American citizens as enemies or when operations occur within the territory of the United States itself.”).

<sup>190</sup> *Zivotofsky*, 132 S. Ct. at 1427; see also Love, *supra* note 174, at 511-12.

<sup>191</sup> Mulhern, *supra* note 36, at 166 n.260 (“There might be such a need, for example, if Congress and the president were engaged in a confrontation over some separation-of-powers question. Thus a case challenging a presidential decision to wage a ‘covert’ war in defil[an]ce of a congressional ban on funding for that war may appropriate for judicial resolution, even if a challenge to the constitutionality of waging war with congressional cooperation, but without a formal declaration, is not.”); See also *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . . . [U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may

Likewise, a court considering this hypothetical statute would not suffer from a lack of judicially manageable standards. Certainly, and just as in *Zivotofsky*, adjudicating the constitutionality of the hypothetical statute would not be an easy endeavor.<sup>192</sup> It would “demand[] careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of [Congress’s and the Executive’s constitutional] powers.”<sup>193</sup> It would require the court, as in *Zivotofsky*, to determine the dividing line between congressional and Executive authority.<sup>194</sup> But the judiciary is up to the task.<sup>195</sup>

A court should be particularly loath to find this hypothetical case nonjusticiable under the second *Baker* prong for two reasons. First, recall that in the past half-century, “the cases involving the absence of judicially manageable standards have all fallen within the same subject-matter: challenges to ‘partisan’ gerrymandering.”<sup>196</sup> Clearly, this hypothetical is not that type of case. Second, the Court’s test in *Zivotofsky* regarding what constitutes a “judicially manageable standard” was “more forgiving” than it had been in the past.<sup>197</sup> *Zivotofsky*, then, seems to urge Martin Redish’s theory that any legal text “can be supplied with working standards of interpretation.”<sup>198</sup>

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have significant political overtones.”); *Massachusetts v. Laird*, 400 U.S. 886 (1970) (Douglas, J., dissenting from denial of certiorari) (arguing there was no reason the Court could not decide whether the Tonkin Gulf Resolution or subsequent acts of Congress were the constitutional equivalent of a declaration of war because the case presented an ordinary question of constitutional construction and statutory interpretation).

<sup>192</sup> *Zivotofsky*, 132 S. Ct. at 1430.

<sup>193</sup> *Id.*

<sup>194</sup> See *id.*; see also HENKIN, *supra* note 35, at 26 (“There is no evidence that the Framers contemplated any significant independent role for the President as Commander in Chief when there was no war. . . . There was to be no standing army for the President to command . . . unless Congress raised or provided it.”); Yoo, *supra* note 189, at 436 (noting that, notwithstanding the President’s foreign affairs-related authority, “Congress has power over funding, and can thus deprive the president of any forces to command” and “by setting the size, armament, and capabilities of the armed forces . . . can determine the type, place, and duration of conflicts that the executive can wage”).

<sup>195</sup> *Zivotofsky*, 132 S. Ct. at 1430.

<sup>196</sup> *Canon*, *supra* note 41, at 1308 n.74.

<sup>197</sup> HART & WECHSLER’S 2012 SUPPLEMENT, *supra* note 34, at 23.

<sup>198</sup> Redish, *supra* note 15, at 1047.

Even if manageable standards are not readily apparent, it is the Court's "first duty," as John Hart Ely has stated, "to *fashion* [such] standards."<sup>199</sup>

In addition, even if the court applied the prudential *Baker* factors to this hypothetical statute, it still should not find the suit nonjusticiable. Indeed, Justice Sotomayor, who explicitly reaffirmed the importance of those additional factors, emphasized that they should lead to a finding of nonjusticiability in only the rarest of cases.<sup>200</sup> If considered at all, those factors should be applied in light of *Zivotofsky*'s language emphasizing the impact that a statute has on the question presented to the courts.<sup>201</sup> Likewise, *Zivotofsky* said that a court should be wary of, not unduly deferential to, Executive claims that a "parade of horrors" will result from judicial review.<sup>202</sup>

Moreover, even if not explicitly considered by the court, realpolitik considerations make it unlikely that the court would find our hypothetical nonjusticiable. As time goes on, and the United States—including its judiciary—moves further from 9/11, courts are likely to become more amenable to reviewing governmental targeting policies.<sup>203</sup> For example, many think that the Supreme Court in *Youngstown* was willing to adjudicate a war powers related dispute

