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NOTES

DISCIPLINING DEFERENCE: STRENGTHENING THE ROLE OF THE FEDERAL COURTS IN THE NATIONAL SECURITY REALM

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Introduction

In a much discussed and influential speech at the National Defense University in May of 2013, President Barack Obama discussed the United States' national security situation.[1] About midway through the speech, President Obama made the following statement:

> The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may . . . continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.[2]

Despite this aspirational rhetoric, little has been done to "discipline" the actions of the United States regarding drone strikes and other national secur-

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1 *See, e.g.*, Peter Baker, *Pivoting from a War Footing, Obama Acts to Curtail Drones*, N.Y. Times (May 23, 2013), http://www.nytimes.com/2013/05/24/us/politics/pivoting-from-a-war-footing-obama-acts-to-curtail-drones.html; Peter W. Singer, *Finally, Obama Breaks His Silence on Drones*, Brookings Inst. (May 23, 2013), https://www.brookings.edu/opinions/finally-obama-breaks-his-silence-on-drones/.

2 President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [hereinafter Nat'l Def. Univ. Speech].

ity measures such as the detainment of suspected terrorists.[3] As the United States transitions into a post, post-9/11 period, the need for judicial deference to the Executive may well be decreasing along with the imminence of national security threats. However, federal district and appellate courts have continued to show high deference to the executive branch in cases involving national security. This Note will argue that federal courts need to be more "disciplined" in their deference determinations in order to effectively check the Executive's power. Part I will look at the Constitution and its allocation of foreign relations powers for evidence of the appropriate amount of deference that ought to be shown by the judiciary. While the text of the Constitution is largely silent on this question, Part I will show that this silence does not exclude a role for the judiciary in foreign affairs. Part II will proceed to discuss several important Supreme Court decisions that have helped to flesh out the historical understanding of deference determinations. These cases will demonstrate that the Supreme Court has not historically hesitated to fulfill its duty to "say what the law is,"[4] even in cases regarding questions of national security. Part III advances to the post-9/11 era and shows that during more recent years, lower courts have conferred an unnecessarily high level of deference to the Executive in cases involving national security issues. After this background, Part IV will make a case for an expanded role for the courts in hearing and reviewing questions involving national security questions and more limited deference to the Executive on these matters. It will argue that this should be accomplished through the application of three principles: (1) a more formal approach to the judiciary's role in foreign affairs; (2) a willingness to apply international law; and (3) a narrow approach to the issues of the case in order to avoid judicial policymaking. Finally, Part V will analyze two recent cases, *Bahlul v. United States*[5] and *Ali Jaber v. United States*,[6] in light of these principles in order to illustrate the benefits that such an approach would have.

I. Foreign Affairs and the Constitution[7]

The Constitution does not vest any one branch with the plenary power of "foreign affairs."[8] Instead, it delegates specific powers related to foreign affairs to a branch or some combination of branches.[9] Article I grants Congress the powers: "To regulate Commerce with foreign Nations"; "To define and punish Piracies and Felonies committed on the high Seas, and Offenses

3 *See, e.g.*, *Detention*, ACLU, https://www.aclu.org/issues/national-security/detention (last visited Nov. 9, 2017); *Targeted Killing*, ACLU, https://www.aclu.org/issues/national-security/targeted-killing (last visited Nov. 9, 2017).

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

5 840 F.3d 757 (D.C. Cir. 2016).

6 861 F.3d 241 (D.C. Cir. 2017).

7 The title of this Part is taken from Louis Henkin's authoritative work. *See* Louis Henkin, Foreign Affairs and the Constitution (1972).

8 *See id.* at 16.

9 *See id.* at 32.

against the Law of Nations"; "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; "To raise and support Armies"; "To provide and maintain a Navy"; "To make Rules for the Government and Regulation of the land and naval Forces"; and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[10] Article II makes the President the "Commander in Chief of the Army and Navy," and grants him the power "by and with the Advice and Consent of the Senate," to "make Treaties" and "appoint Ambassadors."[11] Article III vests the courts with the judicial power and extends this power to

> [A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[12]

From this cursory textual analysis, one can see that the Constitution's delegation of foreign affairs powers is by no means comprehensive.[13] Any attempt to justify all of the aspects of the modern foreign affairs powers in the text of the Constitution "requires considerable stretching of language, much reading between lines, and bold extrapolation from 'the Constitution as a whole.'"[14] Thus, the foreign affairs powers are largely and necessarily "extra-constitutional."[15] One must look to sources outside the Constitution to determine the location and limits of such powers.[16] Of particular importance for this Note is the role of the judiciary in foreign affairs—under what circumstances and to what degree should the judiciary show deference to the political branches? When the political branches are acting within their specific constitutionally delegated authority—for example, when Congress declares war or when the Executive negotiates a treaty—the judiciary ought not refuse to review a challenge to such action. To borrow the words of Professor Henkin, "There is reason for due deference to the executive, but not for undue deference—for due judicial humility, but not undue humility."[17]

The Federalist Papers provides some important insight into the question of judicial deference. These writings show that the Founding Fathers clearly

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10 U.S. CONST. art. I, § 8.

11 U.S. CONST. art. II, § 2.

12 U.S. CONST. art. III, §§ 1, 2.

13 *See* HENKIN, *supra* note 7, at 16 (listing the numerous aspects of the foreign affairs power not specifically enumerated by the Constitution).

14 *Id.* at 17.

15 *Id.* at 26.

16 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("[The foreign affairs powers] exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.").

17 LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 72 (1990).

contemplated an independent role for the judiciary in foreign affairs.[18] In *The Federalist No. 3*, while arguing that the national government is better suited than the state governments to deal with foreign affairs, John Jay wrote, "It is of high importance to the peace of America that she observe the laws of nations . . . ."[19] Jay clearly contemplated a role for the judiciary in ensuring this observance. He argued that the national government would attract the best and brightest minds, with the "result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory *with respect to other nations*."[20] Alexander Hamilton further explained the role of the judiciary in foreign affairs in *The Federalist No. 80*: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. . . . [And] it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."[21] Furthermore, he noted that "cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction."[22] These writings show that the Framers intended the federal courts to play a role in foreign affairs, even to the point of handling cases arising under the laws of nations. The Supreme Court has decided a number of cases that have further shaped the contours of the judiciary's role in foreign affairs. Part II will discuss these cases and their effect.

II. Foreign Affairs and the Judiciary

The federal judiciary has decided cases involving issues of foreign affairs and national security from the time of the United States' founding. The Supreme Court has not always refused to hear a case simply because it requires the consideration of issues touching on foreign affairs.[23] Part II will look at several of these cases to identify the level of deference the judiciary has historically shown to the executive branch in this field.

