Articles

Political Questions and the Role of Federal Courts in Deciding Claims that the Executive Branch is Violating Fundamental Norms of International Law: The Case of United States Aid for the Israeli War Against Palestinians in Gaza and the West Bank

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A recent challenge to the Biden Administration's military aid to Israel as aiding genocide presents an important question of the role of U.S. courts in adjudicating claims that top U.S. officials, in their execution of U.S foreign policy, are violating fundamental international law norms, such as the prohibition against committing violating fundamental international law norms, such as the prohibition against committing or aiding and abetting genocide. Both the District Court and the Court of Appeals for the Ninth Circuit dismissed the case as presenting a non-justiciable political question.

The Ninth Circuit's decision raises the broad question of whether challenges to U.S. government violations of fundamental norms of international law can ever be justiciable in domestic courts. The court's holding suggests that all cases challenging a broad U.S. policy of committing or aiding torture or genocide abroad will be dismissed as a political question. While the panel attempted to temper its holding by asserting that "although some cases involving alleged genocide will be justiciable," the decision's rationale contradicts this.

This essay will analyze Defense for Children International-Palestine v. Biden *("*Defense for Children*") as a window into broader, theoretical questions of the legitimacy and viability of the political question doctrine as the courts have applied it to foreign affairs disputes. Further, this discussion of Defense for Children will fashion a proposed solution to the conundrum federal courts face when confronted with broad challenges to U.S. foreign policy as violative of the Constitution, congressional statutes, or international law.*

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TABLE OF CONTENTS

INTRODUCTION

The Israeli military campaign against Gaza, undertaken in response to Hamas's October 7, 2023 attack on Israel, has occasioned litigation in various international fora and domestic courts around the world. South Africa, now joined by other nations, has alleged in the International Court of Justice ("ICJ") that Israeli actions against Palestinians in Gaza constitute genocide prohibited by the Genocide Convention. The International Criminal Court ("ICC") issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu, the former Israeli Defense Minister, and a (now deceased) Hamas leader who planned the initial attack on the grounds that all three leaders committed war crimes.

In the United States, the Center for Constitutional Rights and its co-counsel[1] filed a lawsuit against President Joe Biden, Secretary of State Antony Blinken, and Secretary of Defense Lloyd Austin on behalf of both Palestinian civilians whose family members were killed, displaced, and subjected to extreme conditions in Gaza, and Palestinian human rights organizations.[2] The plaintiffs alleged that the defendants directly aided and abetted an unfolding genocide by the State of Israel against the civilian population in Gaza.[3]

This case raises an important question of the role of U.S. courts in adjudicating claims that top U.S. officials, in their execution of U.S foreign policy, are violating fundamental international law norms, such as the prohibition against committing or aiding and abetting genocide. The U.S. District Court for the Northern District of California held a hearing on the plaintiffs' motion for a preliminary injunction. Some of the plaintiffs testified in the hearing, including a doctor testifying from a hospital in Gaza. Although the District Court judge held that "it is plausible that Israel's conduct amounts to genocide," and implored the "[d]efendants to examine the results of their unflagging support of the military siege . . . in Gaza," as the ICJ found in its provisional measures in *South Africa v. Israel*, he nonetheless dismissed the case as a nonjusticiable political question.[4] The court based its political question holding entirely on the proposition that "[f]oreign policy is constitutionally committed to the political branches of government, and disputes over foreign policy are considered nonjusticiable political questions."[5]

On appeal, the Ninth Circuit Court of Appeals affirmed the political question dismissal.[6] The panel took a more nuanced perspective compared to the District Court's sweeping pronouncement that foreign policy is constitutionally committed to the political branches of government. The panel concluded that the

1. The San Francisco firm Van Der Hout LLP was co-counsel in the case. Def. for Child. Int'l–Palestine v. Biden, 714 F. Supp. 3d 1160, 1161 (N.D. Cal. 2024).

2. *See generally id.* (summarizing why plaintiffs filed their lawsuit).

3. *Id.*

4. *Id.* at 1167; Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Provisional Measures, 2024 I.C.J 3, ¶ 54 (Jan. 26).

5. *Def. for Child. Int'l-Palestine*, 714 F. Supp. 3d at 1165 (citing Haig v. Agee, 453 U.S. 280, 292 (1981)).

6. Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 929 (9th Cir. 2024).

Circuit decisions "have repeatedly held that the political question doctrine applies in the face of allegations that a defendant had violated legal obligations rooted in international law, where the United States' foreign policy decisions were strongly implicated."[7]

The Ninth Circuit's decision raises the broad question of whether challenges to U.S. government violations of fundamental norms of international law can ever be justiciable in domestic courts. The court's holding suggests that all cases challenging a broad U.S. policy of committing or aiding torture or genocide abroad will be dismissed as a political question. While the panel attempted to temper its holding by asserting that "although some cases involving alleged genocide will be justiciable," the decision's rationale contradicts this.[8] And when the government was asked at oral argument whether it could think of any examples of such cases, the attorney could not present any.[9]

This essay will analyze *Defense for Children International-Palestine v. Biden* ("*Defense for Children*") as a window into broader, theoretical questions of the legitimacy and viability of the political question doctrine as the courts have applied it to foreign affairs disputes.[10] Further, this discussion of *Defense for Children* will fashion a proposed solution to the conundrum federal courts face when confronted with broad challenges to U.S. foreign policy as violative of the Constitution, congressional statutes, or international law.

I. THE POLITICAL QUESTION DOCTRINE AND THE DISTINCTION BETWEEN A LEGAL DUTY AND DISCRETIONARY POLICY

The Supreme Court has repeatedly rejected "sweeping statements to the effect that all questions touching foreign relations are political questions."[11] Indeed, the modern Court has emphasized that the political question doctrine is a "narrow exception to th[e] rule" that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"[12] Particularly in the area of foreign affairs, determining whether an issue presents a nonjusticiable political question requires "a discriminating analysis of the *particular question* posed."[13] The discriminating analysis that courts are

7. *Id.* at 932.

8. *Id.*

9. Transcript of Oral Argument ¶ 376–86, *Def. for Child. Int'l-Palestine*, 107 F.4th 926 (2024) (No. 24-704).

10. *Def. for Child. Int'l-Palestine*, 107 F.4th at 929 (affirming district court ruling).

11. Baker v. Carr, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 229–30 (1986) (citing *Baker*, 369 U.S. at 211); Zivotofsky v. Clinton, 566 U.S. 189, 197 (2012) ("The Secretary contends that . . . the President [has] the sole power to recognize foreign sovereigns . . . . Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute.").

12. *Zivotofsky*, 566 U.S. at 194–95 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

13. *Id.* at 195 (distinguishing between the question of the President's decision to recognize foreign sovereigns and the question of whether a statute is constitutional); *Baker*, 369 U.S. at 212 (emphasis added); Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 822 (9th Cir. 2017) (noting that the political question

mandated to undertake first requires the court to determine whether the plaintiff's claim challenges a purely discretionary executive policy decision or a decision made allegedly in violation of a legal duty.

