



The Political Question Doctrine: Foreign Affairs as a Political Question (Part 4)

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This Legal Sidebar is the fourth in a [six-part series](#) that discusses the Supreme Court’s political question doctrine, which instructs that federal courts should forbear from resolving questions when doing so would require the judiciary to make policy decisions, exercise discretion beyond its competency, or encroach on powers the Constitution vests in the legislative or executive branches. By limiting the range of cases federal courts can consider, the political question doctrine is intended to maintain the separation of powers and recognize the roles of the legislative and executive branches in interpreting the Constitution. Understanding the political question doctrine may assist Members of Congress in recognizing when actions of Congress or the executive branch would not be subject to judicial review. For additional background on this topic and citations to relevant sources, please see the [Constitution of the United States, Analysis and Interpretation](#).

One area where the political question doctrine has particular importance is in foreign affairs. In 1918, the [Court](#) wrote, “The 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 decision.” However, despite that sweeping statement, as the Court recognized in [Baker](#), not “every case or controversy which touches foreign relations lies beyond judicial cognizance;” rather, the Court analyzes each question on a case-by-case basis. For example, [many pre-Baker cases](#) concluded that the judiciary was bound to defer to the political branches on certain questions involving the validity of treaties or the [recognition of foreign governments](#). The [Baker](#) court characterized those cases as ones in which “resolution of such issues frequently turn on standards that defy judicial application, . . . involve the exercise of a discretion demonstrably committed to the executive or legislature . . . [or] uniquely demand single-voiced statement of the Government’s views.”

The first major post-[Baker](#) case to consider these principles was the 1973 case [Gilligan v. Morgan](#). In [Gilligan](#), the Supreme Court declined to consider a claim that defective training of the Ohio National Guard had led to the violence that occurred at Kent State University three years earlier. The plaintiffs sought a “judicial evaluation of the appropriateness of the ‘training, weaponry and orders’ of the Ohio National Guard” and “continuing judicial surveillance” over the Guard to ensure compliance with any court-approved requirements. Although the case did not involve foreign policy, it raised related considerations. Recognizing that the case involved “[t]he complex, subtle, and professional decisions as

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to the composition, training, equipping and control of a military force,” the Court gave two reasons why the political question doctrine applied. First, [Article I, Section 8, of the Constitution](#) gives the authority for “organizing, arming, and disciplining the Militia” to Congress. Second, in concert with the explicit textual commitment of military supervision to a branch outside the judiciary, the Court recognized that the judicial branch was uniquely poorly suited to supervise this activity: “[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence.” Following what *Baker* called the “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,” the Court concluded that the case involved a political question.

The Court next considered whether it could hear a case involving a foreign policy question in 1979 in [Goldwater v. Carter](#). *Goldwater* involved the question of whether courts could entertain a lawsuit by Members of Congress over the President’s unilateral termination of a joint defense treaty with Taiwan. The plaintiff Members argued that this unilateral action deprived them of their constitutional role with respect to a change in the supreme law of the land. The Court voted to dismiss the case without hearing oral argument. Although six Justices voted to dismiss for want of jurisdiction, no opinion received five votes. Justice Rehnquist, writing for a plurality of four Justices, argued that the question presented was nonjusticiable “because it involve[d] 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.” The plurality made three main points in support of the lack of justiciability. First, the question involved separation of powers between two branches, each with resources “available to protect and assert its interests.” Second, the question involved foreign affairs. Finally, the Constitution was silent on the question presented, providing no standards to evaluate the question of the role of Congress in the termination of treaties. The fifth vote was provided by Justice Powell, who agreed that the complaint should be dismissed but for the lack of a ripe dispute rather than on political question grounds. Justice Marshall also concurred in the dismissal but provided no reasoning to support his decision.

In other cases, the Supreme Court has explicitly rejected the application of the political question doctrine, notwithstanding a foreign affairs or foreign treaty dimension to the case. For example, in [Japan Whaling Ass’n v. American Cetacean Society](#), the Court found that the political question doctrine did not prevent federal courts from adjudicating a question involving the interpretation of the International Convention for the Regulation of Whaling. Citing *Baker*, the Court noted that not every matter that touches foreign relations or foreign treaties was nonjusticiable. Rather, the question was whether the case “revolve[d] around policy choices and value determinations constitutionally committed for resolution” to the other branches. In *Japan Whaling*, the question presented was whether the Secretary of Commerce should have certified Japan as “diminishing the effectiveness” of the International Whaling Commission’s quotas under statutes that purportedly required the Secretary to do so. According to the Court, this question involved “applying no more than the traditional rules of statutory construction” in interpreting the Convention and the statutes at issue and, as such, did not present a political question.

The Court again found it had authority to make limited constitutional determinations in the foreign policy context in [Boumediene v. Bush](#). There, the Court considered whether it could entertain habeas petitions from prisoners designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. The United States argued that, because Guantanamo Bay was not a part of the United States, the United States had no sovereignty over it, and, as such, the writ of habeas corpus could not extend to prisoners held there. The Court agreed that, because the question of who held sovereignty over the location was a political question, it would “not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.” However, the Court went on to hold that nothing barred it from considering the “practical sovereignty” or “objective degree of control” the United States had over Guantanamo Bay. Previous cases designating sovereignty as a political question, the Court asserted, had referred to sovereignty in the “narrow, legal sense of the term” rather than the “colloquial sense.” Further, as it was

this colloquial sense that was relevant to the habeas writ, the Court reasoned that it had jurisdiction to evaluate the prisoners' claims.

The Court's embrace of a narrow conception of the political question doctrine continued in the most recent case to consider political question limits to federal court jurisdiction in foreign affairs, *Zivotofsky v. Clinton*. In *Zivotofsky*, the Court concluded that the political question doctrine could not justify refusing to hear cases involving the constitutionality of a federal statute. There, the Court addressed a statute that provided that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports. When the State Department refused to follow that law under a long-standing policy of not taking a position on the political status of Jerusalem, plaintiff Zivotofsky sued to enforce the statute. The Supreme Court concluded that the political question doctrine did not bar it from hearing the case. As the Court noted, the courts were "not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be." Instead, the courts were being asked to engage in the "familiar" exercise of determining what the statute meant and whether it was constitutional. The Court concluded that this exercise would require careful examination of the "textual, structural, and historical evidence" but that this was "what courts do" and that the difficulty of the problem was no justification for avoiding it.

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