

## COMMENT

### There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of *Zivotofsky v. Clinton*

The political question doctrine poses a paradox. Courts increasingly dismiss claims as political questions, especially in sensitive fields like foreign affairs and national security.<sup>1</sup> Yet the principles underlying the doctrine remain “murky and unsettled,”<sup>2</sup> an “enigma” to courts and commentators alike.<sup>3</sup> One scholar famously questioned whether political questions even exist.<sup>4</sup>

The Supreme Court recently offered a partial answer. In *Zivotofsky ex rel. Zivotofsky v. Clinton*, the Court held—in contrast to two lower courts—that a claim under a statute entitling American passport holders born in Jerusalem to designate their birthplace as “Israel” did not constitute a political question.<sup>5</sup>

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1. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (en banc); *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009), *rev’d sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); see also Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1321 (2012) (observing an expansion in use of the political question doctrine after September 11, 2001); Note, *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1193-98 (2009) [hereinafter *Access to Courts*] (noting increasing judicial abstention in foreign affairs cases).
  2. *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 n.8 (D.C. Cir. 1984) (Bork, J., concurring)).
  3. Martin H. Redish, *Judicial Review and the ‘Political Question,’* 79 NW. U. L. REV. 1031, 1031 (1985).
  4. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976).
  5. 132 S. Ct. 1421 (2012). The statute created controversy because United States policy does not recognize Jerusalem as part of Israel. *Id.* at 1425; see *infra* note 31 and accompanying text.

The few commentators who have discussed *Zivotofsky* have urged a narrow reading.<sup>6</sup> This Comment argues instead that the case supports a sweeping and significant rule: *a claim to a federal statutory right can never present a political question.*

Part I probes the definition of political questions and the function of statutes in the doctrine. Part II analyzes the Court's reasoning in *Zivotofsky*. Part III extends that reasoning to establish the principle that statutory claims can never present political questions. While lower court judges suggested partial versions of this position before *Zivotofsky*,<sup>7</sup> this Comment marks the first attempt to apply the argument to all statutory cases. I conclude that a rule against statutory political questions injects needed doctrinal clarity and vindicates fundamental values of separation of powers, access to courts, and executive compliance with the law.

## I. THE ROLE OF STATUTES IN THE POLITICAL QUESTION DOCTRINE

The political question doctrine debuted in *Marbury v. Madison*.<sup>8</sup> Chief Justice Marshall explained that when “the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.”<sup>9</sup> One quintessential area of presidential discretion is the appointment of judicial officers, such as William Marbury.<sup>10</sup> Yet the Court declined to dismiss Marbury's claim as a political question. The reason

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6. See *The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 307, 311 (2012) [hereinafter *Leading Cases*]; Lyle Denniston, *Opinion Analysis: Enabling a Constitutional Fight*, SCOTUSBLOG (Mar. 26, 2012, 6:00 PM), <http://www.scotusblog.com/?p=141804>.

7. See *Zivotofsky v. Sec'y of State*, 610 F.3d 84, 84 (D.C. Cir. 2010) (en banc) (statement of Edwards, J.); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring); *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) (Edwards, J., concurring), *rev'd sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

8. 5 U.S. (1 Cranch) 137 (1803); see THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 3, 10 (1992) (discussing the doctrine's origins in *Marbury*).

9. *Marbury*, 5 U.S. (1 Cranch) at 166.

10. President Adams appointed Marbury to be a Justice of the Peace. *Id.* at 167. For background on the position of Justice of the Peace, see David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996).

was that Congress had enacted a statute restricting the President's discretion by entitling Justices of the Peace to "continue in office for five years."<sup>11</sup> Thus, an executive act that would have presented a political question in the absence of a statute became judicially reviewable in the presence of a statute.