To begin, in *Bas v. Tingy*,[24] which touched on an ongoing conflict between the United States and France, the Supreme Court was called on to interpret a U.S. statute to determine "[w]hether France was an enemy of the United States, within the meaning of the law?"[25] Though Congress had

18 *See* Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. Sch. L. Rev. 119, 120–21 (2012) ("For Jay and Hamilton especially, a crucial component for the maintenance of national security would be an independent federal judiciary.").

19 The Federalist No. 3 (John Jay).

20 *Id.* (emphasis added).

21 The Federalist No. 80 (Alexander Hamilton).

22 *Id.*

23 *See* Joshua Andresen, *Due Process of War in the Age of Drones*, 41 Yale J. Int'l L. 155, 164–67 (2016) (discussing the Supreme Court's willingness to review military activity). *See generally* Louis Fisher, *Judicial Review of the War Power*, 35 Presidential Stud. Q. 466 (2005) (chronicling Supreme Court treatment of foreign affairs issues).

24 4 U.S. (4 Dall.) 37 (1800).

25 *Id.* at 37 (emphasis omitted).

made no declaration of war,[26] the Court held that, for the purposes of the statute, France and the United States were enemies.[27] The Supreme Court did not defer to the judgment of the Executive or wait for Congress to declare war before deciding the case. Instead, this decision was reached by looking at "the situation of the *United States* in relation to *France*."[28] The Court looked at evidence such as the United States' "dissolv[ing its] treaty" with France and Congress's "enjoining the [United States] . . . to attack [France] on the high seas."[29]

A second informative case from this time period is *Little v. Barreme*.[30] During the same conflict with France, Congress passed a law requiring the seizure of American ships travelling *to* French ports.[31] President John Adams instructed Captain Little to stop ships "bound to, *or from*, French ports."[32] The Court was asked to decide if Captain Little was excused from paying damages because he was acting according to the President's instructions. Answering this question required the Supreme Court to consider whether the Executive's interpretation of the law superseded the intent of the Congress. The Court held that it did not, explaining, "instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."[33] Here again, the Supreme Court did not sit out the case because it involved foreign affairs. And they did not simply defer to the political branches. Instead, the Court chose to interpret and apply the relevant law despite the fact that the Executive had interpreted it differently. The Court held the Executive accountable for its actions instead of deferring to its judgment.

Following these early cases, the Supreme Court continued to take and decide cases involving foreign affairs issues throughout the nineteenth and the first half of the twentieth centuries. During the Civil War, President Lincoln instituted a blockade of southern ports.[34] Several suits arose after neutral ships were seized in this blockade in what are known as the *The Prize Cases*.[35] At the heart of these cases was the President's ability to institute the blockade. This question required the Court to decide whether "a state of war existed which would justify a resort to these means of subduing the hostile force."[36] Even though Congress had not officially declared war, the Supreme Court did not accept that no state of war existed. Instead, the Court analyzed

26 *See id.* at 41.
27 *See id.* at 42–43.
28 *Id.* at 41.
29 *Id.*
30 6 U.S. (2 Cranch) 170 (1804).
31 *See id.* at 170–71.
32 *Id.* at 171.
33 *Id.* at 179.
34 Abraham Lincoln, Proclamation by the President of the United States of America on Blockade of Confederate Ports (1861), https://www.loc.gov/item/scsm000582/ (accessed November 30, 2016.)
35 67 U.S. (2 Black) 635 (1862).
36 *Id.* at 666.

whether a "de facto"[37] war existed based on *jus belli* and the law of nations.[38] Using these international law principles, the Court found that a state of war existed and therefore, "the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion."[39]

Though there are others,[40] these examples demonstrate that the Supreme Court has a long history of involvement in national security issues and has even at times held the Executive's foreign affairs actions to be in violation of the law. However, from this early period through the first half of the twentieth century, the Supreme Court did not have a clearly articulated standard for determining when it could decide cases involving national security issues and when it should defer to the Executive.[41] The doctrine by which federal courts determine which questions they can answer and which the Constitution requires the political branches of government resolve is known as the political question doctrine.[42] The political question doctrine naturally flows from the Constitution's system of separated powers. It stands for the idea that some decisions are constitutionally committed to the political branches of government—the executive and the legislative—and cannot be decided by the judiciary.[43] Scholars have attributed the beginning of the political question doctrine in Supreme Court jurisprudence to *Marbury v. Madison*,[44] where Chief Justice Marshall explained, "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[45] Given the explicit constitu-

37 *Id.*

38 *Id.* at 666–70.

39 *Id.* at 671.

40 *See, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (construing the constitutional powers of the Court in a challenge to the legality of a court martial); Fleming v. Page, 50 U.S. (9 How.) 603, 614–15 (1850) (finding that the powers granted to the President by a declaration of war do not include the power to annex territory to the Union); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (finding that the President alone has the authority to call forth the militia, but not hesitating to review the question); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (ruling on the question of whether enemy property can be seized under a declaration of war).

41 *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1393 n.257 (1988) (noting that the political question doctrine was "first articulated thoroughly in Baker v. Carr").

42 *Political Question*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government.").

43 *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597 (1976) ("That there are political questions . . . is axiomatic in a system of constitutional government built on the separation of powers.").

44 5 U.S. (1 Cranch) 137, 170 (1803); *see* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1910 & n.4 (2015) (discussing the origins of the political question doctrine and noting scholarly articles attributing its beginnings to *Marbury v. Madison*).

45 *Marbury*, 5 U.S at 170.

tional role of the executive and legislative branches in foreign affairs,[46] political questions often arise in the national security context.

While the principle underlying the political question doctrine has been around since *Marbury v. Madison*, the doctrine was not particularly well defined through the first half of the twentieth century. This began to change with the landmark decision of *Baker v. Carr*.[47] For the first time, the Court set forth a clearly articulated formula to determine what constitutes a political question.[48] The Supreme Court named six elements that might make a case a nonjusticiable political question:

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

While the issues in *Baker* were not related to foreign affairs, the Court discussed the political question doctrine in this context because of the significant number of foreign affairs cases raising potential political question problems.[50] The Court explained that while "[t]here are sweeping statements to the effect that all questions touching foreign relations are political questions . . . it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[51] In recent years, however, many federal courts have used the *Baker* framework to show a high degree of deference to the executive branch on matters of national security.[52] In some instances, this deference may have been warranted. The years following 9/11 were undoubtedly a dangerous time for the United States. The country was involved in two wars and fighting a new kind of enemy:

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46 *See supra* Part I.

