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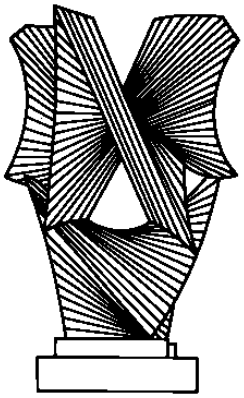

ONE VOICE OR MANY? THE POLITICAL QUESTION DOCTRINE AND ACOUSTIC DISSONANCE IN FOREIGN AFFAIRS

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A common theme in foreign affairs law is the importance of the US speaking with "one voice" to the international community. Speaking with one voice, so the story goes, ensures that the US is not embarrassed by multiple, inconsistent pronouncements from the several states or the different branches of the national government when it takes a position on a foreign affairs issue.[1] Such acoustic dissonance from the US could potentially result in a loss of credibility, a reduced capacity to achieve foreign policy goals, and a greater chance of conflict with other countries. So, when the Constitution is unclear about the allocation of decision-making authority on an issue, but the President or the national government speaks first, the presumption in favor of speaking in one voice reduces the possibility of multiple governmental decision makers and permits the US to act clearly and decisively in foreign affairs. While it reduces acoustic dissonance, the presumption in favor of one voice

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[1] See *Baker v Carr*, 369 US 186, 211 (1962) ("Not only does resolution of such [foreign affairs] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, *but many such questions uniquely demand single-voiced statement of the Government's views.*") (emphasis added).

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has two other effects as well: the centralization of foreign affairs decision making in the federal government vis-à-vis the states[2] and centralization of foreign affairs decision making in the President vis-à-vis Congress.

The Supreme Court applies several doctrines to effectuate the one-voice preference in foreign affairs. For example, the Court has developed preemption doctrines to limit the capacity of the states to interfere with the national government's prerogatives in foreign affairs. In several cases,[3] the courts have struck down state laws that purport to interfere with congressional statutes or touch upon Congress's Commerce Clause or Dormant Commerce Clause authority. In each, the Court relied on a notion of speaking with one voice in the face of potentially inconsistent state laws.[4] Crudely stated, when the federal government and the states act on the same foreign affairs issue—even if the state acts first—the one-voice presumption tends to protect federal government decision making.

In regulating the President's relationship with Congress, the Court's one-voice vehicle has been the political question doctrine. As elucidated by the Court in *Baker v Carr*,[5] the political question doctrine serves to insulate the courts from adjudicating cases that implicate issues that the Court views as properly resolved by the political branches. In *Baker*, the Court outlined a six-factor test, and this article focuses on one of special relevance for foreign affairs: "the potentiality of embarrassment from multifarious pronouncements by various departments on one question":[6] in other words, when adjudicating the case would lead to the possibility of embarrassment by inhibiting the ability of the US to speak with one voice.

In effect, the political question doctrine, at least as applied in the foreign affairs context, creates a first-mover bias: since the first mover is generally the first "voice" to speak authoritatively on a foreign affairs issue, its voice benefits from the presumption that one voice is preferred. And, since the first mover is most often the President instead of Congress, the political question doctrine typically serves to insulate the President's decision making from judicial

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[2] For a discussion of foreign affairs federalism, see Daniel Abebe and Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, Vand L Rev (forthcoming 2013).

[3] For a review of the cases, see id at 7–14.

[4] See notes 19–23.

[5] See 369 US 186, 217 (1962).

[6] See *Baker*, 369 US at 217.

review. At bottom, one factor of the political question doctrine's multifactor test suggests that one voice is almost always preferred and, given the President's capacity to act more quickly than Congress, it effectively means that the one voice will likely belong to the President.

Of course, the courts do not apply the political question doctrine in every case that touches and concerns foreign affairs, and the President does not always succeed in cases where the political question doctrine might be applicable—mostly because it is difficult for courts to weigh the political question factors. Sometimes, as a result, the courts perhaps unwisely exercise jurisdiction over the most complicated and sensitive of foreign policy issues. For example, in *Zivotofsky v Clinton*, the Supreme Court declined to apply the political question doctrine when confronted with the issue of whether Congress or the President had the authority to record the country of birth on a US passport for naturalized US citizens born in Jerusalem.[7] In vacating the decision of the US Court of Appeals for the DC Circuit, the Court held that a congressional statute permitting the designation of Israel as the country of birth for those persons born in Jerusalem did not present a political question,[8] despite the fact that the statute directly conflicted with the State Department's "longstanding policy of not taking a position on the political status of Jerusalem."[9] Rather, the Court held that the conflict was indeed justiciable because it only "demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers"[10] normally associated with judicial review, rather than any consideration of delicate issues of international politics or the merits of US foreign policy.

