CASE NOTES

CONSTITUTIONAL LAW—WHETHER THE PRESIDENT MAY TERMINATE A MUTUAL DEFENSE TREATY WITHOUT CONGRESSIONAL APPROVAL UNDER THE CONSTITUTION IS A NON-JUSTICIABLE POLITICAL QUESTION (Plurality).— ***Goldwater v. Carter*** **(U.S. Sup. Ct. 1979).**

On December 15, 1978, President Carter announced that the United States would recognize the People's Republic of China (PRC) as the sole government of China.[1] At the same time, the President announced that the United States would notify the Republic of China ("ROC" or "Taiwan") that its mutual defense treaty with that country would be terminated as of January 1, 1980.[2] On December 22, 1978, Senator Goldwater, along with seven other Senators and sixteen Congressmen, filed suit against the President in the Federal District Court for the District of Columbia. The Senators and Congressmen claimed that the President's failure to submit the notice of termination to Congress for its approval had deprived each of them of their constitutional right to be consulted and to vote on treaty termination.[3] Thus, plaintiffs sought declaratory and injunctive relief to prevent termination of the Taiwan treaty in the absence of Senate or Congressional approval. The President, for his part, maintained that he had the authority to unilaterally terminate the Taiwan treaty as part of his constitutional authority over foreign affairs.[4]

On October 17, 1979, the district court granted plaintiffs' motion for summary judgment.[5] The district court held that the termination of the Tai-

---

1. Goldwater v. Carter, 617 F.2d 697, 700 (D.C. Cir. 1979).

2. In the early 1970's, the U.S. embarked on a policy to "normalize" relations with the PRC. Because both the PRC and the ROC claimed, and still claim, to be the sole government of China, in order to recognize the PRC it was necessary to de-recognize the ROC. It was within this context that the President determined that although the U.S. would continue to maintain unofficial relations with the "people of Taiwan," there would be no "meaningful vitality" to a mutual defense treaty when there was no recognized state.

3. Goldwater v. Carter, 481 F. Supp. 949, 950 (D.D.C. 1979).

4. *Id.* at 960.

5. *Id.* at 950-51. In a previous memorandum order dated June 6, 1979, the district court dismissed the plaintiffs' complaint without prejudice on the ground that plaintiffs' lacked standing. *Id.* at 950. The district court stated that three resolutions then pending in the Senate might resolve the controversy without the need for judicial intervention. *Id.* at 954. On the same day that the district court's memorandum order was issued, the Senate called up Resolution 15. Senate Resolution 15, as amended by the Foreign Relations Committee, would have recognized some fourteen grounds that would justify unilateral action by the President to terminate treaty obligations of the United States. *Id.* The Committee version would have recognized the right of the President to terminate treaties containing termination clauses like Article

wan treaty could not legally be accomplished without either the approval of two-thirds of the Senate or a majority of both houses of Congress.[6] Although the Constitution is silent on the subject of treaty termination, the district court found support for its decision in Article II, section 2 of the Constitution[7] and in the Supremacy Clause.[8] The district court reasoned that since the Constitution requires the advice and consent of the Senate in the treaty-making process, the same role for the Senate could fairly be implied in the treaty-terminating process. Relying on the status of treaties as the supreme law of the land, the district court analogized treaty termination to the repeal of domestic laws. Thus, the district court determined that termination of a treaty like the repeal of any other "law of the land," requires the approval of both houses of Congress for its accomplishment.[9]

In a *per curiam* opinion, the court of appeals, sitting *en banc*, reversed the decision of the lower court.[10] A majority of judges[11] rejected the reason-

---

X of the Taiwan treaty, *viz.*, a clause providing that either party could terminate the treaty upon one year's notice to the other party. *Id.* at 954 n.17. No final vote was ever taken on Resolution 15, but the Byrd Amendment was voted on and substituted for the committee version of the Resolution. The Byrd Amendment provides "[t]hat it is the sense of the Senate that approval of the United States Senate is required to terminate any mutual defense treaty between the United States and another nation." *Id.* at 954.

