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## The Time for Judgment Has Arrived: The Zivotofsky v. Clinton Effect on the Political Question Doctrine's Application to the War Powers Resolution

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# THE TIME FOR JUDGMENT HAS ARRIVED: THE ZIVOTOFSKY V. CLINTON EFFECT ON THE POLITICAL QUESTION DOCTRINE’S APPLICATION TO THE WAR POWERS RESOLUTION

*Shannon M. Doughty<sup>1</sup>*

*The War Powers Resolution was enacted to serve as a congressional restraint on the President’s power to engage in Military Action. Since then, Congress and the President have disagreed over the enforcement and constitutionality of the statute. Nonetheless, courts have dismissed cases regarding the War Powers Resolution claiming it is of a solely political nature i.e. a political question. The Judiciary traditionally apply the political question doctrine to issues regarding foreign affairs and, in effect, avoided hearing cases regarding the specifics of the war powers pertaining to Executive and Congress. This lack of judicial determination has resulted in the and unclear assignment of constitutional war powers authority to the branches. In Zivotofsky v. Clinton, the Supreme Court held that the political question doctrine cannot be applied to cases regarding statutory and constitutional interpretation. This narrowing of the political question doctrine potentially lowers the standard of justiciability. This Comment advocates, under the new Zivotofsky standard, for the Supreme Court to review statutory and constitutional disputes arising from the War Power’s resolution.*

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## I. INTRODUCTION

In an attempt to avoid the unilateral military authority of the Monarch, the Founding Fathers divided power between the Legislative and Executive branches. Notably, Congress held the power to declare and fund war, while the President oversaw the armed forces as the Commander-in-Chief.<sup>2</sup> But as times have changed, so too has almost every aspect of military action. Some circumstances arise that could call for military action but not war. In the modern era, this separation of authority has led to a great debate over exactly where the line is drawn between Presidential and Congressional authority.<sup>3</sup> In particular, Congress has attempted to reign in the President's ability to circumvent Congress' authority through "military action."<sup>4</sup>

In 1973, Congress passed the War Powers Resolution ("WPR").<sup>5</sup> Since its enactment the WPR has been a source for criticism, litigation, and little enforcement.<sup>6</sup>

The courts have developed a determined habit of avoiding cases regarding the WPR by holding that the claims are not justiciable, or unable to be heard by the courts, under the Art. III powers.<sup>7</sup> Lower courts have clung to two legal theories to avoid WPR questions on the

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2. See generally U.S. Const. art. I, § 8, cl. 4, 11; U.S. Const. art. 2, § 2.
  3. See Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 84 (1984).
  4. Brian Egan & Tess Bridgeman, *Top Experts' Backgrounder: Military Action Against Iran and US Domestic Law*, JUST SECURITY (Jan. 3, 2020), <https://www.justsecurity.org/64645/top-experts-backgrounder-military-action-against-iran-and-us-domestic-law/> [<https://perma.cc/P3Y4-QRWB>].
  5. Vance, *supra* note 3, at 79.
  6. See CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 1 (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf>.
  7. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (affirming dismissal for lack of standing without reaching justiciability); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (dismissing claim as nonjusticiable political question); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (same); *Ange v. Bush*, 752 F. Supp. 509, 515 (D.D.C. 1990) (same); *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987) (same).

merits; (1) a lack of standing<sup>8</sup> and (2) the involvement of a political question<sup>9</sup>. However, in *Zivotofsky v. Clinton*, the Supreme Court significantly limited the use of the political question doctrine as a defense to a WPR challenge.<sup>10</sup>

*Zivotofsky* has laid the groundwork for future substantive judicial determinations on the delegations of foreign affairs and war powers between the Executive and Congress.<sup>11</sup> The political question doctrine is applied to cases where the courts find the issue constitutionally delegated to another branch and outside the purview of the judicial branch.<sup>12</sup> The political question doctrine can be applied in a number of circumstances where courts examine whether a particular case is justiciable and is “essentially a function of the separation of powers.”<sup>13</sup> It is a limitation on the judiciary’s scope of their power and what they are constitutionally authorized to hear.<sup>14</sup> Judicial intervention relating to matters of foreign policy and national security is rarely proper because they are so exclusively entrusted to the political branches of government that the Judiciary has no authority to judge their political discretion.<sup>15</sup>

*Baker v. Carr*, the formative case on the political question doctrine, concerned a civil rights issue, but the Supreme Court took the liberty to opine on the political question doctrine’s frequent applicability to foreign affairs.<sup>16</sup> The Supreme Court found it could not reach a judgement on the merits of a case if any of the following factors applied:

1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it;

