# THE JUSTICIABILITY OF SERVICEMEMBER SUITS

On May 4, 2016, Captain Nathan Michael Smith of the U.S. Army sued President Obama in the U.S. District Court for the District of Columbia.[1] Captain Smith claimed that the President was forcing him to violate his oath of commission by deploying him to Kuwait to fight an illegal war against the Islamic State of Iraq and Syria (ISIS).[2] Captain Smith asked the court to declare that the President had violated the War Powers Resolution[3] (the Resolution) by failing to secure congressional approval for the conflict.[4] On November 21, 2016, the court dismissed the case.[5] First, the court held that Captain Smith's oath-based injury did not rise to the level of an Article III injury in fact.[6] Second, the court held that the political question doctrine barred judicial review of the President's decision.[7] Pointing to the broad language contained in the post-9/11 Authorization for Use of Military Force[8] (AUMF), the court held that the question whether the war was authorized was committed to the Executive's discretion.[9] The case was held to be nonjusticiable.

Despite the outcome of Captain Smith's case, it is easy to envision a realistic hypothetical with a different result. For example, suppose that the plaintiff is an infantry Marine being sent into combat rather than an intelligence officer being deployed to a rear-area headquarters, as Captain Smith was. The President, facing an unexpected crisis, orders that Marine's unit to deploy within a few weeks to fight in a conflict expected to last well over ninety days and covered by no existing AUMF.[10] Congress, controlled by the opposition party and faced with an unpopular war, either explicitly orders the President to cease fighting or refuses to approve the conflict and thus leaves the Executive in violation of the Resolution. And the Marine, who oppos-

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[1] Complaint for Declaratory Relief at 1, Smith v. Obama, No. 16-843, 2016 WL 6839357 (D.D.C. Nov. 21, 2016) [hereinafter Complaint].

[2] *Id.* at 4–5.

[3] 50 U.S.C. §§ 1541–1548 (2012).

[4] *Smith*, 2016 WL 6839357, at *1.

[5] *Id.*

[6] *Id.* at *10. Though the court suggested that allegations of physical or liberty-based injuries might have sufficed, *id.*, Captain Smith did not allege any such injuries, *id.* at *5.

[7] *Id.* at *11.

[8] Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2012)).

[9] *Smith*, 2016 WL 6839357, at *11–15.

[10] Given the breadth of the 2001 AUMF, any conflict fighting terrorism, especially if fought in the Middle East, would probably be covered by the AUMF. *See* 115 Stat. 224 (granting the President broad power to use force against terror groups and nations linked in some way to the September 11, 2001, attacks). However, a conflict fought outside of the Middle East, especially if unrelated to terrorism, would likely not be covered.

es the war and does not want to deploy to fight it, brings suit against the Executive seeking to enjoin his pending deployment.[11]

Under current doctrine, that Marine's suit would force the court to adjudicate the division of the war powers between the President and Congress. First, the plaintiff would be able to establish standing by alleging a qualifying injury. Second, a court could not dismiss the case under the current political question doctrine, at least not without deciding the separation of powers question about which the political branches really care: whether the Executive has authority to fight a conflict in direct violation of a congressional order. This Note argues that only a return to the roots of standing doctrine can reliably keep such suits brought by volunteer servicemembers out of the courts.

This Note proceeds in three parts. Part I frames the continuing debate over the division of war powers between Congress and the President. Part II applies the current tests for the standing and political question doctrines and concludes that the hypothetical Marine's suit would be justiciable, forcing the courts to adjudicate the war powers question. Part III suggests that, properly reframed based on its historical roots, standing doctrine might preclude today's volunteer servicemembers from bringing suit for service-related deprivations.

## I. BATTLING FOR THE WAR POWERS

Although the United States has fought many conflicts since the Founding, it remains unclear how the war powers are divided between the executive and legislative branches. The text of the Constitution shows that the two political branches to some extent share the war powers. Article II, Section 1 vests the President with unenumerated executive powers,[12] and Section 2 makes him the "Commander in Chief of the Army and Navy of the United States, and of the Militia."[13] But the Framers deliberately gave many of the martial powers held by the English monarch to the legislature.[14] Article I, Section 8 commits to Congress the powers to declare war, regulate captures, and regulate the services, among others.[15] The same section

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[11] This question is not merely academic. For example, in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), a three-judge panel of the D.C. Circuit dismissed on standing grounds a suit in which congressmen alleged President Clinton waged a conflict in Yugoslavia in violation of the Resolution because Congress never specifically approved of the President's decision. *Id.* at 20. Had the litigants had standing, at least one of the three judges would have considered the merits of the case. *Id.* at 37 (Tatel, J., concurring).

[12] *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 n.3 (2001).

[13] U.S. CONST. art. I, § 2, cl. 1.

[14] THE FEDERALIST NO. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (noting that the power to declare war and to raise and regulate the military resided in the English king).

[15] U.S. CONST. art. I, § 8.

commits to Congress the power "to make all Laws which shall be necessary and proper" to carry into effect its own war powers, or the President's.[16] Over time, many national security issues have appeared somewhere on the frontier between those powers committed to Congress and those committed to the President.

During the early days of the Republic, the Supreme Court deferred to the political branches on national security questions when the Congress and the President agreed. In *Martin v. Mott*,[17] the Court considered whether a militiaman should face punishment for failing to report for duty when the President called him up.[18] The militiaman challenged the President's determination that an exigency existed that required the militia to be called up.[19] The Court held that Congress had delegated to the President the power to decide whether such an exigency existed.[20] With the two political branches in alignment, the Court held that the issue was a political question committed to the Executive by Congress.[21]

But the nation's conflicts have also triggered skirmishes along the legal frontier that ended in court. Sometimes, Congress carried the day. For example, in *Little v. Barreme*,[22] Chief Justice Marshall implicitly rebuked the Executive by holding a ship's captain liable for trespass for seizing a foreign vessel.[23] Though the captain had followed orders issued by the executive branch, the Court held that those orders exceeded the authority granted by Congress and were thus no defense against a trespass suit.[24] Other times, the Executive emerged victorious. For example, in the *Prize Cases*,[25] the Court blessed President Lincoln's seizure of merchant vessels before a declaration of war on the ground that the Constitution placed on him not only the option, but also the affirmative duty "to resist force by force" in the event of a foreign invasion or domestic insurrection, even though the President lacked "any special legislative authori[zation]."[26]

In 1952, Justice Jackson created a useful structure to help judge conflicts arising between the President and Congress. In *Youngstown Sheet & Tube Co. v. Sawyer*,[27] the Court stopped President Truman's

