CONSTITUTIONAL LAW—JUSTICIABILITY—TREATY TERMINATION: A NONJUSTICIABLE CONTROVERSY—*Goldwater v. Carter*, 100 S. Ct. 533 (1979).

Whether the constitutional authority to terminate a treaty rests with the President alone, or is shared with the Congress, is a sharply contested issue among commentators.[1] President Carter's unilateral notice of intention to terminate the 1954 Mutual Defense Treaty between the United States and the Republic of China has been acclaimed a "stroke of grand strategy,"[2] and condemned as "unconstitutional and illegal."[3] Regardless of which view is correct, the Supreme Court of the United States, in *Goldwater v. Carter*,[4] has decided that the issue presents a political, nonjusticiable question.

In an address to the nation on December 15, 1978, President Carter announced that on January 1, 1979, the United States would terminate diplomatic relations with the Republic of China and "recognize the People's Republic of China as the sole legal government of China."[5] This announcement culminated efforts begun under the Nixon administration to normalize diplomatic relations with the

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[1] The controversy stems from the fact that the Constitution expressly delineates the roles played by the legislative and executive branches in treaty formation, U.S. CONST. art. II, § 2, cl. 2, but is mute on the mechanism for treaty termination. Compounding the problem is the fact that both branches otherwise enjoy substantial constitutional authority in the area of foreign affairs. *Compare* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy . . . ."); *id.* cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ."); *id.* art. II, § 3 ("[H]e shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed . . . .") *and* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") *with* U.S. CONST. art. II, § 2, cl. 2 (Senate granted power to consent before a treaty can become binding); *id.* art. I, § 1 ("All legislative Powers . . . shall be vested in the Congress . . . ."); *id.* art. I, § 8, cl. 11 (Power to declare war vested in the Congress); *id.* art I, § 8, cl. 3 ("[Congress shall have the Power] [t]o regulate Commerce with foreign Nations . . . .").

An analysis of constitutional authority to terminate treaties lies beyond the scope of this note. For a detailed discussion of that topic, see Comment, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 S.W. L.J. 729 (1979), and authorities cited therein.

[2] Kennedy, *Normal Relations with China: Good Law, Good Policy*, 65 A.B.A.J. 194, 195 (1979).

[3] Goldwater, *Treaty Termination Is a Shared Power*, 65 A.B.A.J. 198, 198 (1979).

[4] 100 S. Ct. 533, 536 (1979).

[5] United States Statement, Diplomatic Relations Between the United States and the People's Republic of China, 14 WEEKLY COMP. OF PRES. DOC. 2266, 2266 (Dec. 18, 1978).

People's Republic of China.[6] In addition, the President announced that the Republic of China would be notified concurrently that the United States intended to terminate the 1954 Mutual Defense Treaty pursuant to its terms.[7]

On December 22, 1978, Senator Barry Goldwater, joined by twenty-five fellow congressmen, filed suit in the United States District Court for the District of Columbia, challenging the President's authority to terminate the Treaty without prior legislative consent.[8] Additionally, the plaintiffs alleged a violation of Section 26 of the International Security Assistance Act of 1978,[9] the "Dole-Stone Amendment," which provides "[i]t is the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954."[10] According to Senator Goldwater, the President had acted without the prescribed "prior consultation."[11]

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[6] It was during President Nixon's visit to the People's Republic of China in 1972 that the "Shanghai Communique" was released, declaring a goal of normalization of diplomatic relations between the United States and the People's Republic of China. Joint Statement, *Shanghai: Joint Communique*, 8 WEEKLY COMP. OF PRES. DOC. 473, 475 (Feb. 27, 1972). By implication, one of the conditions precedent to that goal was the termination of the 1954 Mutual Defense Treaty between the United States and the Republic of China. *Id.* at 474.

[7] Article X of the Treaty, which had been negotiated in the aftermath of the Korean War as a security measure against possible future military threats from the People's Republic of China, provides that "[e]ither Party may terminate . . . one year after notice has been given to the other Party." Mutual Defense Treaty with the Republic of China, Dec. 2, 1954, United States–Republic of China on Taiwan, 6 U.S.T. 433, 437, T.I.A.S. No. 3178.

[8] Complaint for Declaratory and Injunctive Relief, Goldwater v. Carter, No. 78-2412, at 3 (D.D.C., filed Dec. 22, 1978) [hereinafter cited as Complaint for Declaratory and Injunctive Relief]. For an enumeration of the party plaintiffs, see Comment, *supra* note 1, at n.3-5.

