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# War Powers Litigation After *Zivotofsky v. Clinton*

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## INTRODUCTION

In modern times, judicial opinions have been largely absent from the debate over constitutional war powers. Among other things, it is widely assumed—especially in light of the courts’ avoidance of the issue during the Vietnam War—that the political question doctrine would preclude judicial determination of war-initiation powers. In *Zivotofsky v. Clinton*,<sup>1</sup> however, the Supreme Court appeared to re-characterize and limit the political question doctrine in a way that might allow wider litigation of war powers issues. According to *Zivotofsky*, the doctrine does not preclude courts from determining the meaning of statutes and the Constitution in separation of powers disputes, even when substantial foreign affairs issues are at stake.<sup>2</sup>

The actual subject of the *Zivotofsky* litigation was, however, relatively modest as foreign affairs controversies go. The courts’ willingness to retreat from the political question doctrine will be more severely tested in matters of greater foreign affairs significance, such as war powers. This essay considers the implications of *Zivotofsky* for war powers litigation, including by revisiting the Vietnam-era decisions. It first asks whether *Zivotofsky*, if taken at face value, does indeed suggest a renewed viability of war powers litigation. Second, it asks whether, as a practical matter, courts can comfortably undertake the task of war powers adjudication. Third, it considers the value of more aggressive war powers adjudication, including whether a *Zivotofsky*-inspired approach to war powers disputes is consistent with the courts’ constitutional role.

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<sup>1</sup> 566 U.S. 189 (2012).

<sup>2</sup> *Id.* at 194–96.

## I. ZIVOTFSKY AS DOCTRINAL CHANGE

*Zivotofsky v. Clinton* appears to signal a major shift in thinking about justiciability in separation of powers disputes.<sup>3</sup> Briefly, the case concerned a statute allowing U.S. citizens born in Jerusalem to request passports reflecting birth in “Jerusalem, Israel.”<sup>4</sup> The U.S. executive branch refused to apply the statute, invoking the president’s supposedly exclusive control of foreign affairs and the diplomatically sensitive nature of Jerusalem’s political status. In a suit to enforce the statute, brought by the parents of Zivotofsky, a U.S. citizen born in Jerusalem, the D.C. Circuit found the case to be a non-justiciable political question.<sup>5</sup> Chief Justice Roberts’ opinion for six Justices reversed, emphasizing the central role of the judiciary in determining the meaning of the Constitution.<sup>6</sup> Roberts’ opinion acknowledged that a political question might exist (a) if the Constitution’s text committed the decision to another branch or (b) if there were no judicially manageable standards by which to decide. But it found neither circumstance to exist in the passport dispute; to the contrary, the opinion emphasized that the case involved determining the constitutionality of a statute, which is “what courts do.”<sup>7</sup>

Prior to *Zivotofsky*, political question analysis had been dominated by Justice Brennan’s six-factor test in *Baker v. Carr*.<sup>8</sup> *Baker* had been cited repeatedly by lower courts in political question cases<sup>9</sup> (including the lower courts in *Zivotofsky*), and by then-Justice Rehnquist’s influential concurring opinion in *Goldwater v. Carter*, an opinion that seemed strongly to disfavor justiciability in separation of powers cases.<sup>10</sup> But *Zivotofsky*

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<sup>3</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925–26 (2015) (describing *Zivotofsky* as having “far-reaching significance” for justiciability of foreign relations law cases).

<sup>4</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107–228, § 213(d), 116 Stat. 1350, 1366, § 214(d) (2002).

<sup>5</sup> See *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1232–33 (D.C. Cir. 2009) (principally concluding that decisions regarding recognition are textually committed to the executive branch); see also *id.* at 1240, 1244–45 (Judge Edwards, concurring) (finding on the merits that Section 214(d) unconstitutionally interfered with the president’s executive power).

<sup>6</sup> *Zivotofsky*, 566 U.S. at 191. Justices Scalia, Kennedy, Thomas, Ginsburg, and Kagan joined Chief Justice Roberts’ opinion. Justice Sotomayor concurred in part and in the result, and Justice Alito concurred in the result. Justice Breyer was the sole dissenter.

<sup>7</sup> *Id.* at 201.

<sup>8</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>9</sup> See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532, 544, 549–58 (9th Cir. 2005) (sequentially applying each of *Baker*’s six factors).

<sup>10</sup> *Goldwater v. Carter*, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., joined by Burger, C.J., Stewart, J., & Stevens, J., concurring).

barely mentioned *Baker*, citing it only in passing.<sup>11</sup> More importantly, *Zivotofsky*—although rejecting a political question challenge—mentioned only two of *Baker*'s six factors (the ones noted above); it did not at any point describe the political question doctrine as resting on a six-factor test or acknowledge that *Baker* had suggested a six-factor test.<sup>12</sup> And even more notably, the *Baker* factors *Zivotofsky* failed to mention were the most open-ended, the most easily invoked to defeat justiciability, and the most apparently relevant to *Zivotofsky* itself in particular: “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; “an unusual need for unquestioning adherence to a political decision already made”; or “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”<sup>13</sup>

Also of note, the *Zivotofsky* majority opinion did not discuss Rehnquist’s concurring opinion in *Goldwater*—and Rehnquist’s analysis in *Goldwater* seems inconsistent with it. *Goldwater* involved the question whether the president had to obtain the Senate’s approval before terminating a treaty in accordance with the treaty’s terms.<sup>14</sup> Although it involved the constitutionality of an executive action rather than the constitutionality of a statute, in other respects the dispute in *Goldwater* fit with Roberts’ description of a question of constitutional law directed to the courts. As in *Zivotofsky*, *Goldwater* did not question the merits of the president’s policy; the question was not what decision should be made, but which branch, constitutionally, should make the decision.

In sum, *Zivotofsky* appears to reaffirm and extend the view that foreign affairs controversies involving only the interpretation of statutes or the Constitution are not qualitatively different from ordinary statutory and constitutional questions. In disregarding *Goldwater* and much of *Baker*, it appears substantially to narrow the grounds upon which a

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<sup>11</sup> See *Zivotofsky*, 566 U.S. at 195, 197, 201 (citing *Baker* directly only once, and indirectly only as quoted—incompletely—in *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

<sup>12</sup> Compare *Zivotofsky*, 566 U.S. at 195, 197, with *id.* at 202 (Sotomayor J., concurring in the judgment) (“In *Baker*, this Court identified six circumstances in which an issue might present a political question . . .”).

<sup>13</sup> See *Baker*, 369 U.S. at 217.

<sup>14</sup> See *Goldwater*, 444 U.S. at 996. There was no opinion of the Court in *Goldwater*, so *Zivotofsky* was under no obligation to cite it—but the *Zivotofsky* majority’s decision not to discuss Justice Rehnquist’s concurrence, which attracted four votes and had been seen as an important statement of the political question doctrine, seems significant.

political question can be found, and thus to open more separation of powers controversies to judicial resolution.

The question remains, however, whether *Zivotofsky* is an isolated decision or a meaningful shift. *Zivotofsky* involved a relatively minor—even obscure—dispute about the wording of the passports of (one assumes) a very small number of people. Little evidence existed of major foreign policy disruption.<sup>15</sup> *Zivotofsky*'s viability when the Court confronts more momentous matters seems open to doubt.

