

# CONGRESS'S WAR POWERS AND THE POLITICAL QUESTION DOCTRINE AFTER *SMITH v. OBAMA*

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## ABSTRACT

*More than seventeen years after the attacks of September 11, 2001, the United States continues to battle terrorist organizations inspired by or derived from al Qaeda under the legal aegis of the 2001 Authorization for the Use of Military Force. The government has interpreted this law as providing expansive authority to conduct military operations against actors that did not even exist in 2001, including the Islamic State of Iraq and Syria (“ISIS”). Congress has largely supported this effort in annual authorizing legislation and by funding the campaign against ISIS.*

*Despite this permissive legal environment, the government pressed for even greater flexibility in *Smith v. Obama*, a 2016 challenge to the legal basis for the anti-ISIS campaign, arguing that the war powers are subject to the political question doctrine and thus outside the purview of the courts. The district court accepted this argument, contravening recent Supreme Court decisions that narrow the doctrine’s scope. In doing so, the *Smith* court cast doubt on the primacy of Congress in bringing the United States into war.*

*In response, this Note offers three insights. First, it assesses historical decisions in cases implicating executive branch war powers in light of the modern political question doctrine. Second, it critiques the *Smith* court’s failure to squarely confront the separation of powers questions presented by the case. Finally, it offers a series of recommendations for Congress and the courts to avoid the pitfalls of the political question doctrine in similar cases in the future.*

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## INTRODUCTION

Despite the Constitution's explicit directive that Congress, not the President, has the power to declare war,<sup>1</sup> post-World War II practices have undermined this seemingly clear rule. This trend originated during the Vietnam War as lower federal courts—which had previously interpreted the Constitution to allow judicial review of military action abroad—began to turn to justiciability, and especially the political question doctrine, to avoid difficult line-drawing questions.<sup>2</sup>

The political question doctrine precludes courts from reviewing the wisdom of discretionary decisions reached by political actors, and properly so. However, it does not prevent a court from determining whether the official who has taken a challenged action had the legal authority to act. That understanding of the political question doctrine, taken to its logical extreme, significantly expands executive power at the expense of Congress. Such an interpretation would allow Presidents to rely on vague statutory grounds or the Commander in Chief Clause<sup>3</sup>—rather than on congressional authorization—to initiate and execute offensive military action abroad.<sup>4</sup> Finally, aggressive interpretation and utilization of the political question doctrine could have unintended consequences in future cases; for example, an American citizen captured abroad while fighting with a terrorist organization could be precluded from challenging the legal basis for his detention.<sup>5</sup>

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1. U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have power . . . to declare war . . .”).

2. See Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK U.L. REV. 47, 47 (2016) (noting that federal courts regularly heard challenges to military action before the Vietnam War). See generally Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1994) (surveying federal court decisions that dismissed challenges to the constitutionality of the Vietnam War).

3. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”).

4. There is some precedential support for the proposition that the President could respond to a military invasion or insurrection without waiting for Congress. See *infra* notes 128–31 (finding inherent Article II authority to take military action where a hostile power made war upon the United States). Further, while this Note does not address this question in detail, this would seem to be true as a logical and practical matter.

5. Cf. *Doe v. Mattis*, 889 F.3d 745, 765 (D.C. Cir. 2018) (enjoining the government from transferring an American captured while fighting alongside ISIS to a third country because the Government had neither established that it had a legal basis for the campaign against ISIS nor that it had a factual basis for the claim that the detainee was, in fact, a member of ISIS). In theory, at least, Doe's habeas petition would be complicated by a holding that the scope of the 2001 AUMF as applied to ISIS is nonjusticiable. While Doe was eventually transferred to an unnamed third country, it is possible, and even likely, that similar situations could arise in the future. See

The possible reach of the political question doctrine is illustrated by the debate whether the President has the legal authority to prosecute a campaign against the Islamic State of Iraq and Syria (“ISIS”)<sup>6</sup> based on the legal authorities enacted in the aftermath of September 11, 2001. Following the 9/11 attacks, Congress quickly passed the Authorization for Use of Military Force (“2001 AUMF”),<sup>7</sup> which authorizes the President “to use all necessary and appropriate force” to prevent future terrorist attacks against the United States and to bring the perpetrators to justice.<sup>8</sup> The following year, Congress authorized the invasion of Iraq in a second resolution, the Authorization for Use of Military Force Against Iraq Resolution of 2002 (“2002 AUMF”).<sup>9</sup> By mid-2014, following the rise of the terrorist group ISIS, the Obama administration had expanded the military campaign under these authorities to target this new threat in Syria and elsewhere.<sup>10</sup>

These events ultimately gave rise to a case—*Smith v. Obama*,<sup>11</sup> discussed at length in this Note—challenging the constitutionality of the ISIS campaign. In *Smith*, a district court relied on lack of standing and on the political question doctrine to avoid determining whether Congress had authorized military action against ISIS.<sup>12</sup> The D.C.

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Doe v. Mattis – *Challenge to Detention of American by U.S. Military Abroad*, ACLU (Oct. 29, 2018), <https://www.aclu.org/cases/doe-v-mattis-challenge-detention-american-us-military-abroad> [<https://perma.cc/5MVA-F77E>] (discussing the case).

6. Observers have coined a number of names for ISIS, including ISIL and Daiish. See Ray Sanchez, *ISIL, ISIS, or the Islamic State?*, CNN (Oct. 25, 2014, 1:30 PM), <https://www.cnn.com/2014/09/09/world/meast/isis-isil-islamic-state/index.html> [<https://perma.cc/4HYN-D82D>] (citing the multiplicity of names used by governments, media outlets, and others to denominate ISIS). For the sake of consistency, this Note refers to the organization as ISIS unless quoting a source that uses a different term.

7. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF].

8. *Id.*

9. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) [hereinafter 2002 AUMF].

10. See EXEC. OFFICE OF THE PRESIDENT, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 15–17 (2016) [hereinafter DEC. 2016 MEMORANDUM]; see also Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn’t Necessary*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html> [<https://perma.cc/D7MT-RY2Z>].

11. *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018).

12. See *id.* at 304 (dismissing the case for lack of standing and for presenting a political question).

Circuit dismissed the case as moot but did not address the district court's application of the political question doctrine.<sup>13</sup> The district court's reasoning, which was not repudiated by the appellate court, represents not only a significant and dangerous expansion of the political question doctrine but also a departure from previously established norms regarding the authority of courts to examine the legal justifications underlying the use of force abroad.<sup>14</sup>

This Note examines the origin and development of the political question doctrine and its relationship to questions implicating the war powers. It argues that the *Smith* court misread the Supreme Court's seminal decision in *Zivotofsky ex rel. Zivotofsky v. Clinton* ("*Zivotofsky I*")<sup>15</sup> and that the *Smith* approach, if widely adopted, would improperly expand the political question doctrine. The doctrine, as formulated by the line of Supreme Court cases culminating in the two *Zivotofsky* decisions, protects a significant degree of discretion for the President and his subordinates in foreign policy and military affairs. However, an expanded political question doctrine, like that articulated by the *Smith* court, would preclude Congress from exercising meaningful oversight of the initiation of the use of military force. That congressional oversight is a critical constitutional constraint on presidential power.

The Note proceeds as follows. Part I briefly surveys the facts surrounding the ongoing military campaign against ISIS that are relevant to *Smith v. Obama*. Part II examines the development of the political question doctrine, with an emphasis on its application to questions of foreign policy and military campaigns. Part III analyzes the constitutional and statutory authorities and constraints at issue in this context. Part IV assesses the district court's decision in *Smith* in detail as a lens through which to examine the political question doctrine more broadly. Finally, Part V recommends several concrete steps to Congress and the courts to reduce the scope of the political question doctrine in this area. These recommendations include more faithful adherence by lower courts to the Supreme Court's restricted reading of the political question doctrine in *Zivotofsky I*; more

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13. *Smith v. Trump*, 731 F. App'x at 10.

14. See Michael J. Glennon, *Smith v. Obama: The Political Question Doctrine Misapplied*, JUST SECURITY (Nov. 22, 2016, 1:04 PM), <https://www.justsecurity.org/34803/smith-v-obama-political-question-doctrine-misapplied> [<https://perma.cc/497A-3FEW>] (arguing that the *Smith* court misinterpreted the political question doctrine and characterizing the court as "straining to avoid" the question whether there was a dispute between Congress and the executive).

15. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (*Zivotofsky I*).

stringent application of standing jurisprudence to avoid reaching the political question doctrine; and a reinvigoration of the War Powers Resolution (“WPR”) that would require Congress to provide a clear statement before courts will find statutory authorization for a challenged military action.

## I. THE ISIS CAMPAIGN AND SMITH’S LAWSUIT

### A. *The Emergence of ISIS*

The terrorist group ISIS emerged following the U.S. invasion of Iraq in 2003.<sup>16</sup> After the invasion, al Qaeda in Iraq (“AQI”), composed primarily of Sunnis, played a central role in the sectarian violence that gripped the country, exacerbating the conflict by targeting Shia civilians, government forces, and cultural landmarks.<sup>17</sup> U.S. forces fought against AQI until withdrawing from Iraq in 2011.<sup>18</sup> ISIS emerged from the remnants of AQI following the U.S. withdrawal, rapidly gaining strength in the Sunni-majority, western parts of Iraq.<sup>19</sup>

The Syrian civil war also contributed to the rise of ISIS.<sup>20</sup> The war began with a series of initially peaceful demonstrations against President Bashar al-Assad in 2010, contemporaneous with the “Arab Spring” protests across the region.<sup>21</sup> However, Syrian security forces violently suppressed these protests.<sup>22</sup> By mid-2012, Syria had fractured along largely sectarian lines, with the Shia-dominated regime in the west, Kurdish separatists in the north, and Sunni groups like ISIS in the east.<sup>23</sup> After another year of bloody fighting, ISIS forces established

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16. Stephen Preston, Gen. Counsel of the Dep’t of Def., *The Legal Framework for the United States’ Use of Military Force Since 9/11*, Address Before the American Society of International Law (Apr. 10, 2015).

17. See Michael Crowley, *How the Fate of One Holy Site Could Plunge Iraq Back into Civil War*, TIME (June 26, 2014), <http://time.com/2920692/iraq-isis-samarra-al-askari-mosque/> [<https://perma.cc/SG6R-U67N>] (describing ISIS’s targeting of civilians in Iraq).

18. *Id.*

19. David Ignatius, *How ISIS Spread in the Middle East and How to Stop It*, ATLANTIC (Oct. 29, 2015), <https://www.theatlantic.com/international/archive/2015/10/how-isis-started-syria-iraq/412042/> [<https://perma.cc/S3ZJ-6683>].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* The Syrian regime depends primarily on support from the Shia and Alawites, the latter of which is a sect associated with Shia Islam. See Sam Dagher, *The Families Who Sacrificed Everything for Assad*, ATLANTIC (Apr. 12, 2018), <https://www.theatlantic.com/international/archive/2018/04/assad-alawite-syria/557810/> [<https://perma.cc/K83Q-J9ZQ>] (explaining that these

their capital in Raqqa in central Syria; from there, ISIS oversaw a “caliphate” that governed over ten million people in Syria and Iraq.<sup>24</sup>

### B. *Operation Inherent Resolve*

President Barack Obama ordered U.S. military forces to return to Iraq in June 2014 to counter the threat posed by ISIS.<sup>25</sup> President Obama stated that he took the action “pursuant to [his] constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.”<sup>26</sup> He characterized the action as consistent with the WPR<sup>27</sup> but cited no statutory basis for the campaign.<sup>28</sup> He announced an offensive against ISIS in September 2014<sup>29</sup> that was later designated Operation Inherent Resolve (“OIR”).<sup>30</sup> In an address to the nation, President Obama stated that the government had sufficient authority to prosecute the war against ISIS under both his Article II authority and the 2001 AUMF.<sup>31</sup> American troops were engaged in offensive actions against ISIS when allied Iraqi troops captured the Mosul Dam in August 2014 with U.S. air support.<sup>32</sup>

Obama administration officials subsequently cited both the 2001 and 2002 AUMFs as establishing legal authority for military action

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groups hold key government positions in Assad’s government and provide many of the fighting forces defending his regime).

24. *Islamic State and the Crisis in Iraq and Syria in Maps*, BBC NEWS (Nov. 3, 2017), <http://www.bbc.com/news/world-middle-east-27838034> [<https://perma.cc/HT6M-MKBY>].

25. See Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and President Pro Tempore of the Senate (June 26, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/26/letter-president-war-powers-resolution-letter-regarding-iraq> [<https://perma.cc/PH8B-H8P7>] (describing the scope and goals of the deployment of U.S. forces to Iraq).

26. *Id.*

27. *Id.*

28. *Id.*

29. President Barack Obama, Address to the Nation on United States Strategy To Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization (Sept. 10, 2014) [hereinafter Sept. 2014 Presidential Address], <https://www.gpo.gov/fdsys/pkg/DCPD-201400654/pdf/DCPD-201400654.pdf> [<https://perma.cc/YWG8-6K48>].