It was on the basis of the Senate's action on the Byrd Amendment that plaintiffs filed a motion for alterration of the June 6 order of dismissal. In his opinion of October 17, 1979, Judge Gasch stated that the Senate's action on the Byrd Amendment was an indication of "at least some congressional determination to participate" in the treaty termination process. *Id.* Because no further Congressional action seemed likely, Judge Gasch concluded: "there is no apparent risk of circumventing or evading the legislative process by a decision on the merits." *Id.* at 955.

6. *Id.* at 965. The district court also ruled that plaintiffs and standing to bring suit having suffered the requisite injury in fact as a result of the denial of their right to be consulted and to vote on treaty termination, *see supra* note 5, and that the issue presented was not a non-justiciable political question. *Id.* at 958.

7. Article II, section 2 of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present Concur; . . . ." U.S. CONST. art. II, § 2.

8. The Supremacy Clause provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; . . . ." U.S. CONST. art. VI, cl. 2.

9. 481 F. Supp. 962-65.

10. 617 F.2d 697 (D.C. Cir. 1979).

11. Circuit Judges McGowan, Robinson, Wald and Wilkey formed the majority who decided the case on its merits. In a concurring opinion joined by Circuit Judge Tamma, Chief Judge Wright was of the opinion that Senator Goldwater lacked standing to bring suit. In Chief Judge Wright's view, plaintiffs would have suffered the necessary injury in fact only if Congress as a whole had suffered injury in fact. The only way Congress could have suffered injury under the circumstances of this case would be if the President had thwarted the will of Congress. Since Congress had taken no final action on the Taiwan treaty, *see supra* note 5, there was no congressional will for the Executive to thwart. Consequently, Chief Judge Wright concluded that the injury the plaintiffs claimed to have suffered, *i.e.*, the nullification of their individual

ing of the district court on the merits and determined that neither Article II, section 2 nor the Supremacy Clause compelled the conclusion that either Senate or Congressional approval was required to terminate the Taiwan treaty. The majority emphasized that a treaty is *sui generis;* unlike a domestic law, a treaty's major effects are external to the United States. As such, the abrogation of a treaty could not be analogized to the repeal of a domestic statute.[12] The majority concluded that the President, as Chief Executive and as the spokesman for the United States in foreign affairs, had not exceeded his authority in unilaterally terminating the treaty with the ROC.[13]

In a two sentence order the United States Supreme Court granted plaintiffs' petition for writ of certiorari, *held,* vacated and remanded with instructions to dismiss.[14] A plurality of the Justices[15] ruled that the issue of whether the President may terminate a treaty under the Constitution without Congressional approval is a political question and therefore not justiciable.

Justice Rehnquist, speaking for the plurality, stated that because the controversy in question involved the conduct of the United States' foreign relations, it should be left to the political branches of the government to resolve.[16] Justice Rehnquist noted the absence of any constitutional provi-

---

votes, was due to their minority position in Congress and not due to any action taken by the President. *Id.* at 714 (Wright, C.J., concurring). On problems of standing in general, *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 13 (3d ed. 1976) [hereinafter cited as WRIGHT].

In a voluminous dissent, Circuit Judge MacKinnon examined the history of treaty termination of the United States, concluding that the power to terminate treaties is a shared power under the Constitution. Judge MacKinnon would have affirmed that part of the judgment of the lower court which required approval of a majority of both houses of Congress to legally terminate the Taiwan treaty. 617 F.2d at 740 (MacKinnon, J., dissenting).

12. *Id.* at 705.

13. *Id.* at 709.

14. Goldwater v. Carter, 100 S. Ct. 533 (1979).

15. Chief Justice Burger and Justices Stewart and Stevens joined with Justice Rehnquist to form the plurality. Justice Marshall concurred in the result, but filed no opinion. Justices Blackmun and White joined in the grant of the writ of certiorari, but dissented from the judgment and would have set the case for argument. Justice Powell concurred in the judgment on the ground that the issue was not ripe for judicial review. Justice Powell stated: "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority." *Id.* at 534 (Powell, J. concurring). Because Congress had taken no official action with respect to the Taiwan treaty, there was no actual confrontation between the executive and legislative branches. Justice Powell concluded that unless Congress chose to confront the President, it was not the Court's job to do so. *Id.* Justice Powell disagreed, however, with the application of the political question doctrine by the plurality. *See* text accompanying notes 61-67 *infra.* In his dissent, Justice Brennan did not view the political question doctrine as a bar to a decision on the merits. Because the power of recognition is committed by the Constitution solely to the President, Justice Brennan would have sustained the President's action in terminating the Taiwan treaty as a necessary incident to the recognition of the PRC. *Id.* at 539 (Brennan, J., dissenting).