47 369 U.S. 186 (1962).

48 Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 264 (2002) (explaining that in *Baker v. Carr*, "the Court engaged in its most detailed discussion of the political question doctrine to date"). It is important to note, however, that despite the formulaic nature of the *Baker* decision, many commentators have criticized the decision and questioned its usefulness. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) ("Unfortunately, the *Baker* factors are much easier to enumerate than they are to apply, and it is perhaps for this reason that the political question doctrine 'continues to be the subject of scathing scholarly attack.' Dean Erwin Chemerinsky has gone so far as to remark that the *Baker* criteria 'seem useless in identifying what constitutes a political question.'" (citation omitted) (first quoting Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984); then quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 149 (5th ed. 2007))).

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

50 *See id.* at 211–13.

51 *Id.* at 211.

52 *See infra* Part III.

terrorism. National security was genuinely and imminently threatened in ways that the United States had never before experienced. Accordingly, the executive branch needed latitude to properly exercise its authority and deal with the crisis at hand. Since this time, however, the need for such deference has waned. Still, courts—especially the district and circuit courts—have continued to defer heavily to the Executive.[53]

III. FOREIGN AFFAIRS AND THE JUDICIARY: MODERN JURISPRUDENCE

Part III will now analyze several significant Supreme Court cases from the post-9/11 era, focusing on the level of deference shown to the Executive. It will then discuss lower court cases that illustrate how the lower courts have been overly and inconsistently deferential to the Executive in cases involving national security issues.

A. Supreme Court Decisions

An early post-9/11 era case concerning national security issues to reach the Supreme Court was *Hamdi v. Rumsfeld*.[54] The case arose out of the detention of a United States citizen, Yaser Esam Hamdi, who the government alleged had taken up arms for the Taliban against the United States in Afghanistan.[55] Hamdi was seized by coalition forces in Afghanistan in 2001 and turned over to the U.S. military. The United States initially detained Hamdi in Guantanamo Bay, but authorities transferred him to a naval prison in Virginia after discovering that he was an American citizen.[56] The United States designated Hamdi an "enemy combatant," which would have allowed the government to detain him indefinitely.[57] Hamdi's father petitioned for a writ of habeas corpus, alleging that his son's detention violated the Fifth and Fourteenth Amendments of the Constitution.[58] After the district court was unable to make a determination on the legality of the detention on the evidence provided, the Fourth Circuit engaged in a comprehensive review of the relationship between the executive and judicial branches during wartime. The Fourth Circuit explained, "The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme," and accordingly, "the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or mili-

53 *See* HENKIN, *supra* note 17, at 82–83 ("[L]ower courts have found issues to be political and nonjusticiable more often during the past twenty-five years since *Baker* than in all our previous history.").

54 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).

55 *Id.* at 510.

56 *Id.*

57 *Id.*

58 *Id.* at 511.

tary affairs."[59] The court went on to enumerate the reasons why this deference is required, including the political branches' better organization to supervise overseas conflict, the judiciary's lack of accountability to the electorate, the textual allocation of powers, and the separation of powers.[60] In keeping with the doctrine of separation of powers, the court held that because of the President's "extraordinarily broad authority as Commander in Chief" the court had to "assume a deferential posture in reviewing exercises of this authority."[61] Accordingly, the Fourth Circuit refused to review Hamdi's status as an enemy combatant and the facts surrounding his capture because doing so would "require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law."[62] The Fourth Circuit's employment of this "distinctive deference" to the Executive was, in large part, motivated by the national security concerns faced by of the United States at the time.

The Supreme Court, however, rejected the separation of powers reasoning that the Fourth Circuit adopted. Justice O'Connor, writing for a plurality, explained that the Executive was undoubtedly "best positioned" to make national security decisions and acknowledged that there are legitimate concerns that could arise from imposing the burdens of running a military commission in a warzone.[63] However, the Court did not find that these concerns precluded the judiciary from considering Hamdi's status as an enemy combatant. Justice O'Connor wrote:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[64]

Review of executive action by the Supreme Court does not necessarily violate separation of powers, but rather, as the Court pointed out, helps to maintain the separation by preventing "*condens*[*ing*] power into a single branch of government."[65] *Hamdi* demonstrates that, while lower courts have been quick to defer to the Executive, the Supreme Court has engaged in more searching review of questions of national security, even early in the post-9/11 era.

A second important case from the post-9/11 era is *Hamdan v. Rumsfeld*.[66] Two years after *Hamdi*, Salim Ahmed Hamdan brought another unlawful

59 Hamdi v. Rumsfeld, 316 F.3d 450, 462–63 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) (plurality opinion).

60 *See id.* at 463.

61 *Id.* at 474.

62 *Id.* at 473.

63 *See Hamdi*, 542 U.S. at 531.

64 *Id.* at 535.

65 *Id.* at 536.

66 548 U.S. 557 (2006).

detention case against the United States. Hamdan was a Yemeni national who was captured in Afghanistan and imprisoned in Guantanamo Bay. After more than a year of imprisonment without charge, President Bush deemed Hamdan eligible for trial by a military commission, but he was not charged with any specific crimes.[67] A year later, he was charged with conspiracy to commit offenses triable by a military commission including "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[68] The charging document also alleged that Hamdan had served as Osama bin Laden's "bodyguard and personal driver," transported weapons, transported Osama bin Laden to anti-American lectures, and received weapons training from Al Qaeda.[69] In response to this charge, Hamdan filed petitions for writs of habeas corpus and mandamus. He argued that the military commission did not have the authority to try him because conspiracy "triable by military commission" did not violate any statute or the law of war, and because the military commission procedure violated military and international law since he would not be able to review the United States' evidence against him.[70] The district court granted the habeas petition, but the D.C. Circuit reversed, finding that the Geneva Conventions invoked by Hamdan were not judicially enforceable and that the commission would not violate either the Uniform Code of Military Justice (UCMJ) or the military regulations designed to enforce the Geneva Conventions.[71]

The Supreme Court granted certiorari despite the government's argument that the Detainee Treatment Act[72] (DTA) precluded the Court from hearing the case.[73] On the merits, the Court first addressed the issue of whether the President had the power to try Hamdan by military commission. The Court found that "[t]ogether, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."[74] The Court then turned to the question of "whether Hamdan's military commission is so justified."[75] To answer this question, the Court explained that in order for the commission to be lawful it needed to be in "compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' . . . including . . . the four Geneva Conventions signed in 1949."[76] The Court did not defer to the Executive's claim that the commission was in accordance with these laws or that the laws

67 *See id.* at 566.

68 *Id.* at 570.