30. See Exec. Order No. 13,723, 81 Fed. Reg. 19,017 (Mar. 30, 2014) (establishing the Operation Inherent Resolve Campaign Medal).

31. Sept. 2014 Presidential Address, *supra* note 29; Savage, *supra* note 10.

32. See Azam Ahmed, *In Retaking Iraqi Dam, Evidence of American Impact*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/world/middleeast/in-retaking-of-iraqi-dam-evidence-of-american-impact.html> [<https://perma.cc/3ZHH-5NDS>] (describing the role of American airstrikes in Iraqi military efforts to retake the Mosul Dam from ISIS).

against ISIS.<sup>33</sup> In short, the argument proceeded as follows: the 2001 AUMF provides authorization for OIR because ISIS was derived from, or is an associated force of, al Qaeda;<sup>34</sup> further, the 2002 AUMF explicitly authorizes military action to address any threat “emanating from” Iraq *and* implicitly grants authority to stabilize Iraq against military threats following the conclusion of the 2003 campaign. President Donald Trump’s administration indicated in a letter to Senator Bob Corker, Chairman of the Senate Committee on Foreign Relations, that legal authority for the campaign “includes the 2001 Authorization for Use of Military Force.”<sup>35</sup> The Trump administration reiterated that position in testimony given by Secretary of State Rex Tillerson before the Senate Foreign Relations Committee.<sup>36</sup>

### C. Smith v. Obama

Captain Nathan Smith filed suit against President Obama on May 4, 2016,<sup>37</sup> after he was deployed to Kuwait in support of the anti-ISIS campaign.<sup>38</sup> He asked the court to find that President Obama lacked legal authority to pursue military action against ISIS, that the campaign constituted an undeclared war, and that it therefore infringed on Congress’s constitutional authority.<sup>39</sup> Smith personally supported the military campaign, and stated that he had filed the lawsuit solely to compel the President and Congress to fulfill their obligations under the Constitution.<sup>40</sup> Smith was joined in his filings by various amici who

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33. See *Smith v. Obama*, 217 F. Supp. 3d 283, 298 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018) (identifying the statutory basis relied on by the President as the 2001 and 2002 AUMFs); see also Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration—Dean’s Lecture at Yale Law School*, 31 YALE L. & POL’Y REV. 141, 145–46 (2012) (describing the legal framework for targeting “associated forces” under the 2001 AUMF). For a more fulsome discussion of the two AUMFs and their implications, see *infra* notes 188–211 and accompanying text.

34. See Preston, *supra* note 16 (discussing both theories).

35. Letter from Charles Faulkner, Deputy Assistant Sec’y, Bureau of Legis. Affairs, U.S. State Dep’t, to Senator Bob Corker (Aug. 2, 2017), <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> [<https://perma.cc/QR85-MJDM>].

36. Rex Tillerson, Sec’y of State, Dep’t of State, Testimony to Senate Foreign Relations Committee on AUMF 1 (Oct. 30, 2017), [https://www.foreign.senate.gov/imo/media/doc/103017\\_Tillerson\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/103017_Tillerson_Testimony.pdf) [<https://perma.cc/AR8H-ME4M>].

37. Complaint for Declaratory Relief, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843) [hereinafter *Complaint*].

38. *Id.* ¶ 1.

39. *Id.* ¶ 40.

40. *Id.* ¶¶ 5–7.

argued that the Obama administration's overly broad interpretation of the 2001 AUMF and the Commander in Chief Clause had read all the meaning out of the War Powers Clause.<sup>41</sup>

The Government moved to dismiss on three grounds.<sup>42</sup> First, the Government asserted that the case presented a political question.<sup>43</sup> The Government argued that the question of whether war had been declared was "'textually committed' for resolution to the political branches"<sup>44</sup> and that courts lacked "judicially discoverable and manageable standards" to decide the case.<sup>45</sup> Second, the Government attacked Smith's standing, arguing that he had suffered no cognizable injury.<sup>46</sup> Third, the Government argued that Smith had failed to establish that the United States had waived sovereign immunity to allow the suit.<sup>47</sup> In a subsequent filing, the Government offered an analysis of the 2001 AUMF, the 2002 AUMF, and other legislation to illustrate congressional support for OIR.<sup>48</sup>

While the Government never conceded that the court had jurisdiction to reach the merits, the Government did present evidence showing that the campaign was congressionally authorized: under the 2001 AUMF, the executive possesses authority to conduct counterterrorism operations "against persons who were a part of . . . associated forces";<sup>49</sup> the definition of associated forces includes persons "engaged in hostilities against the United States or its coalition partners";<sup>50</sup> the 2002 AUMF authorizes the use of force to address "terrorist threats emanating from Iraq";<sup>51</sup> and Congress funded and

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41. See Brief of Amici Curiae in Opposition to Defendant's Motion to Dismiss for Want of Jurisdiction at 18–19, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843) ("For the Court to permit the President to make war on the basis of the specious authority he now claims would wholly defeat the purposes animating the constitutional division of war powers and Congress's intent in enacting the War Powers Resolution.").

42. Reply Memorandum in Support of Defendant's Motion to Dismiss under Rule 12(b)(1) at 2, *Smith v. Obama*, 217 F. Supp. 3d (D.D.C. 2016) (No. 16-843) [hereinafter Reply].

43. *Id.* at 2.

44. *Id.*

45. *Id.*

46. *Id.* at 14.

47. *Id.* at 24.

48. See Defendant's Memorandum of Law in Support of His Motion to Dismiss at 5–17, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843) [hereinafter Gov't Mem. of Law] (citing subsequent congressional enactments authorizing and funding OIR).

49. *Id.* at 6.

50. *Id.* (quoting the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011)).

51. *Id.* at 7.

authorized the campaign against ISIS in fiscal years 2015 and 2016.<sup>52</sup> Finally, the Government noted that the President had provided reports to Congress “consistent with the War Powers Resolution.”<sup>53</sup>

Unsurprisingly,<sup>54</sup> the court dismissed Smith’s claims.<sup>55</sup> It rejected each of his theories of injury to find that he had no standing.<sup>56</sup> First, the court found Smith’s oath to “support and defend the Constitution”<sup>57</sup> would not require him to disobey an order to deploy that he thought might be illegal.<sup>58</sup> Second, the fact that Smith believed that he had been forced to violate his oath of office was not a sufficiently concrete injury.<sup>59</sup> Finally, the court noted that Smith had not alleged any “[p]hysical or [i]ndividual [l]iberty-[b]ased [i]njuries.”<sup>60</sup> This Note does not address Smith’s standing but assumes *arguendo* that the court reached the correct result on the issue.<sup>61</sup>

The court then addressed the Government’s political question claim and found that dismissal was appropriate on those grounds as well.<sup>62</sup> The court found that the question whether the 2001 or the 2002 AUMF authorizes military action against ISIS is inextricably bound with inherently political determinations of what is “necessary and appropriate” for carrying out the congressionally authorized

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52. *Id.* at 10–15.

53. *Id.* at 14 (quoting Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and President Pro Tempore of the Senate, *supra* note 25).

54. *See* Vladeck, *supra* note 2, at 47 (noting that federal courts rarely reach the merits in suits challenging the legality of the use of military force); Marty Lederman, *DOJ’s Motion to Dismiss in Smith v. Obama, the Case Challenging the Legality of the War Against ISIL*, JUST SECURITY (July 14, 2016), <https://www.justsecurity.org/31984/dojs-motion-dismiss-smith-v-obama-case-challenging-legality-war-isil/> [<https://perma.cc/Q63U-39XH>] (arguing that the *Smith* court should dismiss the case for lack of standing).

55. *Smith v. Obama*, 217 F. Supp. 3d 283, 304 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018).

56. *Id.* at 291–92 (finding that the plaintiff did not have a legal duty to disobey the orders to deploy); *id.* at 293–94 (finding that no injury—for the purposes of the standing inquiry—arose from the plaintiff’s violation of his own oath of office); *id.* at 296 (finding that no physical or liberty-based injuries resulted from the plaintiff’s deployment).

57. *Id.* at 293 (citing 5 U.S.C. § 3331 (2012)).

58. *Id.*

59. *Id.* at 293–94.

60. *Id.* at 296.

61. For a discussion of the role of other justiciability doctrines in deciding similar cases, see *infra* Part IV.

62. *Smith v. Obama*, 217 F. Supp. 3d at 297.

campaign.<sup>63</sup> The *Smith* court's decision is consistent with judgments declining to enjoin a President from conducting an ongoing war.<sup>64</sup> However, previous cases—from the time of the Founding through the Vietnam War—reached the merits to find congressional authorization for military action.<sup>65</sup> *Smith*'s expansive language describing the broad powers of the President in this arena, though, seems to suggest that challenges to the legal basis of a war *always* present a political question.<sup>66</sup>

## II. THE POLITICAL QUESTION DOCTRINE

### A. *A Primer on the Modern Political Question Doctrine*

The political question doctrine, rooted in the separation of powers, limits judicial review of certain types of cases and controversies.<sup>67</sup> The Supreme Court has always considered certain cases nonjusticiable because they fall within the doctrine, although the parameters of the doctrine have shifted over time.<sup>68</sup> The Court formulated the modern test in *Baker v. Carr*,<sup>69</sup> the “seminal case” in this area.<sup>70</sup> *Baker* established criteria for courts to use in determining whether a case implicates the political question doctrine.<sup>71</sup> The Court noted that political questions are particularly likely to arise in cases involving:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable

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63. *Id.* at 298 (finding that the question whether ISIS was appropriately targeted was inseparable from the question whether the campaign against ISIS was “necessary and appropriate” under either AUMF (quoting the 2001 AUMF, Pub. L. No. 107-40, § 2(a))).

64. *See id.* at 302–03 (noting several post-Vietnam decisions that declined to reach the question whether Congress had authorized particular military actions).

65. *See infra* Part II.B.

66. *Id.* at 298 (characterizing the question whether military action is either “necessary” or “appropriate” as being committed to the “political branches” and therefore nonjusticiable).

67. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

68. *Compare Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (opinion of Marshall, J.) (noting that where the Constitution vests the President with “certain important political powers, in the exercise of which he is to use his own discretion,” the courts have no jurisdiction), *with Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (noting that “the class of questions deemed to be political” stems from the need for finality of decisions by the political branches and “the lack of satisfactory criteria for a judicial determination”).

69. *Baker v. Carr*, 369 U.S. 186 (1962).

70. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010).

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

and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 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>72</sup>

The *Baker* Court noted that certain fields, such as foreign affairs, would be more likely to involve a political question than others.<sup>73</sup> However, the Court also noted that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”<sup>74</sup> and observed that courts can examine “executive proclamations” relating to “belligerency abroad” to determine the rights of Americans or others.<sup>75</sup> The Court recognized the need for the finality that stems from a determination that a conflict has officially ended for legal purposes, and finality would be furthered by finding a political question.<sup>76</sup> Yet, the Court also noted that if a particular issue is to be deemed a political question, that finding must rest on “isolable reasons for presence of political questions” in the specific factual context.<sup>77</sup> That is, the political question doctrine does not allow a blanket determination that all questions involving war or foreign affairs must be kept out of the courts because of judicial incapacity to resolve such questions.<sup>78</sup>

Subsequent decisions refined the doctrine. In *Nixon v. United States*,<sup>79</sup> the Court relied solely on the first two *Baker* criteria in dismissing a challenge by a federal judge to his impeachment by Congress; the Court cited only the “textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving it.”<sup>80</sup> While *Nixon* did not explicitly state that a

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72. *Id.*

73. *See id.* at 211–16 (reviewing subject areas that had been frequently found to implicate political questions).

74. *Id.* at 211.

75. *Id.* at 212.

76. *Id.* at 213–14.

77. *Id.* at 213.

78. *Id.* at 213.

79. *Nixon v. United States*, 506 U.S. 225 (1993).

80. *Id.* at 228 (quoting *Baker*, 369 U.S. at 217).

case could not present a political question based solely on the four remaining *Baker* factors, the Court implied that textual commitment or a lack of manageable judicial standards would be critical to finding a political question.<sup>81</sup>

The Court went further in *Zivotofsky I* and substantially narrowed the scope of the political question doctrine.<sup>82</sup> The case involved an American citizen, born in Jerusalem, who wished for his passport to list his place of birth as “Jerusalem, Israel.”<sup>83</sup> A 2002 statute required the State Department to record the place of birth of a U.S. citizen born in Jerusalem as Israel if requested by the passport holder.<sup>84</sup> The State Department refused to issue the passport as requested, following a State Department policy that directly contradicted the statute.<sup>85</sup> After several years of litigation on a variety of issues, the D.C. Circuit upheld dismissal on the grounds that the case presented a political question.<sup>86</sup>

Chief Justice Roberts, writing for the Court, reversed. First, the Court reiterated the primacy of the first two *Baker* factors in determining the existence of a political question.<sup>87</sup> Second, the Court emphasized the “existence of a statutory right” on the part of the plaintiff as being “relevant to the Judiciary’s power to decide” the matter, despite the centrality of sensitive foreign affairs concerns to the case.<sup>88</sup> Finally, while the Court noted that the D.C. Circuit had remanded the case to develop the record regarding the “foreign policy implications” of the statute,<sup>89</sup> the Supreme Court did not even mention the remaining “prudential” concerns from *Baker* as grounds for finding

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81. *See id.* at 229 (stating the standard for the political question inquiry and omitting the four remaining *Baker* criteria).