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8. See, e.g., *Campbell*, 203 F.3d at 20. While the issue of standing poses a barrier to litigation on the constitutionality of the WPR, the vast prior literature, opposing arguments, and proposed solutions are outside the scope of this comment. See generally Michael D. Ramsey, *War Powers Litigation After Zivotofsky v. Clinton*, 21 CHAP. L. REV. 177 (2018); McKaye Neumeister, Note, *Reviving the Power of the Purse: Appropriation Clause Litigation and National Security Law*, 127 YALE L. J. 2512 (2018); Samuel R. Howe, Note, *Congress’s War Powers and the Political Question Doctrine after Smith v. Obama*, 68 DUKE L. J. 1231 (2019).
9. See, e.g., *Sanchez-Espinoza*, 770 F.2d at 210; *Crockett*, 720 F.2d at 1357.
10. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).
11. See Ramsey, *supra* note 8, at 177.
12. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).
13. *Id.* at 217.
14. See *id.* at 210-11.
15. *Id.* at 211-12.
16. See *Baker*, 369 U.S. 186.

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 respect due coordinated branches of government; or 5) 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>17</sup>

The *Baker* factors have been used since to refrain from making a judgment on the merits regarding issues of foreign affairs and political questions.<sup>18</sup> In *Zivotofsky*, the scope of test is narrowed when dealing with statutory issues and redefined the comparative importance of the individual factors.<sup>19</sup> This Comment will propose that the Supreme Court's holding in *Zivotofsky v. Clinton*, has greatly altered the reach of the political question doctrine's applicability to statutory and constitutional analysis and therefore the political question doctrine should no longer have a blanket application to cases regarding the WPR.

## II. ZIVOTOFSKY V. CLINTON

In 2002, Congress enacted a statute allowing Jerusalem-born U.S. citizens to state their birthplace on their passports as "Israel."<sup>20</sup> Menachem Binyamin Zivotofsky's parents on behalf of Zivotofsky, an American citizen born in Jerusalem, requested to the State Department that his passport designate "Israel" as his birthplace.<sup>21</sup> The State Department refused the request based on their policy, at the time, to not recognize Jerusalem as a part of Israel.<sup>22</sup> The D.C. District Court dismissed the case for lack of justiciability because the issue, as a matter of foreign policy, fell under the political question doctrine.<sup>23</sup> The D.C. Circuit Court affirmed.<sup>24</sup>

Chief Justice Roberts, writing for the 8-1 majority, reversed the D.C. Circuit stating that "[t]he courts are fully capable of determining

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17. *Id.* at 217.

18. *See e.g., Campbell*, 203 F.3d 19 at 24-25 (Silberman, J., concurring); *Sanchez-Espinoza*, 770 F.2d at 209; *Ange*, 752 F.Supp. at 512; *Lowry*, 676 F.Supp. at 339-40. *See also Crockett*, 720 F.2d at 1357.

19. *See generally Zivotofsky*, 566 U.S. 189.

20. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

21. *Zivotofsky*, 566 U.S. at 193.

22. *Id.*

23. *Id.*

24. *Id.*

whether [the] statute may be given effect, or instead struck down in light of authority conferred on the Executive by the Constitution.”<sup>25</sup> The claim in *Zivotofsky* required the Supreme Court to decide the proper interpretation and constitutionality of the statute.<sup>26</sup> Since it is the job of the judiciary “to say what the law is,” this was a “familiar judicial exercise” for the court.<sup>27</sup>

The statutory interpretation turned primarily on the constitutionality of §214(d) which gave an individual, born in Jerusalem, the right to have “Israel” listed as their place of birth on their U.S. passport.<sup>28</sup> In determining if the political question doctrine applied, Justice Roberts only chose to analyze the first two factors of *Baker*; whether the issue at hand was a “textually demonstrable constitutional commitment” to a political department or whether it lacked a “judicially manageable standard.”<sup>29</sup>

The Supreme Court was not persuaded that the regulation of passport policy is a textually demonstrable constitutional commitment to a single branch.<sup>30</sup> Instead, more generally, it falls under the foreign affairs power for which the branches have overlapping authority.<sup>31</sup> The Government argued passport policymaking is within the President’s exclusive “Political Recognition power.”<sup>32</sup> In opposition, *Zivotofsky* argued that Congress had the authority, under its Naturalization Power, to mandate the recognition of Israel on his passport.<sup>33</sup>

While a lack of judicially discoverable and manageable standards is often the impetus used to invoke the political question doctrine, in *Zivotofsky*, the Supreme Court set a lower barrier for parties to prove a manageable standard exists.<sup>34</sup> Justice Roberts points to the detailed arguments proffered by both sides to emphasize the mere fact these arguments could be levied indicates there was a manageable standard for the Court to follow.<sup>35</sup>

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25. *Id.* at 191.

26. *Id.* at 196.

27. *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

28. *Id.*

29. *Id.* at 195, 197-98.

30. *Id.* at 197.

31. *See id.* at 201 (finding that “[r]esolution of *Zivotofsky*’s claim 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”).

32. *Id.* at 198.