[9] The International Security Assistance Act of 1978, Pub. L. No. 95-384, 92 Stat. 730 (1978). *See* Complaint for Declaratory and Injunctive Relief, *supra* note 8.

[10] The International Security Assistance Act of 1978, Pub. L. No. 95-384, 92 Stat. 730, 746 (1978). The President had signed the Act just a few months prior to his address. *See* Goldwater v. Carter, No. 79-2246, slip op. at 5 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint,* 100 S. Ct. 533 (1979). It must be noted, however, that legislation couched in terms of "it is the sense of" is not binding on the President. *See* CONG. REC. S7048 (daily ed. June 6, 1979) (remarks of Sen. Harry F. Byrd, Jr.).

[11] *See* Complaint for Declaratory and Injunctive Relief, *supra* note 8. The defendants disputed this allegation and filed affidavits detailing the alleged consultation. *See* Declaration of Richard Holbrooke in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. *See also* Defendants' Answer to Plaintiffs' Interrogatory No. 7.

Due to the nonmandatory nature of the Dole-Stone amendment, the district court was unable to determine the degree of consultation required to satisfy its terms. Goldwater v. Carter, No. 78-2412, slip op. at 11 (D.D.C. June 6, 1979), *reopened at* 481 F. Supp. 949 (D.D.C. 1979). For this reason, those counts of plaintiffs' complaint alleging injury under the amendment were dismissed. *Id.*

Although the district court expressed its belief that the power to terminate treaties is shared by the President and Congress,[12] it reasoned that since the suit involved derivative constitutional rights of *individual* legislators, the "political arena" was the appropriate forum for vindication.[13] To bypass the political arena and to achieve standing, the district court ruled that legislation, dissenting from the President's action and adopted by the Senate or Congress *as a whole*, was required to establish the requisite injury in fact.[14] "In the absence of any injury to the institution as a whole, the individual legislators . . . [could not] claim a derivative injury."[15] Accordingly, the absence of such legislation was deemed to preclude standing.[16]

In reaching this posture, the court was cognizant of legislation then pending in the Senate that could evidence that body's "prerogative to act,"[17] and therefore confer standing.[18] In direct response,[19] the Senate as a whole voted to adopt Resolution 15 on the same day as the district court ruling.[20] The Resolution maintained "[t]hat it is the sense of the Senate that approval of the United States Senate is

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[12] Goldwater v. Carter, No. 78-2412, slip op. at 10 (D.D.C. June 6, 1979), *reopened at* 481 F. Supp. 949 (D.D.C. 1979).

[13] *Id.* at 8.

[14] *Id.* at 9-10, 11-12. For a detailed analysis of the standing issue, compare Comment, *supra* note 1, at 748-54, and Goldwater v. Carter, 481 F. Supp. 949, 951-56 (D.D.C. 1979) with Goldwater v. Carter, No. 79-2246, slip op. at 1-16 (D.C. Cir. Nov. 30, 1979) (Wright, C.J., concurring).

[15] Goldwater v. Carter, No. 78-2412, slip op. at 10 (D.D.C. June 6, 1979), *reopened at* 481 F. Supp. 949 (D.D.C. 1979). In this respect, the district court adopted the rationale of Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), that to the extent the powers of Congress are impaired, so too is the power of each congressman, since his office confers the right to participate in the exercise of the powers of the institution. *Id.* at 435-36.

[16] Goldwater v. Carter, No. 78-2412, slip op. at 10 (D.D.C. June 6, 1979), *reopened at* 481 F. Supp. 949 (D.D.C. 1979).

[17] *Id.*

[18] *Id.* at 9 n.13. *See* S. Res. 15, 96th Cong., 1st Sess., 125 CONG. REC. S220 (daily ed. Jan. 18, 1979) (introduced by Sen. Harry F. Byrd, Jr.); S. Res. 10, 96th Cong., 1st Sess., 125 CONG. REC. S209 (daily ed. Jan. 15, 1979) (introduced by Sen. Dole): S. Con. Res. 22, 96th Cong., 1st Sess., 125 CONG. REC. S219 (daily ed. Jan. 18, 1979) (introduced by Sen. Goldwater).