Statutory constraints on the executive also proved decisive in other early cases.<sup>12</sup> By contrast, no case in which the Court recognized a political question stemmed from a statute. Political questions arose only from constitutional or common law challenges to actions within the unquestioned discretion of a political branch, such as the President's recognition of a foreign government.<sup>13</sup>

Modern political questions have coalesced into two primary categories.<sup>14</sup> First, courts will not adjudicate claims arising from "a textually demonstrable constitutional commitment of the issue to a coordinate political department."<sup>15</sup> The Court has applied this principle to claims under the Republican Guarantee Clause,<sup>16</sup> the Impeachment Trial Clause,<sup>17</sup> and, in dicta, Congress's power to examine the qualifications of its members.<sup>18</sup> Second, courts will not adjudicate claims that present "a lack of judicially discoverable and manageable

11. *Marbury*, 5 U.S. (1 Cranch) at 154.
12. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814) (holding that a congressional declaration of war did not authorize the executive to seize enemy property in the United States); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) (rejecting the Navy Secretary's authorization of a military vessel seizure in defiance of an implied congressional prohibition); see CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 56-58 (3d ed. 2009) (assessing early political question cases).
13. See *United States v. Palmer* 16 U.S. (3 Wheat.) 610, 634 (1818); see also *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (determination of a foreign nation's sovereignty); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 308-13 (1829) (determination of territorial boundaries).
14. For detailed histories of the political question doctrine, see FRANCK, *supra* note 8; 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 (2002); Henkin, *supra* note 4; Redish, *supra* note 3; and Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 453 (2004).
15. *Baker v. Carr*, 369 U.S. 186, 217 (1962).
16. U.S. CONST. art. IV, § 4; see *Colegrove v. Green* 328 U.S. 549 (1946) (drawing of congressional districts by Illinois state legislature); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (recognition of state government following the Dorr Rebellion).
17. U.S. CONST. art. I, § 3, cl. 6; see *Nixon v. United States*, 506 U.S. 224 (1993).
18. U.S. CONST. art. I, § 5, cl. 1; see *Powell v. McCormack*, 395 U.S. 486, 521 n.42 (1969).

standards.”<sup>19</sup> The Court has invoked this rationale to dismiss suits challenging a state’s procedures for ratifying a constitutional amendment<sup>20</sup> and seeking to establish protocols for the National Guard.<sup>21</sup> But in no case has the Supreme Court ever found a political question arising from a statutory claim.<sup>22</sup>

By contrast, lower federal courts have increasingly embraced statutory political questions,<sup>23</sup> especially as statutory claims against the executive multiplied after September 11, 2001.<sup>24</sup> This approach has provoked some disagreement, most notably a concurring opinion by Judge Kavanaugh denouncing the D.C. Circuit’s invocation of the political question doctrine in a statutory case involving the Clinton Administration’s bombing of a

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19. *Baker*, 369 U.S. at 217. The *Baker* Court suggested four other possible rationales for political questions, *see id.*, but the Supreme Court’s recent political question opinions, including *Zivotofsky*, seem to have narrowed the list to the two rationales outlined here. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon*, 506 U.S. at 228); *see also* Barkow, *supra* note 14, at 267-73 (noting the apparent narrowing of the doctrine to the first two *Baker* factors).
  20. *Coleman v. Miller*, 307 U.S. 433, 454 (1939) (“[T]hese conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable.”).
  21. *Gilligan v. Morgan*, 413 U.S. 1 (1973).
  22. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) (“The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never.”); *see also* *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230-33 (1986) (declining to hold a particular statutory claim a political question); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (construing a statute to avoid finding a political question).
  23. *See, e.g.,* *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938 (5th Cir. 2011); *El-Shifa*, 607 F.3d at 836; *Zivotofsky v. Sec’y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *rev’d sub nom. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997). The D.C. Circuit is heavily represented in this sample because it hears a disproportionate number of statutory cases against the federal government. *See* Recent Case, *El-Shifa Pharmaceutical Industries Co. v. United States*, 124 HARV. L. REV. 640, 640 (2010) [hereinafter Recent Case] (“The D.C. Circuit frequently encounters cases implicating decisions of the political branches, and thus its political question jurisprudence is particularly important in managing the separation of powers.”).
  24. *See* 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, 693-94 (2008); *see also* sources cited *supra* note 1.

pharmaceutical factory in Sudan.<sup>25</sup> Yet the trend has persisted.<sup>26</sup> Scholars have nonetheless largely avoided the issue of statutory political questions, focusing instead on broader puzzles about the doctrine's scope.<sup>27</sup> Two recent casebooks ask rhetorically whether the doctrine applies to statutory claims,<sup>28</sup> but no answer arrived—until *Zivotofsky* reached the Supreme Court.