To think about that question, consider the justiciability of war powers disputes. Under the *Baker* formulation—especially as applied in *Goldwater*—conventional wisdom has been that questions of the president's unilateral ability to use military force are likely non-justiciable. But *Zivotofsky* calls that assumption into doubt, first by suggesting that constitutional disputes in foreign affairs are matters granted to the judiciary for resolution, and second by apparently dispensing with *Baker*'s concern for “respect due coordinate branches” and “embarrassment” arising from “multifarious pronouncements” on foreign affairs.<sup>16</sup> *Zivotofsky*'s viability, however, may itself depend on the ability to construct a framework of justiciability for war powers disputes that is manageable and plausible.

## II. POLITICAL QUESTIONS AND VIETNAM-ERA WAR POWERS LITIGATION

To make more concrete the questions posed above, this section considers the most extensive modern litigation of constitutional war powers. During the Vietnam War era, from 1967 through 1974, lower courts heard multiple challenges to the war's constitutionality. None of these challenges was successful in limiting the war, and none reached the Supreme Court apart from a single unexplained affirmance of a three-judge district court.<sup>17</sup> Nonetheless, these cases provide a concrete historical example of war powers litigation.

To begin, there is something of a myth that the Vietnam-era cases declared all war powers questions to be political questions. Some cases did, but others found some war powers issues to be political questions and others not to be. The diversity of questions and answers in the Vietnam-era thus offers a way to

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<sup>15</sup> *Zivotofsky*, 566 U.S. at 191–94.

<sup>16</sup> *Baker*, 369 U.S. at 216–17, 225. These were the principal *Baker* factors not discussed in *Zivotofsky*.

<sup>17</sup> *Atlee v. Richardson*, 411 U.S. 911 (1973).

start thinking about what a post-*Zivotofsky* war powers justiciability analysis might involve.

Courts in the Vietnam era pursued at least three different approaches. Two major cases found war powers litigation broadly to be political questions. The D.C. Circuit, in one of the early cases, reached this conclusion almost without analysis, resting principally on the proposition that foreign affairs matters were for the president to determine.<sup>18</sup> Somewhat later, a three-judge district court in Pennsylvania reached a similar conclusion after much more extended analysis; the Supreme Court affirmed this decision without opinion.<sup>19</sup>

The Second Circuit pursued an intermediate course in a series of cases. It found the basic question whether congressional authorization was needed for war initiation to be justiciable; on the merits, it found that congressional authorization was constitutionally required and had been given.<sup>20</sup> However, ostensibly on political question grounds, it held that the method of authorization was up to Congress (thus rejecting, for example, the proposition that an actual formal declaration was required and accepting congressional authorization via the Gulf of Tonkin Resolution and appropriations in support of the military effort).<sup>21</sup> In further litigation, the Second Circuit invoked the political question doctrine to avoid deciding two specific challenges. First, plaintiffs contended that the president's decision to bomb North Vietnam and mine North Vietnamese harbors after a ceasefire lacked congressional approval.<sup>22</sup> At this point, Congress had repealed the Gulf of Tonkin Resolution and indicated that the war should be wound down. Plaintiffs argued that the president's actions were unapproved escalations, while the president argued that renewed bombing to enforce the ceasefire was the best way to achieve Congress's goals.<sup>23</sup> The court, on political question grounds, refused to second-guess the President's strategic

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18 *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967) (“The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.”).

19 *Atlee v. Laird*, 347 F. Supp. 689, 698–707 (E.D. Pa. 1972) (relying heavily on *Baker v. Carr*), *aff'd without opinion sub nom.*, *Atlee v. Richardson*, 411 U.S. 911 (1973); *see also* *Commonwealth of Mass. v. Laird*, 451 F.2d 26, 32–33 (1st Cir. 1971) (finding the whole matter of war powers to be a political question, at least in the absence of an objection by Congress to the president's actions).

20 *Orlando v. Laird*, 443 F.2d 1039, 1042–43 (2d Cir. 1971).

21 *Id.* at 1043; *accord* *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970).

22 *Orlando*, 443 F.2d at 1041.

23 *Id.*

assessment.<sup>24</sup> In a subsequent case, plaintiffs argued that the President's bombing of Cambodia—ostensibly a neutral country—was not authorized by Congress. The President similarly claimed that the bombing was the best way to wind down U.S. involvement, and the court (this time over a dissent by Judge Oakes) refused to decide on political question grounds.<sup>25</sup>

A third group of opinions showed greater willingness to reach the merits. In a subsequent case in the D.C. Circuit, a divided panel followed the Second Circuit in finding that congressional authorization for the war was constitutionally required, and then, rejecting the Second Circuit's analysis, concluded that Congress's authorization could not be found merely from appropriations and other statutes passed to support the war effort.<sup>26</sup> (Like most of the Second Circuit opinions, this case came after Congress's repeal of the Gulf of Tonkin Resolution.) As a remedy, however, the court found injunctive relief inappropriate because at that point, the president (at Congress's direction) appeared to be ending the U.S. involvement in any event.<sup>27</sup> In addition, two dissenting opinions from the cases mentioned above argued for reaching the merits. Judge Lord dissented at length from the three-judge panel's political question conclusion.<sup>28</sup> In the Second Circuit, Judge Oakes would have found the Cambodian bombing unauthorized (at least after

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<sup>24</sup> *DaCosta v. Laird*, 471 F.2d 1146, 1152–53 (2d Cir. 1973).

<sup>25</sup> *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). The district court ruled on the merits that the Cambodia bombing was unconstitutional and directed that it cease. In a once-famous flurry of motions, the court of appeals stayed the district court order, and the plaintiffs asked Justice Thurgood Marshall, as circuit justice, to vacate the stay. When Marshall refused, plaintiffs asked Justice Douglas to lift the stay, and he did. See *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Justice Marshall); *id.* at 1320 (Justice Douglas). On a motion from the government, Justice Marshall, with the concurrence of the full Court apart from Justice Douglas, overturned Justice Douglas's order. See *Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973). Ultimately, as noted in the text, the Second Circuit reversed the district court on political question grounds and the Supreme Court denied certiorari. See *Holtzman*, 484 F.2d at 1315, *cert. denied*, 416 U.S. 936 (1974).

<sup>26</sup> *Mitchell v. Laird*, 488 F.2d 611, 615–16 (D.C. Cir. 1973) (concluding that “none of the legislation drawn to the court's attention [including appropriations and extension of the military draft] may serve as a valid assent to the Vietnam war”). As noted in the opinion, Judge Tamm would have found appropriations an adequate authorization. *Id.* at 615. Four judges, including Judge Tamm, favored rehearing the case en banc on the grounds that appropriations were a proper mode of authorization. *Id.* at 616 (statement of Judge MacKinnon, joined by Judges Tamm, Robb, and Wilkey).

<sup>27</sup> *Id.* at 616 (finding it to be a political question whether the president was proceeding appropriately to end the war).