[19] The Senate was fully aware of the implications of its vote with regard to the district court's June 6th Order. Prior to the vote, Senator Goldwater explained the Order to the Senate, and provided each senator with a summary thereof. 125 CONG. REC. S7033-7035 (daily ed. June 6, 1979). During the debate on Resolution 15, passages from the Order were read by Senator Church. *Id.* at S7058.

[20] Resolution 15 was adopted by a vote of 59 to 35. *See* 125 CONG. REC. S7038-7039 (daily ed. June 6, 1979). However, because the Senate could not agree whether the Resolution should have retrospective effect, so as to embrace President Carter's actions with regard to the 1954 Mutual Defense Treaty, no final action was taken. *Id.* at S7052-7053. The Resolution again was debated while the case was before the court of appeals, but again no final action was taken. *Id.* at S16683-16692 (daily ed. Nov. 15, 1979).

required to terminate any Mutual Defense Treaty between the United States and another nation."[21]

On the plaintiffs' motion to alter or amend the prior judgment in light of the Resolution,[22] the district court opined that the vote "evidence[d] at least some congressional determination to participate in the process whereby a mutual defense treaty is terminated."[23] In granting the motion, the court judged that the plaintiffs had perfected their derivative right to be consulted and to vote on termination of the Treaty, and therefore had established standing.[24] The court further determined that in view of the Resolution, the case did not present a nonjusticiable political question, but a power struggle "between the two political branches in a posture suitable for judicial resolution."[25]

The district court ruled on the merits in *Goldwater v. Carter*[26] and concluded that the constitutional power to terminate a treaty was not vested solely in either political branch. Analogizing to the constitutional process of treaty formation,[27] the court envisioned treaty

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[21] S. Res. 15, 96th Cong., 1st Sess., 125 CONG. REC. S220 (daily ed. Jan. 18, 1979) (introduced by Sen. Harry F. Byrd, Jr.). *But see* S. Rep. No. 119, 96th Cong., 1st Sess., 125 CONG. REC. S7014 (daily ed. June 6, 1979) (Senate Resolution 15, as amended by the Senate Committee on Foreign Relations, recognized constitutional authority on behalf of the President to terminate treaties containing termination clauses like that of the 1954 Mutual Defense Treaty).

[22] Rule 59(a) provides in part:

> On a motion for a new trial [served not later than 10 days after entry of judgment] in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Fed. R. Civ. P. 59(a). The motion was granted on October 17, 1979. Goldwater v. Carter, 481 F. Supp. 949 (D.D.C. 1979), *rev'd*, No. 79-2246 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[23] Goldwater v. Carter, 481 F. Supp. 949, 954 (D.D.C. 1979), *rev'd*, No. 79-2246 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[24] *Id.* at 955.

[25] *Id.* at 958. According to the court, the case did not require a determination of " 'the propriety of what may be done in the exercise of [the foreign affairs power, which] is not subject to judicial inquiry or decision.' " *Id.* at 957 (quoting Baker v. Carr, 369 U.S. 186, 211 n.31 (1962) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)). To the contrary, the court believed that the case presented the antecedent question whether the President had acted within the bounds of executive authority, the resolution of which clearly falls within the court's responsibility to interpret the Constitution. *Id. See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[26] 481 F. Supp. 949, 962 (D.D.C. 1979), *rev'd*, No. 79-2246 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[27] *Id.* The process of treaty formation follows a tripartite model: the President negotiates terms with the other party; the Senate consents to ratification; and, the President communicates such ratification to the other party. *See* Comment, *supra* note 1, at 733-34. *But see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 130 (1972) (function of Senate is to give consent to ratification; President actually ratifies).

termination as a series of complementary acts grounded in the separation of powers doctrine.[28] The executive function was recognized to embrace the initial policy determinations and negotiations regarding the question whether a treaty should be terminated, and final communication of termination to the other party.[29] However, since a treaty is part of the "supreme Law of the Land,"[30] and since the Congress is vested with "All legislative Powers" under the Constitution,[31] the actual decision whether to terminate was deemed to be a legislative function.[32] Accordingly, the district court held that the President must receive either two-thirds approval by the Senate, or majority approval by both houses of Congress, before he constitutionally could give notice of treaty termination.[33]

The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed the district court holding.[34] In the opinion of the appellate court, the constitutional power to terminate the 1954 Treaty was not shared by the President with the Senate or the Congress.[35] Although it agreed that the plaintiffs had suffered injury in fact so as to have standing,[36] the court concluded that Presi-

[28] 481 F. Supp. at 962. In the court's opinion, "[i]t would be incompatible with our system of checks and balances if the executive power in the area of foreign affairs were construed to encompass a unilateral power to terminate treaties." *Id.* at 963.

