CONSTITUTIONAL LAW—POLITICAL QUESTION DOCTRINE—SENATORIAL COURTESY IMMUNE FROM JUDICIAL REVIEW—*Passaic County Bar Ass'n v. Hughes,* 108 N.J. Super. 161, 260 A.2d 261 (Ch. Div. 1969).

> [W]hether the practice of senatorial courtesy is or is not constitutional . . . is a nonjusticiable issue which the court should not undertake to resolve. Whether the practice is to be longer sanctioned or finally condemned must be determined at the bar of public opinion.[1]

The New Jersey Superior Court recently held that, under the political question doctrine, the practice of senatorial courtesy is immune from judicial evaluation. As a result, this unwritten rule of the Senate should continue to serve in New Jersey as an effective check on the virtually unlimited power of the governor to fill positions throughout the state with men of his personal choice.

On April 2, 1969, pursuant to the requirements of the New Jersey Constitution,[2] Governor Richard J. Hughes indicated his intention to nominate three men for vacant judgeships in Passaic County.[3] Nominations for these offices were sent to the Senate on April 10, 1969. Nominations for two other vacant judgeships[4] were likewise submitted for Senate advice and consent on August 6, 1969. No action was taken by the Senate with respect to any of these nominations. As a result of the shortage of judges, a suspension of the trial of all civil cases was announced by the Passaic County Assignment Judge, effective with the commencement of the September, 1969 term of court.

Plaintiff, Passaic County Bar Association, is a nonprofit member-

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1 Passaic County Bar Ass'n v. Hughes, 108 N.J. Super. 161, 173, 260 A.2d 261, 268 (Ch. Div. 1969).

2 N.J. CONST. art. VI, § 6, par. 1:

> The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the judges of the inferior courts with jurisdiction extending to more than one municipality. No nomination to such an office shall be sent to the Senate for confirmation until after seven days' public notice by the Governor.

3 A vacancy occurred in the office of Judge of the Juvenile and Domestic Relations Court on April 28, 1967; on June 28, 1967, an additional County Court judgeship was created by act of the Legislature; and on September 7, 1967, a judge of the Passaic County District Court died.

4 On August 1, 1969, a judge of the Passaic County Court was mandatorily retired by reason of age. The previous day, the Governor gave public notice of his intention to nominate a judge of the Passaic County District Court to succeed the retiring County Court judge, and of his further intention to fill the ensuing vacancy on the District Court with a designated nominee.

ship corporation consisting of several hundred attorneys practicing or residing in Passaic County. The Bar Association charged that, as a consequence of the Senate's inaction in confirming the nominations, "there are a disproportionately large number of judicial vacancies in Passaic County, . . . the trial of civil law actions in the county has virtually ceased, . . . and . . . the courts have the necessary competence to grant the relief sought."[5]

The Senate's procrastination with regard to the judgeship nominations was due to the practice of senatorial courtesy. Briefly stated, this is the tradition by which senators will respect the objection of a fellow senator and vote against, or refuse to vote for, the confirmation of an appointee to a political position in the objecting senator's home district. The first case of senatorial courtesy on the national level occurred in 1789, only three months after the commencement of Congress's first term.[6] This practice has since been invoked on both the federal and state levels of government, sometimes openly, at other times more discreetly, but usually quite effectively.[7]

Disregarding the political ramifications inherent in these, and indeed any, nominations and confirmations, the court in the case at bar had as its primary issue the constitutionality of senatorial courtesy. Without deciding this issue, the court simply determined that, based on the political question doctrine as derived from the separation of powers clause of the state constitution,[8] it could not judge the legality of that practice. Disposition of the case on the ground of nonjusticiability made it unnecessary to reach the claims on the merits.

A political question has been defined as that inquiry which has been "entrusted by the sovereign for decision to the so-called political departments of government, as distinguished from questions which the

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5 108 N.J. Super. at 163-64, 260 A.2d at 263.

6 President Washington had nominated one Benjamin Fishbourn to fill the post of naval officer at the Port of Savannah, and although he was well qualified for that position, actually holding at the time by virtue of a state appointment an office similar to that which Washington desired to appoint him, the Senate rejected the nomination as a courtesy to the two senators from Georgia who had a candidate of their own, one Lachlan McIntosh, a prominent politician in the state. The following day Washington withdrew the nomination in deference to the two Georgia senators, and nominated their candidate. *See* J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 40 (1953); H.J. FORD, WASHINGTON AND HIS COLLEAGUES 90 (1918).

7 *See generally* Harris, *supra* note 6, at ch. XIII.

