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Howard Konar*

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Abstract

The purpose of this Comment is to illustrate a theory of political question jurisprudence which would have allowed the courts to rule that the issue of treaty termination presents a political question without creating unnecessary precedents for the expansion of executive power. Part I will briefly review four leading theories of the political question doctrine, focusing on the difference between exemption of a constitutional issue from judicial review and denial of relief within the context of judicial review. Based on this analysis, Part II will examine the plurality's approach in *Goldwater*, and explore two alternative approaches for categorizing the issue of treaty termination as a political question. Finally, Part III will propose a method for settling the treaty termination problem by congressional action.

COMMENT

TERMINATION OF TREATIES AS A POLITICAL QUESTION: THE ROLE OF CONGRESS AFTER *GOLDWATER v. CARTER*

INTRODUCTION

On December 15, 1978, President Carter announced that the United States and the People's Republic of China (PRC) had agreed to establish full diplomatic relations.¹ The terms of their agreement, including United States recognition of the People's Republic as the "sole legal Government of China," were set forth in the Carter-Hua Communique.² In a separate statement,³ the President announced that the United States would sever diplomatic relations with the Republic of China (ROC), and that he would soon notify the Taipei government of his intent to terminate the Mutual Defense Treaty.⁴ Congressional leaders were informed of the major policy changes contained in these statements less than three hours before they were issued to the public,⁵ and President Carter delivered

1. N.Y. Times, Dec. 16, 1978, at A1, col. 6.

2. Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China, 14 WEEKLY COMP. OF PRES. DOC. 2264-65 (Dec. 15, 1978).

3. United States Statement on Diplomatic Relations Between the United States and the People's Republic of China—Dec. 15, 1978, *Id.* at 2266.

4. De-recognition of the Republic of China and termination of the Mutual Defense Treaty were seen by the PRC as prerequisites for diplomatic normalization. *Normalization of Relations with the People's Republic of China: Practical Implications: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on International Relations*, 95th Cong., 1st Sess. x (1977) [hereinafter cited as *1977 Hearings on Normalization*].

The Mutual Defense Treaty obligated the United States, "in accordance with its constitutional processes" and on joint agreement with the ROC, to defend Taiwan and the Pescadores from an armed attack. Mutual Defense Treaty, Dec. 2-10, 1954, United States—Republic of China, art. V, 6 U.S.T. 433, T.I.A.S. No. 3178. Article X of the treaty provided that it would remain in force "indefinitely," but added that "[e]ither party may terminate it one year after notice has been given to the other party." *Id.*, art. X.

5. The President summoned key members of the Senate and House foreign relations committees to a special White House briefing at 6:15 p.m. N.Y. Times, Dec. 16, 1978, at A1, col. 5, A8, col. 3. The public announcement was made in a televised broadcast at 9:00 p.m. 14 WEEKLY COMP. OF PRES. DOC. 2266 (Dec. 15, 1978).

the notice of termination to Taipei on January 1, 1979 without receiving authorization or approval from Congress.⁶

This series of events prompted Senator Barry Goldwater, joined by twenty-four fellow legislators from both houses of Congress and both parties, to file suit in federal district court challenging the President's actions.⁷ Their complaint sought declaratory and injunctive relief to prevent President Carter's termination of the treaty without legislative approval.⁸

The district court ruled that the separation of powers issue raised by the complaint did not present a political question,⁹ and that treaty termination is a shared power which cannot be exercised by the President acting alone.¹⁰ Thus, the court's ruling required that the President's notice of termination receive the approval of either two thirds of the Senate or a majority of both houses of Congress to be effective under the Constitution.¹¹ The court of appeals agreed that the complaint did not present a politi-

6. N.Y. Times, Jan. 1, 1979, at A4, col. 5. In fact, Congress was not even in session at the time. *Id.*

7. *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C. 1979).

8. *Id.* at 950. Essentially, the court was asked to determine whether the President alone was a "party" for purposes of the treaty's termination clause, and thus able to unilaterally terminate the treaty. *Id.* at 958; *see* note 4 *supra*. Because the law of treaties is concerned with the appearance, as opposed to the legitimacy, of legal authority to terminate treaties, the answer to this question must be derived from municipal rather than international law. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 67, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 8 INT'L LEGAL MATS. 679, 704 (1969). A separate question is whether the termination of a treaty is justified on one or more of the legal grounds set out in articles 54-64 of the convention. The presence of a termination clause, as in the Mutual Defense Treaty, circumvents this problem by allowing the parties to terminate the treaty without legal justification. *See id.* art. 54(a).

9. 481 F. Supp. at 958. For a definition of political questions, *see* text accompanying note 22 *infra*. The court, in an opinion written by Judge Gasch, noted that it was "not attempting to evaluate the wisdom of the underlying political decision or to substitute its judgment for that of a political department, but simply to determine whether the treaty termination was effectuated by constitutionally permissible means." *Id.*

10. In support of this conclusion, the district court cited three "constitutional factors: the status of treaties as the supreme law of the land, together with the obligation of the President to faithfully execute those laws; the implications to be derived from the constitutionally delineated role of the Senate in treaty formation; and the fundamental doctrine of separation of powers." *Id.* at 962. The court also drew support from its reading of the precedents for termination of treaties by the United States. *Id.* at 964.

11. *Id.* at 964-65.

cal question,¹² but concluded that the President's actions were within his constitutional authority.¹³ The Supreme Court granted the petition for certiorari, only to vacate the judgments below and dismiss the complaint without briefing or oral argument.¹⁴

Writing for the plurality, Justice Rehnquist ruled that *Goldwater v. Carter* presents a nonjusticiable political question and dismissed the complaint.¹⁵ Justice Powell concurred in the judgment, but stated that he would dismiss the complaint as not ripe for judicial review.¹⁶ Justice Brennan dissented from the order

12. *Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir. 1979).

13. *Id.* at 699. The court of appeals based this conclusion on several grounds, including the President's foreign affairs power and the need for flexibility in the conduct of foreign policy, his power to recognize and withdraw recognition from foreign governments, and the fact that the treaty contained a termination clause. *Id.* at 703-09.

Through its reliance on the President's power to recognize foreign governments, the court of appeals invoked the lapse theory of treaty termination. *See id.* at 708. According to this theory, all obligations under the Mutual Defense Treaty passed to the PRC when it received de jure recognition from the United States, and then lapsed when the Peking government failed to renegotiate the treaty. President Carter's grant of de jure recognition to the PRC thus left no legitimate role for Congress in terminating the treaty. 1977 *Hearings on Normalization*, *supra* note 4, at 81 (statement of Jerome A. Cohen); 1978 *PROC. AM. SOC'Y INT'L L.* 246-29 (remarks of Jerome A. Cohen). For criticism of this theory, see Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 *HARV. INT'L L.J.* 931, 944-66 (1978).

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

15. *Id.* at 1002. Justice Rehnquist was joined by Justices Stewart and Stevens and by Chief Justice Burger. Justice Powell concurred in the judgment, and Justice Marshall concurred in the result without expressing an opinion. Justices Brennan, Blackmun and White dissented. *Id.* at 996-97.

16. *Id.* at 997. Justice Powell reviewed the history of a Senate resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, and concluded that the Senate had not yet definitively rejected the President's claim. *Id.* at 998.