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16 *Id.* art. I, § 8, cl. 18.
17 25 U.S. (12 Wheat.) 19 (1827).
18 *Id.* at 28.
19 *Id.* at 30–32.
20 *Id.* at 29–31.
21 *Id.* at 31–33.
22 6 U.S. (2 Cranch) 170 (1804).
23 *Id.* at 178–79.
24 *Id.* at 177–79.
25 67 U.S (2 Black) 635 (1863).
26 *Id.* at 668.
27 343 U.S. 579 (1952).

attempt to seize domestic steel mills when imminent labor strife risked critical steel supplies in wartime.[28] In a concurring opinion, Justice Jackson divided executive actions into three categories. The Executive is most powerful when it operates in *Youngstown* Category One by "act[ing] pursuant to an express or implied authorization of Congress."[29] If "the President acts in absence of either a congressional grant or denial of authority," he enters *Youngstown* Category Two: "a zone of twilight" in which courts will look to the context surrounding the conflict to decide whether the President has exceeded his authority.[30] But if the President acts against the explicit or implied congressional will, then he is in Category Three, where "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[31] Today's Supreme Court still applies this elegant framework.[32]

Justice Jackson's *Youngstown* framework helps explain the effect of Congress's most important attempt to assert its war powers: the War Powers Resolution. In 1973, Congress invoked its power under the Necessary and Proper Clause to place limits on presidential powers should "hostilities" be imminent.[33] Among other restrictions, Congress put a time limit on conflicts lacking explicit congressional approval.[34] If sixty days pass without congressional action, the President must end hostilities, though the Resolution permits thirty additional days to allow the military to extract itself from the conflict.[35]

The Resolution changed the default *Youngstown* category for executive-initiated conflicts about which Congress remains silent. Any Executive that prolongs the fight beyond ninety days enters Category Three, where the President's power is at its lowest ebb, rather than Category Two's zone of twilight. The question becomes whether the Resolution is a constitutionally permissible limit on presidential power. To decide its constitutionality, a court would have to rule on what the judiciary has avoided deciding for two centuries: whether and under what circumstances the President has the exclusive and preclusive au-

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[28] *Id.* at 582, 587.

[29] *Id.* at 635 (Jackson, J., concurring).

[30] *Id.* at 637.

[31] *Id.*

[32] *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 135 S. Ct. 2076, 2083–84 (2015).

[33] *See* 50 U.S.C. § 1541(b)–(c) (2012); *see also id.* §§ 1542–1543 (describing consultation and reporting requirements). Congress, hoping to prevent the President from starting another Vietnam War without congressional authorization, passed the Resolution over President Nixon's veto. *See* Eric Talbot Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT'L L. REV. 499, 502 (2015).

[34] 50 U.S.C. § 1544(b). The same subsection permitted the Executive to exceed the time limit if Congress could not physically convene because of the conflict. *Id.*

[35] *Id.*

thority to fight in the face of congressional disapproval. This Note's Marine, asked to risk his life for an allegedly illegal war, would have every incentive to turn to the courts for redress for any executive violation of the Resolution. Would the courts then have authority to answer the question they have so long avoided?

## II. SERVICEMEMBER SUITS AND THE CURRENT DOCTRINE

### *A. Standing*

To understand both why the Marine might meet the constitutionally mandated minimum requirements for standing under the current doctrine and how courts might alter that doctrine to render his suit nonjusticiable,[36] one must look to the roots from which standing doctrine grew. Scholars have traced these roots to before the Founding.[37] Courts in that era distinguished between "core private rights" and "public rights."[38] Core private rights were those that "vested in a particular individual."[39] William Blackstone and his contemporaries identified three now-familiar private rights that government existed to protect: life, liberty, and property.[40] The courts protected private rights because "an exercise of the judicial power is required 'when the government want[s] to act authoritatively upon core private rights.'"[41]

Unlike core private rights, public rights (such as public servitudes) vested in the community rather than the individual.[42] A legitimate sovereign could regulate these rights on behalf of the community and, if no core private right was implicated, adjudicate those rights without

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[36] This Note asks whether servicemember suits can survive the justiciability analysis. The question whether a cause of action exists permitting the servicemember to bring suit is another matter — that inquiry takes place at the merits rather than the justiciability stage. *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1391 n.6 (2014); *see also* Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1813 (2016). While this Note suggests that courts might find a nonstatutory cause of action by looking to equity and historical precedent, *see infra* p. 2196, that question ultimately falls outside of the justiciability-focused scope of this Note.

[37] *See, e.g.*, F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279–86 (2008) (tracing the history of the public-private distinction in English and U.S. courts); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 696–98 (2004). *But see, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–97 (1992) (concluding that standing as a discrete doctrine is a modern invention).

[38] Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565–66 (2007). Congress could also create a third category called "privileges" by assigning private citizens the power to bring a private claim for the violation of a public right. *See id.* at 567–68.

[39] *Id.* at 573.

[40] *See id.* at 567 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *123, *129, *134, *138).

[41] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting) (alteration in original) (quoting Nelson, *supra* note 38, at 569).

[42] Hessick, *supra* note 37, at 279 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).

an exercise of the judicial power.[43] And if a public right was violated, it was normally the sovereign's prerogative to seek redress.[44]

The Constitution separates powers in part based on the public/private rights framework. Articles I and II vest the legislative and executive powers in the politically responsive branches. Those two sets of powers allow Congress and the President to dispose of public rights as they see fit: for example, they might license certain ships to navigate a waterway.[45] The political branches have sole discretion whether to seek a remedy should a public right be violated.[46] But to get a binding judgment that imposes a burden on an individual's core private rights, they must bring the case before a court vested with the Article III judicial power.[47] Courts sitting in judgment of conflicts between the government and private citizens, insulated against interference by structural safeguards like life tenure and guaranteed salary, protect the core private rights vested in citizens against government abuse.[48] As Chief Justice Marshall famously wrote, "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive . . . perform[s] duties in which [he] ha[s] a discretion."[49]

In the twentieth century, the divide between public and private rights evolved into modern standing doctrine.[50] The doctrine became more or less permissive based on the political climate and the Court's makeup. Early in the century, Justices looked to the distinction between public rights and private rights to protect progressive legislation from constitutional challenge: if a law "[did] not directly violate or threaten interference with the personal rights" of a party, then that party was "not . . . in position to question [the law's] validity."[51] Later, as Congress passed progressive regulatory statutes with citizen-suit

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[43] *See id.* at 280; *see also Wellness*, 135 S. Ct. at 1965 (Thomas, J., dissenting).

