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From the XYZ Affair to the War on Terror: The Justiciability of Time of War

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I. Introduction

Chief Justice John Marshall set the course for American jurisprudence when he declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[1] Courts have long exercised their power to declare laws unconstitutional.[2] Moreover, the judiciary has interjected itself into some of the most controversial political battles of American history.[3] Yet the judicial branch has declined to consider certain issues that it considers more properly political questions.[4] Time of war, an issue of vast legal significance,[5] suffers from judicial indecision regarding whether courts can prudently address the issue.[6] This Note seeks to bring clarity to the justiciability of the question of time of war and to provide constructive means by which courts can consider the justiciability of the issue in particular cases.

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

2. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (declaring unconstitutional a statute setting a restriction on the number of hours a baker could work); United States v. Lopez, 513 U.S. 549, 567 (1995) (holding that Congress's attempt to regulate guns in school zones via the Gun-Free School Zones Act of 1990 exceeded congressional power under the Commerce Clause of the Constitution).

3. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 453 (1856) (deciding that slaves were property that could not bring actions in court); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (granting Congress plenary power over interstate commerce); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (concluding that the doctrine of separate but equal could not be applied in education); Bush v. Gore, 531 U.S. 98, 110 (2000) (resolving the disputed 2000 presidential election in favor of George W. Bush by halting the recount process in Florida); Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (finding that the University of Michigan's undergraduate admission policy favoring minority applicants with extra points was unconstitutional).

4. *See infra* notes 20–23 and accompanying text (discussing *Baker v. Carr*, 369 U.S. 186 (1962), and its standards of justiciability).

5. *See infra* notes 26–27 and accompanying text (discussing the significance of "time of war" to the balance of power between (1) the branches of government and (2) the government and the public).

6. *See infra* Part II (outlining cases that argue for and against the justiciability of time of war).

One of the foremost priorities of the Framers of the United States Constitution was providing the new government with powers sufficient to ensure the national defense. In *Federalist No. 23*, Alexander Hamilton listed the common defense first among the "principal purposes" of the proposed government.[7] He argued that the national government's powers to prosecute war must be as vast and as flexible as the possible challenges to national security.[8] Hamilton went on to say that when threats to "the safety of nations are infinite, . . . no constitutional shackles can wisely be imposed on the power" to provide for the common defense.[9] "[T]he *means* ought to be proportioned to the *end* . . . ."[10] Based on Hamilton's representation of the Framers' intentions, the Constitution provides the federal government with all-encompassing power to address challenges to national security.

The Constitution itself does not expressly invest in the national government the infinite power to which Hamilton alludes. The Preamble includes the common defense among the objects of the government, but it only ranks fourth on the list.[11] The Constitution grants Congress the authority to declare war; raise and support an army; provide and maintain a navy; make regulations for land and naval forces; and call forth, organize, arm, and discipline militias.[12] The sole mention of the President's war powers is his title as Commander in Chief of the armed forces.[13]

In practice, congressional and executive war powers enjoy broad interpretation. The Supreme Court interprets Congress's power to declare war to include the "power to wage war successfully."[14] Presidents wage war with nearly total discretion regardless of congressional sanction.[15] Despite sparse constitutional language on the President's powers in war, that

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7. THE FEDERALIST NO. 23, at 149 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961).

8. *See id.* (discussing the importance of war powers). Hamilton wrote that "[t]he authorities essential to the common defense . . . ought to exist without limitation, *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*" *Id.*

9. *Id.*

10. *Id.*

11. *See* U.S. CONST. prmbl. (listing the ends sought through the Constitution).

12. *Id.* art. I, § 8, cl. 11–16.

13. *Id.* art II, § 2, cl. 1.

14. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

15. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 46–50 (Oxford Univ. Press 1996) (1972) (discussing presidential action in the two World Wars; against the Barbary Pirates; and in Korea, Lebanon, Congo, Vietnam, Iran, Grenada, Libya, Panama, and Iraq).

language takes on broad meaning through its application. Indeed, the course of America's history with armed conflict shows that Hamilton's vision in *Federalist No. 23* of a government equipped with the authority to meet an infinite array of security threats has come to fruition. In extraordinary times of danger, our government takes extraordinary measures to protect the nation.[16]

On the other hand, the judiciary's checks and balances against this wartime authority are very circumscribed. As discussed above, when confronted with challenges to presidential or congressional action during a time of war, courts often invoke the political question doctrine or deferentially declare the other branches' conduct regarding the war constitutional.[17] The Constitution, however, does not explicitly require this posture. Article III makes no mention of war, but does give the courts jurisdiction over all cases and controversies between American states and citizens, foreign states and citizens, and cases involving treason.[18] Moreover, the Court traditionally gives itself sweeping authority to interpret the law of the land and to find actions of the political branches unconstitutional.[19] Thus, while courts enjoy enormous authority when they can exercise it, the Constitution does not clarify the justiciability of issues related to war.

The Court addressed the issue of justiciability generally in *Baker v. Carr*.[20] Although it established that not all political questions are properly

16. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 35–38 (1942) (permitting the government to try an American citizen designated an enemy belligerent in a military court); Korematsu v. United States, 323 U.S. 214, 217–18 (1944) (deferring to the President's and Congress's decision to keep Japanese-Americans inside internment camps during World War II); *cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125–26 (1866) (declaring the denial of Sixth Amendment trial rights to a civilian citizen in a non-rebellious state unconstitutional). The Court in *Ex parte Milligan* did say, though, that "[i]t is essential to the safety of every government that, in a great crisis, like [the Civil War], there should be a power somewhere of suspending the writ of habeas corpus." *Id.* at 125.

17. *See supra* notes 14–16 and accompanying text (discussing the judiciary's deference to the other branches of government on issues of war and the subsequent expansion of those branches' war powers).

18. *See* U.S. CONST. art. III, §§ 2–3, *amended by* U.S. CONST. amend. XI (establishing the jurisdiction of the federal courts).

19. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (establishing the judicial branch's authority to interpret the law and declare void those laws that violate the Constitution).

20. *See* Baker v. Carr, 369 U.S. 186, 208–26 (1962) (analyzing the Court's justiciability jurisprudence in various areas of law). In *Baker*, the Court addressed whether a federal court had jurisdiction to hear a claim that Tennessee's state legislative apportionment violated the Fourteenth Amendment. *Id.* at 187–88. Tennessee's constitution required the state legislature to reapportion legislative representation every ten years and following a census. *Id.* at 188–89. The state had not reapportioned seats in the sixty years since 1901. *Id.* at 191. The Court found

beyond the reach of the judiciary, the Court identified six characteristics that indicate a nonjusticiable political question.[21] When applying these factors to cases involving presidential war and foreign powers, courts typically find the issue nonjusticiable.[22] In fact, one court discussing *Baker* stated that "the most appropriate case for applicability of the political question doctrine concerns the conduct of foreign affairs."[23] Although the courts assign themselves near total oversight over presidential and congressional actions by means of judicial review, they largely circumscribe their authority over actions of war and foreign policy by means of the political question doctrine. As a result of this judicial deference, the President's constitutionally delegated powers expand greatly during wartime.[24] Notably, these

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that federal courts have jurisdiction over this case because the plaintiffs claimed violation of the Fourteenth Amendment. *Id.* at 199. The Court also found that the plaintiffs had standing because voters who allege facts that show they have been personally disadvantaged can bring suit. *Id.* at 206. The Court then addressed the justiciability of apportionment cases. *Id.* at 209. It reviewed its prior cases addressing justiciability of different cases. *Id.* at 209–17. The Court then named characteristics that identify an issue as a nonjusticiable political question. *Id.* at 217. The Court also stated that unless one of these problems is central to a case, a court should not dismiss that case because of the presence of a political question. *Id.* The Court found that the case before it did not involve any of these six characteristics. *Id.* at 226. Thus, the Court held that the district court could hear this case. *Id.* at 237.

21. *See id.* at 217 (stating the elements necessary to find a political question). The six characteristics of nonjusticiable political questions identified by the Court are:

> [1] 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.

Id.

22. *See, e.g.*, Bentzlin v. Hughes Aircraft Co., 833 F. Supp. 1486, 1497 (C.D. Cal. 1993) (stating that "policy decisions made in war" implicate the lack of judicially discoverable and manageable standards and the impossibility of deciding without an initial policy determination prongs of *Baker*); Linder v. Calero Portocarrero, 747 F. Supp. 1452, 1469 (S.D. Fla. 1990) (stating that review of governmental actions during the Nicaraguan civil war would carry the potentiality of embarrassment from multifarious pronouncements under *Baker*); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1336–38 (S.D.N.Y. 1984) (finding that a suit challenging the President's decision to deploy nuclear missiles to an American air force base in Britain was nonjusticiable under *Baker* because of a lack of judicially discoverable and manageable standards).

23. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 484 (D.N.J. 1999).

24. *See, e.g.*, Totten v. United States, 92 U.S. 105, 106 (1876) (allowing the President to contract agents to engage in espionage); Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (finding

expansions of presidential power during wartime come largely at the expense of personal constitutional rights.[25]

Clearly, a time of war greatly affects both the balance of power between the executive and judicial branches[26] and the balance between executive powers and individual rights.[27] This reality, in turn, makes the time of war determination vastly important. Such a determination could rely solely on congressional declarations of war and formal treaties—the Uniform Code of Military Justice adopts this method.[28] Yet this test often is too rigid for the exigencies of modern war. The President must be able to respond instantaneously to a wide range of possible threats to national security.[29] A nuclear exchange would require the President to assume a host of wartime powers, yet not afford him time to obtain a congressional declaration of war. As a result, the definition of time of war requires flexibility.[30]

How one defines a time of war has crucial importance as the United States encounters new variations on the classic model of a formally declared war. The amorphous War on Terror presents special problems. Whereas one could easily

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that the President "may . . . establish . . . the jurisdiction and procedure of military commissions . . . in territory occupied by Armed Forces of the United States"); *Ex parte* Quirin, 317 U.S. 1, 46 (1942) (allowing American citizens to be tried by military commission for violations of the law of war). These wartime presidential authorities permitted by judicial acquiescence do not include the broad powers conferred on him by statute during times of war. *See, e.g.*, 50 U.S.C. § 21 (2000) (allowing the President to remove from the United States all unnaturalized natives or citizens, 14 years of age or older, of an enemy country, regardless of whether they have aided the enemy or not); 50 U.S.C. § 1702 (2000) (granting the President enormous authority to regulate the economy during wartime, including the ability to block transactions and seize the property of foreign nationals); 50 U.S.C. App. § 2 (2000) (allowing the President to declare a country an enemy or an ally of an enemy for the purposes of the Trading with the Enemy Act).

25. *See supra* note 16 and accompanying text (discussing cases such as *Ex parte Quirin*, in which the Supreme Court allowed the President to abridge certain constitutional rights during a time of war).

26. *See supra* notes 14–16 and accompanying text (stating that the political branches' war powers expand due to broad judicial interpretation and deference).

27. *See supra* note 16 and accompanying text (discussing cases such as *Ex parte Quirin*, in which the Supreme Court allowed the President to abridge certain constitutional rights during a time of war).

28. *See* United States v. Averette, 19 C.M.A. 363, 365 (1970) (stating that the words "time of war" as used by the Uniform Military Code of Justice, 10 U.S.C. § 802, refer to formally declared wars). *But see* United States v. Taylor, 40 C.M.R. 761, 766 (A.B.R. 1969) (finding that the Vietnam War created a "time of war" despite the lack of a formal declaration).

29. *See supra* notes 7–10 and accompanying text (laying out Alexander Hamilton's argument for broad government powers to respond to infinite possible threats).

30. *See infra* Part III (outlining the various standards courts apply to determine a time of war, including political declarations of wartime and the existence of hostilities).

recognize the Vietnam War, although not begun with a declaration,[31] the War on Terror does not lend itself to easy labeling of enemies, battles, and start and end dates.[32] Regardless, both the government and most of the public accept the War on Terror as a time of war.[33]

Recent cases illustrate the significance of this determination of a time of war. The Supreme Court has permitted the President to detain an American citizen for the duration of a conflict and with something less than full trial rights.[34] The combination of this presidential authority with the shapeless War on Terror poses a serious threat to individual rights. If the President can detain an enemy combatant for the duration of a war, but the war has no clear start date, enemy, battles, or end date, then an enemy combatant's detention can quite conceivably become a life sentence.[35]

This scenario highlights the importance of the issue of who can determine when the nation is in a time of war. The Constitution explicitly gives Congress

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31. *See* United States v. Taylor, 40 C.M.R. 761, 766 (A.B.R. 1969) (stating that the hundreds of thousands of American soldiers in Vietnam, the number of casualties, and the drafting of soldiers all provided ample support for finding a "time of war" (citing United States v. Howe, 17 C.M.A. 165, 173–74 (1967))).

32. The current war in Iraq highlights this confusion. President Bush has suggested that this war is part of the larger War on Terror. *See* Roland Watson, *Bush on Attack in Opening Salvo of Campaign*, TIMES (London), Nov. 22, 2003, at 20 (stating that President Bush has characterized the fighting with guerrillas in Iraq as the "frontline" in the war against terror). Yet public acceptance of this proposition has been limited. *See* Dana Milbank & Thomas E. Ricks, *Survey Shows Skepticism About Iraq; Most Americans Polled Don't Believe Conflict is Key Fight in War on Terrorism*, WASH. POST, Nov. 5, 2003, at A13 (stating that 61% of Americans polled believed that the war in Iraq was part of the war against terrorism, down from 77% in April 2003). The imprecise nature of the War on Terror even bled onto the television screen in an episode of *The West Wing*. *See The West Wing: We Killed Yamamoto* (NBC television broadcast, May 15, 2002) (discussing the inability to determine the beginning and end of war in current world history), http://www.twiztv.com/scripts/westwing/season3/ (last visited Oct. 26, 2004) (on file with the Washington and Lee Law Review). In that episode, the Chairman of the Joint Chiefs of Staff asks the President's Chief of Staff during a discussion about a suspected terrorist leader, "Can you tell when it's peacetime and wartime anymore? . . . I don't know who the world's leading expert on warfare is but any list of the top has got to include me and I can't tell when it's peacetime and wartime anymore." *Id.*

33. *See* Todd S. Purdum, *An Accuser's Insider Status Puts the White House on the Defensive*, N.Y. TIMES, Mar. 23, 2004, at A18 (stating that large numbers of Americans believe that Saddam Hussein had a role in the September 11 attacks and that the war in Iraq is part of the larger War on Terror).

34. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (permitting the President to detain an American citizen for the duration of the War on Terror pursuant to congressional authorization of the exercise of "necessary and proper force").

35. *See id.* at 2641 ("If the Government does not consider this unconventional [War on Terror] won for two generations, . . . then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.").

the power to declare war and the President the power to launch military action, but the judiciary's role is not as well defined.[36] Recently, an enemy combatant argued to the Fourth Circuit that a court could determine that a time of war had ended.[37] The court decided that the justiciability of the end of a time of war was "far from clear," noted that the President is best suited to make that determination, and accordingly declined to consider the question.[38] The Fourth Circuit was correct to state that this issue is unsettled. Courts give different answers to the question of whether courts can determine a time of war and offer even more varied reasoning as to why or why not.[39] Considering the relevancy of this issue to the War on Terror, an analysis of the different approaches courts use to answer this question is necessary.

In Part II, this Note examines the approaches taken by the Supreme Court and lower courts to determine whether time of war is justiciable.[40] In order to conduct this justiciability debate in a common judicial language, this Note translates those approaches into the justiciability framework of *Baker*.[41] One of the questions posed by Part II is whether courts possess adequate standards by which to evaluate a time of war.[42] Part III then discusses various standards courts use to decide whether the nation is in a formal war.[43] Next, Part IV of this Note returns to the arguments for and against justiciability from Part II, adds the relevant standards from Part III to the discussion, and identifies those instances in which time of war is, in fact, justiciable.[44] Finally, Part V of this

36. *See supra* notes 12–16 and accompanying text (discussing the war powers of the political branches).

37. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003), *rev'd*, 124 S. Ct. 2633 (2004), ("Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end."). Although the Supreme Court reversed the Fourth Circuit's decision in this case, the Court did not take up the issue of justiciability of time of war. *See generally Hamdi*, 124 S. Ct. 2633.

38. *Hamdi*, 316 F.3d at 476.

39. *See infra* Parts II–III (outlining arguments for and against the justiciability of time of war and the standards courts use to decide whether wartime exists).

40. *See infra* Part II (discussing courts' opinions on the justiciability of time of war).