As introduced by Senator Harry Byrd, Jr., Senate Resolution 15 stated: "That it is the sense of the Senate that approval of the United States Senate is required to terminate any Mutual Defense Treaty between the United States and another nation." 125 *CONG. REC.* S220 (daily ed. Jan. 18, 1979). The Senate Foreign Relations Committee later amended the resolution to provide several grounds for termination of treaties by the President alone, including, subject to specified conditions, the presence of a termination clause. *Id.* at S7015-S7016 (daily ed. June 6, 1979) (remarks of Sen. Church). In response to an initial Memorandum Order by the District Court which dismissed the complaint, without prejudice, for lack of standing, the Senate voted to restore the language of the original resolution by substituting the Byrd amendment for the Committee version. *Id.* at S7015, S7038-S7039. *See Goldwater v. Carter*, No. 78-2412 (D.D.C., filed Dec. 22, 1978), *reprinted in* 125 *CONG. REC.* S7050, S7051 (daily ed. June 6, 1979). As Justice Powell noted, however,

directing dismissal of the case, stating that the Court should have affirmed the judgment of the court of appeals insofar as it rested on the President's power to recognize and withdraw recognition from foreign governments.¹⁷ Justices Powell and Brennan both strongly criticized the plurality's view that *Goldwater* presents a nonjusticiable political question.¹⁸ Justices Blackmun and White dissented from the decision to dismiss the complaint without more careful consideration.¹⁹

Support for dismissing the complaint as a political question by only four Justices, combined with strong criticism of this approach by Justices Powell and Brennan and the fact that the case was decided without briefing or argument, serve to limit the weight of *Goldwater* as authority for treating foreign policy issues as political questions. *Goldwater* nevertheless provides a clear example of the undesirable precedents which may result when the courts rule that a constitutional issue presents a political question and is therefore exempt from judicial review. Because the plurality refused to consider the allegation that President Carter was exceeding his constitutional authority, it is possible to conclude from their statement that the President has the inherent power to terminate treaties without legislative approval. In fact, this reading is encouraged by the plurality's clear deference to presidential power in the conduct of foreign affairs. The opening sentence of the plurality statement,

no final vote had been taken on the resolution, and it was unclear whether the resolution would have retroactive effect. 444 U.S. at 998. See 125 CONG. REC. S16,683-S16,692 (daily ed. Nov. 15, 1979) (no final vote); *id.* at S7054-S7064 (daily ed. June 6, 1979) (retroactive effect uncertain).

Of the numerous bills and resolutions introduced to prevent termination of the Mutual Defense Treaty without legislative approval, a final vote was taken on only one. The Dole-Stone Amendment to the International Security Assistance Act of 1978 provided, in part, that "[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." 22 U.S.C. § 2151 (note) (Supp. II 1978) (emphasis added). The district court, in its initial Memorandum Order, found this language too imprecise to support a claim upon which relief could be granted. See 125 CONG. REC. S7051 (daily ed. June 6, 1979). It is interesting to note that both the district court and court of appeals considered the issues raised by legislative action in the context of standing rather than ripeness. See 481 F. Supp. at 951-56; 617 F.2d at 701-03 (opinion of the court), 709-16 (Wright, J., concurring).

17. 444 U.S. at 1006; see note 13 *supra*.

18. 444 U.S. at 998-1002 (Powell, J., concurring), 1006-07 (Brennan, J., dissenting).

19. *Id.* at 1006.

for example, declares that the basic question presented by *Goldwater* "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."²⁰

The purpose of this Comment is to illustrate a theory of political question jurisprudence²¹ which would have allowed the courts to rule that the issue of treaty termination presents a political question without creating unnecessary precedents for the expansion of executive power. Part I will briefly review four leading theories of the political question doctrine, focusing on the difference between exemption of a constitutional issue from judicial review and denial of relief within the context of judicial review. Based on this analysis, Part II will examine the plurality's approach in *Goldwater*, and explore two alternative approaches for categorizing the issue of treaty termination as a political question. Finally, Part III will propose a method for settling the treaty termination problem by congressional action.

I. POLITICAL QUESTIONS AND THE POLITICAL QUESTION DOCTRINE

Political questions are those which the Constitution commits to the executive and legislative branches of government for their resolution rather than to the courts.²² In a constitutional system of government based on separation of powers, their existence is axiomatic.²³ Courts will consider the actions of the political branches only to determine whether they conform to constitutional limitations. If so, the wisdom and propriety of their actions are not subject to judicial challenge.²⁴

The political question doctrine, however, carries this basic separation of judicial and political powers one step further. The doctrine holds that certain constitutional questions are inherently nonjusticiable.²⁵ Thus, the doctrine not only prohibits judicial reso-

20. *Id.* at 1002.

21. *See generally* Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597 (1976).

22. *Id.* at 597.

23. *Id.*

24. *Id.* at 598. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

25. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 71-72 (1978).

lution of political questions, but completely exempts them from judicial review.²⁶

A. *Traditional Formulations of the Doctrine*

In *Baker v. Carr*,²⁷ the Supreme Court's landmark reapportionment case, Justice Brennan identified six factors which would invoke the political question doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate 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.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.²⁸

Even this statement of the rule is difficult to apply, however, because it encompasses three different theories of the role of the judiciary in relation to the political branches of government.²⁹

The first factor listed in *Baker*, "a textually demonstrable constitutional commitment of the issue to a coordinate political department," reflects the classical theory of this role.³⁰ The classical theory requires that a court decide all the issues before it unless it finds, purely as a matter of constitutional interpretation, that the Constitution itself has committed final resolution of the issue to Congress or the executive.³¹ In this narrow range of cases, courts

26. Henkin, *supra* note 21, at 599. Professor Tribe takes a somewhat different view of the doctrine. *See* note 53 *infra*.

27. 369 U.S. 186 (1962).

28. *Id.* at 217.

29. L. TRIBE, *supra* note 25, at 71 n.1. The following breakdown of factors listed in *Baker* into classical, functional, and prudential concerns is patterned after Professor Tribe's analysis. *See id.*

30. *See, e.g.,* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-9 (1959).

31. L. TRIBE, *supra* note 25, at 71 n.1.

must abstain from judicial review because the Constitution requires it.³²

The second and third factors listed in *Baker*, "a lack of judicially discoverable and manageable standards" and "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion," reflect the functional theory.³³ According to this theory, courts may abstain from judicial review based on general considerations of judicial competence to decide the issue presented.³⁴

The last three factors listed in *Baker*, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," "an unusual need for unquestioning adherence to a political decision already made," and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," reflect the prudential theory.³⁵ This theory provides that courts may abstain from judicial review based on general considerations of prudence and wisdom.³⁶

Both the functional and prudential theories give the courts wide discretion in deciding whether to reach the merits of a case. As a result, they often serve better to explain past decisions than to predict how the courts will treat a certain issue in the future. For example, during the seventeen years between its statement of the political question doctrine in *Baker* and its decision in *Goldwater*, the Supreme Court was confronted on several occasions with the argument that judicial resolution of a claim might lead to conflict with a coordinate branch of government. Nevertheless, the Court during these years repeatedly stressed that its duty to interpret the Constitution outweighed this concern,³⁷ and invoked the doctrine to bar the review of only one case.³⁸

32. Wechsler, *supra* note 30, at 7-9.

33. See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-82 (1966).

34. *Id.*

35. See, e.g., Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46, 74-79 (1961).

36. *Id.*

37. *United States v. Nixon*, 418 U.S. 683, 704-05 (1974); *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969); *United States v. Brown*, 381 U.S. 437, 462 (1965). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring).