While *Zivotofsky* demonstrates that the President does not always succeed in political question doctrine cases, the general operation of the doctrine combined with the political economy of foreign affairs decision making—the President as first mover—provides lat-

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[7] See *Zivotofsky v Clinton*, 132 S Ct 1421, 1430 (2012) ("Recitation of [the parties'] arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not 'turn on standards that defy judicial application.'") (quoting *Baker*, 369 US at 211).

[8] Id at 1430–31.

[9] Id at 1424.

[10] Id at 1430.

itude to the President to engage in activities that might not be per se constitutional but are later insulated by the Supreme Court's desire to avoid adjudication on the matter. What is less clear, however, is the wisdom of the one-voice presumption built into the political question doctrine. Even with this presumption, the courts lack a framework to distinguish between those foreign affairs issues where speaking with one voice is particularly important and those for which it is not. The political question doctrine, as currently applied, sweeps too broadly and lacks a useful, workable metric for distinguishing among foreign affairs cases, treating some as political questions but failing to draw a principled or meaningful line. This article begins that project.

This article examines the merits of the one-voice presumption of the political question doctrine. It has two goals. First, it aims to unpack the underlying assumptions supporting a presumption in favor of one voice in foreign affairs to determine the conditions under which the presumption holds. The traditional account about speaking with one voice focuses on the benefits of centralizing decision making in foreign affairs.[11] The creation of foreign policy and the provision of national security, among other things, are public goods best provided by the national government, rather than the states. Relative to the national government, the states are not as well placed to coordinate national policy and maximize social welfare for all Americans; in fact, they are more likely to pursue narrow, parochial policies that might be welfare enhancing for the state, but not for the nation as a whole. Beyond that, the benefits of centralization in foreign affairs decision making are plainly obvious in the context of the national government and the fifty states; the possibility of dozens of inconsistent pronouncements from various sovereigns justifies, to some degree, limits on foreign affairs federalism. In fact, exactly this lack of centralization in foreign affairs substantially contributed to the collapse of the Articles of Confederation.

But while this traditional account might justify limits on foreign affairs federalism and support a one-voice presumption for the relationship between the national government and the various states, it is not as convincing when applied to the relationship between President and Congress. Here, there are only two actors rather than

[11] See Jenna Bednar, *The Robust Federation: Principles of Design* 25–52 (Cambridge, 2009) (providing an account of the costs and benefits of decentralization).

potentially dozens, reducing the concern about problematic acoustic dissonance. Moreover, Congress, unlike the states, is well placed to engage in precisely the kind of trade-offs necessary to promote the public good. Congress also has much more foreign affairs expertise than the states, and the competency gap between Congress and the President is much smaller than that between the national government and the states. It's simply easier for Congress to solve collective action problems and reach decisions than the states. Along each of these dimensions, the traditional account justifying the Supreme Court's one-voice presumption is much weaker among the branches of the national government.

Despite the weakness of the traditional account in this context, it does not lead inexorably to the conclusion that the political question doctrine's emphasis on speaking with one voice is inappropriate at all times. Rather, it suggests that the one-voice presumption likely obtains only under certain external conditions. My second goal is to tease out those conditions under which speaking with one voice is most likely to produce the benefits associated with the centralization of foreign affairs decision making for the US, and those when the one voice might be unnecessary. Since we don't know how the courts weigh the different factors of the political question doctrine, measure the potential for embarrassment, or evaluate risks from multiple, inconsistent pronouncements, it might seem like a fool's errand to try to determine the conditions when these factors are more or less salient. Nonetheless, we know that the courts, in applying the political question doctrine, must engage in some ad hoc analysis of these factors when deciding to apply the doctrine or adjudicate the issue on the merits.

Building on prior scholarship on the role of international political factors and the use of polarity as a metric in foreign affairs institutional design,[12] I argue that the political question doctrine's presumption for speaking with one voice should vary with the position of the US in international politics. In simple terms, when the US is in a highly competitive international political environment—for example, when there are multiple powerful states or great powers in the world—the courts should apply a presumption in favor of speaking in one voice. Under this condition, speaking with one voice

[12] See generally Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 Stan J Int'l L (forthcoming 2013) (developing a theory of foreign affairs law based on the concept of polarity and changing geopolitical conditions).

is likely more important because the costs of multiple inconsistent pronouncements from the President, Congress, and the courts increase. Some of the values associated with the centralization of foreign affairs decision making—for example, clear communication of policy to the international community, speed of decision making, and determination of the national interest—are of greater importance when the US is navigating a complicated international political environment and has less freedom to pursue its objectives.

In contrast, when the US is a superpower or the dominant state in international politics—when it is the unipolar power—the necessity of rigidly adhering to a one-voice presumption diminishes. Under this condition, the benefits of centralization of foreign affairs are still present, but not as salient, because the US is pursuing its interests in a less challenging political environment. Stated simply, the more complicated the environment, the higher the cost of acoustic dissonance between the branches. As the environment becomes less complicated, the costs of acoustic dissonance decrease. Moreover, acoustic dissonance promotes transparency and public deliberation, values that are often sublimated in the multipolar world. Using the concept of polarity as a metric,[13] the wisdom of the political question doctrine's one-voice presumption is contingent on or a function of the position of the US in international politics.