[44] *See* Hessick, *supra* note 37, at 280 ("A violation of a public right was a public wrong; the king was the only one injured by such a violation, and he was the proper prosecutor."). There were exceptions to this general rule, such as writs of mandamus, qui tam actions, and informers' actions. *See* Sunstein, *supra* note 37, at 171–77; *see also* Hessick, *supra* note 37, at 280 n.18 (summarizing scholarly debate regarding the significance of these actions).

[45] Nelson, *supra* note 38, at 570.

[46] *Id.* at 570–72.

[47] *Id.* at 569; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (discussing the Framers' emphasis on the separation of powers).

[48] *See* Stern v. Marshall, 564 U.S. 462, 484 (2011).

[49] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). *See generally* Scalia, *supra* note 47, at 894 ("There is, I think, a functional relationship, which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.").

[50] *See* Hessick, *supra* note 37, at 289.

[51] Stearns v. Wood, 236 U.S. 75, 78 (1915); *see also* Hessick, *supra* note 37, at 291–92.

provisions designed to force the Executive to act, the Court loosened standing doctrine to allow more such suits to survive standing analysis.[52] Then, after several new Justices changed the Court's ideological alignment in the 1970s and '80s, the Court again moved to restrict the doctrine.[53]

This evolution culminated in *Lujan v. Defenders of Wildlife*,[54] in which the Court articulated the current test for standing.[55] First, in an echo of the public/private rights roots of the test, the plaintiff must show an injury in fact.[56] That legally protected injury must be sufficiently "concrete and particularized";[57] to "invoke the judicial power," the plaintiff must have suffered or been threatened by "a direct injury" rather than an injury in the "general interest common to all members of the public."[58] The injury must also be "actual or imminent, not 'conjectural' or 'hypothetical.'"[59] Second, the injury must be "fairly . . . trace[able] to the challenged action of the defendant."[60] And "[t]hird, it must be 'likely,' as opposed to merely 'speculative,'" that a favorable decision will redress the injury.[61]

In *Smith*, the court found that the plaintiff did not have standing to sue. Captain Smith alleged that the legal uncertainty surrounding the war left him at risk of violating his oath of commission.[62] Pointing to both precedent and the ephemeral nature of the alleged oath-related harm, the court convincingly held that Captain Smith failed to allege an injury in fact that was sufficiently concrete or particularized to satisfy the *Lujan* test. In contrast, the infantry Marine in this Note's hypothetical would likely have standing to sue under current doctrine.

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[52] *See generally* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 860–73 (7th ed. 2011).

[53] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 179–80 (1974) (holding that a "generalized grievance[]" does not give a citizen a sufficiently individualized interest in the outcome of a case to give rise to standing, *id.* at 180 (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968))).

[54] 504 U.S. 555 (1992).

[55] The Court has loosened the *Lujan* standing test in specific situations. For example, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Court held that states received "special solicitude in [the] standing analysis," *id.* at 520, while in *FEC v. Akins*, 524 U.S. 11 (1998), the Court loosened the standard for informational injuries, *id.* at 24–25. But the Court still applies the *Lujan* test today. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). And it remains the most stringent standing test that the Court has adopted; if servicemembers pass the *Lujan* test, they likely have standing.

[56] *Lujan*, 504 U.S. at 560.

[57] *Id.*

[58] *Id.* at 575 (quoting *Ex parte* Lévitt, 302 U.S. 633, 634 (1938) (per curiam)).

[59] *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[60] *Id.* (alterations in original) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976)).

[61] *Id.* at 561 (first quoting *Simon*, 426 U.S. at 38; then quoting *id.* at 43).

[62] Smith v. Obama, No. 16-843, 2016 WL 6839357, at *6 (D.D.C. Nov. 21, 2016), *appeal docketed sub nom.* Smith v. Trump, No. 16-5377 (D.C. Cir. Dec. 21, 2016).

First, he would face a "concrete and particularized" injury: as an individual, separated from the general population as part of a discrete class of volunteer servicemembers,[63] he would suffer or face the imminent risk of suffering death, serious injury, and deprivation of liberty by being deployed to fight against his will. Such a finding would not be entirely unprecedented. For example, in *Berk v. Laird*,[64] the Second Circuit held that voluntary enlistees had standing to sue the Executive for sending them to fight in Vietnam in violation of their constitutional rights.[65]

The remaining two steps would be straightforward. The "injury . . . fairly can be traced to the challenged action of the defendant": the military would have directly issued the order to the Marine at the behest of the President. And it would be certain — not merely speculative — that an injunction against the Marine's pending deployment would eliminate the inherent risks to life, liberty, and property that would accompany a combat deployment: Servicemembers deployed into combat face an inherent risk of death or serious bodily harm. The military would compel compliance with the order, restricting the Marine's liberty. And if the Marine could articulate a property deprivation due to the deployment, that would also manifest immediately upon execution of the orders.

Standing is only the first major hurdle the hypothetical Marine must clear. Next, he must confront the political question doctrine.

### *B. The Political Question Doctrine*

The political question doctrine is a limit on the judiciary intended to preserve the decisionmaking authority of the political branches. Like standing doctrine, the political question doctrine's roots trace to the distinction between public and private rights. While courts had the clear duty to apply independent judgment to decide issues that implicated individual rights, the Constitution granted the power to decide how to dispose of public rights to the political branches. The judiciary

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[63] This Note does not consider the question whether military draftees have standing to sue. During World War I, the Court reached the merits of challenges to the selective draft. *See Selective Draft Law Cases*, 245 U.S. 366 (1918). But because the entire qualified citizenry is subject to a draft — much like a tax — draftees might face a generalized grievance argument that the discrete population of the volunteer military does not. *Cf.* United States v. Richardson, 418 U.S. 166, 180 (1974).

[64] 429 F.2d 302 (2d Cir. 1970).