38. *Gilligan v. Morgan*, 413 U.S. 1 (1973); see text accompanying notes 112-17 *infra*.

By comparison, the classical theory of the doctrine offers the advantage of predictability because it allows the courts no discretion in deciding whether to reach the merits of a case. Even this theory, however, fails to explain certain Supreme Court decisions.³⁹ In *Powell v. McCormack*,⁴⁰ the Court reviewed and reversed a judgment by the House of Representatives that Adam Clayton Powell was not qualified to take office, despite the constitutional provision that "Each House shall be the Judge of the . . . Qualifications of its own Members . . ."⁴¹ The Court read this provision as giving the House, "at most," the right to bar membership based on age, citizenship, or residence, the only qualifications specifically prescribed by the Constitution.⁴² Similarly, the Court in *Roudebush v. Hartke*⁴³ reviewed and upheld a state procedure providing for a recount in a Senate election even though the Constitution provides that "Each House shall be the Judge of the Elections [and] Returns . . . of its own Members . . ."⁴⁴

Aside from the different concerns emphasized by the classical, functional, and prudential theories and the problems peculiar to the application of each one, these theories are similar in that all three contemplate the exclusion of certain issues from judicial review.⁴⁵ As the ruling in *Goldwater* illustrates, however, using the political question doctrine to bar judicial review of constitutional issues may create undesirable and unnecessary precedents for future claims of executive and legislative power.

B. *Denial of Relief Within the Context of Judicial Review*

A very different view of political questions is taken by Professor Henkin,⁴⁶ who argues that while political questions are necessary and desirable in a government based on separations of powers, the political question doctrine is not.⁴⁷ Henkin sees the doctrine as nothing more than deceptive packaging of three separate ap-

39. See Henkin, *supra* note 21, at 604.

40. 395 U.S. 486, 549-50 (1969).

41. U.S. CONST. art. I, § 5, cl. 1.

42. 395 U.S. at 548; see U.S. CONST. art. I, § 2, cl. 2.

43. 405 U.S. 15, 26 (1972).

44. U.S. CONST. art. I, § 5, cl. 1.

45. See, e.g., Wechsler, *supra* note 30, at 7-9; Scharpf, *supra* note 33, at 596-97; Bickel, *supra* note 35, at 74-79.

46. See generally Henkin, *supra* note 21.

47. *Id.* at 597-601, 622-25.

proaches to constitutional issues.⁴⁸ He suggests that in the leading political question cases, the Supreme Court was following or might have followed one of three well-established lines of jurisprudence:⁴⁹

1. Denial of relief because the act complained of fell within the enumerated powers conferred by the Constitution on the political branches of government, and was not prohibited to them explicitly or by any warranted inference from the Constitution;

2. Denial of relief because the act complained of fell within the inherent powers of the political branches of government, and was not prohibited to them explicitly or by any warranted inference from the Constitution;

3. Denial of relief, even though a legal claim existed, because the remedy sought was an equitable one and would not be granted in the circumstances by a court of equity in the exercise of sound discretion.

None of these approaches require the courts to create exceptions to judicial review.⁵⁰ Under the first and second approaches, courts do not dismiss the complaint as nonjusticiable. Instead, they affirm that the political branches have the power which is challenged, and that nothing in the Constitution prohibits the particular exercise of it.⁵¹ Under the third approach, the courts may review and find a violation, but still deny all or some equitable remedies.⁵² It will be noted that the first and second approaches reflect the classical concerns discussed above, and the third approach reflects functional and prudential concerns. In effect, then, Henkin's analysis incorporates all three theories but places them within the context of judicial review.⁵³

48. *Id.* at 622.

49. *Id.* at 606.

50. *Id.*

51. *Id.*

52. *Id.*

53. Professor Tribe has challenged Henkin's view that the political question doctrine requires the courts to create exceptions to judicial review. See L. TRIBE, *supra* note 25, at 72-73. He suggests, first, that courts retain "the power to determine whether a particular congressional or executive action comes within the terms of the constitutional grant of authority." *Id.* at 73. While in this sense it is true that courts are not required by the doctrine to entirely abstain from judicial review, the plurality in *Goldwater* nonetheless chose to do so even over Justice Brennan's objection that "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 decisionmaking power." 444 U.S. at 1007 (Brennan, J., dissenting) (empha-

As the Supreme Court noted in *Baker v. Carr*, “[m]uch confusion results from the capacity of the ‘political question’ label to obscure the need for case-by-case inquiry.”⁵⁴ Maintaining Henkin’s distinction between political questions and the political question doctrine would, as a practical matter, help clarify much of this confusion. Rather than exempting broad and ill-defined categories of cases from judicial review, courts would reach the merits of each individual case. If denial of relief was appropriate under one of the three approaches set out above, the court would provide specific support for this result along the lines required by that approach. Identifying political questions with this degree of specificity would set less drastic precedents than exempting constitutional issues from judicial review,⁵⁵

sis in original). This is precisely the type of result which Henkin’s first and second approaches would avoid.

Referring to Henkin’s third approach, Tribe suggests that in applying the doctrine the courts are “not concerned with the character of a litigant’s injury or the shape of potential remedies as such, but rather with the possibility of deriving rights from the provision of the Constitution at issue.” L. TRIBE, *supra* note 25, at 73. This distinction merely begs the question, since Tribe never identifies the factors which courts will consider to determine whether a constitutional provision yields judicially enforceable rights. In fact, his reading of the political question cases is replete with references to the same functional and prudential considerations incorporated in Henkin’s third approach. *See id.* at 74-79.

Because Henkin’s third approach does incorporate functional and prudential concerns, it should be pointed out that discretionary theories of judicial review have been strongly criticized. *See, e.g.,* Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

54. 369 U.S. at 210-11.

55. Henkin, *supra* note 21, at 623. In particular, the courts would have no basis for refusing to consider an allegation that Congress or the President acted unconstitutionally. *Id.* As Henkin points out, strict adherence to judicial review would have prevented a great deal of confusion during the Vietnam War, when federal courts routinely applied the political question doctrine to bar review of claims that the President had exceeded his constitutional powers by engaging in an undeclared war. *Id.* at 623-24. Following Henkin’s analysis, the courts would have examined the President’s authority to conduct the war pursuant to the Tonkin Gulf Resolution, and, failing that, the President’s inherent constitutional authority to conduct an undeclared war. If the President’s actions could not be upheld on either basis, the courts would then have decided whether equitable reasons existed for withholding injunctive or even declaratory relief. *Id.* at 624. Even if the courts had denied relief, decisions on the merits would have shifted attention back to the political process by declaring that Congress, or the President, or both, were ultimately responsible for the conduct of the war.

and would thus bring a new precision and flexibility to political question analysis.