[29] *Id.* at 962. This is consonant with the generally accepted view that the President is the sole representative of the nation in its relations with foreign countries. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[30] U.S. CONST. art. VI.

[31] *Id.* art. I, § 1.

[32] 481 F. Supp. at 962.

[33] *Id.* at 964-65 & 964-65 nn.67-69. The potential impact of this decision on possible and permissible mechanisms for termination of the proposed SALT II agreement now before the Senate, has been noted. *See Taiwan Suit Ruling on Appeal Amid Warnings*, 65 A.B.A.J. 1631 (1979).

[34] Goldwater v. Carter, No. 79-2246, slip op. at 3 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979). The court of appeals lacked the majority necessary to dispose of the appeal on the threshold questions of standing and justiciability. *Id.*

[35] *Id.* at 12-20.

[36] *Id.* at 9-12. In finding injury in fact, the court viewed President Carter's unilateral notice of intention to terminate the Treaty as a disenfranchisement; "a complete nullification or withdrawal of a voting *opportunity*." *Id.* at 10 (emphasis added).

Examining the standing issue in a separate concurring opinion, Judges Wright and Tamm voted for reversal on the belief that the plaintiffs lacked a sufficient personal stake in the outcome so as to present an article III "case or controversy." *Id.* at 1-11 (Wright, C.J., concurring). The concurring judges explained that an allegation of injury to a voting *opportunity* traditionally had been considered insufficient to constitute injury in fact. *Id.* at 5. *See* Reuss v. Balles, 584 F.2d 461, 466-68 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); Harrington v. Bush, 553 F.2d 190, 211 (D.C. Cir. 1977). Rather, in order to have standing, a legislator had to show nullification of a vote *already cast*. Goldwater v. Carter, No. 79-2246, slip op. at 6 & n.5 (D.C. Cir. Nov. 30, 1979) (Wright, C.J., concurring), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979). *See* Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). *But see* Goldwater v. Carter, No. 78-2412, slip op. at 10 n.12 (D.D.C. June 6, 1979), *reopened at* 481 F. Supp. 949 (D.D.C. 1979).

dent Carter had acted constitutionally when he issued his unilateral notice of termination.[37]

The appellate court founded its holding, *inter alia*, upon article X of the Treaty.[38] The article provides that "[e]ither Party may terminate . . . one year after notice has been given to the other Party."[39] In the opinion of the appellate court, it was significant that the Senate had ratified the Treaty with such a termination clause without reserving any role for itself in the actual termination process.[40] For this reason, the court held that "the President's authority as Chief Executive is at its zenith when the Senate has consented to a treaty that expressly provides for termination on one year's notice, and the President's action is the giving of [that] notice."[41] After noting that the Senate had yet to take any decisive action in response to the President's announcement since it could not agree whether Resolution 15 would have retrospective effect,[42] the appellate court determined that the Treaty would terminate on January 1, 1980.[43]

The Supreme Court of the United States, in *Goldwater v. Carter*,[44] granted the plaintiffs' petition for certiorari on December 13, 1979, and rendered its decision without oral argument.[45] A divided Court vacated the judgment of the court of appeals and remanded the matter to the district court with directions to dismiss the complaint.[46] A plurality of the Court believed that President Carter's actions with regard to the 1954 Mutual Defense Treaty constituted a political, nonjusticiable question.[47]

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[37] Goldwater v. Carter, No. 79-2246, slip op. at 4, 25 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[38] *See* note 7 *supra*. In all, the circuit court enumerated ten grounds for reversal. Goldwater v. Carter, No. 79-2246, slip op. at 12-23 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979). While expressly declining to consider whether or not the presence of the termination clause was dispositive, the court did view it to be "of central significance." *Id.* at 23.

[39] Mutual Defense Treaty with the Republic of China, Dec. 2, 1954, United States–Republic of China on Taiwan, 6 U.S.T. 433, 437, T.I.A.S. No. 3178.

[40] Goldwater v. Carter, No. 79-2246, slip op. at 3-4, 24 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[41] *Id.* at 23. *See* note 31 *supra*.

