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The Court; Insulating Itself from Politics through the Doctrine of Political Questions: A Critical Exposition

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Abstract

One of the most controversial theories in constitutional discourse is the doctrine of political questions. The court, by this, seeks to insulate itself from political pressures by avoiding the determination of questions which appear political in nature. The singular reason for this act is basically that some questions, such as this, are outside the purview of the courts to decide. Courts are therefore enjoined to refuse the determination of political questions in order to insulate itself from politics. This is despite the fact that democracy enjoins, constitutionalism, free speech, accountability, transparency, human rights, political pluralism and so on on the part of governmental institutions. The institution in which these concepts are anchored is the court. The paper therefore makes a critical exposition of the doctrine of political questions and contends that the court cannot insulate itself from politics merely because it has avoided the determination of political questions. Rather, this will amount to court abdicating its constitutional role as an organ of government. In this paper, various theories on political questions are examined.

Keywords: Judiciary, Political Questions, Constitutionalism, Policy, Democracy

1. Introduction

Justice Marshall, in an attempt to insulate the court from political pressure, in the case of *Marbury v Madison*[1] appears to have created two major controversial doctrines in constitutional law especially when some of his sentences are read in isolation. The first is the statement issued that it is "emphatically the province and duty of the judicial department to say what the law is." The statement, when read in isolation, establishes seemingly limitless constitutional authority in the Supreme Court. The constitution is the law and within the Supreme Court's power - its duty - to say what the law is. Therefore, it is the Supreme Court's province and duty to answer all constitutional questions with finality (Shamrahayu & Sambo, 2011). This is the path of judicial review. The second is the assertion that recognised the existence of certain questions that are wholly outside the purview of the courts by the use of the term 'questions in their nature political.' This has not been subject to definite definition. The statements when read together may reveal Marshall's fundamental conception of the separation of powers and highlights of both the limits of judicial authority and the interpretive role played by the political branches (Shamrahayu & Sambo, 2011). When these political questions are presented, it is the province and duty of legislature or the executive, not the courts, to say what the law is. These questions have formed the gist of the so-called 'political question doctrine' (Barkow, 2002).

The above approach is Justice Marshall's larger vision of the constitutional structure in which the institutional strengths and weaknesses of each branch are taken into consideration in resolving particular issues (Barkow, 2002). Unfortunately, the term political question has created more confusion than creating room for constitutional structure (Henkin, 1976). In other words, the doctrine of political questions has not been subject to a universally acceptable definition. It is defined the doctrine as a substantive ruling by the justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches (Chopper, 2005). It has been described as "Who gets to

decide what the right answer to a substantive constitutional question is?" and "Does the Constitution give a political branch the final power to interpret the Constitution?"(Tushnet, 2002). It is also seen as questions which the court foregoes their unique and paramount function of judicial review of constitutionality (Henkin, 1976). It has also been seen as the result of any development of devices for withholding the ultimate constitutional judgement of the Supreme Court and in a sense their sum (Bickel, 1962). It is also defined as questions which the courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers. The simplest is that it as a non justiciable matter (Nwosu, 2005). It is seen also as issues of constitutional law that are more effectively resolved by the political branches of government and not appropriate for judicial resolution (Redish). It also defined as when the court believes it to be a matter more appropriate for resolution by either of the other branches of government or where the court considers itself as incompetent as the matter is not amenable to resolution by judicial processes (Rodhe & Spaeth, 1976).

It appears there is therefore no universally acceptable definition of the doctrine (Imam, Sambo, Egbewole & Abdulkadir, 2011). The simplest meaning of term is a non-justiciable issue. What is crystal clear from the various attempted definitions of the doctrine is that the court will not go into the merit of the case and will refuse judicial review where a matter has to do with political question. When the doctrine of political question is applied in court, it is a way of avoidance because the court defers without reviewing the position taken by the political departments and refuses to comment on the lawfulness of the position (Scharpf, 1966). However, one must note the difference between avoidance in political question and avoidance on jurisdictional or procedural ground.[2] Where it is based on procedural ground, such as ripeness, or standing, it only affects that particular party, not the constitutional issue. Political question attaches itself to the issue. The court assumes jurisdiction but will not determine the issue in controversy. The two however have the same effect because the court will not eventually decide the matter on the merit. The paper is therefore focusing on where a competent court refuses to decide a case on the merit, not because it does not have jurisdiction on procedural ground but because the controversy presented is non-justiciable being political in nature or encroaching on the powers of the political class.