II. POLITICAL QUESTION ANALYSIS APPLIED TO GOLDWATER

Article II of the Constitution states that treaties shall be made by the President with the consent of two thirds of the Senate,⁵⁶ but it provides no method for their termination. Rather than following one set procedure for the termination of treaties, Congress and the President have pursued a variety of methods. Thus, the United States government has terminated past treaties by an Act of Congress; by a statute directing the President to deliver notice of termination; by the President acting pursuant to a joint resolution of Congress, or otherwise acting with the concurrence of both houses of Congress; by the President acting with the consent of the Senate; and by the President acting alone.⁵⁷

Although the courts have validated certain practices in this area, none of the precedents are directly on point. The Supreme Court has upheld the President's power to terminate provisions of a treaty that were superseded by an Act of Congress,⁵⁸ to assess the continuing validity of a treaty,⁵⁹ and to waive the right to terminate a treaty violated by another party,⁶⁰ but it has never ad-

Nevertheless, many cases challenging the constitutionality of the Vietnam War were dismissed as nonjusticiable political questions. Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 COLUM. J. TRANSNAT'L L. 470, 472 (1974). The Supreme Court regularly denied certiorari, but in *Atlee v. Richardson* a judgment holding various issues political and nonjusticiable was affirmed on appeal without opinion, thus causing speculation that the Court approved of the grounds for dismissal. See *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

56. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur" U.S. CONST. art. II, § 2, cl. 2.

57. See, e.g., 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 327-28 (1927); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 460-62 (1970); V. Bité, *Precedents for U.S. Abrogation of Treaties* (Library of Congress, Cong. Research Service, Feb. 25, 1974), reprinted in STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 95th CONG., 1ST SESS., THE ROLE OF THE SENATE IN TREATY RATIFICATION, App. 4, at 61-78 (Comm. Print 1977).

58. *Van Der Weyde v. Ocean Transp. Co.*, 297 U.S. 114, 118 (1936).

59. *Clark v. Allen*, 331 U.S. 503, 508-14 (1947); *Terlinden v. Ames*, 184 U.S. 270, 285-88 (1902).

60. *Charlton v. Kelly*, 229 U.S. 447, 474-76 (1913).

dressed the issue of presidential power to terminate a valid treaty without legislative approval.⁶¹

In the absence of definitive constitutional or judicial authority for deciding this issue in favor of either party, consideration of *Goldwater* must begin by examining the President's claim that it presents a political question. Following Henkin's analysis,⁶² there are two approaches for categorizing the issue of treaty termination as a political question. Using the "inherent powers" approach, the Court in *Goldwater* might have held that the power to terminate treaties falls within the inherent foreign affairs power of the President, and is not prohibited to him by any warranted inference from the Constitution. Using the "want of equity" approach, the Court might have held that even though the President lacks the power to terminate treaties without legislative approval, the remedies of declaratory and injunctive relief are equitable ones which cannot be granted in the circumstances.

Although both of these approaches would have allowed the Court to reach the merits of the case,⁶³ using an inherent powers argument to support the President's action would further expand the vast powers of the President in foreign affairs.⁶⁴ By compari-

61. This issue has nevertheless received extensive treatment by law commentators. *E.g.*, Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879 (1958); Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CAL. L. REV. 643 (1937); Riggs, *Termination of Treaties by the Executive Without Congressional Approval: The Case of the Warsaw Convention*, 32 J. AIR L. & COM. 526 (1966); Scheffer, *supra* note 13; Comment, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 SW. L.J. 729 (1979); Comment, *Presidential Amendment and Termination of Treaties: The Case of the Warsaw Convention*, 34 U. CHI. L. REV. 580 (1967); Note, *The Constitutional Twilight Zone of Treaty Termination: Goldwater v. Carter*, 20 VA. J. INT'L L. 147 (1979); Note, *Unilateral Termination of the 1954 Mutual Defense Treaty Between the United States and the Republic of China Pursuant to the President's Foreign Relations Power*, 12 VAND. J. TRANSNAT'L L. 133 (1979).

62. See text accompanying note 49 *supra*.

63. See text accompanying notes 49-53 *supra*.

64. For legal analyses advocating a stronger role for Congress in the conduct of foreign policy, see, *e.g.*, T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* (1979); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 529 (1974); Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976). See also CONGRESS AND EXECUTIVE-LEGISLATIVE RELATIONS, COMMISSION ON THE ORGANIZATION OF THE

son, denial of the requested relief for want of equity would set a far narrower precedent for presidential claims of power, and is merited by the facts of the case.

A. *The Plurality Approach*

Writing for the plurality in *Goldwater*, Justice Rehnquist alluded to both of these approaches, but placed greatest reliance on an analogy to *Coleman v. Miller*.⁶⁵ In *Coleman*, members of the Kansas legislature brought an action to invalidate their state's ratification of the Child Labor Amendment.⁶⁶ The Court declined to decide the issue, noting that Article V commits the amendment process to the control of Congress and provides no grounds for invalidating a state's ratification.⁶⁷ Justice Rehnquist reasoned that *Coleman* is directly analogous to *Goldwater* because just as Article V is silent on the issue of invalidating the ratification of an amendment, Article II is silent on the issue of terminating a treaty. He thus relied on *Coleman* to dismiss the issue of treaty termination as a nonjusticiable political question.⁶⁸

Aside from any practical differences between treaties and constitutional amendments, the analogy to *Coleman* is flawed. Article II states that the President has the power to make treaties with the consent of two thirds of the Senate;⁶⁹ it says nothing about his power to modify or terminate treaties, and nothing about his power

GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY, vol. 5, app. L (June 1975) [hereinafter cited as EXECUTIVE-LEGISLATIVE RELATIONS]; A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Sorensen, *Law: The Most Powerful Alternative to War*, 4 FORDHAM INT'L L.J. 13, 14-15 (1980).

65. 307 U.S. 433 (1939) (plurality opinion); see 444 U.S. at 1002-05.

66. H.R.J. Res. 184, 68th Cong., 1st Sess. 43 Stat. 670 (1924). The legislators challenged the right of the Lieutenant Governor to cast the deciding vote in the Senate, and alleged that the amendment had lapsed due to previous rejections and the failure of ratification within a reasonable time. 307 U.S. at 436.

67. *Id.* at 450, 456. Article V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

U.S. CONST. art. V.

68. 444 U.S. at 1003.

69. See note 56 *supra*.

over the treaty process as a whole. The Constitution is truly silent on the issue of treaty termination, leaving only the inherent powers or want of equity approach for categorizing it as a political question. Article V, by comparison, is "silent" on the issue of invalidating a state ratification precisely because, apart from one requirement,⁷⁰ it grants control to Congress over the entire amendment process.⁷¹ Since the Constitution itself imposed no limitations on this control, and Congress, in turn, had set no guidelines for state ratification, the Court in *Coleman* found no basis for invalidating the Kansas vote.⁷² Reaching this result did not require the Court to dismiss the complaint as nonjusticiable and thereby create an exception to judicial review. Instead, the Court reached the merits of the case only to affirm that control over the ratification process is an enumerated power of Congress.⁷³ *Coleman* thus provides no support for dismissing the complaint in *Goldwater* as a nonjusticiable political question.⁷⁴

70. "[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

71. See note 67 *supra*.

72. 307 U.S. at 450, 456; Henkin, *supra* note 21, at 613.