16. 100 S. Ct. at 536.

sions governing treaty termination, and the need for different treaty termination procedures, depending on the particular treaty and the circumstances surrounding its termination. Because of the need for flexibility in treaty termination, Justice Rehnquist determined that political standards, rather than judicial ones, must govern the dispute over the termination of the Taiwan treaty.[17] Justice Rehnquist concluded that unlike private litigants, the litigants before the Court represented coequal branches of government, each had resources available to them to protect and assert their interests and were thus not dependent upon the Court to vindicate those interests.[18] *Goldwater v. Carter,* 100 S.Ct. 533 (1979).

The political question doctrine is an exception to the federal courts' power to review "cases" and "controversies."[19] The doctrine is founded primarily on the separation of powers within the federal government and the policy of judicial self-restraint. In effect, when a federal court invokes the political question doctrine it refuses to decide a case properly placed before it.[20] The legal requirements of standing, ripeness and adverseness have been grouped with the political question doctrine as "avoidance techniques" to be used by the Supreme Court to avoid making improvident or unprincipled decisions.[21] However, a major distinction exists between these other legal requirements and the political question doctrine. When the Court refuses to decide a case because it is not ripe or because the plaintiffs lack standing, the Court's decision affects only the case before it; it does not bar a decision on the merits in future cases.[22] By contrast, the political question doctrine attaches to the issue itself and normally prevents future litigation of that issue, regardless of the parties involved or the injury they may have suffered.[23]

In the century-and-a-half since the political question doctrine was first invoked,[24] there have been numerous attempts by commentators to reduce

---

17. *Id.* at 537.

18. *Id.* at 538.

19. *See generally* C. WRIGHT, *supra* note 11, at §§ 12-14.

20. Michelman, *The Supreme Court 1968 Term,* 83 HARV. L. REV. 7, 63 (1969) [hereinafter cited as Michelman, *The Supreme Court*].

21. A. BICKEL, THE LEAST DANGEROUS BRANCH 69-71 (1962) [hereinafter cited as BICKEL].

22. Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L. J. 517, 529-37 (1966) [hereinafter cited as Scharpf, *A Functional Analysis*]. This distinction is at the root of Justice Powell's disagreement with the plurality opinion in *Goldwater. See* text accompanying notes 66-71 *infra.*

23. *Id.*

24. *Luther v. Borden* was the first important case in which the doctrine was applied in the United States. In *Luther,* the Court refused to decide which of two competing factions was the established, and therefore republican, government of Rhode Island, holding that the application of the guarantee clause rested with the political branches of government. 48 U.S. (7 How.) 1 (1849). Since *Luther,* the Court has consistently refused to consider challenges to state action based on the guarantee clause. *See, e.g.,* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (claim that initiative and referendum destroyed republican form of government

the doctrine to a precise formulation.[25] Unfortunately, the doctrine has largely eluded such attempts to "domesticate" it. A brief look at three of these attempts will provide the theoretical backdrop for an analysis of the *Goldwater* Court's protrayal of the political question doctrine. The "classicist" theory[26] of the political question doctrine takes *Marbury v. Madison*[27] as its starting point. The classicist view stresses the duty of the Court to decide all cases properly placed before it.[28] Thus, the classicist does not permit the Court to exercise discretion in deciding which cases it will hear. Since judicial review is seen as a constitutional duty, the only cases the Court may refuse to decide are cases involving matters which the Constitution explicitly commits to the other departments of government to resolve.[29] In other words, applying the political question doctrine constitutes fulfillment of a constitutional mandate. Of course, in each case in which the political question doctrine is interposed, the Court must first determine whether the issue presented is in fact textually committed by the Constitution to a branch of government other than the courts, a determination which itself requires interpretation of the Constitution.[30]

The "prudentialist" view[31] conceives of the political question doctrine as a product of judicial discretion rather than constitutional interpretation.