The political question doctrine's origins are often attributed to Chief Justice Marshall's statement in *Marbury v. Madison*:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.[14]

Marshall emphasized that only where the challenged action depends on executive discretion and not legal duties can a court avoid its obligation to "say what the law is."[15] "[W]hat . . . shall forbid a court to listen to the claim[,] or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress and the general principles of law?"[16]

Marshall's effort to reconcile challenges to executive discretion—which is, in its nature, political—and the court's duty to say what the law is pervades the modern Court's political question jurisprudence. In *Japan Whaling Association v. Cetacean Society*, the Court determined:

> The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature."[17]

However, while recognizing the "premier role" that Congress and the President have in the conduct of the nation's foreign policy, the Court stated that it could not "shirk [its] responsibility" to decide a "legal question," even when its decision "would have significant political overtones."[18] The fact that the case involved foreign affairs did not alter the analysis: the Court has a duty to determine legal questions and should abstain from political questions involving policy choices.

"analysis requires close attention to the particular claims presented in each case"); Al-Tamimi v. Adelson, 916 F.3d 1, 7 (D.C. Cir. 2019) ("In deciding whether a controversy presents a political question, '[w]e must conduct "a discriminating analysis of the particular question posed" in the "specific case."' Abstraction and generality do not suffice.") (quoting bin Ali Jaber v. U.S., 861 F.3d 241, 245 (D.C. Cir. 2017)).

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

15. *Id.* at 177.

16. *Id.* at 170.

17. Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (quoting United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (footnote omitted)).

18. *Id.*

More recently, the Court in *Zivotofsky v. Clinton* reiterated the distinction between challenges to discretionary foreign policy determinations and claims that the government is violating a specific legal duty. In that case, Zivotofsky asked the Court to change the State Department's designation of his birthplace on his passport from "Jerusalem" to "Jerusalem, Israel."[19] The State Department's foreign affairs policies conflicted with Congress's determination that Americans born in Jerusalem could choose to list Israel as their birthplace on their passports.[20] The Court resolved the dispute of authority among the two political branches, finding that "federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right."[21]

Circuit courts have also refused to dismiss claims that raise purely legal questions as political questions. As the en banc District of Columbia Circuit explained:

> We have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security. In this vein, we have distinguished between claims requiring us to decide whether taking military action was "wise"—"a policy choice and value determination constitutionally committed for resolution to the halls of Congress of the confines of the Executive Branch"—and claims "[p]resenting purely legal issues" such as whether the government had legal authority to act.[22]

That distinction was the foundation upon which the District of Columbia Circuit concluded in a later case that, while claims against Israeli settlers questioning "who has sovereignty over disputed territory" presented a nonjusticiable political question, the issue of whether "Israeli settlers [are] committing genocide" is, in contrast, "a purely legal issue."[23] The court asked, "[h]ow do we determine whether a case involving foreign affairs is a political question? Our en banc court has answered that question: policy choices are to be made by the political branches and purely legal issues are to be decided by the courts."[24]

The Fourth and Ninth Circuits have also relied on the discretionary versus legal duty distinction to ascertain whether an issue presents a nonjusticiable political question. In *Al-Tamimi v. Adelson*, the Fourth Circuit declined to invoke the political question doctrine to dismiss claims alleging that U.S. military contractors tortured Iraqi civilians during the military conflict in Iraq, relying on

19. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012).

20. *Id.* at 192–93.

21. *Id.* at 191.

22. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc) (internal quotation marks omitted) (quoting Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Tatel, J., concurring)).

23. Al-Tamimi v. Adelson, 916 F.3d 1, 11 (D.C. Cir. 2019).

24. *Id.*

the same distinction as the District of Columbia Circuit.[25] The court found that "to the extent that the plaintiffs' claims rest on allegations of unlawful conduct in violation of settled international law or criminal law then applicable to the [contractor's] employees, those claims fall outside the protection of the political question doctrine."[26]

The Ninth Circuit has also followed the Supreme Court's instruction that not every claim that concerns foreign policy presents a political question. It has distinguished between disputes that require the judiciary to impermissibly "make policy related to foreign affairs" and those that involve deciding legal disputes over the proper application of treaties or statutes.[27]

The legal duty versus discretionary policy dichotomy yields a decisive result when applied to *Defense for Children*. There, the plaintiffs did not question the wisdom or discretionary policy choice of the President's military aid to Israel.[28] Nor did they seek "to supplant a foreign policy decision of the political branches with the court's own *unmoored* determination of what United States policy toward Jerusalem should be."[29] Rather, the plaintiffs claimed that such actions are subject to legal restraints—namely, a fundamental norm of international law prohibiting aiding of genocide—and are prohibited by a treaty ratified by the United States and a federal criminal statute implementing that treaty obligation.[30] This is precisely the type of fundamental international law norm that the Supreme Court has allowed courts to apply in lawsuits alleging violations of modern international law.[31]

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25. Al Shimari v. CACI Premier Tech. Inc., 840 F.3d 147, 158 (4th Cir. 2016) ("[T]he district court erred in failing to draw a distinction between unlawful conduct and discretionary acts that were not unlawful when committed.").

26. *Id.*

27. Duetsch v. Turner Corp., 324 F.3d 694, 713 n.11 (9th Cir. 2003). *Cf.* Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 823 (9th Cir. 2017) (stating that there was no political question when the case required the court to apply legal standards, "not pass judgment on the wisdom of the Executive's ultimate foreign policy or military decisions"), *and* Alperin v. Vatican Bank, 410 F.3d 532, 537 (9th Cir. 2005) (holding that the political question doctrine did not bar Holocaust Survivors' property claims against the Vatican Bank for allegedly profiting off of the genocidal acts of a "Nazi puppet regime during World War II" in Croatia), *with* Corrie v. Caterpillar Corp., 503 F.3d 974, 982 (9th Cir. 2007) (stating that the political question doctrine applies where a corporation's "sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States"), *and* Rep. of Marsh. Islands v. U.S., 865 F.3d 1187, 1201 (9th Cir. 2017) (stating that the political question doctrine bars adjudication of claims that call into question "the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion" (quoting with approval the D.C. Circuit in *El-Shifa*, 607 F.3d. at 842 (en banc)). *See also* Sierra Club v. Trump, 929 F.3d 670, 687 (9th Cir. 2019) ("The current action does not ask us to decide whether the projects for which [d]efendants seek to reprogram funds are worthy or whether, as a policy judgment, funds should be spent on them. Instead, we are asked whether the reprogramming of funds is consistent with the Appropriations Clause and section 8005. That 'is a familiar judicial exercise.'" (quoting Zivotofsky v. Clinton, 566 U.S. 189, 19 (2012)).

28. *See* Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 931 (9th Cir. 2024) (summarizing plaintiffs' contentions on the political question doctrine).

29. *Zivotofsky*, 566 U.S. at 196 (emphasis added).

30. *Def. for Child. Int'l-Palestine*, 107 F.4th at 929; *see* 18 U.S.C. § 1091.