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<sup>199</sup> JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 55-56 (1993). Some have even described the argument that cases like our hypothetical raise nonjusticiable political questions as "almost laughable." Vladeck, *supra* note 3. Throughout "Guantanamo-related habeas litigation, courts routinely inquire into the very questions that might well arise in such a damages suit, e.g., whether there is sufficient evidence to support the government's conclusion that the target is/was a senior operation leader of al Qaeda or one of its affiliates." *Id.* Moreover, in *Zivotofsky*, "the Supreme Court went out of its way to remind everyone (especially the D.C. Circuit) of just how limited the political question really should be," making it even more clear that "uses of military force against U.S. citizens neither 'turn on standards that defy the judicial application,' nor 'involve the exercise of a discretion demonstrably committed to the executive or legislature.'" *Id.*

<sup>200</sup> *Zivotofsky*, 132 S. Ct. at 1433 (Sotomayor, J., concurring).

<sup>201</sup> *Leading Cases*, *supra* note 5, at 307 ("[A] broad reading of the case implies that courts must *always* confront the constitutionality of statutory constraints on the Executive.").

<sup>202</sup> *Zivotofsky*, 132 S. Ct. at 1427.

<sup>203</sup> See JACK GOLDSMITH, POWER AND CONSTRAINT 166 (2012).

between Congress and the President, even during the Korean War,<sup>204</sup> in part because that war had become so controversial. One might think similar factors are particularly likely to surface in this hypothetical because the United States is currently involved in an increasingly unpopular armed conflict. In this hypothetical, too, the populace, through its legislature, has expressed discontent with the Executive's targeting killing policy via congressional enactment pushing back against it. In fact, Congress' doing so would most likely require a supermajority vote to overcome a presidential veto, thus demonstrating even further widespread public support.<sup>205</sup>

*b. Enacting a Statute and Thereby Increasing Judicial Review of National Security Policies Is Likely to Have General Rule of Law Benefits*

*i. Prudential Considerations Favoring Judicial Review*

Generally speaking, judicial review in our hypothetical could be beneficial. First, the classical conception of the political question doctrine may be preferable to the prudential approach and to other, more expansive views of nonjusticiability.<sup>206</sup> Some have argued that

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<sup>204</sup> See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 126 (2002) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), as "the Supreme Court's most important contribution to debate over the best reading of the Constitution of foreign affairs").

<sup>205</sup> Cf. Ratner & Cole, *supra* note 132, at 759. *But see* Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002).

<sup>206</sup> Note that, on this score, some might argue *Zivotofsky* did not go far enough in restricting the political question doctrine to its classical—rather than prudential—roots. Cf. FRANCK, *supra* note 37, at 4-5 (The political question doctrine "is not only not required by but wholly incompatible with American constitutional theory."). *But see* Barkow, *supra* note 34, at 334 ("It would be unwise, however, to reject the entire political question doctrine because of the failings of the prudential doctrine, as the "classical political question doctrine is critically important in the constitutional order."); *id.* at 330 ("The same institutional and structural concerns that support giving some deference to Congress's interpretative decisions also justify giving absolute deference to the political branches in certain circumstances" since "questions are left to the political branches not only because of the judiciary's



the prudential approach is not permitted by the Constitution.<sup>207</sup> As a corollary to that point, the classical conception of the political doctrine—arguably that accepted by the Court in *Zivotofsky*—is more in line with our national tradition and the framers’ original understanding of the U.S. constitutional scheme.<sup>208</sup>

It may be inappropriate for courts to consider the prudential *Baker* factors.<sup>209</sup> Ironically, a court’s declining to decide a case by appealing to prudential considerations “seems troubling” because it is “little more than saying [the court] thought it best not to hear the case for [the] *policy* reasons” it claims to be ill-suited to make in the first place.<sup>210</sup> Courts may appear particularly weak if they allow what

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limitations, but also because of the political branches’ virtues.”) (internal quotation marks and citation omitted).

<sup>207</sup> RAMSEY, *supra* note 102, at 322 (“[T]he sweeping version of the political question doctrine suggested by *Goldwater* is not required and indeed not permitted by the Constitution.”); see also Louis Henkin, *Is There a Political Question Doctrine*, 85 YALE L.J. 597, 603 (1976) (“The courts ha[ve] no basis for, and no business abstaining except where the Constitution could fairly be interpreted as requiring them to abstain.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (“[T]he only proper judgment that may lead to abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.”).