Notwithstanding the various definitions attached to the doctrine of political questions, the doctrine is further compounded with the various theories that have emerged to discuss the meaning, scope and rationale for non justiciability of questions which are political in nature. The paper therefore makes a critical exposition of the theories on the meaning of political questions and the rationale for the doctrine.

2. Theories on the Meaning and Scope of Political Questions

In order to explain the meaning and delimit the scope political questions, various theories have emerged. They are: the classical theory; the prudential theory which further includes: the opportunistic theory; the cognitive theory; and the normative theory.

2.1 *The Classical Theory on the Meaning and Scope of Political Questions*

The theory posits that political question is a question of constitutional interpretation rather than judicial discretion and it should be understood as a function of separation of power.[3] Wechsler appears to be the main proponent of this classical school. He submitted that the courts are called upon to consider whether the constitution has committed to another agency of government the autonomous determination of the issues raised, a finding which itself requires an interpretation rather than discretion to abstain or intervene (Wechsler, 1959). He argues while citing constitutional provisions on the impeachment by the Senate and the House as his point of departure, that each House of shall be the judge of the elections, returns, and qualification of its own members, punish its member for disorderly behavior and expel its members where necessary. He therefore considers all these as political questions which the courts should not interfere.

This position is subject to criticism on the ground that it does not support what Wechsler claims. This is because, the examples falls under the justiciable controversy which is within the power of the court to decide in some jurisdiction including United States. It involves dispute which are adjudicative in nature and therefore within the province of the judiciary (Scarpf, 1966). In the view of Shcarpf, he said whether this disposition is based upon an interpretation of the constitution cannot, of course, be determined merely by searching for references to a constitutional grant of power in the opinion. In order to answer this question, it becomes necessary to take a broader look at the court's practice in one particular field and to determine whether over all patterns of political question cases and cases

decided on the merit could be explained in terms of any reasonable interpretation of the constitution.

2.2 *The Prudential Theories on the Meaning and Scope of Political Questions*

The prudential theory evolved as a result of the criticism levied on the classical theory. The theory opines that political question is "something greatly more flexible, something of prudence, not construction and not principle" (Bickel, 1962). It is not based on constitutional interpretation but of prudence. Finkelstein (1924) described the prudential theory as follows:

> There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reason, "political questions." The term applies to all those matters of which the court, at a given time, will be of the opinion that it will be impolitic or inexpedient to take jurisdiction.

Prudential theory is further divided into opportunistic, cognitive and normative theories. This will be discussed.

2.2.1 An *Opportunistic Theory of Political Questions*

Finkelstein explained this theory in terms of court's instinct for political survival which would persuade the court to avoid the court from deciding "prickly issues" and "contentious questions" which touch the hypersensitive nerve of "public opinion." The premise upon which this theory is based is not convincing because it would make the court apprehensive on the particular position it has taken in a particular case (Scharpf, 1966). The court cannot run away from deciding a case properly brought before it all on the ground that it is controversial and thus could be hidden under the doctrine of political questions. Also, this could be criticized on the ground which would not likely focus on the parties disobedience, but upon the willingness of the public and political institutions to accept the court's determination of controversial issue as final and authoritative. However, where the court avoids political question because of its controversial nature, this cannot be correctly argued that there are no other controversial constitutional issues that are more controversial than political question. The court may determine these issues rightly or wrongly but will touch upon the "hypertensive nerves of public opinions" (Scharpf, 1966). It is therefore submitted that the court has all it takes not to seek protection under political question doctrine because of the fear or apprehension that it might be unpopular. What is important is that the court should not abandon its primary duty of formulating and vindicating principles to limit or manage potential clashes with political institutions and opinions of the public without having to resort to complete abdication. This cannot be explained by the political question doctrine satisfactorily.