31. Sosa v. Alvarez Machain, 542 U.S. 692, 724 (2004).

The Ninth Circuit rejected the argument that the policy/legal duty dichotomy was dispositive, stating:

> Many, if not most, grievances can be styled as the violation of an asserted legal obligation. In this case, we question whether the plaintiffs' claimed legal violations can be meaningfully isolated out from the considerable discretion that otherwise characterizes the political branches' powers in the areas of foreign and military affairs. Regardless, there is no valid support for the idea that merely alleging the violation of a claimed legal duty means that the political question doctrine does not apply. Courts must instead consider the full import of the legal claim and the implications of the judiciary deciding it under our separation of powers. Application of the political question doctrine turns not merely on the formal duty-discretion distinction that plaintiffs posit but, as the Supreme Court has said, on a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[32]

The Court's argument suggests that every legal issue that is intertwined with political, strategic decisions would present a political question. But *every* foreign policy decision by the Executive that raises legal questions is taken pursuant to some policy choices and value determinations, and the Supreme Court has never implied—let alone held—that this insulates those decisions from judicial scrutiny. Most legal questions are often embedded in policy choices, and to view the political question doctrine as applicable in every instance would render the doctrine meaningless.

Moreover, the court conflated the political question doctrine—a "narrow exception" to federal jurisdiction—with a pleading rule. The pleading requirements designed to ensure that plaintiffs cannot litigate frivolous or political cases simply by "alleging the violation of a clearly established right" are those articulated by the Supreme Court in *Ashcroft v. Iqbal*,[33] and there was no suggestion that plaintiffs had run afoul of those rules. On the contrary, both the ICJ and the district court found that the plaintiffs' allegations stated a plausible legal claim.[34] This was not a case where the plaintiffs made up allegations of legal violations to litigate what was essentially a policy dispute.

II. THE POLITICAL QUESTION DOCTRINE AND INTERNATIONAL LAW

From the Republic's beginning, the Framers, political leaders, and federal courts have recognized that the executive branch does not have the discretion to violate international law and that federal courts can adjudicate breaches of

32. *Def. for Child. Int'l-Palestine*, 107 F.4th at 932 (citation omitted) (quoting Baker v. Carr, 369 U.S. 186, 211–12 (1962)).

33. Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).

34. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, *supra* note 4; Def. for Child. Int'l–Palestine v. Biden, 714 F. Supp. 3d 1160, 1167 (N.D. Cal. 2024).

international law. For example, both Hamilton and Madison, in their famous debate on the constitutional authority for President Washington's 1793 Proclamation of Neutrality, agreed that the President was required to execute international law.[35] Hamilton argued that "the Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws."[36] Similarly, Madison also claimed that the Executive "is bound to the faithful execution of [the laws of neutrality] as of all other laws internal and external, by the nature of its trust and the sanction of its oath."[37]

Other early leaders agreed with Madison and Hamilton.[38] Scholars have recognized that the Framers believed that the President's constitutional powers to conduct foreign affairs, including warfare, were limited by norms of international law.[39]

Moreover, from our nation's beginning, the Supreme Court has often intervened to limit the President's foreign policy and war powers when the President acts in violation of international law, statutes, or the Constitution.[40]

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35. ALEXANDER HAMILTON, PACIFICUS NO. 1 (1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 40 (Harold C. Syrett ed., 1961).

36. *Id.*

37. JAMES MADISON, HELVIDIUS NO. II, *reprinted in* 6 WRITINGS OF JAMES MADISON 151, 159–60 (Gaillard Hunt ed., 1906). Five years after he published *Helvidius No. II*, Madison again argued that the Executive lacked power to act in derogation of international law. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *reprinted in id.* at 313. The Adams administration had prohibited the arming of ships in U.S. ports as a violation of neutrality. *Id.* As tensions mounted between France and the United States, but before Congress had acted, the Executive revoked its prohibition, thereby granting "an indirect license to arm." *Id.* Madison complained that the Executive had no power to grant such an indirect license: "[t]he first instructions were no otherwise legal than as they were in pursuance of the Law of nations, [and] consequently in execution of the law of the land. The revocation of the instructions is a virtual change of the law[.]" *Id.*

38. Attorney General William Wirt, in an 1822 opinion, concluded that the obligation of the President as executive officer to enforce the laws of the country extended to the "general laws of nations." William Wirt, Restoration of a Danish Slave, 1 Op. Atty. Gen. 566, 570 (1822). In response, Attorney General James Speed agreed, stating that

> [T]he laws of war[,] . . . [l]ike the other laws of nations, . . . are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. . . . [U]nder the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war.

James Speed, Military Comm'ns., 11 Op. Atty. Gen. 297, 299–301 (1865).

39. *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition,* 85 N.Y.U. L. REV. 932, 1008 (2010) (summarizing the Framers' intent that the "President [have] no more authority to violate the nation's international legal obligations than to disregard an act of Congress.").

40. MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY 77, 82 (2019) (recounting how the early Supreme Court showed no hesitancy in enforcing "restrictions on the executive. . . . regardless of whether the constraints derived from the Constitution, statutes, treaties, or the customary law of nations . . . [and] regardless of the executive's assessment of the foreign affairs consequences[.]"); David L Sloss, Michael D. Ramsey, & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 49 (2011) (noting that the early "Court frequently invoked international law to constrain the exercise of governmental power."). *But see* Curtis A. Bradley, *The Political Question Doctrine and International Law*, 91 GEO. WASH. L. REV. 1555, 1555 (2023) (arguing the political question doctrine emerged in part to allow the political branches, rather than the courts, to make determinations about this country's—and other countries'—rights and responsibilities under international law). In my view,

For example, in *Brown v. United States*, the Court rejected the Executive's attempt to seize enemy property during the War of 1812 by construing the scope of the President's constitutional war powers consistently with the law of nations.[41] Chief Justice Marshall argued that "a construction [of the Constitution] ought not lightly [. . .] be admitted, which would give to a declaration of war an effect in this country, it does not possess elsewhere[.]"[42] Justice Story, in his dissent, disagreed with Justice Marshall's view of international law, but agreed that the Constitution limited the President's war powers to those "which, by the modern law of nations, are permitted and approved."[43] Story noted that the President "has a discretion vested in him, as to the manner and extent[,] but he cannot lawfully transcend the rules of warfare established among civilized nations."[44] The President, Justice Story reasoned, "cannot lawfully exercise powers or authorize proceedings, which the civilized world repudiates and disclaims."[45]

Similarly, in *Little v. Barreme*, Justice Marshall, writing for a unanimous Court, determined that the Secretary of the Navy's instructions to American naval captains during the 1790s undeclared war with France went beyond Congress's authorization.[46] The Court deemed Captain Little's seizure of a foreign ship pursuant to those instructions unlawful and ordered the captain to pay damages for the seizure, even though he was only following the President's orders.[47] Chief Justice Marshall, having written in *Marbury* just one year before that political matters delegated to the political branches were not appropriate for judicial review, adjudicated the lawfulness of the President's wartime instructions to military captains.[48]

The 1790s Neutrality Crisis also occasioned numerous Supreme Court decisions involving delicate matters of U.S. foreign policy with respect to the new Republic's obligations under international law. In a well-known episode following the outbreak of war in 1793 between Great Britain and France, the Washington administration requested that the Supreme Court answer a long list of legal questions about the rights and duties of a neutral nation under international law.[49] The Court did not refuse to answer because the questions

almost all the cases that Bradley discusses could be classified as cases the court dismissed on the merits as within the Executive's or Legislative branches discretionary power, as Professor Henkin observed. *See infra* notes 84–96 and accompanying text.