33. *Id.* at 199 (citing U.S. Const. art. I, § 8, cl. 4).

34. *See id.* at 209-10 (Sotomayor, J., concurring).

35. *Id.* at 201.

The D.C. Circuit had erred when it phrased its analysis around the President's decision and the exercise of such power cannot be reviewed by the courts.<sup>36</sup> In *Zivotofsky*, the Supreme Court rephrased the issue at hand within the case. Instead, they asked whether Congress had the authority to pass a statute regulating passports or if that power lies with the Executive.<sup>37</sup> The Supreme Court could avoid commenting on the policy judgement of recognizing Jerusalem as part of Israel and instead focus on the constitutionality of a statute which gave Congress the power to set such a policy.<sup>38</sup> In coming to this conclusion, the Supreme Court emphasized they cannot shy away from decisions of statutory interpretation because of their prominent political overtones.<sup>39</sup>

### III. DEVELOPMENT OF THE POLITICAL QUESTION DOCTRINE'S APPLICATION TO THE WAR POWERS

*Zivotofsky* follows a trend of cases discussing the importance of judicial guidance on statutory interpretation even when foreign affairs are involved.<sup>40</sup> In *El-Shifa Pharmaceuticals Industries Co. v. U.S.*,<sup>41</sup> a pharmaceutical company in Sudan sued President Clinton when he bombed its warehouse for being a suspected terrorist site. El-Shifa sought a declaration from the President stating that the government incorrectly assumed El-Shifa's terrorist affiliation and sought relief for tort damages.<sup>42</sup> The D.C. Circuit refused to hear the case, holding that the wisdom of the President's military judgement was a political question and chose not to analyze the statutory claim.<sup>43</sup>

While presiding on the D.C. Circuit, Justice Brett Kavanaugh, in his concurrence, disagreed and argued for limited deference toward the historical precedent of the political question doctrine, stating, "[t]he political question doctrine has occupied a more limited place in the Supreme Court's history than is sometimes assumed."<sup>44</sup> Two years before *Zivotofsky*, Justice Kavanaugh pointed out that the Supreme Court has never applied the political question doctrine to statutory

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36. *Id.* at 193-94.

37. *Id.* at 196.

38. *Id.*

39. *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

40. See generally *Campbell*, 203 F.3d at 37-41 (Tatel, J., concurring); *El-Shifa Pharm. Indus. Co. v. U.S.*, 607 F.3d 836 (D.C. Cir. 2010); *Lowry*, 676 F.Supp. 333.

41. *El Shifa Pharm. Indus. Co.*, 607 F.3d 836.

42. *Id.* at 840.

43. *Id.*

44. *Id.* at 856 (Kavanaugh, J., concurring).

interpretation.<sup>45</sup> Though his reasoning differed from Justice Roberts in *Zivotofsky*, Justice Kavanaugh felt the D.C. Circuit should abstain from its use in this case and emphasized the consequences of the Court's silence.<sup>46</sup>

In his concurrence, he stressed that by applying the political question doctrine in statutory cases the court oversteps the stated purpose which requires a constitutional "benign deference to political branches."<sup>47</sup> Instead, such an incorrect application of the political question doctrine systematically favors one branch of government over the other.<sup>48</sup> As applied in *El-Shifa*, it "*sub silentio*" increased executive power, by failing to perform a statutory analysis the "court would be establishing that the asserted Executive power is exclusive and preclusive, meaning that Congress cannot regulate or limit that power by a cause of action or otherwise."<sup>49</sup> On the other hand, if the statute clearly limited a sole power of the Executive, such as the delegated power of Commander in Chief, then the court's silence would inappropriately expand the power of Congress.<sup>50</sup>

#### IV. THE IMPORTANCE OF FRAMING THE QUESTION PRESENTED

The holding of *Zivotofsky* relied on the framing of the question presented.<sup>51</sup> Lower courts who had previously examined the political question doctrine in the context of foreign affairs and war powers have also wrestled with pinpointing the proper scope of the issue.<sup>52</sup> If there is a strict adherence to statutory analysis regardless of issue, cases involving traditionally political issues may be recast as judiciable by any tenuous statutory claim.<sup>53</sup> In contrast, cases involving a statutory or constitutional dilemma, with a political element, could be presented as a political decision, but this would be a misapplication of the

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45. *Id.*

46. *Id.* at 857.

47. *Id.*

48. *Id.*

49. *Id.*

50. See Chris Michel, Comment, *There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 YALE L. J. 253, 262 (2013) ("If a statute invades a constitutional power committed exclusively to the executive, the court should invalidate the law ...").