82. *See* 3 VED P. NANDA, DAVID K. PANSIUS & BRYAN NEIHART, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS, § 14:3 (2d ed. 2018) (explaining that *Zivotofsky I* likely precludes recourse to the political question doctrine based on the “prudential factors alone”). *But see The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 316–17 (2012) (arguing that any narrowing of prudential factors in the political question doctrine should not apply to challenges implicating the WPR).

83. *Zivotofsky I*, 566 U.S. at 192–93.

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

85. *Zivotofsky I*, 566 U.S. at 191–93.

86. *Id.* at 193–94.

87. *See id.* at 196 (analyzing the political question doctrine by solely considering the applicability of textual commitment and the absence of judicially manageable standards).

88. *Id.*

89. *Id.* at 193.

a political question.<sup>90</sup> *Zivotofsky I* cemented the necessity of demonstrating either textual commitment to the political branches or a lack of judicially manageable standards before an issue can be considered a political question; this refinement significantly narrowed the field of cases to which the doctrine can be applied.<sup>91</sup> Further, *Zivotofsky I* raised the possibility that the existence of a statutory right could weigh against categorizing an issue as a political question.<sup>92</sup>

### B. *The Political Question Doctrine and Challenges to Military Action*

Challenges to military action predate the Supreme Court's modern formulation of the political question doctrine in *Baker*. Notwithstanding justiciability concerns, plaintiffs have challenged the legal basis for specific uses of military force since the Founding of the republic.<sup>93</sup> Precedent supports the proposition that the exercise of the war powers, shared by the executive and Congress, is judicially reviewable. A brief survey illustrates the courts' willingness to delve into questions regarding the use of force. In each case, the reviewing court found, either explicitly or by implication, that the use of military force is not committed to the absolute discretion of the executive branch. Further, courts found or fashioned appropriate standards by which to decide these cases.

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90. See *id.* at 204, 210 (Sotomayor, J., concurring in part and concurring in the judgment) (describing the final three *Baker* factors as founded on “prudence,” and concurring on the basis of a “textual commitment”); *id.* at 212–13 (Breyer, J., dissenting) (describing the final four *Baker* factors as “prudential”).

91. See NANDA et al., *supra* note 82 (describing the substantial impact of *Zivotofsky I*); see also 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, 260 (2013) (“[T]he rule against statutory political questions should be recognized as the law of the land.”); Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I's Political Question Analysis?*, LAWFARE (May 19, 2016), <https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis> [<https://perma.cc/Q7X8-7SCE>] (arguing that *Zivotofsky I* “lopp[ed] off the prudential *Baker* factors”).

92. *Zivotofsky I*, 566 U.S. at 196 (“The existence of a statutory right, however, is certainly relevant to the Judiciary’s power to decide [the] claim.”). Interestingly, the Supreme Court later ruled that while the case did not raise a political question, the President had the independent constitutional authority under the Recognition Power to issue the passport omitting the word “Israel,” despite the statute to the contrary. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (*Zivotofsky II*). Justice Breyer concurred, noting that he still believed that the case presented a political question. *Id.* at 2096 (Breyer, J., concurring).

93. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 37–39, 46 (1800) (holding that the Court was competent to determine against whom Congress authorized the use of force by reference to the statute and factual record).

1. *A Textually Demonstrable Commitment.* Since the Founding, the Supreme Court has considered justiciable the question whether a congressional enactment provides a legal basis for the use of force against another nation. The Court first implicitly addressed this issue in *Bas v. Tingo*<sup>94</sup> during the Quasi-War of 1798–99.<sup>95</sup> The case involved an American warship that recaptured an American vessel seized by France.<sup>96</sup> The captain of the American warship sued for half the value of the salvage under a 1799 law.<sup>97</sup> The question turned on whether the word “enemy” in the 1799 law referred to France.<sup>98</sup> The Court implicitly recognized its own competence to determine who was targeted by a statutory authorization of the use of force,<sup>99</sup> and it interpreted “enemy” to refer to France.<sup>100</sup> The Court used traditional tools of statutory interpretation to answer this question, reading the statute in accordance with the existing legal and factual circumstances.<sup>101</sup> In that context, the meaning of “enemy” was made clear by a previous statute’s reference to France as a hostile power.<sup>102</sup>

The modern Supreme Court’s clearest rejection of the proposition that the war power is textually committed solely to the executive is found in the landmark case *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>103</sup> which was decided in the midst of the Korean War.<sup>104</sup> It is difficult to overstate the magnitude of the executive decision that was challenged in the case. Fearing the results of a threatened strike at the nation’s largest steel mills, President Harry S. Truman announced his decision to seize the nation’s steel industry and to operate the plants under federal control in order to ensure the continued availability of critical war matériel.<sup>105</sup> The district court enjoined the seizure, rejecting the

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94. *Bas v. Tingo*, 4 U.S. (4 Dall.) 37 (1800).

95. *See id.* at 40 (opinion of Washington, J.) (describing the larger question of the case as “whether, at the time of passing the act of congress of the 2d of March 1799, there subsisted a state of war between” the United States and France).

96. *Id.* at 43 (opinion of Chase, J.).

97. *Id.* at 40 (opinion of Washington, J.).

98. *Id.* at 45 (opinion of Chase, J.).

99. *See id.* at 40–43. (opinion of Washington, J.) (analyzing the issue without explicitly addressing the Court’s competence to do so).

100. *Id.* at 42.

101. *Id.* at 41–42.

102. *Id.*

103. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

104. *Id.* at 642 (Jackson, J., concurring) (“Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.”).

105. *Id.* at 582–84 (majority opinion).

Government's argument that the President had the "inherent power" to take the action.<sup>106</sup> The Supreme Court's decision is known primarily for Justice Jackson's concurring opinion, which lays out a framework analyzing separation of powers claims.<sup>107</sup> The opinion categorized executive actions into three major categories. In the first, where "the President acts pursuant to an express or implied authorization of Congress," he can wield the full inherent authority of the executive as well as any authority that Congress can delegate.<sup>108</sup> In the second, the "zone of twilight" where Congress has neither authorized nor prohibited the President's actions, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>109</sup> Finally, where the President has acted contrary to a congressional enactment, "then he can rely only upon his own constitutional powers minus any constitutional powers of Congress."<sup>110</sup>

This reasoning presaged the Court's modern political question jurisprudence. In essence, where the text of the Constitution or of a statute requires that a question falls squarely to the President and the President alone, then the President's resolution of that question is not subject to judicial examination. In *Youngstown*, Jackson reasoned that Congress had not left the subject area "an open field," but that it had instead enacted a variety of statutes governing the seizure of private property under wartime conditions.<sup>111</sup> Rejecting exclusive presidential control over foreign affairs, Justice Jackson argued:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.<sup>112</sup>

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106. *Id.* at 584.

107. Patricia L. Bellia, *The Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES*, 233, 266 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

108. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

109. *Id.* at 637.

110. *Id.*

111. *Id.* at 639.

112. *Id.* at 642.

Finally, despite a general reluctance to hear challenges to the Vietnam War,<sup>113</sup> two significant circuit court decisions rejected efforts by President Richard Nixon to reduce Congress's role in war-making decisions. First, in *Orlando v. Laird*,<sup>114</sup> the Second Circuit held that Congress can authorize a war, absent a stand-alone declaration of war or other explicit authorization, by appropriating funds with the understanding that the executive will use them to conduct the war in question.<sup>115</sup> Second, in *Massachusetts v. Laird*,<sup>116</sup> the First Circuit held that congressional enactments other than formal declarations of war can provide sufficient constitutional authorization for the challenged use of force.<sup>117</sup> Both cases rejected the executive's position that Article II gives the President sole authority to determine whether the United States is at war.

Even in those cases where courts have dismissed challenges to the use of force as political questions, they have generally exercised care in precisely delineating which executive-branch actions are implicated by the doctrine.<sup>118</sup> In *El-Shifa Pharm. Indus. Co. v. United States*,<sup>119</sup> the D.C. Circuit<sup>120</sup> dismissed a suit brought by the owners of a Sudanese pharmaceutical plant that had been bombed by the United States; the court cited the political question doctrine as the basis for the

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113. Vladeck, *supra* note 2, at 47.

114. *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971).

115. *Id.* at 1042–43.

116. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

117. *See id.* at 34 (finding that “steady [c]ongressional support” for the Vietnam War provided a sufficient legal basis for the executive to continue prosecuting the war, despite the lack of a formal declaration of war).

118. *See* Vladeck, *supra* note 2, at 47 (describing the Supreme Court as using “every way imaginable” to avoid deciding challenges to the Vietnam War on the merits); *see also, e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (differentiating between cases challenging the wisdom of policy choices, which the court characterized as political questions, and “claims [p]resenting purely legal issues’ such as whether the government had legal authority to act”).

119. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010).

120. The D.C. Circuit is widely perceived to have outsized influence in developing and applying separation of powers doctrine. *See* Patricia M. Wald, *Senate Must Act on Appeals Court Vacancies*, WASH. POST (Feb. 28, 2013) [https://www.washingtonpost.com/opinions/senate-must-act-on-appeals-court-vacancies/2013/02/28/e8ad3d3a-8051-11e2-b99e-6baf4ebe42df\\_story.html?noredirect=on&utm\\_term=.239cd8ced2d5](https://www.washingtonpost.com/opinions/senate-must-act-on-appeals-court-vacancies/2013/02/28/e8ad3d3a-8051-11e2-b99e-6baf4ebe42df_story.html?noredirect=on&utm_term=.239cd8ced2d5) [<https://perma.cc/8YFF-Z9R3>] (noting, based in part on her time as Chief Judge, the D.C. Circuit's unique role in resolving “constitutional questions involving separation of powers and executive prerogatives”). This may be due to that court's relatively high administrative law caseload. Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 138 (2013). Whatever the reason, it seems likely that opinions from the D.C. Circuit would be treated as particularly relevant in this area by other courts.

dismissal.<sup>121</sup> After noting that “the political question doctrine does not bar a claim that the government has violated the Constitution simply because the claim implicates foreign relations,”<sup>122</sup> the court found that the ability of a claim to survive such a bar “turns not on the nature of the government conduct under review but . . . on the question the plaintiff raises about the challenged action.”<sup>123</sup> This approach differentiates between challenges to the *prudence* of military action abroad, which present a political question, and challenges to the *statutory authority* of the government to take an action; the *El-Shifa* court implied that challenges in the latter category are justiciable and do not present political questions.

2. *Judicially Manageable Standards.* The requirement for judicially manageable standards—the second prong of the post-*Zivotofsky I* political question doctrine—has not completely barred questions that implicate the war powers. While courts have consistently found that claims challenging the substance of the political branches’ decisions necessarily involve political questions,<sup>124</sup> this bar does not extend to challenges to the legality of military action.<sup>125</sup> Instead, where individuals’ statutory or constitutional rights are threatened, courts have fashioned standards to resolve the specific disputes before them.<sup>126</sup> For instance, courts must answer questions such as whether a

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121. See *El-Shifa Pharm.*, 607 F.3d at 844 (affirming dismissal as a political question).

122. *Id.* at 841 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

123. *Id.* at 842 (citing *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring) (arguing that claims brought by members of Congress challenging the constitutionality of the use of military force against Yugoslavia did not present a nonjusticiable political question)). This issue was explored in greater detail in a concurrence by then-Judge Kavanaugh; his opinion affirmed dismissal but rejected the majority’s application of the political question doctrine and accused the majority of a “*sub silentio*” expansion of executive power at the expense of Congress. *Id.* at 855 (Kavanaugh, J., concurring).

124. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 6, 8 (1973) (finding that a challenge to the content of training provided to National Guardsman was a political question, due to both an explicit textual commitment and a lack of manageable standards); see also *Nixon v. United States*, 506 U.S. 224, 230 (1993) (finding that the word “try” “lacks sufficient precision” to define any manageable standards).

125. Vladeck, *supra* note 2, at 51–52; see also, e.g., *El-Shifa*, 607 F.3d at 842 (implying that courts may hear challenges to the legal basis for military action).