---

held nonjusticiable).

25. *See, e.g.*, BICKEL, *supra* note 21; Finkelstein, *Judicial Self-Limitation*, 37 Harv. L. Rev. 338 (1924) [hereinafter cited as Finkelstein, *Self-Limitation*]; Scharpf, *A Functional Analysis*, *supra* note 22; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as Wechsler, *Neutral Principles*].

26. Professor Wechsler is a leading proponent of the classicist view. *See* Wechsler, *Neutral Principles*, *supra* note 25. For an excellent critique of the various formulations of the political question doctrine see Scharpf, *A Functional Analysis*, *supra* note 22.

27. 5 U.S. (1 Cranch) 137 (1803).

28. Michelman, *The Supreme Court*, *supra* note 20, at 64.

29. *Id.*

30. Wechsler, *Neutral Principles*, *supra* note 25, at 9. Professor Wechsler described the doctrine as follows:

> [A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.
>
> . . . .
>
> [T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgment wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is *toto caelo* different from a broad discretion to abstain or intervene.

Id. at 7-8, 9.

31. For a prudentialist analysis of the doctrine see BICKEL, *supra* note 21; Finkelstein, *Self-Limitation*, *supra* note 25.

To the prudentialist, judicial review is not a constitutionally imposed duty.[32] Rather, it is a means by which the Court can "stand above politics and provide principled guidance for society."[33] However, some issues are so politically controversial that the Court would undermine its power by deciding them. To the prudentialist, the political question doctrine provides a means of avoiding the dilemma of ruling on an issue when the decision will either sacrifice principles to expediency or will weaken the Court's authority.[34] To invoke the doctrine is to exercise discretion. Thus, to the prudentialist, a decision to apply the doctrine in a particular case does not require constitutional interpretation, but an assessment of the political climate.

Unlike the classicist and prudentialist schools of thought, the "functionalist" approach is not based on a particular conception of judicial review.[35] The functionalist defines the scope of the political question doctrine by examining the decided cases to determine what judicial objectives were being pursued in the Court's application of the doctrine.[36] The functionalist then categorizes these objectives and concludes that the doctrine should be invoked whenever one of these objectives becomes important in the circumstances presented by a particular case.[37] Because the proper scope of the political question doctrine is not defined by reference to larger principles of judicial review, the functionalist would apply the doctrine in pursuit of a variety of objectives.[38] Unlike the prudentialist, who would assign primary importance to the preservation of the Court's power, the functionalist would view this objective as just one of many factors to be considered in applying the political question doctrine.

The first serious judicial attempt to provide a concrete formulation of the political question doctrine came in the case of *Baker v. Carr*.[39] In *Baker*, Justice Brennan began as a functionalist and examined the decided cases in an effort to determine the objectives which the doctrine serves. From this

---

32. Michelman, *The Supreme Court*, *supra* note 20, at 64.

33. *Id. See* BICKEL, *supra* note 21, at 23-28.

34. Professor Bickel's rationale for the doctrine is as follows:

> Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

BICKEL, *supra* note 21, at 184.

35. Professor Scharpf presents the functionalist view. *See* Scharpf, *A Functional Analysis*, *supra* note 22.

36. Michelman, *The Supreme Court*, *supra* note 20, at 65.

37. *Id.*

38. *Id.*

39. 396 U.S. 186 (1962).

examination, Justice Brennan derived six categories or "elements," at least one of which is present in any political question case:

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a poltiical decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[40]

Upon examination it becomes apparent that the *Baker* test presents a synthesis of the three lines of thought discussed above.[41] The "textual commitment" element represents the classicist position. Prudential concerns are expressed in elements four, five, and six. Elements two and three are statements of functionalist extraction.