51. See *Zivotofsky*, 566 U.S. 189.

52. See generally *Campbell*, 203 F.3d 19; *El-Shifa Pharm. Indus. Co.*, 607 F.3d 836.

53. See *El Shifa Pharm. Indus. Co.*, 607 F.3d. 850-51.



doctrine.<sup>54</sup> *Zivotofsky* found it was within the Court's discretion to redefine the question and hear the case according to its statutory claim.<sup>55</sup>

Courts are also hesitant to elaborate on the constitutional delegation of authority with regard to the WPR.<sup>56</sup> While the courts have shied away from deciding what action is prudent within a delegated power, they cannot hesitate to validate that the power is constitutionally delegated.<sup>57</sup> In *Zivotofsky*, the D.C. Circuit reasoned that the recognition of Jerusalem as a part of Israel was a political matter and cannot be reviewed by the courts.<sup>58</sup> Instead, the Supreme Court found it was not an issue of whether the U.S. is recognizing Jerusalem as part of Israel, but whether the President must follow a congressional mandate pertaining to passport policy.<sup>59</sup>

In *Campbell v. Clinton*, members of Congress brought suit against President Clinton for his use of extended military force in Kosovo in opposition to their voting against further military action.<sup>60</sup> The D.C. Circuit dismissed the case, in part, because the court did not have the authority to "define war."<sup>61</sup> Since there lacked a manageable standard and the issue was committed to the decision of the other branches.<sup>62</sup> In *Campbell*, the correct question to ask was whether Congress had the authority, under Article I, to demand the President remove the Armed Forces from hostilities despite the President's Powers as Commander in Chief.<sup>63</sup>

Again, in *El Shifa*, the D.C. Circuit refused to review the Executive's "wisdom of retaliatory action taken by the United States."<sup>64</sup>

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54. See Michel *supra* note 50, at 256–57 (noting the trend of lower federal courts to find statutory political questions and arguing that this trend is misguided).

55. *Zivotofsky* 566 U.S. at 195.

56. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL30352, WAR POWERS LITIGATION INITIATED BY MEMBERS OF CONGRESS SINCE THE ENACTMENT OF THE WAR POWERS RESOLUTION 15 (2012).

57. See Bennett C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L. J. 1330, 1335–36 (1984); *Delegation of Legislative Power*, Legal Information Institute, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution-conan/article-1/section-1/delegation-of-legislative-power>, [<https://perma.cc/H4NU-QT8W>].

58. *Zivotofsky*, 566 U.S. at 193–94.

59. *Id.* at 196.

60. *Campbell*, 203 F.3d at 20.

61. *Id.* at 28.

62. *Id.* at 24–25 (Silberman, J., concurring).

63. See *id.* at 37 (Tatel, J., concurring)

64. *El Shifa Pharm. Indus. Co.*, 607 F.3d 851.

As the concurring opinions suggest, this case, in reality, merely relied upon whether there was a remedy available under a torts statute or a common law cause for defamation.<sup>65</sup> The concern over an increase of statutory claims altering the use of the political question doctrine is a misunderstanding of the role of the judiciary. The judiciary's role is to distinguish issues and dismiss frivolous claims.<sup>66</sup> It is not the purpose of political question doctrine to evade determining the applicability of a statute.<sup>67</sup> The D.C. Circuit court should welcome the opportunity to refine the boundaries of statutes that affect issues of foreign affairs such as the Alien Tort statutes and the WPR.

#### V. THE WAR POWERS RESOLUTION AND APPLYING THE BAKER FACTORS

In 1973, the WPR was enacted by Congress, in response to the Vietnam war, as a means of restricting the President's ability to enter and maintain action by the U.S. military into international hostilities and conflict.<sup>68</sup> The stated purpose of the WPR is to limit the President's authority to introduce the military into hostilities only in the following situations: 1) an act of war; 2) statutory approval; or 3) in the case of a national emergency.<sup>69</sup> The Act continues:

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced ... into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing...

Within sixty calendar days after a report is submitted or is required to be submitted ... the President shall terminate any use of United States Armed Forces ... unless the Congress:

(1) has declared war or has enacted a specific authorization for such use of United States Armed Forces,

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65. *Id.* at 853-55.

66. *See Court Role and Structure*, United States Courts, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/PV72-M86T>].

67. *See Michel*, *supra* note 50, at 263 (arguing that, by doing so, "statutory political questions deprive the government of valuable guidance by failing to demarcate the boundaries of each branch's authority").

68. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2018); History.com Editors, *War Powers Act*, HISTORY (June 10, 2019), <https://www.history.com/topics/vietnam-war/war-powers-act>.

69. 50 U.S.C. § 1541(c).