126. See, e.g., *Parhat v. Gates*, 532 F.3d 834, 837–38, 854 (D.C. Cir. 2008) (adopting language derived from the 2001 AUMF to determine whether a detainee was a member of an organization covered by the statute); *Koohi v. United States*, 976 F.2d 1328, 1334–35 (9th Cir. 1992) (finding that judicial notice of facts in the world can be sufficient to establish a manageable standard for determining whether a state of war exists); *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990) (same).

state of war exists, how the enemy is appropriately defined, and what constitutional clause or statute provides a legal basis for a military action.<sup>127</sup>

For most of American history, federal courts have demonstrated a willingness and ability to find facts sufficient to show the existence of war. In the early days of the Civil War, the *Brig Amy Warwick*<sup>128</sup> arose out of President Abraham Lincoln's decision to implement a naval blockade of Southern ports following the secession of the Confederate states.<sup>129</sup> The Court ultimately upheld some of the seizures that resulted from the blockade,<sup>130</sup> finding that the President had a sound legal basis for determining that a state of war existed as a matter of fact as the result of the insurrection of the Confederate states.<sup>131</sup>

The Korean War-era *Youngstown* decision also addressed this question. The Court implicitly recognized courts' competence in use-of-force contexts to determine both the meaning of the factual record and Congress's intent in passing legislation. After all, application of Justice Jackson's test for concurrence between executive action and congressional approval requires, on its face, a determination of what exactly Congress has authorized.<sup>132</sup> Similarly, the *El-Shifa* court reiterated the competence of courts to adjudicate issues that may be closely intertwined with political questions, specifically citing the ability of courts to determine "whether the government has followed the proper procedures . . . and whether [an organization] has engaged in terrorist activity," without having to reach the question whether the government's militaristic response was necessary and appropriate under a statute.<sup>133</sup> *Youngstown's* analysis recognizes that many related

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127. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 41 (1800) (opinion of Washington, J.) (analyzing the identity of the enemy); *Koochi*, 976 F.2d at 1335 (analyzing the existence of war); *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (analyzing the statutory basis for military action).

128. *Brig Amy Warwick*, 67 U.S. (2 Black) 635 (1862).

129. *See id.* at 666 (describing the facts of the blockade that led to the seizure of the four ships in question).

130. *See id.* at 674-82 (affirming the seizure of the *Amy Warwick*, *Hiawatha*, *Brillante*, and *Crenshaw*).

131. *See id.* at 670 (finding that the question whether an insurrection is sufficiently serious to become a civil war "is a question to be decided by" the President). The decision of the *Amy Warwick* Court also explicitly affirmed Congress's sole right to declare war where a de facto state of war did not already exist. *Id.* at 668.

132. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring). Jackson went on to state that the President, acting "pursuant to an express or implied authorization of Congress," is legally able to take such an action unless "the Federal Government as an undivided whole lacks [such] power." *Id.*

133. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010).

questions may ultimately be nonjusticiable where they only challenge the wisdom of the government action in question; it also acknowledges that questions that do not seek such determinations should be heard by courts.<sup>134</sup>

More than a century later, in *Koohi v. United States*,<sup>135</sup> the Ninth Circuit addressed a question that was similarly intertwined with the determination (or lack thereof) of a state of war by the political branches. The case arose during the “tanker war,” in which the U.S. Navy skirmished with Iranian forces in the Persian Gulf.<sup>136</sup> U.S. forces were supporting Iraq in the ongoing Iran-Iraq War, with the goal of ensuring the continuing flow of crude oil from the Gulf; the Iranians sought to destroy Kuwaiti shipping (which carried Iraqi oil) and to thereby choke off Iraq’s economic lifeline.<sup>137</sup> *Koohi* raised the question whether the accidental downing of an Iranian passenger jet by the USS *Vincennes* on July 3, 1988, took place during a “time of war.”<sup>138</sup> The court found itself competent to answer that question using “the normal tools of our trade—reason and judgment.”<sup>139</sup> The court held that a state of war existed, for the purposes of the statute at hand, “when, as a result of a deliberate decision by the executive branch, United States armed forces engaged in an organized series of hostile encounters on a significant scale with the military forces of another nation.”<sup>140</sup> The court concluded that the tanker war between the United States and Iran in the late 1980s met that standard despite the lack of formal congressional authorization.<sup>141</sup>

A more recent case explicitly addressed both prongs of the political question doctrine. The court in *Dellums v. Bush*<sup>142</sup> declined to extend the political question doctrine to grant the executive branch broader authority to determine the existence of a war as a factual matter. In the run-up to the Persian Gulf War, the plaintiffs—sitting members of Congress—sought to enjoin President George H.W. Bush from going to war against Iraq absent explicit congressional

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134. *Id.* at 842.

135. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992).

136. *Id.* at 1329–30.

137. *Id.*

138. *Id.* at 1333.

139. *Id.*

140. *Id.* at 1335.

141. *Id.* at 1334–35.

142. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

authorization.<sup>143</sup> Responding to a claim that Congress had not authorized such a war, the Government asked the court to find that the complaint raised a political question and should be dismissed on those grounds; it argued that there are no judicially manageable standards for determining whether the United States is at war.<sup>144</sup> The court demurred, stating that such an understanding of the political question doctrine is “far too sweeping to be accepted by the courts” and that granting the executive “the sole power to determine that any particular offensive military operation . . . does not constitute war-making . . . would evade the plain language of the Constitution, and . . . cannot stand.”<sup>145</sup> The court ultimately dismissed the case on ripeness grounds.<sup>146</sup>

3. *An Illustrative Example: Military Detainees.* Courts have often answered questions related to the war powers in cases where plaintiffs challenge the authority of the U.S. government to detain individuals captured overseas. *Hamdi v. Rumsfeld*,<sup>147</sup> *Boumediene v. Bush*,<sup>148</sup> and *Parhat v. Gates*<sup>149</sup> all illustrate the tools available to courts in determining the presence or absence of a statutory basis for military action. These cases demonstrate that there often are judicially manageable standards by which a court can ascertain whether a certain individual or group falls within the ambit of a statute authorizing military action.

*Hamdi* was the first case in which an enemy combatant’s habeas petition reached the Supreme Court.<sup>150</sup> There, the Court found that Congress had authorized Hamdi’s detention under the 2001 AUMF.<sup>151</sup> In making that finding, the Court relied on a determination that the detainee was, “in fact, an enemy combatant; whether that is established

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143. *Id.* at 1143.

144. *See id.* at 1145 (noting that the Government asked the court to apply the political question doctrine).

145. *Id.*

146. *See id.* at 1152 (finding that the executive had not “shown a commitment to a definitive course of action sufficient to support ripeness”).

147. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

148. *Boumediene v. Bush*, 553 U.S. 723 (2008).

149. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

150. Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 172 (2013).

151. *See Hamdi*, 542 U.S. at 517 (finding that statutory authority for the detention did exist, and therefore declining to reach the question whether the President had inherent Article II authority for the detention).

by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.”<sup>152</sup> The Court envisioned that this “enemy combatant” determination could be made “in a proceeding that comports with due process.”<sup>153</sup> This point was further emphasized in *Boumediene*, which implied that courts have the capacity to review the “standards and procedures” at a Combatant Status Review Tribunal (“CSRT”).<sup>154</sup> Both the Government and the Court characterized “the CSRT process as direct review of the executive’s battlefield determination that the detainee [was] an enemy combatant.”<sup>155</sup> The Court further noted that “a challenge to the President’s authority to detain is, in essence, a challenge to the Department’s definition of enemy combatant, a ‘standard’ used by CSRTs” in the proceedings of the military commission below.<sup>156</sup> Justice Kennedy’s opinion for the majority showed significant deference to determinations made by the executive; however, the opinion also found that courts are competent to issue rulings on the question whether an individual falls within the ambit of the 2001 AUMF and to devise adequate standards for making that determination.

The D.C. Circuit has also applied the language of the 2001 AUMF to determine whether certain groups or individuals fall within the scope of the authorization. In *Parhat v. Gates*, the court invalidated the detention of a Chinese national who was captured in Afghanistan.<sup>157</sup> Applying a preponderance of the evidence standard, the court determined that the available evidence did not support the Government’s contention that Parhat—a member of a Uighur separatist group who had been captured in Afghanistan—was an enemy combatant who could be targeted under the 2001 AUMF.<sup>158</sup> In making this determination, the court relied partly on a Navy memorandum defining an enemy combatant as:

[A]n individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who

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152. *Id.* at 523.

153. *Id.*

154. *Boumediene v. Bush*, 553 U.S. 723, 787–88 (2008).

155. *Id.* at 783.

156. *Id.* at 788.

157. *Parhat v. Gates*, 532 F.3d 834, 835 (D.C. Cir. 2008).

158. *Id.* at 835.

has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>159</sup>

The Government relied on the fact that Parhat was affiliated with the East Turkistan Islamic Movement (“ETIM”), a Uighur Muslim group that the Government claimed was “associated” with al Qaeda within the meaning of the Navy memorandum.<sup>160</sup> The court looked to classified and unclassified evidence derived from interviews with ETIM members and other sources.<sup>161</sup> While the court ultimately determined that the evidence presented to the CSRT was insufficient to sustain a finding that Parhat was an enemy combatant,<sup>162</sup> the court strongly implied that executive tribunals (like the CSRT) and Article III courts are competent to determine whether individuals and organizations fall within the AUMF-derived definition of “associated forces” where sufficient evidence has been presented.<sup>163</sup>

These precedents illustrate the competence of federal courts to determine whether executive action in the realm of foreign and military affairs has a legal basis. In fact, these precedents explicitly reject the idea that the Constitution grants absolute discretion in this area to the President. Furthermore, courts have proven capable of formulating standards of decision based both on standards developed within the executive branch and on careful review of sensitive and classified records.

### III. LEGAL AUTHORITY FOR THE ISIS CAMPAIGN

The Bush, Obama, and Trump administrations all argued that they had sufficient statutory and constitutional authority to wage war against ISIS and its predecessors. The Obama administration, in particular, articulated several legal theories to justify the war between September 2014 and December 2016.<sup>164</sup> The most comprehensive legal analysis of the issue from the executive branch is contained in a memorandum the Obama administration released to the public in

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159. Memorandum from Deputy Sec’y of Def. to Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal ¶ a (July 7, 2004) [hereinafter CSTR Order].

160. *Parhat*, 532 F.3d at 838.

161. *Id.* at 846–47.

162. *Id.* at 848.

163. *Id.* at 850.

164. Compare DEC. 2016 MEMORANDUM, *supra* note 10, at 3–8 (basing legal authority for military action against ISIS on the 2001 AUMF), with Sept. 2014 Presidential Address, *supra* note 29, at 3 (asserting constitutional authority to combat ISIS).

December 2016.<sup>165</sup> Yet, these asserted statutory and constitutional arguments undermine two pillars of the Government's political question defense—the claim that Congress does not have the authority to regulate the President's actions in this area, and the claim that there are no judicially manageable standards against which to measure executive action.

In his address to the nation on September 10, 2014, in which he announced the military campaign against ISIS, President Obama identified two statutory bases of authority for the proposed military operations: the 2001 AUMF against al Qaeda and associated forces and the 2002 AUMF against Iraq.<sup>166</sup> He also indicated that he would inform Congress “consistent with” the 1973 WPR.<sup>167</sup> Congress subsequently enacted legislation formally authorizing and funding the military campaign against ISIS.<sup>168</sup> It is unclear whether these enactments could form an independent basis of executive authority for the military actions.<sup>169</sup>

#### A. *The War Powers Resolution*

The WPR creates a statutory impediment to the unilateral employment of force abroad by the President.<sup>170</sup> The WPR was enacted in 1973 as a response to what Congress believed was the failure of the executive branch to provide accurate and honest information to Congress during the Vietnam War and as a response to the expansion

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165. DEC. 2016 MEMORANDUM, *supra* note 10, at 3–8. The Trump administration appears to rely on the same or similar arguments. *See* Faulkner, *supra* note 35, at 1–2.

166. Letter from President Barack Obama to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria 1 (Sept. 23, 2014) [hereinafter Sept. 2014 Letter], <https://www.gpo.gov/fdsys/pkg/DCPD-201400697/pdf/DCPD-201400697.pdf> [<https://perma.cc/6EQJ-3CE3>].

167. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–48 (2012)); Sept. 2014 Letter, *supra* note 166, at 1.

168. *See infra* Part III.D.

169. *Cf.* Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (affirming dismissal on political question grounds of a suit filed by servicemen challenging the statutory authority of military action in Vietnam, and finding that congressional enactment of appropriations legislation is sufficient to find “mutual participation between the Congress and the President”). *But see* 50 U.S.C. § 1547(a)(1) (directing courts not to interpret any provision in appropriations legislation as constituting the basis for introducing armed forces into hostilities unless Congress clearly expressed such intent within the legislation).

170. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 102 (1984).

of the war beyond what was statutorily authorized by Congress.<sup>171</sup> It establishes reporting requirements for the employment or deployment of American military forces, and it requires that the President obtain the consent of Congress before introducing American military forces into hostilities.<sup>172</sup> The WPR has four major provisions that work to achieve this purpose.