How would the courts operationalize this as a doctrinal matter? The President certainly has institutional expertise in foreign affairs relative to the courts, and the political question doctrine, at least in the foreign affairs context, serves to ensure that the courts do not weigh in on issues properly committed to the political branches. At the same time, the political question doctrine requires the courts to make a threshold foreign affairs determination, namely, whether adjudication of the issue would cause the US embarrassment or create foreign affairs problems. Since the courts have to make an inquiry into geopolitical conditions anyway, the courts should simply apply a presumption in favor of speaking with one voice when the international political environment is most challenging (multipolar worlds) and relax the presumption when the environment is less challenging (the US as the superpower in the unipolar world). Shifting the presumption in this way would align the political question doctrine's rationale of centralizing decision-making authority

[13] Id (developing this argument at length).

when necessary, while still maintaining a role for the courts to adjudicate issues properly before them when the costs of doing so are likely to be lower. Moreover, it ensures that the political branches—most likely the President—are still tasked with making the foreign affairs determinations for which they are best suited. And it provides much more reasoned guidance to the ad hoc application of the political question doctrine today.

Part I of this article examines the implicit assumptions underlying the political question doctrine's one-voice presumption. Part II proposes a metric to determine the conditions under which the one-voice presumption obtains and describes its operation. It concludes by discussing the merits of the status quo in comparison to varying the one-voice presumption based on changing geopolitical conditions.

I. The Political Question Doctrine in Foreign Affairs

A. THE ONE-VOICE PRESUMPTION

At its core, the political question doctrine is a justiciability limitation on federal court jurisdiction.[14] Beginning with *Marbury v Madison*,[15] the Supreme Court has suggested that there are some questions or issues that properly come before the courts that, by their nature, are somehow political, and thus outside of the traditional scope of judicial review. When a court determines that the matter before it presents a political question and thus applies the political question doctrine, it refuses to adjudicate the matter and in effect provides absolute discretion to the political branches to resolve the matter.

Until the 1960s, the courts generally adopted a categorical approach to the political question doctrine in which some foreign affairs questions were deemed to presumptively or automatically require the application of the doctrine, removing them from the

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[14] See *Baker v Carr*, 369 US 186, 210 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.").

[15] See *Marbury v Madison*, 5 US 137, 164 (1803) ("Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?").

purview of the courts. The categorical approach designated particular questions like those relating to the cessation of hostilities, the territorial boundaries of the US, or whether the US should recognize a government as the legitimate representative of a foreign nation as questions more appropriately resolved by the political branches. The categorical approach's rule-like quality, however, meant that it lacked the flexibility to deal with more nuanced foreign affairs questions that touch and concern war or national security but do not warrant the rigid application of the political question doctrine.

The Supreme Court moved away from the categorical approach in *Baker v Carr*.[16] Though *Baker* addresses a wholly domestic question concerning a denial of equal protection in Tennessee relating to legislative apportionment, Justice Brennan's opinion for the Court discusses the various applications of the political question doctrine in the domestic and foreign affairs context and elucidates a multifactor test to determine when the political question should be applied.[17] The most important factors include determining whether there is textually demonstrable constitutional commitment of the issue to a coordinate federal branch or a lack of judicially discoverable or manageable standards for resolving the issue. Although these two factors are most salient for the application of the political question doctrine, perhaps the factors of greatest relevance in foreign affairs are concern about a lack of respect for the coordinate branches of government and, most important, the possibility of embarrassment to the US from the lack of "one voice."

One way of characterizing the "one-voice" factor in the political question doctrine is a concern that if the President, Congress, and the courts each try to speak authoritatively to resolve a foreign affairs issue, the possibility or likelihood of embarrassment for the US would increase. To put it concretely, if, for example, the na-

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[16] See *Baker v Carr*, 369 US 186 (1962) (outlining the factors to be considered by courts in applying the political question doctrine).

[17] Id at 217 ("[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or *the potentiality of embarrassment from multifarious pronouncements by various departments on one question*" (emphasis added).

tional government cannot speak clearly and articulate its position on which government is the legitimate representative of Syria, the US would suffer some embarrassment in the eyes of both the domestic and international audience. Thus, the one-voice factor serves to prevent or at least reduce the likelihood of embarrassment for the US in foreign affairs.