41. *See infra* Part II (stating that the arguments against justiciability fit into the characteristics of nonjusticiable political questions listed in *Baker*).

42. *See infra* Part II (containing the dispute between some Supreme Court opinions and the opinion in *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990)).

43. *See infra* Part III (outlining five different standards courts use to determine the issue of wartime).

44. *See infra* Part IV (analyzing the arguments for and against justiciability of time of war in light of the standards courts use to decide the issue).

Note offers different proposals that courts can use to determine whether a particular case is justiciable.[45]

As noted above, the vast implications of the issue of wartime for the balance of power between both (1) the branches of government and (2) the government and the citizenry call on the judiciary to resolve the issue whenever it can do so with prudence and within constitutional limitations.[46] As this Note argues, the justiciability of time of war depends upon whether the factual complexities and foreign affairs implications of the case permit judicial review.[47] This Note provides standards that allow courts to determine whether a case is justiciable and that, as a result, enable the judiciary to enter confidently into an area of great legal consequence.[48]

II. Wartime as a Political Question

Analysis of the justiciability of time of war must start with *Baker*, which provides the framework for considering whether political questions are subject to judicial review.[49] Baker identifies six characteristics of nonjusticiable political questions:

- Textually demonstrable constitutional commitment of the issue to a coordinate political branch;
- Lack of judicially discoverable and manageable standards for resolving the issue;
- Impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- Impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

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45. *See infra* Part V (containing proposals for standards with which courts can decide whether a particular case is justiciable).

46. *See supra* notes 26–27 and accompanying text (discussing the relevance of the issue of time of war).

47. *See infra* Part IV.E (summarizing the analysis of justiciability of time of war).

48. *See infra* Part V (proposing new ways in which courts can decide whether a particular case contains a justiciable issue of time of war).

49. *See supra* notes 20–21 and accompanying text (introducing the justiciability analysis in *Baker*).

- Unusual need for unquestioning adherence to a political decision already made; and

- Potentiality of embarrassment from multifarious pronouncements by various departments on one question.[50]

A. *The Supreme Court's Treatment of Time of War as a Political Question*

This subpart discusses Supreme Court opinions that found time of war nonjusticiable. As discussed later, these cases do not present the unanimous view of the Court on justiciability of the issue of wartime.[51] Instead, the cases in this section outline arguments against justiciability that the Court has adopted in the past.

In *Baker*, the Court stated that "recognition of belligerency abroad" was an executive function but granted courts leave to interpret specific statutes dealing with wartime when executive proclamations did not provide an explicit answer.[52] In support of this position, the Court cited *The Three Friends*.[53] In

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50. Baker v. Carr, 369 U.S. 186, 217 (1962). The Court in *Baker* brushed on the justiciability of the issue of time of war when it discussed in dicta the judiciary's ability to fix the dates of hostilities. *See id.* at 213–14 (discussing time of war cases). The Court acknowledged that courts typically left the issue to the political branches of government when the situation required deference, but the Court also recognized that courts have traditionally decided the issue in cases of less significance to national security, such as whether wartime rent controls should remain in effect. *See id.* (drawing distinctions between Court precedent on time of war). Yet the Supreme Court found that in cases of either great or minimum national importance the question of justiciability of the issue of time of war is not firmly established. *See id.* at 214 (stating that the courts may have a role in time of war issues). Thus the Court provided no definitive answer on the topic of justiciability.

51. *See infra* Part III (containing Supreme Court cases that found the issue of time of war justiciable, such as *Lee v. Madigan*, 358 U.S. 228 (1959)).

52. *Baker*, 369 U.S. at 212.

53. *See id.* (citing *The Three Friends*, 166 U.S. 1 (1897), in support of the *Baker* proposition addressing justiciability of wartime). In *The Three Friends*, 166 U.S. 1 (1897), the Court addressed the issue of whether a statute criminalizing private support "of any foreign prince or state, or any colony, district or people," *id.* at 53, engaged in war with a nation at peace with the United States could also extend to private support of people engaged in rebellion against an American ally. *See id.* at 51 (stating the competing characterizations of the relevant statute). The Neutrality Act made it illegal to arm any vessel with the intent that such vessel would be employed by a foreign nation against any nation at peace with the United States. *Id.* at 53. In 1895, when Cuban insurrectionaries engaged in hostility with Spain, President Cleveland declared that the United States sought to remain at peace with Spain and reminded America that the laws prohibited citizens from assisting the revolutionaries. *Id.* at 64. Although the President acknowledged the hostilities in Cuba, he did not recognize a war there in a legal sense. *Id.* An American customs officer seized the *Three Friends* off the coast of Florida in 1896 and found it

The Three Friends, the Court addressed a statute that, for purposes of classification, required a determination of whether a group of people constituted a belligerent, in a legal sense.[54] The Court stated that "it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."[55] The opinion provided neither supporting citations nor further exposition on the source or logic of this maxim.[56] The Court simply excluded from judicial review an issue of supreme importance to the balance of power between the branches of government.

The context of *The Three Friends* places qualifications on this otherwise broad limitation on judicial powers. The precise statute at issue in the case forbade private intervention on behalf of one nation at war with another nation that is on peaceful terms with the United States.[57] The Court addressed the factual issue of whether this statute criminalized assistance of an insurrection in Cuba against Spain.[58] Neither the Court nor the relevant statute addressed the

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armed with the intent to wage war against Spain. *Id.* at 2–3. The owners of the ship challenged the seizure, and a district court ordered the ship released because the government failed to allege a war between two nations. *Id.* at 51. The Court proceeded to analyze whether the Neutrality Act applied to rebellions within a nation. *Id.* Initially, the Court stated that the abstract concept of neutrality consisted not only of abstinence from conflicts between nations but also noninterference in a nation's handling of insurrection. *Id.* at 52. The Court then addressed the introduction of the phrase "or of any colony, district or people" into the Neutrality Act in 1817. *Id.* at 54. In 1816, the Portuguese minister to the United States informed then Secretary of State James Monroe that privateers from Baltimore were aiding residents of Buenos Aires in their rebellion. *Id.* at 54. In response, President Madison implored Congress to amend the Neutrality Act in order to more effectively prevent such private action. *Id.* at 54–55. As a result, Congress inserted the phrase "colony, district or people" into the statute. *Id.* at 55. Significantly, Congress never required political recognition of any such colony, district, or people for the statute to have effect. *Id.* at 56. The Court stated that the statute clearly applied to recognized nations and other bodies engaged in legally recognized wars. *Id.* Turning to the words chosen by Congress to meet President Madison's concerns, the Court reasoned that neither "district" nor "people" would be appropriately used to describe either nations or recognized belligerents. *Id.* at 58. Also, since the courts could not confer belligerent status on a group, they could only pursue Congress's intent of preventing private interference in rebellions by expanding the definition of "people." *See id.* at 63–64 (declaring that only the political department can recognize belligerency). The Court concluded that the word "people" covers any "body of people acting together" in hostilities and "whose belligerency has not been recognized." *Id.* at 62–63.

54. *See The Three Friends*, 166 U.S. at 51 (noting the necessary determination required of the Court in this case).

55. *Id.* at 63.

56. *See id.* (turning directly to the issue of whether the President had recognized belligerency in the case before the Court).

57. *See id.* at 53 (stating the precise terms of the statute and question in the case).

58. *See id.* at 51 (outlining the libel adduced by the government in *The Three Friends*).

status of the United States in the war, except for the condition that America be at peace with the nation not receiving assistance from private citizens.[59] The Court did not consider whether the United States itself was in a time of war. As a result, the Court's statement that only the political department can recognize belligerency was in reference to wars between foreign nations. Therefore, *The Three Friends* does not compel the conclusion that the Court excluded the belligerent status of the United States from judicial review.

The Court's decision to leave the recognition of wars to the executive branch is further limited by the powers the Court retained for itself. The opinion spends great time examining the distinction between war in a material sense and war in a legal sense.[60] War in a legal sense, or belligerency, requires political recognition.[61] War in a material sense includes all warfare that does not receive such a designation.[62] The Court even stated that the President can officially recognize a condition of revolt without recognizing belligerency.[63] Although the Court acknowledged the executive's authority to recognize both classifications of war, it only forbids itself the authority to recognize war in a legal sense.[64] It seems unlikely that the Court would go into detail regarding the distinction between the two classifications of war, war in a legal sense and war in a material sense, only to then include both types of war under the heading given to one of the categories—belligerency. This permits the conclusion that the Court did not leave to the executive the power to determine whether war in a material sense existed between foreign nations.

The Three Friends placed significant restraints upon courts' ability to wade into the waters of foreign affairs.[65] The Court conceded the President's authority to recognize hostilities as legal wars free from judicial review,[66] but

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59. *See id.* at 53 (noting the statutory requirement of peace with the nation that is claiming a violation of the Neutrality Act).

60. *See id.* at 63–64 (delineating between a "belligerency" and a "condition of political revolt").

61. *See id.* at 63 (addressing the need for formal governmental recognition of a belligerency).

62. *See id.* at 64 (defining war in a material sense).

63. *See id.* at 65–66 (outlining the recognition of an "actual conflict of arms" without a full statement of "belligerency").

64. *See id.* at 63 (leaving it "to the political department to determine when *belligerency* shall be recognized," but not mentioning war in a material sense in this statement of judicial restraint (emphasis added)).

65. *See id.* (circumscribing the role of the judiciary in addressing determinations of a state of conflict).

66. *See id.* (authorizing the President to formally recognize a state of belligerency without judicial oversight).

the limited factual scope of the case restricts its precedential value to wars between foreign nations. Moreover, the Court suggests that the judicial branch retains the power to determine the condition of war in a material sense. Thus, *The Three Friends* limits the justiciability of time of war in a narrow class of cases, while leaving the issue unresolved generally. Although the Court in *Baker* cites *The Three Friends* in its discussion of political questions not suitable for judicial review,[67] the opinion in *The Three Friends* does not provide the reasoning for the Court's conclusion in *Baker* that courts cannot review the President's recognition of foreign belligerencies[68] and thus does not contain any political question analysis.

In fact, the Court addressed the issue of the justiciability of time of war more directly as a political question earlier in the *Prize Cases*.[69] In this case regarding the enforcement of the Union blockade of Southern ports during the Civil War, the Court had to determine whether the United States was in an official state of war.[70] Without an official declaration of war, the Court looked

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67. *See supra* notes 53–54 and accompanying text (discussing the reference in *Baker* to *The Three Friends*).

68. *See The Three Friends*, 166 U.S. at 63 (stating that only the political department can recognize belligerency and then immediately considering whether the conflict at hand had been so recognized).

69. *See* Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) (discussing the role of the courts in the determination of whether an insurrection rose to the level of war). In the *Prize Cases*, the Supreme Court addressed the issue of whether President Lincoln could institute a blockade of the ports of states in rebellion during the Civil War. *Id.* at 665. The case involved four ships that breached the blockade and were impounded by the United States military. *See id.* at 674–82 (discussing the particular facts of each case). The Court acknowledged that, under the law of nations, a government could capture a neutral ship at sea if a war existed de facto and the ship knew or had notice of the blockade. *Id.* at 666. The opinion then considered whether a state of war existed when the United States captured the ships. *Id.* The Court noted that international law recognizes civil wars as formal wars. *Id.* at 666–67. The Court also observed that "a civil war is never publicly proclaimed," *id.* at 667, so it looked to the world around it to determine if a war existed, *id.* at 667. Although the Court could not find a proclamation of war by either Congress or the President, it noted that the insurrection of the seceding states required immediate executive action "without waiting for Congress to baptize it with a name." *Id.* at 669. The opinion also pointed to foreign declarations of neutrality as further evidence of a state of war within the United States. *Id.* at 669–70. Finally, the Court stated that the power to determine whether an insurrection rises to the level of war belongs to the President. *Id.* at 670. The Court stated that President Lincoln's imposition of a blockade provided sufficient evidence that he had determined that a state of war existed within the nation. *Id.* The Court also held that the Union could treat all property within the rebellious states as enemy property. *Id.* at 674. As a result, the Court upheld the confiscations of all the ships, with the exception of one ship attempting to withdraw the property of a New York citizen from Virginia. *Id.* at 675–84.

70. *See id.* at 666 ("Let us enquire whether . . . a state of war existed which would justify a resort to these means of subduing the hostile force.").

elsewhere to resolve the issue.[71] The Court stated that "[w]hether the President in fulfilling his duties, as Commander in-chief, . . . has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him . . . ."[72] The Court in the *Prize Cases* located the authority to determine a time of war in the President's Commander in Chief powers.[73] The Court continued, "[T]his Court must be governed by the decisions and acts of the political department of the Government to which this power [to recognize a state of war] was entrusted."[74] The Court held that the Constitution's assignment of this issue to the President precluded judicial review of the subject.[75]

This reasoning resonates with one of the characteristics of nonjusticiable political questions identified by the Court in *Baker*. The first feature of such an issue was "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[76] In the *Prize Cases*, the Court found that the power to determine a time of war resided within Article II and thus did not extend to Article III courts.[77] The Court left the issue to the President.

The Supreme Court approached the issue of time of war as a political question from another perspective in *The Protector*.[78] In that case, a party asked the Court to determine the exact dates of the beginning and end of the

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71. *See id.* at 667 (noting that there was no actual declaration of war in the Civil War).

72. *Id.* at 670.

73. *See id.* (recognizing that the President has the authority to meet hostile action with military force).

74. *Id.*

75. *See id.* (abdicating the responsibility to review the choice made by President Lincoln to meet the insurrection by the South with military force).

76. Baker v. Carr, 369 U.S. 186, 217 (1962).

77. *See Prize Cases*, 67 U.S. (2 Black) at 670 (stating that the President had the power to decide whether the nation was in a state of war due to his role as Commander in Chief, and that the Court was bound by his decision on the issue).

78. *See* The Protector, 79 U.S. (12 Wall.) 700, 701–02 (1871) (declining to decide the start and end dates of the Civil War because the nature of the issue made it more suitable for the political departments). In *The Protector*, the Court addressed the issue of when the Civil War began and ended. *Id.* at 701. This case concerned a motion that a statute of limitations had expired. *Id.* at 700. The statute of limitations did not run during the war, so the Court was forced to consider when the war had ended and the statute of limitations resumed. *Id.* The Court noted that violence occurred in such varying degrees and in such remote pockets of the country throughout the Civil War that it could not provide precise dates for the war's beginning and end. *Id.* at 701–02. As a result the court looked to proclamations made by the President to ascertain the relevant dates. *Id.* at 702. The Court fixed the beginning of the war at the presidential proclamation of a blockade of the South and the end of war in each Southern state based on when the President declared the war over in that state. *Id.*

Civil War.[79] Citing the various degrees of violence and the remote pockets of the country where hostilities lasted longer than in other areas, the Court stated "that it would be difficult, if not impossible, to say on what precise day it began or terminated."[80] Faced with such a complex factual scenario, the Court held that "[i]t is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department."[81] The Court decided to accept the President's determination of the issue because it lacked the capacity to reach its own decision.[82]

Viewed through the lens of *Baker*, this reasoning most closely resembles the second characteristic of nonjusticiable political questions: "a lack of judicially discoverable and manageable standards for resolving" an issue.[83] The Constitution itself does not proscribe judicial resolution of the dates of a war.[84] Yet the Court in *The Protector* found such action to be imprudent.[85]

The Court again used political question analysis to decide the justiciability of time of war in *Ludecke v. Watkins*.[86] A German alien detained during World

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79. *See id.* at 701 (noting the question which the appeal was based on).

80. *Id.* at 701–02.

81. *Id.* at 702.

82. *See id.* (adopting the dates of certain presidential proclamations as the starting and ending dates of the Civil War).

83. Baker v. Carr, 369 U.S. 186, 217 (1962).

84. *See The Protector*, 79 U.S. (12 Wall.) at 702 (citing no constitutional provisions in support of its decision not to determine the start and end dates of the Civil War).

85. *See id.* (recognizing the daunting task facing the Court in fixing the dates of the Civil War).