73. See 307 U.S. at 456. This result was consistent with previous decisions on the merits in which the Court upheld congressional control over the amendment process against challenges by state legislatures and the President. See *United States v. Sprague*, 282 U.S. 716 (1931); *Leser v. Garnett*, 258 U.S. 130 (1922); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith No. 1*, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

Justice Black believed so strongly that control over the amendment process was committed to Congress alone that he objected to the Court's analysis in *Coleman* insofar as it "even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments . . ." 307 U.S. at 458 (Black, J., concurring). He concluded that "Congress has sole and complete control over the amending process, subject to no judicial review . . ." *Id.* at 459. Even this statement, however, does not support the plurality approach in *Goldwater*. Justice Black was protesting the Court's intrusions on congressional control over the amendment process, not suggesting that the Court deny judicial review even to determine whether this control was "sole and complete." See *id.* at 458-59.

74. It is also possible to distinguish *Coleman* along the lines suggested by Justice Powell in *Goldwater*. As Justice Powell points out, the constitutional amendment at issue in *Coleman* would have overruled the Supreme Court's prior decisions in the *Child Labor Tax Case*, 259 U.S. 20 (1922), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918). "Thus, judicial review of the legitimacy of a State's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the Judicial Branch of Government to step aside." 444 U.S. at 1001 n.2. See Scharpf, *supra* note 33, at 587-89.

A closer analogy to the problem of treaty termination is provided by the cases upholding the President's power to remove executive officers without legislative approval. Just as the Constitution does not provide for the termination of treaties made by the President with the advice and consent of the Senate, it does not provide for the removal of officials appointed by the President with Senate advice and consent.⁷⁵ Despite constitutional silence on this issue, the Supreme Court in *Myers v. United States*⁷⁶ upheld President Wilson's dismissal of a postmaster without the consent of the Senate,⁷⁷ ruling that "[t]he power of removal is incident to the power of appointment"⁷⁸ In support of this conclusion, the Court emphasized the President's need for an inherent power of removal in order to faithfully execute the laws.⁷⁹

Since the constitutional provisions governing the removal process and the treaty process are virtually identical, *Myers* has been cited in support of an inherent presidential power to terminate treaties without legislative approval.⁸⁰ The precedent established by *Myers*, however, clearly undercuts the plurality approach in *Goldwater*, because *Myers* was decided on the merits without any suggestion that the political question doctrine barred its review.⁸¹

Pursuing the analogy to *Coleman*, Justice Rehnquist noted that the reasons for categorizing the issue of treaty termination as a political question "are even more compelling than in *Coleman* be-

75. "[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" U.S. CONST. art. II, § 2, cl. 2.

76. 272 U.S. 52 (1926).

77. *Id.* at 176.

78. *Id.* at 122.

79. *Id.*

80. See Nelson, *supra* note 61, at 883-84.

81. Even as support for an inherent presidential power to terminate treaties, *Myers* is of limited value. The Court in *Myers* grounded the President's inherent power of removal in his obligation to faithfully execute the laws, and his corresponding need to maintain administrative control over his subordinates. 272 U.S. at 122, 134. This point was reinforced by the Court's subsequent decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which narrowed the *Myers* rule to include only "purely executive officers" charged with duties unrelated to legislative or judicial powers. *Id.* at 631-32. Since the treaty power is shared with the legislative branch, the analogy to *Myers* is inconclusive. The President's need to remove executive officers in order to effectively execute the laws cannot be used to support a power in the President to alter the laws themselves.

cause it involves foreign relations”⁸² He supported this statement by invoking *United States v. Curtiss-Wright Export Corp.*⁸³ to imply that courts will not decide the constitutionality of federal actions intended “to affect a situation entirely external to the United States”⁸⁴ In fact, the Court in *Curtiss-Wright* reached the merits of the case to uphold a joint resolution of Congress which delegated discretionary export control powers to President Roosevelt,⁸⁵ stating only that the powers of the federal government in foreign affairs are different in nature from those over domestic affairs.⁸⁶ Like *Coleman*, *Curtiss-Wright* thus provides no support for dismissing *Goldwater* as a nonjusticiable political question.

B. *The Inherent Powers Approach*

Curtiss-Wright was also cited by the court of appeals in *Goldwater*, not as support for dismissing the complaint, but as authority for upholding President Carter’s termination of the Mutual Defense Treaty pursuant to the inherent powers of the President in foreign affairs.⁸⁷ As noted in Part I,⁸⁸ the inherent powers approach would not have required the courts to exempt this issue from judicial review, but only to decide that the power to terminate treaties falls within the inherent foreign affairs power of the President and is not prohibited to him by any warranted inference from the Constitution.

82. 444 U.S. at 1003.

83. 299 U.S. 304 (1936).

84. 444 U.S. at 1004, 1005 (quoting *Curtiss-Wright*, 299 U.S. at 315).

85. 299 U.S. at 329.

86. *Id.* at 315. “[*Curtiss-Wright*] recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring).

87. 617 F.2d at 704-05. The court of appeals was careful, however, to limit the scope of its ruling:

The question of whether the Senate may be able to reserve to itself in particular treaties, at the time of their original submission, a specific role in their termination is not presented by the record in this appeal and we decide nothing with respect to it. The matter before us is solely one of whether the Constitution nullifies the procedure followed by the President in this instance.

Id. at 709.

88. See text accompanying notes 49-53 *supra*.

The Court in *Curtiss-Wright* provided the theoretical support for this approach by declaring that the powers to conduct foreign policy, unlike the enumerated domestic powers given up by the states, vested in the federal government as necessary attributes of sovereignty.⁸⁹ It follows that in the province of foreign affairs, the federal government is not limited to those powers specifically enumerated in the Constitution and the implied powers necessary to effect them.⁹⁰ The President, in particular, is vested with "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations"⁹¹

Since the plurality in *Goldwater* never reached the merits of the case, they offer no discussion of the inherent powers of the President in foreign affairs. Nevertheless, their statement clearly reflects an underlying deference to presidential powers in this area.⁹² Applying the inherent powers approach to *Goldwater* and similar cases would not require the courts to create exceptions to judicial review, but it would further expand the President's far-reaching powers in the conduct of foreign affairs. It is therefore necessary to place *Curtiss-Wright's* theory of inherent foreign affairs powers in the proper perspective.⁹³

The weakest argument against recognizing an inherent presidential power to terminate treaties is the attempt to infer a constitutional prohibition against this exercise of power by the President.⁹⁴ According to this argument, treaties are designated by the Supremacy Clause as part of the "supreme Law of the Land,"⁹⁵ and any action by the President to terminate a treaty without legislative approval would therefore violate his duty to faithfully execute the laws.⁹⁶ The central purpose of the Supremacy Clause, how-

89. See 299 U.S. at 315-18.

90. *Id.* at 315-16.

91. *Id.* at 320.

92. See text accompanying note 20 *supra*.

93. The following analysis will attempt only to limit the application of this theory. For criticism of the theory itself, see Berger, *supra* note 64, at 26-33; Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

94. See *Goldwater v. Carter*, 481 F. Supp. at 962-63.

95. "[A]ll Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land" U.S. CONST. art. VI, cl. 2; see *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 457 (1806).