Mirroring these three viewpoints, the *Baker* formulation to a certain extent reflects the shortcomings of all three. All three political question formulations speak in generalized terms. In the case of the classicist and prudentialist this may be attributed to the fact that both positions are based on larger principles of judicial review. The functionalist, by his approach might be thought to have a better chance of escaping generalizations. Unfortunately, the functionalist cannot rationalize the political question cases without producing categories[42] so broad that they fail to provide concrete guidance for the resolution of future cases.[43] While the *Baker* elements, expressed in broad and conclusory terms, suffer the functionalist inadequacy of failing to provide concrete guidance, *Baker* was generally applauded as a first step in alleviating the confusion in the courts (and among the commentators) in understanding and applying the political question doctrine.[44] Not unnaturally, the *Baker* test has been employed by the lower courts as the definitive statement of the political question doctrine.[45]

---

40. *Id.* at 217 (numerical emphasis added).

41. Michelman, *The Supreme Court, supra* note 20, at 65-66.

42. Professor Scharpf's analysis resulted in categories such as "the need for uniformity of decision," "deference to the wider responsibilities of the political departments" and "normative limitations of the political question." Scharpf, *A Functional Analysis, supra* note 22, at 573, 578, 583.

43. Michelman, *The Supreme Court, supra* note 20, at 66.

44. Jackson, *The Political Question Doctrine: Where Does it Stand after Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?* 44 U. COLO. L. REV. 477, 478 (1973) [hereinafter cited as Jackson].

45. For a discussion of the application of the *Baker* formulation by the lower courts and of how *Powell v. McCormack* may have distorted the *Baker* test, *see* Jackson, *supra* note 43.

In his opinion for the *Goldwater* plurality,[46] Justice Rehnquist studiously avoided the *Baker* test. Instead, Justice Rehnquist relied on *Coleman v. Miller*[47] for his conclusion that the issue of whether Congressional approval is required to legally accomplish termination of the Taiwan treaty is a nonjusticiable political question.[48] In *Coleman,* members of the Kansas legislature attacked the validity of a vote of the Kansas Senate ratifying the Child Labor Amendment.[49] Because the Constitution gives Congress alone the authroity to submit constitutional amendments to the states for ratification, the *Coleman* Court ruled that it is for Congress and not the courts to decide the length of time during which, and under what circumstances, a state's ratification of a given amendment will be effective.[50] Justice Rehnquist analogized the constitutional provisions concerning the amendment process to those pertaining to the treaty-making process and stated: "while the Constitution is express as to the manner in which the Senate shall participate in the ratification process of a treaty, it is silent as to that body's participation in the abrogation of a treaty."[51] Therefore, because the Constitution is silent regarding both the treaty-terminating process and the termination of the ratification of constitutional amendments, Justice Rehnquist viewed *Coleman* as authority for deciding that it rested with the Executive and Congress to resolve a dispute between the two over the validity of a specific treaty-terminating procedure.[52] Continuing the analogy, Justice Rehnquist reasoned that just as the validity of a particular state's ratification of a constitutional amendment might be decided differently for different amendments, the validity of a particular treaty termination procedure might be decided differently for different treaties, both determinations being controlled by political, rather than judicial, standards.[53]

Justice Rehnquist stated that the justification for concluding that the question presented in *Goldwater* was political in nature was even more compelling than in *Coleman* because the question in *Goldwater* involved foreign relations.[54] Justice Rehnquist did not elaborate on this statement, but pre-

---

46. *See* note 15 *supra.*

47. 307 U.S. 433 (1939).

48. 100 S. Ct. at 536-38.

49. The plaintiffs in *Coleman* claimed *inter alia* that the Kansas legislature's vote in favor of ratification was ineffective because the Kansas legislature had previously rejected the amendment and that action negated subsequent ratification, and because the amendment had lost its validity because the requisite three-fourths of the states had failed to ratify the amendment within a reasonable time of its submission to them. 307 U.S. at 436.

50. 307 U.S. 433. This was the holding of Chief Justice Hughes in his "opinion of the Court." However, four members of the Court were of the opinion that Congress had exclusive power over the ratification process. *Id.* at 456-60 (Black, J., concurring with whom Roberts, Frankfurter and Douglas, J.J., joined).

51. 100 S. Ct. at 537.