86. *See* Ludecke v. Watkins, 335 U.S. 160, 169 (1948) (stating that termination of a war is a political act "too fraught with gravity" to be considered by a court). In *Ludecke*, the Court considered whether the federal government could detain an unnaturalized German national during World War II and then deport him in 1946. *Id.* at 162–63. In 1798, Congress enacted the Alien Enemy Act, which authorized the President to remove any unnaturalized citizens of a hostile nation from the country. *Id.* at 161. Ludecke, a German alien, was arrested immediately following the attack on Pearl Harbor and detained through January 1946, when the Attorney General ordered him removed from the country. *Id.* at 162–63. The Court addressed Ludecke's challenge of his detention and deportation. *Id.* at 163. The Court initially noted that the administrative procedure employed by the President to deport enemy aliens was sufficient because of his broad discretionary authority concerning enemy aliens. *Id.* at 163–64. The Court then turned to Ludecke's claim that the President's power to deport enemy aliens did not survive the "cessation of actual hostilities" in the war. *Id.* at 166. The Court stated that a time of war may be terminated "by treaty legislation or Presidential proclamation." *Id.* at 168. Yet termination is a political act, and the Court held that the judicial branch is not fit to decide whether a war formally kept alive had ended. *Id.* at 168–69. The Court then accepted a presidential declaration that a state of war still existed and as a result decided that the President's powers under the Alien Enemy Act remained present. *Id.* at 170. Finally, the Court considered the validity of the Alien Enemy Act itself. *Id.* The Court focused on the nature of

War II claimed that the President's war powers had ended by January 1946 because of the cessation of actual hostilities.[87] The Court echoed the distinction enunciated in *The Three Friends* between war in a legal sense and war in a material sense.[88] The *Ludecke* opinion then recognized that belligerency "may be terminated by treaty or legislation or Presidential proclamation."[89] This comports with the Court's statement in *The Three Friends* that recognition of war in a legal sense belongs to the political department.[90] Furthermore, because the Court wrote *Ludecke* in the context of World War II,[91] this decision expands *The Three Friends* rule's application beyond wholly foreign wars to wars in which the United States is a participant.

After acknowledging the executive's authority to terminate an American war, the Court then took the crucial step of removing this issue from the judiciary's purview.[92] The *Ludecke* opinion states that the issue of whether the Court could find that war in a legal sense had ended was "a question too fraught with gravity even to be adequately formulated when not compelled."[93] Although *Ludecke* precedes *Baker*, this language resonates with some of the characteristics of nonjusticiable political questions identified in the later case.[94] The *Ludecke* opinion corresponds most closely with two of the features of political questions identified in *Baker*: "a lack of judicially discoverable and manageable standards for resolving" the issue and "an unusual need for unquestioning adherence to a political decision already made."[95] In this respect, the *Ludecke* Court echoes the opinion in *The Protector*, which also declined to decide the issue of time of war because it lacked adequate standards to decide the issue.[96] The Court in *Ludecke* feared taking on a matter of great

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the President's war powers and the great deference courts give the exercise of those powers. *Id.* at 171. Also, the Court noted that the Congress that passed the Alien Enemy Act was in large part the same group of men who drafted the Constitution. *Id.* The Court thought it "doctrinaire audacity" to find the statute violative of the Bill of Rights as a result. *Id.* The Court thus allowed Ludecke's detention and deportation. *Id.* at 173.

87. *See id.* at 166 (noting the plaintiff's contention that the President lacked the authority to deport him).

88. *See id.* at 167 (stating that "[w]ar does not cease with a cease-fire order").

89. *Id.* at 168.

90. *See supra* notes 53–68 and accompanying text (discussing the treatment of the justiciability of time of war in *The Three Friends*).

91. *See Ludecke*, 335 U.S. at 163 (stating that Ludecke was detained from 1941 to 1946).

92. *See id.* at 169 (avoiding the question of time of war).

93. *Id.*

94. *See supra* note 50 and accompanying text (listing the six characteristics of nonjusticiable political questions).

95. Baker v. Carr, 369 U.S. 186, 217 (1962).

96. *See supra* notes 78–85 and accompanying text (discussing the reasoning in *The*

consequence without the tools and expertise necessary to do so properly, and therefore happily ceded that responsibility to the President.[97]

Significantly, the Court in *Ludecke* did not point to any constitutional provisions that forbade its consideration of the issue.[98] The Court did not state that the Constitution forbids judicial consideration of when war in a legal sense comes to an end. Instead the opinion evaluated the appropriateness of judicial intervention.[99] Although the Court's decision not to entertain the question of when World War II ended was not legally required, it was necessitated by prudential considerations.[100]

The language of the Court's opinion suggests a possible limit on the rule it announced.[101] The Court says that termination of a war is an issue "too fraught with gravity even to be adequately formulated *when not compelled.*"[102] This final phrase could mean that the Court would not consider the question of whether a war had ended unless it was forced to do so by statute or otherwise. Such an interpretation appears plausible because, if a statute required the Court to entertain the issue, the statute would also likely provide the applicable judicial standards. In such a case, the Court's reasons for deciding not to address the question—lack of standards and need for adherence to a President's decision—would be sufficiently accounted for and would permit the Court to consider the issue.

Yet the *Ludecke* Court doubted the likelihood of any statute ever requiring the Court to decide on the termination of a war. The Court states that "when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government."[103] With the possible exception of a statute specifically

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Protector arguing that the issue of time of war did not present a justiciable question).

97. *See Ludecke*, 335 U.S. at 168–69 (describing the termination of war as the President's responsibility and unsuitable for judicial action).

98. *See id.* at 169 (focusing on the consequences of judicial action rather than any constitutional text).

99. *See id.* (noting the inability of the Court to determine a time of war).

100. *See id.* (arguing that the question of time of war is "too fraught with gravity" for the Court to give a definitive answer on it).

101. *See id.* (recognizing that there might be situations where a court has to determine time of war).

102. *Id.* (emphasis added).

103. *Id.* at 169 n.13.

instructing the Court to address the issue, the Court in *Ludecke*[104] considered the matter of a time of war a nonjusticiable political question.[105]

B. Consideration of the Issue by Lower Courts

Three months before the Supreme Court handed down its decision in *Ludecke*, the Tenth Circuit, in *New York Life Insurance Co. v. Durham*,[106] came to a similar conclusion in dicta[107] regarding the justiciability of time of war, although based on slightly different reasoning.[108] In a case involving a life insurance contract that paid at different rates if the nation was engaged in war, one party claimed that the court could not address the issue of whether the United States was at war because that matter was "a political question" left solely to the other branches of government.[109] When the Tenth Circuit began its political question analysis, it started with the maxim that "[c]ourts do not declare war or make peace."[110] Whereas the Supreme Court in *The Protector* and *Ludecke* addressed the inability of courts to apply legal standards to the complicated issue of wartime without interfering with the President's previous decisions,[111] the Tenth Circuit recognized the exclusion of the judicial branch from the war powers.[112]

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104. The decision in *Ludecke* was 5-4, but neither of the two dissents took issue with the Court's decision not to consider whether the time of war had ended.

105. *See Ludecke*, 335 U.S. at 169 (refusing to question the Executive's determination that America was still at war in 1946).

106. N.Y. Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948). In *New York Life*, the Tenth Circuit addressed the issue of whether the United States was at war on a specific date for the purposes of a life insurance contract. *Id.* at 875. The deceased had a life insurance policy that paid out at a lower rate if he died away from home while in the armed forces and the country was engaged in war. *Id.* He in fact did die away from home while in the armed forces, but in September 1945, after the cessation of hostilities in World War II. *Id.* The court noted that parties to a contract dependent on the status of war can contract with reference to politically recognized war or some other understanding of war. *Id.* at 876. The Tenth Circuit decided that the parties in this case intended "war" to mean that the nation was engaged in actual hostilities. *Id.* The court held that the United States was not at war at the time of the deceased's death for the purpose of the insurance policy. *Id.*

107. Based on the facts of *New York Life*, the Tenth Circuit was not required to address the issue of whether a court can define a time of war. *See id.* at 876 (deciding that the parties to the contract did not intend "war" to mean a politically recognized war). Yet its analysis still provides a unique approach to the matter that advances our understanding of the topic.

108. *See id.* at 875 (discussing the commitment of the power to declare war and peace to the political branches of government).

109. *Id.*

110. *Id.*

111. *See supra* notes 78–105 and accompanying text (discussing the Supreme Court's

The court in *New York Life* went on to state that courts cannot decide whether the nation is in a time of war. The court maintained that "[t]he existence of war and restoration of peace are determined solely by the political departments, . . . and such determinations are conclusively binding upon the Courts in all matters of state or public concern."[113] Again comparing the court's treatment of a time of war as a political question with *Baker*, the Tenth Circuit's focus on the judiciary's exclusion from the war powers most closely resembles the first and fourth characteristics of nonjusticiable political questions: "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[114]

The court in *New York Life* concluded that time of war is nonjusticiable because the court could not locate a source for the power of courts to consider it.[115] Instead, the Tenth Circuit looked at the structure of the three branches of government and found that the Constitution left the war powers solely to the President and Congress.[116] Consequently, courts must necessarily rely upon the political branches for determinations of when the United States is at war.[117] Whereas the Supreme Court focused on the practical impossibilities of judicial resolution of the issue of time of war,[118] the Tenth Circuit highlighted the legal impotency of the courts to take on the matter.[119]

Recently, a court used political question analysis to determine whether the United States is in a time of war for the purposes of the War on Terror.[120] In *El-Shifa Pharmaceutical Industries Co. v. United States*,[121] the Court of

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analysis of the justiciability of time of war in *The Protector* and *Ludecke*).

112. *See New York Life*, 166 F.2d at 875 (determining that war and peace are the province of the other branches of government).

113. *Id.*

114. Baker v. Carr, 369 U.S. 186, 217 (1962).

115. *See New York Life*, 166 F.2d at 875 (stating that the political departments have the sole authority to determine "[t]he existence of war and restoration of peace").

116. *See id.* (removing from the Judiciary a role in waging war or peace).

117. *See id.* (asserting that the courts are bound by such determinations made by the political branches and are generally refer to the public acts of those branches when faced with a question regarding a time of war).

118. *See supra* notes 78–105 and accompanying text (discussing the Supreme Court's analysis of the justiciability of time of war in *The Protector* and *Ludecke*).

119. *See New York Life*, 166 F.2d at 875 (stating that courts are bound by the political department's determinations of when war exists and when peace is restored).

120. *See infra* notes 121–27 and accompanying text (analyzing the decision in *El-Shifa Pharmaceutical Industries Co. v. United States*, 55 Fed. Cl. 751 (2003)).

121. El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751 (2003). In *El-Shifa*

Federal Claims addressed this issue.[122] That case involved a Fifth Amendment Takings Clause claim by a Sudanese pharmaceutical company whose factory American cruise missiles destroyed.[123] As part of the court's consideration of whether the Takings Clause permitted claims arising out of military action, the opinion addressed the court's ability to review the President's determination that the plaintiff's facility was an enemy target and that the missile strikes constituted a state of war.[124] The court stated that "the President as Commander in Chief can *conclusively* designate by his actions a state of war."[125] By allowing the executive branch to declare decisively a time of war, the Court of Federal Claims excluded the issue of time of war from judicial review.

The *El-Shifa Pharmaceutical* opinion's citation to the President's role as Commander in Chief revealed the source of the court's political question analysis. As the Tenth Circuit did in *New York Life*,[126] here the Court of

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Pharmaceutical, the Court of Federal Claims faced the issue of whether the Just Compensation Clause of the Fifth Amendment extends to claims arising out of destruction of a believed "enemy war-making instrumentality" by the American military. *Id.* at 752. In August 1998, truck bombs destroyed the American embassies in Kenya and Tanzania, and two weeks later President Clinton ordered retaliatory strikes in Afghanistan and Sudan by the United States military. *Id.* at 753. He stated that the targets were Osama bin Laden's terrorist base in Afghanistan and a chemical-weapons facility in Sudan. *Id.* The attacks destroyed the plaintiff's pharmaceutical plant in Sudan, and the plaintiff sought damages from the American government. *Id.* at 754. The government made a motion to dismiss the claim based on a variety of legal theories. *See id.* at 755 (listing the defects in the plaintiff's complaint asserted by the government). The Court of Federal Claims rejected all of these arguments, dealing mainly with jurisdiction and standing, except for the government's claim that the Fifth Amendment's Takings Clause does not extend to claims arising out of military operations against the enemy's war-making facilities. *Id.* at 755–56. The court stated that the Takings Clause "applies to the civil functions of Government and not to the military." *Id.* at 764. After discussing a possible distinction in Takings Clause analysis between "necessary and unnecessary military destruction," *id.* at 765, the court admitted that it did not have the authority to review "the legitimacy or authority of the Government's action[s]." *Id.* at 766. The court concluded that because the President characterized the military action as necessary, the court had to consider the military action necessary and find the Takings Clause inapplicable to the claim. *Id.* at 767. The court also discussed the President's authority to designate enemies and a state of war. *Id.* at 772. Finally, the court expressed the general judicial policy of deference to the political branches on matters concerning deployment of the armed forces abroad. *Id.* at 773. For all these reasons the Court of Federal Claims granted the government's motion to dismiss the plaintiff's claim. *Id.* at 774.

122. *See id.* at 771–72 (deferring to the President's designation of a pharmaceutical facility as an enemy target and of a missile strike as a state of war).

123. *See id.* at 753–54 (noting the factual background for the *El-Shifa Pharmaceutical* case).

124. *See id.* at 771–72 (addressing the propriety of the missile strike against the El-Shifa plant ordered by President Clinton).

125. *Id.* (emphasis added).

126. *See supra* notes 106–19 and accompanying text (analyzing the Tenth Circuit's

Federal Claims' approach to the issue resembled the first characteristic of nonjusticiable political questions identified in *Baker*: "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[127] Both the Tenth Circuit and the Court of Federal Claims considered the determination of a time of war part of the general war powers, and thus they both found that this issue did not fall within the purview of the judiciary, which does not receive any war powers from the Constitution.

Courts from as far back as 1871[128] and as recently as 2003[129] have found that a time of war is a nonjusticiable political question. Yet the reasons the courts provided for their decisions resembled different items in the *Baker* political questions analysis. The Supreme Court found the issue unsuitable for judicial review because of the lack of adequate standards to review the status of a war and the need to conform to political decisions already made.[130] On the other hand, the Second Circuit, Tenth Circuit, and the Court of Federal Claims focused on the textual commitment of the issue of time of war to the President by the Constitution as part of his Commander in Chief powers.[131] Although the courts did not agree on the precise reason why the judicial branch cannot determine a time of war, a contemporary court applying *Baker* analysis could find precedent implicating no fewer than three of the six characteristics of nonjusticiable political questions.

C. Perhaps Not So Obviously Nonjusticiable

Despite the many cases finding time of war nonjusticiable, one recent court found that a time of war was not a political question beyond the reach of the judiciary. In *Dellums v. Bush*,[132] a federal district court faced a lawsuit by

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conclusion that a time of war was not justiciable because of the Constitution's commitment of the war powers to the political branches).

127. Baker v. Carr, 369 U.S. 186, 217 (1962).

128. *See* The Protector, 79 U.S. (12 Wall.) 700 (1871) (deferring to the executive on the task of deciding a time of war).

129. *See* El-Shifa Pharm. Indus. Co. v. United States, 55 Fed. Cl. 751, 773 (2003) (recognizing the political nature of a time of war and opting to defer to the other branches of government on the issue).

130. *See supra* notes 78–105 and accompanying text (discussing the Court's analysis of the issue in *The Protector* and *Ludecke*).

131. *See supra* notes 106–27 and accompanying text (discussing various courts' approaches to the matter in *New York Life* and *El-Shifa Pharmaceutical*).

132. Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). In *Dellums v. Bush*, a District Court for the District of Columbia had to decide whether a federal court could enjoin the President from launching an offensive attack on another nation without first obtaining "a

members of Congress seeking to enjoin the President from attacking Iraq without prior congressional approval.[133] The plaintiffs' claim relied on the proposition that offensive military action involving several hundred thousand American troops in the region would constitute a war within the meaning of Article I, Section 8, Clause 11 of the Constitution.[134] This would require the President to obtain a declaration of war before ordering military action.[135] The President argued that the issue of whether the anticipated invasion would comprise a war was a nonjusticiable political question.[136] Specifically, the executive branch invoked the "lack of judicially discoverable and manageable standards" prong of *Baker*.[137]

The *Dellums* court, however, departed from Supreme Court precedent[138] and stated that it had adequate standards with which to decide whether a

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declaration of war or other explicit congressional authorization." *Id.* at 1143. After Iraq's invasion of Kuwait in August 1990, the United States sent troops into the region. *Id.* In November 1990, President Bush substantially increased the size of the American force and said the objective of this expansion "was to provide 'an adequate *offensive* military option.'" *Id.* Members of Congress, under the belief that an offensive American attack was imminent, brought this action to prevent the President from launching such an assault without congressional approval. *Id.* at 1144. The President's primary argument against the proposed injunctive relief was that the complaint presented a nonjusticiable political question. *Id.* The court noted that if the President were free to characterize a military action, no matter how large, as not a war, then the constitutionally prescribed task of Congress to declare war would be rendered meaningless. *Id.* at 1145. Instead, the court stated that the judicial branch has the power and ability to decide whether American military actions constitute war. *Id.* at 1146. Also, the district court held that a court is not excluded from the resolution of cases merely because they involve foreign affairs. *Id.* The court then held that an offensive entry of several hundred thousand American troops into Iraq would require a congressional declaration of war. *Id.* Next, the court found that the plaintiffs had standing to bring this action because they would suffer injury by being denied their right to vote on the war and that injury was imminent. *Id.* at 1147–48. The court noted that the plaintiffs did not have a remedy available to them in Congress. *Id.* at 1149. Yet the court did not grant an injunction because it found that the suit was not ripe. *Id.* The court stated that the issue was not ripe because Congress had not indicated that it deemed a declaration of war necessary. *Id.* at 1149–50. Also, the issue was not ripe because the President had not committed himself to immediate military operations that would rise to the level of war. *Id.* at 1151. As a result, the court denied the plaintiff's request for an injunction. *Id.* at 1152.