96. "[H]e shall take Care that the Laws be faithfully executed" U.S. CONST. art. II, § 3, cl. 1.

ever, is to assure that the laws embodied in the Constitution, federal statutes, and treaties will prevail over state law.⁹⁷ These three types of supreme law are very different in their other characteristics, including the procedures for their creation.⁹⁸

A stronger argument against extending the rationale of *Curtiss-Wright* to treaty terminations is that the Supreme Court in later cases has been less receptive to the theory of inherent presidential powers. In *Youngstown Sheet & Tube Co. v. Sawyer*,⁹⁹ the Court held that without specific authority from Congress or the Constitution, President Truman had no power to direct the seizure of steel mills during the Korean War.¹⁰⁰ In his well-known concurring opinion, Justice Jackson rejected the Solicitor General's argument that Article II, by vesting the executive power in the President,¹⁰¹ constitutes a grant of all the executive powers possessed by the government: "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."¹⁰²

Perhaps the more basic difference between *Curtiss-Wright* and *Youngstown*, and the strongest argument against extending the inherent powers approach to treaty terminations, is that *Curtiss-Wright* involved no real conflict between Congress and the President. Unlike *Youngstown*, where the President usurped a legisla-

97. *Goldwater v. Carter*, 617 F.2d at 704.

98. *Id.*

99. 343 U.S. 579 (1952).

100. *Id.* at 585-89.

101. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art II, § 1, cl. 1.

102. 343 U.S. at 641 (Jackson, J., concurring). *Curtiss-Wright's* theory of inherent presidential powers in foreign affairs was further discredited in *Reid v. Covert*, 354 U.S. 1 (1957). The Court in *Reid* struck down an executive agreement subjecting civilians abroad to military trial, declaring:

we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.

Id. at 5-6. But see *Perez v. Brownell*, 356 U.S. 44 (1958), overruled on other grounds, *Afroyim v. Rusk*, 387 U.S. 253 (1967). In *Perez* the Court upheld two sections of the Nationality Act of 1940 providing that United States citizenship would be lost by citizens voting in a foreign election. The Court's opinion recognized that Congress possessed certain legislative powers in foreign affairs not specifically granted by the Constitution. 356 U.S. at 57-62. See also notes 80-81 *supra* and accompanying text.

tive function in defiance of the clear intent of Congress,¹⁰³ the President in *Curtiss-Wright* acted pursuant to a joint resolution of Congress delegating the authority to control arms exports.¹⁰⁴ In view of this fact, *Curtiss-Wright's* affirmation of inherent presidential powers in the conduct of foreign affairs¹⁰⁵ is obiter dictum. The issue presented by the facts of the case required the Court to decide only whether Congress and the President acting together possessed any powers in foreign affairs beyond those granted by the Constitution; it was not required to decide how this power should be distributed between them.¹⁰⁶ *Curtiss-Wright* thus reflects the Court's tendency, in cases where Congress and the President cooperate in the conduct of foreign policy, to uphold their actions whenever possible.¹⁰⁷ The Court's opinion provides no support for upholding foreign policy initiatives by the President on an inherent powers theory when Congress, as in *Goldwater*, has merely acquiesced in the President's actions.¹⁰⁸

103. 343 U.S. at 586.

104. 299 U.S. at 311-13, 321-23.

105. The Court's opinion expressly stated that:

we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the . . . power of the President . . . in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . .

Id. at 319-20.

106. *Curtiss-Wright* involved "not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." 343 U.S. at 635-36 n.2. (Jackson, J., concurring). In upholding the constitutionality of the joint resolution against the claim that it delegated legislative powers to the President, the Court focused on the President's superior access to confidential information on foreign policy matters and his corresponding ability to gauge the effects of his actions. "This consideration . . . discloses . . . the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed." 299 U.S. at 321-22. Justice Jackson identified this line of reasoning as the *ratio decidendi* of *Curtiss-Wright*. 343 U.S. at 636 n.2 (Jackson, J., concurring).

107. Reisenfeld, *supra* note 61, at 665, 668-69.

108. The defendants in *Goldwater* initially argued that Congress had approved President Carter's delivery of the notice of termination by ratifying the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979). See *Goldwater v. Carter*, No. 78-2412 (D.D.C., filed Dec. 22, 1978), reprinted in 125 CONG. REC. S7051, S7052 n.14 (daily ed. June 6, 1979). The Act contained an assurance of continued American concern for the security of Taiwan after termination of the Mutual Defense Treaty. Taiwan Relations Act, Pub. L. No. 96-8, § 2(b), 93 Stat. 14 (1979). As the district court pointed out, however, several members of the Foreign Relations Committee stated during Senate debate on the bill that it did not constitute a determination of the legal issues raised by the President's actions. 125 CONG. REC. S7052 n.14 (daily ed. June 6,

C. Denial of Relief for Want of Equity

The want of equity approach provides an alternative rationale for categorizing the issue of treaty termination as a political question. Like the inherent powers approach, denial of relief based on equitable considerations would not have required the courts to create an exception to judicial review.¹⁰⁹ Instead, this approach would have required only a finding that in the particular circumstances of this case, the equitable remedies of declaratory and injunctive relief could not properly be granted to prevent the President's action.¹¹⁰

The Supreme Court has invoked the special principles and

1979); *see id.* at S2124, S2126, S2130, S2134, S2151 (daily ed. March 7, 1979) (statements of Senators Javits, Glenn, Baker, Hayakawa, Helms, and Stone).

The role of Congress in relation to the President is the key factor in reconciling the Court's decisions in *Curtiss-Wright*, *Youngstown*, and *Goldwater*. Confronted in all three cases with presidential claims of inherent foreign affairs powers, the Court upheld the President's action in *Curtiss-Wright*, denounced the President's action in *Youngstown*, and treated the issue raised by the President's action in *Goldwater* as a political question. These different results are best explained in terms of the three "practical situations," distinguished by Justice Jackson in *Youngstown*, "in which a President may doubt, or others may challenge, his powers" *See* 343 U.S. at 635-38 (Jackson, J., concurring).

"When the President acts pursuant to an express or implied authorization of Congress," as in *Curtiss-Wright*, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as a whole lacks power." *Id.* at 635-37 (citations omitted).

"When the President takes measures incompatible with the expressed or implied will of Congress," as in *Youngstown*, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (citations omitted).

"When the President acts in absence of either a congressional grant or denial of authority," as in *Goldwater*:

he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Id. at 637 (citations omitted). The purpose of the following section is to examine the "contemporary imponderables" which characterize treaty termination as a political question.

109. *See* text accompanying notes 49-53 *supra*.

110. *Id.*

considerations governing the equity jurisdiction of the federal courts in several cases which implicated constitutional rights.¹¹¹ One recent example of this approach is *Gilligan v. Morgan*,¹¹² the only case decided between *Baker* and *Goldwater* in which the Court found a nonjusticiable political question.

