RESOLVING NATIONAL SECURITY QUESTIONS: A COMPARATIVE ANALYSIS OF JUDICIAL REVIEW IN THE UNITED STATES, ISRAEL, AND EUROPE

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ABSTRACT

U.S. federal courts frequently decline to reach the merits of national security cases, instead deferring to the judgment of the executive branch on what are seen as "political questions." Foreign courts are less deferential. This Article looks at the judicial review of national security cases in the United States, Israel, and Europe and demonstrates that U.S. federal courts are as capable as courts in Israel and Europe of deciding sensitive national security cases without infringing on the Constitution's separation of powers. First, the Article examines the history of national security issues in U.S. courts and, in particular, the political question doctrine and its application to targeted killing cases. Targeted killing is a useful policy to examine in this context both because it has become a central feature of the U.S. national security policy against terrorism and because so few U.S. courts have reached the merits in targeted killing cases. The Article then analyzes national security cases and underlying approaches in Israel and Europe. Finally, the Article compares the three legal systems and addresses the benefits, risks, and possible approaches U.S. federal courts could take to play a more active role in national security cases. Ultimately, the evidence from Israeli and European courts weakens U.S. justifications for dismissing national security claims based on a lack of judicial capacity to make decisions or out of respect for the separation of powers.

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I. Introduction

Visiting the United States in 1831, Alexis de Tocqueville observed that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] Whatever the merit of this observation in other areas of law, in the national security context it is largely untrue.[2] Despite an ever-increasing number of cases involving counterterrorism and other national security issues reaching federal courts, those courts are far more likely to dismiss cases on threshold issues than reach the merits of the claims, thus effectively deferring decisions on counterterrorism and other national security issues to the political branches. Not all countries' courts defer so readily to the political branches, however, and there are lessons to be learned from those foreign courts.

This Article looks at judicial review of national security cases in U.S., Israeli, and European contexts to show that U.S. federal courts are as capable as courts in Israel and Europe of deciding sensitive national security cases without infringing on the Constitution's separation of powers. Section II briefly outlines the history of national security issues in U.S. courts and examines the political question doctrine and its application to targeted killing cases. As will be discussed below, targeted killing is a useful policy to analyze in this context both because it has become a central aspect of the U.S. national security policy against terrorism and because so few U.S. courts have reached the merits in targeted killing cases. Sections III and IV then analyze national security cases in Israel and Europe. Finally, Section V and the Conclusion compare the three legal systems and address the benefits, risks, and possible approaches U.S. federal courts could take to play a more active role in national security cases.

II. National Security Issues in U.S. Courts

As with many legal issues, it is worth starting at the Constitution when considering how U.S. courts handle cases that implicate national security. The phrase "national security" is not used in the Constitution, but the Framers addressed the related concept of foreign affairs with respect to all three branches of the government. First, Article II defines the President's significant role in foreign affairs: "[t]he executive power shall be vested in a President of the United States of America,"[3] and

1. Alexis de Tocqueville, Democracy in America, vol. 1, 280 (Phillips Bradley ed., 1991).
2. Stephen Dycus et al., National Security Law, 123 (5th ed. 2011).
3. U.S. Const. art. II, § 1.

"[t]he President shall be Commander in Chief of the Army and Navy of the United States";[4] the President also has the power to make treaties and appoint ambassadors.[5] Second, Article I provides that Congress "shall have the Power . . . to define and punish . . . Offenses against the Law of Nations"[6] and "to declare War."[7] Third, Article III grants the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[8] The Constitution thus provides a foundation for analyzing national security legal questions, but it is not the only source of law on such issues.[9]

The constitutional clauses cited above suggest that the foreign policy and national security powers primarily reside with the President and Congress, but in the first decades following the Constitution's ratification the judicial branch was actively involved in foreign affairs cases. Two Supreme Court cases relating to the early nineteenth century American conflict with France, *Bas v. Tingy*,[10] and *Little v. Barreme*,[11] are illustrative. *Bas* revolved around two statutes, one enacted in 1798 listing the payments owed to any person who recovered an American ship captured by the French and the other from 1799 listing payments owed to a person who recaptured ships from "the enemy."[12] The Court interpreted the statute by answering two questions: "[w]hether the act of March 1799, applied only to the event of a future general war?" and "[w]hether France was an enemy of the United States, within the meaning of the law?"[13] Even though there was not an official declaration of war from Congress, the Court determined that France was engaged in hostilities with the United States as an enemy and thus the 1799 statute applied to the conflict.[14]

Little also involved a statute related to the conflict with France which permitted the U.S. Navy to seize any U.S. ships "bound or sailing to any

4. *Id.* § 2.

5. *Id.*

6. *Id.* art. I, § 8.

7. *Id.*

8. *Id.* art. III, § 2.

9. *See* Dominic X. Barceleau, Note, *Disciplining Deference: Strengthening the Role of the Federal Courts in the National Security Realm*, 93 NOTRE DAME L. REV. 871, 873 (2017) (noting that one must look beyond the Constitution to determine the limits of the President's foreign policy powers).

10. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

11. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

12. *Bas*, 4 U.S. at 37.

13. *Bas*, 4 U.S. at 37 (emphasis omitted).

14. *Id.* at 41–42.

[French] port."[15] However, President Adams authorized Captain Little to capture any ship sailing to or *from* a French port, and Captain Little subsequently captured a ship sailing from a French port.[16] The question before the Court was whether Captain Little was excused from paying damages to the shipowner because he was following the President's orders. Writing for the Court, Chief Justice John Marshall held that "instructions [from the President] cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[17] As in *Bas*, the foreign policy implications of the case did not hold back the Court, which instead reached the merits on an issue involving national security and separation of powers. These two cases were not outliers; throughout the nineteenth and early twentieth centuries the Supreme Court was involved in several cases that touched on national security or foreign affairs issues,[18] and occasionally even found the executive branch to have violated the law, as in the steel seizures case from the 1950s.[19]

The federal courts' eagerness to weigh in on foreign affairs or military operations issues began to wane in the mid-twentieth century.[20] The reasons for this decline in judicial involvement are beyond the scope of this Article, but leading up to and especially after 9/11, federal courts largely avoided deciding national security disputes on the merits, instead usually deferring to the President and occasionally Congress in these cases.[21] One notable exception to this trend comes from the habeas corpus cases involving the Bush Administration's right to detain suspected terrorists or Al-Qaeda members without trial or to try them in military commissions at Guantánamo.[22] As the Fourth Circuit noted in *Hamdi*, "[t]he duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are

15. *Little*, 6 U.S. at 170–71.