<sup>28</sup> *Atlee v. Laird*, 347 F. Supp. 689, 709, 712 (E.D. Pa. 1972) (Judge Lord, dissenting) (“This case does not involve second guessing the wisdom of the Executive in a matter committed by the Constitution to that branch of the Government. It is rather a constitutional question concerning the division of power within our system, involving a determination of whether the executive branch has exceeded the scope of its constitutional power.”).

repeal of the Gulf of Tonkin Resolution) because it had been secret and because it constituted a fundamental change in the scope of the war by involving an additional country in hostilities.<sup>29</sup>

These cases suggest at least three types of questions in war powers litigation: (1) whether Congress's authorization of military action is required; (2) if so, whether Congress has authorized it; and (3) the scope of Congress's authorization. They further suggest, as developed in the next section, that some of these questions are more susceptible to judicial resolution than others.

### III. WAR POWERS LITIGATION AFTER *ZIVOTOFSKY*

This section considers the extent to which *Zivotofsky* vindicates the stronger view of war powers litigation in the Vietnam era. I conclude that it does, with significant limitations.

#### A. Standing

At the outset, it is worth noting that narrower modern views of standing would change the dynamics of the Vietnam-era litigation. Several of the major cases depended on theories of standing that are likely no longer viable: citizen suits, suits based on remote possibilities, and suits based on the standing of members of Congress.<sup>30</sup> However, the litigation also reflected at least one theory of standing likely still available: suit by a member of the military challenging deployment into combat.<sup>31</sup> It is also possible that people overseas affected by the conflict might have standing if U.S. citizens are in the war zone<sup>32</sup> or if the Court recognizes the ability of non-citizens abroad to sue to enforce constitutional provisions.<sup>33</sup> Further, it remains an open question whether Congress as a whole or one of its Houses (as opposed to individual members) can bring suit to protect congressional powers.<sup>34</sup> Thus, modern standing law is likely to limit, but not foreclose, the possibility of war powers litigation.

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<sup>29</sup> *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315–18 (2d Cir. 1973) (Judge Oakes, dissenting).

<sup>30</sup> *See, e.g., id.* at 1307, 1315 (congressional standing); *Mitchell*, 488 F.2d at 613–14 (congressional standing); *Atlee*, 347 F. Supp. at 691 (taxpayer standing).

<sup>31</sup> *See, e.g., Berk v. Laird*, 429 F.2d 302, 306–07 (2d Cir. 1970).

<sup>32</sup> *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515–21 (D.C. Cir. 1984) (finding U.S. citizen had standing to challenge U.S. military actions on his land in Honduras), *vacated and remanded on other grounds*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985).

<sup>33</sup> A possibility suggested by *Boumediene v. Bush*, 553 U.S. 723, 795–98 (2008).

<sup>34</sup> *See U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 66–77 (D.D.C. 2015) (generally finding the question of the standing of the House of Representatives to be unresolved by prior cases, and concluding in the particular case that the House as an institution had standing to challenge some actions of the president); *see also* *Ariz. State*



## B. Questions Involving Congressional Approval

Whether Congress must authorize a military action has two components: (1) whether the declare war clause gives Congress exclusive authority over initiating war; and (2) if so, whether the conflict at issue is a “war” that requires Congress’s authorization. In *Zivotofsky*’s terms, the first question seems clearly one for the courts. It is a question of the Constitution’s meaning in the abstract; it does not require attention to any particular factors of any particular conflict. It is not meaningfully different from the question, for example, whether the president has authority to seize steel mills to avert a strike, or whether the president has authority to terminate treaties without Senate approval. True, it might lead to a decision that a particular executive-initiated conflict is unauthorized—quite possibly running afoul of the *Baker* factors of embarrassment and multifarious pronouncements—but *Zivotofsky* appears to discount those factors, at least where a pure question of law is presented. True also, the constitutional question may be a hard one (at least for some types of conflicts), but *Zivotofsky* makes clear that even a difficult question of constitutional meaning is for the courts to decide.<sup>35</sup>

As a result, a post-*Zivotofsky* analysis confirms the view of the Second and D.C. Circuits in the Vietnam era that the need for congressional authorization is (or at least can be) a judicial question. The decisions that instead found a political question on this point rested on the proposition that the scope of the president’s foreign affairs powers is broadly nonjusticiable<sup>36</sup>—a proposition rejected in *Zivotofsky*. Nor is it clear that judicial engagement with the question is problematic: courts managed it in the Vietnam era<sup>37</sup> as well as in earlier times.<sup>38</sup>

The second part of the authorization question is more problematic. Hostilities exist on a scale from minor skirmishes to total war. Some line must be drawn unless one thinks

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Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2663, 2665 n.12 (2015) (finding that Arizona legislature had standing to contest allegedly unconstitutional diminution of its powers, but expressly reserving the question of whether the U.S. Congress would have standing to challenge actions of the president).

<sup>35</sup> See *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (acknowledging difficulty of the case but finding it to “demand[] 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>36</sup> See, e.g., *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967).

<sup>37</sup> See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1369–70 (2d Cir. 1971).

<sup>38</sup> See *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 665–67 (1863) (deciding on the merits whether President Lincoln’s naval blockade of the South during the Civil War was constitutional); see also *infra* Part IV (discussing additional cases).

(implausibly) that either all military actions must be authorized by Congress or none must be. The difficulty of drawing the line in some circumstances should not preclude adjudication when the line is clear, however, as the Second Circuit found in the Vietnam-era cases.<sup>39</sup> Further, the issue can be made more manageable if courts approach it categorically, finding that the presence of certain circumstances do or do not bring a conflict within the need for approval. For example, in the 2011 Libya conflict, the President argued that congressional approval was not required because U.S. military actions consisted wholly of airstrikes, were of limited duration, and did not involve major threats to U.S. personnel.<sup>40</sup> With these descriptions being largely uncontested as a factual matter, a court could decide as a matter of constitutional interpretation whether a conflict so described requires congressional authorization.

On the other hand, some situations may resist categorical assessment because they depend on disputed or uncertain facts or subjective characterizations. For example, the U.S. military action in Iraq and Syria against the Islamic State seems challenging to describe categorically: the nature of the Islamic State, the extent of the U.S. role, and the U.S. objectives seem sufficiently unsettled that judicial assessment would be, at minimum, a qualitatively different task than the one envisioned in *Zivotofsky*.<sup>41</sup>

### C. Questions Involving the Type of Congressional Approval

A second major issue in the Vietnam era was whether Congress could authorize hostilities either by appropriations or by the vaguely worded Gulf of Tonkin Resolution. Courts divided on whether that question was justiciable.<sup>42</sup> *Zivotofsky* suggests that it should be. A court's analysis here would not seem to depend on factual assessments or subjective characterizations. For example, the D.C. Circuit held that appropriations do not

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<sup>39</sup> *E.g.*, *DaCosta*, 448 F.2d at 1369 (concluding that the Vietnam conflict was a war for constitutional purposes).

<sup>40</sup> Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6–14 (2011); *see also* Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AMER. J. INT'L L. 701, 701–07, 711–13 (2016) (discussing the constitutional debate over the Libya action). Compare Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 980–98 (2016) (defending the constitutionality of the U.S. military action), with Saikrishna Bangalore Prakash, *Military Force and Violence but Neither War nor Hostilities*, 64 DRAKE L. REV. 995, 998–1005 (2016) (finding the Libya action unconstitutional).

<sup>41</sup> *See infra* Part VI (discussing post-*Zivotofsky* litigation challenging U.S. military action against the Islamic State).