8 N.J. CONST. art. III, par. 1:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

sovereign has set to be decided in the courts."[9] However, such a "definition" is hardly helpful in identifying a political question, since its essential characteristic is presented as its being the object of executive or legislative determination, and no more. True, the political question is "primarily a function of the separation of powers;"[10] however, merely because another governmental department has original jurisdiction over a matter is not conclusive.

All controversies political in nature are not necessarily political questions. In determining whether this doctrine should be invoked, a court will examine the controversy and then, after it satisfies itself that the question as presented is nonjusticiable, will justify its inaction by calling the issue a "political question." It is simply a matter of putting the cart before the horse. Thus, the true rationale in invoking the political question rule is not

$$case = political\ issue = nonjusticiable$$

but rather

$$case = nonjusticiable = political\ question\ doctrine.$$

A succinct statement of this proposition was offered a half century ago:[11]

> There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reasons, "political questions." What are these political questions? To what matters does the term apply? It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by

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9 Sevilla v. Elizalde, 112 F.2d 29, 32 (D.C. Cir. 1940).

10 Baker v. Carr, 369 U.S. 186, 210 (1962).

11 Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924). Another explanation of this doctrine was proffered in 62 HARV. L. REV. 659 (1949):

> The doctrine will defeat jurisdiction where the courts have no mechanism for compelling the disclosure of information adequate to support a decision, or where the argument and decision of the question in the public judicial forum would seriously embarrass governmental activities of extreme delicacy which are clearly entrusted by the Constitution to another department of government. Or, a decision may be withheld because of the high probability that the courts would require the assistance of the legislative arm to enforce their decisions and because the possible public consequences of decision are vastly disproportionate to those of ordinary litigation. Or, the decision may be thought to require a review of procedural formalities in the coordinate branches of government which should be within the unqualified control of those branches.

Id. at 663.

> the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.

Thus, although there is a diversity of theory concerning the basis for the political question doctrine,[12] it is primarily invoked when the facts of the controversy, or other practical considerations, render the issue inappropriate for judicial determination. Perhaps this is why "political question" has been described as a residual term, comprehensible only in terms of the particular facts which give rise to its application.[13]

Although the federal courts have held several classes of cases to involve political questions,[14] basic similarities exist in most, if not all, cases:[15]

1. The issue itself is committed to either the legislature or the executive for final determination, with no provision for judicial evaluation;

2. The function is organically "political," i.e., pertaining to the administration of government, either state or federal, as well as foreign relations;

3. Where judicial review is implied, it would be ineffectual because

a. there are no manageable standards by which the court can resolve the issue; or

b. it could not render finality to the controversy; or

c. any judicial resolution would be incapable of enforcement.

Any further discussion of the theoretical bases and historical justifications for the invocation of the political question doctrine would be unnecessary. Suffice it to say that, upon determining that an issue sounding in politics is inappropriate for judicial inquiry, the courts will designate it a "political question" and be done with it. Far out-

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12 *Compare* Finkelstein, *supra* note 11; Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

13 24 NOTRE DAME LAW. 231, 236 (1949).

14 Field, *supra* note 12, lists seven main categories: negotiations, violation, and termination of treaties; beginning and ending of war; admission and deportation of aliens; jurisdiction over territory; recognition of states, governments, war, and measures short of war; status of Indian tribes; and the guarantee of a republican form of government. *See also* note 13 *supra*.

15 *See* Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Pacific States Telephone Co. v. Oregon, 223 U.S. 118 (1912); Taylor v. Beckham, 178 U.S. 548 (1900); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); Kirk v. Boehm, 216 F. Supp. 952 (E.D. Pa. 1963), *aff'd*, 376 U.S. 512 (1964). *See also* Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962).

weighing any occasional injustice[16] resulting from this procedure is a practical utility which cannot be ignored.

"No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons than the maxim [that] . . . the three great departments of power should be separate and distinct."[17] True though this statement may be, the writers of the Federal Constitution nevertheless violated its basic tenet by subjecting the presidential appointment power to the advice and consent of the senate.[18] It is significant, however, that the propriety of this interweaving of authority has never been seriously questioned. This bi-departmental procedure for appointments was early accepted by the Supreme Court,[19] and in the case at bar the challenge is not to the constitutionality of advice and consent, but rather a derivative practice, *viz.*, senatorial courtesy.