16. *Id.* at 171.

17. *Id.* at 179.

18. *See* Barceleau, *supra* note 9, at 875–76 (describing numerous 19th and 20th century cases concerning foreign policy issues).

19. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952).

20. Stephen I. Vladeck, *War and Justiciability*, 49 SUFFOLK U. L. REV. 47, 47 (2016) (describing how federal courts routinely reviewed a wide range of questions related to military operations during wartime until around the Vietnam War).

21. DYCUS, ET AL., *supra* note 2, at 124; *see also* Geoffrey R. Stone, *National Security v. Civil Liberties*, 95 CALIF. L. REV. 2203, 2208 (2007) (noting the "disastrous" history of the courts' tendency to be "highly deferential" in the national security context "so long as the government could offer a reasonable explanation for its actions").

22. *See* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008).

committed by the political branches to armed conflict."[23] Lower federal courts followed the Supreme Court's lead in deciding habeas cases on the merits.[24]

Habeas cases aside, the federal judiciary has largely declined to reach the merits on cases involving national security legal issues since the Vietnam War era.[25] Courts have used myriad procedural or threshold mechanisms to avoid deciding the principal national security issues, with common mechanisms including standing, heightened pleading standards, and the state secrets privilege.[26] The most frequently used limit on judicial review in federal courts, however, is the political question doctrine.[27]

A. *The Political Question Doctrine*

The political question doctrine has a long history dating back to the early years of the Republic. As one commentator describes it, the political question doctrine "refers to subject matter that the [Supreme] Court deems to be inappropriate for judicial review."[28] That subject matter stems from the separation of powers in the Constitution and involves those questions or topics that are for the President or Congress alone to decide.[29] Chief Justice Marshall confirmed the existence of political questions in his seminal *Marbury* decision:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts . . . [t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the

23. Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004).

24. *See, e.g.*, Al-Alwi v. Obama, 653 F.3d 11, 15–18 (D.C. Cir. 2011).

25. *See* Vladeck, *supra* note 20, at 47–48.

26. Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1040–41 (2016) (recognizing twelve obstacles to reaching the merits in national security litigation that federal courts have relied on most often).

27. Michael P. Fix & Kirk A. Randazzo, *Judicial Deference and National Security: Applications of the Political Question and Act of State Doctrines*, 6:1 DEMOCRACY & SECURITY 1, 5 (2010).

28. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 2.8.1, at 130 (4th ed. 2011).

29. *See* Barceleau, *supra* note 9, at 876.

> executive is conclusive. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[30]

Despite this official recognition of the political question doctrine by the Supreme Court, federal courts in the nineteenth and early twentieth centuries did not overly constrain themselves by the doctrine. Instead, courts frequently reached the merits on legal questions involving political subjects.

A willingness by the courts to invoke the political question doctrine in national security cases began to increase in the 1960s, however, and perhaps not coincidentally, the Supreme Court set out a new test for political questions in *Baker v. Carr*.[31] There, the Court emphasized that political questions are "essentially a function of the separation of powers"[32] and thus outside the realm of the judicial branch's mandate, but the Court also noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[33] To determine when a claim presents a legal as opposed to political issue, the Court set out the following six-factor test:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[34]

It is not clear whether meeting any one of the six factors turns a claim into a political question,[35] or if only the first two factors should be the

30. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66, 170 (1803).

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

32. *Id.* at 217.

33. *Id.* at 211.

34. *Id.* at 217.

35. *See* Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) ("To find a political question, we need only conclude that one [of these] factor[s] is present, not all [six].").

focus of a court's analysis.[36] Yet what is clear is that since *Baker* was decided, federal courts have liberally applied the political question test to dismiss many national security cases. The *El-Shifa* case is indicative of this trend.

El-Shifa involved a Sudanese company suing the U.S. government after one of its pharmaceutical plants was destroyed in a military strike in 1998 because of the plant's alleged connection to Osama bin Laden and his goal of making chemical weapons.[37] The plaintiff argued both that the U.S. government owed the company compensation because the military strike violated international law and that the U.S. government had defamed the company by making statements linking it to terrorism.[38] The en banc D.C. Circuit held that both of these claims were barred by the political question doctrine.[39] Writing for the court, Judge Griffith explained "[w]e have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security"[40] and that "[i]n military matters in particular, the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded."[41] Several commentators have taken issue with the court's analysis for not properly engaging with the international law and defamation arguments,[42] but the court's significant deference to the executive branch was by no means unusual. Writing in 1990, one prominent commentator summed up the political question trend by declaring that "lower courts have found issues to be political and nonjusticiable more often during the past twenty-five years since *Baker* than in all our previous history,"[43] and the use of the political question doctrine has only increased in the post-9/11 era.[44]

36. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring in the judgment) (noting that the Supreme Court has only relied on the first two elements when applying the political question doctrine).

37. *Id.* at 838–39.

38. *Id.* at 839–40.

39. *Id.* at 844.

40. *Id.* at 842.

41. *Id.* at 844.

42. *See* Barceleau, *supra* note 9, at 883; Vladeck, *supra* note 20, at 58–59.

43. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 82–83 (1990).

44. *See* Barceleau, *supra* note 9, at 878.

B. *Targeted Killing in U.S. Courts*

Turning from the development of the political question doctrine to its application in a specific area of national security operations, three prominent cases on targeted killings illustrate how courts are generally, although not consistently, reluctant to reach the merits on national security legal questions and instead use the doctrine as a shield to dismiss claims.