<sup>42</sup> *See supra* Part II.

count as approval for constitutional purposes.<sup>43</sup> Whether this is correct or not is a question of constitutional interpretation separate from the facts, policies, and descriptions of any particular conflict; the analysis would be analogous to the way the Court described *Zivotofsky* as requiring “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>44</sup>

One might conclude—as the Second Circuit did—that the Constitution delegates to Congress the decision how to authorize military conflict. Perhaps that makes it a political question (textually committed to another branch), as the Second Circuit described it.<sup>45</sup> But *Zivotofsky* indicates that it is better understood as a decision on the merits: if the Constitution does not require any particular method of authorization, plaintiffs’ challenge to Congress’s method of authorization fails on the merits. Similarly, one might say in *Zivotofsky* that the president’s recognition power is exclusive and gives the president power to decide how to describe the status of Jerusalem. But as the decision in *Zivotofsky* (and the subsequent litigation)<sup>46</sup> indicates, that is a question on the merits—*whether* the Constitution (as interpreted by the judiciary) gives the president that exclusive authority.

In sum, courts should be able to decide, post-*Zivotofsky*, whether the Constitution requires Congress’s authorization to be given in particular ways.

#### D. Questions Involving the Scope of Congressional Approval

The most difficult of the Vietnam-era cases appear to be challenges to the scope of congressional approval. These are almost necessarily fact-intensive—both what Congress approved and what is going on in a particular conflict. For example, if one concluded that after repeal of the Gulf of Tonkin Resolution, Congress had approved only actions designed to wind down the war, it is (as the Second Circuit found) hard to say what activities are designed to wind down the war.<sup>47</sup> The decision of

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<sup>43</sup> *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973). In doing so, the court famously relied on “what every schoolboy knows”: that once hostilities begin, Congress will feel an obligation to fund them. *Id.*

<sup>44</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 200 (2012).

<sup>45</sup> *See DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971).

<sup>46</sup> *See Zivotofsky v. Sec’y of State*, 725 F.3d 197, 204–05, 219–20 (D.C. Cir. 2013) (on remand, finding Section 214(d) unconstitutional as infringing the president’s recognition power), *aff’d*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

<sup>47</sup> *See DaCosta v. Laird*, 471 F.2d 1146, 1147–48 (2d Cir. 1973).

how to wind down the war seems within the category of presidential discretion Chief Justice Marshall identified in *Marbury v. Madison*, in the earliest formulation of the political question doctrine.<sup>48</sup> And it calls for a political solution: if Congress wanted to narrow presidential discretion, it could write a narrower statute.

The modern example of the conflict against the Islamic State is also illustrative. Arguably, Congress authorized U.S. military action against the Islamic State, either through the 2001 Authorization for the Use of Military Force against the perpetrators of the 9/11 attacks, or the 2003 Authorization for the Use of Military Force in Iraq. But reaching either conclusion requires inquiry into difficult facts: to what extent the Islamic State was connected to al Qaeda, or to what extent the Islamic State was connected to prior Iraqi insurgent groups against whom military action was clearly authorized.<sup>49</sup> Adjudication of these questions seems problematic and beyond *Zivotofsky's* direction. The inquiry would involve not merely the ordinary tools of constitutional interpretation, but also resolution of factual disputes and characterizations that may be less judicially manageable.

Of course, often there will be no arguable congressional authorization of a military conflict—as with the U.S. action in Libya in 2011.<sup>50</sup> And sometimes no plausible argument will stretch an authorization to cover a remote conflict. Judge Oakes' opinion in the Cambodian bombing case<sup>51</sup> may be an example of this: as the bombing was secret (and indeed the war had been fought on the premise that Cambodia was neutral), Congress's appropriations for winding down the war it knew about seem inadequate to approve the Cambodian bombing, without requiring any inquiry into disputed facts or characterizations.<sup>52</sup>

Nonetheless, it seems likely that some disputes over the scope of congressional authorization will depend on how one characterizes the nature and purpose of the hostilities. Adjudication thus runs substantial risk of infringing the

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<sup>48</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–67 (1803); see also *infra* Part IV (discussing *Marbury*).

<sup>49</sup> See generally Prakash, *supra* note 40 (considering these issues); see also *infra* Part VI (discussing litigation related to military action against the Islamic State).

<sup>50</sup> See Prakash, *supra* note 40, at 999.

<sup>51</sup> *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315–18 (2d Cir. 1973) (Judge Oakes, dissenting).

<sup>52</sup> See John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1137–38, 1147–48 (1990).

president's war-fighting discretion or of involving the judiciary in the finding or characterization of facts for which it is manifestly unsuited. Both of these lines of the political question doctrine remain viable after *Zivotofsky* and should foreclose some aspects of war powers adjudication.

#### E. Implications

In sum, real and hypothetical war powers litigation indicate that the issues sometimes are largely questions of constitutional or statutory meaning and sometimes turn on disputed facts or subjective characterizations. A *Zivotofsky*-inspired approach suggests that the former are not political questions while the latter may be. Interpretation of statutes and the Constitution as a general matter is, *Zivotofsky* said, entrusted to the courts,<sup>53</sup> and courts do not lack standards to decide such cases even where finding the right answer may be difficult or pose potential embarrassment to the president. The second category of cases, however, raises difficulties on both prongs of the political question doctrine that *Zivotofsky* left intact. Where there are conflicting views as to how to fight a war or how to characterize an enemy or a U.S. objective, the Constitution commits the discretion to the president, and the president should not be second-guessed by the courts (per *Marbury*).<sup>54</sup> Situations where the facts are disputed, rapidly evolving, and difficult to characterize, suggest a lack of judicially manageable standards (or, to put it another way, a practical need to defer to the president's assessment of the hostile situation).

#### IV. ZIVOTOFSKY AND THE HISTORICAL ROLE OF THE COURTS

This section considers whether an expanded role for courts in war powers adjudication is consistent with the Constitution's original meaning and the Constitution's implementation in the early post-ratification era. It finds that *Zivotofsky*'s distinction between interpreting legal texts, on one hand, and second-guessing the exercise of executive discretion, on the other, has strong roots in post-ratification practice and is supported by the Constitution's text.

To begin with the text, the Constitution does not suggest any difference in the courts' role in war powers adjudication (and other foreign affairs-related adjudication) as compared to

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<sup>53</sup> See *Zivotofsky v. Clinton*, 566 U.S. 189, 200–02 (2012).

<sup>54</sup> See generally Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004).

ordinary constitutional litigation.<sup>55</sup> The judiciary's powers and duties with respect to adjudication are conveyed in general terms, without reservation as to war or foreign affairs powers.<sup>56</sup> The grants of war and military powers to other branches of government are intermingled within the Constitution's text with other grants of—and limits on—governmental powers without singling them out for special nonjusticiability. In contrast, some particular subjects may seem to be textually reserved to other branches. For example, “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members;”<sup>57</sup> “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member”;<sup>58</sup> and “[t]he Senate shall have the sole Power to try all Impeachments.”<sup>59</sup> But there is no similar language relating to war powers controversies. Further, leading contemporaneous assessments of the text do not indicate any war-related exception to the courts' decisional authority. Most notably, Hamilton's *Federalist* No. 78, setting out the theory of judicial review later substantially adopted by *Marbury v. Madison*, does not refer to non-justiciability of war powers controversies.<sup>60</sup>

Modern assessments of the political question doctrine typically associate its origins with Chief Justice Marshall's opinion in *Marbury*.<sup>61</sup> An examination of *Marbury* and its subsequent applications indicate that *Zivotofsky* is consistent with early practice. *Marbury*'s discussion of the issue was as follows:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used,

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<sup>55</sup> See MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 321–41 (2007).