69 *Id.*

70 *Id.* at 567–68.

71 *Id.*

72 Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

73 *Hamdan*, 548 U.S. at 584.

74 *Id.* at 594–95.

75 *Id.* at 595.

76 *Id.* at 613 (citation omitted) (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

were not applicable. Instead, the Court found that the procedures for the commission violated the UCMJ and the Geneva Conventions.[77] In response to the government's argument that the Court could not enforce the Geneva Conventions, Justice Stevens explained that as part of the law of war they are included in Article 21 of the UCMJ[78] and must be followed.[79] Even though al-Qaeda was not a signatory to the Convention, the Court still found that at least one of the Conventions applied.[80] *Hamdan* demonstrates the Supreme Court's willingness to interpret and apply international law to the exercise of executive power. The Court did not show complete deference to the executive branch when determining whether the military commission's procedure complied with international law. Instead, it interpreted and applied the relevant international law and found the Executive's action to be in violation.

A final post-9/11 Supreme Court case, *Boumediene v. Bush*,[81] also involved Guantanamo detainees and required the Court to consider the question of judicial deference to the Executive. In *Boumediene*, the Court addressed to the issue of "whether there are prudential barriers to habeas corpus review" in cases of Guantanamo detainees.[82] In its opinion, the Court first made note of "[t]he real risks, the real threats, of terrorist attacks."[83] Because of this threat, the Court reasoned, the judicial branch must take practical considerations into account when considering issues of national security like habeas review for suspected terrorists.[84] Consequently, "proper deference must be accorded to the political branches," which are better suited to answer questions of national security.[85] This "proper deference," however, in no way prevented the judiciary from exercising some review of the Executive's foreign affairs powers. The Court explained:

> On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separa-

77 *See id.* at 567.

78 10 U.S.C. § 821 (2012) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

79 *Hamdan*, 548 U.S. at 602.

80 *Id.* at 629–30 ("'[E]ach Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by . . . detention.' One such provision prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court[,] affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" (second and third alterations in original) (citations omitted) (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3318, 3320, 75 U.N.T.S. 135)).

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

82 *Id.* at 793.

83 *Id.*

84 *Id.*

85 *Id.* at 796.

> tion-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.[86]

This passage articulates the clearly established role of the judiciary when reviewing the exercise of foreign affairs and military powers. But Justice Kennedy, the author of the majority opinion, did not stop there. In a somewhat ominous statement, he seemed to contemplate an expanded role for the judiciary in reviewing war powers cases: "Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[87]

As the War on Terror has progressed, this statement seems more applicable than ever. The United States has still not completed its withdrawal from Afghanistan, Iraq and Syria are in a state of serious instability, and the self-styled Islamic State is providing a new threat in the form of a decentralized and widely dispersed terror network.[88] That being said, progress is, without a doubt, being made. While terror is still a threat to the United States, the likelihood of a large-scale, 9/11-type attack is not as imminent as it once was.[89] Returning again to President Obama's speech at the National Defense University, we must "discipline our thinking, our definitions, our actions" as we proceed into a post, post-9/11 era.[90]

B. Lower Court Decisions

Having established that the Supreme Court has regularly taken and decided cases involving national security issues, this Section will now look at some post-9/11 district and circuit court decisions and analyze the level of deference shown to the Executive.

First, in *El-Shifa Pharmaceutical Industries Co. v. United States*,[91] a Sudanese company sued the United States after its plant was destroyed because of its alleged connection with Osama bin Laden.[92] The plaintiffs alleged that the

86 *Id.* at 797.

87 *Id.* at 797–98.

88 *See* James R. Clapper, Statement for the Record; Worldwide Threat Assessment of the U.S. Intelligence Community 4, 26 (2016) (noting that "fighting will continue to threaten US personnel, our Allies, and international partners—including Afghans—particularly in Kabul and other urban population centers" in Afghanistan, and "[t]he Islamic State of Iraq and the Levant (ISIL) has become the preeminent terrorist threat because of . . . its branches and emerging branches in other countries, and its increasing ability to direct and inspire attacks against a wide range of targets around the world").

89 *See id.* at 4 ("A smaller number [of terrorist organizations] will attempt to overcome the logistical challenges associated with conducting attacks on the US homeland.").

90 Nat'l Def. Univ. Speech, *supra* note 2.

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

92 *See id.* at 838.

attack and the United States' subsequent failure to compensate them violated customary international law that requires states to compensate for the destruction of property that is "mistaken and not justified."[93] They further alleged that the connection to Osama bin Laden was unjustified.[94] The D.C. Circuit held that it was barred from hearing these claims under the political question doctrine.[95] In reaching this conclusion, the en banc court explained, "In military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded."[96] Therefore, the court refused to "assess the merits of the President's decision to launch an attack on a foreign target."[97] Here, the D.C. Circuit showed extraordinary deference to the executive branch. However, this reasoning is either mistaken or clearly false. First, the court was mistaken if it believed it was being asked to assess the merits of the attack. It is generally accepted that the determination of whether a specific military action is a good idea or the right choice in the specific context is a political question.[98] However, the court did not necessarily need to make this determination. Instead, the court could have determined whether the attack was in accordance with international law, a task that could be accomplished without judging the wisdom of a specific strategic or tactical decision. Therefore, to say that it would have to "create standards" in order to determine whether the attack was justified is false. Clearly established and longstanding international law on the rules of war are applicable to these circumstances, and U.S. courts have applied these rules in the past.[99] For these reasons, the deference shown by the D.C. Circuit in this case was both unnecessary and far too high.

Two cases arising from the targeting and subsequent killing of Anwar Al-Aulaqi further demonstrate how the lower federal courts have been overly—and inconsistently—deferential to the Executive. These highly publicized cases involve the targeted killing of a United States citizen and Islamic cleric, Anwar Al-Aulaqi, for his anti-American preaching and involvement with Al-Qaeda in the Arabian Peninsula (AQAP).[100] First, in *Al-Aulaqi v. Obama*,[101] Anwar's father, Nasser, filed a claim in the United States District Court for

93 *Id.* at 844.

94 *See id.* at 839.

95 *See id.* at 844.

96 *Id.*

97 *Id.*

98 *See* Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86, 99–100 (2009).

99 MARY ELLEN O'CONNELL ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 867–983 (7th ed. 2015) (discussing international law and the use of force including its application in U.S. courts).

100 *Anwar al-Awlaki*, N.Y. TIMES, http://www.nytimes.com/topic/person/anwar-alawlaki (last visited Nov. 9, 2017) (providing "[n]ews about Anwar al Awlaki, including commentary and archival articles published in The New York Times").