2.2.2 A *Cognitive Theory of Political Theory*

Field explains political question in terms of 'a lack of legal principles to apply to the questions presented (Field, 1924).' If the danger of clash with the political institution or political controversy about an issue will not account for the court to use the doctrine, we may need to analyse the legal nature of questions which the court has avoided (Finkelstein, 1924). Field (1924) opined that:

> Whatever may be the difficulties in definitively describing the differences between the judicial and the legislative department, it seems settled and clear that the court must have some rule to follow before it can operate. Where no rules exist the court is powerless to act. From this, it follows that the courts cannot enter into questions of statecraft and policy.

It is the authors' view that even though the courts need to follow rules to operate; to argue that court is powerless to act where there are no rules is difficult to justify. This is because there is no how constitutional law could have grown and flourished anywhere in the world especially in America if the court had not been creative or not doing creative functions as advocated by the cognitive theory. Where there are no standards or rules, the court should create legal principles that would be applicable in the circumstances of the case. Although the court in the case of *Baker v Carr*,[4] Justice Frankfurter showed 'lack of judicially discoverable and manageable standards' as one of the elements of political questions, it is difficult to justify on cognitive grounds.[5] That is the reason why the 'minimum rationality test' has been suggested (Scharpf, 1966).

2.2.3 *A Normative Theory of the Political Question*

The question of standards has been restated in normative rather than cognitive terms by Jaffe (1961) as follows:

> We have seen that the constitution grants to the President certain powers which imply certain further

> auxiliary powers. But there may be something about the nature of these powers which in addition to their constitutional assignments, marks them as 'political.' Many of the questions that arise are of the sort for which we do not choose, or have not been able as to yet to establish, strongly guiding rules. We may believe that the job is better done without rules, that even though there are applicable rules, these rules should only be among the numerous considerations.

Jaffe therefore sees some other matters flowing from the powers of the political class apart from constitutional assignments as political questions because there are no guiding rules for its operation or its better done without rules. One is tempted to submit that the rationale of the phrase 'that the job is better done without rules'[6] is less convincing. The reason is that the President and the legislature get to power through legal means such as laws, rules and legal principles. Why should their activities not be regulated by laws and rules? Assuming without conceding that the job is better done without legal rules, why should the court not make it clear that their activities are lawful and valid as no rule is required thereby deciding the matter on the merit? (Bickel, 1962).

The second leg of Jaffe's point is also difficult to justify. He posited that 'that even though there are applicable rules, these rules should be among the numerous relevant considerations.' This appears to be a call for an extra legal measure all in the name of political question. Why should the court regard legal principles as applicable to particular circumstance but refuses to apply or enforce such principles?[7]
It is therefore submitted that such practice would damage the usefulness of the court as a court of law. Where would the court derive its authority to authorize an extra legal approach to solving questions? The court cannot distort the constitution to accommodate an extra legal factor. This would make it difficult for the court to protect constitutional provisions and defend the rights of the common man through the enforcement of legal provisions.

What then is the meaning and scope of political questions? It is therefore crystal clear from the above that the definitions and theories offered by various authors do not perfectly define and delimit the scope of the term political questions. All the definitions and theories have one flaws or another. They are products of individual idiosyncrasies. The definitions and theories do not entirely capture the intention of Marshall in *Marbury*'s case. This is perhaps the reason why an attempt has been made to list the factors or consideration (Nwabueze, 1985). An attempt to propose a definition that will incorporate the various definitions offered does not solve this problem.[8] This is because the incorporation will be suffering from all the defects of the proposed definitions. It is therefore better to describe the term political question to enable us properly analyse this research. This is not to say however that the definitions offered are not helpful in identifying the doctrine of political questions. Political question is thus seen in this thesis as matters which the constitution or the law has given its determination to the political class,[9] or a non justiciable matter or questions which the courts will refuse or be reluctant to take cognizance of, or to decide, or review their constitutionality because of their purely political character or because their determination would involve an encroachment upon an executive or legislative powers.[10] It is a constitutional law doctrine that was developed to stop the court from deciding on the merit certain questions which may affect the powers or functions of other arms of government, or questions relating to the affairs of the political parties.[11]