41. Brown v. United States, 12 U.S. (8 Cranch) 110, 127 (1814).
42. *Id.* at 123.
43. *Id.* at 145 (Story, J., dissenting).
44. *Id.* at 153.
45. *Id.*
46. Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804).
47. *Id.*
48. *Id.*
49. *See* FLAHERTY, *supra* note 40, at 71.

were political questions inappropriate for judicial review, but rather because the request sought an advisory opinion.[50]

Indeed, when presented with a live controversy months later, the Court, in the landmark decision *Glass v. The Sloop Betsey*,[51] resolved one of the central questions posed in the administration's prior letter.[52] Subsequently, the Court continued to decide international law questions involving neutrality that were critical to U.S. national security.[53]

In *Murray v. Schooner Charming Betsey*,[54] the Court ruled that it was unlawful under the law of nations for an American captain to seize a ship he believed to be French, holding that there was a presumption that Congress did not intend to derogate from international law when enacting statutes.[55] Chief Justice Marshall declared that a federal statute "ought never to be construed to violate the law of nations if any other possible construction remains."[56]

Then, in *The Nereide*,[57] the Court held that the judiciary is bound to apply the law of nations to executive conduct absent explicit congressional derogation.[58] Specifically, Chief Justice Marshall noted that the political branches have discretion to take retaliatory or reciprocal actions against neutral foreigners, and deciding whether to impose such discretionary actions was outside the Court's competence.[59] However, as Chief Justice Marshall put it, until such a congressional "act be passed, the Court is bound by the law of nations which is a part of the law of the land."[60] Thus, the *Schooner Charming Betsy* and *Nereide* decisions make clear that, at least absent a clear congressional statute to the contrary, the Court is bound to apply the law of nations as the law of the land to executive actions allegedly in derogation of international law.

Throughout the last two centuries, the Supreme Court has continued to decide legal disputes involving foreign policy and war powers cases in which plaintiffs alleged that the Executive violated the Constitution, federal statutes,

50. Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488, 488–89 (Henry P. Johnston ed., 1891); *see also* FLAHERTY, *supra* note 40, at 72 (emphasizing that neither the Cabinet nor the Court believed these were political questions inappropriate for judicial review).

51. Glass v. Sloop Betsey, 3 U.S. (3 Dall.) 6, 25–26 (1794).

52. Golove & Hulsebosch, *supra* note 39, at 1025–27 (noting the Court extended the federal courts' prize jurisdiction—the power to determine the distribution of property captured at sea in wartime—to rule on the legality of French captures brought into American ports).

53. *See* David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 146–48 (2008) (noting that between February 1794 and February 1797, "roughly half of the Supreme Court caseload" addressed legal issues "directly related to the most important national security issue of the era: how best to maintain U.S. neutrality in the ongoing war").

54. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

55. *Id.*

56. *Id.*

57. The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815).

58. *Id.*

59. *Id.*

60. *Id.* at 423.

or international law.[61] And the Court has continued to utilize international law in deciding the legal disputes at issue.[62]

In the *Prize Cases*, the Court looked to international law in affirming President Lincoln's Civil War blockade.[63] A judge appointed by the U.S. government, who currently serves on the International Court of Justice, once wrote, "[a]ll members of the Court [in the *Prize Cases*] agreed that, once a legal state of war was established, the scope of presidential power to wage war was governed by the international laws of war."[64]

In *The Paquete Habana*,[65] the Supreme Court ruled that the American military did not have the authority to seize a Cuban fishing vessel during the Spanish American War because the seizure violated international law.[66] The Court famously stated that, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[67]

III. THE CONTEMPORARY COURT HAS CONTINUED TO REJECT PRESIDENTIAL CLAIMS THAT LEGAL CHALLENGES TO EXECUTIVE ACTION IN THE FOREIGN AFFAIRS CONTEXT ARE NONJUSTICIABLE POLITICAL QUESTIONS

Throughout the latter part of the twentieth century, the Court continually adjudicated claims that U.S. foreign policy actions violated separation of powers or individual rights.[68] Not once did the Supreme Court hold that a challenge to U.S. foreign policy which allegedly violated legal strictures or individual rights raised a nonjusticiable political question.

More recently, the Court again rejected presidential arguments that legal challenges to executive action in the foreign affairs context raise nonjusticiable political questions, or that the President is entitled to virtually absolute deference.[69] Indeed, the Court adjudicated claims arising out of the nation's war against terrorists despite these arguments.[70] As Justice O'Connor wrote, the Supreme Court has "long since made clear that a state of war is not a blank check for the President."[71]

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61. FLAHERTY, *supra* note 40, at 82, 87–90.

62. *Id.*

63. The Amy Warwick, 67 U.S. (2 Black) 635, 668 (1863).

64. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 20–21 (2006).

65. The Paquete Habana,175 U.S. 677, 700 (1900).

66. *Id.*

67. *Id.*

68. *See* Youngstown v. Sawyer, 343 U.S. 579, 642 (1952); Regan v. Wald, 468 U.S. 222, 234 (1984); Dames & Moore v. Regan, 453 U.S. 654, 662 (1981).

69. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion); Boumediene v. Bush, 553 U.S. 723, 755 (2008).

70. *Boumediene*, 553 U.S. at 723.

71. *Hamdi*, 542 U.S. at 536 (citing *Youngstown*, 343 U.S. at 587 (1952)).

Boumediene v. Bush is instructive here, because, as in *Zivotofsky*, the Court undertook a discriminating analysis of the precise question involved to reject the Executive's political question argument.[72] The Government argued that federal courts could not exercise habeas jurisdiction, because "Guantanamo is outside sovereign U.S. territory."[73] The Court accepted that the issue of who "maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay" was for the President and not the Court to determine, and that this issue would ordinarily present a political question.[74] Nevertheless, the *Boumediene* Court rejected the Government's political question argument because the particular question involved was not whether Guantanamo was subject to the de jure sovereignty of the United States.[75] Rather, the Court held that whether habeas was available required an analysis "into the objective degree of control the Nation asserts over foreign territory."[76] The Court concluded that treating the cases as political questions would require accepting the unfounded "premise that de jure sovereignty is the touchstone of habeas corpus jurisdiction," which would be "inconsistent with our precedents and contrary to fundamental separation-of-powers principles."[77]

Most recently, the Court in *Zivotofsky* again rejected utilizing the political question doctrine in a foreign policy dispute between the President and Congress over the status of Jerusalem.[78] In *Zivotofsky*, the District of Columbia Circuit, like the Ninth Circuit in *Defense of Children International-Palestine*, held that the political question doctrine blocked inquiry into a decision by the Executive to list "Jerusalem" rather than "Israel" on the passport of a person born there.[79] In one of its initial decisions regarding Zivotofsky, *Zivotofsky v. Secretary of State*, the court of appeals reasoned that the political question barred adjudication of the lawsuit because "[o]nly the Executive . . . has the power to define U.S. policy regarding Israeli's sovereignty over Jerusalem and decide how best to implement that policy."[80] In doing so, the court ignored the fact that Zivotofsky grounded his challenge in a federal statute, insisting that "policy decisions made pursuant to the President's recognition power are nonjusticiable political questions."[81] The court refused "to be the first court to hold that a

72. *Boumediene*, 553 U.S. at 755.