<sup>56</sup> See U.S. CONST. art. III.

<sup>57</sup> *Id.* art. I, § 5, cl. 1.

<sup>58</sup> *Id.* art. I, § 5, cl. 2.

<sup>59</sup> *Id.* art. I, § 3, cl. 6.

<sup>60</sup> See RAMSEY, *supra* note 55, at 330–31.

<sup>61</sup> See, e.g., 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, 239 (2002).

still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.<sup>62</sup>

Marshall then gave as an example: “The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion.”<sup>63</sup> In contrast, he said, once the appointment is made, the president lacks discretion to revoke it (in the case of an officer not removable at will by the president).<sup>64</sup>

One might conclude from this discussion that Marshall’s idea of political questions was tautological: that is, where the president had discretion unbounded by law, courts—whose power is to “say what the law is”<sup>65</sup>—had no role. (This would be the case, for example, in the nomination/appointment illustration Marshall invoked.) But Marshall might also have had in mind situations in which the president exercised discretion bounded by law; for example, where the president made factual assessments or military judgments in support of the president’s constitutional powers. In any event, *Marbury*’s concept of political questions

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<sup>62</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

<sup>63</sup> *Id.* at 167.

<sup>64</sup> *Id.* at 162.

<sup>65</sup> *Id.* at 177.

arising from executive discretion would not displace the judicial role in interpreting legal texts, even where those texts relate to the extent of executive discretion. As *Zivotofsky* explained, there is a difference between asking whom the Constitution empowers to make a decision and asking whether the correct decision was made.

This distinction runs implicitly through post-*Marbury* cases in the war and foreign affairs areas. *Little v. Barreme*, decided the next year, challenged the legality of the president's order to seize ships sailing to or from French possessions during the naval hostilities with France.<sup>66</sup> A statute authorized seizure of ships sailing "to"—but not "from"—French possessions; the Court read the statute literally and exclusively, finding the challenged seizure to be unlawful.<sup>67</sup> The Court did not consider whether the case presented a political question. Similarly, in *Murray v. Schooner Charming Betsy*, the Court considered whether the U.S. Navy's seizure of a ship was authorized by the Non-Intercourse Act; the Court found it was not authorized because the ship was not American-owned (in doing so, giving rise to the "*Charming Betsy* canon" that statutes should, if possible, be construed not to violate international law).<sup>68</sup> As in *Little*, the Court did not consider whether the issue was a political question. Finally, in *Brown v. United States*, the Court again found a seizure unconstitutional—in that case, the executive branch's seizure of British-owned timber during the War of 1812.<sup>69</sup> Writing for the Court, Marshall found the seizure unconstitutional because it was not authorized by Congress's declaration of war and therefore it was beyond the president's constitutional powers.<sup>70</sup> Thus, all three cases found executive branch action in wartime to be illegal without expressing any reservations about justiciability. That view is consistent with *Marbury* because in each case, the question was not whether the president or the executive branch had properly exercised discretion, but whether the president or the executive branch had

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<sup>66</sup> *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804).

<sup>67</sup> *Id.* at 178–79.

<sup>68</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18 (1804).

<sup>69</sup> *Brown v. United States*, 12 U.S. (8 Cranch) 110, 150–52 (1814).

<sup>70</sup> *See id.* at 122–25; *see also* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 40–41 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011). Specifically, *Brown* was an application of the *Charming Betsy* canon: the Court found that international law generally allowed enemy aliens a period after a declaration of war to withdraw their property to avoid confiscation, and that the 1812 declaration of war, because it lacked language to the contrary, should be read not to violate this practice. *Id.*



been granted discretionary power by the Constitution or applicable statutes.

In contrast, the Court did appear to invoke a form of the political question doctrine in its early cases to avoid reviewing executive branch factual determinations or other discretionary determinations, or to avoid making such determinations for itself. In *United States v. Palmer*, for example, the Court refused to assess the legitimacy of a rebellious government in the Spanish colonies.<sup>71</sup> Marshall wrote for the Court:

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

As it is understood that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.<sup>72</sup>

Similarly, in *Rose v. Himely*, Marshall wrote for the Court: “It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining

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<sup>71</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818).

<sup>72</sup> *Id.*

unaltered . . .”<sup>73</sup> Notably, none of these cases involved a question of executive or congressional authority under the Constitution or a statute, and thus they did not involve pure questions of interpretation of legal texts as emphasized in *Zivotofsky*.<sup>74</sup>

The historical litigation most similar to potential modern war powers litigation is *The Prize Cases*, decided in 1863. The issue was whether President Lincoln’s naval blockade of the South during the Civil War was unconstitutional as beyond presidential power.<sup>75</sup> Despite the wartime setting, the Court decided the case on the merits. As a co-author and I previously described it:

The most immediately striking aspect of the *Prize Cases* is that the Court considered a constitutional challenge to the President’s military actions during wartime and very nearly ruled against the President. And this attention came despite strong arguments by the President’s counsel for judicial abstention (including, apparently, the suggestion that deciding the merits would make the Court “an ally of the enemy”). . . .

But although the Court made a show of deciding the cases on their merits, the majority opinion contained language of substantial deference to the executive. The Court was quite willing to accept the President’s characterization of the situation as war (even though, at the time the blockade was proclaimed, shots had been fired only at a single fort, and no one had been killed by hostile fire). Indeed, [Justice] Grier [in the majority opinion] asserted that the President’s determination on this ground was conclusive on the Court . . . .

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<sup>73</sup> *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 272 (1808). For later cases, see *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829) (“In a controversy between two nations concerning national boundary . . . the Court [must] conform its decisions to the will of the legislature . . . .”); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 419–20 (1839) (finding that the executive determination that Falkland Islands were not part of the territory of Buenos Aires was conclusive on the judiciary); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 51 (1852) (finding that executive determination regarding status of Texas after the Texas revolution was conclusive on judiciary); *Doe v. Braden*, 57 U.S. (16 How.) 635, 635 (1854) (holding that whether the King of Spain had authority to annul land grants made to Spanish citizens was not a judicial question); and *Jones v. United States*, 137 U.S. 202, 212 (1890) (“Who 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 . . . conclusively binds the judges . . . .”). See also Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1909–15 (2015) (reviewing cases); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 592 (2007) (“[A]n important branch of [the political question] doctrine [in the nineteenth century] operated to identify factual questions on which courts would accept the political branches’ determinations as binding.”).

<sup>74</sup> See Grove, *supra* note 73, at 1918 n.41 (concluding that “the traditional [political question] doctrine did not encompass constitutional questions (that is, the determination whether a statute or other governmental action complied with the Constitution)”).

<sup>75</sup> *The Prize Cases*, 67 U.S. (2 Black) 635, 640–41 (1863).