101 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

the District of Columbia that alleged that the United States violated a number of Anwar's constitutional rights and the Alien Tort Statute by putting him on a secret "kill list" and also sought to prevent the government from carrying out the killing.[102] The district court, relying on *El-Shifa* found that the political question doctrine prevented it from hearing the case.[103] It did, however, seem to give more consideration to the role the judiciary can play in national security cases. Noting that the political question doctrine does not bar courts from hearing all cases involving foreign affairs, the court explained, "Hence, in order to decide whether a particular legal challenge constitutes an impermissible 'attack on foreign policymaking' or is instead a justiciable claim with a permissible 'effect on foreign affairs,' a court 'must conduct "a discriminating analysis of the particular question posed" in the "specific case."'"[104] As the court proceeded, no such discriminating analysis of the question was conducted. Instead, the court simply named a series of highly specific, factual inquiries that would need to be made in order for the court to make its decision, and claimed that these inquiries were exactly the type of "complex policy questions" that the courts should not answer.[105] This absolute deference does not reflect the proper role for the judiciary. While courts will need to make factual inquiries like these, they should not prevent the cases from being heard. Courts may pay a significant amount of deference to the Executive's determination on the level of threat and the alternative options, but there are clear standards of international law that the courts can apply to these factual determinations, and as the Supreme Court noted in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[106]

In 2014, Al-Aulaqi again made his way into the federal courts, this time in *Al-Aulaqi v. Panetta*.[107] This suit was brought after Anwar had been killed by a U.S. drone strike and the suit alleged a violation of Anwar's due process rights, his right to be free from unreasonable search and seizure, and his

102 *Id.* at 12 ("He asserts . . . violat[ions of] (1) Anwar Al-Aulaqi's Fourth Amendment right to be free from unreasonable seizures and (2) his Fifth Amendment right not to be deprived of life without due process of law. Plaintiff further claims that (3) the United States's refusal to disclose the criteria by which it selects U.S. citizens like plaintiff's son for targeted killing independently violates the notice requirement of the Fifth Amendment Due Process Clause. Finally, plaintiff brings (4) a statutory claim under the Alien Tort Statute ('ATS') alleging that the United States's 'policy of targeted killings violates treaty and customary international law.'" (citations omitted)).

103 *See id.* at 52.

104 *Id.* at 46 (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc)).

105 *Id.* (explaining that hearing the case would require inquiries such as "the precise nature and extent of Anwar Al-Aulaqi's affiliation with AQAP," "whether . . . [his] alleged terrorist activity renders him a 'concrete, specific, and imminent threat to life or physical safety,'" and "whether there are 'means short of lethal force' that the United States could 'reasonably' employ" to address any threat).

106 5 U.S. (1 Cranch) 137, 177 (1803).

107 35 F. Supp. 3d 56 (2014).

right under the Bill of Attainder Clause of the Constitution.[108] The district court found that case was not barred by the political question doctrine.[109] Instead, the court explained that the "Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions."[110] The courrt also distinguished the case from *El-Shifa* on the grounds that the plaintiffs in that case had been foreigners suing for a deprivation of property, which is "not comparable to U.S. citizens suing for deprivation of their lives."[111] The district court's willingness to decide this case highlights an inconsistency in lower court determinations of deference to the Executive. While *Al-Aulaqi v. Panetta* was ultimately dismissed on the merits, the court felt that it was capable of deciding the case. There was no discerning analysis of the case's possible effects on foreign affairs and no discussion of any "complex policy questions"—two essential aspects of the court's analysis in *Al-Aulaqi v. Obama*.[112] Instead, the court accepted its duty to say what the law is without being overly deferential to the Executive.

A final informative lower court case is *Schneider v. Kissinger*.[113] This suit was brought on behalf of the estate of Chilean General René Schneider against the United States and National Security Advisor Henry Kissinger for causing the kidnapping, torture, and death of Schneider. The D.C. Circuit held that the suit raised nonjusticiable political questions.[114] The D.C. Circuit found that four of the six *Baker* factors prevented the case from being heard.[115] First, regarding the textually demonstrable commitment to other branches of government, the court explained that precedent and the text of the Constitution clearly allocate foreign affairs to the political branches. This analysis seemed to leave no room for judicial review of foreign affairs questions, explaining that the Constitution gives the judiciary "no authority for policymaking in the realm of foreign relations or provision of national security."[116] Turning to the second factor, a lack of judicially discoverable and manageable standards, the court found that it could not address the claim without having to "define the standard for the government's use of covert operations in conjunction with political turmoil in another country."[117] The court also felt that this case would require an initial policy question of a kind requiring nonjudicial discretion in that it would "be forced to pass judgment

108 *See id.* at 65–66.

109 *See id.* at 68–70.

110 *Id.* at 69 (alteration in original) (quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988)).

111 *Id.* at 70.

112 727 F. Supp. 2d 1, 46 (D.D.C. 2010).

113 412 F.3d 190 (D.C. Cir. 2005).

114 *See id.* at 191.

115 *Id.* at 198.

116 *Id.* at 195.

117 *Id.* at 197.

on the policy-based decision of the executive to use covert action to prevent that government from taking power."[118]

While it is not the job of the courts to pass judgment on every foreign policy decision made by the political branches, they cannot stand by and allow violations of the Constitution.[119] This approach ignores the Supreme Court precedent discussed above and essentially limits the role of the Court in foreign affairs to that of a bystander. While there may be a lack of clear standards in domestic law to address the issue raised in *Schneider*, standards can be found in international law,[120] which the Supreme Court has explained "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."[121] Furthermore, it is a mischaracterization of the question presented to suggest that the court would have been forced to develop a policy for the use of covert action. The proper inquiry is whether the policy chosen by the political branches of government was consistent with the Constitution and the laws of the United States, which includes applicable international law.[122] The result in this case shows a concerning level of deference to the Executive, essentially leaving it unaccountable for any actions taken in the name of national security.

IV. Determining Due Deference

The foregoing analysis shows that lower federal courts have, at worst, abdicated their responsibility to apply the law to cases involving issues of national security and, at best, been inconsistent in the level of deference shown to the executive branch. As the United States continues to engage in the type of activity that gives rise to cases implicating controversial national security issues the judiciary's need for clear and consistent principles to apply in making deference determinations will only grow.[123] Despite the decreasing imminence of threats faced by the United States,[124] the current and past presidential administrations have not reigned in executive power in the national security realm. The Obama administration detained and interro-

118 *Id.*

119 *Cf.* Henkin, *supra* note 17, at 72, 87–88.

120 *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113.

