

Description of Political Question Doctrine Program

University of Texas Law Professor Steve Vladeck will open the program setting the stage. He will describe generally the political question doctrine (“PQD”) and identify the parties in *Goldwater v. Carter*, 617 F.2d 697 (en banc 1979), and the factual setting presenting the PQD/justiciability issue to be argued in the reenactment.

The factual setting, in brief, was this: In December 1978, President Carter decided to recognize the People’s Republic of China, instead of the Republic of China, as the sole legitimate government of China. Simultaneously, the President invoked the termination clause of the Mutual Defense Treaty with the Taiwan government. The district court ruled that the U.S. could not terminate the Treaty until the President’s actions received the approval of two-thirds of the Senate or a majority of both Houses of Congress.

Vladeck, acting as the Marshal, will call the case, identifying the judges. The advocates will be Professor Harold Koh of Yale Law School and Gibson Dunn partner Erin E. Murphy .

Murphy, as counsel for appellant, President Carter, will open, focusing solely on whether the challenge presented a question within the Court’s jurisdiction. She will be urging that the PQD precludes the Court from acting on the issue. The appeal presented other issues -- the standing of the Goldwater appellees, whether the President was a party to the Treaty with authority to exercise the right of termination, etc. -- but they are not to be addressed. Murphy will have 12 minutes for argument (she can reserve time for rebuttal).

Koh, representing Senator Goldwater and eight other Senators as well as 17 Representatives, will respond, addressing the PDQ/justiciability issue. He will seek to convince the Court that the challenge to the legality of President Carter’s action presents a justiciable issue for the Court. He will have 12 minutes for argument.

Circuit Judges Stephen Williams and Harry Edwards will make up the Bench. They reached opposite conclusions on the justiciability issue presented in Judge Walter Nixon’s 1991 challenge to the constitutionality of his trial on impeachment charges by a committee of the Senate. *Nixon v. United States*, 938 F.2d 239 (D.C. Cir. 1991). The judges are expected to question the advocates just as they do in a regularly scheduled case. We do not ask the judges to issue a ruling.

Advocates are asked to rely on cases and materials existing at the time of the argument in *Goldwater* plus the Supreme Court’s rulings in *Walter Nixon v. United States*, 506 U.S. 224 (1993), and *Zivotofsky v. Clinton*, 566 U.S. ___ (2012) . Principal sources will be the parties’ briefs which have been provided to the judges, counsel and participants in the panel discussion. No voice recording or transcript of the actual argument is available.

Following the reenactment, there will be a panel discussion exploring the status and scope of the Political Question Doctrine today. Paul M. Smith, formerly with Jenner & Block and now at the Campaign Legal Center, will serve as moderator. Panelists will include Vladeck, the advocates Koh and Murphy, and Covington & Burling partner Beth Brinkmann.