(2) has extended by law such sixty-day period, or  
(3) is physically unable to meet as a result of an armed attack upon the United States.  
Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires.<sup>70</sup>

Since the statutes enactment there has been little evidence as to whether it has had any actual effect on presidential action.<sup>71</sup> The constitutionality of the WPR has never been decided.<sup>72</sup> No President has ever formally conceded its constitutionality and some Presidents have argued the WPR itself, or in part, is an unconstitutional overreach by Congress.<sup>73</sup>

*A. Applying Baker to War Powers Resolution following Zivotofsky*

The Supreme Court has only ever applied the political question doctrine in two instances: 1) when the Constitution textually and exclusively commits interpretation of the relevant constitutional provision to one or both of the political branches, and 2) when there is no manageable or judicial standards.<sup>74</sup>

1. Textually and Exclusively Committed

First, when considering whether the Constitution textually and exclusively commits an interpretation of a constitutional provision to one or both of the political branches, the Supreme Court will find that where the delegation of power is ambiguous, the Supreme Court has an obligation to determine the constitutionality.<sup>75</sup> The war powers are not specifically enumerated to just one of the branches.<sup>76</sup> The roles of

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70. 50 U.S.C. §§ 1543–1544.

71. John R. Cook, *The War Powers Resolution-- A Dim and Fading Legacy*, 45 CASE W. RES. J. INT'L L. 157, 157 (2012).

72. *See Baker*, 369 U.S. at 211 (observing that the political question doctrine often applies to issues of foreign affairs).

73. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 104 (1984); Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RES. J. INT'L L. 173, 174 (2012) (“The constitutional infirmity of the War Powers Resolution . . . as a statutory straitjacket on executive authority has been uniformly demonstrated by more than forty years of practice.”).

74. *Zivotofsky*, 566 U.S. 195.

75. *See id.* at 195–96 (finding that where there is no “textually demonstrable constitutional commitment of the issue to a coordinate political department,” the judiciary must then decide whether the “interpretation of the statute is correct, and whether the statute is constitutional”).

76. *See generally* U.S. Const. art. I, § 8, cl. 4, 11; U.S. Const. art. 2, §2.

Congress and the President in foreign and military affairs “do not fit neatly into the classic concepts of the separation of legislative and executive powers.”<sup>77</sup> The war powers consist of competing and intertwined delegations of power which the Court has felt the obligation to untangle on many numerous occasions.<sup>78</sup>

*Zivotofsky v. Kerry*,<sup>79</sup> the subsequent Supreme Court decision of *Zivotofsky v. Clinton*, compared the Recognition Power of the President against the Naturalization Powers of Congress and found the power to recognize a foreign government lies within the Executive branch, making the law unconstitutional.<sup>80</sup> In the context of a war powers question, there is arguably a necessity to compare the allocated powers of the Commander in Chief to the President and the residual power of the Vesting Clause to Congress’s right to declare war and raise an army.<sup>81</sup>

The Supreme Court’s refusal to address statutory issues of foreign affairs fails to recognize the resulting implication to the structure of the Constitution.<sup>82</sup> Judicial silence on claims made against the president can lead to a *sub silentio* increase in the power of the presidency.<sup>83</sup> When a court fails to review the constitutionality of presidential actions not compliant with the WPR, they increase presidential power by ignoring the explicit power of Congress to declare war.<sup>84</sup> On the other hand, if the WPR, or parts, are unconstitutional then the President is improperly burdened with complying with its restrictions and requirements and stripped of his right to discretion.<sup>85</sup> Even in cases where the political question doctrine rendered an issue involving the WPR non-justiciable, courts have not precluded all forms judicial

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77. Vance, *supra* note 3, at 84.

78. *Id.*

79. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 135 S.Ct. 2076 (2015) [hereinafter *Zivotofsky II*].

80. *Id.* at 2087–88, 2095.

81. *See generally* Carter, *supra* note 73.

82. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., R43773, *ZIVOTOFSKY V. KERRY: THE JERUSALEM PASSPORT CASE AND ITS POTENTIAL IMPLICATIONS FOR CONGRESS’S FOREIGN AFFAIRS POWERS* 23 (2015) (discussing implications on Congress’s ability to refute future claims of exclusive executive power).

83. *See El-Shifa Pharm. Indus. Co.*, 607 F.3d at 855 (Kavanaugh, J., concurring).

84. *Id.* at 857 (Kavanaugh, J., concurring).

85. *See id.* at 859 (Kavanaugh, J., concurring).

review on the constitutionality of the WPR.<sup>86</sup> On the other hand, the D.C. Circuit has stated that “[a] true confrontation between the Executive and a unified Congress as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review.”<sup>87</sup>

## 2. Lack of Judicially Manageable Standards

In *Zivotofsky*, Justice Roberts holding practically eliminated the second *Baker* factor, “a lack of judicially manageable standards,” by stating there is a manageable legal standard if cognizable arguments are able to be made for both sides.<sup>88</sup> By this measure, the vast scholarly literature and litigation surrounding the WPR represents the already existing legal standards and arguments that can be levied around the constitutionality of the statute.<sup>89</sup>