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

122 Henkin, *supra* note 17, at 78–79 ("Judicial review is necessary in foreign affairs, at least as much as elsewhere, to assure that we are a *constitutional* democracy. Courts ought to exercise that task in foreign affairs, at least as effectively as elsewhere.").

123 *See* Michael J. Glennon, *National Security and Double Government*, 5 Harv. Nat'l Sec. J. 1, 2 (2014) (discussing the continuity in national security policies between the Bush and Obama administrations).

124 *See* Nat'l Def. Univ. Speech, *supra* note 2 (discussing the current national security situation and noting that the Iraq War has ended, "Osama bin Laden is dead [along with] most of his top lieutenants," "the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat," "[f]rom Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse," and "we are safer because of our efforts").

gated terrorism suspects abroad, held American citizens in military confinement without trial, decided whether suspected terrorists were tried by civilian court or military commission, kept Guantanamo Bay open, restricted the rights of detainees, and greatly increased drone usage and targeted killings, including the targeting of a United States citizen.[125] President Obama claimed to have "worked vigorously to establish a framework that governs our use of force against terrorists" by establishing "clear guidelines, oversight and accountability . . . codified in [his] Presidential Policy Guidance."[126] However, the Presidential Policy Guidance (PPG) was only an internal restraint on those within the executive branch. There remained no means of ensuring that the Executive actually followed that guidance or that the guidance conformed to the applicable domestic and international law. Furthermore, until August of 2016, the PPG remained classified as Top Secret.[127] It was only in response to a Freedom of Information Act (FOIA) suit by the American Civil Liberties Union (ACLU) that the Obama administration released the PPG, and even then, only a heavily redacted version.[128] This level of accountability is not a "disciplined" approach to executive power.

Though the Trump presidency is still in its early stages, all indications are that the Trump administration will continue with similar, if not more aggressive, policies.[129] Controversial tweets aside,[130] President Trump has begun taking steps to further empower the executive branch in the national security realm. The *New York Times* has reported that President Trump intends to "keep [Guantanamo] open indefinitely" and allow newly captured terror suspects, including members of the Islamic State, to be detained

125 *See* Glennon, *supra* note 123, at 2–8 & nn.2–37.

126 *See* Nat'l Def. Univ. Speech, *supra* note 2.

127 Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, WASH. POST (Aug. 6, 2016), https://www.washingtonpost.com/world/national-security/newly-declassified-document-sheds-light-on-how-president-approves-drone-strikes/2016/08/06/f424fe50-5be0-11e6-831d-0324760ca856_story.html?utm_term=.6f8aa76adc10.

128 *See U.S. Releases Drone Strike 'Playbook' in Response to ACLU Lawsuit*, ACLU (Aug. 6, 2016), https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit.

129 *See, e.g.*, AP, *Trump Talks Tough on Guantanamo, but Doesn't Differ Much From Obama on Policy*, CBS NEWS (Nov. 3, 2017), https://www.cbsnews.com/news/trump-talks-tough-on-guantanamo-but-doesnt-differ-much-from-obama-on-policy/; Charlie Savage & Adam Goldman, *Trump Officials Renew Effort to Expand Use of Prison at Guantánamo*, N.Y. TIMES (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/us/politics/trump-guantanamo-executive-order.html; Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. TIMES (Sept. 21, 2017), https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html.

130 *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 18, 2017, 6:06 AM), https://twitter.com/realdonaldtrump/status/898531481185689600 ("Radical Islamic Terrorism must be stopped by whatever means necessary! The courts must give us back our protective rights. Have to be tough!"); Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 3, 2017, 9:20 AM), https://twitter.com/realdonaldtrump/status/816333480409833472 ("There should be no further releases from Gitmo. These are extremely dangerous people and should not be allowed back onto the battlefield.").

there.[131] Another report indicates that President Trump plans to water down the Obama administration's internal drone limitations. Possible changes include expanding the targets of drone strikes from only "high-level militants deemed to pose a 'continuing and imminent threat' to Americans" to "foot-soldier jihadists with no special skills or leadership roles" and removing the "high-level vetting" requirements for drone attacks.[132] These changes could further expand the geographic scope of U.S. drone strikes to areas outside the active theater of war.[133] Use of lethal force outside an area of active hostilities is especially problematic under international law.[134] The United States began to execute such attacks during the Obama administration against "'high-value targets' in Pakistan and Yemen," and under President Trump's reported changes, "the new approach would appear to remove some obstacles for possible strikes in countries where Qaeda- or Islamic State-linked militants are operating, from Nigeria to the Philippines."[135]

The practices of the Obama and Trump administrations demonstrate that a check is needed on executive power in the national security realm. As noted by Justice Kennedy is *Boumediene v. Bush*, "Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[136] The time for this luxury has passed. The first step toward defining the outer boundaries of the war powers is disciplining the judiciary's deference to the executive branch. The remainder of this Part will propose three constitutionally and precedentially sound principles courts can use to begin this process.[137]

As a first principle, courts should use a formal, rather than functional, method of analysis in cases involving national security issues. Courts have historically taken a more functional approach to cases involving foreign affairs.[138] Some of the more recent Supreme Court cases mentioned above, however, indicate that the Supreme Court has begun to shift toward a formal

131 *See* Savage & Goldman, *supra* note 129.

132 *See* Savage & Schmitt, *supra* note 129.

133 *See id.*

134 *See* Mary Ellen O'Connell & Brian Boyd, *Drone Technology and the Trump Doctrine*, E-INT'L REL. (June 29, 2017), http://www.e-ir.info/2017/06/29/drone-technology-and-the-trump-doctrine/ ("Outside armed conflict and absent the right to resort to armed force, lethal military force may only be used to save a life which is immediately, directly threatened.").

135 *See* Savage & Schmitt, *supra* note 129.

136 Boumediene v. Bush, 553 U.S. 723, 797–98 (2008).

137 For the remainder of this Part, I rely primarily on the following works: THOMAS M. FRANCK, POLITICAL QUESTION/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); HENKIN, *supra* note 17; and Jonathan I. Charney, *Judicial Deference in Foreign Relations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98 (Louis Henkin et al. eds., 1990).

138 *See* Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 386 (2015).

approach.[139] The functional approach, based largely on the *Baker* factors, has led to inconsistent and confusing results.[140] Put simply, "[t]he courts need new guidance."[141] A more formal approach to foreign affairs, looking at the text of the Constitution, would clarify when and whether the judiciary should defer to the political branches. As noted by Professor Louis Henkin, "If it is textually demonstrable that an issue is committed to a coordinate political department, the issue is not for that reason nonjusticiable; the court should honor that textual commitment by adjudicating the question and finding that the political branch acted within its constitutional authority."[142] While the first factor from *Baker* is in line with a formal approach, the others are "contradicted by the institution of judicial review itself."[143] By committing themselves to a formal approach to foreign affairs questions, lower courts will become more consistent in their outcomes as new standards are developed for issues that had previously been passed over as political questions.