In *Gilligan*, students at Kent State University brought suit in a federal district court alleging that the training, weaponry, and orders of the Ohio National Guard encouraged the use of lethal force in suppressing civilian disorders even when this level of force was excessive.¹¹³ The plaintiffs requested the court to evaluate new standards adopted by the Guard after Kent State, and to impose continuing judicial surveillance to assure compliance with the new standards as approved by the court.¹¹⁴ The Supreme Court held that the district court correctly dismissed the suit, noting that the requested relief would "embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government."¹¹⁵

In upholding the district court's refusal to substitute its own judgments for those of civilian authorities responsible for reviewing military standards, the Supreme Court merely deferred to an enumerated power of Congress and the states.¹¹⁶ In refusing even to assure compliance with standards set by the political branches, however, the Court emphasized that continuing judicial surveillance was an inappropriate remedy:

It is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially profes-

111. See, e.g., *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973); *Laird v. Tatum*, 408 U.S. 1, 14-15 (1972); *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). See generally Henkin, *supra* note 21, at 617-22.

112. 413 U.S. 1 (1973).

113. *Id.* at 3-4.

114. *Id.* at 5-6.

115. *Id.* at 7.

116. *Id.* at 6. Article I grants Congress the power:

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress

U.S. CONST. art. I, § 8, cl. 16.

sional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.¹¹⁷

Applying the want of equity approach to *Goldwater*, certain facts stand out. The petitioners requested declaratory and injunctive relief to prevent the President from terminating the Mutual Defense Treaty.¹¹⁸ Any such relief would have required a constitutional ruling by the courts that treaty terminations must receive some form of legislative approval. Confronted with this responsibility, the court of appeals in *Goldwater* expressed the fear that creating an obligatory role for Congress in the termination of treaties would to that extent lock the United States into all its international obligations,¹¹⁹ and it went on to note that the Senate may in fact wish to continue determining the nature of its involvement on a case by case basis.¹²⁰

Similarly, a review of the historical precedents for termination of treaties by the United States led Justice Rehnquist to conclude that "different termination procedures may be appropriate for different treaties."¹²¹ Just as the Court in *Gilligan* declined to grant equitable relief which would constrain legislative control over military procedures, the plurality in *Goldwater* suggests that the courts

117. 413 U.S. at 10 (emphasis in original).

118. *Goldwater v. Carter*, 617 F.2d at 701.

119. *Id.* at 705.

120. *Id.* at 706. In Senate debate on this issue, Senator Church noted that:

As a responsible deliberative body, we should approach each new treaty proposed, on a case-by-case basis. In some instances, the Senate may well specify in its resolution of ratification that the treaty in question can be terminated only with the consent of the Senate. In other instances, the Senate may choose to allow the President to terminate the treaty at issue, with no more than prior notification to the Senate.

125 CONG. REC. S16,689 (daily ed. Nov. 15, 1979). Senator Javits agreed:

I am very unhappy, and I think every Senator should be very unhappy, in terms of the historic tradition of this body, to see the procedures of the Senate and the relationships between the Senate and the President under the Constitution determined by a court. I think it is a great mistake for us, as Senators—as we are for the time being, holding a power in transition between Senators who come before us and Senators through the ages who will come after us—to allow the courts to write the rules of the game between the Senate and the President of the United States.

Id. See also note 127 *infra*.

121. 444 U.S. at 1003. In support of this conclusion, Justice Rehnquist quoted a long excerpt from the concurring opinion in the court of appeals. See *id.* at 1004 n.1; text accompanying note 122 *infra*.

should not grant equitable relief which would constrain political control over the treaty process.¹²²

The equitable considerations supporting denial of relief in *Goldwater* are most forcefully stated in the concurrence to the court of appeals decision:

The issue here is whether or in what manner Congress and the President share the power to terminate treaties. For over 200 years, through bargaining, compromise, and accommodation, these popularly elected branches of our government have in fact shared the task, without the help or need of the courts. . . . Whether or not the historical record supports either party's substantive constitutional argument—and we express no views on this—it does show that when Congress wants to participate directly in a treaty termination it can find the means to do so. Thus Congress has initiated the termination of treaties by directing or requiring the President to give notice of termination, without any prior presidential request. Congress has annulled treaties without any presidential notice. It has conferred on the President the power to terminate a particular treaty, and it has enacted statutes practically nullifying the domestic effects of a treaty and thus caused the President to carry out termination

. . . .

Moreover, Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates. Congress thus retains a strong influence over the President's conduct in treaty matters.

As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government. We thus should decline the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination¹²³

122. Although "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," resolution of these issues may nevertheless "turn on standards that defy judicial application . . ." *Baker v. Carr*, 369 U.S. at 211.

123. 617 F.2d at 715-16 (citations omitted).

As this statement clearly illustrates, the problem of treaty termination inherent in the Constitution is simply not amenable to solution by the courts. Of the three approaches for treating this issue as a political question to be resolved by the political branches of government, the want of equity approach yields the most accurate analysis of the issue and the most desirable result as precedent.

Denial of relief for want of equity offers an important advantage over the plurality approach in *Goldwater* because it would not create an exception to judicial review.¹²⁴ Instead, courts would be required to consider, within the context of judicial review, the prudential and functional concerns present in *Goldwater* and inherent in the separation of powers between judicial and political institutions. This approach would have less drastic effects on precedent than exempting a constitutional issue from judicial review.¹²⁵

Denial of relief for want of equity offers an equally important advantage over the inherent powers approach because it would not require an expansion of the President's inherent powers to include the termination of treaties. Thus, the want of equity approach would set a far narrower precedent for future claims of presidential power.

III. THE NEED FOR CONGRESSIONAL ACTION

As an observer of American society noted well over a century ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹²⁶ Now that the Supreme Court has declined to solve the treaty termination problem, the responsibility for providing a solution has returned to Congress, where it belongs. Only Congress has both the knowledge of foreign affairs and the awareness of its own limitations necessary to determine its role in this process.¹²⁷

One commentator suggested, prior to the Supreme Court's decision in *Goldwater*, that Congress enact framework legislation to preserve its role in future treaty terminations.¹²⁸ The proposed leg-

124. See notes 49-53 *supra* and accompanying text.

125. See note 55 *supra*.

126. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (11th ed. 1945).

127. "[T]his is a policy decision, a discretionary legislative decision. The particular type of majority required to support the termination of a treaty is a decision that the Senate—not the Court—should make." 125 CONG. REC. S16,685 (daily ed. Nov. 15, 1979) (remarks of Sen. Robert Byrd).

128. Scheffer, *supra* note 13, at 1005-07.

islation would require every new treaty to stipulate that the United States would exercise any rights of termination in accordance with its "constitutional processes," defined in the legislation to require the consent of two thirds of the Senate. This stipulation would place the President on notice that the Senate would refuse to ratify any treaty which failed to comply.

Considering the volatile nature of international politics, it is doubtful whether even framework legislation in this area would be well-advised.¹²⁹ The two-thirds requirement may be appropriate for major defense and trade treaties but too cumbersome for others. The simplest and most flexible response to this question might well be for the Senate to condition its approval of each new treaty on the inclusion of a specific procedure for its termination.¹³⁰ This approach would allow the Senate to determine, on a treaty by treaty basis, how difficult it should be to abrogate each new treaty which it ratifies. For example, termination of minor commercial treaties might require only prior notification from the President. Termination of more important treaties might require the consent of a majority of the Senate, or, to demonstrate even stronger commitment, two thirds of the Senate.¹³¹

It is possible, of course, to question the wisdom of requiring any Senate approval for treaty termination.¹³² The Senate's past record in ratifying treaties reveals that national interests have occasionally been subordinated to domestic political concerns.¹³³ Even so, Senate participation in the termination process may be essential, if only to assure the other parties involved that the decision to terminate a particular treaty will require the same degree of national consensus as the decision to enter into it.