Some argue that past practice and the history of presidential action in war-time has also created a standard for the Supreme Court to follow as to where the authority truly lies. Some scholars argue that “[b]ehind the legal bickering, a complex, but unstated, operational code has developed, allocating competence to initiate, direct, and terminate different types of coercion among the branches.”<sup>90</sup> This operational code works as a constitutional common law developed with regards to use of force that did not amount to war.<sup>91</sup> Previously, the President has used force outside the purviews of the WPR and authorization of force from Congress when he felt it was necessary to protect national interests.<sup>92</sup> Congress was often compliant in the past while the judiciary validated these actions with rulings or with silence.<sup>93</sup> These previous

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86. See *Lowry*, 676 F.Supp. at 339 (D.D.C.1987) (finding an issue involving the War Powers Resolution nonjusticiable under the political question doctrine, but noting that “[j]udicial review of the constitutionality of the War Powers Resolution is not [] precluded by this decision”).

87. *Id.*

88. See *Zivotofsky*, 566 U.S. at 201 (“Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not ‘turn on standards that defy judicial application.’”).

89. See generally Carter, *supra* note 73; William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149 (2001).

90. Corn, *supra* note 89, at 1185 (quoting W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777, 777–78 (1989)).

91. *Id.* (citing Reisman, *supra* note 90, at 781).

92. *Id.*

93. *Id.*

instances have created a “historical gloss” that overshadows war powers disputes.<sup>94</sup> This has set a precedent that places the WPR in conflict with the historical approach to war powers, and therefore provides future legal standards for WPR challenges.<sup>95</sup>

According to Justice Sotomayor, in her concurrence in *Zivotofsky*, the third factor, “disputes [that call] for decision making beyond the court’s competence” can be applied in conjunction with the second factor.<sup>96</sup> Following this logic, the WPR is not beyond the scope of the Court’s competence because of the previously stated reasons that revolve around the robust debate over the conflicting powers of war and the years of historical precedent.

### 3. Prudential Concerns

In *Zivotofsky*, Justice Roberts does not even recognize the last three of the *Baker* factors that Justice Sotomayor refers to as the “prudential concerns.”<sup>97</sup> While still acknowledging their existence, Justice Sotomayor, in her concurrence, urges courts to be “particularly cautious before forgoing adjudication of a dispute” on the basis on the last three factors,<sup>98</sup> emphasizing prudential concerns have only ever been asserted, by the Supreme Court, in dicta like Justice Breyer’s dissent.<sup>99</sup>

The fourth factor of the *Baker* considers “the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinated branches of government.”<sup>100</sup> This factor, though addressed in *Baker*, is diminished as a result of *Zivotofsky* which clearly states that the Courts may not shy away from problems that are political in nature.<sup>101</sup> Cases regarding the WPR most likely occur when both the Executive have reached an impasse. When Congress and the Executive are at odds with the designated military action, the judiciary must step in and cannot avoid a ruling on statutory issues for fear of stepping on the toes of the other branches.<sup>102</sup>

Under the fifth factor, the Court may find an “unusual need for unquestioning adherence to a political decision already made.”<sup>103</sup> In the

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94. See *id.* at 1156–64, for a discussion of the “historical gloss” concept in separation-of-powers analysis.

95. See *id.* at 1187–1188.

96. *Zivotofsky*, 566 U.S. at 203 (Sotomayor, J., concurring).

97. *Id.*

98. *Id.* at 204 (Sotomayor, J., concurring).

99. See *id.* at 186 (Breyer, J., dissenting).

100. *Baker*, 369 U.S. 217.

101. *Zivotofsky*, 566 U.S. 204-05.

102. See *id.* at 205.

103. *Baker*, 369 U.S. at 217.

context of the WPR, judicial deference to ongoing military actions could be expected to fall under this standard and possibly prevent a court from ordering an injunction against the President to remove troops.<sup>104</sup> But if the President is found to be involved in an unconstitutional conflict, the Court should not avoid the question but instead find a practical remedy that does not endanger troops.<sup>105</sup>

The sixth and final factor considers whether, upon the court's judgment, "there is a potentiality of embarrassment from multifarious pronouncements by various departments on one question."<sup>106</sup> Concern about the judiciary causing embarrassment seems frivolous in relation to Congress and the President's long history of public disagreements and lawsuits over military power. Since the Supreme Court makes the final decision about constitutionality, there is no danger "multifarious pronouncements" since the judgment will be binding on all branches.<sup>107</sup> These ongoing lawsuits are in fact already sources of potential embarrassment and a judicial ruling may once and for all render a final and singular explanation for the constitutionality of the WPR and the lengths the President may go as Commander-in-Chief.

*B. Judicial Analysis Applicable to WPR*

I. Statutory Analysis

One of the many constitutional questions regarding the war powers is whether the country is "at war." The courts have been reluctant to hear cases that would define this constitutional term.<sup>108</sup> With regards to the WPR, the confusion revolves around the statutory term "hostilities".<sup>109</sup> Many critics of the WPR question the validity of Section 5(b) that states after 92 days the president must remove troops

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104. See generally Brett M. Kavanaugh, *Congress and the President in Wartime*, LAWFARE (Nov. 29, 2017), <https://www.lawfareblog.com/congress-and-president-wartime> (reviewing DAVID BARRON, *WAGING WAR: THE CLASH BETWEEN THE PRESIDENT AND CONGRESS, 1776 TO ISIS* (2016)).