The first two cases involved U.S. drone strikes in Yemen related to the ongoing military operations against Al-Qaeda. In *Al-Aulaqi v. Obama*, the father of Islamic cleric and Al-Qaeda member Anwar al-Aulaqi sued the United States for allegedly placing his son, a U.S. citizen, on a list authorizing targeted killings.[45] The district court dismissed the claim as a political question.[46] While recognizing that "the *Baker* factors are much easier to enumerate than they are to apply, and it is perhaps for this reason that the political question doctrine 'continues to be the subject of scathing scholarly attack,'"[47] the court nevertheless used the test to conclude that judicial review was inappropriate.[48] Focusing in particular on the second *Baker* factor, "a lack of judicially discoverable and manageable standards," the court noted:

> Unlike the political branches, the Judiciary has no covert agents, no intelligence sources, and no policy advisors. Courts are thus institutionally ill-equipped to assess the nature of battlefield decisions, or to define the standard for the government's use of covert operations in conjunction with political turmoil in another country. These types of decisions involve delicate, complex policy judgments with large elements of prophecy, and are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility.[49]

Thus, the court declined petitioner's request to create a standard for when the government can place individuals on a kill list.[50] Even though the court recognized that "the Executive [does not possess] unreviewable authority to order the assassination of any American whom he labels an enemy of the state," the Court felt that "it lack[ed] the

45. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

46. *Id.* at 52.

47. *Id.* at 45 (quoting Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985)).

48. *Id.* at 47.

49. *Id.* at 45 (internal quotation marks and citations omitted).

50. *Id.* at 47–48.

capacity" to draw a line and determine whether al-Aulaqi presented enough of a threat to make him a valid target.[51]

Similarly, in *bin Ali Jaber v. United States*, the D.C. Circuit held that the political question barred the court from reaching the merits of petitioner's claim.[52] In *bin Ali Jaber*, a Yemeni policeman and an Islamic preacher were killed in a drone strike that was seemingly meant for nearby Al-Qaeda operatives.[53] Surviving family members brought suit against the United States alleging the drone strike was a violation of domestic and international law.[54] In reaching the political question, the court cited *El-Shifa* as controlling precedent and again stated that it lacked the capacity to adjudicate such foreign policy questions.[55] Interestingly, the court recognized the judicial branch's capacity to decide habeas detainee cases implicating national security, but distinguished that issue from targeted killings because:

> [W]hile the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination, that is because the Constitution specifically contemplates a judicial role in this area. There is, in contrast, no comparable constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.[56]

The court likewise noted that despite the existence of rules governing drone strikes laid out by the Bush and Obama Administrations, the court declined either to enforce those rules or create new ones because "courts are not constitutionally permitted to encroach upon Executive powers, even when doing so may be logistically, if not constitutionally, manageable."[57] Thus, despite acknowledging potential avenues for judicial review, the court nevertheless deferred to the President and declined to reach the merits on the tort and international law claims.

Reasonable criticisms of *Al-Aulaqi v. Obama* and *bin Ali Jaber* aside,[58] those cases represent what has become typical judicial deference to the

51. *Id.* at 52 (internal quotation marks omitted).

52. bin Ali Jaber v. United States, 861 F.3d 241, 249–50 (D.C. Cir. 2017).

53. *Id.* at 244.

54. *Id.* at 243.

55. *Id.* at 247.

56. *Id.* (internal quotation marks and citations omitted).

57. *Id.* at 249.

58. *See, e.g.*, John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 177–78 (2011); Barceleau, *supra* note 9, at 893.

executive branch on national security issues, which makes the decision in *Al-Aulaqi v. Panetta* all the more surprising. In *Al-Aulaqi v. Panetta*, al-Aulaqi's relatives again sued the government for violating his constitutional rights, this time after he had been targeted and killed by a drone strike in 2011.[59] The court analyzed whether the claims were barred by the political question doctrine, but rejected the government's argument that the claims were political questions because "the Supreme Court has repeatedly found that claims based on [due process] rights are justiciable, even if they implicate foreign policy decisions," and because "[t]he powers granted to the Executive and Congress to wage war and provide for national security does not give them carte blanche to deprive a U.S. citizen of his life without due process and without any judicial review."[60] Unlike in *Al-Aulaqi v. Obama*, the court distinguished *El-Shifa* as not controlling because "[f]oreign aliens suing for deprivation of a foreign property interest are not comparable to U.S. citizens suing for deprivation of their lives."[61] Ultimately, the court in *Al-Aulaqi v. Panetta* did not concern itself over its lack of capacity to analyze the legal claims, but instead held that the political question doctrine did not apply and fully addressed the merits. Even though the claims were dismissed, the fact that they were fully analyzed casts doubt on the idea that such decisions "are . . . of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility."[62]

Thus, the political question doctrine has been inconsistently applied to targeted killing cases in federal courts, which also reflects the split in public opinion regarding whether federal courts should limit judicial review in such cases. The first *Al-Aulaqi* and *bin Ali Jaber* courts applied the political question doctrine, if not necessarily enthusiastically, earning the approval of those who, like former Secretary of Homeland Security Jeh Johnson, "agree with Judge Bates [in *Al-Aulaqi v. Obama*] . . . that the judicial branch of government is simply not equipped to become involved in targeting decisions."[63] Yet the second *Al-Aulaqi* court questioned the doctrine's general effectiveness by noting that "[the] political question doctrine's shifting contours and uncertain underpinnings make it susceptible to indiscriminate and overbroad

59. Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56, 58–59 (D.D.C. 2014).

60. *Id.* at 69 (internal quotation marks and citations omitted).

61. *Id.* at 70.

62. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (quoting Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948) (internal quotation marks omitted)).

63. Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141, 148 (2012).

application to claims properly before the federal courts,"[64] before finding that it did not apply in that case. Despite this judicial inconsistency, targeted killings remain a pervasive national security issue. As of 2014, 4,700 non-U.S. citizens had been killed by drone strikes,[65] and that number has certainly increased since then.[66]

Cases involving targeted killings are likely to reach federal courts as long as drones are used in operations against terrorists. Notable exceptions aside, these cases will probably continue to be dismissed through political question or other non-merits mechanisms, as are most national security claims. Despite reasonable separation-of-powers concerns, by avoiding reaching the merits on national security issues, courts miss an opportunity to clarify and strengthen national security law or act as a meaningful deterrent against notable abuses that have occurred in the war on terror, and also give the impression that the judiciary is unequipped to handle complex foreign affairs cases.[67] Moreover, if courts more often reached the merits of national security cases, counsel who advise the executive branch on those issues would have more concrete judicial guidance to offer policymakers,[68] and be less likely to put forward controversial policies that would be unlikely to survive judicial review.[69] Perhaps most importantly, victims of counterterrorism abuse lose an opportunity to be fully heard.[70] Justice Kennedy recognized these concerns in *Boumediene*: "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[71] Even if this statement is not entirely accurate,[72] federal courts need only look abroad to

64. Al-Aulaqi v. Panetta, 35 F. Supp. 3d at 69 (internal quotation marks and citations omitted); *see also* Stephen I. Vladeck, Response, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV. ARGUENDO 11, 20 n.55 (2014) (listing several commentators who accept the need for judicial oversight of targeted killings).

65. Vladeck, *supra* note 64, at 21.

66. Whether the families of all the foreign targeted killing victims would have standing to bring suit is a separate question that is outside the scope of this Article.

67. Vladeck, *supra* note 26, at 1035–36.

68. *See* Mary DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277, 284 (2018).

69. *See generally* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

70. *Id.* at 835.

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

72. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Vladeck, *supra* note 20, at 47.

see what a more expansive judicial review of national security issues might look like.

III. National Security Issues in Israeli Courts

While giving a speech on the "judicial role in national security," Judge Stephen Reinhardt asked, "are judges capable of making such [national security] judgments and do they have the knowledge and expertise to do so?"[73] He looked beyond the American judiciary to find an answer: "[a]s to the . . . question, I need only refer to the experience of the Israeli Supreme Court. In times of gravest crisis, that court has repeatedly decided critical questions of national security, including some that have directly affected military operations and tactics . . . ."[74] Indeed, there is general agreement that there is a "greater willingness [on the part] of the Israeli courts to assert the power of judicial review, even in cases involving ongoing military action."[75] Given that there are similarities between the Israeli and U.S. judicial branches, some useful lessons may be found in examining how Israeli courts handle complex national security issues.

Like the United States, Israel has a common law tradition stemming from the British Mandate, the legal framework governing Palestine until 1948.[76] However, unlike the United States, Israel's substantive and procedural laws reflect a diverse mix of Jewish, Ottoman, civil, and even U.S. law.[77] Other differences include Israel's lack of a jury system or capital punishment.[78]

For this analysis, the most important differences between the judicial systems of the United States and Israel are Israel's lack of a written constitution and the authority of the Supreme Court of Israel to issue nonbinding advisory opinions.[79] In the absence of a constitution, the Court has declared that "Basic Laws" issued by Israel's legislature have a "higher normative status" than other laws, and a law found to be in conflict with a Basic Law is invalid.[80] Several Basic Laws related to human

73. Stephen Reinhardt, *The Judicial Role in National Security*, 86 B.U. L. Rev. 1309, 1312 (2006).

74. *Id.*

75. Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 Wash. U. Global Stud. L. Rev. 95, 97 (2013).

76. *See* Amnon Straschnov, *The Judicial System in Israel*, 34 Tulsa L. J. 527, 527 (1999).

77. Elad Gil, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 B.U. Pub. Int. L. J. 245, 265–66 (2014).

78. Straschnov, *supra* note 76, at 528.

79. David Scharia, Judicial Review of National Security 16 (2015).

80. *Id.* at 10.

rights have played a role in the Court's national security decisions, such as those on "Human Dignity and Liberty" and "Freedom of Occupation."[81] Also, the Court may issue advisory opinions and other non-binding guidance, unlike U.S. courts that can only rule on actual cases or controversies brought before them. These differences give Israeli courts the flexibility to determine that a military tactic likely violates a Basic Law or provide guidance to the legislature on a pending law without the need to formally invalidate the tactic or law at issue, which allows the courts to avoid a clash with the executive or legislative branch.[82] Such flexibility undoubtedly encourages the more active judicial approach to national security issues taken by the Israeli courts. A similarity between the U.S. and Israeli judiciaries does exist—both have increasingly had to address national security legal issues as a result of the fight against terrorism[83]—and this has led to Israeli courts confronting their own version of the political question doctrine.

A. *The Political Question Doctrine*

Israeli courts have faced national security cases since the creation of Israel,[84] and from the beginning courts recognized justiciability concerns regarding the separation of powers.[85] Unlike courts in the United States, Israeli courts were initially more likely to dismiss claims as being political questions more appropriate for the executive branch or the Knesset than the court.[86] But they increasingly began reaching the merits on political issues starting in the 1980s.[87] Like *Baker v. Carr*'s significant impact on political question jurisprudence in the United States, the 1988 Israeli Supreme Court decision in *Ressler* had a similar effect on justiciability in Israeli courts.[88]

Ressler involved a challenge to the long-standing policy of the Israeli government allowing Yeshiva students to defer mandatory military service as long as they continued full-time study.[89] Despite dismissing the claim on the merits, Chief Justice Aharon Barak's opinion for the court

81. *Id.*

82. *Id.* at 10, 15.

83. *See* Peter Raven-Hansen, *Panel Report: National Security Secrecy in the Courts: A Comparative Perspective From Israel and Ireland*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 63, 63 (2006).

84. *Id.*

85. Gil, *supra* note 77, at 266.

86. *Id.* at 266–67.

87. *Id.*

88. *See id.* at 267.