3. Why Political Questions? Its Theoretical Evolution and Rationale

The reasons for the doctrine of political questions have also got its theories to rationalize the doctrine. The rationale has been explained in terms of respect for political class otherwise referred to as the pure-theory thereby insulating the courts from politics and in functional term called the functional theory.

3.1 *Respect for Decisions of Political Branches: Pure Theory of Political Question*

The theory is stating that political question evolves out of an ordinary respect of the courts for the decision of the political branches. The chief exponent of this doctrine is Henkin. He argued that no special doctrine is needed for an ordinary respect for the decision of the political branches and that if the doctrine is what the constitution has committed to another branch or whether in fact is committed to such a branch does not requires no special doctrine for its non justiciability. According to him:

> A meaningful political question doctrine in my view implies something more and different: that some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but extra ordinarily left for political decision. In particular, I suggest, in "pure theory" a political question one in which the courts forego their unique and paramount function of judicial review of constitutionality. …[12]

Henkin therefore submitted that the doctrine is unnecessary and misleading but offered no alternative to it. He however suggested its proper content as namely; that the courts are bound by the decisions of the political branches within their constitutional authority; that the court will not find limitation to the powers of the political branches except where the constitution prescribes; that not all limitations give rights and standing to private parties; that the court may refuse some remedies for want of equity and the constitution may properly be interpreted wholly or in part as self monitoring not subject to judicial review.

Henkin's submission however appears contradictory in terms. If the doctrine is unnecessary and misleading in terms, why is he suggesting the content of the doctrine? In the alternative, where he thinks there is no need for such a doctrine to show ordinary respect for the political branches, he should have suggested an alternative doctrine. He appears neither here nor there in his postulations.

3.2 *Functional Theory of Political Questions*

This theory is an attempt to realistically explain why the court should defer the determination of political questions to the political departments. This is explained in functional terms. The theory pointed out some functional factors and considerations which in various combinations may persuade the court that it would overreach its limit in deciding a particular issue. The theory was actually propounded by J.P Frank in 1954 where he identified the need for a quick decision making, judicial incompetence, avoidance for unimaginable situation and clear prerogative of another branch of government as functional rationale for political questions. This was later developed by Scharpf. Scharpf therefore explained the functional rationale for political questions in the following terms:

3.2.1 *Difficulties of Access to Information*

Scharpf doubted the competence of the judiciary to decide matters where it is not seized of full information as to the clarification of all relevant facts and law submitted before it. He submitted that where the court requires information to be able to decide some matters and the information is difficult to obtain, it may redefine the substantive standards in the absolute or abstract terms of an unqualified grant of power or an unqualified limitation upon its power. Thus, where an absolute solution is not acceptable, he argues that an information problem which is inherent in an issue justifies the application of the doctrine of political questions. He argues that the function is clearer in matters of foreign relations where the court would hesitate to trust its own understanding of the broader situation. He however conceded that this will have limited application in matters of domestic issues, yet he contends that inadequate information is significant for decisions relating to the ratification of constitutional amendments,[13] legislative enactments[14] and during the civil war.[15] He therefore concluded that full information is important and where this is lacking, the court should defer the determination of such questions to the political department. He argued further that even where the court has the information of deciding these issues; it will still be difficult for the court to determine as the political branches should be responsible for the determination of these issues because they are better informed.

3.2.2 *The Need for Uniformity of Decision*

The second factor given by Scharpf is political question doctrine needs to be justified on the practical need to ensure uniformity in governmental actions especially in matters of foreign relations. This has been broadly stated as follows: if this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and the judicial departments. By one of these departments, a foreign island or country might be considered as at peace with United States; whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.[16]

The reason advanced for this might seem convincing on the surface especially where the correctness of the political decision is not really in disputes; which of course does not give room for political questions. Where the validity of political decision is very much disputed or in issue, it is better for the court to determine the lawfulness of the political determination. This appears to be a conflict between unlawful political determination and desire for unity among government department. It submitted that the desire for unity among departments must give way to the demand for lawfulness of governmental actions.