But what does embarrassment mean? The one-voice factor assumes that if the US speaks in multiple voices on an issue, the possibility of embarrassment increases. But in fact the US regularly and consistently speaks with multiple voices on many highly sensitive foreign affairs law questions. For example, just in the past ten years the President, Congress, and the Supreme Court have each spoken—and disagreed—on the President's authority to create and set the standards for military commissions during the War on Terror.[18] The President, the Supreme Court, and the state of Texas spoke with different voices on the President's authority to order a state to enforce a decision of the International Court of Justice.[19] The courts often consider and reject Statements of Interest by the Executive Branch regarding the foreign policy complications of international human rights litigation in Alien Tort Statute cases.[20] The truth is that the US often fails to speak in one voice on many highly salient foreign affairs questions, making concerns about potential embarrassment in the political question doctrine seem somewhat antiquated.

Perhaps the one-voice factor and the concern about the possibility of embarrassment actually refer to something else, namely, the important social welfare effects of concentrating or centralizing decision making in the political branches because of their greater competency or expertise in foreign affairs.[21] The wisdom

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[18] See *Hamdan v Rumsfeld*, 548 US 557 (2006) (invalidating the President's military commissions on grounds that it violated the Uniform Code of Military Justice and the Geneva Conventions).

[19] See *Medellin v Texas*, 552 US 491 (2008) (invalidating a memorandum from President Bush purporting to order the state of Texas to enforce a judgment by the International Court of Justice and set aside its procedural default rules for certain alien nationals). See also *Sanchez-Llamas v Oregon*, 548 US 331 (2006) (holding that the Vienna Convention on Consular Relations did not oust a state's procedural default rules).

[20] For a discussion on the Bush Administration's use of statements of interest in Alien Tort Statute cases, see generally Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 Harv Hum Rts J 169 (2004).

[21] For a discussion of institutional competency and the political question doctrine in foreign affairs, see generally Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 Iowa L Rev 941 (2004).

of speaking with one voice rests on the benefits of centralization over decentralization in foreign affairs. On this reading, the one-voice factor in the political question doctrine represents not a concern about embarrassment but rather the Supreme Court's view that the political branches are more competent in foreign affairs than the courts, and its implicit assumption that centralization of decision making in the President should be generally preferred. Rather than a concern about embarrassment, the logic of one voice is better understood as resting on the merits of centralized decision making in foreign affairs.

B. ONE VOICE AND CENTRALIZATION

The Supreme Court's emphasis on centralized decision making in foreign affairs is perhaps best exemplified in its foreign affairs federalism jurisprudence. The Constitution specifically limits the participation of states in foreign affairs[22] and, in the event of conflict between a federal statute and state law, the Supremacy Clause ensures that the state law is preempted. But the Supreme Court has also developed several preemption doctrines to ensure the primacy of the national government over the states on a range of foreign affairs questions, including field preemption,[23] obstacle preemption,[24] dormant foreign affairs preemption,[25] and executive preemption.[26] In each of these areas, the Supreme Court's emphasis on speaking with one voice has resulted in the centralization of foreign affairs decision-making authority in the national government over the states.

What is the logic of this centralization? Much of it rests on general understandings of the merits of centralization in institutional design. The common functionalist account justifying cen-

[22] US Const, Art I, § 10, cl 11.

[23] See *Hines v Davidowitz*, 312 US 52, 56 (1941) (invalidating a Pennsylvania statute where Congress passed legislation to occupy the field).

[24] *Crosby v National Foreign Trade Council*, 530 US 363, 373 (2000) (invalidating a Massachusetts "Burma" statute for creating "an obstacle to the accomplishment of the Congress's full objectives under the federal act.").

[25] *Zschernig v Miller*, 389 US 429, 432 (1968) (striking down an Oregon statute as "an intrusion . . . into the field of foreign affairs which the Constitution entrusts to the President and the Congress.").

[26] See *American Insurance Association v Garamendi*, 539 US 396, 420 (2003) (striking down a California insurance statute because the "likelihood that [it] will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law.").

tralization of decision making in the national government focuses on collective action problems and the provision of public goods. National governments are best placed to coordinate public policy, determine national interests, and engage in the necessary tradeoffs to promote national public welfare. Perhaps most central to the responsibilities of the national government is the provision of national security, the maintenance of a domestic market for trade, and the generation of economic wealth. For example, in the security context, the national government can act as a single, integrated institutional actor to determine the national interest; develop US foreign policy; coordinate the military, diplomatic, and intelligence resources of the nation; swiftly pursue national objectives; and prosecute wars. If the several states were tasked with such responsibilities, it does not take much to imagine the difficulties in coordinating among a large number of heterogeneous subnational governments, each with its own interests and desire to pass on the cost of national defense, when possible, to its cosovereigns.

The same logic applies to the development and maintenance of a common economic market and the promotion of policies to encourage economic prosperity. The national government can aggregate information and coordinate policy to ensure that the US can benefit from international trade, encourage the production of goods for which it has a competitive advantage, protect the national market from foreign anticompetitive behavior, and redistribute wealth, if necessary, to ameliorate the unequal distribution of wealth across particular regions, states, or demographic groups. The states, by contrast, will tend to be focused narrowly on their own economic prosperity, and will produce economic policies that allow them to reap the benefits and externalize the costs. We can imagine Alaska, Texas, and Louisiana, for example, adopting policies with respect to resource extraction that might impose environmental costs on the US as a whole, just as we can imagine Massachusetts, California, and New York adopting regulatory policies that might limit the ability of the US as a whole to benefit from its resource endowment. In these contexts—national security, trade, and economic prosperity—the benefits of centralization over vast decentralization among dozens of subnational entities are clear.

