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WHY CONGRESS CAN'T SUE TO END MILITARY CONFLICTS

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INTRODUCTION

Two months after the United States entered into World War II, President Franklin D. Roosevelt signed Executive Order 9066, which effectively relocated any resident of Japanese ancestry from the western United States and led to the detention of tens of thousands of Japanese-Americans throughout the duration of the war.[1]

Fred Korematsu was one of the many Americans ordered to relocate. He refused, however, and was later convicted for violating the president's wartime order.[2] He then challenged the constitutionality of his conviction. In the meantime, he lived at an "assembly center" for Japanese Americans in San Bruno, California (a former horse track) and a temporary detention camp in Topaz, Utah.

Two years after his conviction—sixth months before Nazi Germany's formal surrender and ten months before Japan's own surrender—Korematsu's claim reached the U.S. Supreme Court, but it upheld the conviction. Justice Hugo Black's majority opinion reasoned that: "Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."[3] Justice Black further rationalized that courts could not judge the government's actions by "the calm perspective of hindsight" and later "say that at that time these actions were unjustified."[4] Before *Korematsu* was published, it had been popularly retold that, while the justices debated the case in conference, Justice Black argued that "somebody has to run this war, either us or Roosevelt. And we can't, so Roosevelt has to."[5]

Of course, time has been unkind to Justice Black's *Korematsu* decision. Even then, Justice Robert Jackson was troubled by the majority's logic. He argued that "once a judicial opinion rationalizes such an order [...] The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[6] And, for decades since, scholars and popular writers have routinely criticized the opinion.[7] Indeed, just last year in Trump v. Hawaii, Chief Justice John Roberts declared that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution."[8]

However, despite such a repudiation, some of the questions underscoring Justice Black's core concerns may still hold true. For example, what is the judiciary's role in war? Is it unable to adjudicate foreign affairs disputes from the "calm perspective of hindsight?"[9] Indeed, current federal court practice suggests that Justice Black's view has ultimately prevailed. Consider the United States' recent engagements in Afghanistan and Syria.

Enacted shortly after the Sept. 11 terrorist attacks, the 2001 Authorization for Use of Military Force gave the president the authority "to use all necessary and appropriate force" against any entity "he determines planned, authorized, committed, or aided" in the attacks, or harbored "such organizations or persons."[10] The next year, Congress passed a second Authorization for the Use of Military Force, which allowed the president "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq."[11]

In the seventeen years since, Congress has not approved any additional uses of force. However, the United States continues to engage in hostilities in Afghanistan, Iraq and beyond. In April 2018, for instance, the United States and allies launched airstrikes in Syria, targeting "research, storage and military targets" as punishment for "a suspected chemical attack near Damascus [...] that killed more than 40 people."[12]

In a memo released a month later, the Office of Legal Counsel (OLC) concluded that the Syria air strike was legal. The OLC reasoned that congressional approval was unnecessary because the president had "determined that the use

of force would be in the national interest" and the limited scope of operations were "sufficiently limited that they did not amount to war in the constitutional sense."[13]

These arguments follow many of the OLC's prior arguments supporting the Obama administration's prolonged 2011 air campaign in Libya.[14] In Libya, the Obama administration concluded that "an extensive bombing campaign that included striking 100 targets in just 24 hours, was [...] not 'hostilities' and therefore not subject to the War Powers Resolution."[15] This decision was recently referred to by Professor Oona Hathaway as "a death blow" to the War Powers Resolution's effectiveness as a congressional check on the president's war powers.

Despite significant military engagement, Congress did not directly authorize hostilities in either Libya or Syria. And both instances were criticized by scholars and members of Congress as an exceedingly broad view of the president's constitutional powers.[16] But, if Congress wanted to stop these military actions, would they have recourse in court? Likely not. Suits challenging the president's overreach in foreign relations have largely failed in federal court. This is because courts have been consistently unwilling to second-guess the executive branch's military decision-making, and have instilled common law barriers that firmly limit judicial engagement. Two of the more common legal barriers barring Congress's success in federal court include the doctrines of standing and political question.

CONGRESSIONAL STANDING

Article III of the Constitution limits judicial power to only "cases" and "controversies."[17] It is not, however, limited to strictly domestic affairs. Article III, for example, states that judicial power extends to treaties and cases affecting ambassadors, admiralty and maritime jurisdiction and suits between domestic and foreign citizens.[18]

Nevertheless, regardless of subject, a claim must be justiciable, meaning "it is a claim that may be resolved by the courts."[19] Ripeness and mootness are common bars to justiciability. Ripeness, for one, is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[20] An example of ripeness is: "when a federal court is asked to render a declaratory judgment that a statute or regulation is invalid or unconstitutional, yet it is unlikely that the plaintiff will suffer a hardship without pre-enforcement review of that law."[21] Mootness, on the other hand, considers a case that was once ripe for adjudication but—due to a potential variety of circumstances—has changed to one wherein "a federal court can no longer grant effective relief."[22] For example, in one case, a prisoner attempted to challenge the constitutionality of his transfer to a maximum security facility, but during the litigation, was transferred back to a minimum security facility and thus the Court determined the case was moot.[23]