The second principle federal courts should use in making deference determinations is a willingness to apply international law. As noted in Part III, the Supreme Court has held—and confirmed on more than one occasion—that courts can and ought to apply international law when applicable.[144] It is true that some legal theorists do not see international law as "real" law that would be binding on domestic courts.[145] However, in practice, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[146] The international legal system of treaties, international court decisions, and customary international law provides norms capable of being applied by U.S. courts.[147] These norms may not always be crystal clear, but it is an "established role of courts [to] clarify[ ] murky areas of law by defining rules and imposing them on diverse fact patterns."[148] If U.S. courts continue to show extreme deference to the Executive or to refuse to hear cases involving foreign affairs questions, clear standards will not evolve. Targeted killings by drone strikes and indefinite detentions of suspected terrorists are new issues arising with the changing nature of warfare. Yet even the executive branch has acknowledged that

139 *See id.* at 404–39.

140 *See supra* Part III.

141 HENKIN, *supra* note 17, at 89.

142 *Id.*

143 *Id.*

144 *See* The Paquete Habana, 175 U.S. 677, 700 (1900). This proposition was reaffirmed much more recently in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

145 *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599, 2608–09 (1997) ("John Austin[ ] soon concluded that international law rules are not really law, because unlike domestic norms, they are not enforced by sovereign coercion.").

146 LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted).

147 *See* Charney, *supra* note 137, at 101.

148 FRANCK, *supra* note 137, at 49.

it must comply with applicable norms of international law when engaging in these activities. In the Presidential Policy Guidance mentioned above, the Obama administration required that drone strikes be in accordance with international law of war, explaining, "[I]nternational legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force—in foreign territories."[149] This statement shows that the executive branch is making determinations about the legality of its drone strikes. If the Executive can make these legal determinations, surely the courts, whose job it is to say what the law is, can review them. By showing less deference and answering difficult questions, courts can help solidify this body of law for the future.

A third and final principle is that courts, when handling questions of foreign affairs or national security, should focus on the narrow question with which they are presented. Following this principle will help courts avoid the kind of policymaking discussed in *Baker*, leaving it where it belongs—with the political branches. By deciding cases with foreign policy implications, a court is not thereby making foreign policy.[150] For example, in *Schneider v. Kissinger*, the court found that it was barred from hearing the case in part because doing so would require the court to "pass judgment on the policy-based decision of the executive to use covert action to prevent that government from taking power."[151] This is a misunderstanding of the court's role. It is certainly not the job of the court to make determinations of this sort, and there is an important distinction between "the foreign policy decision itself" and "the manner in which foreign policy decisions are implemented."[152] While it is not the job of the judiciary to lay down the policy for when the United States may use covert operations to prevent a government from taking power, it can say whether, for the purposes of the specific case before it, action already taken conforms to the applicable law. In these circumstances, the court is not making policy, but engaging in the longstanding practice of judicial review to determine the constitutionality of government action.[153]

149 Memorandum of Presidential Policy Guidance from President Barack Obama on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities 1–2 (May 22, 2013) https://www.aclu.org/foia-document/presidential-policy-guidance?redirectN%de/58033.

150 *See* FRANCK, *supra* note 137, at 5; *see also* Lisa Rudikoff Price, Note, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323, 330 (2005).

151 Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005).

152 Stewart Pollock, *A Political Embarrassment: Jurisdiction and the Alien Tort Statute, Foreign Sovereign Immunities Act, and Political Question Doctrine*, 51 CAL. W. L. REV. 225, 253–54 (2015).

153 *See* HENKIN, *supra* note 17, at 88 ("I am not suggesting that federal judges . . . should issue orders to end a war or drop (or not drop) a bomb. . . . [N]othing in our constitutionalism requires or warrants judicial second guesses on such issues. A court should not declare a question political and nonjusticiable when what the court means to say is that the

V. Due Deference in Practice

Part V will now apply the principles discussed in Part IV to two recent cases in order to demonstrate how a court could use them in making deference determinations.

The first case, *Bahlul v. United States*,[154] was recently decided in a per curiam opinion by the en banc D.C. Circuit, and a writ of certiorari was denied by the Supreme Court.[155] Ali Hamza Ahmad Suliman al Bahlul was convicted by a military commission of conspiracy to commit war crimes for assisting Osama bin Laden in planning the 9/11 attack on the United States. Bahlul challenged his conviction on two constitutional grounds. First, Bahlul argued that "Congress exceeded its authority under Article I, § 8 of the Constitution by defining crimes triable by military commission that are not offenses under the international law of war."[156] Second, he claimed "Congress violated Article III of the Constitution by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war."[157] In June of 2015, the D.C. Circuit, in a three-judge panel, initially vacated Bahlul's conviction.[158] In September, an en banc rehearing was granted to review the panel's decision on both constitutional claims.[159] During this rehearing, a majority upheld Bahlul's conviction, but only a four-judge plurality addressed the constitutional question, finding that "consistent with Articles I and III of the Constitution, Congress may make conspiracy to commit war crimes an offense triable by military commission."[160] In reaching their conclusion, the plurality, as represented by Judge Kavanaugh's opinion, found that Congress may make crimes not included in the international law of war triable by military commission.[161] The plurality relied on "the text and original understanding of the Constitution; the structure of the Constitution; landmark Supreme Court precedent; longstanding congressional practice, as reflected in venerable and contemporary federal statutes;

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particular exercise of authority by one of the political branches is within the constitutional authority of that branch . . . ." (emphasis added)).

154 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *cert. denied*, No. 16-1307, 2017 WL 1550817 (Oct. 10, 2017).

155 *Id.*

156 Al Bahlul v. United States, 792 F.3d 1, 3 (D.C. Cir. 2015), *vacated and reh'g en banc granted*, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam), *cert. denied*, No. 16-1307, 2017 WL 1550817 (Oct. 10, 2017). Article I, § 8 grants Congress the power "[t]o define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8.

157 *Al Bahlul*, 792 F.3d at 3.

158 For an accessible summary of this opinion, see Zoe Bedell, *An Overview of the DC Circuit's Opinion in* Al Bahlul v. United States, Lawfare (June 16, 2015), https://www.lawfareblog.com/overview-dc-circuits-opinion-al-bahlul-v-united-states.