Beyond this traditional account, there are less obvious but sim-

ilarly important justifications for centralization in foreign affairs. One is the clarity of the ensuing foreign policy. Even if there is substantive disagreement over policy, clarity ensures at least in theory that there is a clear communication of the US national interest to friend and foe alike. Another is the designation of a clear decision-making authority in foreign affairs. Among other things, it reduces the likelihood of constitutional impasses over key issues, provides an accountable governmental entity for the domestic voting public, and encourages specialization over time. Finally, to the extent the national government is working with other countries on an issue of global concern, centralization designates the US representative for international policy coordination.

But if the logic of centralization in foreign affairs in the form of speaking with one voice obtains in the context of the national government vis-à-vis the states, it is not as clear that the same logic holds with respect to Congress. In fact, the logic is not as persuasive for at least two important reasons. First, the competency gap in foreign affairs between the national government and the states far exceeds the gap between the President and Congress, and even the gap between the political branches and the courts. The states are very poorly placed to coordinate policy and make foreign affairs determinations. The centralization of decision making and speaking in one voice are, accordingly, much more important when the institutional expertise of the national government is weighed against that of the state. But the President and Congress both have significant institutional resources to coordinate foreign policy and act decisively in foreign affairs, and are specifically empowered by the Constitution to do so. Unlike the states, Congress has institutional structures like the Senate Foreign Relations Committee, the House Armed Services Committee, and dozens of subcommittees dedicated to foreign affairs and international politics, with each generating valuable information and developing Congress's foreign policy expertise. Thus, the necessity of centralization and a unified voice between Congress and the President is not as strong, and that perhaps weakens the common justifications for the one-voice factor in the political question doctrine.

The same analysis applies to the gap between the political branches and the courts. While in the aggregate the political

branches are probably better placed to act in foreign affairs than the courts, the courts certainly adjudicate many sensitive matters that touch and concern foreign affairs, while the states are, for the most part, uninvolved in such issues. From adjudicating delicate issues regarding the War on Terror[27] to determining the constitutionality of international human rights litigation under the Alien Tort Statue,[28] the Supreme Court is not only involved in foreign affairs but also has developed some expertise in dealing with politically sensitive issues. On institutional competency grounds, the importance of centralization for purposes of limiting foreign affairs federalism outweighs the salience of centralization in foreign affairs decision making among the different branches of the national government.

In addition, the concerns about the provision of public goods, the coordination of national policy, and the potential collective actions problems disappear when dealing with the President and Congress. Both branches have the necessary institutional capacity to determine the national interest and ameliorate collective action concerns, far beyond anything the states could muster. Again, while centralization makes sense when dealing with national government and the states, the logic is certainly weaker with respect to the President and Congress. At bottom, the political question doctrine's one-voice factor rests on a conception of centralized foreign affairs decision making that, while appropriate with respect to the states, seems inapt for the coordinate branches of the national government.

II. One Voice and International Politics

A. Effect of the One-Voice Factor in Foreign Affairs

The political question doctrine's one-voice factor demonstrates the Supreme Court's concern with the potential embarrassment for the US of failing to speak in a unified manner. On balance, this factor privileges centralization of decision making in foreign

[27] See *Boumediene v Bush*, 128 S Ct 2229, 2277 (2008) ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").

[28] See *Sosa v Alvarez-Machain*, 542 US 692 (2004) (upholding the constitutionality of international human rights litigation under the Alien Tort Statute under limited circumstances).

affairs. However, as we have seen so far, it is not clear what constitutes embarrassment for the US, as the US often speaks with multiple voices in foreign affairs. Conceptually, it is not clear to whom or to what the embarrassment attaches, or how the embarrassment affects the future pursuit of foreign affairs objectives. And the justifications for centralization that appear so persuasive with respect to limits on foreign affairs federalism and preemption are much less convincing in the political question doctrine context.

Yet the one-voice factor, for reasons I will explain, may very well serve to insulate the President's foreign affairs decision making from judicial review. As we know from *Curtiss-Wright*[29] and *Belmont*,[30] the President is at least the chief representative of the US in foreign affairs. While the President does not act alone—Congress has foreign affairs authority as well—he tends to be the "first mover" in foreign affairs. The President has access to the institutional resources of the Departments of State, Defense, and Homeland Security and can respond more quickly to any foreign affairs concerns. More concretely, in the face of particular foreign affairs issues for which the Constitution isn't clear and Congress has not acted, or when the foreign policy interests of the US are triggered in litigation properly before the courts, the President generally moves first on behalf of the US.