On the other hand, notwithstanding the language of deference, on the crucial question whether the insurrection had progressed to the level of a full-blown civil war the Court also referred to contemporaneous recognition of a state of war by foreign nations, the comparatively amorphous and evolving nature of civil war, the disruption of the courts, and the commonsense obviousness of its conclusion before making the point about deference. Indeed, one could easily argue that the executive deference point . . . was a throwaway claim of little consequence placed late in the opinion.<sup>76</sup>

Thus, while the decision can be read to support varying levels of deference to executive factual determinations, it strongly supports the basic justiciability of war powers claims. To be sure, the decision came long after the immediate post-ratification period, and so may not be strongly indicative of the original view of the courts' role in such controversies. But it indicates that, at least in the nineteenth century, constitutional war powers questions were not regarded as categorically beyond the reach of courts.

## V. POLICY

The foregoing discussion suggests that *Zivotofsky* can be applied to war powers litigation to produce a manageable but not excessive role for courts. This section briefly considers whether it should be as a matter of contemporary policy.

To begin, I assume courts—if they reach the merits—might plausibly find significant instances where congressional approval of hostilities is constitutionally required. The most obvious concern is that this conclusion would interfere with national security by preventing necessary U.S. military action. This concern might arise from at least three circumstances: (1) courts might require the president to desist from needed action; (2) the president might not take action after concluding that Congress would not approve or when Congress in fact refuses to approve; and (3) the president might not take action because it appears Congress would not be able to approve in time to make the action meaningful.

As to the first category, the president's most evident recourse in the event of an adverse judicial decision is not to stop hostilities, but to gain Congress's approval. If the military action is truly necessary, Congress can be expected to approve. If

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<sup>76</sup> Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 86–87 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

Congress does not approve, that at least raises the possibility that the action is not necessary (so the president's inability to pursue it would not be a material downside to adjudication). Whether Congress is, in the general case, likely to mis-assess the need for military action seems speculative. The second category involves similar analysis. The president's inability to act due to Congress's actual or anticipated failure to approve is problematic only if one thinks Congress is systematically likely to disapprove military actions the president favors and are needed.<sup>77</sup> It is not clear that is the case. As to the third category, Congress has shown—for example, in approving the post-9/11 Authorization for the Use of Military Force (“AUMF”)<sup>78</sup>—that it can act relatively quickly. In any event, in the face of a time-sensitive emergency, the president has the option of acting quickly and seeking retroactive approval—a course followed by presidents in various circumstances.<sup>79</sup>

A related concern is that if courts find an ongoing war unconstitutional, it may be difficult and dangerous for the United States to disengage. Of course, Congress can solve the problem by authorizing the war, but suppose Congress does not approve of the war. Arguments for finding a political question in the Vietnam-era cases in part reflect this concern: even if Congress did not approve the war, the war could not be easily discontinued at judicial direction.

This concern, while substantial, may be overstated. First, many conflicts may be relatively easy to discontinue.<sup>80</sup> Second, even without a broad political question doctrine, courts will have various methods of restraint. For example, the D.C. Circuit in the Vietnam-era litigation found the war's initiation to have been unconstitutional due to lack of congressional authorization, but refused to order any remedy.<sup>81</sup> Third, and perhaps most importantly, if courts begin more active adjudication of war

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<sup>77</sup> For example, in 2013 President Obama considered military action against Syria in response to the Syrian government's use of chemical weapons against rebel forces. However, the U.S. Congress appeared unlikely to approve, and the President decided not to proceed without Congress's approval. See Ramsey, *supra* note 40, at 714–15 (discussing this episode). It is not clear whether this is an example of Congress impeding a needed military action or constraining an unwise one.

<sup>78</sup> The 2001 AUMF was approved on September 18, 2001, seven days after the 9/11 attack. See Authorization for the Use of Military Force, Pub. Law No. 107–40, 115 Stat. 224 (2001).

<sup>79</sup> For example, by President Lincoln at the start of the Civil War. See Lee & Ramsey, *supra* note 76, at 53.

<sup>80</sup> One could easily imagine prompt U.S. disengagement from a conflict such as the 2011 Libya intervention.

<sup>81</sup> Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).

powers disputes, presidents would be less likely to undertake substantial commitments without Congress's approval. Relatedly, courts can use situations in which they uphold presidential action to establish a framework for when Congress's approval is required. For example, in *The Prize Cases*, decided during the Civil War, the Court upheld the challenged presidential action (imposing a blockade on the South); the majority emphasized that the blockade was a defensive response to hostilities begun by the other side, while noting that the president could not begin offensive hostilities without Congress's approval.<sup>82</sup> Similarly, the Second Circuit in the Vietnam-era cases found that Congress's approval was required, but that approval had been given.<sup>83</sup>

A further potential problem with enhanced adjudication is that courts, nervous about the downsides discussed above, might give the president more authority than the Constitution allows, and thus license greater presidential adventurism by giving it formal judicial approval. This concern cannot be entirely discounted, but seems speculative in light of the remedy of subsequent congressional authorization (that is, in most cases, courts would be able to ascribe any bad consequences to Congress's failure to authorize the military action).

On the other hand, some material advantages seem to arise from more aggressive war powers adjudication. First, as discussed above,<sup>84</sup> a *Zivotofsky*-inspired approach seems most consistent with the judiciary's original constitutional role. *Marbury*—echoing Hamilton's *Federalist* No. 78—called for the judiciary to say what the law is, without exception for cases affecting foreign affairs or cases that might involve embarrassment or multifarious pronouncements.<sup>85</sup> The expansive *Baker* factors were a modern invention. In the early post-ratification period<sup>86</sup> (and throughout the nineteenth century<sup>87</sup>) courts adjudicated the legality of military force without invoking political question concerns. It is true, of course, that *Marbury* acknowledged a category of political questions

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<sup>82</sup> *The Prize Cases*, 67 U.S. (2 Black) 635, 668–69 (1863); Lee & Ramsey, *supra* note 76, at 72–78, 85.

<sup>83</sup> See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1369–70 (2d Cir. 1971).

<sup>84</sup> See *supra* Part IV.

<sup>85</sup> See RAMSEY, *supra* note 55, at 321, 329–34.

<sup>86</sup> See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176–79 (1804); RAMSEY, *supra* note 55, at 332–33 (listing further examples).

<sup>87</sup> See *The Prize Cases*, 67 U.S. at 668–69; see also *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 115 (1851) (allowing a claim against military officer for seizure of property in Mexico in connection with war effort despite claims of military necessity).

outside judicial competence.<sup>88</sup> But that category does not extend to matters of constitutional and statutory interpretation.

Second, enhanced judicial involvement would likely provide a greater check on the president. Currently it is largely left to Congress to provide a political check. However, Congress's practical ability to check the president in war powers matters seems open to doubt. Congress may lack the incentives and political will to contest the president in war powers controversies except in extreme circumstances. Although one may debate whether more checks upon the president in war powers are desirable, they seem consistent with the Constitution's original design. Multiple framers argued that the president's excessive tendency to war required congressional involvement in the war-initiation decision.<sup>89</sup>

Third, modern war powers authority suffers from the perception that it lacks a rule of law. That is, with regard to any presidential military action, there is debate in commentary (and sometimes in Congress) whether it is constitutional, often with multiple voices claiming the president is acting illegally.<sup>90</sup> However, without an authoritative decision maker to resolve these claims, the law remains unsettled and contested. Even if (as was likely true in the Vietnam conflict) the president acts with adequate approval, constitutional questions may cloud his authority. The president (and the country) likely would have benefitted from a clear, prompt judicial ruling that the Vietnam conflict was constitutional.