89. HCJ 910/86 Ressler v. Minister of Defence, 42(2) PD 441, ¶ 1(1988) (Isr.).

articulated a new approach to political questions, reflected in his distinction between "normative" and "institutional" justiciability:

> Normative justiciability answers the question of whether legal standards exist for the determination of the dispute before the court. Institutional justiciability answers the question of whether the court is the appropriate institution to decide a dispute, or whether perhaps it is appropriate that the dispute be decided by . . . the legislative or executive branches. These two meanings of justiciability are distinct, so that they ought not, therefore, to be confused.[90]

As described above, U.S. courts tend to focus on both a lack of legal standards and the inappropriateness of courts deciding the issue when citing the political question doctrine as a reason to dismiss, and Chief Justice Barak recognized that there are times when a lack of institutional justiciability also prevents an Israeli court from acting.[91] But he categorically rejected the idea that political questions of a normative kind barred justiciability:

> A claim of no normative justiciability proposes that there are no legal criteria for deciding a dispute that is before the court. . . . A claim of no normative justiciability has no legal basis in general because there is always a legal norm according to which a dispute may be decided, and the existence of a legal norm gives rise to the existence of legal criteria for it. Sometimes it is easy to recognize the norm and the criteria inherent in it and at other times it is difficult to do so. But ultimately a legal norm will always be found and legal criteria always exist.[92]

As a practical matter *Ressler* and subsequent Israeli Supreme Court opinions largely did away with the political question doctrine, so that lower courts now routinely reject the political question doctrine and treat military conduct as justiciable.[93] This has led Israeli courts to rule on thousands of national security cases in areas as diverse as claims by inhabitants of the occupied territories, the legality of settlements and the separation fences, the right of Gaza inhabitants to basic necessities

90. *Id.* ¶ 34.

91. Kaufman, *supra* note 75, at 103.

92. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507, ¶ 48 (2006).

93. Kaufman, *supra* note 75, at 96; SCHARIA, *supra* note 79, at 15.

during combat, and the rights of locals during terrorist operations.[94] Most famously, the Israeli Supreme Court has ruled on the government's targeted killing policy in *Public Committee Against Torture in Israel v. Government of Israel* (PCATI), which is the focus of the following section.

B. *Targeted Killing in Israeli Courts*

Targeted killing is a feature of both U.S. and Israeli counterterrorism operations. Although its targeted killing policy has probably been in effect for decades, Israel first publicly acknowledged the policy in 2001 during the second *intifada*.[95] On January 24, 2002, a human rights organization petitioned the Israeli Supreme Court to declare the policy unlawful; the Court took up the petition in what became the *PCATI* decision.[96] Interestingly, a similar case was decided by a separate panel of the Israeli Supreme Court five days after the Court agreed to hear *PCATI*. In that case, *Barakeh v. Prime Minister*, the Court agreed with the government that the case was not institutionally justiciable because "the choice of the method of combat that the respondents employ in order to prevent murderous terrorist attacks before they are committed is not one of the subjects in which this court will see fit to intervene."[97] The government made the same claim in *PCATI*, but unlike the panel in *Barakeh*, this panel, led by Chief Justice Barak, rejected that argument. In language that is similar to *Al-Aulaqi v. Panetta* he noted, "[t]he petition before us seeks to determine what is permitted and what [is] prohibited in military operations that may violate the most basic of human rights, the right to life. The doctrine of institutional non-justiciability cannot prevent an examination of this question."[98] Like in *Ressler*, Chief Justice Barak ultimately rejected the petitioner's claim on the merits, but his opinion is significant both for reaching the merits in a targeted killing case and laying out standards for the government to follow.

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94. Kaufman, *supra* note 75, at 103–04.

95. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 29 (2008) (quoting the Israeli Deputy Minister of Defense Ephraim Sneh, who publicly revealed the policy in 2001 by declaring that "[w]e will continue our policy of liquidating those who plan or carry out attacks, and no one can give us lessons in morality because we have unfortunately one hundred years of fighting terrorism."); *see also* RONEN BERGMAN, RISE AND KILL FIRST: THE SECRET HISTORY OF ISRAEL'S TARGETED ASSASSINATIONS (2018).

96. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507, ¶ 14 (2006).

97. *Id.* ¶ 9 (quoting HCJ 5872/01 Barakeh v. Prime Minister 56(3) PD 1 (2002) (Isr.)).

98. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507, ¶ 50 (2006).

Using international law as a framework, and recognizing that terrorists fall somewhere between regular military units and civilians, Chief Justice Barak declared in *PCATI* that targeted killings are lawful when "civilians . . . take a direct part in hostilities [and] are not protected at that time from being targeted."[99] He further expanded on what "take . . . part in hostilities," "direct," and "at that time" mean, but recognized that many of these standards rely on situations that are not clear-cut and therefore require a case-by-case analysis.[100] To help courts with the analysis, Chief Justice Barak further laid out four elements that each targeted killing must satisfy. First, the government must prove with verifiable evidence that the civilian is taking a direct part in the hostilities.[101] Second, the target should be captured rather than killed if possible, because a trial is preferable to the use of force in "[a] rule of law" state.[102] Third, after the attack the government must perform a thorough investigation to verify the identity of the target and circumstances of the attack.[103] Finally, any harm to innocent civilians must prospectively satisfy the proportionality principle.[104]

Rather than declare targeted killing illegal or give absolute deference to the executive branch on this national security issue, the Israeli Supreme Court struck a balance by crafting legal rules for the military to follow when fighting terrorism, while still giving the executive branch significant discretion when taking action to meet each element of the test.[105] Encouragingly, the executive branch embraced the Court's decision and brought counterterrorism policy into compliance with *PCATI*, which allowed it to claim that Israel conducted its counterterrorism operations within the bounds of both domestic and international law.[106] While *PCATI* deserves its "innovative and groundbreaking" label,[107] this case is ultimately indicative of a larger trend in Israel—having the courts and the political branches of government work together to establish legal national security policies.[108] Even if the attempt is imperfect, and

99. *Id.* ¶ 30.

100. *Id.* ¶ 40.

101. *Id.* ¶ 40; Kaufman, *supra* note 75, at 119.

102. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507, ¶ 40 (2006).

103. *Id.*

104. *Id.* ¶¶ 40, 45.