Since the President tends to be the first mover, the political question doctrine's one-voice factor effectively creates a presumption in favor of the President's action, even if it might very well push the outer bounds of the President's Article II authority. Why? The incentive structure for members of Congress will likely discourage them from acting to challenge the President, even if they might think that he has surpassed his constitutional authority. As an initial matter, the President's party might very well control Congress or be able to block legislation invalidating the President's action. If so, Congress would be unable to act and protect its institutional prerogatives. In addition, Congress rarely gets the credit for foreign affairs successes or failures. Since the public

[29] See *United States v Curtiss-Wright Export Corp.*, 299 US 304, 320 (1936) (characterizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .").

[30] See *United States v Belmont*, 301 US 324, 330 (1937) ("Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.").

generally perceives the President as the dominant actor in foreign affairs, there is little benefit to challenging the President until it becomes clear that his policies have failed. Thus, the President in theory can act, and if his actions or policies are successful—even if the actions are beyond his constitutional authority—Congress is unlikely to respond.[31]

The one-voice factor in the political question doctrine exacerbates this dynamic. The courts, worried about their capacity to make foreign affairs determinations, sensitive to their relative weakness in enforcing their decisions, and lacking contrary legislation from Congress upon which to base a decision, are likely to weigh heavily the political question doctrine's emphasis on speaking with one voice. Thus, to the extent the courts rely on the one-voice factor in applying the political question doctrine, they essentially validate the President's action. Since the President generally moves first and Congress is disincentivized to act, the one-voice factor creates a first-mover bias and insulates the President's action from judicial review.

b. one voice or acoustic dissonance?

Some might immediately ask why this is a problem. After all, the President is the chief actor in foreign affairs and likely has the deepest institutional knowledge and expertise in the area: if the political question doctrine creates a bias in favor of the President, the bias is running in the right direction. This bias, however, creates two kinds of problems.

First, the logic of speaking with one voice, whether resting on concerns about embarrassment for the US or drawn from the merits of centralization in another context, is not as powerful as the political question doctrine suggests. Despite this weak edifice, the first-mover bias almost always privileges the President's foreign affairs decision making whether or not it is consistent with the Constitution. Though it doesn't mean that the President will always prevail—there are other political question factors that the courts consider—the first-mover bias may very well overprivilege the President's actions because it unrealistically assumes that a

[31] William G. Howell and John C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton, 2007) (describing the conditions under which Congress influences the President's use of force).

more vigorous and active Congress would be willing to challenge him. Since we don't know how courts weigh the different factors in applying the political question doctrine, the first-mover bias combined with the one-voice factor might be doing much more work than it should.

Second, the first-mover bias doesn't vary; speaking with one voice is always privileged. But speaking with one voice might be especially important under some conditions, and much less important under others. Consider a crude distinction between high-stakes and low-stakes foreign affairs issues. For example, when the US is at war, or trying to determine whether a mutual-defense treaty requires it to come to the aid of an ally, or even deciding whether to exercise its veto on the United Nations Security Council, we might think that speaking with one voice is especially important. The resolution of foreign affairs questions relating to war, the defense of treaty partners, and other potential national security concerns requires the kind of quick, clear, and decisive action generally associated with the political branches—specifically the President—rather than the courts. We might characterize these as exactly the high-stakes foreign affairs issues for which speaking in a unified voice, on balance, makes sense; the benefits of centralizing decision making in the more competent political branches will likely generate better outcomes than a more ponderous decision-making process by the courts.

But just as we can imagine the type of high-stakes issue for which the one-voice presumption is appropriate, we can also imagine low-stakes issues for which centralizing decision making might be less urgent. Take the seemingly important question of the US position on which government is the legitimate representative of a country. Some might view this as a complicated foreign affairs issue for which speaking with a unified voice through the President is absolutely necessary. However, not all foreign affairs questions of this kind require the quick, decisive action that centralization in the President provides. For example, it is hard to see why the delicate question of whether the US should recognize the recently ousted President Nasheed or the current incumbent President Waheed as the legitimate representative of the government of the Republic of the Maldives necessarily requires the exclusion of Congress or the courts. We can imagine that there are geographically concentrated interest groups with both foreign affairs ex-

pertise and strong policy preferences about the appropriate US policy outcome, giving Congress a legitimate interest in creating policy. In fact, careful deliberation by the political branches together, buttressed by judicial review, might be beneficial in determining the appropriate policy outcome. In other words, acoustic dissonance, in some cases and under certain conditions, may have value.

So when will acoustic dissonance—or speaking with multiple voices—be beneficial and when will it create costs? Acoustic dissonance in foreign affairs will, at times, reduce the ability of the US to react clearly and decisively. As described above, when the US is dealing with a core foreign affairs issue that implicates national security or a sensitive foreign policy objective, the benefits of centralizing decision making are clearer. The one-voice factor in the political question doctrine makes most sense when the US is dealing with vital foreign policy concerns for which acting with speed and dispatch is necessary. For high-stakes or exigent foreign affairs issues, a presumption in favor of one voice seems appropriate.