## II. CLARIFYING THE DOCTRINE: ZIVOTOFSKY V. CLINTON

Menachem Binyamin Zivotofsky's unlikely role in the political question drama began on October 17, 2002, when he was born to American-citizen parents in a Jerusalem hospital.<sup>29</sup> Three weeks earlier, Congress had passed a law providing that “[f]or purposes of the . . . issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary of State shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.”<sup>30</sup> This statutory directive contradicted official State Department policy that Jerusalem's status remains unresolved. President Bush signed the bill but declined to enforce the provision, section 214(d), because it

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25. See *El-Shifa*, 607 F.3d at 855-58 (Kavanaugh, J., concurring) (criticizing the “backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner”); see also *Zivotofsky v. Sec’y of State*, 610 F.3d 84, 87-88 (D.C. Cir. 2010) (en banc) (statement of Edwards, J.) (arguing against the statutory political question in the case at hand, but suggesting that one might exist in other cases); *Zivotofsky*, 571 F.3d at 1233 (Edwards, J., concurring) (same).
  26. See Recent Case, *supra* note 23, at 646 (noting “a broader trend of increasing judicial deference to the executive branch” through courts’ use of the political question doctrine); Vladeck, *supra* note 1, at 1321.
  27. Compare LEARNED HAND, THE BILL OF RIGHTS 15 (1958), and Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (arguing for flexible, prudential application of the doctrine), with Gerald Gunther, *The Subtle Vices of the “Passive Virtues,”* 64 COLUM. L. REV. 1 (1964), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (advocating a narrow doctrine grounded in constitutional text). For more recent perspectives on this fundamental debate, see sources cited *supra* note 14.
  28. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 244 (6th ed. 2009); THOMAS M. FRANCK ET AL., FOREIGN RELATIONS AND NATIONAL SECURITY LAW 872 (4th ed. 2012).
  29. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1425 (2012).
  30. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

would “impermissibly interfere with the President’s constitutional authority to . . . determine the terms on which recognition is given to foreign states.”<sup>31</sup>

Zivotofsky’s parents sued to enforce his statutory rights. The district court accepted the government’s argument that the claim presented a political question, and the D.C. Circuit affirmed.<sup>32</sup> Applying the “textual commitment” branch of the doctrine, the court of appeals explained that “[t]he President’s exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts.”<sup>33</sup> The court noted that “[w]e have never relied on the presence or absence of a statutory challenge in deciding whether the political question doctrine applies,” and concluded that “Zivotofsky’s claim presents a nonjusticiable political question because it trenches upon the constitutionally committed recognition power.”<sup>34</sup> In a concurring opinion, Judge Edwards disagreed with the political question rationale and argued that the court should invalidate the statute on the merits.<sup>35</sup>

The Supreme Court reversed, holding by an eight-to-one margin that Zivotofsky’s statutory claim did not present a political question.<sup>36</sup> Chief Justice Roberts’s opinion pointedly explained that the “existence of a statutory right . . . is certainly relevant to the Judiciary’s power to decide Zivotofsky’s claims,” and chided the D.C. Circuit for “not even mention[ing] § 214(d) until the fifth of its six paragraphs of analysis.”<sup>37</sup> Because neither party disputed the interpretation of the statute, “the only real question for the courts [was] whether the statute is constitutional.”<sup>38</sup> Because the lower courts had not

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31. Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1658, 1659 (Sept. 30, 2002).

32. *Zivotofsky v. Sec’y of State*, 571 F.3d 1227 (D.C. Cir. 2009), *aff’g* 511 F. Supp. 2d 97 (D.D.C. 2007).

33. *Id.* at 1231. The Eleventh Circuit issued a similar statement in finding a statutory political question. *See Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (“The justiciability of a controversy depends not upon the existence of a federal statute, but upon whether judicial resolution of that controversy would be consonant with the separation of powers principles embodied in the Constitution.”).

34. *Zivotofsky*, 571 F.3d at 1232.

35. *Id.* at 1233 (Edwards, J., concurring).

36. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

37. *Id.* at 1427.