133. *See id.* at 1143 (outlining the premise of the lawsuit).

134. *See id.* at 1146 (discussing the relevance of Congress's constitutionally prescribed power to declare war).

135. *See id.* (stating that wars require a congressional declaration).

136. *See id.* at 1144 (discussing the claim made by the President that *Baker* precluded judicial review of his military actions in Saudi Arabia).

137. *Id.* at 1145.

138. *See supra* notes 78–105 and accompanying text (discussing the Supreme Court's conclusion in *The Protector* and *Ludecke* that it could not determine a time of war because of a lack of adequate standards).

military action constituted a formal war.[139] The court admitted that in a situation that was "factually close or ambiguous or fraught with intricate technical, military and diplomatic baggage," the judiciary would likely "defer to the political branches" as to whether a conflict rose to the level of war.[140] Presented with the facts that hundreds of thousands of American troops were in the Middle East and that the President and Secretary of Defense had spoken of offensive military action,[141] the *Dellums* court found that "here the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat."[142] In support of this conclusion the court cited a federal appellate decision that a court could decide with little difficulty that the hostilities in Vietnam constituted a war, despite the fact that the political branches of government never officially stated the fact.[143] Likewise, the *Dellums* court concluded that the question of whether the imminent attack would be a war did not become nonjusticiable because of a lack of adequate judicial standards.[144]

The court in *Dellums* also concluded that the issue was not a nonjusticiable political question simply because the Constitution granted all foreign affairs power to the political branches.[145] It stated that the grant of foreign affairs authority to the President and Congress did not concomitantly exclude the courts from that area.[146] In support of this statement, the court noted that the judicial branch "routinely decide[s]" cases involving issues with a significant impact on foreign policy.[147] The court further observed that courts historically have decided whether the nation was at war for several other purposes, such as treaties, statutes, and contracts.[148] This district court

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139. *See Dellums*, 752 F. Supp. at 1146 (ruling that the court could, in fact, determine a time of war).

140. *Id.* at 1145.

141. *See id.* at 1143 (noting the actions taken by the Bush Administration).

142. *Id.* at 1145.

143. *See id.* (citing *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973), for the proposition that a court can rule on the factual existence of war).

144. *See id.* at 1146 (adjudicating the status of the potential war with Iraq).

145. *See id.* (rejecting the President's argument that the courts should bow out of foreign affairs).

146. *See id.* (noting a role for the courts in foreign affairs).

147. *Id.* (citing the cases *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986)); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

148. *See id.* (describing the role the courts play in foreign affairs).

concluded that the commitment of foreign affairs to the political branches did not exclude the judiciary from deciding the issue before it.[149] As a result, the *Dellums* court decided that it would have "no hesitation in concluding that an offensive entry into Iraq" would constitute a war.[150]

The *Dellums* opinion raises serious concerns as to whether time of war can be dismissed as a nonjusticiable political question. The main arguments for nonjusticiability address the lack of standards, the need to support prior political decisions,[151] and the commitment of foreign affairs and war powers to the political branches.[152] Most significantly, the *Dellums* opinion noted that several courts have decided the issue of time of war and necessarily employed standards to resolve the issue.[153] Decisions referenced by the *Dellums* court offer important insight into whether courts possess adequate standards to determine a time of war. Also, these decisions can shed light on whether the judicial branch improperly interfered with the political departments by addressing the issue.

III. Standards for a Time of War

Part II of this Note discussed arguments for and against the justiciability of the issue of time of war,[154] including the issue of whether courts possess sufficient standards with which to evaluate wartime.[155] This Part now outlines the various standards courts have used to decide whether the nation was in a time of war. In Part IV, this Note will incorporate these standards into the arguments for and against the justiciability of the question of wartime from Part II.[156]

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149. *See id.* (ruling that an offensive action against Iraq would be a war).

150. *Id.*

151. *See supra* notes 78–105 and accompanying text (discussing the Supreme Court's decisions in *The Protector* and *Ludecke*).

152. *See supra* notes 106–27 and accompanying text (discussing the cases *New York Life* and *El-Shifa Pharmaceutical*).

153. *See Dellums*, 752 F. Supp. at 1146 (listing the cases where a court has determined a time of war).

154. *See supra* Part II (outlining arguments on both sides of the debate on the justiciability of time of war).

155. *See supra* Part II (discussing the dispute between the Supreme Court and the court in *Dellums* concerning whether the judiciary possesses adequate standards to resolve the issue of time of war).

156. *See infra* Part IV (analyzing the justiciability of time of war).

A. Express Political Recognition

At first blush, the analysis of time of war in *United States v. Anderson*[157] closely resembles those Supreme Court decisions holding that this issue is a question left to the political departments.[158] When confronted with a statute of limitations based on the end of the Civil War,[159] the Court in *Anderson* deferred to the President and Congress for a determination of the precise date on which the war ended.[160] The Court stated that "in a domestic war, . . . some public proclamation or legislation would seem to be required" to decide when such a war concluded.[161] This analysis mirrors the Supreme Court's holdings in other cases that it would not decide the issue of time of war itself, but would defer to the political departments.[162]

The *Anderson* Court, however, confronted the unique challenge of multiple political pronouncements on the end of the Civil War. The opinion

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157. United States v. Anderson, 76 U.S. (9 Wall.) 56 (1869). In *Anderson*, the Supreme Court had to determine the precise end date of the Civil War. *Id.* at 68. During the Civil War, Congress enacted a statute which gave those owners who remained loyal to the United States the right to be compensated for property confiscated by the Union. *Id.* at 65. Such owners would have to bring suit within two years after the end of the war. *Id.* Anderson, the plaintiff in this case, remained loyal to the Union throughout the war and sought compensation for property confiscated by Union soldiers. *Id.* at 66. As a preliminary matter, the government argued that this statute did not allow a loyal owner to recover damages for property that he had purchased from a rebellious vendor. *Id.* The Court rejected this proposition as contrary to the congressional intent of benefiting loyal property owners. *Id.* at 66–67. Next the Court addressed the government's claim that June 5, 1868, the day on which the plaintiff brought this action, was more than two years removed from the end of the war. *Id.* at 68. The Court stated that the statute comprehended the end of the entire rebellion. *Id.* at 69. The Court found that, in a domestic war, "some public proclamation or legislation" is required to determine the end of the war. *Id.* at 70. The opinion noted various possible acts of Congress and presidential proclamations that could be used for the purpose of determining the precise end of the war, but settled on an announcement by the President on Aug. 20, 1866 "that the whole insurrection was at an end." *Id.* Congress later used this date to fix the time the war ended for the purpose of determining wages due troops. *Id.* at 71. The Court thus adopted August 20, 1866 as the day on which the Civil War ended and held that the plaintiff succeeded in bringing his suit within the two years allowed by statute. *Id.* at 71–72.

158. *See supra* notes 53–105 and accompanying text (discussing the Supreme Court's decisions that a time of war was nonjusticiable in the cases *The Three Friends*, *Prize Cases*, *The Protector*, and *Ludecke*).

159. *See Anderson*, 76 U.S. (9 Wall.) at 65 (noting the terms of the statute at issue in this case).

160. *See id.* at 70–71 (adopting the President's proclamation as the official end of the Civil War).

161. *Id.*

162. *See supra* notes 53–105 and accompanying text (discussing the Supreme Court's decisions that a time of war was nonjusticiable in the cases *The Three Friends*, *Prize Cases*, *The Protector*, and *Ludecke*).

acknowledges the "various acts of Congress and proclamations of the President bearing on" the conclusion of the war.[163] Although the Court had previously used a policy of blind deference to the determinations of the political departments of government on the issue of time of war,[164] the President and Congress's imprecise resolution of the issue forced the Court to choose between alternative political proclamations.[165] The Court, looking for a declaration that "the rebellion [was] entirely suppressed,"[166] adopted a presidential proclamation that "the whole insurrection was at an end" on August 20, 1866.[167]

The selection of this date was not at all obvious. The presidential declaration that the war had ended on that day noted a previous determination on April 2, 1866, "that armed resistance [to the United States] had ceased everywhere except in the State of Texas."[168] The Court in *Anderson* concluded that the relevant statute of limitations began to toll on the day when "the rebellion [was] entirely suppressed" and that a decision on the end date of the war "which would prescribe one rule for the people of one State, and a different rule for those living in another State, [could not] be allowed to prevail."[169] Although the Court cannot be faulted for relying on this particular political proclamation, especially as Congress subsequently used this same date to determine the end of the Civil War for another purpose,[170] the facts make clear that the Court in *Anderson* did not need to select the August 20, 1866 presidential declaration for the basis of fixing the end date of the war.[171] Rather, the Court exercised its own discretion and chose among multiple political pronouncements.[172] In doing so, the Court, by necessity, exercised its own judgment and discretion. This marked the entry of the Supreme Court into the matter of a time of war, if only by a reluctant, incremental step. Other

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163. *Anderson*, 76 U.S. (9 Wall.) at 70.

164. *See supra* notes 53–105 and accompanying text (discussing the Supreme Court's decisions that a time of war was nonjusticiable in the cases *The Three Friends*, *Prize Cases*, *The Protector*, and *Ludecke*).

165. *See Anderson*, 76 U.S. (9 Wall.) at 70 (stating that multiple political declarations had relevance in determining the end of the Civil War).

166. *Id.* at 69.

167. *Id.* at 70.

168. *Id.*

169. *Id.* at 69.

170. *See id.* at 71 (citing a March 2, 1867 act of Congress, concerning the payment of wages to soldiers, that fixed August 20, 1866 as the date of the end of the war).

171. *See id.* at 69–70 (stating that the war ended when the entire rebellion was suppressed).

172. *See id.* at 70 (stating that various congressional acts and presidential proclamations were relevant to a determination of when the Civil War ended).

courts, including a later Supreme Court, have since made greater strides into the realm of deciding the beginning and end of wartime.[173]

B. Statutory Context

The Supreme Court, in *Lee v. Madigan*,[174] changed course from the traditional political recognition standard by turning the focus to the congressional intent behind a statute requiring a determination of a time of war.[175] In that case, the Court addressed a statute that denied courts-martial jurisdiction over certain cases "in time of peace."[176] The opinion began by acknowledging *Ludecke*, which held that only the political branches of government can terminate a time of war.[177] Yet the *Lee* Court found that "*Ludecke* . . . belongs in a special category of cases dealing with the power of the Executive or the Congress to deal with the aftermath of problems which a state of war brings and which a cessation of hostilities does not necessarily

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173. *See infra* Part III.B–E (discussing *Lee v. Madigan*, 358 U.S. 228 (1959), and other cases which have outlined standards for time of war).

174. Lee v. Madigan, 358 U.S. 228 (1959). In *Lee*, the Court had to determine the meaning of the statutory phrase "in time of peace." *Id.* at 229. The defendant, while serving a sentence for an unrelated crime at Camp Cooke in the custody of the United States Army, "was convicted by a court-martial of the crime of conspiracy to commit murder." *Id.* The crime occurred in June 1949. *Id.* Article of War 92, which governed trials for murder or rape before courts-martial prior to the adoption of the Uniform Code of Military Justice, stated that no person would be tried by court-martial for crimes committed within the United States "in time of peace." *Id.* Examining the conclusion of World War II, the Court noted that Germany surrendered in May 1945 and Japan in September 1945. *Id.* at 230. The President declared in December 1946 that hostilities had ended, but added "that a state of war still exists." *Id.* A Joint Resolution of Congress and a Presidential Proclamation ended the war with Germany in October 1951, and in April 1952 the President declared the war with Japan over. *Id.* The Court noted the holding in *Ludecke* that the termination of a time of war is a political act reserved for the political branches of government. *Id.* Yet the *Lee* Court found that it must analyze the facts of each case in light of the particular statute involved. *Id.* at 230–31. The Court noted its historical reluctance to give the military jurisdiction over crimes unless necessary and also the greater appreciation of constitutional trial rights in civilian courts. *Id.* at 232–34. In light of this, the Court assumed that Congress "was alive to the importance of those constitutional guarantees" when it wrote the relevant statute. *Id.* at 235. The Court attributed to Congress a desire to safeguard the liberties protected by civilian trials. *Id.* The Court concluded that it could not assume that Congress intended to deny civilian trials "for capital offenses four years after all hostilities had ceased." *Id.* at 236. The Court held that June 1949 was, therefore, in a time of peace for purposes of the statute. *Id.*

175. *See id.* at 230–31 (stating that the facts of a case must be examined with reference to the particular statute involved).

176. *Id.* at 229.

177. *See id.* at 230 (discussing the holding in *Ludecke*).

dispel."[178] *Ludecke* involved the authority of the President to remove an alien enemy after the cessation of hostilities but prior to a political declaration that wartime had ended.[179] The *Lee* opinion also distinguished other cases that looked only to political proclamations to decide whether the United States was in a time of war but that did not involve courts-martial.[180]

The Supreme Court in *Lee* placed great emphasis on the relationship between the congressional intent behind a statute and the meaning of the phrase "time of war" within a statute. "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another."[181] The task before it was, therefore, to decide "whether 'in the sense of this law'" a time of war existed.[182] Given the facts of *Lee*, the Court determined that Congress intended "time of peace" to mean after the cessation of hostilities.[183]

The *Lee* decision poses great significance for the issue of whether courts can determine a time of war. The opinion rejects the notion that all situations require the judiciary to defer to political determinations of wartime.[184] This implicitly means that courts can use other standards to decide whether a time of war exists, calling into question prior statements by the Supreme Court that courts lacked adequate judicial standards to address the issue.[185] Also, the Court in *Lee* entrusted to judicial interpretation the determination of which standard to apply.[186] In this regard, the Court cast doubt on the contention that wartime is an issue best left outside the scope of judicial review,[187] an argument

178. *Id.* at 231.

179. *See id.* (outlining the facts in *Ludecke*); *see also supra* notes 86–105 (discussing the *Ludecke* opinion).

180. *See Lee*, 358 U.S. at 231–32 (distinguishing the cases *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), *Woods v. Miller Co.*, 333 U.S. 138 (1948), and *McElrath v. United States*, 102 U.S. 426 (1880), from the present dispute).

181. *Id.* at 231.

182. *Id.*

183. *See id.* at 236 (declining to impose on Congress an intent to deny civilian jury trials four years after hostilities had ended).

184. *See id.* at 231 (stating that whether the nation is at war depends on the statute involved); *see also* United States v. Sobell, 314 F.2d 314, 326 (2d Cir. 1963) (stating that *Lee* dismissed the universal assumption that a time of war continued until a political proclamation that the war had ended).

185. *See supra* Part II.A (discussing the Supreme Court precedent holding that time of war is nonjusticiable).

186. *See Lee*, 358 U.S. at 231 (stating that the determination of whether the nation was at war for the purposes of a particular statute was a problem for judicial interpretation).

187. *See id.* (requiring courts to use statutory interpretation where a statute calls for a time of war determination).

previously advanced by the Court.[188] Finally, the *Lee* Court applied an existence of hostilities standard,[189] a topic that is discussed in greater detail below.[190] The above points clarify that the Supreme Court overcame much of its reluctance to wade into the issue of whether the United States was in a time of war, opening the door to alternative formulations of judicial standards for wartime.

C. The Existence of Hostilities

Perhaps the most obvious standard for determining a time of war is the presence of hostilities. The Second Circuit used this standard in *United States v. Sobell*.[191] There the defendant received a sentence under a statutory

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188. *See supra* Part II.A (outlining the reasoning in some Supreme Court opinions for its conclusion that time of war did not present a justiciable question).