In holding that the custom of senatorial courtesy is a nonjusticiable issue, the court recalled the discussion attending the adoption of the appointment procedure at the New Jersey State Constitutional Convention of 1844. The framers of the constitution were aware of the shortcomings of the advice and consent system, having witnessed its operation on the national level. Yet they accepted this procedure, thereby withholding from the judiciary any authority to intervene.[20] The separation of powers rule was thus invoked with regard to the judicial right to intervene, while the checks and balances doctrine was cited as justifying the adoption of the advice and consent procedure.

As an additional ground for reaching its decision, the court cited *Baker v. Carr*,[21] where it was stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of

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16 In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Georgia legislature passed an act which would virtually annihilate the Cherokees as a political society, and seize all the lands of the Cherokee nation in Georgia, if enforced. Refusing to interfere, the Supreme Court, speaking through Chief Justice Marshall, stated that any interposition "savors too much of the exercise of political power, to be within the proper province of the judicial department. . . . If it be true, that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future." *Id.* at 20. *But see* Baker v. Carr, 369 U.S. at 215-16 n.43 for a different interpretation of this case.

17 THE FEDERALIST, (No. 47) at 324 (J. Cooke ed. 1961) (Madison).

18 *See* U.S. CONST. art. II, § 2, cl. 2.

19 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155-56 (1803).

20 *See* Kligerman v. Lynch, 92 N.J. Super. 373, 223 A.2d 511 (Ch. Div. 1966), *cert. denied*, 389 U.S. 822 (1967).

21 369 U.S. 186, 217 (1962).

> judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the 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.

The first test—a "textually demonstrable constitutional commitment of the issue to a coordinate political department"—is applicable to the case at bar, since the Governor's power to nominate and appoint, and the Senate's power to advise and consent, are clear commitments derived from the text of the constitution itself.[22] However, the fact that a branch of the government is constitutionally empowered to perform certain functions does not necessarily preclude it from judicial review. It is the province of the judiciary to inquire whether acts of the other two branches are within the bounds of constitutionality. This power is not an assumed prerogative, nor any assertion of a superiority of the courts over the other governmental departments, but rather a discharge of the duties imposed upon the judiciary by the constitution itself, under the general scheme of checks and balances upon which our constitutional system of government was conceived and founded.[23]

Also cited by the court as determinative of the nonjusticiability of the issue of senatorial courtesy was the second of the analytical threads comprising the political question doctrine as set forth in *Baker v. Carr, i.e.*, "a lack of judicially discoverable and manageable standards for resolving it." Assuming that the Senate fails to confirm a judicial nomination, either by abstaining from voting or by rejecting it by ballot, the court would be compelled to delve "into the thought processes and motivations which led each individual senator to vote or not vote as he did."[24] As the court aptly states:[25]

> How is a judicial inquiry to be undertaken to find out whether, in fact, inaction on the part of the Senate results from a deference to the tradition and practice of senatorial courtesy or from some other cause? Are senators to be interrogated as to the reasons and motivations for their actions or their inaction?

Thus, the court examined the facts of the controversy as submitted to

22 *See* N.J. CONST. art. VI, § 6, par. 1.

23 Denison v. State, 61 S.W.2d 1017, 1019 (Tex. Civ. App.), *error refused*, 122 Tex. 459, 61 S.W.2d 1022 (1933).

24 Kligerman v. Lynch, 92 N.J. Super. 373, 376, 223 A.2d 511, 513 (Ch. Div. 1966).

25 108 N.J. Super. at 173, 260 A.2d at 268.

it, determined, for various reasons, that any judicial resolution on the merits would be impracticable, and consequently invoked the political question doctrine. The propriety of this procedure, at least in the case at bar, cannot be questioned.

As has been mentioned, in determining that the issue of senatorial courtesy is nonjusticiable, the court apparently disregarded the personal motives and political maneuvers which occasioned the controversy. The question arises as to whether the political background *should* be a factor in the result. Obviously not, because no matter what reasons lay behind the senatorial inaction, the fact remains that judicial intervention would be ineffective. An understanding of the cause would not, at least in this case, render the issue suitable for judicial review.

But what of the plaintiffs; are they without a remedy? It would appear so, for although temporary measures, such as transferring judges from one county to another, reassigning judges from criminal to civil cases within a county, and increasing the amount of available judge time by lengthening the court day or even the court week, can be taken to help alleviate crowded court calendars, the official forum for relief is "the bar of public opinion,"[26] which is a kind way of stating that the plaintiffs have no legal redress. But a temporary annoyance, and perhaps even an occasional injustice,[27] should be tolerable, if indeed not welcome, in order to protect the constitutional mandate of an effective and realistic advice and consent procedure.

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26 *Id.*

27 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).