73. *Id.* at 723.

74. *Id.* ("[I]n other contexts the Court has held that questions of sovereignty are for the political branches to decide." (citing Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380 (1948) ("[D]etermination of sovereignty over an area is for the legislative and executive departments[.]"))).

75. *Boumediene*, 553 U.S. at 755.

76. *Id.* at 754 ("When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power . . . but sovereignty in the narrow, legal sense of the term, meaning a claim of right[.]") (internal citations omitted).

77. *Id.* at 755.

78. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012).

79. *Id.* at 193–94.

80. Zivotofsky v. Secretary of State, 571 F.3d 1227, 1232 (D.C. Cir. 2009), *rev'd*, 566 U.S. 189 (2012).

81. *Id.*

statutory challenge to executive action trumps the analysis in *Baker* and *Nixon* and renders the political question doctrine inapplicable."[82]

The Supreme Court reversed this initial court of appeals political question decision in *Zivotofsky v. Clinton*.[83] In an eight to one decision, the Court held that the District of Columbia Circuit had misinterpreted Zivotofsky's claim.[84] Federal courts were "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be."[85] Instead, Zivotofsky asked "that the courts enforce a specific statutory right."[86] This request called upon the judiciary to decide whether "Zivotofsky's interpretation of the statute is correct, and [if so,] whether the statute is constitutional[,]" which the Court recognized was "a familiar judicial exercise."[87]

The Ninth Circuit distinguished *Defense for Children* from *Zivotofsky*, arguing that:

> What we have here is anything but familiar. The myriad policy choices and value determinations that a court would need to pass on in this case, include . . . evaluating the military decisions and strategy the United States has followed with respect to Israel, the scope of the United States' influence over Israel, whether the United States should have imposed conditions on its support to Israel, and how the United States has acted in the United Nations Security Council.[88]

The court expressly distinguished between the requests of the *Zivotofsky* plaintiffs and the *Defense for Children* plaintiffs:

> In what was ultimately a dispute between the political branches, the plaintiff in *Zivotofsky I* wanted a birthplace on a passport to be changed. The plaintiffs here want the judiciary to evaluate and reject the "military decisions and strategy" that the United States has followed with respect to Israel and Gaza since October 7, 2023.[89]

The two cases are, of course, very different. The separation of powers dispute involved in *Zivotofsky* is different than an international law challenge to executive branch political and military aid to a foreign country, particularly in its susceptibility to judicial relief and the factfinding necessary for a court to conclude that the U.S. government is aiding genocide. But the intertwining of

82. *Id.* at 1233.

83. *Zivotofsky*, 566 U.S. at 201.

84. *Id.* at 195.

85. *Id.* 196.

86. *Id.*

87. *Id.* The Court eventually decided the case on the merits in *Zivotofsky v. Kerry*, holding that the congressional statute requiring the Executive to list Israel on the passport of an American citizen born in Jerusalem—contrary to the President's policy of not recognizing Israeli sovereignty over Jerusalem—unconstitutionally usurped the President's recognition power. Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015).

88. Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 933 (9th Cir. 2024) (citations omitted).

89. *Id.*

policy and legal issues is not fundamentally different, and the basic principle articulated in *Zivotofsky* is still applicable in *Defense for Children*.

For instance, the Ninth Circuit attempted to distinguish *Zivotofsky* as involving merely a "birthplace on a passport," but the Executive claimed that the issue had broad policy implications.[90] The State Department said the statutory interpretation favored by *Zivotofsky* would upset "longstanding policy" in the region, and President Bush warned it would "interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states."[91] Yet the Court held that the basic issues were whether Zivotofsky's interpretation of the statute was correct, and if so, whether the statute unconstitutionally infringed on the President's recognition power. Although policy choices were intertwined with or implicated by a judicial decision, they did not render the case a political question.

IV. IS THERE A JUSTIFICATION FOR, AND LEGITIMACY TO, THE POLITICAL QUESTION DOCTRINE?

After two centuries of the Supreme Court grappling with "political questions," what thus emerges is the ongoing validity of Chief Justice Marshall's initial foray into the thicket distinguishing between nonjusticiable "political questions" challenging executive discretion and "legal questions" which the Court has the duty to decide—involving interpretation of statutes, the constitution, or "general principles of law." [92] That framing, however, leads to the logical conclusion, as the illustrious Professor Louis Henkin wrote some time ago, that there really is no political question exception to the normal rule that the courts decide constitutional, statutory, and other legal issues.[93] For if the political question doctrine creates an exception to judicial review when executive discretion is involved, or when issues of policy and not law are raised, then such cases should be appropriately dismissed on their merits for failure to raise a legal claim. As Professor Henkin pointed out, the cases that he reviewed in 1976 involving political questions revealed that "the Court refused to invalidate the challenged actions because they were within the constitutional authority of President or Congress."[94] Specifically, the Executive or Congress was given discretionary power to engage in the challenged activity.

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90. *Id.*

91. Zivotofsky v. Clinton, 566 U.S. 189, 191–92 (2012) (quoting Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1698 (Sept. 30, 2002)).

92. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

93. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 601 (1976).

94. *Id.* For another illustration of Henkin's thesis, Justice Harlan would have dismissed the *Baker v. Carr* lawsuit not because it raised a political question but rather because: "[o]nce one cuts through the thicket of discussion devoted to 'jurisdiction,' 'standing,' 'justiciability,' and 'political question,' there emerges a straightforward issue which, in my view, is determinative of this case. Does the complaint disclose a violation of a federal constitutional right, in other words, a claim over which a United States District Court would have jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983? . . . . However, in my opinion, appellants'

Therefore, defining the political question doctrine as one where the court refuses to adjudicate a claim which calls into question a policy determination by the government is nonsensical. Such cases should be dismissed for failure to state a claim. Rather, the "narrow exception" of nonjusticiable political claims should be reserved for those legal or constitutional challenges to executive or congressional policy which nonetheless should be decided by another branch of government *despite the legal nature of the claim.*