[65] *Id.* at 305 (noting that the suit "possesse[d the] general attribute of justiciability"); Marty Lederman, *Why Captain Smith's Suit to Enforce the War Powers Resolution Won't Be a Big Deal* at n.3, JUST SECURITY (May 9, 2016, 8:42 AM), https://www.justsecurity.org/30949/captain-smiths-suit-enforce-war-powers-resolution-big-deal [https://perma.cc/7P9J-RQZ6] (describing *Berk*). Even while dismissing Captain Smith's suit, Judge Kollar-Kotelly found the standing logic in *Berk* and a similar case "logical and persuasive." *Smith*, 2016 WL 6839357, at *10.

was duty-bound to accede to such political determinations.[66] The "seedling case"[67] from which the political question doctrine sprouted was, unsurprisingly, *Marbury v. Madison*.[68] While Chief Justice Marshall famously held that Article III courts had the power of judicial review, he made clear that the power did not extend to "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive."[69]

During the nineteenth and early twentieth centuries, the political question doctrine focused on the constitutional text and structure. A court would ask whether the Constitution committed a specific question to one or both of the political branches.[70] In the process, the court would implicitly adjudicate a threshold separation of powers question: did the political branch exceed its authority, and thus trench upon another branch's authority, when it decided a question?[71] The Supreme Court found that certain questions relating to international borders, immigration, Indian relations, and national security were committed to one or both of the political branches.[72] But the court would not then dismiss the case as nonjusticiable.[73] Instead, if the Constitution did so commit a question, then the court would treat the answer that the branch or branches gave to the political question as a conclusive "factual rule of decision for the case" that the court was not empowered to revisit.[74] The court would then decide the case or controversy before it on the merits.[75]

The doctrine changed dramatically in the twentieth century. First, some Justices began treating the political question doctrine as a justiciability doctrine that barred courts from deciding the case in which it was presented.[76] Second, the Court began to hold that extraconstitutional prudential concerns could trigger the political ques-

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[66] *See* Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 498 (2004).

[67] Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 726 (2016).

[68] 5 U.S. (1 Cranch) 137 (1803).

[69] *Id.* at 170; *see also* Note, *supra* note 67, at 726.

[70] *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239–40 (2002); Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427, 433 (2014).

[71] Skinner, *supra* note 70, at 453; *see also, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 43–44 (1849).

[72] Skinner, *supra* note 70, at 434–46.

[73] Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1918 (2015).

[74] *Id.*; *see also, e.g.*, Doe v. Braden, 57 U.S. (16 How.) 635, 657–58 (1854).

[75] Grove, *supra* note 73, at 1918.

[76] *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946); Coleman v. Miller, 307 U.S. 433 (1939); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

tion doctrine.[77] This transformation culminated in the Supreme Court's 1962 decision in *Baker v. Carr*.[78] Writing for the Court, Justice Brennan firmly established that the political question doctrine could be triggered by prudential concerns.[79] He famously described the six circumstances in which a political question can arise: (1) if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) if there is "a lack of judicially discoverable and manageable standards for resolving" the case; (3) if the judiciary cannot decide it without making an inappropriate "initial policy determination"; (4) if the judiciary cannot decide "without expressing lack of the respect due [to] coordinate branches"; (5) if there is "an unusual need for unquestioning adherence to a political decision already made"; or (6) if there is "potentiality of embarrassment from multifarious pronouncements by various departments."[80] The first and second factors arose from the text of the Constitution and echoed the traditional doctrine.[81] But the final four were prudential, freeing the courts to relabel previously justiciable difficult questions as nonjusticiable political questions.

Despite its expansive and robust vision of the political question doctrine, *Baker* has not in practice significantly limited the Court's involvement in important separation of powers problems. The Supreme Court has mustered a majority to dismiss only two cases under the political question doctrine described in *Baker*,[82] and in both cases, it focused on the constitutional rather than the prudential factors.[83] In addition, although the *Baker* version of the political question doctrine purports to foreclose judicial review, it does not foreclose judicial resolution of separation of powers questions. As the *Baker* majority acknowledged, the analysis required by the constitutional factors — deciding whether a question was committed to a political branch, or whether that political branch exceeded its authority — was "itself a

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[77] *See* Note, *supra* note 67, at 731–32. In many cases, it appeared as though the Court covered itself with the fig leaf of the political question doctrine to avoid answering a politically contentious question. *See* Grove, *supra* note 73, at 1943.

[78] 369 U.S. 186 (1962).

[79] *Id.* at 210.

[80] *Id.* at 217.

[81] *See, e.g.*, Barkow, *supra* note 70, at 265 ( "The Court in *Baker* therefore recognized . . . the classical theory of the political question doctrine (the first factor and perhaps the second, depending on whether it is used to inform the first) . . . .").

[82] *See id.* at 269–70 (citing Gilligan v. Morgan, 413 U.S. 1 (1973); Nixon v. United States, 506 U.S. 224 (1993)). However, the lower courts have regularly used the *Baker* factors to dismiss difficult questions, especially those involving national security and foreign affairs. *See* Skinner, *supra* note 70, at 461–64; *see also, e.g.*, Corrie v. Caterpillar, Inc., 503 F.3d 974, 982–84 (9th Cir. 2007) (dismissing a suit against Caterpillar for selling bulldozers to Israel under the first, fourth, fifth, and sixth *Baker* factors).

[83] Barkow, *supra* note 70, at 269–73.

delicate exercise in constitutional interpretation, and is a responsibility of [the Supreme] Court as ultimate interpreter of the Constitution."[84] Thus, in both of the cases in which the Supreme Court has identified a nonjusticiable political question, it has considered the threshold separation of powers question whether the political branch had acted within its constitutionally allocated powers.[85]

Perhaps in recognition that its practice did not mirror its theory, the Court signaled a significant paring back of the political question doctrine in *Zivotofsky ex rel. Zivotofsky v. Clinton*[86] (*Zivotofsky I*). In that case, the parents of a U.S. citizen born in Jerusalem wanted his passport to list Israel as his country of birth, in accordance with a federal statute that purported to give them that option.[87] The State Department's longstanding policy of remaining neutral about which government exercises territorial sovereignty over Jerusalem contravened federal statute: claiming that the decision rested exclusively and preclusively with the President, the Department mandated that the passport should name only the city.[88] Writing for the majority, Chief Justice Roberts held that the case did not present a political question.[89] Though the subject matter implicated foreign policy decisions, the real issue was whether the Court would "enforce a specific statutory right."[90] The Court had to undertake only "a familiar judicial exercise": it had to "decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional."[91] To determine the constitutionality of the statute, the judiciary would have to "decid[e] whether the statute impermissibly intrude[d] upon Presidential powers under the Constitution."[92] The Court did not find that the Constitution textually committed the question to one of the political branches.[93] Instead, the responsibility rested with courts to decide the issue using a set of manifestly manageable and discoverable standards: the "familiar principles of constitutional interpretation."[94]

*Zivotofsky I* casts doubt on the viability of relying on the *Baker* prudential factors. The Court's subsequent adjudication of the controversy in *Zivotofsky* will have far-reaching effects on the separation

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[84] *Baker*, 369 U.S. at 211.
[85] Skinner, *supra* note 70, at 453.
[86] 566 U.S. 189 (2012).
[87] *Id.* at 191–93.
[88] *Id.* at 193.
[89] *Id.* at 194.
[90] *Id.* at 196.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 197–201.
[94] *Id.* at 201.

of powers,[95] yet the Court nevertheless decided to adjudicate it.[96] The decision suggests that prudence might no longer be enough to trigger the political question doctrine, even in the war powers context.[97]

Even a prudence-free political question doctrine would not have changed the outcome in Captain Smith's case. Congress never explicitly ordered the President to stop fighting ISIS, and many members of Congress demonstrated support for the conflict.[98] Faced with no raging interbranch dispute, the court noted that the 2001 AUMF committed broad power to the Executive and deferred to his interpretation of its reach.[99] As in *Martin v. Mott*, the only act of Congress touching on the conflict supported broad executive discretion, and Congress had not acted to curtail that discretion.