189. *See Lee*, 358 U.S. at 236 (deciding that the state of war had ended due to the length of time since the cessation of hostilities).

190. *See infra* Part III.C (discussing the existence of hostilities standard).

191. *See* United States v. Sobell, 314 F.2d 314, 329 (2d Cir. 1963) (stating that a sufficient "suspension of hostilities" permits the conclusion that peace has been restored). In *Sobell*, the Second Circuit addressed the issue of whether the defendant, Sobell, was entitled to post-conviction relief under Federal Rule of Criminal Procedure 35. *Id.* at 317–18. Sobell was tried jointly with Julius and Ethel Rosenberg for charges relating to espionage. *Id.* at 319. A jury convicted Sobell of transmitting "information relating to the national defense" to a foreign government. *Id.* at 317. He received a thirty year sentence under the provision that whoever committed such a crime "'in time of war'" was to be punished by death or up to thirty years in prison. *Id.* (citing 50 U.S.C. § 32(a) (1946)). After the appellate process affirmed the conviction, Sobell initiated several attempts at post-conviction relief, including this case that made its way to the Second Circuit. *Id.* at 317–18. He challenged his conviction on two grounds. *Id.* at 318. Sobell first argued that, under *Grunewald v. United States*, 353 U.S. 391 (1957), the trial court improperly permitted the government to question Mrs. Rosenburg about her invocation of her Fifth Amendment right against self-incrimination before a grand jury. *Id.* at 320. In *Grunewald*, decided after Sobell's trial, the Supreme Court held that the probative value of cross-examination on prior invocations of the Fifth Amendment on the issue of credibility was greatly outweighed by the prejudice to the defendant. *Id.* at 318–19. Because the government asked Mrs. Rosenberg such questions on cross-examination, Sobell claimed that she deserved a new trial and that he in turn deserved a new trial because the government's evidence was inconsistent with a finding that "he alone was guilty." *Id.* at 320. The Second Circuit held that Rule 35 did not grant him any relief under this argument, however, because *Grunewald* did not announce a constitutional rule and because a new trial was not likely to have a different result. *Id.* at 323–25. Sobell's second claim stated that his crime did not occur "in time of war" and that he was thus punished under the wrong provision. *Id.* at 325. Although the indictment charged Sobell with committing crimes at some point between June 6, 1944, and June 16, 1950, "the greater portion of the evidence against Sobell concerned 1946, 1947 and 1948." *Id.* at 325. Sobell argued that it was error for the trial court not to instruct the jury that World War II had ended by a certain time in 1945 or 1946. *Id.* at 326–27. The Second Circuit stated that peace may be established by a "long suspension of hostilities" even without a peace

provision that required the crime occur during "time of war."[192] The government charged the defendant for crimes occurring at some point between 1944 and 1950.[193] The defendant argued that the activities for which he was convicted happened after the end of World War II.[194] The Second Circuit, following the *Lee* Court's decision to examine the context of the issue of time of war within a statute, found that Congress did not intend to provide the same sentencing scheme during periods of actual hostility as during periods following hostilities when "our wartime enemies had become our friends."[195]

The court in *Sobell* then established the standard by which it would decide if the United States was in a time of war when the defendant committed his crime. The Second Circuit noted that Congress wrote the relevant sentencing provision aware that "belligerents could 'glide into peaceful relations'" without a formal peace treaty.[196] The court quoted former Secretary of State William Seward's remark that "'the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. . . . [The length of peace required] must in every case be determined with reference to collateral facts and circumstances.'"[197] The Second Circuit, examining the facts of the continued military occupation of Germany and Japan, concluded that the war was over when the defendant committed his crimes during 1948.[198] The court supported this statement by noting that American troops were stationed in these countries in 1948 "for the same reasons that kept them there" in 1952, when all parties agreed that World War II had ended.[199]

Significantly, the Second Circuit in *Sobell* did not cite any political proclamations or any action by the President or Congress in reaching this

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treaty. *Id.* at 329. The court fixed the end of the war at some point before the summer and fall of 1948, the time when certain testimony linked Sobell to espionage. *Id.* The court noted that Sobell could have asked the jury to determine whether he had joined the conspiracy during 1944–45 or at some point after. *Id.* Yet the Second Circuit decided that he was not eligible for relief under Rule 35 because the failure to request such a jury instruction did not deprive him of a constitutional right. *Id.* at 330. Also, the court found that the alleged trial defect did not result in the imposition of an illegal sentence on Sobell. *Id.* at 331. For these reasons, the Second Circuit found that Sobell was not entitled to post-conviction relief. *Id.*

192. *Id.* at 317 (citing 50 U.S.C. § 32(a) (1946)).

193. *See id.* at 325 (quoting the indictment, which stated that Sobell committed crimes "'[o]n or about June 6, 1944, up to and including June 16, 1950'").

194. *See id.* at 325–26 (noting Sobell's claim that it is for the jury to decide if he committed espionage during a time of war).

195. *Id.* at 328.

196. *Id.* at 329 (quoting 2 OPPENHEIM, INTERNATIONAL LAW (1906)).

197. *Id.*

198. *See id.* (finding that, by 1948, the time of war for World War II had ceased).

199. *Id.*

determination.[200] Instead, the court focused on the peaceful relations between the United States and its enemies from World War II and on the lack of any substantial reason to conclude that the war persisted into 1948.[201] The court applied the standard of existence of hostilities to the situation and found the facts insufficient to support a conclusion that the nation was in a time of war during the period in question.[202]

Other courts have also applied the existence of hostilities standard. In *Dellums*, discussed above, a federal district court before the start of the Persian Gulf War declared that it would have "no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a 'war' within the meaning of Article I, Section 8, Clause 11, of the Constitution."[203] The *Dellums* court rejected the notion that it lacked sufficient standards to determine whether a state of war existed.[204] The court offered as an obvious yardstick for a time of war when American troops take part in a massive invasion of another country.[205]

Courts also consider the existence of hostilities when insurance contracts make reference to times of war. In *New York Life*, also discussed above,[206] the Tenth Circuit faced a life insurance contract that paid benefits if the insured died while the country was engaged in war, including an undeclared war.[207] The court initially rejected the notion that it could decide whether the United States was in a formal, legally recognized war.[208] Yet the court went on to say that the political determination of a time of war was immaterial to a private contract that intended war to have a different meaning.[209] The Tenth Circuit

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200. *See id.* (relying only on the argument that the war ended at least by 1948 because nothing had changed between that date and 1952, when all agreed the war was over).

201. *See id.* (relating the factual basis for the court's conclusion that there was no state of war in 1948).

202. *See id.* (stating that a suspension of hostilities can end a time of war).

203. Dellums v. Bush, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

204. *See supra* Part II.C (discussing the court's statement that where "the forces involved are of such magnitude and significance as to present no serious claim that a war" did not exist, courts were quite capable of recognizing a time of war).

205. *See Dellums*, 752 F. Supp. at 1146 (finding that the presence of hundreds of thousands of American troops invading Iraq would meet the prerequisite of a time of war).

206. *See supra* notes 106–19 and accompanying text (analyzing the Tenth Circuit's decision in *New York Life*).

207. *See* N.Y. Life Ins. Co. v. Durham, 166 F.2d 874, 875 (10th Cir. 1948) (outlining the contractual terms at issue in the case).

208. *See id.* (stating that courts do not decide war and peace but are bound by the determinations of the political departments of government on such issues).

209. *See id.* at 876 (noting that a private contract can define war as it wishes).

found that the parties in this case understood war in a practical sense of hazards to human life and not a legal condition.[210] As a consequence, the court looked to whether hostilities existed when the insured died.[211] Because the insured died "after the surrender of [the United States'] enemies," the Tenth Circuit concluded that no benefits were due.[212]

The United States Court of Claims made a similar determination in *Syquia v. United States*.[213] That case centered on a lease created during World War II that would last "for the duration of the war."[214] The court rejected the defendant's argument that this language intended the lease to run until issuance of a political proclamation that the war had ended.[215] The Court of Claims stated that, in the context of private contracts, language similar to "for the duration of the war" is commonly understood to mean "until actual hostilities have ceased."[216] This reiterates the holding in *New York Life* that contractual references to "war" refer to the existence of hostilities.[217]

The courts in *New York Life* and *Syquia* were not asked to decide whether the United States was in an official time of war.[218] The significance of these

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210. *See id.* (recognizing the ability of private parties to define contractual elements as they wish).

211. *See id.* (turning to the factual question of the existence of war for purposes of the contract).

212. *Id.*

213. *See* Syquia v. United States, 124 F. Supp. 638, 641 (Ct. Cl. 1954) (stating that references to "war" in contracts generally mean "hostilities"). In *Syquia*, the Court of Claims had to determine the meaning of the phrase "the duration of the war" in the context of a lease agreement. *Id.* at 639. In February 1945, the plaintiff leased apartment buildings in the City of Manila, Philippine Islands, to the Army "for the duration of the war and six months thereafter." *Id.* at 640. Despite requests by the plaintiff for the Army to vacate the buildings after hostilities with Japan ceased in 1945, the Army did not vacate them until 1948. *Id.* at 640–41. The plaintiff sought the fair market value of the leased properties for the period between the end of hostilities plus six months and the time of the Army's departure. *Id.* at 639. The defendant argued that the phrase "duration of the war" meant a time until a political proclamation that the war had ended. *Id.* at 641. The Court of Claims stated that for purposes of a contract, phrases such as "duration of the war" are commonly understood to mean "until actual hostilities have ceased." *Id.* Thus a war ends when hostilities end. *Id.* at 642–44. The court found that the parties in this case intended "duration of the war" to have its ordinary meaning, existence of hostilities, and fixed the termination of the leases at six months after the formal Japanese surrender in September 1945. *Id.* at 645.

214. *Id.* at 639.

215. *See id.* at 641 (discussing the legal interpretation of a contractual term dependent on a "time of war").

216. *Id.*

217. *See supra* notes 106–07 (stating that a life insurance contract meant "hostilities" when it said "war").

218. *See supra* notes 206–17 and accompanying text (discussing the treatment of war in the

cases to the issue of justiciability is apparent because they provide a standard by which courts have decided whether the nation was in a time of war. Whereas some courts held that the judicial branch lacks sufficient standards to address the issue of time of war,[219] the contract cases offer one possible option.

Military courts also use the existence of hostilities standard to decide whether the United States is in an official time of war.[220] Courts-martial can involve statutes that require a finding that a crime was committed during wartime.[221] Military courts understand time of war to mean existence of hostilities.[222] These military court decisions do not directly establish that the issue of time of war is justiciable for civilian courts, but they do highlight one type of judicial standard courts employ to decide whether a time of war exists.

It should be noted that a number of cases have flatly rejected existence of hostilities as a judicial standard for determining a time of war.[223] Yet all these cases predate *Lee*, which overturned the principle that the onset of war and the return to peace depended solely on political pronouncements.[224] Courts have used the existence of hostilities standard, particularly in cases involving

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context of private contracts in *New York Life* and *Syquia*).

219. *See supra* Part II.A (discussing Supreme Court decisions which found inadequate standards for determining whether wartime exists).

220. *See, e.g.*, United States v. Sanders, 7 C.M.A. 21, 22 (1956) (deciding that time of war referred to actual hostilities); United States v. Busbin, 22 C.M.R. 822, 825 (A.F.B.R. 1956) (stating that wartime continued as long as hostilities lasted).

221. *See Sanders*, 7 C.M.A. at 22 ("If committed 'in time of war' a violation of Article 113 is punishable by death . . . ."); *Busbin*, 22 C.M.R. at 822 (noting that punishment for absence without leave depends on whether it is wartime).

222. *See Sanders*, 7 C.M.A. at 22 (stating that time of war meant "existence of actual armed hostilities"); *Busbin*, 22 C.M.R. at 825 (finding that a July 1953 Armistice Agreement did not end the Korean War because of the continuation of a shooting war); *cf.* United States v. Anderson, 17 C.M.A. 588, 590 (1968) (concluding that the Vietnam War rose to the level of an official time of war due to sufficient political recognition of such a state, including the Gulf of Tonkin Resolution).

223. *See, e.g.*, J. Ribas y Hijo v. United States, 194 U.S. 315, 323 (1904) (stating that a truce or suspension of hostilities does not end a time of war); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 158–59 (1919) (stating that the mere cessation of hostilities under an armistice does not end a time of war); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141 (1948) (stating that wartime "does not necessarily end with the cessation of hostilities"); Ludecke v. Watkins, 335 U.S. 160, 169 (1948) (finding that conclusion of time of war "is a political act" and not determined by a cessation of hostilities); United States *ex rel.* Kessler v. Watkins, 163 F.2d 140, 142 (2d Cir. 1947) (finding that the President's power to detain enemy aliens under his war powers survives the cessation of hostilities); United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (declaring the law settled on the conclusion that the United States remained at war with Germany in World War II "despite the cessation of hostilities").

224. *See supra* notes 174–89 and accompanying text (discussing *Lee* and its rejection of the political determination standard as the sole standard).

contracts and courts-martial.[225] Thus, this standard remains an option available to courts that decide the issue of time of war.

D. Totality of the Circumstances

Branching off of the existence of hostilities standard, the Ninth Circuit in *Koohi v. United States*[226] applied a totality of the circumstances approach to the issue of time of war.[227] This case involved actions by the American military to protect oil tankers during the war between Iran and Iraq in the 1980s.[228] The plaintiffs sought damages for an incident in which an American naval cruiser mistakenly shot down an Iranian civilian plane.[229] The Ninth Circuit addressed the issue of whether the Federal Tort Claims Act (FTCA) allowed the suit to proceed against the government.[230] Specifically, the FTCA precludes suits against the United States arising out of combat activities "during time of war."[231]

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225. *See supra* notes 206–24 and accompanying text (discussing contract cases and courts-martial that required courts to decide whether the nation was in a time of war).

226. Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992). In *Koohi*, the Ninth Circuit addressed the issue of whether the heirs of passengers killed when the American military shot down a civilian plane could bring suit against the United States. *Id.* at 1330–31. During the war between Iran and Iraq in the 1980s, the battle shifted toward oil tankers in the Persian Gulf. *Id.* at 1329–30. Iran concentrated its attacks principally on Kuwaiti oil ships. *Id.* at 1330. The United States decided to allow Kuwaiti ships to fly the American flag and to protect these Kuwaiti ships from Iranian attacks. *Id.* This, in effect, brought America into the war on the side of Iraq. *Id.* A series of military encounters ensued between Iran and American forces in the Persian Gulf. *Id.* In one incident, a United States naval cruiser, while protecting American helicopters from antiaircraft fire, mistook an Iranian Airbus for an F-14 and shot it down, killing all 290 persons on board. *Id.* The plaintiff heirs of the passengers sought compensation from the United States and other defendants allegedly responsible for the fatal misidentification. *Id.* The Ninth Circuit began its analysis with a rejection of the defendants' argument that the case presented a nonjusticiable political question. *Id.* at 1331. The court noted that the Supreme Court has held that federal courts can review military decisions that injure civilians. *Id.* Yet the court decided that sovereign immunity prevented the claim from going forward. *Id.* at 1333. Although the Federal Tort Claims Act generally waives sovereign immunity, the statute provides an exception for claims arising out of military activity "during time of war." *Id.* The Ninth Circuit decided that, despite the fact that the United States had not declared war, American armed forces were in a time of war for the purposes of the FTCA. *Id.* at 1335. The court also held that the Public Vessels Act did not provide the plaintiffs with a route around sovereign immunity because FTCA exceptions could be incorporated into the PVA. *Id.* at 1336. Finally, the court extended the government's sovereign immunity to the defense contractors also named in the suit. *Id.* As a result, the court affirmed dismissal of the action. *Id.* at 1337.

227. *See id.* at 1334–36 (discussing the factors that allowed the court to conclude that a time of war existed when an American cruiser shot down an Iranian plane).

228. *See id.* at 1330 (outlining the factual basis for this case).

229. *See id.* (noting the reasons for the mistaken attack on the Iranian airliner).