[42] *Id.* at 4. *See* note 20 *supra*.

[43] *Id.* at 12.

[44] 100 S. Ct. 533 (1979).

[45] *Id.*

[46] *Id.* at 538 (Rehnquist, J., concurring). In the opinion of the Court, this procedural disposition was necessary so that the lower courts' decisions on what was in reality a nonjusticiable question would not " 'spawn any legal consequences.' " *Id.* (Rehnquist, J., concurring) (quoting United States v. Munsingwear, 340 U.S. 36, 41 (1950)).

[47] 100 S. Ct. at 536 (Rehnquist, J., concurring).

The plurality opinion, authored by Justice Rehnquist, relied heavily upon the prior Court decision in *Coleman v. Miller*.[48] In *Coleman*, the Court was asked to consider whether the Kansas State Senate constitutionally could ratify the Child Labor Amendment after it previously had voted to reject it.[49] The amendment had been proposed by Congress to undercut *Hammer v. Dagenhart*[50] and *Bailey v. Drexel Furniture Co.*,[51] wherein the Supreme Court held unconstitutional congressional attempts to regulate child labor. The *Coleman* Court held that whether the amendment had been duly ratified presented a political question.[52] In reaching this conclusion, the Court deemed it important that the Constitution only delineates the procedure for ratification of amendments, but is mute as to rejection.[53]

Justice Rehnquist noted that the Constitution similarly delineates the roles of the executive and legislative branches in treaty formation, but is mute as to the process for treaty termination.[54] Due to the lack of constitutional guidance, and the fact that unique termination mechanisms might obtain for each and every treaty, the plurality concluded that the controversy " 'must surely be controlled by political standards.' "[55] As a further justification for its holding of nonjusticiability, the plurality voiced its concern that since the case also touched upon the area of foreign relations, judicial intervention might constitute an impermissible intrusion into the President's foreign affairs power.[56]

Although he concurred in the dismissal of the complaint because he did not deem the controversy to be ripe for judicial review, Justice Powell strongly attacked the plurality's reliance upon the political question doctrine.[57] In a separate opinion, Justice Powell stressed

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[48] *Id.* at 536-37 (Rehnquist, J., concurring). *See* Coleman v. Miller, 307 U.S. 433 (1939).

[49] 307 U.S. 433 (1939).

[50] 247 U.S. 251 (1918).

[51] 259 U.S. 20 (1922).

[52] 307 U.S. at 450.

[53] *Id. See* U.S. CONST. art. V.

[54] 100 S. Ct. at 537 (Rehnquist, J., concurring). *See* U.S. CONST. art. II, § 2, cl. 2.

[55] 100 S. Ct. at 537 (Rehnquist, J., concurring) (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

[56] *Id.* (Rehnquist, J., concurring). *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[57] 100 S. Ct. at 533 (Powell, J., concurring). According to Justice Powell, the controversy was not sufficiently ripe for judicial review, and would not be so until the parties reached "a constitutional impasse." *Id.* at 534. Referring to the status of Senate Resolution 15, he concluded that since the Congress had not seen fit to challenge the President's actions, it was not the Court's province to do so. *Id.* However, Justice Powell seems to have misinterpreted the effect of legislation such as Senate Resolution 15. *See* note 10 *supra*.

that the amendments at issue in *Coleman v. Miller*, if ratified, would have reversed prior Court decisions.[58] Since judicial review of the efficacy of the State Senate's ratification would have placed the Court in a position to mold "the very constitutional process used to reverse Supreme Court decisions,"[59] prudential considerations weighed against judicial intervention.[60] The Justice did not discern any such considerations in *Goldwater v. Carter*.[61]

Addressing the plurality's concern with judicial intrusion into the President's conduct of United States foreign relations, Justice Powell stated " 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.' "[62] Rather than involving judicial review of, or intrusion into the President's conduct of foreign relations, he concluded that the question presented was only one of allocation of constitutional authority between the executive and legislative branches.[63] As Justice Powell noted, the Court readily has resolved such questions of authority on other occasions.[64]

A discussion of the plurality holding in *Goldwater* requires an analysis of *Baker v. Carr*,[65] the Court's most authoritative statement of the political question doctrine and nonjusticiability. From the various analytical threads comprising the doctrine, the *Baker* Court delineated essentially three tests which would characterize a question as "political": whether resolution of the issue involves questions textually committed by the Constitution, demonstrably or by reasonable inference,[66] to a coordinate political branch; whether resolution of the issue involves judicially unmanageable standards; and, whether resolution of the issue would entail various prudential considerations which counsel against judicial intervention.[67]

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[58] 100 S. Ct. at 536 n.2 (Powell, J., concurring). *See* notes 50-51 *supra* and accompanying text.