<sup>208</sup> See Barkow, *supra* note 34, at 250 (“[A]lthough its critics believe the doctrine has no place in a country where judicial review is a fundamental part of the constitutional structure, the classical version of the political question doctrine can trace its pedigree to the Constitution itself and its original understanding.”) (internal citation omitted); Michael E. Tigar, *Judicial Power, The ‘Political Question Doctrine,’ and Foreign Relations*, 17 UCLA L. REV. 1135, 1154 (1970) (“[A]ttention to the doctrine’s history reveals that it is . . . a recent invention based upon a misreading or distortion of the early ‘political question’ cases.”).

<sup>209</sup> Wechsler, *supra* note 207, at 7–8, 9 (“[T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts” which “is *toto caelo* different from a broad discretion to abstain or intervene.”); cf. CHEMERINSKY, *supra* note 36, at 146 (arguing that “the[] [*Baker*] criteria seem useless in identifying what constitutes a political question” and it is therefore “hardly . . . surprisingly that the doctrine is described as confusing and unsatisfactory”).

<sup>210</sup> RAMSEY, *supra* note 102, at 326 (emphasis added); see also BRADLEY & GOLDSMITH, *supra* note 21, at 56; FRANCK, *supra* note 37, at 106 (“If there are prudential reasons favoring the courts’ taking jurisdiction in some foreign-affairs cases, perhaps the blanket invocation of prudential reasons for denying jurisdiction in others also needs to be reexamined.”); Goldsmith, *supra* note 106, at 1418.

many believe to be unconstitutional actions to continue unabated on such policy bases.<sup>211</sup>

Second, the costs of such review are lower than one might think. Here, where the question for the court to decide is properly framed, the prudential issues raised in *Baker* are not of concern. Somewhat counter-intuitively, the classical version of the political question doctrine may help courts avoid many of the prudential problems *Baker* was concerned with, yet do so without requiring the court to make the policy determinations *Baker* assumed courts were incapable of performing. For example, assuming that Congress and the Executive acquiesce in the judiciary's constitutional and statutory determinations, in cases like our hypothetical where the political branches are at odds, judicial review could actually ensure there is one voice in foreign affairs, rather than give rise to multifarious pronouncements on national policy.<sup>212</sup>

Third, there are practical reasons why judicial review could be beneficial, even from a substantive foreign policymaking perspective. The judiciary—in contrast to the political branches—has a longer-term perspective, and, thus, might be thought of as an integral protector of our national system.<sup>213</sup> Federal judges have life tenure and are, therefore, at least relative to political actors, likely to be less sensitive to heat-of-the-moment concerns. Moreover, even

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<sup>211</sup> Redish, *supra* note 15, at 1055; *see also* FRANCK, *supra* note 37, at 11 (“The public in America expects that the legitimacy of almost any exercise of political power can be tested by referring it to the validating authority of the judiciary.”); Henkin, *supra* note 207, at 625 (“Would not the part of the courts in our system, the institution of judicial review, and their public and intellectual acceptance, fare better if we broke open th[e] package [of abstention principles often lumped together as the political question doctrine], assigned its authentic components elsewhere, and threw the package away?”).

<sup>212</sup> *Cf.* RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 162 (2001) (suggesting that there were forceful “pragmatic” reasons for the Court to intervene in *Bush v. Gore*, as “[p]olitical considerations in a broad, nonpartisan sense will sometimes counsel the Court to . . . to intervene”). Although this argument may hold less water at the lower court level, the Supreme Court would be made more likely to grant certiorari to resolve any resultant inconsistency.