52. *Id.*

53. *Id.*

54. *Id.*

sumably was alluding to cases which have held questions of foreign policy to be inappropriate for judicial resolution.[55]

In addition, Justice Rehnquist found it necessary to distinguish the *Steel Seizure* case,[56] a case cited by Senator Goldwater as authority for reaching the merits of the dispute over the termination of the Taiwan treaty. In the *Steel Seizure* case, private litigants brought suit challenging the President's authority under his war powers to seize the nation's steel mills.[57] The Court enjoined enforcement of the President's seizure order holding that the order was an unconstitutional usurpation of the law-making authority of Congress.[58] Justice Rehnquist distinguished the *Steel Seizure* case on the ground that the plaintiffs in that case were private and did not have resources outside the judicial forum to protect and assert their interests.[59] In contrast, the dispute in *Goldwater* was between coequal branches of government, both enjoying ample means outside the judicial forum to vindicate their interests. In a footnote, Justice Rehnquist made reference to the fact that Congress has a variety of tools at its disposal to influence the President's conduct in treaty matters.[60] The inference being that when Congress wants to participate in the treaty termination process it can find, and in the past it has found, the political means to do so.

In a separate concurring opinion, Justice Powell took issue with the plurality's conception and application of the political question doctrine. Justice Powell maintained that if the issue presented in *Goldwater* was ripe for decision,[61] the political question doctrine would not bar a decision on the merits.[62] By way of illustration, Justice Powell examined the *Baker* elements[63] and concluded that none of them were present in the case at bar. In his discussion of the *Baker* test, Justice Powell gave primary consideration to the "textual commitment" element. After determining that the Constitution does not unquestionably commit the power to terminate treaties to the President alone, Justice Powell found that neither the prudentialist nor the functionalist components of the *Baker* test[64] would prevent the Court from applying the normal principles of constitutional interpretation to decide whether congressional approval is necessary to give a Presidential decision

---

55. *See* note 84 *infra*.
56. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
57. *Id.*
58. *Id.*
59. 100 S. Ct. at 538.
60. *Id.* at 538 n.1. Among the congressional tools for influencing foreign policy decisions, Justice Rehnquist noted Congress' power to regulate commerce with foreign nations, raise armies and declare war. Justice Rehnquist also noted Congress' power over the appointment of ambassadors and the funding of embassies and consulates. *Id.*
61. *See* note 15 *supra*.
62. 100 S. Ct. at 536.
63. *See* text accompanying note 40 *supra*.
64. *See* text accompanying notes 40-41 *supra*.

to terminate a treaty the force of law.[65] Apart from his reliance on the *Baker* elements, the thrust of Justice Powell's argument was that if the President and Congress had reached irreconcilable positions over the termination of the Taiwan treaty, it would be the responsibility of the Court to resolve the dispute as part of its duty "to say what the law is."[66]

To illustrate his disagreement with the plurality, Justice Powell posed the following hypothetical situation. Suppose the President signs a mutual defense treaty with a foreign country and later announces that this treaty will go into effect despite its rejection by the Senate. According to Justice Powell, under Justice Rehnquist's analysis this situation would present a nonjusticiable political question despite the fact that article II, section two of the Constitution[67] would clearly resolve the dispute.[68] In Justice Powell's view the nature of the legal issue presented in his hypothetical is no different from that presented in *Goldwater*—in both the court would be called upon to interpret the Constitution to determine whether congressional approval is required to give a Presidential decision on the validity of a treaty the force of law.[69]

It is hazardous, and perhaps pointless, to speculate as to how the Court or a particular Justice will react to a given factual situation. However, Justice Powell's criticism of the plurality's conception of the political question doctrine does seem warranted. Justice Rehnquist is vulnerable to Justice Powell's criticism because of his failure to make the distinction between the minority position taken by the plaintiffs, individual Congressmen and Senators, *vis-a-vis* termination of the Taiwan treaty and the position taken, or lack thereof, by Congress as a whole *vis-a-vis* such termination.[70] Justice Rehnquist's characterization of the dispute in *Goldwater* as one "between coequal branches of our government"[71] leads one to the conclusion that if there was a genuine stalemate between Congress and the President, Justice Rehnquist would invoke the political question doctrine thereby washing his hands of the Court's responsibility to intervene to resolve the dispute. If

---

65. 100 S. Ct. at 534.