First, the WPR requires the President to “consult” with Congress “in every possible instance” before introducing American military forces into hostilities.<sup>173</sup> Legislative history indicates that the congressional drafters intended the process of consultation to be something more than merely informing Congress of a proposed or already-accomplished action.<sup>174</sup> It further requires regular consultation of Congress until American forces have been removed from the situation in question.<sup>175</sup> The statute does not, however, define “consultation.”

Second, the WPR requires that the President regularly report to Congress every time he takes an action that implicates the WPR.<sup>176</sup> Section 4(a)(1) places particularly stringent reporting requirements on the President, requiring a report within forty-eight hours any time he places forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>177</sup> Legislative history indicates that Congress used the term “hostilities” instead of “armed conflict” because it considered the former term to be broader, encompassing more of the activities that Congress intended to cover.<sup>178</sup>

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171. See Thomas F. Eagleton, *Congress: Does It Abdicate Its Power?*, 19 ST. LOUIS U. PUB. L. REV. 1, 3–4 (2000) (describing the goals of Congress in enacting the WPR, and discussing the WPR’s failure to reach those goals, in the eyes of the U.S. Senator who was the bill’s author and original sponsor).

172. See H.R. REP. NO. 93-547, at 7–8 (1973) (Conf. Rep.), as reprinted in 1973 U.S.C.C.A.N. 2363, 2363–64 (defining the “[p]urpose and [p]olicy” of the WPR).

173. 50 U.S.C. § 1542.

174. H.R. REP. NO. 93-547, at 7 (1973) (Conf. Rep.), as reprinted in 1973 U.S.C.C.A.N. 2363, 2363–64; see also H.R. REP. NO. 93-287, at 21 (1973) (Cmte. Rep.), as reprinted in 1973 U.S.C.C.A.N. 2346, 2349–50 (noting that the purpose of the legislation was to reaffirm the primacy of Congress in authorizing war while recognizing the obligation of the President to defend the country in an emergency).

175. 50 U.S.C. § 1542.

176. 50 U.S.C. § 1543(a).

177. 50 U.S.C. § 1543(a)(1).

178. H.R. REP. NO. 93-287, at 2351 (1973) (noting that “hostilities” would include “a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict”).

Third, the WPR requires the President to take affirmative action to remove any forces committed to hostilities falling under the purview of section 4(a)(1) unless certain requirements are met within a sixty-day period.<sup>179</sup> This section also includes a provision allowing Congress to require the President to withdraw forces at any time upon passage of a joint resolution.<sup>180</sup> These provisions can only be waived by a declaration of war, another authorization for the use of force by Congress, by the extension of the sixty-day period by subsequent legislation, or by the physical inability of Congress to meet as the result of an attack on the United States itself.<sup>181</sup>

Finally, the WPR sets out guidelines for determining whether subsequent legislation constitutes an authorization for the use of force under the WPR.<sup>182</sup> Notably, given the backdrop of the Second Circuit's decision in *Orlando v. Laird*, section 8(a) of the WPR states that legislation—including appropriations legislation—that does not specifically authorize the introduction of American forces into hostilities shall not be construed as constituting a declaration of war or authorization of force under section 5(c).<sup>183</sup>

The WPR was passed over the veto of President Nixon.<sup>184</sup> Since that time, every President has contended that the WPR represents an unconstitutional infringement on the President's constitutional authority as Commander in Chief.<sup>185</sup> Despite these criticisms, Presidents have largely complied with the reporting requirements

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179. 50 U.S.C. § 1544(b). The statute provides for an initial sixty-day period, but the President can unilaterally extend the period to ninety days if he certifies that there exists an “unavoidable military necessity” requiring a longer period of time in which to safely redeploy the forces in question. *Id.* Commentators have noted that this provision may also authorize the broad use of military force by the President, as long as hostilities cease within sixty days. H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 123 (2002).

180. 50 U.S.C. § 1544(c).

181. 50 U.S.C. § 1544(b).

182. 50 U.S.C. § 1547.

183. 50 U.S.C. § 1547(a)(1); *see also* *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) (finding authorization for the Vietnam War, based on enacted appropriations).

184. Carter, *supra* note 170, at 102 n.6.

185. MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, *THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE* 6 (2017); *see, e.g.*, Overview of the War Powers Resolution, 28 Op. O.L.C. 271, 273 (1984) (arguing that the WPR is unconstitutional); *see also* Alan Greenblatt, *Why The War Powers Act Doesn't Work*, N.P.R. (June 16, 2011), <https://www.npr.org/2011/06/16/137222043/why-the-war-powers-act-doesnt-work> [https://perma.cc/8ZFB-MKPW] (noting that “no president has accepted the constitutionality of the War Powers Act”).

established under the WPR.<sup>186</sup> In that sense, the WPR seems to have been effective in forcing the executive branch to provide congressional leaders with information that might have otherwise been withheld.

*B. The 2001 AUMF*

Following the terrorist attacks of September 11, 2001, Congress enacted the 2001 AUMF.<sup>187</sup> It authorizes the President to use “all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States” by al Qaeda and associated forces.<sup>188</sup> It further authorizes the use of such force against any “nations, organizations, or persons” who “planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”<sup>189</sup> The AUMF does not expire.<sup>190</sup> Congress declared that the AUMF constitutes authorization for the President to introduce American forces into hostilities under the WPR.<sup>191</sup>

The AUMF provided the asserted legal basis for the invasion of Afghanistan in 2001 and for the continuing military operations in that country.<sup>192</sup> The Bush and Obama administrations also relied on the 2001 AUMF for statutory authority to conduct military operations against al Qaeda and affiliated entities in the Philippines, Somalia, Yemen, Pakistan, Libya, and elsewhere.<sup>193</sup>

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186. See WEED, *supra* note 185, at 57–84 (listing 168 instances where Presidents reported to Congress, consistent with the WPR, compared to 19 instances where they did not).

187. See *Smith v. Obama*, 217 F. Supp. 3d 283, 286 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018) (describing the passage of the 2001 AUMF).

188. 2001 AUMF § 2(a).

189. *Id.*

190. Jack Goldsmith, *Why a Sunset Clause is Important in Any New AUMF*, LAWFARE, (Feb. 5, 2015), <https://www.lawfareblog.com/why-sunset-clause-important-any-new-aumf> [<https://perma.cc/D3N5-K3J8>].

191. 2001 AUMF § 2(b)(1).

192. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066–68 (2005) (noting that the 2001 AUMF provided the legal authorization for the Afghanistan campaign).

193. See MATTHEW C. WEED, CONG. RESEARCH SERV., R43983, 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 5 (2015) (stating that the Obama administration had also conducted “other military operations in . . . Pakistan and Libya” under the authority of the 2001 AUMF); Memorandum from Matthew Weed, Analyst in Foreign Policy Legislation, Cong. Research Serv., to Congresswoman Barbara Lee 3–4 (July 10, 2013) (listing all presidential notifications to Congress referencing the 2001 AUMF between September 2001 and June 2013).

Both the Bush and Obama administrations developed and refined the concept of targeting “associated forces” under the 2001 AUMF as the threat from al Qaeda was mitigated over time. For example, in 2004, the Bush administration defined the scope of CSRTs to include authority over combatants captured while fighting as part of “associated forces” without providing a specific definition for that term.<sup>194</sup>

The Obama administration formulated this interpretation in a 2012 speech by then–General Counsel of the Department of Defense Jeh C. Johnson.<sup>195</sup> The administration defined an “associated force” as “(1) . . . an organized, armed group that has entered the fight alongside al Qaeda, and (2) . . . a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners.”<sup>196</sup> By September 2014, the Obama administration asserted that ISIS fell within this definition of “associated forces” and, accordingly, that no additional congressional authorization was required to pursue military action against the group.<sup>197</sup> Stephen W. Preston, Johnson’s successor as General Counsel at the Department of Defense, further elaborated this theory in an April 2015 speech to the American Society of International Law.<sup>198</sup> Relying on Johnson’s 2012 definition, Preston argued that ISIS had been an “associated force” within the meaning of the statute since at least 2004.<sup>199</sup> He argued that neither the existence of conflict between ISIS and al Qaeda nor the fact that al Qaeda and other groups might “splinter[] into rival factions” should limit the powers available to the executive branch under the AUMF. Preston reasoned that to consider such things would be to allow the enemy, rather than congressional intent, to control the meaning of the statute.<sup>200</sup>

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194. See CSTR Order, *supra* note 159, ¶ a (defining “enemy combatant” to include any person “supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners”); see also Bradley & Goldsmith, *supra* note 192, at 2113–16 (arguing that individuals or groups can come within the ambit of the 2001 AUMF by joining al Qaeda in its conflict against the United States at some point after the passage of the statute).

195. See Johnson, *supra* note 33, at 145–46 (describing the legal framework for targeting “associated forces” of al Qaeda).

196. *Id.* at 146.

197. Savage, *supra* note 10.

198. Preston, *supra* note 16, at 2–11 (discussing the legal framework for American military action under the 2001 and 2002 AUMFs).

199. *Id.* at 4–7.

200. *Id.*

C. *The 2002 AUMF*

In October 2002, Congress authorized military force against the government of Iraq as part of the 2002 AUMF.<sup>201</sup> The statute was predominately predicated on the threat posed by Saddam Hussein's regime,<sup>202</sup> but it also includes a provision identifying the alleged presence of al Qaeda as grounds for the authorization.<sup>203</sup> The statute authorizes the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."<sup>204</sup> As with the 2001 AUMF, Congress determined that the legislation "constitut[ed] specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."<sup>205</sup> And like the 2001 AUMF, the 2002 AUMF has no prescribed expiration date.<sup>206</sup>

The 2002 AUMF served as the legal basis for the April 2003 invasion of Iraq.<sup>207</sup> Similarly, following the invasion, the 2002 AUMF also constituted the statutory basis for the enduring presence of American forces in Iraq; the executive branch interpreted the 2002 AUMF as permitting the continued combat deployment of American forces to assist Iraqi government forces against AQI (the predecessor of ISIS) and other insurgent groups.<sup>208</sup> Until either the President or Congress declares the conflict officially over, the 2002 AUMF will remain in effect.<sup>209</sup> The Obama administration did not initially rely on the 2002 AUMF for the military campaign against ISIS, but the administration later argued that the Act did provide a legal basis.<sup>210</sup>

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201. 2002 AUMF, Pub. L. No. 107-243, 116 Stat. 1498.

202. *Id.* at 1498–1500.

203. *Id.* at 1499.

204. *Id.* § 3, 116 Stat. at 1501.

205. *Id.*

206. MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 2 (2017).

207. Bradley & Goldsmith, *supra* note 192, at 2076.

208. *See id.* at 2104 n.258 (noting that the 2002 AUMF provided a basis for the occupation following the successful invasion of Iraq).

209. *Cf.* Ludecke v. Watkins, 335 U.S. 160, 167 (1948) (holding that the President may continue to exercise war powers until the President or Congress formally terminates hostilities).

210. *See* Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes*, *Official Says*, N.Y. TIMES (Sept. 13, 2014), <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html> [https://perma.cc/R3XV-XP34] (describing the Obama administration's understanding of the authorities provided by both the 2001 and 2002 AUMFs).

The Trump administration has also asserted that the 2002 AUMF provides a legal basis for ongoing military operations, including the anti-ISIS campaign.<sup>211</sup>

#### D. *Subsequent Authorization and Appropriations*

While President Obama’s declaration of hostilities against ISIS did not cite this legal basis,<sup>212</sup> courts have recognized the authority of Congress to implicitly authorize the use of force in the form of subsequent authorizing and appropriating legislation.<sup>213</sup> Section 8(a) of the WPR requires an express declaration of war or authorization of the use of military force.<sup>214</sup> No court has explicitly considered the constitutionality of that provision.

Congress’s subsequent enactment of appropriations legislation—like that relied on by the Second Circuit in *Orlando v. Laird*—might still form the basis for an implicit authorization of the use of force under the theory that such subsequent congressional enactment overrules the WPR requirement for express authorization.<sup>215</sup> This

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211. See Letter from Donald Trump, President of the United States, to the Speaker of the House of Representatives and President Pro Tempore of the Senate (Dec. 11, 2017), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/> [<https://perma.cc/JN86-AC8D>] (indicating that the 2002 AUMF, referred to herein as Public Law 107-243, provides statutory authority for the military activities detailed in the letter).

212. Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and President Pro Tempore of the Senate, *supra* note 25.

213. See *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) (finding that Congress had implicitly authorized continued intervention in Vietnam—despite the repeal of the Gulf of Tonkin Resolution—by extending the Selective Service Act and appropriating monies to fund the war). In footnotes, the Second Circuit further described the specific congressional acts that served as the basis for finding congressional approval, including authorizing legislation *and* appropriations bills. *Id.* at 1041–42 nn.1–3. Authorizing legislation, such as the National Defense Authorization Act, is legislation that specifies the *ends* to which the executive branch can (or must) carry out programs. Appropriations legislation provides the funding, the *means*, by which the executive branch can accomplish those ends. In the absence of congressional authorization, appropriations legislation is considered to implicitly authorize the programs and departments that it funds. See, for example, 36 Comp. Gen. 240, 242 (1956), stating:

It is fundamental . . . that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money.