105. Kaufman, *supra* note 75, at 120.

106. Gil, *supra* note 77, at 282–83.

107. SCHARIA, *supra* note 79, at 61.

108. *See also* HCJ 2722/92 Alamarin v. IDF Commander in Gaza Strip 46(3) PD 7–8, ¶¶ 9(a)–(e) (1992) (Isr.) (holding that the military's policy of demolishing the homes of suspected

the Israel-Palestine conflict has seen its share of abuses,[109] the Israel experience demonstrates that judges are more than capable of adjudicating complex and controversial national security cases.

IV. National Security Issues in European Courts

Like the courts of the United States and Israel, European courts have had a long history of confronting foreign affairs and national security cases. In fact, the first case before the European Court of Human Rights (ECtHR) was that of an unlawful detention arising from the detainee's suspected membership in the Irish Republican Army (IRA).[110] The requirement of balancing national security with human rights is written into the European Convention on Human Rights (ECHR),[111] and the Pan-European ECtHR and European Court of Justice (ECJ) are far less likely to dismiss national security claims without deciding the merits than U.S. federal courts.[112]

As with the Israeli judicial system, it is worth pointing out that there are differences between the two European courts and courts in the United States. For example, both the ECtHR and ECJ are supranational courts, meaning they interpret the law for all Member States of the Council of Europe and the European Union, respectively, rather than for a single nation. Like the Supreme Court of Israel, both courts can also issue advisory opinions which, as is the case with the Israeli courts, helps minimize the risk of conflicts with the political branches of Member States. Even if European jurisprudence on national security issues is not as well-known as the Guantánamo habeas cases in the United States or *PCATI* in Israel, the following three cases demonstrate the active involvement of the ECtHR and the ECJ in evaluating national security claims.

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terrorists was legal as long as the commander considers the four *PCATI* factors before taking action).

109. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 201–02 (July 9); Amnesty Int'l, *Human Rights in the Middle East and North Africa: Review in 2018*, (2019), https://www.amnesty.org/en/latest/research/2019/02/human-rights-in-the-middle-east-and-north-africa-2018/.

110. Lawless v. Ireland, Eur. Ct. H.R. App. No. 332/57 (1960).

111. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, (as amended by Protocols No. 11 and 14) ("The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security . . . .").

112. David Aronofsky & Matthew Cooper, *The War on Terror and International Human Rights: Does Europe Get It Right?* 37 Denv. J. Int'l. L. & Pol'y 567, 612 (2009).

While policy regarding the use of drones and targeted killings has become more prominent in Europe,[113] European courts have had little exposure to the issue compared to those in the United States and Israel. That does not mean, however, that those courts do not regularly reach the merits of national security cases not involving targeted killings. *McCann and Others v. United Kingdom*[114] is one notable example. In *McCann*, three suspected IRA members were killed by British security forces in Gibraltar.[115] The ECtHR held that the security forces themselves did not violate the ECHR, as they had to make a reasonable split-second decision to try to prevent a bomb being detonated, even if that decision turned out to be mistaken.[116] However, the court found the British government had violated Article 2(2) of the ECHR, which prohibits using unnecessary force to take life, because the government's actions and intelligence failures leading up to the shooting were disproportionate to the use of lethal force.[117] Of note, the court rejected the government's argument that even if the intelligence was wrong the government was permitted to rely on it in good faith, because the government's "absence of sufficient allowances being made for alternative possibilities [other than that the three targets were carrying a bomb]" and "the failure to make provision for a margin of error" meant that the use of lethal force against the three was "almost unavoidable."[118] Rather than deferring to the government's interpretation of counterterrorism intelligence, or categorically faulting the government for getting the intelligence wrong, the court took a middle ground and found the government liable because it did not adequately take precautions in case that intelligence was wrong. Thus, the ECtHR was able to reach the merits of a national security issue without invalidating British counterterrorism policies. As a supra-national court, the ECtHR has different powers and jurisdiction than U.S. federal courts, but *McCann* nevertheless demonstrates that European judges have not felt constrained by executive branch power to decide national security cases.

Saadi v. Italy is another case that demonstrates the willingness of European courts to create standards for complex foreign affairs issues.

113. *See* Jessica Dorsey & Giulia Bonacquisti, *Towards an EU Common Position on the Use of Armed Drones*, European Parliament: Directorate General for External Policies (2017), http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578032/EXPO_STU(2017)578032_EN.pdf.

114. McCann and Others v. United Kingdom, Eur. Ct. H.R. App. No. 18984/91 (1995).

115. *Id.* ¶¶ 60–80.

116. *Id.* ¶ 200.

117. *Id.* ¶¶ 213–14.

118. *Id.* ¶¶ 210–11.

In *Saadi*, Italy attempted to deport Nassim Saadi to Tunisia, where a military court had sentenced him to twenty years of imprisonment for membership in a terrorist organization and "incitement to terrorism."[119] Despite Italy arguing before the court that it had received diplomatic assurances that Saadi would not be tortured, which would have violated ECHR Article 3's prohibition against torture, the court found in favor of Saadi.[120] The specific ruling of the court turned on Tunisia's lack of substantive guarantees to Italy, as well as the country's past practices involving torture.[121] More importantly, however, the court recognized that even if Tunisia had provided the requisite diplomatic assurances,

> [T]hat would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.[122]

Here, the ECtHR made clear that executive branch determinations by states alone are not always enough to be in compliance with the ECHR; instead, the court may also be involved in the analysis.[123]

Finally, European judicial involvement in national security issues need not automatically restrict government action. In *Council of the European Union v. Hamas*, the ECJ overturned a lower court ruling that had ordered Hamas be taken off a list of terrorist organizations kept by the Council of the European Union.[124] In doing so, the court held that the Council can keep a person or entity on the list if it concludes that there is a continuing risk of that person or entity being involved in the terrorist activities which justified the initial listing.[125] The Council must provide a decision from a judicial authority[126] to initially place someone

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119. Saadi v. Italy, Eur. Ct. H.R. App. No. 37201/06 (2008), ¶ 29.

120. *Id.* ¶ 149.

121. *Id.* ¶¶ 54–55, 147.

122. *Id.* ¶ 148.

123. *See also* Alice Izumo, *Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence*, 42 COLUM. HUM. RTS. L. REV. 233, 258 (2010).