Scharpf also noted that the ultimate determination of international disputes should be left for international order, then the court's opinions would be provisional rather than final as far as the international disputes is concerned. He argues further that where there is no such prior political determination; the court may justifiably decide even questions that might arise in international disputes. The opinion offered by Scharpf here appears to be outdated. It is doubtful whether local courts have even procedural jurisdiction in matters relating to international disputes. This is clearly within the powers of the International Court of Justice.[17] The issue of international disputes being political question

does not therefore arise at the local court. However, where the matter is brought in a local court, the court must decline jurisdiction because it is of international affairs and states sovereignty will come into place. Issue of political question may therefore arise as to where treaties are being negotiated by a government of a country, or issue whether to go to war. It most humbly submitted that this is regulated by law. Thus, where the law is violated in this act, it is a ground for judicial review and the issue of political question should not arise.

3.2.3 *The Deference to the wider Responsibilities of the Political Departments*

The rationale for political question doctrine has been justified on the ground that to do otherwise would embarrass or interfere with the exercise of power of the political department. In the case of *Chicago and Southern Airlines, Inc v Waterman S.S. Corp,*[18]Justice Jacskson refused judicial review that on the ground that it would embarrass or interfere with effective exercise of the President's power in matters of foreign policy."[19]

Even though this rationale of political questions on grounds of embarrassment, delicacy, and complexity appears convincing, the effect of this is that it could remove most questions of domestic law from judicial competence without any limitation. This is because most contested cases or political decisions are delicate and complex. This might undermine judicial role in government as the court will have a very limited role as a political institution.

3.2.4 *Normative Limitations of the Political Question*

Scharpf also submitted that the court should limit the thrust of the functional rationale for political questions by way of normative qualification. Thus, where a fundamental individual right is at stake, the court should not intervene. He argues that political question will not be applicable where the matter has to do with competing claims among the department of the Federal government or between the Federal government and the State. Such issues should be decided on the merit. Scharpf however noted that if the court had deferred to the claims asserted by one of the conflicting departments, such a decision has therefore delegated to the department general competence under the constitution. He also argues that political question doctrine could be made applicable to the co ordinate branches of government to settle their disputes. This it is submitted will confer adjudicatory role on other branches of government other than the judiciary as this will even amount to abdication of duties by the courts.

One must also note with concern from the foregoing that all the doctrines propounded to rationalize the doctrine even though persuasive, they are not absolutely convincing. The first reason is that the theories are too sectional and a look has not been on its universal applications. The discussion has been so much limited to the jurisprudence of United States or the Western perspective. It does not accommodate the social, political, and legal atmospheres of developing nations. Also, no comparative study has been adopted by the propounders for their various rationalizations and conclusions. It is therefore apposite to submit that the doctrine of political question is not of universal application. This is not to say however that some countries as it will be shown are not applying it inadvertently.

Also, the general weaknesses of the theories have been its intended application to all circumstances that present itself. The application of the doctrine should be tied to the specifics of individual cases. Most of the theories may even undermine the established concept of judicial review but giving way for judicial restraints allowing the courts to establish the criteria for intervention in political questions (Navot). This criterion appears different from the ones applied for reviewing the actions of the political branches. This is not to say however that the theories have not been relevant in clearing the air on the possible rationale for the doctrine.[20]It has been revealed that what is political question is subject also to the interpretative powers of the court. Also, that the doctrine of political questions is more of public law but has also been applied to private actions.[21]

4. Conclusion

From the fore-going, the court has endeavoured to insulate itself from political pressures by the introduction of the doctrine of political questions. This evolved from the use of the word 'questions in their nature political' by Justice Marshall in *Merbury v Madison*. The court felt that these questions should be left for the political class to decide. Thus, where political questions are presented before the court, the court should decline jurisdiction; not because it does not have the procedural jurisdiction to entertain the matter but because the case is seen as having presented a controversy not meant for the court to decide. This, though evolved from the constitutional jurisprudence of the United States, has cropped up into the jurisprudence many countries of the world. This is because courts decline jurisdiction in matters which are political in nature without necessarily discussing the doctrine.