To cabin the political question exception, the Supreme Court has identified two essential components: first, a textually demonstrable commitment of the issue to a coordinate branch of government, and second, the lack of judicially discoverable and manageable standards to resolve it.[95] While not explicitly discarding the other four prongs of the doctrine articulated in *Baker v. Carr*—such as the need for the court to make an initial policy determination of a kind clearly for nonjudicial discretion, or an unusual need for unquestioning adherence to a political decision already made, or requiring a decision causing "embarrassment" due to multiple pronouncements on the same question, or expressing lack of respect for another branch—which were vague and ambiguous, the Court has made clear that the first two factors are key.[96] Indeed, since *Baker,* the Court has not dismissed any case on political question grounds based on any of the factors except the first two. This is true despite the amorphous descriptions of the doctrine by prominent commentators such as Alexander Bickel,[97] and lower courts' continual dismissals of cases as presenting nonjusticiable political questions based on broad, nebulous reasoning (with the Supreme Court generally declining to review these decisions).[98] This disconnect between lower courts' reasoning and the Supreme Courts strict reliance on the textual commitment and lack of judicially manageable standards is particularly prominent in cases involving foreign affairs.[99]

Defense for Children fits the paradigmatic disconnect that various scholars have observed. The court of appeals and district court broadly utilized the political question doctrine to dismiss plaintiffs' claims. Neither decision

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allegations, accepting all of them as true, do not, parsed down or as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. Accordingly, I believe the complaint should have been dismissed for 'failure to state a claim upon which relief can be granted.'" Baker v. Carr, 369 U.S. 186, 331 (1962) (Harlan, J., dissenting) (quoting FED. R. CIV. P. 12(b)(6)).

95. *Zivotofsky*, 566 U.S at 195.

96. *Id.*

97. Alexander M. Bickel, *The Supreme Court, 1960 Term. Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961) ("The political question doctrine simply resists being domesticated in this fashion.").

98. Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1054 (2023) (explaining that while the Supreme Court has been willing to let lower courts dismiss on political question grounds because it agrees with getting rid of those cases, the Court itself doesn't want to use the doctrine). *See generally* John Harrison, *The Political Question Doctrine*, 67 AM. U. L. REV. 467 (2017) (describing a disconnect between the Supreme Court's and lower courts' use of the political question doctrine).

99. Bradley & Posner, *supra* note 98, at 1089.

grappled with the particular legal issue that the plaintiffs presented: Namely whether the prohibition on genocide set forth in a treaty ratified by the United States, incorporated in a congressional statute, and constituting a fundamental norm of customary international law is binding on the President. That question, and not the issue that both courts addressed—whether the provision of foreign aid to an ally is within the Executive's discretion accorded by the constitution—is what the case really presented. Of course, the provision of foreign military and political aid is a power exclusively reserved to the political branches. But the question of what, if any, statute, treaty, or customary international law constraints apply to any specific provision of such aid is not reserved to the political branches to decide; nevertheless, neither the Ninth Circuit nor the district court addressed that question. Instead, the district court broadly invoked the President's power to conduct foreign policy, and the circuit claimed that cases questioning or "condemning" U.S. foreign policy present political questions.[100]

The contrast with the Supreme Court's *Zivotofsky* opinion is striking. There, the Court held that the issue was not the broad question of whether the President had the power not to recognize Jerusalem as the capital of Israel (which he did), but rather whether it was constitutionally permissible for Congress to attempt to cabin that power through a statute.[101] That precise issue did not present a political question.[102] So too, the question in *Defense for Children* was not whether the Executive had broad power to provide aid to another nation, but rather whether that aid could be bound by legal rules set forth in statutes, treaties, and customary international law.

To the extent that the Ninth Circuit relied on *Baker*, it was not to engage in a careful analysis of whether the issue presented was textually committed to the Executive, or whether there were judicially manageable standards. The court instead followed *Baker*'s amorphous instructions that the court should consider the "history of [the issue's] management by the political branches, of its susceptibility to judicial handling in light of the nature and posture in the specific case, and of the possible consequences of judicial action."[103] The circuit further relied on the point that this case did not present a "familiar judicial exercise."[104]

True enough. But this opinion renders the political question doctrine into one unbounded by principle and legal standards, to be deployed when a court believes that the issue presented is not "susceptib[le] to judicial handling," does not present a "familiar judicial exercise," and would have unwanted "possible

100. Def. for Children Int'l-Palestine v. Biden, 714 F. Supp. 3d 1160, 1162 (9th Cir. 2024); Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 927 (9th Cir. 2024).

101. Zivotofsky v. Clinton, 566 U.S. 189, 189 (2012).

102. *Id.*

103. Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 930 (9th Cir. 2024) (quoting Baker v. Carr, 369 U.S. 186, 211–12 (1962)).

104. *Id.* at 933.

consequences."[105] That view is in line with Bickel's characterization of the doctrine: "the court's sense of lack of capacity, . . . the strangeness of the issue[,] . . . the suspicion that it will have to yield more often . . . to expediency than to principle[,] . . . the sheer momentousness of it[,] . . . the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't[,] . . . [and] the inner vulnerability of an institution which is electorally irresponsible."[106]

The problem with Bickel's approach—essentially utilized by the Ninth Circuit in *Defense for Children* and by other lower courts—is that it is unprincipled and unbounded by any clear standard of when the political question doctrine should apply, except for a court's sense that the issue is not susceptible to judicial scrutiny. In the area of foreign affairs, where this vague articulation of the political question doctrine is most often deployed, such an approach leads to a foreign policy unrestrained by the legal rules adopted by Congress and the international community that were designed precisely to place legal restraints on leaders' ability to engage in conduct that violates fundamental norms such as the prohibitions on torture or genocide. Moreover, the Supreme Court has not adopted such an approach, having refused to ground the political question doctrine on this vague, unprincipled basis. Rather, the Court has focused on the two prongs in *Baker* that seem best suited for a principled doctrine: whether there is a textual commitment to deciding the precise issue presented to another branch, and whether the issue is subject to judicially manageable standards. Those two inquiries suggest that the questions presented in *Defense for Children* should not be dismissed as nonjusticiable.

First, there is no textual commitment to the President to determine whether providing aid to another nation constitutes genocide. Indeed, such amorphous foreign policy powers are not textually committed to the President at all, but represent a construct fashioned by history, derived from the foreign affairs powers provided for in the Constitution and structural considerations favoring presidential management of foreign affairs; but of course, this authority is bound by Congress's own substantial foreign affairs powers. Answering questions such as whether a particular war launched or threatened by the President is an unconstitutional usurpation of Congress's war powers is not textually committed to the President.[107] Similarly, the question of whether the Alien Tort Statute ("ATS")[108] provides a cause of action cognizable in federal court to challenge executive branch actions which aid and abet genocide is not textually committed to the President. Resolving such legal questions is "the province and duty of the judicial department."[109]

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105. *Id.* at 930, 933.

106. Bickel, *supra* note 97, at 75; *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1st ed. 1962).

107. *See* Dellums v. Bush, 752 F. Supp. 1141, 1151–52 (D.D.C. 1990).

108. 28 U.S.C. § 1350.

109. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Nor is the question of what constitutes aiding genocide not subject to judicially manageable standards. The ATS provides for lawsuits by noncitizens for torts committed in violation of the law of nations.[110] The statute's scope has been narrowed by the Court to include only "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth] century paradigms" recognized by the Court.[111] The prohibition on genocide is one of those norms, and it is defined with a specificity that makes it clearly judicially manageable.[112] Indeed, all three norms that *Sosa v. Alvarez-Machain* cited as judicially cognizable in the eighteenth century have been congressionally incorporated into U.S. criminal law, just as the prohibition on genocide is today.[113]

It is inconceivable that the courts lack judicially manageable standards to address an offense set forth in a federal criminal statute—and, unsurprisingly, courts have readily rejected that proposition.[114] Federal criminalization of genocide is strong evidence, as *Sosa* recognizes, that the customary law and treaty prohibition against genocide is one of the small groups of international law norms actionable under the ATS and not subject to dismissal under the political question doctrine.

Indeed, that lawsuits charging U.S. officials with aiding or committing genocide should be justiciable. Their justiciability would logically follow from the Supreme Court and lower federal courts' allowance of lawsuits brought by noncitizens against foreign officials for committing genocide or other egregious human rights violations, such as torture.[115] It would be inconsistent to allow federal courts to adjudicate suits charging genocide by foreign leaders but not claiming the same illegal conduct against our own leaders. That logic was recognized by the D.C. Circuit in a case challenging U.S. aid to the "Contras" attacking Nicaragua:

> Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in

110. 28 U.S.C. § 1350.

111. Sosa v. Alvarez Machain, 542 U.S. 692, 725 (2004).

112. *See* 18 U.S.C. §§ 1091, 1093 (defining terms in the offense).

113. *Id.*

114. *See* Al Shimari v. CACI Premier Tech. Inc., 840 F.3d 147, 161 (4th Cir. 2016) (finding judicially manageable standards after noting that "the terms 'torture' and 'war crimes' are defined at length in the United States Code and in international agreements to which the United States government has obligated itself").

115. Al-Tamimi v. Adelson, 916 F.3d 1, 11–12 (D.C. Cir. 2019) ("Thus, the ATS—by incorporating the law of nations and the definitions included therein—provides a judicially manageable standard to determine whether Israeli settlers are committing genocide."). Similarly, the Second Circuit rejected the political question doctrine in connection with a claim alleging genocide. Kadic v. Kardzic, 70 F.3d 232, 249 (2d Cir. 1995). There, the court reasoned that the "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Id.* at 250 (citing Filártiga v. Peña–Irala, 630 F.2d 876, 876 (2d Cir. 1980)).

> the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law. Such a conclusion was indeed implicit in the landmark decision in *Filartiga v. Peña-Irala*, which upheld jurisdiction over a suit by a Paraguayan citizen against a Paraguayan police chief for the death by torture of the plaintiff's brother. The court concluded that "official torture is now prohibited by the law of nations." The same point has been echoed in our own court. Judge Edwards observed *in Tel-Oren v. Libyan Arab Republic* that "commentators have begun to identify a handful of heinous action—each of which violates definable, universal and obligatory norms," and that these include, at a minimum, bans on governmental "torture, summary execution, genocide, and slavery."[116]

While neither a textual commitment to another branch nor the lack of judicially manageable standards requires that *Defense for Children* be dismissed as a nonjusticiable political question, two other factors involved in the lawsuit would give most courts pause and require some workable solutions: the difficulty of the factfinding necessary for the court to conclude that the Biden administration was in fact aiding and abetting Israeli genocide in Gaza, and the difficulty of fashioning appropriate relief. As to the first factor, while the plaintiffs made a compelling case in testifying at the district court's hearing on their motion for preliminary injunction, and the district court's noted in its opinion that the evidence did demonstrate a probability that Israel was committing genocide in Gaza,[117] the defendants would have to be afforded an opportunity to rebut that evidence. The defendants would likely claim that factual evidence justifying their conclusion that Israel was not aiding genocide might be found in secret intelligence, privileged diplomatic communications, or on the battlefields of Gaza not available for judicial inspection. One difficulty in these kinds of cases is that, unlike the situation in *Zivotofsky*, the facts are in dispute and not easily accessible to the court.

Second, as the Ninth Circuit noted, the plaintiffs' initial requests for relief were far-ranging, requiring a determination of which particular military provisions were being utilized by Israel to conduct the alleged genocide, what conditions to promulgate on U.S. aid to Israel, and whether to enjoin U.S. actions in the Security Council, such as vetoing resolutions condemning Israel. The reluctance of courts to issue broad injunctive relief in these types of situations is understandable, but the sweeping invocation of the political question doctrine to preclude jurisdiction is not a principled, legitimate, or desirable solution. The next Part proposes an alternative solution.

116. Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (citing *Filártiga,* 630 F.2d at 884; Tel–Oren v. Libyan Arab Republic, 726 F.2d 774, 781, 791 n.20 (D.C. Cir. 1984).

117. Def. for Child. Int'l-Palestine v. Biden, 107 F.4th 926, 933–34 (9th Cir. 2024).

V. A PROPOSED SOLUTION TO THE POLITICAL QUESTION CONUNDRUM

The solutions to the fact-finding difficulties and concerns about how to grant relief set forth above are for the court to focus on the legal issues involved in the case, and to grant either declaratory relief or to draft a creative decision which, while not ordering relief, effectively provides a legal framework for the political branches to follow.

The availability of declaratory relief is an alternative to a political question holding because of the difficulty of granting coercive, injunctive relief in a case like *Defense for Children*. As the Court said in *Powell v. McCormack*, a case in which the court of appeals relied on the unavailability of injunctive relief as grounds to dismiss the case on justiciability, "[w]e need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued."[118] While political and foreign policy reasons may make a court cautious in granting wide ranging injunctive relief in cases such as *Defense for Children*, the availability of declaratory relief was a viable alternative. Declaratory relief would set forth the legal standards that the President must follow; it would leave to the Executive and Legislative branches discretion in fashioning an appropriate response to the declaratory relief issued by the court. In short, it would recognize the Executive Branch's discretion and control over foreign policy without abdicating the "province and duty of the judicial department to say what the law is."[119]

Alternatively, the court may adopt an even more creative approach that also states what the law is without actually ordering the Executive and Legislative Branches to do anything, or even officially granting declaratory relief, but which nonetheless provides the legal parameters cabining their action. There are several examples of courts doing just that.

The first is the case of *Dellums v. Bush*, wherein fifty-six members of Congress sued President George H. W. Bush seeking to enjoin the President's threatened attack on Iraq to force Saddam Hussein to withdraw from Kuwait.[120] The plaintiffs claimed that such an attack would violate the provision of the Constitution which accords Congress, and not the President, the power to declare war.[121] A court issuing an injunction halting a military action would have been almost unprecedented,[122] and thus not a "familiar" judicial exercise. Moreover, the Justice Department argued that the question of what is a war, for purposes of Article 1, was a political question to be determined by the political branches and not subject to an objective legal standard that the court could apply.[123]

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118. Powell v. McCormack, 395 U.S. 486, 517–18 (1969).
119. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
120. Dellums v. Bush, 752 F. Supp. 1141, 1149–50 (D.D.C. 1990).
121. U.S. CONST. art. I, § 8.
122. Schlesinger v. Holtzman, 414 U.S. 1321, 1321 (1973).
123. *Dellums*, 752 F.Supp at 1145.