214. 50 U.S.C. § 1547(a)(1).

215. See, e.g., *Authorization for Continuing Hostilities in Kosovo*, 24 Op. O.L.C. 327, 327 (2000) [hereinafter O.L.C. Kosovo Memo] (stating that “relevant case law, historical practice, and basic principles of constitutional law lead to the conclusion that appropriation laws may authorize military combat”).

theory flows from the principle that one session of Congress cannot bind a future session of Congress through legislation.<sup>216</sup> On this understanding, whatever the intent of the Ninety-Third Congress in enacting the WPR, Congress has effectively repealed that provision by repeatedly authorizing the use of military force implicitly through appropriations legislation.<sup>217</sup>

In the time since President Obama first announced OIR, Congress has enacted both authorizing and appropriations legislation addressing and supporting U.S. efforts against ISIS.<sup>218</sup> These laws have provided for funding of U.S. forces engaged in hostilities against ISIS, and they expressly contemplate the nature of the ongoing military operations.<sup>219</sup> Congress had enacted both appropriations supporting OIR *and* authorization language for certain aspects of the counter-ISIS campaign by the time Captain Smith filed his suit.<sup>220</sup>

### *E. Independent Constitutional Authority for the ISIS Campaign*

Presidents Obama and Trump have also argued that inherent Article II authority provides a legal basis for the campaign against ISIS.

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216. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that “one legislature cannot abridge the powers of a succeeding legislature”); *see also* O.L.C. Kosovo Memo, *supra* note 215, at 342 (noting that the WPR did not “bind[] future Congresses, but instead establish[ed] a background principle against which Congress legislates”).

217. *Cf.* Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1399 (1994) (noting that the Congress that passed the WPR was constitutionally precluded from preventing future Congresses from declaring war via appropriations legislation).

218. *See Reply*, *supra* note 42, at 10 (noting congressional enactments in support of the counter-ISIS campaign).

219. *See Consolidated Appropriations Act, 2016*, Pub. L. No. 114-113, 129 Stat. 2242, 2386–87, 2393, 2397 (2015) (providing funding for counter-ISIS operations while prohibiting the use of funds that are in contravention of the WPR); *National Defense Authorization Act for Fiscal Year 2016*, Pub. L. No. 114-92, 129 Stat. 726 §§ 1224, 1225(a) (2015) (requiring regular reporting to Congress on U.S. military forces supporting OIR, and expressly authorizing “defensive supportive fire” in support of the Syrian opposition); Carl Levin and Howard P. “Buck” McKeon *National Defense Authorization Act for Fiscal Year 2015*, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558–62 (2014) (authorizing the President to provide assistance to coalition partners against ISIS); *Consolidated and Further Continuing Appropriations Act, 2015*, Pub. L. No. 113-235, 128 Stat. 2130, 2276, 2301 §§ 8097, 9016 (2014) (providing funding for OIR and counter-ISIS operations).

220. Captain Smith filed his complaint on May 4, 2016. Complaint, *supra* note 37, at 1. Congress authorized the provision of assistance to allied forces fighting ISIS in the Carl Levin and Howard P. “Buck” McKeon *National Defense Authorization Act for Fiscal Year 2015* § 1236, which had an effective date of December 19, 2014. Congress specifically contemplated costs for OIR in the *Consolidated and Further Continuing Appropriations Act, 2015* § 8097, which had an effective date of December 16, 2014.

President Obama cited his Article II Commander in Chief authority in each formulation of the authorities underpinning the campaign, including his initial announcement to Congress.<sup>221</sup> Similarly, by resting the legal basis for the campaign against ISIS at least in part on “U.S. national self-defense,”<sup>222</sup> the Trump administration has implied that the President has independent constitutional authority to conduct the campaign. However, the Obama administration did not rely on the President’s inherent authority to conduct military action against ISIS in either the reply brief in *Smith v. Obama* or in the December 2016 memorandum.<sup>223</sup>

The President does not have the constitutional authority to unilaterally declare war.<sup>224</sup> This understanding is supported by statute,<sup>225</sup> case law,<sup>226</sup> and historical practice.<sup>227</sup> However, this restriction does leave room for significant discretion by the President. First, in the event that the United States is directly attacked, the President can respond using military force, despite the fact that Congress has not yet declared a war.<sup>228</sup> Second, the President may be constitutionally authorized to take military actions in furtherance of

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221. See Sept. 2014 Presidential Address, *supra* note 29, at 3 (“I have the authority to address the threat from ISIL . . . .”); Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and President Pro Tempore of the Senate, *supra* note 25 (stating that the action was taken “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive”).

222. Faulkner, *supra* note 35.

223. See Gov’t Mem. of Law, *supra* note 48, at 2 (arguing that the suit raised a political question because the challenged military action was a matter committed to both the President and Congress); DEC. 2016 MEMORANDUM, *supra* note 10, at 7–8 (omitting Syria and Iraq from a discussion of the President’s inherent authority to take military action, but including them in a discussion of statutory authorization).

224. While the President did not formally concede this point in *Smith v. Obama*, the Government spent a significant proportion of its brief arguing that Congress had, in fact, authorized the campaign. See Gov’t Mem. of Law, *supra* note 48 at 8–13 (noting congressional action supporting OIR).

225. See 50 U.S.C. § 1541(a) (stating the purpose of the WPR as “insur[ing] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities”).

226. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring) (“Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.”).

227. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 45 (2013) (finding that “with the special exception of Korea, . . . all of America’s most consequential . . . conflicts” were authorized by Congress).

228. See POWELL, *supra* note 179, at 119 (noting that the President’s authority to take military action absent congressional action extends beyond circumstances where the President is responding to an attack).

important policy goals, even where the possible consequences of those actions include the possibility of provoking a war.<sup>229</sup> For example, the President could likely deploy military forces—up to and including initiating hostilities—in support of an ally to whom the United States has treaty obligations.<sup>230</sup> The Government did not raise any such argument in *Smith v. Obama*.<sup>231</sup>

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The historical and legal record clearly demonstrates the active involvement of Congress in regulating the use of American force abroad; that congressional oversight undermines the presidential argument of exclusive control in this area. Congress has established a broad and reasonably comprehensive set of background rules severely limiting the legal authority of the President to act unilaterally in the use of military force. Further, Congress has enacted express authorizations in those instances where it permitted the use of military force. And, as described above, Congress has regulated in this fashion in the post-Vietnam era, when members of Congress would presumably be aware of the growing hesitation of federal courts to challenge executive action in this area.<sup>232</sup> At a minimum, the overlapping constitutional grants of authority and extensive statutory framework should trigger a careful analysis in Justice Jackson's so-called "zone of twilight."<sup>233</sup>

#### IV. THE *SMITH* COURT MISAPPLIED THE POLITICAL QUESTION DOCTRINE

The district court in *Smith v. Obama* did not conduct such an analysis. Instead, the court fundamentally misapplied the political question doctrine by holding that it precludes courts from determining whether a particular terrorist group falls within the scope of a congressional authorization for the use of force. This interpretation would substantially increase the authority of the executive branch at the expense of Congress. The *Smith* court failed to correctly apply either of the two critical elements of the modern political question doctrine: the textual commitment of an issue to a political branch and the lack of judicially manageable standards. Instead, while facially

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229. *Id.* at 118.

230. *Cf.* Bobbitt, *supra* note 217, at 1372–74 (describing both this view and the opposing view that Congress cannot delegate the power to declare war under any circumstance).

231. *See generally* Reply, *supra* note 42 (foregoing any such argument).

232. *See supra* note 113 and accompanying text.

233. *See supra* notes 103–10 and accompanying text.

relying on those factors, the court appears to have in fact relied on the same prudential concerns that the Supreme Court seemingly abandoned<sup>234</sup> in its *Nixon* and *Zivotofsky I* decisions.<sup>235</sup>

A. *The War Powers Are Not “Textually Committed” Within the Meaning of Baker*

The Supreme Court has affirmed that courts may not hear cases “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department.’”<sup>236</sup> However, the Court has not found that this prohibition precludes courts from hearing cases and controversies where *both* coordinate political branches, Congress and the executive, have overlapping authority.<sup>237</sup> Instead, the Court found that “[t]he Judicial Branch appropriately exercises” the authority to determine the constitutionality of a statute “where the question is whether Congress or the Executive is ‘aggrandizing its power at the expense of another branch.’”<sup>238</sup>

The Constitution grants Congress the power “[t]o declare War.”<sup>239</sup> In filing suit, Smith expressly rested his claim on the argument that Congress had not declared war on ISIS.<sup>240</sup> The Government did not argue that the power to declare war is textually committed to the executive branch, but it did argue that dismissal as a political question was appropriate because “[t]here is an explicit textual commitment of

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234. See *Zivotofsky I*, 566 U.S. 189, 202–05 (2012) (Sotomayor, J., concurring) (criticizing the majority’s omission of the remaining *Baker* factors, and arguing that the “inquiry required by the political question doctrine . . . [is] more demanding than that suggested by the Court”).

235. Compare *id.* at 196 (majority opinion) (finding dismissal “merely ‘because the issues have political implications’” inappropriate under the political question doctrine (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983))), with *Smith v. Obama*, 217 F. Supp. 3d 283, 300 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018) (finding a political question because the question was “committed to the political branches,” and because the court was not “well-equipped to resolve” the factual questions presented (emphasis added)). Other courts have also continued to apply the *Baker* “prudential factors” after *Zivotofsky I*. See *Loomis*, *supra* note 91 (criticizing these courts).

236. *Zivotofsky I*, 566 U.S. at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

237. See *id.* (recognizing that courts would be correct to find a political question where the challenged rule is a judgment “that ‘the Constitution leaves to the Executive alone’” (quoting *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1231–33 (D.C. Cir. 2009))); cf. *Nixon*, 506 U.S. at 229 (affirming dismissal as a political question where the language of the Constitution “indicates that this authority is reposed in the Senate and nowhere else”).

238. *Zivotofsky I*, 566 U.S. at 197 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 878 (1991)).

239. U.S. CONST. art. I, § 8, cl. 11.

240. See Complaint, *supra* note 37, ¶ 23 (“President Obama is fighting a war against ISIS without a declaration of war or specific statutory authorization.”).

the war powers not to *one* of the political branches, but to *both*.”<sup>241</sup> This argument must fail.

There are two plausible interpretations of the Government’s argument. One version would preclude courts from reviewing political decisions by the executive and Congress *only* where both branches are textually allocated authority under the Constitution, as is the case for the war powers. However, in other policy areas where control is constitutionally divided between the political branches, the courts do have authority to review executive actions. For example, the President has the authority to make recess appointments without Senate approval,<sup>242</sup> while the Senate has the authority to “determine the Rules of its Proceedings.”<sup>243</sup> The Supreme Court found that the Senate’s authority to establish its own rules includes the authority to decide whether it is in recess at any given time; the Court also held that courts are competent to determine whether the facts on the ground meet the standard set out in those Senate rules.<sup>244</sup> Based on a finding that the Senate was in fact not in recess, the Court found that the President’s attempt to make a recess appointment had exceeded his authority; the Court thus blocked his appointment.<sup>245</sup>

Alternatively, the Government’s argument in *Smith* could stand for the proposition that *only* the war powers are allocated between the political branches in such a way that precludes judicial consideration. This proposition does have some support from lower court decisions.<sup>246</sup> However, reading these cases to support such a proposition overstates

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241. Reply, *supra* note 42, at 7 (alteration in original) (quoting *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990)).

242. See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate . . .”).

243. *Id.* art. I, § 5, cl. 2.

244. See *NLRB v. Canning*, 134 S. Ct. 2550, 2574–75 (2014) (“[W]e must give great weight to the Senate’s own determination of when it is and when it is not in session. But our deference to the Senate cannot be absolute.”).

245. *Id.* at 2574 (finding that the Senate has the authority to determine that it is not in recess and to block appointments under the Recess Appointments Clause).

246. See, e.g., *Doe v. Bush*, 323 F.3d 133, 142 (1st Cir. 2003) (noting that the Constitution “envisages the *joint* participation of the Congress and the executive in determining the scale and duration of hostilities” (quoting *Massachusetts v. Laird*, 451 F.2d 26, 31–32 (1st Cir. 1971) (emphasis added))); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983) (“If Congress doubts or disagrees with the Executive’s determination that [military action is consistent with the WPR], it has the resources to investigate the matter and assert its wishes.”).

the strength of the Government's position.<sup>247</sup> Put simply, it proves far too much. Courts throughout the nation's history have grappled with the question whether a specific military action falls within the grant of authority from Congress to the executive in a given instance.<sup>248</sup> In many instances, courts have reached the merits of the question and found that Congress had, in fact, granted the executive the authority it was exercising.<sup>249</sup> If these decisions are legitimate interpretations of the relevant statutes, then it follows that courts could properly find that the executive had overstepped its authority on different facts.