38. *Id.* at 1424.

answered this question, the Court remanded the case to the D.C. Circuit.<sup>39</sup> (A year later, the court of appeals held § 214(d) unconstitutional on the merits.<sup>40</sup>)

The Court never stated categorically that statutory claims could not present political questions. But Justices Sotomayor and Alito felt obliged to write separate opinions clarifying their view that, in Justice Alito's words, "determining the constitutionality of an Act of Congress may present a political question" in some cases.<sup>41</sup> Justice Breyer's solo dissent would have found a political question in *Zivotofsky* based on "prudential considerations" including the sensitivity of Middle East diplomacy and the Court's lack of foreign policy expertise.<sup>42</sup>

### III. THE RULE AGAINST STATUTORY POLITICAL QUESTIONS

Given the controversial legal and political issues at stake, *Zivotofsky* generated surprisingly little attention.<sup>43</sup> The limited commentary has rejected a reading that makes "an entire category of cases" based on statutory claims "inherently justiciable."<sup>44</sup> But the Court's reasoning supports this broader result. Moreover, rejecting statutory political questions squares with

39. *Id.* at 1431.

40. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, No. 07-5347, 2013 WL 3799663 (D.C. Cir. July 23, 2013). For an insightful perspective on the merits decision, see Jack Goldsmith, *Quick Reaction to CADCS's Analysis in Zivotofsky*, LAWFARE (July 24, 2013, 6:08 PM), <http://www.lawfareblog.com/2013/07/quick-reaction-to-cadcs-analysis-in-zivotofsky>.

41. *Zivotofsky*, 132 S. Ct. at 1436 (Alito, J., concurring); see also *id.* at 1435 (Sotomayor, J., concurring) ("It is not impossible to imagine a case involving the application or even the constitutionality of an enactment that would present a nonjusticiable issue.").

42. *Id.* at 1437-41 (Breyer, J., dissenting).

43. One explanation for the lack of attention may be that the Court released *Zivotofsky* on the same day that it heard oral argument on the Affordable Care Act. See, e.g., Peter Spiro, *In Other Supreme Court News: Political Question Doctrine Takes a Hit in Jerusalem Passport Case*, OPINIO JURIS (Mar. 26, 2012, 11:49 AM), <http://opiniojuris.org/2012/03/26/in-other-supreme-court-news-political-question-doctrine-takes-a-hit-in-jerusalem-passport-case> ("Too bad the decision comes out today – with the Supreme Court beat otherwise occupied, I wonder if it will get more than a blip in tomorrow's papers."). Another explanation is that the Court remanded on the controversial merits question, see *supra* text accompanying note 39, which may have conveyed the impression of a narrow procedural ruling. Finally, commentators may resist the argument that *Zivotofsky* precludes all statutory political questions, both because the Court failed to articulate a bright-line rule and because norms of judicial deference to executive expertise in national security cases have grown so ingrained that *Zivotofsky* can be dismissed as a mere outlier. See Vladeck, *supra* note 1, at 1329-30.

44. *Leading Cases*, *supra* note 6, at 311.

longstanding doctrine, vindicates structural separation of powers principles, and advances prudential considerations like access to courts and clarity of the law. This Part thus contends that the rule against statutory political questions should be recognized as the law of the land.

### A. *Preserving Doctrinal Consistency*

As noted in Part I, the Supreme Court has never found a statutory political question. *Zivotofsky* shows why this doctrinal consistency is not a coincidence but rather a necessary rule of federal jurisdiction. The Court's opinion reiterated the two rationales for political questions: a "textually demonstrable constitutional commitment" of constitutional power to one of the political branches, and "a lack of judicially discoverable and manageable standards" to resolve a case.<sup>45</sup> The textual commitment prong cannot apply to a statutory claim because, as the Court explained, "there is . . . no exclusive commitment to the Executive of the power to determine the constitutionality of a statute."<sup>46</sup> Similarly, the judicially manageable standards prong does not apply because federal courts have developed the "familiar principles of constitutional interpretation" and statutory interpretation needed to resolve statutory cases.<sup>47</sup>

While the Court appropriately limited its holding to the case before it, these principles apply with equal force to *all* statutory claims. Thus, courts cannot invoke either branch of the political question doctrine without contradicting *Zivotofsky's* reasoning. This clarification of the doctrine may force significant shifts in the lower courts, which—with rare exceptions like the separate opinions by Judges Edwards and Kavanaugh noted above<sup>48</sup>—had routinely departed from the Supreme Court's refusal to recognize statutory political questions.<sup>49</sup>

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45. *Zivotofsky*, 132 S. Ct. at 1428; see *supra* notes 15-21 and accompanying text (outlining these rationales).

46. *Zivotofsky*, 132 S. Ct. at 1428; see *id.* at 1435 (Sotomayor, J., concurring) (agreeing with this position). Likewise, there is no exclusive commitment to the executive to interpret federal statutes in nonconstitutional cases. Cf. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (explaining that a court's holding that a statute has an unambiguous meaning trumps a contrary interpretation by an administrative agency).