105. See *id.*

106. *Baker*, 369 U.S. at 217.

107. See *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/MA2J-8XFQ>].

108. See *Campbell*, 203 F.3d at 26 (Silberman, J., concurring) (observing no authority to define when "war" has been "declared"); *Dellums*, 752 F.Supp. at 1146 (noting in dicta that the action would amount to "war," but denying preliminary injunction for lack of ripeness).

109. See *Campbell*, 203 F.3d at 25 (Silberman, J., concurring) ("Prior litigation under the WPR has turned on the threshold test whether U.S. forces are engaged in hostilities or are in imminent danger of hostilities.").

from hostilities, unless he receives constitutional approval.<sup>110</sup> A case may arise challenging the controversial 5(b) provision, posing the question as to whether Congress has the power to dictate through statute the proper movement of troops and military action, in which normally lies with executive, unanswered.

In the past, Congress and the President have disagreed on the definition of “hostilities.”<sup>111</sup> If the forces are not in hostilities, they do not need to be removed, but the WPR fails to define “hostilities.”<sup>112</sup> When Barak Obama sent troops to Libya in 2011, he determined, at the advice of the U.S. Department of State Legal advisor, Harold Koh, that the military actions in Libya did not amount to hostilities.<sup>113</sup> Koh determined that military action does not amount to hostilities if the mission is limited, the exposure of the armed forces is limited, risk of escalation is limited, and the military means are limited.<sup>114</sup>

More recently, there is a disagreement between Congress and the Trump Administration as to whether U.S. forces assisting the Saudi-led coalition in Yemen have been introduced into active or imminent hostilities for purposes of the WPR.<sup>115</sup> Some Members of Congress claimed that by providing support to the Saudi Arabia, U.S. forces have been introduced into a “situation where imminent involvement in hostilities is clearly indicated” according to the WPR.<sup>116</sup> In 2019, the House passed a joint resolution “Directing the removal of United States Armed Forces from hostilities in the Republic of Yemen that have not been authorized by Congress.”<sup>117</sup> In response, then-Acting General Counsel of the Department of Defense, William Castle, released a letter arguing that the premise of the proposed resolution was “flawed” because it incorrectly asserted that U.S. forces had been introduced into

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110. Vance, *supra* note 3, at 84-86.

111. *See id.* at 92-93 (suggesting an amendment to the WPR that would define “hostilities” due to Presidents avoiding the WPR by construing military actions as not involving “hostilities”).

112. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 13 (2011) (statement of Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State).

113. *Id.* at 14-16.

114. *Id.*

115. CONG. RESEARCH SERV., R45046, CONGRESS AND THE WAR IN YEMEN: OVERSIGHT AND LEGISLATION 2015-2019, at 9-10 (2019).

116. *Id.* at 10.

117. *Id.* at 15.



“hostilities.”<sup>118</sup> Consistent with this opinion, President Trump vetoed the resolution.<sup>119</sup>

Courts have applied the political question doctrine in cases involving hostilities because they thought it required political judgment.<sup>120</sup> A long history of these cases have stated that the courts are not equipped to determine “what is war.”<sup>121</sup> The better question for the judiciary may be “who has the power to define what is war?”. Congress has assigned the term “hostilities” as to the scope of the WPR.<sup>122</sup> Because of the lack of any judicial guidance, the Executive has been defining the scope of the word.<sup>123</sup> A task the Court may find is in the power of Congress or its own purview. Better defining scope hostilities is statutory analysis and not a “textually demonstrable constitutional commitment.”<sup>124</sup> Further resolving WPR disputes would require a judgement of whether the military action was wise, but whether the President possessed legal authority to conduct the military operation.<sup>125</sup>

## II. Determining the Delegation and Scope of Presidential Authority

The Supreme Court found in *Zivotofsky* it must determine which branch had the right to make policy as a question of constitutional and statutory interpretation.<sup>126</sup> A lack of a specified delegation of war powers does not immediately create a gap that cannot be remedied by judicial means. For many years, the ambiguity of presidential power has been analyzed by the courts using a three-part analysis first proposed in Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>127</sup> First, the President’s authority is strongest when he “acts pursuant to an express or implied authorization of Congress,” for it includes all that he possesses in his own right plus all that Congress

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118. Oona A. Hathaway, et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT’L SECURITY J. 1, 20 (2019).

119. CONG. RESEARCH SERV., R45046, CONGRESS AND THE WAR IN YEMEN: OVERSIGHT AND LEGISLATION 2015-2019, at 15 (2019).

120. *See generally Campbell*, 203 F.3d at 37-41 (Tate, J. concurring).