In any event, the *Smith* court did not expressly commit to either interpretation of the Government's approach to determining what constitutes textual commitment for the purpose of the political question doctrine.<sup>250</sup> Instead, the court emphasized the broad discretion Congress granted the President in carrying out both the 2001 and 2002 AUMFs by granting the authority to use any force that the President determines to be "necessary and appropriate."<sup>251</sup> The court suggested that absent the infringement of a statutory right like in *Zivotofsky I*, courts are not competent to second-guess the executive's determination of the appropriate level of force.<sup>252</sup> That is likely true, but it mischaracterizes the question the court was asked—not *how* the

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247. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (noting that "[e]ven in the context of military action, the courts may sometimes have a role"); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723 (2008) ("If there is a party with constitutionally sufficient standing to demand judicial protection from a presidential refusal to obey a statute during war, it is not clear why there should be a general rule that courts must leave the question to the political branches.").

248. See *supra* Part II.B.

249. See, e.g., *Massachusetts v. Laird*, 451 F.2d at 34 (finding that parsing of the allocation of war powers between Congress and the executive was unnecessary where Congress had appropriated significant funds to the Vietnam War because that appropriation was sufficient to find "a prolonged period of [c]ongressional support of executive activities"); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (finding that congressional enactments supporting the Vietnam War satisfied the requirement for congressional support that is implied in the Constitution).

250. See *Smith v. Obama*, 217 F. Supp. 3d 283, 298–300 (D.D.C. 2016), order vacated, appeal dismissed as moot *sub nom.* *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018) (discussing textual commitment under the first *Baker* factor).

251. *Id.* at 300 (first quoting 2002 AUMF § 3(a)(1); then quoting 2001 AUMF § 2(a)).

252. See *id.* at 299 (distinguishing lawsuits to "enforce a specific statutory right" from lawsuits asking "the Court to second-guess the Executive's *application* of these statutes to specific facts on the ground").

President should prosecute a war against ISIS, but *whether* Congress had authorized the President to prosecute a war against ISIS at all.<sup>253</sup>

As an absurd example, the court would presumably have rejected an argument that the 2001 and 2002 AUMFs authorized the President to use military force against a Venezuelan terrorist organization, reasoning that neither statute specifies the group as a legitimate target. While ISIS presents a much closer question, the court failed to address the claim despite its legal obligation to do so. As the D.C. Circuit implied in *El-Shifa*, the political question doctrine does not preclude consideration of “claims ‘[p]resenting purely legal issues’ such as whether the government had legal authority to act,” even when those cases implicate military action.<sup>254</sup> The *Smith* court conflated that question—whether the statute provided the requisite authority to prosecute a military campaign—with the question of the wisdom of the campaign.<sup>255</sup> The latter is a political question under current doctrine; the former is not.

#### B. Cases like *Smith* Present Judicially Manageable Standards

The *Smith* court also noted that “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 manageable standards.”<sup>256</sup> The court identified one such question as whether ISIS continued to owe some degree of allegiance to al Qaeda.<sup>257</sup> This approach was, at a minimum, inconsistent with the D.C. Circuit’s holding in *Parhat* that the evidence presented by the Government in a military tribunal was “insufficient to categorize [the plaintiff] as an

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253. See Complaint, *supra* note 37, ¶¶ 17–19 (noting that the executive did not provide a legal explanation for whether a war against ISIS is consistent with the WPR).

254. *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (alteration in original) (quoting *Campbell v. Clinton*, 203 F.3d 19, 40 (D.C. Cir. 2000)) (affirming dismissal where the action challenged the wisdom of military action abroad).

255. Compare *Smith v. Obama*, 217 F. Supp. 3d at 299–300 (characterizing the question before the court as seeking “to determine whether the President is correct that the ongoing military action against ISIL is in fact ‘necessary and appropriate’” within the meaning of the statute (quoting 2002 AUMF § 3(a)(1))), with *El-Shifa*, 607 F.3d at 842 (“[W]e have distinguished between claims requiring us to decide whether taking military action was ‘wise’—‘a . . . determination[] constitutionally committed for resolution to . . . Congress or . . . the Executive Branch’—and claims ‘[p]resenting purely legal issues’ such as whether the government had legal authority to act.” (second, third, and fourth alterations in original) (quoting *Campbell*, 203 F.3d at 40)).

256. *Smith v. Obama*, 217 F. Supp. 3d at 300.

257. See *id.* (noting disagreement among the parties on this question).

enemy combatant under [the Department of Defense]’s definition.”<sup>258</sup> The *Smith* court did not note, but might have, the reluctance of some courts to provide an answer to the question whether a state of war exists given a particular set of facts.<sup>259</sup> The court should have found that it could answer both questions via “careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute” and the governmental powers at issue.<sup>260</sup>

The first and most basic question the *Smith* court should have addressed is the existence *vel non* of a state of war between the United States and ISIS. In *Crockett v. Reagan*,<sup>261</sup> the same court found that the question whether the facts on the ground constituted a state of war was nonjusticiable.<sup>262</sup> However, that ruling was predicated on facts that are easily distinguished from the instant case. First, in *Crockett*, the Government did not even concede the existence of hostilities.<sup>263</sup> In fact, the plaintiffs’ assertions that the U.S. military forces in El Salvador were in combat were specifically contested by the Government.<sup>264</sup> Second, the scale of the conflict involved, even on the plaintiffs’ account, was negligible compared to the ongoing campaign against ISIS.<sup>265</sup> The Government’s briefs in *Smith* described the scope of the operation in some depth and asserted that the President had authority to conduct military operations against ISIS under both the 2001 and 2002 AUMFs.<sup>266</sup> The Government even cited its notification of the appropriate congressional committees in accordance with the WPR as

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258. Parhat v. Gates, 532 F.3d 834, 842 (D.C. Cir. 2008).

259. See, e.g., *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982) (finding that two news articles referencing U.S. forces engaged in hostilities in El Salvador were not sufficient grounds to find that a state of war existed, and finding that the case should be dismissed as a political question that lacked manageable standards) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

260. *Zivotofsky I*, 566 U.S. 189, 201 (2012).

261. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982).

262. See *id.* at 896 (“[T]he cause of action under the [WPR] . . . is non-justiciable because of the nature of the factfinding that would be required . . .”).

263. See *id.* at 896–97 (noting the Government’s assertion that U.S. military forces were not involved in hostilities in El Salvador).

264. See *id.* at 897–98 (comparing the Government and the plaintiff’s characterizations of the U.S. military’s involvement in El Salvador).

265. Compare *id.* at 897 (noting that the plaintiffs based their suit on unsubstantiated reports that the Department of Defense authorized hostile-fire pay to troops serving in El Salvador and on a lone newspaper report of “U.S. Armed Forces . . . ‘fighting side by side’ with government troops”), with *Smith v. Obama*, 217 F. Supp. 3d 283, 285–86 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018) (describing the scope of OIR).

266. E.g., Gov’t Mem. of Law, *supra* note 48, at 3–8.

well as congressional authorizations and appropriations covering fiscal years 2015 and 2016 as additional evidence of congressional support for the campaign.<sup>267</sup> Given these facts—which were included in the pleadings—and given the inherent authority of the court to find facts by judicial notice,<sup>268</sup> the *Smith* court could and should have found that a state of war existed for the purpose of the suit.<sup>269</sup>

The second question the *Smith* court was asked to address is whether ISIS was a permissible target of war under either a statute or the Constitution.<sup>270</sup> The court specifically found that that inquiry presented a political question because “[r]esolving 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.”<sup>271</sup> This argument is unpersuasive on two grounds.

First, in *Parhat*, the D.C. Circuit implied that courts are competent to determine whether a particular terrorist organization is an “associated force” within the meaning of a standard derived from the 2001 AUMF.<sup>272</sup> The court relied largely on classified sources gathered from U.S. intelligence agencies in concluding that the available evidence did not support an “associated force” determination; ultimately, the court reversed a military commission’s designation of a Chinese national as an enemy combatant.<sup>273</sup> The D.C. Circuit returned to the same question in *Al-Bihani v. Obama*,<sup>274</sup> and this time it upheld

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267. *See id.* at 9–15 (describing congressional appropriations and authorizations for fiscal years 2015 and 2016).

268. *See* 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5106 (2d ed.) (noting that “Rule 201(b)(2) permits judicial notice of ‘ascertainable facts’”).

269. *See, e.g.,* *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992) (finding that courts are able to ascertain the existence of war by using “reason and judgment”).

270. *See* Complaint, *supra* note 37, ¶¶ 31–41 (arguing that the campaign was not supported by either statutory or constitutional authority).

271. *Smith v. Obama*, 217 F. Supp. 3d 283, 300 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018).

272. *See Parhat v. Gates*, 532 F.3d 834, 844, 854 (D.C. Cir. 2008) (finding that the evidence presented was insufficient to show that the detainee was a member of an “associated force,” and ordering the government to either release him or conduct a new hearing to determine whether a member of a terrorist organization alleged to be essentially part of al Qaeda falls within the scope of the 2001 AUMF).

273. *See id.* at 837, 844, 854.

274. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

the detention for trial under the Military Commissions Act<sup>275</sup> of a Yemeni citizen who was captured while fighting as part of a brigade of foreign fighters aligned with Taliban forces in Afghanistan.<sup>276</sup> The court specifically noted that “the facts show [Al-Bihani’s group] . . . was affiliated with Al Qaeda and Taliban forces and engaged in hostilities against a U.S. Coalition partner”; consequently, Al-Bihani “falls squarely within the scope” of the President’s authority under the statute.<sup>277</sup>

The challenge in *Al-Bihani* was to government detention, rather than to the use of military force alone, and the statute in question was the Military Commissions Act, rather than the 2001 AUMF alone.<sup>278</sup> However, the issues raised in *Al-Bihani* are analogous to the questions presented in *Smith*. While the courts have proven more willing to challenge executive actions in the detention context than other forms of military action,<sup>279</sup> the *Al-Bihani* court necessarily found that, in isolation, the question whether a particular force is an “associated force” of al Qaeda and the Taliban is not beyond the competence of the court to answer.<sup>280</sup>

Second, the Government proposed a workable standard in *Smith*. The *Al-Bihani* court noted that the 2006 Military Commissions Act “provided guidance on the class of persons subject to detention under the AUMF.”<sup>281</sup> However, the lack of a statutory definition of associated forces in either AUMF is not dispositive. As the Government noted in its brief to the *Smith* court, the National Defense

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275. Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241 (2006)).

276. See *Al-Bihani*, 590 F.3d at 872–73 (finding that evidence of the activities of the defendant’s military unit with regard to the Taliban was sufficient to establish that he was a member of an “associated force” within the meaning of the statute).

277. *Id.* at 873.

278. *Id.* at 869–72. Al-Bihani was detained pursuant to military action taken under the 2001 AUMF, so that statute is also discussed in the case.

279. Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 528, 538 (2004) (finding that the petitioner’s due process rights were violated because “the most elemental of liberty interests” — freedom from government detention — was implicated), with *Jaber v. United States*, 861 F.3d 241, 247 (D.C. Cir. 2017) (contrasting, explicitly, the need for deference to military planners in selecting targets for drone strikes with the need to provide judicial review in detention cases), *cert. denied*, 138 S. Ct. 480 (2017).

280. See *Al-Bihani*, 590 F.3d at 872 (finding that an organization that “supported” al Qaeda and that was “aided” or “commanded” by al Qaeda members falls within the statute (quoting Brief for Petitioner-Appellant at 33, *Al-Bihani*, 590 F.3d 866 (No. 09-5051))).

281. *Id.* at 872.

Authorization Act for Fiscal Year 2012<sup>282</sup>— which was enacted prior to any of the events at issue in the case— affirms the President’s authority under the 2001 AUMF to detain individuals who are “part of or substantially supported al-Qaeda, the Taliban, or associated forces.”<sup>283</sup> Congress’s use of the word “affirmation” to describe the President’s powers to detain members of associated forces under the AUMF implies that Congress understood the President to *already* have the authority to target those individuals and groups under the existing statutory framework.<sup>284</sup> To meet that associated-force requirement, the Government in *Smith* presented evidence intended to show that ISIS satisfied both prongs of the two-part test articulated by Johnson and Preston,<sup>285</sup> namely, ISIS was “an organized, armed group that has entered the fight alongside al Qaeda and . . . is a cobelligerent with al Qaeda in hostilities against the United States.”<sup>286</sup> The *Smith* court could have found that the evidence presented, including classified evidence, was insufficient or unresponsive to the question. It did neither.

C. *The Smith Court’s Reliance on the Political Question Doctrine Was Both Misleading and Unnecessary*

As the *Baker* Court noted, the political question doctrine provides a judicial tool for analyzing separation of powers problems.<sup>287</sup> In describing the alleged constitutional violation at issue, *Smith* expressly described President Obama’s campaign against ISIS as “misusing limited congressional authorization for the use of military force as a blank check to conduct a war against enemies of his own choosing.”<sup>288</sup> On its own terms, the question raised by this allegation could not be

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282. See Gov’t Mem. of Law, *supra* note 48, at 6 (quoting *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990)) (citing the National Defense Authorization Act for Fiscal Year 2012 as demonstrating congressional intent that the 2001 AUMF covers ISIS).

283. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011).

284. See JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RES. SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION 8 (2016) (noting that the National Defense Authorization Act for Fiscal Year 2012 was intended to codify existing authority under the 2001 AUMF, as interpreted by the D.C. Circuit).

285. Gov’t Mem. of Law, *supra* note 48, at 8–17.

286. *Id.* at 5–8; Johnson, *supra* note 33.

287. See *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”).

288. See Complaint, *supra* note 37, at ¶ 8.

answered without reference to the statute.<sup>289</sup> The *Smith* court, while claiming to be incapable of deciding the case because of the political question doctrine, nevertheless dedicated the entire latter third of its opinion to actually addressing separation of powers questions. The court followed *Youngstown*—the dominant paradigm for separation of powers questions—closely analyzing the nature of the power exercised and the underlying congressional authorization.<sup>290</sup>

Moreover, the *Smith* court *did* reach the merits on the question whether Congress had approved military action against ISIS, finding that “the Court in this case is not presented with a dispute between the two political branches regarding the challenged action.”<sup>291</sup> The court devoted nearly half of its discussion of the political question doctrine to the apparent agreement between the executive and Congress on this matter.<sup>292</sup> The court cited a string of cases to support the uncontested proposition that “judicial intervention into military affairs is particularly inappropriate when the two political branches to whom war-making powers are committed are not in dispute as to the military action at issue.”<sup>293</sup> In making that statement, the court answered the very question which it said it was incapable of determining: Had Congress passed legislation under which the executive could take lawful military action against ISIS?

In a footnote, the court offered one hint at a possible reason why it did not reach the merits of the case; it noted that it declined to address the question whether the subsequent authorizations and appropriations constituted a sufficient statutory basis in order to avoid addressing the constitutionality of section 8(a) of the WPR.<sup>294</sup> Such

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289. While the Obama administration publicly argued that the executive possesses sufficient exclusive authority under Article II to prosecute the campaign against ISIS, *see, e.g.*, Sept. 2014 Presidential Address, *supra* note 29 (stating that the President has sufficient authority to wage war against ISIS, but nevertheless stating “I believe we are strongest as a nation when the President and Congress work together”), the Government did not raise this argument explicitly in its *Smith* filings.

290. *See Smith v. Obama*, 217 F. Supp. 3d 283, 297–303 (D.D.C. 2016), *order vacated, appeal dismissed as moot sub nom. Smith v. Trump*, 731 F. App’x 8 (D.C. Cir. 2018) (analyzing the President’s decision to conduct the campaign in light of steady congressional support); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (analyzing the executive action in light of the existing statutory scheme and finding no congressional support); Barron & Lederman, *supra* note 247, at 701 (describing Justice Jackson’s three-part analysis as “the conventional post-*Youngstown* orientation”).

291. *Smith v. Obama*, 217 F. Supp. 3d at 301.

292. *Id.* at 301–03.

293. *Id.* at 302.

294. *Id.* at 302 n.15.

hesitation is neither surprising<sup>295</sup> nor necessarily improper.<sup>296</sup> However, in extending the political question to cover a challenge to the authority of the executive to wage war on targets of its choosing, the court brought into question the meaning of the Constitution itself, rather than that of a mere statute.

The Government in *Smith* did not claim that it has inherent constitutional authority to initiate a war without congressional approval,<sup>297</sup> and the court did not explicitly make any such finding.<sup>298</sup> However, by dismissing the case as a political question, the court implied that the subject matter falls entirely within the purview of the executive branch.<sup>299</sup> In an apparent effort to avoid deciding the constitutionality of a statutory provision, section 8(a) of the WPR, the court instead cast doubt on the constitutional authority of Congress to constrain the executive under its war-powers authority. If every finding of a political question is, in effect, a victory on the merits for the executive branch vis-a-vis Congress,<sup>300</sup> then the court's decision in *Smith* was a significant advancement of the proposition that whatever authority Congress may have under the Declare War Clause is *never* judicially enforceable.

## V. RECOMMENDATIONS

The *Smith* court's expansive reading of the political question doctrine was overbroad, but it represents the logical culmination of

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295. Compare Carter, *supra* note 170 (arguing that the WPR is constitutional), with ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 107–33 (1983) (arguing that the WPR is likely unconstitutional).

296. See *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”). *But see* *Clark v. Martinez*, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting) (noting that in some instances, the avoidance doctrine decides, rather than avoids, constitutional questions).

297. See *Reply*, *supra* note 42, at 2 (noting that “this case would require answering questions that are ‘textually committed’ for resolution to the political branches” (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

298. See *Smith v. Obama*, 217 F. Supp. 3d at 298 (basing dismissal on the political question doctrine—specifically on the textual commitment of “foreign policy and national security” to “the political branches”).

299. *Cf. Zivotofsky I*, 566 U.S. 189, 195–96 (2012) (finding that the lower courts erred in dismissing the challenges as political questions because they implicated a private statutory right).

300. See Louis M. Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 477 (2004) (arguing that decisions reached under the political question doctrine can be understood as decisions on the underlying merits of the case).

increasing deference to the executive on matters of national security; the unique nature of the United States' adversaries under the 2001 AUMF as compared to previous conflicts; and Congress's lack of oversight beyond annual authorizations and appropriations legislation. This Part recommends solutions for each of those issues.

First, federal courts should take *Zivotofsky I* at its word when they are asked to differentiate between the statutory basis for and the wisdom of government action, instead of “treat[ing] the two questions as one and the same.”<sup>301</sup> It is relatively easy to use such a formulation when the court finds that a lawsuit challenges the *wisdom* of government action; such a suit is a political question both in the sense that it challenges an action that was subject to the discretion of actors within one political branch and in the sense that a court could not use judicially manageable standards without substituting its own judgment for that of the political-branch actors.<sup>302</sup> In such cases, dismissal as a political question is appropriate.

Second, the nature of suits challenging military action abroad are such that there will often be other grounds on which dismissal is appropriate; courts have dismissed similar actions on grounds of standing,<sup>303</sup> ripeness,<sup>304</sup> and redressability.<sup>305</sup> In fact, some commentators have gone so far as to argue that standing jurisprudence has subsumed the political question doctrine entirely.<sup>306</sup> These justiciability tools may be particularly useful where a court wishes to avoid enjoining the President from carrying out an ongoing military campaign, as in *Smith*. Because the political question doctrine implicates the constitutional separation of powers,<sup>307</sup> courts can and should dismiss suits on other grounds before reaching the political

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301. John R. Crook, *U.S. Supreme Court Rules Statute Directing State Department to Record Jerusalem-Born Citizen's Birthplace as "Israel" Does Not Raise Political Question*, *Contemporary Practices of the United States Relating to International Law*, 106 AM. J. INT'L L. 644, 645 (2012); see also, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (differentiating between challenges to the wisdom of government action and to the legal basis for that action).

302. See *El-Shifa*, 607 F.3d at 842–43 (identifying challenges to the “prudence of the political branches” as unavoidably political questions).

303. *Smith v. Obama*, 217 F. Supp. 3d at 289.

304. *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990).

305. *N.J. Peace Action v. Obama*, No. 08-2315, 2009 WL 1416041, at \*5 (D.N.J. May 19, 2009).

306. E.g., Linda Sandstrom Simard, *Standing Along: Do We Still Need The Political Question Doctrine?*, 100 DICK. L. REV. 303, 333 (1996).

307. See *Baker v. Carr*, 369 U.S. 186, 210–11 (1962) (explaining that the nonjusticiability of political questions stems from the separation of powers).

question doctrine and creating a sweeping precedent where a narrow decision could have reached the same, correct result.<sup>308</sup>

Once a court has reached the merits of the legality of military action, the critical question becomes the formulation of judicially manageable standards by which to adjudicate the case. Two alternatives present themselves: develop a set of standards de novo or adapt standards developed by the parties. While there may be some cases where judges determine that they are competent to develop manageable standards absent input from the parties,<sup>309</sup> in cases implicating national security and military action, it seems more likely that judges will rely on the parties (and particularly the Government) to provide suggestions.<sup>310</sup> As Justice Souter reasoned in *Nixon*, courts could always retain the flexibility to reject proposed standards in the event that the Government proposes or employs a sufficiently arbitrary standard.<sup>311</sup>

This is not to suggest that the questions presented in this context will be simple ones. To take *Smith* as an example, courts might be asked to consider questions such as whether a given set of facts is sufficient to find that “war” exists; the meaning of a statute authorizing force against a given set of actors; whether an organization falls within that set of permissible targets under the statute; and whether the executive has an independent constitutional authority to take the challenged action. However, courts have already devised standards to answer each

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308. As Justice Brandeis explained:

The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided upon two grounds, one involving a constitutional question, the other involving a question of statutory construction or general law, the Court will decide only the latter.

*Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

309. See, e.g., *Nixon v. United States*, 506 U.S. 225, 253–54 (1993) (Souter, J., concurring) (suggesting that arbitrary procedures for impeachment cases might justify judicial intervention, despite textual commitment of the matter to Congress).

310. See, e.g., *Parhat v. Gates*, 532 U.S. 822, 837–38 (2008) (adopting the Government’s standards for determining whether an alleged terrorist group was an “associated force” of al Qaeda). The Government did reference the “associated forces” framework in its brief to the *Smith* court, but it did not develop that legal framework to the same degree seen in contemporaneous public statements by administration officials. Compare Gov’t Mem. of Law, *supra* note 48, at 30–31 (arguing that courts lack the capacity to determine whether an individual or group falls within the ambit of the 2001 or 2002 AUMFs), with Preston, *supra* note 16 (articulating one set of possible standards).

311. See *Nixon*, 506 U.S. at 253–54 (arguing against accepting arbitrary and capricious standards, even given clear textual commitment).

of those questions.<sup>312</sup> The fact that questions require careful analysis, hinge on access to classified information, or seem politically sensitive does not preclude their consideration.

Finally, courts should apply the same principles of statutory interpretation and canons of construction to questions implicating the WPR that they would apply to other statutes. Specifically, in asking whether a statute has authorized the use of military force, courts should weigh the WPR's section 8(a) prohibition on using appropriations absent an explicit grant of authority, on the one hand, against a reading of the statute that would, on the other hand, give full effect to all the WPR's provisions.<sup>313</sup> Reading section 8(a) as an absolute bar would unconstitutionally restrict the ability of future Congresses to conduct foreign affairs under the principle that one Congress cannot bind a future Congress.<sup>314</sup> However, courts should keep the language of section 8(a) in mind, considering that Congress enacts all subsequent legislation against the background principle that absent clear statutory language, laws do not authorize the President to conduct a war.

This approach would be consistent with longstanding principles of statutory interpretation: “[R]epeals by implication are not favored . . . and will not be found unless an intent to repeal is clear and manifest.”<sup>315</sup> The 2001 AUMF both reiterates and satisfies the WPR's clear-statement requirement.<sup>316</sup> Congress continues to legislate as if the WPR is good law.<sup>317</sup> Finally, to the constitutional question, even if the

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312. See *Parhat*, 532 U.S. at 837–38 (finding that the group to which the defendant belonged was not an authorized target under the statute); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640–55 (1952) (Jackson, J., concurring) (finding that the President did not have independent constitutional authority to take the challenged executive action); *Brig Amy Warwick*, 67 U.S. (2 Black) 635, 670 (1862) (finding the de facto existence of war); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (inferring from a statute's use of the word “enemy” that it permitted military action against French targets).

313. See 50 U.S.C. § 1547(a)(1) (stating that appropriations legislation shall not provide the legal basis for military action unless otherwise explicitly authorized).

314. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (establishing this principle).

315. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987).

316. 2001 AUMF § 2(b) (“Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”).

317. See, e.g., Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3560 (2014) (“Nothing in this section shall be construed to constitute a specific statutory authorization for the introduction of United States Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.”).

WPR is not binding on *Congress*, it may still be binding on the courts that interpret Congress's enactments.<sup>318</sup>

#### CONCLUSION

The political question doctrine is an important tool to avoid entangling the judiciary in matters over which the courts properly have no jurisdiction. However, given the realities of a presidential system, an overly broad reading of the doctrine risks giving the executive unfettered control over areas of policy that are properly shared between Congress and the President under the Constitution. Since the Vietnam War era, courts have increasingly used the political question doctrine to avoid reaching critical questions of foreign and military policy; that invocation of the doctrine rests on uneasy constitutional footing. The interpretation of the political question doctrine embraced by the *Smith* court represents a dramatic expansion of executive power that should be repudiated.

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318. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (noting that a court “must read [allegedly conflicting] statutes to give effect to each if [it] can while preserving their sense and purpose”).