[59] 100 S. Ct. at 536 n.2 (Powell, J., concurring).

[60] *Id. See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 589 (1966).

[61] 100 S. Ct. at 536 n.2 (Powell, J., concurring).

[62] *Id.* at 535 (Powell, J., concurring) (quoting Baker v. Carr, 364 U.S. 186, 211 (1962)).

[63] *Id. See* note 25 *supra*.

[64] 100 S. Ct. at 536 (Powell, J., concurring). *See* Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974).

[65] 369 U.S. 186 (1962). Interestingly, the plurality opinion did not cite this landmark case.

[66] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 78 HARV. L. REV. 1, 7-9 (1959).

[67] 369 U.S. at 217. For a detailed discussion of the Court's political question practice, see Scharpf, *supra* note 60.

A close reading of *Baker* indicates that the Court perceived the "textual commitment" test to be of primary importance, since it justified the political question doctrine as an extension of the federal separation of powers.[68] Indeed, as Justice Douglas pointed out in his separate opinion, when the determination of an issue has been entrusted constitutionally to a coordinate branch, "the federal judiciary does not intervene."[69] The *Baker* Court recognized, however, that since the Court is the "ultimate interpreter of the Constitution," it "cannot reject as [a political question] a bona fide controversy as to whether some action denominated 'political' exceeds [whatever authority has been committed]."[70]

Cases involving United States foreign relations commonly are cited as examples of judicial abstention because the issues presented were political questions.[71] Nonetheless, a survey of the Court's abstention practice in this area reveals that the questions actually labelled "political" were, *finding constitutional authority to exist*, whether the actions of the executive or legislative branches were within the limits of that textually committed authority.[72] That is, though " 'the propriety of what may be done in the exercise of the foreign affairs power is not subject to judicial review or decision,' "[73] the Court has not abstained from reviewing whether the legislative or executive branches had constitutional authority to act in the first place.[74] For example, the Court has utilized the political question doctrine with respect to presidential decisions regarding which political faction represents the government of a foreign state,[75] and which nation has sovereignty over disputed territory,[76] "because [the President] had made decisions that were [his] to make."[77]

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[68] 369 U.S. at 210. *See* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 327 (1974).

[69] 369 U.S. at 246 (Douglas, J., concurring).

[70] 369 U.S. at 211, 217. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). In *Marbury*, Justice Marshall queried: "[t]o what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Id.* at 176.

[71] *See* L. HENKIN, *supra* note 27, at 210-16.

[72] *Id.* at 449 n.26 and accompanying text.

[73] 369 U.S. at 211 n.31 (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).

[74] As Professor Henkin has noted: "[The Court must review] whether the political branches of government . . . have exceeded constitutional limitations; as long as they act within their constitutional powers, the desirability or wisdom of what they do is a 'political question.' " L. HENKIN, *supra* note 27, at 449 n.26. *See id.* at 449.

[75] *See, e.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

[76] *See, e.g.*, Jones v. United States, 137 U.S. 202, 212 (1890).

[77] L. HENKIN, *supra* note 27, at 214.

Unlike most cases involving foreign policy, the issue in *Goldwater* did not involve the propriety of President Carter's actions in the exercise of his foreign affairs power.[78] Significantly, President Carter did not justify his termination of the 1954 Mutual Defense Treaty with his undisputed authority to recognize, or withdraw recognition from, foreign governments.[79] In cases where such authority was invoked, the Court has acknowledged that the President has an implied "[p]ower to remove . . . obstacles to full recognition [of foreign governments]," [80] and that the exercise of such textually committed power is judicially non-reviewable.[81] In this instance, President Carter chose to assert independent constitutional authority to terminate the Treaty pursuant to its terms.[82]

If the plurality's application of the political question doctrine rested upon the "textual commitment" test, it would be true, as Justice Powell asserted, that the Court should have reviewed the issue whether President Carter had constitutional authority to terminate the 1954 Treaty.[83] It seems, however, that Justice Powell misinterpreted the plurality's application of the doctrine. This is apparent from the fact that, in discussing the "confusion" inherent in the plurality opinion, the Justice set forth a hypothetical in which the President had unilaterally enacted a treaty despite prior Senate disapproval.[84] Justice Powell felt that the plurality's logic would lend itself to declare such a situation nonjusticiable, "even though Art. II, § 2, clearly would resolve the dispute" [85] by textual commitment.

