AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 9: Liberalism Divided – Judicial Power and Constitutional Authority

Goldwater v. Carter, 444 U.S. 996 (1979)

In 1978, President Jimmy Carter announced that the United States would recognize the People's Republic of China as the sole government of that country and withdraw recognition of the Republic of China (Taiwan), and soon thereafter the State Department informed Taiwan that it was terminating the Mutual Defense Treaty of 1955. Barry Goldwater, along with other senators, sought an injunction against the president from terminating the treaty without a two-thirds vote of the Senate. The district court issued the injunction against the secretary of state, holding that historical practice required Senate participation in the termination of treaties. The circuit court reversed on the merits. Without hearing arguments, the Supreme Court granted certiorari, vacated the judgment of the lower court, and remanded with instructions to dismiss the suit. There was no opinion for the Court in Goldwater *because the justices could not agree on the reasons for dismissing the case. Justice Rehnquist, Chief Justice Burger, Justice Stewart, and Justice Stevens insisted that whether the president could unilaterally terminate a treaty was a non-justiciable political question. Justice Powell believed the matter justiciable, but that the issue was not ripe for adjudication because Congress had not officially objected to the president's action.*

JUSTICE POWELL, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review.

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This Court has recognized that an issue should not be decided if it is not ripe for judicial review. *Buckley v. Valeo* (1976) (per curiam). Prudential considerations persuade me that 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. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

. . . . It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.

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Justice Rehnquist suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of *Baker v. Carr* (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review.

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. . . . [T]he text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone.

. . . . We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. . . . This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.

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. . . . Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell v. McCormack* (1969). If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "'to say what the law is.'" *United States v. Nixon* (1974), quoting *Marbury v. Madison* (1803).

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In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. See *Buckley v. Valeo*; *United States v. Nixon*; The Pocket Veto Case (1929); *Myers v. United States* (1926). Under the criteria enunciated in *Baker v. Carr*, we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

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JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE STEVENS join, concurring.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President. . . .

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I believe it follows a fortiori from *Coleman v. Miller* (1939) [holding that it is a political question whether a state legislature can rescind an earlier vote on ratification of a constitutional amendment] that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. . . .

I think that the justification for concluding that the question here is political in nature are even more compelling than in *Coleman* because it involves foreign relations -- specifically a treaty commitment to use military force in the defense of a foreign government if attacked. . . .

The present case differs in several important respects from *Youngstown Sheet & Tube Co. v. Sawyer* (1952), cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum. Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs." Finally, as already noted, the situation presented here is closely akin to that presented in

Coleman, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection.

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JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. While I therefore join in the grant of the petition for certiorari, I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

JUSTICE BRENNAN, dissenting.

I respectfully dissent from the order directing the District Court to dismiss this case, and would affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments.

In stating that this case presents a nonjusticiable "political question." Justice Rehnquist, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." *Baker v. Carr* (1962). But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision making power. Cf. *Powell v. McCormack* (1969). The issue of decision making authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.