Unfortunately, however, what amounts to political questions was not defined by Marshall CJ. This has therefore led to theories to discover the meaning and scope of the doctrine. Thus, the paper examines various definitions offered for the doctrine and contends that none is universally acceptable to discover Marshall's intention by the use of the term political questions. They have however contributed to the understanding of the term. In order to analyse the meaning and the scope of the doctrine therefore, the paper makes a critical exposition of classical and prudential and theories of political questions. It also, in order to discuss the rationale for the doctrine in the opinions of authors analyses the theoretical evolution of the doctrine. It therefore critically examines the theories propounded in rationalizing the theory. This has been explained in terms of respect for decisions of political branches (pure theory of political question). It is also explained in functional terms: difficulties in accessing information; the need for uniformity of decisions; deference to the wider responsibilities of the political departments; and normative limitations of the political question. The paper notes that all the theories propounded to rationalize the doctrine even though persuasive, they are not absolutely convincing. It does not accommodate the social, political, and legal atmospheres of developing nations. This is not to say however that theories are not helpful in contributing to an understanding of the term.

Also, the general weaknesses of the theories have been its intended application to all circumstances that present itself. They are not tied down to specifics of individual cases. Most of the theories may even undermine the concept of judicial review by giving way for judicial passivism in political questions. However, what amounts political question should be subject to the interpretative powers of the court. This will not allow the court to decline jurisdiction in *bona fide* controversy only for the singular reason of being political questions. The court should not abdicate its adjudicatory role only for wanting to insulate itself from politics. The doctrine has not in itself helped the court from such insulation from political pressures. Therefore, propounding a theory in the name of political questions is not a way for the court to insulate itself from politics. Rather, the court creates more problems when a *bona fide* controversy is not resolved only because the nature of the questions posed is political in nature. This will render useless the concept of constitutional law or constitutionalism as many constitutional questions carry with it the sting of politics.

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Notes

This paper is an extract from a PhD research on-going at International Islamic University Malaysia.

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

Note 2. The law normally confers on each court jurisdiction on certain matters exclusively. Other courts will therefore stay away from the matter. This is avoidance based jurisdictional or procedural ground.

Note 3. The court in *Moyer v Peabody*, 212, U.S. 78 (1909) was of the view where the constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.

Note 4. 369 U.S. 186 (1962)

Note 5. Field and Frankfurter's views are related in the sense that both are saying where there are no standards or rules to decide a particular situation, the court will not interfere by regarding it as a political question. For instance, since there are no guidelines, rules or standards to measure when emergency proclamation is needed; it should be regarded as a political question.

Note 6. This phrase means that actions of political class do not have rules to be followed in doing it or even if there are rules, they may not be complied with as its often influenced by political processes. Thus, courts should not enforce the rules of the House where it is not complied with.

Note 7. This view was clearly supported and articulated by Scharpf where he opined: "My objection can be stated more broadly: where the court was persuaded that the political departments ought to be able to act with a view to non-legal factors-economic, political, military, international- and expediency, it has usually been to allow this freedom of action through its substantive interpretation of the scope of constitutional power and discretion…if even the need to accommodate non-legal factors could be met by the decision of the merits, then Mr Jaffe's second formular does not seem to establish a compelling necessity for the court's reliance on political question doctrine."

Note 8. See Nwosu at 21-22 where he defined the doctrine as: "issues which in the considered opinion of a superior court of record, have in clear and unequivocal terms, been constitutionally or statutorily allocated to the legislative and or executive branches for final resolution, and includes matters in which, in the considered opinion of a court, would for a combination of reasons inappropriate for resolution through judicial process; and matters which the court find itself functionally incompetent to resolve and or enforce."