But this Note's hypothetical Marine's suit is different. If courts follow *Zivotofsky I*'s lead and do not apply the *Baker* prudential factors, their political question doctrine analysis will rest on the constitutional factors alone. Regardless of whether a court ultimately concludes that a political question is presented, it will be unable to avoid the question about the allocation of the war powers between the *disputing* political branches because the constitutional *Baker* factors require the court to conduct precisely that analysis.[100]

Even before *Zivotofsky I*, this anomaly led some judges to conclude that the political question doctrine offers courts no protection against hard national security choices when Congress has passed a statute purporting to constrain the President and has placed him in *Youngstown* Category Three. In *El-Shifa Pharmaceutical Industries Co. v. United States*,[101] for example, the D.C. Circuit, sitting en banc,

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[95] *See* Jack Goldsmith, *The Supreme Court, 2014 Term — Comment:* Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).

[96] *Zivotofsky I*, 566 U.S. at 194; *see also* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 433–34 (2015); Carol Szurkowski, Recent Development, *The Return of Classical Political Question Doctrine in* Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012)*, 37 HARV. J.L. & PUB. POL'Y 347, 357–58 (2014). The Court must have considered explicitly applying an analysis focusing on the *Baker* prudential factors — Justice Sotomayor walked through all the *Baker* factors in her concurring opinion, *Zivotofsky I*, 566 U.S. at 202–07 (Sotomayor, J., concurring in part and concurring in the judgment), and Justice Breyer relied on the *Baker* prudential factors in his dissent, *id.* at 212–20 (Breyer, J., dissenting).

[97] *See, e.g.*, *The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 315–16 (2012) (suggesting that a narrow reading of *Zivotofsky I* might be necessary to avoid adjudicating war powers questions).

[98] Smith v. Obama, No. 16-843, 2016 WL 6839357, at *13–14 (D.D.C. Nov. 21, 2016), *appeal docketed sub nom.* Smith v. Trump, No. 16-5377 (D.C. Cir. Dec. 21, 2016).

[99] *Id.* at *13.

[100] *See supra* notes 82–85 and accompanying text; *see also* Nixon v. United States, 506 U.S. 224, 237–38 (1993) ("[C]ourts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Id.* at 238.).

[101] 607 F.3d 836 (D.C. Cir. 2010) (en banc).

relied on the political question doctrine to dismiss a Federal Tort Claims Act suit brought by a Sudanese pharmaceutical company whose factory was destroyed in a U.S. cruise missile strike.[102] Concurring in the judgment, Judge Kavanaugh pointed out that "[t]he Supreme Court has never applied the political question doctrine in cases involving statutory claims" that allege a violation of a statute specifically passed to constrain executive action.[103] In these cases, a court must answer the question "whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II," or the court will resolve the separation of powers conflict "*sub silentio* in favor of the Executive through use of the political question doctrine."[104] This leads to a counterintuitive result: by declaring a suit nonjusticiable under the *Baker* constitutional factors, the court would decide that the President has an exclusive and preclusive power over the issue, and that Congress lacks authority to regulate that power by statute.[105] As one commentator has observed, "a claim to a federal statutory right can never present a political question"[106]: no matter which path the court chooses, it necessarily makes a decision about the Constitution's allocation of power.[107]

A court would face precisely the catch-22 described in *El-Shifa* in a suit brought by this Note's Marine. In the hypothetical, Congress and the President are in direct conflict either through the Resolution or through specific legislation rejecting the commitment of U.S. forces. A court would have judicially manageable standards to apply because it would be reviewing the constitutionality of a statute.[108] As described above, the Constitution textually commits some war powers to each political branch.[109] If a court were to dismiss the suit under the political question doctrine on the ground that the question whether to fight was committed to the Executive alone, it would implicitly hold that the Executive had not exceeded its constitutional authority when deciding to fight in contravention of a congressional act (the Resolution or otherwise). That holding would in turn mean Congress lacks the power to stop the President from fighting where and when he chooses. The Chief Justice's opinion in *Zivotofsky I* showed that the Supreme Court understood the logic of such cases as *El-Shifa* and would not

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102 *Id.* at 838–40.

103 *Id.* at 855 (Kavanaugh, J., concurring in the judgment).

104 *Id.*

105 *Id.* at 857.

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

107 *See* Skinner, *supra* note 70, at 453.

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

109 *See supra* notes 12–16 and accompanying text.

choose tacit acquiescence to the Executive through the political question doctrine. Lower courts could apply the same logic to suits such as the hypothetical Marine's.

### *C. A Few Caveats*

Although the modern versions of the standing and political question doctrines could result in a justiciable servicemember suit, there are several other practical obstacles that could permit the court to avoid the age-old question of how the war powers are allocated.

First, courts will likely look hard for any congressional action that they can interpret to grant the Executive authority to fight, thereby avoiding the separation of powers question altogether or resorting to a *Martin v. Mott*–like application of the political question doctrine. That is why this hypothetical assumes that the Executive acts either in the absence of any congressional act that might qualify as approval under the Resolution or in direct contravention of a congressional act that disapproves of the conflict. Second, a court might conclude that the servicemember lacks a right of action — that he has not proven he is owed a remedy for the Executive's violation of his rights. However, this possibility may have become less likely in the wake of *Armstrong v. Exceptional Child Center, Inc.*,[110] in which the Court suggested that federal courts may grant injunctive relief against executive officials planning to violate or actively violating federal law.[111] This Note's Marine might argue that the President had violated the Resolution or another explicit congressional act, triggering the equitable cause of action discussed in *Armstrong*. And the Marine could suggest that the Court has adopted analogous causes of action in the national security context before: in *Youngstown*, the Court enjoined the Executive from acting without identifying a statutory cause of action upon which the plaintiff steel corporations based their claim.[112]

Despite these potential obstacles, recent developments in standing and political question doctrines have at least made it more likely that a court could soon find itself caught in the crossfire of a battle between the executive and legislative branches over the division of the war powers.