121. *Id.* at 25-26 (Silberman, J., concurring).

122. *See id.* at 25 (Silberman, J., concurring).

123. *See Vance*, *supra* note 3, at 92.

124. *See Zivotofsky*, 566 U.S. at 195-96.

125. *Campbell*, 203 F.3d at 40.

126. *Zivotofsky*, 566 U.S. at 196.

127. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

can delegate.”<sup>128</sup> Second, there is a “zone of twilight” where there is an “absence of either a congressional grant of denial of authority.”<sup>129</sup> This creates a form of concurrent authority.<sup>130</sup> Third, when the President acts incompatibly with Congressional mandates “he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>131</sup> To succeed in this third category, the President’s asserted power must be both “exclusive” and “conclusive” on the issue.<sup>132</sup>

Conflicts surrounding the WPR fall under the third tier of the *Youngstown Sheet* model where the president has the least amount of independent authority since his actions are in direct conflict with the WPR.<sup>133</sup> The President’s power must be exclusive and conclusive.<sup>134</sup> The courts will have to determine if his role as commander in chief, head of state, or other constitutional authority rise to such a level. The Supreme Court’s tendency to avoid the nuances of the delegation of power within foreign affairs, in favor of a political solution, shirks the very important constitutional test set in *Youngstown Sheet*.

## VI. CONCLUSION

Currently, the WPR is to some mostly ignored.<sup>135</sup> No president has acknowledged its constitutionality.<sup>136</sup> There is no indication that any president has refrained from utilizing U.S. military force solely because of the WPR,<sup>137</sup> instead, continuous and constant Executive Actions make the resolution itself “something of an archaic expression of an earlier era of American politics.”<sup>138</sup> The multiple, fruitless lawsuits brought by Congress, have further “implicitly reinforced the impotence of the Resolution with startling clarity.<sup>139</sup> If the Court’s concerns in *Baker* surrounding the three branches’ exhibition of an impartiality and an undivided front in the face of serious political action, each time

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128. *Id.* at 635 (Jackson, J., concurring).

129. *Id.* at 637.

130. *Id.*

131. *Id.*

132. *Id.* at 637–38.

133. *See id.*

134. *Id.*

135. Cook, *supra* note 71, at 157.

136. *Id.* at 159.

137. *Id.* at 160.

138. Newton, *supra* note 73, at 174.

139. *Id.*

the President's is forced to act inconsistently with the WPR displays a striking flaw in the balance of our three branches of power.

The WPR fails to recognize modern-day military action and the technological abilities that now allow war to be conducted through drone strikes and cyber-attacks. Military action no longer consists solely of sending fighting troops into foreign territory.<sup>140</sup> Drone strikes are now a common form of military action as opposed to the kinds anticipated by the drafters of the statute.<sup>141</sup> These attacks can be carried out in hours and therefore would be over before the President was required to notify Congress of any action. Moreover, drone strikes have historically not fallen within the established definition of Armed forces in areas of hostilities.<sup>142</sup> Drone strikes require no "on-site military," but may have the same military and foreign affairs consequences as a traditional military action.<sup>143</sup> The WPR may have been an attempt to limit the scope of unauthorized military action, however, because the courts have refused to apply it to the changing battlefield, Presidents have continued to engage in conflicts without constitutional certainty.

*Zivotofsky* illustrates the Court's previous deference to the President's foreign affairs decision has taken a backseat to the concern for statutory and constitutional interpretation by the courts. The Court still may not question the wisdom of an Executive acting within his specified foreign affairs role, but, they no longer abstain when there are competing laws and interests. The Court continues to defer to the Executive when acting within his specified foreign affairs role, but, the Court no longer abstains when there are competing laws and interests.

The weakened potency of the *Baker* factors may allow cases to be brought to question the depth of the presidential power or, in contrast, the validity of the WPR itself. The WPR poses many structural concerns for the Court to address, while policy concerns weigh in the favor of judicial involvement. With the evolution of war and our constant state of conflict, these crucial and frequently performed powers must be defined by the Court.

The D.C. circuit, as the major venue for such cases, can no longer hide behind the presence of a military action, a controversial international conflict, or murky international law, but must follow Supreme Court precedent. After *Zivotofsky* and the appointment of Justice Kavanaugh, the Court may be more inclined and better poised to analyze the overall separation of powers when it comes to the intricacies of the war powers and the unexplored constitutionality of

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140. Amy Bryne, *A Dangerous Custom: Reigning in the Use of Signature Strikes Outside Recognized Conflicts*, 86 GEO. WASH. L. REV. 620, 644 (2018).

141. *See Id.*

142. *Id.*

143. *See Id.*

the WPR. They have a responsibility to hear these arguments and weigh in on statutory and constitutional authority.