Despite some confusing language which may have lead to Justice Powell's misunderstanding, the *Goldwater* plurality actually rested its holding not upon the "textual commitment" test, but rather upon the "lack of judicially manageable standards" test of the political question

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[78] *See* note 25 *supra*. *See also* Scharpf, *supra* note 60, at 585.

[79] *See* Goldwater v. Carter, No. 79-2246, slip op. at 3 n.2 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979). *See also* United States v. Pink, 315 U.S. 203, 229 (1942).

[80] 315 U.S. 203, 229 (1942).

[81] *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question. . . ."). *See also* L. HENKIN, *supra* note 27, at 214.

[82] *See* Goldwater v. Carter, No. 79-2246, slip op. at 3 n.2 (D.C. Cir. Nov. 30, 1979), *vacated and remanded to dismiss complaint*, 100 S. Ct. 533 (1979).

[83] As several commentators have noted, the Court has never decided that a constitutional power struggle between the executive and legislative branches is nonjusticiable. *See* R. BERGER, *supra* note 68, at 332. *See also* Scharpf, *supra* note 60, at 542.

[84] 100 S. Ct. at 535 (Powell, J., concurring).

[85] *Id.* (Powell, J., concurring). *See* U.S. CONST. art. II, § 2, cl. 2.

doctrine. Specifically, the plurality opinion found support for its holding of nonjusticiability in the total absence of constitutional guidance on treaty termination, and the fact that unique mechanisms might obtain for each and every treaty.[86] Citing *Dyer v. Blair*,[87] the plurality concluded that " '[a] question that might be answered in different ways for different [treaties] must surely be controlled by political standards rather than standards easily characterized as judicially manageable.' "[88]

Given this disposition of the case, it is quite confusing why the *Goldwater* plurality discussed its concern with judicial intervention into the area of foreign affairs.[89] Indeed, the opening sentence of the plurality opinion, which reads "I am of the view that the basic question presented . . . in this case is 'political' . . . because it involves the authority of the President in the conduct of our country's foreign relations,"[90] leads one to believe that this is the actual holding of the case. President Carter, however, did not even assert the power, incident to his foreign affairs power, to recognize or withdraw recognition from foreign governments.[91] More importantly, to correctly invoke the political question doctrine under the "textual commitment" test, the Court would in effect be saying that the President had made a decision that was his to make.[92] Given the Court's disposition of *Goldwater*, it is evident that the Court did not intend the Constitution to be so interpreted.

Goldwater v. Carter, therefore, does not represent the first "textual commitment" case in which the Court refused to decide a question of constitutional power, although Justice Powell asserted otherwise. To the contrary, the *Goldwater* Court was presented with a unique and problematical case in that, not only was the Constitution totally silent as to the proper procedure for treaty termination, but also that different termination mechanisms might exist for each

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[86] 100 S. Ct. at 537 (Rehnquist, J., concurring). In light of the actual grounds for application of the political question doctrine, the plurality's concern with intruding into the President's conduct of our foreign relations policy seems misplaced and confusing. Such concern seems to lend itself more to the "textual commitment" test. *See* text accompanying notes 71-77, *supra*.

[87] 390 F. Supp. 1291 (N.D. Ill. 1975).

[88] 100 S. Ct. at 537 (Rehnquist, J., concurring) (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

[89] 100 S. Ct. at 536-37 (Rehnquist, J., concurring).

[90] *Id.* (Rehnquist, J., concurring).

[91] *See* notes 79-82 *supra* and accompanying text.

[92] *See* note 77 *supra* and accompanying text.

and every treaty. Since there is no constitutional standard to guide judicial intervention, the Court peculiarly found itself unable to "[s]ay what the law is."[93]

Vincent John Paluzzi

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[93] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). *See* Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 511 (1924). "[T]he court must have some rule to follow before it can operate . . . [w]here no rules exist, the court is powerless to act." *Id.*