However, when the US is dealing with a foreign affairs issue for which the speed and dispatch associated with centralized decision making is not as crucial, the one-voice presumption might be less important. Again, the discussion above of high-stakes and low-stakes foreign issues illustrates exactly this concern. In low-stakes cases, we might find that acoustic dissonance improves decision making by encouraging Congress to engage the President in foreign affairs. Open, careful deliberation about foreign affairs questions leads to greater transparency and democratic legitimacy. Since greater congressional involvement in foreign affairs in low-stakes questions will likely lead to more opportunities for judicial review, acoustic dissonance prevents the atrophy of oversight that the one-voice factor creates. The courts' willingness to adopt a one-voice presumption in low-stakes cases could reduce the judiciary's future capacity to engage in a meaningful review of the President in foreign affairs, concretize the first-mover bias in favor of the President, and disincentivize the President, over time, to employ his own intrabranch review mechanisms. This phenomenon is exacerbated by a dynamic effect, whereby the President's expertise and decision-making preeminence become self-affirming over time, and congressional enfeeblement becomes increasingly

pathological. In low-stakes foreign affairs cases, the presumption in favor of one voice is weaker and acoustic dissonance may be appropriate.

c. acoustic dissonance and international politics

All of this might make sense in theory. But when courts consider whether or not to apply the political question doctrine and weigh the various factors, they will struggle to distinguish the high-stakes cases that might warrant a one-voice presumption from the low-stakes cases where acoustic dissonance might be useful. While courts have experience adjudicating foreign affairs questions, it is not clear that they have the necessary foreign policy expertise to make fine-grained distinctions between seemingly high-stakes and low-stakes foreign affairs questions. Nonetheless, courts routinely make those determinations when they apply the political question doctrine. For example, in order to determine whether there is a possibility of embarrassment to the US by failing to speak with one voice, the courts must make some threshold inquiry about the importance of the foreign affairs issue, the likelihood of embarrassment, and the consequences of that embarrassment on US foreign policy objectives. Yet we don't know how the courts make this inquiry or assessment in deciding whether the application of the political question doctrine is merited. Thus the courts—or, perhaps more accurately, individual judges—engage in an ad hoc analysis without the benefit of a framework to guide their reasoning.

While a more categorical approach to the political question doctrine would carry the benefits commonly associated with rules—clarity, ease of administration, and low decision costs—it is probably too rigid to deal with the great variety of foreign affairs issues commonly before the courts. The late-twentieth-century rise of international human rights litigation under the Alien Tort Statute,[32] for example, implicates sensitive foreign affairs issues that make a rule-like approach to the political questions doctrine a poor fit with the complex transnational litigation seen in US courts today. The increasing intermingling of foreign and domestic issues and the collapse of any meaningful definitional dis-

[32] See *Sosa v Alvarez-Machain*, 542 US 692 (2004) (upholding international human rights litigation under the Alien Tort Statute under limited circumstances).

tinction between the two only weakens the value of the categorical approach. But if courts lack the institutional competency to assess complicated foreign affairs questions, and the nature of modern litigation so routinely implicates foreign affairs that it makes a categorical issue-by-issue approach unworkable, how should courts determine when speaking with one voice (or acoustic dissonance) is appropriate?

Courts can gain traction on this question by assessing the background conditions of international politics to understand when a presumption in favor of speaking with one voice is warranted, and when such a presumption is unnecessary. As I have argued in prior scholarship,[33] the courts can adopt a parsimonious framework, based on the international relations concept of polarity, to assess background international political conditions and the role of the US in the world. Based on this assessment, the courts would not decide whether a particular foreign affairs question required the application of the political question doctrine; rather, the assessment would assist the courts in weighing the benefits of speaking with one voice.

International theorists often describe the structure of international politics in terms of polarity.[34] Polarity is a heuristic that permits a simple, if somewhat crude, measure of the material power of the most influential states in international politics. By looking at a rough measurement of a state's economic wealth and military strength, scholars and judges can identify the most powerful countries in the world and focus attention on them. Such identification is particularly important in the foreign affairs context because, on average, the most powerful countries are best placed to influence international politics.

Polarity refers to the number of great powers (powerful states in the world). A multipolar system reflects a world in which there are three or more great powers. Similarly, a bipolar system is a world with two great powers, and a unipolar system is one with only one great power or hegemon in international politics. Each of these systems presents different challenges or background con-

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[33] See Abebe, 49 Stan J Int'l L (cited in note 12).

[34] For a general discussion about polarity in international politics, see John J. Mearsheimer, *The Tragedy of Great Power Politics* (Norton, 2001); Kenneth N. Waltz, *Theory of International Politics* (McGraw-Hill, 1979).

ditions, and these conditions are relevant for understanding the importance of speaking with once voice.