230. *See id.* at 1332 (addressing the defendant's claims of sovereign immunity in the

The *Koohi* court began its analysis by affirming the principle that times of war are not dependent upon political declarations.[232] The court then followed the guidance of *Lee*[233] and considered the congressional intent behind the relevant section of the FTCA.[234] The court found that Congress desired "to ensure that the government will not be liable for negligent conduct by our armed forces in times of combat."[235] The Ninth Circuit next looked at the facts of the case to decide whether sufficient hostilities had occurred to allow a finding that the military shot down the plane during a time of combat.[236]

The *Koohi* court found more than enough evidence that the United States was in a time of war. The Ninth Circuit noted that American involvement in the Iran-Iraq war was part of "a deliberate decision by the executive branch."[237] American forces engaged the military of a foreign nation in a "series of hostile encounters on a significant scale."[238] The United States military not only defended itself, but attacked Iranian gunboats and oil platforms.[239] These military actions occurred "in order to further the perceived interests of the United States" in Middle Eastern oil.[240] Based on all of these considerations, the court concluded that the American armed forces were in a time of war when they shot down the Iranian plane.[241]

Koohi was not the first decision to adopt a totality of the circumstances approach to the issue of time of war. In *United States v. Ayers*,[242] the United

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action).

231. *Id.* at 1333 (quoting 28 U.S.C. § 2680(j)).

232. *See id.* ("We agree with those courts that have found the term not to require an express declaration of war.").

233. *See supra* notes 174–89 and accompanying text (discussing *Lee* and its holding that the meaning of "time of war" depends upon its context within a statute).

234. *See Koohi*, 976 F.2d at 1334 (outlining the purpose behind the exception contained in 28 U.S.C. § 2680(j)).

235. *Id.*

236. *See id.* at 1335 (considering the facts of American involvement in the Iran-Iraq war).

237. *Id.*

238. *Id.*

239. *See id.* (noting the extent of military conflict between the United States and Iran).

240. *Id.*

241. *See id.* ("Under the circumstances, we believe that the shooting down of the Airbus by the Vincennes falls within the FTCA's exception for combatant activities during time of war.").

242. United States v. Ayers, 12 C.M.R. 413 (A.B.R. 1953). In *Ayers*, the Army Board of Review addressed the issue of whether the Korean War constituted a time of war. *Id.* at 414. A court-martial convicted the defendant of "desertion in violation of Article of War 58" for his absence from duty within the continental United States from December 1950 to January 1953. *Id.* at 413. If this desertion occurred outside a time of war, the court-martial would have lacked jurisdiction to try the case. *Id.* at 414. The Board of Review noted that the meaning of "time of

States Army Board of Review applied the same standard almost forty years earlier.[243] That court had to decide whether a time of war existed in the United States during the Korean War.[244] The Board of Review noted a number of factors, such as draft calls, combat legislation, and casualties, that permitted the conclusion that a state of war existed in Korea.[245] Yet the court found that the United States itself was not in a time of war based on other indicia.[246] The President suspended punishment limitations for certain wartime offenses, but only for American forces in the Far East.[247] Congress passed special postage, wage, "and special income tax laws for military personnel *in Korean combat*."[248] Also, the Coast Guard continued to "operate[ ] under the Treasury Department rather than the Navy," which normally controlled the Coast Guard during wartime.[249] Dependents of military personnel could travel "to overseas stations, *other than Korea*."[250] Finally, the law officers of courts-martial only applied "time of war" laws within Korea.[251] Based on all of these factors, the Board of Review in *Ayers* decided that the continental United States was not in a time of war.[252]

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war" within the relevant Article of War was not clear, although a formal declaration of war would obviously qualify combat as a time of war. *Id.* The court recognized a distinction in American jurisprudence between general wars and more limited wars and found that a state of war could exist only within a particular geographic location. *Id.* at 415–16. The court then considered a number of facts that permitted the conclusion that the United States was in a time of war in Korea during the time in question. *Id.* at 417–18. The court found, though, that a time of war did not exist within the continental United States during the Korean War. *Id.* at 419. As a result, the Board of Review set aside the defendant's conviction because the court-martial lacked jurisdiction. *Id.*

243. *See id.* at 417 (deciding that a time of war existed in Korea because of a number of relevant facts).

244. *See id.* at 414–16 (stating that the court-martial would lack jurisdiction if a time of war did not exist and noting that, under the theory of limited wars, the United States can be in a time of war in one place but at peace in another place).

245. *See id.* at 417 (discussing the status of the Korean conflict).

246. *See id.* (delineating between the continental United States and Korea in the time of war determination).

247. *See id.* (stating the presidential policy as to punishment limitations for offenses committed in the United States during the Korean conflict).

248. *Id.*

249. *Id.*

250. *Id.*

251. *See id.* at 417–18 (stating the military justice limitations in place during the Korean conflict).

252. *See id.* at 419 ("We do not believe that 'in time of war' . . . was applicable to the continental United States . . . ."); *see also infra* Part III.E (discussing the distinction between general and limited wars).

Viewed in the larger context of the justiciability of the issue of time of war, *Koohi* and *Ayers* implicitly criticize the argument that courts lack adequate standards to decide the issue. Whereas previous courts declared the issue of time of war unfit for judicial review because courts did not possess sufficient standards,[253] the Ninth Circuit and the Army Board of Review found that at least certain statutes required courts to decide whether hostilities existed.[254] The courts then took the existence of hostilities standard and gave it greater nuance. As part of its determination of whether sufficient hostilities existed, the Ninth Circuit considered a number of factors, including presidential authorization of combat, the scale and repetition of hostile actions, the aggressive nature of some American actions, and the pursuit of American interests.[255] The Army Board of Review looked at different applications of military law, postage rates, combat pay, tax law, and the rights of military dependents to decide whether a time of war existed.[256] These more developed incarnations of the existence of hostilities standard pose a greater challenge to the argument that courts lack adequate standards to decide the issue of time of war. By listing a number of factors that enter the analysis of the issue, the Ninth Circuit in *Koohi* and the Army Board of Review in *Ayers* identified multiple measures courts may adopt in determining whether the United States is at war.

E. The Distinction Between General and Limited War

The *Ayers* opinion also addressed the historically recognized distinction between general and limited wars.[257] As discussed above, the facts in *Ayers* required the Army Board of Review to decide whether the continental United States was in a time of war during the Korean War.[258] The court made use of the distinction between general war, which states that the country is at war for

253. *See supra* Part II.A (outlining Supreme Court decisions that found inadequate standards for a time of war to make the issue justiciable).

254. *See* Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992) (deciding that Congress intended the FTCA to prevent suits against the government for military action "during times of combat"); *Ayers*, 12 C.M.R. at 417 (noting the type of circumstances that permit a court to conclude that a time of war exists).

255. *See Koohi*, 976 F.2d at 1335 (describing the factual predicate the court used to determine whether a time of war existed between the United States and Iran).

256. *See Ayers*, 12 C.M.R. at 417–18 (outlining the factual circumstances relevant to a time of war determination).

257. *See id.* at 415–17 (discussing general and limited wars).

258. *See id.* at 414 (explaining the jurisdictional question relevant to the *Ayers* appeal).

all purposes, and limited war, which finds that the nation is at war for one purpose and at peace for another.[259] This allowed the court to conclude that America was in a time of war in Korea but not in the continental United States.[260]

Bas v. Tingy[261] served as the primary case used by the Army Board of Review in *Ayers* to support the distinction between general and limited war.[262] In *Bas*, the Supreme Court decided whether France was an enemy of the United States at a time when the two countries were attacking each other at sea.[263] As a means of analysis, Justice Washington noted two forms of war.[264] War "of the perfect kind" is "declared in form."[265] In such a war, "one whole nation is at war with another whole nation."[266] As opposed to this general war, a limited, "imperfect war" exists when hostilities between two nations are "confined in [their] nature and extent."[267] Justice Washington clarified that both general and limited wars are public wars because they involve external use of force, are

259. *See id.* at 415–17 (drawing the distinction between general and limited wars).

260. *See id.* at 418–19 (concluding that the time of war in Korea did not extend to the continental United States).

261. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). In *Bas*, the Supreme Court addressed the issue of whether France was an enemy of the United States. *Id.* at 40. In 1799, the United States and France engaged in hostilities at sea. *Id.* at 41. At the same time, Congress passed a law entitling a person that recaptured an American ship from "the enemy" to a one-half interest in salvage of the ship. *Id.* at 40. Congress had enacted in June 1798 a statute giving re-captors of American ships a one-eighth interest in salvage of ships reclaimed from the French. *Id.* In April 1799, the defendant captured an American ship that had previously been taken by the French. *Id.* at 37. The Court reasoned that if France was an enemy of the United States in April 1799, then the defendant would be entitled to one-half salvage under the March 1799 law. *Id.* at 40. Yet if France was not an enemy, then the defendant would receive a one-eighth interest under the June 1798 law. *Id.* The Court found that, even if France and the United States were not engaged in a declared war, the level of hostilities between them and the authorization of this combat by the respective governments put the nations at war. *Id.* at 39, 41–43, 45. As a result, the Court concluded that France was an enemy of the United States in April 1799 and the defendant was entitled to a one-half interest in the salvage of the ship. *Id.* at 46.

262. *See Ayers*, 12 C.M.R. at 415 (citing *Bas* for the proposition that two kinds of war exist).

263. *See Bas*, 4 U.S. (4 Dall.) at 40–41 (stating that the defendant's right to recovery depended on whether France was an enemy of the United States and describing the conflict between the two nations); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 170 (2003) (discussing how, during a war between France and Great Britain that began in 1793, the Jay Treaty between the United States and Britain and the XYZ Affair between the United States and France led to an undeclared war between the Americans and the French).

264. *See Bas*, 4 U.S. (4 Dall.) at 40 (describing two distinct categories of wars).

265. *Id.*

266. *Id.*

267. *Id.*

between two nations, and are "authorized by the legitimate powers."[268] He also stated that a limited, imperfect war does not require explicit declaration of war, but only authorization of sufficient hostilities.[269]

Justice Chase, in *Bas*, also acknowledged the distinction between general and limited wars.[270] He noted, however, that although limited wars are wars in the legal sense, they do not grant the same expansive powers to the military as do general wars.[271] He also stated that, just as a war may be limited in scope, so may enemies be either general enemies or partial enemies.[272] Justice Patterson also recognized that a limited war existed between the United States and France at the time.[273]

The distinction between general and limited wars has significance for the justiciability of time of war in that it allows courts to address those conflicts it believes itself capable of addressing.[274] A proponent of the justiciability of the issue could concede that in some contexts the issue should remain beyond the reach of judicial powers, yet at the same time argue that, in cases with either minimal potential impact on foreign affairs or obvious facts, courts should have the power to subject the issue to judicial review. The opinions in *Bas* offer a potential compromise on the issue of justiciability by allowing courts to sort between cases of broad impact on the entire nation and those of limited relevance.

IV. Analysis of Arguments Against the Justiciability of Time of War

Part II of this Note outlined cases that argue both sides of whether the issue of time of war is a nonjusticiable political question.[275] That section also placed all cases within the political question framework of *Baker*.[276] Then in

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268. *Id.*

269. *See id.* at 41 (defining the scope of an imperfect war).

270. *See id.* at 43 (accepting two categories of war).

271. *See id.* at 44 (recognizing the limited scope of a limited war).

272. *See id.* (outlining two classes of enemies).

273. *See id.* at 45 (describing the conflict with France as an imperfect war).

274. Although perfect, declared wars have been rare in American history, the concept of perfect war remains viable. Despite the fact that much of the current risk to American national security comes from nonstate actors, several nations have been identified in recent years as potential threats to the United States, including North Korea, Iran, and even China. Indeed, if Congress had decided to declare war on Iraq rather than authorize the President to use military force there, the country would currently be in a perfect war.

275. *See supra* Part II (outlining arguments for and against the justiciability of time of war).

276. *See supra* Part II (bringing the reasons given for and against justiciability into the

Part III, this Note considered the different standards courts use to determine whether a time of war exists.[277] Now this Note analyzes those arguments for and against justiciability in light of the cases discussed in the previous section. Later, in Part V, this Note will use the analysis in this section to propose standards courts can use to decide whether the case before them presents a justiciable question of time of war.[278]

A. Constitutional Commitment of the Issue to Coordinate Branches of Government

A number of the cases in Part II found that the authority of the political departments to determine when the nation is at war made this issue nonjusticiable for the courts.[279] As previously outlined, this analysis resonates with the "textually demonstrable constitutional commitment" factor identified by the Supreme Court in *Baker*.[280] These cases emphasize Congress's Article I power to declare war and the President's Article II Commander in Chief authority.[281] Since *Baker*, the Court has subsequently written that deciding whether a matter is so textually committed to the political branches as to preclude judicial review calls on courts to "interpret the text in question and determine whether and to what extent the issue is textually committed."[282] Consequently, this Note will analyze the two relevant constitutional provisions separately.

1. The Power of the Legislative Branch

Article I, Section 8 of the Constitution explicitly authorizes Congress "to declare war."[283] This Section establishes congressional power to determine that

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context of *Baker*).

277. *See supra* Part III (discussing different standards employed by courts to determine whether the nation is in wartime).

278. *See infra* Part V (proposing standards that illuminate the justiciability of particular cases involving time of war).

279. *See supra* Part II.B (discussing *Prize Cases*, *New York Life*, and *El-Shifa Pharmaceutical*).

280. *See supra* Part II.B (analyzing the justiciability approaches taken by the Supreme Court to date in regard to time of war).

281. *Id.*

282. Nixon v. United States, 506 U.S. 224, 228 (1993).

283. U.S. CONST. art. I, § 8, cl. 11.

the nation is in an official time of war. Congress is also given powers to raise, support, and regulate the armed forces and to regulate commerce with foreign nations.[284] These constitutional delegations give Congress a vital role in the nation's foreign affairs by cementing congressional authority to find that the nation is in a time of war and, along with the power to declare war, creating a role for Congress in the decision that a time of war has ended. With regard to this latter authority, the Court once stated that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires."[285] Finally, the Constitution requires the Senate to approve all treaties, including those that bring an end to wartime.[286] Thus, the Constitution grants Congress the power to start a war and presumably to conclude a war as well.

Under *Baker*, this textual commitment of the issue of time of war to Congress seems to wholly preclude judicial action on the issue.[287] Yet a closer analysis of Congress's constitutionally delegated war powers casts doubt upon this conclusion. Article I grants Congress the responsibility for declarations of war,[288] yet the precise nature of this power is not clear. Broadly interpreted, Congress could possess full authority to make binding determinations of when the nation is in a time of war. On the other hand, this provision could only give Congress the ability to make a priori determinations that the United States is on the cusp of war, even though such an extreme position seems an impracticably narrow interpretation of the constitutional text. If that is the case, though, the courts would not be denied the ability to determine a time of war because of a textual commitment.

Even if the broad interpretation that Congress can decide when the nation is in wartime is correct, the issue of time of war still does not become nonjusticiable. As the Supreme Court recognized in *Bas*, all wars are not created equal.[289] Declared wars are of a perfect, general type.[290] Imperfect wars can occur when two nations engage in hostilities limited to certain people

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284. *See id.* art. I, § 8, cl. 3, 12-14 (noting the express powers of Congress).

285. Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923).

286. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring the "advice and consent" of the Senate for treaty ratification).

287. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (listing "a textually demonstrable constitutional commitment of the issue to a coordinate political department" as a reason to find an issue nonjusticiable).

288. U.S. CONST. art. I, § 8, cl. 11.

289. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (noting the distinction between perfect, general wars and imperfect, limited wars).

290. *See id.* (defining a general war).

and places.[291] Regardless, these imperfect, limited wars are still public wars.[292] In accordance with this framework, every time Congress uses its Article I power to declare war, a perfect war results. Yet *Bas* states that imperfect wars occur,[293] so another means of starting a war must exist. At this point, it seems sufficient to note that there is a subset of wars that Congress possesses no power to declare.[294] The Constitution does not textually commit the entirety of the authority to determine a time of war to Congress.

Finally with respect to Congress's Article I powers, no language in the Constitution clearly grants the legislative branch the authority to determine that a time of war has ended. The Supreme Court stated in *Commercial Trust Co. v. Miller*[295] that the power to declare war necessarily implies the power to declare that war is over.[296] This statement, as it relates to the justiciability of the issue of time of war, suffers from two weaknesses. First, as noted above, the text of the Constitution only grants Congress the ability to declare perfect wars.[297] Thus, by the Court's analysis, this constitutional provision only gives Congress the power to declare an end to perfect wars. Indeed, the Court in *Miller* dealt with World War I, a perfect war formally declared. Second, constitutional

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291. *See id.* (describing a limited war).

292. *See id.* (noting the public nature of a limited war).

293. *See id.* at 41 (declaring hostilities between the French and Americans during the XYZ Affair an imperfect war).