Judge Greene rejected the argument that the political question doctrine should be applied to this case, holding that the President's interpretation of the Constitution would render the provision which accords Congress the power to declare war meaningless.[124] He found that Congress, not the President, had the power to authorize the threatened war with Iraq.[125] He did not enter into the factual thicket of what facts constitute warfare, but simply held that a situation wherein 500,000 American troops were facing off against an equivalent number of Iraqi soldiers constituted war under any meaning of that term.[126]

However, Judge Greene did not grant the members of Congress relief, invoking a proposition first articulated by Justice Powell in the *Goldwater v. Carter*[127] case challenging President Carter's termination of a treaty with Taiwan. Justice Powell also rejected application of the political question doctrine in that case, but held that the issue of which branch has the power to terminate a treaty is not ripe until Congress takes action disputing the President's purported termination of the treaty.[128] Similarly, Judge Greene opined that the war powers dispute between members of Congress and President Bush was not ripe until the war was both imminent and Congress had taken some action disputing the President's authority to wage war against Iraq without congressional approval.[129] Therefore, he denied the plaintiffs' motion for a preliminary injunction but did not dismiss the case.[130]

In retrospect, Judge Greene's decision was wise and cautious. Had he issued the injunction plaintiffs requested, his decision would likely have been reversed by the District of Columbia Circuit in short order. The plaintiffs did not appeal.[131] Harold Koh, then a law professor at Yale Law School,[132] termed Greene's opinion essentially a non-appealable declaratory judgment against the President.

Greene's *Dellums* opinion received wide coverage and acclaim in the leading newspapers in the country, putting pressure on President Bush to seek

124. *Id.* at 1145–46.

125. *Id.* at 1151.

126. *Id.* at 1146.

127. Goldwater v. Carter, 444 U.S. 996, 996 (1979).

128. *Dellums*, 752 F. Supp. at 1150.

129. *Id.*

130. *Id.* at 1152.

131. I was lead counsel for the Congressional plaintiffs in the *Dellums* case.

132. Koh later became the Dean and a Legal Advisor to the United States Department of State under President Obama. *Harold Hongju Koh*, YALE L. SCH., https://law.yale.edu/harold-hongju-koh (last visited July 6, 2025). He had authored an amicus brief in support of the plaintiffs on behalf of prominent constitutional law professors. *See generally* Bruce A. Ackerman, Abram Chayes, Lori F. Damrosch, John H. Ely, Erwin N. Griswold, Gerald Gunther, Louis Henkin, Harold H. Koh, Philip B. Kurland, Laurence H. Tribe & William W. Van Alstyne, Ronald V. Dellums v. George Bush *(D.D.C. 1990): Memorandum* Amicus Curiae *of Law Professors*, 27 STAN. J. INT'L L. 257 (1991).

congressional approval before launching the war to drive Iraq out of Kuwait.[133] Our plaintiffs introduced a resolution in the House of Representatives opposing any U.S. military action against Iraq without congressional approval, which passed by a wide majority.[134] In our opinion, that resolution set up the confrontation with the President that Greene had required. President Bush, however, bowed to public pressure and sought congressional approval for the attack.[135] The Senate narrowly authorized such U.S. military action, and the House of Representatives did so by a wide margin, rendering our case moot.[136] But Greene's opinion succeeded in forcing the President to seek congressional approval before waging war.

A different tack was taken by the District of Columbia Circuit in *Committee of U.S. Citizens in Nicaragua v. Reagan* ("CUSCLIN"),[137] where the plaintiffs challenged U.S. aid to the Nicaraguan Contras fighting the Nicaraguan government. The court was skeptical of the government's political question argument, although the district court had dismissed on those grounds.[138] The court ultimately rejected the government's political question argument, in part because it found it more appropriate to dismiss for failure to state a claim on the merits.[139] In discussing the case's merits, the court engaged in a lengthy analysis of the relationship between international law and statutes, following the established precedent that a statute could override a treaty or customary law.[140] But the court also held that this general rule may not be the case for fundamental international norms such as those on genocide or torture, which was the plaintiff's main argument.[141] Further, the court held that the rule that nations must obey ICJ opinions—as the Court ruled that the aid was illegal under customary international law—was not a fundamental norm of international law.[142]

133. Martin Tolchin, *Mideast Tensions: 45 in House Sue to Bar Bush from Acting Alone*, N.Y. TIMES (Nov. 21, 1990), https://www.nytimes.com/1990/11/21/world/mideast-tensions-45-in-house-sue-to-bar-bush-from-acting-alone.html.

134. H.R. Con. Res. 32, 102d Cong. (1991) ("Expressing the sense of Congress that te President should adhere to the War Powers Resolution and obtain specific statutory authoriziation for the use of United States Armed Forces in Libya.").

135. Paul Houston & Dwight Morris, *Times Survey: Congress Split on Giving Bush Its Vote for War*, L.A. TIMES (Jan. 11, 1991); Adam Clymer, *Congress Acts to Authorize War in Gulf; Marins Are 5 Votes in Senate, 67 in House*, N.Y. TIMES (Jan. 13, 1991), https://www.nytimes.com/1991/01/13/world/confrontation-gulf-congress-acts-authorize-war-gulf-margins-are-5-votes-senate.html; Thomas L. Friedman, *White House Hints It May Talk if Iraq Offers a New Date: Congressional and Allied Pressure Rising for a Peaceful Way Out*, N.Y. TIMES (Jan. 3, 1991), https://www.nytimes.com/1991/01/03/world/confrontation-gulf-white-house-hints-it-may-talk-if-iraq-offers-new-date-nato.html.

136. Authorization for Use of Military Force Against Iraq Resolution, H.R.J. Res. 77, 102d Cong. (1991).

137. Comm. of U.S. Citizens in Nicar. v. Reagan, 859 F.2d 929, 932–33 (D.C. Cir. 1988).

138. *Id.*

139. *Id.* at 953.

140. *Id.* at 941.

141. *Id.*

142. *Id.* at 935–36.

While a later District of Columbia Circuit opinion criticized the CUSCLIN opinion, asserting that it was not appropriate to rule on the merits without affirmatively rejecting the political question doctrine,[143] the CUSCLIN approach is appropriate, and much better than an unprincipled political question dismissal. Although dicta, the court's holding as to the role of fundamental international norms could be useful in the future development of the law.

CONCLUSION

The political question doctrine thus should have a very limited role in adjudicating foreign policy or separation of powers disputes, confined to those few cases where a legal standard exists for deciding the issue presented to the court, but the application of such a standard is textually committed to the political branches. Rather than utilize a broad and amorphous political question doctrine, in cases such as *Defense for Children*, courts should address, decide, and provide relief with respect to plaintiffs' claims through creative case management and equitable relief strategies.

143. Schieber v. United States, 77 F.4th 806, 809 (D.C. Cir. 2023).