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[110] 135 S. Ct. 1378 (2015).

[111] *Id.* at 1384; *see also* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902). *But see* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1011–18 (2008) (suggesting that the precedent has been misread to find implied causes of action against government officials).

[112] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1636–37 (1997).

### *D. Implications of Justiciable Servicemember Suits*

After several decades of warfare characterized by aggressive executive action and meek congressional acquiescence, justiciable servicemember suits might seem a desirable check on the President and Congress. The executive branch has consistently avoided forcing the courts to decide the division of the war powers. While successive administrations have declared the Resolution an unconstitutional limit on executive power,[113] each nevertheless worked to demonstrate that any conflict fought during its time in office did not violate the Resolution.[114] Each administration feared risking an adverse judgment that would constrain the Executive's control over the military. Servicemember suits might add to this check by giving a third party the power to force the issue in the courts. The President might more aggressively pursue congressional approval before committing troops or choose not to commit troops in the first place. And, of course, servicemembers like this Note's Marine would have a self-help measure to protect their core private rights against infringement by the Executive.

Yet, while the threat of servicemember suits might help limit executive overreach, it also risks turning the deeply rooted tradition of military discipline and subordination on its head. Since before the Founding, the Anglo-American legal tradition has recognized the military as a legal world parallel to, but apart from, the civilian world. Blackstone noted that the civilian and military legal traditions had very different underlying justifications: while civilian law existed to safeguard core private rights,[115] military law existed because of "the necessity of order and discipline in an army."[116] In his time, that meant placing "almost an absolute legislative power" over the military in the hands of the Crown.[117] While Blackstone bristled at the fact "that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen,"[118] he never questioned the need to subject soldiers and sailors to a stricter legal code.

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[113] *See The Supreme Court, 2011 Term — Leading Cases*, *supra* note 97, at 316.

[114] *See, e.g.*, *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 11–17 (2011) (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State) (arguing that the term "hostilities" in the Resolution is ambiguous and should be interpreted not to include the air and naval strikes against Libya); Authorization for Continuing Hostilities in Kos., 24 Op. O.L.C. 327, 365 (2000).

[115] 1 BLACKSTONE, *supra* note 40, at *120; *see also* Nelson, *supra* note 38, at 567.

[116] 1 BLACKSTONE, *supra* note 40, at *400.

[117] *Id.* at *403.

[118] *Id.*

Since the Founding, U.S. courts have "recognized that the military is, by necessity, a specialized society separate from civilian society"[119] with "a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[120] That legal system exists separate and apart for one reason: to maintain the military discipline necessary for an effective fighting force able to answer the civilian leadership's call in times of crisis.[121]

A suit like the one this Note's infantry Marine might bring would challenge this history. As Commander in Chief, the President sits atop the entire military chain of command. A suit would turn the commander and the commanded into legal adversaries when they are supposed to be functioning as a cohesive unit. And a suit would be a time-consuming challenge that risks bogging the Executive down in litigation and stopping much-needed personnel from entering the conflict.[122] Overall, such suits risk degrading the efficiency and effectiveness of the U.S. military.[123]

## III. A RETURN TO THE HISTORICAL ROOTS OF STANDING

### *A. Justice Thomas's* Wellness *Approach*

A return to the historical roots of the standing doctrine could render the servicemember suit contemplated by this Note nonjusticiable. Congress abandoned military conscription in 1973.[124] All soldiers, sailors, airmen, and Marines today volunteered to serve in a profession that deals with, in the words of a former Chairman of the Joint Chiefs

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119 Parker v. Levy, 417 U.S. 733, 743 (1974).

120 *Id.* at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)).

121 *See, e.g.*, *In re* Grimley, 137 U.S. 147, 153 (1890) (noting that an army's law "is that of obedience" in which "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier"); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) ("A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the [military's] object.").

122 *See Martin*, 25 U.S. (12 Wheat.) at 30–31.

123 It is important to note that the Uniform Code of Military Justice (UCMJ) does not require personnel to obey unlawful orders. 10 U.S.C. § 892 (2012) (punishing only the failure to obey a "lawful order"). Servicemembers therefore cannot claim the defense of superior orders for war crimes or specific illegal acts. *See, e.g.*, Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 170 (1993) (describing the defense in the context of the massacre at My Lai during the Vietnam War). But as the court pointed out in *Smith v. Obama*, "it appears well-settled . . . that there is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort." No. 16-843, 2016 WL 6839357, at *7 (D.D.C. Nov. 21, 2016), *appeal docketed sub nom.* Smith v. Trump, No. 16-5377 (D.C. Cir. Dec. 21, 2016); *see also* United States *ex rel.* New v. Rumsfeld, 448 F.3d 403, 411 (D.C. Cir. 2006).

124 John T. Warner & Beth J. Asch, *The Record and Prospects of the All-Volunteer Military in the United States*, J. ECON. PERSP., Spring 2001, at 169, 169.

of Staff, "'the management of violence' . . . on behalf of the nation."[125] If the courts are willing to return standing doctrine to its roots, the volunteer nature of modern military service might preclude servicemembers from seeking Article III redress.

The key insight comes from an unlikely source: a recent Supreme Court bankruptcy decision. In *Wellness International Network, Ltd. v. Sharif*,[126] the Supreme Court considered a case in which two parties consented to an adjudication by an Article I bankruptcy judge that would otherwise require an exercise of Article III judicial power.[127] Writing for the Court, Justice Sotomayor held that private parties could waive their right to Article III adjudication.[128] She further held that the adjudication did not "usurp the constitutional prerogatives of Article III courts" because it was subject to supervision by an Article III court and presented a negligible incursion into the judicial powers.[129] Chief Justice Roberts dissented on formalist grounds, arguing that the separation of powers cannot be waived by a private individual and any incursion into the judicial powers violates the Constitution.[130] The Chief Justice was joined by Justice Scalia and by Justice Thomas in part.[131]

But it is Justice Thomas's solo dissent that could provide the courts a means to avoid servicemember suits.[132] Justice Thomas noted that the "[d]isposition of private rights to life, liberty, and property falls within the core of the judicial power."[133] This notion is reinforced by three types of cases that have typically been held not to require an exercise of the judicial power: "[T]hose arising in the territories, those arising in the Armed Forces, and those involving public-rights disputes."[134] The first two are categorical exceptions derived from histor-

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[125] Interview by Jeffrey McClausland, Senior Fellow, Carnegie Council, with Gen. Martin E. Dempsey, in N.Y.C. (Nov. 6, 2014) [hereinafter Dempsey Interview] (quoting SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 12 (1957)), https://www.carnegiecouncil.org/studio/multimedia/20141106-a-conversation-with-general-martin-dempsey-chairman-of-the-joint-chiefs-of-staff [https://perma.cc/HG2M-WY8N].