<sup>213</sup> Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 *YALE L.J.* 1230, 1264 (2007).

though theoretically the Executive Branch is relatively expert on national security matters, “its self-interested and self-protective instincts cloud its judgment.”<sup>214</sup> Likewise, Congress may not be as expert in foreign policy matters as one might at first assume. “[M]ost of the members never develop the specialized expertise needed for real oversight” and “tend not to like responsibility for national security decisions.”<sup>215</sup> Thus, “in an increasing number of cases, the courts are both better positioned to decide disputes and less likely to provoke disaster, even if they get something wrong.”<sup>216</sup>

More generally, judicial review, even of questions like those posed by our hypothetical, will foster the rule of law.<sup>217</sup> This not only has merit in and of itself, but also is invaluable to the United States’ counterterrorism efforts,<sup>218</sup> which are in part based on winning over hearts and minds.<sup>219</sup> For the court to call our hypothetical a political question will foster the political branches’ perception that such a question is a political issue, rather than a constitutional one, thus undermining the *ex ante* limiting effect of any applicable legal constraints.<sup>220</sup> While, of course, the political branches have a

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<sup>214</sup> GOLDSMITH, *supra* note 203, at 58.

<sup>215</sup> *Id.* at 91–92.

<sup>216</sup> Spiro, *supra* note 4 (internal citations omitted).

<sup>217</sup> See HENKIN, *supra* note 35, at 37, n.\* (“Constitutionalism requires also that no part of governance be exempt from judicial review – not even in foreign affairs.”); see also McKelvey, *supra* note 168, at 1374 (“The Obama Administration’s assurances regarding the targeted killing program are unsatisfactory because they fail to address the primary concern at issue: the possibility that an unchecked targeted killing power within the Executive Branch is an invitation for abuse.”).

<sup>218</sup> See Cheri Kramer, *The Legality of Targeted Drone Attacks As U.S. Policy*, 9 SANTA CLARA J. INT’L L. 375, 391 (2011) (“Rule of law is critical to counter-terrorism, and it applies to all nations involved in counter-terrorism—including the United States.”); see also Editorial, *Passport Control*, N.Y. TIMES, Nov. 10, 2011, at A34.

<sup>219</sup> The United States’ allies and enemies may view the American targeted killing program, if subjected to no real independent oversight, as hypocritical, in light of America’s general tendency to push its human rights and democratic values agenda on other countries. Thus, judicial abstention may impact the credibility of the United States abroad, and may even provide fodder for the United States’ enemies. Consequently, unchecked targeted killings in the name of national security might actually place the United States in a more dangerous position, since such a choice could help America’s enemies build support and recruit potential terrorists.

<sup>220</sup> See HENKIN, *supra* note 35, at 87 (“By calling a claim a political question courts foster the perception that it is not a constitutional question and encourage the

responsibility to interpret and apply the Constitution when deciding on their own course of action, one might think that the rigor of their compliance might decrease where there is no potential for judicial review *ex post*. This is likely to be particularly true in the national security realm, where, arguably, the political branches—namely, the Executive—are especially susceptible to efficiency-based arguments and have institutional incentives to be overzealous in the exercise of their war powers at the expense of individual rights.<sup>221</sup>

## ii. General Separation of Powers Values

Counter to critics' claims, judicial involvement in questions like those that surround this hypothetical statute would not controvert democratic will during times of crisis.<sup>222</sup> In fact, there may actually be representation-reinforcing value in *Zivotofsky's* pro-justiciability approach to the political question doctrine. First, generally speaking, one might think that judicial review in the foreign relations realm is “democracy-forcing *ex ante*, [as it] reassure[s] the legislature that it can pass laws without having them subject to wild-eyed, self-interested interpretations by the executive.”<sup>223</sup> Likewise, judicial review may be democracy-forcing *ex*

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exercise of political power without regard to constitution prescriptions and restraints.”).

<sup>221</sup> See *id.* at 108; see also Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457 (2005) (suggesting, on similar grounds, that individual rights-based claims should never be treated as presenting nonjusticiable political questions).

<sup>222</sup> Cf. Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 815 (1989) (stating that “judicial resolution of hot controversies merely encourages legislative buck-passing”).

<sup>223</sup> Jinks & Katyal, *supra* note 213, at 1276; see also Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 467 (1976) (“[T]he manner in which judicial decision making has been avoided (particularly through the ‘political question’ doctrine) has created a demarcation between law and politics which, in turn, has diminished the effectiveness of existing nonjudicial sanctions.”); Michel, *supra* note 118, at 264 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) (“Rejecting statutory political questions redeems the deep structural premises of American democracy” because, “[b]y preventing courts from circumventing the legislature’s ability to constrain the executive, the rule [that a federal statutory claim can never present a political question] would reinforce the principle that ‘the Constitution diffuses power the better to secure liberty.’”).