Finally, the likely result of greater judicial involvement would be greater cooperation between the president and Congress in war powers matters. In many modern conflicts in which congressional approval was not sought, approval likely would have been forthcoming: the president might choose not to seek approval because there might seem no immediate gain from doing so, not because there is a major disagreement between the president and Congress. It seems plausible, for example, that Congress would have approved military strikes in Libya, and it

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<sup>88</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803); *see also* *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (referring to “questions [that] are generally rather political than legal in their character”); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (finding that the president had constitutional power to protect U.S. citizens abroad, and that whether the use of force was necessary in the particular circumstances was a matter of executive discretion and thus was a “public political question” unreviewable under *Marbury*).

<sup>89</sup> *See* RAMSEY, *supra* note 55, at 235–37.

<sup>90</sup> *See, e.g.,* Prakash, *supra* note 40.

seems likely Congress would approve continuing military action against the Islamic State. In the long term, the president would be in a stronger position directing a unified rather than a unilateral military action.

## VI. POST-*ZIVOTFSKY* WAR POWERS LITIGATION IN THE LOWER COURTS

This section reviews post-*Zivotofsky* war powers litigation in the lower courts, focusing on two leading cases: *Jaber v. United States*<sup>91</sup> and *Smith v. Obama*.<sup>92</sup> Although both decisions found a political question barrier to the particular dispute, their application of *Zivotofsky* follows the discussion above and confirms the justiciability of some war powers disputes.

In *Jaber*, the plaintiffs' relatives were killed by a U.S. drone strike in Yemen.<sup>93</sup> The relatives were not targets of the strike but unfortunately were in the vicinity of al Qaeda members who were targeted. The plaintiffs made various claims under two U.S. statutes, the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA"), that the strike violated international law.<sup>94</sup> The D.C. Circuit affirmed the district court's dismissal of the claim on political question grounds, with this assessment of *Zivotofsky*:

*Zivotofsky* confirms no *per se* rule renders a claim nonjusticiable solely because it implicates foreign relations. Rather, it recognizes that, in foreign policy cases, courts must first ascertain if "[t]he federal courts are . . . being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination" or, instead, merely tasked with, for instance, the "familiar judicial exercise" of determining how a statute should be interpreted or whether it is constitutional. In the latter case, the claim is justiciable. Therefore, if the court is called upon to serve as "a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security[.]" then the political question doctrine is implicated, and the court cannot proceed.

*Zivotofsky* sought only to enforce a statute alleged to directly regulate the Executive, and the reviewing court needed to determine only "if *Zivotofsky's* interpretation of the statute [was] correct, and whether the statute [was] constitutional." The Court was not called upon

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<sup>91</sup> 861 F.3d 241 (D.C. Cir. 2017).

<sup>92</sup> 217 F. Supp. 3d 283 (D.D.C. 2016).

<sup>93</sup> *Jaber*, 861 F.3d at 243.

<sup>94</sup> *Id.* The plaintiffs did not claim that the strike was unconstitutional, presumably because they thought the 2001 AUMF had authorized hostilities against al Qaeda personnel in Yemen.

to impose its own foreign policy judgment on the political branches, only to say whether the congressional statute encroached on the Executive's constitutional authority. This is the wheelhouse of the Judiciary, and accordingly, it does not constitute a nonjusticiable political question. Here, however, Plaintiffs assert claims under the TVPA and the ATS that would require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether “an urgent military purpose or other emergency justified” a particular drone strike. Indeed, Plaintiffs' request is more analogous to an action challenging the Secretary of State's independent refusal to recognize Israel as the rightful sovereign of the city of Jerusalem, a decision clearly committed to executive discretion.<sup>95</sup>

This assessment seems correct and consistent with some justiciability of war powers claims. The key is the court's characterization of the claims as “requir[ing] the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target—to determine, among other things, whether an ‘urgent military purpose or other emergency justified’ a particular drone strike.”<sup>96</sup> This situation-specific analysis, which does seem to render justiciability problematic even under a broad view of *Zivotofsky*, would not be present in the more typical constitutional dispute over presidential war initiation. Where the question is simply whether the president has independent constitutional authority to act in response to a set of undisputed events, the situation is analogous to the one described by the court as justiciable: where the court is “tasked with, for instance, the ‘familiar judicial exercise’ of determining how a statute should be interpreted or whether it is constitutional.”<sup>97</sup> In the war powers situation, typically the court would be assessing whether an executive action (rather than a statute) is unconstitutional, but that should not be a material distinction in many cases. As in *Zivotofsky* (and in contrast to *Jaber*), the question for the court would be which branch has decision-making authority under the Constitution, not what decision should be made.

*Smith v. Obama* involved a service member's constitutional challenge to the president's use of force against the Islamic State in Iraq and Syria.<sup>98</sup> The central claim was that neither the 2001 AUMF nor the 2002 authorization of the action against Saddam Hussein in Iraq provided congressional authorization for military

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<sup>95</sup> *Id.* at 248–49 (citations omitted).

<sup>96</sup> *Id.* at 249 (citation omitted).

<sup>97</sup> *Id.* at 248 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

<sup>98</sup> See *Smith v. Obama*, 217 F. Supp. 3d 283, 284 (D.D.C. 2016).



action against the Islamic State.<sup>99</sup> The district court dismissed the claim on political question grounds after a careful assessment of *Zivotofsky*.<sup>100</sup> Acknowledging that not all questions relating to war are nonjusticiable, the court stated:

[T]he Court begins by clarifying the precise questions posed by Plaintiff's claims. Plaintiff's claims are premised on the notion that Congress has not previously authorized the use of force against [the Islamic State]. Defendant disputes this. Resolving this dispute would require the Court to determine whether the legal authorizations for the use of military force relied on by President Obama—the 2001 and 2002 AUMFs—in fact authorize the use of force against [the Islamic State]. With regard to the 2001 AUMF, the Court would have to determine whether the President is correct that [the Islamic State] is among “those nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,” and that Operation Inherent Resolve represents “necessary and appropriate force” against that group. With regard to the 2002 AUMF, the Court would have to determine whether the President is correct that operations against [the Islamic State] are “necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.” For the reasons set out below, the Court finds that these are political questions under the first two *Baker* factors: the issues raised are primarily ones committed to the political branches of government, and the Court lacks judicially manageable standards, and is otherwise ill-equipped, to resolve them.<sup>101</sup>

The court then elaborated:

Plaintiff's attempts to analogize his case to *Zivotofsky* are strained. Although, as in *Zivotofsky*, statutes are *involved* in this case—in particular, the War Powers Resolution, the 2001 AUMF and the 2002 AUMF—this case does not present nearly the same fundamental legal issues as were at issue in *Zivotofsky*. The questions posed in this case go significantly beyond interpreting statutes and determining whether

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<sup>99</sup> See Charlie Savage, *An Army Captain Takes Obama to Court Over ISIS Fight*, N.Y. TIMES (May 4, 2016), <https://www.nytimes.com/2016/05/05/us/islamic-state-war-powers-lawsuit-obama.html?mcubz=0>; Bruce Ackerman, *Is America's War on ISIS Illegal?*, N.Y. TIMES (May 4, 2016), <https://www.nytimes.com/2016/05/05/opinion/is-americas-war-on-isis-illegal.html?mcubz=0>. The statutes, rather than independent presidential power, were the president's principal bases for authority to take military action against the Islamic State. See Ramsey, *supra* note 40, at 710–11.