47. *Zivotofsky*, 132 S. Ct. at 1430.

48. See *supra* note 7.

49. See *supra* notes 23, 26.



### B. Vindicating the Separation of Powers

Scholars and courts agree that the political question doctrine arises “primarily [as] a function of the separation of powers.”<sup>50</sup> But that concept requires further definition. When the Court has invoked the separation of powers in political question cases, it has referred to the separation *between the judicial branch and one of the political branches*. For example, in *Nixon v. United States*, the Court refused to second-guess the Senate’s procedures for exercising its “sole Power to try all Impeachments.”<sup>51</sup> By contrast, the Court has consistently adjudicated cases involving the separation of powers *between the legislative and executive branches*. Indeed, some of the most significant decisions in constitutional law fall into this category.<sup>52</sup> Moreover, the Court’s role as the ultimate tiebreaker between the political branches helps sustain the constitutional order.<sup>53</sup>

The distinction between these meanings of “separation” derives from structural constitutional principles. As Judge Kavanaugh insightfully observed, the political question doctrine operates asymmetrically in favor of the executive.<sup>54</sup> When a court dismisses a claim as nonjusticiable, the defendant wins and the status quo prevails. By definition, when the claim alleges the executive’s failure to comply with a statute, the result is that “Congress is unable to constrain Executive conduct in the challenged sphere of action.”<sup>55</sup>

This outcome raises troubling implications, especially in the field of national security, where the Constitution distributes power among both

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50. *Baker v. Carr*, 369 U.S. 186, 210 (1962); Barkow, *supra* note 14, at 335 (“The doctrine strikes at the heart of the separation of powers and the need for each branch to stay within its sphere to maintain the constitutional order.”).
51. U.S. CONST. art. I, § 3, cl. 6; *Nixon v. United States*, 506 U.S. 224 (1993).
52. *E.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926).
53. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 162 (2001) (invoking a “reverse political question doctrine” to justify judicial intervention rather than abstention in cases of constitutional or national crisis). For a contrary perspective, see Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1109 (2001).
54. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 855 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring).
55. *Id.* at 857.

political branches.<sup>56</sup> By systematically favoring the executive over the legislature, statutory political questions enable executive lawlessness and destabilize what Justice Jackson termed “the equilibrium established by our constitutional system.”<sup>57</sup> It is important to recognize, however, that the rule against statutory political questions does not imply that Congress can always constrain the President. If a statute invades a constitutional power committed exclusively to the executive, the court should invalidate the law—as the Supreme Court has done in several landmark cases,<sup>58</sup> and as the D.C. Circuit did with respect to § 214(d) on remand.<sup>59</sup> Conversely, if Congress enacted the statute validly, the court must enforce the law against the President.<sup>60</sup> But in each scenario, the separation of powers requires adjudicating the merits. As *Zivotofsky* put it, “[e]ither way, the political question doctrine is not implicated.”<sup>61</sup>

### C. Advancing Prudential Objectives

Judicial opponents of statutory political questions have relied primarily on doctrinal and structural constitutional arguments. But prudential

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56. Compare U.S. CONST. art. I, § 8 (providing Congress with powers to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . raise and support Armies . . . [and] provide and maintain a Navy”), with U.S. CONST. art. II, §§ 2, 3 (providing the President with powers to “be Commander in Chief of the Army and Navy . . . make Treaties, provided two thirds of the Senators present concur . . . appoint Ambassadors . . . [and] receive Ambassadors and other public ministers”). See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 69 (1990) (“[G]enerally speaking, the foreign affairs power of the United States is a *power shared* among the three branches of the national government.”).
57. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). To situate this Comment’s argument within Justice Jackson’s classic tripartite framework, see *id.* at 635–38, the flaw with statutory political questions is that they improperly shift cases from Category Three, in which the executive takes action “incompatible with the . . . will of Congress” and finds its power at “its lowest ebb,” into Category Two, in which presidential power is evaluated against a backdrop of congressional silence, see *id.*
58. E.g., *INS v. Chadha*, 462 U.S. 919 (1983); *Myers v. United States*, 272 U.S. 52 (1926).
59. See *supra* note 40 and accompanying text.
60. E.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown*, 343 U.S. at 579.
61. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012).