Note 9. See for instance Section 60 of the Constitution of the Federal Republic of Nigeria which confers powers on the Legislature (The National Assembly) power to regulate its own procedure. See Article 62(1) of the Malaysian Federal Constitution for similar provision.

Note 10. See Black's Law Dictionary, HC Black, USA: West Publishing Co., 1979. See also the case of *Baker v Carr* 369 U.S. 186 (1962) for the six factors considered by the United States Supreme Court as constituting the elements of political question doctrine.

Note 11. See the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Note 12. He further stated that: "As so conceived, the doctrine would have that in general, in a proper case, the courts will examine the actions of government for constitutional authorization and limitations, some constitutional requirements are entrusted exclusively and finally for the political branches of government for self monitoring. As to these, the courts say to the petitioner in effect: "Although you may indeed be aggrieved by an action of the government, although the action may indeed do violence to the constitution, it involves a political question which is not justiciable, not given to us to review."

Note 13. Scharpf cited in support of his argument the cases of *Coleman v Miller* 307 U.S. 433 (1939) where the court was called upon to determine the validity of the Child Labour Amendment which the congress had postponed much earlier Kansas legislative members who voted against the ratification contended *inter alia* that the amendment was invalid because it was not ratified within a 'reasonable time' by the requisite number of States. The court was however of the view that question of reasonable tie could not be based on the prior practice of speedy ratification and noted that "question of reasonable time in many cases would involve as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in any court of justice... On the other hand, these conditions are appropriate for the consideration of the political departments of the government. The questions they involve are essentially political and not justiciable. They can be decided by Congress with the full knowledge ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment."

Note 14. See *United States v Ballin*, 144 U.S. 1 (1892); *Lyons v Woods*, 153 U.S. 649 (1894); *Missouri Pac. Ry v Kansas*, 248 U.S. 276 (1919); *Rainey v United States*, 323 U.S. 310 (1914); *Flint v Stone Tracy Co*., 220 U.S. 107 (1911); *Twin City Bank v Nebeker*, 167 U.S. 196 (1897). In all these cases, the Supreme court was of the view that a statute becomes law if it conforms fully with the text which was voted in the Congress; a quorum is formed if majority members are present even if not all of them will vote; a two third majority requires consent of two-third

members voting, not two-thirds of all members etc. political question in these cases were limited to issues of germaneness of Senate amendment.

Note 15. For the cases that treated issue of duration of civil war as political question he cited *Adger v Alston*, 82 U.S.(15 Wall.) 555 (1873).

Note 16. *Williams v Suffolk Ins. Co*., 38 U.S. (13 Pet) 415, 420 (1839).

Note 17. For instance, where there is dispute between two countries on territorial boundary, the ICJ takes jurisdiction of the matter.

Note 18. 333 U.S. 103, 111 (1948).

Note 19. He stated that: "the very nature of the executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our constitution to the political departments of the government, executive and legislative. They are delicate, complex, and involve large elements of prophecy…They are decisions of a kind for which judiciary has no aptitude, facilities nor responsibility and which has long been held to belong to the domain of political power not subject to judicial intrusion or inquiry.

Note 20. This perhaps prompted the court in *Baker v Carr* 369 U.S. 186 (1962) to offer certain criteria though not universal, to the issue of political question. It states as follows: "… it is essentially (not solely) a function of separation of powers. Prominent on the surface of any case held to involve political question is found a textually demonstrable constitutional commitment of the issue to a coordinate branch; a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind not of judicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of 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."

Note 21. Constitutional Law — Political Question Doctrine — D.C. Circuit Holds That Government Officials' Potentially Defamatory Allegations Regarding Plaintiffs' Terrorist Ties Are Protected By Political Question Doctrine. — *El-Shifa Pharmaceutical Industries Co. v. United States,* 607 F.3d 836 (D.C. Cir. 2010) (En Bane) (2010) *Harv. L. Rev.,* vol. 124, 640.