124. Council of the European Union v. Hamas, Case C-79/15 P, ¶ 87 (2016).

125. *Id.* ¶ 82.

126. Given the different types of judicial bodies in the EU Member States, EU law often refers to "judicial" or "competent" authority as shorthand. *See, e.g.*, Treaty of Lisbon Amending the

on the list, but it can rely on non-judicial determinations, such as military intelligence or news reports, to maintain that person or entity on the list.[127] As a postscript, the court acknowledged the need to carefully balance decisions implicating law and foreign policy:

> Both Hamas' application at first instance and the Council's present appeal were, quintessentially, about process rather than substance. In reaching my conclusions, I deliberately refrain from expressing any view on the substantive question as to whether conduct imputed to Hamas as assessed and established by decisions of competent authorities, warrants placing and/or retaining that group and/or its affiliates on the Article 2(3) list. This Opinion should therefore be read as being concerned exclusively with upholding the rule of law, respect for due process and the rights of the defence.[128]

As in *McCann* and *Saadi*, the decision in *Hamas* reflects a confident, and able, approach by the two highest courts in Europe to tackle national security issues.

V. Comparing the Different Approaches

Having highlighted the differences between the Israeli and European courts in handling national security issues compared to courts in the United States, it is worth analyzing the potential benefits, risks, and approaches U.S. courts could take in adjudicating more national security cases on the merits.

There are significant advantages to U.S. judges emulating Israeli and European courts in taking a more active approach when facing national security questions. First, taking this approach will allow the judiciary to return to its past practice of not deferring too quickly to the executive branch. As described above, the heavy use of the political question doctrine to avoid reaching the merits in such cases is a relatively recent development, and should the courts not dismiss at the threshold so many cases touching on national security issues, it would make the judiciary appear to more fully act "[with] due deference to the executive, but not

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Treaty on European Union and the Treaty Establishing the European Community art. 61(3), Dec. 13, 2007, 2007 O.J. (C306) 1 ("The Union shall endeavour to ensure a high level of security . . . through measures for coordination and cooperation between police and judicial authorities and other competent authorities . . . .").

127. Council of the European Union v. Hamas, Case C-79/15 P, ¶¶ 81–84 (2016).

128. *Id.* ¶ 86.

[with] undue deference."[129] Second, reaching the merits means victims will more likely be satisfied with the outcome of their case. Currently, few plaintiffs claiming government abuse receive judicial remedies,[130] and instead see their case dismissed by the court for the reasons described above. A court that more frequently reached the merits would likely allow victims of national security abuses some measure of closure, since even if they lose the case on the merits the plaintiffs have had an opportunity to have their claims considered. At the same time, substantive judicial review could give the public confidence that U.S. national security policies are pursued in accordance with U.S. law.

Finally, and perhaps most importantly, if U.S. courts were more willing to address national security questions it would increase the likelihood of judicial development of concrete national security legal standards,[131] such as the use of lethal force factors in *PCATI* or the *Hamas* rule that an organization can only be placed on the Council of the European Union's terrorism list by a judicial authority. Having a more extensive body of law in this area would clarify to the executive what is and is not allowed when it conducts national security operations.[132] More judicial involvement need not automatically restrain the executive branch, but could also result in legitimizing certain government actions.[133] For example, it is significant that the Israeli Supreme Court has given the Israeli military a foundation that legitimizes its targeted killing policy, something even *Al-Aulaqi v. Panetta* did not do.[134] Given that thousands have been killed by drone strikes in the fight against terrorist groups,[135] having a judicial stamp of approval on this and similar policies would take away at least some of the controversy surrounding such actions.[136]

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129. HENKIN, *supra* note 43, at 72.

130. *See* Vladeck, *supra* note 26, at 1037.

131. *See* Barceleau, *supra* note 9, at 889.

132. Richard H. Pildes, *Does Judicial Review of National-Security Policies Constrain or Enable the Government?* LAWFARE (Aug. 5, 2013), https://www.lawfareblog.com/does-judicial-review-national-security-policies-constrain-or-enable-government.

133. Justice Kennedy vividly articulated this point in his opinion in *Boumediene*: "Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. . . . Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch." Boumediene v. Bush, 553 U.S. 723, 797 (2008).

134. Gil, *supra* note 77, at 282–83; *see also* Pildes, *supra* note 132.

135. Vladeck, *supra* note 64, at 21.

136. Joshua Andresen, *Due Process of War in the Age of Drones*, 41 YALE J. INT'L L. 155, 187–88 (2016).

Although there are significant advantages to U.S. judges more frequently reaching the merits in national security cases, the disadvantages to such an approach should not be overlooked. First, to the extent that judges are ruling on the prudence or necessity, rather than the legality, of any particular policy or action, such a decision would infringe on the separation of powers enshrined in the Constitution.[137] As described above, Israeli and European courts are able to avoid this problem through the use of advisory opinions, but if U.S. courts are accused of straying from their judicial prerogatives, the important perception of the judiciary as the non-political body of the U.S. government could be eroded. Similarly, overly active judicial review could hamper foreign and national security policy by compromising legitimate security needs, such as protecting confidential sources or classified operations.[138] The President's ability to implement national security policies could also suffer if the government had to spend significant resources defending these cases, since a judiciary more open to hearing national security cases would likely increase the volume of litigation on these issues.[139] Finally, there is the risk that bad policy promulgated by the executive branch in the name of national security is legitimized by judicial approval. One such example is the *Korematsu* decision, in which the Supreme Court upheld an executive order requiring Japanese-Americans to be interned in camps during WWII for national security reasons.[140] Justice Robert Jackson, dissenting in *Korematsu*, eloquently described the inherent risks of judicial support of controversial policies:

> Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency . . . [b]ut once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated

137. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 45 (D.D.C. 2010) (internal quotation marks and citations omitted).

138. Pildes, *supra* note 132.

139. *See* Vladeck, *supra* note 26, at 1088.

140. Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

> the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[141]

The *Korematsu* decision is rightly condemned and its precedential value today is limited.[142] Yet, the case shows the damage that can occur when a court legitimizes questionable conduct.