*post*, as “the political branches are most likely to redress judicial under-protection errors”—i.e., cases in which “courts do not believe that the foreign relations calculus requires abstention . . . , but the political branches would have wanted [that] result[.]”—because “political branch responsiveness is at its height when a gap in federal law harms U.S. foreign relations interests.”<sup>224</sup>

Second, in this hypothetical, Congress has already expressed its democratic preference via statute, and is at loggerheads with the also democratically-elected Executive, complicating any notions of pure democratic will. Thus, if *Zivotofsky*'s pro-justiciability stance is read as largely, if not solely, applying to cases in which Congress has spoken via federal statute, then political accountability concerns are minimal.

Third, our constitutional democracy is, in part, maintained through institutional features that are, in some ways, anti-democratic. Democratic values are not the be-all-end-all of our Constitution. Most obviously, the Bill of Rights is meant to protect certain fundamental liberties against the will of the majority. More broadly, our constitutional system includes a judiciary, which exists, in part, to uphold such rights against majoritarian overreaching.<sup>225</sup> That is, judicial review exists, among other reasons, to ensure that we remain a *constitutional* democracy.<sup>226</sup>

Likewise, in this hypothetical, Congress enacted a statute to directly confront the Executive. Thus, one cannot claim that Congress has shirked responsibility by failing to utilize all of the political weapons that the Constitution has put at its disposal.<sup>227</sup> This is because the hypothetical statute assumes that the country has reached a point—in time, history, and politics—in which Congress

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<sup>224</sup> Goldsmith, *supra* note 106, at 1419-20.

<sup>225</sup> HENKIN, *supra* note 35, at 76 (internal citations omitted).

<sup>226</sup> *Id.* at 78.

<sup>227</sup> *Cf.* Glennon, *supra* note 222, at 815 (“[I]n separation of powers disputes particularly, there is little room for the Supreme Court to intervene because each department possesses an impressive arsenal of weapons to demand observance of constitutional dictates by the other.”) (internal quotation marks and citation omitted).

has already been able to surmount political barriers (and potentially the presidential veto) to enact legislation directly counter to the express policy of the President in the national security realm.

Moreover, if one thinks that the President is right, and Congress is wrong, then, perhaps, judicial review is requisite for pushing back against impermissible congressional action. That is, the courts' involvement may play a valuable role in policing constitutional boundaries, and ensuring that the Executive—arguably expert vis-à-vis Congress in matters of national security—can effectuate those policies to which he is entitled. Of course, the President already has numerous political powers<sup>228</sup> with which to push back against Congress and to protect his constitutional prerogatives. In particular, his veto power is likely sufficient in most cases.<sup>229</sup> But in cases like our hypothetical, judicial review may serve as a backstop against congressional overreaching.

In addition, as in *Zivotofsky*, it may be particularly valuable for courts to adjudicate foreign policy-related disputes when there is a statutory question involved.<sup>230</sup> If, as in a case like our hypothetical, Congress and the Executive are at loggerheads, then abstention by the Court would encourage legislative buck passing. If Congress knows that its actions—even if right—will go unheeded by the Executive, Congress may choose not to act at all, thus leaving

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<sup>228</sup> See generally Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

<sup>229</sup> Of course, and particularly in light of the statute at issue in *Zivotofsky*, one might question whether the presidential veto is a sufficient check against congressional overreaching. There, perhaps due to Congress's inclusion of Section 214 in an otherwise vitally necessary statute, or as a result of other political constraints, President Bush did not veto the legislation, but rather merely attached a signing statement to the law. See HENKIN, *supra* note 35. This might indicate, as some have argued, that in today's world the presidential veto is a far less significant check on congressional authority than the framers intended it to be. See, e.g., SHANE & BRUFF, *supra* note 113, at 137–39 (citing RICHARD A. WATSON, PRESIDENTIAL VETOES AND PUBLIC POLICY (1993)).

<sup>230</sup> Cf. RAMSEY, *supra* note 102, at 335–36 (“Claims based on federal statutes may raise foreign affairs difficulties in two ways: statutes may affect the President’s foreign affairs power; and private statutory claims may embarrass the conduct of foreign affairs even where no part of the U.S. government is a party . . . . These require distinct treatment.”).