<sup>100</sup> See *Smith*, 217 F. Supp. 3d at 297. The court also found that *Smith* lacked standing as an independent ground for dismissal. *Id.* at 285. The case is currently on appeal to the Court of Appeals for the D.C. Circuit, where the standing issue has taken a central role after the plaintiff's departure from active service in the military. See Brief for Appellee at 17–25, *Smith v. Obama* (No. 16-5377), <https://www.scribd.com/document/351181196/DOJ-Response-to-Nathan-Michael-Smith-Appeal> [<http://perma.cc/3G5S-LSDK>].

<sup>101</sup> *Smith*, 217 F. Supp. 3d at 298 (citations omitted).

they are constitutional. Plaintiff asks the Court to second-guess the Executive's *application* of these statutes to specific facts on the ground in an ongoing combat mission halfway around the world. For example, the Court is not asked simply to "interpret" the 2001 AUMF, or to determine its constitutionality. It is asked to determine whether the President is correct that [the Islamic State], as it exists today, is an appropriate target under that resolution based on the nature and extent of [the Islamic State]'s relationship and connections with the terrorist organization that the President has determined was responsible for the September 11, 2001 attacks. The Court would also have to go further than simply "interpreting" the 2002 AUMF. It would have to determine whether the President is correct that the ongoing military action against [the Islamic State] is in fact "necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."

The reality, then, is more nuanced than Plaintiff suggests. Plaintiff's claims raise mixed questions of both discretionary military judgment *and* statutory interpretation. The Court does not read *Zivotofsky* as foreclosing the application of the political question doctrine under this scenario.<sup>102</sup>

Again, the court's emphasis is on the claim involving "mixed questions of both discretionary military judgment *and* statutory interpretation."<sup>103</sup> As discussed above, one can imagine many situations in which war-initiation disputes are such mixed questions; but one can also imagine many situations in which such disputes are *not* mixed questions and involve only questions of constitutional interpretation. Consistent with *Zivotofsky*, the *Smith* court's analysis suggests that the latter disputes might be justiciable.

The court then focused on the key *Zivotofsky* factors: textual commitment and judicially manageable standards:

First, certain aspects of the questions posed by this case are indisputably and completely committed to the political branches of government. Both the 2001 and 2002 AUMFs authorize only that force that the President determines is "necessary and appropriate." The necessity and appropriateness of military action is precisely the type of discretionary military determination that is committed to the political branches and which the Court has no judicially manageable standards to adjudicate.

Second, . . . [b]ased on the pleadings thus far alone, the Court can easily discern that this case raises factual questions that are not of a type the Court is equipped to handle with traditional judicially

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<sup>102</sup> *Id.* at 299–300 (citations omitted).

<sup>103</sup> *Id.* at 300.

manageable standards. The President and Department of Defense officials apparently believe that [the Islamic State] is connected with al Qaeda and that, despite public rifts, some allegiances between the groups persist and [the Islamic State] continues to pursue the same mission today as it did before allegedly splintering from al Qaeda. Plaintiff disputes these factual assertions, relying on an affidavit from scholars of Islamic Law that argue that as of today, the groups are in fact sufficiently distinct, and potentially even antagonistic, that they can no longer be viewed as the same terrorist organization. Resolving this dispute would require inquiries into sensitive military determinations, presumably made based on intelligence collected on the ground in a live theatre of combat, and potentially changing and developing on an ongoing basis. *See Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 45 (D.D.C. 2010) (“The difficulty that U.S. courts would encounter if they were tasked with ‘ascertaining the ‘facts’ of military decisions exercised thousands of miles from the forum, lies at the heart of the determination whether the question [posed] is a ‘political’ one.”) (quoting *DaCosta v. Laird*, 471 F.2d 1146, 1148 (2d Cir. 1973)).<sup>104</sup>

Thus, if a war powers claim did not involve such factual determinations (and some plausibly might not), this reasoning suggests that the claim would be justiciable.<sup>105</sup> As a result, the

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<sup>104</sup> *Id.* at 300–01 (some citations omitted).

<sup>105</sup> The court added a further consideration that might pose a broader barrier to war powers litigation, but that also seems unsupported by either *Zivotofsky* or the Constitution:

Finally, an additional factor makes judicial intervention particularly inappropriate on the specific facts of this case. Unlike the situation presented in *Zivotofsky*, the Court in this case is not presented with a dispute between the two political branches regarding the challenged action. In fact, Congress has repeatedly provided funding for the effort against [the Islamic State]. For example, on November 10, 2014, President Obama sent a letter to the Speaker of the House of Representatives requesting that Congress consider proposed amendments to the 2015 Budget to provide funding for Operation Inherent Resolve. The letter explained that “[t]hese amendments would provide \$5.6 billion for OCO activities to degrade and ultimately defeat the Islamic State of Iraq and the Levant (ISIL)—including military operations as part of Operation Inherent Resolve.” President Obama also attached a letter from the Director of the Office of Management and Budget, which explained in some detail the military operations that the additional budget would be used to fund. In December 2014, Congress passed the Consolidated and Further Continuing Appropriations Acts of 2015, in which it appropriated the funds the President had sought. . . .

The Congressional budget activity cited above by Defendant, and relied on by the Court, demonstrates that the Court can discern no impasse or conflict between the political branches on the question of whether [the Islamic State] is an appropriate target under the AUMFs cited by the President as authority for Operation Inherent Resolve.

This lack of conflict is relevant to the *justiciability* of Plaintiff’s claims under the political question doctrine because judicial intervention into military affairs is particularly inappropriate when the two political branches to whom

leading post-*Zivotofsky* war powers cases indicate that not all war powers questions are political questions even though some of them are.

#### CONCLUSION

In sum, a post-*Zivotofsky* analysis in separation of powers cases implies a distinction between, on the one hand, cases that involve legal interpretation, resting on traditional textual and historical materials, and on the other hand, cases that involve disputed facts, policies or characterizations. Applied to war powers litigation, this distinction seems both manageable and useful; it suggests that some war powers disputes are justiciable while others are not. More generally, the viability of *Zivotofsky*-inspired analysis in the especially difficult area of war powers suggests its broad potential for lasting influence in separation of powers and foreign affairs disputes.

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war-making powers are committed are not in dispute as to the military action at issue.

*Id.* at 301–02 (footnotes and citations omitted). For this conclusion, the court cited only pre-*Zivotofsky* cases and Justice Sotomayor’s concurrence in *Zivotofsky*. *Id.* at 302–03. Although it is true that *Zivotofsky* involved a conflict between Congress and the president, the majority opinion did not suggest that such a conflict was essential to its finding of justiciability (and no other Justice joined Justice Sotomayor’s suggestion that it should be). Further, as the Court has emphasized elsewhere, the structural provisions of the Constitution exist not merely to protect the powers of particular branches of government, but principally to protect individual liberty by assuring checked and divided powers among all the branches. *See Bond v. United States*, 564 U.S. 211, 223 (2011).