294. This Note does not suggest that Congress cannot initiate an imperfect, limited war through its other Article I powers to raise armies and navies and control their funding. *See* U.S. CONST. art. I, § 8 (giving Congress the authority to raise an army and navy and to regulate the armed forces). Rather, anytime that Congress makes an official declaration of war it creates a perfect war. And although Congress can instigate an imperfect war, this precise power is not explicitly committed to it by the text of the Constitution. *See id.* (granting Congress the unambiguous power to declare war but not to wage limited war).

295. Commercial Trust Co. v. Miller, 262 U.S. 51 (1923). In *Miller*, the Court addressed the issue of whether an official of the executive branch could seize property believed to belong to an enemy of the United States without a review of that person's enemy status. *Id.* at 55. The Trading with the Enemy Act gave the executive branch authority to seize enemy property. *Id.* at 52–53. The Alien Property Custodian attempted to seize bonds owned by two men after he determined that one of the owners was a neutral in World War I and the other an enemy. *Id.* at 54. The bond owners challenged the attempted seizure in court. *Id.* at 55. The Court noted that it had previously found that the Trading with the Enemy Act gave the executive branch broad authority to seize property no matter if a seizure was right or wrong. *Id.* at 56. The Court also rejected the owners' argument that they could not be enemies because the war had ended, noting that the task of marking the end of war belongs to the branch of government that declared that war. *Id.* at 57. As a result, the Court allowed the seizure of the property. *Id.*

296. *See id.* at 57 ("[T]he power which declared the necessity is the power to declare its cessation . . . .").

297. *See supra* Part III.E (discussing the distinction between perfect and imperfect wars, as recognized in *Bas*, and its implications for congressional authority to determine a time of war).

authority to declare an end to war is not mentioned in the text of the Constitution but is inferred by the Court.[298] Although it seems likely that the Constitution does grant Congress the ability to determine that a war has ended, the textual commitment of this issue to the legislative branch is indeterminate.

As a result, the Constitution contains a textually demonstrable constitutional commitment of the declaration of perfect wars to Congress. Yet such a textual commitment to Congress of either the power to declare imperfect wars or to find that war has ended is not well established. Thus, the issue of whether a perfect war has begun would be a nonjusticiable issue for the judiciary under Article I and the textual commitment prong of *Baker*, but Article I does not so obviously preclude judicial review of other issues related to a determination of a time of war.

2. The Power of the Executive Branch

Next, this Note considers whether Article II prevents courts from addressing the issue of time of war. The President receives the title of Commander in Chief from this part of the Constitution.[299] He also possesses the power to enter into treaties "with the Advice and Consent of the Senate"[300] and to receive and appoint ambassadors and public ministers.[301] These are the only constitutional provisions giving the President a role in the military or the foreign affairs of the nation.[302] Clearly the Constitution does not allow the President to declare war as explicitly as it permits Congress to do so.[303] Justice White noted that "'textually demonstrable constitutional commitments' . . . are few if any . . . . The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution."[304] Many of the cases discussed above make clear that courts infer a presidential authority to determine whether a time of war exists based on the President's role as

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298. *See Commercial Trust*, 262 U.S. at 57 (stating that the power to declare war is the power to find that it has ended).

299. *See* U.S. CONST. art. II, § 2, cl. 1 (describing the principal powers of the President).

300. *Id.* art. II, § 2, cl. 2.

301. *See id.* art. II, § 2, cl. 2 & § 3, cl. 1 (outlining the President's duties regarding ambassadors).

302. *See* U.S. CONST. art. II (listing no other presidential powers over the military or foreign affairs).

303. *See supra* Part IV.A.1 (discussing Congress's authority to declare war and decide that wartime had ended).

304. Nixon v. United States, 506 U.S. 224, 240 (1993) (White, J., concurring) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Commander in Chief.[305] Yet courts do not agree on whether this inference precludes judicial review of the subject.[306]

The textual commitment to the executive branch of the power to determine the issue of time of war is not entirely clear. First, the text only states that the President is Commander in Chief, can make treaties, and is to receive and appoint ambassadors and public ministers.[307] Although courts consistently hold that through these powers the President can determine whether the nation is in wartime,[308] the "textually demonstrable constitutional commitment" mentioned in *Baker*[309] does not leap out of the Constitution. Secondly, the powers that come with the role of Commander in Chief seem more concerned with waging war than with making technical determinations about whether a state of war exists. Courts often find that the President's war powers permit him to prosecute war in nearly any manner he sees fit.[310] The President's authority to conduct the armed forces in war seems quite congruous with the title Commander in Chief. Yet waging war is separate from characterizing the legal status of hostilities. Although the President enjoys the power to determine whether a time of war exists, the text of the Constitution does not clearly commit this authority to him alone. Article II itself does not make the issue of time of war nonjusticiable.

In conclusion, under the textually demonstrable constitutional commitment analysis of *Baker*, courts cannot declare that the United States has entered into a perfect war.[311] Remaining issues related to the determination of time of war arguably remain justiciable. As seen below, however, this does not mean that the judicial branch can freely broach the subject.[312]

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305. *See supra* Parts II.B & III.A (discussing the constitutionally prescribed ability of the political departments to make binding determinations on whether a time of war exists).

306. *See supra* Part II (analyzing cases that present arguments for and against the justiciability of the issue of time of war).

307. *See* U.S. CONST. art. II, § 2, cl. 1–2 & § 3, cl. 1 (establishing the foreign affairs power of the President).

308. *See supra* Parts II.B & III.A (discussing cases that defer to presidential determinations of time of war).

309. Baker v. Carr, 369 U.S. 186, 217 (1962).

310. *See supra* notes 15–16 and accompanying text (describing measures taken by the executive branch under its war powers).

311. Although perfect wars are rare, that legal concept remains relevant today. *See supra* note 267 (discussing the possibility that a perfect war could still occur).

312. *See infra* Part IV.B–E (discussing remaining justiciability concerns that a court must weigh when deciding whether the issue of time of war presents a justiciable question).

B. Lack of Judicial Standards

Several cases discussed above found that the issue of time of war was nonjusticiable because of an absence of adequate judicial standards.[313] In *Baker*, the Supreme Court stated that "a lack of judicially discoverable and manageable standards for resolving" an issue would make that issue inappropriate for judicial consideration.[314] In dicta, the Court in *Baker* noted that a "lack of judicially discoverable standards . . . may impel reference to the political departments' determination of dates of hostilities' beginning and ending."[315] As this statement suggests, whether courts possess sufficient standards to decide the issue of time of war remains unclear.

Part III of this Note discussed in detail a number of standards that courts have used to determine whether a time of war exists.[316] Those standards include political determinations, statutory context, the existence of hostilities, totality of the circumstances, and the distinction between general and limited wars.[317] Courts employ these standards, particularly statutory context and the existence of hostilities, with great regularity.[318] Thus, courts have a number of alternative judicial standards at their disposal to determine whether a time of war exists. Yet the mere presence of standards does not wholly satisfy the lack of judicial standards prong of the *Baker* analysis.

The adequacy of these standards must also be considered. If a standard does not adequately resolve the issue, then it does not satisfy the *Baker* test.[319] Here the standards must adequately determine whether the nation is in a state of war. The issue is perhaps better framed as whether a standard is capable of fully comprehending all the incidents of war necessary for a conclusion that a time of war exists.

Certainly the political determination standard satisfies this test because of its binary nature—the political branches have either proclaimed that a time of war exists or they have not. Yet, the political determination standard largely precludes judicial review of the issue of time of war, except in cases of

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313. *See supra* Part II.A (outlining Supreme Court decisions that found the issue of time of war nonjusticiable because of a lack of adequate standards).

314. Baker v. Carr, 369 U.S. 186, 217 (1962).

315. *Id.* at 214 (citing *The Protector*, discussed in Part II.A, *supra*).

316. *See supra* Part III (outlining the standards courts use to decide whether the nation is in a time of war).

317. *See supra* Part III (noting how courts determine a time of war).

318. *See supra* Part III.B–C (discussing cases that employed the statutory context and existence of hostilities standards).

319. *See Baker*, 369 U.S. at 217 (stating that judicial standards must be able to resolve the issue).

conflicting political pronouncements, as in *Anderson*.[320] This standard, although adequate to satisfy the judicial standards prong of *Baker*, does not advance the justiciability of the issue because it calls on the judiciary to parrot the political departments' decisions.[321]

The four fact-sensitive standards discussed above—statutory context, existence of hostilities, totality of the circumstances, and distinction between general and limited war[322]—do not allow a court to make a decision with ease. All of these standards require a court to surmise all the facts for and against a conclusion that a time of war exists. As an example, the existence of hostilities standard looks at all evidence of combat between American troops and the nation's enemies[323] to decide whether hostilities rise to the level of war.[324] Yet the standard does not establish the necessary level of hostilities for a conclusion that war exists. Also, a domestic court sits in a far inferior position than either political branch to review all incidents of conflict involving the United States military abroad.

In order to appraise how adequately these fact-sensitive standards can address the factual complexities inherent in a determination of time of war, this Note considers these standards from the two ends of the factual spectrum: those cases with overwhelming evidence that wartime exists and those cases with very limited facts relevant to the question of time of war. Both extremes present factual scenarios in which the fact-sensitive standards adequately resolve the issue of time of war. In actuality, these two classes of cases might overlap and thus permit the conclusion that the fact-sensitive standards always provide courts with adequate tools to decide the issue of time of war.[325] Theoretically, however, these two divisions are mutually exclusive and require separate consideration of how far they might extend.

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320. *See supra* Part III.A (discussing *Anderson* and the standard the Court applied).

321. The judicial branch has no room for maneuverability except in cases like *Anderson*, where a court faces multiple political pronouncements and can select one.

322. *See supra* Part III.B–E (detailing the fact-sensitive standards for a time of war that courts use).

323. Although enemies of the United States are typically foreign nations, both the Civil War and the War on Terror raise the possibility of combat between American forces and other actors.

324. *See supra* Part III.C (outlining cases that employed the existence of hostilities standard).

325. This seems unlikely, since certain levels of combat do not permit easy classification as war and yet rise beyond the capabilities of most courts. Consider, for example, a series of covert operations by American forces around the globe. Unlike the Civil War or the Vietnam War, this is not obviously a war. Additionally, a court trying to decide whether these operations constituted a war would likely confront incomplete evidence and suspicions of greater American involvement as a result of the operations' covert nature.

As courts have noted with reference to the wars in Korea, Vietnam, and Iraq, certain facts allow easy determinations that a war exists.[326] Other undeclared wars, such as the Civil War, also permit ready classification as times of war. When the United States military attacks another country, mobilizes large numbers of American troops, and suffers heavy casualties, even the lowest court can take judicial notice that a war is raging outside its walls. Thus, the four fact-sensitive standards may adequately determine that the nation has entered a time of war when hostilities are so great as to make the conclusion obvious.

The statutory context, existence of hostilities, totality of the circumstances, and the distinction between general and limited war standards are less equipped to determine when the nation has entered a more circumscribed war or when a time of war has ended. As cases above have discussed, even the most massive wars often come to indeterminate, prolonged conclusions.[327] Thus, these standards that rely, at least in part, on courts to examine the incidents of war are not well suited to the complexity and ambiguity of the end of war. This same reason also suggests that these standards do not adequately aid a court in its determination that a limited, factually ambiguous war has begun. In close cases, the facts relevant to a decision on whether wartime exists must fall within the ability of courts to evaluate evidence.[328] These four standards, therefore, are only useful to resolve the issue of wartime when the conclusion that a war exists is obvious or when the relevant facts are so limited as to warrant judicial consideration.[329]

Thus, the political determination standard seems to resolve the issue of time of war most sufficiently. This standard applies equally well to all of the varied sizes and complexities of war. In effect, however, the political determination standard does not grant the judiciary the power to decide the issue, except in cases of conflicting political proclamations, as seen in *Anderson*.[330] The other standards discussed above rely on courts to make

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326. *See supra* notes 31, 132–53, 242–56, and accompanying text (discussing cases which found the fact of war obvious in Korea, Vietnam, and Iraq).

327. *See supra* note 223 (containing cases that found that a time of war continued in World War I and World War II despite the cessation of hostilities).

328. Although courts routinely decide close cases on the basis of massive, unwieldy evidentiary records, the prudential concerns regarding the justiciability of time of war weigh in favor of judicial reluctance to consider factual scenarios better left to the political branches for classification.

329. Of course, courts can still employ one of these four standards when it is implicated by a statute or contract.

330. *See supra* Part III.A (discussing the *Anderson* opinion and the Supreme Court's choice between alternative political determinations of when the Civil War ended).

factual determinations that often lie beyond the capacity of the judiciary. In cases with overwhelming evidence that the nation is in wartime, such as the Civil War or the Vietnam War, courts possess the ability to apply standards like the existence of hostilities or the totality of the circumstances. Yet in situations that involve remote battles or indefinite levels of combat, these fact-sensitive standards do not provide the judiciary with a sufficiently adequate standard to address the question of time of war.

C. Adherence to a Prior Political Decision

In *Ludecke*, the Supreme Court stated that courts should not address the issue of time of war because of the need for deference to a prior political resolution of the matter.[331] Indeed, the Court in *Baker* identified "an unusual need for unquestioning adherence to a political decision already made" as a reason to find an issue nonjusticiable.[332] In fact, the Court often identifies foreign affairs, especially war, as requiring judicial deference.[333] Yet the Court noted in *Baker* that not every case involving foreign affairs requires judicial deference.[334]

As the issue of time of war relates more to the conduct of war or intergovernmental relations, the justiciability of that issue becomes less likely. If a judicial determination that a time of war had ended would alter the United States' relationship with other nations, then the unusual need for adherence to a prior political determination becomes obvious based on overreaching consequences. Likewise, a determination that the country was not at war that somehow affected the President's ability to wage war would also lie beyond the proper scope of judicial power.

Still, the Supreme Court has recognized that the judiciary has at least some role in wartime when government action threatens individual rights. In *Hamdi v. Rumsfeld*,[335] a plurality of the Court identified a tension between the

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331. *See supra* notes 86–105 and accompanying text (discussing the analysis of the justiciability of the issue of time of war in *Ludecke*).

332. Baker v. Carr, 369 U.S. 186, 217 (1962).

333. *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (finding that "professional military judgments are subject *always* to civilian control of the Legislative and Executive Branches"); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 250 (1985) (stating that an "'unusual need' arises most of the time, if not always, in the area of foreign affairs" (citing *Baker v. Carr*, 369 U.S. 186, 211–13 (1962))).

334. *See Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

335. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). In *Hamdi*, the Supreme Court reviewed the Fourth Circuit's determination that the President could detain an American citizen for the

governmental autonomy necessary to pursue effectively a goal and the judicial process a citizen is due when he is deprived of a constitutional right.[336] Justice O'Connor wrote for the plurality "that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them."[337] Yet she wrote that Hamdi's interest in the case "is the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[338] The plurality applied the balancing test to these competing interests, "weighing 'the private interests that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[339] The Court held that, although the President requires great autonomy during wartime, the government must provide at least some judicial review of the detention of a citizen.[340] The Supreme Court recognizes that government exigencies must be balanced against individual rights, even during time of war.

As the issue of time of war presents greater significance for individual rights and less significance for the conduct of war and intergovernmental relations, the issue moves toward justiciability. Courts consistently decide whether the nation is at war for the purposes of contracts.[341] Although a court in such a case renders a decision on matters of vast significance, the decision itself only affects a narrow group of individuals and does not interfere with

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duration of the War on Terror and without any judicial process. *Id.* at 2635. Yaser Esam Hamdi, born an American citizen in Louisiana, moved to Saudi Arabia as a child and later to Afghanistan. *Id.* The American military arrested him in Afghanistan in 2001. *Id.* at 2635–36. The government classified him as an "enemy combatant" and detained him in the United States "without formal charges or proceedings." *Id.* at 2636. A plurality of the Court noted the President's authority to successfully prosecute war under the congressional Authorization of Military Force for the War on Terror permitted him to detain individuals for the duration of the conflict. *Id.* at 2640. But the plurality also found that, if the government's enemy combatant argument was followed to its logical extreme, Hamdi could receive an effective life sentence without any judicial process. *Id.* at 2641. The Court decided that a detained American citizen was entitled to challenge his enemy combatant status. *Id.* at 2648. A detained citizen "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.*

336. *Id.* at 2646.

337. *Id.* at 2647.

338. *Id.* at 2646.

339. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

340. *Id.* at 2635; *see also* Rasul v. Bush, 124 S. Ct. 2686, 2699 (2004) (finding that federal courts have jurisdiction over non-American citizens detained in Guantanamo Bay during the War on Terror).