66. *Id.* at 536. Justice Powell's argument is strongly reminiscent of former Chief Justice Warren's treatment of the political question doctrine ten years earlier in *Powell v. McCormack*. The *Powell* Court held on the merits that the House of Representatives did not have the constitutional authority to exclude one of its duly elected members on grounds other than for a failure to meet age, citizenship and residency requirements as set forth in the Constitution. 395 U.S. 486 (1969). In rejecting the contention that the Constitution gives unreviewable power to the House to set qualifications for membership and to judge its members, the Court emphatically asserted that it is the responsibility of the Supreme Court to determine whether a matter has been committed by the Constitution to another branch and whether the action of that branch exceeds its authority. 395 U.S. at 549.

67. *See* note 7 *supra*.

68. 100 S. Ct. at 535.

69. *Id.*

70. *See* note 5 *supra*.

71. 100 S. Ct. at 538. *See* text accompanying notes 59 & 60 *supra*.

indeed the President and Congress, and not just a few individual members thereof, had come to loggerheads over the termination of the Taiwan treaty, the need for judicial resolution of the dispute would be great. Such a situation would not only present a constitutional crisis of the first order, it would also entail grave external ramifications for this country. Governmental indecision as to the status of a mutual defense treaty with one country would jeopardize our relations with all countries. Such indecision would cause other countries to question the President's authority to speak for the nation, thereby undermining the President's power to operate on the international scene. Lack of confidence in the United States' foreign policy would have a destabilizing effect on international politics, causing nations who depend on us to look elsewhere for aid and those who fear us to take advantage of our paralysis. Faced with this type of scenario, it would indeed be imperative for the Court to intervene to determine the constitutional validity of the President's decision to terminate the Taiwan treaty. One hesitates to suggest that Justice Rehnquist would invoke the political question doctrine if presented with such a scenario. However, the language of his opinion in *Goldwater* is certainly open to such an interpretation.

Whether or not one accepts this interpretation, the plurality's invocation of the political question doctrine in *Goldwater* unnecessarily carves out an exception to judicial review. By refusing to decide the question presented on the ground that it was "political" in nature, the plurality made all future controversies over the constitutional division of power between the Executive and Congress in the treaty terminating process unreviewable.[72] The plurality's reliance on *Coleman*[73] as authority for the conclusion that *Goldwater* presented a nonjusticiable political question was misplaced. First, Justice Rehnquist's analogy between the constitutional provisions concerning the amendment process and those concerning the treaty power[74] is not persuasive. The Constitution gives Congress alone the authority to submit amendments to the states for their approval.[75] Thus, a decision that Congress alone should determine the efficacy of a state's ratification does not negate the Court's responsibility to interpret the Constitution to resolve disputes between the political branches of government. In contrast, the Constitution mandates both executive and congressional participation in the treaty making process.[76] Consequently, a decision that the President and Congress should jointly determine the validity of an executive action without judicial

72. This was Justice Powell's interpretation of the effect of the plurality opinion. 100 S.Ct. at 534 (Powell, J., concurring). However, since the opinions of Justices Marshall, Blackmun and White with respect to the applicability of the political question doctrine in *Goldwater*, *see* note 15 *supra* are not known, it would of course be possible for the present Court to decide a controversy over treaty termination on its merits in spite of the *Goldwater* plurality.

73. *See* text accompanying notes 47-53 *supra*.

74. *See* text accompanying note 51 *supra*.

75. U.S. CONST. art. V.

76. *See* note 7 *supra*.

interference is, by definition, an abdication of the Court's duty as ultimate interpreter of the Constitution to resolve constitutional disputes between the branches.

In addition, the Child Labor Amendment at issue in *Coleman* was calculated to overrule a decision of the Supreme Court.[77] As pointed out by Justice Powell, a decision on the merits in *Coleman* would have placed the Court in the position of overseeing the very constitutional process used to reverse Supreme Court decisions.[78] In such circumstances, it has been argued that the Court could not fulfill its responsibility "to say what the law is" without, at the same time, undermining the legitimacy of its power to do so.[79] Similar prudentialist considerations were not present in *Goldwater*.