Beyond ripeness and mootness, standing is perhaps the most challenging bar to overcome. In short, to show standing, a plaintiff must show a "personal stake in the outcome of the controversy."[24] This is satisfied by showing an "injury fairly traceable to the defendant's allegedly unlawful conduct" that is "likely to be redressed by the requested relief."[25] This requirement is often more challenging to show in the realm of foreign affairs. After all, plaintiffs "often lack the concrete and particularized injury that is required in order to have standing to challenge the legality of government action."[26] Being a taxpayer or merely interested in a government act is not enough to show standing.[27]

Raines v. Byrd

Standing is often even more challenging for individual members of Congress. The seminal case *Raines v. Byrd* helps to explain why. In Raines, four Senators and two House members voted against the 1996 Line Item Veto Act. The Act, however, passed both chambers and was signed by the president. The day after the law went into effect, the six members sued in federal court, arguing the Act unconstitutionally infringed on Congress's Article I powers.[28]

The Supreme Court concluded that the congressional members lacked "legislative standing" to challenge the Act. It noted that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[29] With this in mind, the Court emphasized the distinction between personal and institutional injury.

Standing, according to the Court, requires a "particularized" injury. In other words, "the injury must affect the plaintiff in a personal and individual way."[30] For example, in an earlier case, the Court found that a member of Congress had standing because the dispute concerned his expulsion from the House and loss of salary.[31] In *Raines*, though, the Court reasoned that the congressional members were not asserting a particularized, personal injury. Instead, they were asserting an *institutional* injury because their actual injury was the loss of legislative power, "which necessarily damages all Members of Congress and both Houses of Congress equally."[32]

At the same time, the Court clarified that the result might be different in the instance where there are enough legislators to enact or defeat a legislative act. Under those facts, there may be standing because the members' votes would "have been completely nullified."[33] Here, in contrast, the members' "votes were given full effect. They simply lost that vote."[34]

With this in mind, the Court reminded the members that they still have "an adequate remedy" outside of the federal courts.[35] They can garner enough votes to repeal the Act or alter its effect through appropriation. The Act also remained open to challenge by someone who directly suffered a "judicially cognizable injury as a result of the Act."[36]

After *Raines*

Suits by members of congress against executive actions did not end after *Raines*, including suits protesting certain military actions. In 1999, for example, 31 members of Congress sued, arguing that President Clinton violated the War Powers Resolution and the Constitution's War Powers Clause by singlehandedly directing American involvement in NATO air and cruise missile attacks in Yugoslavia.[37] The district court dismissed the case for lack of standing, and the D.C. Circuit affirmed the lower court's decision.

Looking to *Raines*, the circuit court explained that "Congress has a broad range of legislative authority it can use to stop a President's war making [...] and therefore under *Raines* congressmen may not challenge the President's war-making powers in federal court."[38] The D.C. Circuit noted that "Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign," but a similar measure was already soundly defeated.[39] The circuit court also observed that "Congress always retains appropriations authority and could have cut off funds for the American role in the conflict."[40] Yet Congress had already authorized appropriations. Finally, the circuit court noted that "there always remains the possibility of impeachment" if the president openly defied Congress.[41]

Similar attempts continue to fail in federal court. In 2011, after President Obama ordered military strikes against Libya, ten members of Congress sued, arguing the strikes unconstitutionally sidestepped congressional consent.[42] Citing *Raines* and others, the district court found that "injuries that affect all members of Congress in the same broad and undifferentiated manner are not sufficiently 'personal' or 'particularized,' but rather are institutional, and too widely dispersed to confer standing."[43]

The district court also noted that, like *Raines*, the members of Congress "did not initiate their lawsuit on behalf of their respective legislative bodies."[44] Three years later, this fact became key in a federal suit by the Arizona state legislature. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court held that the state legislature had standing because it asserted an institutional injury—losing legislative redistricting power—and it sued only after authorizing votes in both of its chambers.[45]

Today, it is more likely for a congressional litigant to gain standing if they are asserting an institutional injury with the support of the institution—in this case, Congress. Nevertheless, past cases demonstrate that open legislative options (such as additional votes, appropriations and impeachment) often blunt a congressional litigants' success in court.[46]

POLITICAL QUESTION DOCTRINE

In addition to standing, the political question doctrine frequently bars litigating foreign affairs disputes in the courts. The doctrine has a long history, arguably beginning as early as Chief Justice John Marshall's opinion in Marbury v. Madison. In Marbury, Marshall famously wrote: "It is emphatically the province and duty of the judicial department to say what the law is."[47] The opinion, however, also concedes that "mere political act[s]" may not "be examinable in a court of justice" and "must always depend on the nature of that act."[48]

Baker v. Carr

Whether a "mere political act" is justiciable is a fact-specific inquiry that has gone through many revisions. *Baker v. Carr* is the most relevant modern application of the doctrine and offers several factors for courts (and potential litigants) to consider.