Having considered some of the advantages and disadvantages of more involved judicial review of national security issues, is there a way to emulate the success of the Israeli and European courts while avoiding the risks of such an approach? Commentators have suggested several options. One would be for courts to take a more "formal," rather than "functional" approach to foreign affairs questions, meaning courts should interpret the Constitution and statutes strictly, rather than broadly and with an eye toward achieving the government's goals.[143] Such an approach would reflect Chief Justice Barak's pronouncement that a legal norm "applies to every governmental action, and . . . within the framework of the applicable norm it is always possible to formulate standards . . . . for the examination of the reasonableness of conduct, and the authority's action will be examined on its merits pursuant to these standards . . . ."[144] The idea is that a formalist approach will more likely lead a court to adjudicate an issue on the merits, even if the Constitution makes clear that the decision should ultimately be held to be within the executive branch's power.[145] Another option would be to follow Israeli and European courts and incorporate human rights and other international law into the judicial process. The Supreme Court has held that U.S. courts should apply international law when appropriate;[146] the executive branch has also referenced "international legal principles . . . [that] impose important constraints on the ability of the

141. *Id.* at 245–46 (Jackson, J., dissenting).

142. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

143. *See* Barceleau, *supra* note 9, at 889.

144. HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441, ¶ 46 (1988) (Isr.).

145. *Id.*

146. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

United States to act unilaterally—and on the way in which the United States can use force—in foreign territories.[147] Since the executive branch at least outwardly checks itself through international law, there is reason to think the judiciary could more fully adjudicate national security cases using the same legal principles.[148] Finally, judges handling foreign or national security cases could avoid infringing on the President's national security prerogative by narrowly addressing such issues, so that only the legality, rather than the wisdom and reasoning behind a particular policy choice, is adjudicated.[149] Thus, a judge should focus on how a particular policy was implemented and whether such action conformed to the applicable laws.[150]

Incorporating aspects of all these approaches would probably benefit the judiciary, but approaching national security questions narrowly seems to be the easiest to implement. Given how conservative the judicial branch's approach as a whole tends to be,[151] and the reluctance of many judges to rule on executive branch conduct,[152] approaching national security legal questions narrowly would likely make it easier for courts to adjudicate the merits of narrowly framed questions rather than approaching the issues more broadly. It would also be in keeping with Chief Justice John Marshall's admonition that judges should not avoid difficult questions:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution. Questions may occur which we would gladly avoid; but we cannot avoid

147. MEMORANDUM OF PRESIDENTIAL POLICY GUIDANCE FROM PRESIDENT BARACK OBAMA ON PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES 1–2 (May 22, 2013), https://www.aclu.org/foia-document/presidential-policy-guidance?redirect=node/58033.

148. *See* Barceleau, *supra* note 9, at 890.

149. *Id.*; *see also* Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security.").

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

151. By conservative, I mean designed to avoid public passions, which "sometimes disseminate among the people themselves, and which, though they [may] speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the [disfavored] in the community." THE FEDERALIST No. 78 (Alexander Hamilton); *see also* Vladeck, *supra* note 26, at 1085.

152. Vladeck, *supra* note 26, at 1083.

> them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[153]

Even if the outcome of many such cases is to confirm that the executive branch acted legally, narrowly addressing the issues would still allow for more national security legal standards to emerge from federal courts.[154] That would be a development worth encouraging, because it is ultimately the role of the judiciary, rather than the political branches, "to say what the law is."[155]

VI. Conclusion: A Way Forward?

Turning back to Judge Reinhardt, he summed up an idea that seems more ingrained in Israeli and European judges than in his fellow Americans on the bench:

> [O]ur role with respect to national security cases is essentially no different from our role with regard to any other important or controversial matter—maybe a little more difficult, maybe a little more daunting, maybe a little more perilous, but in the end it is simply a matter of what good jurists regularly do—weighing, balancing, exercising independent judgment, and safeguarding the Constitution.[156]

The similarities between the U.S., Israeli, and European judicial systems should not be overstated, of course; they work with different laws, governing structures, and historical frameworks, all of which influence how national security cases are decided. Nevertheless, the evidence from Israeli and European courts weakens U.S. courts' justifications for dismissing national security claims based on a lack of judicial capacity to make decisions or out of respect for separation of powers. Those foreign courts can handle equally complex and sensitive matters without overly interfering with the executive branch, or in the case of the ECtHR and ECJ, Member States of the Council of Europe and the EU.

The idea that federal courts in the United States should be less deferential to the political branches is not a new one, and as described above commentators have proposed several methods of reforms, each with

153. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

154. *See* Barceleau, *supra* note 9, at 890.

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

156. Reinhardt, *supra* note 73, at 1313.

their own strengths and weaknesses.[157] This Article has not attempted to analyze in depth which of those approaches is the right one for federal courts to adopt. Instead, it has sought to demonstrate what is lost when U.S. courts dismiss national security cases under the political question or similar doctrines. Understandably, there are those who fear that "[d]angerous precedents occur in dangerous times,"[158] but unlike the ECtHR in *McCann*, the court that does not reach the merits on these issues leaves the door open for government abuse and a lack of a remedy for victims. Thus, "in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."[159] However, a less commonly heard but still worthwhile consequence of courts reaching the merits in such cases is that government policies or actions that are not invalidated have the weight of the law behind them.[160] For at least these two reasons, federal courts in America should take a more proactive approach to national security cases. As Chief Judge Barak noted:

> The maxim 'When the cannons speak, the Muses are silent' is well known. A similar idea was expressed by Cicero, who said: *silent enim leges inter arma* (laws are silent in times of war). These statements are regrettable. They do not reflect the law either as it is or as it should be. It is precisely when the cannons speak that we need laws.[161]

Both for the Muses' sake, and for the cannons'.

157. *See* Vladeck, *supra* note 26, at 1083–88; Gil, *supra* note 77, at 281; Barceleau, *supra* note 9, at 888–90.

158. United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807).

159. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

160. *See* Pildes, *supra* note 132; Vladeck, *supra* note 64, at 13.

161. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. 62(1) PD 507, ¶ 61(2006) (internal citations omitted).