considerations also bolster this position.<sup>62</sup> Consider the practical consequences of dismissing a statutory claim like Zivotofsky's. On the one hand, if the statutory constraint is constitutional but the claim is dismissed, the court has sanctioned executive defiance of a valid statute, thus contradicting the foundational principle that no President stands above the law.<sup>63</sup> On the other hand, if the statute is unconstitutional and the claim is dismissed, the unconstitutional law remains on the books "like a loaded weapon ready for the hand" of future executives to abuse.<sup>64</sup>

Even presuming the good faith of public officials, statutory political questions deprive the government of valuable guidance by failing to demarcate the boundaries of each branch's authority. As Justice Kennedy noted at the *Zivotofsky* oral argument, avoiding the merits of statutory claims invites "the specter of constant legislative determinations that are not clearly" on either side of the constitutional line.<sup>65</sup> Paradoxically, a doctrine designed to constrain judicial discretion<sup>66</sup> can yield broader and less transparent decisions than merits holdings. Statutory political questions thus represent a form of false modesty, professing judicial restraint but producing judicial abdication.

Government actors are not the only ones who suffer when courts find statutory political questions. The litigant whose claim is dismissed loses his or her day in court. This problem is especially acute given the prominent role of statutes as a source and a vehicle for individuals to vindicate fundamental rights.<sup>67</sup> Of course, some claims dismissed as political questions would not have prevailed on the merits. But procedural justice—the understanding that

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62. For an elaboration of doctrinal, structural, and prudential modalities of constitutional argument, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 1-8 (1982).

63. See *United States v. Nixon*, 418 U.S. 683, 708 (1974).

64. Cf. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (coining the phrase to describe the risks created by a misguided judicial precedent).

65. Transcript of Oral Argument at 35, *Zivotofsky*, 132 S. Ct. 1421 (2012) (No. 10-699).

66. See, e.g., Bickel, *supra* note 27, at 40 (characterizing the doctrine as exemplifying a "passive virtue[']").

67. See WILLIAM N. ESKRIDGE JR. & JOHN A. FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTIONALISM* 5 (2010) (noting that "statutes commonly provide positive rights to people, providing them with legal means to combat oppression and discrimination"); *Access to Courts*, *supra* note 1, at 1193-98.

the legitimacy of a legal system depends on litigants' rights to have their claims heard—demands merits adjudication when possible.<sup>68</sup>

Moreover, because a political question holding stamps a claim as unsuited for judicial resolution, plaintiffs generally have no other forum in which to seek redress. When courts dismiss common law or constitutional claims as political questions, the disappointed parties may petition the legislature to recognize their rights via statute. But when courts dismiss a statutory claim, injured plaintiffs have nowhere to turn.<sup>69</sup> Prudential considerations counsel against delivering such a far-reaching disposition without considering the merits—particularly when the claimant asserts a right conveyed through the democratic process of statutory enactment.

## CONCLUSION

This Comment has advocated a straightforward proposition: a federal statutory claim can never present a political question. The rule against statutory political questions builds on *Zivotofsky's* reasoning and arguments articulated by Judges Edwards and Kavanaugh in earlier separate opinions. The proposal extends beyond any previous scholarly or judicial position by applying the rule to all statutory cases—and by defending it based on a combination of doctrinal, structural, and prudential grounds.

Ultimately, the most important implications of this Comment's proposal transcend judicial practice. Rejecting statutory political questions redeems the deep structural premises of American democracy. By preventing courts from circumventing the legislature's ability to constrain the executive, the rule proposed in this Comment would reinforce the principle that "the Constitution diffuses power the better to secure liberty."<sup>70</sup> It would provide plaintiffs a forum to vindicate the rights that their elected representatives have created.

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68. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26-27 (2007). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (elaborating the theory of procedural justice).

69. By depriving the plaintiff of an alternative forum, the political question doctrine differs sharply from other forms of judicial abstention, which leave state courts open to plaintiffs whose claims are dismissed in federal court. The analogy between the political question doctrine and these other forms of abstention in Justice Sotomayor's concurrence thus rests on a faulty premise. See *Zivotofsky*, 132 S. Ct. at 1434 (Sotomayor, J., concurring).

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

And it would ensure, in the words of Chief Justice Marshall, that our constitutional system reflects a “government of laws, and not of men.”<sup>71</sup>

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71. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

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