Executive policies wholly unchecked.<sup>231</sup> This is exacerbated by the fact that, often, the Executive acts swiftly in the foreign affairs realm, leaving Congress with no option but to acquiesce. *Zivotofsky* gives Congress another tool with which to push back against such overwhelming Executive action, thus enhancing (or restoring to its proper constitutional level) the ability of Congress to do what it feels is constitutionally or otherwise proper.<sup>232</sup>

The judiciary might need to get involved to restore the proper balance of powers in our system.<sup>233</sup> Judicial review in our hypothetical would ensure that the relative powers of Congress and the Executive remain within the bounds intended by the framers.<sup>234</sup> For instance, were a court instead to find our hypothetical case nonjusticiable, it would, practically speaking, give the Executive a trump card.<sup>235</sup> Notwithstanding the Executive's key constitutional

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<sup>231</sup> See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 922 (2d ed. 2006) (“[O]ne [might] view the decision on the merits as a better way to channel political energy by taking constitutional constraints off the table as a factor in political debate.”). *But see id.* (citing MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (1989) (noting the objection that “use of adjudication . . . divert[s] political energy away from” democratic challenges to disfavored policies)).

<sup>232</sup> See Tigar, *supra* note 208, 1179 (“Far from bespeaking a sensitive regard for a coordinate branch, therefore, judicial abdication in such cases contributes to the erosion of the formal structural guarantees which the Constitution codified.”).

<sup>233</sup> See GOLDSMITH, *supra* note 203, at 166 (The Supreme Court “ultimately prov[ed] to be one of the most important agents for making the Constitution’s checks and balances work in the last decade.”); Ratner & Cole, *supra* note 132, at 751 (“[A] statute gains the force of law only where the judiciary performs its constitutional duty to enforce the law,” and that “is especially true where, as here, the statute is directed at the Executive, who has consistently ignored its proscription.”).

<sup>234</sup> *Cf.* Jinks & Katyal, *supra* note 213, at 1281 (“To be sure, the President has accountability advantages (and comparative expertise advantages vis-à-vis the judiciary), but he does not possess those same advantages over Congress.”).

<sup>235</sup> See Glennon, *supra* note 222, at 819 (“Arguments against judicial resolution of such disputes are often, in reality, thinly disguised pleas for executive hegemony, for the Executive almost always wins if the courts sit on the sidelines [because] the Executive can move quickly . . . leaving Congress, if and when it finds out, faced with a *fait accompli*.”) (internal citation omitted); *see also* Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659 (2000) (“Since early in the nation’s history, courts have been reluctant to contradict the executive branch in its conduct of foreign relations.”); Adam Liptak, *Dispute Over Jerusalem Engages Court*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/08/us/dispute-over->

role in our nation's foreign affairs, this is arguably troubling from a separation of powers perspective.<sup>236</sup> Judicial review, one might hope, will thus serve to “check[] the steadily expanding foreign affairs powers of the Executive branch.”<sup>237</sup> Likewise, judicial review will help clarify the relative scope of Executive and congressional authorities, thus strengthening mechanisms for holding the political branches accountable, both in our specific hypothetical context and in other realms as well.

c. *If One's Aim is to Constrain the Executive's Targeting Program, Then Increased Judicial Review Spurred by a Statutory Cause of Action Will Be Counterproductive*

Nevertheless, there is an overriding danger of judicial review. Notably, judicial review of the President's policies might make them more legitimate—and persistent—than they would otherwise be.<sup>238</sup> As Jesse Choper wrote:

[I]f it is fear of presidential abuse of power—whether generally usurping the authority of Congress or more specifically imposing on the interests of individuals—that triggers the call for judicial involvement (and that is its modern impetus),

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jerusalem-engages-supreme-court.html (“Some of the justices [in the *Zivotofsky* oral arguments] said the case presented the sort of political question not fit for judicial resolution, a stance that would as a practical matter amount to a ruling for the executive branch.”); Ratner & Cole, *supra* note 132, at 719 (“Without law, there is only politics; the carefully crafted checks and balances of the Constitution fall prey to the institution that acts first and speaks later: the Presidency.”).

<sup>236</sup> Specifically, “our Founders set up the tripartite government to make it difficult for government to take action that deprives people of their rights. Short of an emergency that precluded Congress from acting . . . Congress had to pass a law, the President had to enforce the law, and the courts had to uphold the law.” Jinks & Katyal, *supra* note 213, at 1277. That is, “[a]ll three branches thus had to agree under this constitutional framework—a key feature of the document that led to greater deliberation and dialogue among the branches.” *Id.*

<sup>237</sup> Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 1994-95 (1993) (internal citations omitted).