[126] 135 S. Ct. 1932 (2015).

[127] *Id.* at 1938–42.

[128] *Id.* at 1944–45.

[129] *Id.*; *see also The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 201, 203 (2015).

[130] *Wellness*, 135 S. Ct. at 1950–60 (Roberts, C.J., dissenting).

[131] *Id.* at 1950.

[132] *Id.* at 1960 (Thomas, J., dissenting). Solo opinions can have a dramatic impact on the law as courts and commentators eventually recognize the wisdom in them. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[133] *Wellness*, 135 S. Ct. at 1963 (Thomas, J., dissenting).

[134] *Id.* at 1964 (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–67 (1982) (plurality opinion)). Justice Thomas noted that "the Court has upheld laws authorizing the

ical practice and constitutional interpretation.[135] But the public rights exception is different. It is "not that public rights affirmatively require adjudication by some other governmental power, but that the Government has a freer hand when private rights are not at issue" — which means that the so-called public rights exception to judicial power "may not require the presence of a public right at all, but may apply equally to any situation in which private rights are not asserted."[136] If the public rights exception is really more of an absence-of-a-private-right exception, then consent to an alternative disposition of one's private rights may eliminate the constitutional requirement of judicial intervention as a prerequisite to action by the political branches that deprives an individual of his private rights. Put differently, "[a]lthough it may not authorize a constitutional violation, consent may prevent one from occurring in the first place."[137]

The law provides analogues to this approach. The judiciary has for years recognized that a defendant's right to a jury trial is "exercised and honored, not disregarded," when the defendant waives it, thus "lift[ing] a limitation on government action by satisfying its terms."[138] For example, in *Patton v. United States*,[139] the Court noted that the jury system had always been a private right that the defendant could "forego at his election."[140] With the private right to a jury trial now absent, the judiciary could step in to adjudicate without a jury under the authority granted to it by Article III's Vesting Clause.[141] The same idea applies when individuals waive their right to access the courts entirely. People can "dispose of their own private rights freely, without judicial intervention," including by vesting some other authority (say, an arbitral tribunal) with the power to dispose of those private rights according to that authority's judgment (as in a binding arbitration).[142]

As discussed above, modern standing doctrine is an echo of the historical allocation of power between the judicial branch and the political branches to dispose of public and private rights.[143] When a litigant comes before the court without a private right, he lacks standing. It

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adjudication of cases arising in the Armed Forces in non–Article III courts-martial, inferring from a constellation of constitutional provisions that Congress has the power to provide for the adjudication of disputes among the Armed Forces it creates and that Article III extends only to *civilian* judicial power." *Id.*

135 *See id.*

136 *Id.* at 1968.

137 *Id.* at 1961.

138 *Id.* at 1962 (citing Patton v. United States, 281 U.S. 276, 296–98 (1930), *abrogated on other grounds*, Williams v. Florida, 399 U.S. 78 (1970)).

139 281 U.S. 276.

140 *Id.* at 298.

141 *Id.* at 298–99.

142 *Wellness*, 135 S. Ct. at 1968 (Thomas, J., dissenting).

143 *See supra* pp. 2187–89.

should not matter that the litigant has lost a private right because he consented to its disposition by other means.[144]

That logic applies to this Note's Marine. That Marine is a *volunteer*: he freely chose to enter the profession of arms and manage violence on behalf of the nation.[145] All servicemembers know, or should know, that the position for which they volunteer might require them to fight and thus risk losing their lives, liberties, or property.[146] The chain of command, with the President at the top, will dictate when that individual will fight. Arguably, upon volunteering, the servicemember has made a "conditional surrender" of his or her core private rights contingent on the future decision by the Executive to order him or her into combat.[147]

There is some precedent for inferring a conditional surrender: because of the unique military context, courts have long departed from standard interpretive defaults and read an implicit waiver of such fundamental constitutional rights as freedom of speech into the act of volunteering.[148] Courts would need to decide the breadth of that conditional surrender. On the one hand, courts have long held that servicemembers give up certain rights upon enlistment because of the nature of the service they join.[149] On the other, courts seem unlikely to find a knowing surrender if the context in which a violation arose were not incidental to military service, as with cases of sexual assault

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144 Bankruptcy law again provides a comparison. *Cf.* Sean O'Neal & Jessica L. Uziel, *No-Action Clauses in Bankruptcy: Standing in the Way of Standing*, AM. BANKR. INST. J., Dec. 2013, at 14, 14 (discussing bankruptcy cases in which courts found that plaintiffs lacked standing because they had bargained it away).

145 *See* Dempsey Interview, *supra* note 125.

146 While this point is common knowledge, military recruiters still make these risks clear. *See, e.g.*, *What We Do: Rapid Response*, MARINES, https://www.marines.com/what-we-do/rapid-response.html [https://perma.cc/29JL-4623] (informing visitors to the recruiting website that "[a]ll Marines know there may come a time when they are the first called upon to fight in defense of our nation and its interests"). Because this information is common knowledge that is reinforced by military recruiters over an extended recruitment process designed to screen out the physically or mentally unfit from service, courts could and should treat the decision to join as explicit consent to executive branch adjudication of service-related core private rights violations. *Cf.* Godinez v. Moran, 509 U.S. 389 (1993) (discussing standards for a competent and intelligent waiver of the Sixth Amendment right to counsel).

147 *Wellness*, 135 S. Ct. at 1968 (Thomas, J., dissenting).

148 *See, e.g.*, Raderman v. Kaine, 411 F.2d 1102, 1104 (2d Cir. 1969) ("If [a soldier] asks: Does being in the Army curtail or suspend certain Constitutional rights?, the answer is unqualifiedly 'yes.'"); *see also* Jason Steck, *You're in the Army Now! Reforming Military Enlistment Contracts*, 38 HAMLINE L. REV. 451, 460–63 (2015) (describing how courts deviate from normal contract law default rules for voluntary waiver of constitutional rights when considering military service contracts).