159 Order, 840 F.3d 757 (D.C. Cir. 2016) (per curiam) (ordering an en banc rehearing).

160 Bahlul v. United States, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (plurality opinion) (per curiam).

161 *Id.* at 760.

and deeply rooted Executive Branch practice, from the 1800s to the present."[162]

This conclusion, as the dissent aptly points out, is far too deferential to the Executive.[163] Allowing the political branches to look outside the international law and pick and choose which crimes are punishable by military commission could be "just the first step toward a much greater usurpation of the judiciary's domain" and represents a

> [B]reathtakingly expansive view of the political branches' authority to subject non-service-members to military trial and punishment[,] . . . admit[ting] only two constitutional constraints on its power to try individuals in law-of-war military commissions: the charges must allege (1) that the individuals are "enemy belligerents" who (2) engaged in proscribed conduct "in the context of and associated with hostilities.[164]

An approach in line with the first principle, formalism, would help to curtail this expansion. By focusing on the text of the Constitution, as the dissent does, one can see that "Article III commits the entire 'judicial Power of the United States'" to the federal courts.[165] While there is a narrow exception for military commissions, nothing in the text of the Constitution or the Supreme Court's precedent indicates that Congress gets to define what crimes those commissions may try—they are for trying offenses against the international law of war.[166] This brings the second principle into play—that courts should be more willing to apply international law. While the primary concurrence did look to international law, it gave far too much deference to Congress by ultimately allowing the legislature to look outside of international law for the crime of conspiracy. While Congress may have the power, based on the Define and Punish Clause,[167] to "clarify somewhat murky areas of international law," it does not have the "power to make up that law entirely."[168] Turning then to the third principle—by reviewing the political branches' decision to include conspiracy as a crime triable by military commission, a court is not making policy in the realm of foreign affairs. A narrow view of the question presented only requires a court to follow clearly established international law, which shows that conspiracy is not included in the international law of war.[169] In doing so, a court would only be reviewing the decision to assure its constitutionality.

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162 *Id.*

163 *See id.* at 838 (Rogers, Tatel, and Pillard, JJ., dissenting) ("Whatever deference the judiciary may owe to the political branches in matters of national security and defense, it is not absolute.").

164 *Id.* at 835.

165 *Id.* at 809 (quoting U.S. CONST. art. III, § 1).

166 *See id.* at 816.

167 U.S. CONST. art I, § 8, cl. 10.

168 *Bahlul*, 840 F.3d at 819 (Rogers, Tatel, and Pillard, JJ., dissenting).

169 *Id.* at 813.

The second case is *Ali Jaber v. United States*,[170] recently decided by the D.C. Circuit. This case was brought by the family of Salem and Waleed bin Ali Jaber, an Islamic preacher and a policeman, respectively, who were killed by a U.S. drone strike in Yemen in 2012.[171] The district court did not reach the merits of the case on the grounds that it was a political question,[172] and the case was appealed to the D.C. Circuit. Judge Janice Rogers Brown wrote both the majority opinion and a concurrence. In the majority opinion, Judge Brown affirmed the district court's opinion, relying on *El-Shifa* as controlling authority requiring application of the political question doctrine.[173] She explained, "[i]n matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified."[174] The court could not decide this case, therefore, because it would be required to "pass judgment on the wisdom of Executive's decision to commence military action . . . against a foreign target."[175]

In this opinion, the D.C. Circuit, while faithfully applying precedent, was overly deferential in its application of the political question doctrine. Two statements from the opinion exemplify this point. First, when stating that this case would require the court to "pass judgment on the wisdom of Executive's decision to commence military action,"[176] the court misunderstands the proper question and looks at the issue too broadly. To review this case, the court would not need to establish whether the drone strike that killed the Ali Jabers was a wise military decision. Rather, it only needs to determine whether the drone strike complied with clearly established international law on the use of force. By applying the third principle discussed above, focusing on the narrow question presented, the D.C. Circuit would not have strayed into political question territory and infringed on the role of the Executive.

This leads to the second passage, "In matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified."[177] This statement either underestimates the ability of the federal courts to handle complex disputes or overestimates the complexity of international law regarding the use of force. As laid out by amici Professors Mary Ellen O'Connell and Douglass Cassel, there are "well-established, manageable standards of international law that are regularly applied by courts . . . to make judicial determinations of the lawful use of lethal force."[178] Use of lethal force is justified if it falls into one of three categories: (1) lethal force that occurs within a zone of armed conflict; (2) peacetime

170 861 F.3d 241 (D.C. Cir. 2017).
171 *See id.* at 243.
172 *Id.*
173 *Id.* at 246.
174 *Id.* at 247.
175 *Id.* at 246.
176 *Id.*
177 *Id.* at 247.
178 Brief of Amici Curiae Professors Mary Ellen O'Connell & Douglass Cassel in Support of Plaintiff-Appellants at 3, Ali Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093).

law enforcement; or (3) self-defense.[179] Each of these categories provides clear contours that courts can apply that are no more complicated than the United States' current Fourth Amendment jurisprudence regarding search and seizure.[180] By showing a willingness to apply international law under the second principle, courts will find the judicially manageable standards required to resolve cases like *Ali Jaber*.

CONCLUSION

Federal courts must take a more disciplined approach to deference determinations in cases raising questions of foreign affairs generally, and national security issues specifically. Cases like *Bahlul* and *Jaber* will continue to arise, and federal courts need to discipline their deference to prevent a dangerous expansion of power by the executive branch. While discussing the role of the federal courts in an influential work on foreign relations, *Foreign Affairs and the Constitution*, Professor Louis Henkin noted—and the preceding analysis confirms—that, while the lower courts have used the political question doctrine to abstain from answering foreign affairs questions, the Supreme Court has not.[181] He explained, however, that if, as indicated in Justice Brennan's opinion in *Baker v. Carr*, the political question doctrine allows or requires the Supreme Court to abstain from deciding cases related to foreign affairs, the Court ought to "lay down standards or lines to guide the discretion of the lower courts."[182] These words were written in 1972, but the Supreme Court has yet to provide sufficient guidance to the lower courts on matters of foreign affairs. As cases like *Bahlul* and *Ali Jaber* make their way through the federal courts, the Supreme Court ought to grant certiorari and finally provide the standards that courts have sorely needed for over forty years.

179 *Id.* at 5–14.

180 *Id.* at 27 ("American courts are expected to adjudicate claims of excessive use of force by the police in the death of a single person. This case asks the court to assess the legality of a use of major firepower in which five people died.").

181 *See* HENKIN, *supra* note 7, at 214.

182 *Id.* at 215 n.†.