To make the illustration simple, let's imagine that it is the year 2030 and the US is one of three great powers in a multipolar world, along with Germany and China. Each of these great powers will have different and often competing economic goals, security interests, and national objectives, drawn from their respective cultures, histories, and resource endowments. Each will develop policies designed to achieve their goals and will look to build relationships with other states to advance their interests. In a world with finite resources, these great powers will compete, conflict, and perhaps even clash as they pursue their foreign policy objectives.

The multipolar world presents a complex and challenging international political environment for the US. Since it is competing with China and Germany as a relative equal, the US incurs great costs in trying to achieve its objectives. In a multipolar world, the returns to speaking with one voice and centralizing foreign affairs decision making will likely be high. The US is not a global superpower and lacks the material power and political influence to ignore China and Germany as it pursues its policies. In fact, the US has to be careful to calibrate its foreign policy goals and the means to achieve them to minimize conflict with China and Germany, just as China and Germany exercise care vis-à-vis the US. Here, the President's foreign affairs expertise, institutional knowledge, and capacity to marshal resources and act quickly are especially beneficial given the particularly challenging international political environment that the US must navigate. To put it differently, the benefits of acoustic dissonance that emerge from careful, open, and deliberate consideration of policy are unlikely to be realized in a more complicated world requiring high levels of expertise and decisive action. Under this condition, a presumption in favor of speaking with one voice—through the one-voice factor in the political question doctrine—is appropriate. Such a presumption links the centralization of foreign affairs decision making through speaking with one voice with the international political environment in which it is most useful.

In contrast, consider a unipolar world with the US as the hegemon or the unipolar power in international politics. Here, the US stands alone; by definition, there are no other great powers

that can approximate the material power and political influence of the US. Of course, there are other powerful states in the world, but none of them is a peer of the US, the sole superpower. In the unipolar world, the President still has valuable foreign affairs expertise useful for the pursuit of the national interest, but the necessity of acting with speed, secrecy, and dispatch is not as urgent. Since the US is dominant, it has greater latitude to develop foreign policy, define more broadly the national interest, and pursue national objectives because the potential for serious conflict with peer states is reduced. Stated slightly differently, the error costs tend to be lower. This does not mean that the US is free to do what it wants in international politics—it simply suggests that relative to a multipolar world, the unipolar world reduces some of the concerns that speaking with one voice or centralization address.

It also leads to a different reading of the one-voice factor in the political question doctrine. Again, the structure of international politics is simply a background condition that helps inform the merits of centralization. In the unipolar world, the need for centralization in foreign affairs is not as acute as it is in the multipolar world. And, in the same unipolar world, the benefits of acoustic dissonance increase. Since the US is a superpower, the international political environment is not as complicated or taxing as the more challenging multipolar world. This permits the US to act with greater transparency and less haste, engage in more open deliberation, and encourage greater participation of Congress and the courts. At the same time, centralizing decision making still has some role to play; the President still maintains a high level of expertise regardless of whether the US is in a multipolar or unipolar world. Thus, to ensure that the President's expertise and the value of centralization are captured by the doctrine, while still profiting from the virtues of some acoustic dissonance, the one-voice presumption should be relaxed when the US is the dominant power in a unipolar world. That is, the burden of demonstrating the necessity of speaking with one voice on a particular foreign affairs question should rest with the first mover, generally the President.

D. CONCLUSION: STATUS QUO VERSUS SHIFTING PRESUMPTIONS

Treating the one-voice factor as presumption that shifts ac-

cording to international political conditions represents an improvement on the status quo for several reasons. First, it is information generating and only applies under the conditions when the costs of deliberation and information production are likely to be lowest. In practice, the President enjoys the presumption in a multipolar world, when the benefits of speaking with one voice and centralization of foreign affairs decision making are most important to the US. Similarly, the President bears the burden of showing that the one-voice presumption is necessary in a unipolar world, when the benefits of acoustic dissonance are more apparent. Either way, the President has the opportunity, in both the unipolar and multipolar world, to insulate his decision making from review by making a showing that speaking with one voice is appropriate.

Second, the information-generating component of the shifting presumption will likely result in a better-informed judiciary on foreign affairs issues and, in some instances, result in better policy outcomes. At the very least, it encourages greater participation by Congress and the courts in foreign affairs when such participation will likely produce the most benefits and the least cost: in a unipolar world. Third, this approach brings some clarity to the current operation of the one-voice factor as part of the political question doctrine's multifactor balancing test. It is less manipulable than traditional standards, but more flexible than rules. Finally, rather than leaving judges without guidance in weighing the multiple factors or determining whether to use the political question doctrine to insulate the President's action from review, the approach outlined here provides the courts with a more rigorous, parsimonious, and easily applicable framework for thinking about the merits of speaking in one voice in foreign affairs.

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