149 *See, e.g.*, *Raderman*, 411 F.2d at 1103–04; *cf.* Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

or harassment.[150] The rights at issue in the hypothetical Marine's suit seem more similar to the former than the latter. Risks to life, liberty, and property arise from the nature of military service; restricting the ability of servicemembers to claim judicial protection of those rights is necessary to the preservation of the discipline and obedience that are essential to military success.[151] The question then becomes whether this conditional surrender applies even if the order to deploy were potentially in violation of a statute.

Existing precedents, although not directed to this question, suggest that the answer is yes. Though servicemembers are obligated not to follow clearly unlawful orders, they are subject to punishment in a court-martial for disobeying orders simply because they question the congressional authorization of the conflict.[152] In other words, the military may deprive a servicemember of liberty or even life on the basis of an unlawful order, and it may do so without intervention by an Article III court. Such action would presumably not be possible had the servicemember not conditionally surrendered his or her core private rights in the manner contemplated by this Note.

Having conditionally surrendered his core private rights to the Executive, the Marine in this Note's hypothetical has no "legally protected" life, liberty, or property interest, the deprivation of which would give rise to an injury in fact.[153] Without standing, the case becomes nonjusticiable, and the courts can avoid deciding the separation of the war powers between the President and Congress. Such an approach also would complement the Supreme Court's decades-long consolidation along originalist lines and retreat from dubious modern separation of powers doctrines. This shift has manifested in diverse areas of the law, from the Commerce Clause[154] to independent agencies[155] and beyond. *Zivotofsky I* is one such case. Chief Justice Roberts turned from the modern political question doctrine; instead, he identified a private statutory right, noted that it was the Court's duty to decide if the statute granting the right was constitutional, and sent the case to the merits stage.[156] His approach recalls commitments about the judicial role in the early days of the Republic.[157]

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150 Other hurdles may prevent Article III adjudication of such claims. *See, e.g.*, Recent Case, Baldwin v. Dep't of Def., *No. 1:15-cv-00424 (E.D. Va. Oct. 14, 2016)*, 130 HARV. L. REV. 2241 (2017). Such cases are beyond the scope of this Note.

151 *See supra* pp. 2197–98.

152 *See supra* note 123.

153 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

154 *See* NFIB v. Sebelius, 567 U.S. 519, 554–58 (2012) (opinion of Roberts, C.J.) (curbing Congress's Commerce Clause power).

155 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010).

156 *Zivotofsky I*, 566 U.S. 189, 194–201 (2012).

157 *See* Szurkowski, *supra* note 96, at 359; *see also supra* p. 2191.

Justice Thomas's *Wellness* approach as applied to servicemembers would make sense in the context of this consolidation. The approach is rooted in the Founding-era understanding of the public/private rights dichotomy that underlies standing doctrine. It aligns with the judiciary's long-standing deference to the executive branch on matters concerning military discipline by correcting the extant doctrine to foreclose servicemember suits. And, most importantly, it leaves questions over the division of the war powers where they belong: with the political branches.

### *B. Bright Lines over Standards*

The principal drawback to an approach modeled on Justice Thomas's *Wellness* opinion is its novelty. Some courts might find it more appealing to redeploy the *Baker* prudential factors with which they are familiar.[158] Though *Zivotofsky I* cast serious doubt on the continued viability of the *Baker* prudential factors,[159] it did not explicitly overrule the *Baker* six-factor test. Some commentators have suggested a narrow reading of *Zivotofsky I* specifically to save the prudential factors.[160] And some lower courts have continued to cite all six *Baker* factors in cases touching on foreign affairs and national security.[161] Courts might simply choose to ignore the import of *Zivotofsky I* and dismiss cases under *Baker*.

But while the *Baker* prudential factors might be more familiar, they are problematic. First, judges lack clear guidance for how and when to apply these factors, leading to potentially divergent or arbitrary decisions.[162] Second, the *Baker* prudential factors might allow federal courts to abdicate their constitutionally defined role as adjudicators by giving an excuse to avoid controversial questions.[163] Thus, inasmuch as *Zivotofsky I* cast doubt on the prudential factors, it was a positive step toward removing the *Baker* factors from courts' political question

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158 *See* Skinner, *supra* note 70, at 461–65 (describing lower courts using *Baker*'s prudential factors to avoid difficult foreign policy questions).

159 *See supra* notes 86–97 and accompanying text; *see also, e.g.*, Cohen, *supra* note 96, at 434; Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1925–26 (2015) ("Chief Justice Roberts's opinion for six members of the Court abandoned the multifactor *Baker v. Carr* test.").

160 *See The Supreme Court, 2011 Term — Leading Cases*, *supra* note 97, at 313–17.

161 *See* Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring* Zivotofsky I*'s Political Question Analysis?*, LAWFARE (May 19, 2016, 4:23 AM), https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis [https://perma.cc/8P4P-CCLK] (collecting and analyzing cases).

162 *Compare, e.g.*, *Zivotofsky I*, 566 U.S. 189 (2012) (not applying any prudential factors), *with, e.g.*, *id.* at 202 (Sotomayor, J., concurring in part and concurring in the judgment) (applying the prudential factors and agreeing with the majority's result), *and id.* at 212 (Breyer, J., dissenting) (applying the prudential factors and disagreeing with the majority's result).

163 *See* Skinner, *supra* note 70, at 464.

analyses. But as this Note has argued, the prudential factors are required to render servicemember suits nonjusticiable under the political question doctrine. Given that risk, Justice Thomas's *Wellness* approach would serve as a targeted solution to a specific problem: it would per se bar servicemember suits. If the person knowingly volunteered for service, he or she would not have an injury in fact, and thus would not have standing, ending the suit quickly and efficiently. Such a bright-line rule would be preferable to a revival of the ill-defined prudential standards in *Baker*.

## CONCLUSION

Under the current standing and political question doctrines, servicemembers like the hypothetical Marine in this Note probably have a justiciable case. Such a suit would necessarily force the judiciary to decide the division of the war powers between the two political branches. Both political branches have reason to worry about how the courts might divide that power. Thus, those concerned about presidential overreach or congressional inaction in the national security sphere might welcome such suits. But the history, structure, and character of the military suggest that encouraging servicemember suits risks undermining the discipline and obedience upon which the military depends. To avoid such suits, courts might look to the public rights/private rights analysis found in Justice Thomas's *Wellness* dissent. Courts could hold that military members, having freely and willingly volunteered to place their core private rights to life, liberty, and property in jeopardy on behalf of their nation, surrendered those rights contingent on an executive branch decision to send them into combat. Such a holding would mean that volunteer servicemembers have no injury in fact upon which to base standing. Without standing, their cases become nonjusticiable, and the courts could avoid answering the hardest of separation of powers questions.