341. *See supra* Part III.C (containing cases in which courts employed the existence of hostilities standard to decide whether the United States was in a time of war on a precise date).

foreign affairs. Thus, a court could comfortably determine the issue of time of war using the fact-sensitive standards when the impact of that decision would be limited in scope and wholly domestic.

The issue becomes more complicated in cases of both foreign and domestic concern. *Baker* instructs courts in such hard cases to employ "a discriminating analysis" to the historical treatment of the issue by the courts, the practicability of judicial action, and "possible consequences of judicial action."[342] The result of such analysis is not clear without consideration of the precise facts of a case. Yet the nature of war should make a court reluctant to dismiss a prior political determination of time of war.

As a result, the need for adherence to previous political decisions prevents the judiciary from addressing time of war when that issue implicates the conduct of war or intergovernmental relations. A court should be able to make a determination on the issue, however, when the case wholly or overwhelmingly involves individual rights. Also, it should be noted that the need for adherence to a prior political determination only exists when either the President or Congress makes such a determination.

D. Respect Due Coordinate Branches of Government

The opinion in *New York Life* suggested that courts should defer to political determinations of the issue of time of war because the judiciary, lacking the power to "declare war or make peace," could not make such a determination and at the same time respect presidential and congressional authority.[343] In *Baker*, the Court stated that "the impossibility of a court's undertaking independent resolution [of an issue] without expressing lack of the respect due coordinate branches of government" would make that issue nonjusticiable.[344] In a subsequent case, the Court noted the limitations of this characteristic of political questions and found that mere lack of respect does not create a political question when a court addresses a matter appropriately within its purview, such as constitutionality.[345] Thus, to determine whether the respect due coordinate branches of government prong of *Baker* makes the issue of time of war nonjusticiable, a court must go through the justiciability analysis

342. Baker v. Carr, 369 U.S. 186, 211–12 (1962).

343. *See supra* notes 106–19 and accompanying text (discussing the Tenth Circuit's analysis of the justiciability of time of war in *New York Life*).

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

345. *See* United States v. Munoz-Flores, 495 U.S. 385, 390–91 (1990) (rejecting lack of respect alone as being a touchstone for nonjusticiability).

discussed above to determine whether the issue is properly within its province.[346]

E. Summary

The textual commitment in the Constitution of the power to declare war to Congress prevents courts from deciding that the nation has entered a perfect war.[347] On remaining questions related to a time of war, only the political determination standard fully addresses the issue adequately because it can account for all varieties of hostilities, yet this standard does not afford the judiciary much authority on the question of time of war.[348] Other standards can also effectively evaluate the factual incidents of war, most easily in obvious cases.[349] Finally, there is an unusual need for courts to defer to political decisions on a time of war when a case presents implications for the conduct of war or intergovernmental relations.[350] Courts, therefore, are left with the ability to decide: (1) wartime cases generally, using the relatively impotent political determination standard; (2) cases of limited foreign implication and in which the existence of a war is so obvious that a court could take judicial notice of it, using fact-sensitive standards; and (3) cases of limited foreign implication and limited factual complexity, using fact-sensitive standards.[351]

V. Proposals for Future Treatment of Time of War

Although the first two categories of cases present situations in which the question of time of war is justiciable, they leave a great number of situations

346. *See supra* Part IV.A–C (outlining the justiciability analysis of time of war as it relates to the constitutional commitment of the issue to the political branches, the lack of adequate judicial standards for resolving the issue, and the need for adherence to a prior political decision).

347. *See supra* Part IV.A (discussing the commitment of the power to declare a perfect war to Congress).

348. *See supra* Part IV.B (stating that the political determination standard only permits courts to parrot prior political determinations).

349. *See supra* Part IV.B (discussing the ability of different standards for a time of war to comprehend the factual complexities of the issue of wartime).

350. *See supra* Part IV.C (stating that the foreign affairs implications of a case can necessitate judicial deference to the political branches).

351. As noted above, courts are free to use any other standard for a time of war that a statute or contract implicates.

beyond the scope of judicial review.[352] The third category points courts in the direction of circumstances that might make the issue of wartime justiciable, yet this category requires a court to make two difficult determinations: that a case involves sufficiently limited facts and sufficiently limited implications for foreign affairs.[353] Generally speaking, however, the same reasons that prevent a court from deciding all questions of time of war—textual commitment of the issue to other branches, lack of adequate judicial standards, and the need for deference to other branches—also prevent a court from determining whether a particular situation is sufficiently limited. Just as courts cannot decide whether combat in an isolated corner of the world rises to the level of war, courts cannot conclude that such combat falls into the narrow class of cases limited enough for judicial review. Consequently, this third category of cases does not afford the judiciary the ability to decide the issue of time of war when courts are required to evaluate the level of factual and foreign relations complexity involved in a particular set of hostilities.

Courts can resolve the question of whether a case poses sufficiently limited facts and foreign affairs implications, however, based on the nature of the individual parties rather than the nature of the hostilities. Although a court cannot adequately understand all the incidents of a remote war, a court can determine the relevant facts and the possible implications presented by the parties of a particular case. Such a situation occurred in *United States ex rel. Viscardi v. MacDonald*,[354] in which a federal district court considered whether an individual person was in a time of war.[355] In this case the Navy was allowed to recall a person to active duty only "in time of war or national emergency."[356]

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352. *See supra* Part IV.E (discussing the areas where a court can decide a time of war).

353. *See supra* Part IV.E (noting the role of courts in determining time of war in cases implicating individual rights).

354. United States *ex rel.* Viscardi v. MacDonald, 265 F. 695 (E.D.N.Y. 1920). In *Viscardi*, the district court addressed the issue of whether the defendant could be tried by court-martial. *Id.* at 696. During World War I, the defendant was charged with attempting "to bribe a chief boatswain's mate in the navy" while the defendant was on active duty in the Navy. *Id.* at 698. The defendant was detained on a charge of bribery but then was released from active duty with the equivalent of an honorable discharge in July 1919. *Id.* at 696. Case law and a written opinion of the Attorney General made clear that a person could not be tried by court-martial after being released from active duty. *Id.* at 697–98. Thus the defendant could only be tried by court-martial if he was brought back into active duty. *Id.* at 698. The district court noted that a person could only be called back into active duty "in time of war or of national emergency." *Id.* at 699. The court decided that, although the nation was still technically at war in 1919, the time of war with respect to the defendant had terminated upon his release from active duty. *Id.* at 698. The court concluded that the defendant could not be tried by court-martial. *Id.* at 699.

355. *See id.* at 698 (stating that the time of war, as it concerned a particular person, had ended).

356. *Id.* at 696.

The defendant in *Viscardi* had been released from active duty in World War I in July 1919.[357] The court found that he had received his discharge because the war necessity that required his service had ended.[358] Although the court noted that the United States was still officially in a time of war, it decided that the time of war with respect to the defendant had come to an end.[359] The district court stated that the statute under which the defendant originally enlisted in the Navy, which limited his enlistment to four years, compelled this conclusion.[360] If the time of war extended indefinitely, the defendant could conceivably be recalled to active duty for an indefinite period as well.[361] As a result, the *Viscardi* court stated that a time of war would not exist with respect to the defendant unless a new emergency required a new time of war.[362]

The *Viscardi* opinion offers an additional lens through which to view a time of war. The court focused on wartime in terms of hostilities,[363] much as other courts have.[364] This district court added the further consideration that once a man has been removed from the combat that creates a time of war, that time of war ceases as far as that man is concerned.[365] Significantly, the court in *Viscardi* did not attempt to address the issue of whether the United States remained in a time of war. Instead the court addressed the role of the individual defendant within that war,[366] thus necessarily limiting the implications of the case.

This individual determination of the issue of time of war largely accounts for the shortcomings of the other fact-sensitive standards.[367] Although an

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357. *See id.* (noting the date of the defendant's release from active duty).

358. *See id.* at 698 (discussing why the defendant had been discharged from the Navy).

359. *See id.* (ruling that an individual's time of war can terminate upon military discharge).

360. *See id.* at 696–98 (interpreting the terms of the enlistment statute applicable to the defendant).

361. *See id.* (stating that the court had to conclude that the time of war had expired with respect to the defendant, so as to make the laws under which he enlisted capable of use).

362. *See id.* (discussing the circumstances under which the defendant could be subject to a new time of war).

363. *See id.* (stating that a new time of war with regard to the defendant could come about with a new national emergency).

364. *See supra* Part III.C–D (discussing the existence of hostilities standard and the totality of the circumstances standard, respectively).

365. *See Viscardi*, 265 F. at 698 (stating that the defendant's release from active duty ended the time of war with respect to him and that a time of war would not exist for him without a new emergency).

366. *See id.* ("[I]t should be held that the 'time of war' with respect to the relator was terminated by his release from active duty with the equivalent of an honorable discharge . . . .").

367. *See supra* Part IV.B (stating that fact-sensitive standards often cannot adequately apprise the factual complexities of hostilities).

individual determination still requires a court to address some facts of a larger war, its narrow focus on the situation of a particular individual can bring the issue within the capabilities of a court. As a result, individual determinations provide the judiciary with a useful tool to address the issue of whether the nation is in a time of war.

Certainly not all individual cases present sufficiently limited facts and foreign affairs implications as to permit judicial determination of the question of time of war. One can imagine cases of such complexity or significance that courts properly should defer to the political departments.[368] Yet the Supreme Court has recently demonstrated a willingness to permit courts to decide issues incident to times of war when exercise of judicial power is provident.[369] This Note now offers possible means by which courts can decide whether the facts and implications of a particular case are so narrow as to make the issue of time of war justiciable.

A. Totality of the Circumstances

The largest source of uncertainty is what size and scope of hostilities a court can address with adequate standards and with sufficient deference to prior political decisions. As a conflict increases in size, standards become more inadequate and the level of deference intensifies. Thus the issue becomes how large a conflict a court can address.[370] A list of factors to be considered could inform a court's determination of whether hostilities are too large to present a justiciable question.

With regard to conflict in general, offensive attacks by American troops, institution of a draft, rationing of goods, and political proclamations all could evidence a situation beyond the proper scope of judicial authority. Smaller conflicts might still be nonjusticiable if they involved treaties, American troops abroad, or foreign policy. A standard for justiciability could state that any one or a combination of these factors would preclude judicial review.

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368. *See, e.g.*, *supra* note 328 (discussing the factual complexities of a covert war).

369. *See supra* notes 335–40 and accompanying text (discussing the application of a balancing test by a plurality of the Court in *Hamdi* to the issue of whether an American citizen could challenge his detention as an enemy combatant during the War on Terror in a judicial proceeding).

370. This subpart of the Note addresses solely those cases that are not so large as to rise obviously to the level of time of war. As a result, this subpart attempts to identify criteria courts can use to decide that the facts of a case are sufficiently limited to fall within their capabilities of review.

Additionally, the facts of a particular case might make the question of time of war nonjusticiable. For instance, if a case involved a citizen of a nation engaged in combat with the United States or a contract with parties from a nation engaged in hostilities with American forces, or if a case had the potential to affect foreign affairs, courts would pass on the case as nonjusticiable. Each of these proposed factual scenarios seeks to identify characteristics of hostilities that go beyond the scope of prudent judicial review.[371]

B. Constitutional Necessity

Courts could also consider the constitutional imperative of the underlying issue in a case when deciding whether a time of war is justiciable. As the Supreme Court noted, the judiciary shows no disrespect to the other branches when it takes on issues that implicate constitutional interpretation.[372] When viewed from a distance, the issue of justiciability is seen as part of the larger topic of separation of powers and checks and balances. Thus, when a case involves foreign affairs or war, the political branches' primacy in these areas requires the judicial branch to adopt a largely deferential posture. When such a case raises matters of constitutional rights or interpretation, however, the judiciary's role becomes more prominent.

A standard of justiciability that considers the constitutional necessity of a case addresses this phenomenon. As the constitutional implications of a case surpass the foreign affairs concerns, the role of the courts begins to displace the role of the political branches. For example, consider the detention of suspected terrorists within the United States as part of the War on Terror.[373] If these detentions continued indefinitely and the War on Terror had all but officially ended, the constitutional rights of the detainees might eventually outweigh the reasons for judicial deference to the political determination that a time of war existed. A balancing test between constitutional necessity and the need for

371. As a reminder, this Note evaluated the adequacy of the fact-sensitive standards for the two classes of cases at the opposite ends of the spectrum of factual complexity. *See supra* notes 325–30 and accompanying text (dividing cases into a category of obvious wars and a category of situations with facts narrow enough for judicial resolution). Although these two classes might possibly converge and overlap, theoretically they remain distinct. A court making the determination of whether it possesses standards adequate for the facts of a particular case should decide whether those facts fall into either of these two categories.

372. *See* United States v. Munoz-Flores, 495 U.S. 385, 390–91 (1990) (finding that the Court was free to address the constitutionality of a statute despite the government's "lack of respect" argument).

373. *See supra* note 34 and accompanying text (discussing the government's detention of American citizens designated enemy combatants).

judicial deference recognizes the fact that some foreign affairs cases also present fundamental constitutional issues. A plurality of the Supreme Court has already adopted such an approach when deciding whether courts should entertain claims related to the prosecution of war.[374]

C. Creation of a Standard Other than Time of War

Courts should emphasize the context in which the issue arises. If that issue could be resolved simply by finding that a certain level of hostilities exists, without necessarily determining that the United States is at war, the court would be able to make such a determination. Under this proposal, courts would defer to political determinations of a time of war. Yet when a case raises the issue of whether the nation is at war, courts could simply find that "sufficient hostilities" do or do not exist to warrant a particular conclusion. Although courts would still face the difficulty of finding a standard capable of appraising the level of hostilities, use of "sufficient hostilities" language would limit the effect of a decision to the facts of a case. For instance, a court could find that insufficient hostilities exist for the government to continue imposition of military law, and yet would not address the broader issue of whether a state of war still existed. In effect, this standard attempts to isolate the facts of an individual case and allow courts to render a decision without concern for the extensive implications of a decision on the issue of time of war.

Each of these proposals addresses only a portion of the problems currently associated with a determination of whether the issue of time of war is justiciable. Yet each points the way toward considerations that a court should bear in mind when deciding whether a case presents a justiciable question of time of war. With these proposals, a court can walk the narrow line between those cases in which the issue of time of war is justiciable and those in which it is not.

VI. Conclusion

The issue of time of war holds massive significance for the powers of the United States government.[375] In wartime Congress takes on new

374. *See supra* notes 335–340 and accompanying text (discussing the application of a balancing test by a plurality of the Court in *Hamdi* to the issue of whether an American citizen could challenge his detention as an enemy combatant during the War on Terror in a judicial proceeding).

375. *See supra* notes 26–35 and accompanying text (discussing the relevance of the issue

responsibilities,[376] the President's authority expands exponentially,[377] and the rights of individuals contract.[378] With all of the ramifications of a time of war on the balance between (1) the branches of government and (2) the powers of government and the rights of private citizens, the usual arbiter of such tensions—the judiciary—has been relegated to an, at best, imprecise role in deciding whether a time of war exists.

The judicial branch has well-established authority to resolve the question of time of war in certain cases where either the courts take their cue from the political branches or the fact of war is so obvious as to be unavoidable.[379] When the facts of a case are adequately narrow and the foreign affairs implications of a case are sufficiently limited, a court possesses both the constitutional authority and the capability to decide whether a time of war exists.[380] By focusing on the particular parties, facts, and issues of each case before it, a court may determine whether a case is so limited as to present a justiciable question.[381] Although this will not grant the judiciary unfettered power over the issue of time of war, it does allow for the maximum judicial presence in a field of such vast importance. The great significance of the issue of time of war compels the judiciary to sit in judgment wherever prudence and the Constitution permit.

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of time of war, particularly during the War on Terror).

376. *See supra* note 14 and accompanying text (stating that during wartime Congress possesses the power to wage war successfully, a power open to broad interpretation).

377. *See supra* notes 15, 24, and accompanying text (discussing how the President can wage war with near total discretion).

378. *See supra* notes 16, 34, and accompanying text (discussing cases in which the rights of American citizens gave way to the exigencies of wartime).

379. *See supra* Part IV.E (summarizing this Note's analysis of the arguments for and against justiciability of the issue of time of war).

380. *See supra* Part IV.B–E (discussing how certain cases are justiciable if they fall within the capabilities of a court and do not unduly interfere with the foreign affairs powers of the political branches).

381. *See supra* Part V (proposing means by which courts can determine whether a particular case is justiciable).