<sup>238</sup> See, e.g., GOLDSMITH, *supra* note 203, at 196 (“[F]or those who believe that the terrorist threat remains real and scary, and that the nation needs a Commander in Chief empowered to meet the threat in unusual ways—embedding these presidential prerogatives in the rule of law is an enormous blessing.”).



then, in the plausible judgment of distinguished observers, history teaches that the Court's participation has, on balance, been counterproductive. Rather than curtailing executive aggrandizement, many judicial holdings and dicta have . . . licensed the executive branch to secure the dominant voice in our society.<sup>239</sup>

This is because, with 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.<sup>240</sup> Thus, 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.<sup>241</sup> Such legitimation is arguably that which is most dangerous about judicial review in the context of targeted killings, and more broadly in the foreign affairs realm.

In addition, even a judicial ruling that, on its face, seems to be a victory for individual rights<sup>242</sup> may have the unintended effect of incentivizing the Executive to shift to strategies that may be more

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<sup>239</sup> JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 314 (1980) (citation and internal quotation marks omitted).

<sup>240</sup> *See, e.g.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)) ("[T]he nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of [the Supreme] Court.'"); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

<sup>241</sup> *Cf. Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) ("I would not lead people to rely on this Court for a review that seems to me wholly delusive . . . . The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.").

<sup>242</sup> *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that individuals detained by the U.S. military at Guantanamo have a constitutional right to seek habeas review in U.S. courts).

harmful to individuals' liberties.<sup>243</sup> "Demands to raise legal standards for terrorist suspects in one arena often lead to compensating tactics in another arena that leave suspects (and, sometimes, innocent civilians) worse off."<sup>244</sup> Consider, for example, what could happen if the military was ordered to prosecute criminally all those that it captured. Prosecution, with its procedural and other individual rights safeguards, might incentivize the military to circumvent the criminal justice system's protections and to push its efforts underground, utilizing more secretive and brutal means. It might even encourage U.S. agents and soldiers to kill, rather than capture, their enemies marginally more often. If one wishes to promote individual rights and civil liberties, then one might think it is better for the Court to stay out of national security questions altogether, rather than permitting risk of judicial error.<sup>245</sup>

Of course, it would be a mistake to reject out of hand judicial review based on the risks of courts' likely mistakes. The existence of risk—and one's desire to avoid it—is not and cannot be a trump card.<sup>246</sup> One must weigh the costs and benefits of judicial involvement against those of inaction. But if one thinks the expected cost of erroneous review is greater than the costs of erroneous abstention—namely, the persistence of constitutional wrongs and the *ex ante* constraining effects lost through abdication<sup>247</sup>—then judicial abstention may remain the preferred outcome.<sup>248</sup> Although this cost-

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<sup>243</sup> Jack Goldsmith, *The Shell Game on Detainees and Interrogation*, WASH. POST (May 31, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052902989.html>.

<sup>244</sup> *Id.*

<sup>245</sup> *But see* FRANCK, *supra* note 37, at 159 ("[W]hen courts do take jurisdiction over foreign-affairs cases, the costs to national policy interests are generally far less than the government may have imagined.").

<sup>246</sup> *Cf.* Adrian Vermeule, *Precautionary Principles in Constitutional Law*, 4 J. LEGAL ANALYSIS 181, 213 (2012) ("In general, second-order or indirectly consequentialist arguments for (some version of) the precautionary principle imply that it is not necessarily best for regulators to attempt to weigh all relevant risks, because they will predictably display certain biases in doing so.").

<sup>247</sup> *See* Jaffer, *supra* note 181, at 186.