Even this proposal, however, offers no solution to possible

129. "My bottom line analysis is that the uncertain world in which we live does not invite a rigid approach to treaty termination. We should reserve a maximum degree of flexibility for the Senate in handling the matter of treaty termination in the future." 125 CONG. REC. S16,689 (daily ed. Nov. 15, 1979) (remarks of Sen. Church).

130. *Id.* (remarks of Sen. Javits).

131. *Id.* at S16,685 (remarks of Sen. Robert Byrd).

132. As Professor Henkin has noted, "perhaps the Framers were concerned only to check the President in 'entangling' the United States; 'disentangling' is less risky and may have to be done quickly, and is often done piecemeal, or *ad hoc*, by various means or acts." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 169 (1972). See also Henkin, 'A More Effective System' for Foreign Relations: *The Constitutional Framework*, in EXECUTIVE-LEGISLATIVE RELATIONS, *supra* note 64, at 9.

133. See generally T. FRANCK & E. WEISBAND, *supra* note 64, at 275-86.

disputes over other treaties now in force. Developing a retroactive procedure for terminating these treaties would admittedly be more difficult, but it must be attempted. It is simply inconceivable that the President alone could nullify America's commitment to the United Nations¹³⁴ or NATO¹³⁵ with a single stroke of his pen.¹³⁶

The most suitable response to this problem would require the appointment of a Senate subcommittee or special commission to classify existing treaties according to the degree of Senate involvement appropriate for their termination. As in the example cited for new treaties, this involvement might range from prior notification by the President to the consent of two thirds of the Senate. Upon completion of this review, the Senate would adopt a resolution which specified the procedure for terminating the treaties in each class.¹³⁷

As one indication of the problems involved in this approach, it must be noted that Senate resolutions are not legally binding on the President.¹³⁸ Nevertheless, passage of the resolution would unite the Senate on principle against any contrary action by the President, even though, as in the case of President Carter's policies toward the ROC, a majority of Senators might personally approve of the practical result.¹³⁹ Considering the Senate's ability to frustrate his initiatives, the President would be in a very tenuous position if he refused to follow the specified procedures.

134. U.N. CHARTER, signed June 26, 1945, and entered into force Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993.

135. North Atlantic Treaty, signed Apr. 4, 1949, and entered into force Aug. 24, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243.

136. See 125 CONG. REC. S7047 (daily ed. June 6, 1979) (remarks of Sen. Goldwater quoting Professor Eugene Rostow).

137. See *id.* at S16,689 (daily ed. Nov. 15, 1979) (remarks of Sen. Javits).

138. F. RIDDICK, SENATE PROCEDURE 761 (1974). By comparison, attempting to legislate procedures for termination would raise more problems than it solved. First, the House of Representatives might hesitate to support any procedure which required only Senate approval, because in past years the House has benefited from the practice of authorizing treaty terminations by joint resolution or statute. See note 57 *supra* and accompanying text. For similar reasons, the President would almost certainly oppose such a bill. Second, even if the bill were enacted, it would always be open to the challenge that the requirement of Senate approval imposed an unconstitutional restraint on an inherent power of the President to terminate treaties. See note 87 *supra*. See also *Myers v. United States*, 272 U.S. 52 (1926).

139. See 125 CONG. REC. S7058 (daily ed. June 6, 1979) (remarks of Sen. Goldwater).

A second problem involved in this approach is the conflict and uncertainty which would be generated by a comprehensive review of United States treaty commitments. These short-term costs, however, would certainly be preferable to a future crisis, caused by a President's decision to terminate a vital treaty in the belief that his actions would not be challenged in the courts or by Congress. Furthermore, constructive reassessment of our treaty commitments should be welcomed, rather than feared, by critics here and abroad who have noted the lack of direction and glaring inconsistencies in United States foreign policy.¹⁴⁰ Consistency in foreign affairs, including loyalty to our allies, must flow from political consensus rather than Supreme Court decisions.

In many respects, the legal debates today over presidential power to terminate treaties bear an ironic resemblance to debates thirty-five years ago, as the Second World War drew to an end, over presidential power to conclude executive agreements which bypassed the two-thirds requirement of Article II.¹⁴¹ This power was favored by scholars who feared that an isolationist minority in the Senate would once again prevent the United States from exercising a leading role in world affairs, and, more specifically, from joining a post-war international organization similar to the League of Nations.¹⁴² The wisdom of this approach is suspect today, when executive agreements outnumber treaties four to one,¹⁴³ and United States foreign policy is criticized not for its insularity but for its carelessness and vacillation under a series of presidents who have assumed vast and unchecked powers in the area of foreign relations. With passage of the War Powers Resolution¹⁴⁴ in 1973,

140. See, e.g., THE ECONOMIST, Oct. 18, 1980, at 11; *id.*, May 3, 1980, at 15; N.Y. Times, Dec. 9, 1979, § 5 (Week in Review), at 2, col. 1; *id.* § 6 (Magazine), at 46.

141. For the classic statement of both positions in this debate, compare McDougal and Lans, *Treaties and Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 534 with Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945).

142. See McDougal & Lans, *supra* note 141, at 181-92.

143. As of January 1, 1972, 4,359 executive agreements and 947 treaties were in force. Furthermore, the figure for executive agreements does not reflect agreements concluded by individual agencies with their counterparts in foreign governments. *Congressional Oversight of Executive Agreements: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92nd Cong., 2nd Sess. 249 (1972) (statement of John R. Stevenson, Legal Advisor, Dep't of State).

144. 50 U.S.C. §§ 1541-1548 (1976).

Congress began the slow process of reasserting its power in the conduct of foreign policy.¹⁴⁵ The Court's decision in *Goldwater* leaves Congress free to continue this process as best it can, through legislative action rather than judicial fiat. For as Justice Jackson noted in *Youngstown*:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there is worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.¹⁴⁶

CONCLUSION

The Supreme Court in *Goldwater v. Carter* was asked to decide whether the Constitution requires legislative approval for the termination of treaties. The Court declined to decide this issue, ruling instead that it presented a nonjusticiable political question. While this decision may be welcomed by those who believe that Congress has the right and obligation to determine its own role in the conduct of foreign policy, the Court's disposition of *Goldwater* raises some disturbing questions. By dismissing the complaint without briefing or oral argument, by straining to fit this case within the purview of *Coleman v. Miller*, and by invoking *Curtiss-Wright's* theory of inherent presidential powers in foreign affairs, the plurality statement seems to signal a willingness on the part of certain Justices to categorically approve presidential actions in the realm of foreign policy. Henkin's approach to political question analysis was designed to prevent the creation of such ambiguous precedent by requiring the courts to reach the merits of each case, and, where denial of relief is appropriate, to identify the specific reasons which support this conclusion. At best, this approach would bring a new precision and flexibility to political question analysis, but no analytical process can guarantee that legal judgments are made with foresight and wisdom.

Howard Konar

145. See generally T. FRANCK & E. WEISBAND, *supra* note 64, at 61-82.

146. 343 U.S. at 654 (Jackson, J., concurring).