In that case, Tennessee citizens challenged the state's method of redistricting. In determining whether the state residents had standing, the Court identified six factors that may trigger a nonjusticiable political question:

> (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) an unusual need for unquestioning adherence to a political decision already made;" (6) "or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[49]

Given the ambiguity of these factors, *Baker* specifically addressed whether "all questions touching foreign relations are political questions."[50] The Court acknowledged that, often, foreign affairs cases "involve the exercise of a discretion demonstrably committed to the executive or legislature" and "such questions uniquely demand single-voiced statement of the Government's views."[51] At the same time, the Court emphasized, "it is error" to believe "that every case or controversy which touches foreign relations lies beyond

judicial cognizance."[52] Accordingly, this balance falls on "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."[53]

After *Baker*

The 1979 case *Goldwater v. Carter* considered the factors established by *Baker* seventeen years earlier. In this case, eight senators and sixteen House members argued that President Carter unconstitutionally planned to terminate the United States' mutual defense treaty with Taiwan without consent from Congress. The Supreme Court accepted the case, but before oral arguments and without a majority opinion, remanded it to the district court with direction to dismiss the complaint.[54]

This was because a plurality of the Court agreed that the dispute was a nonjusticiable political question because the case concerned "the authority of the President in the conduct of our country's foreign relations" against "the extent to which [...] Congress is authorized to negate the action of the President."[55] Justice Lewis Powell, writing separately, agreed that the case should not be decided, not because it was permanently barred from review, but simply because the case was not ripe. Citing the *Baker* factors, Justice Powell argued that the case was "not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."[56] Only when the government was "brought to a halt because of the mutual intransigence," would the Court need to step in to decide the constitutional question.[57]

But if *Goldwater* shut the door for Congress to litigate foreign affairs disputes, *Zivotofsky v. Clinton* ever so slightly reopened it. Zivotofsky was an American citizen born in Jerusalem. His parents filed an application for his passport to list his place of birth as "Jerusalem, Israel." But State Department policy barred adding "Israel or Jordan" on passports where Jerusalem was the place or birth.[58] Congress disagreed with the State Department. And in 2003, Congress included in the Foreign Relations Authorization Act a provision that "sought to override this instruction by allowing citizens born in Jerusalem to have 'Israel' recorded on their passports if they wish."[59]

Lower courts concluded the issue was a nonjusticiable political question. But the Supreme Court reversed, explaining that it was "not being asked to supplant a foreign policy decision" about the political status of Jerusalem, it was instead deciding whether "the statute is constitutional," which "is a familiar judicial exercise."[60] Citing *Baker*, the Court claimed it had sufficient "discoverable and manageable standards" for resolving the issue because the question concerned the constitutionality of a statute rather than finding who had the power to decide the political status of a foreign city.[61]

Yet even after *Zivotofsky*, many courts still continue to dismiss a number of foreign affairs claims pursuant to the political question doctrine. One survey of relevant circuit cases concluded, for example, that "[m]any appellate judges still use the prudential Baker factors to dispose of cases under the political question doctrine, notwithstanding *Zivotofsky*."[62] The author speculated a number of potential reasons why. For one *Zivotofsky* did not overrule *Baker*. Additionally, in *Zivotofsky*, the "President and Congress had seemed to reach what Justice Powell described in a related context in *Goldwater v. Carter* as 'a constitutional impasse.'"[63] In any event, the doctrine is often—and successfully—raised by the executive branch to curb suits protesting military action.

CONCLUSION

Individual members of Congress have little chance of successfully suing to block an executive military action. And Congress—even citing institutional concerns—often fares no better under the political question doctrine. These doctrines emulate Justice Black's concerns as far back as World War II. Judges cannot run wars. And when it comes to foreign affairs, courts are more than happy to leave it to the political branches to decide.

So, in light of this, what is Congress to do? Courts have offered some advice: use their institutional power. As the Supreme Court has reminded the legislature: "Congress has a broad range of legislative authority it can use to stop a President's war making."[64] Oversight, appropriations and legislation, for instance, always remain tools in the legislature's toolkit. And when it comes to the current conflicts in Afghanistan, Syria and beyond, Congress will see more results on the floor than in the courtroom.

ABOUT THE AUTHOR

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32. Raines, 521 U.S. 811 at 821.

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