The fact that the dispute in *Goldwater* involved foreign relations does not compel the conclusion that the issue presented was nonjusticiable. An examination of foreign relations cases has led one writer to conclude that with very few exceptions "the Court has consistently decided on their merits all *constitutional* issues arising out of cases involving the foreign relations power."[80] Indeed, the Court has decided on their merits cases involving the constitutional scope of the treaty power *vis-a-vis* the states[81] and *vis-a-vis* individuals.[82] The Court has also passed on the constitutional allocation of competence in treaty-making between the executive and legislative branches.[83] It is, however, true that the Court has refused to review the propriety of foreign policy decisions made by the political branches.[84] Nevertheless, a decision determining the validity under the Constitution of President Carter's termination of the Taiwan treaty would not require the Court to judge the wisdom of the presidential policy behind the treaty termination. Such a dicision would only require the Court to interpret the Constitution to determine whether the President had exceeded the authority given to him by the Constitution.

It is not meant to be implied from the foregoing analysis that the plurality should have decided *Goldwater* on the merits; only that another means for avoiding a decision should have been employed. Justice Rehn-

---

77. Hammer v. Dagenhart, 247 U.S. 251 (1918).

78. 100 S. Ct. at 536 n.2.

79. Sharpf, *A Functional Analysis*, *supra* note 22, at 589.

80. *Id.* at 542.

81. *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

82. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957).

83. United States v. Belmont, 301 U.S. 324 (1937); B. Altman & Co. v. United States, 224 U.S. 583 (1912).

84. In *Oetjen* the Court stated:

> [T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decisions.

Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

quist's strongest argument for refusing to decide the case on its merits was his recognition of the need for different termination procedures depending on the particular treaty and the circumstances surrounding its termination.[85] This need for flexibility in treaty termination procedures led Justice Rehnquist to conclude that political, and not judicial, standards should govern the treaty termination process.[86] A ruling by the *Goldwater* Court that approval of two-thirds of the Senate or a majority of both houses of Congress was required to terminate the Taiwan treaty would have severely restricted the President's authority to unilaterally terminate any treaty in the future regardless of the circumstances which might necessitate such unilateral termination. On the other hand, a decision upholding the President's unilateral termination of the Taiwan treaty would have prevented Congress from asserting any influence over treaty termination procedures in the future regardless of the factors which might cause Congress to attempt to block unilateral termination by the President. In other words, any decision on the merits in *Goldwater* would have locked the United States into a specific termination procedure thereby preventing the President or Congress, depending in whose favor the Court held, from responding to contingencies in international politics as they arose. Given the lack of direct confrontation between Congress and the President over the Taiwan treaty, a decision on the merits, resulting as it would in such profound consequences for the conduct of United States' foreign policy, was properly avoided by the Court.

A decision on the merits could have been avoided, however, without the plurality's invocation of the political question doctrine. By invoking the political question doctrine, the plurality has made it necessary for courts to overcome the precedential weight of *Goldwater* should they be presented with a genuine dispute between Congress and the President over treaty termination in the future. A ruling by the plurality that the plaintiffs lacked standing[87] or that the case was not ripe for judicial review[88] would have preserved the issue presented in *Goldwater* for decision in a future case properly placed before the Court. Such a ruling would not have created a special exception to judicial review as the plurality has done.[89] Furthermore, a ruling on one of these alternative grounds would have avoided further confusion of the political question doctrine which will undoubtedly result from the plurality's treatment of the doctrine. By its studied avoidance of the *Baker* test, the *Goldwater* plurality has chipped away at the already skeletal foundation of guidelines for applying the political question doctrine provided by *Baker*. Moreover, the plurality's application of the political question doctrine in *Goldwater* raises doubts as to the current Court's willing-

85. *See* text accompanying note 53 *supra*.
86. 100 S.Ct. at 537.
87. Two judges of the court of appeals espoused this reasoning. *See* note 11 *supra*.
88. This was Justice Powell's rationale for not reaching the merits. *See* note 15 *supra*.
89. *See* text accompanying note 20 *supra*.

ness to fulfill its duty as ultimate interpreter of the Constitution to "say what the law is."

Alice M. Shuman.