<sup>248</sup> Vermeule, *supra* note 246, at 199 ("In many settings, the most forceful argument against precautions is simply that the optimal level of the target risk is not zero, and that some degree of expected harm from the target risk is necessary to obtain other goods."); *see also* FRANCK, *supra* note 37, at 159 ("[N]ot to decide has heavy costs,

benefit calculus, if done globally, is unknowable, the net effect of judicial review is more obviously negative in the specific context of our hypothetical.<sup>249</sup>

With respect to targeted killings in particular, courts are likely to reaffirm that the President, as Commander-in-Chief, has the constitutional authority to undertake such targetings as a military strategy should he so choose. Courts will probably be apprehensive about interposing themselves between the Executive and tactics he describes as invaluable to him in combating imminent, catastrophic threats. Given the unpopularity of and skepticism towards the so-called War on Terror, as well as the other pro-justiciability factors described above, courts will probably intervene, but do so rather timidly. For instance, while courts might be willing to impose minimal procedural requirements on the President's ability to choose and attack targets, they nevertheless will probably approve the broad brushstrokes of the U.S. government's targeting program. Consequently, judicial review in the targeted killings realm will likely provide legitimacy to the Executive's policy without effectively providing opponents desired procedural protections. This, in addition to realpolitik considerations, might mean that critics of the U.S. government's targeting policy should pursue congressional<sup>250</sup> or

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precisely in the area of foreign policy" because, today, "America's principal shield and sword . . . is the rule of law" and "to make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament.").

<sup>249</sup> In a related vein, several commentators have proposed that the Foreign Intelligence Surveillance Act model—which provides for judicial oversight of Executive wiretapping decisions—be adapted to create a new court to oversee the Executive's targeted killing decisions. See, e.g., Daniel Byman, *Do Targeted Killings Work*, 85 FOR. AFF. 95, 111 (2006); W. Jason Fisher, *Targeted Killings, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 754-55 (2007); Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 834-35 (2007).

<sup>250</sup> See, e.g., Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 615 (2011) (citing Kathleen Clark, *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915) ("Congress should also take the opportunity to make a critical change to all such Gang of Eight reporting mechanisms, . . . possibly by permitting the chief majority and minority counsels for the relevant committees to attend as well (creating a Gang of Twelve)."); Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 402 (2012) ("Congress needs to

other<sup>251</sup> non-judicial oversight mechanisms, rather than attempt to curtail that program directly (lawsuits) or indirectly (encouraging a statutory cause of action) via judicial review.

#### IV. CONCLUSION

*Zivotofsky* is not particularly significant in its alleged return to the classical version of the political question doctrine. Specifically, the Supreme Court, in prior cases, had already preferred *Baker*'s classical factors over the prudential components of that test, and many lower courts still use all six *Baker* factors in the wake of *Zivotofsky*. Despite this, other aspects of *Zivotofsky* are likely to shift the judicial landscape. In particular, *Zivotofsky* was forthrightly pro-justiciability with regards to cases implicating federal statutes, and was arguably meaningful in its refusal to defer to the Executive Branch regarding the potential foreign policy costs of judicial review. Taken together, these parts of *Zivotofsky* signal to Congress that it can encourage judicial review of national security policies—namely, targeted killings—by enacting relevant statutes. If one seeks to hold the Executive accountable for such policies, then one might, at first, think a broad, pro-justiciability reading of *Zivotofsky* will lead to rule of law and responsibility-forcing results. And, in general, increased judicial review is likely to do so. But with respect to targeted killings, this is probably not the most effective route for critics of targeted killings to take. In particular, if Congress enacts a law creating a cause of action for the families of those killed via targeting, then

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specifically authorize force against groups outside of al-Qaeda and the Taliban.”); Nat'l Comm'n on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 419-21 (2004) (recommending that congressional oversight of Executive wartime practices be improved by restructuring the House and Senate Intelligence Committees).

<sup>251</sup> See, e.g., Alston, *supra* note 182, at 420–21 (“[I]n order to achieve the necessary ‘public legitimacy,’ the executive should articulate more clearly the basis for its legal arguments (while not revealing ‘secret facts, programs, activities, and other things that ought to remain secret’.”); Chesney, *supra* note 250, at 543 (arguing that presidential approval should be required, at a minimum, for all targeted killings undertaken outside the combat zone); Murphy & Radsan, *supra* note 12, at 411 (“[E]xecutive authorities should . . . require an independent, intra-executive investigation of any targeted killing by the CIA . . . [and these] investigations should be as public as is reasonable consistent with national security.”).

courts may, after using *Zivotofsky* to find more cases justiciable, ultimately legitimate questionable Executive practices. In so doing, the courts will give Executive policies their imprimatur, yet provide little in the way of real oversight or review. Therefore, if one desires to constrain the Executive in the national security realm, then one should be skeptical of *Zivotofsky* as a means to pursue such limitation.

